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NO. 64362-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

WASHINGTON DEPARTMENT OF RETIREMENT SYSTEMS, and
KING COUNTY,

Appellants.

v.

WILLIAM SERRES, on behalf of himself and a class of persons similarly
situated

Respondent

KING COUNTY'S REPLY BRIEF

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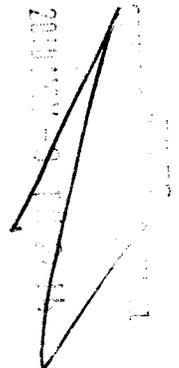


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A. ARGUMENT

1. THE PRESIDING OFFICER'S INTERPRETATION OF RCW 41.40.010(8) WAS CORRECT

Serres oversimplifies the nature of the *Duncan/Roberts* settlement payments in an attempt to support his argument that the Superior Court's September 24, 2009 ruling regarding RCW 41.40.010(8)(a) and (b) should be upheld. As stated in the County's brief, the settlement payments were not retroactive salary increases as Serres suggests, they were payments to resolve "all claims under RCW 49.52.040, all claims under RCW 49.52.070, RCW 49.48.030, and RCW 19.52.010; all claims based on promissory estoppels or alleged violations of the county's personnel practices or guidelines . . . and all claims based upon any other theories for relief sought in *Roberts* or *Duncan*, including equal protection and arbitrary and capricious action, any other theories to support the claims in *Roberts* or *Duncan*". CP 143. The Department of Retirement Service's Presiding Officer correctly noted:

WAC 415-108-445(1)(b) addresses the nature of the payment. In doing so, it makes paramount the reason for the payment in determining its nature. In the *Robert/Duncan* Settlement Agreement, it is clear that the County made these payments to its employees and former employees to settle their claims short of full litigation without admission of liability. Thus despite the many aspects of these payments in which they resembled retroactive salary, the **reason for** the payments will control and they will not be found to be retroactive salary payments.

CP. 209.

The fact that the methodology chosen by the parties to distribute the *Duncan/Roberts* settlement proceeds by pay period does not convert the settlement awards into compensation earnable pursuant to WAC 415-108-547. The size of the settlement fund was not tied to the number of *Duncan/Roberts* class members or their work history. CABR 0575, ¶36. The DRS Presiding Officer correctly determined that the settlement payments were not compensation earnable as a matter of law. Serres has not met his burden of showing that the DRS Presiding Officer erroneously interpreted the law. *Grabicki v. Department of Retirement Systems*, 8 Wn. App. 745, 916 P.2d 452 (1996) (burden on challenger to show that DRS erroneously interpreted law).

2. THE SUPERIOR COURT'S JUNE 9, 2009 ORDER REGARDING RCW 41.50.130(1) SHOULD BE UPHELD

RCW 41.50.130(1) allows the Department of Retirement Systems to correct its records in specific limited circumstances:

- 1) The director may at any time correct errors appearing in the records of the retirement systems listed in RCW 41.50.030. Should any error in such records result in any member, beneficiary, or other person or entity receiving more or less than he or she would have been entitled to had the records been correct, the director, subject to the conditions set forth in this section, shall adjust the payment in such a manner that the benefit to which such member, beneficiary, or

other person or entity was correctly entitled shall be paid in accordance with the following:

(a) In the case of underpayments to a member or beneficiary, the retirement system shall correct all future payments from the point of error detection, and shall compute the additional payment due for the allowable prior period which shall be paid in a lump sum by the appropriate retirement system.

(b) In the case of overpayments to a retiree or other beneficiary, the retirement system shall adjust the payment so that the retiree or beneficiary receives the benefit to which he or she is correctly entitled. The retiree or beneficiary shall either repay the overpayment in a lump sum within ninety days of notification or, if he or she is entitled to a continuing benefit, elect to have that benefit actuarially reduced by an amount equal to the overpayment. The retiree or beneficiary is not responsible for repaying the overpayment if the employer is liable under RCW 41.50.139.

(c) In the case of overpayments to a person or entity other than a member or beneficiary, the overpayment shall constitute a debt from the person or entity to the department, recovery of which shall not be barred by laches or statute of limitations.

If this court upholds the trial court's September 9, 2009 ruling and finds that the *Duncan/Roberts* settlement payments were compensation earnable pursuant to RCW 41.40.010(8), the *Serres* class members' retirement benefits will increase. See Order Granting Motion for Class Certification, dated May 8, 2009, CP 874-75 (*Serres* class is defined as only those *Duncan/Roberts* class members whose retirement benefits "would be increased if their settlement payments are deemed to be

compensation earnable"). *Duncan/Roberts* class members who are not *Serres* class members would not receive more or less in retirement benefits if the *Duncan/Roberts* settlement payments are found to be compensation earnable. Because RCW 41.50.130(1) only allows the DRS director to correct the retirement systems' records if "any error in such records result in any member, beneficiary, or other person or entity" would receive "more or less than he or she would have been entitled to had the records been correct", the trial court's June 9, 2009 order correctly limited DRS' ability to correct its records and collect employer and/or employee contributions from *Duncan/Robert* class members who are not *Serres* class members.

DRS overstates Division II's ruling in *City of Pasco v. Department of Retirement Systems*, 110 Wn. App. 582, 42 P.3d 992 (2002) in support of its argument regarding its authority to correct its records. In the *City of Pasco* case, the court held that the correction of errors statute:

unambiguously gives the [DRS] Department Director authority to correct errors appearing in the records of any state retirement system *that cause members or beneficiaries to receive more or fewer benefits than those to which they are entitled.*

Id. at 589 (emphasis added). The Court did not, as DRS suggests, rule that the DRS may correct any error in their system at any time.

B. CONCLUSION

Serres is not entitled to relief under RCW 34.04.470. The Superior Court erred in determining that the *Duncan/Roberts* settlement payments were compensation earnable. King County respectfully requests this court to issue an order determining that the DRS Presiding Officer's order was not afforded the weight it was due pursuant to RCW ch. 34.05, overturning the Court's September 11, 2009 order and reinstating the DRS Presiding Officer's final ruling on compensation earnable. Finally, King County requests that this court uphold the Superior Court's June 9, 2009 ruling regarding RCW 41.50.130(1).

DATED this 3rd day of November, 2010.

RESPECTFULLY submitted,

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ORIGINAL

I, LUCIA TAM, hereby certify and declare under penalty of perjury under the laws of the State of Washington as follows:

1. I am a legal secretary employed by King County Prosecutor's Office, am over the age of 18, am not a party to this action and am competent to testify herein.
2. On November 3, 2010, I caused to be filed via ABC Legal Messenger with the Court of Appeals of Washington, Division I, the original and one copy of "King County's Reply Brief" and this "Proof of Service" in the above referenced case.
3. Per the parties' agreement, said pleadings were sent via email in "PDF" format to James D. Oswald at email address jimo@jimowaldlaw.com, and Sarah Blocki at email address sarahb@atg.wa.gov.

DATED this 3rd day of November, at Seattle, Washington.



LUCIA TAM