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Idaho Supreme Court
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IN THE SUPREME COURT FOR THE STATE OF IDAHO

IDAHO RETIRED FIRE FIGHTERS ASSOCAITION, SHARON KOELLING, and JOHN ANDERSON

Plaintiff-Appellant,

v.

PUBLIC EMPLOYEE RETIREMENT BOARD

Defendant- Respondent.

Supreme Court Case No. 45769-2018

Industrial Commission
Case No. 17-000044

APPELLANT'S REPLY BRIEF

APPEALED FROM THE IDAHO INDUSTRIAL COMMISSION

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The Retirement Board was entrusted to operate the Fireman's Retirement Fund in such a way that it would not see any significant changes from how it was operated before the merger with PERSI. I.C. §59-1392. Yet, the Board now refuses to take any steps whatsoever to actually utilize and enforce the statutory definition of the phrase "paid firefighter" which was intended to govern how annual Cost of Living Allowances (COLAs) would be calculated. In response, the Retirement Board does not assert that it has actually made those calculations, does not assert that the definitions it uses are actually identical to the definition of "paid firefighter," does not dispute that harm is being done to retired firefighters in Idaho. Instead, it asserts that part-time firefighters are also paid firefighters, while ignoring the fact that it has absolutely no way of knowing whether the "reserve" firefighters actually at issue in this case are or are not paid firefighters. It argues that it should be entitled to rely on a "presumption of regularity" regarding the conduct of Cities and Fire Districts, while ignoring that it is its own failures that are at issue in this case, not those of Cities. And finally, it seeks to recast its decisions to adopt regulatory definitions as something other than the adoption of laws.

The retired fire fighters of the FRF performed decades of service for the people of Idaho in reliance on a promise of a pension that would be indexed to the wages of "paid fire fighters." Instead, the Retirement Board is giving them a pension indexed to the wages of individuals who happen to meet PERSI's extremely loose definition of "employee." This violates the letter and spirit of the FRF statute, and violates the contracts clauses of the U.S. and Idaho Constitutions.

I. The Only Unambiguous Meaning That Can Be Discerned From The Plain Language of the "Paid Firefighter" Definition, Is One That Supports the Appellants In This Case.

The most important question in this case is whether the term "paid firefighter" includes every individual who is employed by an Idaho fire department, or is limited to those who also meet additional criteria. For an individual to meet the definition of "paid firefighter" requires

satisfaction of at least two conditions. The individual must be "on the payroll of a" fire department; and, must "devote his or her principal time of employment" to that department. I.C. 59-1391(f). The Retirement Board argues that anyone who is a PERSI-eligible employee, and who is also a firefighter meets this definition. The Association assert the definition only encompasses those individuals whose primary employment is as a firefighter.

The statutory question depends entirely on what "employment" the definition is referring to when it uses the term "principal time of employment." The Idaho Retired Firefighters Association (Association) asserts it refers only to the employee's employment, such that inclusion of an individual firefighter's pay in the calculation would depend on that individual's "principal time of employment." The Retirement Board asserts that the definition turns on whether that individual's principal employment with the particular City or District is as a firefighter. If the answer to this disagreement cannot be discerned directly from the language of the statute then there is ambiguity requiring construction.

This Court has long understood that the careful analysis of language is critical to discerning the meaning of statutes. For instance in *Hellar v. Cenarussa*, 104 Idaho 858 (1983), the Court discerned the meaning of a state Constitutional provision governing apportionment of legislative districts:

> City of Boise, as an intervenor, urged an interpretation of Idaho Const. art. 3, § 5, which would prohibit the division of counties in the formation of legislative districts only where more than one county constitutes a district. The section provides that a "senatorial or representative district, when more than one county shall constitute the same, shall be composed of contiguous counties, and no county shall be divided in creating *such* districts." (Emphasis added.) The interpretive key is the word "such." The inclusion of that specific pronoun suggests that the prohibition does not extend to all legislative districts, but only to *such* districts which are composed of "more than one county." The pronoun must have an antecedent, and the prior reference to districts made up of more than one county clearly supplies that antecedent.

Id., at 861. The present case demands the same kind of precision. To satisfy the second condition required to be a "paid firefighter," the legislation requires that an individual "devotes his or her principal time of employment" to firefighting. I.C. 59-1391(f). The phrase "principal time of employment" is constrained by the specific determiner[1] "his or her." The specific language adopted by the Legislature, and its use of a specific determiner directs the Court, and the Retirement Board, to determine the individual firefighter's principal time of employment, not the principal time of his public employment. The Retirement Board's construction places the emphasis on "employment" and seeks to construe the statute solely within the boundaries of public employment. The statute, however, in constraining the phrase "principal time of employment" specifically places the emphasis on the individual employee, and requires determination of "his or her" principal employment.

The Retirement Board is urging a reading of the statute that adds an additional phrase. By asking the Court to find that "his or her principal time of employment" means their principal employment for the City or District, they are inserting a word that the legislature did not include. The retirement Board's construction amounts to changing the statutory definition to read "his or her principal time of public employment." The legislature, however, never indicated that public employment was the focus of the definition, and never included that word. Instead, it requires the Board and the PERSI Director to focus on the particular employee's principal time of employment.

[1] The role of determiners is succinctly explained by numerous sources, including this one from Wikipedia: "An important role in English grammar is played by determiners – words or phrases that precede a noun or noun phrase and serve to express its reference in the context. The most common of these are the definite and indefinite articles, *the* and *a(n)*. Other determiners in English include demonstratives such as *this* and *that*, possessives such as *my* and *the boy's*, and quantifiers such as *all*, *many* and *three*." https://en.wikipedia.org/wiki/Determiner#Possessive_determiner, accessed July 30, 2018. This role is also discussed by the website of the British Council, which focuses on use and learning of the English language. It explains that "his or her" is a "specific determiner" which is used "when we believe the listener/reader knows exactly what we are talking about." http://learnenglish.britishcouncil.org/en/english-grammar/determiners-and-quantifiers, accessed July 30, 2018.

The Association's proffered meaning is also consistent with the "rule of the last antecedent clause," a tool of statutory discernment utilized by this Court. *BHC Intermountain Hosp. v. Ada County,* 150 Idaho 93, 244 P.3d 247 (2010). "Under the rule of the last antecedent clause, a referential or qualifying clause refers solely to the last antecedent, absent a showing of contrary intent." *Id.,* at 96, citing *Mayer v. Ada County,* 50 Idaho 39, 42, 293 P. 322, 323 (1930). As noted above, the clause "principal time of employment" follows immediately *after* "his or her," and before the clause concerning services to or on behalf of a city fire department or fire district. Since principal time of employment occupies the particular space it does, it refers back to "his or her" rather than to the nature of the service performed.

There is no doubt that if the legislature had wanted to exclude other types of employment from consideration, it knew how to do so. In closely related statutes, the legislature made clear when it intended that only public employment for the fire district be considered. See, e.g., I.C. 72-1403(D), (E) and (H). In those statutes the legislature made clear that only employment for a fire department would be counted for the particular purposes of those statutes. In defining "paid firefighter" for purposes of the COLA, however, the legislature did not focus on fire department employment, or even more generally on public employment, it directed the focus to "his or her" employment, requiring consideration of that individual's employment rather than merely his public employment.

II. If the Statute is Ambiguous the Canons of Construction Require the Court to Construe it in Favor of the Association.

To ascertain the meaning of a statute, not only must the literal words of the statute be examined, but also the context of those words, the public policy behind the statute and its legislative history, as well as the language and design of the statute as a whole. *Sherwood & Sherwood & Roberts, Inc. v. Riplinger,* 103 Idaho 535, 650 P.2d 442 (1981); *Idaho Power Co. v.*

Idaho Pub. Utils. Comm., 102 Idaho 744, 639 P.2d 442 (1981); *State v. Groseclose,* 67 Idaho 71, 171 P.2d 863; *Zazzali v. United States (In re DBSI, Inc.)*, 2017 U.S. App. LEXIS 16817, *11 (9th Cir. Idaho Aug. 31, 2017) citing *K Mart Corp v. Cartier, Inc*., 486 U.S. 281, 291, 108 S. Ct. 1811, 100 L. Ed. 2d 313 (1988); see also *Carpenters Health & Welfare Tr. Funds v. Robertson (In re Rufener Constr.)*, 53 F.3d 1064, 1067 (9th Cir. 1995). Statutory construction is a "holistic endeavor," Id., citing *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988), that relies on context to be "a preliminary determinant of meaning," Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 168 (2012).

The context of the current statute shows that it was a remedial statute deisgned to protect the interests of the covered individuals, fire fighters and their beneficiaries. Remedial statutes must be construed broadly to effectuate their remedial purposes. *Doggett v. Electronics Corp. of America*, 93 Idaho 26 (1969). In context, the statute specifically sets out the benefits to be earned and received by full-time, career fire fighters. I.C. §§72-1403(D),(E), and (H). Yet, the Board suggests that the benefits (specifically the COLA) should be based on the earnings of reserve fire fighters who might never have met the qualifications to actually receive an FRF pension benefit. This does violence to the contextual reading of the statute, and assumes that the Legislature intended to “pull a fast one” by promising benefits to career fire fighters based on the earnings of occasional, part-time, reserve, or volunteer fire fighters who are principally employed in some other occupation altogether. Reading the statutes contextually satisfies the requirement that the provisions be read *in pari materia. Union Pac. R.R. v. Board of Tax Appeals*, 103 Idaho 808, 811, 654 P.2d 901, 904 (Idaho 1982) citing *Magnuson v. Idaho State Tax Commission*, 97 Idaho 917, 556 P.2d 1197 (1976); *North Idaho Jurisdiction of Episcopal*

Churches, Inc. v. Kootenai County, 94 Idaho 644, 496 P.2d 105 (1972); *Janss Corp. v. Board of Equalization of Blaine County*, 93 Idaho 928, 478 P.2d 878 (1970).

If the statute is ambiguous, the tools and canons of statutory construction all point toward a conclusion that the COLA adjustment is to be based on the earnings of individuals, each of whom devotes their principal time of employment to fighting fire.

III. The Retirement Board and Its Director Shared a Duty to Accurately Calculate COLAs on the Basis of Wages of Paid Firefighters, Rather than on the Basis of Wages Paid to Employees.

Defendant does eventually, towards the end of its 22-page brief, admit that it has a duty imposed by statute to correctly calculate cost of living adjustments:

> 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.

Respondents' Brief, p. 20. While it phrases the duty in slightly different terms than does the Association, the duty remains. The Legislature directed PERSI and its Director not merely to delegate their jobs to cities, but to (in the Board's words) "collect the relevant data." It has failed to do so.

The Retirement Board, as noted previously, does not even attempt to determine who is and who is not a paid firefighter. It does not ask Cities or Fire Districts to determine who is a "paid firefighter" instead, it directs them only to determine who meets the definition of employee, and who meets the definition of firefighter; never inquiring whether the statutory definition of "paid firefighter" is met. Far from demonstrating that the Retirement Board is engaged in a "ministerial duty," the record (and the admissions of Director Drum) indicate that the Board has entirely abdicated its duty. Although Director Drum claimed that Cities and Districts were making that determination (see Appellant's Brief, p. 13), in fact nobody makes

that determination whatsoever, and the definition of "paid firefighter" has become an irrelevancy.

Rendering the statute irrelevant is necessarily a breach of even a ministerial duty to apply the statute and calculate a figure based on its provisions.

IV. Because the Decision to Include Employees With Paid Firefighters In Calculating COLAs Was Legislative in Character and Because It Constituted a Change in How Plaintiffs' Benefits Were Calculated, the Decision Violated the Contracts Clauses of the Idaho and United States Constitutions.

The Retirement Board seeks to have this Court adopt an unduly restricted view of what conduct is capable of violating the Federal and State Constitutional protections against impairment of contracts. The Board improperly seeks to limit the impairment provision to "legislative and not executive branch action." (Respondent's Brief, pp. 19-20). This is an incorrect statement of the law. Action by state agencies which is "legislative in character" is subject to the contracts clause, regardless whether that agency is technically of the legislative branch. Since the Retirement Board engaged in action of a legislative character when it adopted its rule defining employees, and when it decided to apply that rule in its administration of the Fireman's' Retirement Fund, it violated the contract clause.

The Contracts Clause of the U.S. Constitution states in relevant part: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." U.S. Const. art. I, § 10, cl. 1. The Contracts Clause prevents the impairment of contracts by legislative action. See *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U.S. 18, 30, 8 S. Ct. 741, 31 L. Ed. 607 (1888). The prohibition extends to lower arms of government than the legislature, including to political subdivisions and agencies where power that is legislative in nature is delegated by the legislature. *Nowicki v. Contra Costa Cty. Employees' Ret. Ass'n*, 2017 U.S. Dist. LEXIS 99485,

*41-42, 2017 WL 2775040 (N.D. Cal. June 27, 2017) quoting *New Orleans Waterworks*, 125 U.S. at 31.

The Contracts Clause reaches "every form in which the legislative power is exerted," which may include certain executive actions, such as the issuance of "a regulation or order [through] delegated legislative authority." *Ross v. Oregon*, 227 U.S. 150, 162-63, 33 S. Ct. 220, 57 L. Ed. 458 (1913); see also *I.N.S. v. Chadha*, 462 U.S. 919, 986, 103 S. Ct. 2764, 77 L. Ed. 2d 317 (1983) (describing the type of administrative rulemaking deemed legislative in nature). "Whether actions . . . are, in law and fact, an exercise of legislative power depends not on their form but upon 'whether they contain matter which is properly to be regarded as legislative in its character and effect.'" *Kamplain v. Curry County Bd. of Com'rs*, 159 F.3d 1248, 1252, 1998 U.S. App. LEXIS 27469, *9 (10th Cir. N.M. Oct. 27, 1998) *citing INS v. Chadha*, 462 U.S. 919, 952, 77 L. Ed. 2d 317, 103 S. Ct. 2764 (1983) (citation omitted); *accord Roberson*, 29 F.3d at 135; *Chicago Miracle Temple Church, Inc. v. Fox*, 901 F. Supp. 1333, 1343-44 (N.D. Ill. 1995).

These federal decisions are entirely consistent with Idaho decisions which have expressly found that any act of a "legislative character" may implicate the contracts clause. *In re Fidelity State Bank,* 35 Idaho 797, 810 (1922); *Steward v. Nelson,* 54 Idaho 437, 443 (1934); *Agricultural Products Corp. v. Utah Power & Light Co.,* 98 Idaho 23, 28-29 (1976). The Retirement Board seeks to distinguish these cases by claiming that the utility rate cases, at least, constitute the exercise of a "legislative function" regardless of who so exercises it. But the distinction between acts of a "legislative character" which were found to implicate the contracts clause, and acts that constitute a "legislative function" is not at all clear, and both terms likely to refer to the same doctrine. Namely, that where a state exercises power that applies in the same manner as would a legislative enactment, it must not impair the obligation of contracts, or its risks invalidity.

In the present case, the Retirement Board adopted and applied regulations in a legislative fashion. The FRF was first established in 1947. Until 1980 it was administered entirely separate from PERSI. Since that time, the Retirement Board has adopted and amended its rules in ways that have impaired pension obligations to FRF retirees. In 1994 the Retirement Board adopted Rule 100 which required PERSI participation for everyone who met the definition of "employee." IDAPA 59.01.02.100. At the same time it adopted rules further defining "employee" to include individuals who work 20 hours or more for more than half of the weeks in a given period. IDAPA 59.01.02.113. The Retirement Board has also adopted a rule which defines the term "firefighter." IDAPA 59.01.02.300. And, finally, it has chosen, since at least 2013 to treat "employees" as if they are necessarily "paid firefighters" despite the fact that its own regulations specify that a "firefighter" for "[PERSI] retirement purposes" might include individuals "not eligible to be a 'paid firefighter.'" Id. Finally, the ongoing decision of the Retirement Board to ignore its own regulation is a legislative act. The Retirement Board has adopted a regulation which specifically provides that "The provisions of Rules 300 and 301 of this Chapter do not apply to a 'paid firefighter' as defined by Sections 59-1391(f) or 72-1403(A)." IDAPA 59.01.02.302. Despite this unequivocal, unambiguous regulation, the Retirement Board has made a decision that it will rely on the definitions of "firefighter" in various categories, as well as the definition of "employee" to determine who is a "paid firefighter." That decision, because it changed prospectively the benefits to be received by FRF retirees, was legislative in character.

Even if the Court does not wish to follow *Deonier* as an application of *stare decisis*, the same result will occur in this case based on other existing law. A violation of the contracts clause proceeds through a "three-step analysis." *CDA Dairy Queen, Inc. v. State Ins. Fund*, 154 Idaho

379, 387 (2013). The first step is to determine whether action of a legislative character has operated as a substantial impairment of a contract by identifying whether a contractual relationship exists, whether the action in question impairs that relationship, and whether the impairment was substantial. In both *Nash v. City of Boise,* 104 Idaho 803 (1983) and *Deonier v. PERSI*, 144 Idaho 721 (1988), this Court addressed the important question of whether Firemen's retirement Fund was "contractual in nature" and decided it was sufficiently so to deserve protection regardless of whether it met strict definitions of a "contract." *Nash* was a unanimous decision of the four justices who heard the case, and therefore binding on this Court, which found that modifications to the method of calculating cost of living adjustments were impermissible if they negatively affected vested pension rights. 104 Idaho at 808. The only gloss added to this analysis by *Deonier* was the finding that such a modification not only violated the agreement to provide benefits, but also was an impairment of contracts. The law of Idaho is clear despite the plurality nature of the *Deonier* decision: once vested, pension benefits are protected against attempts to modify the method of calculating COLAs. While not strictly a contractual relationship, the promise of pensions by the State and the reliance on that promise by public employees, indeed the relationship between the state and retirees is "contractual in nature:"

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

Deonier, 114 Idaho at 726, quoting *Lynn v. Kootenai County Fire Protective Dist. # 1*, 97 Idaho 623, 627, 550 P.2d 126, 130 (1976); quoting *Hanson v. City of Idaho Falls*, 92 Idaho 512, 514, 446 P.2d 634, 636 (1968).

A decision that results in a negative COLA, as happened here is necessarily an impairment of the benefit on which retired Fire Fighters have relied. *Straus v. Ketchen,* 54 Idaho 56, 70 (1933) (any change in the law "giving to one a greater and to the other a less interest or benefit in the contract impairs its obligation.") There was no dispute between the parties below that if reserve fire fighters were not "paid firefighters" and thus were deemed excluded from the COLA calculation, the COLA in 2013 and subsequent years would have been substantially larger in favor the retirees. While the precise value of that effect is unknown (because the Retirement Board and its staff have never determined which of the reservist are in fact "paid firefighters") the parties agree that the inclusion has reduced benefits to those retirees in the range of hundreds of thousands of dollars per year and will result, over time, in losses to them of millions of dollars. Such an impairment is undoubtedly "substantial." *Straus v. Ketchen,* 54 Idaho at 70 ("The extent of the change is immaterial").

V. Conclusion

The case presents the simple question whether the Retirement Board may substitute a determination that certain workers are "employees" and "firefighters" rather than making an actual determination whether those workers meet a statutory definition of "paid firefighters." The Retired Firefighters Association and the named Plaintiffs have sought merely to have someone make an actual determination whether the statutory definition has been met. But PERSI Director Drum has refused to do so, the Retirement Board has refused to do so, and there is no evidence that Cities or Fire Districts are actually doing so. The briefs to date reveal little more than complex efforts to avoid simply doing the job that the Legislature imposed.

Rather than condoning the dodging of work, the Court should remand this matter to the Industrial Commission, with instructions to remand it to the Retirement Board with a direction to

determine who are paid firefighters, and who are not, and to calculate COLAs on the basis of their earnings. That is the simple task assigned by the Legislature, which the Executive has sought to avoid, the avoidance of which it now seeks to stamp with the Judiciary's imprimatur.

DATED this 30th day of July, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of July, 2018, a true and correct copy of the above and foregoing APPELLANT'S BRIEF was forwarded addressed as follows in the manner stated below:

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that on this 30th day July, 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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