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

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IN THE SUPREME COURT OF THE STATE OF IDAHO

IDAHO RETIRED FIRE FIGHTERS ASSOCIATION, JAMES NALLY, SHARON KOELLING, and JOHN ANDERSON, Appellant, vs. PUBLIC EMPLOYEE RETIREMENT BOARD, Respondent.	Supreme Court No. 45769 Industrial Commission Case No. IC 17000044 **RESPONDENT'S BRIEF**

APPEALED FROM THE IDAHO INDUSTRIAL COMMISSION

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I. INTRODUCTION

The resolution of this appeal turns on the meaning of the term "paid firefighters," as used in Idaho Code § 72-1471 and defined in Idaho Code §§ 72-1403(A) and 59-1391(f). Appellants the Idaho Retired Fire Fighters Association, Sharon Koelling, and John Anderson (collectively, the "Association") contend that these statutes require that the Fireman's Retirement Fund's ("FRF") cost-of-living adjustment ("COLA") be calculated based on the salary of only full-time "paid firefighters." However, the statutory definitions of "paid firefighters" are unambiguous and make no distinction between part-time and full-time firefighters.

Instead, in order to meet the statutory definitions, a firefighter must be on the payroll of a city or fire district and devote the majority of his or her time to firefighting related activities while on the payroll. Accordingly, when the Public Employee Retirement System of Idaho ("PERSI") calculates the COLA for FRF, it has appropriately been including both part-time and full-time firefighters that meet those two criteria.

The Association also claims that PERSI is acting in violation of its statutory duty to correctly calculate the COLA by basing that calculation off of reports provided by cities that include part-time firefighters and by failing to make its own fact specific determinations regarding who qualifies as a paid firefighter. More specifically, the Association contends that Idaho Code § 72-1431 calls for PERSI to make fact specific determinations as to whether specific firefighters should be classified as "paid firefighters" within the meaning of §§ 72-1403(A) and 59-1391(f). However, § 72-1431 does not require PERSI to make such fact specific

determinations as to how specific firefighters should be classified. Instead, it requires PERSI to calculate the average salary of firefighters. PERSI does so based on reports it receives from the cities or fire districts employing the firefighters and they determine who meets the statutory definition of a paid firefighter. As such, PERSI has not violated any statutory duty.

Finally, the Association claims that, by including the part-time firefighters from the City of Lewiston when making the COLA calculation, PERSI has acted in a legislative manner that impaired the contractual rights of beneficiaries of the FRF, and that PERSI has thereby violated the Contracts Clause of both the Idaho and United States Constitutions. This argument has no merit because PERSI was discharging a purely ministerial, administrative duty in making such calculations, and has not engaged in legislative acts. Thus, this argument fails as well.

Based on the foregoing, Respondent Public Employee Retirement Board (the "Board") respectfully requests that this Court affirm the Idaho Industrial Commission's decision.

II. STATEMENT OF THE CASE

In November 2015, the Association filed a Petition for Declaratory Ruling and Complaint with the Board. (R. Vol. II, p. 327-36.) The Board ordered a contested hearing on the petition and complaint pursuant to Idaho Code § 67-5232. (R. Vol. I, p. 94.)

A hearing was held on May 3, 2016, during which both parties submitted evidence and testimony and a briefing schedule was established. (R. Vol. I, pp. 97-98.) On August 18, 2016, the hearing officer issued findings of fact, conclusions of law, and a recommended order denying the Association's request for a declaratory ruling that part-time firefighters must be excluded from the COLA calculations for the FRF. (R. Vol. I, pp. 97-112.) The Board adopted the

recommendation in its entirety by way of an order dated October 18, 2016. (R. Vol. I, pp. 114-16.)

On November 23, 2016, the Association filed a petition and complaint before the Idaho Industrial Commission appealing the Board's order. (R. Vol. I, pp. 48-56.) The parties submitted briefs and exhibits to the Industrial Commission and the matter went under advisement on September 18, 2017. (R. Vol. III, p. 554.) The issue considered by the Industrial Commission was whether PERSI was acting in violation of statute by including part-time firefighters employed by the City of Lewiston in the COLA calculation for the FRF. (*Id.*) On December 29, 2017, the Industrial Commission issued findings of fact, conclusions of law, and an order, which found that the definition of "paid firefighters" included firefighters that work for a city or fire district on less than a full time basis. (R. Vol. III, pp. 553-69.) This appeal followed.

III. FACTUAL BACKGROUND

A. The FRF System And The COLA Calculation.

In 1945, the Idaho Legislature created the FRF to provide retirement benefits to Idaho firefighters. It codified the FRF in Chapter 14 of Title 72 and tasked the State Insurance Fund with administering the fund. The Legislature also provided definitions for the terms used within the Chapter and defined "paid fireman" as follows:

> The words "paid fireman" means any individual 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 requirements of a regularly constituted Fire Department of such city or fire district in the State of Idaho.

1945 Idaho Sess. Laws 113.

In 1976, the Idaho legislature passed Idaho Code § 72-1432B (since re-designated Idaho Code § 72-1471), which created an annual cost of living adjustment for FRF beneficiaries. The COLA is to be "calculated on the percentage of increase or decrease in the average paid firefighter's salary or wage."[1] Idaho Code § 72-1471.

In 1979, the Idaho Legislature transferred all assets and administration of the FRF to PERSI effective October 1, 1980. Any firefighters hired after October 1, 1980 participate in the PERSI retirement system, rather than FRF. Any firefighters hired before October 1, 1980 were still allowed to participate in the FRF retirement system. Today, there are only a few firefighters still working who are under the FRF retirement system (R. Vol. III, p. 445:5-9), but there are many firefighters that have retired under it.

The Legislature amended Title 72 of Chapter 14 of the Idaho Code as part of the above-referenced transfer. One such amendment was to adopt the following definition of "paid firefighter:"

> 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 fire district in the state of Idaho prior to October 1, 1980, 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.

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[1] The Association claims that, during the four years from 1976 to 1980 when the State Insurance Fund administered the FRF, it only included full-time firefighters in its COLA calculations. (Appellants' Br., p. 8.) However, as was noted by the hearing officer, there was no evidence submitted to support that claim. (R. Vol. I, p. 98-99.)

Idaho Code § 72-1403(A).

The Legislature also adopted Idaho Code §§ 59-1351- through 1359 (re-designated Idaho Code §§ 59-1391- through 1399) to govern the transfer of the FRF to PERSI. Idaho Code § 59-1351 defined the terms used therein. The term paid fireman was defined as "an employee who engages in fire fighting, emergency or hazardous duties or other duties required of and by his employer." 1979 Idaho Sess. Laws 452-53. In 1984, the Legislature amended the definition of "paid fireman" to more closely track the wording of the definition at § 72-1403(A), but the definition omitted the date restriction and opening clause about the terms "paid fireman" and "paid firefighter" being synonymous. 1984 Idaho Sess. Laws 318-19. In 1990, the Legislature revised the definition to refer to a firefighter instead of a fireman, such that the term is currently defined as follows:

> "Paid firefighter" means any individual, male or female, excluding office secretaries on the payroll of any city or fire district in the state of Idaho 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.

Idaho Code § 59-1391(f).

PERSI, under management of the Board, has set the FRF COLA since 1980. PERSI, pursuant to Idaho Code 59-1325(1), directs all employers to report and pay contributions on any qualifying employee. Idaho Code 59-1302(14) defines "employee" as an individual who normally works twenty or more hours a week for an employer for at least five consecutive months. PERSI Rule 113 clarifies that if an employee works more than twenty hours a week

during more than half of the five month period, then they are PERSI eligible. IDAPA 59.01.02.113.

PERSI categorizes employees based on their contribution rate. *Id.*; IDAPA 59.01.03.026-028. Public safety employees, including firefighters and police officers, are Class II and have a higher contribution rate. IDAPA 59.01.03.028. Employers decide which employees to report in what class based on guidance from PERSI. *Id.*

In order to calculate the FRF COLA each year, PERSI compiles monthly firefighter salary reports from all cities or fire districts who have or had FRF firefighters, which consists of 22 different fire departments. (R. Vol. III, pp. 424:25-425:13; 443:17-444:6.) Those employees are broken down into Class A, Class B, Class D and Class E firefighters. (R. Vol. III, p. 444:714.) Class A firefighters are those hired before October 1, 1980, who chose Option I retirement under FRF. (R. Vol. III, p. 444:15-25.) Class B firefighters are those hired before October 1, 1980, who chose Option II retirement under FRF.[2] (R. Vol., III, p. 445:1-4.) Class D firefighters are those hired after October 1, 1980. (R. Vol. III, p. 445:21-25.) Class E are employees who meet the definition of paid firefighter under Idaho Code § 59-1391(f), but who are not firefighters as defined by Idaho Code § 59-1302(16). (R. Vol. III, p. 448:1-10.) The total salary for all 22 fire departments is divided by the total service months for all firefighters to arrive at an average salary. (R. Vols. I & II, pp. 198-211; R. Vol. III, p. 558 ¶ 5.) The average

[2] Option I allowed a firefighter to have his retirement based upon a percentage of the statewide average paid firefighter's salary or wage and Option II allowed a firefighter to have his retirement based upon a percentage of their own salary or wage. Idaho Code § 72-1431.

salary for that year is then compared to the prior year to arrive at the COLA. (R. Vol. III, at 558 ¶ 5*Id*.)

B. Issues Arose Regarding The Inclusion Of Reserve Firefighters In The COLA Calculation.

The Association is a non-profit that was formed to keep track of pension and retirement benefits for retired firefighters in Idaho. (R. Vol. I, p. 2 at ¶ 2.) The Association meets with PERSI regularly, tracks the yearly COLA, and advocates on behalf of its members. (*Id*.; R. Vol. I, p. 180:16-81:10.)

In the fall of 2009, at PERSI and the Association's annual meeting, the Association brought up some concerns regarding an increase in months of accumulated service reported for paid firefighters reported by the City of Lewiston. (R. Vol. III, pp. 451:17-452:7.) Based on these concerns, PERSI's executive director, Don Drum, ordered an audit. (R. Vol. III, p. 452:18-23.) The 2009 PERSI audit did determine that the Lewiston Fire Department had been incorrectly including in their monthly reports some employees who should not have been included and was also not including some employees who should have been included. (R. Vol. III, p.p. 452:24-453:20.) PERSI made corrections based on its determination that Lewiston had not been correctly reporting its "paid firefighters." (*Id*. at 453:11-20.) After the audit, the Lewiston Fire Department began reporting the wages of any fire department employees who met the statutory definition of paid firefighter and the PERSI definition of an employee. (R. Vol. I, p. 101.)

The Association also claims that, from 1980 to 2009, it was PERSI's policy to only

include full-time firefighters in the COLA calculations. (Appellants' Br., p. 8.) However, as was noted by the hearing officer, no evidence was presented to support that claim. (R. Vol. I, p. 99.) Rather, Director Drum testified that the methodology PERSI uses to calculate the COLAs is based upon employer monthly reports of PERSI eligible paid firefighters and that policy has never changed. (R. Vol. III, pp. 450:23-451:16.)

In 2013, the Association again raised concerns about Lewiston after noting an increase in the number of months of service reported in its annual report when compared to the sum in its monthly reports. (R. Vol. I, pp. 180:23-82:5.) PERSI investigated this issue and followed up by meeting with the Association. (R. Vol. I, p. 182:7-25.) At the meeting, a PERSI employee named Debbie Buck explained the increase by noting that Lewiston added in 49 more months of service in its year-end report that it had mistakenly excluded in its monthly reports. (R. Vol. I, pp. 183:1-17.)

After a few more meetings, the Association requested that PERSI recalculate the COLA with part-time firefighters excluded to see how it would affect their benefits. (R. Vol. III, pp. 464:15-465:2.) Ms. Buck performed the calculations and the COLA increased with such firefighters excluded. (R. Vol. II, pp. 212-13.) The Association lobbied through legal counsel for PERSI to change its practice of including part-time firefighters in the COLA calculations. (R. Vol. II, pp. 215, 222, & 224-25.) However, the Association was unsuccessful in such efforts as PERSI believed that an amendment to the statute would be necessary for it exclude part-time firefights from the COLA calculation. (R. Vol. II, p. 226; R. Vol. III, pp. 466:3-20; 468:6-12.) Accordingly, the Association initiated legal proceedings.

IV. ISSUES PRESENTED ON APPEAL

The Board believes the issues on appeal are more appropriately described as follows:

1. Whether the statutory definitions of the term "paid firefighters" set forth in Idaho Code §§ 72-1403(A) and 59-1391(f) include all firefighters on the payroll of a city or fire district who devote the majority of their time on the payroll to firefighting activities?

2. Whether PERSI can rely on the cities and fire districts to make fact specific determinations as to whether specific firefighters should be classified as "paid firefighters" within the meaning of §§ 72-1403(A) and 59-1391(f)?

3. Whether PERSI was discharging a ministerial, administrative duty—and not engaging in legislative acts—when it calculated the COLA adjustment for the Fireman's Retirement Fund?

V. STANDARD OF REVIEW

The Board agrees with the Association that, on appeals from the Industrial Commission, the Court conducts *de novo* review of conclusions of law by the Commission, but does not disturb findings of fact so long as they are supported by substantial and competent evidence. *Soto v. J.R. Simplot*, 126 Idaho 536, 539, 887 P.2d 1043, 1046 (1994).

VI. ARGUMENT

A. Statutes Must Be Given Their Plain And Ordinary Meaning.

It is a well-established rule of statutory construction that statutes will be given their plain and ordinary meaning. Indeed, this Court has left no doubt about the core rules of statutory interpretation controlling here:

> The interpretation of a statute "must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole. If the statute is not ambiguous, this Court does not construe it, but simply follows the law as written."

Verska v. St. Alphonsus Reg'l Med. Ctr., 151 Idaho 889, 893, 265 P.3d 502, 506 (2011) (quoting *State v. Schwartz*, 139 Idaho 360, 362, 79 P.3d 719, 721 (2003)). Consequently, "where a statute or constitutional provision is plain, clear, and unambiguous, it 'speaks for itself and must be given the interpretation the language clearly implies.'" *Id.* (citations omitted). "Unlike courts in some other states, we are not at liberty to depart from the plain meaning of a statute for policy reasons." *Grazer v. Jones*, 154 Idaho 58, 66, 294 P.3d 184, 192 (2013) (citations omitted).

The first step in interpreting a statute is to discern whether or not it is ambiguous. "'A statute is ambiguous where the language is capable of more than one *reasonable* construction.'" *Verska*, 151 Idaho at 896, 265 P.3d at 509 (quoting *Porter v. Bd. of Trs., Preston Sch. Dist. No. 201*, 141 Idaho 11, 14, 105 P.3d 671, 674 (2004)) (emphasis added). A statute is not ambiguous "merely because an astute mind can devise more than one interpretation of it." *Farmers Nat'l Bank v. Green River Dairy, LLC*, 155 Idaho 853, 856, 318 P.3d 622, 625 (2014) (citation omitted). "[T]he fact that two different interpretations of a statute are presented does not alone make a statute ambiguous. Rather, the statute's meaning must be so doubtful or obscure that reasonable minds would be uncertain or doubtful as to the statute's meaning." *Id*. (citation omitted). "[W]here statutory language is unambiguous, legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." *Verska*, 151 Idaho at 893 (quoting *City of Sun Valley v. Sun Valley Co.*, 123 Idaho

665, 667, 851 P.2d 961, 963 (1993)).

B. Sections 72-1403(A) And 59-1391(f) Are Unambiguous And Do Not Distinguish Between Part-Time And Full-Time Firefighters.

This appeal's resolution turns on the meaning of "paid firefighter" as used in Idaho Code § 72-1471 and defined in Idaho Code §§ 72-1403(A) and 59-1391(f). Sections 59-1391(f) and 72-1403(a) juxtapose two clauses in defining "paid firefighter" status: an individual (1) "who is on the payroll of any city or fire district in the state of Idaho" and (2) "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."

Those clauses work in tandem by imposing two complementary requirements. First, the individual must be employed by the city or fire district. Second, that individual must perform a specific category of public safety work during the majority of his or her time while on the city or fire district's payroll. Nothing in the definition adds a third requirement that such employment be "the principal means of livelihood" (§§ 72-1403(D) and (H)) or not engaging "in any other gainful occupation as his [or her] principal gainful occupation" (§ 72-1403(E)).

Sections 59-1391(f) and 72-1403(A) are indifferent as to whether an individual derives the bulk of her or his income from passive investments or functions as a real estate agent during off-hours. So, too, they are indifferent as to whether an individual subsists solely on part-time firefighter pay. Their concern lies solely in identifying an "employee" who performs a specific type of public safety work during the majority of their time on the job.

There is only one clear exclusion from the class of paid firefighters and that is an office

secretary. Had the Legislature intended to incorporate that additional restriction on "paid firefighter" status, it would have added it expressly rather than expecting the State Insurance Fund and now PERSI to insert it through administrative *fiat* into an otherwise straightforward set of pre-conditions to such status.

In the past, when arguing that the term "paid firefighters" refers only to full-time firefighters, the Association relied not on the language of §§ 59-1391(f) and 72-1403(A), but on several definitions that assign meaning to periods of service. More specifically, the Association has argued that "[t]he FRF was built on an assumption of covering only full-time, primary employment" as "seen not only in the definition of 'paid firefighter' but also in the definitions of 'service.'" (R. Vol. II, p. 257; *see also id.* at 253 n.2.)

While the Association did not make this argument in its Opening Brief and thus appears to have abandoned this argument, it should be noted that this approach conflicts with the straightforward language in the "paid firefighter" definition and introduces ambiguity where none exists by conflating statutory provisions that serve wholly different purposes.

Section 72-1403(A) determines a specific form of employee status; §§ 72-1403(D), (E) and (H) determine when service for a city or fire district qualifies for benefits under FRF provisions other than § 72-1471. Accepting this position thus ignores binding rules of statutory interpretation that require laws to be given their unambiguous meaning. It also fails to acknowledge both the limited role of the latter provisions in even the FRF's administration and the fact that they cannot be incorporated into the definition of "paid firefighter" in the substantively identical § 59-1391(f).

Also, the terms that the Association previously sought to engraft on the "paid firefighter" definition have highly circumscribed significance. The term "twenty-five (25) years active service" appears only in § 72-1465(1) that addresses death benefits for a paid firefighter's surviving spouse and children. The term "five (5) years continuous services" appears in § 72-1443 dealing with pension payments for a paid firefighter who retires prior to meeting voluntary or disability requirements. Section 72-1446(1), which provides a pension for paid firefighters totally disabled, uses the term "five (5) years' active service" and thus deletes the "continuous" element. The only references to § 72-1403(H) are in that provision and § 72-1465(1). These definitions accordingly function as gatekeepers to quite specific benefits regardless of the precise meaning that should be assigned to them. *See Verska*, 151 Idaho at 894, 265 P.3d at 507 ("The fact that a portion of a statute has a restricted application does not similarly restrict the entire act of which that portion was a part.").

Equally important, §§ 72-1403(D), (E) and (H) have no effect on "firefighter" or "paid firefighter" status under § 59-1391(f) for those individuals—whose hours accounted for 99.77% of hours on the fiscal year 2015 Fire Fighter Salary Report—employed on or after October 1, 1980; *i.e.*, the PERSI statute itself has no restrictions comparable to the ones that the Association previously argued are imposed on the same definition in § 72-1403(A). If the Legislature had endorsed that theory, it would have included them, at the least, among the definitions in § 59-1391.

The Association's prior suggestion that "subsections (D), (E) and (H) provide *insight* into the Legislative *intent* to limit the benefits in the FRF to those whose primary employment was as

a firefighter" (R. Vol. II, p. 253 at n.2 (emphasis added)) thus advances a patently farfetched reading of "paid firefighter" definitions in the FRF and PERSI statutes. Its strained attempt to conjoin statutory provisions with entirely different language and statutory purposes does not create a reasonable basis for finding ambiguity.

In summary, as *Verska* makes clear, perceived legislative "intent," whether premised on a litigant's singular insight or more concrete grounds, does not override the unambiguous language actually used. The PERSI hearing officer, the Board, and the Industrial Commission, correctly concluded that "there is no language in the statutory definition of paid firefighter distinguishing whether the employee is full time or part time or excluding part time firefighters." (R. Vol. I, p. 108.) Their construction of the definitions of "paid firefighter" gives them their plain and ordinary meaning and should be affirmed.

C. The Association Did Not Rebut The Presumption Of Regularity Applicable To Employer PERSI Reports Or Otherwise Establish A Statutory Duty That PERSI Failed To Discharge With Respect To Calculating § 72-1471 Adjustments.

The Association asserts that "[n]either 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" and that, "[b]y 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." (Appellants' Br., pp. 12-13.) However, no evidence exists in the hearing record showing that any of the employer-reported amounts used to calculate the § 72-1471 COLA adjustment were inaccurate other than the City of Lewiston's fiscal year 2009 errors.

PERSI corrected those errors following an audit. (R. Vol. III, pp. 452:24-453:20.)

The Association instead challenges, not the accuracy of the calculations themselves, but the failure to make those calculations in accordance with its definition of "paid firefighter." (Appellants' Br., p. 15.) Because the preceding argument addresses that issue, this section deals only with PERSI's reliance on employer reports concerning firefighter compensation.

First, "[i]n Idaho, as in most states, there is a presumption of regularity in the performance of official duties by public officers." *Horner v. Ponderosa Pine Logging*, 107 Idaho 1111, 1114, 695 P.2d 1250, 1253 (1985) (citation omitted); *accord Nelson v. Lake View Bible Chapel*, 131 Idaho 156, 157, 953 P.2d 596, 597 (1998). Reports from cities and fire districts, both of which are public entities, share in this presumption. The Association proffered nothing to rebut it. Nor did it adduce any evidence indicating that PERSI's monthly or annual Fire Fighter Salary Reports contained any errors aside from the City of Lewiston's in 2009. Consequently, the record is barren of any mistakes in reporting or PERSI's compilation of the reported data into annual averages.

Second, to the extent that the Association contends that §§ 72-1431 and 72-1471 establish a clear legal duty on the part of the Director to calculate the average salary of paid firefighters, it ignores the record which contains Fire Fighter Salary Reports (R. Vols. 1 & 2, pp. 198-211.)[3]

[3] Section 72-1431(b) provides in part:

> The contribution shall be collected by the employer by deducting the amount of the contribution from the firefighter's wages or salary as and when paid. The contribution shall be remitted to the retirement board by the city or fire district employing the paid firefighter no later than five (5) days after each pay date. The average paid salary or

PERSI clearly discharged its responsibilities under § 72-1431. If the Association's actual grievance lies in the agency's reliance on employer-reported data, it ignores the statutory responsibility on employers to report those data consistently with the PERSI statute. Section 59-1325(1) provides in part:

> Each employer, or, where the employer's payroll is paid separately by departments, each department of the employer, shall remit to the retirement board all contributions required of it and its employees on the basis of salaries paid by it during each pay period together with whatever contributions or contribution credits may be required to correct previous errors or omissions. These remittances shall be accompanied by such reports as are required by the board to determine contributions required and member benefit entitlements established under this chapter and, unless extended in writing by the executive director, shall be remitted no later than five (5) days after each pay date. Such contributions shall be remitted together with contributions remitted pursuant to subsection (5) of section 59-1308, Idaho Code, as directed by the board.

The accuracy of the reported data, again, enjoys a presumption of correctness.

Director Drum also testified concerning the reporting process at some length. He explained how firefighter-compensation data from the 22 FRF employers are processed:

> That information comes in a transmittal to our office. My staff will pull that information out for those people, and they do it on a monthly basis. So they capture that data by the individuals in that. [¶] At the end of the year, we do a calculation to see how much the average wage of those reported firefighters changed from the previous year.

> wage or the individual firefighter's salary or wage, shall be calculated annually no later than the first day of September by the director, in the manner prescribed in section 72-1432, Idaho Code. The director shall notify each city and fire district of the amount of the contribution to be collected based on the average paid salary or wage or individual firefighter's salary or wage, as applicable, for all pay periods commencing on or after the first day of October.

(R. Vol. III, p. 425:7-13.) He explained further that "all employers are given the guidance as spelled out in the Idaho Code" and that employers make the determination concerning whether an employee has firefighter status and subject to a higher retirement contribution rate. (R. Vol. III, pp. 426:4-427:11); *see* Idaho Code §§ 59-1393, 59-1394, 74-1431, 74-1432. If PERSI identifies an anomaly in the reports, it queries the employer and conducts an audit if necessary. (R. Vol. III, pp. 437:23-438:15; 439:2-4; & 478:12-479:20.) Otherwise, because employers "understand that they are supposed to report to PERSI every other month, . . . the assumption is they will follow the rules and report everybody to PERSI." (R. Vol. III, pp. 438:20-439:1; *see also* p. 476:12-15 ("So if they are following the rules and law and expectations given to them by the state and by us, those people who are being reported as firefighters are firefighters.").) The Association simply failed to carry its burden as to its reporting and calculation challenge directed to the determination of COLA increases or decreases under § 72-1471.

D. PERSI's Application Of The "Paid Firefighters" Definition Neither Involved Legislative Action Nor Changed Preexisting Practices.

The Association relies upon *Deonier v. State, Pub. Emp. Ret. Bd.*, 114 Idaho 721, 760 P.2d 1137 (1988), for the claim that PERSI violated the Contracts Clauses in the United States Constitution, Art. I, § 10, and its counterpart in the Idaho Constitution, Art. I, § 16.[4] That

[4] Article I, Section 10 of the U.S. Constitution provides in relevant part that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts." Article I, section 16 of the Idaho Constitution, provides that "[n]o bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed." The Supreme Court applies the analytical standards developed under the federal Contracts Clause to claims under the Idaho provision. *CDA Dairy Queen, Inc. v. State Ins. Fund*, 154 Idaho 379, 387, 299 P.3d 186, 194 (2013) ("challenges based upon article I, § 16 should be evaluated under the federal framework and

reliance is misplaced because (1) *Deonier*, as a plurality opinion, and thus is not controlling precedent; (2) PERSI's action was not "legislative" in nature and thus falls outside the reach of the Contracts Clauses; and (3) PERSI did not alter a preexisting interpretation of the "paid firefighter" definition for § 72-1471 adjustment-calculation purposes.

In *Deonier*, two firefighters challenged PERSI's change in prior administrative practice that resulted in their worker's compensation benefits being used to offset a portion of their retirement disability payments. A two-Justice plurality opinion first held that the policy change violated the now-repealed Idaho Code § 72-1414. 114 Idaho at 723-725, 760 P.2d at 1139-42. Although that determination resolved the case (*id.* at 733, 760 P.2d at 1149 (Bakes, J., dissenting)), the plurality continued on to address the claim that the policy change unconstitutionally impaired the firefighters' contractual right to full retirement benefits.

The plurality recognized that the change was not legislative in character. 114 Idaho at 726, 760 P.2d at 1142 ("In the instant case, it is not a subsequent legislative modification which has impinged upon vested rights, but a new administrative interpretation of an extant statute which was subsequently merged into a different retirement system.").

In addition, it recognized that "no case we have found directly addresses a situation where an administrative agency unilaterally alters its previously developed policy to lessen a public employee's right to receive benefits" and thereby unconstitutionally impaired a contract right. *Id.* The plurality nevertheless held that the firefighters "were entitled to rely upon the

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rules"). As the two provisions' text reflects and as further explained below, the constitutional prohibition against contract impairment extends only to legislative action.

State Insurance Fund's prior interpretation of § 72-1414 (*i.e.*, not applying any offset pursuant thereto), and the administrative alteration of such interpretation materially altered their contractual expectations regarding their vested right to receive their retirement benefits through the FRF." *Id.* at 726-27, 760 P.2d at 1142-43.

Deonier, as a plurality opinion, has no binding effect on the Industrial Commission for any purpose, including its application of the federal and state constitutions' Contracts Clause. *Osick v. Pub. Emp. Ret. Sys. of Idaho*, 122 Idaho 457, 459, 835 P.2d 1268, 1270 (1992) ("Our concern about the precedential authority of *Deonier* is that because only two members of the Court concurred in both the result and the rationale stated in the opinion, the rationale is not controlling for other cases, including this one."); *accord Barrett v. Barrett*, 149 Idaho 21, 25, 232 P.3d 799, 803 (2010).

The *Deonier* plurality opinion also incorrectly construed the Contracts Clauses, both of which apply to legislative and not executive branch action. *See, e.g.*, *City of Pontiac Retired Emps. Ass'n v. Schimmel*, 751 F.3d 427, 431 (6th Cir. 2014) ("A Contract Clause claim must be based on a legislative act because the clause's prohibition 'is aimed at the legislative power of the state, and not at the decisions of its courts, or the acts of administrative or executive boards or officers, or the doings of corporations or individuals.'") (quoting *New Orleans Water-Works Co. v. La. Sugar Ref. Co.*, 125 U.S. 18, 30 (1888)); *Mabey Bridge & Shore, Inc. v. Schoch*, 666 F.3d 862, 875-76 (3d Cir. 2012) ("In contrast, an act is likely not legislative when 'its purpose was not to prescribe a new law for the future, but only to apply to a completed transaction laws which were in force at the time.' Thus, there is no violation of the Contract Clause when the act in

question 'investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist.'" (quoting *Ross v. Oregon*, 227 U.S. 150, 163 (1913)).

This Court has agreed that the Contracts Clauses apply to legislative and not executive branch action. *See CDA Dairy Queen*, 154 Idaho at 387, 299 P.3d at 194 ("a *legislative* act does not violate the contracts clause unless there is a contractual relationship between the parties regarding the specific terms at issue, the challenged *act* impairs an obligation under that contract, and that impairment is substantial" (emphasis added)).

The Association realizes that *Deonier*'s Contracts Clause holding is insupportable and thus argues instead that PERSI's COLA determinations are "legislative" in nature. It relies on *Agricultural Products Corporation v. Utah Power & Light Company*, 98 Idaho 23, 587 P.2d 617 (1976), which arose from a rate charge increase by the Public Utilities Commission ("PUC"). The PUC, however, exercises *legislative*, not Executive Branch, authority under Idaho law. *In re Mountain States Tel. & Tel. Co.*, 76 Idaho 474, 480, 284 P.2d 681, 683 (1955) ("The function of rate making a [sic] legislative and not judicial. The commission as the agency of the legislative department of government exercises delegated legislative power to make rates."). That dispositive distinction aside, PERSI discharges a purely ministerial, administrative statutory duty in determining the amount of the annual § 72-1471 adjustment. The Legislature has set the COLA formula and imposed on the agency the task of collecting the relevant data and calculating the percentage increase or decrease in FRF retirement benefits in accordance with the formula.

Finally, the factual predicate for the Association's Contracts Clause claim—that PERSI

has altered a long-standing administrative policy—has no support in the PERSI proceeding record. The types of data collected and reported on the annual Fire Fighter Salary Reports for fiscal years 2005 through 2015 and the monthly reports for fiscal years 2011 through 2015 did not change. (R. Vols. I & II, pp. 198-211.) There is, as well, no evidence that the issue whether part-time paid firefighters should be included within the § 72-1471 adjustment calculation had arisen prior to the dispute over the City of Lewiston reservists. (R. Vol. III, pp. 472:14-473:6; 506:21-507:8.) The record thus does not permit any conclusions concerning whether part-time paid firefighters existed prior to 2009 or whether they were included in the COLA calculation. What is clear is that when the issue did arise, PERSI's position was consistent. (R. Vol. III, p. 466:12-20.) That position, as discussed above, is also consistent with the language of §§ 59-1391(f) and 72-1403(A).

VII. CONCLUSION

Based on the foregoing, the Board respectfully requests that this Court affirm the Idaho Industrial Commission's decision and find that the definition of "paid firefighters" includes firefighters who may work for a city or fire district on less than a full time basis.

DATED July 9, 2018.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 9, 2018, I filed the foregoing electronically through the iCourt E-File system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notification of Service:

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