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IMPORTANT CASE DECIDED PERTAINING TO RE-EMPLOYMENT AFTER LEOFF-2 RETIREMENT

Recently, the Washington Court of Appeals ("COA), decided against the Department of Retirement Systems ("DRS") in a case involving a LEOFF-2 retirement. In *Wilson v. DRS,* No. 79867-7-I (2020),[1] the COA found that a retired police chief, Wilson, was wrongly denied LEOFF benefits merely because he became the chief of staff for the mayor of the same city for which he was the police chief.

A brief statement of the applicable law is in order: Any LEOFF 2 member at least 53 years old and has at least "five service credit years of service" is eligible to retire and to receive retirement benefits. RCW 41.26.430(1). Any member eligible to receive retirement benefits "shall be eligible" to begin receiving their retirement benefit after applying with the DRS. RCW 41.26.490(1). Retirement benefits "shall accrue from the first day of the calendar month immediately following such member's *separation from service*." RCW 41.26.490(1). (emphasis added). A person is "separated from service" on the date that they have "terminated all employment with an employer." RCW 41.26.490(5).

Wilson enrolled in LEOFF 2 in 1980 when he became employed by the Renton Police

[1] http://www.courts.wa.gov/opinions/pdf/798677.pdf

Department. Time passed and he became the Chief of Police for the City of Federal Way ("City") in 2006. In 2013, Wilson met with the City mayor, who expressed interest in hiring Wilson as his chief of staff. At that time, Wilson indicated that he was interested but wanted to ensure that he could still obtain his LEOFF 2 benefits upon retiring from the Chief position.

His LEOFF-2 benefits were denied by the DRS. He appealed that denial to superior court which *reversed* the DRS. Then the DRS appealed to the COA which *affirmed* the superior court decision.

In making its decision, the COA took note of a DRS handbook that was published between June 2011 and April *2015*, which stated as follows: "If you return to work in a position that is eligible for membership in the Washington State Public Employees' Retirement System (PERS) . . . you can choose to continue to receive your benefits or you can choose to become a member of that retirement system."[2]

The COA further noted that "as of January 2014, no (DRS) publication stated that a person following the usual procedures in separating from service and terminating all employment in his present LEOFF position would be prohibited from receiving his retirement benefits if he returned to work with that same employer in a different position," which is exactly what Wilson did by filling out an application for retirement on January 6, 2014. In that application, Wilson opted to continue receiving his LEOFF 2 retirement benefits rather than opting into PERS. He was subsequently removed from the City's payroll system, i.e. he was "separated from employment." Wilson was not employed by the City from January 15 to January 20, 2014. On January 21, 2014, he began as chief of staff for the mayor.

Wilson continued to expect that he would receive his LEOFF 2 benefits even though he was being employed by the same employer (the City), albeit in a different position.

However, the DRS denied his application in February 2014 because, according to a DRS plan administrator, he "never completely separated or severed all employment with the City of Federal Way as required."

The COA noted that in March 2014—two months after Wilson applied for benefits—the DRS published another handbook which stated as follows:

> *You have not terminated all employment with your employer if you accept a verbal or written offer of employment with the same employer before you separate from your LEOFF position. You must complete the necessary actions of leaving employment before you accept a new job with the same employer, even if (1) your new job is within a different department or division of that employer, (2) or the new job is not LEOFF eligible*

(emphasis added).

Wilson appealed his denial of benefits from the administrator and the DRS Board to an administrative law judge (ALJ). The ALJ

[2] We noted the equal protection issue that this option, available to law enforcement and firefighters but not teachers, raises in the following article: https://www.firehouselawyer.com/Newsletters/July2016FINAL.pdf

agreed with the DRS that "separation of service" under RCW 41.26.490 requires that the member have "no reasonable expectation" of continuing employment with the employer at the time of separation. Wilson appealed this "no reasonable expectation" position to King County Superior Court. The court agreed with the ALJ that the "no reasonable expectation" requirement was valid to find a true "separation from service" under the statute. However, the court found that this requirement was "inequitably applied" to Wilson due to the discrepancy in DRS publications, referenced above.

The trial court reasoned that nothing in any DRS publication in existence in January 2014—when Wilson applied for his LEOFF-2 benefits—supported the position that a person following the usual procedures in separating from service and terminating all employment in his present LEOFF position would be prohibited from receiving his retirement benefits, even if he returned to work with that same employer, in a different position, after retirement. No DRS publication in January 2014 stated that the employee, to receive LEOFF-2 benefits upon retirement, must have "no reasonable expectation" of employment with the same employer.[3] Hence the trial court found that this "no reasonable expectation" requirement was inequitably applied to Wilson.

The DRS appealed to the COA which affirmed the trial court on "equitable estoppel" grounds.[4] The doctrine of "equitable estoppel" boils down to this: If you take a position (Position One) that someone reasonably relies on, and take an inconsistent position (Position Two) after that person relies on your Position One, you are "estopped"—prevented—from applying the Position 2 to that person. Make sense?

The COA began by saying that "Wilson has, in essence, a *contractual right* to his LEOFF 2 benefits…rather than raise equitable estoppel as a sword, Wilson properly asserted equitable estoppel as a *defense* to the Department's defense of not paying him his pension because of Wilson's alleged breach." (emphasis added). In other words, the COA thinks of pension issues in a contractual sense. The COA did not find that Wilson was using equitable estoppel as a "sword." Instead, he was defending against what the DRS deemed to be a "breach" of his "contract" with the DRS.

Finding first that Wilson properly asserted equitable estoppel as a defense, the COA then looked to whether Wilson successfully argued that equitable estoppel should be applied to the DRS. Wilson argued that he relied on Position One of the DRS, Position One being that, according to all of the DRS Publications available prior to January 2014

[3] The court determined that the DRS owed Wilson $266,934 in benefits. The court also awarded Wilson $12,000 in attorney fees.

[4] The underlying legal issue in *Wilson* was whether "equitable estoppel" could be used as a "sword," or basis for a cause of action, when equitable estoppel is generally used as a *defense.* But we believed this case to have practical implications that transcend the underlying legal issue in *Wilson*, so we do not discuss whether equitable estoppel can be used as a "sword" but instead discuss how the COA ruled on the equitable application of the "no reasonable expectation" requirement.

on the "return to work" rules, Wilson needed only to take the practical steps to sever employment—return his keys, be removed from payroll, etc—to be found to have validly "separated from service."

He argued, therefore, that his having any reasonable expectation that he might return as the Chief of Staff to the Mayor should not have precluded him from receiving his LEOFF-2 benefits. Under the law, and according to DRS publications available at the time of his application, Wilson had "separated from service," so Wilson argued. The COA agreed, finding that the DRS denied Wilson his LEOFF 2 benefits between February 2014 and his ultimate retirement from the chief of staff position on November 30, 2016.

To be clear, Position Two in the *Wilson* case—the "no reasonable expectation" requirement—does not change the law: A LEOFF-2 retiree that returns to work in a PERS "eligible position" must either opt to become a member of PERS or remain a member of LEOFF-2.[5]

That being said, **Position Two is now codified** in the Washington Administrative Code (WAC): "In accordance with the IRS interpretation, you have separated from service only when you have ended the employment relationship *without any reasonable expectation* between you and your employer that you will return to work for the same employer in any capacity (including in an eligible or ineligible position or as an independent contractor)." WAC § 415-02-115 (emphasis added).

Ultimately, *Wilson* does not stand for the proposition that the DRS may no longer take Position Two when reviewing future DRS applications. (And Position Two is the current law, under WAC § 415-02-115, cited above.) *However*, the impact of *Wilson* is that the DRS may not rely on publications that are *subsequently enacted* from the date of an application for retirement benefits as grounds to deny an application. The DRS is bound by its publications in the same sense that the DRS is bound by *the law*, according to the *Wilson* COA. That is the—perhaps unintended—rule from *Wilson*: State agencies such as the DRS may be prevented from taking positions that are not merely inconsistent with the law, but inconsistent with what the agency is telling the public on their websites.

This same rationale could be applied to a public agency that takes an inconsistent position from that set forth in its policies. For example, let us assume that a water-sewer district has a policy of charging a $1,000.00 "connection fee" for new construction. Assume further that as of December 2020, the water-sewer district states that that the connection fee is being waived through January 2021. In February 2021, a taxidermist opens a newly constructed taxidermy store in the water district after applying for a building permit

[5] As per RCW 41.26.500 (3): "A member or retiree [under LEOFF-2] who becomes employed in an eligible position as defined in RCW 41.40.010…shall have the option to enter into membership in the corresponding retirement system for that position…A retiree who elects to enter into plan membership shall have her benefits suspended as provided in subsection (1) of this section. A retiree who does not elect to enter into [PERS] plan membership shall continue to receive her [LEOFF-2] benefits without interruption."

in *December 2020*. The taxidermist then receives a $1,000.00 invoice from the district. The taxidermist pays the fee and appeals that payment to superior court. The taxidermist, applying *Wilson*, would win and be reimbursed the $1,000.00 fee under an equitable estoppel theory, or something analogous to that theory.

PRORATIONING OF PROPERTY TAXES—DO YOU KNOW WHAT THAT IS?

Usually, our clients' eyes glaze over when we start talking about prorationing of property taxes. Discussing a topic that only nerdy lawyers can love to analyze is dangerous in the *Firehouse Lawyer*, but it is high time you all learned a little bit about it!

Prorationing is the term used by the Department of Revenue, county assessors, and yes—us municipal lawyers—to describe what happens when the total of the tax rates that local and state government agencies desire to charge in their ad valorem property tax requests, total might exceed two constitutional and statutory limitations. For our purposes here we will call these the "1% of value" limit and the "$5.90 limit."

The 1% of value limit (not to be confused with the 1% limit on tax revenue increases year to year that is traced back to the Eyman initiative) comes from the State Constitution and RCW 84.52.050. See Article VII, Section 2. But our discussion today focuses only on the $5.90 limitation, which is primarily stemming from RCW 84.52.043, which is referred to in RCW 84.52.050.

RCW 84.52.043(2) provides a limitation on the total rates requested by the junior taxing districts and the senior taxing districts (other than the state) of $5.90 per thousand AV. The maximum statutory rates of some of the typical taxing districts are as follows:

- The county: $2.20
- County roads: $1.80
- Public hospital districts: $.50
- Fire districts: $1.50
- Library districts $.50
- City: $3.375 (unless annexed to fire and/or library district)

Just to clarify, if property is located in a city or town, the county and county roads taxes are not applicable. Moreover, few if any counties request the maximum statutory rate in general for roads, or the $5.90 limit would be routinely exceeded! Also, most cities assess nowhere near the $3.375 limit for property taxes as they have sales tax and other revenue sources. (Note that cities annexed to fire and/or library districts can levy up to $3.60 *minus* the fire and/or library levy rates.)

However, it is not unusual to see the county levying close to $3.00 for the general tax plus the roads. When fire and library are added, the aggregate can easily approach $5.00. Now add in a park district and especially a hospital district and you can see that it is possible to approach $5.90 and theoretically invoke the prorationing rules. That means, according to another statute, that lower priority districts have their levies stripped. We liken it to the peeling of an onion, where each slice of taxes removed gets you closer to lowering the aggregate back under $5.90.

If it even becomes necessary to cut the tax rates of two equal priority districts, such as fire and library, then the rates must be reduced pro rata (hence the origin of the word "prorationing").

In recent years, there have prorationing scares (1) when King County considered a flood control tax, which would impact fire districts and (2) when one or more hospital districts increased levies by about 50 cents. One of our clients withdrew about a square mile from their fire district to avoid a prorationing debacle. Remember that if the area overlapping, for example, with a hospital district, is only *part* of your taxing district, that still creates a problem throughout your district, due to the necessity for uniformity of taxation in each taxing district. So if an overlap with a hospital district, for example, causes a drop of 25 cents in part of your taxing district, that drop applies throughout the fire district and reduces the rate accordingly. You could lose, for example, half of the "third fifty cents" allowed by RCW 52.16.160.[6]

FIREFIGHTERS AND OCCUPATIONAL DISEASE—AN IMPORTANT DECISION?

In August, the COA decided a case involving the rebuttable presumption statute applicable to firefighters with alleged occupational disease. It was an unpublished opinion, which typically means the Court did not believe the decision broke new ground or had any particular precedential value. On November 24th, however, (yesterday) the Court decided to publish that opinion in *Leitner v. City of Tacoma and Department of Labor and Industries,* No.52908-4-II.

Firefighter Leitner was a 30-year veteran of the Tacoma Fire Department, having worked as a marine officer on a fireboat, an incident commander, a lieutenant, and a member of the hazardous materials team. His job involved some physical exertion and the record showed he was exposed to smoke, fumes, and other toxic substances. On December 31, 2014 Leitner experienced some upper back pain, radiating into his chest and down his left arm. He also experienced weakness, dizziness, shortness of breath and nausea. After that he regularly felt similar symptoms. On February 25, 2015, he was exposed to some fumes and he also experienced some left arm pain and other similar symptoms. His symptoms worsened, and on February 28 he had a heart attack. He was found to have a 100% blockage in his left descending artery.

In June of 2015, L&I rejected his claim for benefits finding that he had a pre-existing condition and not an industrial injury.

The applicable law—RCW 51.32.185—provided a rebuttable presumption for firefighters who experience heart problems within 72 hours of exposure to smoke, fumes or other toxic substances or within 24 hours of strenuous physical exertion on the job. That presumption, albeit rebuttable, means the injury or condition is *presumed* to be occupationally caused.

In October 2015 L&I reversed itself and concluded that the heart problem treated on February 28, 2015 was covered, but the City of Tacoma appealed. An Industrial Appeals Judge (IAJ) took testimony at a hearing, including treating providers and expert witnesses. The City's expert testified that the heart attack did not occur within 24 hours of any physical exertion on the job. The IAJ affirmed L&I's decision accepting the claim, but the City petitioned to the Board of Industrial Insurance Appeals, which ultimately disagreed.

[6] Your fire department may protect $.25 cents of your regular fire levy from pro-rationing, as per RCW 84.52.125.

The Board concluded that the presumption applied but that the City's expert medical opinion testimony successfully rebutted the presumption. Leitner then appealed that decision to Superior Court. When these kinds of cases proceed to "trial," the record made before the Board is presented to the court or a jury. In this case, a jury was requested. That is important, because that means the jury was the decider of all factual questions, not the Superior Court judge, who simply instructs the jury on the proper standards to apply. In this case, the jury decided that as a matter of fact, the City's experts had rebutted the presumption.

Of course, Leitner appealed the Superior Court's judgment to the Court of Appeals. On review of such a case, the Superior Court acts like an appellate court and reviews the findings and decision of the Industrial Insurance Board *de novo*, relying exclusively on the evidence presented to the Board. This places the burden on the appellant to persuade the court that the decision of the Board, which is presumed to be correct, is wrong, by a preponderance of the evidence.

When the matter comes before the Court of Appeals as in this case, the Court reviews the Superior Court's decision and the Board's order. The appellate court reviews the record to determine whether substantial evidence supports the findings made after the trial court de novo review of the board decision and whether the trial court's conclusions of law flow from those findings. The appellate court does that review by viewing the record in a light most favorable to the party that prevailed below.

As you might discern from looking at this procedural tangle, it would seem that chances of reversal of a board decision become less and less as the matter proceeds through the appeals process.

What this case demonstrates to us, is that this entire field of rebuttable presumptions of occupational disease for firefighters is very fact dependent. The firefighter lost this case because the proof at the important hearing overwhelmingly favored the city's expert witness presentation. That hearing was not the "trial" in Superior Court; the proceedings before the IAJ and the Board of Industrial Insurance Appeals were the vital proceedings that shaped this result. The firefighter lost because there was not enough testimony to convince a reasonable trier of fact that his heart problems fell within the very precise time lines of the statute.

The "lessons learned" from this case include the need for precise documentation to show that the onset of symptoms ("heart problems") occurred either within 72 hours of an exposure or within 24 hours of a strenuous physical exertion at work. While the firefighter may have done that here, the city effectively rebutted the presumption with evidence tending to show that indeed the heart problems pre-existed any of that evidence because of coronary artery disease that must have developed over a long period of time. Another expert testified that Leitner was obese, which is another risk factor. Evidence of family history (his mother) was also pertinent. It appears that there was simply not enough testimony to respond to that evidence and so the presumption was successfully rebutted. This just shows once again, that although the law is important, facts control the results.