BEFORE THE ARBITRATOR

In the matter of the interest arbitration under Chapter 47.64 RCW between STATE OF WASHINGTON / WASHINGTON STATE FERRIES and PUGET SOUND METAL TRADES COUNCIL	)	ARBITRATION AWARD FMCS No. 081004-50143-8 (Negotiations for 2009-2011)

Rob McKenna, Attorney General, by *David J. Slown*, Assistant Attorney General, appeared on behalf of the employer.

Reid, Pedersen, McCarthy & Ballew, L.L.P., by *Kenneth J. Pedersen*, Attorney at Law, appeared on behalf of the union.

The State of Washington operates Washington State Ferries (WSF) as part of the Marine Transportation Division of its Department of Transportation, and is an employer under Chapter 47.64 RCW.[1] For the purposes of collective bargaining under Chapter 47.64 RCW, the Puget Sound Metal Trades Council (union) and its affiliated organizations represent WSF employees regularly assigned maintenance, repair and conversion work necessary to maintain WSF vessels and auxiliary equipment or fixtures.[2] Those parties have a collective bargaining agreement in effect from July 1, 2007 through June 30, 2009. The parties' representatives obtained a list of arbitrators from the Federal Mediation and Conciliation Service in the autumn of 2007, and selected Marvin L. Schurke of Olympia, Washington, as the impartial arbitrator for interest arbitration to set the terms of the parties' 2009-2011 collective bargaining agreement.

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1 WSF operates about 21 passenger-and-vehicle ferries on 10 routes crossing Puget Sound and related waters.

2 The PSMTC participants are Local 46 of the International Brotherhood of Electrical Workers, Local 49 of the International Association of Machinists and Aerospace Workers, Local 1184 of the United Brotherhood of Carpenters and Joiners of America, Locals 117 and 174 of the International Brotherhood of Teamsters, Local 66 of the Sheet Metal Workers International Association, Local 104 of the International Brotherhood of Boilermakers, and Local 32 of the United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry.

Under the parties' current contract, the journeymen in all of the crafts are paid at the same rate. All of the employees involved here are based at the WSF maintenance base at Eagle Harbor on Bainbridge Island in Kitsap County. They routinely perform some of their work on WSF vessels brought to the Eagle Harbor facility, but they also routinely perform some of their work at WSF terminal facilities located from Tacoma on the south to the San Juan Islands on the north.

August 12 and 13, 2008, were set months in advance as the dates for a hearing in this matter. The Arbitrator reviewed the statute, and posed several procedural questions to the parties in advance of the hearing. At the hearing, the parties stipulated that they had:

- Met the requirements of RCW 47.64.170 with regard to their selection of the arbitrator and setting the hearing;
- Waived mediation under RCW 47.64.230;
- Waived a certification of issues under RCW 47.64.300(1);
- Waived a tri-partite panel under RCW 47.64.300(2); and
- Waived the time requirements under RCW 47.64.300(4), and had exchanged their final offers by a stipulated deadline. [3]

The Arbitrator conducted the hearing on August 12 and 13, 2008. Witnesses testified under oath, and exhibits totaling 539 pages were received in evidence. A court reporter was present, and issued

3 At the hearing, the union withdrew a "vacations" proposal contained in the written final offer it filed in advance of the hearing. The employer did not object to the deletion of "vacations" from the issues for arbitration.

a 214-page transcript on August 20, 2008. The parties filed briefs on September 5, 2008, after a one-week extension requested by the employer was granted without objection from the union.

THE ULTIMATE ISSUE

The Arbitrator in this interest arbitration proceeding must ultimately determine the wages to be paid to the employees involved for the period from July 1, 2009 through June 30, 2011:

- The employer's final offer is a 1.6% wage increase on July 1, 2009, followed by a 1.7% wage increase on July 1, 2010;
- The union's final offer is a 6.0% wage increase on July 1, 2009, followed by another 6.0% wage increase on July 1, 2010.

RCW 47.64.200 limits the Arbitrator to selecting, "the most reasonable offer . . . of the final offers on each impasse item . . . ." The employer contends the 2009 and 2010 wage increases should be treated as a single package, while the union argues the two years could be decided separately.

In practical terms, the parties' final offers leave substantial gaps between them for each year:

- A $1.15 difference of journeyman rates in the first year, where the employer's offer would yield a $0.42 per hour wage increase (from $26.14 to $26.56) on July 1, 2009, while the union's final offer would yield a $1.57 per hour increase (to $27.71) on that date.
- A $1.21 difference of journeyman rates in the second year, where the employer's offer would yield a $0.45 per hour wage increase (from $26.56 to $27.01) on July 1, 2010, while the union's final offer would yield a $1.66 per hour increase (to $29.37) on that date.

UNDERLYING ISSUES

By arguments at the hearing and in their briefs, the parties framed several issues that underlie the ultimate decision in this case and warrant separate discussion, as follows:

1. What weight should be given to the salary survey issued by the Marine Employees Commission (MEC) in 2008?
2. What weight should be given to wages paid to employees in the building and construction industry?
3. What weight should be given to evidence purporting to show a high level of satisfaction among current Eagle Harbor employees?
4. What weight should be given to the wages the state pays to its civil service employees?
5. What weight should be given to the "implicit price deflator" as a measure of inflation?
6. What weight should be given to the employer's ability to pay in 2009-2011?

UNDERLYING ISSUE 1 – THE SALARY SURVEY

The union characterizes the salary survey computed as of September 2007 data and published by the MEC in 2008 as "a primary factor" in this proceeding. It points out that the MEC salary survey found these WSF employees lagged 10% behind the shipyard rates and 16.5% behind a blended shipyard / building and construction rate. The employer's brief acknowledges "that the . . . [MEC] salary survey shows . . . [these] employees are behind the comparables listed with respect to wages", but the employer would have the Arbitrator largely ignore the salary survey in favor of its other arguments.

Legal Standards Applicable to Underlying Issue 1

This is an interest arbitration proceeding under a statute, rather than a process agreed upon by the parties. The Arbitrator thus looks to the applicable statute for guidance in deciding all issues.

RCW 47.64.005 has been on the statute books since 1949. With an amendment in 1961, it now provides:

> The state of Washington, as a public policy, declares that *sound labor relations are essential to* the development of a ferry and bridge system which will best *serve the interests of the people of the state.*

[Emphasis supplied.] Chapter 47.64 RCW may have been the first public sector collective bargaining law in the nation. It was adopted in the context of the state taking over a private operation after ferry service was interrupted due to a lawful strike by the private sector employees.

RCW 47.64.006 has been on the books since 1983. With an amendment in 1989, it now provides, in pertinent part:

> The legislature declares that it is the public policy of the state of Washington to: (1) Provide continuous operation of the Washington state ferry system at reasonable cost to users; . . . (3) promote harmonious and cooperative relationships between the ferry system and its employees . . . ; (4) protect the citizens of this state by assuring effective and orderly operation of the ferry system in providing for their health, safety, and welfare; (5) prohibit and prevent all strikes or work stoppages by ferry employees; . . . and (7) *promote just and fair compensation, . . . for ferry system employees as compared with public and private sector employees* in states along the west coast of the United States, including Alaska, and in British Columbia *in directly comparable but not necessarily identical positions.*

[Emphasis supplied.] That section originated as part of a statute which created a (new) Marine Employees' Commission, required the MEC to conduct a salary survey, explicitly provided for interest arbitration, and imposed the "final offer" format for interest arbitration.

RCW 47.64.120 has also been on the books since 1983. With amendments in 1997 and 2006, it now provides, in relevant part:

> (1) The employer and ferry system employee organizations, through their collective bargaining representatives, shall meet at reasonable times, to *negotiate in good faith with respect to wages*, ...
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> . . .
>
> (3) Except as otherwise provided in this chapter, *if a conflict exists between an executive order, administrative rule, or agency policy relating to wages . . . and a collective bargaining agreement* negotiated under this chapter, *the collective bargaining agreement shall prevail.* A provision of a collective bargaining agreement that conflicts with the terms of a statute is invalid and unenforceable.

[Emphasis supplied.] Thus, the state law governing WSF collective bargaining since 1983 continues principles that had been in effect under state law since 1949 and under the National Labor Relations Act before the state took over the ferry operation: Wages are a mandatory subject of bargaining, and agreements reached in bargaining prevail over conflicting employer policies.

RCW 47.64.220 has also been on the books since 1983. With amendments in 1989, 1999, 2005 and 2006, it now provides, in pertinent part:

> (1) Prior to collective bargaining and *for purposes of collective bargaining and arbitration, the [MEC] shall conduct a salary survey.* The results of the survey shall be published in a report which shall be a public document *comparing wages . . . of involved ferry employees with those of public and private sector* employees in states along the west coast of the United States, including Alaska, and in British Columbia *doing directly comparable but not necessarily identical work*, giving consideration to factors peculiar to the area and the classifications involved. Such survey report shall be for the purpose of disclosing generally prevailing levels of compensation . . . . It shall be used to guide generally but not to define or limit collective bargaining between the parties.

[Emphasis supplied.] Working through the state Department of Personnel, the MEC retained an outside firm to conduct its salary survey in 2007-2008.

RCW 47.64.320 has been on the books since 2006, and sets forth the standards currently to be applied in interest arbitration:

> (1) The mediator, arbitrator, or arbitration panel may consider only matters that are subject to bargaining under this chapter.
>
> (2) The decision of an arbitrator or arbitration panel is not binding on the legislature and, if the legislature does not approve the funds necessary to implement provisions pertaining to compensation and fringe benefit provisions of an arbitrated collective bargaining agreement, is not binding on the state, the department of transportation, or the ferry employee organization.
>
> (3) In making its determination, the arbitrator . . . shall be mindful of the legislative purpose under RCW 47.64.005 and 47.64.006 and, as additional standards or guidelines to aid it in reaching a decision, shall take into consideration the following factors:
>
> (a) Past collective bargaining contracts between the parties including the bargaining that led up to the contracts;
>
> (b) The constitutional and statutory authority of the employer;
>
> (c) Stipulations of the parties;
>
> (d) *The results of the salary survey as required in RCW 47.64.220*;
>
> (e) Comparison of wages, hours, employee benefits, and conditions of employment of the involved ferry employees with those of public and private sector employees in states along the west coast of the United States, including Alaska, and in British Columbia doing directly comparable but not necessarily identical work, giving consideration to factors peculiar to the area and the classifications involved;
>
> (f) Changes in any of the foregoing circumstances during the pendency of the proceedings;
>
> (g) The limitations on ferry toll increases and operating subsidies as may be imposed by the legislature; and
>
> (h) Other factors that are normally or traditionally taken into consideration in the determination of matters that are subject to bargaining under this chapter.

[Emphasis supplied.] Neither party cites any direct and authoritative interpretation of that statute by an arbitrator or a court.

Analysis of Underlying Issue 1

The Legislature made a deliberate choice in 1983, when it expressly inserted a salary survey into the WSF collective bargaining process. The Legislature clearly perpetuated that deliberate choice as recently as 2006, when it both retained the salary survey requirement in amending RCW 47.64.220 and made explicit reference to that salary survey in adopting RCW 47.64.320(3)(d).

The MEC salary survey is unique among the interest arbitration processes found in current Washington State law. There is no state-required salary survey for local government law

enforcement officers, corrections personnel, fire fighters, emergency medical personnel, or public transit workers who are subject to interest arbitration under Chapter 41.56 RCW. No salary survey is required for home care workers, child care workers or adult family home providers, who negotiate with the Governor's representatives and are subject to interest arbitration under other Chapter 41.56 RCW provisions. RCW 41.06.167 continues to require a salary survey concerning Washington State Patrol officers and officer candidates, but that salary survey is not referenced among the interest arbitration criteria set forth for those employees in RCW 41.56.475.[4]

The salary surveys prepared by the Milliman firm and published by the MEC in 2006 and 2008 are in evidence in this proceeding. Three separate benchmark groups are identified: A "ferry operations" group, an "administration / office / terminals" group, and the "shipyards" group that is of interest here. The Executive Summary published at the front of the 2008 survey document set forth "Key findings" from the survey, including:

> - A comparison of data from both the 2006 and 2008 surveys shows that [WSF] has lost ground competitively on an overall basis in all three benchmark groupings. The overall percentage lag of 4.6% . . . is determined on a simple pay rate basis. . . . .
> . . .
> - Shipyards benchmarks have lost 10 percentage points to the competitive market . . . .
> . . .
> - The cost-of-living for the Greater Seattle area during the period April 2007 – January 2008 is 3.4% and the Employment Cost Index is up 2.9% over the same period. However, the Economic Research Institute (ERI) projects that the July 2007 to July 2008 cost-of-living change . . . will likely approach 5.0% . . . .

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4 The salary survey historically required by Chapter 41.06 RCW for state civil service employees disappeared as part of the Personnel System Reform Act of 2002, which gave those employees bargaining rights concerning wages.

The 2008 salary survey document also anticipated further wage and benefit increases by surveyed employers, at page 59.

Conclusion on Underlying Issue 1

The Legislature does not enact nullities, and the statutory provisions must be given effect in this proceeding. The salary survey issued by the MEC in 2008 is entitled to substantial, if not controlling, weight in this proceeding.

UNDERLYING ISSUE 2 – THE BUILDING AND CONSTRUCTION PREMIUM

The union contends a pay premium above the shipyard rates is justified by the building maintenance work performed by these employees at WSF terminals, and that such a premium existed in the past. The employer points out that the premium disappeared in the parties' recent contracts.

Legal Standards Applicable to Underlying Issue 2

RCW 47.64.006 has been on the books since 1983. With an amendment in 1989, it provides, in pertinent part:

> The legislature declares that it is the public policy of the state of Washington to: . . . (7) *promote just and fair compensation, . . . for ferry system employees as* compared with . . . *employees . . . in directly comparable but not necessarily identical positions.*

[Emphasis supplied.] That comparability language is in addition to the salary survey conducted by the Marine Employees Commission under RCW 47.64.220.

RCW 47.64.320 has been on the books since 2006, and sets forth the standards currently to be applied in interest arbitration. It provides, in pertinent part:

> (3) In making its determination, the arbitrator . . . shall be mindful of the legislative purpose under RCW 47.64.005 and 47.64.006 and, as additional standards or guidelines to aid it in reaching a decision, shall take into consideration the following factors:
>
> (a) *Past collective bargaining contracts between the parties* including the bargaining that led up to the contracts;
>
> (b) The constitutional and statutory authority of the employer;
>
> (c) Stipulations of the parties;
>
> (d) The results of the salary survey as required in RCW 47.64.220;
>
> (e) *Comparison of wages, hours, employee benefits, and conditions of employment of the involved ferry employees with those of public and private sector employees in states along the west coast of the United States, including Alaska, and in British Columbia doing directly comparable but not necessarily identical work, giving consideration to factors peculiar to the area and the classifications involved*;
>
> (f) Changes in any of the foregoing circumstances during the pendency of the proceedings;
>
> (g) The limitations on ferry toll increases and operating subsidies as may be imposed by the legislature; and
>
> (h) Other factors that are normally or traditionally taken into consideration in the determination of matters that are subject to bargaining under this chapter.

[Emphasis supplied.] Here again, the comparability language in RCW 47.64.320(3)(e) is in addition to the MEC salary survey conducted under RCW 47.64.220.

Analysis of Underlying Issue 2

The employees involved here do perform both ship repair tasks (comparable to the work in the shipyards surveyed by the MEC) and building maintenance work (comparable to the building and construction crafts, but seldom performed by shipyard employees). Invoking the "past contracts" criteria of RCW 47.64.320(3)(a) is a wash, however: While the union aptly notes that the parties' 1977-1980 contract gave these employees a 3.55% premium over the rates paid in the shipyards, the employer aptly notes that pay premium disappeared from the parties' more recent contracts.

The union characterizes its final offer as more tailored to the basic wage gap identified by the MEC survey than to its "restore the premium" aspirations. The employer contends the financial difficulties

currently facing state government make this a bad time for a real change from the status quo. Absence of separate final offers on a pay premium eliminates the need for a direct ruling on a contractual tie to the building and construction pay rates, and testimony at the hearing indicated that other union efforts to restore the building and construction premium have borne some fruit. These parties agreed to change the scope and content of the 2008 MEC salary survey, and the paragraph on shipyards in the Executive Summary of the 2008 salary survey continued beyond the portion quoted above, as follows:

> *Shipyards have been experiencing significant difficulty in the hiring and retention of skilled trades. As a result, they are beginning to tie their base pay rates to a percentage of the building and construction trades rates.* Their primary competition, cities, counties and ports, are all agreeing to this approach in contract negotiations. . . . (C)omparison of weighted average shipyard rates to the maintenance trades rate composite derived from local public sector employer contracts (showing) . . . lag percentages, 10.0% to 23.0% is significant and attributable to decisions made by other public sector employers to align or index rates to a certain percentage of the Building and Construction (B&C) industry rates. Supply and demand is driving this decision. From a total compensation standpoint (wages, benefits and workplace environment) the (WSF) does not need to pay the B&C rates, but should close the gap. A simple average of the two comparative rate summaries shows an overall lag of 16.5% which is most reflective of the current skilled trades' labor market environment.

[Emphasis supplied.] Thus, the salary survey issued by the MEC in 2008 already addresses the union's quest for consideration of the building and construction industry pay rates.

Conclusion on Underlying Issue 2

The shipyards' action to "*tie their base pay rates to a percentage of the building and construction trades rates*" likely contributes to the substantial lag which developed since the 2006 MEC salary survey found WSF employees to be at par with the shipyards. Continuation of that practice by the shipyards will inevitably show up in their base wages in future MEC salary surveys, and will reduce the need for a premium in this contract.

UNDERLYING ISSUE 3 - EMPLOYER CLAIM OF EMPLOYEE SATISFACTION

At the hearing, the employer offered testimony of one of its supervisors (a former bargaining unit employee) and one document (Exhibit 110) as purporting to show low turnover and high satisfaction among the employees affected by this proceeding. The union cites an absence of statutory criteria to consider the employer's argument, and points out that there may be other reasons for low turnover among the employees involved in this proceeding.

Legal Standards Applicable to Underlying Issue 3

RCW 47.64.320 has been on the books since 2006, and includes the current standards to be applied in interest arbitration. It provides, in pertinent part:

> (3) In making its determination, the arbitrator . . . shall be mindful of the legislative purpose under RCW 47.64.005 and 47.64.006 and, as additional standards or guidelines to aid it in reaching a decision, shall take into consideration the following factors:
>
> (a) Past collective bargaining contracts between the parties including the bargaining that led up to the contracts;
>
> (b) The constitutional and statutory authority of the employer;
>
> (c) Stipulations of the parties;
>
> (d) The results of the salary survey as required in RCW 47.64.220;
>
> (e) Comparison of wages, hours, employee benefits, and conditions of employment of the involved ferry employees with those of public and private sector employees in states along the west coast of the United States, including Alaska, and in British Columbia doing directly comparable but not necessarily identical work, giving consideration to factors peculiar to the area and the classifications involved;
>
> (f) Changes in any of the foregoing circumstances during the pendency of the proceedings;
>
> (g) The limitations on ferry toll increases and operating subsidies as may be imposed by the legislature; and
>
> (h) Other factors that are normally or traditionally taken into consideration in the determination of matters that are subject to bargaining under this chapter.

None of those criteria directly address employee retention, employee satisfaction, or employee turnover.

Analysis of Underlying Issue 3

Your Arbitrator observes that the interest arbitration criteria for WSF employees differ markedly from the interest arbitration criteria for child care workers in RCW 41.56.465(4) (which expressly addresses "reducing turnover and increasing retention" among child care workers),[5] as well as from the interest arbitration criteria for home care workers in RCW 41.56.465(5) (which expressly addresses "promoting a stable workforce" of home care providers).[6] Evidence of satisfaction among WSF employees could thus only be considered under the "*other factors*" language in RCW 47.64.320(3)(h).

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5 **RCW 41.56.465 . . . Interest arbitration panel-Determinations-Factors to be considered.** . . .
(4) For employees listed in RCW 41.56.028:
(a) The panel shall also consider:
(i) A comparison of child care provider subsidy rates and reimbursement programs by public entities, including counties and municipalities, along the west coast of the United States; and
(ii) The financial ability of the state to pay for the compensation and benefit provisions of a collective bargaining agreement; and
(b) The panel may consider:
(i) The public's interest in reducing turnover and increasing retention of child care providers;
(ii) The state's interest in promoting, through education and training, a stable child care workforce to provide quality and reliable child care from all providers throughout the state; and
(iii) In addition, for employees exempt from licensing under chapter 74.15 RCW, the state's fiscal interest in reducing reliance upon public benefit programs . . . .

6 **RCW 41.56.465 . . . Interest arbitration panel-Determinations-Factors to be considered.** . . .
(5) For employees listed in RCW 74.39A.270:
(a) The panel shall consider:
(i) A comparison of wages, hours, and conditions of employment of publicly reimbursed personnel providing similar services to similar clients, including clients who are elderly, frail, or have developmental disabilities, both in the state and across the United States; and
(ii) The financial ability of the state to pay for the compensation and fringe benefit provisions of a collective bargaining agreement; and
(b) The panel may consider:
(i) A comparison of wages, hours, and conditions of employment of publicly employed personnel providing similar services to similar clients, including clients who are elderly, frail, or have developmental disabilities, both in the state and across the United States;
(ii) The state's interest in promoting a stable long-term care workforce to provide quality and reliable care to vulnerable elderly and disabled recipients;
(iii) The state's interest in ensuring access to affordable, quality health care for all state citizens; and
(iv) The state's fiscal interest in reducing reliance upon public benefit programs . . . .

Employee satisfaction is a complex issue, and the limited testimony of one employer witness does not provide a convincing case. Moreover, close examination of Exhibit 110 also provides basis to diminish its probative value. The document lists numerous individuals not affected by this proceeding: Testimony at the hearing brought out that the WSF workforce at Eagle Harbor includes a "shore gang" represented by another union that is not a party to this proceeding;[7] a "Washington Management Service" title on the list is understood to be covered by the state Civil Service Law, Chapter 41.06 RCW, and is thus exempt from Chapter 47.64 RCW. With those clarifications: Nine of ten (90%) of the most-senior employees and 14 of 50 (28%) of the most-senior employees on the exhibit are shore gang members; after exclusion of titles connoting exclusion from this bargaining unit, all 50 of the least-senior employees on the list are involved in this proceeding.

Conclusion on Underlying Issue 3

The Arbitrator rejects the employer's "employee satisfaction justifies a wage increase less than the MEC salary survey" argument.

UNDERLYING ISSUE 4 – COMPARABILITY WITH CIVIL SERVICE EMPLOYEES

At the hearing, the employer offered testimony and an exhibit to show that the employees involved in this proceeding are already paid at hourly rates substantially higher than state civil service employees working under similar-sounding titles. The union contends that comparison to civil service employees is inapt, and that direct comparability was not sufficiently established.

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7 The Inlandboatmen's Union represents the shore gang.

Legal Standards Applicable to Underlying Issue 4

RCW 47.64.005 has been on the statute books since 1949. It provides:

> The state of Washington, as a public policy, declares that *sound labor relations are essential to* the development of a ferry and bridge system which will best *serve the interests of the people of the state.*

[Emphasis supplied.] Chapter 47.64 RCW gave the (original) Marine Employees' Commission authority to resolve any and all labor disputes arising in connection with the ferry system. While the "interest arbitration" term did not come into use until much later, the authority conferred by the 1949 law was broad enough to include setting the terms of a contract. After administration of Chapter 47.64 RCW was transferred on January 1, 1976, the Public Employment Relations Commission conducted interest arbitrations, including setting the terms of the 1977-1980 collective bargaining agreement between these parties. Washington State Ferries, Decisions 413, 561 (MRNE, 1979).

RCW 47.64.006 has been on the books since 1983. With an amendment in 1989, it now provides, in relevant part:

> The legislature declares that it is the public policy of the state of Washington to: (1) *Provide continuous operation of the Washington state ferry system* at reasonable cost to users; . . . (3) promote *harmonious and cooperative relationships between the ferry system and its employees* by permitting ferry employees to organize and bargain collectively; (4) protect the citizens of this state by *assuring effective and orderly operation of the ferry system* in providing for their health, safety, and welfare; (5) *prohibit and prevent all strikes or work stoppages by ferry employees*; . . . and (7) *promote just and fair compensation*, benefits, and working conditions *for ferry system employees as compared with public and private sector employees* in states along the west coast of the United States, including Alaska, and in British Columbia *in directly comparable but not necessarily identical positions.*

[Emphasis supplied.] That was the first section in a package of amendments enacted on the basis of a study committee recommendation, after several work stoppages by WSF employees provoked legislative dissatisfaction with the historical system, and a 1981 statutory change putting all of the

WSF employees under the state civil service law triggered an additional work stoppage by WSF employees.[8]

RCW 47.64.120 has also been on the books since 1983. With amendments in 1997 and 2006, it now provides, in relevant part:

> (1) The employer and ferry system employee organizations, through their collective bargaining representatives, shall meet at reasonable times, to *negotiate in good faith with respect to wages*, hours, working conditions, insurance, and health care benefits as limited by RCW 47.64.270, and other matters mutually agreed upon. . . . .
>
> (2) Upon ratification of bargaining agreements, ferry employees are entitled to an amount equivalent to the interest earned on retroactive compensation increases. . . . .
>
> (3) Except as otherwise provided in this chapter, *if a conflict exists between an executive order, administrative rule, or agency policy relating to wages . . . and a collective bargaining agreement* negotiated under this chapter, *the collective bargaining agreement shall prevail.* A provision of a collective bargaining agreement that conflicts with the terms of a statute is invalid and unenforceable.

[Emphasis supplied.] Thus, the collective bargaining process for WSF employees continued to authorize bargaining on wages at a time when state civil service employees lacked any bargaining rights concerning their wages.

RCW 47.64.140 has also been on the books since 1983. With amendments in 1989 and 2006, it provides, in relevant part:

> (1) *It is unlawful for any ferry system employee or any employee organization, directly or indirectly, to induce, instigate, encourage, authorize, ratify, or participate in a strike or work stoppage against the ferry system.*
>
> *(2) It is unlawful for the employer to authorize, consent to, or condone a strike or work stoppage; or to conduct a lockout*; or to pay or agree to pay any ferry system employee for any day in which the employee participates in a strike or work stoppage; or to pay or agree to pay any increase in compensation or benefits to any ferry system employee in response to

8 The bill passed by the Legislature in 1981 repealed collective bargaining on the wages of WSF employees and provided for future wage increases to be made under the state civil service law (in the same manner as wages were then set for state civil service employees). The additional work stoppage ensued when Governor Spellman announced that he would let the bill become law without his signature. The 1981 law was only to take effect when existing collective bargaining agreements expired, however, and the 1983 law took effect before those contracts expired.

> or as a result of any strike or work stoppage or any act that violates subsection (1) of this section. *It is unlawful for any official, director, or representative of the ferry system to authorize, ratify, or participate in any violation of this subsection.* . . . .
>
> (3) In the event of any violation or imminently threatened violation of subsection (1) or (2) of this section, *any citizen domiciled within the jurisdictional boundaries of the state may petition the superior court for Thurston county for an injunction* restraining the violation or imminently threatened violation. Rules of civil procedure regarding injunctions apply to the action. However, the court shall grant a temporary injunction if it appears to the court that a violation has occurred or is imminently threatened; the *plaintiff need not show that the violation or threatened violation would greatly or irreparably injure him or her*; and no bond may be required of the plaintiff unless the court determines that a bond is necessary in the public interest. Failure to comply with any temporary or permanent injunction granted under this section is a contempt of court as provided in chapter 7.21 RCW. The court may impose a penalty of up to ten thousand dollars for an employee organization or the ferry system, for each day during which the failure to comply continues. The sanctions for a ferry employee found to be in contempt shall be as provided in chapter 7.21 RCW. An individual or an employee organization which makes an active good faith effort to comply fully with the injunction shall not be deemed to be in contempt.
>
> (4) The right of ferry system employees to engage in strike or work slowdown or stoppage is not granted and nothing in this chapter may be construed to grant such a right.
>
> (5) Each of the remedies and penalties provided by this section is separate and several, and is in addition to any other legal or equitable remedy or penalty.
>
> (6) In addition to the remedies and penalties provided by this section the *successful litigant is entitled to recover reasonable attorney fees and costs* incurred in the litigation.
>
> (7) Notwithstanding the provisions of chapter 88.04 RCW and chapter 88.08 RCW, the *department of transportation shall adopt rules allowing vessels*, as defined in RCW 88.04.015, as well as other watercraft, *to engage in emergency passenger service on the waters of Puget Sound in the event ferry employees engage in a work slowdown or stoppage.* Such emergency rules shall allow emergency passenger service on the waters of Puget Sound within seventy-two hours following a work slowdown or stoppage. *Such rules that are adopted shall give due consideration to the needs and the health, safety, and welfare of the people of the state of Washington.*

[Emphasis supplied.] Those work stoppage provisions are arguably the most explicit to be found in Washington statutes regulating collective bargaining by public employees. They certainly go far beyond state common law, which makes strikes by public employees unlawful and enjoinable.[9]

RCW 47.64.170 has also been on the books since 1983. With amendments in 2006 and 2007, it now provides, in relevant part:

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9 Port of Seattle v. Longshoremen, 52 Wn.2d 317 (1958).

> (2) A ferry employee organization or organizations and the governor may each designate any individual as its representative to engage in collective bargaining negotiations.
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> . . .
>
> (4) Terms of any collective bargaining agreement may be enforced by civil action in Thurston county superior court upon the initiative of either party.
>
> . . .
>
> (6) . . . (b) The negotiation of a proposed collective bargaining agreement by representatives of the employer and a ferry employee organization shall commence on or about February 1st of every even-numbered year.
>
> (c) For negotiations covering the 2009-2011 biennium and subsequent biennia, the time periods specified in this section, and in RCW 47.64.210 and 47.64.300 through 47.64.320, must ensure conclusion of all agreements on or before October 1st of the even-numbered year next preceding the biennial budget period during which the agreement should take effect. . . . .
>
> (7) Until a new collective bargaining agreement is in effect, the terms and conditions of the previous collective bargaining agreement shall remain in force. . . . .
>
> (8)(a) The governor shall submit a request either for funds necessary to implement the collective bargaining agreements including, but not limited to, the compensation and fringe benefit provisions or for legislation necessary to implement the agreement, or both. Requests for funds necessary to implement the collective bargaining agreements shall not be submitted to the legislature by the governor unless such requests:
>
> (i) Have been submitted to the director of the office of financial management by October 1st before the legislative session at which the requests are to be considered; and
>
> (ii) Have been certified by the director of the office of financial management as being feasible financially for the state.
>
> (b) *The governor shall submit a request either for funds necessary to implement the arbitration awards* or for legislation necessary to implement the arbitration awards, or both. *Requests for funds necessary to implement the arbitration awards shall not be submitted to the legislature by the governor unless such requests have been submitted to the director of the office of financial management by October 1st before the legislative session at which the requests are to be considered.*
>
> (c) *The legislature shall approve or reject the submission of the request for funds necessary to implement the collective bargaining agreements or arbitration awards as a whole for each agreement or award.* The legislature shall not consider a request for funds to implement a collective bargaining agreement or arbitration award unless the request is transmitted to the legislature as part of the governor's budget document submitted under RCW 43.88.030 and 43.88.060. If the legislature rejects or fails to act on the submission, either party may reopen all or part of the agreement and award or the exclusive bargaining representative may seek to implement the procedures provided for in RCW 47.64.210 and 47.64.300. . . .

[Emphasis supplied.] The 1983 law made the interest arbitration process much more explicit than it had been under the 1949 law. The current law notably distinguishes interest arbitration awards from negotiated agreements by omitting the "certified by the director of the office of financial management as being feasible financially" concept from subsection RCW 47.64.170(8)(b).

RCW 47.64.300 has been on the books since 2006, and was amended in 2007. It provides, in relevant part:

> (5) The neutral chair .... Within thirty days following the conclusion of the hearing, or sooner as the October 1st deadline set forth in RCW 47.64.170 (6)(c) and (7) necessitates, *the neutral chair shall make written findings of fact and a written determination of the issues in dispute, based on the evidence presented.* A copy thereof shall be served on each of the other members of the arbitration panel, and on each of the parties to the dispute. That determination is final and binding upon both parties, subject to review by the superior court upon the application of either party solely upon the question of whether the decision of the panel was arbitrary or capricious.

[Emphasis supplied.] Further reinforcing the interest arbitration process, RCW 47.64.310 goes on to affirm that interest arbitration is a state function, and that the interest arbitrator is functioning as a state agency exempt from the Administrative Procedure Act.

RCW 47.64.320 has been on the books since 2006, and includes the current standards to be applied in interest arbitration. It provides, in pertinent part:

> (3) In making its determination, the arbitrator . . . shall be mindful of the legislative purpose under RCW 47.64.005 and 47.64.006 and, as additional standards or guidelines to aid it in reaching a decision, shall take into consideration the following factors:
>
> (a) Past collective bargaining contracts between the parties including the bargaining that led up to the contracts;
>
> (b) The constitutional and statutory authority of the employer;
>
> (c) Stipulations of the parties;
>
> (d) The results of the salary survey as required in RCW 47.64.220;
>
> (e) *Comparison of wages*, hours, employee benefits, and conditions of employment *of the involved ferry employees with those of public and private sector employees* in states along the west coast of the United States, including Alaska, and in British Columbia *doing directly comparable but not necessarily identical work*, giving consideration to factors peculiar to the area and the classifications involved;
>
> (f) Changes in any of the foregoing circumstances during the pendency of the proceedings;
>
> (g) The limitations on ferry toll increases and operating subsidies as may be imposed by the legislature; and
>
> (h) *Other factors that are normally or traditionally taken into consideration* in the determination of matters that are subject to bargaining under this chapter.

[Emphasis supplied

Analysis of Underlying Issue 4

The Legislature must be presumed to have understood the concept of wage bargaining when it amended Chapter 47.64 RCW in 1983. Apart from its pioneering grant of wage bargaining rights to WSF employees under the original provisions of Chapter 47.64 RCW in 1949, it had granted wage bargaining rights to public utility district employees in 1963,[10] it had granted a form of wage bargaining rights to public school teachers in 1965,[11] it had granted wage bargaining rights to port district employees in 1967,[12] it had granted wage bargaining rights to all local government employees in 1967,[13] it had granted a form of wage bargaining rights to community college faculty in 1969,[14] and it had re-enacted wage bargaining for public school teachers in 1975.[15] In distinct contrast to the laws enacted concerning WSF employees and numerous other types of public employees in the state, the wages of state civil service employees continued to be set as of 1983 by a combination of salary surveys and legislative appropriations that did not necessary fully implement those salary surveys. State civil service employees were not given the right to bargain their wages until the Personnel System Reform Act of 2002, and then only effective beginning with the 2003-2005 biennium.

The Legislature must also be presumed to have understood the use of interest arbitration as a substitute for work stoppages when it amended Chapter 47.64 RCW in 1983. Apart from its pioneering 1949 law authorizing the (original) MEC and later the Public Employment Relations Commission to resolve all labor disputes involving WSF employees, it had amended Chapter 41.56

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10 RCW 54.04.170 and 54.04.180.
11 Chapter 28.72 RCW, later recodified as Chapter 28A.72 RCW and since repealed.
12 Chapter 53.18 RCW.
13 Chapter 41.56 RCW.
14 Chapter 28B.52 RCW.
15 Chapter 41.56 RCW.

RCW in 1973 to establish interest arbitration and explicitly prohibit work stoppages by law enforcement officers employed by the largest cities and King County, and by fire fighters.[16]

Washington law has continued to impose interest arbitration selectively since 1983, applying it only to employees who provide services that can be described as essential to the public. In the local government sector, interest arbitration has only been extended to additional law enforcement officers, corrections personnel employed by the largest counties, paramedics and public transit workers. In the state government sector, interest arbitration has only been imposed for home care workers, child care workers, adult family home providers, and Washington State Patrol troopers. Important to this discussion, the Legislature has never extended interest arbitration to all local government employees or to any state civil service employees.

The long history of selective utilization of interest arbitration reinforces the significance of recent legislative changes which perpetuated the importance of both the interest arbitration process and the work stoppage prohibition in Chapter 47.64 RCW. By amendments enacted in 2006 and 2007, the interest arbitration process for WSF employees has been moved ahead of the legislative budget process and the interest arbitration awards have been exempted from budget director review.

The limited testimony of the one employer witness did not make out a convincing case that the state civil service employees cited by the employer are, in fact, comparable to the employees affected by this proceeding. There was no testimony that any state civil service employee performs ship

16 RCW 41.56.430, et seq. (1973).

maintenance and repair work of the types routinely assigned to the employees involved here. Also ominous for the state is that the MEC salary survey only lists cities, counties and ports (and not the state) as primary competitors to the shipyards in the labor market.

Close examination of Exhibit 112 also provides basis to minimize its probative value. The document provided by the employer simply compares the wage rates of persons who work at the Eagle Harbor facility with the wage rates of various state civil service classifications. That falls far short of meeting the comparability standard stated in the statute as: "[P]ublic and private sector employees in states along the west coast of the United States, including Alaska, and in British Columbia *in directly comparable but not necessarily identical positions*." [Emphasis supplied.]

Conclusion on Underlying Issue 4

The Arbitrator rejects the employer's "comparison with civil service employees" argument under RCW 47.64.320(3)(e), on the basis of insufficient evidence of comparability. The Arbitrator rejects the employer's "comparison with civil service employees" argument under RCW 47.64.320(3)(h), due to the different statutory schemes historically and currently applicable to the two groups.

UNDERLYING ISSUE 5 – THE "COST OF LIVING" DEBATE

The employer contends the "Implicit Price Deflator" (IPD) justifies its final offer, and should be used as the measure of inflationary pressures on the affected employees. The union disputes the propriety of the IPD measure, and supports use of the "Consumer Price Index for Urban Wage Earners and Clerical Workers, Seattle-Tacoma-Bremerton (CPI-W)" as the measure of inflationary pressures.

Legal Standards Applicable to Underlying Issue 5

RCW 47.64.320 has been on the books since 2006, and includes the current standards to be applied in interest arbitration. It provides, in pertinent part:

> (3) In making its determination, the arbitrator or arbitration panel shall be mindful of the legislative purpose under RCW 47.64.005 and 47.64.006 and, as additional standards or guidelines to aid it in reaching a decision, shall take into consideration the following factors:
> (a) Past collective bargaining contracts between the parties including the bargaining that led up to the contracts;
> (b) The constitutional and statutory authority of the employer;
> (c) Stipulations of the parties;
> (d) The results of the salary survey as required in RCW 47.64.220;
> (e) Comparison of wages, hours, employee benefits, and conditions of employment of the involved ferry employees with those of public and private sector employees in states along the west coast of the United States, including Alaska, and in British Columbia doing directly comparable but not necessarily identical work, giving consideration to factors peculiar to the area and the classifications involved;
> (f) Changes in any of the foregoing circumstances during the pendency of the proceedings;
> (g) The limitations on ferry toll increases and operating subsidies as may be imposed by the legislature; and
> (h) Other factors that are normally or traditionally taken into consideration in the determination of matters that are subject to bargaining under this chapter.

Neither the term "Implicit Price Deflator" nor the term "Consumer Price Index" appears anywhere in Chapter 47.64 RCW.

Analysis of Underlying Issue 5

The first thing to be said about the arguments of both parties is that no "cost-of-living" component is to be found among the statutory criteria applicable in this proceeding. The statute applicable here is comparable to the statutory criteria applicable to child care workers and home care workers, both of which omit explicit "cost-of-living" factors.[17] The salary survey required by RCW 47.64.220

17 RCW 41.56.465(4), applicable to child care workers, is fully set forth in footnote 5, above. RCW 41.56.465(5), applicable to home care workers, is fully set forth in footnote 6, above.

occupies the place in RCW 47.64.320(3) that is held by the "cost of living" factor in RCW 41.56.465 applicable to certain local government employees.[18]

The union questioned the legitimacy of the IPD at the hearing, but your Arbitrator accepts that it is a nationwide economic measure driven by Gross National Product computations and published by the U.S. Department of Commerce. The IPD has been used since the 1990's for computations under RCW 84.55.005(1), which defines inflation as, "[T]he percentage change in the implicit price deflator for personal consumption expenditures *for the United States* as published for the most recent twelve-month period by the bureau of Economic analysis of the federal Department of Commerce in September of the year before the taxes are payable" [emphasis supplied].[19] That said:

First, your Arbitrator's understanding is that the IPD has limited acceptance as a measure in collective bargaining processes. This employer has not provided evidence of any collective bargaining agreement which expressly uses the IPD to set employee wages or benefits. Further, your

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18 **RCW 41.56.465 Uniformed personnel-Interest arbitration panel-Determinations-Factors to be considered.** (1) In making its determination, the panel shall be mindful of the legislative purpose enumerated in RCW 41.56.430 and . . . shall consider:

(a) The constitutional and statutory authority of the employer;

(b) Stipulations of the parties;

(c) The average *consumer prices for goods and services, commonly known as the cost of living*;

(d) Changes in any of the circumstances under (a) through (c) of this subsection during the pendency of the proceedings; and

(e) Such other factors, not confined to the factors under (a) through (d) of this subsection, that are normally or traditionally taken into consideration . . . .

(2) For employees listed in RCW 41.56.030(7) (a) through (d), the panel shall also consider a comparison of the wages, hours, and conditions of employment of personnel involved in the proceedings with the wages, hours, and conditions of employment of like personnel of like employers . . . .

(3) For employees listed in RCW 41.56.030(7) (e) through (h), the panel shall also consider a comparison of the wages, hours, and conditions of employment of personnel involved in the proceedings with the wages, hours, and conditions of employment of like personnel of public fire departments of similar size. . . .

[Emphasis supplied.]

19 A paper posted on the Municipal Research and Services Center of Washington website with a 1998 date explains: "The Washington State Legislature passed Referendum Bill No. 47 on to the voters of the state who in turn approved it by a 60% majority."

Arbitrator's computer-assisted search of Washington cases failed to disclose any interest arbitration award that actually used the IPD to set employee wages or benefits.[20]

Second, although the employer's witness on this issue gave the IPD high marks for including military personnel, farmers, and others who are excluded from CPI-W computations, that testimony was not convincing. The nationwide coverage of the IPD reduces its relationship to the employee wages, hours and working conditions which are the focus of Chapter 47.64 RCW. The persons affected by this proceeding are, in fact, urban wage earners, not military personnel or farmers.

Third, your Arbitrator finds it significant that none of the multiple amendments made to Chapter 47.64 RCW since the adoption of Referendum 47 make any reference to the IPD.

In distinct contrast to the limited acceptance of the IPD as a measure in collective bargaining agreements, your Arbitrator has encountered the Consumer Price Index (CPI) in its various iterations throughout a 40+ year career in labor-management relations. Thus:

First, and as noted in Washington State Ferries, Decision 561 (MRNE, 1979), these parties actually used the CPI in their 1977-1980 collective bargaining agreement.

Second, the computer-assisted research tool that yielded only four hits on the IPD terminology yielded at least 150 interest arbitration awards using "CPI" or "consumer price index" terminology.

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20 The Public Employment Relations Commission website features a searchable database which appears to include at least 182 public sector interest arbitration awards in Washington since 1976, other than cases decided under Chapter 47.64 RCW since 1983. Using "implicit price deflator" as the search criteria produced only four hits:

- In Spokane County and Spokane County Deputy Sheriffs (1999), Arbitrator Alan Krebs referred to the IPD in setting forth an employer argument, but then noted the employer had not used the IPD in its proposal.
- In Port of Seattle and Teamsters Local 117 (2000), Arbitrator Kenneth McCaffree made reference to the IPD in setting forth an employer argument, but then never used the term again in his lengthy decision.
- In City of Longview and Longview Police Guild (2001), Arbitrator Luella Nelson made reference to the IPD once in setting forth an employer argument, but then turned to applying the CPI-W.
- In Spokane County and Spokane County Deputy Sheriffs Association (2001), Arbitrator Michael Beck referred to the IPD once in setting forth employer arguments, but then noted the employer had not used the measure.

Third, the base work station of these employees at Eagle Harbor is well within the marketplace measured by the CPI-W for Seattle (directly across Puget Sound from Eagle Harbor and location of WSF's Seattle and Fauntleroy terminals), Tacoma (down Puget Sound from Eagle Harbor and location of WSF's Point Defiance terminal), and Bremerton (within the same county as Eagle Harbor and location of a WSF terminal).[21]

Fourth, the 2008 MEC salary survey document cites the CPI-W, stating: "The July 2007 to July 2008 cost-of-living change for the Seattle / Greater Seattle area will likely approach 5.0%." In fact, the Bureau of Labor Statistics website reports a 6.2% increase of the CPI-W for Seattle-Tacoma-Bremerton as of June, 2008.

Conclusion on Underlying Issue 5

The Arbitrator rejects the employer's argument that the Implicit Price Deflator should be used as the measure of inflation in this proceeding. While parties to collective bargaining negotiations could certainly agree to use the IPD in their contracts, interest arbitration is much more suited to updating existing contracts than to imposing major shifts of concept on an unwilling party. To the extent that the recent inflation figures are entitled to some consideration and under the "comparability" or "salary survey" or "other factors" language in RCW 47.64.320(3), they tend to support finding the union's final offer to be the more reasonable.

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21 Apart from the already-mentioned terminals in Seattle, Tacoma and Bremerton: Orcas Island, Shaw Island, Friday Harbor and Lopez Island are all in San Juan County; Anacortes is in Skagit County; Port Townsend is in Jefferson County; Keystone and Clinton are in Island County; Mukilteo and Edmonds are in Snohomish County; Kingston, Bainbridge and Southworth are in Kitsap County; Vashon and Tahlequah are in King County. Simple inquiries using Google Maps suggest: The WSF terminals only span a northernmost to southernmost distance of about 140 miles by automobile (including one ferry ride); the longest one-way northward trip from Eagle Harbor to San Juan Island is about 120 miles (including two ferry rides); an all-highway route southward from Eagle Harbor to the Tacoma (Point Defiance) ferry terminal is about 60 miles.

UNDERLYING ISSUE 6 – THE ABILITY TO PAY ARGUMENT

The employer's brief launches an "ability to pay" argument with, "The 2009-11 biennium will not be business as usual for the State, its employees, or the public. The State is facing a 2.7 billion dollar projected revenue shortfall for the biennium . . . ." The union responds that the Legislature recently changed the statute to put the interest arbitration process for WSF employees ahead of the state budget process, and that ability to pay is no longer among the applicable statutory criteria.

Legal Standards Applicable to Underlying Issue 6

RCW 47.64.320 has been on the books since 2006, and includes the current standards to be applied in interest arbitration. It provides, in pertinent part:

> (3) In making its determination, the arbitrator or arbitration panel shall be mindful of the legislative purpose under RCW 47.64.005 and 47.64.006 and, as additional standards or guidelines to aid it in reaching a decision, shall take into consideration the following factors:
> (a) Past collective bargaining contracts between the parties including the bargaining that led up to the contracts;
> (b) The constitutional and statutory authority of the employer;
> (c) Stipulations of the parties;
> (d) The results of the salary survey as required in RCW 47.64.220;
> (e) Comparison of wages, hours, employee benefits, and conditions of employment of the involved ferry employees with those of public and private sector employees in states along the west coast of the United States, including Alaska, and in British Columbia doing directly comparable but not necessarily identical work, giving consideration to factors peculiar to the area and the classifications involved;
> (f) Changes in any of the foregoing circumstances during the pendency of the proceedings;
> (g) The limitations on ferry toll increases and operating subsidies as may be imposed by the legislature; and
> (h) Other factors that are normally or traditionally taken into consideration in the determination of matters that are subject to bargaining under this chapter.

That section replaced interest arbitration criteria in RCW 47.64.240, which originated as part of the package of amendments adopted in 1983. RCW 47.64.240 had been amended in 1989 before being repealed in 2006.

Analysis of Underlying Issue 6

The omission of an "ability to pay" component from RCW 47.64.320 contrasts sharply with the interest arbitration criteria adopted in 2007 for adult family home providers,[22] and later in 2007 for child care and home care workers.[23] The absence of an "ability to pay" component aligns the current criteria for WSF interest arbitration with the interest arbitration criteria set forth in RCW 41.56.465 for local government uniformed personnel.

The legislative history weighs heavily against using the "other factors" language in RCW 47.64.320(3)(h) as a toe-hold for "ability to pay" arguments in this case. The "other factors" language of the current law arguably supplanted the "other relevant factors" language of the prior law, but the "ability to pay" concept of the prior law was repealed. [24]

Conclusion on Underlying Issue 6

The Arbitrator rejects direct consideration of the employer's ability to pay arguments in light of the recent legislative history. The governor's representatives negotiate contracts and engage in interest

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22 Chapter 184, Laws of 2007 (RCW 41.56.029(2)(d)(i)) includes, "[The interest arbitration panel] shall consider the financial ability of the state to pay for the compensation . . . provisions of a collective bargaining agreement."

23 Chapter 278, Laws of 2007 (RCW 41.56.465(4) and (5)) are set forth in footnotes 5 and 6, above.

24 Repealed RCW 47.64.240 included:

(9) The panel of arbitrators shall consider, in addition to *any other relevant factors*, the following factors:

(a) Past collective bargaining contracts between the parties . . . ;

(b) Comparison of wages, hours, employee benefits, and conditions of employment of the involved ferry employees with those of public and private sector employers in states along the west coast of the United States, including Alaska and in British Columbia doing directly comparable but not necessarily identical work, giving consideration to factors peculiar to the area and the classifications involved;

(c) The interests and welfare of the public, *the ability of the ferry system to finance economic adjustments,* and the effect of the adjustments on the normal standard of service;

(d) The right of the legislature to appropriate and to limit funds for the conduct of the ferry system; and

(e) The limitations on ferry toll increases and operating subsidies as may be imposed by the legislature.

[Emphasis supplied.]

arbitration for diverse groups under several statutes with differing criteria. Even if "ability to pay" criteria applicable to other groups would permit balancing the employer's budget on the backs of those employees, the criteria applicable to WSF employees must be applied in this proceeding.

THE ULTIMATE ISSUE

The union contends that its final offer reasonably addresses the 10% basic lag identified in the MEC salary survey, or only modestly addresses the 16.5% lag noted in the MEC salary survey with regard to the rates paid in the building and construction industry. The employer contends that its final offer would address its estimates of inflation over the two years of the parties' next contract, and is the more reasonable offer in light of the state's budget shortfall.

Legal Standards Applicable to Ultimate Issue

RCW 47.64.005 has been on the statute books since 1949. It provides:

> The state of Washington, as a public policy, declares that *sound labor relations are essential to* the development of a ferry and bridge system which will best *serve the interests of the people of the state.*

[Emphasis supplied.]

RCW 47.64.006 has been on the books since 1983. With an amendment in 1989, it now provides, in relevant part:

> The legislature declares that it is the public policy of the state of Washington to: (1) *Provide continuous operation of the Washington state ferry system* at reasonable cost to users; . . . (3) promote *harmonious and cooperative relationships between the ferry system and its employees* by permitting ferry employees to organize and bargain collectively; (4) protect the citizens of this state by *assuring effective and orderly operation of the ferry system* in providing for their health, safety, and welfare; (5) *prohibit and prevent all strikes or work stoppages by ferry employees*; . . . and (7) *promote just and fair compensation*, benefits, and

> working conditions *for ferry system employees* as compared with public and private sector employees in states along the west coast of the United States, including Alaska, and in British Columbia in directly comparable but not necessarily identical positions.

[Emphasis supplied.]

RCW 47.64.320 has been on the books since 2006, and provides, in pertinent part:

> (3) In making its determination, the arbitrator or arbitration panel shall be mindful of the legislative purpose under RCW 47.64.005 and 47.64.006 and, as additional standards or guidelines to aid it in reaching a decision, shall take into consideration the following factors:
> (a) Past collective bargaining contracts between the parties including the bargaining that led up to the contracts;
> (b) The constitutional and statutory authority of the employer;
> (c) Stipulations of the parties;
> (d) The results of the salary survey as required in RCW 47.64.220;
> (e) Comparison of wages, hours, employee benefits, and conditions of employment of the involved ferry employees with those of public and private sector employees in states along the west coast of the United States, including Alaska, and in British Columbia doing directly comparable but not necessarily identical work, giving consideration to factors peculiar to the area and the classifications involved;
> (f) Changes in any of the foregoing circumstances during the pendency of the proceedings;
> (g) The limitations on ferry toll increases and operating subsidies as may be imposed by the legislature; and
> (h) Other factors that are normally or traditionally taken into consideration in the determination of matters that are subject to bargaining under this chapter.

Analysis of Ultimate Issue

The statutes referenced in RCW 47.64.320(3) are the policy preambles of the 1949 statute (RCW 47.64.005) and the 1983 statute (RCW 47.64.006). Both of those sections evidence a legislative concern for maintaining sound labor relations at WSF for protection of the public. RCW 47.64.006 then goes on to hold up "just and fair compensation" of WSF employees at the same level with maintaining orderly operation of the ferry system and preventing work stoppages. Your Arbitrator thus interprets and applies RCW 47.64.320 with an eye toward history and the goals set forth in those policy statements.

The "past collective bargaining contracts between the parties" language in RCW 47.64.320(3)(a) has brought out a mix of practical and legal arguments. The employer notes that these employees had a 0% increase in 2002, a 3% increase in 2003 and a 0% increase in 2004. It generalizes that, "during periods of low revenue, wages for State employees (marine or otherwise) increase very little." The employer justifies its final offer as both "similar to the 2002-2004 period" and as "based upon estimates of projected inflation . . . using the Implicit Price Deflator." It notes that the parties' current collective bargaining agreement provides wage increases far less than those being proposed by the union for 2009-2011. The union points to the statutory change in 2006, and notes that the parties' earlier contracts were signed under different criteria (including the "ability to pay" factor discussed above) than are now in effect.

The Arbitrator rejects finding the size of the wage increases in the parties' current collective bargaining agreement to be evidence favoring the employer's position in this case. The negotiations leading to that agreement were necessarily influenced by the 2006 MEC salary survey, which found the WSF employees involved here were essentially at par with their shipyard counterparts.

The Arbitrator must apply RCW 47.64.320(3)(a) in the context that this is the first round of collective bargaining under the before-the-budget time sequence adopted in 2006. From 1983 to 2007, the focus of WSF collective bargaining was necessarily limited to dividing up the amount already set by legislative appropriations. The fact that the bargaining process in Chapter 47.64 RCW was changed in 2006 warrants an inference that labor and/or management were unhappy with after-the-budget bargaining at WSF once the Personnel System Reform Act of 2002 gave state civil service employees before-the-budget bargaining on their wages. Assuming no further change of the statutory timetable for WSF bargaining and interest arbitration, this component of the current

statutory criteria will likely have increasing importance in the future, when parties refer back to the collective bargaining agreements signed beginning this year. For present purposes, the Arbitrator gives minimal weight to the contracts these parties signed under the previous statutory scheme.

The "constitutional and statutory authority of the employer" language in RCW 47.64.320(3)(b) has brought out another mix of practical and legal arguments. The employer does not cite any applicable constitutional provision and it put forth a "state government may not run a deficit" argument without actually citing statutory authority for that proposition. Starting from the premise that the Governor must submit a balanced budget to the Legislature, the employer contends that its projected revenue shortfall makes its final offer reasonable. The union asserts a lack of constitutional or statutory authority for the employer's position, although it acknowledges that Chapter 43.88 RCW obligates agencies to limit their spending to the amount appropriated by the Legislature. The union points out that this before-the-budget process is to be considered by the Governor in developing a budget for submission to the Legislature, and that the final decision on state budgets lies with the Legislature.

The employer's "constitutional and statutory authority" arguments only thinly disguise "ability to pay" arguments which much be rejected for the reasons described in the foregoing analysis of Underlying Issue 6. No constitutional provision requires acceptance of the employer's final offer and no constitutional impediment exists to prevent acceptance of the union's final offer.

The Arbitrator does not accept the across-the-board-cuts mentality implied by the employer's arguments in this case. Governing is prioritizing. The Governor will undoubtedly need to make some tough decisions about which state services should continue and which state services should be curtailed or completely eliminated in the face of a revenue shortfall, but governors have also needed

to make tough decisions about which programs to adopt or expand in good times. The Arbitrator has no authority to require (or even recommend) cuts of other programs, but must confine himself to implementing the statutory criteria applicable in this proceeding.

The "stipulations of the parties" language in RCW 47.64.320(3)(c) has not brought out anything from the parties in this case. The Arbitrator thus concludes it has no weight in this proceeding.

The "results of the salary survey" language in 47.64.320(3)(c) and the foregoing analysis of Underlying Issue 1 has led the Arbitrator to develop four separate scenarios to test the relative reasonability of the parties' final offers under various sets of "target" assumptions.

None of the scenarios developed by the Arbitrator would support acceptance of the employer's final offer for one of the years coupled with acceptance of the union's final offer for the other year. That obviates the need for the Arbitrator to address the procedural issue framed by the parties at the hearing and in their briefs.

Detailed computations are contained in a spreadsheet attached to this Arbitration Award. To summarize:

1. The Target 1 scenario uses only the -10% finding of the MEC survey and the 5% inflation estimated for 2008 in the MEC survey. The employer's final offer would continue the existing lag at -9.6% in 2010, while the union's final offer would only reduce the lag to -0.8% in 2010, so that the union's offer appears to be the more reasonable.

2. The Target 2 scenario uses the -10% finding of the MEC survey, and then uses the employer's IPD-based inflation estimates for the ensuing years. The employer's final offer would increase

the lag to -11.1% in 2009 and 2010, while the union's final offer would reduce the lag to -2.2% in 2010. Thus, the union's offer is the more reasonable even when the employer's inflation assumptions are used.

3. The Target 3 scenario uses the -10% finding of the MEC survey and the wage increases actually negotiated at MEC-surveyed shipyards for 2008 through 2010. The employer's final offer would increase the lag to -19.5% in 2010, while the union's final offer would continue the lag at -9.8% by 2010. Again, the union's offer is the more reasonable.

4. The Target 4 scenario uses the -16.5% blended rate finding of the MEC survey and the 5% inflation estimated for 2008 in the MEC survey, without any further inflation for 2009 or 2010. The employer's final offer would slightly reduce the lag to -16.1% in 2010, while the union's final offer would reduce the lag to -6.7% in 2010. Again, the union's offer is the more reasonable.

The only set of circumstances in which the employer's final offer would significantly reduce the basic -10% lag identified by the MEC (and in which the union's final offer would overshoot the mark and put these employees ahead of the shipyards) would require both disregard of the 5.0% inflation estimated in the MEC survey for 2008 and then estimating NO inflation in 2009 and 2010. Such a scenario is rejected as unreasonable.

The "comparison of wages . . . with public and private sector employees language in RCW 47.64.320(3)(e) evoked surprisingly little evidence or argument from the parties, other than the building and construction premium rejected in the foregoing analysis of Underlying Issue 2 and the comparison with civil service employees rejected in the foregoing analysis of Underlying Issue 4.

The Arbitrator infers that these parties generally accept the effort put forth and results reached by the outside firm which prepared the salary surveys published by the MEC in 2006 and 2008. For this employer, the alternative to having its own maintenance workforce would be to contract out all vessel and terminal repairs to private sector firms. Although not fully detailed, testimony in this proceeding uniformly indicates that WSF would incur greater expense for contracting out the work than it now incurs for tasks performed by bargaining unit employees.

The "changes in any of the foregoing" language in RCW 47.64.320(3)(f) has been cited by the union in connection with evidence of wage increases it has negotiated with MEC-surveyed shipyards: The employees at Foss shipyard were to receive increases in excess of 4.3% in 2008 and in 2009; the employees at Todd shipyard were to receive wage increases in excess of 4.3% in 2008, in 2009, and in 2010. The employer has not controverted that testimony. The Arbitrator has already considered the testimony as part of the foregoing analysis of the "Target 3" scenario, where it supports finding the union's final offer to be the more reasonable.

The limitations on ferry toll increases and operating subsidies language in RCW 47.64.320(3)(g) has been the subject of arguments from both parties. The union points out that the Legislature that has imposed limitations can also change those limitations, and it suggests that changes to increase farebox and concessions revenues are warranted to keep pace with inflation and operating costs. The employer starts from the premise that it must maintain its current level of service, and then contends that the alternate sources of revenue historically used to subsidize WSF are tapped out.

A copy of a report that Cambridge Systematics, Inc. submitted to the Washington State Transportation Commission in January of 2008 is in evidence as Exhibit 12 in this proceeding. That report addresses this subject with a bullet on page 7, saying: "Since 1960's, public subsidies used to close revenue gap." Thus, there is nothing new about WSF receiving funds beyond its farebox. Only the sources of alternate WSF revenues have changed from time to time.

A legislated limitation on ferry fares is currently in effect, but even the employer does not claim that it directly controls the wages of WSF employees. A "Puget Sound Trends" publication dated April 2006 in evidence as Exhibit 13 indicates that ferry fares declined in real terms from the 1980's until 2002, and only "returned to the level of the early 1980's" between 2002 and 2006. Thus, any insufficiency of WSF farebox revenues may be of the employer's own doing. The coming months will undoubtedly provide opportunities for creative thinking by the Governor and Legislature: At a time when fuel prices and highway construction costs are both skyrocketing, they may want to cut passenger-only fares and/or increase vehicle tolls to discourage commuters from bringing autos into the crowded Seattle area. At a time when WSF fuel costs are skyrocketing, they may want to reduce ferry speeds and/or cut low-patronized runs to save on fuel costs. The point of this speculation is that nothing about the WSF operation is fixed and immutable.

The "other factors" language of RCW 47.64.320(3)(h) is so inherently vague as to permit consideration of a wide range of facts and arguments, but your Arbitrator would require clear and compelling evidence to warrant disregard of the more specific factors in paragraphs (a) through (g) of the same subsection. RCW 47.64.320(3)(h) does provide a safety valve for an arbitrator who is faced with a union or management proposal that offends sensibility.

Some employer arguments in this case have already been rejected: Its "employee satisfaction" argument is addressed in the foregoing analysis of Underlying Issue 3; its direct comparison with state civil service employees is addressed in the foregoing analysis of Underlying Issue 4; its preference for the Implicit Price Deflator is addressed in the foregoing analysis of Underlying Issue 5; and its direct "ability to pay" argument is addressed in the foregoing analysis of Underlying Issue 6. One employer argument remaining to be addressed under the "other factors" language is an internal equity concern raised by evidence suggesting the employer has responded to its projected revenue shortfall with similar (or identical) offers to all of the unions that represent its employees in collective bargaining. Such uniformity might offend sensibility if the employer continued to insist on uniformity. This employer must deal with WSF bargaining units under interest arbitration criteria that are separate and distinct from those applicable to other employees.

Some union arguments in this case have already been rejected: Its quest for a pay premium is addressed in the foregoing analysis of Underlying Issue 2. The union might offend sensibility if it were insisting on restoration of the 3.55% wage premium that once existed in the parties' collective bargaining agreements, or if it was insisting on immediate closure of the 16.5% lag which the MEC survey only computed as an average of shipyard and building/construction wage rates. Neither of those situations exists, however.

Conclusion on Ultimate Issue

Washington state law only imposes interest arbitration sparingly, and only in connection with strong public policies to prevent work stoppages that would jeopardize the interests of the public. Chapter 47.64 RCW has imposed interest arbitration in one form or another for WSF collective bargaining

since 1949, when the state took over the ferry operation. RCW 47.64.320 specifically directs interest arbitrators to consider public policy statements supporting sound labor-management relations and fair compensation for WSF employees. The statute further directs interest arbitrators to consider criteria which do not include either the "Implicit Price Deflator" measure or the "ability to pay" analysis supported by the employer. The Marine Employees Commission has issued salary surveys as required by law, and its 2008 survey shows the wages of the employees involved in this case fell 10% behind the wages of comparable shipyard employees since the salary survey it issued in 2006.

The employer's final offer in this proceeding fails to address the 10% lag identified in the MEC salary survey. The employer's case is further weakened by its failure to provided detailed computations supporting its claim that the Implicit Price Deflator will show only a 1.6% rate of inflation for 2009 and will show only a 1.7% rate of inflation for 2010, and by the computations indicating that acceptance of its IPD-based inflation estimates would likely exacerbate the wage lag. The union's final offer in this proceeding would contain or reduce – but not completely eliminate – the 10% wage lag by 2010, and is found to be the more reasonable offer under the criteria set forth in Chapter 47.64 RCW.

AWARD

Based on the foregoing, and the record as a whole, it is the award and decision of the undersigned Arbitrator that the final offer made by the Puget Sound Metal Trades Council is more reasonable, under the criteria set forth in Chapter 47.64 RCW, than the final offer made by the state of Washington on behalf of Washington State Ferries. The collective bargaining agreement between

the Puget Sound Metal Trades Council and the state of Washington for the period from July 1, 2009 through June 30, 2008 shall include:

1. A 6.0% wage increase for all bargaining unit employees, effective on July 1, 2009; and
2. A 6.0% wage increase for all bargaining unit employees, effective on July 1, 2010.

ISSUED at Olympia, Washington, on the 19th day of September, 2008.

Marvin L. Schurke, Arbitrator

Washington State Ferries and Puget Sound Metal Trades Council

"Targets" Analysis as of: 9/18/2008

	WSF July 1, 2007	$ Change	% Change	WSF July 1, 2008	$ Change	% Change	WSF July 1, 2009	$ Change	% Change	WSF July 1, 2010	$ Change	% Change
STATUS QUO = Journeyman rate per WSF / PSMTC 2007-09 collective bargaining agreement	$ 25.63	$ -	0%	$ 26.14	$ 0.51	2.0%	$ 26.14	$ -	0.0%	$ 26.14	$ -	0.0%
TARGET 1 - MEC Survey 10% lag + MEC survey 5% inflation in 2008 + no 2009-2010 inflation	***$ 28.19***	***$ 2.56***	***10%***	***$ 29.60***	***$ 1.41***	***5.0%***	***$ 29.60***	***$ -***	***0.0%***	***$ 29.60***	***$ -***	***0.0%***
WSF Final Offer	$ 25.63	$ -	0%	$ 26.14	$ 0.51	2.0%	**$ 26.56**	**$ 0.42**	**1.6%**	**$ 27.01**	**$ 0.45**	**1.7%**
Gap from Target 1	$ (2.56)		-10.0%	$ (3.46)		-13.2%	$ (3.04)		-11.5%	$ (2.59)		-9.6%
PSMTC Final Offer	$ 25.63	$ -	0%	$ 26.14	$ 0.51	2.0%	**$ 27.71**	**$ 1.57**	**6.0%**	**$ 29.37**	**$ 1.66**	**6.0%**
Gap from Target 1	$ (2.56)		-10.0%	$ (3.46)		-13.2%	$ (1.89)		-6.8%	$ (0.23)		-0.8%
			FAVORS UNION:	***Honors MEC salary survey for 2007 & 2008, but dubious to assume no inflation in 2009-2011. WSF final offer largely perpetuates lag; PSMTC final offer largely eliminates lag.***								
TARGET 2 - MEC Survey 10% lag + 3% IPD inflation in 2008 + OFM's IPD inflation in 2009-2010	***$ 28.19***	***$ 2.56***	***10%***	***$ 29.04***	***$ 0.85***	***3.0%***	***$ 29.50***	***$ 0.46***	***1.6%***	***$ 30.00***	***$ 0.50***	***1.7%***
WSF Final Offer	$ 25.63	$ -	0%	$ 26.14	$ 0.51	2.0%	**$ 26.56**	**$ 0.42**	**1.6%**	**$ 27.01**	**$ 0.45**	**1.7%**
Gap from Target 2	$ (2.56)		-10.0%	$ (2.90)		-11.1%	$ (2.94)		-11.1%	$ (2.99)		-11.1%
PSMTC Final Offer	$ 25.63	$ -	0%	$ 26.14	$ 0.51	2.0%	**$ 27.71**	**$ 1.57**	**6.0%**	**$ 29.37**	**$ 1.66**	**6.0%**
Gap from Target 2	$ (2.56)		-10.0%	$ (2.90)		-11.1%	$ (1.79)		-6.5%	$ (0.63)		-2.2%
			FAVORS UNION:	***Honors MEC salary survey for 2007 only, then uses WSF-supported IPD for inflation estimates. WSF final offer slightly increases lag; PSMTC final offer only reduces lag.***								
TARGET 3 - MEC Survey 10% lag	***$ 28.19***	***$ 2.56***	***10%***	*$ 28.19*	*$ 2.56*	*10.0%*	*$ 29.52*	*$ 1.32*	*4.7%*	*$ 30.87*	*$ 1.35*	*4.8%*
+ Foss Shipyard increases	***n/a***	***$ -***	***0%***	*$ 29.44*	*$ 1.25*	*4.4%*	*$ 30.74*	*$ 1.30*	*4.4%*	*$ -*	*$ -*	*0.0%*
+Todd Shipyard increases	***n/a***	***$ -***	***0%***	*$ 29.59*	*$ 1.40*	*5.0%*	*$ 30.99*	*$ 1.40*	*4.7%*	*$ 32.39*	*$ 1.40*	*4.5%*
= Average Comps Increase	***n/a***	***$ -***	***0%***		*$ 1.32*			*$ 1.35*			*$ 1.40*	
Adjusted Target:	***$ 28.19***	***$ 2.56***	***10%***	***$ 29.52***	***$ 1.32***	***4.7%***	***$ 30.87***	***$ 1.35***	***4.8%***	***$ 32.27***	***$ 1.40***	***4.7%***
WSF Final Offer	$ 25.63	$ -	0%	$ 26.14	$ 0.51	2.0%	**$ 26.56**	**$ 0.42**	**1.6%**	**$ 27.01**	**$ 0.45**	**1.7%**
Gap from Target 3	$ (2.56)		-10.0%	$ (3.38)		-12.9%	$ (4.31)		-16.2%	$ (5.26)		-19.5%
PSMTC Final Offer	$ 25.63	$ -	0%	$ 26.14	$ 0.51	2.0%	**$ 27.71**	**$ 1.57**	**6.0%**	**$ 29.37**	**$ 1.66**	**6.0%**
Gap from Target 3	$ (2.56)		-10.0%	$ (3.38)		-12.9%	$ (3.16)		-11.4%	$ (2.89)		-9.8%
			FAVORS UNION:	***Honors MEC survey for 2007 only, then uses MEC-surveyed shipyards to estimate future increases. WSF final offer increases lag; PSMTC final offer only slightly reduces lag.***								
TARGET 4 - MEC 16.5% blended lag + MEC-estimate 5% inflation in 2008 + no further inflation	***$ 29.86***	***$ 4.23***	***16.5%***	***$ 31.35***	***$ 1.49***	***5.0%***	***$ 31.35***	***$ -***	***0.0%***	***$ 31.35***	***$ -***	***0.0%***
WSF Final Offer	$ 25.63	$ -	0%	$ 26.14	$ 0.51	2.0%	**$ 26.56**	**$ 0.42**	**1.6%**	**$ 27.01**	**$ 0.45**	**1.7%**
Gap from Target 4	$ (4.23)		-16.5%	$ (5.21)		-19.9%	$ (4.79)		-18.0%	$ (4.34)		-16.1%
PSMTC Final Offer	$ 25.63	$ -	0%	$ 26.14	$ 0.51	2.0%	**$ 27.71**	**$ 1.57**	**6.0%**	**$ 29.37**	**$ 1.66**	**6.0%**
Gap from Target 4	$ (4.23)		-16.5%	$ (5.21)		-19.9%	$ (3.64)		-13.1%	$ (1.98)		-6.7%
			FAVORS UNION:	***Honors MEC survey for 2007 B&C rates and 2008 inflation, but dubious to assume no 2009-11 inflation. WSF final offer barely reduces lag; PSMTC final offer only reduces lag.***								