



# Career Change

**Initial Consideration  
August 28, 2013**

# Issue

- Abuse of “Career Change” legislation could undermine public trust that the plan is responsibly designed and professionally managed.

# Background

- Recent action by City of DuPont re-designating Police Chief position as “part-time” in order to facilitate a LEOFF Plan 2 retiree filling the position and continuing to draw his pension.
- Unintended Consequence of 2005 Career Change legislation undermines legitimate policy of the law.

# Post-Retirement Employment Restrictions

- **LEOFF Plan 2 benefits suspended if retiree returned to work in any public position (pre-2005).**
- **LEOFF Plan 2 Board 2004 study noted:**
  - At age 53 an employee ages out of LEOFF but can continue to work in less strenuous profession;
  - Retiree skills can translate well to a new career, often with a public employer;
  - Original pension suspension law discouraged career change.

# Board Recommended Career Change Law

- **LEOFF Plan 2 retiree to begin a second career in a non-LEOFF position and:**
  - Establish membership in the new public retirement system suspending their LEOFF Plan 2 pension; or
  - Choose not to establish membership in the new public retirement system and continue to receive their LEOFF Plan 2 pension while pursuing their second career.
- **Legislature enacted new law in 2005.**



# Unintended Consequence

- **DuPont needed to replace its full-time police chief. It wished to hire a LEOFF plan 2 retiree. The retiree did not wish to lose his LEOFF pension.**
  - DuPont converted LEOFF position (police chief) into PERS by re-designating it “part-time”.
  - Loophole in career change law allowed LEOFF Plan 2 retiree to return to law enforcement career and continue to receive pension.

# How the Loophole Works

- **Unintended intersection of valid policies.**
- **Career Change policy.**
  - Facilitate transition to less strenuous non-LEOFF career.
- **LEOFF membership policy.**
  - Full-time.
  - Fully Compensated.

# Full Time, Fully Compensated

- **LEOFF members must be “full time, fully compensated.”**
  - Career officers and fire fighters in LEOFF.
  - Volunteer fire fighters and reserve police officers in Volunteer Firefighter and Reserve Police Officer Retirement System, Chapter 41.24 RCW.
- **“Full time, fully compensated” not defined in statute or case law.**

# Full Time, Fully Compensated – DRS Rule

- **DRS adopted definition in rule in 1995, WAC 415-104-011.**
  - “Full time” means at least 160 hours per month;
  - “Fully compensated” means earning the same salary and benefits as other employees of same rank and position.
- **DRS rule adopted 10 years before the career change law.**
  - At that time no intersection with post-retirement employment.
  - A part-time or less than fully compensated LEOFF Plan 2 retiree would still have stopped receiving pension.

# Media

- **Recent articles reporting on DuPont.**
  - Transition Police Chief from full-time to part time.
  - Receive “over \$170,000” in salary and pension.
- **Follow-up editorial in Olympian.**
  - Mistakenly identified LEOFF Plan 2 Career Change as part of 2001 PERS & TRS retire-rehire bill;
  - Called for repeal of Retire-rehire and Career Change.

# Summary

- Career Change enables transition to a new career.
- Redefining a position to enable a LEOFF Plan 2 retiree to work as a law enforcement officer while still drawing a LEOFF 2 pension violates that intent.
- Misuse undermines public trust in the LEOFF Plan 2 system and the legitimate policy goals of the original law.

# Next Steps

- Not pursue the issue at this time.
- Provide Comprehensive Report with policy options.

# Any Questions?

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redefining a full-time position as a part-time job. Nonetheless, the Olympian included the Career Change law in its call for a full repeal of retire-rehire<sup>8</sup>.

## **SUMMATION**

The Board recommended the Career Change bill to enable retired law enforcement officers and firefighters to transition to a new career. Redefining a position to enable a LEOFF Plan 2 retiree to work as a law enforcement officer while still drawing a LEOFF 2 pension violates that intent. Misusing the Career Change law to draw a LEOFF Plan 2 salary while working as a law enforcement officer undermines both public trust in the LEOFF Plan 2 system and the legitimate policy goals of the original law.

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<sup>8</sup> *Time for Retire-Rehire to End in This State*, Daily Olympian, August 8, 2013.

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years before the Career Change law, the rule had no impact on post-retirement employment laws when adopted. The 2005 Career Change legislation unintentionally created the loophole used by DuPont. Prior to that time a LEOFF Plan 2 retiree's pension would be suspended upon reentering covered employment regardless of what public position he or she entered. Redefining a LEOFF position as a PERS position would have been pointless, as it would not prevent suspension of the retiree's pension.

That is no longer the case. Even though the DuPont's Police Chief is a commissioned position created by the city to enforce the criminal laws of the State of Washington generally, i.e. a law enforcement position, DuPont has reduced the hours to make it a PERS position so its Police Chief can continue to receive a LEOFF Plan 2 pension.

DRS has fielded similar inquiries seeking the same result by focusing on the "fully compensated" eligibility requirement. Some examples include questioning whether a LEOFF Plan 2 retiree is not fully compensated, and therefore not LEOFF eligible, if he or she did not receive health care benefits, or earned annual leave at a lesser rate than other employees with similar experience. These inquiries are designed to take advantage of the high bar to LEOFF membership used to distinguish between LEOFF eligible law enforcement officers and fire fighters and volunteer or part-time law enforcement officers and fire fighters. They seek to use that policy for an unintended purpose: to enable retirees to work as a law enforcement officer or fire fighter and continue to receive their pension.

### **MEDIA RESPONSE TO PART-TIME DUPONT POLICE CHIEF**

The Associated Press and the Daily Olympian recently published articles reporting on DuPont's arrangement<sup>7</sup>. Publishers of the Associated Press article include the Seattle Times, the Bellingham Herald, the Spokesman Review, and the Kansas City Star.

The Olympian followed up with an editorial confusing the 2005 Career Change bill with the 2001 Retire-Rehire provisions legislation, mistakenly claiming the 2001 law allowed LEOFF Plan 2 retirees to return to work as law enforcement officers or fire fighters for 1800 hours per year (35 hours per week x 52) while receiving a benefit. Neither the 2001 law nor the 2005 career change legislation intended that result. Further, that result cannot be accomplished without

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<sup>7</sup> *DuPont police chief will collect salary, \$90,000-a-year pension*, Associated Press, published in Seattle Times August 3, 2013.

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hours per month<sup>2</sup>. A review of the role of volunteer firefighters and reserve police officers helps explain why the Legislature set the bar for LEOFF membership so high.

### **Part-time Law Enforcement Officers and Fire Fighters**

LEOFF's full-time requirement springs from a unique aspect of the fire fighter and law enforcement officer professions. A number of Washington's communities are served by Volunteer Fire Fighters and/or Reserve Police Officers. These part-time public safety officers belong to the Volunteer Firefighters and Reserve Police Officers' Retirement System, Chapter 41.24 RCW.

Volunteer Firefighters and Reserve police officers have the same authority and duties as their full-time counterparts when called into service. The distinction is they do not work full-time:

"Reserve officer" includes any law enforcement officer who does not serve as a law enforcement officer of this state on a full-time basis, but who, when called by such agency into active service, is fully commissioned on the same basis as full-time officers to enforce the criminal laws of this state<sup>3</sup>;

Washington's Courts recognize a similar distinction between LEOFF eligible fire fighters and volunteer firefighters, noting the distinction between full time vs. part time/volunteer controls whether the firefighter goes into LEOFF or the Volunteer system<sup>4</sup>. Similarly, when discussing LEOFF eligibility for police matrons the Court noted: "that plaintiffs are full-time employees, they are regularly employed as opposed, for example, to police reservists..."<sup>5</sup>

"Full-time" is not defined in the LEOFF statute, nor has it been defined by the Courts<sup>6</sup>. DRS adopted a rule in 1995 defining full time as "regularly scheduled to work at least 160 hours per month," i.e. at least 40 hours per week for at least 20 days, WAC 415-104-011(3). Coming ten

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<sup>2</sup> An "eligible position" for PERS, PSERS, and TRS Plan 2/3 is a position that normally requires 70 or more hours per month for at least 5 months per year. The relatively new retirement system of PSERS, created for public safety officers who are not fully commissioned law enforcement officers, also requires full-time employment.

<sup>3</sup> WAC 139-05-810(1).

<sup>4</sup> *Schrom v. Board for Volunteer Fire Fighters*, 153 Wn.2d 19, 27, 28, 100 P.3d 814 (2004).

<sup>5</sup> *Beggs v. City of Pasco*, 93 Wn.2d 682, 685, 611 P.2d 1252 (1980).

<sup>6</sup> *Tucker v. Department of Retirement Systems of State*, 127 Wn.App. 700, 706, 113 P.3d 4 (2005); The closest the Court has come is to uphold DRS determinations that persons performing law enforcement or firefighter duties less than half time do not meet the statutory full time requirement, see *Buckley v. Department of Retirement Systems*, 116 Wn.App. 1, 65 P.3d 1216 (2003); *International Ass'n of Fire Fighters Local 3266, AFL-CIO v. Department of Retirement Systems, State of Wash.*, 97 Wn.App. 715, 987 P.2d 115 (1999).

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intersection of the Career Change law and the pre-existing LEOFF definition of law enforcement officer to do exactly that.

### UNINTENDED CONSEQUENCE OF CAREER CHANGE LAW

The City of DuPont's full-time Chief of Police recently retired from LEOFF. The City hired a LEOFF Plan 2 retiree to replace him. The new Chief was originally hired on an interim basis and served full-time for approximately 3 months. Following DRS's recent disallowance of DuPont's claim that its Fire Chief was an independent contractor and the resulting suspension of the Fire Chief's LEOFF Plan 1 pension, the interim Police Chief "...notified the city of his intention to terminate his interim contract 'out of fear and confusion from the recent audit findings,<sup>1</sup>"

To allow the retiree to work as Police Chief and receive his LEOFF 2 pension, the City reclassified the Police Chief's position from full-time to "part-time" requiring 35 hours per week. It does not appear any change in duties accompanied the change in hours. The City redefined the position to reclassify it from LEOFF to PERS to fit within LEOFF Plan 2's Career Change provisions.

This loophole relies on an aspect of LEOFF's definition of a "Law Enforcement Officer":

"Law enforcement officer" beginning January 1, 1994, means any person who is commissioned and employed by an employer on a **full time, fully compensated** basis to enforce the criminal laws of the state of Washington generally, with the following qualifications:

...

(c) Only such **full time** commissioned law enforcement personnel as have been appointed to offices, positions, or ranks in the police department which have been specifically created or otherwise expressly provided for and designated by city charter provision or by ordinance enacted by the legislative body of the city shall be considered city police officers;

RCW 41.26.030(18) (emphasis added). Firefighters must also be full-time, fully compensated to qualify for LEOFF, RCW41.26.030(16). LEOFF is somewhat unique in limiting membership to full-time employees. PERS, TRS, SERS, include part-time employees if they work at least 70

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<sup>1</sup> *DuPont police chief to work part time, retain benefits*, The Olympian, July 31, 2013.

enforcement officer or fire fighter. A LEOFF Plan 2 member who separates from LEOFF employment at age 53 may be expected to seek continued full-time employment in a non-LEOFF capacity for a number of reasons including income, access to health care coverage and the ability to qualify for social security or earn additional pension benefits to supplement those provided by LEOFF Plan 2.

Public employment offers a number of potential second careers to LEOFF 2 members where the skills developed in their LEOFF positions can be utilized. However, LEOFF Plan 2 members who seek to continue in public employment following separation or retirement from LEOFF may be restricted from establishing membership in a second public retirement system or receiving their LEOFF pension. Thus, there are barriers to transitioning to public employment after completing a career in LEOFF.

When a LEOFF Plan 2 retiree becomes employed in an eligible position covered by another state pension system the retiree will have their LEOFF pension suspended. Additionally, the retiree would normally be prohibited from participating as a member in the other state pension system and accruing a second pension. These pension provisions may make continued public employment an unviable option for LEOFF Plan 2 retirees.

LEOFF Plan 2 staff presented three different options to the Board, including providing the same retire-rehire provisions available in PERS and TRS. But the Board's concern was not supplementing a pension with part-time work. Its issue was transitioning from a law enforcement officer or fire fighter career to a new career. Accordingly, the Board declined the option to adopt retire-rehire instead proposing Career Change legislation. Those provisions, enacted in RCW 41.26.500, allow a LEOFF Plan 2 retiree who starts a new career in public employment other than as a law enforcement officer or fire fighter to either:

- Establish membership in a new public retirement system suspending their LEOFF Plan 2 pension; or
- Opt out of the second public retirement systems and continue to receive their LEOFF Plan 2 pension while pursuing their second career.

It was not the intention of the Board nor the Legislature to allow a retired LEOFF Plan 2 member to return to work as a law enforcement officer or fire fighter and continue receiving a LEOFF Plan 2 pension. The City of DuPont has taken advantage of a loophole created by the

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as “part-time,” i.e. 35 hours a week. The sole reason for this action was to move a law enforcement officer position into PERS to take advantage of the Career Change legislation.

This report will explain the difference between the Board’s Career Change policy and the retire-rehire policy in PERS and TRS; identify unintended consequences of the Career Change law, explain how the loophole works, and discuss media reaction to DuPont’s utilization of that loophole.

## **BACKGROUND INFORMATION & POLICY ISSUES**

When creating LEOFF Plan 2 in 1977, the Legislature prohibited members from receiving a pension while engaged in retirement system covered employment. If a LEOFF Plan 2 retiree entered public employment covered by LEOFF, the Public Employees’ Retirement System (PERS), or the Teachers’ retirement system (TRS), that member’s pension would be suspended. Over subsequent years the suspension requirement was expanded to include employment in positions covered by the School Employees’ Retirement System (SERS) or the Public Safety Officers’ Retirement System (PSERS). RCW 41.26.500.

## **CAREER CHANGE VS. RETIRE-REHIRE**

The LEOFF Career Change bill is sometimes confused with retire-rehire provisions governing PERS and TRS. Retire-rehire was enacted in 2001 and has been in the news, and before the Legislature, repeatedly since then. The retire-rehire law was intended to allow PERS and TRS retirees to supplement their pensions by working in part-time or temporary positions. Current retire-rehire provisions allow PERS and TRS retirees to work 867 hours per year while collecting their full pension. This allows part-time work or a temporary assignment to full-time work.

The retire-rehire law does not apply to LEOFF Plan 2. Its policy of assisting both employers and employees by facilitating part-time or temporary work by experienced workers stands in marked contrast to the Career Change policy.

### **Career Change Legislation**

The Board studied the LEOFF Plan 2 pension suspension provisions in 2004. The policy considerations underlying the action ultimately taken by the Board were discussed in the LEOFF Plan 2 staff presentation:

The normal retirement age for LEOFF Plan 2 (53) is an age at which a person is generally considered to still be in the prime of their productive employment period although they may no longer be capable of performing the duties of a law



August 28, 2013  
**CAREER CHANGE**

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## **INITIAL CONSIDERATION**

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## **ISSUE**

Abuse of “Career Change” legislation could undermine public trust that the plan is responsibly designed and professionally managed.

## **MEMBERS IMPACTED**

Board staff is currently working with the Department of Retirement Systems (DRS) to determine how many LEOFF Plan 2 retirees have utilized the provisions of the original 2005 Career Change bill. Assuming utilization continues at the same rate, a similar number of members would be impacted by any changes to the law. The public trust issues implicated by manipulation of the original bill impact all LEOFF Plan 2 members.

## **OVERVIEW**

Before 2005 a LEOFF Plan 2 retiree’s pension stopped upon return to work in a job covered by any state-wide public retirement system. The LEOFF Plan 2 Board (Board) recognized members could age out of LEOFF positions before they were ready or could afford to leave the workforce. The Board proposed Career Change legislation in 2005 enabling retired LEOFF Plan 2 retiree to start a second career in non-LEOFF public employment. A retiree accepting such a job can either establish membership in another public system, thus suspending their LEOFF Plan 2 pension, or waive membership in the new system and continuing to receive a pension.

The Board intended to facilitate transition from a physically demanding profession to another, often less-well compensated, job. It did not intend to enable LEOFF Plan 2 retirees to return to work as a law enforcement officer or firefighter and continue to receive their pension. The Legislature passed the LEOFF Plan 2 Career Change bill in 2005.

The City of DuPont recently utilized an unintended loophole in the Career Change legislation to hire a LEOFF Plan 2 retiree as police chief and continue his pension. Although DuPont’s former police was a full-time employee covered by LEOFF, DuPont found a way to ostensibly place their new Chief, a LEOFF Plan 2 retiree, outside of LEOFF. The City did this by redefining the position