The Honorable Cindi Port
Hearing Date: June 7, 2024 at 11:00 A.M.
With Oral Argument

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

DANA RUSH and a class of similarly situated individuals, Plaintiffs, v. STATE OF WASHINGTON, Defendant.	No. 21-2-04314-0 SEA (Consolidated with *Gary Wolf v. State*, No. 23-2-20449-2 SEA)

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY FOR THE DEFINED BENEFIT IN THE SUPPLEMENTAL RETIREMENT PLAN

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Relief Requested

Dana Rush, the plaintiff, was previously a class representative for part-time faculty across the State in a class action against the State of Washington that successfully obtained relief for the State's failure to provide them retirement benefits. *Mader v. State*, King County No. 98-2-30850-8, noted at *Mader v. HCA*, 149 Wn.2d 458, 460, 464 n. 3 (2003); see also S. Strong Dec., ¶¶ 1, 5 (Dkt. 20). While Mr. Rush previously obtained the right to participate in the retirement plan in *Mader*, when it came time for him to retire, the State failed to provide the retirement benefits he was owed. This case seeks to remedy this failure.

This is a certified class action that includes community and technical college employees who allege they did not receive retirement benefits they are due under State Board for Community and Technical College retirement plans. The plaintiffs are Dana Rush, Gary Wolf, and a class of similarly situated individuals and the defendant is the State of Washington. At issue in this motion is a supplemental retirement benefit due under the State Board's Retirement Plan, which provides that employees are eligible for benefits under the plan if they have "ten or more years of service." The State denies benefits under the plan to employees who have worked ten or more years of service because the State interprets the plan to require ten or more *continuous* years of service, rather than just ten or more years of service. For instance, plaintiff Gary Wolf has over 15 years of service but was denied eligibility under the plan because he did not have 10 continuous years of service. Additionally, plaintiff Dana Rush had worked well over half-time each quarter from 1991 until 2020, with the exception of one quarter he took off for vacation (with the State understanding he would continue teaching after his trip). The State refused to count his service after his trip when calculating his eligibility for supplemental retirement benefits. The State's interpretation is based on a "break in service" provision that was added in 2016 that cannot apply to any class member as all their pension rights vested no later than 2011. Plaintiffs move for partial summary judgment on the "break in service" provision in the plan.

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Facts

I. Consolidated Cases

This case, *Dana Rush v. State of Washington*, King County No. 21-2-04314-0 SEA, is consolidated with *Gary Wolf v. State of Washington and the Washington State Board of Community and Technical Colleges*, Thurston County No. 19-2-05358-34. The *Wolf* case was filed as a putative class action on October 30, 2019. The parties agreed that the *Wolf* case should be transferred to King County to consolidate it with the *Rush* class action because they both raise supplemental retirement benefit claims. Consolidation Order (Dkt. 36); *Wolf case* record (Dkt. 32).

II. Previous class actions against the State for part-time faculty benefits.

The State's system of community and technical colleges is "an integral part of the *state's system of higher education*." *Centralia Col. Ed. Ass'n v. Bd. of Trustees*, 82 Wn.2d 128, 132 (1973) (Supreme Court's emphasis). Thus, "each community college district is but a single unit of an overall state system, basically controlled and supervised by the state." *Id*. at 130. The State employs all the faculty at these colleges and it is responsible for all the actions of the various colleges. Order Certifying Class (Dkt. 27), p. 2 ("[t]he part-time faculty are employees of the defendant State of Washington"). The State Board for Community and Technical Colleges has general supervisory authority over the State's college districts. RCW 28B.52.090.

"Part-time faculty" are a substantial part of the community colleges' faculty, teaching about 25% of their classes and making up just under 50% of the workforce. A. Strong [5/10/24] Dec., A187-190. The State employs between 9,000 and 10,000 part-time faculty per year. *Id*. Additionally, being a "part-time faculty" member does not necessarily mean the instructor works part-time. Rather, a "part-time academic employee" is anyone who works "any percentage of a full-time academic workload for which the part-time academic employee is not paid on the full-time academic salary schedule." RCW 28B.50.489(3). Thus, "part-time faculty" are defined by the salary schedule they are placed on, not the amount of teaching performed. And many part-

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time faculty work hours comparable to full-time faculty. For instance, class representative Dana Rush worked as a part-time faculty member from 1991 to 2020 and worked "from 73% of full-time to more than full-time" each quarter. Rush Dec. ¶8 (Dkt. 22).

The Legislature and the courts have spent almost three decades trying to correct the treatment of part-time faculty. S. Strong Dec. ¶¶2-17 (Dkt. 20). This is the fifth class action seeking employee benefits that the State of Washington failed to provide to part-time instructors working at its community and technical colleges. *Id*. Class counsel here represented all of these classes. *Id*., ¶2.

In 1996, the Legislature had enacted a statute aimed at making sure that the State's community colleges calculated part-time academic employees' eligibility for retirement and health insurance benefits in an equitable fashion. Washington Laws 1996, Ch. 120, § 3. The statute required that part-time instructors' eligibility for those state-mandated benefits be calculated "in a percentage of the part-time academic workload to the full-time academic workload," using only the "in-class teaching hours" of each. *Id*. § 2, codified at RCW 28B.50.489.

The college districts did not follow the Legislature's mandate and thus the two *Mader* cases were brought against the State for health and retirement benefits on behalf of part-time faculty statewide. S. Strong Dec. ¶¶3-11 (Dkt. 20).[1] Dana Rush was a named plaintiff and class representative in the retirement case, *Mader I*. *Id*. ¶7. The *Mader I* class obtained retirement benefits for thousands of part-time faculty working at least half-time based on RCW 28B.50.489 and -.4891 (eligibility for retirement benefits is "based on calculating the hours worked by part-time academic employees as a percentage of…the full-time academic workload…"). *Id.*

The State's error in *Mader I* was eligibility for retirement benefits based on half-time work. But in determining the part-time instructors' percentage of full time the State did not

[1] The *Mader* cases were brought in a single case number, King County No. 98-2-30850-8. *Mader*, 149 Wn.2d at 460, 464 n. 3.

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compare in-class hours of part-time instructors to the in-class hours of full-time instructors, as the above statute required, but instead compared in-class hours of part-time instructors to the *total* hours worked for full-time instructors. Thus, the State's calculation made half-time instructors ineligible for retirement benefits.

In the health benefit case, *Mader II*, thousands of part-time faculty successfully obtained year-round health insurance (Mr. Rush was a class member in *Mader II*). The Supreme Court ruled that part-time faculty's eligibility for employment benefits when working half-time is determined under the same general rules as "[a]ny state employee" and that a part-time faculty member's eligibility for benefits is based on "the length of the employment relationship" and actual work hours (Mader had worked at least half-time during the nine-month academic year for 21 years), not on contract labels. *Mader*, 149 Wn.2d at 475-76, citing RCW 49.44.160;[2] S. Strong Dec. ¶¶8-11 (Dkt. 20).

The State's error in *Mader II* was that it treated long-term part-time faculty working half-time or more as quarter-by-quarter temporary employees as no longer employed when they did not work during the summer and therefore ineligible for health benefits while full-time faculty who also did not work in the summer received year-round health benefits. *Id.*

Plaintiffs' counsel then brought *Moore v. Health Care Authority and State of Washington*, 181 Wn.2d 299 (2014), because, after the *Mader* settlement, the State was still not providing health insurance to employees who "averaged" half-time (0.5 FTE), denying benefits to an employee who dropped below half-time in any individual month even if the employee worked well over half-time over an academic year. S. Strong Dec. ¶12-13 (Dkt. 20). Judge Catherine Shaffer certified a class that included part-time faculty at all of the State's college districts (and other departments of the State) and granted summary judgment for the plaintiffs. After remand from the Supreme Court upholding the trial court's method of calculating damages,

[2] The State Legislature specifically referred to the *Mader* cases in enacting RCW 49.44.160 at 170. *Mader*, 149 Wn.2d at 475 n. 8.

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the parties settled and provided relief to part-time faculty (and others) across the State for the failure to receive health insurance as required by state law. *Id*., ¶¶12-14.

The fourth case seeking employee benefits (sick leave) for part-time faculty is *Rush v. State of Washington*, King County No. 20-2-03771-1. Mr. Rush is the class representative in that case. The class was certified by Judge Averil Rothrock and Judge Marshall Ferguson granted summary judgment on liability.[3]

During the pendency of the *Mader* cases, the Legislature passed Washington Laws 2000, Ch. 128, which provided (RCW 28B.50.4893):

> Part-time academic employees of community and technical colleges shall receive sick leave to be used for the same illnesses, injuries, bereavement, and emergencies as full-time academic employees at the college in proportion to the individual's teaching commitment at the college.

The Legislature provided that all part-time faculty were eligible for sick leave benefits based on hours worked ("in proportion to the individual's teaching commitment"). But the State simply disregarded this statute and did not provide proportionate sick leave based on the part-time faculty members' full-time percentage (as in *Mader I*).

The current case for retirement benefits for instructors owed by contract is an outgrowth of the earlier class actions. Here, the State is making errors similar to its earlier errors that affected eligibility for retirement benefits. It assumed that part-time faculty are quarter-by-quarter employees even if they work for decades and that any "break in service" requires part-time faculty to requalify for retirement benefits. Similarly, the State says that part-time faculty must have at least 10 years of "unbroken service" to be eligible for the defined benefit portion of the plan. Moreover, it does not count the retirement service credit class members received in *Mader* when calculating eligibility for supplemental retirement benefits.[4]

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[3] Plaintiffs moved for consolidation of the two *Rush* cases—the sick leave case and this retirement case. It was denied by Chief Civil Judge Michael Scott after the State objected. Dkt. 49.

[4] See proposed amended complaint ¶¶35-47.

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III. Nature of the Case

The supplemental defined benefit portion of the State Board's Retirement Plan provides that an instructor is eligible for benefits if he or she has 10 or more years of service. The State explains that the "objective of the supplemental benefit feature is to ensure that the []retiree will receive a pension at least equivalent to the amount that would be produced given the same length of service and earnings for a TRS [Teachers Retirement System] Plan 1 member." A. Strong [5/10/24] Dec., A152 (State Board's 1991 Administrative Handbook).

The Legislature restricted eligibility for the supplemental defined benefit plan to those participating in the plan prior to July 1, 2011, *i.e.* those hired after July 1, 2011 are not eligible. RCW 28B.10.400(1)(b) and (c) (SBCTC may "pay only [] those persons who participate in a[]… retirement plan… prior to July 1, 2011").

The State refused to provide supplemental benefits when plaintiff Gary Wolf retired. Wolf was a part-time community college instructor from 1993 through the spring of 2002 when he took a break from teaching to care for his young children. He resumed teaching in the fall quarter of 2006 until he retired at the end of spring quarter 2017. Wolf Dec. ¶2-5 (Dkt. 23).

When he retired Mr. Wolf he applied for supplemental retirement benefits pursuant to the State Board's Retirement Plan. *Id.* His college district submitted a service calculation worksheet (a State Board form) to the State Board showing that Mr. Wolf had 15.17 years of full-time equivalent service for his work from 1993 through 2002 and 2006 through 2017. Stobaugh [5/10/24] Dec., A016.

John Boesenberg, the Deputy Executive Director of Business Operations for the State Board, was the administrator of the retirement plan. When asked to review Mr. Wolf's supplemental benefit eligibility, Mr. Boesenberg determined Mr. Wolf was ineligible, saying Mr. Wolf's application was denied because he did not have "ten years of *unbroken* full-time service or the equivalent full-time service" due to the fact that he stopped working for a time to care for his young children. Boesenberg Dep. at 37-38.

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Mr. Wolf appealed pursuant to the review procedure in the 2016 plan. Wolf Dec. ¶12 (Dkt. 23). Mr. Wolf sought review on the basis that nowhere in the 2016 plan or the authorizing statutes did it say 10 years of *continuous* service is needed, only "ten or more years of service." Stobaugh [5/10/24] Dec., A011. Mr. Boesenberg denied Mr. Wolf's appeal based on the State's interpretation of the terms "Break in Service" and an "unbroken service" in the definition of the "Year of Service" in the 2016 plan document. *Id.*, Ex. 5.

The terms relied upon the State ("Break in Service" and "unbroken service") did not exist until after the plan stopped accepting new members in 2011. And under Washington law a public employee pension rights are based on the plan in effect when hired. *Bakenhus v. Seattle*, 48 Wn.2d 695, 698 (1956); *Bowles v. DRS*, 121 Wn.2d 52, 65 (1993). Employees receive any positive changes to the pension plan, but their pension rights cannot be changed to the detriment of employees from the plan in effect when hired. *Id.*

Plaintiff Dana Rush experienced the same problem. Dana Rush taught astronomy as a part-time instructor from 1991 until he retired in 2020. Rush Dec. ¶8 (Dkt. 22). In each quarter, he worked "from 73% of full-time to more than full-time." *Id*. In that entire time, he took only one quarter off work to take a vacation to New Zealand in winter quarter 2018. *Id*., ¶10. It is undisputed that both his college district and Mr. Rush himself understood that he would return to his regular teaching duties after the completion of his vacation. *Id*., ¶9. However, his college district acted as if he had been terminated and required him to requalify for retirement benefits. *Id*., ¶12.

When Mr. Rush retired after winter 2020, the State refused to include any of Mr. Rush's service after his return from his vacation (the period of spring 2018 through winter 2020) in its calculation of Mr. Rush's eligibility for a supplemental retirement benefit. Rush [5/4/24] Dec., ¶2. The State's calculation thus excluded 1.71 years of Mr. Rush's retirement service. *Id*., ¶9. Mr. Rush estimates that this resulted in him losing approximately $115 per month in

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supplemental retirement benefits. *Id*., ¶10.[5]

Therefore Gary Wolf and Dana Rush brought lawsuits to vindicate their vested rights to retirement benefits under the pre-2016 Retirement Plan. The cases were consolidated and the class was certified. Consolidation Order (Dkt. 36); Certification Order (Dkt. 27).

The certified class therefore moves for summary judgment that the State cannot deny supplemental retirement benefits to participants who have ten total years of service, even if they have a "break in service."

Issues Presented

Should the Court grant partial summary judgment on the defined benefit claim because:

(1) the 2011 Plan—the latest plan that could apply to class members hired by 2011—does not have the "break in service" and "unbroken service" language relied on by the State that is in the 2016 plan;

(2) assuming arguendo that the 2016 plan could apply to employees hired by 2011, the anti-cutback provision of the plan required by federal tax law prevents the State from relying on the "break in service" provision to the detriment of the instructors;

(3) the State has misinterpreted the 2016 plan because the "break in service" and "unbroken service" provisions in that plan provide only that no service is earned during the year in which the break occurs, not that the service before or after the break is forfeited.

Evidence Relied On

Plaintiffs rely on the Declarations of Dana Rush, Gary Wolf, Alexander Strong and David Stobaugh and the Deposition of John Boesenberg.

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[5] Unlike Mr. Wolf, the State considered Mr. Rush to still have over ten years of continuous service and so they performed a calculation of Mr. Rush's eligibility for supplemental retirement benefits. Rush [5/4/24] Dec., ¶¶5-7. Mr. Rush was thus able to use the State's calculation to estimate his losses due to omitted service. *Id*., ¶¶9-10. The State considers Mr. Wolf to be ineligible even for the supplemental benefit calculation because, while he has 15.17 years of service, the State considers him to have less than ten years of continuous service in any one stretch. Wolf Dec., ¶14 (Dkt. 23).

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Argument

I. Summary judgment should be granted because all instructors covered by the plan were hired before July 1, 2011 and therefore their pension rights are based on the plans before July 1, 2011 under which instructors were eligible after 10 years of service, not of "unbroken" service.

Class members have vested pension rights in the Retirement Plan as it existed at the time they were hired. Because the plan stopped accepting new participants in 2011 and the State refuses to provide supplemental retirement benefits pursuant to a provision inserted in the Retirement Plan in 2016, the State is violating the vested pension rights of class members.

Dana Rush, Gary Wolf, and the class's defined benefit claim is based on their contracted pension rights. "[P]ublic employee pension rights are contractual in nature, as the pension constitutes deferred compensation for service rendered." *Bowles*, 121 Wn.2d at 62. "A public employee's right to a pension is a 'vested contractual right based on the promise made by the State at the time an employee commences service.'" *Id.* at 65, quoting *State Employees v. State*, 98 Wn.2d 677, 686 (1983), citing *Bakenhaus*, 48 Wn.2d at 700. The contractual right to this deferred compensation is formed as soon as the employee commences service. *Id*. Thus, because "pension rights are contractual rights which vest at the beginning of the employment relationship[,] [t]he State cannot alter that contract without mutual consent." *State Employees v. State,* 98 Wn.2d at 686. "Where the change is favorable to the employee, consent may be implied." *Id*. Thus, the pension plan in effect at the time of hire may not be modified if the modification is detrimental to the employee because it "amounts to an unconstitutional impairment of contracts." *Id.*; *Bowles*, 121 Wn.2d at 65.

This vesting is particularly important here because the Supplemental Benefit Plan stopped accepting new participants in 2011. The Legislature restricted eligibility for the supplemental defined benefit plan to those participating in the plan prior to July 1, 2011, *i.e.* those hired after July 1, 2011 are not eligible. RCW 28B.10.400(1)(b) and (c). The "unbroken service" phrase and the definition of "break in service" were added to the plan in 2016. Thus, under *Bakenhus* there are no instructors in the supplemental retirement plan who are subject to

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the 2016 plan because they were all employed before July 2011 when new enrollments were eliminated.

The State, however, is relying on the "break in service" and "unbroken service" language in the definition of a "Year of Service" in the 2016 plan, that is not in the statute or any of the earlier plans.

The State does not count all years of service in determining eligibility. When an instructor does not teach for a quarter, the State says that there is a "break in service" such that, if the instructor's service is less than 10 years before or after the quarter of not working, the cumulative service does not count for determining the supplemental defined benefit. According to the State, only "unbroken service" counts in determining eligibility. Boesenberg Dep. at 80, Ex. 10, p. 9; Wolf Dec. ¶¶5, 13-14 (Dkt. 23).

The State relies on the "break in service" and "unbroken service" language in the definition of a "Year of Service" in the 2016 plan. Boesenberg Dep., p.22, Ex. 13. These provisions say in full (A. Strong [5/10/24] Dec., A055, A061):

> 1.4 "Break in Service" "Break in Service" means termination of all employment with a Participating Employer for a full academic year quarter or an equivalent period of time, excluding summer quarter or an equivalent off-season quarter.
>
> […]
>
> 1.37 "Year of Service" "Year of Service" means retirement credit based on unbroken full time employment or the equivalent thereof based on part-time employment in an eligible position in a Fiscal Year during which Plan contributions were made… For this purpose, "unbroken service" means service without a Break in Service.

It is undisputed that the language on which the State relies ("Break in Service" and "unbroken service") was not present until 2016. Prior to the creation of the State Board's retirement plan, community college instructors participated in the state-managed Teachers Retirement System (TRS) defined benefit plan, which provided a specified amount of monthly benefits at retirement based on years of service and average final salary. Originally, the State created a new defined contribution plan, one of two parts of a retirement plan for community

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college instructors managed by a national teachers retirement organization, TIAA-CREF. A. Strong [5/10/24] Dec., A149 New hires were mandated into the new defined contribution plan and those in TRS defined benefit plans were given the option of transferring to the new defined contribution plan. To assure that the community college instructors in the new defined contribution plan—both those transferring and those mandated into the plan—received a retirement pension that was equivalent to the TRS defined benefit pension, the Legislature directed the State Board to adopt a supplemental retirement pension plan for those "who have served more than 10 years but less than twenty-five years." Washington Laws, 1971 1st Ex. Session, Ch 261, Section 4, codified at RCW 28B.10.415.

Initially, the defined benefit plan was set forth in regulations. The regulations did not include the language that the State now relies upon (A. Strong [5/10/24] Dec., A140-A146):

> **WAC 131-16-011 Definitions.** For the purpose of WAC 131-16-010 through 131-16-066, the following definitions shall apply:
>
> ***
>
> (3) "Year of full-time service" means retirement credit based on full-time employment or the equivalent thereof based on part-time employment in an eligible position for a period of not less than five months in any fiscal year during which TIAA/CREF contributions were made by both the participant and a Washington higher education institution or the state board or any year or fractional year of prior service in a Washington public retirement system while employed at a Washington public higher education institution…
>
> **WAC 131-16-061 Supplemental retirement benefits.** (1) A participant is eligible to receive supplemental retirement benefit payments if at the time of retirement the participant is age sixty-two or over and has at least ten years of full-time service…
>
> [The full text of these WAC provision are included in the appendix.]

The regulation, which was in effect when Mr. Rush was hired in 1991 and Mr. Wolf was hired in 1993, did not have the "unbroken service" phrase, nor did it have the definition of "break in service" relied on by the State. Rather, it provided that an employee was eligible when he or she had 10 or more years of service. WAC 131-16-061.

In 1998, the State created a written plan, in contract form instead of regulations, which combined defined benefit and defined contribution plan that replaced the regulations. The 1998

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plan and all the versions of the plans thereafter, up until the 2016 plan, defined "Year of Service" without any reference to "unbroken service" or "break in service" (A. Strong [5/10/24] Dec., A015):

> 1.48 "Year of Service" means retirement credit based on full time employment or the equivalent thereof based on part-time employment in an eligible position for a period of not less than five months in any Fiscal Year during which Plan contributions were made…

And the eligibility section of the 1998 plan explained that participants were eligible for a supplemental retirement benefit if they worked ten or more years of service, not ten or more *continuous* years (A. Strong [5/10/24] Dec., A025):

> 6.2(a)
>
> A Participant is eligible to receive Supplemental Retirement Benefit payments if at the time of termination of employment the Participant is age sixty-two or over and has at least ten Years of Service…

The seven Administration Handbooks and the five Summary Plan Descriptions provided by the State Board also demonstrate that the State did not add the language on which it bases its interpretation until 2016. They are the same as stated in the pre-2016 plans above and the regulation: only 10 years of service, not 10 years of continuous service, is needed to be eligible. A. Strong [5/10/24] Dec., A149, A152, A155, A169. Relevant excerpts from these handbooks and plan descriptions confirming the previous eligibility language is included in the appendix accompanying this motion.

Thus, up until 2016 the statutes, the prior regulations, all the plan contracts, and all the State's explanations for the plans for instructors and colleges stated that the instructors are eligible if they had at least 10 years of full-time-equivalent service. None of them stated that the service had to be continuous or unbroken to be eligible.

Earlier in this litigation, the deposition of John Boesenberg, the administrator of the Supplemental Retirement Plan, was taken. He said he was aware of the *Bakenhus* vesting principle, but thought it did not apply here because he (mistakenly) thought the 2016 plan's provisions on service credit was identical to the earlier plan documents. Boesenberg. Dep. at 77-

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79.[6] When proposing the 2016 plan to the State Board, Mr. Boesenberg said the new version was just the "result of IRS guidance" wherein the IRS wanted the State Board to split the defined contribution portion and the defined benefit portion of the 2011 plan into two separate plans for purposes of tax compliance. A. Strong [5/10/24] Dec., A184-186. He specifically told the Board that the "policies governing eligibility, contributions, withdrawals, and retirement" in the plan "are not changing." *Id.*

In Mr. Boesenberg's deposition he conceded that he was wrong about the 2016 plan being the same as earlier plan because the previous plan did not have "unbroken service" and "break in service" provisions he had relied on. Boesenberg Dep. at 102-03.

Thus, under *Bakenhus* and its progeny, the 2016 plan's "unbroken service" language on which the State relies cannot apply to *any* class member because they were all hired under the previous plan (*i.e*, 2011). Mr. Wolf was hired in 1993 and has 15.17 full-time equivalent years of service, 5.17 years more than the minimum eligibility requirement under the plan in effect before the 2016 plan. Stobaugh [5/10/24] Dec., A016. Similarly, Mr. Rush was hired in 1991 and the State could not modify the pension system he was hired under to his detriment thereafter. *Bakenhus,* 48 Wn.2d at 699. The Legislature restricted eligibility for supplemental defined benefit plan to these instructors hired before July 1, 2011, RCW 28B.10.400, so there are actually no instructors to which the 2016 plan could apply. Because all class member pension rights vested prior to July 1, 2011, the State cannot impose the "unbroken service" requirement

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[6] Q. Are you familiar with a case [in the] Washington Supreme Court [of] *Bakenhus versus City of Seattle*?
A. I am.
Q. When did you become familiar with that case?
A. Oh, many years ago.
Q. Don't you think it had any application in this particular situation?…
THE WITNESS: I don't believe it had relevance to this particular decision because I don't believe the plan changed.…
Q. Did you in any way consider the *Bakenhus* case in your writing or your consultations or whatever you did?
A. No.

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in the 2016 plan on any plan participant because it adversely affects vested pension rights. *State Employees v. State*, 98 Wn.2d at 686; *Bowles,* 121 Wn.2d at 65.

Accordingly, the Court should grant plaintiffs' motion for partial summary judgment on the defined benefit portion of the plan based on the *Bakenhus* line of cases.

II. Summary judgment should also be granted because the anti-cutback provision in the 2016 plan prevents the State from requiring "unbroken" service.

The Court should also grant summary judgment because the anti-cutback provision in the Internal Revenue Code and its explicit incorporation into the 2016 plan prohibit cutbacks and changing the calculation of years of service is a prohibited cutback.

The Internal Revenue Code provision prohibits amendments to the plan that cut back on accrued benefits. 26 U.S.C. 411(d)(6)(A) states that a plan is not a qualified plan "if the accrued benefit of a participant is decreased by an amendment of the plan…" And the Treasury Regulations explain that a cutback includes changing how years of service are calculated. Amendments that cut back accrued benefits include "*all of the amendments of a plan affecting*, directly or indirectly, the compensation of *accrued benefits*…for example, *provisions relating to years of service*." Treas. Reg. §1.411(d)-3(a)(2) (emphasis added). Here, under the State's interpretation, the 2016 plan amended the plan to require ten *continuous* years of service, even though Plan Administrator John Boesenberg admitted that that language was not present in the previous plan. Boesenberg Dep., p. 102-103.

Moreover, the 2016 plan incorporated the anti-cutback rule. The plan itself confirms this; the 2016 plan expressly incorporated the "anti-cutback" rule of the Internal Revenue Code (IRC §411(d)(6)). Stobaugh [5/10/24] Dec., A008. The plan states that no amendment "shall be effective to the extent it eliminates or reduces any 'Section 411(b)(6) protected benefits.'" *Id.*

And the adoption of the 2016 plan demonstrates that it was *not* intended to change the eligibility rules. When the State Board was considering adopting the 2016 plan, Mr. Boesenberg assured the State Board amendment was for the purpose of splitting the defined contribution portion and defined benefit portion of the 2011 plan into two separate plans due to IRS guidance.

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A. Strong [5/10/24] Dec., A184-186. He said specifically told the Board that the "policies governing eligibility, contributions, withdrawals, and retirement" in the plan "are not changing." *Id.*

Thus, the anti-cutback provision in the 2016 plan—required by federal tax law—prohibits the State from changing the provisions on how "years of service" are calculated for plan benefits. Consistent with the statute (RCW 28B.10.400), the plans before the 2016 plan required only 10 years of full-time equivalent service to be eligible, not 10 years of "unbroken" full-time equivalent service. Like the *Bakenhus* vesting principle, the anti-cutback provision in the 2016 plan prohibits the State from imposing the unbroken service provision on any instructors covered by any of the prior plans. And because the Legislature restricted eligibility for the supplemental defined benefit plan to instructors hired before July 1, 2011, and because of the anti-cutback rule, there are actually no instructors to whom the "unbroken service" or "break in service" provisions in the 2016 plan could apply.

Accordingly, the Court should also grant partial summary judgment for the plaintiffs because the anti-cutback rule in the 2016 plan prohibits the State from using the 2016 plan amendment to change the way by which years of service are calculated.

III. Alternatively, summary judgment should be granted because the State misinterpreted the 2016 plan as providing a forfeiture of service when the plan says there are no forfeitures.

The Court should also grant summary judgment to the plaintiffs because the State has misinterpreted the 2016 plan. The State has misinterpreted the 2016 plan because the 2016 plan only provides that participants do not accrue service while not working, not that they lose service. Moreover, the 2016 plan provides that the participant's rights "shall be 100% vested immediately, and at all times." A. Strong [5/10/24] Dec., A116. And "should not be subject to forfeiture under any circumstances." *Id.,* A120. Thus, the State's interpretation of the 2016 "break in service" provision improperly reads a forfeiture into the 2016 plan that does not exist.

Retirement plans are contracts and thus are construed under Washington contract law.

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"The rights and obligations of the parties are measured by the terms of the contract under the ordinary rules of contractual construction." *Jacoby v. Grays Harbor Chr. & Mfg. Co.*, 77 Wn.2d 911, 916 (1970). When interpreting a contract, a court "strives to ascertain the meaning of what is written." *Bort v. Parker*, 110 Wn.App. 561 (2002). And public pension plans are liberally construed in favor of the beneficiaries. *Bates v. City of Richland*, 112 Wn.App. 919, 929 (2002); *Grabicki v. Department of Ret. Sys.*, 81 Wn.App. 745, 751 (1996). "[I]n an action to enforce a written contract,…the court must enforce it as written." *Bernard v. Triangle Music Co.*, 1 Wn.2d 41, 48 (1939). "The court cannot disregard or suppress any of its terms[,] and, of course, by the same token, it cannot read anything into the instrument which is not already there." *Id*.

Like the previous plans, the 2016 supplemental defined benefit plan, provides a defined benefit for those instructors whose defined contribution benefit is not sufficient to meet the target goal of being equivalent to a TRS Plan 1 retirement pension. A. Strong [5/10/24] Dec., A119-120, A152. Thus, determining whether an instructor receives a supplemental defined benefit is a two-step process. First, the instructors need to be eligible under the terms of the plan and, if the instructor is eligible, the instructor receives a supplemental defined benefit if the instructor's defined contribution account is not sufficient under the terms of the plan.

The 2016 supplemental defined benefit plan provides the conditions for eligibility as follows (A. Strong [5/10/24] Dec., A117):

> 3.1 CONDITIONS OF ELIGIBILITY
>
> (a) A Participant is eligible for a benefit calculation, as described in Section 6, if all of the following are true:
>
> (1) The Participant actively participated in the Retirement Plan prior to July 1, 2011.
>
> (2) A Participant, who is actively participating in the Retirement Plan, dies or elects to retire, consistent with a Participating Employers policies, having reached age 62 or retires due to reasons of health or permanent disability; and
>
> (3) The Participant has ten or more Years of Service.

The plan also provides that the participant's rights "shall be 100% vested immediately, and at all times." *Id.*, A116. And "should not be subject to forfeiture under any circumstances." *Id.*,

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A120.

As discussed above, the State relies on the "break in service" and "unbroken service" language in the definition of a "Year of Service" in the 2016 plan (A. Strong [5/10/24] Dec., A055, A061):

> 1.4 "Break in Service" "Break in Service" means termination of all employment with a Participating Employer for a full academic year quarter or an equivalent period of time, excluding summer quarter or an equivalent off-season quarter.
>
> […]
>
> 1.37 "Year of Service" "Year of Service" means retirement credit based on unbroken full time employment or the equivalent thereof based on part-time employment in an eligible position in a Fiscal Year during which Plan contributions were made by a Washington public higher education institution to the State Board Retirement Plan or any other plan established pursuant to RCW 28B.10.400. Any year or fractional year of prior service in a Washington Public Retirement System while employed at a Participating Employer is included, provided the Participant transferred directly from such retirement system to the State Board Retirement Plan and will receive a pension benefit from such other retirement system; and provided further, that not more than one Year of Service will be credited for service in any one Fiscal Year. For this purpose, "unbroken service" means service without a Break in Service. Except as otherwise provided for within this Plan Document, periods of leave without pay or other periods in which a Participant is not earning Compensation from a Participating Employer and periods after termination of employment by reason of permanent disability while receiving a salary continuation benefit through a plan made available by the State of Washington shall not be included in a Participant's Years of Service.

The language relied upon by the State does not state that that a "Break in Service" results in any forfeiture. In fact, the definition of "Year of Service" contemplates that a "Break in Service" does not result in forfeiture of prior service. The provision states that "any year *or fractional year*… is included." *Id*. Moreover, the definition of "Year of Service" provides that breaks in service simply are not counted when adding up service credit—"periods of leave without pay or other periods in which a Participant is not [contributing to the retirement plan] … shall not be included in a Participant's Years of Service." *Id*. Nowhere in either provision does the contract provide that a break in service has any effect on service already earned. As explained above, the contract states to the contrary that pension rights "shall be 100% vested immediately, and at all times." and "should not be subject to forfeiture under any circumstances." *Id.*, A116.

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The State wants to read in a forfeiture provision that does not exist. This is contrary to Washington law governing the interpretation of the plan. *Bernard*, 1 Wn.2d at 48. The State's interpretation violates the plan because it forfeits Wolf's 15 years of service when the plan says his service is vested and cannot be forfeited. Here, it is undisputed that Gary Wolf worked for 9 years prior to taking a break from teaching to care for his young children. Stobaugh [5/10/24] Dec., A016. It is undisputed that he had accrued 6.99 "Years of Service" at that time. *Id*. The plan provides that that service "shall be 100% vested immediately" and "should not be subject to forfeiture under any circumstances." The State's interpretation of the "Break in Service" provision in the 2016 plan, however, resulted in the State considering his service earned prior to his break of childcare to be forfeited. Thus, although it is undisputed that Mr. Wolf has 15.17 years of service, the State considers his pre-break service forfeit, and Mr. Boesenberg determined he did not meet the 10-year threshold for eligibility for a supplemental retirement benefit. This interpretation reads into the plan a forfeiture provision when actually the plan expressly disclaims such forfeiture.

Accordingly, the Court should grant summary judgment because the State's position is based on a fundamental misinterpretation of the 2016 plan.

Conclusion

Under Washington law, a public employee's pension rights are based on the plan in effect when hired. *Bakenhus v. Seattle*, 48 Wn.2d 695, 698 (1956); *Bowles v. DRS*, 121 Wn.2d 52, 65 (1993). Employees receive any positive changes to the pension plan, but their pension rights cannot be changed to the detriment of employees from the plan in effect when hired. *Id*.

The Court should grant plaintiffs' motion.

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I certify that this memorandum contains 6,424 words, in compliance with the Local Civil Rules.

DATED this 10th day of May, 2024.

Respectfully submitted,

STOBAUGH & STRONG, P.C.

/s/ Alexander F. Strong

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DECLARATION OF SERVICE

I, Erika Haack, declare that I effected service of the following document(s) on the parties listed below via the King County Superior Court eFiling application and via email.

Document(s):

1. Plaintiffs' Motion for Partial Summary Judgment on Liability
2. Proposed Order Granting Partial Summary Judgment
3. Notice of Hearing
4. Declaration of David Stobaugh
5. Declaration of Alexander Strong
6. Declaration of Dana Rush
7. Notice of Filing of Boesenberg Deposition

Parties:

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Attorney for Defendant

I declare under penalty of perjury that the foregoing is true and correct.

DATED this 10th day of May, 2024.

/s/ Erika Haack
Erika Haack
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Appendix to Plaintiffs' Motion for Partial Summary Judgment on Liability

1.46 "Vested"

"Vested" means the nonforfeitable portion of any Account maintained on behalf of a Participant. Under the terms of this Plan, the entire balance of a Participant's Account shall be 100% Vested immediately, and at all times.

1.47 "WAC"

"WAC" means the Washington Administrative Code, as now or hereafter amended.

1.48 "Year of Service"

"Year of Service" means retirement credit based on full time employment or the equivalent thereof based on part-time employment in an eligible position for a period of not less than five months in any Fiscal Year during which Plan contributions were made by a Washington public higher education institution (whether or not it is a Participating Employer) or the State Board, or any year or fractional year of prior service in a Washington Public Retirement System while employed at a Washington public higher education institution; provided, that the Participant will receive a pension benefit from such other retirement system; and provided further, that not more than one Year of Service will be credited for service in any one Fiscal Year. Periods of leave without pay. or other periods in which a Participant is not earning Compensation from a Participating Employer shall not be included in a Participant's Years of Service.

Years of Service with any Participating Employer shall be recognized.

2. PLAN SPONSOR

2.1 POWERS AND RESPONSIBILITIES OF THE SPONSOR

(a) In addition to the authority to amend, merge or terminate the Plan, and in addition to the authority and responsibilities otherwise provided for in this Plan, the Sponsor, by action of the State Board, shall be empowered to appoint and remove a Plan Administrator. Effective on and after the Restatement Effective Date, and in the absence of a subsequent Plan amendment to the contrary, the Plan Administrator shall be the Director of Human Resources of the State Board.

(b) The Sponsor shall have the authority and responsibility to appoint and replace the Benefit Administrator. The Benefit Administrator shall have such duties as may be stated in a contract between that service provider and either the State Board or the Plan Administrator.

(c) Effective on and after the Restatement Effective Date, the State Board shall have the authority and responsibility to appoint the Trustee for the purpose of holding any or all Plan assets.

2.2 AUTHORITY TO APPOINT BENEFIT ADMINISTRATOR

The Sponsor, by action of the State Board, may appoint one or more Benefit Administrators. As of the Restatement Effective Date, the Benefit Administrator is Teachers Insurance and Annuity Association of America.

Any person or entity shall be eligible to serve as a Benefit Administrator. In the case of any Benefit Administrator that is a third-party service provider (rather than an Employee of the State Board or a Participating Employer), the contractual terms applicable to the Benefit Administrator shall be stated in a

commencement of distributions under Article 11 and Code Section 401(a)(9), a Participant may postpone the commencement of benefit payments under this Plan. Upon a Participant's Normal or Late Retirement Date (whichever occurs first), or as soon thereafter as is practicable, the Benefit Administrator shall distribute all amounts credited to such Participant's Account in accordance with Section 6.4.

6.2 SUPPLEMENTAL RETIREMENT BENEFITS

This Section 6.2 describes the terms of a benefit (the Supplemental Retirement Benefit) which, if payable, shall not be payable from assets of the Plan Fund but shall instead be payable from assets of the State Board.

(a) A Participant is eligible to receive Supplemental Retirement Benefit payments if at the time of termination of employment the Participant is age sixty-two or over and has at least ten Years of Service in either the Predecessor Plan, this Plan, or a combination of both at a Washington public institution of higher education, provided, that the amount of the Supplemental Retirement Benefit, as calculated in accordance with the provisions of this Section, is a positive amount.

(b) Subject to the provisions of subdivisions (3), (4), and (5) of this subsection, the annual amount of Supplemental Retirement Benefit payable to a Participant upon retirement is the excess, if any, when the value determined in subdivision (2) is subtracted from the value determined in subdivision (1), as follows:

(1) The lesser of fifty percent of the Participant's Average Annual Compensation or two percent of the Average Annual Compensation multiplied by the number of Years of Service; provided that if the Participant did not elect to contribute ten percent of salary beginning July 1, 1974, or if later, after attainment of age fifty, service for such periods shall be calculated at the rate of one and one-half percent instead of two percent.

(2) The combined Retirement Benefit from the Predecessor Plan, this Plan and any other Washington State public retirement system as a result of service while employed by a Washington public higher education institution that the Participant would receive in the first month of retirement multiplied by twelve; provided, that the benefit under this subsection "(b)" shall be calculated on the following assumptions.

(i) After July 1, 1974, fifty percent of the combined contributions to the Predecessor Plan and this Plan were made to the TIAA Traditional Annuity and fifty percent to the CREF Stock Account during each Year of Service, provided, that benefit calculations related to contributions made prior to July 1, 1974, shall be computed on the basis of actual allocations between TIAA and CREF; and

(ii) The full TIAA-CREF annuity accumulations, including all dividends payable by TIAA and further including the amounts, if any, paid in a single sum under the retirement transition benefit option, were fully settled on a joint and two-thirds survivorship option with a ten-year guarantee, using actual ages of retiree and spouse, but not exceeding a five-year difference; except that for unmarried Participants the TIAA accumulations, including dividends, were settled on a life annuity with ten-year guarantee option, all to be based on TIAA-CREF estimates at the time of retirement; and

(iii) Annuity benefits purchased by premiums paid other than as a participant in a Washington public institution of higher education TIAA-CREF retirement plan shall be excluded; and

1.2 "Appointing Authority"

"Appointing Authority" means a Participating Employer's governing board or the designees of such boards.

1.3 "Benefit Administrator"

"Benefit Administrator" means the service provider to the Plan that is responsible for maintaining the records of the Participants' Accounts and determining benefits under the Plan, and for performing certain other benefit administration and communications functions, in accordance with such contractual agreements and direction letters as may exist from time to time between such service provider and the Plan Administrator or Sponsor. The Benefit Administrator is sometimes referred to as the "Record Keeper" in certain documents such as the trust agreement with the Trustee. As of the Restatement Effective Date, the Benefit Administrator is Teachers Insurance and Annuity Association of America.

1.4 "Break in Service"

"Break in Service" means termination of all employment with a Participating Employer for a full academic year quarter or an equivalent period of time, excluding summer quarter or an equivalent off-season quarter.

1.5 "Code"

"Code" means the Internal Revenue Code of 1986, as amended from time to time, and regulations issued pursuant thereto.

1.6 "Compensation"

"Compensation" with respect to any Participant means the sum of the following elements of compensation paid to the Participant from his or her Participating Employer, including base salary, summer quarter compensation, extra duty pay, leave stipends, and grants made by or through the Participating Employer or State Board; but not including any severance pay, early retirement incentive payment, remuneration for unused sick or personal leaves, settlement payments resulting from claims, disputes or litigation, or remuneration for unused annual or vacation leaves in excess of the amount payable for thirty days or two hundred forty hours of service. For purposes of this Section, the determination of Compensation shall be made by including both: (i) amounts which are contributed by the Participating Employer pursuant to a salary reduction agreement and which are not includable in the gross income of the Participant under Code Sections 125, 132(f)(4), 402(e)(3), 402(h), 403(b) or 457, and (ii) Employee Contributions (sometimes called Pick-Up Contributions).

For a Participant's initial year of participation, Compensation shall be recognized as of such Employee's effective date of participation pursuant to Section 3.3.

meeting the requirements of Code Section 403(a). On and after the Restatement Effective Date, the Plan Fund shall include a combination of (i) Contracts (which shall be deemed to be held in trust in accordance with Code Section 401(f)), and (ii) other Plan assets, including, by way of example, shares or units of mutual funds or other investment vehicles which shall be held in trust by the Trustee. Notwithstanding any other provision of the Plan, the Plan Fund, including all amounts of Deferred Compensation, all property and rights purchased with those amounts and all income attributable thereto, shall be held solely for the purposes set forth in this Plan.

1.31 "Plan Year"

"Plan Year" means the Plan's accounting year of twelve (12) months commencing on January 1st of each year and ending the following December 31st.

1.32 "Predecessor Plan"

"Predecessor Plan" means the Washington State Board for Community and Technical Colleges 403(b) Plan that was in effect prior to January 1, 1998.

1.33 "Pre-Restatement Plan"

"Pre-Restatement Plan" means the Washington State Board for Community and Technical Colleges 403(a) Retirement Plan, as such plan was in effect from January 1, 1998 to December 31, 2005.

1.34 "RCW"

"RCW" means the Revised Code of Washington, as it may be amended from time to time.

1.35 "Restatement Effective Date"

"Restatement Effective Date" means January 1, 2006, that being the effective date of the conversion of the Pre-Restatement Plan from its qualified status under Code Section 403(a) to qualified status under Code Section 401(a). In 2010, the plan was amended to comply with Code and in 2011 to comply with RCW changes effective July 1, 2011.

1.36 "Regulation"

"Regulation" means the Income Tax Regulations as promulgated by the Secretary of the Treasury or his delegate, and as amended from time to time.

1.37 "Retired Participant"

"Retired Participant" means a person who has been a Participant, but who has become entitled to Retirement Benefits under the Plan and has not yet ceased to be a Participant as a result of receiving all vested benefits which are due or payable hereunder.

2.3 INFORMATION FROM PARTICIPATING EMPLOYERS

To enable the Plan Administrator to perform their functions, any Participating Employer shall supply full and timely information to the Plan Administrator on all matters relating to the Compensation of all Participants, their hours of service, their Years of Service, their retirement, death or termination of employment, and such other pertinent facts as the Plan Administrator may require. The Plan Administrator may rely upon such information as is supplied by the Participating Employer and shall have no duty or responsibility to verify such information.

3. ELIGIBILITY

3.1 CONDITIONS OF ELIGIBILITY

(a) A Participant is eligible for a benefit calculation, as described in Section 6, if all of the following are true:

(1) The Participant actively participated in the Retirement Plan prior to July 1, 2011.

(1) A Participant, who is actively participating in the Retirement Plan, dies or elects to retire, consistent with a Participating Employers policies, having reached age 62 or retires due to reasons of health or permanent disability; and

(2) The Participant has ten or more Years of Service,

(b) A Participant is eligible for a benefit under the Plan if the amount, as calculated in Section 6, is a positive amount.

3.2 DETERMINATION OF ELIGIBILITY

An Employee's Participating Employer shall determine the eligibility of the Employee for participation in the Plan in accordance with Section 3.1(a) and 3.1(b). Such determination shall be conclusive and binding upon all persons, as long as the same is made in accordance with the terms of the Plan.

3.3 REEMPLOYMENT OF A RETIREE

If a retiree who is receiving a benefit under the Plan shall be reemployed at 40% or more of full-time by any Participating Employer, the benefit payment will be suspended until the percentage of work falls below 40% of full time.

AMENDATORY SECTION (Amending WSR 97-10-069, filed 5/5/97, effective 7/8/97)

WAC 131-16-010 Designation of community and technical college system retirement plan. There is hereby established for the eligible employees of the community and technical colleges of the state of Washington and the state board, a retirement plan which shall ((~~entitle~~)) provide such employees ((~~to purchase retirement annuities from~~)) with an employer sponsored retirement plan through the teachers' insurance annuity association (TIAA) and the college retirement equities fund (CREF), hereafter called ((~~the~~)) TIAA/CREF ((~~plan~~)), subject to the provisions of WAC 131-16-011 through 131-16-066. On and after January 1, 1998, this retirement plan is intended to comply with the requirements of a qualified plan under Section 403((~~(b)~~)) (a) of the Internal Revenue Code of 1986, as amended and the provisions of the plan document filed with the Internal Revenue Service on October 29, 1997. Prior to January 1, 1998, the plan was intended to comply with the requirements of Section 403(b) of the Internal Revenue Code of 1986, as amended. ((~~Notwithstanding the previous sentence, the state board shall reserve the right to modify the plan to qualify under Section 403(a) of the Internal Revenue Code of 1986, as amended.~~))

AMENDATORY SECTION (Amending WSR 97-10-069, filed 5/5/97, effective 7/8/97)

WAC 131-16-011 Definitions. For the purpose of WAC 131-16-010 through 131-16-066, the following definitions shall apply:

(1) "Participant" means any employee who is eligible to purchase retirement annuities through the TIAA/CREF plan who, as a condition of employment, on and after January 1, 1997, shall participate in the TIAA/CREF plan upon initial eligibility.

(2) "Supplemental retirement benefit" means payments, as calculated in accordance with WAC 131-16-061, made by the state board to an eligible retired participant or designated beneficiary whose retirement benefits provided by the TIAA/CREF plan do not attain the level of the retirement benefit goal established by WAC 131-16-015.

(3) "Year of full-time service" means retirement credit based on full-time employment or the equivalent thereof based on part-time employment in an eligible position for a period of not less than five months in any fiscal year during which TIAA/CREF contributions were made by both the participant and a Washington public higher education institution or the state board or any year or fractional year of prior service in a Washington public retirement system while employed at a Washington public higher education institution: *Provided,* That the participant will receive a pension benefit from such other retirement system((~~: And~~

~~provided further,~~)) and that not more than one year of full-time service will be credited for service in any one fiscal year.

(4) "Fiscal year" means the period beginning on July 1 of any calendar year and ending on June 30 of the succeeding calendar year.

(5) "Average annual salary" means the amount derived when the salary received during the two consecutive highest salaried fiscal years of full-time service for which TIAA/CREF contributions were made by both the participant and a Washington public higher education institution is divided by two.

(6) "TIAA/CREF retirement benefit" means the amount of annual retirement income derived from a participant's accumulated annuities including dividends at the time of retirement: *Provided,* That solely for the purpose of calculating a potential supplemental retirement benefit, such amount shall be adjusted to meet the assumptions set forth in WAC 131-16-061(2).

(7) "Salary" means all remuneration received by the participant from the employing college district or the state board, including summer quarter compensation, extra duty pay, leave stipends, and grants made by or through the college district or state board; but not including any severance pay, early retirement incentive payment, remuneration for unused sick or personal leave, or remuneration for unused annual or vacation leave in excess of the amount payable for thirty days or two hundred forty hours of service.

(8) "Designated beneficiary" means the surviving spouse of the retiree or, with the consent of such spouse, if any, such other person or persons as shall have an insurable interest in the retiree's life and shall have been nominated by written designation duly executed and filed with the retiree's institution of higher education or the state board.

(9) "State board" means the state board for community and technical colleges ((~~education~~)) as created in RCW 28B.50.050.

(10) "Appointing authority" means a college district board of trustees or the state board or the designees of such boards.

AMENDATORY SECTION (Amending WSR 97-10-069, filed 5/5/97, effective 7/8/97)

WAC 131-16-021 Employees eligible to participate in retirement annuity purchase plan. (1) Eligibility to participate in the TIAA/CREF plan is limited to persons who hold appointments to college district or state board staff positions as full-time or part-time faculty members or administrators exempt from the provisions of chapter 28B.16 RCW and who are assigned a cumulative total of at least eighty percent of full-time workload as defined by the appointing authority at one or more college districts or the state board for at least two consecutive college quarters or ((~~who otherwise would be eligible for membership in~~)) whose employment meets the requirements for an "eligible position" as defined by the Washington state teachers retirement system.

(2) Participation in the plan is also permitted for current and former employees of college districts or the state board who

(ii) Payments to prevent the participant's impending bankruptcy; and/or

(iii) Unreimbursable medical expenses incurred by the participant, spouse, dependent children, and/or dependent parents.

The participant shall be deemed to have "no other resources reasonably available to meet the need" if the participant certifies that he/she cannot meet the need through:

(A) Reimbursement or compensation by insurance or another source;

(B) Reasonable liquidation of assets;

(C) Borrowing from supplemental retirement accounts, life insurance values, or commercial sources; and/or

(D) Stopping any voluntary employee contributions to tax deferral or savings plans made available by the employer.

Note: Contributions to the employer-sponsored retirement plan must continue while the employee remains eligible for the plan.

(3) Hardship withdrawals from the community and technical college TIAA/CREF plan are taxable income in the year received. Taxes, early withdrawal penalties, and any other consequences of hardship withdrawals shall be the sole responsibility of the participant. Withdrawals from the employer-sponsored TIAA/CREF plan may not be replaced at a later date.

[Statutory Authority: Chapter 28B.50 RCW. 95-13-069, § 131-16-056, filed 6/20/95, effective 7/21/95.]

WAC 131-16-060 Repurchase of annuity contract under certain conditions. In the event a participant leaves the employ of all Washington community and technical college districts and the state board and the participant requests repurchase of his or her TIAA/CREF accumulation, such repurchase is authorized: *Provided,* That TIAA/CREF's published repurchase guidelines applicable to the participant's contract are followed.

[Statutory Authority: RCW 28B.10.400. 93-01-015, § 131-16-060, filed 12/4/92, effective 1/4/93; 91-13-048 (Resolution No. 91-20, Order 129), § 131-16-060, filed 6/14/91, effective 7/15/91; Order 28, § 131-16-060, filed 7/1/74; Order 4, § 131-16-060, filed 10/22/69.]

WAC 131-16-061 Supplemental retirement benefits. (1) A participant is eligible to receive supplemental retirement benefit payments if at the time of retirement the participant is age sixty-two or over and has at least ten years of full-time service in the TIAA/CREF plan at a Washington public institution of higher education: *Provided,* That the amount of the supplemental retirement benefit, as calculated in accordance with the provisions of this section, is a positive amount.

(2) Subject to the provisions of subdivisions (c), (d), and (e) of this subsection, the annual amount of supplemental retirement benefit payable to a participant upon retirement is the excess, if any, when the value determined in subdivision (b) is subtracted from the value determined in subdivision (a), as follows:

(a) The lesser of fifty percent of the participant's average annual salary or two percent of the average annual salary multiplied by the number of years of full-time service; provided

that if the participant did not elect to contribute ten percent of salary beginning July 1, 1974, or if later, after attainment of age fifty, service for such periods shall be calculated at the rate of one and one-half percent instead of two percent.

(b) The combined retirement benefit from the TIAA/CREF annuity and any other Washington state public retirement system as a result of service while employed by a Washington public higher education institution that the participant would receive in the first month of retirement multiplied by twelve: *Provided,* That the TIAA/CREF benefit shall be calculated on the following assumptions:

(i) After July 1, 1974, fifty percent of the combined contributions were made to TIAA and fifty percent to the CREF stock fund during each year of full-time service: *Provided,* That benefit calculations related to contributions made prior to July 1, 1974, shall be computed on the basis of actual allocations between TIAA and CREF; and

(ii) The full TIAA/CREF annuity accumulations, including all dividends payable by TIAA and further including the amounts, if any, paid in a single sum under the retirement transition benefit option, were fully settled on a joint and two-thirds survivorship option with a ten-year guarantee, using actual ages of retiree and spouse, but not exceeding a five-year difference; except that for unmarried participants the TIAA accumulations, including dividends, were settled on an installment refund option and the CREF accumulations were settled on a life annuity with ten-year guarantee option, all to be based on TIAA/CREF estimates at the time of retirement; and

(iii) Annuity benefits purchased by premiums paid other than as a participant in a Washington public institution of higher education TIAA/CREF retirement plan shall be excluded.

(iv) For the purposes of this calculation, the assumptions applied to the TIAA/CREF accumulation settlement shall also apply to settlement of the benefit from any other retirement plan.

(c) The amount of supplemental retirement benefit for a participant who has not attained age sixty-five at retirement is the amount calculated in subsection (2) of this section reduced by one-half of one percent for each calendar month remaining until age sixty-five: *Provided,* That the supplemental retirement benefit for an otherwise qualified participant retired for reason of health or permanent disability shall not be so reduced.

(d) Any portion of participant's TIAA and/or CREF annuity accumulation paid to a participant's spouse upon dissolution of a marriage shall be included in any subsequent calculation of supplemental retirement benefits just as if these funds had remained in the participant's TIAA and/or CREF annuity.

(e) The selection of a TIAA/CREF retirement option other than the joint and two-thirds survivorship with ten-year guarantee shall not alter the method of calculating the supplemental retirement benefit; however, if the participant's combined TIAA/CREF retirement benefit and calculated supplemental retirement benefit exceeds fifty percent of the participant's average annual salary, the supplemental retirement benefit shall be reduced so that the total combined benefits do not exceed fifty percent of average annual salary.

(3) The payment of supplemental retirement benefits shall be consistent with the following provisions:

(a) Supplemental retirement benefits shall be paid in equal monthly installments, except that if such monthly installments

should be less than ten dollars, such benefit payments may be paid at longer intervals as determined by the state board.

(b) Supplemental retirement benefit payments will continue for the lifetime of the retired participant; however, prior to retirement, a participant may choose to provide for the continuation of supplemental retirement benefit payments, on an actuarially equivalent reduced basis, to his or her spouse or designated beneficiary after the retiree's death. Notification of such choice shall be filed in writing with the state board and shall be irrevocable after retirement. If such option is chosen, the supplemental retirement benefit payments shall be in the same proportion as any TIAA/CREF survivor annuity option potentially payable to and elected by the participant. If a designation of a survivor's option is not made and the participant dies after attaining age sixty-two but prior to retirement, any supplemental benefit payable shall be based on the two-thirds benefit to survivor option.

(c) Prior to making any supplemental benefit payments, the state board shall obtain a document signed by the participant and spouse, if any, or designated beneficiary acknowledging the supplemental retirement benefit option chosen by the participant.

(4) A retired participant who is reemployed shall continue to be eligible to receive retirement income benefits, except that the supplemental retirement benefit shall not continue during periods of employment for more than forty percent of full-time or seventy hours per month or five months duration in any fiscal year. Retirement contributions shall not be made from the salary for such employment, unless the individual once again becomes eligible to participate under the provisions of WAC 131-16-021.

[Statutory Authority: RCW 28B.10.400. 91-13-048 (Resolution No. 91-20, Order 129), § 131-16-061, filed 6/14/91, effective 7/15/91; 83-20-042 (Order 95, Resolution No. 83-25), § 131-16-061, filed 9/28/83. Statutory Authority: RCW 28B.10.400(3). 82-11-014 (Order 91, Resolution No. 82-6), § 131-16-061, filed 5/10/82. Statutory Authority: RCW 28B.10.400. 79-12-069 (Order 80, Resolution No. 79-44), § 131-16-061, filed 11/30/79; Order 28, § 131-16-061, filed 7/1/74.]

WAC 131-16-062 Benefit options after termination of employment. (1) After termination of employment, participants who have attained age fifty-five, or who have completed thirty years of full-time service in this plan or any combination of Washington state sponsored retirement plans, or who have retired due to disability in accordance with WAC 131-16-040 may exercise any settlement option for receipt of retirement benefits being made available by TIAA/CREF at that time.

(2) The federal income tax consequences resulting from the exercise of any options of elections provided by this section shall be the sole responsibility of the individual participant, and all federal tax regulations related to the receipt of retirement income benefits shall apply.

(3) The provisions of this section shall apply only to TIAA and CREF account accumulations attributable to contributions made as a result of employment in institutions or agencies subject to the provisions of WAC 131-16-005 through 131-16-066.