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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 47337-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

TIM LENANDER,

Appellant,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,

Respondent

REPLY BRIEF OF APPELLANT

Wayne L. Williams, WSBA# 4145
Attorney for Appellant

Williams, Wyckoff & Ostrander, PLLC
P.O. Box 316
Olympia, Washington 98507
(360) 528.4800

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I. ARGUMENT

A. The State Actuary Has Not Usurped the Director's Power.

The Department of Retirement Systems (DRS) brief provides you with a bleak view of a world where the Director of DRS is but a helpless pawn of the State Actuary. In that world, on a rigid six year schedule, the State Actuary delivers his or her pronouncements, and the hapless Director falls in line by adopting them.

It is difficult to square this world view with the language of RCW 41.45.090, regarding actuarial data which authorizes the Actuary to conduct an actuarial experience study "at least once in each six year period." We read this to mean that the Actuary can conduct an experience study whenever he or she wishes as long as that happens at least once in every six year period.

The concluding sentence of RCW 41.45.090 says:

Upon the basis of such actuarial investigation the department shall adopt such tables, schedules, factors, and regulations as are deemed necessary in the light of the finding of the actuary for the proper operation of the state retirement systems.
[Emphasis supplied]

In short, the Director can accept or deny the recommendations of the Actuary and need only adopt those if he or she deems necessary.

B. DRS Ignores the WSPRS Definition.

DRS argues that, when the legislature adopted Laws of 1999, Chapter 74, Section 4, requiring DRS to adopt an actuarially equivalent retirement option, actuarially equivalent meant “an option of ‘equal value’ computed using actuarial science.” Brief of DRS p. 13. However, Section 1 of that very same Act defined “actuarial equivalent” as “a benefit of equal value when computed upon the basis of such mortality table as may be adopted and such interest rate as may be determined by the Director.” RCW 43.43.120(1). This language defines “actuarial equivalent,” and there is no mention of the State Actuary or actuarial science.

None of the provisions of Chapter 41.45 RCW, governing the State Actuary, have amended or repealed the definition of actuarial equivalent contained in RCW 43.43.120(1). Nor, has anything contained in Chapter 41.45 RCW changed the fact that “actuarial equivalent” for the Washington State Patrol

Retirement System (WSPRS) is “as may be determined by the Director.” Not the State Actuary, but the Director.

C. Other Deadline Statutes Reserved the Right to Change Formulas.

Next, DRS argues that the July 1, 2000 deadline for the adoption of Option B was only a deadline for initial adoption, similar to requirements found in RCW 41.32.530(4) and RCW 41.35.220. DRS Brief p. 24, paragraph 2 and footnote 11.

Turning to those two specific statutes is enlightening.

RCW 41.32.530(4) provides as follows:

No later than July 1, 2001, the department shall adopt rules that allow a member additional actuarially equivalent survivor benefit options, and shall include, but are limited to:

(a)(i) A retired member who retired without designating a survivor beneficiary shall have the opportunity to designate their spouse from a postretirement marriage as a survivor during a one-year period beginning one year after the date of the postretirement marriage provided the retirement allowance payable to the retiree is not subject to periodic payments pursuant to a property division obligation as provided for in RCW 41.50.670.

(ii) A member who entered into a postretirement marriage prior to the effective date of the rules adopted pursuant to this subsection and satisfies the conditions of (a)(i) of this subsection shall have one year to designate their spouse as a survivor beneficiary following the adoption of the rules.

(b) A retired member who elected to receive a reduced retirement allowance under this section and designated a nonspouse as survivor beneficiary shall have the opportunity to remove the survivor designation and have their future benefit adjusted.

(c) The department may make an additional charge, if necessary, to ensure that the benefits provided under this subsection remain actuarially equivalent.
[Emphasis supplied]

RCW 41.35.220(3) also requires DRS to adopt rules providing an actuarially equivalent survivor benefit and also provides in Subsection (c) that “The department may make an additional charge, if necessary, to ensure that the benefits provided under this subsection remain actuarially equivalent.”

The fact that no such parallel language was used in RCW 43.43.278 points to a clear legislative intent that no future changes be made in the rate once adopted.

D. Members Can Choose Benefits.

DRS argues that, without changing the Option B reduction, over time Option A may be of greater value or lesser value or of the same value as Option B. This is precisely why the legislature gave retiring members a choice, so that they can choose the benefit with the greatest value in their particular situation.

E. There Is No Evidence of an Adverse Funding Effect.

DRS then argues that “moreover, the actuarial funding of the system itself could be adversely affected.” DRS Brief p. 26.¹ However, it made no factual showing that WSPRS Plan 1 was or will actually be adversely affected. In fact, neither DRS nor the State Actuary can identify what assumptions were originally used to derive the three percent reduction. DRS was unable to identify the interest rate used when the three percent deduction was adopted. DRS now argues that the statutory interest rate increased from 7.5 percent when the three percent reduction was enacted, to eight percent when the deduction was increased from three percent. However, what DRS refers to as an interest rate is an investment rate of return. RCW 41.45.035(3). In short, the State Patrol Retirement System was going to be in better shape than it was when the three percent reduction was adopted, because it is going to earn a half percent more on its investments than it did in 2000.

¹ Actually, this litigation can only potentially affect WSPRS Plan 1. Everyone who became a member of WSPRS on or after January 1, 2003 is in Plan 2. RCW 43.43.120(15).

F. Rule Governing WSPRS Plan1 Did Not Refer to Actuarial
Tables, Schedules and Factors.

DRS argues that in 2003 the Option B equivalent rule was amended to include the periodic updating of actuarial tables, schedules, and factors citing WAC 415-103-215(6). DRS Brief p. 37.

WAC 415-103-215(6) provided as follows:

See chapter 415-02 WAC starting with WAC 415-02-300 for information on how the department uses factors and schedules to calculate retirement benefits.

WAC 415-103-300 said “See chapter 415-02 WAC starting with WAC 415-02-300 for information on how the department uses factors and schedules to calculate optional retirement allowances of members of the Washington state patrol retirement system Plan 2.” (Emphasis supplied)

However, if one went to WAC 41-02-380, relating to surviving beneficiaries, he or she would have found the rule only applied to WSPRS Plan 2. WAC 415-02-380(3). WSR 02-18-048, Section 415-02-380. WAC 415-02-380 (9) and (10), which address the age of members and their survivors only applied to WSPRS Plan 2. WSR 02-18-048, Section 415-02-380. WAC 415-02-380 was amended in 2006 but still only applied to WSPRS Plan 2 and

referred those wanting information about Plan 1 to RCW 43.43.278 and WAC 415-103-215. See WSR 10-16-086, OTS-3351.2, amending WAC 415-02-380.

In short, if you were a Plan 1 member and followed the references, you would be reassured that changing tables, schedules and factors only applied to Plan 2, and not to members of Plan 1. The assurance provided by these rules negate DRS's argument that the language of RCW 43.43.278, referred to a "ongoing" actuarial equivalence. DRS Brief p. 42. A Plan 1 member was assured that the only reduction applicable to him or her was the three percent reduction.

G. Administrative Rules Created Constitutionally Protected Expectations.

In fact, the administrative assurance provided by the WACs is just the type of practice that resulted in constitutionally protected expectations in Bowles v. Department of Retirement Systems, 121 Wn.2d 52, 847 P.2d 440 (1993). This is especially so when "reservation" language, regarding tables, schedules and factors, was adopted for the other retirement systems under the Director's control, including WSPRS Plan 2.

H. Ten Points Responding to DRS.

- 1) The legislature required the Director to develop an “actuarially equivalent” retirement option by enacting RCW 43.43.278.
- 2) At that time, as now, Chapter 43.43 RCW contained a specific definition of “actuarial equivalent.” RCW 43.43.120(1).
- 3) The legislature did not use reservation of rights language in the section which authorized the Option B benefit.
- 4) The Director adopted WAC 415-103-215 implementing the Option B benefit, with the three percent reduction.
- 5) The Director did not use any language reserving the right to change the three percent reduction by using amended tables, schedules and factors, although that language was used for other systems. WAC 415-112-040, WAC 415-104-108, WAC 415-108-340.
- 6) The Director adopted WAC 415-103-300, effective in 2002, which advised readers that actuarial tables,

schedules and factors applied to all systems except WSPRS 1.

- 7) The Director adopted WAC 415-02-380, in 2006, which tied benefit reductions to the surviving beneficiary's age in all systems except WSPRS 1.
- 8) The Director has admitted that, if the same morality tables and interest rates, used in 2000 were used in 2010, the three percent reduction may still have been "actuarially equivalent." Brief of Appellant, p. 17.
- 9) The Director has admitted that neither DRS nor the State Actuary has any documentation of what interest rate(s) or mortality table was used to develop the Option B three percent reduction.²
- 10) The Director left the three percent reduction unchanged for ten years.

II. CONCLUSION

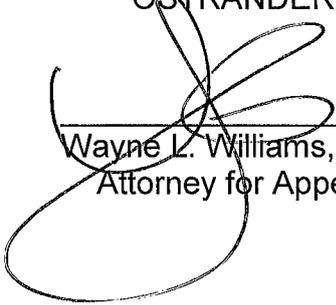
DRS did not have the statutory or constitutional authority to increase the deduction in Mr. Lenander's initial

² In footnote 12, on page 29, DRS presumes the State Actuary used a 7.5 percent interest rate in 2000 and an eight percent rate in 2001. However, it is the rate the Director used that is dispositive. About that, DRS has no knowledge.

retirement allowance from three to 5.3 percent. Mr. Lenander should be granted his attorney's fees and costs.

DATED this 6th day of October, 2015.

WILLIAMS, WYCKOFF &
OSTRANDER, PLLC



Wayne L. Williams, WSBA# 4145
Attorney for Appellant

CERTIFICATE OF MAILING

I, Julie Hatcher, hereby certify that a true and correct copy of Appellant's Reply Brief to Brief of Respondent was mailed and emailed on this date to each of the following:

Sarah Blocki
Office of the Attorney General
P.O. Box 40108
Olympia, Washington 98504-0108
SarahB@atg.wa.gov

Tsering Cornell
Office of the Attorney General
P.O. Box 40108
Olympia, Washington 98504-0108
TseringK@atg.wa.gov

DATED this 8th day of October, 2015.



Julie Hatcher

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