IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GARY CONKLIN, Respondent, v. CITY OF TACOMA, a municipal corporation, Appellant, STATE OF WASHINGTON, Defendant.	No. 36677-1-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — The City of Tacoma appealed the trial court's summary judgment ruling requiring that it use the definition of "basic salary" from the Washington Law Enforcement Officers' and Firefighters' Retirement System Act (LEOFF), ch. 41.26 RCW, in calculating "excess payments" in benefits retired fire fighters receive under the pre-LEOFF pension plan, ch. 41.18 RCW (the 1955 Act). Division One of this court addressed this issue in *McAllister v. City of Bellevue Firemen's Pension Board*, 142 Wn. App. 250, 180 P.3d 786 (2007), *aff'd*, 166 Wn.2d 623, 210 P.3d 1002 (2009), and held that the City of Bellevue properly computed the "excess payment" calculation under the 1955 Act. 142 Wn. App. at 257-58. We stayed our review of this case pending the Supreme Court's review of the *McAllister* decision. On July 9,

2009, our state's highest court issued a unanimous opinion "hold[ing] that under LEOFF the City is required to calculate excess payments based upon the statutory definitions in the 1955 Act." *McAllister*, 166 Wn.2d at 626. *McAllister* controls the issue presented and we are bound to apply it. Accordingly, we are compelled to reverse.

FACTS

Factual Background

A. Background and Statutory History

On March 4, 1968, the City hired Gary Conklin as a fire fighter. The City promoted Conklin to lieutenant in 1976, captain in 1980, battalion chief in 1985, and deputy chief in 1987. On November 30, 1993, Conklin retired from the City Fire Department on a work-related disability.

Prior to March 1, 1970, all fire fighters participated in a retirement system under the 1955 Act. Former RCW 41.26.030(8) (2003). The 1955 Act required every fire fighter to contribute six percent of his "basic salary" to the pension fund. Former RCW 41.18.030 (1961). The 1955 Act defined "basic salary" as

> the basic monthly salary, including longevity pay, attached to the rank held by the retired fireman at the date of his retirement, without regard to extra compensation which such fireman may have received for special duties assignments not acquired through civil service examination: PROVIDED, That such basic salary shall not be deemed to exceed the salary of a battalion chief.

Former RCW 41.18.010(4) (1973). Thus, prior to March 1, 1970, a fire fighter's contributions could not exceed six percent of a battalion chief's salary.

In turn, the 1955 Act computed retirement benefits at 50 percent of "basic salary." Former RCW 41.18.040 (1973). And, because "basic salary" could "not . . . exceed the salary of

a battalion chief," a fire fighter's benefits were capped at 50 percent of a battalion chief's salary, even if he retired at a rank higher than that of battalion chief, such as deputy chief or chief. Former RCW 41.18.010(4).

In 1969, the legislature replaced multiple municipal police and firemen pension plans with LEOFF, a single statewide pension system for law enforcement and fire fighters administered by the Department of Retirement Systems.[1] Ch. 41.26 RCW. On March 1, 1970, Conklin and all other full-time fire fighters and law enforcement officers participating in the 1955 Act had their pensions transferred to LEOFF, "to the exclusion of any pension system existing under any prior act," such as the 1955 Act. RCW 41.26.040(1). Under LEOFF, as with the 1955 Act, a fire fighter contributed six percent of his basic salary. Former RCW 41.26.080 (2000).

But unlike the 1955 Act, LEOFF did not cap the fire fighter's six percent contribution rate at the battalion chief salary, the highest "basic salary" under the former system. Former RCW 41.26.080. Instead, LEOFF defines "basic salary" as:

> [T]he basic monthly rate of salary or wages, including longevity pay but not including overtime earnings or special salary or wages, upon which pension or retirement benefits will be computed and upon which employer contributions and salary deductions will be based.

RCW 41.26.030(13)(a). In other words, after March 1, 1970, if a fire fighter held a rank higher than battalion chief, he would contribute six percent of that higher salary to his LEOFF plan. RCW 41.26.040.

Correspondingly, LEOFF pension benefits are not capped at a percentage of the battalion chief's salary either, as they were under the 1955 Act. RCW 41.26.420. As a result, a fire fighter who retired as chief or deputy chief under LEOFF would have his benefits calculated according to

[1] The Department of Retirement Systems is not a party to this case on appeal.

his final average salary, not that of a battalion chief. RCW 41.26.420.

B. The Excess Payment Calculation

To ensure that fire fighters and other law enforcement officers who made contributions under the 1955 Act would not suffer a diminution in benefits, LEOFF provides for an "excess payment" contribution if the retiree would have received more under the 1955 Act. RCW 41.26.040(2). In order to determine whether an "excess payment" is required, the City must calculate the fire fighter's benefits under LEOFF and compare that amount to what he would have received under the 1955 Act "as if he had not transferred" to LEOFF. RCW 41.26.040(2). If the LEOFF benefit (without the salary cap on benefits and contributions) is less than what the fire fighter would have received under the 1955 Act (with the salary cap on benefits and contributions), the City must pay the retiree the difference. RCW 41.26.040(2). Under this provision, the retiree will always receive the highest benefit authorized under either statute. RCW 41.26.040(2).

Procedural History

On July 1, 2004, Conklin sued the City, asking for declaratory relief, requiring the City to compute his benefits under the 1955 Act without the battalion chief cap. Conklin did not argue that LEOFF was unconstitutional but, rather, asked that the City be required to calculate his benefits under the 1955 Act for purposes of the "excess payment" calculation at his retiring rank of deputy chief. Conklin also asked for damages in the amount of his back benefits as well as attorney fees and interest.

On September 29, 2006, the trial court granted Conklin's motion for summary judgment, requiring the City to compute Conklin's benefits based upon his retiring rank of deputy chief. On

August 10, 2007, the trial court entered another order of summary judgment granting Conklin back benefits, attorney fees, and interest in the amount of $134,219.55.

The City timely appeals, presenting a single question for our review: Did the trial court err when it required the City to compute Conklin's benefit under the 1955 Act using LEOFF's definition of "basic salary" and granted Conklin's motion for summary judgment?

DISCUSSION

Standard of Review

We review an order for summary judgment de novo, engaging in the same inquiry as the trial court. *Benjamin v. Wash. State Bar Ass'n*, 138 Wn.2d 506, 515, 980 P.2d 742 (1999). Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993). We view all facts in the light most favorable to the nonmoving party, here the City. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is appropriate only if reasonable persons could reach but one conclusion from all the evidence. *Vallandigham*, 154 Wn.2d at 26.

Our Supreme Court answered the question of whether calculation of retiree's pension is made under the 1955 Act or LEOFF in *McAllister*, stating:

> The plain language of RCW 41.26.040(2) . . . requires that an excess payment be calculated under the prior retirement system, not under LEOFF. "For the purpose of such computations, the employee's creditability of service and eligibility for service or disability retirement and survivor and all other benefits shall continue to be as provided in such prior retirement act, as if transfer of membership had not occurred."

166 Wn.2d at 629 (quoting RCW 41.26.040(2)).

McAllister controls our decision here. The trial court's decision to grant Conklin's motion for summary judgment, requiring calculating of his "excess payments" under LEOFF, was erroneous. Accordingly, we reverse the trial court's summary judgment orders and remand for entry of summary judgment in favor of the City of Tacoma.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HUNT, J.

VAN DEREN, C.J.