

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Sep 23, 2013, 9:23 am
BY RONALD R. CARPENTER
CLERK

NO. 88546-0

RECEIVED BY E-MAIL

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON DEPARTMENT OF RETIREMENT SYSTEMS and
STATE OF WASHINGTON,

Petitioners,

vs.

WASHINGTON EDUCATION ASSOCIATION, *et al.*;

Respondents.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION OF MUNICIPAL
ATTORNEYS & ASSOCIATION OF WASHINGTON CITIES

Daniel G. Lloyd, WSBA No. 34221
Amicus Curiae on behalf of
WSAMA & AWC
Assistant City Attorney, City of Vancouver
P.O. Box 1995
Vancouver, WA 98668-1995
(360) 487-8500 / (360) 487-8501 (fax)

FILED
SUPERIOR COURT
STATE OF WASHINGTON
2013 OCT -2 P 11:03
BY RONALD R. CARPENTER
CLERK
D/G

ORIGINAL

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. IDENTITY AND INTEREST OF AMICUS CURIAE.....	3
III. STATEMENT OF THE CASE	5
IV. ISSUES PRESENTED.....	5
V. ARGUMENT.....	6
A. If the Court gives effect to RCW 41.40.197(5) and recognizes the legislature’s ability to reserve the right to repeal a future pension benefit for the security and integrity of the pension system, then the 2011 Act repealing UCOLA is constitutional.....	7
B. The reservation of rights section was intimately connected with the decision to establish the UCOLA benefit, meaning that the invalidation of the reservation of rights subsection results in the invalidation of UCOLA section altogether.	10
C. The inability to sever the reservation of rights section from the substantive UCOLA provisions is consistent with this Court’s pension jurisprudence, which defines an employee’s pension by the latest act that can be constitutionally applied in lieu of any requested hybrid system.....	14
VI. CONCLUSION.....	19
CERTIFICATE OF SERVICE.....	v

TABLE OF CASES AND AUTHORITIES

PAGE(S)

WASHINGTON STATE CASES

Bakenhus v. City of Seattle,
48 Wn.2d 695, 296 P.2d 536 (1956).....14, 15, 17

Bowen v. Statewide City Employees Ret. Sys.,
72 Wn.2d 397, 433 P.2d 150 (1967).....9

Bowles v. Dep't of Ret. Sys.,
121 Wn.2d 52, 847 P.2d 440 (1993).....2

Cent. Wash. Bank v. Mendelson-Zeller, Inc.,
113 Wn.2d 346, 779 P.2d 697 (1989).....4

Dailey v. City of Seattle,
54 Wn.2d 733, 344 P.2d 718 (1959).....14, 16, 17, 19

Duke v. Boyd,
133 Wn.2d 80, 942 P.2d 351 (1997).....1, 10

Eisenbacher v. City of Tacoma,
53 Wn.2d 280, 333 P.2d 642 (1958).....15, 16, 17

Hall v. Niemer,
97 Wn.2d 574, 649 P.2d 98 (1982).....11, 12

Homes Unlimited, Inc. v. City of Seattle,
90 Wn.2d 154, 579 P.2d 1331 (1978).....8

Leonard v. City of Spokane,
127 Wn.2d 194, 897 P.2d 358 (1995).....11, 12

Letterman v. City of Tacoma,
53 Wn.2d 294, 333 P.2d 650 (1958).....15, 16, 17

McAllister v. City of Bellevue Firemen's Pension Bd.,
166 Wn.2d 623, 210 P.3d 1002 (2009).....10, 17, 18, 19

McGinnis v. State,
152 Wn.2d 639, 99 P.3d 1240 (2004).....9

Schrom v. Bd. for Volunteer Firefighters,
153 Wn.2d 19, 100 P.3d 814 (2004).....9

State ex rel. Evans v. Bhd. of Friends,
41 Wn.2d 133, 247 P.2d 787 (1952).....13

State ex rel. King County v. Tax Comm'n,
174 Wash. 336, 24 P.2d 1094 (1933)6, 12

State v. Anderson,
81 Wn.2d 234, 501 P.2d 184 (1972).....13

WASHINGTON STATE CASES (continued)

State v. J.P.,
149 Wn.2d 444, 69 P.3d 318 (2003).....10

Vallet v. City of Seattle,
77 Wn.2d 12, 459 P.2d 407 (1969).....17, 18

Wash. State Pub. Employment Bd. v. Cook,
88 Wn.2d 200, 559 P.2d 991 (1977).....1

Weden v. San Juan County,
135 Wn.2d 678, 958 P.2d 273, 284 (1998).....8

WASHINGTON STATE CONSTITUTIONAL PROVISIONS

CONST. art. I, § 23 *passim*

CONST. art. II, § 11

WASHINGTON STATUTES

Substitute Senate Bill 5119 (1995) *passim*

Substitute House Bill 2021 (2011).....8

LAWS OF 1915, ch. 40, § 2.....17

LAWS OF 1961, ch. 191, § 1.....17

LAWS OF 1995, ch. 345, § 2,
codified as amended at RCW 41.32.489(6)2

LAWS OF 1995, ch. 345, § 5(6),
codified as amended at RCW 41.40.197(5)2

LAWS OF 2009, ch. 561, § 3(3)(c),
codified at RCW 41.45.060(3)(c).....7

LAWS OF 2011, ch. 362, § 17

LAWS OF 2011, ch. 362, § 6,
amending RCW 41.40.1978

Chapter 41.18 RCW18

Chapter 41.20 RCW16

Chapter 41.40 RCW3

RCW 4.92.11011

RCW 41.26.040(2).....18

RCW 41.40.010(4).....7

PAGE(S)

WASHINGTON STATUTES (continued)

RCW 41.40.0484
RCW 41.40.1979, 10
RCW 41.40.197(5).....8, 9, 10
RCW 41.40.330(1).....4
RCW 41.45.0607
RCW 41.45.060(3).....4

COURT RULES

RAP 10.3(e)2

I. INTRODUCTION¹

Our constitution makes clear that “[t]he legislative authority of the state of Washington shall be vested in the legislature.” CONST. art. II, § 1. One component of this authority is the ability to establish a pension system for Washington’s public employees. *Wash. State Pub. Employment Bd. v. Cook*, 88 Wn.2d 200, 206, 559 P.2d 991 (1977). And it is the function of this Court to enforce statutes as written so long as such legislation does not run afoul of the federal or state constitution. *Duke v. Boyd*, 133 Wn.2d 80, 87-88, 942 P.2d 351 (1997).

The Plaintiffs in these cases argue that the legislature violated article I, § 23 of the Washington Constitution in 2011, when it repealed a benefit first established in 1995 called “uniform cost of living adjustments” (UCOLA). To reach the result advanced by the Plaintiffs in this case, the Court would have to judicially excise a specific subsection of Substitute Senate Bill [SSB] 5119 (1995), which provided in no uncertain terms:

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 postretirement adjustment not granted prior to that time.

¹ Much of this brief is identical to that filed contemporaneously in the companion to this case, *Wash. Educ. Ass’n v. State*, No. 87424-7, as the issues and legal analyses are largely the same.

LAWS OF 1995, ch. 345, § 5(6), *codified as amended at* RCW 41.40.197(5).²

If the Court concludes as it should and defers to the legislature’s ability to “keep[] the pension system flexible and maintain[] its integrity,” *Bowles v. Dep’t of Ret. Sys.*, 121 Wn.2d 52, 65, 847 P.2d 440 (1993) (citations and internal quotation marks omitted), then the Plaintiffs’ claim to have a vested right in a future pension increase to which there was no “contractual right” fails. On the other hand, if the Court concludes that the legislature acted outside its authority by “reserv[ing] the right to amend or repeal this section in the future,” then the Plaintiffs must also show that the legislature still would have passed the substantive UCOLA provisions in the first place. Otherwise, UCOLA must also be invalidated. This is a hurdle that these Plaintiffs cannot overcome, because the language of statute makes clear that the reservation of rights subsection was crucial to the legislature’s endeavor into uncharted waters. In other words, the legislature enacted UCOLA only on the express assumption that it had the ability to repeal that benefit in the future. Consequently, if the legislature could not have reserved its rights in the way that it did, then the entire

² Section 2 of SSB 5119 contains identical language, but is applicable to members of Plan 1 of the Teachers Retirement System (TRS), ch. 41.32 RCW. *See* LAWS OF 1995, ch. 345, § 2, *codified as amended at* RCW 41.32.489(6). This brief will focus primarily on the provisions affecting members of the Public Employees Retirement System (PERS), as those members are employed by the cities and towns that amici curiae represents. *See* RAP 10.3(e). However, the arguments herein apply with equal force to TRS.

statutory scheme giving rise to UCOLA must fall as well. Under either scenario, there is no vested right to future UCOLAs in Washington's public pension scheme.

Undersigned amicus curiae, writing on behalf of the Washington State Association of Municipal Attorneys (WSAMA) and Association of Washington Cities (AWC), offers this brief in support of reversing the trial court's order to the extent it invalidated the legislature's repeal of UCOLA.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

WSAMA is a non-profit organization of municipal attorneys in Washington. Washington has 281 cities and towns, ranging from Seattle at over 600,000 citizens to Krupp, with a population of about 60. WSAMA members represent municipalities throughout the state, as both in-house counsel and as private, outside legal counsel. WSAMA associate members include attorneys that advise their municipality clients on employment matters, including deferred compensation under the Public Employment Retirement Systems (PERS), chapter 41.40 RCW.

AWC is a private, non-profit corporation that represents Washington's cities and towns before the State Legislature, the State Executive branch and regulatory agencies. Membership in the AWC is voluntary, however the association includes 100% participation from

Washington's 281 cities and towns. A 25-member board of directors oversees AWC's activities. Its mission is to serve its members through advocacy, education and services. It has provided from time to time amicus briefing to Washington courts on issues of significant importance to its members.

Moreover, a decision striking down the repeal of UCOLA would result in drastic and severe consequences for municipalities around the State. Because public employees' contributions are capped, any need to provide additional funding to the PERS plans necessarily falls on municipalities. RCW 41.40.048, 41.40.330(1), 41.45.060(3). Critical municipal services, such as police, fire, public safety, and road maintenance and safety would have to be cut even further than they have in recent years to shoulder the financial burden continued UCOLA would cause. *Accord* CP at 707, ¶ 33.³

As such, both WSAMA and AWC have a strong interest in the outcome of this case.

³ "When a nonmoving party fails to controvert relevant facts supporting a summary judgment motion, those facts are considered to have been established." *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989). Plaintiffs did not offer any competing evidence to the facts offered by the State outlining the devastating effects on municipal budgets if UCOLAs were judicially reinstated, meaning the Court can accept those facts as "hav[ing] been established." *Id.*

III. STATEMENT OF THE CASE

As discussed below, the critical issue in this case is one of law, namely the extent of the legislature's power to regulate a pension system for public employees. As such, WSAMA/AWC incorporates by reference the factual discussion presented by the parties, thus negating any need to repeat them here.

IV. ISSUES PRESENTED

(1) Whether the legislature may repeal a future pension enhancement, before the enhancement actually takes effect, when the legislature has explicitly reserved the right to do so without violating the contracts clause of the Washington Constitution, article I, § 23.

(2) Whether, if the legislature does not have the ability to reserve the right to repeal a pension benefit conferred, the entire benefit conferred by that statute must be invalidated because:

- (a) The Court cannot sever unconstitutional language from a statute if it cannot be reasonably believed the legislature would have enacted the statute anyway;
and
- (b) This Court's jurisprudence on public pensions prohibits judicially merging the most favorable parts of several pension statutes, but instead

requires that an employee's pension rights be determined by the latest act that can be constitutionally applied.

V. ARGUMENT

The basic thrust of the Plaintiffs' argument is that the Legislature impermissibly reserved the right to repeal UCOLA in SSB 5119 (1995). Consequently, Plaintiffs ask this Court to hold that the legislature's repeal of UCOLA in 2011 amounts to an unconstitutional impairment of a contractual right.

The fundamental flaw in this approach, however, is it disregards this Court's precedent addressing when a specific section can be severed and leave the remaining statutory language intact. Specifically, the Court cannot judicially excise one part of a statute due to an alleged constitutional infirmity, but allow the remaining sections to stand if "it could not be believed that the legislature would have passed one without the other." *State ex rel. King County v. Tax Comm'n*, 174 Wash. 336, 339-40, 24 P.2d 1094 (1933). As discussed in greater detail below, the history behind the reservation of rights clauses shows beyond doubt that the legislature would not have extended a UCOLA benefit to the state's public employees had it known such a conferral was necessarily permanent.

- A. **If the Court gives effect to RCW 41.40.197(5) and recognizes the legislature’s ability to reserve the right to repeal a future pension benefit for the security and integrity of the pension system, then the 2011 Act repealing UCOLA is constitutional.**

As aptly described by the State, the legislature enacted SSB 5119 in 1995 to consistently augment the “annual increase” provided to PERS 1 members. *See generally* RCW 41.40.010(4). But the legislature later realized, as it had feared, that this method of funding the retirement systems was unsustainable, as the costs to both the State’s General Fund and to public employers were staggering if UCOLAs were to continue.

Chapter 561, Laws of 2009 made necessary changes to the funding plan for the fiscal integrity of the teachers’ retirement system, plan 1 and the public employees’ retirement system, plan 1, and provides a basis for improvements in the financial soundness of the pension plans.⁴ The legislature now finds that changing economic conditions have also made necessary the amendatory provisions contained in this act. *Due to the current extraordinary economic recession and due to the financial demands of other core responsibilities of government, it is not feasible for public employers of this state to fund the annual increase amount and continue to ensure the fiscal integrity of these pension funds.*

LAWS OF 2011, ch. 362, § 1 (emphasis added). Of course, despite the Plaintiffs’ arguments that there was no need to repeal UCOLA, it must be remembered that “[t]he wisdom, necessity and expediency of the law are not for judicial determination,’ and an enactment may not be struck down

⁴ Chapter 561, Laws of 2009 (Substitute Senate Bill 6161) adjusted the funding mechanism for the various pension plans. For purposes here, the bill amended RCW 41.45.060 to provide the employer contribution rates set by the Pension Funding Council created by RCW 41.45.100, “[t]o fully fund the public employees’ retirement system plan 1.” LAWS OF 2009, ch. 561, § 3(3)(c), *codified at* RCW 41.45.060(3)(c).

as beyond the police power unless it ‘is shown to be clearly unreasonable, arbitrary or capricious.’” *Weden v. San Juan County*, 135 Wn.2d 678, 700, 958 P.2d 273, 284 (1998) (quoting *Homes Unlimited, Inc. v. City of Seattle*, 90 Wn.2d 154, 159, 579 P.2d 1331 (1978)).

The legislature recognized the multi-billion dollar liability and the threat it posed to basic pension benefits and other necessary government services, such as public safety and education. Consequently, it passed Substitute House Bill 2021 in 2011, which repealed UCOLAs for PERS 1 members unless the retiree was receiving an allowance “lower than the minimum benefit provide under RCW 41.40.1984.” LAWS OF 2011, ch. 362, § 6, *amending* RCW 41.40.197.

The argument that SHB 2021 violates the constitution is premised on article I, § 23, which states: “No bill of attainder, ex post facto law, or law impairing the obligations of contracts shall ever be passed.” Inherent in this argument, though is the notion that these Plaintiffs held a contractual right to the UCOLA afforded by SSB 5119 (1995), regardless of whether that law was amended or repealed. But the law said just the opposite:

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 postretirement adjustment not granted prior to that time.*

RCW 41.40.197(5) (emphasis added).

The goal of any statutory analysis is to give effect to the legislature's intent, which is derived solely from the plain language of the statute whenever possible. *Schrom v. Bd. for Volunteer Firefighters*, 153 Wn.2d 19, 25, 100 P.3d 814 (2004). Though courts "construe ambiguous pension statutes 'in favor of the party for whose benefit the pension statute was intended,'" that rule has no application to unambiguous statutes. *Id.* at 32 & n.8 (quoting *Bowen v. Statewide City Employees Ret. Sys.*, 72 Wn.2d 397, 402, 433 P.2d 150 (1967)). Statutes are ambiguous if they are "fairly susceptible to different, reasonable interpretations," but they are not ambiguous "merely because different interpretations are conceivable." *McGinnis v. State*, 152 Wn.2d 639, 645, 99 P.3d 1240 (2004).

Here, there is no other way to construe the reservation of rights language of RCW 41.40.197(5). This language could not be more clear: (1) "[t]he legislature reserves the right to amend or repeal *this section* in the future," meaning RCW 41.40.197, in which the UCOLA provisions were codified, and (2) "no member or beneficiary has a contractual right to receive *this* postretirement adjustment not granted prior to *that* time." Use of the word "that time" undeniably refers to the time of any "amendment or repeal" of "this section" that would occur "in the future."

And as recognized just a few years ago in another pension case, this Court "cannot 'delete language from an unambiguous statute.'"

McAllister v. City of Bellevue Firemen's Pension Bd., 166 Wn.2d 623, 630-31, 210 P.3d 1002 (2009) (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)). But that is exactly what the Plaintiffs ask this Court to do: judicially erase subsection (5) from RCW 41.40.197. This is not a power the Court has. If the law is constitutional, it must be enforced. *Duke*, 133 Wn.2d at 87-88.

Consequently, unless the Court invalidates RCW 41.40.197(5), it must give effect to that language, which unambiguously negates any perpetual contract right to future UCOLAs post-amendment or repeal.

B. The reservation of rights section was intimately connected with the decision to establish the UCOLA benefit, meaning that the invalidation of the reservation of rights subsection results in the invalidation of UCOLA section altogether.

Not surprisingly, the Plaintiffs' argument hinges on the notion that the legislature cannot, in the context of public pensions, reserve the right to amend or repeal a benefit and declare that members and retirees have no contractual right to receive it in perpetuity. *See* Br. of Resp'ts at 28-29. In this sense, Plaintiffs' argument hinges on whether this Court will strike down Section 5(6) of SHB 5119 (1995), *codified as amended at* RCW 41.40.197(5).

But where the Plaintiffs fail to offer any analysis as to whether and how the Court can adopt Sections 5(1)-(5) of SHB 5119 (1995) (granting

the UCOLA benefit), and strike the allegedly worst part, Section 5(6) (reservation of rights).⁵ Assuming the legislature could not reserve its right to repeal a pension benefit, the Court must then engage in an analysis whether *any* part of SHB 5119 could be enforced, and particularly the UCOLA benefit in the first place. This Court has consistently refused to sever allegedly unconstitutional provisions from constitutional ones if:

the constitutional and unconstitutional provisions are so connected ... that it could not be believed that the legislature would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature.

Leonard v. City of Spokane, 127 Wn.2d 194, 201, 897 P.2d 358 (1995) (quoting *Hall v. Niemer*, 97 Wn.2d 574, 582, 649 P.2d 98 (1982) (quoting *State Tax Comm'n*, 174 Wash. at 339-40)). For example, the Court in *Leonard* refused to sever a constitutionally deficient provision from a legislative financing act because the infirm section “represent[ed] the heart and soul of the Act,” meaning that “the Act would be virtually worthless without it.” *Leonard*, 127 Wn.2d at 202. In *Hall* the Court declined to sever the unconstitutional portion of the previous version of RCW 4.92.110 because “the unconstitutional provisions are so ‘intimately

⁵ The only constitutional provision cited in the Plaintiffs’ brief is article I, section 23, which as discussed above prohibits the passage of any law “impairing the obligations of contracts.” CONST., art. I, § 23. Nothing in the Plaintiffs’ brief explains how an Act impairs a contractual right the existence of which is expressly disclaimed by the same piece of legislation. Amici agrees with the analysis advanced by the State in this regard.

connected' with the condition precedent requirement that they are not capable of meaningful severation." *Hall*, 97 Wn.2d at 583. Conversely, in *State Tax Commission*, a case involving a property tax statute, the Court noted that the "Legislature ha[d] made it clear that it would have passed the act as to intercounty property even though it had been advised as to the invalidity of such an act as to intracounty property." *State Tax Comm'n*, 174 Wash. at 340. In other words, unlike *Leonard* and *Hall*, there was support in *State Tax Commission* for the proposition that the legislature would have passed the constitutional sections regardless of whether the unconstitutional sections were ultimately struck down.

The reservation of rights provision in SHB 5119 cannot be severed from the remainder of the section granting the UCOLA benefit. As articulated by the State, the history of granting COLAs to retirees was done only on an ad hoc basis. *See* Br. of Appellant at 7. In this sense, "it [can]not be believed that the legislature would have passed [UCOLA] without the [reservation of rights clause]." *Leonard*, 127 Wn.2d at 201.

Furthermore, SHB 5119 does not contain a severability clause. Although the presence of such a clause certainly would not be dispositive of whether the Court *could* sever an allegedly constitutionally infirm section (i.e., the reservation of rights clause), *see Leonard*, 127 Wn.2d at 201-02, the absence of such a clause is highly indicative that the

legislature would *not* have passed UCOLA had it believed the benefit would remain permanently. *Compare State ex rel. Evans v. Bhd. of Friends*, 41 Wn.2d 133, 153, 247 P.2d 787 (1952) (invalidating “statute [that] contain[ed] no separability provision” in its entirety because the lack of such a severability clause meant the statute “must be considered as a unit or as an inseparable legislative enactment”) *with State v. Anderson*, 81 Wn.2d 234, 237-40, 501 P.2d 184 (1972) (reversing decision invalidating a statute in its entirety, highlighting the importance of the severability clause and the legislative intent the constitutional sections would have been passed anyway).

As a result, even if the Court were to accept the Plaintiffs’ suggestion that the legislature cannot, pursuant to its broad police power, reserve the right to repeal a future pension increase and declare that no person has a contractual right to it, then there still is no right to continued UCOLAs because the pensioners would then be entitled to retire under the pension scheme as it existed *before* SHB 5119 (1995). *See infra*, Part V.C.

C. The inability to sever the reservation of rights section from the substantive UCOLA provisions is consistent with this Court’s pension jurisprudence, which defines an employee’s pension by the latest act that can be constitutionally applied in lieu of any requested hybrid system.

Plaintiffs place heavy reliance on *Bakenhus v. City of Seattle*, 48 Wn.2d 695, 296 P.2d 536 (1956), to argue that they are contractually entitled to (a) receive the UCOLA benefits provided in SHB 5119 (1995) (b) ignore the reservation of rights subsection, and (c) receive the added benefits conferred by subsequent statutes. *Bakenhus* does not allow—much less require—a court to craft a hybrid pension system if a later statute is deemed to have impaired existing contractual rights.

Bakenhus held: “[T]he employee who accepts a job to which a pension plan is applicable contracts for a substantial pension and is entitled to receive the same when he has fulfilled the prescribed conditions.” *Bakenhus*, 48 Wn.2d at 701. Three years later, the Court clarified its precedent on legislative modifications to pension plans by holding that “pension rights are to be determined *by the latest act which could constitutionally be applied.*” *Dailey v. City of Seattle*, 54 Wn.2d 733, 739, 344 P.2d 718 (1959) (emphasis added).

Bakenhus and its progeny are grounded in the constitutional prohibition in article I, section 23 forbidding the passage of any “law impairing the obligations of contracts.” CONST. art. I, § 23; *see also*

Letterman v. City of Tacoma, 53 Wn.2d 294, 298-99, 333 P.2d 650 (1958) (“The *Bakenhus* case specifically dealt with the constitutionality of the 1937 police pension act as applied to Mr. Bakenhus.”); *Eisenbacher v. City of Tacoma*, 53 Wn.2d 280, 282, 333 P.2d 642 (1958) (recognizing *Bakenhus* held a 1937 amendment to a public pension act “*could not, constitutionally, be applied to Mr. Bakenhus as a limitation on his pension rights*”) (italics in original).

Yet in cases in which the pensioner succeeded in proving that subsequent legislation unconstitutionally impaired his or her preexisting pension rights, the pensioner was allowed only to *retire* under the pre-existing pension act, *not* to combine the most favorable parts of several statutes to receive an *increase* in that former pension. For example, in *Bakenhus* the plaintiff, a former police officer, convinced this Court that the 1937 pension act unconstitutionally capped his pension at \$125. *Bakenhus*, 48 Wn.2d at 701. His remedy was the ability to retire under the act that defined his rights prior to 1937. *Id.* at 697, 702-03.

In *Eisenbacher* former Tacoma firefighters, like Mr. Bakenhus, claimed a 1935 cap on their pension to \$125 per month unconstitutionally impaired their rights under prior legislation, which if applied would result in more money. *Eisenbacher*, 53 Wn.2d at 282. This Court agreed, and ordered the firefighters be paid in accordance with “the Firemen’s Relief

and Pension Act *in force prior to 1935.*” *Id.* at 281 (emphasis added); *see also id.* at 284, 286.

Likewise, *Letterman* considered which of several different pension acts (1919, 1929, 1935, 1955) applied to a Tacoma firefighter employed between 1929 and 1957. *Id.* at 296-300. The Court first held that the 1929 act’s amendments did not unreasonably impair the firefighter’s rights under the 1919 act, consequently concluding “that the 1929 act c[ould] validly be applied to respondent [firefighter].” *Id.* at 299. The Court then held that “[t]he 1935 act could *not* constitutionally be applied to respondent as a limitation on his pension rights,” concluding that the firefighter’s pension would be governed by either the 1929 pension act or the 1955 act. *Id.* The Court held that, per the terms of the 1955 act, the firefighter could within 60 days elect between retiring under either the 1929 act or the 1955 act, but he could not choose his preferred provisions of both acts. *Id.* at 300-01.

Lastly, *Dailey* held that a 1955 act governing police officers (ch. 41.20 RCW), was unconstitutional as applied to Captain Dailey. *Dailey*, 54 Wn.2d at 742. The Court then held that “Captain Dailey could and did retire under the terms of the 1915 act, and that the terms of chapter 69, Laws of 1955, are not applicable to his retirement.” *Id.*

These authorities each hold and reaffirm that “pension rights are to be determined by *the latest act which could constitutionally be applied.*” *Id.* at 739 (emphasis added); *Letterman*, 53 Wn.2d at 298; *Eisenbacher*, 53 Wn.2d at 280. Not surprisingly then, this Court has rejected prior attempts to create a hybrid pension by borrowing different sections from separate pension acts. *McAllister*, 166 Wn.2d at 632; *Vallet v. City of Seattle*, 77 Wn.2d 12, 19-21, 459 P.2d 407 (1969).

For example, *Vallet* involved a police officer at the rank of Inspector who elected to retired in 1965. *Id.* at 13. At issue was whether a 1915 act or a 1961 act determined the amount of benefits due. *Id.* at 16. The 1915 statute provided a pension at one-half his rank’s salary, but that amount was fixed. *Id.* at 16-17 (citing LAWS OF 1915, ch. 40, § 2). The 1961 statute’s pension was capped at the level of one-half of a Captain’s salary, but the amount escalated with the pay of Captains in active service. *Id.* (citing LAWS OF 1961, ch. 191, § 1). The police officer sought a pension at one-half the salary of Inspector, as under the uncapped 1915 statute, that would escalate like pensions under the 1961 statute. *Id.* at 19. After the officer prevailed at the trial court, this Court reversed, agreeing with the city’s argument “that the *Bakenhus* rule does not allow the selection by respondent of the best parts of several pension plans, but only requires the application of the most favorable statute to respondent’s status

at the time of his retirement.” *Id.* The Court found that the 1961 statute’s “modification to respondent’s pension rights [was] reasonable and equitable and respondent must, therefore, retire under the 1961 act and *cannot select the most favorable parts of the 1915 and 1961 acts as a basis for his pension rights.*” *Id.* at 22 (emphasis added). The Court found that “to permit [one] to receive the most beneficial parts of the 1915 and 1961 acts to the exclusion of any detriments contained therein would result in absurd consequences to the whole pension system.” *Id.* at 19.

The Court followed *Vallet* more recently in *McAllister*. There, two retired firefighters argued that *Bakenhus* required the City of Bellevue to calculate the excess payment owed to them under RCW 41.26.040(2) by using a more favorable definition of the statutory term “basic salary” as used in a different statute, namely the 1955 Pension Act, ch. 41.18 RCW. *McAllister*, 166 Wn.2d at 626-28. The Court rejected that argument by following *Vallet* and held that “the City is correct that the McAllisters may be trying to ‘cherry pick’ the best of LEOFF and the 1955 Act.” *Id.* at 632. The Court held that allowing a pensioner “to ‘blend’ the best of two different pension plans would run counter to our holding in *Vallet* and introduce instability into the administration of the plans.” *Id.*

Pursuant to this long line of authorities, the Court must either uphold the reservation of rights subsection in SHB 5119 (1995) or strike

the Act down in its entirety *along with* the substantive UCOLA benefit of which these Plaintiffs want to take advantage. Otherwise, the Court would run afoul of the rule which is to have pension rights “be determined by the latest act which could constitutionally be applied.” *Dailey*, 54 Wn.2d at 739; *accord McAllister*, 166 Wn.2d at 632. The Plaintiffs cannot have their pension rights defined by the most favorable parts of SHB 5119 (1995) (UCOLA) but simultaneously ignore another integral part of that statute (reservation of rights).

VI. CONCLUSION

Pensioners cannot, consistent with this Court’s jurisprudence, pick and choose which parts of a pension act they desire to craft a new design the legislature did not enact. For all of the foregoing reasons and for the reasons advanced by the State, WSAMA and AWC ask this Court to reverse the trial court and grant summary judgment to the State.

RESPECTFULLY SUBMITTED this 23rd day of September, 2013.

/s/ Daniel G. Lloyd

Daniel G. Lloyd, WSBA No. 34221
Amicus Curiae on behalf of
WSAMA & AWC
Assistant City Attorney, City of Vancouver
P.O. Box 1995
Vancouver, WA 98668-1995
(360) 487-8500 / (360) 487-8501 (fax)
dan.lloyd@cityofvancouver.us

CERTIFICATE OF SERVICE

I certify that on the date referenced below, I mailed (via first class mail, postage prepaid) a copy of the foregoing document to each and every attorney of record herein, as identified below:

James Oswald
Schwerin Campbell Barnard
Iglitzin & Lavitt, LLP
18 W. Mercer St., Ste. 400
Seattle, WA 98119

Richard E. Spoonemore
Eleanor Hamburger
Stephen J. Sirianni
Sirianni Youtz Spookemore
Hamburger
999 Third Ave., Ste. 3650
Seattle, WA 98104

Harriet Strasberg
Law Office of Harriet Strasberg
203 4th Ave. E., Ste. 520
Olympia, WA 98501

Anne E. Hall
Spencer W. Daniels
Sarah E. Blocki
7141 Cleanwater Drive SW
Olympia, WA 98504

Edward Younglove III
Youglove & Coker, PLLC
1800 Cooper Point Rd. SW, Bldg 16
Olympia, WA 98502

Noah G. Purcell
Solicitor General
PO Box 40100
Olympia, WA 98504-0100

Don Clocksin
Law Office of Don Clocksin
203 4th Ave. E., Ste. 405
Olympia, WA 98501

DATED on September 23, 2013.

/s/ Daniel G. Lloyd

Daniel G. Lloyd, WSBA No. 34221
Amicus Curiae on behalf of WSAMA/AWC
Assistant City Attorney, City of Vancouver
P.O. Box 1995
Vancouver, WA 98668-1995
(360) 487-8500 / (360) 487-8501 (fax)

OFFICE RECEPTIONIST, CLERK

To: Lloyd, Dan
Subject: RE: Submission of Motion for Leave to File Amicus Curiae Brief and Amicus Curiae Brief

Rec'd 9-23-13

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Lloyd, Dan [<mailto:Dan.Lloyd@cityofvancouver.us>]
Sent: Monday, September 23, 2013 9:16 AM
To: OFFICE RECEPTIONIST, CLERK
Subject: Submission of Motion for Leave to File Amicus Curiae Brief and Amicus Curiae Brief
Importance: High

Dear Mr. Carpenter:

Pursuant to Order 25700-B-334 (Sept. 4, 1997), and the Clerk's protocols pursuant to said order, please find attached (1) Motion for Leave to File Amicus Curiae Brief, and (2) Brief of Amicus Curiae, for filing in the below referenced case:

Wash. Dep't of Ret. Sys. et al. v. Wash. Educ. Ass'n, No. 88546-0

Daniel G. Lloyd
Assistant City Attorney
415 W. 6th St.
P.O. Box 1995
Vancouver, WA 98660
Tel: (360) 487-8520 (direct)
Main: (360) 487-8500 / **Fax:** (360) 487-8501
dan.lloyd@cityofvancouver.us

CONFIDENTIALITY NOTICE: This email message may be protected by the attorney/client privilege, work product doctrine or other confidentiality protection. If you believe that it has been sent to you in error, do not read it. Please reply to the sender that you have received the message in error, then delete it. Thank you.