



April 25, 2018

Definition of Child

INITIAL CONSIDERATION

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ISSUE STATEMENT

The LEOFF definition of "child" excludes children adopted after retirement from eligibility for benefits.

OVERVIEW

LEOFF provides benefits to children of active and retired members. LEOFF Plan 1 and Plan 2 provide different benefits, though both use the same definition of child. While the definition includes children adopted before retirement, it excludes children adopted after retirement.

This report provides an overview of the current state of the law and options for potential modification.

BACKGROUND AND POLICY ISSUES

This issue has been discussed by the LEOFF Plan 2 Retirement Board twice.

Member correspondence was presented on this topic during the Board's Administrative Update at the November 15, 2017. The Board directed staff to present a Comprehensive Report at the next meeting. At the December 20, 2017 meeting, a motion was passed to not take any action on the issue.

The Select Committee on Pension Policy heard testimony and conducted a work session on this issue at their December 12, 2017 meeting. While some members expressed interest in the issue, no action was taken.

Adopted Family Members as Children

The LEOFF definition of "child" includes children adopted before retirement:

"Child" or "children" means an unmarried person who is under the age of eighteen or mentally or physically disabled as determined by the department, except a person who is disabled and in the full time care of a state institution, who is:

- (i) A natural born child;
- (ii) A stepchild where that relationship was in existence prior to the date benefits are payable under this chapter;
- (iii) A posthumous child;

(iv) **A child legally adopted or made a legal ward of a member prior to the date benefits are payable under this chapter; or**

(v) An illegitimate child legitimized prior to the date any benefits are payable under this chapter.

RCW 41.26.030(6)(a) (*emphasis added*). Worker's compensation law has a similar provision:

"Child" means every natural born child, posthumous child, stepchild, child legally adopted prior to the injury, child born after the injury where conception occurred prior to the injury,...

RCW 51.08.030.

These definitions create two categories of children:

1. Biological children who qualify by the circumstances of their birth; and
2. Stepchildren, adopted children, or illegitimate children, who do not qualify unless they satisfy a statutory condition, for instance adoption, before the member retires.

While there is no specific statutory history, this provision may have been enacted out of concern that a beneficiary might adopt a child after retirement to enhance benefits. This same policy is found in the LEOFF Plan 1 surviving spouse benefit, RCW 41.26.160(2), which only allows benefits to a spouse married to the member for at least one year prior to retirement.

Benefits Denied Children Adopted After Retirement

Both LEOFF Plan 1 and Plan 2 provide benefits to qualifying children.

LEOFF Plan 2 Child Benefits

- Death in service benefit, with a choice between:
 - Retirement allowance:
 - Direct to child if no surviving spouse; or
 - Derived from surviving spouse if he or she dies after member but while child still under age of majority; *RCW 41.26.510(2)(a)*
 - or
 - 150% contribution refund if no surviving spouse; *RCW 41.26.510(2)(b)*
- Duty death benefit¹:
 - Unreduced survivor allowance if no surviving spouse; *RCW 41.26.510(4)*
 - Reimbursement of health insurance premiums; *RCW 41.26.510(5)*

¹ Children not eligible for lump sum death benefit; RCW 41.26.048

- Tuition Waiver; *RCW 28B.15.380*
- Catastrophic disability benefit:
 - Reimbursement of health insurance premiums; *RCW 41.26.510(5)*
 - Tuition waiver; *RCW 28B.15.380*
- Establishing service credit for interruptive military service credit where member dies before establishing leave; *RCW 41.26.520(7)(d)*.

LEOFF Plan 1 Child Benefits

LEOFF 1 increases the benefits of retirees and surviving spouses with qualifying children:

- Duty disability - Additional 5% of final average salary (FAS) for each child up to a maximum of 10%; *RCW 41.26.130*;
- Death benefit¹ –
 - Surviving spouse receives an additional 5% of FAS for each child up to a maximum of 10%.
 - If no surviving spouse or surviving spouse dies with qualifying children, the children receive 30% of FAS for one child, 10% for each additional up to 60%, share and share alike. *RCW 41.26.160, 41.26.161²*

The widow of a LEOFF Plan 1 disability retiree who adopted children after retirement, argues the exclusion of the children is discriminatory and seeks legislation to include children adopted after the date of retirement within the LEOFF definition of “child.”

APPENDICES

Appendix A – Member Correspondence

² *RCW 41.26.160* applies to duty related death while *RCW 41.26.161* applies to non-duty death. Both statute provide the same benefit.

Jackson, Jessie (LEOFF)

From: Kate Boreen <boreenpk@tctwest.net>
Sent: Thursday, October 26, 2017 10:01 AM
To: Kate Boreen
Cc: To: Aaron Gutierrez; McDonald, Joyce; Hayes, Dave; Holy, Jeff; Rivers, Ann; Manweller, Matt; Pedersen, Jamie; Angel, Jan; Bailey, Barbara; Schoesler, Mark; Conway, Steve; Fitzgibbon, Joe; Ormsby, Timm; Hobbs, Steve; Volz, Mike; governor.inslee@gov.wa.gov; Owen, Brad; pres@wscff.org; Nelsen, Steve (LEOFF); votejeffholy@gmail.com; Joyce Willms; Dave Peery; Tyson DePoe; joanna@iaff27.org; Andy; Valencia, Tim (LEOFF); Neal, Paul (LEOFF); Frost, Ryan (LEOFF); Harman, Tammy (LEOFF); Bergquist, Steve; Warnick, Judy
Subject: Correction
Attachments: Boreen DRS Petition Decision_Redacted.pdf; Boreen DRS Petition Decision_Redacted.pdf; RCW 41.26.030 Eligibility Discrimination language.pdf; Ltr. to Select Legislatorsre- Discrimination 22017.pdf; RCW Titles 11 & 26 AdoptiveHeirs.pdf

The e-packet of information sent yesterday did not contain the redacted version of the DRS opinion on Title 41 Eligibility definition affecting adopted children of disability-retired LEOFF 1 and LEOFF 2 Plan members.

Below is the redacted version of the opinion meant to be included in yesterday's 11 a.m./noon mailing, as a protection of minor children's privacy.

Please delete yesterday's communication and use this version instead.

Thank you.

Katharine S. Boreen

Per our conversation, Aaron, what follows in this email packet is the version that should be published on the Pension Policy Committee website. I would like the Committee on Pension Policy to know that all of this information is also in the hands of: The Washington State Council of Fire Fighters, the LEOFF 2 Retirement Board, Seattle Fire Fighters Union/IAFF Local 27 Board, along with more than several interested Washington State Legislators. Because it also involves law enforcement professionals in both LEOFF 1 and LEOFF 2 plans, I would hope it would be an issue for those law enforcement affiliated organizations and boards as well.

The discriminatory statute in question affects disability fire and law of any age from BOTH LEOFF 2 and LEOFF 1 systems. According to the LEOFF Plan 2 Retirement Board website.... as of June 30, 2014, 8.9% of retirees have retired from a LEOFF 2 position due to a duty-related disability. 12.2% of duty-related disabilities have been classified catastrophic.

It is hoped that the Committee on Pension Policy will be able to perhaps address a policy change or steer a bill to change this language for the good of our LEOFF 2 and LEOFF 1 disability-retired members and their families. If you can find a way to support such a policy change or a bill, it would be appreciated by more than just the Boreen family. Thank you, Kate

October 17, 2017

Dear Governor, Lt. Governor, Select Committee on Pension Policy, and Seattle Firefighters Local 27 Board Members:

My husband was a retired Seattle fireman who died late last summer, leaving me to raise our minor children alone. Lt. Phillip Neill Boreen was born and raised in Lewis County and fought fires for the City of Seattle for 28 years. His entire family was from Cowlitz and Lewis Counties. Many of them still reside there, and in Tacoma. At the time of his passing I was made painfully aware of a **blatantly discriminatory statute** in Washington law that prevents his minor children from receiving benefits because they are adopted.

The purpose of this communication is to inform you of language in RCW 41.26.030 that pertains to both LEOFF 2 and LEOFF 1 members and their families, disability-retired OF ANY AGE, singling out and **discriminating** against adopted children of both firefighters and law enforcement. This law as it currently exists can affect disability retired members and their children that are not “naturally” born i.e., if you choose to conceive a child naturally after your disability retirement date... your children will receive benefits If you adopt your children, your children will not receive benefits. I am hoping that once educated, people will do what they can to change this statute. This is a blemish on two very honorable professions.

Included with this email you will find:

- (1) a copy of the **discriminatory portion** of the statute (re: contained in the definitions section, “eligibility” of children to receive benefits upon the death of a disability-retired LEOFF 2 or LEOFF 1 member),
- (2) legal opinion concerning this matter rendered earlier this year by Washington Department of Retirement Systems attorney,
- (3) copy of my letter sent February 2017 to select members of the WA legislature explaining the situation, and
- (4) language from other RCW statutes that directly conflict with RCW 41.26.030.

Further, I would emphasize the following:

- The language in RCW 41.26 directly applies to **BOTH** LEOFF 2 and LEOFF 1 plans. (Page 3 of Ms. Buddeke’s decision specifically addresses this fact. Don’t be lulled into thinking that only one plan or the other is involved here.
- There is currently a limitation (cap) of two children “naturally born” per disability-retired members’ family.
- LEOFF 1, and perhaps LEOFF 2, members need to understand that there are more benefits being denied than a nominal monthly death benefit until they turn of age. “Natural children” born after the disability retirement date are entitled to the lifetime survivor benefit (should the surviving spouse also die before the LEOFF children come of age) to be received until the child or children come of age. As it currently stands, this statute makes sure that the fire or law enforcement pension check is denied to adopted children should both their parents die before they come of age.
- It is unclear whether this issue also affects the ability of the deceased members’ adopted children to receive health insurance coverage through either LEOFF plans.
- Please note that the DRS opinion was very well written, so that a bill can be sponsored or action can be taken with comparatively little effort to rectify the issue.
- I have been asked how this very subtle and almost hidden language affects other portions of the LEOFF 2 or LEOFF 1 plans. I do not know.

In including the February DRS decision for review, I ask everyone to please, please try to keep our children’s names out of this. They do not know that the entire State of Washington considers them a lesser form of human being when it comes to their existence and the legitimacy of firefighter Boreen as their father. My concern is that if one of them does an internet search (or one of their friends do) of our last name and they see all of this, they will be crushed. They don’t deserve it. They were little when we became a family, and the youngest was 9 when his father was diagnosed with cancer. We were his hospice. He is the only father they will ever have.

The list of legislators who have contacted me by phone or email regarding this statute following last February’s letter is found below. I hope that you will choose to take action against the **discrimination of adopted children** of disability-retired firefighters and law enforcement personnel. It is the right thing to do.

Senator Jan Angel, District 26 (Kitsap and Pierce Counties)

Senator Barbara Bailey, District 10 (Island, Skagit, Snohomish)

Senator Jamie Pedersen, District 43 (King County)

Ann Rivers, District 18 (Clark & Cowlitz Counties)

Rep. Dave Hayes. District 10 (Island, Skagit, Snohomish)

Representative Joyce McDonald – District 25 (Tacoma)

Thank you,

Katharine S. Boreen

Wife of deceased SFD FF, Lt. Phillip Neill Boreen

Phone: (307) 272-4208 or (307) 272-6640.

**WASHINGTON STATE
DEPARTMENT OF RETIREMENT SYSTEMS
PETITION DECISION**

DATE: February 1, 2017
PETITIONER: Katharine Boreen
MEMBER: Phillip Boreen
SYSTEM: LEOFF Plan 1 (LEOFF1)
ISSUE: Minor children eligibility for LEOFF1 death and survivor benefits

BACKGROUND

1. Phillip Boreen, who is now deceased, was a member of the Law Enforcement Officers' and Firefighters' Retirement System, Plan 1 (LEOFF1). At the time of his death,¹ he was a LEOFF1 disability retiree who regularly received a disability retirement benefit.²

Katherine Boreen, the Petitioner, is Mr. Boreen's widow.

2. Mr. and Mrs. Boreen had four children, who they adopted on July 18, 2008: [REDACTED] (born [REDACTED]); [REDACTED] (born [REDACTED]); [REDACTED] (born [REDACTED]); and [REDACTED] (born [REDACTED]).³
3. The question here is whether [REDACTED] [REDACTED] [REDACTED] and [REDACTED] are eligible for LEOFF1 death and/or disability benefits. However, we should make one thing clear at the outset: those "child benefits" are not benefits paid to children.
 - o In LEOFF1, as with public pensions generally, a child *disability benefit* is actually a percentage increase in a disabled parent's benefit. It is the parent (the LEOFF member) who receives the disability benefit. That benefit is calculated by

¹ Mr. Boreen died on August 6, 2016.

² Mr. Boreen's local disability board determined that his disability was duty-related.

³ In this decision, we refer to [REDACTED] [REDACTED] and [REDACTED] by their first names, or as the "Boreen children." Mr. Boreen had a fifth child ([REDACTED] born [REDACTED]). Because of her age, [REDACTED] was not eligible for an eligible child for purposes of calculating a disability retirement or death benefit under Mr. Boreen's retirement account. Consequently, her interests are not at issue here.

reference to his final average salary,⁴ and may be increased by an additional percentage for each eligible child (up to a maximum amount).

- A child *death benefit* is actually a percentage increase in a surviving spouse's benefit (also up to a maximum amount). It is the surviving spouse (of the deceased LEOFF member) who receives the death benefit—usually for the survivor's life.
4. In this decision, we frequently refer to Mr. Boreen's disability benefit and Mrs. Boreen's survivor benefit as "child benefits." For the sake of simplicity and readability:
- When we refer to the Boreen children's eligibility for a disability benefit, that eligibility would have the practical effect of retroactively increasing Mr. Boreen's disability benefit.
 - When we refer to the Boreen children's eligibility for a death benefit, that eligibility would have the practical effect of retroactively increasing Mrs. Boreen's survivor benefit.

LEOFF, GENERALLY

5. The Legislature created the LEOFF system to provide death, disability, and retirement benefits to LEOFF members and their beneficiaries.⁵ LEOFF benefits are limited to those who meet the requirements of the LEOFF Act.⁶ The disability and death benefits at the heart of this petition are two examples of frequently-administered LEOFF benefits.
6. DRS is responsible for LEOFF administration. As the statutory LEOFF administrator, we manage the LEOFF trust fund for the benefit of its intended beneficiaries.⁷ In fulfilling that responsibility, our primary point of reference is the LEOFF Act—the most direct indicator of the intent of the Washington Legislature.

LEOFF BENEFITS, GENERALLY

7. There are two LEOFF plans: LEOFF1 and LEOFF2.⁸

⁴ "Final average salary," like dozens of other terms applied in LEOFF administration, is defined by statute. See RCW 41.26.030(15)(a). Mr. Boreen's final average salary is not at issue in this petition.

⁵ RCW 41.26.020. See also *Auto Drivers v. Retirement System*, 92 Wn.2d 415, 422-23 (1979).

⁶ The LEOFF Act is codified at Ch. 41.26 RCW.

⁷ RCW 41.26.020. See *Fire Fighters v. DRS*, 97 Wn. App. 715, 718 (1999).

⁸ LEOFF1 covers those who established LEOFF membership before October 1, 1977. LEOFF2 covers those who established LEOFF membership on and after that date. See RCW 41.26.030(21) and (22).

8. In many respects, there are critical differences in the benefits payable under LEOFF1 and LEOFF2. Disability and death benefits are good examples of those differences. The disability and death benefit statutes discussed in this decision are specific to LEOFF1.
9. In other important respects, however, LEOFF1 and LEOFF2 are the same: they derive generally from the same public pension policy, and they share many common definitional terms. This decision hinges on one such definition: "child." That word carries the same meaning in both LEOFF1 and LEOFF2.

LEOFF 1 DISABILITY BENEFITS

10. A LEOFF1 member who retires for disability is entitled to receive a correctly calculated disability benefit, payable until his death or recovery from the disability. That benefit is calculated by reference to two factors: (a) his final average salary; and (b) the number of children he had at the time of his disability retirement. The relevant LEOFF1 disability benefit statute is RCW 41.26.130:

Allowance on retirement for disability.

(1) Upon retirement for disability a member shall be entitled to receive a monthly retirement allowance computed as follows:

- (a) A basic amount of 50% of final average salary at time of disability retirement, and
- (b) An additional 5% of final average salary for each child as defined in [RCW 41.26.030(6)]...
- (c) The combined total of (a) and (b) of this subsection shall not exceed a maximum of 60% of final average salary...⁹

LEOFF 1 DEATH BENEFITS

11. When a LEOFF1 disability retiree dies, that member's surviving spouse is entitled to receive a lifetime survivor benefit equal to the benefit the member received while he was alive.¹⁰ The relevant LEOFF1 death benefit statute is RCW 41.26.161(1):

⁹ Both the disability retirement benefit and the death benefit grant a 5% benefit increase per eligible child. Because both benefits are capped at a total of 60%, however, the practical result for a 4-child increase would be a total benefit increase of only 10%. See RCW 41.26.130(1)(c)(the disability benefit cap) and RCW 41.26.161(1)(the death benefit cap).

¹⁰ Under some circumstances, a surviving spouse may not be eligible for a survivor benefit—but none of those circumstances apply here. Mrs. Boreen receives a lifetime survivor benefit; it became payable on the day after Mr. Boreen's death.

Death benefits—Nonduty connected death

(1) In the event of the nonduty connected death of any member who is...retired, [whether for disability or service], the surviving spouse shall become entitled...to receive a monthly allowance equal to...the amount of the retirement allowance such retired member was receiving at the time of death...

The amount of this allowance will be increased 5% of final average salary for each child as defined in [RCW 41.26.030(6)], subject to a maximum combined allowance of 60% of final average salary....¹¹

THE LEOFF DEFINITION OF "CHILD"

12. This petition concerns the 5% additional benefit per eligible child. As applied to Mr. Boreen's retirement account, those "child benefits" would add 10% to the benefit Mr. Boreen received while he was alive, as well as to the survivor benefit Mrs. Boreen has received since his death.

13. In LEOFF, the Legislature defined "child" by reference to five categories of children, as follows:

"Child or children" means an unmarried person who is under [age 18] who is:

- (i) A natural born child;¹²
- (ii) A stepchild where that relationship was in existence prior to the date benefits are payable under this chapter;
- (iii) A posthumous child;
- (iv) *A child legally adopted...prior to the date benefits are payable under this chapter*; or
- (v) An illegitimate child legitimized prior to the date any benefits are payable under this chapter....¹³

14. The "child" categories, in turn, are organized into two groups: those children who must meet a condition precedent in order to be eligible for LEOFF beneficiary status, and those who need not meet that condition precedent. That is:

¹¹ RCW 41.26.030(6)(a). This is the benefit that applies to a LEOFF1 member who retired for duty-related disability, but whose death was not connected to his LEOFF duty. For the law that applies to a LEOFF1 member who was retired for duty-related disability, and whose death was connected to his LEOFF duty, see RCW 41.26.160. Both statutes apply the same disability benefit calculation formula.

¹² The statutory LEOFF "child" definition uses the term "natural born" child. Because we think it more properly descriptive, for the remainder of this decision we will use the term "biological child." For the same reason, we refer to a "legitimized child" as an "extramarital child."

¹³ RCW 41.26.030(6)(a)(emphasis added). These are the provisions of the LEOFF "child" definition that apply to this petition. The full LEOFF definition of "child," for benefit eligibility purposes, is broader than the language we have selectively quoted above. The issue here is whether the Boreen children are eligible LEOFF beneficiaries, and our analysis limited accordingly.

CONDITION PRECEDENT:

- Adopted child
- Stepchild
- Extramarital child

NO CONDITION PRECEDENT:

- Biological child
- Posthumous child

The condition precedent requires a child to have met the “child” definition on or before the date when the LEOFF member’s benefit became payable.¹⁴

15. Mrs. Boreen reasons that the LEOFF “child” definition is unfair to [REDACTED] and [REDACTED] because it treats adopted children less favorably than biological (including posthumous) children. That is: a biological (including posthumous) child can receive a LEOFF benefit at any time, without meeting any condition precedent, but an adopted child can only receive a that benefit if he/she was adopted when his/her parent began receiving a LEOFF benefit. The biological child need not meet any condition precedent, but the adopted child must.

PAYMENT OF LEOFF BENEFITS TO CHILD BENEFICIARIES

16. Mr. Boreen's disability benefit became payable on March 31, 2000, when he retired for disability and began receiving LEOFF benefits. Any (otherwise eligible) child¹⁵ he had at that time would have been benefit-eligible, whether that child was biological, posthumous, adopted, stepchild, or (acknowledged) non-marital.¹⁶

Because Mr. Boreen had no benefit-eligible children when he retired, no child was eligible for a disability benefit.

17. When Mr. Boreen died on August 6, 2016, he had been receiving LEOFF benefits since 2000. His death benefit (that is, Mrs. Boreen’s survivor benefit) was also determined as of the date of his retirement, because that was the point at which he first began receiving LEOFF benefits.

¹⁴ For the sake of readability, we use the phrases “when the member’s benefit becomes payable” and “when the member receives his benefit” interchangeably.

¹⁵ As mentioned above, Mr. Boreen's daughter [REDACTED] was his biological child, but she was not “otherwise eligible” because she was older than 18 when he retired.

¹⁶ In particular, a posthumous child would have been Mr. Boreen's beneficiary because that child would have already been conceived when he retired for disability. A posthumous child is not simply any biological child—it is a child who was conceived while a parent was alive, but born after that parent died.¹⁶ See Black’s Law Dictionary 1167 (7th ed. 1999)(A posthumous child is a child “born after the death of his or her father.”) In the administration of LEOFF benefits, a posthumous child can only be a child who was *in utero* when LEOFF benefits first became payable.

Because [REDACTED] [REDACTED] [REDACTED] and [REDACTED] were not Mr. Boreen's children when he retired, they were not eligible for a death benefit. But that was not because they are adopted.

18. Without question, [REDACTED] [REDACTED] [REDACTED] and [REDACTED] were Mr. Boreen's children when he died—actually, practically, and legally. They became his children when they were adopted on July 18, 2008. Under Washington State probate law, they are his lawful issue and lineal descendants.¹⁷ Under Washington State adoption law, they are in all respects his children.¹⁸ But under Washington State LEOFF pension law, they are not his beneficiaries.

THE CONSTITUTIONAL CLAIM

19. Finally, we understand Mrs. Boreen's concern that the LEOFF Act appears to unconstitutionally treat biological children more favorably than adopted children. This appears to be, at heart, a claim that the LEOFF Act sanctions the unconstitutionally disparate treatment of adopted children. We do not address that claim here.
20. DRS is an administrative agency. It has no authority to determine the constitutionality of the LEOFF Act; only the courts have the authority to adjudicate that question.¹⁹ As we are obliged to do, we presume that RCW 41.26.030(6) is constitutional.²⁰

THE SCOPE OF DRS' AUTHORITY

21. As the statutory LEOFF administrator, DRS is required to correctly administer the LEOFF Act—including the definition of "child" codified at RCW 41.26.030(6)(a). We have no authority to pay a child benefit increase to any minor who does not meet the

¹⁷ See RCW 11.02.005(8): "Issue" means all the lineal descendants of an individual. An adopted individual is a lineal descendant of each of his or her adoptive parents....A child conceived prior to the death of a parent but born after the death of the deceased parent is considered to be the surviving issue of the deceased parent...."

¹⁸ RCW 26.33.260(1): "The adoptee shall be, to all intents and purposes, and for all legal incidents, the child, legal heir, and lawful issue of the adoptive parent, entitled to all rights and privileges, including the right of inheritance and the right to take under testamentary disposition, and subject to all the obligations of a natural child of the adoptive parent."

¹⁹ *Bare v. Gorton*, 84 Wn.2d 380, 383 (1974), citing *U.S. v. Kissinger*, 250 F.2d 940 (3d Cir. 1958) and 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 20.04 at 74 (1958).

²⁰ See *Auto Drivers v. Retirement System*, *supra* at 422 ("The wisdom of a legislative classification is not subject to our review. [A] statute is presumed to be constitutionally valid and the burden is on the challenger to prove that a classification does not rest on a reasonable basis.") (citation omitted).

Legislature's definition of "child." We cannot disregard the wording of that definition, or read into it a meaning that was not intended by the Legislature.²¹ We have no authority to grant LEOFF1 disability or death benefits to the Boreen children.

CONCLUSION

22. We would like to conclude that [REDACTED] [REDACTED] [REDACTED] and [REDACTED] are beneficiaries under Mr. Boreen's LEOFF account. But we cannot.

23. In the calculation and payment of statutory disability/death/injury benefits for children, the Legislature has in some other respects used the same language that is so problematic in this case (that is, determining a child's beneficiary status by reference to a specific point in time).²² But it has not done so in the LEOFF Act.

24. We can discern no ambiguity in RCW 41.26.030(6), and we do not have the authority to creatively interpret an unambiguous statute.²³ We are required to administer the LEOFF Act as the Legislature has written it, not as we might prefer it to have been written.²⁴

25. Mr. Boreen's LEOFF benefits—including "child" benefits—are established by the Legislature. They exist only in LEOFF statute, and are defined solely by the LEOFF Act.

²¹ See *Water Power v. Human Rights Commission*, 91 Wn.2d 62, 65 (1978) ("An administrative agency is limited in its powers and authority to those which have been specifically granted by the legislature."), citing *Cole v. Transportation Commission*, 79 Wn.2d 302, 306 (1971) ("An administrative agency must be strictly limited in its operations to those powers granted by the legislature.") (additional citations omitted).

²² For example, worker's compensation benefits are determined by the worker's circumstances (and number of children) on the date of his industrial injury. They are payable to an adopted, step, or non-marital child, but only if that child held that status at the time of the parent's injury. They are payable to a posthumous child, but only if that child had been conceived before the injury. See RCW 51.08.030. See also, for example, *Foster v. L&I*, 161 Wash. 54, 57 (1931) (denying beneficiary status for both a biological child and a stepchild of an injured worker who had neither at the time of his industrial injury) ("The [law] is clear and unambiguous. It denies to an injured workman the right to recover for an illegitimate child, unless legitimated prior to injury, and for a child not legally adopted. Respondent cannot recover on behalf of his stepchild, for the reason that its status, as such, did not become established until February 27, 1929, the date of the marriage, which was two years subsequent to the date of injury....").

The Legislature embraced the same approach in the payment of crime victim compensation benefits. Those benefit amounts are also determined by the victim's circumstances (and number of children) on the date of his injury. See RCW 7.68.020(4).

²³ See *Roza Irrigation Dist. v. State*, 80 Wn.2d 633, 635 (1972) ("Of course the basic rule [of statutory construction] is that, where the language of a statute is clear and unambiguous, there is no room for judicial interpretation.") (citation omitted).

²⁴ See *Auto Drivers v. Retirement System*, *supra* at 421 ("This court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or inadvertent omission.") (citation omitted).

They are payable only because the Legislature has allowed them to be paid. They are payable only when, and in the amount, allowed under the LEOFF Act.

The LEOFF Act requires DRS to determine Mr. Boreen's death and disability benefits as of his disability retirement date: March 31, 2000. Because [REDACTED] [REDACTED] [REDACTED] and [REDACTED] were not his children at that point in time, they are not eligible for those benefits.

26. In the end, we are obliged to deny Mrs. Boreen's petition because of the language the Legislature chose to use when it enacted the "child" definition in RCW 41.26.030(6)(a). Her concerns are perhaps best directed to the Legislature's attention.

DECISION

DRS correctly determined that [REDACTED] [REDACTED] [REDACTED] and [REDACTED] Boreen are not eligible for LEOFF1 disability or death benefits.



Ceil Buddeke
Petition Examiner
Department of Retirement Systems

YOU HAVE A RIGHT TO APPEAL THIS PETITION DECISION: You may appeal by filing a written appeal notice within **60 days** of the date of this decision. File any appeal notice TO THE ATTENTION OF THE DRS APPEALS UNIT, using one of the following methods:

- **By mail:** Department of Retirement Systems / P.O. Box 48380 / Olympia, WA 98504-8380
- **By delivery:** Department of Retirement Systems / 6835 Capitol Blvd / Tumwater, WA 98504.
- **By FAX:** Department of Retirement Systems / 360.586.4225. (Follow with a hard copy by U.S. Mail or delivery).

You can find the appeal rules at **Ch. 415-08 WAC**. If you have any questions about the appeal process, you may contact the DRS Appeals Unit at rebekahc@drs.wa.gov or 360.664.7294.

**Existing language from Washington Code in LEOFF PLANS 2 and 1 Definitions.
Re: eligibility RCW 41.26.030 (6)(a)**

Very discriminatory language in reference to "legally adopted children" in RCW 41.26.030 (6)(a) STIPULATING AGAINST any child adopted after the disability retirement date

While "naturally born" children born after the disability retirement date DO receive benefits.

Further, it is very upsetting that because of this wrongful and discriminatory language, Lt. Boreen's minor children are not eligible for even survivor benefits that I now receive, should I die before they reach the age of 18. Where as other children that are biologically born after the disability retirement date would receive benefits until their 18th birthday. What can be more discriminatory than that?

EXCERPT – RCW 41.26.030. Definitions Section

(6)(a) "Child" or "children" means an unmarried person who is under the age of eighteen or mentally or physically disabled as determined by the department, except a person who is disabled and in the full time care of a state institution, who is:

- (i) A natural born child;
- (ii) A stepchild where that relationship was in existence prior to the date benefits are payable under this chapter;
- (iii) A posthumous child;
- (iv) A child legally adopted or made a legal ward of a member prior to the date benefits are payable under this chapter; or
- (v) An illegitimate child legitimized prior to the date any benefits are payable under this chapter.

(6)(b) A person shall also be deemed to be a child up to and including the age of twenty years and eleven months while attending any high school, college, or vocational or other educational institution accredited, licensed, or approved by the state, in which it is located, including the summer vacation months and all other normal and regular vacation periods at the particular educational institution after which the child returns to school.

Subject: Discrimination of Adopted Children

Honorable (select Legislators last spring).

I am writing to you concerning what would be considered by most people to be a deplorable situation, in which minor children of disabled Seattle fireman, and LEOFF 1 member Phillip Neill Boreen are denied benefits simply because they are adopted, versus “naturally” born. It is hard to believe. But it is true. Having gone through all the channels necessary, I find myself at your doorstep. Not only on behalf of our own minor children, but on behalf of children throughout the State of Washington who may be subjected to discrimination under any situation because of antiquated laws or ignorance.

I beg forgiveness in approaching you at this late date. In 2016, I began working diligently with the WA Dept. of Retirement Systems (DRS) regarding benefits for my children following the death of their father. I finally received a definitive decision the appeal process from DRS on February 1. Unfortunately, my children, or any adopted child, cannot receive benefit unless the language in the statute is changed. This discrimination of adopted children is inconsistent with other parts of Washington Code, but non-the-less, still rears its’ ugly head in this particular section of state law.

As progressive and sensitive to human rights as Washington seeks to be recognized for, I fervently hope that you will see this situation as something that can and should be remedied as quickly as possible. It appears that it is possible to remedy the discriminatory and unjust language in the existing statute, given the efforts and language provided by the Dept. of Retirement Systems recent decision. I’ve included in here for you to read.

I am asking for your intervention to change the language in RCW 41.26.030 (6)(a) and prevent discrimination against children by nature of the advent of their birth. Children, that through no fault of their own, are being considered lesser human beings by statute in the State of Washington, because of the language in RCW 41.26.030 (6)(a) I respectfully submit my plea as an advocate for our own and the future of other very loved children and their families in the State of Washington, and seek your help to correct this wrong. These children should not be separated out.

Sincerely,

Mrs. Katharine S. Boreen
Wife of Lt. P.N. Boreen, Seattle Fire Dept., deceased
(307) 272-4208 or (307) 272-6640

Title 11 - Probate and Trust Law

RCW 11.02.005

(3) "Degree of kinship" means the degree of kinship as computed according to the rules of the civil law; that is, by counting upward from the intestate to the nearest common ancestor and then downward to the relative, the degree of kinship being the sum of these two counts.

(6) "Heirs" denotes those persons, including the surviving spouse or surviving domestic partner, who are entitled under the statutes of intestate succession to the real and personal property of a decedent on the decedent's death intestate.

(8) "Issue" means all the lineal descendants of an individual. **An adopted individual is a lineal descendant of each of his or her adoptive parents and of all individuals with regard to which each adoptive parent is a lineal descendant.** A child conceived prior to the death of a parent but born after the death of the deceased parent is considered to be the surviving issue of the deceased parent for purposes of this title.

Title 26 - Domestic Relations

RCW 26.33.260

Decree of adoption—Effect—Accelerated appeal—Limited grounds to challenge—Intent.

(1) The entry of a decree of adoption divests any parent or alleged father who is not married to the adoptive parent or who has not joined in the petition for adoption of all legal rights and obligations in respect to the adoptee, except past-due child support obligations. **The adoptee shall be free from all legal obligations of obedience and maintenance in respect to the parent. The adoptee shall be, to all intents and purposes, and for all legal incidents, the child, legal heir, and lawful issue of the adoptive parent, entitled to all rights and privileges, including the right of inheritance and the right to take under testamentary disposition, and subject to all the obligations of a natural child of the adoptive parent.**

(2) Any appeal of an adoption decree shall be decided on an accelerated review basis.

(3) Except as otherwise provided in RCW [26.33.160](#) (3) and (4)(h), no person may challenge an adoption decree on the grounds of:

(a) A person claiming or alleging paternity subsequently appears and alleges lack of prior notice of the proceeding; or

(b) The adoption proceedings were in any other manner defective.

(4) It is the intent of the legislature that this section provide finality for adoptive placements and stable homes for children.



STATE OF WASHINGTON

**LAW ENFORCEMENT OFFICERS' AND FIRE FIGHTERS'
PLAN 2 RETIREMENT BOARD**

P.O. Box 40918 • Olympia, Washington 98504-0918 • (360) 586-2320 • FAX (360) 586-2329

October 19, 2017

TO: Steve Nelsen, Executive Director

FROM: Paul Neal, Senior Research and Policy Manager

SUBJECT: Survivor rights of adopted children of LEOFF Plan 2 members.

Question

Does the LEOFF definition of “child”, which excludes children adopted after retirement, apply to LEOFF Plan 2? If so, what benefits exclude such children?

Answer

Yes. RCW 41.26.030(6)(a)'s definition of child applies to both LEOFF Plan 1 and LEOFF Plan 2. It includes adopted children only if the adoption occurred “prior to the date benefits are payable under this chapter” thus excluding children adopted after retirement. Children adopted after the member's retirement do not qualify for the following LEOFF Plan 2 benefits:

- Death in service benefit, including
 - Retirement allowance either:
 - Selected by child if no surviving spouse or domestic partner; or
 - Survivor benefit if surviving spouse or domestic partner dies while child under age of majority; *RCW 41.26.510(2)(a)*or
 - 150% contribution refund; *RCW 41.26.510(2)(b)* or
 - Duty death benefit:
 - Unreduced survivor allowance; *RCW 41.26.510(4)*
 - Reimbursement of premiums; *RCW 41.26.510(5)*
 - Tuition Waiver; *RCW 28B.15.380*
 - *Note: children not eligible for lump sum death benefit; RCW 41.26.048*

- Establishing service credit for interruptive military service credit where member dies before establishing leave, *RCW 41.26.520(7)(d)*.



Definition of Child

Initial Consideration - April 25, 2018

Issue

- The LEOFF definition of “child” excludes children adopted after retirement from eligibility for benefits.

History

- **Member Correspondence**
- **LEOFF Plan 2 Board**
 - Member correspondence discussed at November 15, 2017 meeting
 - Comprehensive Report at December 19, 2017 meeting
 - Motion passed to not take any action at that time
- **SCPP**
 - Work session at December 12, 2017 SCPP meeting
 - Interest expressed, no action taken

Two Categories of Qualifying Children

- Biological Children who qualify by birth
- Children must meet statutory condition before member retires
 - Adopted children must be adopted prior to retirement
 - Stepchild relationship must have been in existence prior to retirement
 - Illegitimate child legitimized, i.e. paternity established prior to retirement
- Avoid perceived incentive to adopt a child in order to enhance LEOFF benefits

LEOFF Plan 2 Benefits for Qualifying Children

If no surviving spouse or surviving spouse dies while children under 18:

- Death in service benefit, choice between:
 - Retirement allowance or
 - 150% contribution refund - *RCW 41.26.510(2)(b)*
- Duty death benefit:
 - Unreduced survivor allowance - *RCW 41.26.510(4)*
 - Reimbursement of health insurance premiums - *RCW 41.26.510(5)*
 - Tuition Waiver - *RCW 28B.15.380*
- Establishing service credit for interruptive military service credit where member dies before establishing leave - *RCW 41.26.520(7)(d)*

LEOFF Plan 1 Benefits for Qualifying Children

LEOFF 1 increases benefits of retirees & surviving spouses with qualifying children:

- **Duty disability: Additional 5% of final average salary (FAS) for each child up to a maximum of 10% - RCW 41.26.130**
- **Death benefit:**
 - **Surviving spouse receives an additional 5% of FAS for each child up to a maximum of 10%**
 - **If no surviving spouse or surviving spouse dies with qualifying children, the children receive 30% of FAS for one child, 10% for each additional up to 60%, share and share alike - RCW 41.26.160, 41.26.161**



Thank You

Ryan Frost

Research and Policy Manager

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(360) 586-2325