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SUPREME COURT OF THE STATE OF WASHINGTON

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WASHINGTON EDUCATION ASSOCIATION; et al, and all others
similarly situated,

Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON and DEPARTMENT OF RETIREMENT
SYSTEMS,

Appellants/Cross-Respondents.

CHERYL COSTELLO, STEPHEN GORE, RICHARD MORVAN, and
JERALD NEWELL, on behalf of themselves and a class of persons
similarly situated,

Respondents,

v.

STATE OF WASHINGTON and DEPARTMENT OF RETIREMENT
SYSTEMS,

Appellants.

WASHINGTON FEDERATION OF STATE EMPLOYEES, PAULETTE
THOMPSON and DANA HUFFORD,

Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON and DEPARTMENT OF RETIREMENT
SYSTEMS,

Appellant/Cross-Respondents.

APPELLANTS' BRIEF

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I. INTRODUCTION

In 1998, the Legislature enacted gain-sharing, a limited, revocable public pension provision that provided additional monies to public pension members and retirees during times of high investment gains. Concerned that gain-sharing was untried and its future costs uncertain, the Legislature simultaneously reserved the right “to amend or repeal it in the future.” The Legislature expressly provided that “no member or beneficiary has a contractual right” to receive future gain-sharing payments if gain-sharing were repealed. This reservation allowed implementation of an untested pension benefit that had been requested by public employees and their unions, while maintaining flexibility to protect public employers, and ultimately taxpayers, from unanticipated costs.

Because gain-sharing paid out a portion of extraordinary investment gains, rendering those gains unavailable to ease severe investment declines, the Legislature’s concerns about the future costs of gain-sharing were realized. Recognizing that the costs of gain-sharing were unsustainable for state and local governments, the Legislature repealed gain-sharing in 2007 (after paying gain-sharing benefits that had already been earned), thereby protecting the financial integrity and flexibility of the affected pension plans. In place of gain-sharing, the Legislature enacted long-sought benefits, including an increase in a cost of

living adjustment (COLA) and an opportunity to retire with an unreduced pension at an earlier age. Nevertheless, some plan members and public employees' unions sued, asking for the reinstatement of gain-sharing *and* retention of replacement benefits for certain plan members.

The central issue in this case is whether the Legislature may, when enacting a public pension provision, expressly reserve the right to amend or repeal that provision in the future. Plan members ask this Court to rewrite the plain language of the gain-sharing statute to create a contractual pension benefit to gain-sharing in perpetuity, something the Legislature never intended. The Legislature's repeal of gain-sharing was appropriate and constitutional because the Legislature plainly did not promise gain-sharing in perpetuity, and, therefore, it impaired no contractual right when it repealed gain-sharing. This Court should therefore reverse the trial court and uphold the Legislature's repeal of gain-sharing.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in holding that the repeal of gain-sharing was an unconstitutional impairment of contract in violation of the Contracts Clause of the Washington Constitution. CP 5106-11, 6497.
2. The trial court erred to the extent that it found that the repeal of gain-sharing constituted a breach of contract and/or unconstitutionally deprived class members of due process. CP 5106-11, 6496.
3. The trial court erred to the extent that it found the State was

estopped from repealing gain-sharing.¹ CP 5111, 6497.

4. The trial court erred in awarding attorneys' fees pursuant to RCW 49.48.030 and in assessing those fees against the State and the Department of Retirement Systems without finding either to be the employer of individual class members. CP 7157-58, 7160.

5. The trial court erred in providing for post-judgment interest on the award of attorneys' fees pursuant to RCW 4.56.110(4). CP 7160.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. May the Legislature reserve the right to amend or repeal a public pension benefit when that reservation is plain and enacted as a part of the provision which enacts that benefit? [Assignment of Error 1,2]

2. May the Legislature repeal statutory gain-sharing provisions when the statute enacting the provisions includes an express reservation of the right to repeal the provisions? [Assignment of Error 1,2]

3. Did plan members have no contractual right to gain-sharing in perpetuity where the Legislature expressly stated that gain-sharing was not a contractual right? [Assignment of Error 1,2]

4. Even if class members could claim a contractual right to perpetual gain-sharing, was the repeal of gain-sharing permissible because it did not substantially impair the alleged contract and plan members received new comparable benefits? [Assignment of Error 1,2]

5. Was the Legislature's repeal of gain-sharing reasonable and necessary to serve a legitimate public purpose and to protect the flexibility and integrity of the affected pension plans? [Assignment of Error 1,2]

6. Where (a) the Department of Retirement Systems (DRS) made no assurances that gain-sharing would be permanent, (b) no class representative has shown reasonable reliance on a DRS statement, injury,

¹ It is uncertain whether the Final Judgment and Order ruled on class members' estoppel claims. Certain class members brought claims of equitable and promissory estoppel. The trial court's uncaptioned memorandum opinion contains a section entitled "Estoppel/Ultra Vires." CP 5111. However, nothing in the memorandum contains any clear finding of fact or conclusion of law regarding either type of estoppel. CP 5111. The Final Judgment and Order incorporates the memorandum opinion but contains no other mention of estoppel. CP 6492-6499.

or manifest injustice, and (c) no proof of reasonable reliance can be made on a class-wide basis, are plan members entitled to the reinstatement of gain-sharing based on promissory or equitable estoppel? [Assignment of Error 3]

7. Should class members' equitable and promissory estoppel claims be rejected because, under the ultra vires doctrine, estoppel cannot be used to compel the State to take action contrary to the law? [Assignment of Error 3]

8. RCW 49.48.030 allows a court to assess attorneys' fees against an employer when an employee recovers wages withheld by that employer. Assuming that class counsel would be entitled to attorneys' fees if the class were to prevail, should fees be awarded pursuant to the common fund doctrine rather than RCW 49.48.030, when neither the State nor DRS is the employer? [Assignment of Error 4]

9. Does sovereign immunity exempt the State from paying interest on the judgment for attorneys' fees, when the State has not waived its immunity either by statute or contract? [Assignment of Error 5]

IV. STATEMENT OF THE CASE

A. Pension Plans Affected by Gain-Sharing and the Replacement Benefits for Gain-Sharing

The Legislature has established several public pension plans for state employees, and for employees of school districts, counties, cities, and other political subdivisions. Gain-sharing was a provision in Plans 1 and 3 of both the Public Employees' Retirement System (PERS) and the Teachers' Retirement System (TRS), and Plan 3 of the School Employees' Retirement System (SERS).²

Plan 1 is a "defined benefit" plan, meaning that upon retirement a

² PERS includes employees of the state, counties, cities, and other political subdivisions. RCW 41.40. TRS includes teachers and some school administrators. RCW 41.32. SERS includes most school employees other than teachers. RCW 41.35.

member's monthly retirement allowance is defined by a statutory formula. *See, e.g.*, RCW 41.40.185(2). Plan 1 includes those who became members of the pension systems prior to October 1, 1977,³ when there was no other plan option. RCW 41.32.010(31); RCW 41.40.010(27). Plan 1 is funded by contributions from plan members and their public employers and by returns on investments of those contributions, with the bulk of the funding coming from returns. CP 2653. The employee contribution rate is fixed in statute, while the employer contribution rate is adjusted to ensure that the plan is adequately funded.⁴ RCW 41.32.350; RCW 41.40.330(1).

Plan 3 is a combination of a "defined benefit" plan and a "defined contribution" plan. RCW 41.32.831-.950; RCW 41.35.600-.901; RCW 41.40.780-.932. Plan 3 includes those who became plan members after October 1, 1977, and who either were mandated into Plan 3, elected Plan 3 when first hired, or elected to transfer into Plan 3 from Plan 2. RCW 41.32.010(33); RCW 41.35.010(30); RCW 41.40.010(29). The "defined benefit" component is funded solely by the contributions of public employers and the investment returns thereon. For the "defined

³ For simplicity, this brief will use the term "plan member" or "member" to include active, inactive, and retired members in the affected pension plans.

⁴ PERS, SERS, and TRS each has a Plan 2, for those who became plan members after October 1, 1977, and who either did not elect Plan 3 or were not mandated into Plan 3. RCW 41.32.010(32); RCW 41.35.010(29); RCW 41.40.010(28). Plan 2 is also a "defined benefit" plan. RCW 41.40.620. In contrast to Plan 1, Plan 2 member and employer contribution rates are equal, and both go up or down as needed to ensure the plan is adequately funded. RCW 41.45.061.

contribution” component of Plan 3, the plan member has an individual account.⁵ The member chooses how much to contribute and directs investment (within limits). RCW 41.34. The employer does not contribute to the “defined contribution” component. The amount the member receives upon retirement from the “defined contribution” component depends on how well the selected investments have performed. Thus, the total of the Plan 3 member’s “defined benefit” and “defined contribution” components upon retirement might be higher or lower than if the member had been just in a “defined benefit” plan. The Legislature enacted Plan 3 in the late 1990s to provide flexibility for employees and to allow employees a greater chance to reap the benefits of any favorable investment returns. CP 2142-43, 2291, 2294, 2391, 2666-67. RCW 41.34.010 (Plan 3 declaration of purpose).

B. Gain-Sharing and the Limits on Gain-Sharing Imposed by the Legislature

During the 1990s the state and nation experienced a sustained economic boom, resulting in very favorable returns on investment of pension plan funds.⁶ CP 2341, 2345. Employees were concerned that they

⁵ The formula for the monthly retirement allowance for Plan 3 retirees is half of the formula for the monthly retirement allowance for Plan 1 and Plan 2 (1% of compensation per year of service, rather than 2%) . *See, e.g.*, RCW 41.40.790(1).

⁶ The Court can take judicial notice of economic circumstances. *State ex rel. Pac. Tel. & Tel. Co. v. Dep't of Pub. Serv.*, 19 Wn.2d 200, 265, 142 P.2d 498 (1943); *State ex rel. Hamilton v. Martin*, 173 Wash. 249, 256, 23 P.2d 1 (1933).

were not sharing in these favorable investment returns, and the Legislature responded by enacting gain-sharing. Gain-sharing was a new type of provision in the public pension arena, and only a few other jurisdictions in the nation had adopted it. The State Actuary's Office reported to the Legislature, "fewer than 6% of public sector organizations in the United States . . . had implemented a gain-sharing program in 1997." CP 2625.

The Legislature initially enacted gain-sharing statutes in 1998.⁷ Gain-sharing took a portion of favorable investment returns that would otherwise reduce the contributions of public employers and instead used them to fund additional benefits for Plan 1 and Plan 3 members.⁸ Whenever the pension funds earned an average return of more than ten percent over four consecutive years (constituting "extraordinary investment gains"), half of the extraordinary gains would be provided to members. Former RCW 41.31.020 (2006) (Plan 1); former RCW 41.31A.020 (2006) (Plan 3). When the statutory criteria were met, this was referred to as a "gain-sharing event."⁹

⁷ Laws of 1998, ch. 340 (Plan 1, formerly codified at RCW 41.31) (CP 2120-40); Laws of 1998, ch. 341 (Plan 3, formerly codified at RCW 41.31A) (CP 2115-19). *See* Appendix.

⁸ Plan 2 members automatically shared in favorable investment returns because such returns lowered their member contribution rate (unlike Plan 1 and 3 members, whose contribution rates were fixed). Thus, gain-sharing was not provided for Plan 2.

⁹ In Plan 1, gain-sharing was paid as an addition to the Uniform COLA that Plan 1 retirees received each year after age 66. Former RCW 41.31.010 (2006). In Plan 3, gain-sharing was paid into the plan member's individual account (the "defined

Since gain-sharing was a new concept both in Washington and nationwide, the Office of the State Actuary¹⁰ was concerned that the full impact of gain-sharing was uncertain and that the gain-sharing provisions might have to be refined in the future. CP 1619. Gain-sharing might prove to be so expensive that it would adversely affect the ability of the State and other public employers to fund the other pension benefits. CP 1619. Accordingly, the Actuary recommended that the Legislature include in the gain-sharing statutes a clause reserving the right to amend or repeal gain-sharing, as the Legislature had done on other occasions in which it had enacted new benefits whose cost, sustainability, and impacts were uncertain.¹¹ CP 1618-19.

Thus, in the original 1998 statutes and in all later versions of the gain-sharing statutes, the Legislature expressly reserved the right to amend or repeal gain-sharing and declared that there existed no contractual right to any gain-sharing payment not granted prior to amendment or repeal:

[Plan 1] The legislature reserves the right to amend or repeal this chapter in the future and no member or beneficiary has a contractual right to receive this postretirement adjustment not granted prior to that

contribution" component) based on the member's months of service credit. Former RCW 41.31A.020 (2006).

¹⁰ The State Actuary is part of the legislative branch that provides actuarial advice to the Legislature. RCW 44.44.040.

¹¹ Laws of 1990, ch. 274, §§ 18-19; Laws of 1995, ch. 345, §§ 2(6), 5(6). The Legislature has also included such clauses in other pension and non-pension statutes. *See* CP 2144-45 (list of statutes with reservation of rights clauses).

amendment or repeal.

[Plan 3] The legislature reserves the right to amend or repeal this section in the future and no member or beneficiary has a contractual right to receive this distribution not granted prior to that time.

Former RCW 41.31.030 (2006) (Plan 1); former RCW 41.31A.020(4), .030(5), .040(5) (2006) (Plan 3).

C. The Impact of Gain-Sharing on Employer Contribution Rates and the Decline in Investment Returns After 2000

Gain-sharing had an adverse effect on the State and other public employers by reducing the funds available to pay for all other benefits that the pension trust funds must support. This resulted in the State, other public employers, and ultimately taxpayers, having to pay higher employer contributions than they otherwise would have paid.

In Plan 1 the employee contribution rate is fixed; only the employer contribution rate can be increased to assure there are adequate funds to provide the retirement benefits. The Plan 1 employer rate is based on certain assumptions, including an assumed rate of investment return. RCW 41.45.035. The employer rate is adjusted periodically upward or downward to reflect unfavorable or favorable returns on investments. Similarly, in Plan 3 the “defined benefit” component is funded entirely by employer contributions and investment returns. Gain-sharing resulted in a portion of those investment earnings being removed from the trust fund

and allocated instead to Plan 3 individual accounts. The overall effect was that the State and other public employers were burdened with all of the “valleys” of unfavorable investment returns, but could not rely on the benefit of the “peaks” to balance out periods of little or no gain, ultimately resulting in a higher contribution rate for public employers.

Gain-sharing events occurred in 1998 and 2000, reflecting strong investment returns in the years leading up to those dates. CP 2528. But the very favorable returns on investments of the pension trust funds in the 1990s that prompted gain-sharing did not continue, and the incidence of gain-sharing events after that time proved to be unpredictable. After the boom of the 1990s, the nation and state experienced significant economic downturns, caused first by the dot-com bust and later by the aftermath of 9/11, resulting in fluctuating performance of the pension plan investments, as well as adversely impacting the State’s overall revenue and budget situation. CP 1038, 1050, 1228-29, 1929, 1932, 2176, 2623. Investment returns were not sufficient to trigger a gain-sharing event in 2002, 2004, or 2006. CP 2529, 2623-24.

D. Evolving Actuarial Views of How Gain-Sharing Should Be Treated, Its Costs, and the Legislature’s Response

As the economy was fluctuating after the boom of the 1990s, professional actuaries were evolving in their view of how gain-sharing

should be treated, even as the Legislature was just beginning to understand its true costs. When gain-sharing was first considered, the State Actuary did not quantify for the Legislature a specific cost to the State, other public employers, and ultimately taxpayers, of diverting investment returns to plan members through gain-sharing. CP 1622-41.

The Actuary accounted for the adverse effect of gain-sharing by making adjustments to employer contribution rates after gain-sharing events occurred or when one was certain to occur. CP 2362. That is, the Actuary accounted for the adverse effects of gain-sharing events through increases to employer contributions after the events. CP 2362.

In 2002, the Legislature appointed a new Actuary, who reviewed how gain-sharing was being accounted for actuarially. CP 1705. The new Actuary initially advised the Legislature that his office was considering whether gain-sharing was a “material liability”¹² of the pension plans that should be reflected in employer contribution rates on an ongoing basis, as other material liabilities are, rather than being accounted for only after a gain-sharing event had occurred. CP 2151. The Actuary sought input from professional actuarial associations and from other jurisdictions with gain-sharing or similar provisions. CP 2371-88. As a result, he advised the Legislature that gain-sharing was a material liability of the pension plans.

¹² A material liability of the pension plans is any cost that would increase the total contribution rate by at least .01 percent. CP 1705.

He recommended that the Legislature fund gain-sharing just as any other material liability, *i.e.*, that higher employer contribution rates be adopted in anticipation of future gain-sharing events, even if the date of those events could not be predicted. CP 2153-55. This position reflected an evolution in actuarial standards since the late 1990s when gain-sharing was first enacted. CP 2199.

The Actuary also advised the Legislature of the dollar impact of gain-sharing on the pension funds. He reported the present value of future gain-sharing was \$930 million for Plan 1, and \$622 million for Plan 3 over the expected lifetimes of then-eligible members (not including employees to be hired in the future). CP 2153-54. The Actuary recommended that employer rates for Plan 1 and Plan 3 be increased, beginning with the 2005-07 biennium. CP 2515. This was the first time the Actuary quantified costs of gain-sharing in this way.

The Legislature proceeded carefully. It did not amend or repeal gain-sharing, nor did it immediately adjust contribution rates. Instead, it directed a study of its options. Laws of 2005, ch. 370, § 6. That study, presented in late 2005, discussed several alternatives. CP 2511-62. As part of the study, the Legislature obtained a formal opinion of the Office of the Attorney General, which advised them that the reservation of rights clauses in the gain-sharing statutes were effective and that the Legislature

could repeal gain-sharing if it so chose without violating any rights of pension plan members. Op. Att’y Gen. 16 (2005) (CP 2218-23).

E. Legislature’s Repeal of Gain-Sharing and Enactment of Replacement Benefits

In 2007, after carefully studying its options, the Legislature repealed gain-sharing and enacted certain replacement benefits. Laws of 2007, ch. 491 (EHB 2391) (2007 Act). *See* Appendix. The 2007 Act had two goals: first, to reduce costs to the State and other public employers caused by gain-sharing; and, second, to provide, certain “replacement” benefits that employees had long been seeking. CP 233-35.

The 2007 Act had several components. The Act eliminated gain-sharing for employees hired after July 1, 2007, and eliminated gain-sharing for existing employees effective January 2, 2008. The Act also provided several “replacement benefits”: (1) Plan 1 members would receive an increase in their Uniform COLA on July 1, 2009;¹³ (2) some Plan 2 and 3 members could retire before age 65 with no or lesser reductions for early retirement; (3) newly hired members of TRS and SERS could choose between Plans 2 and 3, rather than being mandated into Plan 3. Allowing the gain-sharing event projected for January 1, 2008, to go forward was considered a replacement benefit by the Actuary, given

¹³ The Uniform COLA was subsequently repealed in 2011. A lawsuit has been filed under Thurston County Superior Court Cause No. 11-2-00213-4, challenging the repeal as an impairment of contract.

that the 2007 Act could have repealed gain-sharing immediately. CP 2496.

The Legislature expressly provided that if the repeal of gain-sharing were challenged and the courts ultimately reinstated it, any replacement benefits not already given would be automatically terminated. For example, if gain-sharing were reinstated, members of Plan 2 and Plan 3 who had not yet retired could no longer retire under the more favorable early retirement factors in the 2007 Act. *See, e.g.*, RCW 41.40.630. In no case would plan members receive both gain-sharing and replacement benefits.

The net projected savings from the 2007 Act was \$2.265 billion over 25 years. CP 2641. The 2007 Legislature could have saved \$6.7 billion over this period by simply repealing gain-sharing immediately for all existing and future pension plan members. CP 2631-36. Instead, it allowed the January 1, 2008, gain-sharing event to go forward (at a cost of \$1.48 billion over 25 years, CP 2632, 2637), enhanced the Plan 1 Uniform COLA (\$493.5 million, CP 2633), improved early retirement factors for Plan 2 and Plan 3 (\$2.164 billion, CP 2639), and provided a choice of plans for new members of TRS and SERS (\$301.7 million, CP 2638). Thus, pension plan members received benefits in the 2007 Act totaling \$4.442 billion over 25 years. *See* CP 2160-61. In addition to their monetary value, the replacement benefits provided qualitative

improvements in the design of the plans, substituting more stable and long-sought-after replacement benefits for the uncertain, unpredictable provisions of gain-sharing. CP 2656-72.

The economic crisis that affected the state and nation beginning in 2008 proved that the Legislature's concerns about the long-term sustainability of gain-sharing were warranted. If gain-sharing were reinstated, the State Actuary has estimated that it would cost the public pension plans \$3.364 billion over 25 years,¹⁴ at a time when the State, school districts, counties, cities, and other political subdivisions are straining to fund essential services and can least absorb this impact. CP 1699-1702, 5886-89, 5935-40, 5941-71, 5972-76, 6172-6226. Furthermore, TRS and PERS Plans 1 have been underfunded for some time. Adding back the cost of gain-sharing could make some pension plans "at risk" or "borderline unhealthy." CP 1716-17.

F. Proceedings in the Trial Court

Two unions, the Washington Education Association and the Washington Federation of State Employees; some of their members; and an unaffiliated group of employees (the "Costello" group) filed lawsuits against the State, challenging the 2007 Act. CP 1-16, 17-38, 70-74, 83-107. (One other union filed suit but withdrew it. CP 39-48.) The trial court

¹⁴ This number is lower than the cost in the Actuary's fiscal note for the 2007 Act, because it does not include gain-sharing for future hires. CP 1718, 1722.

consolidated the actions. The Washington Education Association and the Costello lawsuits were class actions, and the trial court granted class certification for certain issues. CP 548-54.

The unions and their members claimed the repeal of gain-sharing was unconstitutional under the Contracts and Due Process Clauses of the state and federal constitutions; that the State had breached the class members' employment contract; and that the State was estopped from repealing gain-sharing because communications from the State did not specifically advise members that gain-sharing could be repealed.¹⁵ The unions and members further claimed that the 2007 Act's replacement benefits could not be terminated if gain-sharing were reinstated. Thus, contrary to the express provisions of the gain-sharing statute, they asserted they were entitled to both gain-sharing and the replacement benefits.

The trial court bifurcated the lawsuit into two phases. CP 461-63. In Phase 1, the court considered the repeal of gain-sharing, granted summary judgment to the unions and members, and enjoined the State from implementing the repeal.¹⁶ CP 5105-12, 6492-99. The State appealed. CP 6500-20. In Phase 2, the court considered the automatic termination of the replacement benefits and granted summary judgment to

¹⁵ Communications between the State and plan members are discussed in detail below in connection with the estoppel issue.

¹⁶ To date, there have been no further gain-sharing events, so the injunction has not needed to be implemented or stayed.

the State. CP 6468-71, 6488-99. The unions and members appealed. CP 6521-30.

The trial court also granted the unions' and members' request for attorneys' fees and costs for Phase 1, relying on RCW 49.48.030, which provides for an award of fees in an action for wages and salaries. The court rejected the State's argument that any award of fees should occur under the common fund doctrine, applied in prior pension cases. CP 7155-61. The State appealed the attorneys' fees and costs award. CP 7164-74.

V. ARGUMENT

A. Summary of the Argument

Under its plenary power the Legislature had full authority to repeal gain-sharing because plan members did not have a contractual right to gain-sharing in perpetuity. Under the terms of the gain-sharing statute, the Legislature expressly provided that it could repeal gain-sharing at any time and gain-sharing in perpetuity was not a contractual right. Further, repeal of gain-sharing in perpetuity did not substantially impair any right because the Legislature was clear from the outset that gain-sharing was revocable. Nevertheless, plan members received comparable benefits in exchange for the loss of gain-sharing in perpetuity. Repeal of gain-sharing was necessary to protect basic governmental services, to protect the integrity and the flexibility of the pension plans, and ultimately to protect against a

burden on taxpayers who provide the financial support for the State's and local governments' pension contributions for public employees.

Plan members are not entitled to gain-sharing under promissory or equitable estoppel because they were never promised gain-sharing indefinitely, and plan members have not proved reliance, which must be demonstrated on an individual basis. Finally, members are not entitled to attorneys' fees under RCW 49.48.030 or post judgment interest thereon.

B. The Legislature Has Plenary Power to Enact, As Well As Limit, Pension Legislation Absent a Constitutional Prohibition

The fundamental question in this case is whether the Legislature may, when enacting a public pension provision, expressly reserve the right to amend or repeal that provision in the future. The Legislature has authority under its police power to establish a retirement system for public employees. *Wash. State Pub. Employees' Bd. v. Cook*, 88 Wn.2d 200, 206, 559 P.2d 991 (1977). *See also Wash. Fed'n of State Employees v. State*, 107 Wn. App. 241, 247, 26 P.3d 1003 (2001).¹⁷ The Legislature may enact new pension provisions, modify them, and maintain the financial viability of the Washington's public retirement systems via statute.¹⁸ This authority

¹⁷ "Police power is an attribute of sovereignty, an essential element of the power to govern, and a function that cannot be surrendered. . . . A large discretion is therefore vested in the Legislature to determine what the public interest demands and what measures are necessary to secure and protect the same." *Shea v. Olson*, 185 Wash. 143, 154, 53 P.2d 615 (1936).

¹⁸ As part of that power, the Legislature has the prerogative to reserve the right to amend or repeal a statutory provision, including a pension provision. Under the

includes the power, when enacting a pension benefit, to qualify or limit the benefit in the same statute that creates it. *See, e.g., Cook*, 88 Wn.2d at 206 (upholding restrictions on choice of beneficiary). Courts will not substitute their judgment for the Legislature's with respect to pension plan structure. *Id.* Thus, the only restrictions on the Legislature's authority to establish and limit pension plans arise from the federal and state constitutions. *Luders v. City of Spokane*, 57 Wn.2d 162, 165, 356 P.2d 331 (1960).

The Legislature enacted gain-sharing and, in the same statute, expressly reserved its authority to amend or repeal gain-sharing. The Legislature plainly stated that (1) gain-sharing could be amended or repealed at any time, and (2) gain-sharing *in perpetuity* (*i.e.*, not subject to amendment or repeal) was not being provided to members as a contractual right. This Court must determine whether the Legislature's later repeal of gain-sharing was constitutionally permissible in light of this language.

C. The Legislature's Exercise of Its Reservation of Rights in the Gain-Sharing Statute Did Not Violate the Washington Constitution's Contracts Clause

This Court reviews the constitutionality of statutes de novo, and statutes are presumed constitutional. Challengers must meet "a heavy

Separation of Powers doctrine, the test to determine a Separation of Powers violation is whether one branch of government "threatens the independence or integrity or invades the prerogatives of another." *State v. Gresham*, 153 Wn. App. 659, 665-66, 223 P.3d 1194 (2009). Due deference must be given to the Legislature to modify pension provisions given the broad powers of the Legislature over its legislatively-created pension systems.

burden of proving unconstitutionality beyond a reasonable doubt.” *Voters Educ. Co. v. Wash. State Pub. Disclosure Comm’n*, 161 Wn.2d 470, 481, 166 P.3d 1174 (2007); *Retired Pub. Employees Coun. v. Charles*, 148 Wn.2d 602, 623, 62 P.3d 470 (2003).

The Legislature’s exercise of its express reservation of the right to repeal gain-sharing did not violate the Contracts Clause of the Washington Constitution.¹⁹ The Contracts Clause did not prevent the Legislature from repealing gain-sharing because it was fully within the Legislature’s authority both to create and to repeal gain-sharing, and the statute established at the outset that there was no contractual right granted to gain-sharing in perpetuity.²⁰

1. This Court’s Three-Part Test for Analyzing Whether Legislation Violates the Contracts Clause Provides the Analytical Framework for This Case

Washington’s Contracts Clause provides, “No ... law impairing the obligations of contracts shall ever be passed.” This Court has analyzed Contracts Clause claims using a three-part test. In 2003, in *Charles*, this Court evaluated whether certain public pension legislation violated the

¹⁹ Plan members also cite the federal Contracts Clause. “The Washington and federal provisions forbidding impairment of contract are given similar effect.” *Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 145, 744 P.2d 1032 (1987).

²⁰ The plan members also raised breach of contract and due process at the trial court level, but these issues simply reframe the impairment of contract claim. There was no breach of contract because plan members received all they were entitled to under the gain-sharing statutes, and no due process violation because the repeal of gain-sharing did not deprive plan members of any right. Members received benefits they were entitled to under statute. *Haberman*, 109 Wn.2d at 142-43.

Contracts Clause by asking: (1) Is there a private contractual right to the claimed benefit? (2) If so, does the legislation substantially impair the contractual relationship? (3) If so, was the impairment reasonable and necessary to serve a legitimate public purpose? *Charles*, 148 Wn.2d at 624.²¹ As a threshold matter in any Contracts Clause analysis, the Court must first decide whether the Legislature created a contractual right to the particular benefit claimed.

In *Charles*, this Court made clear that some pension provisions may be contractual rights, but implied that not *all* public pension provisions are contractual rights. When analyzing whether members have a contractual right to a public pension benefit, the Court must *first* determine whether the claimed benefit is actually part of the contract:

Under the first prong, we must initially determine whether a contract exists. Pension provisions are part of the compensation for services and therefore become part of the employment contract. *Bakenhus*, 48 Wn.2d at 698-99. . . . As a consequence, at least *some* pension rights are contractual in nature. We must then ascertain *whether the pension rights claimed by Retirees and Employees to have been impaired are in fact terms in the employment contract.*

Id. at 624 (emphasis added). Only if the Court first determines that the claimed right is indeed a contractual right, can the Court then turn to the

²¹ Federal and state courts consistently use this test to evaluate impairment of contract claims by members of both public and private retirement plans. *US Trust Co. v. New Jersey*, 431 U.S. 1, 21, 97 S. Ct. 1505, 52 L. Ed. 2d 92 (1977); *Parker v. Wakelin*, 123 F.3d 1, 4-5 (1st Cir. 1997); *Robertson v. Kulongoski*, 466 F.3d 1114, 1117 (9th Cir. 2006); *Strunk v. Pub. Employees' Ret. Bd.*, 338 Or. 145, 170, 108 P.3d 1058 (2005).

remaining parts of the Contracts Clause analysis.

While the plan members have relied on *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956), and its progeny, *Bakenhus* did not present the question of whether a contractual pension right existed, but rather assumed such a right.²² The *Bakenhus* Court considered whether a change in the city's pension provisions could be applied after an employee performed work under the previous pension law, which provided for larger on-going monthly retirement allowances. *Id.* at 696. The *Bakenhus* Court, assuming that previous law created a contractual right to an allowance in the amount stated, explained that “*substantial*” pension benefits are contractual-like rights, and that the monthly retirement benefit promised to a public pension member when the member began employment is one such right.²³ Neither *Bakenhus* nor any subsequent case has defined what a “substantial” benefit is, nor has any subsequent case suggested that courts will enforce a pension “right” where that “right” extends beyond what is provided by the plain language of the enacting statute.²⁴

²² *Bakenhus* did not involve a reservation of rights clause, unlike the gain-sharing statute here.

²³ *Bakenhus* characterized pension benefits as an employee's deferred compensation which, therefore, “in a sense [become] part of the contract of employment itself.” *Bakenhus*, 48 Wn.2d at 698.

²⁴ This Court has remarked on *Bakenhus*'s limitations: (1) “[T]here is no statutory analysis in *Bakenhus*”; (2) the *Bakenhus* Court acknowledged its reasoning may “not be flawless in a purely legalistic sense”; and (3) in spite of *Bakenhus*'s progeny finding that a pension right vests contractually on the first day of employment, there is no

Moreover, *Bakenhus* established that pension provisions may be modified to keep the system flexible and preserve its integrity, so long as the modifications relate to the theory of the pension plan, and any changes that “result in a disadvantage to [an] employee [are] accompanied by comparable new advantages.” *Id.* at 701-02. The *Bakenhus* “comparable new advantages” requirement is similar to the second prong of the Contracts Clause: whether a contract has been substantially impaired. The *Bakenhus* requirement that modifications preserve the pension plans’ integrity and flexibility is similar to the third Contracts Clause prong: whether impairment is reasonable and necessary to serve a legitimate public purpose.

Therefore, under the traditional Contract Clause analysis, and consistent with *Bakenhus*, if this Court finds the Legislature created a contractual right to the benefit claimed in the first instance, only then should the Court address the remaining Contracts Clause analysis. *Charles*, 148 Wn.2d at 624.²⁵ While not all public pension cases have

statutory provision that so states; “this contractual term has been implied by this court.” *Noah v. State*, 112 Wn.2d 841, 844-45, 846, 774 P.2d 516 (1989).

²⁵ This Court may wish to determine where *Bakenhus* fits within this Court’s broader Contracts Clause analysis. To do so, it is important to note the evolving analysis in more recent public pension cases, including *Charles*, where this Court applied the traditional Contracts Clause analysis, and *Navlet v. Port of Seattle*, 164 Wn.2d 818, 194 P.3d 221 (2008), where this Court held that an explicit reservation of a right to repeal a benefit is effective so long as it appears in the contract-forming instrument itself, and not in a collateral document. For a critical discussion of the “California Rule,” upon which

found it necessary to address the first element of the Contracts Clause test, the question of whether the Legislature created a contractual right to the claimed benefit (here, gain-sharing in perpetuity) is a threshold question. Because the Legislature did not create a contractual right to gain-sharing in perpetuity, the analysis should end there, and the Court need not consider the remainder of the Contracts Clause/*Bakenhus* tests.

2. Gain-Sharing in Perpetuity Was Not a Right Because the Legislature Expressly Stated It Could Amend or Repeal Gain-Sharing and It Was Not Creating a Contractual Right

The “contracts clause is applicable only if the legislative act complained of impairs a contractual relationship.” *Haberman*, 109 Wn.2d at 145 (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244-45, 98 S. Ct. 2716, 57 L. Ed. 2d 727. (1978)). This Court has cautioned that a “contract clause claim based on statutory rights succeeds only if ‘the language and circumstances [of the statute] evince a legislative intent to create private rights of a contractual nature enforceable against the State.’” *Haberman*, 109 Wn.2d at 145. Because the “language [of the statute] and the circumstances [of its adoption must] demonstrate a legislative intent to create rights of a contractual nature enforceable against the State,” *Wash. Fed’n of State Employees v. State*, 101 Wn.2d

Bakenhus is based, see Amy B. Monahan, *Statutes As Contracts? The “California Rule” and Its Impact on Public Pension Reform*, 97 Iowa L. Rev. 1029 (2011-2012).

536, 539, 682 P.2d 869 (1984), the first step is to examine the statutory language itself. *National R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985) (quoting *Sinking Fund Cases*, 99 U.S. (9 Otto) 700, 720, 25 L. Ed. 496 (1879)). *Nat'l R.R.*, 470 U.S. at 466. See also *King Cnty. Employees' Ass'n v. State Employees' Ret. Bd.*, 54 Wn.2d 1, 9, 336 P.2d 387 (1959) (looking to plain language of pension statute to determine member had no contractual right to annuity table in effect when the member began work); *Bates v. City of Richland*, 112 Wn. App. 919, 927-28, 51 P.3d 816 (2002) (pension rights depend on statutory provisions).

The statute enacting Plan 3 gain-sharing specifically stated, “[N]o member or beneficiary has a contractual right to receive this distribution not granted prior to [the repeal of gain-sharing],” and “[t]he legislature reserves the right to amend or repeal this section in the future.” Former RCW 41.31.030 (2006) (Plan 1); former RCW 41.31A.020(4), .030(5), .040(5) (2006) (Plan 3). The Plan 1 language was virtually identical.

The Oregon Supreme Court has analyzed similar language and concluded it “could not be clearer.” *Strunk v. Pub. Employees' Ret. Bd.*, 338 Or. 145, 108 P.3d 1058, 1079 (2005).²⁶ In *Strunk*, although the Public

²⁶ The Oregon statute (ORS 238.375(3)) stated, “No member . . . shall acquire a right, contractual or otherwise, to the increased benefits provided by” certain Oregon statutes. *Id.*

Employees' Retirement System (PERS) of Oregon was generally considered a contract between the state and its employees, the Oregon Legislature had authority to enact a reservation of rights clause in the PERS statutes that was effective to prevent the creation of a contractual right in the specific benefit to which the reservation referred.²⁷ *Id.* Like the Oregon Legislature, the Washington Legislature expressly qualified plan members' rights to gain-sharing, and precluded any assertions of contractual entitlement.

This Court has been very reluctant to find an enforceable contractual obligation arising out of statute when the circumstances of its enactment indicate a contrary intent. *Haberman*, 109 Wn.2d at 145. When the gain-sharing legislation was considered, staff from the State Actuary's office explained to the Joint Committee on Pension Policy that the funding requirements for gain-sharing were "unknown and unpredictable." Specifically, because of the "*Bakenhus* decision on vested pension benefits, we included the reservation of rights clauses . . . so that gain-sharing would not become a vested right to the pension plan members who

²⁷ The federal Social Security Act has a similar reservation clause that expressly reserves Congress's right to "repeal, alter, or amend" at any time. 42 U.S.C. § 1304. The United States Supreme Court has concluded that this reservation language "is hardly the language of contract," and "through the language of reservation 'Congress not only retains, but has given special notice of its intention to retain, full and complete power to make such alterations and amendments of the charter as come within the just scope of legislative power.'" *Nat'l R.R.*, 470 U.S. at 467 n. 22. *See also US R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 174, 101 S. Ct. 453, 66 L. Ed. 2d 368 (1980).

received gain-sharing payments.” CP 1619. Therefore, when the Legislature adopted the experimental gain-sharing provisions, it included language that specifically disavowed a contractual right to future gain-sharing not already paid (*i.e.*, disavowed gain-sharing in perpetuity), and specifically reserved the right to amend or repeal gain-sharing.²⁸

Plan members have argued that the terms of the statute are irrelevant; they contend that as long as members provide consideration in the form of services in exchange for that part of the pension statute which defines a benefit, they have a right to that benefit as deferred compensation regardless of a pension statute’s reservation clause.²⁹ They are wrong. Gain-sharing was deferred compensation for plan members only to the extent defined in the gain-sharing statute.³⁰ Members received all of the gain-sharing benefits that they “earned” with work performed from the date of gain-sharing’s enactment until the last gain-sharing event, the day before gain-sharing’s repeal. Because the right to repeal was expressly stated in the enacting statute, employees had no legitimate

²⁸ The State Actuary “included the reservation of rights clauses in the gain-sharing statutes because [it was] aware of the highly technical nature of gain-sharing [and was] concerned that . . . [gain-sharing may be] untenable. . . . [T]he gain-sharing provision may be so expensive that it would adversely affect the ability of the State and its political subdivisions to fund the public pension plans” CP 1619.

²⁹ Plan members have relied on dicta in *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 920-21, 468 P.2d 666 (1970) for support, but that case did not decide the effect of an employer’s reservation clause on a pension provision.

³⁰ Plan 1 and Plan 3 members who retired or ended their public employment prior to the enactment of gain-sharing did not provide any consideration for gain-sharing and, therefore, have no argument that they were entitled to the same.

expectation or right to continue earning gain-sharing after the date of repeal. There was no alteration of the terms of the contract.

Moreover, in *Navlet v. Port of Seattle*, 164 Wn.2d 818, 194 P.3d 221 (2008), this Court recently decided a reservation of rights within a collective bargaining agreement (CBA), reserving the employer's right to later limit or cease certain benefits, would be permissible, so long as the language was clear and placed in the instrument forming the contract. *Id.* at 849. The reservation language at issue in *Navlet* failed because it was placed in a document peripheral to the contract. *Id.* at 849. However, the *Navlet* Court made clear that its decision did not mean that a reservation clause could never be effective in an employment contract. In fact, the *Navlet* Court explicitly stated, "If the Port [had] wanted to limit its obligation to provide welfare benefits, then it could have insisted on limiting the right to benefits *in the CBA itself.*" *Id.* Conferral of benefits through a CBA only created a vested right "absent express language in the agreement" limiting those rights. *Id.* at 851. Furthermore, this Court has adopted similar reasoning when analyzing rights conferred in legislation. *See, e.g., Caritas v. Dep't of Soc. & Health Servs.*, 123 Wn.2d 391, 394-95, 869 P.2d 28 (1994) (public contract explicitly contingent on future legislative enactment does not impair a contractual right); *Wash. Fed'n of State Employees v. State*, 127 Wn.2d 544, 563, 901 P.2d 1028 (1995)

(reservation requires explicit language).

Therefore, under *Navlet*, an employer can rely on a properly worded reservation limiting the right conferred by allowing the employer to later amend or repeal it, so long as the reservation is contained in the document creating the provision.³¹ The *Navlet* Court struck a balance. On the one hand, it required clear expression of the limitations of the pension right being conferred in the contract-forming instrument (there the CBA) at the outset. On the other, it also provided the Legislature with a mechanism to confer a new benefit such a gain-sharing while determining its long-term viability.³² This is especially important where there is risk that maintaining the benefit may adversely impact state and local budgets, require increased financial burden on taxpayers, and lead to increased chance of failure of the pension plans themselves, risks the Legislature anticipated here.

In this case, unlike *Navlet*, the Legislature placed the limiting language in the very statute that created gain-sharing, limiting the benefit in the manner approved by the *Navlet* Court. Because the gain-sharing

³¹ The effectiveness of the reservation clause is even more compelling here where (1) there are no internal inconsistencies in the language granting and reserving the right to repeal gain-sharing; (2) gain-sharing was repealed when it became clear it was economically unsustainable; and (3) the Legislature, responsible for the economic welfare of the entire state, acted when gain-sharing stood to threaten government's ability to meet core responsibilities to citizens. *Compare Navlet*, 164 Wn.2d at 846.

³² Unlike the ongoing monthly retirement income at issue in *Bakenhus*, gain-sharing was paid only during times of outstanding investment income, rendering the amount and timing of gain-sharing payments unpredictable at best.

statute declared gain-sharing was not a contractual right, the subsequent repeal of gain-sharing was not prohibited by the Contracts Clause and was fully within the Legislature's plenary power. *Luders*, 57 Wn.2d at 165.

Furthermore, any concern that the Legislature will apply a reservation clause to all pension benefits is unwarranted. The Legislature has coupled a reservation clause to only a handful of pension provisions. CP 2144. The Legislature has never reserved the right to repeal a pension system, or to repeal fundamental ongoing monthly benefits of the type at issue in *Bakenhus*. However, without the power to reserve the right to repeal a contingent benefit such as gain-sharing, there would be no incentive for the Legislature to create any new benefits for public pension members in the future if the Legislature has no means to control unpredictable future costs of those benefits.³³

In sum, applying the first part of a Contracts Clause analysis, the Legislature's clear intent in enacting gain-sharing was to avoid creating a contractual right to gain-sharing in perpetuity. The Legislature did all in its power to make it clear that gain-sharing was not a contractual right and that the Legislature could amend or repeal gain-sharing in the future. When the Legislature repealed gain-sharing, it did so using its plenary

³³ Since the filing of these gain-sharing lawsuits in 2007, the Legislature has not enacted any significant benefit enhancements to these pension plans. *Gross v. City of Lynnwood*, 90 Wn.2d 395, 397, 583 P.2d 1197 (1978) (courts will take judicial notice of statutes of Washington State).

power to design the pension plans. The repeal did not impair a contractual obligation in contravention of the Washington Constitution. No further analysis is required—gain-sharing’s repeal should be upheld.³⁴

3. Repeal of Gain-Sharing Was Not a Substantial Impairment of Contract and the Plan Members Received Corresponding Benefits

Only if this Court were to hold gain-sharing in perpetuity was a contractual right, must the Court consider the remaining parts of the Contracts Clause analysis. Under the second prong, legislation impairs a contractual obligation only if the impairment is substantial, *i.e.*, if the amending statute (1) alters the terms of the contractual relationship, (2) imposes new conditions, or (3) lessens its value. *Charles*, 148 Wn.2d at 625; *Pierce Cnty. v. State*, 159 Wn.2d 16, 30, 148 P.3d 1002 (2006). Similarly, under *Bakenhus*, if a contractual right to a pension benefit is impacted, members must receive comparable replacement benefits because otherwise the value of the contract is reduced.³⁵

First, even if the gain-sharing statutes gave rise to a contractual entitlement, the repeal of gain-sharing did not alter the terms of plan members’ contract or contractual relationship. The contract provided both

³⁴ If the repeal is upheld, the replacement benefits will be effective.

³⁵ While *Bakenhus* provided a contractual-like right to “*substantial*” pension benefits, gain-sharing can hardly be termed “substantial,” raising whether *Bakenhus* applies here. See the discussion on the limitations of the “California Rule” upon which *Bakenhus* is based in Monahan, 97 Iowa L. Rev. at 1076-82.

for gain-sharing benefits when warranted by investment returns, and for legislative amendment or repeal of gain-sharing. Class members cannot claim more than they were granted by the statute. Plan members are not entitled to claim a contract to gain-sharing under the statute and ignore other express terms of the statute that allegedly creates their contractual relationship. *McAllister v. City of Bellevue Firemen's Pension Bd.*, 166 Wn.2d 623, 632, 210 P.3d 1002 (2009) (members cannot “cherry pick” the best parts of acts related to them). Otherwise, the Legislature would be divested of its fundamental role to determine the limits of public pension benefits. *Cook*, 88 Wn.2d at 206.

Second, the repeal of gain-sharing did not impose new conditions on class members. It merely put into effect the gain-sharing repeal provisions that were plainly included in the gain-sharing statute from the outset. Third, the repeal of gain-sharing did not reduce the value of the contract because not only did plan members receive what any alleged “contract” provided, but they also received comparable benefits when gain-sharing was repealed, including (1) additional protection for the actuarial soundness of their plans and (2) highly valuable replacement benefits. *See Bakenhus*, 48 Wn.2d at 702.

Though many cases have discussed sufficiency of “corresponding benefits” to replace a benefit lost, no court has clearly defined how to

determine whether they are reasonable and equitable. *Dailey v. City of Seattle*, 54 Wn.2d 733, 738, 344 P.2d 718 (1959) (comparing new and pre-existing rights to determine if changes were reasonable and equitable). However, two principles appear to apply. First, a pension system must be funded sufficiently to pay for the benefits to which members and retirees are entitled. *Weaver v. Evans*, 80 Wn.2d 461, 478, 495 P.2d 639 (1972). What the plan members lost in gain-sharing, they gained in increased actuarial soundness and integrity of the plans. This is a significant benefit especially in the context of the recession of the early 2000s, the current Great Recession, and the resulting severe economic crisis facing the State.

Second, no court has held that a corresponding benefit must be exactly equal, monetarily or otherwise, to the modified benefit. It would not make sense to require that a benefit that government cannot afford be replaced by another benefit of equal monetary value. Instead, courts have looked to a variety of factors, both qualitative and quantitative, to determine whether modifications to a pension plan are reasonable and equitable. In *McAllister*, 166 Wn.2d at 631, this Court found that replacing a capped pension contribution rate with a retirement allowance more closely aligned to members' salaries was reasonable and equitable. In *Vallet v. City of Seattle*, 77 Wn.2d 12, 22, 459 P.2d 407 (1969), this Court found that reducing a member's allowance at retirement was equitable

when replaced with an allowance that met inflation. In *Dailey*, 54 Wn.2d at 741, replacing a retirement formula with a right to retire at 25 years of service was found to be equitable.

Here, pension members received specific replacement benefits when gain-sharing was repealed. Plan 1 members lost gain-sharing, an unpredictable adjustment to the Uniform COLA, and gained a permanent increase in that COLA. Plan 3 members lost an unpredictable addition to their individual accounts and gained the right to retire earlier without an actuarial reduction to their allowance, a benefit that plan members characterized as very valuable. CP 5367, 5370. These are benefits that the union has long sought for its members. CP 2658, 2662, 2667. Not only do these replacement benefits restore a significant percentage of the financial value of gain-sharing, they provide significantly better stability and predictability.

In sum, there was no substantial impairment of the pension members' contractual right because plan members received exactly what the statute provided to them. In addition, the gain-sharing repeal enhanced actuarial soundness of the plans *and* plan members received enviable replacement benefits for which the unions have been advocating for years.

4. Even if This Court Finds Contractual Rights Were Substantially Impaired, Repeal Was Necessary to Ensure Continued Funding of Members' Substantive Pension Benefits and Government's Basic Services

Even if the Court were to find that repeal of gain-sharing substantially impaired pension members' contractual rights, repeal was "reasonable and necessary to serve a legitimate public interest" and to keep the pension systems flexible and maintain their integrity. *Charles*, 148 Wn.2d at 624; *Bakenhus*, 48 Wn.2d at 701. This Court has emphasized the importance of the financial sustainability of the pension systems and the need to protect the ability of a pension plan sponsor (here the Legislature) to ensure continuation of basic government services. *King Cnty. Employees' Ass'n.*, 54 Wn.2d at 12.

In 2003, the State Actuary advised the Legislature that gain-sharing was a material liability of the pension plans and recommended that the funds be funded systematically by regular *additional* pension contributions from State and local governmental employers *before* a gain-sharing event occurs. The Legislature decided to repeal gain-sharing in 2007 in light of (1) the consequences to the State budget of providing additional employer pension contributions,³⁶ (2) fluctuations in the economy and their impact on funding of government services, and (3) the

³⁶ Only public employers would fund gain-sharing because Plan 1 and 3 members' contribution rates are set by statute or by the employee and cannot be increased to pay for gain-sharing.

updated conclusion that gain-sharing created a material liability to the funds. The Legislature concluded it could no longer commit the State and other public employers to provide gain-sharing in the future.

The Legislature's foresight was correct. The effect of gain-sharing was to withdraw funds from the pension plans when investment income was high, making those funds unavailable to ease the impact of periods of low investment income. Given the current economic crisis, requiring public employers to make *additional* pension contributions to pay for the resulting investment income "lows" would jeopardize the ability of the state and local government to provide even the most basic and vital programs to their citizens. CP 1702, 5976, 5888, 5940. The repeal of gain-sharing was reasonable and necessary to serve a legitimate public purpose.

The repeal was also necessary to maintain the flexibility and integrity of the public pension systems themselves.³⁷ Plan preservation necessarily requires an ability to provide benefits even in economic downturns.³⁸ To do so, there must be sufficient contributions by employers

³⁷ Modifications to pension systems must also bear a material relationship to the adequate funding and successful operation of the retirement systems. *Weaver*, 80 Wn.2d at 476. The repeal of gain-sharing was certainly materially related to protecting the fiscal integrity of the system to provide for future benefits.

³⁸ As the State Actuary explained, an "at-risk plan [such as PERS and TRS Plans 1] has a significant risk of exhausting its trust fund before all benefit payments are made." Therefore, an at-risk plan "will have less flexibility to weather economic downturns." CP 6032-33. If the plan has to raise enough funds to provide guaranteed basic benefits *and* added expensive benefits such as gain-sharing, this decreases the flexibility the plan sponsor has to adjust contribution rates to reflect economic conditions.

and employees to adequately fund the plan. Because employees' contributions rates in Plan 1 and Plan 3 are fixed, the Legislature's only option to raise revenue for the plans is to increase public employer rates. Where a financial crisis severely limits a public employer's budget such that funding for even basic governmental programs (like police, firefighting, roads, and children's health services) is in jeopardy, public employers simply cannot afford increased pension contributions required to support ongoing gain-sharing. CP 1701-02, 5887-89, 5939-40, 5974-76. If state and local government employers cannot pay the additional contributions needed to pre-fund gain-sharing, but gain-sharing were nonetheless maintained, funding gain-sharing would threaten the ability of each pension plan to conserve sufficient funding to pay for other, even basic pension benefits to which the government is committed.³⁹ This, in turn, affects the flexibility and integrity of the plans.

Both PERS and TRS Plans 1 have been at-risk for some time.⁴⁰

The law does not require the Legislature to wait until the pension systems fail, or are on the verge of failing, to modify pension benefits in order to maintain a pension systems' integrity. The Legislature's determination

³⁹ Former Office of Financial Management Director, Marty Brown, stated, "[G]iven the State's current economic situation, and the unpredictability of the recession on future State revenues, I cannot predict when, if ever, the State will have the financial resources to devote to paying for the costs of the restoration of gain-sharing." CP 5940.

⁴⁰ The financial status of Plan 3 is somewhat better, but with current limitations on state and local budgets, even they are threatened.

that neither the State nor local governments could afford to pre-fund gain-sharing is reasonable and should be accorded deference. *SEIU Healthcare 775 NW v. Gregoire*, 168 Wn.2d 593, 601, 229 P.3d 774 (2010).

Under its plenary power the Legislature had full authority to repeal gain-sharing because plan members did not have a contractual right to gain-sharing in perpetuity. The Legislature was clear when enacting gain-sharing that gain-sharing was revocable. Nevertheless, plan members received comparable benefits in exchange for the loss of gain-sharing in perpetuity. Repeal of gain-sharing was necessary to protect basic governmental services, to protect the integrity and the flexibility of the pension plans, and ultimately to relieve the financial burden on taxpayers who provide the fiscal support for the state's and local governments' pension contributions for public employees. Therefore, plan members have failed to meet their heavy burden of proving beyond a reasonable doubt that the repeal of gain-sharing violated the Contracts Clause of the Washington or federal Constitutions.⁴¹

D. Neither Promissory Nor Equitable Estoppel Entitles Plan Members to Ongoing Gain-Sharing

Claims of both promissory and equitable estoppel have been brought on behalf of some members of the Plans 1 (TRS only) and all

⁴¹ Similarly, class members have not proved a violation of the Due Process Clause or that there was a breach of contract.

members of the Plans 3 (PERS, TRS, and SERS). Class members claim the State should be estopped from (1) repealing Plan 1 gain-sharing based on statements in Plan 1 handbooks that the Department of Retirement Systems (DRS) produced; and (2) repealing Plan 3 gain-sharing based on statements in handbooks, and statements in educational materials that DRS produced in consultation with the unions.

Courts do not apply estoppel unless the equities clearly favor the party seeking it. *Ruland v. Dep't of Soc. & Health Servs.*, 144 Wn. App. 263, 277, 182 P.3d 470 (2008). And, “[a]s a general rule, the doctrine of estoppel will not be applied against . . . state governments . . . where . . . public revenues are involved.” *Finch v. Matthews*, 74 Wn.2d 161, 169-70, 443 P.2d 833 (1968). Class members have a high burden to prove each element of estoppel by “clear, cogent and convincing evidence.” *Id.*

To recover in promissory estoppel, class members must establish:

(1) [a] promise which (2) the promisor should reasonably expect to cause the promisee to change . . . position and (3) which does cause the promisee to change . . . position (4) justifiably relying upon the promise, in such a manner that (5) injustice can be avoided only by the enforcement of the promise.

Klinke v. Famous Recipe Fried Chicken, Inc., 94 Wn.2d 255, 259, 616 P.2d 644 (1980). Equitable estoppel, in contrast, requires (1) a statement, admission, or act by the party to be estopped, which is inconsistent with a

claim subsequently asserted; (2) an action by another party in reasonable reliance on that statement; (3) an injury to the relying party if the court allows the first party to repudiate its statement; (4) that estoppel is necessary to prevent manifest injustice to the relying party; and (5) that estoppel will not impair governmental functions. *Chemical Bank v. Wash. Pub. Power Supply Sys.*, 102 Wn.2d 874, 905, 691 P.2d 524 (1984). Because none of DRS's written materials "promised" gain-sharing would continue forever (promissory estoppel); the statements in DRS materials were not "inconsistent with" its repeal (equitable estoppel); and several affirmative defenses bar application of either doctrine, the plan members' estoppel claims are barred as a matter of law.⁴²

1. DRS Materials Informed Members About Gain-Sharing but Also Explained the Information Was a Summary, Rather Than a Complete Description of the Law

Plan 1. TRS Plan 1 was available to newly eligible teachers from its inception until October 1977, when it was closed to new members. Prior to 1977, the TRS Board made handbooks available to members, and after, DRS continued to update the handbooks for the benefit of established members. Because the handbooks could not possibly cover

⁴² Estoppel is also barred here by the "clean hands doctrine." *See, e.g., Mutual of Enumclaw Ins. Co. v. Cox*, 110 Wn.2d 643, 651, 757 P.2d 499 (1988) (class members cannot invoke estoppel against promises they wrote or approved). Further, equitable estoppel cannot be used as a "sword" rather than a shield, as attempted here. *Klinke*, 94 Wn.2d at 259.

every detail in the complex retirement statutes, since 1983 they have prominently displayed an “accuracy statement” indicating the handbook was only a summary, subject to the terms of the retirement act.

In the first TRS Plan 1 handbook to address gain-sharing in 1998, DRS provided a brief description of the benefit. It is undisputed that, like prior handbooks, this one contained the following caveat:

[t]he actual rules governing your benefits are contained in state retirement laws. This handbook is a summary, written in less legalistic terms. It is not a complete description of the law. If there are any conflicts between . . . this handbook and . . . the law, the current law will govern.

Subsequent handbook revisions contained both the description of gain-sharing and the caveat. CP 1083, 1092.

Plans 3. In 1996, the Legislature created TRS Plan 3. Eligible new members of TRS were mandated into Plan 3, and existing members were provided an opportunity to transfer from Plan 2 into Plan 3. Rather than a 2% “defined benefit” funded by both the employer and employee (Plan 2), Plan 3 members were entitled to a 1% “defined benefit” funded by employer contributions. Members’ contributions were invested in individual accounts. The amount available from these accounts at retirement depended entirely on market performance.

Because of the importance of an employee’s decision to transfer from Plan 2 to Plan 3, DRS provided an extensive educational program to

ensure member decisions would be well-informed. In late 1997, just before the close of the Plan 2-3 transfer window, Senator Carlson sent a letter informing potential transferees that the Legislature was *considering* adding gain-sharing to the new Plan 3. The TRS transfer window closed on December 31, 1997; then the 1998 Legislature enacted gain-sharing. In the first TRS Plan 3 handbook to address gain-sharing, DRS provided a brief description of the benefit. This and all subsequent revisions of the handbook contained a caveat virtually identical to the one above. CP 2403.

SERS Plan 3 was created in 2000, and PERS Plan 3 in 2002. Like the TRS materials, SERS and PERS materials briefly described gain-sharing and contained the same caveats. Thus, DRS materials educating affected members about gain-sharing all explicitly stated that they were merely summarizing, and applicable laws would control.

2. Promissory Estoppel: DRS Made No Promise That Gain-Sharing Would Continue Indefinitely

To evaluate the members' promissory estoppel claim, the Court must determine whether the summary of gain-sharing in DRS materials conveyed a *promise* that gain-sharing would remain a feature of the plan forever. "A promise is 'a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.'" *Havens v. C&D*

Plastics, Inc., 124 Wn.2d 158, 172, 876 P.2d 435 (1994). A party must not read into a statement a commitment that is not there. “[O]ne must show that an actual promise was made;” the promise “must be very clear” and “definitive.” *Simpson v. Murkowski*, 129 P.3d 435, 443 (Alaska 2006). *See also Havens*, 124 Wn.2d at 173 (requiring a “clear and definite promise”).

Washington cases are clear that descriptions regarding the current state of affairs (even with *no* indication that the state of affairs could change) do not constitute promises that the current state of affairs will endure forever. For example, where an employer hired an employee without telling him his employment was “terminable at will,” there was no promise that the employee had been hired indefinitely. *Id.* at 171-75. Similarly, where a city told a contractor that “water services will be provided” to certain properties (without telling him that the approved services could later be withdrawn), this was not a promise that water services would be provided indefinitely. *Harberd v. City of Kettle Falls*, 120 Wn. App. 498, 520, 84 P.3d 1241 (2004).

Accordingly, when DRS included summary information regarding the new gain-sharing provision in the various handbooks, it was simply updating its description of current plan provisions consistent with changes in the pension law, in an effort to make the plans widely understandable to members. Even without the prominent caveats, no class member was

justified in reading into these summaries a *commitment* that gain-sharing or any plan provision would continue indefinitely. When the brief summaries of gain-sharing are considered in conjunction with the caveats, it is clear DRS made no “clear and definite promise” to any Plan 3 or TRS Plan 1 member that gain-sharing would continue forever.⁴³

3. Equitable Estoppel: the Repeal of Gain-Sharing Was Not Inconsistent With Any Prior Statement of Fact in DRS Handbooks or Literature

In the alternative, class members claim that the State is equitably estopped from repealing gain-sharing. To prove the first element of equitable estoppel (inconsistent statements), they claim that (i) DRS’s “silence” regarding the potential repeal of gain-sharing was tantamount to a factual statement that gain-sharing would be provided indefinitely and (ii) the repeal of gain-sharing was “inconsistent with” these “statements.”

In contrast to promissory estoppel, “[e]quitable estoppel is based upon a representation of [presently] existing or past facts” *Klinke*, 94 Wn.2d at 258-59. Equitable estoppel will not be applied if “the representations allegedly relied upon are matters of law, rather than fact.”

Dep’t of Ecology v. Theodoratus, 135 Wn.2d 582, 599-600, 957 P.2d 1241

⁴³ Plan 3 members have no basis on which to argue that a promise was made prior to January 2000. No DRS literature mentioned gain-sharing as a feature of Plan 3 prior to that date. Senator Carlson’s 1997 letter, indicating that gain-sharing *may* be adopted in the future, certainly was not a “promise” that gain-sharing was a permanent feature of any Plan 3. CP 2359.

(1998). Not even an incorrect statement of existing law can serve as the basis of equitable estoppel. *Pacific Land Partners, LLC, v. Dep't of Ecology*, 150 Wn. App. 740, 750-51, 208 P.3d 586 (2009).

The purpose of DRS's handbooks and other educational materials has always been to present the statutory provisions of a member's plan as understandably as possible, "in less legalistic terms" than the law itself. Even if the handbooks had *expressly stated* that gain-sharing would be provided indefinitely, this representation would have been a statement of law (albeit, an incorrect one), not subject to equitable estoppel.

Moreover, absence of information regarding the expected duration of gain-sharing is not a basis for estoppel by silence. Under very limited circumstances, silence regarding certain relevant *facts* followed by a later assertion of those facts has been found to satisfy the inconsistent statement element of estoppel, "but only if there [was] an affirmative duty to speak." *Ticor Title Ins. Co. of California v. Nissell*, 73 Wn. App. 818, 823, 871 P.2d 652 (1994). In such cases, the initial "silence" regarding a particular fact has been deemed tantamount to an affirmative statement that a particular fact did *not* exist.

For example, in *West v. Dep't of Soc. & Health Servs.*, 21 Wn. App. 577, 586 P.2d 516 (1978), DSHS did not inform a mother regarding the costs of foster care when it had a duty to do so under its rules. The

Court found DSHS's silence in the face of its "duty to speak" was tantamount to a statement that there was no cost. DSHS's subsequent attempt to enforce the cost was deemed inconsistent with this earlier "statement of fact" for purposes of the first element of equitable estoppel.

Yet, the doctrine of "estoppel by silence" does not extend to silence about the law. *See, e.g., Rhoades v. City of Battle Ground*, 115 Wn. App. 752, 63 P.3d 142 (2003). Even in the unusual circumstance where a governmental entity has a duty to inform citizens about the law, silence followed by a later attempt to enforce the law does not constitute an inconsistent statement sufficient to equitably estop the State. *Pioneer Nat'l Title Ins. Co. v. State*, 39 Wn. App. 758, 761, 695 P.2d 996 (1985).

Here, the absence of information regarding the possible repeal of gain-sharing simply cannot be construed as a "statement" that gain-sharing was permanent. Even if DRS had made a "statement" that gain-sharing was permanent, that would have been an (incorrect) statement of law, not a representation of fact, and could not be subject to equitable estoppel.

4. Estoppel May Not Be Used to Validate an Ultra Vires Statement, Act, or Promise

Even if the statements in DRS's materials were somehow promises or factual statements inconsistent with the repeal of gain-sharing, under the ultra vires doctrine they could not work an estoppel against the State.

Neither promissory nor equitable estoppel may “be applied against a governmental entity for an ultra vires act which is void because it is done . . . in direct violation of existing statutes.” *Fitzgerald v. Neves, Inc.*, 15 Wn. App. 421, 428, 550 P.2d 52 (1976). *See also McGuire v. State*, 158 Wn. App. 195, 199, 791 P.2d 929 (1990) (ultra vires promises in agency employee handbook were void). The ultra-vires doctrine is well-established. *Choi v. City of Fife*, 60 Wn. App. 458, 464, 803 P.2d 1330 (1991).

Even if DRS’s materials *had* stated that gain-sharing would continue forever, which they did not, such statements would have been in direct derogation of existing statutes in which the Legislature expressly reserved the right to repeal gain-sharing. *Fitzgerald*, 15 Wn. App. at 428. Consistent with strong policy against allowing public officials to tie the Legislature’s hands, especially when billions of public dollars are at stake, this Court should not allow the repeal of gain-sharing to be estopped by statements of an agency whose only role is to administer the retirement statute. *See Lavin v. Marsh*, 644 F.2d 1378, 1383 (9th Cir. 1981).⁴⁴

5. The Remaining Elements of Estoppel May Only Be Proved on an Individual Basis

⁴⁴ To allow information disseminated by DRS, in a good faith effort to inform pension plan members about their plans, to compel the State to provide a multi-billion dollar benefit not provided by the Legislature itself would create a major disincentive for State agencies to provide *any* educational materials in the future, for fear that a statement will be misinterpreted, significantly impairing a valuable governmental function.

Only if this Court finds that the first element of estoppel (promissory or equitable) is met, should it reach the remaining elements. Both estoppels require proof that the person seeking estoppel (i) took some action in reasonable reliance on statements of the party sought to be estopped; and (ii) will be unjustly injured if that party is permitted to repudiate its original statements. The analysis of reasonable reliance and injury are similar in promissory and equitable estoppel. *Nw. Magnesite v. State*, 28 Wn.2d 1, 29, 182 P.2d 643 (1947).

As a preliminary matter, this record contains no evidence that any individual class member (i) took action in reasonable reliance or (ii) incurred any injury. Rather, the class's estoppel claims are based solely on allegations in their complaints. CP 11, 505, 533-34. Mere allegations, without supporting evidence, are insufficient as a matter of law to establish reasonable reliance and injury by "clear, cogent, and convincing evidence." *See Kirk v. Moe*, 114 Wn.2d 550, 789 P.2d 84 (1990).

Even if individual class representatives could personally establish reasonable reliance and injury, such proof would not establish these elements on a class-wide basis. Whether reliance and injury can be proved on a class-wide basis varies with the facts of each case. For example, in *Poulos v. Ceasars World, Inc.*, 379 F.3d 654 (9th Cir. 2004), the class alleged that statements and omissions by casino owners had induced them

to play casino games (reliance) and caused them to lose money (injury). Although the court acknowledged certain misrepresentations occurred, the court held that it could not reach a class-wide conclusion regarding whether plaintiffs had played casino games in reliance on the statements because “[g]amblers do not share a common universe of knowledge and expectations—one motivation does not ‘fit all.’” *Id.* at 665. In contrast, in *King v. Riveland*, 125 Wn.2d 500, 886 P.2d 160 (1994), this Court found that individual inmate class representatives’ reliance on statements that their sex offender treatment information would be kept confidential, and their resultant injury, could be extrapolated to the entire class.

However, the facts of this case more closely resemble *Poulos* because class members here do not share a “common universe of knowledge and expectations.” *Poulos*, 379 F.3d at 665. Even if this Court were to accept as true class representatives’ allegations regarding their reliance and injury, the same knowledge, expectations, and motivations cannot be ascribed to other class members. For example, just because Ms. Bilsland, a TRS class representative, alleges she remained in Plan 1 employment to augment her gain-sharing COLA does not mean that any other member remained for the same reason. CP 4, 11. Some plan members may have remained, not knowing that gain-sharing existed. Others may have continued to teach because they found their job

rewarding, because they wanted to earn a particular amount of service credit before retiring, or for other reasons.

Similarly, just because Ms. Axtell, a SERS class representative, alleges she transferred from Plan 2 to Plan 3 to receive gain-sharing payments does not mean that any other person chose Plan 3 for the same reason. CP 4. Others may have chosen Plan 3 because they wanted to self-direct investment of a personal retirement account or preferred the increased career flexibility it provided. In short, this Court cannot presume that individual class members specifically relied on DRS's statements about gain-sharing or that they would be injured by its repeal.

When factual elements of a claim cannot be proved on a class-wide basis, they must be tried. *Panorama Residential Protective Ass'n v. Panorama Corp.*, 28 Wn. App. 923, 627 P.2d 121 (1981). Thus, to the extent that this Court finds that issues of reliance, injury, and injustice must be addressed to resolve this case, these factual elements cannot be proved on a class-wide basis and, therefore, must be tried.

E. If Due, Attorneys' Fees Should Be Awarded Pursuant to the Common Fund Doctrine Rather Than RCW 49.48.030

Class members requested attorneys' fees for Phase 1 pursuant to RCW 49.48.030, or alternatively, pursuant to the common fund doctrine, an equitable exception to the American Rule through which class action

plaintiffs may be required to pay their attorneys a portion of the amount recovered. While the State acknowledges that the Court may award common fund fees *if* class members ultimately prevail on whether gain-sharing must be reinstated, fees under RCW 49.48.030 are improper.

RCW 49.48.030 authorizes fees only against an employer:

In any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees . . . shall be assessed against said employer or former employer

RCW 49.48.030 clearly applies when a person's recovers improperly withheld wages from an immediate employer. However, it "does not authorize . . . fees against a [non-employer]," third party. *See City of Kennewick v. Bd. for Volunteer Firefighters*, 85 Wn. App. 366, 370, 933 P.2d 423 (1997).

1. Class Members Are Not Entitled to RCW 49.48.030 Fees Because the State Is Not Their Employer

Here a third party—the State acting through the Legislature—took action that deprived certain public employees of "wages."⁴⁵ Notwithstanding the fact that the State is not the immediate employer of any class member, class members argue that the State must be deemed their employer for purposes of fees.

Washington courts have not addressed the question whether, in

⁴⁵ In *Bates*, 112 Wn. App. 919, 51 P.3d 816 (2002), the court held that pension distributions are "wages" under RCW 49.48.030.

addition to a public employee's immediate employer (*i.e.*, state agency, school district, local government, or other political subdivision), the State is *also* the "employer" of the public employee for purposes of RCW 49.48.030. Significantly, in all cases in which a public employee has received fees under RCW 49.48.030, they have been awarded against the immediate employer who has reduced or withheld wages, not the State. *See, e.g., Naches Valley Sch. Dist. No. JT3 v. Cruzen*, 54 Wn. App. 388, 399, 775 P.2d 960 (1989); *Herring v. Dep't of Soc. & Health Servs.*, 81 Wn. App. 1, 33-34, 914 P.2d 67 (1996); *Bates*, 112 Wn. App. at 828 (fees against school district, state agency, and local government respectively).

Keenan v. Allan, 889 F. Supp. 1320 (E.D. Wash. 1995), provides useful guidance in this case. Keenan was employed by a department of Grant County. The department submitted a payment voucher to the County, which operated the payroll system for county departments. The County, through its legislative body, blocked payment. Keenan filed a wage claim and sought attorneys' fees against the County as employer. The Court ordered the County to pay Keenan's compensation, but declined to award attorneys' fees against the County because it was not her employer.

The *Keenan* court considered "'economic reality' rather than 'technical concepts'" to determine who was the employer. *Keenan*, 889

F.Supp. at 1381. An “employer” is the entity that (1) has the power to hire and fire the employee; (2) supervises and controls conditions of employment; (3) determines the rate and method of payment; and (4) maintains employment records. *Id.* Applying this test, the *Keenan* court found that the county department was Keenan’s employer. Grant County, as the larger political entity, *was not*:

the County had no involvement with Keenan’s employment except to budget funds in advance for the [department] . . . [G]iven this (non)involvement, the County and its Commissioners were not Keenan’s “employer” *under RCW 49.48.010, RCW 49.52.050, or the FLSA.*

Id. (emphasis added).⁴⁶

Similarly, the State as a political entity is not the “employer” of agency, school district, or local government employees here. Like Grant County in *Keenan*, the State’s involvement is insufficient to meet *Keenan*’s practical test. The Legislature’s policy-making does not make the State their employer for purposes of RCW 49.48.030. Thus, the State is not liable for fees under the statute.

2. Fees Cannot Be Assessed Against DRS and the State if They Are Not Class Members’ Employer

The trial court *did not* find that either DRS or the State was an “employer” within the meaning of RCW 49.48.030. Yet, it awarded attorneys’ fees “pursuant to RCW 49.48.030” and entered “judgment” for

⁴⁶ RCW 49.48.010 authorizes individual employees to bring wage claims against their employers. RCW 49.48.030 governs the attorneys’ fees available in such a suit.

these fees “against [DRS] and the State” Then, the court authorized DRS to “recover the amount of the . . . fees . . . through future assessments against [members’ immediate] employers.” This is error upon error. Nothing in RCW 49.48.030 authorizes a court to assess attorneys’ fees against a non-employer. And nothing in RCW 49.48.030 authorizes a court to empower the non-employer to seek reimbursement from an actual employer—who took no action to deprive the person of wages in the first instance and was not a party to the suit. RCW 49.48.030 simply cannot serve as a ground for fees under the facts of this case.

F. Sovereign Immunity Bars the Courts From Awarding Interest on Attorneys’ Fees

In light of well-settled law regarding sovereign immunity, the trial court was also incorrect to order that the “judgment [for attorneys’ fees] shall accrue post-judgment interest.” “The general rule is that as a matter of sovereign immunity, . . . ‘the state cannot, without its consent, be held to interest on its debts.’” *Our Lady of Lourdes Hosp. v. Franklin Cnty.*, 120 Wn.2d 439, 455-56, 842 P.2d 956 (1993). “[S]uch consent [may] be manifested expressly by statute or found by implication . . . where state agencies [are] authorized to enter into contracts.” *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 616, 94 P.3d 961 (2004). Or, “[t]he State may [expressly] waive sovereign immunity by contract” *Id.* at 615.

However, “only the legislature can adopt a blanket waiver.” *Id.*

The trial court’s judgment awarding attorneys’ fees is a debt of the State and, therefore, immune from interest unless the State has consented to interest by statute or contract. The State has not, through statute, waived immunity against the payment of interest on judgments for attorneys’ fees. Although RCW 4.56.110 provides generally that judgments shall bear interest, this Court has held that this general provision is *not* a blanket waiver of sovereign immunity. *See Jenkins v. Wash. Dep’t of Soc. & Health Servs.*, 160 Wn.2d 287, 302, 157 P.3d 388 (2007); *Lourdes*, 120 Wn.2d at 456. Nor does the State’s narrow consent to interest on judgments “founded on tortious conduct” in RCW 4.56.110(2) apply, because without dispute, no tort claim has been raised here. Finally, the State has not, through contract, consented to pay interest on attorneys’ fees here. If this Court upholds the trial court’s order assessing RCW 49.48.030 fees against the State, the interest requirement should be stricken.

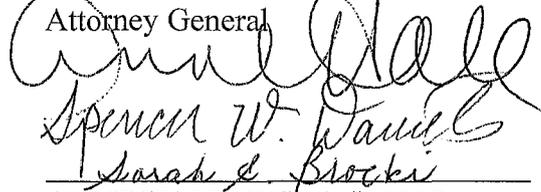
VI. CONCLUSION

For the foregoing reasons, this Court should reverse and hold that the Legislature’s repeal of gain-sharing did not violate the Washington Constitution, nor are plan members entitled to ongoing gain-sharing pursuant to estoppel. Finally, plan members are not entitled either to statutory attorney fees or post judgment interest thereon.

RESPECTFULLY SUBMITTED this 21st day of December, 2012.

ROBERT M. MCKENNA

Attorney General

Handwritten signatures of Anne Hall, Spencer W. Daniels, and Sarah E. Blocki. The signatures are written in black ink and are positioned above a horizontal line.

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Attorneys for the State of Washington and
Washington State Department of Retirement
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CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that a copy of Appellants' Brief was served on all counsel at the following addresses by E-mail and U.S. Mail:

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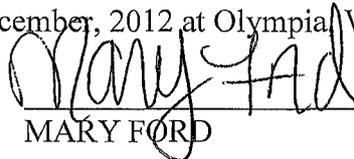
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MARY FORD

APPENDIX

FORMER

RCW 41.31

41.28.190 Payments to be made monthly. A pension annuity or a retirement allowance granted under the provisions of this chapter, unless otherwise specified herein, shall be payable in monthly installments, and each installment shall cover for the current calendar month. [1939 c 207 § 20; RRS § 9592-120.]

41.28.200 Exemption from process—Rights not assignable. The right of a person to a pension, an annuity or a retirement allowance, to the return of contributions, the pension, annuity or retirement allowance itself, any optional benefit, any other right accrued or accruing to any person under the provisions of this chapter, and the moneys in the fund created under this chapter shall not be subject to execution, garnishment, attachment, or any other process whatsoever and shall be unassignable except as in this chapter specifically provided. [1939 c 207 § 21; RRS § 9592-121.]

41.28.205 Benefits payable in accordance with court decree or order of dissolution or legal separation. Benefits under this chapter shall be payable to a spouse or ex-spouse to the extent expressly provided for in any court decree of dissolution or legal separation or in any court order or court-approved property settlement agreement incident to any court decree of dissolution or legal separation. [1979 ex.s. c 205 § 9.]

41.28.207 Payments to spouse or ex spouse pursuant to court order. (1) If the board of administration makes payments to a spouse or ex spouse to the extent expressly provided for in any court decree of dissolution or legal separation or in any court order or court-approved property settlement agreement incident to a court decree of dissolution or legal separation, it shall be a sufficient answer to any claim of a beneficiary against the board of administration or the retirement system for the board of administration to show that the payments were made pursuant to a court decree.

(2) All payments made to a nonmember spouse or ex spouse pursuant to RCW 41.28.205 shall cease upon the death of such a nonmember spouse or ex spouse. Upon such a death, the board of administration shall pay to the member his or her full monthly entitlement of benefits.

(3) The provisions of RCW 41.28.205 and this section shall apply to all court decrees of dissolution or legal separation and court-approved property settlement agreements, regardless of when entered, but shall apply only to those persons who have actually retired or who have requested withdrawal of any or all of their accumulated contributions: PROVIDED, That the board of administration shall not be responsible for making court-ordered divisions of withdrawals unless the order is filed with the board at least thirty days before the withdrawal payment date. [1987 c 326 § 20.]

Effective date—1987 c 326: See RCW 41.50.901.

Mandatory assignment of retirement benefits to spouse or ex spouse: RCW 41.50.500 through 41.50.660.

41.28.210 Estimates of service, compensation, or age. If it shall be impracticable for the board of administration to determine from the records the length of service, the compensation, or the age of any member, the said board may estimate

for the purpose of this chapter, such length of service, compensation or age. [1939 c 207 § 22; RRS § 9592-122.]

41.28.220 Suspension of allowances during other public aid. The payment of any retirement allowance to a member who has been retired from service shall be suspended during the time that the beneficiary is in receipt of other pension or of other compensation for state or public service paid from direct or indirect state or municipal taxes or revenues of publicly owned utilities, except as to the amount by which such retirement allowance may exceed such compensation for the same period. [1939 c 207 § 23; RRS § 9592-123.]

41.28.230 Administrative expense. The city council or city commission shall appropriate annually from the retirement fund the amount it deems necessary for the purpose of paying the expenses of administering the retirement system. The board of administration shall annually submit to the city council or city commission its estimate of the amount necessary to pay such expenses. The preliminary cost of establishment of said retirement system, such as clerical help and actuarial survey costs, etc., shall be paid by the department or departments affected. [1939 c 207 § 24; RRS § 9592-124.]

41.28.240 Existing systems preserved. Nothing in this chapter shall repeal, supersede, alter, amend or be regarded as a substitute for any existing retirement or pension system, duly established by city ordinance. [1939 c 207 § 28; RRS § 9592-128.]

41.28.900 Severability—1939 c 207. If any one or more sections, subsections, subdivisions, sentences, clauses or phrases of this chapter are for any reason held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this chapter, but the same shall remain in full force and effect. [1939 c 207 § 25; RRS § 9592-125.]

41.28.910 Repeal. All laws and parts of laws in conflict herewith be and the same are hereby repealed. [1939 c 207 § 26.]

41.28.920 Effective date—1939 c 207. The retirement system shall become effective on July 1, 1939, as provided in RCW 41.28.020. [1939 c 207 § 27.]

Chapter 41.31 RCW

EXTRAORDINARY INVESTMENT GAINS—PLAN 1

Sections

41.31.010	Annual pension increases—Increased by gain-sharing increase amount.
41.31.020	Gain-sharing increase amount calculated.
41.31.030	Contractual right to increase not granted.

41.31.010 Annual pension increases—Increased by gain-sharing increase amount. Beginning July 1, 1998, and on January 1st of even-numbered years thereafter, the annual increase amount as defined in RCW 41.32.010 and 41.40.010

shall be increased by the gain-sharing increase amount, if any. The monthly retirement allowance of a person in receipt of the benefit provided in RCW 41.32.489 or 41.40.197 shall immediately be adjusted to reflect any increase. [1998 c 340 § 1.]

Effective date—1998 c 340: "Except for section 13 of this act, this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 3, 1998]." [1998 c 340 § 14.]

41.31.020 Gain-sharing increase amount calculated.

(1) The gain-sharing increase amount shall be the amount of increase, rounded to the nearest cent, that can be fully funded in actuarial present value by the amount of extraordinary investment gains, if any. The amount of extraordinary investment gains shall be calculated as follows:

(a) One-half of the sum of the value of the net assets held in trust for pension benefits in the teachers' retirement system plan 1 fund and the public employees' retirement system plan 1 fund at the close of the previous state fiscal year;

(b) Multiplied by the amount which the compound average of investment returns on those assets over the previous four state fiscal years exceeds ten percent.

(2) The gain-sharing increase amount for July 1998, as provided for in RCW 41.31.010, is ten cents. [1998 c 340 § 2.]

Effective date—1998 c 340: See note following RCW 41.31.010.

41.31.030 Contractual right to increase not granted.

The legislature reserves the right to amend or repeal this chapter in the future and no member or beneficiary has a contractual right to receive this postretirement adjustment not granted prior to that amendment or repeal. [1998 c 340 § 3.]

Effective date—1998 c 340: See note following RCW 41.31.010.

Chapter 41.31A RCW

EXTRAORDINARY INVESTMENT GAINS—PLAN 3

Sections

- 41.31A.010 Definitions.
 41.31A.020 Extraordinary investment gain—Credited to member accounts—Persons eligible—Calculation of amount—Contractual right not granted.
 41.31A.030 Retroactive extraordinary investment gain—Credited to member accounts—Persons eligible—Calculation of amount—Contractual right not granted.
 41.31A.040 Retroactive extraordinary investment gain—Credited to member accounts—Persons eligible—Calculation of amount—Contractual right not granted.

41.31A.010 Definitions. The definitions in this section apply throughout this chapter unless the context requires otherwise.

(1) "Actuary" means the state actuary or the office of the state actuary.

(2) "Department" means the department of retirement systems.

(3) "Teacher" means any employee included in the membership of the teachers' retirement system as provided for in chapter 41.32 RCW.

(4) "Member account" or "member's account" means the sum of any contributions as provided for in chapter 41.34 RCW and the earnings on behalf of the member.

[Title 41 RCW—page 154]

(5) "Classified employee" means the same as in RCW 41.35.010.

(6) "Public employee" means the same as "member" as defined in RCW 41.40.010(5). [2000 c 247 § 407; 1998 c 341 § 311.]

Effective dates—Subchapter headings not law—2000 c 247: See RCW 41.40.931 and 41.40.932.

Effective date—1998 c 341: See RCW 41.35.901.

41.31A.020 Extraordinary investment gain—Credited to member accounts—Persons eligible—Calculation of amount—Contractual right not granted. (1) On January 1, 2004, and on January 1st of even-numbered years thereafter, the member account of a person meeting the requirements of this section shall be credited by the extraordinary investment gain amount.

(2) The following persons shall be eligible for the benefit provided in subsection (1) of this section:

(a) Any member of the teachers' retirement system plan 3, the Washington school employees' retirement system plan 3, or the public employees' retirement system plan 3 who earned service credit during the twelve-month period from September 1st to August 31st immediately preceding the distribution and had a balance of at least one thousand dollars in their member account on August 31st of the year immediately preceding the distribution; or

(b) Any person in receipt of a benefit pursuant to RCW 41.32.875, 41.35.680, or 41.40.820; or

(c) Any person who is a retiree pursuant to RCW 41.34.020(8) and who:

(i) Completed ten service credit years; or

(ii) Completed five service credit years, including twelve service months after attaining age fifty-four; or

(d) Any teacher who is a retiree pursuant to RCW 41.34.020(8) and who has completed five service credit years by July 1, 1996, under plan 2 and who transferred to plan 3 under RCW 41.32.817; or

(e) Any classified employee who is a retiree pursuant to RCW 41.34.020(8) and who has completed five service credit years by September 1, 2000, and who transferred to plan 3 under RCW 41.35.510; or

(f) Any public employee who is a retiree pursuant to RCW 41.34.020(8) and who has completed five service credit years by March 1, 2002, and who transferred to plan 3 under RCW 41.40.795; or

(g) Any person who had a balance of at least one thousand dollars in their member account on August 31st of the year immediately preceding the distribution and who:

(i) Completed ten service credit years; or

(ii) Completed five service credit years, including twelve service months after attaining age fifty-four; or

(h) Any teacher who had a balance of at least one thousand dollars in their member account on August 31st of the year immediately preceding the distribution and who has completed five service credit years by July 1, 1996, under plan 2 and who transferred to plan 3 under RCW 41.32.817; or

(i) Any classified employee who had a balance of at least one thousand dollars in their member account on August 31st of the year immediately preceding the distribution and who has completed five service credit years by September 1,

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shall be increased by the gain-sharing increase amount, if any. The monthly retirement allowance of a person in receipt of the benefit provided in RCW 41.32.489 or 41.40.197 shall immediately be adjusted to reflect any increase. [1998 c 340 § 1.]

Effective date—1998 c 340: "Except for section 13 of this act, this act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [April 3, 1998]." [1998 c 340 § 14.]

41.31.020 Gain-sharing increase amount calculated.

(1) The gain-sharing increase amount shall be the amount of increase, rounded to the nearest cent, that can be fully funded in actuarial present value by the amount of extraordinary investment gains, if any. The amount of extraordinary investment gains shall be calculated as follows:

(a) One-half of the sum of the value of the net assets held in trust for pension benefits in the teachers' retirement system plan 1 fund and the public employees' retirement system plan 1 fund at the close of the previous state fiscal year;

(b) Multiplied by the amount which the compound average of investment returns on those assets over the previous four state fiscal years exceeds ten percent.

(2) The gain-sharing increase amount for July 1998, as provided for in RCW 41.31.010, is ten cents. [1998 c 340 § 2.]

Effective date—1998 c 340: See note following RCW 41.31.010.

41.31.030 Contractual right to increase not granted.

The legislature reserves the right to amend or repeal this chapter in the future and no member or beneficiary has a contractual right to receive this postretirement adjustment not granted prior to that amendment or repeal. [1998 c 340 § 3.]

Effective date—1998 c 340: See note following RCW 41.31.010.

Chapter 41.31A RCW

EXTRAORDINARY INVESTMENT GAINS—PLAN 3

Sections

- 41.31A.010 Definitions.
 41.31A.020 Extraordinary investment gain—Credited to member accounts—Persons eligible—Calculation of amount—Contractual right not granted.
 41.31A.030 Retroactive extraordinary investment gain—Credited to member accounts—Persons eligible—Calculation of amount—Contractual right not granted.
 41.31A.040 Retroactive extraordinary investment gain—Credited to member accounts—Persons eligible—Calculation of amount—Contractual right not granted.

41.31A.010 Definitions. The definitions in this section apply throughout this chapter unless the context requires otherwise.

(1) "Actuary" means the state actuary or the office of the state actuary.

(2) "Department" means the department of retirement systems.

(3) "Teacher" means any employee included in the membership of the teachers' retirement system as provided for in chapter 41.32 RCW.

(4) "Member account" or "member's account" means the sum of any contributions as provided for in chapter 41.34 RCW and the earnings on behalf of the member.

[Title 41 RCW—page 154]

(5) "Classified employee" means the same as in RCW 41.35.010.

(6) "Public employee" means the same as "member" as defined in RCW 41.40.010(5). [2000 c 247 § 407; 1998 c 341 § 311.]

Effective dates—Subchapter headings not law—2000 c 247: See RCW 41.40.931 and 41.40.932.

Effective date—1998 c 341: See RCW 41.35.901.

41.31A.020 Extraordinary investment gain—Credited to member accounts—Persons eligible—Calculation of amount—Contractual right not granted. (1) On January 1, 2004, and on January 1st of even-numbered years thereafter, the member account of a person meeting the requirements of this section shall be credited by the extraordinary investment gain amount.

(2) The following persons shall be eligible for the benefit provided in subsection (1) of this section:

(a) Any member of the teachers' retirement system plan 3, the Washington school employees' retirement system plan 3, or the public employees' retirement system plan 3 who earned service credit during the twelve-month period from September 1st to August 31st immediately preceding the distribution and had a balance of at least one thousand dollars in their member account on August 31st of the year immediately preceding the distribution; or

(b) Any person in receipt of a benefit pursuant to RCW 41.32.875, 41.35.680, or 41.40.820; or

(c) Any person who is a retiree pursuant to RCW 41.34.020(8) and who:

(i) Completed ten service credit years; or

(ii) Completed five service credit years, including twelve service months after attaining age fifty-four; or

(d) Any teacher who is a retiree pursuant to RCW 41.34.020(8) and who has completed five service credit years by July 1, 1996, under plan 2 and who transferred to plan 3 under RCW 41.32.817; or

(e) Any classified employee who is a retiree pursuant to RCW 41.34.020(8) and who has completed five service credit years by September 1, 2000, and who transferred to plan 3 under RCW 41.35.510; or

(f) Any public employee who is a retiree pursuant to RCW 41.34.020(8) and who has completed five service credit years by March 1, 2002, and who transferred to plan 3 under RCW 41.40.795; or

(g) Any person who had a balance of at least one thousand dollars in their member account on August 31st of the year immediately preceding the distribution and who:

(i) Completed ten service credit years; or

(ii) Completed five service credit years, including twelve service months after attaining age fifty-four; or

(h) Any teacher who had a balance of at least one thousand dollars in their member account on August 31st of the year immediately preceding the distribution and who has completed five service credit years by July 1, 1996, under plan 2 and who transferred to plan 3 under RCW 41.32.817; or

(i) Any classified employee who had a balance of at least one thousand dollars in their member account on August 31st of the year immediately preceding the distribution and who has completed five service credit years by September 1,

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2000, and who transferred to plan 3 under RCW 41.35.510; or

(j) Any public employee who had a balance of at least one thousand dollars in their member account on August 31st of the year immediately preceding the distribution and who has completed five service credit years by March 1, 2002, and who transferred to plan 3 under RCW 41.40.795.

(3) The extraordinary investment gain amount shall be calculated as follows:

(a) One-half of the sum of the value of the net assets held in trust for pension benefits in the teachers' retirement system combined plan 2 and 3 fund, the Washington school employees' retirement system combined plan 2 and 3 fund, and the public employees' retirement system combined plan 2 and 3 fund at the close of the previous state fiscal year not including the amount attributable to member accounts;

(b) Multiplied by the amount which the compound average of investment returns on those assets over the previous four state fiscal years exceeds ten percent;

(c) Multiplied by the proportion of:

(i) The sum of the service credit on August 31st of the previous year of all persons eligible for the benefit provided in subsection (1) of this section; to

(ii) The sum of the service credit on August 31st of the previous year of:

(A) All persons eligible for the benefit provided in subsection (1) of this section;

(B) Any person who earned service credit in the teachers' retirement system plan 2, the Washington school employees' retirement system plan 2, or the public employees' retirement system plan 2 during the twelve-month period from September 1st to August 31st immediately preceding the distribution;

(C) Any person in receipt of a benefit pursuant to RCW 41.32.765, 41.35.420, or 41.40.630; and

(D) Any person with five or more years of service in the teachers' retirement system plan 2, the Washington school employees' retirement system plan 2, or the public employees' retirement system plan 2;

(d) Divided proportionally among persons eligible for the benefit provided in subsection (1) of this section on the basis of their service credit total on August 31st of the previous year.

(4) The legislature reserves the right to amend or repeal this section in the future and no member or beneficiary has a contractual right to receive this distribution not granted prior to that time. [2003 c 294 § 4; 2000 c 247 § 408; 1998 c 341 § 312.]

Effective date—2003 c 294 § 4: "Section 4 of this act takes effect January 1, 2004." [2003 c 294 § 17.]

Effective dates—Subchapter headings not law—2000 c 247: See RCW 41.40.931 and 41.40.932.

Effective date—1998 c 341: See RCW 41.35.901.

41.31A.030 Retroactive extraordinary investment gain—Credited to member accounts—Persons eligible—Calculation of amount—Contractual right not granted.

(1) On March 1, 2001, the member account of a person meeting the requirements of this section shall be credited by the 1998 retroactive extraordinary investment gain amount and the 2000 retroactive extraordinary investment gain amount.

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(2) The following persons shall be eligible for the benefits provided in subsection (1) of this section:

(a) Any classified employee who earned service credit during the twelve-month period from September 1st to August 31st immediately preceding the distribution and who transferred to plan 3 under RCW 41.35.510; or

(b) Any classified employee in receipt of a benefit pursuant to RCW 41.35.680 and who has completed five service credit years by September 1, 2000, and who transferred to plan 3 under RCW 41.35.510; or

(c) Any classified employee who is a retiree pursuant to RCW 41.34.020(8) and who has completed five service credit years by September 1, 2000, and who transferred to plan 3 under RCW 41.35.510; or

(d) Any classified employee who has a balance of at least one thousand dollars in his or her member account and who has completed five service credit years by September 1, 2000, and who transferred to plan 3 under RCW 41.35.510.

(3) The 1998 retroactive extraordinary investment gain amount shall be calculated as follows:

(a) An amount equal to the average benefit per year of service paid to members of the teachers' retirement system plan 3 pursuant to section 309, chapter 341, Laws of 1998 in 1998;

(b) Distributed to persons eligible for the benefit provided in subsection (1) of this section on the basis of their service credit total on August 31, 1997.

(4) The 2000 retroactive extraordinary investment gain amount shall be calculated as follows:

(a) An amount equal to the average benefit per year of service paid to members of the teachers' retirement system plan 3 pursuant to section 309, chapter 341, Laws of 1998 in 2000;

(b) Distributed to persons eligible for the benefit provided in subsection (1) of this section on the basis of their service credit total on August 31, 1999.

(5) The legislature reserves the right to amend or repeal this section in the future and no member or beneficiary has a contractual right to receive this distribution not granted prior to that time. [1998 c 341 § 313.]

Effective date—1998 c 341: See RCW 41.35.901.

41.31A.040 Retroactive extraordinary investment gain—Credited to member accounts—Persons eligible—Calculation of amount—Contractual right not granted.

(1) On June 1, 2003, the member account of a person meeting the requirements of this section shall be credited by the 2000 retroactive extraordinary investment gain amount and the 2002 retroactive extraordinary investment gain amount.

(2) The following persons shall be eligible for the benefits provided in subsection (1) of this section:

(a) Any public employee who earned service credit during the twelve-month period from September 1st to August 31st immediately preceding the distribution and who transferred to plan 3 under RCW 41.40.795; or

(b) Any public employee in receipt of a benefit pursuant to RCW 41.40.820 and who has completed five service credit years by September 1, 2002, and who transferred to plan 3 under RCW 41.40.795; or

(c) Any public employee who is a retiree pursuant to RCW 41.34.020(8) and who has completed five service credit years by September 1, 2002, and who transferred to plan 3 under RCW 41.40.795; or

(d) Any public employee who has a balance of at least one thousand dollars in either his or her member account or in plan 2 accumulated contributions and who has completed five service credit years by September 1, 2002, and who transferred to plan 3 under RCW 41.40.795.

(3) The 2000 retroactive extraordinary investment gain amount shall be calculated as follows:

(a) An amount equal to the average benefit per year of service paid in 2000 to members of the teachers' retirement system plan 3 under section 309, chapter 341, Laws of 1998;

(b) Distributed to persons eligible for the benefit in subsection (1) of this section on the basis of their service credit total on July 1, 1999.

(4) The 2002 retroactive extraordinary investment gain amount shall be calculated as follows:

(a) An amount equal to the average benefit per year of service paid in 2002 to members of the teachers' retirement system plan 3 and the school employees' retirement system plan 3 under RCW 41.31A.020;

(b) Distributed to persons eligible for the benefit provided in subsection (1) of this section on the basis of their service credit total on July 1, 2001.

(5) The legislature reserves the right to amend or repeal this section in the future and no member or beneficiary has a contractual right to receive this distribution not granted prior to that time. [2000 c 247 § 409.]

Effective dates—Subchapter headings not law—2000 c 247: See RCW 41.40.931 and 41.40.932.

Chapter 41.32 RCW TEACHERS' RETIREMENT

Sections

"PROVISIONS APPLICABLE TO PLAN 1, PLAN 2, AND PLAN 3"

41.32.005	Provisions applicable to "plan 1," "plan 2," and "plan 3."
41.32.010	Definitions.
41.32.013	Substitute teachers—Application for service credit—Procedures.
41.32.020	Name of system.
41.32.025	Department's power to determine eligibility.
41.32.032	Membership in system—Service credit of educational staff associates.
41.32.035	Employer contribution rates—Computation and payment.
41.32.042	Validity of deductions—Interest.
41.32.044	Retired teacher may reenter system—Benefit limitations.
41.32.052	Exemption from taxation and judicial process—Exceptions—Nonassignability—Deductions authorized.
41.32.053	Death benefit—Course of employment.
41.32.054	Disability retirement—Criminal conduct.
41.32.055	Falsification—Penalty.
41.32.062	Effect of certain accumulated vacation leave on retirement benefits.
41.32.063	Benefit calculation—Limitation.
41.32.064	Establishing, restoring service credit.
41.32.065	Election to use out-of-state service credit to calculate time at which the member may retire.
41.32.066	Purchase of additional service credit—Costs—Rules.
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"PLAN 1"

41.32.215	Provisions applicable to plan 1.
41.32.240	Membership in system.
41.32.260	Credit for military service or as state legislator.

41.32.263	State legislators and state officials eligible for retirement benefits.
41.32.267	Service credit for paid leave of absence—Application to elected officials of labor organizations.
41.32.270	Teaching service, how credited.
41.32.300	Limitation on credit for out-of-state service.
41.32.310	Time limit for claiming service credit—Payments.
41.32.330	Credit for professional preparation subsequent to becoming teacher.
41.32.340	Creditable service, what to consist of.
41.32.345	"Earnable compensation" defined for certain part-time employees—Adoption of rules.
41.32.350	Purchase of additional annuity.
41.32.360	Basis of contributions to disability reserve fund.
41.32.366	Basis of contributions to death benefit fund.
41.32.380	Source of pension reserve—Contributions.
41.32.390	Contributions for prior service credits.
41.32.470	Eligibility for retirement allowance.
41.32.480	Qualifications for retirement.
41.32.485	Minimum retirement allowance—Cost-of-living adjustment—Post-retirement adjustment—Computation.
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2007 ACT

(Laws of, ch. 491)

CERTIFICATION OF ENROLLMENT

ENGROSSED HOUSE BILL 2391

Chapter 491, Laws of 2007

60th Legislature
2007 Regular Session

GAIN-SHARING--ALTERNATE PENSION BENEFITS

EFFECTIVE DATE: 07/22/07 - Except sections 1, 3, and 7, which
become effective 07/01/07.

Passed by the House April 21, 2007
Yeas 52 Nays 45

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 22, 2007
Yeas 26 Nays 21

BRAD OWEN

President of the Senate

Approved May 15, 2007, 2:29 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Richard Nafziger, Chief Clerk
of the House of Representatives of
the State of Washington, do hereby
certify that the attached is
ENGROSSED HOUSE BILL 2391 as
passed by the House of
Representatives and the Senate on
the dates hereon set forth.

RICHARD NAFZIGER

Chief Clerk

FILED

May 16, 2007

Secretary of State
State of Washington

ENGROSSED HOUSE BILL 2391

Passed Legislature - 2007 Regular Session

State of Washington 60th Legislature 2007 Regular Session
By Representatives Fromhold, Conway and Moeller
Read first time 03/19/2007. Referred to Committee on Appropriations.

1 AN ACT Relating to retirement system gain-sharing and alternate
2 benefits; amending RCW 41.31A.020, 41.32.765, 41.32.835, 41.32.875,
3 41.35.420, 41.35.610, 41.35.680, 41.40.630, 41.40.820, and 41.45.070;
4 adding a new section to chapter 41.32 RCW; adding a new section to
5 chapter 41.40 RCW; creating new sections; repealing RCW 41.31.010,
6 41.31.020, 41.31.030, 41.31A.010, 41.31A.020, 41.31A.030, and
7 41.31A.040; providing effective dates; and declaring an emergency.

8 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

9 **Sec. 1.** RCW 41.31A.020 and 2003 c 294 s 4 are each amended to read
10 as follows:

11 (1) On January 1, 2004, and on January 1st of even-numbered years
12 thereafter, the member account of a person meeting the requirements of
13 this section shall be credited by the extraordinary investment gain
14 amount.

15 (2) The following persons, hired prior to July 1, 2007, shall be
16 eligible for the benefit provided in subsection (1) of this section:

17 (a) Any member of the teachers' retirement system plan 3, the
18 Washington school employees' retirement system plan 3, or the public
19 employees' retirement system plan 3 who earned service credit during

1 the twelve-month period from September 1st to August 31st immediately
2 preceding the distribution and had a balance of at least one thousand
3 dollars in their member account on August 31st of the year immediately
4 preceding the distribution; or

5 (b) Any person in receipt of a benefit pursuant to RCW 41.32.875,
6 41.35.680, or 41.40.820; or

7 (c) Any person who is a retiree pursuant to RCW 41.34.020(8) and
8 who:

9 (i) Completed ten service credit years; or

10 (ii) Completed five service credit years, including twelve service
11 months after attaining age fifty-four; or

12 (d) Any teacher who is a retiree pursuant to RCW 41.34.020(8) and
13 who has completed five service credit years by July 1, 1996, under plan
14 2 and who transferred to plan 3 under RCW 41.32.817; or

15 (e) Any classified employee who is a retiree pursuant to RCW
16 41.34.020(8) and who has completed five service credit years by
17 September 1, 2000, and who transferred to plan 3 under RCW 41.35.510;
18 or

19 (f) Any public employee who is a retiree pursuant to RCW
20 41.34.020(8) and who has completed five service credit years by March
21 1, 2002; and who transferred to plan 3 under RCW 41.40.795; or

22 (g) Any person who had a balance of at least one thousand dollars
23 in their member account on August 31st of the year immediately
24 preceding the distribution and who:

25 (i) Completed ten service credit years; or

26 (ii) Completed five service credit years, including twelve service
27 months after attaining age fifty-four; or

28 (h) Any teacher who had a balance of at least one thousand dollars
29 in their member account on August 31st of the year immediately
30 preceding the distribution and who has completed five service credit
31 years by July 1, 1996, under plan 2 and who transferred to plan 3 under
32 RCW 41.32.817; or

33 (i) Any classified employee who had a balance of at least one
34 thousand dollars in their member account on August 31st of the year
35 immediately preceding the distribution and who has completed five
36 service credit years by September 1, 2000, and who transferred to plan
37 3 under RCW 41.35.510; or

1 (j) Any public employee who had a balance of at least one thousand
2 dollars in their member account on August 31st of the year immediately
3 preceding the distribution and who has completed five service credit
4 years by March 1, 2002, and who transferred to plan 3 under RCW
5 41.40.795.

6 (3) The extraordinary investment gain amount shall be calculated as
7 follows:

8 (a) One-half of the sum of the value of the net assets held in
9 trust for pension benefits in the teachers' retirement system combined
10 plan 2 and 3 fund, the Washington school employees' retirement system
11 combined plan 2 and 3 fund, and the public employees' retirement system
12 combined plan 2 and 3 fund at the close of the previous state fiscal
13 year not including the amount attributable to member accounts;

14 (b) Multiplied by the amount which the compound average of
15 investment returns on those assets over the previous four state fiscal
16 years exceeds ten percent;

17 (c) Multiplied by the proportion of:

18 (i) The sum of the service credit on August 31st of the previous
19 year of all persons eligible for the benefit provided in subsection (1)
20 of this section; to

21 (ii) The sum of the service credit on August 31st of the previous
22 year of:

23 (A) All persons eligible for the benefit provided in subsection (1)
24 of this section;

25 (B) Any person who earned service credit in the teachers'
26 retirement system plan 2, the Washington school employees' retirement
27 system plan 2, or the public employees' retirement system plan 2 during
28 the twelve-month period from September 1st to August 31st immediately
29 preceding the distribution;

30 (C) Any person in receipt of a benefit pursuant to RCW 41.32.765,
31 41.35.420, or 41.40.630; and

32 (D) Any person with five or more years of service in the teachers'
33 retirement system plan 2, the Washington school employees' retirement
34 system plan 2, or the public employees' retirement system plan 2;

35 (d) Divided proportionally among persons eligible for the benefit
36 provided in subsection (1) of this section on the basis of their
37 service credit total on August 31st of the previous year.

1 (4) The legislature reserves the right to amend or repeal this
2 section in the future and no member or beneficiary has a contractual
3 right to receive this distribution not granted prior to that time.

4 Sec. 2. RCW 41.32.765 and 2000 c 247 s 902 are each amended to
5 read as follows:

6 (1) NORMAL RETIREMENT. Any member with at least five service
7 credit years of service who has attained at least age sixty-five shall
8 be eligible to retire and to receive a retirement allowance computed
9 according to the provisions of RCW 41.32.760.

10 (2) EARLY RETIREMENT. Any member who has completed at least twenty
11 service credit years of service who has attained at least age fifty-
12 five shall be eligible to retire and to receive a retirement allowance
13 computed according to the provisions of RCW 41.32.760, except that a
14 member retiring pursuant to this subsection shall have the retirement
15 allowance actuarially reduced to reflect the difference in the number
16 of years between age at retirement and the attainment of age sixty-
17 five.

18 (3) ALTERNATE EARLY RETIREMENT.

19 (a) Any member who has completed at least thirty service credit
20 years and has attained age fifty-five shall be eligible to retire and
21 to receive a retirement allowance computed according to the provisions
22 of RCW 41.32.760, except that a member retiring pursuant to this
23 subsection shall have the retirement allowance reduced by three percent
24 per year to reflect the difference in the number of years between age
25 at retirement and the attainment of age sixty-five.

26 (b) On or after September 1, 2008, any member who has completed at
27 least thirty service credit years and has attained age fifty-five shall
28 be eligible to retire and to receive a retirement allowance computed
29 according to the provisions of RCW 41.32.760, except that a member
30 retiring pursuant to this subsection shall have the retirement
31 allowance reduced as follows:

<u>Retirement</u>	<u>Percent</u>
<u>Age</u>	<u>Reduction</u>
<u>55</u>	<u>20%</u>
<u>56</u>	<u>17%</u>

1	<u>57</u>	<u>14%</u>
2	<u>58</u>	<u>11%</u>
3	<u>59</u>	<u>8%</u>
4	<u>60</u>	<u>5%</u>
5	<u>61</u>	<u>2%</u>
6	<u>62</u>	<u>0%</u>
7	<u>63</u>	<u>0%</u>
8	<u>64</u>	<u>0%</u>

9 Any member who retires under the provisions of this subsection is
10 ineligible for the postretirement employment provisions of RCW
11 41.32.802(2) until the retired member has reached sixty-five years of
12 age. For purposes of this subsection, employment with an employer also
13 includes any personal service contract, service by an employer as a
14 temporary or project employee, or any other similar compensated
15 relationship with any employer included under the provisions of RCW
16 41.32.800(1).

17 The subsidized reductions for alternate early retirement in this
18 subsection as set forth in section 2, chapter . . . (this act), Laws of
19 2007 were intended by the legislature as replacement benefits for gain-
20 sharing. Until there is legal certainty with respect to the repeal of
21 chapter 41.31A RCW, the right to retire under this subsection is
22 noncontractual, and the legislature reserves the right to amend or
23 repeal this subsection. Legal certainty includes, but is not limited
24 to, the expiration of any: Applicable limitations on actions; and
25 periods of time for seeking appellate review, up to and including
26 reconsideration by the Washington supreme court and the supreme court
27 of the United States. Until that time, eligible members may still
28 retire under this subsection, and upon receipt of the first installment
29 of a retirement allowance computed under this subsection, the resulting
30 benefit becomes contractual for the recipient. If the repeal of
31 chapter 41.31A RCW is held to be invalid in a final determination of a
32 court of law, and the court orders reinstatement of gain-sharing or
33 other alternate benefits as a remedy, then retirement benefits for any
34 member who has completed at least thirty service credit years and has
35 attained age fifty-five but has not yet received the first installment
36 of a retirement allowance under this subsection shall be computed using
37 the reductions in (a) of this subsection.

1 **Sec. 3.** RCW 41.32.835 and 1995 c 239 s 105 are each amended to
2 read as follows:

3 (1) All teachers who first become employed by an employer in an
4 eligible position on or after July 1, (~~1996, shall be members of plan~~
5 3)) 2007, shall have a period of ninety days to make an irrevocable
6 choice to become a member of plan 2 or plan 3. At the end of ninety
7 days, if the member has not made a choice to become a member of plan 2,
8 he or she becomes a member of plan 3.

9 (2) For administrative efficiency, until a member elects to become
10 a member of plan 3, or becomes a member of plan 3 by default under
11 subsection (1) of this section, the member shall be reported to the
12 department in plan 2, with member and employer contributions. Upon
13 becoming a member of plan 3 by election or by default, all service
14 credit shall be transferred to the member's plan 3 defined benefit, and
15 all employee accumulated contributions shall be transferred to the
16 member's plan 3 defined contribution account.

17 (3) The plan choice provision as set forth in section 3, chapter .
18 . . (this act), Laws of 2007 was intended by the legislature as a
19 replacement benefit for gain-sharing. Until there is legal certainty
20 with respect to the repeal of chapter 41.31A RCW, the right to plan
21 choice under this section is noncontractual, and the legislature
22 reserves the right to amend or repeal this section. Legal certainty
23 includes, but is not limited to, the expiration of any: Applicable
24 limitations on actions; and periods of time for seeking appellate
25 review, up to and including reconsideration by the Washington supreme
26 court and the supreme court of the United States. Until that time, all
27 teachers who first become employed by an employer in an eligible
28 position on or after July 1, 2007, may choose either plan 2 or plan 3
29 under this section. If the repeal of chapter 41.31A RCW is held to be
30 invalid in a final determination of a court of law, and the court
31 orders reinstatement of gain-sharing or other alternate benefits as a
32 remedy, then all teachers who first become employed by an employer in
33 an eligible position on or after the date of such reinstatement shall
34 be members of plan 3.

35 **Sec. 4.** RCW 41.32.875 and 2006 c 33 s 1 are each amended to read
36 as follows:

1 (1) NORMAL RETIREMENT. Any member who is at least age sixty-five
2 and who has:

3 (a) Completed ten service credit years; or

4 (b) Completed five service credit years, including twelve service
5 credit months after attaining age forty-four; or

6 (c) Completed five service credit years by July 1, 1996, under plan
7 2 and who transferred to plan 3 under RCW 41.32.817;
8 shall be eligible to retire and to receive a retirement allowance
9 computed according to the provisions of RCW 41.32.840.

10 (2) EARLY RETIREMENT. Any member who has attained at least age
11 fifty-five and has completed at least ten years of service shall be
12 eligible to retire and to receive a retirement allowance computed
13 according to the provisions of RCW 41.32.840, except that a member
14 retiring pursuant to this subsection shall have the retirement
15 allowance actuarially reduced to reflect the difference in the number
16 of years between age at retirement and the attainment of age sixty-
17 five.

18 (3) ALTERNATE EARLY RETIREMENT.

19 (a) Any member who has completed at least thirty service credit
20 years and has attained age fifty-five shall be eligible to retire and
21 to receive a retirement allowance computed according to the provisions
22 of RCW 41.32.840, except that a member retiring pursuant to this
23 subsection shall have the retirement allowance reduced by three percent
24 per year to reflect the difference in the number of years between age
25 at retirement and the attainment of age sixty-five.

26 (b) On or after September 1, 2008, any member who has completed at
27 least thirty service credit years and has attained age fifty-five shall
28 be eligible to retire and to receive a retirement allowance computed
29 according to the provisions of RCW 41.32.840, except that a member
30 retiring pursuant to this subsection shall have the retirement
31 allowance reduced as follows:

<u>Retirement</u>	<u>Percent</u>
<u>Age</u>	<u>Reduction</u>
<u>55</u>	<u>20%</u>
<u>56</u>	<u>17%</u>
<u>57</u>	<u>14%</u>

1	<u>58</u>	<u>11%</u>
2	<u>59</u>	<u>8%</u>
3	<u>60</u>	<u>5%</u>
4	<u>61</u>	<u>2%</u>
5	<u>62</u>	<u>0%</u>
6	<u>63</u>	<u>0%</u>
7	<u>64</u>	<u>0%</u>

8 Any member who retires under the provisions of this subsection is
9 ineligible for the postretirement employment provisions of RCW
10 41.32.862(2) until the retired member has reached sixty-five years of
11 age. For purposes of this subsection, employment with an employer also
12 includes any personal service contract, service by an employer as a
13 temporary or project employee, or any other similar compensated
14 relationship with any employer included under the provisions of RCW
15 41.32.860(1).

16 The subsidized reductions for alternate early retirement in this
17 subsection as set forth in section 4, chapter . . . (this act), Laws of
18 2007 were intended by the legislature as replacement benefits for gain-
19 sharing. Until there is legal certainty with respect to the repeal of
20 chapter 41.31A RCW, the right to retire under this subsection is
21 noncontractual, and the legislature reserves the right to amend or
22 repeal this subsection. Legal certainty includes, but is not limited
23 to, the expiration of any: Applicable limitations on actions; and
24 periods of time for seeking appellate review, up to and including
25 reconsideration by the Washington supreme court and the supreme court
26 of the United States. Until that time, eligible members may still
27 retire under this subsection, and upon receipt of the first installment
28 of a retirement allowance computed under this subsection, the resulting
29 benefit becomes contractual for the recipient. If the repeal of
30 chapter 41.31A RCW is held to be invalid in a final determination of a
31 court of law, and the court orders reinstatement of gain-sharing or
32 other alternate benefits as a remedy, then retirement benefits for any
33 member who has completed at least thirty service credit years and has
34 attained age fifty-five but has not yet received the first installment
35 of a retirement allowance under this subsection shall be computed using
36 the reductions in (a) of this subsection.

1 NEW SECTION. **Sec. 5.** A new section is added to chapter 41.32 RCW
2 under the subchapter heading "plan 1" to read as follows:

3 (1) Beginning July 1, 2009, the annual increase amount as defined
4 in RCW 41.32.010(46) shall be increased by an amount equal to \$0.40 per
5 month per year of service minus the 2008 gain-sharing increase amount
6 under RCW 41.31.010 as it exists on the effective date of this section.
7 This adjustment shall not decrease the annual increase amount, and is
8 not to exceed \$0.20 per month per year of service. The legislature
9 reserves the right to amend or repeal this section in the future and no
10 member or beneficiary has the contractual right to receive this
11 adjustment to the annual increase amount not granted prior to that
12 time.

13 (2) The adjustment to the annual increase amount as set forth in
14 section 5, chapter . . . (this act), Laws of 2007 was intended by the
15 legislature as a replacement benefit for gain-sharing. If the repeal
16 of chapter 41.31 RCW is held to be invalid in a final determination of
17 a court of law, and the court orders reinstatement of gain-sharing or
18 other alternate benefits as a remedy, then this adjustment to the
19 annual increase amount shall not be included in future annual increase
20 amounts paid on or after the date of such reinstatement.

21 **Sec. 6.** RCW 41.35.420 and 2000 c 247 s 905 are each amended to
22 read as follows:

23 (1) **NORMAL RETIREMENT.** Any member with at least five service
24 credit years who has attained at least age sixty-five shall be eligible
25 to retire and to receive a retirement allowance computed according to
26 the provisions of RCW 41.35.400.

27 (2) **EARLY RETIREMENT.** Any member who has completed at least twenty
28 service credit years and has attained age fifty-five shall be eligible
29 to retire and to receive a retirement allowance computed according to
30 the provisions of RCW 41.35.400, except that a member retiring pursuant
31 to this subsection shall have the retirement allowance actuarially
32 reduced to reflect the difference in the number of years between age at
33 retirement and the attainment of age sixty-five.

34 (3) **ALTERNATE EARLY RETIREMENT.**

35 (a) Any member who has completed at least thirty service credit
36 years and has attained age fifty-five shall be eligible to retire and
37 to receive a retirement allowance computed according to the provisions

1 of RCW 41.35.400, except that a member retiring pursuant to this
2 subsection shall have the retirement allowance reduced by three percent
3 per year to reflect the difference in the number of years between age
4 at retirement and the attainment of age sixty-five.

5 (b) On or after September 1, 2008, any member who has completed at
6 least thirty service credit years and has attained age fifty-five shall
7 be eligible to retire and to receive a retirement allowance computed
8 according to the provisions of RCW 41.35.400, except that a member
9 retiring pursuant to this subsection shall have the retirement
10 allowance reduced as follows:

<u>Retirement</u>	<u>Percent</u>
<u>Age</u>	<u>Reduction</u>
<u>55</u>	<u>20%</u>
<u>56</u>	<u>17%</u>
<u>57</u>	<u>14%</u>
<u>58</u>	<u>11%</u>
<u>59</u>	<u>8%</u>
<u>60</u>	<u>5%</u>
<u>61</u>	<u>2%</u>
<u>62</u>	<u>0%</u>
<u>63</u>	<u>0%</u>
<u>64</u>	<u>0%</u>

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23 Any member who retires under the provisions of this subsection is
24 ineligible for the postretirement employment provisions of RCW
25 41.35.060(2) until the retired member has reached sixty-five years of
26 age. For purposes of this subsection, employment with an employer also
27 includes any personal service contract, service by an employer as a
28 temporary or project employee, or any other similar compensated
29 relationship with any employer included under the provisions of RCW
30 41.35.230(1).

31 The subsidized reductions for alternate early retirement in this
32 subsection as set forth in section 6, chapter . . . (this act), Laws of
33 2007 were intended by the legislature as replacement benefits for gain-
34 sharing. Until there is legal certainty with respect to the repeal of
35 chapter 41.31A RCW, the right to retire under this subsection is
36 noncontractual, and the legislature reserves the right to amend or

1 repeal this subsection. Legal certainty includes, but is not limited
2 to, the expiration of any: Applicable limitations on actions; and
3 periods of time for seeking appellate review, up to and including
4 reconsideration by the Washington supreme court and the supreme court
5 of the United States. Until that time, eligible members may still
6 retire under this subsection, and upon receipt of the first installment
7 of a retirement allowance computed under this subsection, the resulting
8 benefit becomes contractual for the recipient. If the repeal of
9 chapter 41.31A RCW is held to be invalid in a final determination of a
10 court of law, and the court orders reinstatement of gain-sharing or
11 other alternate benefits as a remedy, then retirement benefits for any
12 member who has completed at least thirty service credit years and has
13 attained age fifty-five but has not yet received the first installment
14 of a retirement allowance under this subsection shall be computed using
15 the reductions in (a) of this subsection.

16 **Sec. 7.** RCW 41.35.610 and 1998 c 341 s 202 are each amended to
17 read as follows:

18 (1) All classified employees who first become employed by an
19 employer in an eligible position on or after (~~September 1, 2000, shall~~
20 ~~be members of plan 3~~) July 1, 2007, shall have a period of ninety days
21 to make an irrevocable choice to become a member of plan 2 or plan 3.
22 At the end of ninety days, if the member has not made a choice to
23 become a member of plan 2, he or she becomes a member of plan 3.

24 (2) For administrative efficiency, until a member elects to become
25 a member of plan 3, or becomes a member of plan 3 by default under
26 subsection (1) of this section, the member shall be reported to the
27 department in plan 2, with member and employer contributions. Upon
28 becoming a member of plan 3 by election or by default, all service
29 credit shall be transferred to the member's plan 3 defined benefit, and
30 all employee accumulated contributions shall be transferred to the
31 member's plan 3 defined contribution account.

32 (3) The plan choice provision as set forth in section 7, chapter .
33 . . (this act), Laws of 2007 was intended by the legislature as a
34 replacement benefit for gain-sharing. Until there is legal certainty
35 with respect to the repeal of chapter 41.31A RCW, the right to plan
36 choice under this section is noncontractual, and the legislature
37 reserves the right to amend or repeal this section. Legal certainty

1 includes, but is not limited to, the expiration of any: Applicable
2 limitations on actions; and periods of time for seeking appellate
3 review, up to and including reconsideration by the Washington supreme
4 court and the supreme court of the United States. Until that time, all
5 classified employees who first become employed by an employer in an
6 eligible position on or after July 1, 2007, may choose either plan 2 or
7 plan 3 under this section. If the repeal of chapter 41.31A RCW is held
8 to be invalid in a final determination of a court of law, and the court
9 orders reinstatement of gain-sharing or other alternate benefits as a
10 remedy, then all classified employees who first become employed by an
11 employer in an eligible position on or after the date of such
12 reinstatement shall be members of plan 3.

13 **Sec. 8.** RCW 41.35.680 and 2006 c 33 s 2 are each amended to read
14 as follows:

15 (1) NORMAL RETIREMENT. Any member who is at least age sixty-five
16 and who has:

17 (a) Completed ten service credit years; or

18 (b) Completed five service credit years, including twelve service
19 credit months after attaining age forty-four; or

20 (c) Completed five service credit years by September 1, 2000, under
21 the public employees' retirement system plan 2 and who transferred to
22 plan 3 under RCW 41.35.510;

23 shall be eligible to retire and to receive a retirement allowance
24 computed according to the provisions of RCW 41.35.620.

25 (2) EARLY RETIREMENT. Any member who has attained at least age
26 fifty-five and has completed at least ten years of service shall be
27 eligible to retire and to receive a retirement allowance computed
28 according to the provisions of RCW 41.35.620, except that a member
29 retiring pursuant to this subsection shall have the retirement
30 allowance actuarially reduced to reflect the difference in the number
31 of years between age at retirement and the attainment of age sixty-
32 five.

33 (3) ALTERNATE EARLY RETIREMENT.

34 (a) Any member who has completed at least thirty service credit
35 years and has attained age fifty-five shall be eligible to retire and
36 to receive a retirement allowance computed according to the provisions
37 of RCW 41.35.620, except that a member retiring pursuant to this

1 subsection shall have the retirement allowance reduced by three percent
2 per year to reflect the difference in the number of years between age
3 at retirement and the attainment of age sixty-five.

4 (b) On or after September 1, 2008, any member who has completed at
5 least thirty service credit years and has attained age fifty-five shall
6 be eligible to retire and to receive a retirement allowance computed
7 according to the provisions of RCW 41.35.620, except that a member
8 retiring pursuant to this subsection shall have the retirement
9 allowance reduced as follows:

<u>Retirement</u>	<u>Percent</u>
<u>Age</u>	<u>Reduction</u>
<u>55</u>	<u>20%</u>
<u>56</u>	<u>17%</u>
<u>57</u>	<u>14%</u>
<u>58</u>	<u>11%</u>
<u>59</u>	<u>8%</u>
<u>60</u>	<u>5%</u>
<u>61</u>	<u>2%</u>
<u>62</u>	<u>0%</u>
<u>63</u>	<u>0%</u>
<u>64</u>	<u>0%</u>

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22 Any member who retires under the provisions of this subsection is
23 ineligible for the postretirement employment provisions of RCW
24 41.35.060(2) until the retired member has reached sixty-five years of
25 age. For purposes of this subsection, employment with an employer also
26 includes any personal service contract, service by an employer as a
27 temporary or project employee, or any other similar compensated
28 relationship with any employer included under the provisions of RCW
29 41.35.230(1).

30 The subsidized reductions for alternate early retirement in this
31 subsection as set forth in section 8, chapter . . . (this act), Laws of
32 2007 were intended by the legislature as replacement benefits for gain-
33 sharing. Until there is legal certainty with respect to the repeal of
34 chapter 41.31A RCW, the right to retire under this subsection is
35 noncontractual, and the legislature reserves the right to amend or
36 repeal this subsection. Legal certainty includes, but is not limited

1 to, the expiration of any: Applicable limitations on actions; and
2 periods of time for seeking appellate review, up to and including
3 reconsideration by the Washington supreme court and the supreme court
4 of the United States. Until that time, eligible members may still
5 retire under this subsection, and upon receipt of the first installment
6 of a retirement allowance computed under this subsection, the resulting
7 benefit becomes contractual for the recipient. If the repeal of
8 chapter 41.31A RCW is held to be invalid in a final determination of a
9 court of law, and the court orders reinstatement of gain-sharing or
10 other alternate benefits as a remedy, then retirement benefits for any
11 member who has completed at least thirty service credit years and has
12 attained age fifty-five but has not yet received the first installment
13 of a retirement allowance under this subsection shall be computed using
14 the reductions in (a) of this subsection.

15 **Sec. 9.** RCW 41.40.630 and 2000 c 247 s 901 are each amended to
16 read as follows:

17 (1) NORMAL RETIREMENT. Any member with at least five service
18 credit years who has attained at least age sixty-five shall be eligible
19 to retire and to receive a retirement allowance computed according to
20 the provisions of RCW 41.40.620.

21 (2) EARLY RETIREMENT. Any member who has completed at least twenty
22 service credit years and has attained age fifty-five shall be eligible
23 to retire and to receive a retirement allowance computed according to
24 the provisions of RCW 41.40.620, except that a member retiring pursuant
25 to this subsection shall have the retirement allowance actuarially
26 reduced to reflect the difference in the number of years between age at
27 retirement and the attainment of age sixty-five.

28 (3) ALTERNATE EARLY RETIREMENT.

29 (a) Any member who has completed at least thirty service credit
30 years and has attained age fifty-five shall be eligible to retire and
31 to receive a retirement allowance computed according to the provisions
32 of RCW 41.40.620, except that a member retiring pursuant to this
33 subsection shall have the retirement allowance reduced by three percent
34 per year to reflect the difference in the number of years between age
35 at retirement and the attainment of age sixty-five.

36 (b) On or after July 1, 2008, any member who has completed at least
37 thirty service credit years and has attained age fifty-five shall be

1 eligible to retire and to receive a retirement allowance computed
2 according to the provisions of RCW 41.40.620, except that a member
3 retiring pursuant to this subsection shall have the retirement
4 allowance reduced as follows:

	<u>Retirement</u>	<u>Percent</u>
	<u>Age</u>	<u>Reduction</u>
5		
6	<u>55</u>	<u>20%</u>
7	<u>56</u>	<u>17%</u>
8	<u>57</u>	<u>14%</u>
9	<u>58</u>	<u>11%</u>
10	<u>59</u>	<u>8%</u>
11	<u>60</u>	<u>5%</u>
12	<u>61</u>	<u>2%</u>
13	<u>62</u>	<u>0%</u>
14	<u>63</u>	<u>0%</u>
15	<u>64</u>	<u>0%</u>
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17 Any member who retires under the provisions of this subsection is
18 ineligible for the postretirement employment provisions of RCW
19 41.40.037(2)(d) until the retired member has reached sixty-five years
20 of age. For purposes of this subsection, employment with an employer
21 also includes any personal service contract, service by an employer as
22 a temporary or project employee, or any other similar compensated
23 relationship with any employer included under the provisions of RCW
24 41.40.690(1).

25 The subsidized reductions for alternate early retirement in this
26 subsection as set forth in section 9, chapter . . . (this act), Laws of
27 2007 were intended by the legislature as replacement benefits for gain-
28 sharing. Until there is legal certainty with respect to the repeal of
29 chapter 41.31A RCW, the right to retire under this subsection is
30 noncontractual, and the legislature reserves the right to amend or
31 repeal this subsection. Legal certainty includes, but is not limited
32 to, the expiration of any: Applicable limitations on actions; and
33 periods of time for seeking appellate review, up to and including
34 reconsideration by the Washington supreme court and the supreme court
35 of the United States. Until that time, eligible members may still
36 retire under this subsection, and upon receipt of the first installment

1 of a retirement allowance computed under this subsection, the resulting
2 benefit becomes contractual for the recipient. If the repeal of
3 chapter 41.31A RCW is held to be invalid in a final determination of a
4 court of law, and the court orders reinstatement of gain-sharing or
5 other alternate benefits as a remedy, then retirement benefits for any
6 member who has completed at least thirty service credit years and has
7 attained age fifty-five but has not yet received the first installment
8 of a retirement allowance under this subsection shall be computed using
9 the reductions in (a) of this subsection.

10 Sec. 10. RCW 41.40.820 and 2006 c 33 s 3 are each amended to read
11 as follows:

12 (1) NORMAL RETIREMENT. Any member who is at least age sixty-five
13 and who has:

14 (a) Completed ten service credit years; or

15 (b) Completed five service credit years, including twelve service
16 credit months after attaining age forty-four; or

17 (c) Completed five service credit years by the transfer payment
18 date specified in RCW 41.40.795, under the public employees' retirement
19 system plan 2 and who transferred to plan 3 under RCW 41.40.795;
20 shall be eligible to retire and to receive a retirement allowance
21 computed according to the provisions of RCW 41.40.790.

22 (2) EARLY RETIREMENT. Any member who has attained at least age
23 fifty-five and has completed at least ten years of service shall be
24 eligible to retire and to receive a retirement allowance computed
25 according to the provisions of RCW 41.40.790, except that a member
26 retiring pursuant to this subsection shall have the retirement
27 allowance actuarially reduced to reflect the difference in the number
28 of years between age at retirement and the attainment of age sixty-
29 five.

30 (3) ALTERNATE EARLY RETIREMENT.

31 (a) Any member who has completed at least thirty service credit
32 years and has attained age fifty-five shall be eligible to retire and
33 to receive a retirement allowance computed according to the provisions
34 of RCW 41.40.790, except that a member retiring pursuant to this
35 subsection shall have the retirement allowance reduced by three percent
36 per year to reflect the difference in the number of years between age
37 at retirement and the attainment of age sixty-five.

1 (b) On or after July 1, 2008, any member who has completed at least
2 thirty service credit years and has attained age fifty-five shall be
3 eligible to retire and to receive a retirement allowance computed
4 according to the provisions of RCW 41.40.790, except that a member
5 retiring pursuant to this subsection shall have the retirement
6 allowance reduced as follows:

<u>Retirement</u>	<u>Percent</u>
<u>Age</u>	<u>Reduction</u>
<u>55</u>	<u>20%</u>
<u>56</u>	<u>17%</u>
<u>57</u>	<u>14%</u>
<u>58</u>	<u>11%</u>
<u>59</u>	<u>8%</u>
<u>60</u>	<u>5%</u>
<u>61</u>	<u>2%</u>
<u>62</u>	<u>0%</u>
<u>63</u>	<u>0%</u>
<u>64</u>	<u>0%</u>

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19 Any member who retires under the provisions of this subsection is
20 ineligible for the postretirement employment provisions of RCW
21 41.40.037(2)(d) until the retired member has reached sixty-five years
22 of age. For purposes of this subsection, employment with an employer
23 also includes any personal service contract, service by an employer as
24 a temporary or project employee, or any other similar compensated
25 relationship with any employer included under the provisions of RCW
26 41.40.850(1).

27 The subsidized reductions for alternate early retirement in this
28 subsection as set forth in section 10, chapter . . . (this act), Laws
29 of 2007 were intended by the legislature as replacement benefits for
30 gain-sharing. Until there is legal certainty with respect to the
31 repeal of chapter 41.31A RCW, the right to retire under this subsection
32 is noncontractual, and the legislature reserves the right to amend or
33 repeal this subsection. Legal certainty includes, but is not limited
34 to, the expiration of any: Applicable limitations on actions; and
35 periods of time for seeking appellate review, up to and including
36 reconsideration by the Washington supreme court and the supreme court

1 of the United States. Until that time, eligible members may still
2 retire under this subsection, and upon receipt of the first installment
3 of a retirement allowance computed under this subsection, the resulting
4 benefit becomes contractual for the recipient. If the repeal of
5 chapter 41.31A RCW is held to be invalid in a final determination of a
6 court of law, and the court orders reinstatement of gain-sharing or
7 other alternate benefits as a remedy, then retirement benefits for any
8 member who has completed at least thirty service credit years and has
9 attained age fifty-five but has not yet received the first installment
10 of a retirement allowance under this subsection shall be computed using
11 the reductions in (a) of this subsection.

12 NEW SECTION. Sec. 11. A new section is added to chapter 41.40 RCW
13 under the subchapter heading "plan 1" to read as follows:

14 (1) Beginning July 1, 2009, the annual increase amount as defined
15 in RCW 41.40.010(41) shall be increased by an amount equal to \$0.40 per
16 month per year of service minus the 2008 gain-sharing increase amount
17 under RCW 41.31.010 as it exists on the effective date of this section.
18 This adjustment shall not decrease the annual increase amount, and is
19 not to exceed \$0.20 per month per year of service. The legislature
20 reserves the right to amend or repeal this section in the future and no
21 member or beneficiary has the contractual right to receive this
22 adjustment to the annual increase amount not granted prior to that
23 time.

24 (2) The adjustment to the annual increase amount as set forth in
25 section 11, chapter . . . (this act), Laws of 2007 was intended by the
26 legislature as a replacement benefit for gain-sharing. If the repeal
27 of chapter 41.31 RCW is held to be invalid in a final determination of
28 a court of law, and the court orders reinstatement of gain-sharing or
29 other alternate benefits as a remedy, then this adjustment to the
30 annual increase amount shall not be included in future annual increase
31 amounts paid on or after the date of such reinstatement.

32 Sec. 12. RCW 41.45.070 and 2006 c 94 s 3 are each amended to read
33 as follows:

34 (1) In addition to the basic employer contribution rate established
35 in RCW 41.45.060 or 41.45.054, the department shall also charge
36 employers of public employees' retirement system, teachers' retirement

1 system, school employees' retirement system, public safety employees'
2 retirement system, or Washington state patrol retirement system members
3 an additional supplemental rate to pay for the cost of additional
4 benefits, if any, granted to members of those systems. Except as
5 provided in subsections (6) (~~and~~), (7), and (9) of this section, the
6 supplemental contribution rates required by this section shall be
7 calculated by the state actuary and shall be charged regardless of
8 language to the contrary contained in the statute which authorizes
9 additional benefits.

10 (2) In addition to the basic member, employer, and state
11 contribution rate established in RCW 41.45.0604 for the law enforcement
12 officers' and firefighters' retirement system plan 2, the department
13 shall also establish supplemental rates to pay for the cost of
14 additional benefits, if any, granted to members of the law enforcement
15 officers' and firefighters' retirement system plan 2. Except as
16 provided in subsection (6) of this section, these supplemental rates
17 shall be calculated by the actuary retained by the law enforcement
18 officers' and firefighters' board and the state actuary through the
19 process provided in RCW 41.26.720(1)(a) and the state treasurer shall
20 transfer the additional required contributions regardless of language
21 to the contrary contained in the statute which authorizes the
22 additional benefits.

23 (3) The supplemental rate charged under this section to fund
24 benefit increases provided to active members of the public employees'
25 retirement system plan 1, the teachers' retirement system plan 1, and
26 Washington state patrol retirement system, shall be calculated as the
27 level percentage of all members' pay needed to fund the cost of the
28 benefit not later than June 30, 2024.

29 (4) The supplemental rate charged under this section to fund
30 benefit increases provided to active and retired members of the public
31 employees' retirement system plan 2 and plan 3, the teachers'
32 retirement system plan 2 and plan 3, the public safety employees'
33 retirement system plan 2, or the school employees' retirement system
34 plan 2 and plan 3 shall be calculated as the level percentage of all
35 members' pay needed to fund the cost of the benefit, as calculated
36 under RCW 41.45.060, 41.45.061, or 41.45.067.

37 (5) The supplemental rate charged under this section to fund
38 postretirement adjustments which are provided on a nonautomatic basis

1 to current retirees shall be calculated as the percentage of pay needed
2 to fund the adjustments as they are paid to the retirees. The
3 supplemental rate charged under this section to fund automatic
4 postretirement adjustments for active or retired members of the public
5 employees' retirement system plan 1 and the teachers' retirement system
6 plan 1 shall be calculated as the level percentage of pay needed to
7 fund the cost of the automatic adjustments not later than June 30,
8 2024.

9 (6) A supplemental rate shall not be charged to pay for the cost of
10 additional benefits granted to members pursuant to chapter 340, Laws of
11 1998.

12 (7) A supplemental rate shall not be charged to pay for the cost of
13 additional benefits granted to members pursuant to chapter 41.31A RCW;
14 section 309, chapter 341, Laws of 1998; or section 701, chapter 341,
15 Laws of 1998.

16 (8) A supplemental rate shall not be charged to pay for the cost of
17 additional benefits granted to members and survivors pursuant to
18 chapter 94, Laws of 2006.

19 (9) A supplemental rate shall not be charged to pay for the cost of
20 the additional benefits granted to members of the teachers' retirement
21 system and the school employees' retirement system plans 2 and 3 in
22 sections 2, 4, 6, and 8 of this act until September 1, 2008. A
23 supplemental rate shall not be charged to pay for the cost of the
24 additional benefits granted to members of the public employees'
25 retirement system plans 2 and 3 under sections 9 and 10 of this act
26 until July 1, 2008.

27 NEW SECTION. Sec. 13. The following acts or parts of acts are
28 each repealed, effective January 2, 2008:

29 (1) RCW 41.31.010 (Annual pension increases--Increased by gain-
30 sharing increase amount) and 1998 c 340 s 1;

31 (2) RCW 41.31.020 (Gain-sharing increase amount calculated) and
32 1998 c 340 s 2;

33 (3) RCW 41.31.030 (Contractual right to increase not granted) and
34 1998 c 340 s 3;

35 (4) RCW 41.31A.010 (Definitions) and 2000 c 247 s 407 & 1998 c 341
36 s 311;

1 (5) RCW 41.31A.020 (Extraordinary investment gain--Credited to
2 member accounts--Persons eligible--Calculation of amount--Contractual
3 right not granted) and 2003 c 294 s 4, 2000 c 247 s 408, & 1998 c 341
4 s 312;

5 (6) RCW 41.31A.030 (Retroactive extraordinary investment gain--
6 Credited to member accounts--Persons eligible--Calculation of amount--
7 Contractual right not granted) and 1998 c 341 s 313; and

8 (7) RCW 41.31A.040 (Retroactive extraordinary investment gain--
9 Credited to member accounts--Persons eligible--Calculation of amount--
10 Contractual right not granted) and 2000 c 247 s 409.

11 NEW SECTION. Sec. 14. If any part of this act is found to be in
12 conflict with a final determination by the federal internal revenue
13 service that is a prescribed condition to favorable tax treatment of
14 one or more of the retirement plans, the conflicting part of this act
15 is inoperative solely to the extent of the conflict and with respect to
16 the individual members directly affected. This finding does not affect
17 the operation of the remainder of this act in its application to the
18 members concerned. The legislature reserves the right to amend or
19 repeal this act in the future as may be required to comply with a final
20 federal determination that amendment or repeal is necessary to maintain
21 the favorable tax treatment of a plan.

22 NEW SECTION. Sec. 15. The new benefits provided pursuant to
23 sections 2(3)(b), 4(3)(b), 6(3)(b), and 8(3)(b) of this act are not
24 provided to employees as a matter of contractual right prior to
25 September 1, 2008, and will not become a contractual right thereafter
26 if the repeal of chapter 41.31A RCW is held to be invalid in a final
27 determination of a court of law. The legislature retains the right to
28 alter or abolish these benefits at any time prior to September 1, 2008.

29 NEW SECTION. Sec. 16. The new benefits provided pursuant to
30 sections 9(3)(b) and 10(3)(b) of this act are not provided to employees
31 as a matter of contractual right prior to July 1, 2008, and will not
32 become a contractual right thereafter if the repeal of chapter 41.31A
33 RCW is held to be invalid in a final determination of a court of law.
34 The legislature retains the right to alter or abolish these benefits at
35 any time prior to July 1, 2008.

1 NEW SECTION. Sec. 17. Any action brought under this act must be
2 commenced within three years after the effective date of this section.

3 NEW SECTION. Sec. 18. If any provision of this act or its
4 application to any person or circumstance is held invalid, the
5 remainder of the act or the application of the provision to other
6 persons or circumstances is not affected.

7 NEW SECTION. Sec. 19. Sections 1, 3, and 7 of this act are
8 necessary for the immediate preservation of the public peace, health,
9 or safety, or support of the state government and its existing public
10 institutions, and take effect July 1, 2007.

Passed by the House April 21, 2007.

Passed by the Senate April 22, 2007.

Approved by the Governor May 15, 2007.

Filed in Office of Secretary of State May 16, 2007.