6-6-2018

Idaho Retired Firefighters Association v. Public Employee Retirement Board Appellant's Brief Dckt. 45769

IN THE SUPREME COURT FOR THE STATE OF IDAHO

IDAHO RETIRED FIRE FIGHTERS ASSOCIATION, SHARON KOELLING, and JOHN ANDERSON Plaintiff-Appellant, v. PUBLIC EMPLOYEE RETIREMENT BOARD, Defendant-Respondent.	Supreme Court Case No. 45769 Industrial Commission Case No. 17-000044 APPELLANT'S BRIEF

APPEALED FROM THE IDAHO INDUSTRIAL COMMISSION

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I. STATEMENT OF THE CASE

Appellants seek determination of the meaning of the term "paid firefighter" for purposes of determining cost of living ("COLA") adjustments for participants in the Idaho Firemen's Retirement Fund. Neither the Industrial Commission, the Retirement Board, nor the Public Employee Retirement System of Idaho ("PERSI") Director, have made this determination. Rather, the determination has been left to the Cities, some of whom have been instructed to include all "PERSI-eligible employees" of their fire departments regardless of whether they are "paid firefighters." Appellants sought injunctive relief directing PERSI to determine the meaning of the term "paid firefighter" so it can be decided what wages are, and what wages are not, included in determining COLA adjustments provided by statute. The Commission affirmed the Board's refusal to do so, and Plaintiffs-Appellants now seek to reverse the decision of the Commission.

A. Nature of the Case

Since 1980 publicly employed fire fighters in Idaho have been divided into two retirement systems. Those hired before 1980 participate in the Firemen's Retirement Fund. Those hired after 1980 participate in the PERSI system. The Retirement Board, as administrators of PERSI, manage both systems. PERSI staff has calculated COLAs for retirees in the Firemen's Retirement Fund on the basis of the total amounts paid by Idaho fire departments to anyone performing firefighting duties and reported as "employees," while Idaho statute requires that COLAs for this group be based only on the average salaries earned by "paid firefighters," a term of art defined by the Idaho Legislature. The failure to exclude individuals

who do not meet the definition of "paid firefighter" breaches the Retirement Board's and PERSI Director's statutory duties, reduces the benefits received by Firemen's Retirement Fund ("FRF") beneficiaries, and thus violates both statutory and constitutional standards. The Commission erred when it affirmed the Retirement Board's decision to treat "employees" as equivalent to "paid firefighters."

B. Procedural History

In approximately June, 2013, members of the Idaho Retired Firefighters Association ("IRFA") Board learned that certain "reserve" fire fighters from the City of Lewiston were being included in the FRF COLA calculation. (R. Vol. 1, pp. 180-181, Hearing Transcript, Testimony of Parks). The IRFA undertook an investigation, working with PERSI staff to understand how COLAs were calculated and what had happened. (Id, pp. 182-183). The "reserve" firefighters were included because they had been deemed to be PERSI-eligible, having satisfied the standard of "employee" under PERSI rules. (Id, pp. 184-186). Over the course of several meetings with PERSI staff, IRFA learned that the inclusion of "reserve" firefighters by Lewiston in their monthly and annual reports lead to their inclusion in the annual COLA calculation. They also determined, in agreement with PERSI staff, that the inclusion of "reserve" firefighters was reducing the COLA for FRF retirees. (R, Vol. 3, pp. 401-403, Hearing Transcript, Testimony of Parks; R. Vol. 2, pp. 212-213, email from Drum). Although the IRFA repeatedly pointed out that the FRF required that COLAs be based on the wages of "paid firefighters" rather than "employees," Director Drum (and later the Retirement Board and the Industrial Commission)

never made a determination whether the reservists met that definition, relying instead simply on the determination that they were "employees" who engaged in fighting fire.

Based on its investigation and analysis of the relevant statutes (including PERSI Executive Director Drum's confirmation that "reserve" fire fighters were being included and were likely driving the COLA down) the IRFA requested that the Retirement Board overrule Director Drum's decision to include the reservists. By letter dated February 17, 2015, IRFA described the issue in detail, and requested that the Retirement Board correct the error by recalculating FRF COLAs without including "reserve" firefighters unless they also met the definition of "paid firefighter" under the FRF. (R. Vol. 2, pp. 215-220).

At its March 24, 2015 meeting the Retirement Board reviewed the IRFA's letter, considered comments by IRFA Counsel Alan Herzfeld, and determined it would take no action and make no changes to the manner in which it calculated FRF COLAs. (R. Vol. 2, p. 222, Minutes of March 24, 2015 Meeting). By letter dated April 20, 2015, IRFA again attempted to resolve the matter. (R. Vol. 2, pp. 224-225). On or about June 26, 2015, PERSI Director Drum informed the IRFA via letter that neither the Retirement Board nor PERSI staff would take any steps to address the issue. (R Vol. 2, p. 226).

In October, 2015, Appellants filed a Petition and Complaint for Declaratory Ruling with the Idaho Industrial Commission pursuant to Idaho Code § 72-1423. (R. Vol. 1, pp. 1-10). The Petition was denied on grounds that the PERSI Board's decision to take no action was not an appealable decision. (R. Vol. 1, pp. 44-47).

3. Appellant's Brief

Appellants then filed a Petition for Declaratory Relief with PERSI in November, 2015. (R. Vol. 1, pp. 48-56). A Recommended Order was issued (R. Vol. 1, pp. 97-112) and Appellants sought exception, which was denied and a Final Order entered in October, 2016. (R. Vol 1, pp. 114-116). The question at issue had still not been answered.

Appellants then returned to the Industrial Commission in November, 2016, seeking review of the Retirement Board's formal decision. (R. Vol. 2, pp. 245-264). In December, 2017, the Commission affirmed the Board's decision. (R. Vol. 3, p 568.).

This action followed.

C. Statement of the Facts

1. History of the Firemen's Retirement Fund and its Integration Into PERSI.

The FRF was established by the Idaho Legislature in 1945 and codified in Title 72, Chapter 14, Idaho Code. The purpose of the system was straightforward and clearly expressed:

> The retirement, with continuance of pay for themselves, provision for dependents, and pay during temporary disability, and the encouragement of long service in fire fighting service, of paid firefighters becoming aged or disabled in the service of the state or any of its cities or fire districts, is hereby declared to be a public purpose of joint concern to the state and each of its cities and fire districts in the protection and conservation of property and lives and essential to the maintenance of competent and efficient personnel in fire service.

I.C. §72-1401.

From 1945 until 1980, the FRF was administered by the State Insurance Fund and provided pensions and disability benefits for Idaho's fire fighters pursuant to the original FRF statute as amended. In 1976, and presumably to further the public interest set out in §72-1401, the Legislature provided for an annual COLA to pension benefits. The newly codified §72-

1432B specified that beneficiaries would "be entitled to receive adjustments to such benefits, calculated on the percentage of increase or decrease in the average paid firefighter's salary or wage, in this state, as computed under the terms of section 72-1411, Idaho Code." 1976 Sess. Laws, Ch. 273, §23, p. 942.

The statement of purpose specified that I.C. §72-1432B was added to the law "to provide a process for making cost of living adjustments to retirement benefits." Id., p. 921. In that respect, the 1976 bill made similar adjustments to the manner of calculating benefits for early retirement, for disability retirement, for survivor benefits, and for voluntary retirements occurring at 20, 21, 22, 23, 24 or 25 years of service. Id., §§6-18. In each case, the method of calculating benefits was based on "the percentage of increase or decrease in the average paid firefighter's salary or wage." Id., §23. To ensure there was no confusion, the same bill amended the definitions section of the FRF statute to specify that:

> The words 'paid fireman' are synonymous with 'paid firefighter,' and mean any individual, male or female, excluding office secretaries employed after July 1, 1967, who is on the payroll of any city or town or fire district in the state of Idaho and who devotes his or her principal time of employment to the care, operation, maintenance or the requirements of a regularly constituted fire department of such city or fire district in the state of Idaho.

Id., §1, p. 922. This did not work any substantive change in the definitions, it merely made clear that "paid fireman" and "paid firefighter" were to have the same meaning, and that both terms still referred to individuals for whom firefighting was their principal occupation.

By 1979, the Legislature had decided to merge the FRF into PERSI. In 1979 House Bill 116 "provide[d] for the transfer of" "the assets, liabilities, duties, obligations and rights" of the

FRF to PERSI effective October 1, 1980. 1979 Sess. Laws, Ch. 147, §2, p. 453. Importantly, the Legislature created Idaho Code § 59-1356 (subsequently designated §59-1392) which provided:

> The combined rights and benefits of firemen members as of October 1, 1980, shall not be less than the rights and benefits they would have received from the firemen's retirement fund and social security, had the fund not been integrated with the employee system.

During the 1980 legislative session, substantial "housekeeping" completed the process of converting the FRF to a program within and administered by PERSI. 1980 House Bill 526 amended numerous sections of the Firefighter's Retirement Fund statute, as well as the PERSI statute.

Significantly, the definition of "paid firefighter" was left unchanged in the course of the merger. The Legislature limited future participation in FRF to firefighters employed prior to October 1, 1980, and specified that all subsequently hired firefighters be enrolled in PERSI. 1980 Id. Sess. Laws Ch. 50, §2, p. 81. Management of the FRF was shifted from the State Insurance Fund to the Retirement Board (which already oversaw PERSI). Id., §§3, 4, 6, 10. Closing a gap it had appeared to leave open in 1976, the Legislature again reaffirmed that FRF COLAs would continue, would be calculated pursuant to the provisions of the 1976 law, and would be extended to spouses and children receiving death benefits. Id., §25. The manner of calculating COLAs was left unchanged. Id., §36.

The Legislature ensured however, that fire fighters who had begun employment under the FRF system were fully protected in the merger with PERSI by specifying once again that their

"rights and benefits . . . shall not be less than the rights and benefits they would have received from the firefighters' retirement fund, had the fund not been integrated with the employee system." Id. §43. This amendment simplified the provision that had been first added in 1979, by removing the references to social security, so that the provision simply required that FRF beneficiaries continue to receive benefits as if there had been no merger. Id.

In 1990 the Legislature made substantial changes to all state employee retirement programs, though few of those changes directly affected FRF retirees. However, 1990 House Bill 231 did result in renumbering of many sections of Idaho code, yielding the code section designations we see today. 1990 Idaho Sess. Laws, Ch. 231, p. 611.

2. Application of the COLA Provisions of the 1976 and Subsequent Amendments.

From 1976 until 1980, the State Insurance Fund (which operated the FRF at that time) implemented COLA increases for FRF retirees by calculating the increase in the average salary or wages of paid firefighters in the state of Idaho, and ensuring that FRF retirees received a similar adjustment and, in doing so, excluded so-called volunteer firefighters, even though those "volunteers" were in fact paid for their time when they performed firefighting services. This practice was consistent with both the COLA statute which required COLAs to match the adjustments earned by "paid firefighters," I.C. §72-1471, and the definitions section of the FRF statute which defined "paid firefighter" as any individual employed by a city or fire district "who devotes his or her principal time of employment to the care, operation, maintenance or the requirements of a regularly constitute fire department." I.C. §72-1403(A).

Although some fire departments in the 1970s and 1980s utilized part-time, volunteer firefighters, none of those volunteers received pension benefits, none were reported to PERSI, and, as a result, none were included in COLA calculations. (R. Vol. 3, pp. 527-529, Hearing Transcript, Testimony of Nokes).

From 1980 until approximately 2009, PERSI and the Retirement Board implemented COLA increases for FRF beneficiaries based on the average salary or wages of full time, paid firefighters in the state of Idaho, excluding anyone else such as "volunteer" firefighters, just as the State Insurance Fund had done. This practice was consistent both with the FRF statutes, as well as with Idaho Code §59-1397 (requiring that former FRF participants receive the same benefits they would have without the merger) and with Idaho Code §59-1391(f) which defined paid firefighter in terms almost identical to the definition in §72-1403(A).

The Retirement Board bases its COLA calculations on pension contribution reports received from fire departments around the state. In 2009, the City of Lewiston and the union representing its firefighters agreed to include in its PERSI reports certain part-time fire department employees known as "reservists." (R. Vol. 2, p. 214). Since all such "reserve" firefighters were hired after 1980, their eligibility for retirement benefits arose from PERSI statutes and regulations, rather than FRF statutes and regulations. Put simply, they would get PERSI benefits if they were "employees" rather than having to meet the more stringent requirements of being "paid firefighters" under FRF rules.

After Lewiston began reporting these part-time workers as employees, the Retirement Board included them in their calculation of "the percentage of increase or decrease in the average

paid firefighter's salary or wage" to determine COLA raises for FRF retirees and beneficiaries, despite, as discussed below, never having determined whether they are or are not "paid firefighters." I.C. §72-1471 (R. Vol. 1, pp. 198-200; R. Vol, 2, pp. 201-211). PERSI and the IRFA agreed that the inclusion of the reservists effectively reduced the COLAs received by FRF retirees and beneficiaries. (R. Vol. 2, pp. 212-213, email from Drum). The reservists both increased the number of alleged "paid firefighters" and diluted the wages earned because of their reduced hours of work. (Id.).

Because PERSI and Director Drum never made any effort to determine which, if any of the reservists would also meet the definition of "paid firefighter" it is impossible to calculate the actual economic effect of their inclusion on the FRF retirees. The parties, however, prior to the litigation, came "close" to each other in their calculations. (Id.). The IRFA had calculated that inclusion of reservists from Lewiston had reduced each retirees benefit by an average of $516 per year. (Id.). PERSI staff did similar calculations and concluded that the inclusion of reservists had reduced the monthly benefit by $457, resulting in a first year reduction in benefits of $208,000. (Id.). The IRFA knew at the time that there were 551 FRF retirees, thus even $457 per year, the first year loss of benefits was $251,807, rather than the $208,000. Extrapolating the first year loss of benefits of $251,000 in 2013 over the intervening five years, puts the total benefits reduction for the now-elderly retired firefighters at well over a million dollars. The losses will continue to grow each year since COLAs are essentially cumulative. While the exact loss is unknown (only PERSI could accurately calculate it), it is substantial and it is borne

entirely by the now-elderly fire fighters (and their widows) who spent careers serving Idaho communities.

II. ISSUES PRESENTED ON APPEAL

The present appeal from a final order of the Industrial Commission presents the following questions:

A. Did the Industrial Commission err as a matter of law in holding that the defined term "paid firefighter" includes all fire fighters meeting the definition of "employee" under the Public Employee Retirement System of Idaho;

B. Has the Retirement Board failed to exercise a statutory duty to determine who are "paid firefighters" within the meaning of the Fireman's Retirement Fund and related Acts;

C. Have retired fire fighters in the State of Idaho been denied the full statutory benefit owed them under the Fireman's Retirement Fund and related Acts;

D. Have the actions of the Idaho Public Employee Retirement Board impaired the contracts of the Appellants and other retired fire fighters in violation of the United States and Idaho Constitutions.

III. STANDARD OF REVIEW

In appeals from the Industrial Commission, the Court reviews de novo the Commission's legal conclusions, but does not disturb factual findings if they are supported by substantial and competent evidence. IDAHO CONST. ART. V, §9; I.C. §72-732[1]; *Berglund v. Potlatch Corp.*,

[1] This case first arose under the Firemen's Retirement Fund Act, which was placed under the administration of the Public Employee Retirement Board. Claims against that Board are first presented there and, if appeal is sought,

129 Idaho 752, 754, 932 P.2d 875, 877 (1996); *Steen v. Denny's Rest.*, 135 Idaho 234, 235, 16 P.3d 910 (2000).

IV. ARGUMENT

A. The Industrial Commission Erred as a Matter of Law When it Failed to Issue a Declaratory Judgment Requiring the Retirement Board to Base FRF COLA's on the Wages of "Paid Firefighters" Rather Than on the Wages of all "Employees."

Idaho statute is unequivocal in requiring that FRF beneficiaries receive an annual COLA. I.C. § 72-1471. The statute requires that the annual COLA be based on the percentage annual increase or decrease in the "average paid firefighter's salary or wage." "Paid firefighter" is a specifically-defined term in Chapter 14, Title 72 and the definition requires that "paid firefighter," include only those career firefighters whose "principal time of employment" was as a firefighter with an Idaho city or fire district. I.C. § 72-1403(A).

The reserve firefighters which the Retirement Board insists on including in the COLA calculation have only been determined to meet the much less demanding definition of "employee" set out in I.C. 59-1302(14). To be an "employee" §59-1302(14) requires only that an individual "normally work twenty hours or more per week for an employer … and receive salary for services rendered for such employer" for at least five consecutive months. PERSI Rule 113 provides that a person meets the "normally work twenty hours or more per week" requirement if he or she "works twenty hours or more per week for more than half of the weeks during the period of employment being considered." (IDAPA 59.01.02.113). Thus, an

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appeal is to the Industrial Commission and, pursuant to I.C. §77-1423 such claims are treated as if they arose under the Workmen's Compensation Act. Proceedings from that point onward proceed under that statute.

"employee" under PERSI's regulations is someone who, at least every other week, works over 20 hours for the employer. In contrast to full-time Lewiston suppression firefighters, who normally work approximately 242 hours per month, (Parks, pp. 23-24) a reservist need only work slightly more than 40 hours per month in order to meet the PERSI definition of employee. To state the same in slightly different terms, since firefighters routinely work 24-hour shifts, a "paid firefighter" in Lewiston typically works at least ten shifts per month (240 hours per month or more), while a reserve firefighter would qualify as a PERSI "employee" under Rule 113 if he worked as little as one shift every other week (48 hours per month).

An individual working as little as 48 hours per month might meet the employee definition, but doing so would entirely fail to prove that their "principal time of employment" is as a firefighter. By determining that all PERSI "employees" reported by fire departments would be included in FRF COLA calculations, without regard to whether those "employees" met the definition of "paid firefighter," the PERSI staff have acted contrary to both the language and intent of the statute defining paid firefighter, as well as in violation of the statute requiring that FRF benefits be maintained as if no merger with PERSI had ever occurred. I.C. §59-1392 to §59-1356

B. The Industrial Commission Erred When it Failed to Require PERSI and the Retirement Board to Perform Their Statutory Duty to Determine Who Are Paid Firefighters, and Base COLA Increases Only on Their Wages.

Neither the Retirement Board nor PERSI staff make any determination whatsoever of whether any individual fire fighter is a "paid firefighter" within the meaning of the statute. By

making no determination, the PERSI staff, on behalf of the Retirement Board, and the Director as Director, is failing to exercise a statutory duty in violation of state law.

Idaho Code provides that FRF beneficiaries "shall be entitled to receive adjustments to such benefits, calculated on the percentage of increase or decrease in the average paid firefighter's salary or wage, in this state, as computed under the terms of Section 72-1431, Idaho Code." I.C. 72-1471. In turn, Section 72-1431 provides that "The average paid salary or wage or the individual firefighter's salary or wage, shall be calculated annually no later than the first day of September **by the director.**" (emphasis added). These provisions establish a clear legal duty on the part of the Director to calculate the average salary of "paid firefighters." As Director Drum testified, however, he does not make any such calculation. Instead he calculates the average salary of "employees" who work at fire departments, and makes no determination whether those "employees" are also satisfying the requirements to be "paid firefighters:"

> A: Basically, all employers are given the guidance spelled out in Idaho Code. They are to report everybody who is PERSI-eligible. Okay? So PERSI eligibility – and this is very simplified – is that if an individual works twenty hours or more per week for the majority of the weeks in a five-month pay period, they reach PERSI eligibility.
>
> If they reach PERSI eligibility, the employer is required to report them to us and pay contributions on their wages.
>
> Q: How does your staff determine which of those individuals are paid firefighters to be included in determining the COLA for FRF beneficiaries?
>
> **A. Well, the employer determines whether they are paid firefighters, not our staff.**

(Testimony of Drum, p. 85) (emphasis added). In short, PERSI tells employers to report all of their "employees." PERSI then assumes that "employees" who fight fire are necessarily also

"paid firefighters" within the meaning of the FRF statute. (Id.). This is despite the differences in the definitions of "employee" and "paid firefighter." Having been given a clear, statutory directive by the Idaho Legislature, the Retirement Board and its Director, have ignored that duty, and instead allowed it to be informally delegated to City and District officials.

The Legislature's definition of employee includes anyone "who normally works twenty (20) hours or more per week for an employer." I.C. §59-1302. The Retirement Board has added a gloss to that, providing that "a person works twenty (20) hours or more per week for more than one-half (1/2) of the weeks during the period of employment being considered, then the person . . . shall be considered an employee." IDAPA 59.01.02.113. "Paid firefighters," however, and as set out above, includes an employee only if he is one "who devotes his or her principal time of employment" to the operation of a fire department. Although the Idaho legislature made clear that only those whose "principal" employment was as firefighters were to be included in the COLA calculation, and required Director Drum to make that determination, he has chosen not to:

> Q: Right. So when a person spends twenty hours a week - - let's say it's every week - - working for a city, they could easily be spending thirty hours a week at some other non-public employment; right?
>
> A: Correct.
>
> Q: It wouldn't matter to you, would it?
>
> A: We don't care.

(Drum, pp. 91-92).

Indeed, the statutory term "principal time of employment" is not given any particular meaning by Director Drum, (Drum, pp. 93-94), or by the Retirement Board. (Drum, p. 96). Putting it bluntly, Director Drum reiterated that "PERSI doesn't care" what a person's "principal time of employment" is, it cares only that the person is PERSI eligible under the "employee" standard. (Drum, p. 100). This is despite the fact that an individual could be PERSI eligible while still spending more of their time in other, non-covered employment. (Drum, p. 101-102).

Director Drum intimated that his method successfully calculated the salary of "paid firefighters" simply because the reports received by PERSI are supposed to establish that the principal public employment of such "employees" is in fire service. The Hearing Officer adopted this approach, and the Retirement Board affirmed it, finding that "principal time of employment" in the statute, really only meant principal time of public employment. (Record Vol. 1, p. 109). But any argument that this satisfies the statute must ignore the very statutory language. The terms "paid firefighter" and "paid fireman" refer only to an individual "who devotes **his or her** principal time of employment" to the fire service. I.D. 72-1403(A) (emphasis added). The definition is not based on any assessment of whether the individual's employment with a particular City is principally with the fire department as opposed to some other department, rather it must be based on "his or her" principal time of employment. The statute thus specifies that the proper reference is to the individual's employment, not to the City or Fire District's employment. An individual who worked twenty-one hours every other week in a fire department may well have their "principal" time of employment with some other entity entirely, and thus not be eligible for inclusion in the calculation of COLAs.

15. Appellant's Brief

The Industrial Commission both repeated the errors of the Retirement Board and added a new one. First, the :Commission misunderstood the legal question before it. Repeatedly, the Commission focused on whether "part time" fire fighters could also be "paid firefighters." (Findings and Conclusions, Vol. 3, pp. 553, 568. Second, it held that "principal time of employment" unambiguously referred solely with whether an individual's sole "public" employment was with a fire department. R.,Vol. 3, p. 561. The first contention simply misunderstood the issue. While it is entirely possible that even a part-time firefighter might devote his principal time of employment to fighting fire, it is just as clear that he or she may not. Yet, nobody has made a determination whether the "reserve" firefighters in Lewiston are or were "paid firefighters." For many years, "volunteer" firefighters (who were not "volunteers" but rather were paid for their time when they were called to duty) engaged in public employment, for at least some of them, it is reasonable to conclude that fighting fire was their only public employment, yet they were never included in the category "paid firefighter" for FRF purposes. The question both the Retirement Board and Industrial Commission failed to answer is whether anyone is recognizing the distinction between employee and paid firefighter, and whether there are individuals who are not paid firefighters being included in the FRF COLA.

C. The Change in COLA Methodology Results in Violations of the Idaho and United States Constitutions.

Both statutory and Constitutional provisions expressly and directly protect the interests of FRF retirees in maintaining the system of calculating COLAs as it existed in 1980. Article I, Section 10 of the U.S. Constitution prohibits states from passing "any … law impairing the

obligation of contracts…." Article I, Section 16 of the Idaho Constitution likewise provides: "No … law impairing the obligation of contracts shall ever be passed." And the Idaho Legislature chose to essentially "freeze" the retirement system for FRF beneficiaries at the status quo as it existed in 1980 when it mandated that the "rights and benefits of firemen members as of October 1, 1980, shall not be less than the rights and benefits they would have received from the firemen's retirement fund and social security, had the fund not been integrated with the employee system." I.C. § 59-1356. Both the statutory and constitutional provisions have been violated, and the Industrial Commission erred in not correcting those violations.

The evidence at hearing demonstrated that there had been, for many years, firefighters who received pay, but for whom there were no FRF or even PERSI reports filed. These firefighters were called "volunteers" but they were paid for their time when they were called to a fire or other public safety emergency. (R. Vol. 3, pp. 527-529, Hearing Transcript, Testimony of Nokes). Starting in2009, the Retirement Board required that they be reported as "employees" if they met the "employee" definition. This was an act well within the Retirement Board's power in its role as PERSI administrator. But in its role as FRF administrator, this constituted an unlawful change to the status quo of 1980, which the Legislature had required be preserved. There was be no dispute that prior to 1980 (and indeed until at least 2009) fire fighters who worked at fire departments on an occasional basis and in less than a "career" capacity, were not reported as "paid firefighters." And they would never have been reported as "employees" if the FRF and PERSI had not been merged, because the FRF never required reporting of employees, only "paid firefighters." By including "employees" in the COLA calculation, when those

employees were never previously included (because they were not individual's whose "principal time of employment" was as a fire fighter), the Board reduced the "rights and benefits" of FRF employees by what will soon amount to several million dollars, and did so solely because the PERSI and FRF programs were merged, and in contravention of the statutory directive to preserve those rights and benefits as if no merger occurred.

In *Deonier v. PERSI*, 144 Idaho 721 (1988), this Court reversed a lower court decision upholding a PERSI decision to offset workers compensation benefits from FRF disability retirement benefits contrary to established historical practice. In doing so, the Court found that the decision to change the established practice not only violated statutory intent, but also unconstitutionally impaired the affected FRF retirees' contractual rights to vested retirement benefits. Citing earlier Idaho Supreme Court decisions, the *Deonier* Court explained:

> This court has adopted the rule "the rights of employees in pension plans such as Idaho's [Firemen's] Retirement Fund are vested, subject only to reasonable modification for the purpose of keeping the pension system flexible and maintaining its integrity."

Deonier, 144 Idaho at 726. Citing decisions from several other states, as well as earlier Idaho Supreme Court decisions, the Court went on to hold that even though the change was the result of an administrative action rather than a "law," the PERSI administrative action unconstitutionally impaired the affected FRF retirees' contractual rights by "materially alter[ing] the vested rights of firefighters subject to the FRF." *Id*.

As in *Deonier*, the Retirement Board's decision to include the wages of "employees" who have not been determined to be paid firefighters in the calculation of the FRF COLA materially altered the vested rights of FRF beneficiaries, significantly reducing the amounts of

their monthly pension benefits. Stated alternatively, the failure to exclude individuals who are not "paid firefighters" merely because they do happen to be "employees," has violated the vested rights of retirees to a COLA based on the wages of "paid firefighters." Since there has not been, and cannot be any showing that this administrative decision by PERSI was necessitated "for the purpose of keeping the pension system flexible and maintaining its integrity," the detrimental administrative action cannot pass constitutional muster.

The Retirement Board has justified its position by claiming that they have not taken any action which would constitute a "law impairing the obligations of contracts." U.S. Const., Art. I, Sec. 10. This argument is incorrect as a matter of law. First, any act "of a legislative character," if it has the prohibited effect on an existing contract, is subject to the Constitution's prohibition. *In Re Fidelity State Bank*, 35 Idaho 797, 810 (1922). The establishment of payment rates by an administrative agency, the very activity at issue in this case, is subject to the contract impairment prohibition. *Agricultural Products Corp. v. Utah Power & Light Co.*, 98 Idaho 23, 28-29 (1976); *Arkansas Nat. Gas Co. v. Arkansas R.R. Comm'n.*, 261 U.S. 379, 43 S.CT. 387 (1923). Whether the actions of Director Drum and the Retirement Board are viewed as acts of commission or omission, the result is identical: they have made a decision that they will not determine who are and who are not "paid firefighters," and this decision is reducing the consideration promised to FRF retires in the contracts entered into by and between the State of Idaho and the cities and fire districts at which the FRF retirees worked, which, per *Deonier,* created vested rights in those retirees.

The Industrial Commission refused to address the constitutional aspects of the case, claiming that only a court could do so. R., Vol. 3, p. 566. This Court has both the power and, of course, the competency to do so. On review of a decision by the Industrial Commission, the Court is obligated to reverse if the Commission misapplies the law. *Combs v. Kelly Logging*, 115 Idaho 695, 697, 769 P.2d 572 (1989); *Bortz v. Payless Drug Stores*, 110 Idaho 942, 945, 719 P.2d 1202 (1986).

V. Conclusion

The present case presents the seemingly simple question whether the Retirement Board and its Director may simply lump all "employees" working for fire departments into the category of "paid firefighter" without making any further inquiry or determination. Given the statutory duties of the Director and the Board, and the painstaking work by the Legislature to define "paid firefighter" and "employee" as separate and distinct, the answer should be "no." In addition, by making a determination that it would include all "employees" of fire departments as necessarily meeting the definition of "paid firefighter," the Board has violated both its statutory obligation to assure the FRF retirees suffer no loss or reduction of benefits, and the constitutional prohibitions on impairment of contracts. The decision of the Industrial Commission should be reversed as contrary to law, and the matter remanded for further proceedings by the Retirement Board to determine whether all of the employees reported to it are in fact individuals whose principal time of employment is as a fire fighter.

Dated this 6th day of June, 2018

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of June, 2018, a true and correct copy of the above and foregoing APPELLANT'S BRIEF was forwarded addressed as follows in the manner stated below:

Clay Smith	Hand Delivered	☐
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James M. Piotrowski

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that on this 6th day June, 2018, the electronic brief submitted is in compliance with all of the requirements set out in I.A.R. 34.1, and that and electronic copy was served on each party at the following email addresses:

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