The Honorable John R. Hickman
Special Setting
Hearing Date: June 5, 2015 1:30 p.m.
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

KEVIN DOLAN and a class of similarly situated individuals, Plaintiffs, v. KING COUNTY, a political subdivision of the State of Washington, Defendant, and DEPARTMENT OF RETIREMENT SYSTEMS, Intervenor	NO. 06-2-04611-6

PLAINTIFFS' MOTION TO MODIFY PERMANENT INJUNCTION AND REQUIRE INTERVENOR DRS TO PROVIDE THE SERVICE CREDIT DUE TO CLASS MEMBERS

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RELIEF REQUESTED

Plaintiffs, the King County public defense lawyers and staff (hereafter, collectively "the employees"), move to modify the Court's permanent injunction entered on April 17, 2009, affirmed in *Dolan v. King County*, 172 Wn.2d 299, 301, 310, 320, 322 (2011), and modified on March 2, 2012. The injunction required King County to enroll in PERS all class members who were then employed, or employed in the future. The enrollment occurred beginning on March 31, 2012, and class members employed on July 1, 2013 also became "official" King County employees on that date.

In addition to enrollment, forty class members have received service credit for their work in King County public defense pursuant to interim orders and then retired with their pension benefits, based on years of service or disability. Stobaugh Dec., ¶4.

It has now been over three years and nine months since the Supreme Court decided that King County public defenders should have been in PERS. *Dolan,* 172 Wn.2d at 301, 303, 320, 322. King County has reported class members' work history data to DRS going back to 1978 and DRS found the data sufficient to determine service credit. Stobaugh Dec., Ex. C (Tardif letter, March 6, 2015). But DRS will not officially provide the service credit to class members because "service credit for these members has not been determined" by the Court. Stobaugh Dec., Ex. D (Tardif letter, March 6, 2015, p. 1).

More *Dolan* class members (beyond the forty mentioned above) are eligible to retire based on service and wish to do so either right now or very soon. They should not have to wait for service credit while DRS litigates on other matters, such as how much King County will pay DRS (a dispute lasting more than two years so far). Accordingly, the employees move to modify the permanent injunction to require DRS (and King County, to the extent it has further responsibilities on this matter) to promptly provide service credit to class members so they can retire in accordance with PERS provisions.[1] The order should be final under CR 54(b) to avoid further harm to class

[1] The employees are not asking the Court to rule at this time on responsibility for payment of PERS contributions (continued)

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members.

STATEMENT OF FACTS

A. King County Has Reported the Class Members' Employment Information and DRS Has Accepted it as Satisfactory to Determine Service Credit.

After the Court of Appeals vacated the settlement agreement and reversed the Court's limited intervention order, King County reported to DRS the *Dolan* class members' pay and employment histories that DRS needed to determine service credit and the amount of each retiring employee's PERS pension with that service credit.[2] The information that King County reported also allows DRS to determine the amount of the PERS contributions omitted by King County plus any interest, if owed.

DRS acknowledged in its appeal from the settlement that the Supreme Court determined "the eligibility of King County public defenders for retroactive membership over a period of 35 years." DRS Appellants' Brief at 11, citing *Dolan, supra.* And DRS agrees that King County reported the "information needed for DRS to determine retroactive service credit, contributions and interest." Stobaugh Dec., ¶3, Ex. C (Tardif letter of March 6, 2015).

King County has reported class members' work history and pay information to DRS so that DRS can determine service credit and contributions due from the County. DRS, however, will not let the class members have that service credit in their retirement records because "service credit for these members has not been determined" by the Court and because there are still contribution and interest issues with King County. Stobaugh Dec. , ¶3, Ex. D (Tardif letter of March 6, 2015).

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and interest, if any. The employees have no responsibility under federal tax law or under the PERS statute to pay any omitted contributions or interest, if any is owed. Nor does King County have any right to seek or obtain payments from the employees for the County's failure to make the contributions. (See pp. 10-13, *infra.*) Even if the County could make a claim against the employees, the employees could amend their complaint to assert claims for other benefits including pay parity, the value of which would surpass the value of any theoretical claim that King County could have against the employees. Further, assuming *arguendo* that the employees did not or could not amend their complaint, the value of the other benefits including pay parity claims, would more than offset any supposed amount owed to King County as a matter of equitable recoupment.

[2] Employment information for the class members that King County reported to DRS covers the time period from January 1, 1978 (the PERS 2 claims) to March 31, 2012 (the enrollment date) for those members enrolled in PERS 2. A few class members are in PERS 1 and had not yet obtained thirty years of service and, for those class members, King County reported employment information before January 1, 1978. Stobaugh Dec. , ¶5.

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B. Forty Class Members Were Able to Retire Pursuant to Interim Orders.

After the Supreme Court's decision, the Court entered orders allowing the three seriously ill class members to retire with PERS disability retirement, with full retroactive service credit. Orders of 5/25/12; 9/21/12; and 11/16/12.

After the settlement was approved, the Court entered an interim order, agreed to by King County and DRS, allowing class members who were over 65 to receive full service credit going back to 1978 for those in PERS 2 and to retire with their PERS pension. Order, 9/17/13. Thirty-seven additional long-term King County public defense employees, many with 20 to 30 years of service, were thus able to retire with PERS pensions under that order. Stobaugh Dec. , ¶4; Dolan Dec. ¶3.

C. More Class Members Now Need to Retire.

There are now about 50 additional class members who are over 65 now, or will within a few months turn 65, and most of them are still working. Stobaugh Dec. , ¶6; Dolan Dec., ¶6. Most of them would like to retire with their PERS pension but they cannot because DRS shows service credit only since March 2012 when the Court ordered enrollment. Thus, DRS shows them as not eligible to retire when in fact they have more than sufficient service credit, with 20 or more years of service that has not yet been officially credited by DRS. Dolan Dec., ¶¶6-7; Faller Dec., ¶6.

For example, Virginia Faller will be 65 in October. She has worked as a King County public defense employee with TDA for over 20 years. She would like to retire when she turns 65 in October. She cannot, however, because DRS shows her with PERS service credit starting only in April 2012, when the Court ordered King County to start making PERS contributions for the public defense employees. Thus, according to DRS, Virginia is not even vested in PERS and cannot retire from PERS. But actually she has 20 more years of service credit that King County reported to DRS. DRS is not officially counting this work reported by King County because the Court has not determined service credit. Faller Dec., ¶¶1-4.

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There are several other long-term public defense employees at TDA working with Virginia who are now 65 or will soon be 65 and who would also like to retire with their PERS pension. Like Virginia, they cannot retire because DRS only credits them with service since April 2012, even though King County has reported to DRS that they have 20 or more additional years of employment as King County public defense employees. Some of these long-term employees have been told that their jobs are going to be eliminated by King County, and thus receiving their PERS pension is critical if they lose their jobs. They cannot retire without receiving the service credit that King County has reported to DRS. Faller Dec., ¶ 6.

Similarly, Lois Trickey is a long-term King County public defense attorney with SCRAP. She recently turned 65 and would like to consider retiring, but that is not feasible because DRS shows her service credit only since April 2012 and thus she is not even vested according to DRS. But she has actually worked for over 24 years before April 2012 as a King County public defense attorney and King County has reported that employment information to DRS. DRS is not willing to give Lois service credit without an order by the Court. There are several other long-term public defense employees at SCRAP that are in the same situation as Lois. They would like to retire or at least consider retiring but they cannot because DRS shows them as not vested when actually they have extensive service that has been reported by King County to DRS. Trickey Dec. ¶¶2, 3.

D. King County Would Like Its Public Defense Employees to be Able to Retire.

King County would like the public defense employees who want to retire to be able to retire. It sent them a voluntary separation agreement encouraging these public defense employees who are eligible to retire from PERS to retire and leave county employment, in exchange for a $16,000 separation payment. Unfortunately the public defense employees could not accept the offer, even if they wanted to, because their long-term service as King County public defense employees was not then officially credited by DRS. Faller Dec. ¶ 7 (and attachment).

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ISSUES

1. Should Intervener DRS be ordered to provide service credit in retirement records to class members in accordance with the Supreme Court's mandate and the data provided by King County?

2. Should the Court reserve all issues concerning funding other than King County paying the overdue employer contributions undisputedly owed?

ARGUMENT

I. THE SUPREME COURT DETERMINED THAT CLASS MEMBERS ARE ENTITLED TO SERVICE CREDIT FOR THEIR PUBLIC DEFENSE WORK.

The Supreme Court affirmed this Court in *Dolan v. King County*, 172 Wn.2d 299, 301, 320 (2011), holding that King County public defense employees are employees of King County and for many years should have been enrolled in PERS as "employees" under RCW 41.40.010(12). DRS agrees that by this decision class members are entitled to retroactive service credit, that it has the data required to determine service credit, and that class members are entitled to retire when they have sufficient service credit and reach the appropriate age. DRS, however, says it needs the Court to formally order it to provide service credit. This motion is therefore intended to carry out the Supreme Court's mandate to provide a remedy for the erroneous denial of service credit. *Dolan*, 172 Wn.2d at 301, 322.

DRS said (quoted on p. 2 *supra*) that *Dolan* entitles class members to as much as thirty-five years of retroactive service. King County has provided the data supporting this to DRS. Stobaugh Dec., ¶5. Accordingly, the Court's permanent injunction requiring PERS enrollment should be modified to require DRS to provide service credit to class members, based on the data provided by King County.[3]

[3] This does not mean that there cannot be some further individual changes in the future, such as to add additional class members that may appear (as one does every now and then) or correct data entry or other errors. As stated in Argument III, *infra*, DRS may correct such errors at any time.

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II. FEDERAL RETIREMENT PLAN CORRECTION PROCEDURES GOVERNING DRS REQUIRE CORRECTIONS FOR ALL YEARS TO PROVIDE FULL BENEFITS ACCRUALS TO CLASS MEMBERS.

DRS has repeatedly stated that it considers compliance with federal tax law absolutely necessary to retain the benefits of being a tax-qualified plan (*e.g.*, DRS Amicus Memo. in Supreme Court *Dolan* case, Sept. 12, 2011 at 8, n. 1):

> [I]f a pension plan does not qualify under I.R.C. § 401(a), the plan may suffer adverse tax effects in several areas. Potential adverse consequences include (1) unfavorable income tax consequences for employees; (2) unfavorable FICA (Social Security and Medicare) tax consequences for both employers and employees; (3) unfavorable income tax withholding consequences, which may affect both employers and employees; (4) unfavorable tax consequences for retirees; and (5) less administrative flexibility.

DRS's recognition of the importance of maintaining tax qualification was also expressed by the Legislature in a 1984 statute, Laws of 1984, Ch. 227, §§ 1, 6, partially codified at RCW 41.04.440. It said State retirement plans are intended to "enjoy the tax deferral benefits allowed under [federal tax law]." *Id.* Accordingly, the Legislature said, "the plan shall meet federal requirements" and any rule governing PERS "shall be inoperative to the extent" that it is "found to be in conflict with federal requirements."[4] Laws of 1984, Ch. 227 §6 [see notes to RCW 41.40.440]. See also Argument IV, *infra* (discussing this 1984 statute, as interpreted by DRS).

Here, federal tax law prescribes what DRS must do to correct the erroneous omission of King County public defense employees from PERS. *Dolan,* 172 Wn.2d at 301(omission from PERS of King County public defense lawyers violated PERS statute). To maintain its tax-qualified status under IRC §401(a), DRS must follow the procedures of IRS Revenue Procedure 2013-12, the Employee Plans Compliance Resolution System (EPERS), to correct the errors found by the Supreme Court.

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[4] The Ninth Circuit said, in a case applying Washington law, that federal tax law was incorporated into a benefit plan because the plan stated that it is intended to comply with tax law. *Vizcaino v. Microsoft*, 97 F.3d 1187, 1197 (9th Cir. 1996) *modified en banc,* 120 F.3d 1003 (9th Cir. 1997), *cert. denied*, 524 U.S. 1098 (1998); *enforced by mandamus*, *Vizcaino v. U.S. District* Court, 173 F.3d 713 (9th Cir. 1999), *cert denied*, 528 U.S. 1105 (2000). See also *Dopps v. Alderman*, 12 Wn.2d 268, 273-74 (1942) (pertinent federal law incorporated into contract).

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DRS's duty to correct its error here arises from the fact that PERS is an Internal Revenue Code section 401(a) retirement plan, which enjoys tax-qualified status that provides tax benefits to those employees in the plan. The IRS has enacted the Employee Plans Compliance Resolution System (EPCRS), which is a "revenue procedure" that provides a "comprehensive system of correction programs" for retirement plans so that plans can maintain their tax-qualified status after an error. Rev. Proc. 2013-12, §1.01. The EPCRS applies to both an "Operational Failure" that "arises solely from the failure to follow plan provisions" and a "Plan Document Failure" that arises when a plan provision on its face is contrary to tax law. Rev. Proc. 2013-12, §5.01(2)(a)-(b).

The failure to include all eligible employees in a plan, which is what happened here, is considered an "Operational Failure," and it must be corrected under the EPCRS for the plan to retain its tax-qualified status. Rev. Proc. 2013-12, §1.01. Section 6 of the EPCRS contains the "Correction Principles and Rules of General Applicability." Rev. Proc. 2013-12, §6. These apply here.

First, "*a failure is not corrected unless full correction is made with respect to all participants and beneficiaries, and for all taxable years* (whether or not the taxable year is closed)." Rev. Proc. 2013-12, §6.02 (emphasis added). There is also a consistency requirement, which requires that "the correction method . . . should be applied consistently in correcting all Operational Failures of that type for that plan year." Rev. Proc. 2013-12, §6.02(3).

"For Qualified Plans [such as PERS], any correction method permitted under Appendix A . . . is deemed to be a reasonable and appropriate method of correcting the related failure." *Id.*, §6.02(2). Appendix A of the EPCRS in turn "sets forth Operational Failures and Correction Methods relating to Qualified Plans." Rev. Proc. 2013-12, App. A, §.01. "In each case, the method described corrects the Operational Failure identified in the headings[.]" *Id.*

The Operational Failure here is covered by the heading concerning "*Exclusion of an eligible employee from all contributions or accruals under the plan for one or more plan years.* (1) *Improperly excluded employees: employer provided contributions or benefits.*" Rev. Proc. 2013-12, App. A, §.05 (emphasis in original). The "permitted correction method is to make a

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contribution to the plan on behalf of the employees excluded from a defined contribution plan or to *provide benefit accruals for the employees excluded from a defined benefit plan.*" Rev. Proc. 2013-12, Appendix A, §.05(1). [Emphasis added.]

Here, PERS 2 is a defined benefit plan. RCW 41.40.620; -.630. Accordingly, to retain tax-qualified status for this defined benefit plan, DRS is required "to provide benefit accruals for the employees excluded . . . ." Rev. Proc. 2013-12, Appendix A, §.05(1).[5] Therefore, in order to maintain the tax-qualified status for PERS, DRS owes an unconditional duty to provide the class members the "benefit accruals" (service credit) that they would have received but for their wrongful exclusion from the plan for all plan years. *Id.*

DRS thus has a duty under federal tax law to provide King County public defense employees the full "benefit accruals" that they lost because DRS (and King County) wrongly excluded them from PERS. And DRS recognizes it has this duty to comply with federal tax law.

III. DRS'S STATUTORY OBLIGATION TO CORRECT ERRORS IS NOT LIMITED IN TIME; IT IS OBLIGATED TO CORRECT ERRORS "AT ANY TIME," NO MATTER HOW LONG AGO THE ERRORS OCCURRED.

RCW 41.50.130 authorizes DRS to correct errors in retirement records *at any time* and the statute does not limit the correctable errors to any specific type.

In *City of Pasco v. DRS*, 110 Wn. App. 582, 589 (2002), the Court of Appeals considered whether DRS had authority under RCW 41.50.130(1) to correct an erroneous eligibility determination that occurred 20 years earlier. DRS's brief in *Serres v. DRS*[6] summarized the facts in *City of Pasco* (Attachment A, pp. 6-7):

> *In RCW 41.50.130, the legislature delegated to the Department broad,*

[5] The employer is required to make up for both employer and employee omitted contributions (and the missing investment gains they would have accrued) when such contributions were not made to an employee's defined contribution account due to the employee's omission from the plan. Rev. Proc. 2013-12, Appendix A, §.05(1). This includes a few members of the class who are already in PERS 3, which is one-half a defined contribution plan. The PERS statute also requires DRS to make up any loss of investment returns in employees' Plan 3 accounts when the loss was due to a DRS error. RCW 41.50.145(2).

[6] These statements by DRS are from DRS's Superior Court brief in *Serres*. The Superior Court decided that DRS's duty to correct errors at any time did not apply where the errors did not affect any member's benefits, but DRS had to correct errors that diminished members' benefits. That decision was affirmed, *Serres v. DRS*, 163 Wn. App. 569, 587 (2011), *review denied*, 173 Wn.2d 1014 (2011).

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plenary authority to correct errors in its records. Indeed, '*[t]he director may at any time correct errors appearing in the records of the retirement systems listed in RCW 41.50.030.*' RCW 41.50.130(1). Potential errors in the PERS records include, but are not limited to, the following:

> (a) applying an incorrect retirement allowance formula in computing [a] retirement allowance;
> (b) including service that is not creditable to the member;
> (c) including payments [to the member] that do not constitute earnable compensation [in the computation of] the member's retirement allowance . . ., or
> excluding earnable compensation not reported by an employer [in the computation of] the member's retirement allowance
> (d) benefit overpayments and underpayments;
> (e) including an individual in the membership of the retirement system who is not entitled to such membership.

WAC 415-108-820. Indeed, RCW 41.50.130 'does not limit correctable errors to reporting or other specific types of errors.' *City of Pasco v. Dep't of Retirement Sys.*, 110 Wn. App. 582, 589, 42 P.3d 992 (2002). 'There is no qualifying or limiting language before the word 'errors' in the statute.' *Id.* [Emphasis added.]

In City of Pasco, the Court of Appeals affirmed the breadth of the Department's authority to correct errors in its records. In June 1974, Pasco firefighter Andres had been enrolled in the Law Enforcement Officers' and Firefighters' Retirement System (LEOFF) Plan 1. However, after the required medical examination, the examining doctor indicated that Andres did not meet the minimum health standards required for LEOFF eligibility. Accordingly, the Department determined that Andres was not eligible for LEOFF membership. Andres terminated employment and was withdrawn from LEOFF Plan 1.

Four years later, in June 1978, Andres reapplied for employment as a firefighter and submitted to a second medical examination. Noting the identical medical condition that had been identified in 1974, the second doctor nonetheless indicated that Andres did meet the minimum health standards. Andres was hired and enrolled in LEOFF Plan 2.

Twenty years later, in 1998, Andres asked to be enrolled in LEOFF Plan 1 rather than LEOFF Plan 2, beginning with his brief employment from June to August 1974, and continuing through his longstanding employment from July 1978 to the present. *The Department determined that the failure to enroll Andres in LEOFF Plan 1 in June 1974 constituted an error in its records and that the error should be corrected pursuant to RCW 41.50.130.* The employer argued that the Department did not have the authority under that statute to change Andres' retirement system enrollment. [Emphasis added.]

DRS's description of the *City of Pasco* case explains that the Court of Appeals held there that DRS not only had the authority to correct the error in its retirement system records,

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but it was also "*obligated*" to correct the error "*on its own initiative or at the request of the enrollee*" to ensure "full compliance" with the retirement statutes (Attachment A, p. 7):

> The Court of Appeals held that the Department did have the authority to correct records that erroneously showed Andres as a LEOFF Plan 2 member with a July 1978 entry date. Moreover,
>
> > *[t]he Department is obligated to administer the LEOFF retirement system carefully and correctly in full compliance with Chapter 41.26 RCW* and its own rules implementing this authorizing legislation.
>
> City of Pasco, 110 Wn. App. at 596-97 (emphasis added). Under chapter 41.26 RCW, Andres was entitled to LEOFF Plan 1 membership in 1974 and had been wrongfully excluded. The court held that "the Department may correct a flawed eligibility determination 'at any time,' whether it does so on its own initiative or at the request of an enrollee." *Id.*, at 596. In so doing, the Department would meet its obligation for "full compliance" with the retirement statute.

Accordingly, DRS is similarly obligated to correct errors here in the public defense employees' service credit to meet its duty of "full compliance" with the retirement statutes (as determined in *Dolan*). *Id.*; *City of Pasco,* 110 Wn. App. at 596-97; RCW 41.50.130. Accordingly, under DRS's own understanding of its statutory duties, DRS has an obligation to correct the error "at any time" by providing service credit back to the beginning of class members' employment (*e.g.*, 20 years later, just as in the *Pasco* situation).

IV. DRS CANNOT DENY SERVICE CREDIT BASED ON ANY ALLEGED NEED FOR EMPLOYEES TO REPAY KING COUNTY FOR EMPLOYER PICK-UP CONTRIBUTIONS.

Washington law has, since 1984, forbid employers from collecting PERS contributions from employees. Laws of 1984, Ch. 227, codified at RCW 41.04.440 *et seq*. Before that, PERS required both employer and employee contributions. In 1984 the Legislature decided to take advantage of IRC (26 USC) § 414(h), which provides a tax benefit to public employees when a government shifts from requiring employee contributions to reducing employees' gross income by the amount of the former employee contribution, which the public employer then "picks up" that combines the employer and employee contributions into a single employer contribution. DRS Director George Northcroft [8-15-90] Opinion Letter (hereafter "Northcroft Opinion Letter" [copy attached to this brief]).

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To receive the tax benefit of this reduction from gross income, the employer pick-up contribution (which replaced the former employee contribution) cannot be paid by the employees. Otherwise it would not be a true reduction from gross income. *Id.* at 2; IRC § 414(h); *Public Emp. Retire. Bd. v. Shilala*, 153 F.3d 1160, 1164 (10th Cir. 1998) (a pick-up plan cannot allow the employee to receive the contribution, or have an option for the employee to receive the contribution).

Accordingly, the 1984 Washington statute ended *employee* PERS contributions and made the employers pick up those contributions. RCW 41.04.440 *et seq.*, enacted by Laws of 1984, Ch. 227. This completely ended the concept of employee contributions (Northcroft Opinion Letter at 2):

> It was not the intent of the employer pick up law to make employers pay employee contributions. Rather, the intent was to allow employers to pick up the employee contributions and reduce employee gross income accordingly. A review of the employer pick up law reveals that at no time is the employer described as paying the member contribution; instead the employer picks up the contribution. The two concepts are distinct.

Because there are no longer any employee contributions, *id.*, the previous (1982) statute on employee repayment of employer-paid employee contributions does not apply. "[W]hen an employer fails to report a member as required . . ., the employer is *de facto* put in the position of paying the member contribution that it erroneously failed to pick up." Northcroft Opinion Letter at 1-2. In that situation, an employer cannot obtain repayment under RCW 41.50.140(3) from employees of contributions the employer failed to "pick up." *Id.*

Under the prior 1982 statute, RCW 41.50.140(3), the employer had to make up all omitted contributions. And it could then bill employees for any "employer-paid employee contributions" that it made. *Id.* Crediting of those contributions to "member accounts" could be withheld until the employer told DRS that the employer had paid them.[7] *Id.*

[7] Although it is possibly implied in the Northcroft Opinion Letter (at 2, discussing Joseph Wilcox) that, under the 1982 statute, service credit could be withheld if employees did not repay "employer-paid employee contributions," the 1982 statute actually said that "member accounts" would not be credited, not that service credit would be

(continued)

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DRS said this statute no longer applies after the 1984 statute, RCW 41.04.445, was adopted because there were no long any "employee contributions." DRS explained as follows (Northcroft Opinion Letter at 1-2):

> RCW 41.50.140(3) requires that employer paid employee contributions not be credited to the employee's account until the employee has reimbursed the employer; however, the same law goes on to say that this in no way lessens the employer's responsibility for the total liability. Since the obligation is established and the employee is entitled to withdraw employer paid contributions if terminated, we currently place the contributions into the member's account and bill the employer's accounts receivable. Our current member account tracking system and billing system does not provide for separate line items on the member's account; *e.g.*, employee paid and/or employer paid contributions. Initial review of 41.04.445(4) and 41.50.140(3) indicates a potential conflict between the two statutes -- one requiring the member's account be credited and one prohibiting it. Further analysis, however yields a distinction between employer paid employee contributions and employee contributions picked up by the employer.
>
> Your letter implicitly applies RCW 41.50.140(3) to member contributions picked up by the employer under RCW 41.04.440 through 41.04.455. Such contributions are, however, distinct from the employer paid employee contributions referenced in RCW 41.50.140(3). The employer pick up law established a system where an employer picks up the member contributions to the retirement system and reduces the member's gross taxable income by the amount of the contributions picked up. See RCW 41.04.445. The employer pick up bill was enacted for "the sole purpose of . . . allow(ing) members of the retirement system . . . to enjoy the tax deferral benefits allowed under 26 USC 414(h)", RCW 41.04.440(i).
>
> It sometimes happens that, when an employer fails to report a member as required by RCW 41.32.430 and RCW 41.50.140(1), the employer is de facto put in the position of paying the member contributions that it erroneously failed to pick up. The employer's neglect of its statutory duty is not sufficient to change the characterization of the picked up contributions such that they become "employer paid employee contributions" within the meaning of 41.50.140(3).

Therefore, according to DRS, employers must pay DRS for any omitted pick-up contributions and it cannot later collect these back pick-up contributions from the employees. Doing so would violate RCW 41.04.445 and IRC § 414(h). Northcroft Opinion Letter at 2.

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withheld. RCW 41.50.140(3). "Member accounts" are defined in RCW 41.50.260(1). The only effect of not crediting funds to member accounts is that these funds cannot be withdrawn upon death or departure from PERS. *Id.*; RCW 41.04.445(4); Northcroft Opinion Letter at 1.

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Even under the previous (1982) law, DRS had no right to collect omitted contributions from employees; only employers did. Employers had to pay DRS and the employers could in turn collect "employer-paid employee contributions" from the employees. RCW 41.50.140(3) (*but see* n. 7 on p. 11, *supra*). Since 1984, under RCW 41.04.445 and IRC § 414(h), the employers cannot collect from employees any omitted pick-up contributions they must make to DRS.

V. BECAUSE THE CLASS INCLUDES ONLY PUBLIC DEFENSE EMPLOYEES WHOSE CLAIMS ARE NOT BARRED BY THE STATUTE OF LIMITATIONS, THERE IS NO SUCH DEFENSE.

King County, back in Dec. 2006, argued that the statute of limitations runs on any employee's pension claims each month that they were excluded from PERS. That is not the rule; it is well established that an employee's PERS pension claims do not begin to run until an employee actually retires. King County dropped its statute of limitations argument in settlement, but it reserved the possibility of bringing it back up if the settlement were overturned. Accordingly, King County might conceivably bring it up again, so it is addressed here.

The Supreme Court in *Bowles v. DRS*, 121 Wn.2d at 78-79, 92 (1993), addressed the statute of limitations for "actions alleging a breach of state employee pension rights" and when that statute of limitations begins to run. The *Bowles* court explained that it had previously held in *Noah v. State*, 112 Wn.2d 841 (1989), that the statute of limitations is three years and it runs from retirement (*Bowles*, 121 Wn.2d at 78):

> A 3-year statute of limitations applies to actions alleging a breach of state employee pension rights. *Noah v. State*, 112 Wn.2d 841, 774 P.2d 516 (1984). In Noah, *this court recognized that this limitations period begins to run upon the employee's retirement from service*. (Emphasis by Court modified.)

The Supreme Court explained in *Bowles* that it would adhere to its holding in *Noah* that the limitation period runs from retirement (121 Wn.2d at 79):

> We decline to overrule *Noah*. This opinion, written only 3 years ago, *unequivocally establishes* the applicable statute of limitations and *the date upon which the limitations period begins to run*. (Emphasis added.)

The *Noah* opinion, 112 Wn.2d at 84, in turn relied on *Martin v. Spokane*, 55 Wn.2d 52 (1959), which also applied the three-year statute of limitations to a claim for an *increase* in pension

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payments, but only to bar collecting a larger amount in pension payments paid more than three years before the suit was filed — 14 years after Martin retired.

The Supreme Court very recently reiterated the holding of *Bowles* on the statute of limitations for public employees' pension claims. In *WEA v. DRS*, 181 Wn.2d 233, 248 (2014), the Court said "[i]t is well settled that retirees are subject to a three-year statute of limitations for action alleging a breach of pension contract[,]" citing *Bowles*. "[T]his three-year clock began to run at the time of retirement." *Id.* The *WEA* court held that claims there were not time-barred where class members had retired within three years before filing or had not yet retired. *Id.*

The Court incorporated the *Bowles* holding into the class definition in *Dolan*:

> All W-2 employees of the King County public defender agencies and any former or predecessor King County public defender agencies who work or have worked for one of the King County public defender agencies *within three years of the filing of this lawsuit*. (Emphasis added.)

The class thus specifically includes only those whose claims are not time-barred under *Bowles*.[8] Thus, *Dolan* class members' claims are timely because they are brought within *three years of retirement*, regardless of when their service commenced.

Accordingly, all pension claims here are within the statute of limitations as stated in *Bowles*, etc. The County's statute of limitations argument, if any, should be rejected.

CONCLUSION

Class members should receive the service credit from DRS to which their King County public defense work entitles them. The permanent injunction should be modified to order DRS to provide the service credit shown by the data provided it by King County. King County should pay the employer contributions due for this service and cooperate with DRS in providing the service

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[8] On June 12, 2012 the class definition was expanded, by agreement, to add others within the same time period:

> All W-2 employees of the King County public defender agencies and any former or predecessor King County public defender agencies who have not worked for one of the King County public defender agencies within three years of the filing of this lawsuit but who work or have worked in a PERS-eligible position *within three years of the filing of this lawsuit*. (Emphasis added.)

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credit. Other issues, including pick-up contributions and any other additional funding, are reserved.

Respectfully submitted this 8th day of May, 2015.

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Attorneys for Plaintiff & the Class

CERTIFICATE OF SERVICE

I certify under penalty of perjury in accordance with the laws of the State of Washington that Plaintiffs' Motion to Modify Permanent Injunction and Require Intervenor DRS to Provide the Service Credit due to Class Members was filed with the Pierce County Superior Court on May 8, 2015.

I further certify that on Friday, May 8, 2015, one copy of the aforementioned document was served as follows to opposing counsel:

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I certify under penalty of perjury of the laws in the State of Washington that the foregoing is true and correct.

DATED: May 8, 2015.

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ATTACHMENT

GEORGE NORTHCROFT
Director

STATE OF WASHINGTON
DEPARTMENT OF RETIREMENT SYSTEMS
1025 E. Union • Olympia, Washington 98504-2511

Paul's letter & attachments. Rita

August 15, 1990

Larry E. Lael
Personnel Director
State Board of Community College Education
319 Seventh Avenue, FF-11
Olympia, WA 98504-3111

Dear Mr. Lael:

Thank you for your letter of June 28, 1990, bringing to my attention the internal procedures of applying contributions and service credit on arrears billings.

RCW 41.50.140(3) requires that employer paid employee contributions not be credited to the employee's account until the employee has reimbursed the employer; however, the same law goes on to say that this in no way lessens the employer's responsibility for the total liability. Since the obligation is established and the employee is entitled to withdraw employer paid contributions if terminated, we currently place the contributions into the member's account and bill the employer's accounts receivable. Our current member account tracking system and billing system does not provide for separate line items on the member's account; e.g., employee paid and/or employer paid contributions.

RCWs 41.04.440 through 41.04.455, the employer pick up law, are also relevant to the situation identified in your letter. That situation is a product of the interaction of the employer pick up law and 41.40.150(3).

RCW 41.04.445(4) states:

> "All member contributions to the respective retirement system picked up by the employer as provided by this section, plus the accrued interest earned thereon, shall be paid to the member upon the withdrawal of funds or lump-sum payment of accumulated contributions as provided under the provision of the retirement systems."

Initial review of 41.04.445(4) and 41.50.140(3) indicates a potential conflict between the two statutes -- one requiring the member's account be credited and one prohibiting it. Further

analysis, however, yields a distinction between employer paid employee contributions and employee contributions picked up by the employer.

Your letter implicitly applies RCW 41.50.140(3) to member contributions picked up by the employer under RCW 41.04.440 through 41.04.455. Such contributions are, however, distinct from the employer paid employee contributions referenced in RCW 41.50.140(3). The employer pick up law established a system where an employer picks up the member contributions to the retirement system and reduces the member's gross taxable income by the amount of the contributions picked up. See RCW 41.04.445. The employer pick up bill was enacted for "the sole purpose of . . . allow(ing) members of the retirement system . . . to enjoy the tax deferral benefits allowed under 26 USC 414(h)", RCW 41.04.440(1).

It was not the intent of the employer pick up law to make employers pay employee contributions. Rather, the intent was to allow employers to pick up the employee contributions and reduce employee gross income accordingly. A review of the employer pick up law reveals that at no time is the employer described as paying the member contribution; instead the employer picks up the contribution. The two concepts are distinct.

It sometimes happens that, when an employer fails to report a member as required by RCW 41.32.430 and RCW 41.50.140(1), the employer is de facto put in the position of paying the member contributions that it erroneously failed to pick up. The employer's neglect of its statutory duty is not sufficient to change the characterization of the picked up contributions such that they become "employer paid employee contributions" within the meaning of 41.50.140(3).

In the case of Mr. Joseph P. Wilcox, the payroll officer failed to report this employee on the monthly transmittal as required by RCW 41.32.430 and RCW 41.50.140(1). The member notified us of this oversight and was allowed to recover this service time by furnishing us with a proof of service, which was verified by Highline Community College. Had this been reported by payroll at the time the service was earned, this billing would not have been necessary. No interest was charged to the employer for the time the contributions would have been in this member's account had the member been reported in a timely manner.

If you would like to see 41.50.140(3) changed to include back contributions picked up by an employer, I recommend that you contact your legislator about introducing appropriate legislation.

If you wish to discuss the procedure further, please contact Maureen Westgard, Assistant Director of Operations at 753-5282.

Sincerely,

George Northcroft

George Northcroft
Director

MW:cil

cc: Pete Cutler
Jean Wilkinson

PLEASE REFER TO SS# AND RETIREMENT SYSTEM ON ALL CORRESPONDENCE.