

In the Matter of the Interest Arbitration

between Washington State Patrol Troopers' Association
("Association")

and

Findings,
Discussion and
Award.

Washington State Patrol ("Patrol" of "WSP")

Case Numbers:	Washington Public Employee Relations Commission case Numbers 21892-I-08-0514 and 21803-M-08-6826. Arbitrator's case No. J36.
Representing the Association:	Jeffrey Julius, Esq., and Aitchison and Vick, 5701 Sixth Avenue South, Suite 491A, Seattle, WA 98108-2568.
Representing the Patrol:	Elizabeth Delay Brown, Asst. Attorney General, P.O. Box 40145, Olympia, WA 98504-0145.
Arbitrator:	Howell L. Lankford, P.O. Box 22331, Milwaukie, OR 97269-0331.
Hearing held:	In the offices of the Attorney General in Tacoma, Washington on August 11-15, 2008.
Witnesses for the Association:	Anya King, Tommy Pillow, John Martin, and Richard W. Jensen.
Witness for the Patrol:	John Richard Batiste, Kara Larren, David Karnitz, Brian Ursino, Darrin Grondel, Karl Nagel, Melissa Rubenstein, Cary Randow, Diane Lutz, Garry D. Austin, and Wolfgang Opitz.
Post-hearing argument received:	From both parties by email on September 11, 2008.
Date of this award:	September 25, 2008.

This is an interest arbitration under the authority of RCW Chapter 41.56. RCW 41.56.473 and 41.56.475 specifically provides for interest arbitration here. The parties stipulate that the preliminary steps leading to interest arbitration have been taken and the conditions for the attachment of my jurisdiction have all been met. In particular, PERC certified a long list of issues to interest arbitration, and the bargaining representatives and counsel diligently whittled that list down before the interest arbitration hearing and then reduced it further as that hearing progressed.¹ The hearing was orderly. Each party had the opportunity to present evidence, to call and to cross examine witnesses, and to argue the case. Testimony was taken down by a court reporter, and the parties had the benefit of a transcript when preparing their Post-hearing Briefs.

THE ISSUES

PERC certified approximately 30 issues to interest arbitration. By the conclusion of the interest arbitration hearing the majority of those disputes were resolved. Those that remain divide into two groups: issues of compensation, and issues of assignment. Issues of compensation include wages (Section 28.2), Court Appearances (Section 12.15D), Vacation Accrual (Section 14.2), Uniforms and Equipment (Section 23.2.C), and premium pay for BAC Technicians. WSP offers an across-the-board compensation increase of 1.6% on July 1, 2009 and 1.7% on July 1, 2010; and the Association proposes an increase of the Seattle area CPI-W, with a minimum of 4% and a maximum of 6%, on each of those dates. Issues of assignment include Employer Assignments/Transfers, Specialty Assignments (Sections 11.3, 11.5, 11.5E, and a new article proposed by the Patrol), Motorcycles (Section 23.9), and a new definition of “Line Employee” (Section 9.1).

STATUTORY AUTHORITY

. Here is the controlling language of RCW 41.56.475:

(4) In making its determination, the arbitration panel shall be mindful of the legislative purpose enumerated in RCW 41.56.430 and, as additional standards or guidelines to aid it in reaching a decision, shall take into consideration the following factors:

- (a) The constitutional and statutory authority of the employer;
- (b) Stipulations of the parties

1. Appendix I shows the issues originally certified to interest arbitration and the disposition of each of them.

- (c) Comparison of the hours and conditions of employment [sic] of personnel involved in the proceedings with the hours and conditions of employment [sic] of like personnel of like employers of similar size on the west coast of the United States.
- (d) Changes in any of the foregoing circumstances during the pendency of the proceedings; and
- (e) Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of matters that are subject to bargaining under RCW 41.56.473.

In the usual interest arbitration dispute, after quoting the controlling statutory authority, the arbitrator might turn to a review of court exposition of that language or, at least, to a study of the pronouncements of other interest arbitrators operating under the same statutory authority in the past. That assistance is not available in this case. The statutory language set out above is specific to the interest arbitration of disputes between WSP and the WSPTA; and the parties have never before resorted to the process authorized by that statute. Unfortunately, there is room for some dispute about the proper application of that statute when it turns to its list of factors to be considered by an interest arbitrator.

The two potential problems with this language are both in the subsection (c) which deals with comparability. First, how should an interest arbitrator apply the statutory expression “on the west coast of the United States?” That language certainly encompasses Oregon and California; but does it include Alaska and Hawaii? In the case at hand, neither party urges consideration of those two west coast states, so it is not necessary to resolve that potential issue.² But is “on the west coast” limited to states with Pacific Ocean coastline, or is the expression to be taken in a looser sense that would include the second tier of “west coast” states, Idaho, Nevada and Arizona?³ Here, each party proposes some consideration of wages, hours and conditions of employment in some second tier states, so neither party argues that “on the west coast” should be limited to states with ocean frontage.

2. Moreover, I took notice at hearing that a substantial part of Alaska State Troopers are stationed “in the bush,” i.e. in remote areas of Alaska, and therefore have conditions of employment that make them questionable candidates for comparison.

3. At least one interest arbitrator has concluded that “on the west coast” (although in a different part of the statutory scheme) “clearly means Oregon and California.” Timothy Williams (NAA) in his 2006 Home Child Care Provider award (PERC #20690-I-06-483, at 28).

The larger problem with Subsection (c) is in its use of the expression, “hours and conditions of employment.” This seems to be the final two-thirds of the traditional expression, “wages, hours, and conditions of employment” which appears repeatedly in the Washington statutory scheme, including RCW 41.56.465, which sets out the factors to be considered in interest arbitration for local government police and fire units. The expression “wages, hours and other conditions of employment” came into American labor law in 1935 (in a slightly longer version) in Section 9(a) of the National Labor Relations Act. Subsequent case law took that expression as the label for the collection of topics which an employer and union *must* bargain over on demand, “rates of pay, wages, hours of employment, and other conditions of employment.” When collective bargaining later appeared in the public sector, that same language—“wages, hours and other conditions of employment”—became the focus of the local case law harmonizing the general duty to bargain with the specific statutory responsibilities of various employing agencies. In short, in its full form, the phrase has a long and rich legal history.

The statutory problem in the case at hand, to repeat, is that the Legislature left out the “wages” part of the expression, “wages, hours and other conditions of employment.” The parties in this case generally attribute the omission to a drafting error;⁴ but I find that conclusion beyond my authority: it is not for an interest arbitrator to question whether the Legislature meant something quite different from what it clearly said. Under the usual rules of statutory interpretation, it is significant that the statutory scheme uses the full, traditional, three-part expression elsewhere, but uses only “hours and conditions of employment” here. Therefore, I have done my best to consider those two elements with respect to the various other employers offered by these parties as comparables. The result was not helpful, and neither party argues that it should be or could be helpful.

That leaves the primary statutory factor in this case as the “etc.” subsection, (e), which authorizes and requires consideration of “Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of matters that are subject to bargaining under RCW 41.56.473.” There is no dispute that one such factor is the comparison of wages, hours, and other conditions of employment of employees performing

4. It is perfectly clear that the Legislature intended to authorize bargaining over the missing third of the traditional expression. For example, RCW 49.56.473 talks about “negotiating wages, wage-related matters.”

similar duties for comparable employers. (RCW 41.56.465, for example, provides several iterations of that “traditional” consideration of this factor.)

ISSUES OF COMPENSATION

The parties generally agree on the relevant factors to be considered. Indeed, the parties generally agree on the facts with respect to those factors; their disputes are pretty much limited to matters of *degree*. The agreed factors to be considered are four. I will begin with WSP’s “ability to pay” because this is the factor that most likely frustrated the parties’ attempts to reach agreement without interest arbitration.⁵ Next come recruitment and retention, comparability, changes in the cost of living, and productivity.

Ability to Pay. In Washington, the Governor is required to propose a balanced budget based on the November income estimates made by the Economic and Revenue Forecast Counsel (ERFC). In June, 2008, the Office of Financial Management made public ERFC’s most recent forecast:

Excluding legislation enacted in the 2008 session, the General Fund-State revenue forecast has been reduced by \$166 million for the combined 2007-2008 and 2009-2011 biennia. The new U.S. economic forecast exhibits weaker growth of GDP, employment and income than did the forecast adopted in February. The forecast assumes that the economy slumps once again to a near-recessionary state in the fourth quarter of this year and first half of next year as the impact of the tax rebates wears off. The new forecast also expects higher inflation in 2008 and 2009 than assumed in February. The weaker national outlook is the main reason for the reduction in the state’s economic and revenue forecasts.

The actual standard against which the Governor must present a balanced budget will be the *November* forecast, which is still several months down the road. But after the publication of the June ERFC forecast, the revenue report for June and the subsequent revenue report for July each came in about \$60 million below the projections underlying the June forecast.⁶ And I take notice that a machinist strike,

5. A fuller caption for this factor would be something like, “the financial condition of the employer and its ability to devote funding to the costs of the parties’ proposals.” “Ability to pay” has become convenient shorthand.

6. Higher gasoline prices drive State revenues down: gas tax is collected per gallon sold, so reduced consumption reduces gas tax income, and high gas prices drive proportionately more spending into sales tax exempt food items.

now in its third week, has stopped production at Boeing. The State Senate Ways and Means staff projection paints a similarly bleak picture—and the basis for this picture, too, does not include the \$60 million per month reduction in revenue for June and July—projecting about a \$2.7 billion shortfall in the general fund for the 2009-2011 biennium.

The additional \$120 million which failed to come in through the June and July revenue reports, on top of the June ERFC projection of a \$167 million shortfall for the combined current and next biennia, led the Governor to impose a mandatory hiring freeze (for new vacancies) at the beginning of August.

Only about 15% of WSP's \$47 million budget for the current biennium comes from the general fund. Most, 71%, of the Patrol's funding comes from the State Patrol Highway Account (SPHA); and the SPHA, in turn, is funded mostly from automobile license application and renewal fees.⁷ That funding is part of the State's Transportation Budget. Most of the other 29% of the income comes out of the Omnibus Budget, including the 15% from that budget's General Fund. The final 14% comes from some 20 different accounts, none of which comprises over 2.5% of WSP's budget.

The 2005-2007 Legislature directed a study of the SPHA, and that study was performed by the Governor's staff together with House and Senate committee staff. The long range study projects a growing gap between SPHA revenues and the Patrol's expenses over the next sixteen years. Focusing on the current biennium, "The projected revenue shortfall in the SPHA for the 2007-2009 Biennium is \$45.7 million."⁸ In order to cover that \$45.7 million, the Governor's budget proposes to transfer additional funds into SPHA: about \$12.7 million from the Highway Safety Account, \$31.6 million from the Motor Vehicle Account, and just over \$1.4 million from the Licensing Service Account. Two of the report's conclusions stand out in the context of this interest arbitration dispute:

7. Of the \$30 annual registration fee, \$20.35 goes to SPHA regardless of whether the fee is for a new license or for a renewal; \$2.02 of new license fee goes to the Puget Sound Ferry Account (\$0.93 of a renewal), and \$7.93 of a new license fee goes to the Motor Vehicle Fund (\$8.73 of a renewal). See RCW 46.68.030. SPHA's 71% of WSP's budget also includes some other fee income, such as temporary license fees and driving record abstract fees. A separate SPHA-Federal account passes along about \$10 million in federal funds restricted to commercial vehicle enforcement.

8. The Governor's proposed budget had already reduced the red ink in the Patrol's original budget proposal from about \$60 million down to \$45.7 million.

Absent new revenue to the State Patrol Highway Account, a continued reallocation of resources within the overall transportation arena will be required each biennium over the life of the 16-year financial plan to fund the critical services of the State Patrol. While manageable as an interim solution, the long term policy tradeoffs of other transportation priorities may be intolerable.

And,

The State Patrol Highway Account currently faces a \$35 million shortfall and competes for funding from other accounts that would otherwise fund construction projects. ***

Recruitment and Retention. Once again, there is no dispute that WSP has experienced a continuing, substantial problem in recruitment; and there is no dispute that, as the Chief testified, WSP must be economically competitive in order to attract and retain quality Troopers. The Chief and other official representatives testified to that problem in the interest arbitration hearing and have done so repeatedly in legislative hearings, particularly during 2007. The table at the right sets out the dimensions of that problem by a series of snapshots of WSP’s vacancy history of over the last half dozen years. (Vacancy rates vary over the course of each year, of course. At the time of the interest arbitration hearing in August, 2008, the vacancies were down to about 45, which is still a bit over 4%.)

FY	Budgeted	Vacant
‘02	1,056	33
‘03	1,056	75
‘04	1,071	79
‘05	1,078	63
‘06	1,071	93
‘07	1,075	107
‘08	1,090	118

Vacant Unit Positions

The Legislature has taken note of WSP’s continuing recruitment problem. Vacant positions mean that funding intended for those positions is available for other uses by the agency. The most recent legislative session tied a \$3.3 million appropriation to “salaries and benefits associated with accretion in the number of troopers employed above 1,158 authorized commissioned troopers, or solely for training new cadets; however the amount provided in this subsection is contingent on the Washington state patrol submitting a 2009-11 budget that fully funds field force operations without reliance on a projected vacancy rate.” (The target mentioned for “commissioned troopers” presumably includes a substantial number of positions outside the bargaining unit.) The Patrol has made serious efforts at recruitment; and the vacancy problem persists in the face of those efforts. As far as this record shows, the problem is not getting better: It is particularly striking that this year, for the first time ever, the Patrol was unable to fill up a Trooper class.

The vacancy history takes on added urgency in light of the recent history of decline in the number of applications for the vacant positions. The table on the following page sets out that history, taking 1995 as the base year. After eight years of fairly steady decline, application volume hit a low in 2003 of just over 30% of the 1995 base. Since then, the volume has slowly climbed back, but it is still down almost a third from 1995.

It is fairly common to find that recruitment problems are accompanied by retention problems. That is a particularly vicious combination for police agencies, because it is so very expensive to train a new police officer. (In the case of the WSP, it costs about \$100,000 to train a new Trooper; and that number probably does not reflect the reduced productivity of any new police officer during his or her first few years on the job.) The record here does not suggest a substantial retention problem through 2006. Based on thumbnail summaries of exit interviews, the number of bargaining unit employees leaving WSP for employment in other police agencies *was* remarkably low. The data for 2006, for example, identified eight departures for other police agencies. But in 2006 the statutory mandatory retirement age at WSP was 60, and WSP representatives later told the Legislature that six of the departures for other agencies were caused by that mandatory retirement age.⁹ That leaves only two identified departures for other law enforcement employment out of about a thousand employees.¹⁰ But after SB 5113 fixed the mandatory retirement problem, the current, 2008 data shows an alarming spike. Up until the interest arbitration hearing in mid-August, WSP had

Year	Applications	% of 1995
1995	3072	NA
1996	3057	99.5%
1997	2295	74.7%
1998	2337	76.1%
1999	1861	60.6%
2000	1453	47.3%
2001	1448	47.1%
2002	1528	49.7%
2003	938	30.5%
2004	1215	39.6%
2005	1096	35.7%
2006	1712	55.7%
2007	2103	68.5%

Application Volume Trend

9. That testimony came in WSP’s testimony before the Senate Appropriations Committee in support of SB 5313, which raised the mandatory retirement age.

10. Given the foundation of this data, these numbers are somewhat rough and ready: some employees cite “personal reasons” when they are headed for another police agency, and some identify their reason for departure as a movement to another police agency even though the reason for moving is really quite personal (e.g. to be near an aging relative). But this is a generic feature of this sort of retention data.

already lost at least seven Troopers to other police employment.¹¹ This disturbing jump in nonretention comes on top of the application volume and vacancy trends which show a continuing problem in getting the sworn staff up near the authorized complement; and WSP's testimony to the Legislature has repeatedly identified salary and benefits as one important basis of these problems.

Comparability: Resolving Conflicts in the Data. Both parties introduced evidence of the compensation received by employees performing similar duties for proposed comparable employers. That evidence is consistent in broad outline but differs in detail. To the extent that it is necessary to choose between the evidence offered by the Association and that offered by the State, I must find the Association's data far more convincing for the following reasons.

It is not uncommon for an interest arbitrator in the Northwest to find that both parties can come to agreement about compensation data. That is because it is not uncommon for the parties to provide well documented data. For most police, fire and corrections employers in the Northwest, the basic factors of compensation are controlled by collective bargaining agreements, so most of the data for a compensation analysis is fairly readily available, even though extracting that data in readily comparable form still requires considerable skill and experience. When it is necessary to go beyond the face of the various CBAs, the fairly common practice is to carefully document the source of the additional data (with, for example, a copy of the relevant email exchange or a record of just who in the payroll department answered a particular telephone inquiry). When each party then submits a compensation analysis along with that sort of supporting documentation, and when each party calls the analyst who did the work and makes him or her available for cross examination, it is sometimes possible for the advocates to work out any apparent inconsistencies during the arbitration process.

From an interest arbitrator's point of view, that situation is the best of all possible worlds. The record before me falls somewhat short of that ideal. The Association did put together and presented its comparability data that way: The Association's counsel's staff performed the analysis in-house; the analyst who did that work appeared as a witness and demonstrated her skill and experience in the field; every item on every individual survey shows the source of the recorded data; and when the source is not a collective bargaining agreement—which is in

11. SB 5313 had an emergency clause which the Governor vetoed because no member of the Patrol was going to reach 60 between July 1, 2007 and the usual effective date.

evidence in the record—the questionnaire shows exactly who provided that datum and under what circumstances.

The Patrol, on the other hand, put into evidence data which had been supplied to the Patrol by the Department of Personnel. DOP, in turn, had contracted the compensation survey work out to Milliman.¹² Two witnesses appeared from DOP but neither of them had been involved in the actual analysis.¹³ More particularly, neither of them knew whether the underlying survey forms had been completed in-house—i.e. by a Milliman employee—or by various unidentified employees of the comparable employers. There is no evidence of the degree of skill and experience of whoever it was who completed the individual surveys, and there is no clear documentation of the sources of answers to the survey questions.¹⁴ On the basis of such a record, there is no possibility of serious competition between the data offered by the Association and the data offered by the State.

Comparability: The State's data. WSP proposes comparison with a complex of other police agencies including Oregon and Idaho, nine Washington

12. Before 2006, WSP did its own salary survey work. Following a statutory change, the 2006 survey was done by the Labor Relations Office, and the current survey became the responsibility of the DOP, which contracted it out to Milliman.

13. The employee DOP chose to assign to do this work had never done a salary survey before, had no prior training in wage and hour survey work, and simply assumed that Milliman had accurately gathered and standardized the data provided to the State.

14. To complete the picture of what was *not* offered in support of DOP's work, DOP neither performed any in-house spot check of Milliman's work nor specified in its contract with Milliman the level—if any—of spot checking that Milliman was required to do of its own work. A DOP representative testified that an exception report was expected but that there had been no discussion of such a report after Milliman completed the study. DOP management testified that it assumed that Milliman would do spot checking as a matter of course (without, apparently, giving any particular thought to how much and by whom). After almost a quarter century of oversight and evaluation of such survey work in interest arbitration I find that assumption naïve. The Manager of Compensation also testified that DOP “learned” that some of Milliman's data—particularly head counts—were wrong, but the record does not show who turned on that particular light, nor does it suggest that DOP then wondered whether Milliman's general data gathering process might not be entirely dependable. Although the Manager of Compensation repeatedly used expressions like “making sure we had accurate data,” as far as the record shows, DOP made no such attempt whatsoever.

counties, and twelve Washington Cities.¹⁵ As the prior discussion indicates, it is not exactly clear where the State’s numbers came from (beyond the fact that Milliman forwarded this raw data to DOP which put it into its current format). Setting that issue aside for the moment, the State offers a “weighted” approach to comparison, i.e. it multiplies each base by that employer’s total number of employees in the classification, adds the resulting products and divides that sum by the number of employees of all the employers combined. In part, that approach is driven by the prior contract’s geographic pay provision which added substantially to the base compensation of Troopers stationed in King, Pierce and Snohomish Counties. That additional compensation is reasonably captured by a “weighted” approach to find the average Trooper base; so the State extends that same pattern of analysis to its proposed comparables. The results of that analysis are set out in the chart on page 12.

What that chart shows, in summary, is that if we compare a Trooper and a Sergeant, midway through the salary schedule,¹⁶ with similar employees in the total group of the State’s proposed comparables, the Trooper’s compensation is almost 3.6% below the average (i.e., $-0.77 + -6.36 / 2$) and the Sergeant’s compensation is almost 9.8% below the average. This gloomy picture is by far the most optimistic in the record; and it is based on a year-old snapshot, since the State’s survey date is September 1, 2007. (In particular, the State’s data includes only the retroactive part of the June, 2008 contract for Seattle Police Officers—24% over four years—which amount for about a fifth of the entire comparable employees proposed by the State.)

States Proposed Comparables (weighted)	WSP	+/-
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15. WSP notes that California is “a whole different world” in terms of compensation. But it is hard to imagine the Legislature did not realize that when it mandated consideration of “west coast” state comparators. On the other hand, neither party objects to the use of cities and counties as comparators even though the work of Troopers and Sergeants is far more focused on traffic enforcement and motorist assistance.

16. This “midway” approximation would again understate the problem. The current average Trooper tenure is almost twelve years, and the average tenure for Sergeants is almost twenty. As the chart of the State’s comparability data shows, WSP is much further behind at the top of the schedule than at the base, and the average bargaining unit employee is beyond mid-schedule.

Trooper	States	at base	4,352	4,950	13.73%
		at top step	4,721	5,007	5.71%
	Counties	at base	5,097	4,950	-2.97%
		at top step	5,065	5,007	-1.15%
	Cities	at base	5,105	4,950	-3.14%
		at top step	5,613	5,007	-12.10%
	All combined	at base	4,988	4,950	-0.77%
		at top step	5,326	5,007	-6.36%
Sergeant	States	at base	5,851	5,891	0.68%
		at top step	6,363	5,758	-10.51%
	Counties	at base	6,318	5,891	-7.25%
		at top step	6,027	5,758	-4.67%
	Cities	at base	6,657	5,891	-13.00%
		at top step	6,587	5,758	-14.40%
	All combined	at base	6,416	5,891	-8.91%
		at top step	6,369	6,768	-10.61%

Comparability: *The Association's data.* The Association proposes several alternative approaches to choice of comparables; but, given the numbers below, it is not necessary to resolve the issue of identification of appropriate comparables. Rather, for the purposes of the case at hand, I *assume* the appropriateness of the comparables proposed by WSP and turn to the Association's data for that group of employers.

If the State's data at best shows Troopers and Sergeants to be from 3.6 to 9.8% behind, the picture presented by the Association's data is much more bleak. The Association offers compensation data as of January 1, 2008.¹⁷ The Association followed the usual method of analysis for interest arbitration cases in

17. WSP had an opportunity to review the Association's exhibits and to question the Association's research analyst who did the work. Some of WSP's concerns were explained away, and some led to revisions of the exhibits offered by the Association. The parties agreed that the Association would make the required corrections and would provide the edited exhibits by mail before briefs were due.

Washington (and throughout the Northwest) by adjusting salary schedule compensation to reflect other financial benefits and differences in hours worked (usually due to differences in vacation and holiday accruals). The financial adjustments shown by the Association include premium pay, longevity, POST/education incentive, and deferred compensation; and all those adjustments are proper in this case.

But the adjustments shown in the Association's data also include employer retirement contribution, social security, and insurance contribution. WSP objects to those adjustments because RCW41.56.773(1) prohibits the State "from negotiating any matters relating to retirement benefits or health care benefits or other employee insurance benefits." The Association replies that it is not proposing to *bargain* over retirement benefits or health care benefits but only proposes to recognize that differences in such benefits affect overall employee compensation.

The Association is certainly correct in arguing that retirement and health benefits are universally perceived to be part of an overall compensation package. A potential employer could hardly expect a high volume of quality applications if it offered a take-home pay rate equal to the local labor market but offered no health insurance while all the competitors offered full family coverage. And labor news in recent years may well include more strikes over health and retirement benefits than over any other sort of compensation.¹⁸ But that recognition does not change the language of the statute. If the statute prohibited the State "...from negotiating retirement benefits or health care benefits," then the Association's argument would be convincing, because the Association does not propose to negotiate those benefits. But what the statute actually does is prevent the State "...from negotiating *any matters relating to* retirement benefits or health care benefits." The "any matters relating to" prohibition would seem to be broader than a prohibition from negotiating those benefits themselves. And to take the actual statutory language to mean nothing more than a prohibition on negotiating retirement or health care benefits would seem to eliminate the term "...any matters relating to..." from the statute, which is an unacceptable result by the usual rules of statutory construction. I therefore ruled at hearing that considerations of employer retirement contribution, social security, and insurance contribution are relevant

18. For example, representatives of both the Association and WSP told the House Committee on Transportation in 2007, in support of HB 1260, that it was important to adjust the retirement contribution rate because (quoting the Staff Summary) "The market is very competitive when it comes to attracting good applicants and this is one area that can assist in recruitments."

only for purposes of costing the proposals of the parties and not for purposes of a total compensation analysis.¹⁹ It is not absolutely clear that this approach is *required* by RCW 41.56.773(1); but certainly no broader exclusion is required. Neither party takes issue with that ruling.

Rather than providing comparison data only at the base and at the top of the schedule, the Association offers data for employees at 5, 10, 15, 20 and 25 years of service. But the Association also argues that the best point of comparison is the one that most nearly matches the actual distribution of this work force. Troopers average almost 12 years of service with an AA degree, and Sergeants average almost 20 years of service with an AA. WSP agrees with the Association that the best benchmark for general comparison is at 10 years for Trooper and at 20 for Sergeant, both with an AA (Post -hearing Brief at 22).

The Association offers a variety of alternative sets of comparables; but *for the purpose of this discussion* I assume that WSP's choice of comparables is appropriate. The table on the next page summarizes the Association's comparability data for *WSP's* proposed comparables, without adjustment for retirement and health benefits.²⁰

19. This approach artificially transfers these retirement and health care benefit costs to the same category as, e.g., workers compensation costs, which are never analyzed as a part of compensation but are always recognized—under a heading such as “other personnel costs” or “rollups”—as cost factors for an employer. The ruling here is in the nature of dictum in any event, because the outcome of this portion of the case is not determined by the difference between the data adjusted for retirement and health benefits and the data not so adjusted.

20. One systemic problem in abstracting wage and hour data is how to deal with economic benefits received by some, but not all employees. The Association uses an 80% cutoff, i.e. a benefit received by 80% of the unit is treated as if it were received by all, and a benefit received by less than 80% is treated as if it were received by none. Only 34% of the WSP unit receive geographic pay, and the Association's numbers therefore do not capture that compensation. By comparison, the questionnaire upon which the State's data rests asks whether there is geographic pay but does not ask how many employees receive that benefit.

Thus, on the basis of the Association’s far superior data, even using the Patrol’s own proposed comparables, a typical Trooper is now 9.5% below comparable jurisdictions and a typical Sergeant is almost 15% behind.²¹ This analysis does not reflect geographic pay for Troopers and Sergeants around Puget Sound, and there is no dispute that a large percentage of the Troopers and Sergeants are employed in Districts which abut the Puget Sound. But the addition of that factor does not much improve the picture. Shortly before the arbitration hearing, the officers of the Seattle Police Department entered into a new collective bargaining agreement which provides for a 24% increase over four years. Seattle is, in the words of the Chief, “one of our biggest competitors.” Comparing Trooper pay to the pay of only Seattle Police Officers and King County Deputies (and, again, backing out insurance and pension differences from the Association’s numbers), Troopers at the ten year benchmark are currently about 11% behind *even when WSP’s geographic pay is included*. (That same percentage applies to WSP compared to Tacoma Police and Pierce County Sheriffs, but the lag drops to a bit under 7% when WSP is compared to the Everett Police and Snohomish County Sheriffs.)

Total Compensation		WSP	+/-	
Trooper	States	5,536	6,007	*7.8%
	Counties	6,205	6,007	-3.3%
	Cities	7,043	6,007	-17.2%
	Combined	6,580	6,007	-9.5%
Sergeant	States	7,433	7,143	-4.1%
	Counties	7,625	7,143	-6.7%
	Cities	8,769	7,143	-22.8%
	Combined	8,192	7,143	-14.7%

Association’s numbers for WSP’s comparables

The Cost of Living. RCW 41.56.465(1) lists factors to be considered by interest arbitrators in *local government* uniformed personnel interest arbitrations. One item on that list is “The average consumer prices for goods and services, commonly known as the cost of living.” That statute is certainly in the mainstream of compensation practice in that respect: it would be very odd *not* to consider

21. Note that the average number for “States” is misleadingly inflated because it averages and gives equal rate to only two items, Oregon with 531 unit members and Idaho with 185. To avoid perpetuating that inflation, the “combined” numbers here are the average of all 23 jurisdictions (12 cities, 9 counties, and 2 states). (If the State average, the County average and the City average were averaged, then Idaho’s 185 unit would account for a sixth of the total (1/3 x 1/2) while Seattle’s almost 840 unit would account for 1/36 (1/12 x 1/3).)

changes in “the average consumer prices for goods and services.” Those changes are tracked by Bureau of Labor Statistics’s (BLS) Consumer Price Index (CPI).

The Patrol’s compensation proposal is based on the annual increase in the Implicit Price Deflator (IPD), and the Patrol argues that the IPD is an “indicator of inflation” that is “in wide use.” I must agree with the Association that the Washington Legislature had the right of it in RCW 41.56.465(1)(c): the traditional concern for an interest arbitrator is “the average consumer prices for goods and services, commonly known as the cost of living.”²² And, as OFM’s own web site puts it,

The CPI is the most commonly used measure for adjusting payments to consumers when the intent is to allow consumers to purchase, at today’s prices, a market basket of goods and services equivalent to one that they could purchase in an earlier period. It is widely used to index wages, benefits, taxes and transfers. Also, the CPI makes comparison between years other than the base year easy because the types and quantities of the goods and services consumed are fixed.

Although the State uses the IPD to adjust economic and revenue data and as the basis of its expenditure limit, I agree with the Association that it is not “normally or traditionally taken into consideration” (in the language of the controlling statute) in interest arbitrations. The proper measure of change in the cost of living is the CPI. This is not because of past practices of the particular bargaining parties, as WSP suggests, but because the CPI is the index which focuses on cost of living changes at the consumer level.²³

22. WSP correctly notes (Post-hearing Brief at 12) that this factor is not specifically listed with respect to interest arbitration proceedings involving the Patrol. But in this regard the Legislature is part of the “tradition” that makes the CPI one of the “other factors traditionally taken into consideration in the determination” of such matters. RCW 41.56.475(4)(e). On the other hand, WSP cites only one case in which an interest arbitrator apparently considered the IPD, the 2008 Family Child Care Provider award by Michael Cavanaugh (NAA).

23. The Department of Labor web site makes no mention of the IPD on its website under the headings of “inflation” or “inflation and prices.” Even the CPI index no longer quite measures the changing cost of a “fixed” basket of goods and services. Since the Boskin Report and changes in calculation of the CPI, the CPI is adjusted to reflect probable consumer purchasing changes resulting from price changes. One commentator has described the current version of the CPI as “the cost of holding to an ever declining standard of living.” (W. Joseph Stroupe, “Caution: Inflation Is Higher Than You Think,” *Asia Times*, June 27, 2006.)

WSP also argues that the IPD should be preferred because it records a national average rather than focusing on the more changeable local base of the Seattle-Tacoma-Bremerton CPI index proposed by the Association. That criticism is best met by consideration of the All Cities CPI index. From the viewpoint of the bottom line, the Seattle index has not shown recent extreme variation from the All Cities. One of the largest differences in the record was the variation between the 4.9% change in the Seattle Area CPI-W for the first half of 2008 and the 4.2% change in the somewhat more general West Urban index for the first half. For August, 2008 the Seattle Area annual increase 6.2%, the All Cities increase was 5.9%, and the intermediate West Urban change was 5/4%.

Productivity. There is no dispute about the data traditionally addressed under this heading. Due, in part, to WSP's chronic shortage of troopers, according to the Chief's testimony, both Troopers and Sergeants now have to work harder—i.e. must deal with more calls for service per Trooper—to try to cover the necessary work. The relevant and uncontested testimony comes directly from the Chief:

On an average, we arrest about 20 to 22,000 drunk drivers per year as an organization. The state as a whole arrests on average about 40 to 44,000 drunk drivers. We, per million miles driven, the first six months of '08 were sitting on about .08 percent. The national average is deaths per 1 million miles driven. So folks are doing a great job. Last year as a state we finished up at about 1.0 per million miles, deaths per million miles. We lost I believe in the state of Washington last year 567 or 68 lives, which is the lowest in our state since 1961. And we're on pace to shatter that record. We're about 14 percent lower this current time by comparison to 2007 with regards to lives lost in our state. (1 Tr. 29:13.)

And,

[T]omorrow ([August 12]) the governor is going to announce to the state of Washington that we have been notified by the International Association of Chiefs of Police that we are the best police agency in the United States. Actually, it's in the world, because it's an international selection. So we have been named by that organization. Regardless of size, regardless of type of agency, we are the best police agency in the business. (1 Tr. 28-29.)

Other Compensation Issues: Cleaning Allowance and Vacation Accrual Rate: The Association proposes add to Section 23.2 a cleaning allowance of \$360 per year and to increase the vacation accrual rate for Troopers and Sergeants with twenty or more years of service. Under the current contract the rate of accrual tops

out at 14:40 hours per month—176 hours per year—in the sixteenth year. The Association proposes to add two additional increases in the accrual rate, up to 15 hours per month—183 hours per year—beginning in the 20th year and up again to 15:40 per month—188 hours per year—in the 25th year and thereafter.

The Association correctly points out that most of the various comparables proposed by the Patrol pay a cleaning allowance and that most of those allowances exceed the \$360 proposed by the Association. Similarly, with respect to vacation accrual, the Association argues that the existing rates have remained constant for over 20 years and that the top rates now lag substantially behind the top rates for comparable employers, those being 180 hours per year for Troopers and 188 for Sergeants, compared to the current 176 hours per year top of the WSP range.

Other Compensation Issues: Specialty Pay Changes. The Association proposes to increase specialty pay for Detectives from 3% to 4% and to recognize a new specialty pay rate of 3% for BAC Technicians. BAC Technicians must complete a substantial initial training course and annual updates; and, in addition to their core duty of testing the blood alcohol content of possibly inebriated drivers, they also fill a continuing training function for their peers in other agencies around the State. The contract has never provided specialty pay for this assignment.

Other Compensation Issues: Court Appearance Pay. WSP proposes this change in Section 12.15's language dealing with pay for court appearances:

When court is scheduled for a previously-approved compensatory day or holiday credit day off, such court time shall be considered work time unless it exceeds eight (8) hours and compensated at the employee's regular rate of pay for time spent up to the employee's normal shift length (normally eight (8) or ten (10) hours). Court time on a previously-approved compensatory day or holiday credit day off in excess of the employee's normal shift length will be compensated at one and one-half (1-1/2) times the employee's regular rate of pay.

Discussion: The resolution of the economic dispute in this case is driven by the facts and factors set out above. First, there is no doubt at all that the State faces a massive current shortfall in the General Fund. Although that fund makes up only 15% of the Patrol's financial base, the SPHA, which accounts for 71%, falls short as well. But there is no dispute that the inadequacy of funding from the SPHA is not a problem of the moment; that inadequacy is structural and continues—as far as this record shows—at least 16 years into the future. Nothing that I can do in this interest arbitration case can make a significant difference in that long term financial picture.

Meanwhile, there is no dispute at all that the Patrol must compete with other employers of police officers. The Legislature's staffing level goal for the Patrol is clear and express. And the Chief and other Patrol spokespersons are certainly correct in pointing out that the Patrol cannot hope to meet that staffing goal unless it is economically competitive.

When the Legislature extended full collective bargaining rights to State employees, including the sworn employees of the Patrol, the Legislature potentially made interest arbitrators partially responsible for staffing: Before full collective bargaining and interest arbitration, the Legislature itself could meet a challenge to the Patrol's competitiveness by increasing compensation. But compensation is now left to collective bargaining, and, potentially, to interest arbitration, so that direct fix is no longer possible. The Legislature can reduce *the cost of the Patrol* by reducing the authorized FTE, but the Legislature's ability to *sustain or increase the FTE* of the Patrol depends on an interest arbitrator's maintaining competitive levels of compensation. And any decision to reduce the size of the Patrol, it seems to me, should be left to the Legislature: an interest arbitrator should not make it impracticable for the Patrol to actually fill its authorized FTE by so reducing compensation that the Patrol is no longer seriously competitive. As long as the Legislature is committed to maintaining this staffing level, the long-term, systemic shortfall in SPHA funding requires some other fix.

The issue before me is not restricted to a compensation level just for today. It includes compensation levels that extend well into 2011. Changes in the cost of living during that period are significant not only because those changes are experienced by bargaining unit employees at the check-out counter. More importantly, those changes have a notorious tendency to drive wages offered by comparable employers. Between the date of this decision in September, 2008, and the end of the new contract almost three years later, it is quite likely that the compensation levels of the Patrol's *competitors* will increase, partially to reflect changes in the cost of living. The Patrol begins that period 9.5% behind its own proposed collection of comparable employers for Troopers (based on the Association's superior data) and about 15% behind its own proposed collection of comparable employers for Sergeants. WSP's IPD-based proposal for the next two year contract cannot seriously hope to hold on to even that substantial recruitment *disadvantage* as other police employers find compensation driven upward by CPI-measured cost of living increases between now and 2011.²⁴ The interest and

24. WSP notes that ERFC's projections suggest that Seattle inflation should decline to 2.9% in 2009 and 2.0% in 2010 and 2011. (Post-hearing Brief at 14.) That projection predates September's interesting developments in financial news. But if inflation should

welfare of the public would not be well served by an award that left the Patrol not only with its current staffing problems, but left it grossly uncompetitive by the end of the new contract period.

Thus I agree with the Association that a CPI-based increase is required, even in the face of the State's current financial condition; and I agree that a 4% annual minimum is required in light of how far the Patrol is now behind its comparables and the deteriorating recruitment and retention data. But I will award the old Kennedy era anti-inflation formula of CPI-1% in light of the State's severely limited ability to pay during the next biennium; and I will further soften the financial burden by breaking the increases up into four steps, rather than two, each of the four being ½ of 1% less than the Seattle Metropolitan Area CPI-W for the year ending six months prior, with a minimum of 2% and a maximum of 3%. That is the smallest and least expensive pattern of compensation increases that seems to me to have the least acceptable prospect of ending the next contract period with WSP, the best police agency in the country, not grossly disadvantaged in its ability to recruit and retain Troopers and Sergeants.

For those same reasons, I decline to award any further economic burden on the Patrol at this time. The outcome of this case hangs on the necessity of maintaining—i.e. not further deteriorating—the Patrol's ability to recruit and retain. Although comparability favors the Association's proposals to increase detective premiums, vacation accrual rates for senior employees, and the additions of a BAC Technician premium and a cleaning allowance, it is unlikely that those considerations drive many choices of which police employer a candidate will apply to. In the face of the State's current financial conditions, those proposals must wait for a better day.

The final issue of compensation is the Patrol's proposal to revise the language dealing with pay for court appearances. It is not really clear that this is an issue of compensation in this case rather than a language dispute (discussed in general below): the target situation is very small and apparently quite rare, so the financial consequences are extremely modest. The focus of the dispute is on whether an employee regularly working a ten hour shift should hit overtime after only eight hours if he or she were kept on the clock that long after being called in for a court appearance on a scheduled comp day of holiday credit day. I agree

actually decline over that period, and assuming that a resulting reduction in inflationary pressure causes the collective comparable employers to stand still over that period, the Patrol would still end the new contract period with Troopers 1.5% behind WSP's proposed comparables and with Sergeants about 7% behind. I find that both hypotheticals unlikely.

with the Patrol that that is a small detail which need not wait for a dispute to arise: the notion of a “regular” shift is usually the basis for determining that employee’s daily overtime trigger. The Association does not offer any substantial reasons why this situation should be an exception; and I will award the language proposed by the Patrol.

ISSUES OF ASSIGNMENT

The “Transfer” Article of the 2007-2009 CBA includes one subsection, 11.3, titled “Employer Assignments/Transfers” and another, 11.5, titled “Specialty Assignments.” The Article does not define the scope of that term. Nonetheless, Section 11.5 details the process for beginning a special assignment, the process for ending a special assignment, and the process for contesting the termination of a special assignment. In particular, if a specialty assignment is ended involuntarily, that employee may seek a single managerial level of review of the removal of that assignment, but Section 11.5E specifically provides that such a change “shall not be subject to the arbitration procedures...” WSP now proposes to provide a broad general definition of “specialty assignment” and to revise the organization of several provisions of the contract in order to make it clear just what—including, particularly, motorcycle assignments and CVA assignments—falls under that designation. The Association opposes those changes and proposes to eliminate Section 11.5's exception to arbitral authority.

The “baseline” question: What does the current language mean? The “baseline” question here is just what the parties have understood by the term “specialty assignment” in the current contract. Neither party points to any other contract reference as a possible source of help in answering that question; neither party claims that the contract language is clear on its face “within the four corners of the document;” and neither party offers any bargaining history to elucidate how Section 11.5 came into the agreement.

The disputed language has been subjected to arbitral interpretation only once, and that was in 1997-1998 in an award by Mike Beck (NAA). That dispute arose out of a general reorganization of the motorcycle program in 1996. As a result of the reorganization, eight motorcycle Troopers (including one Sergeant) were transferred out of motorcycles, and they grieved the involuntary transfer. The Association argued that the transfers had been disciplinary; but arbitrator Beck took a broader view of the issue before him, which he found to be, “did the Employer’s decision to transfer the eight Grievants out of the motorcycle program . . . violate the Agreement?” and, “Did the Employer violate the Agreement in the manner in which it selected employees for the motorcycle program in or about

May 31, 1996?” Then, as now, the Specialty Assignment provision provided (quoting arbitrator Beck) “that the reassignment or transfer of employees from a specialty position shall not be considered disciplinary action or a subject of a grievance.” Arbitrator Beck’s findings included the history of the Specialty Assignment provision. Neither party now takes issue with those findings, and I adopt them.

According to Arbitrator Beck, the Association had filed a ULP complaint in 1991 over the filling of a motorcycle assignment. The current language was already a part of the contract at that time. In discussions of the pending ULP, the Association asked WSP what it considered a specialty provision, and WSP’s Labor Relations Coordinator replied,

The issue of Specialty positions was raised during the Collective Bargaining process of both our first contract and the successor Agreement. The only Specialty assignment agreed to during the negotiation process was for Detective positions, and the selection process for these positions is outlined in Article 17, Subsection H . . . No other Special positions have been identified.

WSP’s counsel later assured PERC that

It is the position of the Patrol that its assignment of officers to motorcycle positions is not an assignment to a “specialty position.” * * * The discussions during bargaining related solely to assignments to detective positions which might involve assignment to either the narcotics section or criminal investigation section (Traffic Investigation)...

Arbitrator Beck’s conclusion is compelling on the basis of that history: “the position of motorcycle trooper is not a specialty position.” The issue before me is broader, but the history set out by arbitrator Beck is still compelling: in the past, the parties have understood the term Specialty Position, now set out in Section 11.5, to apply only to detective assignments. On the other hand, nothing in arbitrator Beck’s discussion—and nothing in the record before me—contradicts the express provision of Section 11.3 of the current contract which requires cause for “involuntary reassignment, removal, or transfer of employees from a specialty position” *except* for an assignment as detective, which is the sole subject of subsection 11.5 E. (Section 11.3 does not *expressly* require the disciplinary standard “*just* cause,” nor does it otherwise specify what exactly what the parties understood by “cause” in that Section.)

The Special Assignment Proposals. Against this baseline, the primary thrust of the Patrol’s proposal (set out in Appendix II) would be to bring a large collection of assignments—ranging from motorcycles to CVD to the bomb squad,

to intergovernmental task forces, to the Governor's security detail—all under the same contractual assignment provision. Under the proposed new, broad definition, “specialty assignment” would apply to any “assignment for which there is a special selection process.” And the new language would exclude the involuntary termination of all such assignments from the contract's arbitration provision, as detective assignments are now excluded.

The Association, on the other hand, proposes to end the exclusion of detective involuntary reassignments from access to arbitration.

Definition of “Line Employee.” WSP proposes to add a definition of “line employee” to Section 9.1 which addresses establishing the boundaries of assigned patrol areas:

9.1 The Employer will determine the boundaries of assigned patrol areas (APAs) and geographic areas; however, the Employer will continue to satisfy its collective bargaining obligations regarding changes to these boundaries. “Line employee” shall mean a fully-commissioned officer in a position in the Field Operations Bureau (FOB) assigned to traffic enforcement, or assigned to direct support of traffic enforcement. Line employees are under the command of a district commander. Commercial Vehicle Division employees shall not be considered line employees.

The Association particularly opposes the final sentence of the proposed change, which would expressly exclude CVD Troopers and Sergeants from “line employees.”

The parties agree that the scope of the proposed new definition would extend to the entire collective bargaining agreement: Even though WSP proposes to put the new definition in Article 9, titled “Residence Requirements,” the parties do not understand that the definition is to be limited to that section.

Once again, the first problem is in establishing a baseline: exactly what features of the current contract would be changed by the addition of this definition. The parties do not appear to have addressed that topic during two-party negotiations. At my request, the advocates searched through the existing collective bargaining agreement for occurrences of terms similar to “line employee.” The contract uses the terms “line employee,” “line position” (and “non-line position”), “line trooper assignment,” “line detachment,” and simply “line” in several sections. The absence of prior discussion leaves some doubt about the exact scope of the Patrol's proposal; but I will take it as a proposal to clarify or adjust the meaning of all those terms, including “line trooper” and “line employees” in Article 9 defining residence and reporting locations in terms of an

APA, “line position” in Article 10 addressing voluntary transfers, “line trooper assignment” in Article 11 addressing voluntary demotion, “line detachment” in Article 12 addressing scheduling, “line duty” and “line assignment” in Article 16 addressing temporary and long term limited duty, and “line assignment” in Article 23 addressing motorcycles.

Discussion: Resolving Language Disputes. When it comes to language issues—rather than economic issues—none of the factors set out in the statute is much help except the final “other factors” item. But language proposals bring a different set of principles into play. A language proposal in interest arbitration usually invites the arbitrator to vary language which the parties once crafted between themselves on the basis of their joint, massive, combined, daily experience. It seems to me that an arbitrator should be guided by two fixed principles when asked to alter such language. The first principle has a very long pedigree: *Primum non nocere*: first, do no harm. If the record does not give the arbitrator a clear and distinct picture of just how the new language will actually work on a day to day basis, the arbitrator’s duty to do no harm should weigh heavily against departing from the language the parties once bargained between themselves. The second principle is equally well established (even though it may lack a famous Latin expression): If it ain’t broke, don’t fix it. Even though there is no technical burden of proof in these cases, it seems to me that the language changes awarded in interest arbitration should always be narrowly tailored to address specific problems caused by the language which the parties once bargained between themselves.

Discussion: Special Assignment Proposals. Turning to the case at hand, as far as this record shows, Mike Beck’s 1998 grievance arbitration award establishes the proper interpretation of “specialty assignment” in Section 11.5. But the clarity provided by the Beck award requires a pretty careful reading of that award; it does not appear on the face of the contract. The current language of the contract leaves the reader wondering just what the term “specialty assignment” applies to. With respect to clarity, the current language “is broke;” but it seems to me that it can be fixed in that respect by incorporating the results of the Beck award into the terms of the contract as follows:

11.5 Specialty Assignments. This subsection shall apply to assignments as detective only.

I will award that change.

I have pored over the record and over the Patrol's brief in this case, trying to find an adequate basis for WSP's proposed wholesale change in the structure of the contract with respect to assignment.²⁵ But the motivation for the change seems to be a general managerial uncertainty about what sorts of assignments are specialty assignments. There is no record of *any* grievance ever being filed in this topic area; and there is not even any sign of a series of substantial disputes between the parties that were resolved before the formal grievance level. In short, the record does not show that this portion of the existing contract "is broke." Moreover, the record fails to offer a convincing basis for the conclusion that this change would "do no harm:" WSP seeks express license to make very substantial changes in how bargaining unit employees will pursue their careers without any check or limit. The potential for continuing unresolved conflict between the parties resulting from such a change seems to outweigh the modest support for the proposal in this record.

The Association proposes to eliminate the current contract's explicit exclusion of Specialty Assignments—i.e. detective assignments—from the grievance and arbitration provision. As far as the record shows, the Patrol has terminated detective assignments only twice in recent memory. The parties differ on the underlying merits of those reassignments. I agree with the Association that those disputes look a lot like the usual grist for the grievance arbitration mill. But the Association's proposal would have an unfortunate "side effect." Section 11.3 provides that the involuntary end of an assignment shall be "for cause only," but it does not expressly say "*just* cause" and it does not define the term "cause." Does that provision imply that all involuntary assignment terminations shall be treated as if they were disciplinary actions? The Beck arbitration involved an involuntary termination as part of a general reorganization. But even apart from the rare departmental reorganization, it is at least imaginable that some involuntary assignment terminations might be "for cause" in some sense without being disciplinary in nature and passing the "*just* cause" standard. That ambiguity, to repeat, appears on the face of this language; and the parties have gotten along well

25. If the record included a list of particular problems involving involuntary loss of assignment in the past, then it might be possible to set out to craft some less sweeping contract changes to deal with them. One might, for example, add a six-month assignment probation provision, particularly for motorcycle assignments. But the Chief testified that throughout his three years as head of the Patrol there have been no problems involving the involuntary removals of motorcycle or CVD assignments under the current contract. The rest of the record similarly fails to show any history of problems. (For example, the Patrol witnesses could not recall the Association ever challenging the termination of a CVD assignment.) That seems to leave any such specifically tailored change as a solution in search of a problem.

in this regard, in the face of that potential ambiguity, for many years. Subsection 11.5, which the Association now proposes to eliminate, includes contract language which might be significant with respect to that ambiguity: Subsection E,1 provides that an involuntarily reassigned detective “will be informed of the cause (reasons) for the decision...” Getting rid of the language “...cause (reasons)...” might be a significant step toward carrying the conclusion that “cause” in Section 11.3 means “just cause” and that all such terminations (other than those that arise in departmental reorganizations) are to be considered disciplinary. But the record before me is not adequate to support a resolution of that general issue one way or the other. Once again, the record does not show that this part of the contract is substantially “broke;” nor is it clear that my removing one of the props of the existing ambiguity would do no harm. I decline to award the Association’s proposal.

Discussion: The Proposed Definition of “Line Position.” The proposal would apply the new definition of “line position” throughout the contract. Exactly what features of the current contract would be changed by the addition of this definition? Somewhat remarkably, the parties do not appear to have addressed that topic during two-party negotiations. At my request, the advocates searched through the existing collective bargaining agreement for occurrences of terms similar to “line employee.” The contract uses the terms “line employee,” “line position” (and “non-line position”), “line trooper assignment,” “line detachment,” and simply “line” in several sections. The absence of prior discussion leaves some doubt about the exact scope of the Patrol’s proposal; but I will take it as a proposal to clarify or adjust the meaning of all those terms, including “line trooper” and “line employees” in Article 9 defining residence and reporting locations in terms of an APA, “line position” in Article 10 addressing promotion and promotion passovers, “line trooper assignment” in Article 11 addressing voluntary demotion, “line detachment” in Article 12 addressing scheduling, “line duty” and “line assignment” in Article 16 addressing temporary and long term limited duty, and “line assignment” in Article 23 addressing motorcycles.

The Association does not take exception to this proposal except for the express exclusion of CVD employees. I assume the parties have a good grip on the overall significance of this definition; and I will award the uncontested part of the Patrol’s proposed language. On the other hand, the Chief testified that CVD and motorcycles are now both line positions; and the record does not present an adequate basis for awarding the proposed change.

AWARD

Section 9.1 shall read:

The Employer will determine the boundaries of assigned patrol areas (APAs) and geographic areas; however, the Employer will continue to satisfy its collective bargaining obligations regarding changes to these boundaries. "Line employee" shall mean a fully-commissioned officer in a position in the Field Operations Bureau (FOB) assigned to traffic enforcement, or assigned to direct support of traffic enforcement. Line employees are under the command of a district commander.

Article 11 shall be unchanged except that the initial, title line of section 11.5 shall read:

11.5 Specialty Assignments. This subsection shall apply to assignments as detective only.

Section 12.15D shall read:

When court is scheduled for a previously-approved compensatory day or holiday credit day off, such court time shall be considered work time and compensated at the employee's regular rate of pay for time spent up to the employee's normal shift length (normally eight (8) or ten (10) hours). Court time on a previously-approved compensatory day or holiday credit day off in excess of the employee's normal shift length will be compensated at one and one-half (1-1/2) times the employee's regular rate of pay.

Section 14.2 (vacation accrual) and Section 28.7 A (specialty pay) shall be unchanged.

Section 23.2C (uniforms and equipment) and Section 23.9 (motorcycles) shall be unchanged.

Section 28.1 shall read:

Effective July 1, 2009, all salary ranges and steps of the WSP Commissioned Officer Salary Schedule that were in effect on June 30, 2009 shall be increased by a percentage equal to one-half of one percent less than the change in the Seattle-Tacoma-Bremerton CPI-W from December 2007 to December 2008. The minimum increase shall be 2%, and the maximum increase shall be 3%.

(For example, if the CPI-W increased 5.2% from December to December, the July 1 increase would be ½ of (5.2%-1%) [minimum of 2% and maximum of 3%] = 2.2%.)

Effective January 1, 2010, all salary ranges and steps of the WSP Commissioned Officer Salary Schedule that were in effect on December 31, 2009 shall be increased by a

percentage equal to one-half of one percent less than the change in the Seattle-Tacoma-Bremerton CPI-W from June, 2008 to June, 2009. The minimum increase shall be 2%, and the maximum increase shall be 3%.

Effective July 1, 2010, all salary ranges and steps of the WSP Commissioned Officer Salary Schedule that were in effect on June 30, 2010 shall be increased by a percentage equal to one-half of one percent less than the change in the Seattle-Tacoma-Bremerton CPI-W from December 2008 to December 2009. The minimum increase shall be 2%, and the maximum increase shall be 3%.

Effective January 1, 2011, all salary ranges and steps of the WSP Commissioned Officer Salary Schedule that were in effect on December 31, 2010 shall be increased by a percentage equal to one-half of one percent less than the change in the Seattle-Tacoma-Bremerton CPI-W from June, 2009 to June, 2010. The minimum increase shall be 2%, and the maximum increase shall be 3%.

The parties shall devise appropriate appendixes for the contract as the required CPI data becomes available.

By stipulation of the parties, the Patrol shall be the custodian of the official record of the interest arbitration hearing which resulted in this Award.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Howell L. Lankford". The signature is fluid and cursive, with the first name being the most prominent.

Howell L. Lankford
Arbitrator

Appendix 1:
Resolution of the Issues Certified to Interest Arbitration

Article 5, Section 5.2	Leave for Vice President	Resolved 7/28
Article 9, Section 9.1	Definition of Line Employee	AT ISSUE
Section 9.13 C 2	Homeland Security Residency and Commute Requirement	AT ISSUE Resolved 7/28
Article 11, Section 11.3`	Employer Assignments/Transfers	AT ISSUE
Section 11.5	Specialty Assignments	AT ISSUE
Section 11.5E	Specialty Assignments	AT ISSUE
Section 11.6	Intra District Transfers	Resolved 7/28
New Article (proposed by employer)	Specialty Assignments	AT ISSUE
Article 12, Section 12.12	Overtime	Resolved 8/14
Section 12.15 D	Court Appearances	AT ISSUE
Article 14, Section 14.2	Rate of Vacation Accrual	AT ISSUE
Article 15, Section 15.7	Workers' Compensation	Resolved 8/11
Article 18, Sections 18.1, 2, 3	Job Performance Appraisal	Resolved 7/28
New Article (proposed by union)	Vehicle Collisions	Resolved 7/28
Article 23, Section 23.2 C	Uniforms and Equipment	AT ISSUE
Section 12.4 A & D	Tuition Reimbursement	Resolved 7/28
Section 23.9	Motorcycles	AT ISSUE
Section 23.12 (new)	Driving Certification	Resolved 7/28
Article 27, #2 and #4	MOUs and Settlement Agreements	Resolved 7/28
Article 28, Section 28.1 and Appendices A and B	Wage Scales and Increases	AT ISSUE
Section 28.2	Definition	Resolved 8/11
Section 28.5`	Education Incentive	Resolved 7/28
Section 28.7 A G	Premium and Award Pay All but A	Resolved 8/11
Section 28.7 H	Canine Handler Pay	Resolved 7/28
Section 28.9 A	Geographic Assignment Pay	Resolved 8.11
Section 28.13 A	Certified Technical Specialist	Resolved 8/11
Section 28.14	Drug Recognition Expert	Resolved 8/11
New Section	Senior Trooper	Resolved 8/14
New Section	Physical Fitness Incentive	Resolved 8/14
Section 28.16 (new)	Salary Overpayment Recovery	Resolved 8/11

1 **Appendix II**

2 **WSP's Proposal for a new Specialty Assignments Article**

3
4 **NEW ARTICLE X**

5 **SPECIALTY ASSIGNMENTS**

6
7 ~~11.5 Specialty Assignments~~

8
9 ~~A.X.1~~ A specialty assignment is an assignment for which there is a special selection
10 process. Selection for a specialty assignment will be treated as a reassignment
11 and will not be considered a promotion. To assist the Chief in selecting the
12 best-qualified candidate for the assignment, minimum qualifications may be
13 established for specialty assignments. Selection for a motorcycle assignment
14 will be in accordance with Section X.3 below; selection for a canine
15 assignment will be in accordance with Section X.4 below; and selection for a
16 detective assignment will be in accordance with Section X.5 below.

17
18 ~~B.X.2 Selection Process for Specialty Assignments other than Motorcycle,~~
19 ~~Canine or Detective~~

20
21 †A. Specialty assignment openings will be advertised in the Daily Bulletin at
22 least five (5) business days prior to the start of the selection process.
23 The advertisement shall include the number of openings to be filled in
24 the specialty assignment, a brief job description, any minimum
25 qualifications, and a description of the testing procedure to be used.

1 Selection for a specialty assignment shall be at the discretion of the
2 district/division commander.

3
4 2B. Qualified non-probationary employees, ~~including probationary~~
5 ~~employees~~, can apply for any specialty assignments that are advertised
6 statewide, unless the advertisement specifies otherwise. If there are not
7 enough non-probationary candidates, or if none of the non-probationary
8 candidates are chosen for a particular opening, the agency may open the
9 advertisement for probationary candidates.

10
11 3C. Specialty assignments may be given on a temporary basis without
12 following the above process in exigent circumstances. Temporary
13 assignments will not normally last more than six (6) months. At the
14 conclusion of the temporary assignment or when the exigent
15 circumstances no longer prevail, the assignment shall be advertised in
16 accordance with this Article.

17
18 **~~23.9~~X.3 Motorcycles Specialty Assignment Selection Process**

19
20 A. Employees shall be allowed to submit requests at any time for basic
21 Employer motorcycle training for motorcycle assignments. Requests for
22 training for motorcycle assignments shall be reasonably considered in
23 order of the date of request. Request for motorcycle training shall be
24 logged on a statewide motorcycle training request list maintained at
25 Field Operations Headquarters. Motorcycle assignments shall be
26 classified as line assignments.

1 B. The Employer will advertise all open positions for motorcycle officers
2 in the Daily Bulletin, and interested applicants may submit requests for
3 consideration via normal channels. Openings will be filled according to
4 the following:

5
6 1. Employees currently assigned as motorcycle officers will be
7 given first priority. In the event two (2) or more employees
8 currently assigned to motorcycles request transfer to the open
9 position, the employee with the most “motorcycle seniority”
10 (total time spent riding a motorcycle on a full-time basis during
11 employment with the Agency regardless of any breaks in
12 motorcycle service) will be given first consideration. If both
13 applicants have equal motorcycle seniority, the definition of
14 seniority specified in Article 8 of this Agreement shall determine
15 the selection.

16
17 2. If the position is not filled in accordance with Subsection X.3 B 1
18 above, employees who are alternates will be given second
19 priority for consideration. In the event two (2) or more
20 employees who are alternates apply for the open position, the
21 certified employee with the most motorcycle seniority will be
22 given first consideration. If both have equal motorcycle
23 seniority, the definition of seniority specified in Article 8 of this
24 Agreement shall determine the order of consideration.
25 Employees considered but not selected shall be notified of the

1 reason for the denial, and may appeal the denial to the Chief.
2 The Chief's decision shall be final.

3
4 23. If the open position is not filled ~~in accordance with~~by employees
5 who meet the criteria in either Subsection ~~23.9~~X.3 B 1 or 2
6 above, employees who were previously: (a) trained to ride
7 motorcycles; (b) held motorcycle certifications; and (c) rode
8 motorcycles on a full-time basis will be given third priority for
9 ~~considered~~consideration. In the event two (2) or more employees
10 that meet the criteria set forth in this Subsection request transfer
11 to the open position, the employee with the most motorcycle
12 seniority will be given first consideration. If both applicants have
13 equal motorcycle seniority, the definition of seniority specified in
14 Article 8 of this Agreement shall determine the order of
15 consideration. Employees considered but not selected shall be
16 notified of the reason for the denial, and may appeal that denial to
17 the Chief. The Chief's decision shall be final.

18
19 ~~3. If the position is not filled by employees who meet the criteria in~~
20 ~~either Subsection 23.9 B 1 or 2 above, employees who are~~
21 ~~alternates will be given third priority for consideration. In the~~
22 ~~event two (2) or more employees who are alternates apply for the~~
23 ~~open position, the certified employee with the most motorcycle~~
24 ~~seniority will be given first consideration. If both have equal~~
25 ~~motorcycle seniority, the definition of seniority specified in~~
26 ~~Article 8 of this Agreement shall determine the order of~~

1 ~~consideration. Employees considered but not selected shall be~~
2 ~~notified of the reason for the denial, and may appeal the denial to~~
3 ~~the Chief. The Chief's decision shall be final.~~

4
5 4. If the position is not filled by employees who meet the criteria in
6 Subsection ~~23.9X.3~~ B 1, 2 or 3 above, employees currently
7 trained but not assigned or certified as motorcycle officers will be
8 given fourth priority for consideration. In the event two (2) or
9 more trained but not assigned or certified employees apply for the
10 open position, the employee with the earliest date of graduation
11 from basic motorcycle training, notwithstanding breaks in
12 motorcycle service, will be given first consideration. If both have
13 the same date of graduation from basic motorcycle training, the
14 definition of seniority specified in Article 8 of this Agreement
15 shall determine the order of consideration. Employees
16 considered but not selected shall be notified of the reason for the
17 denial, and may appeal that denial to the Chief. The Chief's
18 decision shall be final.

19
20 5. If no employees who meet the criteria in Subsection ~~23.9X.3~~ B 1,
21 2, 3, or 4 above apply for an opening, selection will be based on
22 an oral interview, resume review, Office of Professional
23 Standards history, Job Performance Appraisals, and evaluation of
24 narrative command recommendations. The interview panel will
25 consist of representatives from the Employer and one (1)
26 representative from the Association. The panel shall make their

1 recommendation to the district captain for final determination.
2 This determination is not subject to the grievance procedure of
3 this Agreement.
4

5 C. There shall be one (1) alternate in each district where motorcycles are
6 assigned. District commanders have the authority to assign alternates to
7 motorcycle duties at their discretion, provided that the assignment meets
8 the operating needs of the district. The failure of an alternate to fill a
9 temporary vacancy arising in his/her district area in accordance with
10 Subsection ~~23.9~~X.3 D below shall result in the alternate being removed
11 from consideration for any future motorcycle position unless his/her
12 refusal results from a documented medical condition that prevents the
13 alternate from riding.
14

15 D. In the event an employee currently assigned as a motorcycle officer on a
16 full-time basis is prevented from performing his/her motorcycle
17 assignment because of a medical condition for thirty (30) calendar days
18 or more, the employee's motorcycle position shall be filled by an
19 alternate.
20

21 E. In the event the employee currently assigned as motorcycle officer on a
22 full-time basis is prevented from performing his/her motorcycle
23 assignment for six (6) months or less because of a medical condition,
24 when he/she returns from Temporary Disability Leave (TDL) he/she
25 shall be returned to his/her motorcycle assignment upon applying for the

1 assignment and being certified as able to perform the essential functions
2 of the job.

- 3
- 4 F. In the event the employee currently assigned as motorcycle officer on a
5 full-time basis is prevented from performing his/her motorcycle
6 assignment for more than six (6) months because of a medical condition,
7 the position may be filled permanently in accordance with this Section.
8 If, after TDL is exhausted, the employee is placed on disability or in a
9 long term limited duty position and is subsequently returned from
10 disability or the long term limited duty assignment to a line assignment
11 and is certified as being able to perform the essential functions of the
12 job, and his/her prior motorcycle assignment was not filled by an
13 alternate but filled by a permanent replacement, the employee will be
14 guaranteed the opportunity to fill the first available motorcycle vacancy
15 and each subsequent motorcycle vacancy until he/she takes a motorcycle
16 assignment.

17

18 **~~23.10~~X.4 Canine Handlers Specialty Assignments**

- 19
- 20 A. Canine handlers will be selected in accordance with the Canine Unit
21 Manual.
- 22
- 23 B. Currently assigned canine handlers will have priority, by Agency
24 seniority or by selection by the Employer, in filling any new canine
25 team vacancies.
- 26

1 C. Non-routine care of the canine, i.e., veterinary visits, etc., which occur
2 off-duty will be compensable, in addition to the scheduled workday.

3
4 D. Assignment as a canine handler will be a three (3) year minimum
5 commitment; however, employees will not be prevented from testing
6 for, and receiving, promotional opportunities while assigned as canine
7 handlers.

8
9 E. The Employer acknowledges that the work of using canines to provide
10 law enforcement services at Washington State Ferry terminals and on
11 Washington State Ferry vessel is work that historically has been done by
12 members of the bargaining unit.

13
14 **~~23.8X.5~~ Eligibility for Detective Specialty Assignments**

15 An employee is not eligible for a detective assignments unless he/she has
16 completed four (4) years of commissioned service; however, if there is no
17 qualified employee with four (4) or more years of commissioned service who
18 applies for the detective assignment, the assignment may be filed with an
19 employee with less than four (4) years of commissioned service. Detective
20 position vacancies shall be filled by first allowing detectives within the division
21 qualified to perform the work to apply for lateral transfer. Transfer approval
22 shall be at the discretion of the division commander. Remaining vacancies will
23 be filled according to the current detective selection process.

24
25 **~~EX.6.~~** An employee who accepts a specialty assignment will not be removed from
26 transfer lists ~~unless the specialty assignment requires a minimum commitment.~~

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DX.7. When a trooper ~~assigned to~~ a specialty ~~position~~-assignment and the WSP both agree that it would be in the best interest of the trooper and the Agency to allow the trooper to transfer out of a specialty ~~position~~assignment, then the following provisions will apply:

- †A. The trooper will only be allowed to transfer back to the district and geographic area where he/she was assigned prior to the specialty assignment ~~to the specialty position~~; and
- ‡B. All cost associated with any move relating to this voluntary transfer request will be borne by the employee.

EX.8. Removal from a Specialty Assignment

The involuntary reassignment, removal or transfer of an employee from any specialty ~~position~~-assignment shall not be subject to the grievance-arbitration procedure pursuant to Article 21 of this Agreement, but may be appealed in accordance with the procedure set out below.

- †A. The employee will be afforded an opportunity to meet with the decision maker within a reasonable amount of time after being notified that he/she has been involuntarily reassigned, removed, or transferred from a specialty ~~position~~assignment. During the meeting with the decision maker, the employee will be informed of the cause (reasons) for the decision ~~to involuntarily reassign, remove, or transfer him/her from the specialty position.~~

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2B. In the event the employee or the Association does not believe that there is cause for the involuntary reassignment, removal or transfer, the employee or Association may request and will be afforded an appeal to the person in the chain of command who is one (1) level higher than the person making the initial decision ~~to involuntarily reassign, remove, or transfer the employee from the specialty position.~~

a1. In the event of an appeal, the employee and the Association will be afforded an opportunity to meet with the person in the chain of command who is one (1) level higher than the person making the initial decision ~~to involuntarily reassign, remove, or transfer the employee from the specialty position.~~

b2. The meeting will occur within ten (10) calendar days after the appeal is requested, unless otherwise mutually agreed to by the Association and the Employer.

c3. At the meeting, the employee and the Association will be given a full opportunity to present all of the facts and circumstances the employee and the Association feel are relevant.

d4. Within ten (10) calendar days after the conclusion of the meeting, the employee and Association shall be presented with a written decision on the appeal from the person in the chain of command who is one (1) level higher than the person making the initial

1 ~~decision to involuntarily reassign, remove, or transfer the~~
2 ~~employee from the specialty position.~~

3
4 3C. The decision of the person in the chain of command who is one (1) level
5 higher than the person making the initial decision to involuntarily
6 reassign, remove, or transfer the employee from the specialty ~~position~~
7 assignment shall be final and binding upon the employee and the
8 Association.

9
10 4D. The Employer will not involuntarily reassign, remove, or transfer the
11 employee from the specialty ~~position~~ assignment until the appeal
12 procedure set forth in this ~~Subsection 11.5 E-X.8~~ has been exhausted.

13
14 **X.9 SWAT/Crisis Negotiating Team (CNT)**

15 A trooper who is a member of either the SWAT or the CNT and who is
16 promoted to Sergeant may continue to be a member of the SWAT or CNT at
17 the discretion of the Chief.

