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STATE OF WASHINGTON

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No. 81187-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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DAVID McALLISTER and  
KEN McALLISTER

Petitioners,

v.

CITY OF BELLEVUE FIREMEN'S  
PENSION BOARD

Respondent.

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SUPPLEMENTAL BRIEF OF RESPONDENT CITY OF  
BELLEVUE FIREMEN'S PENSION BOARD

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## I. INTRODUCTION

The Court of Appeals correctly concluded that since January 2004, Respondent City of Bellevue Firemen's Pension Board ("City") has correctly calculated and paid to Petitioners David and Ken McAllister ("McAllisters") their pension benefit under RCW 41.26.040(2), a part of the LEOFF statute. There is no dispute between the parties what the plain and unambiguous language of RCW 41.26.040(2) and RCW 41.18 et. seq., known as the 1955 Act, states shall be the pension calculations for a fire chief or deputy chief retired under LEOFF but who made pension contributions under the 1955 Act. However, the McAllisters claim that LEOFF exacted a higher salary pension contribution than what was contributed under the 1955 Act and this constitutes a legal wrong that must be remedied. Interestingly, the McAllisters proclaim they are not challenging the constitutionality of LEOFF even though it is the LEOFF statute that exacts the higher pension contribution.

Prior briefing and the Court of Appeal's decision explain well:

- 1) the two separate retirement systems known as LEOFF and the 1955 Act;
- 2) the calculation of a pension for a fire chief and deputy chief under the 1955 Act and the lawful actions of the City under this statute;
- 3) the plain and unambiguous language of RCW 41.26.040(2);
- 4) the legal effect of the 1969 version of RCW 41.26.040(2) which never went into effect;

- 5) the legal impact of the McAllisters claiming that LEOFF is unconstitutional; and
- 6) the legal impact of the McAllisters' failure to follow the procedural requirements for challenging a state statute administered by the Department of Retirement Systems.

This supplemental briefing will focus on:

- 1) the McAllisters new legal paradigm – their pseudo constitutional challenge to LEOFF under Article I, §23 of the Washington Constitution and *Bakenhus*;
- 2) whether there is any legal basis for the remedy sought by the McAllisters;
- 3) whether the “basic salary” definitions under LEOFF and the 1955 Act must be the same; and
- 4) whether the legal remedy sought by the McAllisters can even be obtained from the City.

## II. ARGUMENT

### A. There Is No Legal Support For The McAllisters' Pseudo Constitutional Challenge To LEOFF.

The McAllisters rely on Article I, §23 of the Washington Constitution and *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956) to claim (1) their increased pension contributions paid to the State under LEOFF was a legal wrong; but (2) LEOFF is constitutional (after all it has great perks such as fully paid lifetime retiree health benefits); and, therefore, (3) the remedy must be that the City (who never received a dime of the increased LEOFF pension contributions) must pay them greater pension benefits than the plain language of RCW 41.18 mandates. The McAllisters are borrowing elements of a constitutional public pension

challenge to a statute to seek a remedy that is not provided under any permissible legal theory – their pseudo constitutional challenge fails.

In their Petition for Review, the McAllisters begin by framing the issue as whether the Legislature acted within the restrictions imposed by Article I, §23 of the Washington Constitution in the enactment of LEOFF. The McAllisters claim that the Legislature unlawfully diminished their pension benefits by uncapping the contribution rates for fire chief and deputy fire chief (i.e. ranks above battalion chief) under LEOFF.<sup>1</sup> (Unlike under the former 1955 Act, these pension contributions were paid to the State.) The McAllisters rely on *Bakenhus* for this argument. This reliance however is misplaced.

The *Bakenhus* court held that any modification of pension benefits of a public employee which operates to the detriment of the employee must be coupled with a corresponding increase in benefits. *Bakenhus* found that if the legislative modifications are not reasonable and equitable, they are **unconstitutional and void**. *Id.* at 702-703. Under those circumstances, “a pensioner’s rights will be determined by the latest act which can be constitutionally applied to him.” *Vallet v. City of Seattle*, 77 Wn.2d 12, 21, 459 P.2d 407 (1969).

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<sup>1</sup> LEOFF also correspondingly uncapped the benefit calculation for positions above battalion chief.

By invoking *Bakenhus* and its progeny, one might logically conclude that the McAllisters are arguing that LEOFF is unconstitutional. Each of the cases cited by the McAllisters involving pension plan modifications examined the vested pension rights of the affected employee and whether the legislative modification was reasonable and equitable. When the legislative modification was determined not be reasonable and equitable, the modification was found unconstitutional.

But the McAllister's argument turns *Bakenhus* on its head. The McAllisters do not claim that LEOFF's increased contribution rate requires a declaration of LEOFF's unconstitutionality. Instead, the McAllisters argue that LEOFF's increased contribution rate requires a modification of the prior pension law - the 1955 Act - even though the McAllisters have never claimed that under the 1955 Act their contributions to the City were unlawful. Further, but for the enactment of LEOFF, the McAllisters have never claimed the statutory formula under the 1955 Act for calculation a fire chief or deputy chief's pension was unlawful. As a matter of law, the Court should reject such a radical departure from pension law precedent.

This psuedo constitutional argument put forth by the McAllisters fails for several other reasons. As the City briefed extensively earlier, the constitutionality of LEOFF is not properly before this court. The McAllisters failed to make that argument at the outset and failed to notify

the attorney general. This court lacks jurisdiction to consider the McAllisters' challenge to the constitutionality of LEOFF.

Secondly, LEOFF is constitutional. LEOFF members were provided with additional advantages, including fully paid health care benefits for life (including long term care) and 100% survivor benefits with the enactment of LEOFF. RCW 41.26.150 and 41.26.160. These benefits were not offered under the 1955 Act.

As further evidence of their pseudo constitutional challenge to LEOFF, the McAllisters do not even attempt to fully apply the analysis required under *Bakenhus*. The McAllisters have never challenged the conclusion that that they received increased benefits under LEOFF. The McAllisters have never challenged the conclusion that these additional benefits were reasonable and equitable. In fact, the McAllisters admit that the Legislature was well aware of *Bakenhus* and the constitutional limitations on altering vested pension benefits when it enacted LEOFF. The Legislature added benefits and the excess payment calculation of RCW 41.20.040(2) to insure that LEOFF was constitutional. This is consistent with *Bakenhus*. The McAllisters simply ignore this part of the *Bakenhus* analysis.

Even assuming that LEOFF is not constitutional (which no one is contending), the McAllisters are attempting to fashion a remedy that is not provided under the law. If the provisions of LEOFF are not constitutional as applied to the McAllisters, then the remedy is to apply the provisions of

the previous act – the 1995 Act. However, the McAllisters are not seeking that remedy. The McAllisters do not want to forego the additional benefits which LEOFF provides to them.

B. The McAllisters Cannot Select The Most Favorable Parts LEOFF And The 1955 Act As A Basis For Their Pension Rights.

Prior to March 1, 1970, the McAllisters were members of the 1955 Act and making pension contributions to the City controlled Firemen's Pension Fund. After March 1, 1970, the McAllisters were no longer members of the 1955 Act. They were no longer making contributions to the Bellevue Firemen's Pension Fund under the provisions of the 1955 Act.

On March 1, 1970, the McAllisters had their pension membership "transferred" to LEOFF "to the exclusion of any pension system existing under any prior act." RCW 41.26.040(1) and (2). Contrary to their allegation, the McAllisters did not have the right to choose which act would apply to them. On March 1, 1970, the McAllisters were only members of LEOFF.

The 1955 Act and LEOFF are two separate pension plans. The McAllisters are enjoying all of the benefits of LEOFF, including the fully paid lifetime health care. Thus, they are unwilling to come out and openly challenge the enactment of LEOFF. Declaring LEOFF unconstitutional and void would limit their benefits to those provided in the 1955 Act.

The McAllisters want the court to fashion a remedy just for them. The McAllisters want the court to permit them to take the definition of “basic salary” from LEOFF and use it in the 1955 Act to provide them with a higher overall pension benefit. They want their excess payment calculation under the 1955 Act to be uncapped and not limited to the salary of a battalion chief. The McAllisters want to “cherry pick” the best of each pension plan to provide them with the largest benefit.

There is no authority for the approach argued by the McAllisters. The language of LEOFF is clear and unambiguous. Under LEOFF, the McAllisters had the right to be treated as if they had retired under the 1955 Act. Pursuant to RCW 41.26.040(2), the Pension Board is required to calculate the benefits under the 1955 Act as compared to LEOFF. The language of RCW 41.26.040(2) makes it clear that the City must use the definitions of the 1955 Act, including the 1955 Act basic salary definition to make that calculation. There is no basis for the McAllisters’ argument that the LEOFF formula for calculating a pension only upon retirement is to be used to calculate what they would have received under the 1955 Act for each and every year following retirement.

The court in *Vallet v. City of Seattle*, 77 Wn.2d 12, 459 P.2d 407 (1969) rejected exactly this type of argument. Vallet began working for the Seattle Police Department in 1922. Vallet retired in 1965 at the rank of Inspector of Police.

Vallet was initially hired by Seattle while a 1915 version of RCW 41.20.050 was in effect. RCW 41.20.050 was subsequently amended in 1961. Each version provided a different calculation for Vallet's retirement benefits. Vallet contended that he was entitled to retire under the 1915 law at the rank of Inspector and that the subsequent legislation did not take away that right. Vallet also argued that he was entitled to the benefit of an escalator clause contained in the 1961 amendment. The end result was that Vallet argued he should be entitled to retire under the beneficial aspects of both the 1915 and 1961 laws without accepting the limitations set forth in the 1961 law which limited his pension to one-half of a Captain's salary. The Supreme Court rejected Vallet's argument and held that a pensioner's rights will be determined by the latest act that can be constitutionally applied to him. *Id* at 21.

The concurrence in *Eisenbacher v. City of Tacoma*, 53 Wn.2d 280, 333 P.2d 642 (1958), succinctly laid out the options available to those with vested pension rights. When legislative changes are made to pension benefits which impair the existing pension contract or vested pension rights, the person with the vested pension rights may elect to accept the changes. However, the election cannot be forced upon him by the Legislature. If the person does not accept the modifications, the latest act which can be constitutionally applied to the person will be applied.

The McAllister's claim that they are not alleging that LEOFF is unconstitutional. Thus, under the analysis of *Eisenbacher* they have accepted the pension modifications of LEOFF and their rights derive from the clear and unambiguous language of LEOFF. There are no decisions which accept the McAllisters' proposal that they are entitled to the best parts of several pension acts relating to them. As the court in *Vallet* noted, to allow such an approach "would have a serious effect on the everyday administration of pension plans in the state." *Vallet*, 77 Wn.2d at 21. The remedy proposed by the McAllisters would create an administrative nightmare for both the Department of Retirement Services and local jurisdictions throughout the state.

C. There Is No Legal Requirement That The Basic Salary Definition Under LEOFF Be The Same As Existed Under The 1955 Act.

In their twisted use of *Bakenhus*, the McAllisters argue that both pension acts must have the same definition of "basic salary." However, they provide no legal authority for their contention that LEOFF was required to adopt the same "basic salary" provision set forth in the 1955 Act. Under the *Bakenhus* line of cases all that is required is that the pension modification be reasonable and equitable. There are any number of ways this standard can be met. LEOFF adopted a new definition of "basic salary," and within its provisions, the statutory application of "basic salary" is internally consistent. As explained above, it also meets the standards of *Bakenhus*.

Under LEOFF, current fire fighters contribute 6% of their basic salary. LEOFF's basic salary definition has no cap associated with any rank. RCW 41.26.030(13)(a). Correspondingly, under RCW 41.26.130, the formula for calculating a LEOFF disability pension is not capped by rank.

The McAllisters argue that since the definition of basic salary under LEOFF is not the same definition of basic salary utilized in the 1955 Act that somehow inconsistencies exist which justify using the basic salary definition from LEOFF to calculate whether a fire fighter is entitled to an excess payment as defined by LEOFF under RCW 41.26.040(2). There are no inconsistencies within LEOFF. LEOFF utilizes the same basic salary definition for contribution rates and for benefits.

The only time the basic salary definition of the 1955 Act comes into play under LEOFF is when the fire fighter also had been a member of that prior 1955 Act pension plan. In that limited circumstance (and to insure the principles of *Bakenhus*), LEOFF provides that after the Department of Retirement Services determines a LEOFF member's pension benefit each year, the retiree's former employer (here the City) must calculate what the pension benefit would have been for the LEOFF member if he had retired under the 1955 Act as if LEOFF did not exist (the excess payment calculation). If the 1955 Act pension benefits would have been greater, the City pays the LEOFF retiree the difference from the

City's Firemen's Pension Fund. RCW 41.26.040(2). Therefore, each act has its own set of definitions and pension calculations. They are mutually exclusive.

One can only surmise that this "inconsistency" argument is a failed attempt to preserve LEOFF's constitutionality while claiming its components do not fit together. The McAllisters allege that the language of RCW 41.26.3902 (now located at RCW 41.26.3902) requires the court to adopt the "basic salary" definition under LEOFF and apply it to the City's mandated 1955 Act excess payment calculation so that both statutes use the same "basic salary" definition. RCW 41.26.3902 provides:

To the extent the provision of this 1969 amendatory act are inconsistent with the provisions of any other law, the provisions of this 1969 amendatory act shall be controlling.

However, the statutory language of RCW 41.26.3902 does not apply in this situation because the provisions of LEOFF are not inconsistent with any other laws, as alleged by the McAllisters.

The unambiguous language of RCW 41.26.040(2) simply means that the City is required to perform the excess payment calculation under the 1955 Act using the definitions from that act alone. In fact, the McAllisters do not challenge this interpretation of the statute. There is simply no inconsistency between LEOFF and the 1955 Act. RCW 41.26.3902 is not applicable.

D. The Remedy The McAllisters Seek Is With The State Not With The City.

The McAllisters challenge the Legislature's authority to uncap their contribution amounts under LEOFF. However, the remedy the McAllisters seek is to have the City pay more to them from the pension benefits under the 1955 Act which the City still administers. Why should the City pay the McAllisters additional benefits when the City plays no role in administering LEOFF or controlling any LEOFF pension contributions? While members of the 1955 Act, the McAllisters were required to make pension contributions to the City's pension fund under the terms of the 1955 Act. A state wide pension plan administered by the State of Washington Department of Retirement Systems was created with the enactment of LEOFF. On March 1, 1970, the McAllisters began making all their pensions contributions to the state Department of Retirement Services. The City ceased receiving any pension contributions from the McAllisters.

The McAllisters challenge their increased pension contribution amounts after March 1, 1970. However, the remedy they seek is for the City to pay them increased pension benefits by lifting the cap on pension benefits set forth under the provisions of the 1955 Act. The McAllisters want the City to pay for the error they allege was created by the Legislature in the enactment of a state pension plan – LEOFF.

The error alleged by the McAllisters and the remedy they seek are incongruent. The Court of Appeals correctly noted that the McAllisters' challenge to the increased contribution rate under LEOFF is a "claim against the State not the Pension Board." *McAllister v. City of Bellevue*, 142 Wash.App. 250, 258, 180 P.2d 786 (2007).

E. The Court Of Appeals Correctly Analyzed The Application Of LEOFF.

The Court of Appeals thoroughly and thoughtfully analyzed the arguments put forth by the McAllisters. The Court of Appeals found the language of RCW 41.26.040(2) to be plain and unambiguous. The Court of Appeals noted that to require the City to use the LEOFF salary definition to calculate the excess payment amount under the 1955 Act would be contrary to the plain language of the statute.

The Court of Appeals concluded that LEOFF provided increased benefits, including medical coverage for life and a survivor benefits of 100 percent of the retiree's pension and thus did not violate *Bakenhus*. The Court of Appeals also correctly pointed out that any challenge the McAllisters were making to the increased contribution rate under LEOFF was properly a claim against the State and not the City's Pension Board.

Finally, the Court of Appeals rejected the McAllisters' argument that the first version of RCW 41.26.040(2) enacted on July 1, 1969 should govern. The court correctly pointed out that before the effective date of

March 1, 1970, the Legislature amended RCW 41.26.040(2). Thus, it was the later version of RCW 41.26.040(2) which governs the McAllisters' claim.

### III. CONCLUSION

The appellate court's decision should be affirmed.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of September, 2008.

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