

403(b) LIMITS

The government provides fairly high 403(b) contribution limits for those who want to plan for retirement. The maximum potential 403(b) contribution is \$55,000 per year for fiscal year 2018 if you meet certain conditions. The following is a breakdown of the potential 403(b) contributions that can be made:

Basic salary deferral (the maximum payroll amount an employee can contribute to their 403(b) plan by having money taken out of their check) is \$18,500 for fiscal year 2018.

Employees 50 years and older can add \$6,000 per year in special 403(b) contributions called “catch-up” 403(b) contributions. This is in addition to the \$18,500 they can put aside as a regular employee.

Some people are eligible for an additional 403(b) contribution known as a 403(b) Lifetime Catch-up. This special type of 403(b) contribution is only available to employees who have worked for a qualified organization for 15 years or longer. Often, this special 403(b) contribution is referred to as the “15-year rule” from IRS Publication 571.

These 403(b) contributions, combined with any matching funds provided by the employer, cannot exceed 100 percent of compensation or \$55,000 for the fiscal year 2018. Thus, the only people who will be able to take advantage of the total maximum 403(b) contribution are those who work for a company that has extraordinarily rich benefits.

The government allows these 403(b) contribution limits to increase for inflation by releasing the cost of living adjustment figures each year.

Option I: In addition to the base salary described in Section III.A , the District shall pay into the Superintendent’s plan account under the District’s (IRC section 403(b) plan) (IRC section 457(b) plan) an employer-provided nonelective contribution no less than \$5,000 each year. Both parties intend, but neither assures the other, that those contributions be excluded from the Superintendent’s gross income for federal income tax purposes. The Superintendent shall direct investment of the nonelective contributions and amounts attributable to them, but shall direct investment subject to the plan’s terms, including the District’s selection of the plan’s investment alternatives.

If the Superintendent wishes to maximize the amount of money going into a 403(b) account (accounting for both voluntary wage deferrals and employer contributions and any limits that apply to each type of contributions), the Superintendent may want to keep this language largely the same as it is now – as a “non-elective contribution.” The downside of this approach is that employer contributions made directly to a 403(b) plan will most likely be considered a “fringe benefit” under WAC 415-112-480 and will probably not be considered a part of the Superintendent’s compensation for the purpose of calculating their person benefit.

WAC 415-112-480

- Are fringe benefits earnable compensation?
- Fringe benefits provided by an employer are not a salary or wage, and are not earnable compensation. Fringe benefits include, but are not limited to:
 - (1) Employer retirement contributions.
 - (2) Any type of insurance such as medical, dental or life insurance; and any employer contribution to meet the premium or charge for the insurance; or
 - (3) Any employer payments into a private fund to provide health or welfare benefits for you or your dependents, with the exceptions of compensation paid pursuant to a bona fide cafeteria plan, flexible benefit plan or similar arrangement as described in WAC 415-112-4604

Option 2: In addition to the base salary described in section III.A, the District shall provide additional salary compensation in the form of an elective contribution of no less than \$5,000 each year to the Superintendent's plan account under the District's {IRC section 403(b) plan}{IRC section 457(b) plan} This shall be an elective contribution, shall be considered additional income beyond the Superintendent's base salary and will be run through payroll as a deferred wage each month in the amount of 1/12 of the total annual contribution of \$5,000. This contribution is intended to be additional salary compensation and shall be made in a manner that the Washington State Retirement Systems will consider it to be salary compensation (or "earnable compensation"), if different than manner described herein. The District shall report its contribution to the Washington State Retirement System as salary compensation ("earnable compensation")

Option 2: However, if the Superintendent's goal is to maximize their total compensation reported to Department of Retirement Systems (DRS) for the purpose of calculating their pension, they may want this section to be considered additional salary on top of the base salary described in Section III.A and treated as a voluntary deduction from their payroll. The downside to this approach is that it may not maximize the total annual contributions that can be made to a 403(b) plan. But if the payment is treated as a deferred wage (i.e., it is a voluntary deduction from their compensation run through the payroll) then it may be considered a part of the Superintendent's compensation for the purpose of calculating their pension. See WAC 415-112-4609.

WAC 415-112-4609 ARE PAYROLL DEDUCTIONS EARNABLE COMPENSATION?

Amounts withheld from your salary or wages are earnable compensation. Examples include:

- (1) Your employers contributes to the TRS (compare WAC 415-112-480 regarding employer contributions);
- (2) Amounts withheld for federal income tax purposes; and
- (3) **Other authorized voluntary deductions, such as the deferred compensation plan on 403(b) plan defferals.**

Superintendent A was particularly concerned with 403(b) terms in his/her contract and obtained assurances that this contribution would be considered salary and would be reported to the Washington State Department of Retirement Systems (DRS) as such. Section III.G of the Employment Agreement reads as follows:

On or before June 30th of each year of this Employment Agreement beginning with the 2014-2015 school year, the District shall make a contribution to the Superintendents 403(b) Tax Sheltered Annuity (“TSA”) Plan of his or her choosing in the amount of \$24,000. The contribution made for June 30, 2015 shall be 5/12th of this amount. **This contribution shall be reported** to the Washington State Retirement Systems **as salary compensation** as may be permitted by the regulations of that agency.

“The District breached Superintendent A’s contract when it failed to report contributions to his/her 403(b) Plan as salary compensation to DRS Section III.G of Superintendent A’s Employment Agreement simply states: “On or before June 30th of each year of this Employment Agreement ...the District **shall make** a contribution to the Superintendent’s 403(b) Tax Sheltered Annuity (“TSA”) Plan.” It continues by stating that “This contribution **Shall be reported** to the Washington State Retirement Systems as compensation as may be permitted by the regulations of that agency.” The use of “shall” in this case makes it mandatory that the District (i) make the annual \$24,000 contribution on or before June 30, and (ii) report such contribution as salary. This clause provides that it was the District’s obligation to make the contribution in a way that it would be reported to DRS as salary compensation.



SUFFICIENT CAUSE V. JUST CAUSE

WHICH IS BETTER?

I. TERMINATION; SEVERANCE PAY

- A. This Agreement may be terminated by mutual agreement, retirement, or resignation.
- B. During the term of this agreement, the Superintendent will be subject to discharge for sufficient cause.
- C. Should the Board believe probable cause exists to terminate this Agreement, the Board must deliver a written statement of the cause for termination, including the underlying facts giving rise thereto, to the Superintendent. The Superintendent shall then be entitled to a conference with the Board, at which time the Superintendent shall be given a reasonable opportunity to address the written statement of grounds for termination, including the underlying facts. The Superintendent shall have the right to have a representative of his/her choice at the conference with the Board.
- D. In the event that the Board chooses to terminate this Agreement based on its determination of probable cause, the Superintendent may appeal any final decision by the Board to do so under RCW 28A.405.300. If the Superintendent appeals the decision to terminate this Agreement under RCW 28A.405.300, he/she shall continue to be paid until the hearing officer renders a decision. The hearing officer shall determine whether there is sufficient cause or causes to terminate the contract.
- E. Should the Board or District terminate this Agreement for any reason not amounting to sufficient cause as defined under RCW 28A.405.300 and associated case law, then District shall pay the Superintendent, as severance pay, _____ months compensation. In the event of such termination, the Superintendent shall also be entitled to COBRA benefits, and the District shall pay the costs of such benefits for a period of at least ____ months. The Superintendent shall also be entitled to any other compensation that would be available to him/her under this Agreement, such as lump sum compensation for unused vacation and sick leave earned under the terms of this Agreement.

JUST CAUSE

Professor Carol Daugherty developed in 1966 a seven-part “just cause” analysis. The seven factors have been widely adopted including in Washington in Civil Serv. Comm’n of City of Kelso v. City of Kelso 137 Wash.2d 166, 176, 969 P.2d 474, 480 (1999). The factors are:

1. The employee knew of the company’s policy
2. The company’s policy was reasonable
3. The company investigated to determine that the employee violated the policy
4. The investigation was fair and objective
5. Substantial evidence existed of the employee’s violation of the policy
6. The company’s policy was consistently applied
7. The discipline was reasonable and proportional (the punishment fit the crime)

SUFFICIENT CAUSE

“Sufficient cause for a teacher's discharge exists as a matter of law where the teacher's deficiency **is unremediable** and (1) materially and substantially affects the teacher's performance or (2) lacks any positive educational aspect or legitimate professional purpose.

Courts consider the *Hoagland* factors to determine whether a teacher's conduct substantially undermines a teacher's effectiveness. The eight factors are:

- (1) the age and maturity of the students;
- (2) the likelihood the teacher's conduct will have adversely affected students or other teachers;
- (3) the degree of the anticipated adversity;
- (4) the proximity or remoteness in time of the conduct;
- (5) the extenuating or aggravating circumstances surrounding the conduct;
- (6) the likelihood that the conduct may be repeated;
- (7) the motives underlying the conduct; and
- (8) whether the conduct will have a chilling effect on the rights of the teachers involved

Fed. Way Sch. Dist. No. 210 v. Vinson, 172 Wash. 2d 756, 772, 261 P.3d 145, 153 (2011)

WHAT DOES THE SECOND PHRASE MEAN AND WHEN DOES IT APPLY?

(2) Lacks any positive educational aspect or legitimate professional purpose:

1. Sexual contact with students
2. Physically or emotionally abusing a student

ATTORNEY FEE PROVISIONS

A. In any suit or action relating to this Agreement, the substantially prevailing party shall be entitled to recover its costs, including attorney fees, from the other party.