



November 28, 2018  
LEOFF/PERS Eligibility Gap

## INITIAL CONSIDERATION

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## ISSUE STATEMENT

Gaps in eligibility in Law Enforcement Officers and Fire Fighters Plan 1 (LEOFF 1), Public Employees Retirement System (PERS), and Law Enforcement Officers and Fire Fighters Plan 2 (LEOFF 2) may have resulted in some career law enforcement officers and fire fighters not receiving a pension.

## OVERVIEW

This report will provide historical information on LEOFF 1, PERS, and LEOFF 2 eligibility and how some full-time career law enforcement officers and fire fighters could have not received a pension benefit.

## BACKGROUND AND POLICY ISSUES

### **LEOFF 1 Minimum Medical and Health Standards for Eligibility**

LEOFF 1 required law enforcement officers and fire fighters to meet minimum medical requirements to be eligible for membership in the plan<sup>1</sup>. Minimum medical and health standards were adopted into rule by the Department of Retirement Systems (DRS)<sup>2</sup>. These standards included requirements for, but not limited to, weight, height, hearing, and vision. Failing to meet the minimum medical requirements did not prevent people from being hired as law enforcement officers or fire fighters, instead it only prevented them from being members in LEOFF 1. An Attorney General's Office (AGO) memo stated the policy reason for excluding these employees from the pension system was a belief that they would result in increased costs to LEOFF 1 (See Appendix A).

If a law enforcement officer or fire fighter was not eligible for LEOFF 1 because of failing to meet the minimum medical and health standards, they typically were eligible for PERS.

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<sup>1</sup> RCW 41.26.045

<sup>2</sup> WAC 415-104-500 through 415-104-755

However, there was an exception to this general rule. Prior to 1994, the AGO advised DRS and employers that “in cities or towns having more than two law enforcement officers and/or two fire fighters, those persons who do not meet the minimum medical and health standards for LEOFF may not join any other pension system the city has available for its employees.” (see Appendix A). This exception created a class of police officers and fire fighters who were not in a pension system. This issue was further exacerbated by the fact that most law enforcement officer and fire fighter positions were not enrolled in Social Security. Therefore, this class of police officers and fire fighters were left without a pension and without Social Security.

### **LEOFF 2 Created**

Law enforcement officers and fire fighters who began service in October 1, 1977 forward were enrolled in LEOFF 2. LEOFF 2 did not impose any minimum medical and health standards for membership into the plan. Instead, employers had their own minimum medical and health standards to hire law enforcement officers and fire fighters. If an employer believes an applicant is physically and mentally qualified to be a law enforcement officer or fire fighter, the legislature did not impose additional minimum medical and health standards for membership in LEOFF 2.

### **LEOFF 2 Eligibility Window**

In 1981, the legislature passed SB 3244 to create a window for law enforcement officers and fire fighters who were not eligible for LEOFF 1 due to failing to meet the minimum medical and health standards to opt-in to LEOFF 2. The bill did not specify who was responsible for notifying, or define a process for identifying the employees eligible for this window. Instead, DRS sent a notice to all LEOFF employers regarding this window (see Appendix B).

Some law enforcement officers and fire fighters who would have been eligible for this window have stated that they never received notification from their employer or DRS and therefore, missed the window.

### **PERS Eligibility Clarified by Legislature**

In 1994, the legislature passed ESHB 2643 which clarified that the AGO’s interpretation of RCW 41.26.045 (See Appendix A) was not what the legislature intended. This bill was retroactive, making those law enforcement officers and fire fighters who were not eligible for LEOFF 1 due to failing to meet the minimum medical and health standards and who had not opted into LEOFF 2 during the 1981 window, eligible for membership in PERS back to the date they entered an eligible position.

Again, the bill did not specify who was responsible for notifying, or define a process for identifying the employees eligible for this window. The data DRS typically receives from

employers does not identify the position of employees. Therefore, DRS would not have had a list of law enforcement officers and fire fighters in PERS. Furthermore, for law enforcement officers and fire fighters who were not in LEOFF 1 or PERS, DRS would not have had any data from employers regarding these employees, since employers do not report ineligible employees. Consequently, DRS was reliant on each employer to identify employees impacted by this bill and report them to DRS, or for the employees to be aware of this law and to reach out to DRS for membership in PERS.

If a law enforcement officer or fire fighter qualified for PERS membership under this bill, their membership was mandatory. The employer was required to provide DRS with salary and service credit history and pay employer contributions. Members were required to pay their member contributions, and were given payment plan options by DRS.

If a vested member separates before paying their past contributions, DRS's past practice is to give the member two benefit options: 1) withdraw contributions foregoing a pension, or 2) receive a reduced pension benefit once the member is eligible to retire. Typically, DRS would have a record in the member's retirement file of having given the member this option prior to the member deciding to withdraw their contributions.

## **SUPPORTING INFORMATION**

Appendix A: AGO 1971 No. 30

Appendix B: DRS Employer Notice No. 80-10



**APPENDIX A**

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Attorney General Slade Gorton

OFFICES AND OFFICERS -- COUNTY -- DEPUTY SHERIFF -- PARTICIPATION IN RETIREMENT SYSTEM -- ELIGIBILITY

(1) Section 3, chapter 257, Laws of 1971, 1st Ex. Sess., does not prohibit a person who cannot meet the minimum medical and health standards necessary for membership in the Washington law enforcement officers' and fire fighters' retirement system from serving as a county deputy sheriff or from retaining his civil service position or rank under chapter 41.14 RCW.

(2) A county deputy sheriff who cannot meet the minimum medical and health standards necessary for membership in the Washington law enforcement officers' and fire fighters' retirement system is, if otherwise eligible under RCW 41.40.120, thereby required to participate in the Washington public employees' retirement system if the county by which he is employed is an employer under that system.

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October 5, 1971

Honorable Herbert H. Davis  
Benton County Prosecuting Attorney  
P. O. Box 510  
Prosser, Washington 99350

Cite as: AGO 1971 No. 30

Dear Sir:

By recent letter you have requested an opinion of this office relative to the construction and effect of § 3, chapter 257, Laws of 1971, 1st Ex. Sess. We paraphrase your questions as follows:

(1) Does § 3, chapter 257, Laws of 1971, 1st Ex. Sess., prohibit a person who cannot meet the minimum medical and health standards necessary for membership in the Washington law enforcement officers' and fire fighters' retirement system from serving as a county deputy sheriff or from retaining his civil service position or rank under chapter 41.14 RCW?

[[Orig. Op. Page 2]]

(2) If question (1) is answered in the negative, is the deputy sheriff envisioned by this question, if otherwise eligible under RCW 41.40.120, thereby required to participate in the Washington public employees' retirement system where the county by which he is employed is an employer under that system?

We answer question (1) in the negative and question (2) in the affirmative, for the reasons set forth below.

ANALYSIS

Prior to the enactment of chapter 257, Laws of 1971, 1st Ex. Sess., chapter 41.26 RCW clearly required that all "law enforcement officers" and "fire fighters" be members of the law enforcement officers' and fire fighters' retirement system (LEFF) provided for in that chapter. See, RCW 41.26.040 (1), which reads as follows:

" . . .

"(1) All fire fighters and law enforcement officers employed as such on or after March 1, 1970, on a full time fully compensated basis in this state shall be members of the retirement system established by this chapter with respect to all periods of service as such, to the exclusion of any pension system existing under any prior act except as provided in subsection (2) of this section.

" . . ."

In addition, the language of various definitional phrases contained in RCW 41.26.030, also clearly reflected this intent:

" . . .

"(2) 'Employer' means the legislative authority of any city, town, county or district or the elected officials of any municipal corporation that employs any law enforcement officer and/or fire fighter . . .

"(3) 'Law enforcement officer' means any person who is serving on a full time, fully compensated basis as a county sheriff or deputy sheriff, . . .

[[Orig. Op. Page 3]]

"(4) 'Fire fighter' means any person who is serving on a full time, fully compensated basis as a member of a fire department by an employer . . .

" . . .

"(14) 'Service' means all periods of employment for an employer as a fire fighter or law enforcement officer, for which compensation is paid, . . ." (Emphasis supplied.)

It is easy to see from the foregoing that the law enforcement officers' and fire fighters' act as it was originally passed by the legislature<sup>1</sup>/ contemplated that all persons employed by an "employer" as "fire fighters" or "law enforcement officers" would be subject to mandatory coverage under the retirement system. However, by its recent enactment of § 3, chapter 257, Laws of 1971, 1st Ex. Sess., the legislature has created an exception to this general rule with the following language:

"After the effective date of this act no law enforcement officer or fire fighter, including sheriff, may become eligible for coverage in the pension system established by this chapter, until he has met and has been certified as having met minimum medical and health standards: PROVIDED, That in cities and towns having not more than two law enforcement officers and/or not more than two fire fighters and if one or more of such persons do not meet the minimum medical and health standards as required by the provisions of this 1971 act, then such person or persons may join any other pension system that the city has available for its other employees."

By virtue of this enactment it is to be seen that now, the only newly employed law enforcement officers or fire fighters who are to become members of the LEFF system are those who meet and [[Orig. Op. Page 4]] have been certified as having met minimum medical and health standards adopted by the state retirement board.<sup>2</sup>/

Question (1):

Your first question asks whether, in view of this new statute, a person who cannot meet these minimum medical and health standards is prohibited from being employed as a county deputy sheriff or from retaining his civil service position or rank. As noted above, § 3, chapter 257, Laws of 1971, 1st Ex. Sess., merely creates an exception to the previous mandatory coverage under the LEFF system for those new employees who have not met or have not been certified as having met those standards. The relevant language is as follows:

"... no law enforcement officer or fire fighter ... may become eligible for coverage in the pension system ... until he has met and has been certified as having met minimum medical and health standards: ..."

It is important to note the use of the phrases "law enforcement officer" and "fire fighter." RCW 41.26.030 (3) and (4), supra, define these terms as meaning a person "who is serving" as a law enforcement officer or fire fighter. Both terms obviously relate to a person who is presently employed. Therefore, the new statute in question provides no restriction on employment, but merely upon coverage in the law enforcement officers' and fire fighters' retirement system. For this reason, a person's failure to meet the minimum medical and health standards for membership in the LEFF system does not preclude his continued employment; nor does it affect his civil service position or rating. Your first question, therefore, is answered in the negative.

Question (2):

Your county, as we understand it, is and for many years has been an "employer" participating in the Washington public employees' retirement system (PERS). Your second question asks whether, in view of the inability of the deputy sheriff described in question (1) to qualify for membership in the LEFF system, this individual is now to be covered by PERS [[Orig. Op. Page 5]] instead.

We begin our response by noting the material provisions of RCW 41.40.120, relating to membership in PERS as follows:

"Membership in the retirement system shall consist of all regularly compensated employees and appointive and elective officials of employers as defined in this chapter who have served at least six months without interruption or who are employed, appointed or elected on or after July 1, 1965, with the following exceptions:

"...

"(4) Employees holding membership in, or receiving pension benefits under, any retirement plan operated wholly or in part by an agency of the state or political subdivision thereof, ..."

It is, of course, partially because of subsection (4) of this statute that a county deputy sheriff who is a member of the LEFF system is not also to be covered by PERS where his county is an employer under both. 3/ Conversely, if the deputy sheriff is not a member of the LEFF system, he falls within the mandatory coverage of PERS unless (a) one of the other exclusions in RCW 41.40.120 is applicable (and we have paraphrased your question to exclude this possibility) or (b) he is to be regarded as being barred from such coverage by virtue of the proviso to § 3, chapter 257, Laws of 1971, 1st Ex. Sess., supra, which (repeated for ease of reference) says:

"... PROVIDED, That in cities and towns having not more than two law enforcement officers and/or not more than two fire fighters and if one or more of such persons do not meet the minimum medical and health standards as required by the provisions of this 1971 act, then such person or persons may join any other pension system that the city has available [[Orig. Op. Page 6]] for its other employees."

This proviso expressly permits a physically disqualified (for LEFF membership) law enforcement officer or fire fighter employed by a city or town to be covered by another pension system only if such city or town does not have more than two law enforcement officers or fire fighters (as the case may be) in its police or fire department. By implication, in cities or towns having more than two law enforcement officers and/or two fire fighters, those persons who do not meet the minimum medical and health standards for LEFF may not join any other pension system the city has available for its employees. The issue raised by your second question is

whether this negative implication should be extended to those physically disqualified law enforcement officers or fire fighters who are employed by some other category of employer; e.g., a county (as here) or a fire protection district. We think not.

At the present time, this state has by statute provided retirement security for almost every type of employee of state and local government.<sup>4/</sup> It is hardly consistent with this manifested state policy and legislative purpose to exclude certain employees of political subdivisions from membership in all pension systems. Any such revolutionary change would have to be clearly expressed or implied (as above).

Of course, it is a rule of statutory construction that provisos should be strictly construed and not be held to include any instance not clearly within the purpose or express terms of the proviso. 50 Am. Jur., Statutes, § 437. In this instance, application of the rule limits the proviso's affect, both affirmative and negative, to "cities and towns."

It is also a rule of statutory construction that:

". . . in cases involving pensions when there is statutory ambiguity, doubt should [[Orig. Op. Page 7]] be resolved in favor of the party for whose benefit the pension statute was intended. . . ." Bowen v. Statewide Retirement System, 72 Wn.2d 397, 402, 433 P.2d 150 (1967).

Here, the statute in question was obviously intended to protect the fiscal integrity of the LEFF retirement system by excluding those members whose questionable health might lead them to seek retirement benefits (either for service or for disability) earlier than those whose health was clearly established. Of course, this end is served by the exclusion of persons who cannot meet the minimum medical and health standards necessary for membership in the system. Nothing is added by excluding those same persons from any other pension systems - particularly a pension system such as PERS which does not require, as a prerequisite for membership, that an employee have met minimum medical and health standards.

For these reasons, we conclude that a county deputy sheriff who is unable to meet the minimum medical and health standards required for membership in the LEFF retirement system, if otherwise eligible for membership in PERS under RCW 41.40.120 (4), is required to participate therein. Your second question is, therefore, answered in the affirmative.

We trust the foregoing information will be of assistance to you.

Very truly yours,

SLADE GORTON  
Attorney General

WAYNE L. WILLIAMS  
Assistant Attorney General

**\*\*\* FOOTNOTES \*\*\***

<sup>1/</sup>Chapter 209, Laws of 1969, 1st Ex. Sess., as amended by chapter 6, Laws of 1970, 1st Ex. Sess.

<sup>2/</sup>See, RCW 41.26.050 and § 4, chapter 257, Laws of 1971, 1st Ex. Sess.

<sup>3/</sup>In addition, see RCW 41.26.040 (1), supra, which provides for exclusive LEFF coverage for the members of that system.

<sup>4/</sup>See, chapter 41.24 RCW (volunteer firemen's relief and pensions); chapter 41.26 RCW (law enforcement officers' and fire fighters' retirement system); chapter 41.28 RCW (retirement of personnel in certain first class

cities); chapter 41.32 RCW (teachers' retirement); chapter 41.40 RCW (Washington public employees' retirement system); and chapter 41.44 RCW (state-wide [[statewide]]city employees' retirement system).



STATE OF  
WASHINGTON

Diry Lee Ray  
Governor

DEPARTMENT OF RETIREMENT SYSTEMS

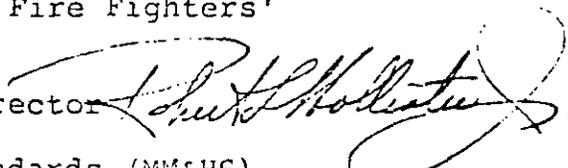
1925 E. Union, Olympia, Washington 98504 (360) 755-5283  
Dr. Robert L. Hollister, Jr., Director

M E M O R A N D U M

August 15, 1980

DRS Notice No. 80-010

To: Personnel/Payroll Officers  
Law Enforcement Officers and Fire Fighters'  
Retirement System

From: Robert L. Hollister, Jr., Director 

Subject: Minimum Medical & Health Standards (MM&HS)

My memorandum of July 30, 1979 (see DRS Notice No. 79-015) included instructions on the application of MM&HS to seven classes of employees. All seven classes are repeated here and classes 1, 3, 5 and 7 have been modified to reflect legislative enactment of chapter 130, Laws of 1980 (SB 3244), which adds a new section to chapter 41.26 RCW. The new provision allows a "law enforcement officer" or "fire fighter" previously excluded from membership or the right to reenter membership in this System due to failure to meet the MM&HS an opportunity to elect to become a member under LEOFF Plan II.

Persons employed as "law enforcement officers" or "fire fighters" on June 12, 1980, must make the election on or before December 31, 1981. Persons reemployed as "law enforcement officers" or "fire fighters" after June 12, 1980, shall have one year from the date of reemployment or until December 31, 1981, whichever is later, to make the election.

All persons initially employed by an employer, as defined in RCW 41.26.030(2)(b) as "law enforcement officers" or "fire fighters" on or after June 12, 1980, are required to enter LEOFF Plan II and MM&HS do not apply.

The seven classes of employees mentioned in the first paragraph are:

1. Individuals who were ever Plan I members and who reenter employment after a break in service of more than six months must again meet the requirements of the MM&HS and be certified as again meeting them by their employer. Note that individuals in this category who cannot meet this requirement cannot be reinstated in Plan I; however, they may elect to be enrolled in Plan II.

**EXHIBIT 32-1**

2. An individual who was first employed prior to October 1, 1977, but did not successfully pass the MM&HS until after that date will be enrolled as a Plan I member retroactive to the first day of employment.
3. An individual who was first employed after October 1, 1977, and failed to pass the MM&HS may elect to be enrolled in Plan II.
4. An individual who was first employed after October 1, 1977, and prior to July 1, 1979, and passes the MM&HS will be enrolled as a Plan II member effective on the date of employment. Certification is required.
5. An individual who was first employed after October 1, 1977, and prior to July 1, 1979, and failed to pass the MM&HS may elect to be enrolled in Plan II.
6. An individual who was first employed on or after July 17, 1979, is not required to take the MM&HS examination as a precondition for entry into the LEOFF retirement system, nor is any certification required. Note that this change relates only to membership in the retirement system. Retirement laws neither require nor preclude employers requiring a physical examination prior to employment.
7. Individuals who were first employed in a LEOFF position prior to July 1, 1979, and failed to successfully meet the MM&HS or terminated prior to completing the MM&HS examination and who were employed again (same or different employer) on or after July 1, 1979, must complete and pass the MM&HS examination. If their first employment was prior to October 1, 1977, they will become members of Plan I; if it was on or after October 1, 1977, they will become members of Plan II. If the individuals fail to pass the examination, they may elect to be enrolled in Plan II.

All exceptions to the MM&HS previously authorized by law are still in effect.

EXHIBIT 32-2



# LEOFF/PERS Eligibility Gap

Initial Presentation  
November 28, 2018

# Issue

- **Gaps in eligibility in LEOFF 1, PERS, and LEOFF 2 may have resulted in some career law enforcement officers and fire fighters not receiving a pension**

# Overview

- This presentation will provide historical information on LEOFF 1, PERS, and LEOFF 2 eligibility and how some full-time career law enforcement officers and fire fighters could have not received a pension benefit.

# LEOFF 1 Eligibility

- Full-time and fully-compensated fire fighters and law enforcement officers hired before October 1, 1977 were eligible for LEOFF 1
- Exception: They didn't meet minimum medical and health standards

# PERS Eligibility

- Law enforcement officers and fire fighters not eligible for LEOFF 1 due to minimum medical and health standards were eligible for PERS
- Exception: They were employed in a city or town with more than two law enforcement officers or fire fighters

# 1977 - LEOFF 2 Created

- Full-time and fully-compensated fire fighters and law enforcement officers first employed after October 1, 1977 are LEOFF 2 members
  - No minimum medical and health standards
- Did not include those employed prior to October 1, 1977 who were ineligible for LEOFF 1

# 1981 - LEOFF 2 Eligibility Window

- Allowed law enforcement officers and fire fighters not in LEOFF 1, due to failing to meet minimum medical and health standards, a window to join LEOFF 2
- DRS relied on employers to identify and notify employees of window

# 1994 - PERS Eligibility Clarified by Legislature

- Corrected AGO's interpretation of employer eligibility for PERS law enforcement officers and fire fighters
  - Applied retroactively
  - DRS relied on employers to notify eligible employees
  - Employees and employers had to pay back past contributions owed

# Vested Member Withdrawal

- If a vested member separates before paying their past contributions DRS's past practice is to give the member two benefit options:
  1. withdraw contributions foregoing a pension, or
  2. receive a reduced pension benefit once the member is eligible to retire



**Thank You**

**Jacob White**

**Senior Research and Policy Manager**

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