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DIVISION II

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STATE OF WASHINGTON

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DEPUTY

NO. 47337-2

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

TIM LENANDER,

Appellant,

v.

DEPARTMENT OF RETIREMENT SYSTEMS,

Respondent

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BRIEF OF APPELLANT

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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. INTRODUCTION

Mr. Lenander worked as a commissioned officer and member of the Washington State Patrol Retirement System Plan 1 (WSPRS 1)<sup>1</sup>. For his last ten years of service, he was entitled to retire and, by reducing his retirement benefits by three percent, provide his wife with lifetime survivor benefits. Approximately a year before he retired, the Director of the Department of Retirement Systems (Director) changed the benefit calculation to reduce his benefits by 5.3 percent, rather than three percent, to provide the same benefit to his wife. Since cost of living increase percentages will be applied to the reduced benefit, all future cost of living increases, for Mr. Lenander and his spouse, will also be reduced.

We believe the Director lacked the statutory authority to reduce Mr. Lenander's benefits. Mr. Lenander had a constitutionally protected contractual right to have his benefit reduction limited to the original three percent amount.

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<sup>1</sup> Mr. Lenander joined the Washington State Patrol in 1987. (Final Order, p. 4, Finding 5) He was therefore a member of WSPRS Plan 1. WSPRS Plan 2 applies to all who join after January 1, 2003. (Final Order, p. 4, Finding 5)

## II. ASSIGNMENTS OF ERROR

1. The Superior Court erred in entering the order of March 16, 2015, declaring WAC 415-103-215 and WAC 415-02-380 to be valid, as applied to Mr. Lenander.

2. The Superior Court erred in entering its order of March 16, 2015, affirming the November 18, 2013 Final Order of the Department of Retirement Systems (DRS), finding Mr. Lenander's retirement benefit had been correctly reduced by 5.3 percent.

3. The Superior Court erred by, in effect, affirming the last paragraph of the DRS Final Order Conclusion of Law 2 that reads: "It follows that the 5.3% reduction to Mr. Lenander's WSPRS retirement benefit should not be changed because it is the correct one in his circumstance." (Final Order, p. 6)

4. The Superior Court erred by, in effect, affirming that portion of the DRS Final Order, Section 1, p. 12 which states: "The Appellant's WSPRS retirement benefit is correctly reduced by 5.3% for his selection of option B under WAC 415-103-215(3) and WAC 415-02-380(10),(11) (2011)."

5. The Superior Court erred in entering its order of March 16, 2015, to the extent that it required each party to bear its

own attorneys fees and costs in the proceeding before the Superior Court.

### III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the DRS have the statutory authority to reduce Mr. Lenander's retirement benefit by more than the three percent reduction originally authorized by WAC 415-103-215(2)?

Assignments of Error No. 1, 2, 3 and 4.

2. In the absence of a legislative "reservation" of the right to change the benefit calculation, was there some other provision of law which allowed DRS to change the three percent reduction it had adopted? Assignments of Error No. 1, 2, 3 and 4.

3. Where DRS rules specifically "reserved" the right to amend tables, schedules and factors for other retirement systems, but did not do so for WSPRS 1, did that administrative construction give rise to a constitutionally protected right to limit the reduction of State Patrol retirement benefits to the three percent which had been in effect for over ten years? Assignments of Error No. 1, 2, 3 and 4.

4. In the absence of the Director adopting a new mortality table or determining a new interest rate, did the Director

have statutory authority to increase the three percent reduction of benefits? Assignments of Error No. 1, 2, 3 and 4.

5. Did the failure of the Legislature to reserve the right to change the three percent benefit, coupled with DRS' failure to reserve the right to increase the three percent reduction, give rise to a constitutionally protected right of Mr. Lenander to have his benefit reduction limited to three percent? Assignments of Error No. 1, 2, 3 and 4.

6. Is Mr. Lenander entitled to attorney's fees, pursuant to RCW 49.48.030, RCW 4.84.340 and RCW 4.84.350 or the common fund/common benefit theory recognized in Seattle School District No. 1 v. State, 90 Wn.2d 476, 540, 585 P.2d 71 (1978); and Bowles v. Retirement Systems, 121 Wn.2d 52, 847 P.2d 440 (1993). Assignment of Error No. 5.

#### IV. STATEMENT OF THE CASE

This case began with the filing of a Petition for Declaratory Judgment Invalidating Agency Rule (CP 146-174), in Thurston County Superior Court. This was soon followed by a First Amended Petition for Declaratory Judgment Invalidating Agency Rule (CP 175-180). The original Petitioner was Dale Lathan, a retired member of WSPRS 1.

On April 22, 2011, a Motion for Class Certification and Supporting Memorandum was filed. (CP 184-205) The class sought to be certified encompassed those whose retirement benefit calculation had, or would be subject to the new calculation method rather than the flat three percent reduction.

The Department opposed the Motion for Class Certification. (CP 207-218) On June 10, 2011, the Superior Court entered an Agreed Order on Motion for Class Certification. (CP 287-288) The Order denied the Class Certification, but provided that, if the amendments to WAC 415-02-380(10) and (11) and WAC 415-103-215 were invalidated by a court of final appeal, the Department would notify all WSPRS Plan 1 members, who had retired subject to the new benefit calculation, of their right to request a retroactive recalculation of their benefits and that future retiring WSPRS Plan 1 members selecting the option B survivor benefit would be entitled to have their benefits calculated pursuant to the prior, three percent limitation. (CP 288)

On June 8, 2012 the Superior Court entered an Order Supplementing the Agency Record with certain additional documents. (CP 518-557)

On June 29, 2012 the Superior Court entered an Order Staying Proceedings, and allowing the Petitioner to pursue an administrative appeal of his retirement benefit with the Department of Retirement Systems. (CP 571-572) An Order for Substitution of Petitioner and Modification of Order was filed by the Superior Court on December 14, 2012, substituting Tim Lenander for the original Petitioner, Dale Lathan. (CP 585-586) The Order allowed for, among other things, the petition for judicial review of a Department order at the conclusion of the Petitioner's administrative appeal. (CP 586)

A hearing was held before the Department of Retirement Systems, and the issues were briefed and argued. The Department entered its Final Order on November 18, 2013. Mr. Lenander filed a Petition for Review of the Order of the Department of Retirement Systems on December 4, 2013. (CP 729-748) The appeal was granted and was designated Cause No. 13-2-02465-6.

On January 31, 2014, the Superior Court entered the Joint Motion and Order to Lift Stay and Consolidate Appeals. The effect of the Order was to consolidate the appeals in Cause No. 10-2-01949-6 and Cause No. 13-2-02465-6 under Cause No. 10-2-01949-6. (CP 751-758)

On March 7, 2014 a Joint Motion to Vacate and Substitute Order and Order Vacating and Substituting Order was filed. (CP 607-615) The order amended the June 10, 2011 Agreed Order on Motion for Class Certification and provided that Timothy Lenander had standing to pursue the actions consolidated under Cause No. 10-2-01949-6 and that the Department would notify other WSPRS 1 members who had been or would be affected by the change in the three percent reduction, with notice of the Court's decision and the opportunity to have their benefits recalculated, should the attempt to increase the amount of the three percent reduction be ruled invalid on various grounds. (CP 607-615)

Mr. Lenander filed his Superior Court Opening Brief on October 20, 2014. (CP 620-638) The Department filed its response to Mr. Lenander's Opening Brief on November 10, 2014. (CP 644-690) Mr. Lenander filed his reply to the Department's brief on November 20, 2014. (CP 691-701)

On February 27, 2015, the Superior Court heard argument by the parties. (RP 1-42, February 27, 2015)

On March 13, 2015, the Court delivered its Oral Opinion. (RP 1-26, March 13, 2015)

The Thurston County Superior Court entered its Order Declaring Validity of WAC 415-103-215 and WAC 415-02-380 and Affirming Final Order of the Department of Retirement Systems on March 16, 2010. (CP 720-722)

Mr. Lenander then timely filed his Notice of Appeal to this Court on March 23, 2015. (CP 723-727)

#### V. SUMMARY OF ARGUMENT

In 1999, the Legislature required the Director of DRS to develop an "actuarially equivalent retirement option" to provide a benefit to surviving spouses. RCW 43.43.278. At that time, as now, Chapter 43.43 RCW contained a specific definition of "actuarial equivalent." RCW 43.43.120(1). The Legislature did not use reservation of rights language in the section which authorized the Director to adopt the new option. The Director of DRS adopted WAC 415-103-215, providing for a three percent benefit reduction.

In 2002, the Director adopted WAC 415-103-300, which advised readers that actuarial tables, schedules and factors applied to all Systems except WSPRS 1.

The Director did not use language reserving the right to change the WSPRS 1 three percent benefit by using amended tables, schedules or factors, although that language was used for

other retirement systems under his control. WAC 415-112-040 (Teacher Retirement System 1), WAC 415-104-108 (Law Enforcement Officers' and Firefighters' Retirement System), WAC 415-108-340 (Public Employees' Retirement System).

In 2006, the Director adopted WAC 415-02-380 tying retirement benefit reductions to the surviving spouse's beneficiary's age in all Systems except WSPRS 1.

Neither the Director nor the State Actuary has any documentation of what interest rate or mortality table was used to develop the original option B, three percent reduction.

Mr. Lenander worked for ten years with the three percent reduction in effect, and he is entitled to receive a benefit reduction of no more than the three percent. Mr. Lenander's benefit was reduced by 5.3 percent, and this was not statutorily justified nor constitutionally permitted.

#### A. Statutory Background.

A WSPRS member's basic retirement benefit is calculated under RCW 43.43.260. (Attached as Appendix A) Generally, this will be a retirement allowance "equal to two percent of the member's average final salary multiplied by the number of years of service rendered while a member of the retirement

system.” RCW 43.43.260(5) provides the member or beneficiary a consumer price index increase in benefits which cannot exceed three percent.

RCW 43.43.270 only applies to WSPRS Plan 1 members and provides death benefits for spouses of those members who die while in State Patrol or on United States military duty. The benefits are paid to surviving spouses or domestic partners. RCW 43.43.270(2). Death benefits are also provided for the member’s surviving children. RCW 43.43.270(3) and (4).

In 1999, the Legislature enacted Chapter 74, Laws of 1999 (Attached as Appendix B). Subsection 2(1) of the law provided an “annual increase” in retirement benefits for the spouse of retired WSPRS Plan 1 members if they were over the age of 66 in the calendar year in which the increase is provided. Section 2(2) said:

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.

Section 4 of that same act provided as follows:

By July 1, 2000, the department of retirement systems shall adopt rules that allow a member to select, in lieu of benefits under RCW

43.43.270, an actuarially equivalent retirement option that pays the member a reduced retirement allowance and upon death shall be continued throughout the life of a lawful surviving spouse. The continuing allowance to the lawful surviving spouse shall be subject to the yearly increase provided by RCW 43.43.260(5) in lieu of the annual increase provided in section 2 of this act.

In 2000, the Legislature enacted Section 9, Chapter 186, Laws of Washington which amended the 1999 law and RCW 43.43.278, as follows:

By July 1, 2000, the department of retirement systems shall adopt rules that allow a member to select (~~in lieu of benefits under RCW 43.43.270~~) an actuarially equivalent retirement option that pays the member a reduced retirement allowance and upon death shall be continued throughout the life of a lawful surviving spouse. The continuing allowance to the lawful surviving spouse shall be subject to the yearly increase provided by RCW 43.43.260(5) in lieu of the annual increase provided in RCW 43.43.272. The allowance to the lawful surviving spouse or lawful domestic partner under this section, and the allowance for an eligible child or children under RCW 43.43.270, shall not be subject to the limit for combined benefits under RCW 43.43.270.<sup>2</sup> (New language underlined, deleted language interlined.)

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<sup>2</sup> The limit for combined benefits under RCW 43.43.270(3)(a) is 60% of the member's final average salary.

The deleted language shows the actuarial equivalent benefit which was to be provided was not "in lieu benefits under RCW 43.43.270," but a new independent benefit.

In response to the Legislature's command, DRS adopted WAC 415-103-215 which became effective on May 17, 2000. WSR 00-11-103. That Washington Administrative Code Provision provided, in relevant part, as follows:

RCW 43.43.278 requires the department to provide retiring members with an actuarially equivalent retirement option by July 1, 2000. The option pays the retiree a reduced retirement allowance which, upon the retiree's death, continues throughout the life of the lawful surviving spouse. When retiring for service, the married member can select either the historic retirement option under RCW 43.43.270 (Option A) or the actuarially equivalent retirement option (Option B). Both options include a survivor feature that entitles the eligible surviving spouse to receive a monthly allowance after the retiree dies.

(1) Option A (historic retirement option and survivor benefit). The department pays the retiree a monthly retirement allowance in accordance with RCW 43.43.260. The department pays survivor benefits in accordance with RCW 43.43.270.

(2) Option B (actuarially equivalent retirement option and survivor benefit). The department pays the retiree a monthly benefit that is actuarially reduced by three percent to offset the cost of the survivor feature. The retiree's

annual post-retirement increase (PRI) is based upon the amount of the retiree's reduced benefit.

(a) When the retiree dies, the department pays the retiree's eligible spouse a monthly retirement benefit equal to the gross monthly benefit then payable to the retiree. This allowance is paid for the duration of the spouse's lifetime. The surviving spouse allowance will be increased every July 1 by the amount of the PRI that had been paid to the retiree under the provisions of RCW 43.43.260(5).

(b) Benefits to the surviving spouse cease upon the spouse's death.  
(Emphasis supplied)

This three percent reduction of benefits remained essentially unchanged for ten years. Then, effective September 1, 2010, DRS amended WAC 415-103-215(3) to replace the uniform three percent benefit reduction with an individualized calculation that applied new "factors and schedules" as found in WAC 415-02-380. The effect of this amendment was to reduce Mr. Lenander's retirement benefit by 5.3 percent rather than three percent. Final Order, Finding of Fact No. 7. (DRS Certified Record p. 0005).

The magnitude of this rule change is large. If the new age related reduction had been applied to the 183 Plan 1 option B members who had retired as of December 7, 2009, 178 of the 183

would have received a benefit reduction greater than three percent. The average increased deduction in monthly benefits per member would have been \$99.89. (CP 636-638)

In short, the Legislature authorized a particular benefit, which DRS adopted, and DRS attempted to reduce that benefit. It is our position that DRS had neither the statutory nor constitutional authority to do so. The extent of DRS' rule-making authority is a question of law. Washington Public Ports, 148 Wn.2d, at 645, 62 P.2d 462. In Shorelines Hearings Bd., 85 Wn.2d 441, 448, 536 P.2d 157 (1975), the court said:

Certain well settled principles govern the scope of an administrative agency's rule-making authority. First, an agency has only those powers either expressly granted or necessarily implied from statutory grants of authority. Second, an agency does not have the power to promulgate rules that amend or change legislative enactments. Third, rules may 'fill in the gaps' in legislation if such rules are 'necessary to the effectuation of a general statutory scheme.

B. The Enabling Legislation Did Not Allow Future Benefit Reductions.

What became the three percent reduction was authorized by Section 4 of Chapter 74, Laws of 1999. Section 2 of that same act authorized a cost of living increase for certain surviving spouses. That Section 2 read as follows:

(1) Beginning July 1, 1999, and annually thereafter, the surviving spouse allowance provided in RCW 43.43.270 shall be adjusted by the annual increase amount. To be eligible, a surviving spouse must have attained at least age sixty-six by July 1<sup>st</sup> in the calendar year in which the annual increase is provided.

(2) 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.<sup>3</sup>

(Emphasis supplied)

Note that the Legislature specifically attempted to retain the right to amend or repeal the cost of living increase granted by Section 2. Yet it used no such language in Section 4 which led to the three percent reduction.

Since there is no specific provision allowing the Legislature or DRS to change the reduction, once adopted, any authority to make such a change must arise by implication. As we understand it, DRS is arguing that since the original reduction was meant to produce an “actuarially equivalent” benefit, then that reduction can be changed if the new benefit is “actuarially

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<sup>3</sup> This language takes on new significance in view of Wash. Educ. Ass'n v. Ret. Sys., 181 Wn.2d 233, 332 P.3d 439 (2014), which upheld a similar “reservation” clause. There is a companion case dealing with a slightly different issue, but reaching the same result. Wash. Educ. Ass'n v. Ret. Sys., 181 Wn.2d 212, 332 P.3d 428 (2014). For now, we only consider the significance of this provision as it relates to statutory construction.

equivalent.” However, there is nothing in the language of RCW 43.43.278 that authorizes DRS to change the rule which it was required to adopt by July 1, 2000. Even if DRS had the implied authority, that authority would be limited by statutory language.

As we have said, RCW 43.43.278 was adopted by Section 4, Chapter 74, Laws of 1999. Section 1 of the same Act contained the exact definition of "actuarial equivalent" that is found in current law.<sup>4</sup>

The definition is:

“Actuarial equivalent” shall mean 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)

DRS adopted WAC 415-103-010, effective July 9, 2001, which reads, in relevant part, as follows:

(1) General. The definitions in RCW 43.43.120 and 41.50.010 apply to this chapter. In case of conflict between definitions, RCW 43.43.120 will prevail.

The definition of “actuarial equivalent” contained in RCW 43.43.120(1) only allows consideration of an “adopted”

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<sup>4</sup> It was then contained in RCW 43.43.120(16) and is now located in RCW 43.43.120(1).

mortality table and an interest rate "determined" by the Director. RCW 43.43.120(1). To the extent there is a conflict between that statute and WAC provisions, obviously the statute controls.

If there is implied authority to change the retirement calculation the three percent reduction, one or both of the two elements of the definition of actuarial equivalent would have to have changed to justify a different reduction: either the mortality table or interest rate.

When asked about those two elements, DRS responded as follows:

INTERROGATORY NO. 1: If the Department of Retirement Systems had used the same mortality table and interest rate that it used when it promulgated WAC 415-103-215, in May of 2000, at the time it enacted WSPRS WAC 415-02-380(10) and (11), effective September 1, 2010, would the original three percent reduction still have been the actuarial equivalent of the retirement option pursuant to RCW 43.43.278? If your answer is no, please explain your answer.

ANSWER: It is impossible to answer this interrogatory. Because there is no record of what mortality table and interest rate *were* used to calculate the 'flat' 3% actuarial reduction in 2000, it is impossible to perform

the calculation that would be required to respond to this interrogatory.<sup>5</sup>

REQUEST FOR PRODUCTION NO. 2: Please provide us with a copy of the mortality table used to develop the WSPRS1 three percent Option B reduction adopted May 17, 2000.

RESPONSE: Neither the Department of Retirement Systems (the Department) nor the Office of the State Actuary (OSA) has any documentation to indicate what mortality table was used to develop the 'WSPRS1 three percent Option B reduction adopted May 17, 2000.' Smith Dep. 87, 218. Hence, it is impossible to provide a copy thereof.

REQUEST FOR PRODUCTION NO. 3: Please provide us with a copy of the document establishing the interest rate or rates used to develop the WSPRS1 three percent Option B reduction adopted May 17, 2000.

RESPONSE: Neither the Department nor OSA has any documentation to indicate what interest rate[s] was/were used to develop the 'WSPRS1 three percent Option B reduction adopted May 17, 2000.' Smith Dep. 87, 218. Hence, it is impossible to provide a copy of a document establishing them.<sup>6</sup>

We have not found a specific mortality table which was "adopted" by the Director of DRS to apply to WSPRS Plan 1. See, generally, RCW 34.05.360 and RCW 34.05.010 (11)(b).

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<sup>5</sup> Response of DRS to Third Set of Interrogatories and Requests for Production, p. 1. (DRS Certified Record p. 0054).

<sup>6</sup> Response of DRS to Requests for Production, p. 2. (DRS Certified Record p. 0054-0055).

Likewise, we have been unable to find any interest rate which was "determined" by the Director.

Absent proof of a change of either one of the elements in the definition of actuarial equivalent found in RCW 43.43.120(1), there cannot be an implied legal basis to change the three percent reduction.

C. Washington State Patrol Plan 1 System Was Always Understood To Be Different From Other Systems.

When DRS originally adopted WAC 415-103-215, age was not a factor. There were no tables, schedules or factors. There was a three percent reduction. Other retirement systems were different.

For the Teachers Retirement System, DRS adopted WAC 415-112-040, effective January 21, 1991,<sup>7</sup> which provides in relevant part, as follows:

This chapter contains the tables, schedules, and factors adopted by the director of the department of retirement systems pursuant to the authority granted by RCW 41.50.050 and 41.32.140 for calculating optional retirement allowances of members of the Washington state teachers' retirement system, as administered by the director. These tables, schedules, and factors were adopted by the director upon the recommendation of and in

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<sup>7</sup> WSR 91-02-020.

light of the findings of the state actuarial investigation into the mortality, service, compensation, and other experience of the members and the beneficiaries of teachers' retirement system. The tables, schedules, and factors contained in this chapter shall govern the retirement allowances only of members retiring during the period from October 1, 1990 until such time as these tables, schedules, and factors are amended by the director following the next actuarial investigation conducted by the state actuary. The retirement allowances of members retiring before October 1, 1990 shall continue to be governed by the tables, schedules, and factors in effect at the time of each member's retirement. Any new tables, schedules, and factors adopted by the director in the future shall govern retirement allowances only of members retiring after the adoption of such new tables, schedules, and factors. (Emphasis supplied)

Identical language was adopted for the LEOFF Retirement System in WAC 415-104-108<sup>8</sup> and for the PERS Retirement System in WAC 415-108-340.<sup>9</sup> In all these other systems, the Director used "reservation" language similar to that used by the Legislature, in Section 2(2) of the original Act.

WAC 415-103-300, which became effective September 1, 2002, said:

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<sup>8</sup> WSR 91-02-019, effective January 21, 1991.

<sup>9</sup> WSR 91-02-018, effective January 21, 1991.

See chapter 415-02 WAC starting with WAC 415-02-300 for the tables, schedules, and factors the department uses for calculating optional retirement allowances of members of the Washington State Patrol Retirement System Plan II.  
(Emphasis supplied.)

Again, there is no mention of WSPRS Plan 1.

Effective January 1, 2003, DRS amended WAC 415-103-215 to describe WSPRS Plan 1 retirement benefit options. WAC 415-103-215(3) was amended to say "The Department pays a retiree a monthly retirement allowance that is reduced by three percent from the benefit calculated under option A. The Department pays survivor benefits in accordance with RCW 43.43.278." There was no reservation language about future changes.

Effective September 24, 2006, DRS adopted WAC 415-02-380, which contained age related benefit reductions and applied to LEOFF I and II; PERS I, II and III; PSERS<sup>10</sup>; SERS<sup>11</sup> Plan II and III; TRS Plan I, II and III; and WSPRS Plan II. The rule stated that a survivor's beneficiary's age would be used in determining the amount of the retiree's retirement allowance and

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<sup>10</sup> The Public Safety Employees Retirement System. WAC 415-02-020(1)(b).

<sup>11</sup> The School Employees Retirement System. WAC 415-02-020(1)(d).

the allowance of their survivor beneficiary. WAC 415-02-380(5).

Again, the rule did not apply to WSPRS Plan 1.

The administrative practice identified in the rules governing other systems, anticipated and advised everyone that the actuarial rate used would be changed, from time to time, based on "tables, schedules, and factors adopted by the director." No such rules applied to WSPRS Plan 1.

WAC 415-02-380 is the provision which sets forth the tables explaining how age affects the survivor benefit options for the various retirement systems. WSPRS 1, was not included under this WAC until the challenged amendments adopted effective September 1, 2010.

When the Director originally adopted WAC 415-103-215(2), the language could have said: "The Department currently pays the retiree a monthly benefit that is actuarially reduced by three percent." The language could have said: "The Department pays the retiree a monthly benefit that is actuarially reduced by three percent until such time as this amount is amended." The Director chose not to use any limiting language.

This administrative history shows DRS recognized that there was no way to "reserve" the right to change the three

percent reduction which had already been adopted. There was no basis for changing the three percent reduction contained in WAC 415-103-215.

D. Increasing The Three Percent Reduction Violated A Constitutionally Protected Contractual Right.

The constitutional issue is one which DRS rightly made no attempt to resolve, recognizing state agencies have no authority to decide constitutional issues. (DRS Certified Record, p. 0009) Bare v. Gorton, 84 Wn.2d 380, 526 P.2d 379 (1974).

Public employee pension benefits may only be reduced under extremely limited circumstances. Bakenhus v. Seattle, 48 Wn.2d 695, 698, 296 P.2d 536 (1956). A public employee's right to a pension vests when he or she commences service. Washington Fed'n of State Employees, AFL-CIO, Council 28, AFSCME, et al v. State, 98 Wn.2d 677, 683, 658 P.2d 634 (1983).

Although pension rights may be modified prior to retirement, such modifications must be for the sole purpose of keeping the pension system flexible and maintaining its integrity. Even where permitted, the modifications must be reasonable and a disadvantageous modification must be . . . accompanied by a corresponding benefit. If there is no counter

balance, the disadvantageous modification will be declared unreasonable.  
State Employees, 98 Wn.2d 683-684.

Violation of a public employee's right to pension benefits constitutes an unconstitutional impairment of contract pursuant to Article 1, Section 23, Washington State Constitution.  
Washington Fed'n of State Employees, *supra*.

When you compare the reservation of rights considered in Wash. Educ. Ass'n v. Ret. Sys. (*supra*, p. 15) with the language authorizing the three percent reduction, the difference is stark.

The Legislature, in 1995, had enacted a cost-of-living adjustment which increased retiree's pension benefits each year by three percent. When it enacted this "UCOLA," the legislation also provided:

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 his postretirement adjustment not granted prior to that time." Former RCW 41.32.489(6); former RCW 41.40.197(6).<sup>12</sup>

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<sup>12</sup> The Teachers Retirement System and the Public Employees Retirement System.

In 2011, the Legislature repealed the UCOLA. This froze the amount retired employees could receive to the previously adjudicated 2010 amount. PERS Plan 1 employees, who had not retired, would receive no UCOLA adjustments. Not surprisingly, this was challenged, by affected public employees, as an unconstitutional impairment of contract.

The Supreme Court upheld the repeal of the UCOLA, adopting a test begun by Carlstrom v. State, 103 Wn.2d 391, 394-399, 694 P.2d 1 (1985). The Supreme Court established a three prong test as follows:

- (1) Whether a contractual relationship exists;
- (2) Whether the legislation substantially impairs the contractual relationship; and
- (3) If there is substantial impairment, whether the impairment is reasonable and necessary to serve a legitimate public purpose.

Since the reservation clause was a part of the legislation which granted the UCOLA benefit, the Court upheld the right to repeal that which had been reserved. The reservation prevented the benefit from meeting the second prong, since the contract, itself, allowed the change.

However, the Supreme Court's decision also warns about the need for specificity in a reservation clause, saying:

The ordinary rules of construction link the enforceability of reservation clauses to the degree of specificity contained in the clause. See, e.g., Wash. Fed'n, 127 Wn.2d at 563 ("To be effective as a reservation of powers clause, the language must specifically and explicitly mention future retroactive modification of preexisting or already performed contracts."); Caritas, 123 Wn.2d at 406-07 (holding a reservation clause unenforceable and reasoning that "our case law requires such reservation clauses to be made *explicitly* contingent on future acts of the Legislature with retroactive effect"); Carlstrom, 103 Wn2d at 398 (holding a reservation clause unenforceable because it was not specific enough and reasoning that "[t]he Legislature knows how to use plain English to make existing contracts subject to future modification"). 181 Wn.2d, 247.

(Emphasis in original)

With the specific benefit, in this case, there was no legislative reservation of rights, nor was there any suggestion the Director of DRS was authorized to do anything except, by July 1, 2000, adopt rules establishing a reduction. In the same Act, when the legislature wished to reserve the right to change a grant of benefits, it used "plain English" to do so. Section 2, Chapter 74, Laws of 1999.

In Washington Association of County Officials v. Washington Public Employees Retirement System Board, 89 Wn.2d 729, 575 P.2d 230 (1978) the Supreme Court extended its prior holdings to prohibit pension reductions caused by an administrative body rather than the legislature.

In Bowles v. Retirement Systems, 121 Wn.2d 52, 847 P.2d 440 (1993) the court further extended its holding to say that:

... the cases established flat rules prohibiting the state from altering pension rights in a manner that is disadvantageous to the PERS1 employees. These rules apply whether or not many of the employees knew the specifics of their pension rights and had any specific expectations in them. (121 Wn.2d 67)

As to the period of time an administrative practice must be in effect before constitutionally protected rights arise, the practice in Bowles v. Retirement Systems, supra, lasted from four to ten years. Bowles v. Retirement Systems, 121 Wn.2d 68.

In this case, the practice of reducing benefits by three percent, continued for almost ten years. At no time during this ten year period did DRS adopt a rule which indicated that the three percent reduction might be increased in the future. This must be contrasted to the language used for other retirement systems which did alert members that current rates (practices) were transitory.

The change from the three percent reduction to that enacted in 2010 was clearly a detriment. If the new age related reduction had been applied to the 183 option B retirees, who had retired before December 7, 2009, 178 of them would have received a reduced benefit. Mr. Lenander certainly was detrimentally affected.

The DRS reliance on King County Employees' Association v. State Employees' Retirement Board, 54 Wn.2d 1, 336 P.2d 387 (1959) is badly misplaced. In that case, retirees were entitled to annuities and the Retirement System was directed by RCW 41.04.050 to adopt tables, schedules, factors and regulations as were deemed necessary. The Board adopted new mortality tables which reflected that women on average, outlived men and provided a smaller annuity to women. In this case, Chapter 43.43 RCW does not refer to "tables, schedules and factors." There is no evidence the Director adopted a new mortality table.

If members in the King County Employees case, had been told their benefit would be reduced by three percent to provide a benefit to their surviving spouse, and the Retirement Board later increased the deduction to 5.3 percent for retiring women, the

measure would be struck down because a three percent reduction has none of the inherent ambiguity of the phrase "an annuity."

On very similar facts, the Alaska Supreme Court rejected a change in Retirement Board adopted mortality tables because the effect was to decrease some member benefits. Sheffield v. Alaska Public Employees' Association, Inc., 732 P.2d 1083 (1987). The court specifically rejected the reasoning of King County Employees' Association v. State Employees Retirement Board, supra. Alaska uses the same contract theory to protect public employees as does Washington. They held vested rights include the amount of benefits payable, not just an actuarial calculation. A copy of the Sheffield decision is attached as Appendix C.

Expectations created by administrative action or inaction are protected just as assiduously as those enacted by the legislature. In County Officials v. Retirement Board, 89 Wn.2d 729, 733, 575 P.2d 230 (1978) our Supreme Court said:

For 25 years, PERS has consistently included termination payments in the computation of "average final compensation." During this period numerous expectations based upon this practice have arisen in the minds of current employee-members of the system. To now hold termination payments not includable

would violate those expectations and be contrary to the position of this court first expressed in Bakenhus v. Seattle, 48 Wn.2d 695, 700, 296 P.2d 536 (1956), where we stated 'The promise on which the employee relies is that which is made at the time he enters employment; and the obligation of the employer is based upon this promise.'

In Bowles v. Retirement Systems, *supra*, the court considered a Public Employees Retirement System (PERS) change of procedure which had the effect of reducing some employees pension levels by reducing the amount of accrued leave included in pension calculations.

The Court said:

Here, the Department consistently and routinely refused to take into account employers' percentage limitations for a period of 4 to 10 years after learning of the existence of these limitations. The Department's own 1980 memorandum terms its action as a "change", not just a clarification, of practice. We conclude that after 4 to 10 years of consistent application, the practice was no longer in an experimental phase but had become an established policy.

We conclude the Department violated the pension rights of PERS I employees when it reduced pension levels by changing its practices with regard to employers' percentage limitations.

The three percent adopted by DRS could hardly have been clearer. The Department said it would pay a retiree a monthly benefit that is reduced by three percent. Members expected to receive that reduced benefit. That expectation is constitutionally protected.

E. Mr. Lenander Is Entitled To Attorney's Fees.

On the issue of attorneys fees, precedent is to be found in Bates v. City of Richland, 112 Wn.App 919, 51 P.3d 816 (2002) which determined that recovery of statutory disability benefits qualifies as "wages" within the definition of RCW 49.46.010(7). The Bates decision held that attorney's fees can be recovered under RCW 49.48.030, whenever a judgment is obtained for any type of compensation due by reason of employment.

RCW 49.48.030 provides that:

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, in an amount to be determined by the court, shall be assessed against said employer or former employer: PROVIDED, HOWEVER, That this section shall not apply if the amount of recovery is less than or equal to the amount admitted by the employer to be owing for said wages or salary.

Division II has accepted the reasoning of the Bates court as it applied to Washington State Patrol Disability benefits. See Merino v. State, 179 Wn.App 889, 320 P.3d 153 (2014).

In this case, we request you to regard the State of Washington as Mr. Lenander's employer and award fees against DRS, the State agency charged with providing retired WSPRS 1 members and their spouse's benefits.

RCW 4.84.340 and RCW 4.84.350 also allow an award of attorney's fees and expenses as follows:

(3) "Fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of a study, analysis, engineering report, test, or project that is found by the court to be necessary for the preparation of the party's case, and reasonable attorneys' fees. Reasonable attorneys' fees shall be based on the prevailing market rates for the kind and quality of services furnished, except that (a) no expert witness shall be compensated at a rate in excess of the highest rates of compensation for expert witnesses paid by the state of Washington, and (b) attorneys' fees shall not be awarded in excess of one hundred fifty dollars per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

RCW 4.84.350 applies to judicial review of agency action and allows awarding fees, expenses and attorney's fees.

(1) Except as otherwise specifically provided by statute, a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

These statutes also authorize an award of costs, expenses and attorneys fees to Mr. Lenander, since he prevailed in a judicial review of an agency action. Gerow v. Washington State Gambling Commission, 181 Wn.App 229, 324 P.3d 800 (2014).

In oral argument, before the Superior Court, counsel for Mr. Lenander asked the court to award attorney fees pursuant to the common fund or common benefit theory utilized by the Supreme Court in Bowles v. Retirement Systems, *supra*. (RP 11, February 27, 2015.)

On March 15, 2015 DRS filed a pleading titled Department of Retirement Systems Motion to Dismiss Common Fund Attorney Fees Claim. (CP 716-718). On March 15, 2015,

when the Superior Court announced its decision, counsel for DRS said:

The Department submitted a motion to dismiss Mr. Lenander's most recent claims made during rebuttal for attorney's fees under the common fund. As this court has ruled in favor of the Department, we can withdraw that motion for - - the motion to dismiss. (RP 25, March 13, 2015)

Mr. Lenander renews his request for fees pursuant to a common fund/common benefit theory. Bowles, supra at 121 Wn.2d 52, 70-71. Although not a class action, if Mr. Lenander prevails he will cause DRS to increase benefits for a number of WSPRS members, due to the Amended Agreed Order on Motion for Class Certification. (CP 607-615).

#### VI CONCLUSION

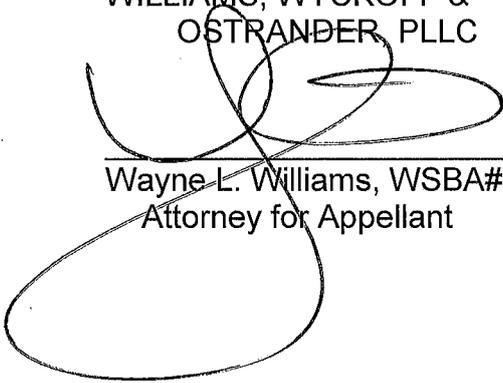
RCW 43.43.278 did not grant DRS the power the change the rule it required DRS to adopt by July 1, 2000. If a rule change were allowed, it must be an "actuarial equivalent," as defined in RCW 43.43.120(1), which must be based upon the adoption of a new mortality table and/or a determination of a new interest rate. This has not occurred.

Administrative history gave no indication the Director had the power to change the three percent reduction. For over nine

years, the only reduction applicable to WSPRS 1 retirement was three percent. Nothing in statute or DRS rules suggested or advised that future calculations could or would be changed. Mr. Lenander had and has a constitutionally protected contract right to the continuation of the three percent reduction. He is entitled to attorney's fees and costs for protecting his right.

DATED this 17<sup>th</sup> day of July, 2015.

WILLIAMS, WYCKOFF &  
OSTRANDER, PLLC



Wayne L. Williams, WSBA# 4145  
Attorney for Appellant

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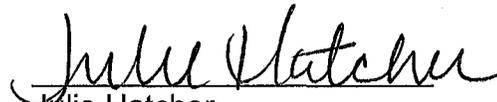
CERTIFICATE OF MAILING

I, Julie Hatcher, hereby certify that a true and correct copy of Brief of Appellant 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 17<sup>th</sup> day of July, 2015.

  
Julie Hatcher

# APPENDIX A

West's Revised Code of Washington Annotated
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Title 43. State Government--Executive (Refs & Annos)
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Chapter 43.43. Washington State Patrol (Refs & Annos)
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West's RCWA 43.43.260

43.43.260. Benefits--Military service credit

Effective: July 26, 2009

Currentness

Upon retirement from service as provided in RCW 43.43.250, a member shall be granted a retirement allowance which shall consist of:

(1) A prior service allowance which shall be equal to two percent of the member's average final salary multiplied by the number of years of prior service rendered by the member.

(2) A current service allowance which shall be equal to two percent of the member's average final salary multiplied by the number of years of service rendered while a member of the retirement system.

(3)(a) Any member commissioned prior to January 1, 2003, with twenty-five years service in the Washington state patrol may have the member's service in the uniformed services credited as a member whether or not the individual left the employ of the Washington state patrol to enter such uniformed services: PROVIDED, That in no instance shall military service in excess of five years be credited: AND PROVIDED FURTHER, That in each instance, a member must restore all withdrawn accumulated contributions, which restoration must be completed on the date of the member's retirement, or as provided under RCW 43.43.130, whichever occurs first: AND PROVIDED FURTHER, That this section shall not apply to any individual, not a veteran within the meaning of RCW 41.06.150.

(b) A member who leaves the Washington state patrol to enter the uniformed services of the United States shall be entitled to retirement system service credit for up to five years of military service. This subsection shall be administered in a manner consistent with the requirements of the federal uniformed services employment and reemployment rights act.

(i) The member qualifies for service credit under this subsection if:

(A) Within ninety days of the member's honorable discharge from the uniformed services of the United States, the member applies for reemployment with the employer who employed the member immediately prior to the member entering the uniformed services; and

(B) The member makes the employee contributions required under RCW 41.45.0631 and 41.45.067 within five years of resumption of service or prior to retirement, whichever comes sooner; or

(C) Prior to retirement and not within ninety days of the member's honorable discharge or five years of resumption of service the member pays the amount required under RCW 41.50.165(2); or

(D) If the member was commissioned on or after January 1, 2003, and, prior to retirement, the member provides to the director proof that the member's interruptive military service was during a period of war as defined in RCW 41.04.005. Any member who made payments for service credit for interruptive military service during a period of war as defined in RCW 41.04.005 may, prior to retirement and on a form provided by the department, request a refund of the funds standing to his or her credit for up to five years of such service, and this amount shall be paid to him or her. Members with one or more periods of interruptive military service credit during a period of war may receive no more than five years of free retirement system service credit under this subsection.

(ii) Upon receipt of member contributions under (b)(i)(B), (b)(iv)(C), and (b)(v)(C) of this subsection, or adequate proof under (b)(i)(D), (b)(iv)(D), or (b)(v)(D) of this subsection, the department shall establish the member's service credit and shall bill the employer for its contribution required under RCW 41.45.060 for the period of military service, plus interest as determined by the department.

(iii) The contributions required under (b)(i)(B), (b)(iv)(C), and (b)(v)(C) of this subsection shall be based on the compensation the member would have earned if not on leave, or if that cannot be estimated with reasonable certainty, the compensation reported for the member in the year prior to when the member went on military leave.

(iv) The surviving spouse or lawful domestic partner or eligible child or children of a member who left the employ of an employer to enter the uniformed services of the United States and died while serving in the uniformed services may, on behalf of the deceased member, apply for retirement system service credit under this subsection up to the date of the member's death in the uniformed services. The department shall establish the deceased member's service credit if the surviving spouse or lawful domestic partner or eligible child or children:

(A) Provides to the director proof of the member's death while serving in the uniformed services;

(B) Provides to the director proof of the member's honorable service in the uniformed services prior to the date of death; and

(C) If the member was commissioned on or after January 1, 2003, pays the employee contributions required under chapter 41.45 RCW within five years of the date of death or prior to the distribution of any benefit, whichever comes first; or

(D) If the member was commissioned on or after January 1, 2003, and, prior to the distribution of any benefit, provides to the director proof that the member's interruptive military service was during a period of war as defined in RCW 41.04.005. If the deceased member made payments for service credit for interruptive military service during a period of war as defined in RCW 41.04.005, the surviving spouse or eligible child or children may, prior to the distribution of any benefit and on a form provided by the department, request a refund of the funds standing to the deceased member's credit for up to five years of such service, and this amount shall be paid to the surviving spouse or children. Members with one or more periods of interruptive military service during a period of war may receive no more than five years of free retirement system service credit under this subsection.

(v) A member who leaves the employ of an employer to enter the uniformed services of the United States and becomes totally incapacitated for continued employment by an employer while serving in the uniformed services is entitled to retirement system service credit under this subsection up to the date of discharge from the uniformed services if:

(A) The member obtains a determination from the director that he or she is totally incapacitated for continued employment due to conditions or events that occurred while serving in the uniformed services;

(B) The member provides to the director proof of honorable discharge from the uniformed services; and

(C) If the member was commissioned on or after January 1, 2003, the member pays the employee contributions required under chapter 41.45 RCW within five years of the director's determination of total disability or prior to the distribution of any benefit, whichever comes first; or

(D) If the member was commissioned on or after January 1, 2003, and, prior to retirement, the member provides to the director proof that the member's interruptive military service was during a period of war as defined in RCW 41.04.005. Any member who made payments for service credit for interruptive military service during a period of war as defined in RCW 41.04.005 may, prior to retirement and on a form provided by the department, request a refund of the funds standing to his or her credit for up to five years of such service, and this amount shall be paid to him or her. Members with one or more periods of interruptive military service during a period of war may receive no more than five years of free retirement system service credit under this subsection.

(4) In no event shall the total retirement benefits from subsections (1), (2), and (3) of this section, of any member exceed seventy-five percent of the member's average final salary.

(5) Beginning July 1, 2001, and every year thereafter, the department shall determine the following information for each retired member or beneficiary whose retirement allowance has been in effect for at least one year:

(a) The original dollar amount of the retirement allowance;

(b) The index for the calendar year prior to the effective date of the retirement allowance, to be known as “index A”;

(c) The index for the calendar year prior to the date of determination, to be known as “index B”; and

(d) The ratio obtained when index B is divided by index A.

The value of the ratio obtained shall be the annual adjustment to the original retirement allowance and shall be applied beginning with the July payment. In no event, however, shall the annual adjustment:

(i) Produce a retirement allowance which is lower than the original retirement allowance;

(ii) Exceed three percent in the initial annual adjustment; or

(iii) Differ from the previous year’s annual adjustment by more than three percent.

For the purposes of this section, “index” means, for any calendar year, that year’s average consumer price index for the Seattle-Tacoma-Bremerton Washington area for urban wage earners and clerical workers, all items, compiled by the bureau of labor statistics, United States department of labor.

The provisions of this section shall apply to all members presently retired and to all members who shall retire in the future.

### Credits

[2009 c 522 § 2, eff. July 26, 2009; 2009 c 205 § 9, eff. July 26, 2009; 2005 c 64 § 10, eff. July 24, 2005; 2002 c 27 § 3; 2001 c 329 § 4; 1994 c 197 § 34; 1982 1st ex.s. c 52 § 27; 1973 1st ex.s. c 180 § 3; 1971 ex.s. c 278 § 1; 1969 c 12 § 4; 1965 c 8 § 43.43.260. Prior: 1963 c 175 § 2; 1957 c 162 § 4; 1955 c 244 § 2; 1951 c 140 § 5; 1947 c 250 § 15; Rem. Supp. 1947 § 6362-95.]

Notes of Decisions (1)

West’s RCWA 43.43.260, WA ST 43.43.260

Current with legislation effective through May 18, 2015, which includes Chapters 1 through 4, 70 (part), 125, 134, 193, 222, 234 (part), 244 (part), 269 (part), 273, 281, and 289 from the 2015 Regular Session

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# APPENDIX B

payment of ~~((the costs of administering the program))~~ administrative and operating costs of the agency are subject to the allotment procedures under chapter 43.88 RCW and may be made only after appropriation by statute. No appropriation is required for other expenditures from the account.

(2) Each calendar quarter, the director shall report to the insurance commissioner the loss and surplus reserves required for the calendar quarter. The director shall notify the department of revenue of this amount by the fifteenth day of each calendar quarter.

(3) Each calendar quarter the director shall determine the amount of reserves necessary to fund commitments made to provide financial assistance under RCW 70.148.130 to the extent that the financial assistance reserves do not jeopardize the operations and liabilities of the pollution liability insurance program. The director shall notify the department of revenue of this amount by the fifteenth day of each calendar quarter. The director may immediately establish an initial financial assistance reserve of five million dollars from available revenues. The director may not expend more than fifteen million dollars for the financial assistance program.

(4) This section expires June 1, 2001.

Passed the Senate March 12, 1999.

Passed the House April 8, 1999.

Approved by the Governor April 22, 1999.

Filed in Office of Secretary of State April 22, 1999.

## CHAPTER 74

[Substitute Senate Bill 5030]

### WASHINGTON STATE PATROL SURVIVING SPOUSE RETIREMENT ALLOWANCE-- ANNUAL INCREASE

AN ACT Relating to the Washington state patrol surviving spouse retirement allowance; amending RCW 43.43.120 and 43.43.274; and adding new sections to chapter 43.43 RCW.

Be it enacted by the Legislature of the State of Washington:

**Sec. 1.** RCW 43.43.120 and 1983 c 81 s 1 are each amended to read as follows:

As used in the following sections, unless a different meaning is plainly required by the context:

- (1) "Retirement system" means the Washington state patrol retirement system.
- (2) "Retirement fund" means the Washington state patrol retirement fund.
- (3) "State treasurer" means the treasurer of the state of Washington.
- (4) "Member" means any person included in the membership of the retirement fund.
- (5) "Employee" means any commissioned employee of the Washington state patrol.

(6)(a) "Cadet," for a person who became a member of the retirement system after June 12, 1980, is a person who has passed the Washington state patrol's entry-level oral, written, physical performance, and background examinations and is, thereby, appointed by the chief as a candidate to be a commissioned officer of the Washington state patrol.

(b) "Cadet," for a person who became a member of the retirement system before June 12, 1980, is a trooper cadet, patrol cadet, or employee of like classification, employed for the express purpose of receiving the on-the-job training required for attendance at the state patrol academy and for becoming a commissioned trooper. "Like classification" includes: Radio operators or dispatchers; persons providing security for the governor or legislature; patrolmen; drivers' license examiners; weighmasters; vehicle safety inspectors; central wireless operators; and warehousemen.

(7) "Beneficiary" means any person in receipt of retirement allowance or any other benefit allowed by this chapter.

(8) "Regular interest" means interest compounded annually at such rates as may be determined by the director.

(9) "Retirement board" means the board provided for in this chapter.

(10) "Insurance commissioner" means the insurance commissioner of the state of Washington.

(11) "Lieutenant governor" means the lieutenant governor of the state of Washington.

(12) "Service" shall mean services rendered to the state of Washington or any political subdivisions thereof for which compensation has been paid. Full time employment for seventy or more hours in any given calendar month shall constitute one month of service. An employee who is reinstated in accordance with RCW 43.43.110 shall suffer no loss of service for the period reinstated subject to the contribution requirements of this chapter. Only months of service shall be counted in the computation of any retirement allowance or other benefit provided for herein. Years of service shall be determined by dividing the total number of months of service by twelve. Any fraction of a year of service as so determined shall be taken into account in the computation of such retirement allowance or benefit.

(13) "Prior service" shall mean all services rendered by a member to the state of Washington, or any of its political subdivisions prior to August 1, 1947, unless such service has been credited in another public retirement or pension system operating in the state of Washington.

(14) "Current service" shall mean all service as a member rendered on or after August 1, 1947.

(15) "Average final salary" shall mean the average monthly salary received by a member during the member's last two years of service or any consecutive two-year period of service, whichever is the greater, as an employee of the Washington

state patrol; or if the member has less than two years of service, then the average monthly salary received by the member during the member's total years of service.

(16) "Actuarial equivalent" shall mean 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.

(17) Unless the context expressly indicates otherwise, words importing the masculine gender shall be extended to include the feminine gender and words importing the feminine gender shall be extended to include the masculine gender.

(18) "Director" means the director of the department of retirement systems.

(19) "Department" means the department of retirement systems created in chapter 41.50 RCW.

(20) "State actuary" or "actuary" means the person appointed pursuant to RCW 44.44.010(2).

(21) "Contributions" means the deduction from the compensation of each member in accordance with the contribution rates established under RCW 43.43.300.

(22) "Annual increase" means as of July 1, 1999, seventy-seven cents per month per year of service which amount shall be increased each subsequent July 1st by three percent, rounded to the nearest cent.

**NEW SECTION. Sec. 2.** A new section is added to chapter 43.43 RCW to read as follows:

(1) Beginning July 1, 1999, and annually thereafter, the surviving spouse allowance provided in RCW 43.43.270 shall be adjusted by the annual increase amount. To be eligible, a surviving spouse must have attained at least age sixty-six by July 1st in the calendar year in which the annual increase is provided.

(2) 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.

**Sec. 3.** RCW 43.43.274 and 1997 c 72 s 1 are each amended to read as follows:

Effective July 1, 1997, the retirement allowance under RCW 43.43.260 and 43.43.270(2) shall not be less than twenty dollars per month for each year of service. Effective July 1, 1999, and annually thereafter, the retirement allowance provided under this section shall be adjusted by the annual increase amount. If the member has elected to receive a reduced retirement allowance under RCW 43.43.280(2), the minimum retirement allowance under this section shall be reduced accordingly.

**NEW SECTION. Sec. 4.** A new section is added to chapter 43.43 RCW to read as follows:

By July 1, 2000, the department of retirement systems shall adopt rules that allow a member to select, in lieu of benefits under RCW 43.43.270, an actuarially equivalent retirement option that pays the member a reduced retirement allowance and upon death shall be continued throughout the life of a lawful surviving spouse.

The continuing allowance to the lawful surviving spouse shall be subject to the yearly increase provided by RCW 43.43.260(5) in lieu of the annual increase provided in section 2 of this act.

Passed the Senate March 11, 1999.

Passed the House April 9, 1999.

Approved by the Governor April 22, 1999.

Filed in Office of Secretary of State April 22, 1999.

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## CHAPTER 75

[Senate Bill 5037]

### COURT OF APPEALS—NEW JUDICIAL POSITION

AN ACT Relating to the court of appeals; amending RCW 2.06.020; and adding a new section to chapter 2.06 RCW.

Be it enacted by the Legislature of the State of Washington:

**Sec. 1.** RCW 2.06.020 and 1993 c 420 s 1 are each amended to read as follows:

The court shall have three divisions, one of which shall be headquartered in Seattle, one of which shall be headquartered in Spokane, and one of which shall be headquartered in Tacoma:

(1) The first division shall have twelve judges from three districts, as follows:

(a) District 1 shall consist of King county and shall have eight judges;

(b) District 2 shall consist of Snohomish county and shall have two judges;

and

(c) District 3 shall consist of Island, San Juan, Skagit and Whatcom counties and shall have two judges.

(2) The second division shall have ~~((six))~~ seven judges from the following districts:

(a) District 1 shall consist of Pierce county and shall have ~~((two))~~ three judges;

(b) District 2 shall consist of Clallam, Grays Harbor, Jefferson, Kitsap, Mason, and Thurston counties and shall have two judges;

(c) District 3 shall consist of Clark, Cowlitz, Lewis, Pacific, Skamania, and Wahkiakum counties and shall have two judges.

(3) The third division shall have five judges from the following districts:

(a) District 1 shall consist of Ferry, Lincoln, Okanogan, Pend Oreille, Spokane and Stevens counties and shall have two judges;

(b) District 2 shall consist of Adams, Asotin, Benton, Columbia, Franklin, Garfield, Grant, Walla Walla, and Whitman counties and shall have one judge;

(c) District 3 shall consist of Chelan, Douglas, Kittitas, Klickitat and Yakima counties and shall have two judges.

**NEW SECTION. Sec. 2.** A new section is added to chapter 2.06 RCW to read as follows:

# APPENDIX C

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> Sheffield v. ALASKA PUBLIC EMP. ASS'N

## Sheffield v. ALASKA PUBLIC EMP. ASS'N

[Annotate this Case](#)

**732 P.2d 1083 (1987)**

Honorable William SHEFFIELD, Governor, State of Alaska; Eleanor Andrews, Commissioner, Department of Administration, State of Alaska; Department of Administration, State of Alaska; Public Employees' Retirement Board, State of Alaska; and the State of Alaska, Appellants, v. ALASKA PUBLIC EMPLOYEES' ASSOCIATION, INC., a non-profit corporation; Robert S. Moffat; Vernon L. Helkenn; Albert F. Detmer; and Gary L. Teseneer, Appellees.

No. S-1238.

**Supreme Court of Alaska.**

February 20, 1987.

Virginia B. Ragle, Asst. Atty. Gen., and Harold M. Brown, Atty. Gen., Juneau, for appellants.

\*1084 John B. Gaguine, Juneau, for appellees.

Constance E. Livsey, Jermain, Dunnagan & Owens, Anchorage, for amicus curiae.

Before RABINOWITZ, C.J., and BURKE, MATTHEWS, COMPTON and MOORE, JJ.

OPINION

RABINOWITZ, Chief Justice.

The issue presented is whether the Alaska Public Employees' Retirement Board may compute early retirement benefits for an employee according to actuarial factors adopted subsequent to the commencement of his employment by the state and prior to his retirement, when such computation reduces the amount of early retirement benefits the

employee would receive when compared to payments calculated under the actuarial factors operative at the time of commencement of his state employment. The superior court held that article XII, section 7 of the Alaska Constitution prohibits such a reduction in employees' retirement benefits. We affirm.

## FACTS AND PROCEEDINGS BELOW

Prior to amendments effective in 1986, the Alaska Public Employees' Retirement System ("PERS") Act provided that a state employee with at least five years of credited service could elect early retirement at age fifty, subject to an actuarial adjustment of the amount of PERS benefits he or she would have received upon normal retirement at age fifty-five. AS 39.35.370(a)(c) (1984) (amended 1986).[1] PERS defines "actuarial adjustment" to mean "equality in value of the aggregate expected payments under two different forms of pension payments, considering expected mortality and interest earnings on the basis of tables adopted from time to time by the [PERS] board." AS 39.35.680(2). The PERS board adopted a new table of actuarial factors effective January 1, 1981, based on then-current mortality and interest earnings data, which superseded the table in effect since 1972.

In August 1982, the Alaska Public Employees' Association ("APEA") and four of its members whose employment by the state began before January 1, 1981, filed this action seeking to enjoin the application of the new actuarial table to all PERS members similarly situated to the named individual plaintiffs.[2] APEA alleged that article XII, section 7 of the Alaska Constitution bars application of the new table to such employees because any of them taking early retirement on or after January 1, 1981, would receive lower monthly benefits than they would have received under the 1972 table of factors.[3] Alaska Const. art. XII, § 7 provides:

Membership in employee retirement systems of the State or its political subdivisions shall constitute a contractual relationship. Accrued benefits of these systems shall not be diminished or impaired.

The parties submitted the case for decision on cross-motions for summary judgment. Among the facts to which they stipulated was that the 1981 factors "come closer to achieving equality in value of aggregate payments as between early and normal retirement than would be possible under the old factors... ." The superior \*1085 court denied the state's motion and granted APEA's motion for summary judgment in a Memorandum Decision and Order issued June 4, 1985. Adhering to our prior ruling that an employee's right to PERS benefits vests upon employment and enrollment in the PERS system,[4] the superior court held that the state could not constitutionally apply the new actuarial factors to employees whose rights vested prior to January 1, 1981.[5] This appeal followed.[6]

## DISCUSSION

Hammond v. Hoffbeck, 627 P.2d 1052 (Alaska 1981), controls the disposition of this case. In Hoffbeck, this court held that an employee's right to PERS benefits vests upon employment and enrollment in the PERS system rather than at the time when he or she is eligible to receive benefits, and that any changes in the system that operate to a given employee's disadvantage must be offset by comparable advantages to that employee. *Id.* at 1056-57. A diminution in an employee's vested right<sup>[7]</sup> to benefits is constitutionally infirm under Alaska Const. art. XII, § 7, if it is not outweighed by comparable advantages. *Id.* at 1059. Of particular relevance to the solution of this case is the fact that in Hoffbeck we stated that the vested rights protected by this section "necessarily include ... the dollar amount of the benefits payable... ." *Id.* at 1058 (emphasis added).

The state attempts to distinguish Hoffbeck on the ground that the case involved a statutory amendment which reduced the percentage of monthly salary according to which the benefits of certain retirees were calculated, whereas the PERS provisions in issue here do not promise a specific amount of early retirement benefits but merely an early benefit "equal in value" to the normal benefit the employee would have received upon retirement at age fifty-five with the same number of years of service. The state in effect argues that no reduction in the benefits to which early retirees are entitled has occurred.<sup>[8]</sup>

\*1086 Courts from other jurisdictions have endorsed the position argued by the state. In *King County Employees' Ass'n v. State Employees' Retirement Bd.*, 54 Wash.2d 1, 336 P.2d 387 (1959) (en banc), the Washington Supreme Court confronted a case in which computation of retirement benefits for female employees, under actuarial tables for female lives in lieu of the tables for male lives previously applied, resulted in a decrease in female employees' monthly benefit payments. The statutory scheme in issue was in most respects identical to the PERS provisions in issue here.<sup>[9]</sup> The court held that the new tables could be validly applied to all female employees who had not yet retired as of the effective date of the new tables; it reasoned that the employees had "acquired a contractual right to an annuity when they commenced employment under the provisions of the statute," but that

one must look to the statute to determine what that annuity is... . The member, under the plain wording of the statute, does not acquire a vested contractual right to an annuity based on the mortality table in use when the employee became a member of the retirement system; rather, the employee acquires a vested right to "a benefit of equal value" to his or her accumulated contributions, which is to be paid on a monthly basis over the remainder of his or her life. Any computations based upon mortality tables rejected by the board because from experience and actuarial investigation they did not properly reflect the life expectancy

of retiring members would be actuarially unsound, and would not give the employees what they had contracted for.

Id. 336 P.2d at 392. See also *Olson v. Cory*, 93 Cal. App.3d 942, 156 Cal. Rptr. 127, 134 (1979), rev'd on other grounds, 27 Cal.3d 203, 164 Cal. Rptr. 217, 609 P.2d 991 (1980), quoting in part *Casserly v. City of Oakland*, 6 Cal.2d 64, 56 P.2d 237, 239 (1936) ("[W]hen the pension is a floating or fluctuating pension, `the right which [is] vested is the right to have the pension, not of a particular number of dollars, but `equal to [a percentage] of the amount of salary attached to the rank,' whether it should be more or less than that attached to the rank when the contract of employment was made."); cf. *O'Neal v. Trustees, Springfield Firemen's Pension and Relief Fund*, 160 N.E.2d 563, 568 (Ohio C.P. Clark County 1959) ("[No] rights to any monies [contributed to the pension fund] result except as specifically provided by the statutes creating the fund and governing its operation.").

We do not, however, find the foregoing arguments sufficiently compelling to overcome the view we espoused in *Hoffbeck*.<sup>[10]</sup>\*1087 *Hoffbeck* requires that a determination of whether vested rights to benefits have been diminished be made on a case-by-case basis, and that any diminution be accompanied by corresponding advantages to that employee. See 627 P.2d at 1057, 1059. "The comparative analysis must ... focus on the particular employee whose own vested pension rights are involved,' and not on hypothetical cases." Id. at 1058, quoting in part *Betts v. Board of Admin. of Pub. Employees' Retirement Sys.*, 21 Cal.3d 859, 148 Cal. Rptr. 158, 582 P.2d 614, 617 (1978).

Although application of the 1981 actuarial factors to PERS members employed prior to 1981 and retiring thereafter will provide the average employee with the present value equivalent to benefits calculated under the 1972 factors, the actual amount of benefits received by any given individual PERS member will in fact be diminished.

Furthermore, we are not persuaded that substantive consequences should attach to the fact that the reduction of early retirees' benefits occurred by means of a change in the PERS implementing regulations rather than by legislative amendment. Even though the statutory terms embodying the employees' contracts remained unchanged, the effect on the individual employee is the same as if the statute had previously promised a specific dollar amount in benefits and that amount was reduced through the amendment process. We did not limit the requirement of comparable offsetting advantages delineated in *Hoffbeck* to changes in the PERS system effected by the legislature; the form of the change should be disregarded in favor of its impact. As stated by the Massachusetts Supreme Judicial Court in interpreting that state's law protecting employees' contractual rights to retirement benefits:

The minimal meaning ... is that the "contract" is formed when a person becomes a member

by entering the employment, and he is entitled to have the level of rights and benefits then in force preserved in substance in his favor without any modification downwards. ... When we speak of the level of rights and benefits protected by [this statute] we mean the practical effect of the whole complex of provisions not excluding the [employees' contributions], for an increase in the [rate thereof] is little different from a diminution of the allowance.

Opinion of the Justices, 364 Mass. 847, 303 N.E.2d 320, 327 (1973), construing Mass.Gen.Law ch. 32, § 25(5) (amended 1956) (emphasis added). Our holding here is consonant with both the express terms of and the principle embodied in Hoffbeck, where we stated that "the vested benefits protected by Alaska Const. Art. XII, § 7, necessarily include not only the dollar amount of the benefits payable, but the requirements for eligibility as well." 627 P.2d at 1058.

A New York Court of Appeals decision which addressed circumstances similar to those we face here provides significant support for our position. In *Birnbaum v. New York State Teachers Retirement Sys.*, 5 N.Y.2d 1, 176 N.Y.S.2d 984, 152 N.E.2d 241 (1958), the court faced a constitutional challenge to the adoption of an actuarial table for computing teachers' annuity benefits which would reduce those benefits below the amounts that the teachers would have received if the table in effect when they joined the system were used. The case arose under an amendment to the New York Constitution which provides in pertinent part:

After July first, nineteen hundred forty, membership in any pension or retirement system of the state ... shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

N.Y. Const. art. V, § 7. The court held that this section precluded application of the new actuarial table to members of the \*1088 teachers' retirement system who entered the system before the date of the new actuarial table's promulgation, even though the statutes in effect at the time of adoption of the constitutional provision authorized the adoption of the new annuity tables.[11]

To reach this result, the *Birnbaum* court reasoned that the constitutional amendment was designed to overrule dictum in a prior New York decision which stated that a member's rights in a state pension or retirement system was subject to change or revocation at the will of the legislature until the member's retirement. 176 N.Y.S.2d at 989, 152 N.E.2d at 245. Since "[t]he purpose of the amendment was to fix the rights of an employee at the time he became a member of the system," the court ruled that "[t]he adoption of a mortality table which reduces ... the amount of the money payments he will receive from the Retirement System ... certainly effects a diminution and an impairment of the benefits of the Retirement System." *Id.* The court noted that to hold otherwise would mean the teachers "will continue

to be exposed to the vicissitudes of actuarial experience in the future, and the defendants will be free to reduce still further the annuities of the teachers by the adoption of another mortality table." Id. 176 N.Y.S.2d at 990, 152 N.E.2d at 246.

As a matter of statutory construction[12] which arguably applies equally to the Alaska PERS scheme, the New York court concluded:

While it is clear that section 508 contemplates a periodic review of the mortality tables to be used in determining the amounts of annuities to be allowed on the basis of the contributions of members, the section nowhere declares that mortality tables adopted after a person has become a member of the system are to be employed in determining the annuity benefits to which such person is entitled upon retirement. Nor do we see that we should read such an intention into the statute. The constitutional amendment ... prohibits official action during a public employment membership in a retirement system which adversely affects the amount of the retirement benefits payable to the members on retirement under laws and conditions existing at the time of his entrance into retirement system membership. If we are to construe section 508 of the Education Law as authorizing that which the Constitution prohibits, then, the statute must be held to have been superseded by the constitutional amendment. It seems to us that there is no necessity for so holding since it is reasonable to construe the Education Law as authorizing ... the use of the new mortality tables in the \*1089 computation of the annuities of only such persons as enter the system thereafter.

Id. 176 N.Y.S.2d at 991-92, 152 N.E.2d at 246-47 (emphasis of last line in original, remainder added). Contra, King County, 336 P.2d at 391-92; Birnbaum, 176 N.Y.S.2d at 994, 152 N.E.2d at 249 (Desmond, J., dissenting).

Finally, general considerations of equity weigh in favor of holding that Hoffbeck bars application of the 1981 table of actuarial factors to PERS members who were employed but had not taken early retirement as of the table's effective date. The following scenario posited by APEA illustrates the potential arbitrariness resulting from such application:

[Consider] two employees who worked for the State for twenty-five years, who planned to retire at age fifty, and who relied since 1972 on receiving seventy percent of normal retirement (based on twenty-five years of service). One of these two was born in 1930, the other in 1931. The first gets his relied-upon seventy percent; the second sees his expectations dashed and gets three percent less [even though] [f]rom an actuarial standpoint, the two are essentially the same.[13]

In conclusion, to hold that employees have a right only to early retirement benefits which are subject to actuarial changes until retirement would vitiate Alaska's constitutional protection

of accrued benefits for those employees who anticipate early retirement: they could not count on any particular amount of pension but only that they will each receive one. We therefore hold that the plain meaning<sup>[14]</sup> of Alaska Const. art. XII, § 7 should be interpreted to cover the diminution in early retirement benefits at issue, without regard to the fact that the diminution is accomplished through regulations (the actuarial factors) contemplated by the PERS statutes. The decision of the superior court is therefore AFFIRMED.<sup>[15]</sup>

## NOTES

[1] The terms of AS 39.35.370 relating to eligibility for, and computation of, retirement benefits for public safety employees and employees with at least thirty years of credited service vary from the foregoing description. This case does not implicate these variations. We also note that although the 1986 PERS amendments affect an employee's age of eligibility and computation of his benefits, they are immaterial to the issue presented in this appeal. See ch. 82, §§ 22-25, SLA 1986.

[2] Only the rights of employees who had not yet retired prior to January 1, 1981, are involved in this case. The state has not attempted to apply the new actuarial factors to employees who had already taken early retirement as of that date.

[3] For example, application of the 1972 table to a PERS member taking early retirement at age fifty would entitle him to seventy percent of the normal retirement benefits to which he would be entitled (assuming the same number of years of service); the same retiree would receive approximately sixty-seven percent of his normal benefits under the 1981 table.

[4] See *Hammond v. Hoffbeck*, 627 P.2d 1052, 1057 (Alaska 1981).

AS 39.35.120(a) provides that a state employee shall be included in the PERS system upon commencement of employment with the state, or on January 1, 1961, whichever is later; an employee of a political subdivision or public organization shall be included on the effective date of the employer's participation or the date of the employee's commencement of employment with the employer, whichever is later. Inclusion in the PERS system is a condition of employment for all state employees, except as otherwise provided for elective officials. AS 39.35.120(b).

[5] We note that APEA does not argue that the actuarial factors employed prior to 1972 be applied to employees who commenced employment (and whose rights to benefits therefore vested) before the effective date of the 1972 actuarial table; APEA confines its argument to the choice between the 1972 and 1981 tables. It challenges the application of the 1981 table to pre-1981 employees regardless of how long they have been PERS members. (The

complaint alleges only that the named individual plaintiffs commenced employment before January 1, 1981.)

[6] The superior court entered a stipulated final judgment under Alaska Civil Rule 54(b) granting APEA's claim for declaratory relief in order that this court could consider the constitutional question presented.

[7] We have construed the phrase "accrued rights" in Alaska Const. art. XII, § 7 to be synonymous with "vested rights." See *id.* at 1055 n. 4, citing *Bidwell v. Scheele*, 355 P.2d 584, 586 (Alaska 1960).

[8] More specifically, the state advances the contentions that any public employee enrolled in PERS prior to January 1, 1981 "contracted" under the PERS statutes to receive early retirement benefits in the amount of the benefits due him on normal retirement, adjusted actuarially to achieve "equality in value of the aggregate expected payments" under AS 39.35.680(2). Any such employee who elects early retirement on or after January 1, 1981, would receive that amount, computed according to current actuarial factors adopted by the board in accordance with the extant statutory scheme. On the average, early retirees would now receive their benefits over a longer period of time, and under changed interest earnings conditions, than would have been true under the actuarial conditions prevailing at the time the 1972 factors were adopted. The state also argues that the parties' stipulation that the 1981 actuarial factors come closer to achieving a "benefit of equal value" lends support to the conclusion that to apply the 1972 factors now would give such employees a windfall. Moreover, the state contends that no legislative change intending to reduce early retirees' benefits has transpired, and that the statutory terms of their employment contract pertaining to retirement benefits remain unchanged. Cf. *Kraus v. Board of Trustees of Police Pension Fund*, 72 Ill. App.3d 833, 28 Ill.Dec. 691, 390 N.E.2d 1281, 1293 (1983) (legislative action, which reduced employees' salaries/hours and thus had effect of reducing pension benefits, upheld against challenge under Illinois analog to Alaska Const. art. XII, § 7, because action not aimed at reducing benefits; noting that employees' contract "may be made subject to any contingency, consistent with public policy, built into the contract").

[9] At the time *King County* was decided, upon retirement in Washington a public employee began to draw a retirement allowance which included an annuity; the annuity was "the actuarial equivalent of his accumulated contributions at the time of his retirement;" and "actuarial equivalent" was defined as a "benefit of equal value when computed upon the basis of such mortality and other tables as may be adopted by the retirement board." See 336 P.2d at 391-92, citing Wash. Rev. Code §§ 41.40.010 (as amended 1957), .190 (as amended 1955) (emphasis added). The Washington Supreme Court in *King County*

interpreted the statutory language to mean that the annuity should be computed "on the basis of the mortality tables most recently adopted prior to the retirement of a member." *Id.*

[10] In specific regard to King County, we offer no opinion as to the validity of any benefit plan that results in unequal annuity benefit payments for male and female employees who make equal contributions, in light of recent Supreme Court holdings invalidating similar schemes. See *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 103 S.Ct. 3492, 77 L.Ed.2d 1236 (1983) (per curiam) (holding Title VII of the Civil Rights Act of 1964 prohibits an employer from offering its employees the option of receiving retirement benefits from one of several companies selected by the employer, all of which pay to a woman lower monthly retirement benefits than to a man who has made the same contributions); *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (holding Title VII prohibits an employer from requiring women to make larger contributions in order to obtain the same monthly pension benefits as men).

[11] The New York statute provided for computation of the annuity part of a teacher's retirement allowance as "the actuarial equivalent of his accumulated contributions at the time of his retirement." See *Birnbaum*, 176 N.Y.S.2d at 988, 152 N.E.2d at 244, quoting N.Y. Education Law, § 510(2)(a). The *Birnbaum* court explained that "the term 'actuarial equivalent' has reference to the mathematical formula for computing annuity payments according to the mortality table calculated and adopted pursuant to [the statute]." 152 N.E.2d at 244.

[12] The pertinent New York statute read in part as follows:

Upon the basis of the mortality and service experience of the members and beneficiaries of the system, the retirement board from time to time shall adopt the tables to be used for valuation purposes and for determining the amount of annuities to be allowed on the basis of the contributions of members.

At such times as the retirement board may deem it necessary and at least once each quinquennial period, the retirement board shall have prepared by a competent actuary familiar with retirement systems, a report showing a complete valuation of the present and prospective assets and liabilities of the various funds created by this article with the exception of the expense fund. The actuary shall make an investigation of the mortality and service experience of the members of the retirement system and shall report fully upon its conditions with such recommendations as he shall deem advisable for the information of the retirement board in the proper operation of the retirement system.

See *Birnbaum*, 176 N.Y.S.2d at 991, 152 N.E.2d at 246, quoting N.Y. Education Law §

508(4), (5).

[13] We note that although unforeseen by the parties, from a practical standpoint, our refusal to allow application of the new actuarial factors to employees enrolled in the PERS system as of the factors' effective date should create an incentive for the state to prevent the actuarial factors from becoming outdated by revising the table more frequently in order to avoid the fiscally undesirable position of being forced to apply the old factors to large numbers of employees. If the PERS board repeatedly revises the tables during the course of an employee's employment, we think the employee should be permitted to elect which of those tables will apply to the computation of his or her PERS early retirement benefits. Cf. Hoffbeck, 627 P.2d at 1059 n. 13 ("Upon remand the state is to give requisite notice to and a reasonable time for all those public safety employees affected to exercise their right to choose which system they desire to come under.").

[14] See Hoffbeck, 627 P.2d at 1056 & n. 7.

[15] We find APEA's arguments concerning employee expectations of a particular amount of benefits and equitable estoppel lacking in merit.

APEA argues that the 1972 early retirement factors constituted part of the employees' contract because the employees were not told prior to 1981 that AS 39.35.370 conferred a right to an unspecified amount in early retirement benefits, but were told that upon retirement at age fifty they had a right to seventy percent of the normal benefit. In support of this argument, APEA cites the 1980 PERS booklet furnished to new employees to explain the benefits system, which set forth the 1972 early retirement factors as absolutes and did not specifically state that the factors are subject to change based on new actuarial data. However, the 1980 PERS booklet contained an express disclaimer that, "[i]f there is any difference of interpretation between this handbook and the actual text of either the laws or the Public Employees' Retirement Board Regulations governing the system, AS 39.35 and the Board Regulations shall take precedence." In addition, this booklet would have no relevance to the expectations of employees who joined the PERS system prior to the booklet's publication in 1980. Furthermore, an argument that retirees were "misled by propaganda" used by the retirement board to explain the retirement system to new members has been rejected by the Washington Supreme Court: "When one deals with a statutory board or commission, he is presumed to know the statutory limits of its vested authority; when he deals with such statutory body without ascertaining those limits, he does so at his own peril." King County, 336 P.2d at 393 (citations omitted).

APEA also argues that the doctrine of equitable estoppel compels the PERS board to apply

the 1972 factors to the employees in this case. A necessary prerequisite for application of equitable estoppel to a public entity such as the defendants herein is the assertion of a position by that public entity on which the plaintiffs reasonably relied. *Municipality of Anchorage v. Schneider*, 685 P.2d 94, 97 (Alaska 1984). The only "assertion" cited by APEA is the publication of the 1972 factors in the aforementioned PERS booklet "as immutable"; in this regard, see *Whaley v. State*, 438 P.2d 718, 720 (Alaska 1968) (any representation by state official contradicting explicit provision of personnel rule would be unauthorized and of no effect, and therefore state was not estopped from denying effect to the representation). APEA offers no evidence to show that PERS members reasonably relied on the 1972 factors.