NO. 87424-7

SUPREME COURT OF THE STATE OF WASHINGTON

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

Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON and DEPARTMENT OF RETIREMENT SYSTEMS,

Appellants/Cross-Respondents.

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

Respondents,

v.

STATE OF WASHINGTON and DEPARTMENT OF RETIREMENT SYSTEMS,

Appellants.

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

Respondents/Cross-Appellants,

v.

STATE OF WASHINGTON and DEPARTMENT OF RETIREMENT SYSTEMS,

Appellants/Cross-Respondents.

STATE'S REPLY AND CROSS-RESPONSE

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REPLY IN SUPPORT OF APPEAL

I. INTRODUCTION

Plaintiffs claim a contract right to billions of dollars in pension enhancements—money that could otherwise fund crucial needs from education to infrastructure repairs—based on a statute that explicitly barred any such right and said that it could be repealed at any time. Their argument misstates both the facts and the law, asking this Court to ignore plain statutory language, invade core legislative powers, and cripple state and local budgets. The Court should decline.

Plaintiffs misstate the facts in claiming that "the State Actuary proposed establishing gain-sharing" and that the Legislature repealed gain-sharing based on actuarial whims, not legitimate cost concerns. Br. of Resps. at 1, 5. In truth, it was *Plaintiffs* who demanded gain-sharing, while the Legislature included the reservation of rights clause out of fear that gain-sharing would prove "so expensive that it would adversely affect the ability of the State . . . to fund the public pension plans." CP 1619. When those fears came true, the Legislature exercised its reserved right and canceled future gain-sharing.

As to the law, Plaintiffs say that "employees' expectations" dictate pension benefits, even if those expectations are directly contrary to "the express intention of the [Legislature]." Br. of Resps. at 22. That has never

been the law. To show a Contracts Clause violation, Plaintiffs must prove "beyond a reasonable doubt" that they had a *contractual* right to future gain-sharing. *Retired Pub. Employees Coun. v. Charles*, 148 Wn.2d 602, 623, 62 P.3d 470 (2003). They cannot do so because the gain-sharing statute clearly said that "no member or beneficiary has a contractual right to receive" gain-sharing forever, and "[t]he legislature reserve[d] the right to amend or repeal this chapter in the future." Former RCW 41.31.030 (2006). This Court "cannot delete language from an unambiguous statute," even in pension cases. *McAllister v. Bellevue Firemen's Pension Bd.*, 166 Wn.2d 623, 630-31, 210 P.3d 1002 (2009) (quotation marks omitted).

Plaintiffs even claim a right to permanent gain-sharing on behalf of class members who retired *before gain-sharing was enacted* (over half of the PERS/TRS 1 class, CP 4546) and thus never provided any work in exchange for the gain-sharing benefit. Br. of Resps. at 4 n.6. But as Plaintiffs concede elsewhere, only class members who "worked while gain-sharing was offered" even potentially have a claim. *Id.* at 27-28.

Plaintiffs also argue that although the gain-sharing statute expressly barred any contractual right to permanent gain-sharing, the Department of Retirement Systems (DRS) created such a right by contract or estoppel. But "agencies do not have the power to amend unambiguous statutory language," *Caritas Servs., Inc. v. DSHS*, 123 Wn.2d 391, 415,

869 P.2d 28 (1994), and "[e]stoppel will never be asserted to enforce a promise which is contrary to the statute." *King Cnty. Employees Ass'n v. State Employees' Ret. Bd.*, 54 Wn.2d 1, 11-12, 336 P.2d 387 (1959). Moreover, estoppel may be invoked only to prevent a "manifest injustice," *Campbell v. DSHS*, 150 Wn.2d 881, 902-03, 83 P.3d 999 (2004), and the only "manifest injustice" here would be to ignore the statutory language to grant Plaintiffs billions in pension benefits they were never promised.

At bottom, this case is about the roles of the Legislature and the courts. In enacting gain-sharing, the Legislature clearly stated that it was creating no contract rights and reserved the right to repeal. The Legislature trusted that courts would respect its clear intent, and it relied on opinions of this Court stating that the Legislature may limit contract rights if it does so clearly.[1] Plaintiffs now ask the Court to override the Legislature's intent and grant them billions in benefits the State can ill afford. But our "[s]tate has enjoyed a rich history of cooperation and harmony among its three branches of government," and "[i]t is this court's obligation to determine and carry out the intent of the legislature." *Hale v. Wellpinit Sch. Dist. 49,* 165 Wn.2d 494, 507, 509, 198 P.3d 1021 (2009) (citation omitted). There is no basis in law or equity to override the Legislature's intent here.

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[1] *See, e.g., WA Fed'n of State Employees v. State*, 127 Wn.2d 544, 563, 901 P.2d 1028 (1995); *Caritas*, 123 Wn.2d at 407; *Carlstrom v. State*, 103 Wn.2d 391, 398, 694 P.2d 1 (1985).

II. RESPONSE TO PLAINTIFFS' STATEMENT OF THE CASE

A. The Impetus for Gain-Sharing Came From Plan Members

Plaintiffs claim that the impetus for gain-sharing came from the State Actuary and that the State's purpose in enacting it was to induce plan members to transfer to Plan 3. Br. of Resps. at 5-6. This is untrue. The push for gain-sharing came from employees and their unions, not the State.

Favorable returns on the investments of State pension funds in the 1990s led plan members and their unions to lobby the Legislature to allow the members to share in those returns, rather than having the returns temporarily lower contribution rates for employers (and thus taxpayers). Specifically, the plaintiff unions here pushed for the enactment of gain-sharing and creation of the Plan 3s, both of which gave members the benefit of above-average returns. *See, e.g.*, CP 2319, 2659-60, 2663-64 (WEA "supports and is urging calls to [Governor] Locke's office to sign" SERS Plan 3 bill and bill providing gain-sharing for TRS and PERS Plan 1), 2666 (WEA supporting creation of TRS Plan 3), 2667, 2673-74.[2]

The unions were well aware that the gain-sharing statutes included

[2] Plan members' efforts to share in favorable returns went beyond lobbying the Legislature. They also filed court actions, which were unsuccessful. *See WA Fed'n of State Employees v. State*, 107 Wn. App. 241, 26 P.3d 1003 (2001) (seeking to require the Legislature to lower Plan 1 member contribution rate); *Retired Pub. Employees Coun. v. Charles*, 148 Wn.2d 602, 62 P.3d 470 (2003) (seeking to bar the State from lowering Plan 1 employer contribution rates, to make more assets available to increase benefits).

a reservation of rights clause. In 1997, "stakeholder groups such as the Washington Education Association, the Washington State Retired Teachers Association, and the Retired Public Employees Council . . . raised concerns about the reservation of rights clauses," but the State Actuary insisted on including them "so that gain-sharing would not become a vested right of the pension plan members." CP 1619.

Contrary to Plaintiffs' suggestion, the Plan 3s were not established because they were "significantly less costly to employers than Plan 2." Br. of Resps. at 6. Indeed, in both Plans 2 and 3, the employer funds a defined benefit equal to 1% of the employee's highest average annual salary for each year of service. Rather, the Legislature created the Plan 3s to respond to the plan members' desire to share more fully in favorable investment returns, as well as to provide a pension plan better suited to more flexible careers of newer employees who may not continue working for the State until age 65. Unions supported the creation of the Plan 3s and advised their membership of the advantages of the new plans. CP 2323-24 (WEA and WFSE testifying in support of PERS Plan 3 bill), 2329-30, 2660 (WEA summary of the benefits of TRS Plan 3), 2667, 2673-74.

B. The Legislature Feared Gain-Sharing's Cost From the Beginning, and Ultimately Repealed Gain-Sharing Due to Its Unsustainable Costs and Other Pressing Budget Needs

Plaintiffs claim that "[t]he legislative history of gain-sharing

contains no discussion of whether the costs would be unsustainable." Br. of Resps. at 8. This is simply false. When describing the reservation of rights clause in the draft gain-sharing legislation in 1997, the State Actuary's Office testified that it included the reservation clause because "we were concerned that the gain-sharing provision may be so expensive that it would adversely affect the ability of the State and its political subdivisions to fund the public pension plans." CP 1619. The clause was modeled after similar clauses the Legislature had included in a few other pension provisions where the future cost was unclear. CP 1618-19, 2144.

The Legislature canceled future gain-sharing when its fears came true. Plaintiffs argue that because the Legislature repealed gain-sharing before the Great Recession of 2008, it could not have been acting based on real fiscal concerns. They seem to have forgotten the dire economic conditions following September 11, 2001, and the budget shortfalls that have been endemic ever since. Starting in 2002, the Legislature saw "a significant reduction in General Fund-State revenues . . . [m]ost [of which] was a result of a downturn in the economy, including the effects of the terrorist attacks of September 11, 2001." 2002 Final Legislative Report, 57th Wash. Leg., at 246. In 2003, the Legislature noted: "The prolonged national recession that began in 2001 resulted in below average forecasted general fund revenue growth for the 2003-05 biennium." 2003 Final

Legislative Report, 58th Wash. Leg., at 299. Again in 2005, the Legislature said: "Since September 11, 2001, Washington State has faced continuing budget deficits as the cost of current services has exceeded current revenues." 2005 Final Legislative Report, 59th Wash. Leg., at 365.

Plaintiffs also claim that the Legislature had no grounds for concern about the health of public pension plans. Br. of Resps. at 15-16. In reality, however, PERS 1 and TRS 1, long underfunded, consistently lost funds throughout the 2000s. By 2007, PERS 1 was funded at 71% and TRS 1 was funded at 76%, meaning that, without additional taxpayer funding, the plans were expected to pay only 71/76 cents on every dollar owed. CP 5585. From 2000 on, the funded status of PERS, TRS, and SERS Plans 2 and 3 also steadily declined. *Id.* Between 2002 and 2007, the funded status of PERS 2 and 3 declined 38%; TRS 2 and 3 declined 52%; and SERS 2 and 3 declined 43%. *Id.*[3]

It was against this dire economic backdrop that the Legislature canceled future gain-sharing and granted replacement benefits. It saw that public employers (and ultimately taxpayers) could not afford to fund gain-

[3] The funded status of the pension plans in the aggregate is irrelevant. Funds from one plan cannot be used to fund benefits in any other plan. 26 U.S.C. § 401(a)(2).

sharing and the *core* retirement benefits to which they were committed.[4]

C. The Legislature Acted Reasonably in Basing Its Actions on the Most Recent Actuarial Standards

Almost immediately after his appointment, the current State Actuary questioned whether gain-sharing's impact on the funding of the pension plans was being properly treated. He noted that gain-sharing payments reduce the assets available to fund core benefits, and these lost assets must be replaced. Ultimately, he recommended to the Legislature that the impact of future gain-sharing events be taken into account in setting employer contribution rates before gain-sharing events occur, like all other benefits that constitute a material liability to the pension plans. This differed from the approach of the former Actuary, who accounted for gain-sharing events after the fact. This difference reflected an evolution in actuarial standards, as actuarial associations gave more guidance as to how provisions like gain-sharing—new in the 1990s—should be accounted for.

Plaintiffs never dispute that the current Actuary's approach is the preferred method. They argue, however, that the Legislature was not required to adopt that method, so it could have ignored the Actuary's advice. Br. of Resps. at 12-13. This suggestion is irresponsible at best.

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[4] As Governor Gregoire said: "[I]f I am going to be fiscally responsible with the pension system, I've got to assure these state employees that it's sound, . . . in order to make that happen we would end gain-sharing." CP 5660.

Had the Legislature ignored the Actuary's advice, plan members might well have filed suit arguing that the Legislature was failing to systematically fund the pension plans. *See Weaver v. Evans*, 80 Wn.2d 461, 495 P.2d 639 (1972).

III. ARGUMENT

A. Plaintiffs Have Failed to Prove a Violation of the Contracts Clause Beyond a Reasonable Doubt

Plaintiffs admit that the starting point for the Court's analysis here is its normal Contracts Clause test. Br. of Resps. at 21. "The three-part test to determine if there has been an impairment of a public contract is: (1) does a contractual relationship exist; (2) does the legislation substantially impair the contractual relationship; and (3) if there is substantial impairment, is it reasonable and necessary to serve a legitimate public purpose." *Charles*, 148 Wn.2d at 624. Plaintiffs also concede that this Court's decision in *Bakenhus v. City of Seattle,* 48 Wn.2d 695, 296 P.2d 536 (1956), merely "supplements" the later prongs of this test, and has no bearing on the first prong. Br. of Resps. at 21 (arguing that *Bakenhus* addresses only whether "a change in pension benefits is 'reasonable and necessary'"). And although Plaintiffs claim that cases applying the federal Contracts Clause are irrelevant here, *id.* at 23, "[i]t is well-settled that these state and federal constitutional provisions are

coextensive and are given the same effect." *Pierce Cnty. v. State*, 159 Wn.2d 16, 27 n.5, 148 P.3d 1002 (2006).

Applying the proper test, Plaintiffs cannot prove any of the three necessary elements, especially in light of this Court's longstanding rule—never mentioned by Plaintiffs—that "a statute is presumed to be constitutional, and the party seeking to overcome that presumption must meet the heavy burden of proving unconstitutionality beyond a reasonable doubt." *Charles*, 148 Wn.2d at 623.

1. Plan Members Have No Contractual Right to Gain-Sharing in Perpetuity

"Under the first prong," of the Contracts Clause analysis, "we must initially determine whether a contract exists." *Charles*, 148 Wn.2d at 624. Crucially, the question "is not whether any contractual relationship whatsoever exists between the parties, but whether there was a 'contractual agreement *regarding the specific . . . terms allegedly at issue.*'" *Robertson v. Kulongoski*, 466 F.3d 1114, 1117 (9th Cir. 2006) (quoting *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 187, 112 S. Ct. 1105 (1992)). Here, the plain language of the gain-sharing statutes, together with controlling precedent, demonstrates that Plaintiffs cannot satisfy the first prong because the Legislature expressly provided that no member had a contractual right to gain-sharing in perpetuity.

a. The Gain-Sharing Statutes Explicitly Disclaimed a Contractual Right and Allowed Repeal

In enacting gain-sharing, the Legislature explicitly declared that it reserved the right to amend or repeal gain-sharing, and it created no contractual right to future gain-sharing payments:

> The legislature reserves the right to amend or repeal this chapter in the future and no member or beneficiary has a contractual right to receive this postretirement adjustment not granted prior to that amendment or repeal.

Former RCW 41.31.030 (2006) (Plans 1). *See also* Former RCW 41.31A.020(4), .030(5), .040(5) (2006) (Plans 3).

Plaintiffs contend, however, that the Legislature intended to make gain-sharing a permanent contractual right, and retained the ability to repeal gain-sharing only for employees starting work after its repeal. Br. of Resps. at 27-28. Their reading is untenable for several reasons.

First, reading the provisions as Plaintiffs suggest would render them superfluous. The Legislature always has authority to alter the pension system as to employees starting work thereafter. *E.g., WA State Pub. Employees Bd. v. Cook,* 88 Wn.2d 200, 206, 559 P.2d 991 (1977). The Legislature need not limit contractual rights conferred nor reserve the right to amend to retain this authority. *See id.* Thus, reading the provisions as Plaintiffs suggest gives them no effect at all, contrary to this Court's rule of construing statutes to give effect to all the language. *G-P Gypsum*

Corp. v. Dep't of Rev., 169 Wn.2d 304, 309, 237 P.3d 256 (2010).

Second, Plaintiffs' argument turns on reading the phrase "not granted prior to that amendment or repeal" as modifying "contractual right," rather than "postretirement adjustment." Br. of Resps. at 28. But the last antecedent rule of statutory construction undermines their interpretation. The last antecedent rule provides that, unless contrary intent appears in the statute, "'relative and qualifying words and phrases, both grammatically and legally, refer to the last antecedent.'" *Boeing Co. v. Dep't of Licensing,* 103 Wn.2d 581, 587, 693 P.2d 104 (1985) (citation omitted). Applying this rule here, the phrase "not granted prior to that amendment or repeal" modifies its last antecedent: "this postretirement adjustment." It does not modify the earlier noun "contractual right."

Even if this Court found the gain-sharing statutes ambiguous enough to resort to legislative history, the result would be the same. The Office of the State Actuary "included the reservation of rights clauses in the draft legislation so that gain-sharing would not become a vested right of the pension plan members who received gain-sharing payments." CP 1619. The Actuary's Office conveyed this intended effect to stakeholder unions and to the Legislature's Joint Committee on Pension Policy. CP 1619-20; *see also* CP 1617-18. Thus, both the legislative sponsors and stakeholder unions were well aware of the intended effect of

the reservation of rights clause.

In sum, the Legislature's intent is plain: "no member or beneficiary has a contractual right to receive" gain-sharing forever. Former RCW 41.31.030 (2006).

b. The Legislature Has the Authority to Limit the Rights It Grants, as It Did Here

This Court and the U.S. Supreme Court have adopted a strong presumption that statutes create no contract rights. Only "[u]nder very limited circumstances a statute may be treated as a contract: when the statutory language and the circumstances establish a legislative intent to create rights contractual in nature." *Noah v. State*, 112 Wn.2d 841, 843, 774 P.2d 516 (1989). "If a statute is subject to full legislative control by future amendments and repeals, the statute" creates no "contractual or vested rights." *Id.* at 843-44. The reason for this longstanding rule is that "to construe laws as contracts when the obligation is not *clearly and unequivocally expressed* would be to limit drastically the essential powers of a legislative body." *Nat'l R.R. Passenger Corp. v. Atchison, Topeka & Santa Fe Ry. Co.*, 470 U.S. 451, 466, 105 S. Ct. 1441, 84 L. Ed. 2d 432 (1985) (emphasis added).

The gain-sharing statutes have none of the features of a contractual promise. Rather than "the statutory language . . . establish[ing] a

legislative intent to create rights contractual in nature," *Noah*, 112 Wn.2d at 843, here the statutory language establishes the opposite: "no member or beneficiary has a contractual right to receive" gain-sharing increases after repeal. Former RCW 41.31.030 (2006) (Plans 1). Moreover, the gain-sharing statutes are plainly "subject to full legislative control by future amendments and repeals." *Noah*, 112 Wn.2d at 843-44. They expressly state that "[t]he legislature reserves the right to amend or repeal this chapter in the future." Former RCW 41.31.030; former RCW 41.31A.020(4), .030(5), .040(5) (2006). The Legislature has thus clearly and validly foreclosed any contractual right to receive gain-sharing payments after the statutes' repeal.

Plaintiffs contend, however, that *every* provision in the public pension statutes is a contract right, regardless of legislative intent. Br. of Resps. at 22. This Court has never so held. Rather, only "*some* pension rights are contractual in nature," namely, those that "are in fact terms of the employment contract." *Charles*, 148 Wn.2d at 624 (emphasis added). Here, the relevant "terms of the employment contract" are of course the gain-sharing statutes, which could not be clearer that "no member or beneficiary has a contractual right to receive" gain-sharing after repeal. Former RCW 41.31.030 (2006). Even in public pension cases, this Court "cannot 'delete language from an unambiguous statute.'" *McAllister,* 166

Wn.2d at 630-31 (quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003)).

Plaintiffs next cite *Navlet v. Port of Seattle*, 164 Wn.2d 818, 194 P.3d 221 (2008), to argue that "even if the Legislature clearly intended to reserve the right to repeal gain-sharing, courts cannot give effect to that intention." Br. of Resps. at 24. In *Navlet*, however, the Court made clear that "[i]f the Port wanted to limit its obligation to provide welfare benefits, then it could have insisted on limiting the right to retirement welfare benefits in the CBA itself." 164 Wn.2d at 849. This holding was unsurprising, as the Court had repeatedly held that the State can reserve the right to amend a contract if it does so explicitly. *See, e.g.*, *Caritas*, 123 Wn.2d at 406 n.9 ("[S]tates or agencies may put potential contractors explicitly on notice that the terms of a public contract are subject to retroactive adjustment."); *Carlstrom*, 103 Wn.2d at 398 (the Legislature may "expressly . . . provide: These agreements shall be subject to subsequent modification by the legislature"). The Legislature included just such explicit language here.

Plaintiffs claim that this statement in *Navlet* has no bearing here because the CBA in *Navlet* was (i) negotiated and (ii) distributed to employees. Neither argument is persuasive. First, nothing in *Navlet* hints that reservations by employers are effective only in negotiated agreements.

In any case, the gain-sharing statutes were enacted in response to lobbying by Plaintiffs, who were in no weaker position than the employees in *Navlet*, and it would be nonsensical for a private employer to have more power to reserve the right to amend a contract than the Legislature has in carrying out its plenary power to enact legislation. Second, even if the CBA in *Navlet* was distributed to employees, here the reservation of rights was in a *statute*, easily viewed by anyone. *See, e.g.*, *Charles*, 148 Wn.2d at 622 (because a statute "disclosed the lowered contribution rates," "[t]his information was readily available to Retirees and Employees"). And while employees may or may not read CBAs, all are presumed to know the law. *Retired Pub. Employees Coun. v. State*, 104 Wn. App. 147, 152, 16 P.3d 65 (2001) ("'[I]gnorance of the law is no excuse.'").

Plaintiffs also raise a parade of horribles if the Legislature is allowed to apply reservation clauses to future pension benefits. Br. of Resps. at 45-46. This parade is a myth. There are hundreds of pension provisions in the state's pension plans, yet only five, other than gain-sharing and its replacement benefits, have reservation clauses. CP 2144. The Legislature has *never* applied a reservation to a core pension benefit, and never to a pension plan as a whole, and it is unlikely ever to do so, especially given stakeholder involvement in the political process.

By contrast, serious negative consequences would follow if the

Court held that the Legislature has no power to limit the scope or duration of pension enhancements when it creates them. Faced with such a ruling, the Legislature would likely cease enacting new pension benefits, and might choose to adopt purely defined contribution (similar to 401(k)) plans for which public employers do not pay and in which the risk of insufficient funds for retirement is borne solely by employees.

c. Plan Members' Alleged "Expectations" Cannot Override Explicit Statutory Language

Plaintiffs seek to avoid the plain language of the gain-sharing statutes by arguing that "employees' expectations" determine their pension benefits, even if those expectations are contrary to "the express intention of the [Legislature]." Br. of Resps. at 22. That is not and cannot be the law.

This Court has long held that "the extent of [pension] compensation is limited by the terms of the contract." *Jacoby v. Grays Harbor Chair & Mfg. Co.*, 77 Wn.2d 911, 920, 468 P.2d 666 (1970). The reason for this rule is clear: "the alternative would be to hold that the adoption of a pension plan of any type creates an immediate . . . right in employees, irrespective of the terms of the contract," which "would severely limit the adoption of purely voluntary pension plans." *Id.* at 921.

Here, the "terms of the contract," *id.*, are the gain-sharing statutes,

which clearly provide that employees have no right to continued gain-sharing if the statute is repealed. "Where 'a statute is clear on its face, its meaning [should] be derived from the language of the statute alone,'" even if the statute regulates public pensions. *Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 219, 173 P.3d 885 (2007) (quoting *Kilian v. Atkinson*, 147 Wn.2d 16, 20, 50 P.3d 638 (2002)).

In arguing that employee expectations nonetheless control, Plaintiffs twist this Court's holdings in *Bakenhus,* 48 Wn.2d 695, and *Navlet*, 164 Wn.2d 818. In both cases, however, this Court looked to the language of the statute or agreement to determine the intent of the parties.

Bakenhus never held that employees' expectations *create* the terms of their contract. Rather, it was the other way around: the Court held that the terms of the statute in place at the time Mr. Bakenhus began work created a valid expectation that he would receive his promised pension. 48 Wn.2d at 702 ("Under the system provided by law at the time the respondent entered his employment, he was entitled to receive one half of the salary which he received during the last year before his retirement."). That simply is not the situation here, where the gain-sharing statute made clear from the beginning that it created no permanent contractual right.

Similarly, in *Navlet* this Court explained: "The purpose of contract interpretation is to determine the intent of the parties," which is found

through "the objective manifest language of the contract itself." 164 Wn.2d at 842. Thus, "the terms of the CBA determined the extent of the Port's obligation to provide benefits." *Id.* at 847. It was those terms that gave rise to employee expectations, not the other way around.

In short, while the language of a statute or agreement may give rise to contract rights and employee expectations, this Court has never held that employee expectations can override the plain language and "express intention of the [Legislature]," as Plaintiffs claim. Br. of Resps. at 22.

d. The Majority of Plan 1 Class Members Lack Even a Colorable Claim to a Contractual Right

Plaintiffs' claim to gain-sharing, whether based on contract or estoppel, rests on the theory that plan members are entitled to pension benefits because they worked in consideration for those benefits. Br. of Resps. at 20. Indeed, Plaintiffs repeatedly contend that "each member's contractual right to gain-sharing was 'granted' when he first worked *while gain-sharing was offered*," and thus, "retirement system members who worked *after the 1998 or 2000 enactment of gain-sharing* were 'granted' a contractual right to gain-sharing." *Id.* at 27-28 (emphasis added).

Despite this clear, admitted limit to the scope of their claim, Plaintiffs demand that gain-sharing be reinstated for all plan members, Br. of Resps. at 4 n.6, even though over 77,000 PERS 1 and TRS 1 members

retired *before* gain-sharing was enacted in 1998. CP 4546. None of those 77,000 retirees could possibly have earned a "right" to gain-sharing, even under Plaintiffs' theory. Therefore, at least as to those people, the Court should deny any right to gain-sharing.

2. There Has Been No Substantial Impairment of Contract; Members Received Everything They Were Entitled to Under the Gain-Sharing Statutes

"The second prong" of the Contracts Clause analysis "requires a determination of whether the legislation substantially impairs the contractual relationship. A contract is impaired by a statute which alters its terms, imposes new conditions, or lessens its value." *Charles*, 148 Wn.2d at 625. That "impairment is substantial if the complaining party relied on the supplanted part of the contract." *Margola Assocs. v. City of Seattle*, 121 Wn.2d 625, 653, 854 P.2d 23 (1993). Under these well-established standards, even if Plaintiffs could show a contractual right, they have not shown substantial impairment.

First, the repeal of gain-sharing did not alter the terms of, impose new conditions on, or reduce the value of any plan member's contract. *Charles*, 148 Wn.2d at 625. Under the plain language of the statutes, "no member or beneficiary has a contractual right to receive" gain-sharing after it is repealed. Former RCW 41.31.030 (2006). Thus, plan members never had a contractual right to receive gain-sharing increases forever;

rather, they had a right to receive gain-sharing increases only while gain-sharing was in effect. Members received all of those increases.

Moreover, plan members cannot reasonably have "relied on" gain-sharing's continuing forever, *Margola*, 121 Wn.2d at 653, because the statutes expressly said: "The legislature reserves the right to amend or repeal this chapter in the future." Former RCW 41.31.030 (2006). As the author of *Bakenhus* later emphasized, one cannot claim to have relied on something he never actually read. *See Jacoby*, 77 Wn.2d at 921 ("[W]e must assume that the parties relying on the contract have read it in its entirety.") (Rosellini, J., concurring in result). This goes double for a statute that allegedly creates a contract. This Court has long held that "a party who enters into a contract regarding an activity already regulated in the particular to which he now objects is deemed to have contracted subject to further legislation upon the same topic," and cannot show substantial impairment based on such legislation. *Margola*, 121 Wn.2d at 653 (quotation marks and citation omitted). Here, the alleged contract was not just on a subject already regulated by statute, it was *in a statute* that said it created no contract rights and could be repealed at any time. In short, it could not have been clearer that the alleged contract was "subject to further legislation upon the same topic." *Id.*

In any case, plan members received significant benefits in

exchange for the loss of gain-sharing that are "reasonably commensurate" with the value of gain-sharing. *Navlet*, 164 Wn.2d at 850. Plaintiffs attack these replacement benefits because they have a lower estimated value than gain-sharing. Br. of Resps. at 44-45. But unlike gain-sharing, the replacement benefits were predictable and reliable. Were gain-sharing still in effect, members would have received no payments since January 2, 2008. By contrast, with the replacement benefits, members of Plans 3 have been retiring early with fewer benefit reductions, and Plan 1 retirees got an enhanced adjustment to their COLA. And the money the Legislature saved allowed state agencies and local governments to continue to pay for the core pension benefits to which they were committed.

3. Repealing Gain-Sharing Was Reasonable and Necessary to Serve a Legitimate Public Purpose: Preserving the Flexibility and Integrity of the Pension Funds

The final prong of the Contracts Clause "test calls for two broad and interrelated inquiries: (1) can a legitimate public purpose for the legislation be identified and, if so, (2) is the legislation reasonable and necessary to achieve that public purpose." *Tyrpak v. Daniels*, 124 Wn.2d 146, 156, 874 P.2d 1374 (1994). Here, the answer to both is: "Yes."

The Legislature canceled future gain-sharing increases for two legitimate public purposes: to preserve the integrity and flexibility of the

public pension system, and to protect funds for basic government services. Plaintiffs concede that these are valid purposes, but argue that repealing gain-sharing was not necessary to achieve them. Br. of Resps. at 36-45. The burden is on Plaintiffs to prove this claim "beyond a reasonable doubt." *Charles*, 148 Wn.2d at 623. They have fallen far short.

Plaintiffs claim that Washington's public pension plans were in perfect health in 2007, so the Legislature had no reason for concern. In truth, PERS 1 and TRS 1 were underfunded even before the recession that followed 9/11, and they lost funds throughout the 2000s. By 2007, PERS 1 and TRS 1 could pay only 71/76 cents on every dollar owed without more taxpayer funding. CP 5585. Plans 2 and 3 were also in rapid decline: between 2002 and 2007, the funded status of PERS Plans 2 and 3 declined 38%; TRS Plans 2 and 3 declined 52%; and SERS Plans 2 and 3 declined 43%. *Id.* Given these dire straits, public employers could not guarantee funding for gain-sharing and for the *core* retirement benefits to which they were committed. It was thus perfectly "reasonable and necessary" for the Legislature to cancel future gain-sharing. *Tyrpak*, 124 Wn.2d at 156. This is especially so because "'all risk of a shortfall rests on state and local government employers and ultimately, on taxpayers.'" *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 71, 847 P.2d 440 (1993). Had the Legislature not canceled future gain-sharing, it would have endangered not just core

pension benefits, but also basic government services.

B. No DRS Statement Created a Right to Perpetual Gain-Sharing

1. DRS Literature Created No Unilateral Contractual Obligation to Provide Gain-Sharing

Plaintiffs argue that even if the pension statutes create no contractual right to gain-sharing, the literature distributed by DRS does. This argument fails for several reasons.

a. DRS Had No Authority to Establish Terms of the Public Pension Plans by Unilateral Contract

In arguing that DRS publications created a unilateral contract with plan members, Plaintiffs rely on two cases involving private employers: *Swanson v. Liquid Air Corp.*, 118 Wn.2d 512, 826 P.2d 664 (1992), and *Gaglidari v. Denny's Restaurants, Inc.,* 117 Wn.2d 426, 815 P.2d 1362 (1991). Br. of Resps. at 31-32. In each of those cases, however, the private employer had full authority to establish the terms of the employment relationship and to offer binding contractual terms to employees. By contrast, DRS has *no* authority to contract with public employees regarding the terms of their pensions.

In Washington, "the terms and conditions of public employment . . . are basically controlled by statute, not by contract." *Ass'n of Capitol Powerhouse Eng'rs v. Div. of Bldg. & Grounds*, 89 Wn.2d 177, 184, 570 P.2d 1042 (1977). "[A]gencies do not have the power to amend

unambiguous statutory language," *Caritas*, 123 Wn.2d at 415, so any action by an agency that purports to change the terms of a statute governing public employment is null and void as a matter of law. *See McGuire v. State*, 58 Wn. App. 195, 198-99, 791 P.2d 929 (1990); *Nye v. Univ. of WA*, 163 Wn. App. 875, 260 P.3d 1000 (2011).

Although DRS has statutory authority to administer and implement the pension statute, it does not have authority to confer benefits not granted by statute or otherwise circumvent pension laws.[5] Accordingly, DRS had no authority to extend a unilateral offer of "perpetual gain-sharing" when the pension statutes provided otherwise.

b. DRS Handbooks Never "Offered" Gain-Sharing in Perpetuity

Even if DRS had authority to offer a pension contract, neither the member handbooks nor the educational materials DRS distributed offered permanent gain-sharing. DRS literature describes gain-sharing precisely according to the terms of the statute creating gain-sharing. Indeed, the literature contained clear and conspicuous disclaimers stating:

> The actual rules governing your benefits are contained in state retirement laws. This handbook is a summary, written in less legalistic terms. . . . If there are any conflicts

[5] The U.S. Supreme Court recognized this same distinction between the roles of plan sponsor and plan administrator when it found that summary materials prepared by a plan administrator *about* an ERISA pension plan did not "themselves constitute the *terms* of the plan." *CIGNA Corp. v. Amara*, 131 S. Ct. 1866, 1878, 179 L. Ed. 2d 843 (2011).

> between . . . this handbook and . . . the law, *the current law will govern.*

CP 1083, 1092 (emphasis added).[6]

Plaintiffs make conclusory statements as to the placement and font of the disclaimers. Br. of Resps. at 32. In reality, as the examples in the attached appendix show, the disclaimers are well-positioned and boldly displayed to make clear that they apply to the *entire* document.[7] *See* Appendix A. Plaintiffs' argument is particularly troubling because the plaintiff unions reviewed the DRS communications issued to inform Plan 2 members that they could transfer to Plan 3, and the unions raised no concerns that the discussion of gain-sharing did not mention the reservation clause. CP 1606-15, 2673.

Plaintiffs further claim that without the verbatim language of the disclaimer in *Swanson,* DRS is relying merely on an "unexpressed subjective intent" not to offer benefits beyond those contained in statute. Br. of Resps. at 31-32. But the verbatim language is not required: when provisions in a handbook or manual are accompanied by *any* clear and

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[6] Some DRS literature notes that the "plan documents" govern. Plaintiffs are incorrect as a matter of law in claiming that "there are no 'plan documents.'" Br. of Resps. at 32. The "plan documents" are the documents establishing and defining the plans, i.e., the statutes. *See* http://www.irs.gov/Retirement-Plans-FAQs-regarding-Governmental-Plans.

[7] Representative samples of the disclaimers in the member handbooks are found at CP 2402-03, 2435-38, 2457-60, 2486-89, 3946-49, 4940-43, and 4948-51. Representative samples of the disclaimers in the educational publications are found at CP 2449-51, 2456, 2470, 2481-83, 4938-39, and 4952-53.

conspicuous statement that they are not intended to become binding contractual terms, they do not create contractual obligations. *Birge v. Fred Meyer, Inc.*, 73 Wn. App. 895, 900-01, 872 P.2d 49 (1994). The DRS handbooks clearly state that "[i]f there are any conflicts between . . . this handbook and . . . the law, the current law will govern." *See, e.g.*, CP 1083. This language is the express outward manifestation of DRS's intent not to create new pension "rights" beyond those in the statute.

2. Nothing in DRS Administrative Practice Enlarged the Scope of the Gain-Sharing Statute

Plaintiffs cite several cases to argue that statements in DRS publications created a constitutionally protected "administrative practice." Br. of Resps. at 29 (citing *WA Ass'n of Cnty. Officials v. WA Pub. Employees' Ret. Sys. Bd.*, 89 Wn.2d 729, 575 P.2d 230 (1978); *WA Fed'n of State Employees v. State,* 98 Wn.2d 677, 658 P.2d 634 (1983); and *Bowles,* 121 Wn.2d 52). These cases are inapposite.

The question in each case was whether sick-leave and/or vacation "cash-outs" at retirement should be included in calculating members' pensions. In each case, DRS had interpreted an ambiguous statute to include these "cash-outs" and *had paid* benefits accordingly. And in each case, this Court held that DRS's *practice*, which had enhanced members' pension benefits and continued for a significant period (4 to 25 years), had

created a pension right. "The proper focus" was on the "nature and duration of the administrative practice at issue." *Bowles*, 121 Wn.2d at 66.

In this case, DRS has done nothing through *administrative practice* to expand gain-sharing beyond the statute. DRS provided gain-sharing to members, according to the terms of the statute, each time it was triggered by a "gain-sharing event." DRS never provided gain-sharing after the statute was repealed, and thus never created an expectation that it would do so. Moreover, the gain-sharing statute was never ambiguous about whether members would continue to receive gain-sharing increases after the statute's repeal, so even if DRS had taken actions inconsistent with the statute, its actions could not bind the state to a unilateral contract. *See, e.g.*, *Caritas*, 123 Wn.2d at 415 ("[A]gencies do not have the power to amend unambiguous statutory language.").

3. Plan Members Have No Right to Ongoing Gain-Sharing Based on Estoppel

Because neither the gain-sharing statutes nor DRS literature gave Plaintiffs a contractual right to receive gain-sharing indefinitely, they argue that they nonetheless possess such a right based on equitable or promissory estoppel. This argument fails for several reasons.

a. No Form of Estoppel May Be Used to Validate an Ultra Vires Statement, Act, or Promise

"Estoppel will never be asserted to enforce a promise which is

contrary to the statute." *King Cnty. Employees Ass'n*, 54 Wn.2d at 11-12. Attempting to overcome this defense, Plaintiffs argue that DRS's statements were not "ultra vires" because the issuance of handbooks and other literature was within DRS's authority to administer the retirement plans. Br. of Resps. at 47-48. This argument misses the point.

The ultra vires doctrine is a well-established defense to estoppel:

> (1) estoppel may not be used to enforce a promise [or statement] which is contrary to statute . . . [***and***] (2) estoppel may not be asserted to enforce the promise [or statement] of one who had no authority to enter into that undertaking on behalf of the state.

State v. Nw. Magnesite, 28 Wn.2d 1, 26, 182 P.2d 643 (1947). Plaintiffs' objection to the State's ultra vires defense attacks only the second prong of this test, focusing on DRS's authority to write and distribute handbooks. Br. of Resps. at 47-48. Regardless of that authority, Plaintiffs ignore that "estoppel may not be used to enforce a promise [or statement] which is contrary to statute." *Nw. Magnesite*, 28 Wn.2d at 26. To the extent that any DRS literature indicated that gain-sharing would continue indefinitely (which it did not), the statement was contrary to statute and as such was ultra vires and void.

b. Plan Members Are Not Entitled to Ongoing Gain-Sharing Based on Equitable Estoppel

To prove equitable estoppel, Plaintiffs must show "by clear, cogent, and convincing evidence" that (1) the State made a factual

statement inconsistent with its later claims; (2) members acted in reliance on that statement; (3) they would suffer injury if the State could retract its statement; (4) estoppel is necessary to prevent a manifest injustice; and (5) estoppel will not impair government functions. *Campbell*, 150 Wn.2d at 902. Plaintiffs have shown none of these elements. Their equitable estoppel claim must fail, especially given that "[e]quitable estoppel against the government is not favored" and "'[c]ourts should be most reluctant to find the government equitably estopped when public revenues are involved,'" as here. *Id.* (quoting *Kramarevcky v. DSHS*, 122 Wn.2d 738, 744, 863 P.2d 535 (1993)).

(1) Applying Estoppel Will Not Prevent a Manifest Injustice but Will Impair Government Functions

Taking the last parts of the estoppel test first, Plaintiffs must show that estoppel "is necessary to prevent a manifest injustice" and "will not impair government functions." *Campbell*, 150 Wn.2d at 902. They have shown neither.

If Plaintiffs' estoppel claim prevails, Washington taxpayers will be forced to contribute billions of extra dollars to public employee pensions based solely on DRS's alleged errors. This result would not *prevent* a manifest injustice, it would *be* a manifest injustice. It would be especially unjust given that DRS's alleged errors were simply omissions of statutory

reservation language, language that was available for any plan member to read. *See, e.g.*, *Charles*, 148 Wn.2d at 622. Plaintiffs should not reap a windfall at taxpayers' expense by claiming ignorance of the law.

Meanwhile, the State's budget difficulties are huge. Every dollar Plaintiffs obtain in added pension benefits is money that cannot be used to fund education, improve services to the most vulnerable, or repair failing infrastructure. Applying estoppel here and requiring the State to divert billions of dollars from these vital needs would plainly impair government functions and be far from equitable. This is precisely why "[c]ourts should be most reluctant to find the government equitably estopped when public revenues are involved." *Kramarevcky*, 122 Wn.2d at 744.

(2) Repeal of Gain-Sharing Was Not Inconsistent With Any Prior DRS Statement of Fact

Under the law of estoppel, a misrepresentation of *fact* may potentially give rise to "inconsistent statements," but a misrepresentation of *law* may not. *Dep't of Ecology v. Theodoratus*, 135 Wn.2d 582, 599-600, 957 P.2d 1241 (1998). Even if DRS literature had stated that gain-sharing would continue forever, that would be strictly a misrepresentation of law and could not form the basis of equitable estoppel.

In arguing to the contrary, Plaintiffs rely on *Dorward v. ILWU-PMA Pension Plan*, 75 Wn.2d 478, 452 P.2d 258 (1969), and *Hitchcock v.*

Department of Retirement Systems, 39 Wn. App. 67, 692 P.2d 834 (1984). Br. of Resps. at 47-48. But each of these cases involved a misrepresentation of fact. The original representation to Mr. Dorward was that he had 25 years of "qualifying service" in a particular pension plan; the "inconsistent" representation was that he had 15. Similarly, the original representation to Mr. Hitchcock was that his transportation allowance would be included in computing his retirement allowance; the "inconsistent" representation was that it would not. In making the original representations, DRS applied the retirement statute to Mr. Hitchcock's unique factual situation. *Hitchcock*, 39 Wn. App. at 75-76. As this Court made clear in *Metropolitan Park District of Tacoma v. Department of Natural Resources*, 85 Wn.2d 821, 826, 539 P.2d 854 (1975), statements applying the law to an individual's peculiar set of facts are statements of fact upon which equitable estoppel may be based.[8] These cases do not support Plaintiffs' assertion that estoppel may be based purely on a misrepresentation of law.

[8] Considered in its entirety, *Hitchcock* does not appear to have been decided on equitable estoppel. The court appears to have decided that the retirement statute at issue, correctly interpreted, allowed the inclusion of transportation allowances in the computation of Hitchcock's retirement benefit. *Hitchcock*, 39 Wn. App. at 72. Accordingly, *Hitchcock* is not compelling authority for *any* principle regarding estoppel.

(3) Reliance and Injury May Only Be Proved on an Individual Basis

Like any other element of estoppel, an individual's reliance must be proved by "clear, cogent, and convincing evidence." *Campbell*, 150 Wn.2d at 902. Only when there is *no* other explanation for the action allegedly taken in reliance will reliance be presumed. *See Peterson v. H&R Block Tax Servs., Inc.,* 174 F.R.D. 78, 84-85 (N.D. Ill. 1997); *Negrete v. Allianz Life Ins. Co. of N. Am.*, 238 F.R.D. 482, 491-92 (C.D. Cal. 2006). In the words of the *Negrete* court, to avail themselves of a presumption of class-wide reliance, class plaintiffs "accept . . . a high bar" to prove that "no rational [person]" would have taken the alleged action in reliance if [s]he "had known the truth."[9] *Negrete,* 238 F.R.D. at 492.

Plaintiffs cite *Dorward* for the proposition that "reliance is shown where the plaintiff knew of the benefits offered and continued working." Br. of Resps. at 48. But Mr. Dorward's action in reliance was *not* that he had simply "continued working." Rather, it was that he had "continued working until he reached age 65," i.e., he had *stopped* working at age 65

[9] Plaintiffs mischaracterize *CIGNA*, 131 S. Ct. 1866. Though cited for the proposition that no showing of specific actions taken in reliance was required to prove estoppel, *CIGNA* was not decided on estoppel. After acknowledging that "when a court exercises its authority . . . to impose a remedy equivalent to estoppel, a showing of detrimental reliance *must* be made," the *CIGNA* court ordered equitable relief on a basis more "flexible" than estoppel. Because the case was not decided on estoppel, the CIGNA plaintiffs were not required to "meet the more rigorous standard implicit in the words 'detrimental reliance.'" *Id.* at 1881-82 (emphasis added).

rather than work an additional three years to guarantee an unreduced pension. *Dorward,* 75 Wn.2d at 488.

In the alternative, Plaintiffs ask this Court to *presume* that each class member's decision to remain in service was based entirely on the continued existence of gain-sharing, meaning that *no* rational member of Plan 1 or 3 would have worked past 1997 had [s]he known that gain-sharing could be repealed. Similarly, Plaintiffs asks this Court to presume that *no* rational member of Plan 2 would have transferred to Plan 3 had [s]he known that gain-sharing could be repealed. Neither presumption is reasonable given the multitude of other "logical reasons" for the actions allegedly taken here. *See* Appellants' Br. at 49-50 (detailing reasons for members' decisions). Reliance simply cannot be presumed.

c. Plan Members Are Not Entitled to Ongoing Gain-Sharing Based on Promissory Estoppel

Plaintiffs also ask this Court to reinstate gain-sharing based on promissory estoppel.[10] Promissory estoppel requires proving (1) "a promise," (2) "which the promisor should reasonably expect to cause the promisee to change his position," (3) "which does cause the promisee to change his position," and (4) "that injustice can be avoided only by

[10] To the extent that Plaintiffs claim estoppel on behalf of persons who transferred from TRS Plan 2 to TRS Plan 3, only those who transferred *after* November 20, 1997, are included in this request for relief. CP 4531. Nowhere in their complaints did Plaintiffs claim estoppel on behalf of any member of PERS Plan 1. CP 503-07, 6447-48.

enforcement of the promise." *Jones v. Best*, 134 Wn.2d 232, 239, 950 P.2d 1 (1998). Plan members have not established any element.

(1) The State Made No Promises Intended to Induce Plaintiffs' Reliance

No DRS publication ever promised that gain-sharing would continue indefinitely. Rather, DRS's summaries explained how gain-sharing operated by describing the circumstances in which it would be awarded in the future. CP 2409, 2437, 2442. Plaintiffs contend that these descriptions amounted to a promise to pay gain-sharing indefinitely because they did not explicitly mention that gain-sharing could be repealed. But these summaries *are summaries*; if they must note every potential contingency, they will serve no purpose at all. *See, e.g.*, *CIGNA*, 131 S. Ct. at 1877-78, 179 L. Ed. 2d 843 (noting that if summary materials *about* a plan were held to be legally binding, "that would defeat the fundamental purpose of the summaries," to describe the plan in "readily understandable form"). And each summary noted that "[t]he actual rules governing your benefits are contained in state retirement laws." CP 1083.

Plaintiffs claim that statements about *when* gain-sharing "will be paid" unambiguously amounted to a promise to continue gain-sharing indefinitely, and could not possibly have been simple descriptions of how gain-sharing worked. Br. of Resps. at 47. But "will be paid" is not by

definition a promise. "Will" is often used simply to indicate what is expected to happen in the future. *See, e.g., Webster's II New Riverside University Dictionary* 1319 (3d ed. 1994) (stating that "will" can indicate merely "simple futurity"); *Harberd v. City of Kettle Falls,* 120 Wn. App. 498, 520, 84 P.3d 1241 (2004) (finding statement that "water services will be provided" was not a promise). Here, the term simply indicates futurity; it *describes* what will happen upon the occurrence of future gain-sharing events. Plan members do not explain how DRS could possibly have explained gain-sharing's future operation *without* describing the circumstances in which gain-sharing payments "will be made."

(2) Reasonable Reliance and Injustice May Only Be Proved on an Individual Basis

For the same reasons that reliance and injury must be proved individually for purposes of equitable estoppel, reliance and injustice must be proved on an individual basis for purposes of promissory estoppel.

(3) Plaintiffs Have Shown No Injustice

As explained above, there is nothing just about requiring the State, and ultimately taxpayers, to provide billions of dollars in additional pension benefits to Plaintiffs based solely on alleged misstatements by DRS. This is especially true given that the supposed misstatements were refuted by the gain-sharing statute itself, which "was readily available to Retirees and Employees." *Charles*, 148 Wn.2d at 622.

In sum, Plaintiffs have not shown that any DRS action created a unilateral contract or that estoppel should apply. However, if this Court finds that the first element of either estoppel is met, a remand will be necessary for class members to prove individual reliance and injury.

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

Plaintiffs have requested attorneys' fees pursuant to either RCW 49.48.030 or the common fund doctrine. Br. of Resps. at 53-57. If awarded under the common fund doctrine, Plaintiffs requested that fees be calculated under a lodestar approach and paid at the time of the next gain-sharing event. CP 6615, 6786-89. If Plaintiffs were to prevail in this proceeding, the State did not and does not object to this approach. However, fees must not be awarded pursuant to RCW 49.48.030 because the State is not the employer of the vast majority of class members.

Plaintiffs' response never even bothers to argue that the State is actually the "employer" of all class members. Indeed, Plaintiffs conceded in the Superior Court that the class includes many "school district and county employees who are not employed by the state," CP 7050, and such non-state employees comprise well over half of the class. CP 6993-97. Nonetheless, Plaintiffs argue that the State employs some class members, and so RCW 49.48.030 should be "liberally construed" to allow fees to be

awarded against the State. Br. of Resps. at 55-56.

What Plaintiffs request is not "liberal construction," but rather that the Court ignore the statute altogether. RCW 49.48.030 provides that "[i]n any action in which any person is successful in recovering judgment for wages or salary owed to him or her, reasonable attorney's fees . . . shall be assessed against said employer or former employer." The statute simply does not allow assessment of attorneys' fees against anyone other than the person's "employer." Thus, given that Plaintiffs concede that the State was not the "employer" of the vast majority of the class, fees cannot be assessed against the State under this statute. Liberal construction cannot override a clear statute, for "[a] statute that is clear on its face is not subject to judicial construction." *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001).

It would be especially inappropriate to override the plain language of the statute here given that an award of attorneys' fees is allowed under the common fund doctrine if Plaintiffs prevail. That is the mechanism this Court has used previously when plaintiffs have prevailed in pension cases like this one. *See, e.g.*, *Bowles*, 121 Wn.2d at 69-74.

D. Sovereign Immunity Bars the Court From Awarding Interest on Attorneys' Fees

As a matter of sovereign immunity, the State cannot, without its

consent, be held to interest on its debts. The *only* exceptions to this general rule are when the State has consented to interest on a particular debt (i) either by statute or contract and (ii) either expressly or by reasonable construction. *Carillo v. City of Ocean Shores*, 122 Wn. App. 592, 616, 94 P.3d 961 (2004). Without dispute, the State has not, in this case, consented to interest on attorneys' fees by statute or expressly by contract.

Citing *Architectural Woods, Inc. v. State*, 92 Wn.2d 521, 598 P.2d 1372 (1979), Plaintiffs appear to argue that the State has *impliedly consented* to interest on attorneys' fees *by contract* because (i) the pension plans have private contractual relationships with members; (ii) inherent in that relationship is consent to be held to the *same responsibilities* as a private contracting individual; and (iii) one of those responsibilities is paying interest on attorneys' fees. This argument must fail.

Plaintiffs cite no authority for the proposition that interest on attorneys' fees is one of the "responsibilities" or "liabilities" of a private contracting individual. To the contrary, under the American Rule, which governs the award of attorneys' fees in Washington, a private party is not responsible for attorneys' fees in a contractual dispute—much less interest on those fees—unless the contract *expressly* so provides. *See Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996).

RESPONSE TO CROSS-APPEAL

I. INTRODUCTION

Plaintiffs' cross-appeal involves a "replacement benefit" the Legislature provided in the 2007 Act (Laws of 2007, ch. 491): improved early retirement reduction factors (ERFs or ERRFs) for members of Plan 2s. In enacting this benefit, the Legislature made clear that if the courts reinstated gain-sharing, improved ERFs would automatically end. Nonetheless, Plaintiffs now seek to force the State both to restore gain-sharing *and* to continue the improved ERFs.

In Phase 2 of the trial court proceedings, the court ruled for the State and concluded that automatic termination of the replacement benefits was legal. If this Court upholds the Legislature's repeal of gain-sharing, it need not consider the cross-appeal, since the replacement benefits will continue. If the Court orders gain-sharing restored, however, it should not require the State to continue the replacement benefits.

II. COUNTERSTATEMENT OF THE CASE

In the 2007 Act, the Legislature provided replacement benefits in place of gain-sharing: (1) an addition to the uniform cost of living allowance (COLA) for Plan 1 members; (2) the ability for new employees in TRS and SERS to choose between Plan 2 and Plan 3, rather than being automatically placed into Plan 3; (3) improved ERFs for members of Plans

2 and 3; and (4) a final gain-sharing payment in 2008 that the Legislature could have canceled. Laws of 2007, ch. 491, §§ 2-11. The ERFs are provisions in the retirement plans under which members with at least 30 years of service can retire prior to age of 65 without a reduction in their monthly retirement allowance. A version of the ERFs was in statute prior to the 2007 Act,[11] but the 2007 Act provided improved ERFs for Plan 2 and 3 members who met the eligibility requirements.

The replacement benefits in the 2007 Act had significant monetary value, as well as other advantages to plan members. Each of them was a benefit for which plan members and their unions had long advocated.

The Legislature expressly provided these benefits as replacements for gain-sharing, not in addition to gain-sharing. Specifically, the Legislature stated that if gain-sharing was eventually restored, the replacement benefits would terminate without any further action by the Legislature. With respect to the ERFs for Plan 2, the Act stated:

> If the repeal of chapter 41.31A [gain-sharing] is held to be invalid in a final determination of a court of law, and the court orders reinstatement of gain-sharing or other alternative benefits as a remedy, then retirement benefits for any member who has completed at least thirty service credit years and has attained age fifty-five but has not yet received the first installment of a retirement allowance under this subsection [the improved ERFs] shall be

[11] RCW 41.32.765(3)(a); RCW 41.32.875(3)(a); RCW 41.35.420(3)(a); RCW 41.35.680(3)(a); RCW 41.40.630(3)(a); RCW 41.40.820(3)(a).

> computed using the reductions in (a) of this subsection [the previous, less favorable ERFs].

Laws of 2007, ch. 491, § 2(3)(b) (TRS Plan 2). *See also* Laws of 2007, ch. 491, §§ 4(3)(b), 6(3)(b), 8(3)(b), 9(3)(b), 10(3)(b).

The 2007 Act stated that plan members had no contractual right to the replacement benefits until there was legal certainty with respect to the repeal of gain-sharing. Laws of 2007, ch. 491, § 2(3)(b) ("Until there is legal certainty . . . the right to retire under this subsection [the improved ERFs] is noncontractual."). However, the Act did not take away any replacement benefits that a plan member had received. *Id.* ("[U]pon receipt of the first installment of a retirement allowance computed under this subsection, the resulting benefit becomes contractual for the recipient."). Thus, if the Court orders gain-sharing reinstated, a Plan 2 member who retired under the improved ERFs in the 2007 Act would continue to receive his monthly retirement allowance based on those ERFs. However, a Plan 2 member who had not yet retired when gain-sharing was restored could not retire under the improved ERFs.

In their complaints, Plaintiffs claimed that the provisions automatically terminating the replacement benefits upon the restoration of gain-sharing were invalid and sought to require the State to provide both

gain-sharing and the replacement benefits to all plan members.[12] CP 15, 506. The trial court granted summary judgment to the State on this claim, concluding that the automatic termination provisions were valid. CP 6488-99. Plaintiffs filed a cross-appeal to this Court but limited their cross-appeal to the Plan 2 ERFs. CP 6521-30.

III. ARGUMENT

A. Plan Members Cannot Base a Contracts Clause Violation on a Purported Contractual Right That Is Contingent

To establish a violation of the Contracts Clause, Plaintiffs must show that they had a contractual right in the first place. A pension plan member's benefits are determined by the pension statutes. *Eisenbacher v. City of Tacoma*, 53 Wn.2d 280, 283-84, 333 P.2d 642 (1958). The Legislature provided the improved ERFs for Plan 2 members only on a contingent basis, clearly stating that if gain-sharing was restored by court order, the improved ERFs would end for any Plan 2 member who had not yet retired under them. Thus, Plan 2 members have only a conditional right to the improved ERFs.

It has long been established that for there to be "a contract within the meaning of the Constitution," there must be "a valid subsisting obligation, not a contingent or speculative one." *Ochiltree v. R.R. Co.*, 88

[12] The Costello group did not join in this claim.

U.S. (21 Wall) 249, 252, 22 L. Ed. 546 (1874). *See generally* 16A C.J.S. *Constitutional Law* § 424 (2005); 16B Am. Jur. 2d *Constitutional Law* § 765 (2009). This principle has been applied to public pension cases. *See, e.g.*, *Webb v. Whitley*, 114 Ga. App. 153, 157-58, 150 S.E.2d 261 (1966); *Buchholz v. Storsve*, 740 N.W.2d 107, 113-14 (S.D. 2007).

Washington courts have repeatedly held that the Legislature has the power to make statutory provisions become effective or cease to be effective upon the occurrence of later events. *See, e.g.*, *Brower v. State*, 137 Wn.2d 44, 969 P.2d 42 (1998) (statute providing for election regarding financing football stadium would be null and void unless football team agreed to reimburse state for costs of conducting election); *Royer v. Pub. Util. Dist. 1*, 186 Wash. 142, 56 P.2d 1302 (1936) (statute providing that a public utility district coextensive with a county would go into effect upon vote of county electorate, after petition or referral by board of county commissioners); *State v. Storey*, 51 Wash. 630, 99 P. 878 (1909) (statute permitting running at large of livestock to be effective when three-fourths of unincorporated lands are fenced, as determined by petition to county commissioners).[13] This is consistent with case law from

[13] *See also, e.g.*, *Diversified Inv. P'ship v. DSHS*, 113 Wn.2d 19, 775 P.2d 947 (1989) (statute providing that state Medicaid reimbursement would be reduced if federal government determined it was inconsistent with federal requirements); *Morgan v. Dep't*

other jurisdictions. *See* 16 C.J.S. *Constitutional Law* § 258 (2005); 82 C.J.S. *Statutes* § 84 (2009); 1 Norman J. Singer, *Statutes & Statutory Construction* § 33:7 (6th ed. 2002).

Thus, the legislature can provide that benefits will terminate if a statute is declared unconstitutional. *See Tatom v. Wheeless*, 180 Miss. 800, 178 So. 95 (1935) (state unemployment benefits to be suspended if federal court declares federal statute unconstitutional). The legislature can also provide for a statutory alternative in the event the preferred statutory provision is declared invalid. *See State v. Duren*, 547 S.W.2d 476 (Mo. 1977) (alternative criminal penalty if death penalty is struck down as unconstitutional). *See also Marr v. Fisher*, 182 Or. 383, 187 P.2d 966 (1947) (statute increasing exemptions and credits from state income tax effective only if state sales tax referendum is approved by voters).

Contrary to Plaintiffs' contention, Br. of Cross-Appellant at 65, such conditional or contingent provisions can apply to pension benefits. Indeed, "[a] public employee's vested pension rights . . . are subject to any designated condition precedent." *Ludwig v. Dep't of Ret. Sys.*, 131 Wn. App. 379, 383, 127 P.3d 781 (2006). For example, in *McCall v. State of New York*, 219 A.D.2d 136, 640 N.Y.S.2d 347 (1996), the New York

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of Soc. Sec., 14 Wn.2d 156, 127 P.2d 686 (1942) (initiative providing that calculation of senior citizen benefits be adjusted to reflect requirements of federal statute).

Legislature provided an alternative contingent date for the provision of an additional retirement benefit for public employees in the event a separate section of the statute was found unconstitutional. The *McCall* court held that the contingent legislation was constitutional because it demonstrated the legislature's clear intent with respect to how the remainder of the statute was to be treated if the separate section was found to be illegal. 640 N.Y.S.2d at 351.

It is also well recognized that a contract can include conditions precedent or subsequent that excuse performance, including the outcome of pending litigation. *See City Nat'l Bank of Anchorage v. Molitor*, 63 Wn.2d 737, 745, 388 P.2d 936 (1964) (promise not to enforce obligations until a court decision issued would have created a condition subsequent if adequate proof shown). *See generally* 25 David K. DeWolf, Keller W. Allen, and Darlene Caruso, *Wash. Practice, Contract Law & Practice* § 8.3 (Conditions precedent), § 8.5 (Conditions subsequent) (2d ed. 2007).

In sum, the Legislature provided the improved ERFs to Plan 2 members only on a conditional basis, i.e., that gain-sharing would not be restored. Accordingly, Plan 2 members do not have a right to the improved ERFs that would support a Contracts Clause violation.

B. Invalidation of a Statute by the Courts Is Not a Later Act of the Legislature Giving Rise to a Contracts Clause Claim

For there to be a Contracts Clause violation, there must be some action by the Legislature *after* the formation of the contract that impairs the contract. That is, a contract cannot be impaired by a statute in force when the contract was made, for it is presumed the contract was made in contemplation of existing law. 16A C.J.S. *Constitutional Law* § 428, at 107 (2005); 16B Am. Jur. 2d *Constitutional Law* § 62, at 208-09 (2009).

This principle is recognized in Washington. *See Minish v. Hanson*, 64 Wn.2d 113, 390 P.2d 704 (1964) (contract between water district and engineers not impaired when petition to dissolve water district was filed; provisions for dissolving water district existed before contract was entered and so cannot impair contract); *Shoreline Cmty. Coll. Dist. 7 v. Empl. Sec. Dep't*, 120 Wn.2d 394, 410, 842 P.2d 938 (1993); *Eskay Plastics, Ltd. v. Chappell*, 34 Wn. App. 210, 212, 660 P.2d 764 (1983).

Here, the contingent replacement benefits, including the improved ERFs for Plan 2 members, did not exist until the Legislature enacted those provisions in the 2007 Act. An integral part of the replacement benefits was that they were contingent on gain-sharing's not being restored by court order. The 2007 Act is self-executing in this regard and no further action by the Legislature is necessary. A judicial decision is not a "later

act" that gives rise to an impairment of contract claim under the Contracts Clause. *See* 16A C.J.S. *Constitutional Law* § 431 (2005); 16B Am. Jur. 2d *Constitutional Law* § 760 (2009). Accordingly, there is no "later act" by the Legislature that could give rise to a Contracts Clause claim here.

C. *Bakenhus* and *Navlet* Do Not Require Continuing the Plan 2 ERFs

As they did in response to the State's appeal in Phase 1, Plaintiffs rely on *Bakenhus*, 48 Wn.2d 695, and *Navlet*, 164 Wn.2d 818, in support of their cross-appeal on Phase 2. However, as with Phase 1, *Bakenhus* and *Navlet* are not controlling for several reasons and do not require the State to continue the Plan 2 ERFs if this Court restores gain-sharing.

First, neither *Bakenhus*, *Navlet*, nor any other case cited by Plaintiffs involved a contingent benefit like the Plan 2 ERFs involved here. Moreover, even if *Bakenhus* and *Navlet* were controlling as to a reservation of rights clause (which they are not), there is a difference between a reservation of rights clause and a contingent benefit, such as the improved ERFs for Plan 2. As the trial court noted, there is a qualitative difference between the Legislature's reserving the right to repeal a pension benefit in the future (which may or may not occur) and the Legislature's providing in the same act that creates a benefit that the benefit will automatically end if a certain outside event occurs. CP 6489-90.

Second, as to the flexibility and integrity prongs of the *Bakenhus* analysis, suffice it to say that if in 2007 the State and other public employers could not afford gain-sharing, they certainly could not afford both gain-sharing *and* the replacement benefits.

Third, Plaintiffs' argument that if the improved ERFs for Plan 2 are eliminated, there is no comparable benefit to replace them, is misplaced. In the 2007 Act, the Legislature considered the replacement benefits for all the plans as a package to replace gain-sharing. This Court should approach the matter similarly. Gain-sharing, if restored, would be a more than adequate replacement for the loss of the improved ERFs.

Even if the Court considers only what Plan 2 members would gain if the improved ERFs end, however, the "comparable benefit" standard is satisfied. Automatic termination of the improved ERFs will lower the Plan 2 member contribution rate, since that rate no longer will be based on the improved ERFs. Only a portion of Plan 2 members will be able to take advantage of the improved ERFs in the 2007 Act because many will not have had 30 years of service before reaching age 65. CP 2033. But their member contribution rate nevertheless is based on the improved ERFs.[14]

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[14] The Plan 2 member contribution rate is based on all the benefits the plan provides, not the benefits any individual member is eligible for. For example, the Plan 2 member contribution rate recognizes the cost of providing disability retirement benefits, even though (hopefully) few Plan 2 members will ever have to use those benefits. Thus,

Thus, automatic termination of the improved ERFs for Plan 2 members would result in a reduction in their member contribution rate, which benefits not just those members who would have enough service time and age to take advantage of the improved ERFs, but also those Plan 2 members who could never take advantage of the new ERFs. This meets the test for a comparable benefit under *Bakenhus*.

IV. CONCLUSION

To prevail, Plaintiffs must prove "beyond a reasonable doubt" that they had a contractual right, that the Legislature substantially impaired it, and that the impairment was unreasonable and unnecessary. *Charles*, 148 Wn.2d at 623-24. Plaintiffs have proven none of these elements because the gain-sharing statute clearly stated that "no member or beneficiary has a contractual right to receive" gain-sharing forever, and "[t]he legislature reserve[d] the right to . . . repeal" gain-sharing, which it ultimately did to protect core pension benefits. Former RCW 41.31.030 (2006).

At bottom, Plaintiffs ask this Court to grant them billions of dollars in pension enhancements by ignoring the Legislature's clear intent. But this Court has always strived "to determine and carry out the intent of the legislature," *Hale,* 165 Wn.2d at 509, and it should again do so here.

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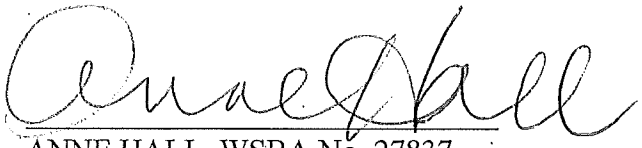
if gain-sharing were restored and the Plan 2 improved ERFs terminated as provided in the 2007 Act, Plan 2 members would see a reduction in their member contribution rate, in that they would not be paying for a benefit that some of them could never use.

RESPECTFULLY SUBMITTED this 1st day of May, 2013.

ROBERT W. FERGUSON
Attorney General



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DATED this 1st day of May, 2013, at Olympia, Washington.

MARY FORD

APPENDIX A

WASHINGTON STATE
Department of
Retirement Systems

PERS 1

PUBLIC EMPLOYEES' RETIREMENT SYSTEM
PLAN 1

Seminar/Workshop presentation
Rights and benefits information
May 2007

CONTACTING DRS

Department of Retirement Systems ..... 6835 Capitol Blvd. Tumwater
P.O. Box 48380, Olympia, WA 98504-8380

Telephone ..... (360) 664-7000
(800) 547-6657

TDD Line (hearing impaired) ..... (360) 586-5450
(866) 377-8895

Fax ..... PERS/SERS (360) 753-4790 or
(360) 664-7336

Web site ..... *www.drs.wa.gov*

E-mail address ..... *recep@drs.wa.gov*

The actual rules governing your benefits are contained in state retirement laws. This handout is a summary, written in less legalistic terms and designed to accompany a presentation conducted by a Washington State Department of Retirement Systems (DRS) employee. If there are any conflicts between the applicable law and what is written in this handout, the law will govern.

Only DRS staff members are authorized by DRS to conduct presentations on the state retirement systems. DRS does not endorse any presentation or use of this handout by persons that are not employed by DRS.

Washington State

etirement System

TRS Plan 3

Member Handbook

Updated September 2000

For those who first became members after June 30, 1996, or chose to transfer from TRS Plan 2.

DRS
Department of Retirement Systems

DRS0001869

APPENDIX A

TEACHERS' RETIREMENT SYSTEM PLAN 3

For those who first became TRS members on or after July 1, 1996, and those who transfer from Plan 2

Teachers' Retirement System (TRS) Plan 3 was created by the Washington State Legislature in 1995 and became effective on July 1, 1996. Plan 3 is designed to provide a flexible retirement program that enables members to make career changes or leave public employment before the Plan's normal retirement age without undue penalty.

TRS PLAN 3 IS COMPOSED OF TWO SEPARATE RETIREMENT BENEFIT COMPONENTS

TRS Plan 3 has a dual benefit structure. Member contributions finance a defined contribution component, and employer contributions finance a defined benefit component.

The defined contribution component is member financed and provides a tax-deferred investment program that you may access any time you separate from TRS-covered employment. The amount of retirement income generated by the defined contribution component depends on how much you contribute and how well your investments do in the market. You have an initial choice in how much you contribute, and choices of where your contributions are invested. When you separate from TRS service you may also choose how and when you take payment.

The defined benefit component is employer financed and, once you meet service requirements, provides for a lifetime monthly benefit at age 65 or an actuarially reduced lifetime monthly benefit as early as age 55. The amount of the benefit is based on your time in service and your average final compensation.

HOW YOUR HANDBOOK IS ORGANIZED

On the following page you will find a Table of Contents. Using the Table of Contents, you should be able to identify where in the handbook you can find any specific information you wish to know.

This handbook is divided into three sections. The first section describes the defined contribution component. The second describes the defined benefit component. These two sections begin with a list of highlights followed by a description of your rights and benefits in a question and answer format. The third section provides general information about the administration of Plan 3. On the last page of the handbook, you will find a telephone listing for the Department of Retirement Systems and other important Plan 3 contacts.

SUMMARY DESCRIPTION

This book provides a summary of the rules governing your retirement plan. The actual rules governing your benefits are contained in State retirement laws. This handbook is a summary, written in less legalistic terms. It is not a complete description of the law. If there are any conflicts between what is written in this handbook and what is contained in the law, the applicable law will govern.

TABLE OF CONTENTS

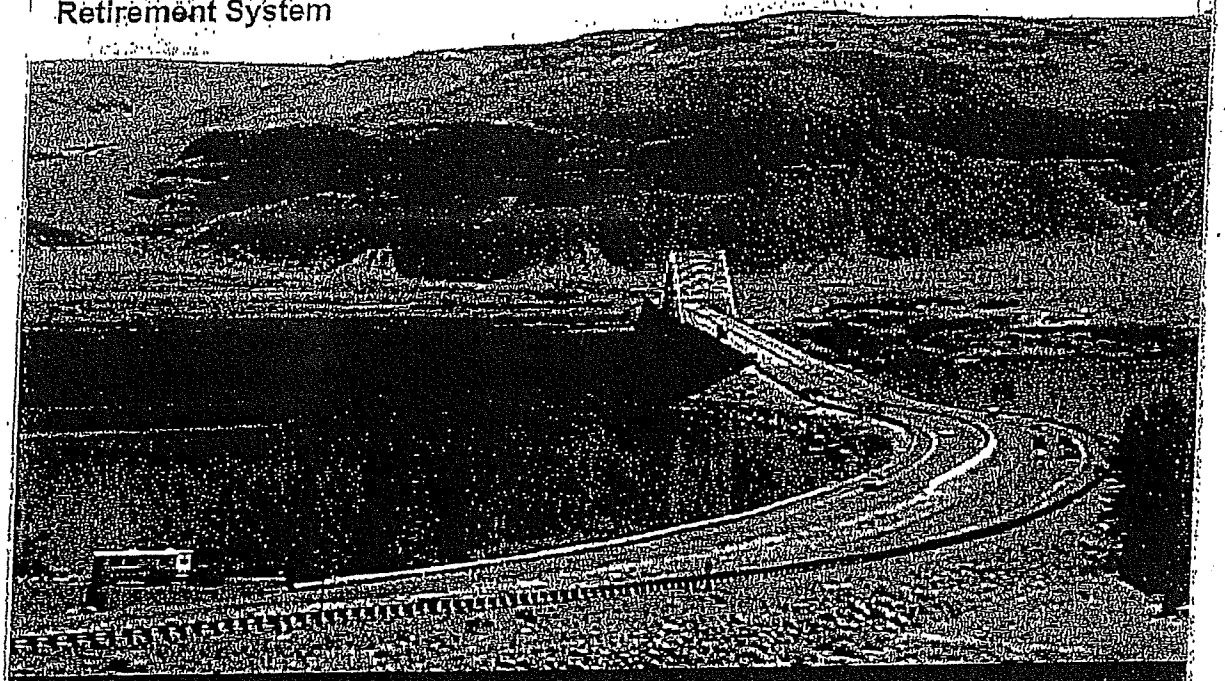
DEFINED CONTRIBUTION COMPONENT

DEFINED BENEFIT COMPONENT

GENERAL INFORMATION

Washington State
Public Employees'
Retirement System

June 2003



PERS Plan 3 Member Handbook

DRS
Department of
Retirement
Systems

DRS0003886

APPENDIX A

Table of Contents - PERS Plan 3 Member Handbook

Summary of Benefits for PERS Plan 3

Defined Contribution Account	Your member contributions are deposited in a defined contribution account. That money is invested according to your instructions and you can take payment of that account any time you terminate from all covered employment (see pages 4 and 7).
Contribution Rates	Contributions to PERS Plan 3 are mandatory. Under current federal law, once you select a contribution rate you cannot change it unless you change employers. Currently, there are six contribution rate options (see page 4).
Gain Sharing	PERS Plan 3 members may receive gain sharing payments in January of even-numbered years if eligible (see page 6).
Defined Benefit Formula	1% x Service Credit Years x AFC = Monthly Benefit (see page 12).
Eligible for Retirement	Plan 3 provides for an unreduced retirement benefit at age 65 if you have: • At least 10 service credit years; or • Five service credit years, including 12 service credit months that were earned after age 54; or • Five service credit years earned in PERS Plan 2 prior to June 1, 2003. A reduced benefit is available as early as age 55 (see page 11).
How Service Credit Is Accumulated	Service credit is based on the total compensated time reported by your employer to DRS on your behalf (see page 8).
Service Credit for Military Time	You may be eligible to receive service credit for time spent in the military. To qualify you must have left retirement-covered employment to enter the military (see page 9).
Average Final Compensation or AFC	Your AFC is the monthly average of your 60 consecutive highest-paid service credit months. Not included are lump sum payments for unused sick leave, unused vacation or annual leave, or any form of severance pay (see page 12).
Disability Retirement	If you become totally incapacitated for continued employment with a covered employer, and leave that employment as a result of a disability, you may be eligible for a disability retirement benefit (see page 15).
Cost of Living Adjustment	On July 1 of every year following your first full year of retirement, your monthly defined benefit will be adjusted by the percentage change in the Consumer Price Index (CPI-U, Seattle), to a maximum of three percent per year (see page 15).
Temporary Duty Disability	You may be eligible to receive up to 12 months of service credit while on leave for a duty disability (see page 10).
Health Insurance Coverage	If you are qualified for Public Employees Benefits Board (PEBB) health insurance coverage, you must elect PEBB coverage within 60 days of separation from employment, and be 55 years of age and have 10 years service credit (see page 19).
Death In Service Survivor Benefit	• If you die before you have initiated payment from your defined contribution account, your beneficiary will receive the balance in that account (see page 8). • If you die before you retire, your surviving spouse, or if none, your minor children will receive a defined benefit (see page 15).

Plan 3

Public Employees' Retirement System (PERS) Plan 3 was created by the Washington State Legislature, and became effective on March 1, 2002.

PERS Plan 3 is composed of two separate retirement benefit components

PERS Plan 3 has a dual benefit structure. Member contributions finance a defined contribution component, and employer contributions finance a defined benefit component.

The member-financed, defined contribution component provides an investment program you may access any time you separate from covered employment. The amount of retirement income generated by the defined contribution component depends on how much you contribute and the performance of your investments. You must choose how much you contribute, where your contributions are invested, and how and when you take payment.

The employer-financed, defined benefit component, provides for a lifetime monthly benefit at age 65, or a reduced lifetime monthly benefit as early as age 55. Reduction factors vary based on the number of service credit years and your age. The benefit amount is based on your years of service credit and your average final compensation. Your benefit amount could be affected if you choose a benefit option (see pages 13 and 14).

Am I a member of the plan?

Benefits in PERS Plan 3 are for PERS Plan 2 members who transfer during subsequent Januarys, and new employees who choose or default to PERS Plan 3.

New employees

- **State agency and higher education employees** - If you were first hired into an eligible position on or after March 1, 2002.
- **Local government employees** - If you were first hired into an eligible position on or after September 1, 2002.

You have 90 days from your date of eligibility to make a decision. Your employer reports you in PERS Plan 2 until you make a choice. If you don't choose, you default into PERS Plan 3.

Membership exclusions

If you are already receiving retirement or disability benefits from a Washington state retirement system, you may be prohibited from joining this Plan. If this applies to you, contact the Department of Retirement Systems (DRS) (see page 20 for a list of contact telephone numbers).

Elected officials, governor appointees, city managers, and chief administrators for ports, counties, and P.U.D.s

These officials and administrators have the option to be covered under PERS. If they wish to be covered they must contact DRS.

Summary description

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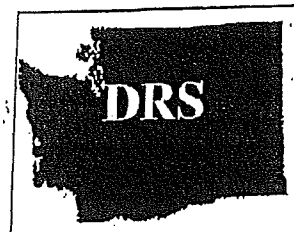

Washington State Department of Retirement Systems

PLAN 3

PUBLIC EMPLOYEES' RETIREMENT SYSTEM
SCHOOL EMPLOYEES' RETIREMENT SYSTEM
TEACHERS' RETIREMENT SYSTEM

Seminar/Workshop presentation
Rights and benefits information
December 2002

CONTACTING DRS

Department of Retirement Systems, ... 6835 Capitol Blvd. Tumwater
P.O. Box 48380, Olympia, WA 98504-8380

Appointments, forms, all other information ..... (360) 664-7000
(800) 547-6657

Telecommunications device for
the hearing impaired (TTY/TDD) ..... (360) 586-5450

Fax machine ..... (TRS) (360) 753-3429

(PERS/SERS) (360) 753-4790
or
(360) 664-7336

DRS Internet Home Page ..... http://www.wa.gov/drs

DRS e-mail address ..... recep@drs.wa.gov

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PERS Plan Choice At a Glance

Timely Decision

NEW MEMBERS

You have 90 days from your date of eligibility to make a decision. If you don't choose a plan during that time, you will automatically default to PERS Plan 3.

JANUARY TRANSFER MEMBERS

You must earn service credit during the January in which you transfer and turn in your Member Information Form by January 31.

As a new Public Employees' Retirement System (PERS) member, or a January Transfer Member you have the opportunity to choose between two retirement plans: PERS Plan 2 or PERS Plan 3. This *At a Glance* summary outlines some of the key points and important steps to help you through the decision-making process. For more information, refer to your *Journey to Retirement* PERS Plan Choice Booklet.

The Department of Retirement Systems' (DRS) goal is to provide you with information and tools so you can make an informed choice for you and your family. We encourage you to take advantage of all the resources available to you to help you make your decision.

AM I A NEW MEMBER OR JANUARY TRANSFER MEMBER?

NEW MEMBER

You are a New Member if you were first hired into an eligible position at a state agency or higher education employer on or after March 1, 2002 or a local government employer on or after September 1, 2002.

JANUARY TRANSFER

PERS Plan 2 members employed in eligible positions at a state agency or higher education employer prior to March 1, 2002 or a local government employer prior to September 1, 2002.

HOW DO I KNOW WHICH PLAN IS BETTER FOR ME?

Your individual circumstances will determine which is more beneficial — for you to choose PERS Plan 2 or PERS Plan 3. There are a number of factors to consider, such as your comfort level with investment risk, your expected length of employment, how much you are earning and how much you have saved.

Gain Sharing

Gain sharing is a provision of PERS Plan 3 which can add to the value of your PERS Plan 3 Defined Contribution account. For information about gain sharing, see page 9 of your PERS Plan Choice Booklet.

Risk

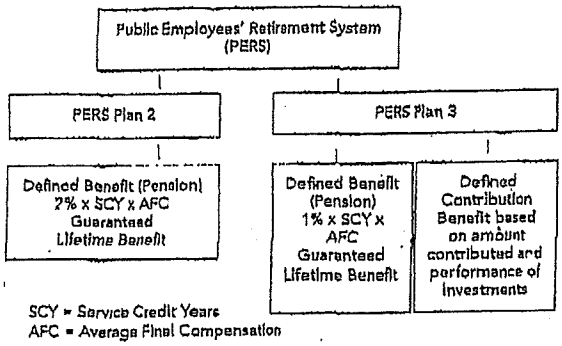
Risk is the chance that your investment will not grow as expected, or that it could decline in value.

WHAT ARE THE DIFFERENCES BETWEEN THE PLANS?

PERS Plan 2 is a **Defined Benefit** plan. It provides a guaranteed lifetime monthly retirement benefit. The benefit is based on the member's length of employment and salary. The formula is given in the chart below, and is described on pages 6 and 7 of your PERS Plan Choice Booklet.

PERS Plan 3 has a benefit which is made up of two parts:

- a **Defined Benefit** component like PERS Plan 2, but providing half the benefit; and
- a **Defined Contribution** component, in which you have some flexibility and assume investment risk. This is because you choose the level of your contributions and how they are invested.



SCY = Service Credit Years
AFC = Average Final Compensation

For an overview of the two plans and how each can benefit you, see pages 18 and 19 of your PERS Plan Choice Booklet.

HOW DO I KNOW WHICH PLAN IS BETTER FOR ME?

How comfortable are you assuming investment risk?

In PERS Plan 2, your retirement benefit is based on a formula, and that benefit is guaranteed. Like PERS Plan 2, part of PERS Plan 3 is also based on a formula and is guaranteed. However, there is another part of PERS Plan 3 that is based on investment returns. This portion carries investment risk. Your investment choices are your responsibility and will determine how much risk your account is exposed to — and what kind of benefit you receive in retirement.

How does your length of employment impact your benefit?

How long you plan to be employed will impact your benefit in each plan, and should be a consideration when making your decision.

PERS Plan 2 and the Defined Benefit portion of PERS Plan 3 are calculated based on your length of employment and salary. So, the longer you've been a PERS member when you retire, the more service credit you will have and the higher your pension benefit will be in each plan.

If you plan on retiring early, take note — eligibility for benefits is different in each plan. See the comparison chart on page 18 of your PERS Plan Choice Booklet to see how PERS Plan 2 and PERS Plan 3 compare.

Does your salary make a difference?

In both plans, your member contribution is based on a percentage of your salary. So, if your salary changes, so does your contribution amount.

In PERS Plan 2, your retirement benefit is based on your salary, as well as your length of employment. Therefore, a higher salary will result in a higher retirement benefit. This is the same for the Defined Benefit portion of PERS Plan 3.

How will you meet your retirement goals?

Your PERS retirement benefit may only be a part of your retirement income. It may come from a variety of sources, including Social Security benefits, a deferred compensation 457 plan, a 403(b) plan or an IRA. It could also include money in savings accounts or a spouse's retirement plan.

Think about how your other sources of retirement income factor into your plan choice. How much additional retirement income will you need to meet your retirement goals in each plan?

How can you compare your benefits in each plan?

Financial modeling software has been developed that factors in multiple variables for PERS Plan 2 and PERS Plan 3 and performs the complex calculations needed to project your future benefit in each plan. It allows you to compare the projected benefits for both plans based on your personal situation, including variables such as your contribution level and expected rate of return.

You can find out more about the software on page 14 of your PERS Plan Choice Booklet.

Retirement Goals

You will need to decide which plan best meets your retirement goals.

Compare Benefits

You can use the financial modeling software to compare the benefits in each plan.

DRS0004193

WHERE CAN I FIND HELP?

Several resources are available to help you evaluate your individual situation. The PERS Plan Choice Booklet is a good place to start. The booklet outlines the two plans, explains many of the important considerations and provides an explanation of the resources you can use to make an informed decision for you and your family:

- *Journey to Retirement* PERS Plan Choice Booklet
- Financial Modeling Software - available on the Web site
- Phone Support Center and E-mail - call 888-711-8773 or write pershelp@icmarc.org
- Video - For New Members only, available on the Web or from your employer
- Web site - www.wa.gov/DRS/member/pers/2or3

ONCE I DECIDE, WHAT DO I DO?

NEW MEMBER

If you choose PERS Plan 2, you need to fill out two forms — the Member Information Form and the Beneficiary Designation Form— and turn them in to your employer. You can find the forms in the back of your PERS Plan Choice Booklet, or on the Web site.

If you choose PERS Plan 3, you need to fill out the same two forms to choose your contribution rate and make your investment selections. If you do not choose a contribution rate when you choose or default to PERS Plan 3, you will automatically default to rate Option A (5%), and the Washington State Investment Board's (WSIB) Total Allocation Portfolio (TAP).

JANUARY TRANSFER

If you want to remain in PERS Plan 2, you do not need to do anything. Your benefit will continue to be reported in PERS Plan 2.

If you want to transfer to PERS Plan 3 you must earn service credit during the January in which you transfer and turn in your Member Information Form to your employer by January 31. You can find the Member Information Form in the back of your PERS Plan Choice Booklet, or on the Web site. If you do not choose a contribution rate when you transfer to PERS Plan 3, you will automatically default to rate Option A (5%), and the Washington State Investment Board's (WSIB) Total Allocation Portfolio (TAP).

Time is Important

NEW MEMBER

If you fail to choose a plan within 90 days, you will default into PERS Plan 3.

JANUARY TRANSFER

You must earn service credit during the January in which you transfer and turn in your Member Information Form to your employer by January 31.

Your decision is final; once a decision is made to join PERS Plan 3, you cannot return to PERS Plan 2.

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