In the Matter of the Interest Arbitration

between Office and Professional Employees International Union Local No. 8, AFL-CIO ("Union" or "OPEIU") and The State of Washington, Washington State Ferries, Office of Financial Management ("Agency" or "WSF").	Findings, Discussion and Award.

Case Numbers:	Washington PERC No. 128390-I-16. Arbitrator's R22.
Representing the Union:	Cliff Freed, Beth Barrett Bloom, and Frank, Freed, Subit & Thomas, LLP, 703 Second Avenue, Suite 1200, Seattle, WA 98104-1798.
Representing the Agency:	Janetta E. Sheehan, Assistant 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 Agency's offices on Seattle, Washington, on August 24, 2016.
Witnesses for the Agency:	Robin C. Vazquez and Erik Hansen.
Witnesses for the Union:	James Grabecki, Lisa Wiesel, and Valarie Peaphon.
Date of this award:	September 23, 2016.

This is a statutory interest arbitration under the authority of RCW Chapter 47.64 for the period July 1, 2017 through June 30, 2019. I am the parties' mutual choice as a single arbitrator as permitted by RCW 47.64.300(2). The parties agree that the procedures leading up to interest

arbitration have been satisfactorily completed, that there are no procedural objections to this interest arbitration, and that each party had satisfactory advance notice of the issues to be addressed in the hearing. 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 agree that the Agency will be the official custodian of the record and will hold me harmless in that regard. The parties agreed to close the record with oral arguments.

Only one dispute remains between the parties, and that is the across-the-board increases for bargaining unit members during the life of the new contract. The Agency proposes 2% at the beginning of the first year of that contract and 2% at the beginning of the second; and the Union proposes 8% and 8%.

This is the largest ferry system in the United States and the third largest in the world, transporting some twenty-two million passengers a year on twenty-three vessels to twenty different ports.[1] The OPEIU bargaining unit consists of about 54 employees (in 55 FTE positions) who perform administrative and clerical functions, almost all at WSF's Seattle headquarters.

STATUTORY CRITERIA

47.64.005
Declaration of policy.

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.

47.64.006
Public policy.

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; (2) efficiently provide levels of ferry service consistent with trends and forecasts of ferry usage; (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; (6) protect the rights of ferry employees with respect to employee organizations; 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

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[1] My 2014 discussion and Award (for the 2015-2017 CBA) for the IBU Interest Arbitration is in this record (Union Exhibit 14), and I quote this fundamental background fact from that document.

States, including Alaska, and in British Columbia in directly comparable but not necessarily identical positions.

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47.64.320
Parties not bound by arbitration – Arbitration factors.

(1) The mediator, arbitrator or arbitration panel may consider only matters that are subject to bargaining under this chapter, except that health care benefits are not subject to interest arbitration.

(2) The decision of an arbitrator or arbitration panel is not binding on the legislature and, if the legislature does not approve the funds..., is not binding on the State, the department of transportation, or the ferry employee organization.

(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) The financial ability of the department to pay for the compensation and fringe benefit provisions of a collective bargaining agreement;

(b) Past Collective bargaining contracts between the parties including the bargaining that led up to the contracts;

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

(d) Stipulations of the parties;

(e) The results of the salary survey as required in RCW 47.64.170(8);

(f) 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;

(g) Changes in any of the foregoing circumstances during the pendency of the proceedings;

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

(I) The ability of the state to retain ferry employees;

(j) The overall compensation presently received by the ferry employees, including direct wage compensation, vacations, holidays and other paid excused time, pensions, insurance benefits, and all other direct or indirect monetary benefits received; and

(k) Other factors that are normally or traditionally taken into consideration in the determination of matters that are subject to bargaining under this chapter.

Finally, RCW 47.64.170(9)(I) and (ii) limit the funding of WSF awards to those

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 ... certified by the director of the office of financial management as being feasible financially for the state.

DISCUSSION

The factors listed in 47.64.320(3)—even without the "other factors" permitted by (3)(k)—pretty much cover the entire area of expertise for either rational classification/ compensation work and for public sector collective bargaining. Not every listed factor is significant in every case, and some of the listed factors substantially overlap. In the case at hand, for example, there are no important stipulations of the parties apart from their agreement to put the annual Survey into the record without supporting testimony and their acceptance of one another's documentary evidence without objection. The west coast comparison listed as factor (f) substantially overlaps with the biennial state-wide Survey set out as factor (k), although the extent of that overlap depends on the positions at issue. The 2016 state-wide Survey quite reasonably focuses on local employers for the OPEIU bargaining unit but on distant ferry operators (e.g., BC and Alaska Ferries and Black Ball) for the Vessel/Terminal part of the Survey. Neither party offers evidence, apart from the Survey, with respect to west coast "wages, hours, employee benefits, and conditions of employment."

(b). Prior contracts and current bargaining. Like virtually all other State of Washington employees, the members of this bargaining unit took a 3% wage reduction in 2010-2011 followed by a rate freeze in 2011-2012. During those two years, the cost of living—as measured by the Seattle-Tacoma-Bremerton CPI-W—rose 6.4%. The 2015-2016 CBA resulted from an interest arbitration Award by arbitrator Thomas Levak (NAA) who rejected both the Agency's proposed 9.1% and 5% and the Agency's 3% and no increase and awarded increases of 3% and 2%. That made up some of the ground lost to increases in the CPI, because the CPI increase over the resulting contract period was only 3.1%. But that improvement brought bargaining unit employees up to around 6% behind the cost of living increases since 2010, rather than the 9% they had trailed it in 2014. In short, in terms of real purchasing power, bargaining unit employees have lost about 6% since 2009-2010.

The current negotiations made several improvements in other areas of the Classification and Wage Rate Article even though they did not reach agreement on across-the-board rate increase.[2] The parties agreed to eliminate three nearly empty ranges at the bottom of the schedule by moving the Mail Clerk up to the fourth range. They agreed to create a new Range at the top of the schedule for the Bid Administrator. They moved Buyer II and Buyer III up a Range each because they were so far behind market average.[3] Most significantly, they expedited

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[2] One of the "changes" was really no change at all but merely a reiteration. The prior CBA already provided that the step placement was a matter of discretion for the Agency and the stated steps were minimums. The new contract leaves that prior language in place but reiterates its message as part of the revised Classification and Wage Rate Article.

[3] The range increase for mail clerk may have been driven in part by Seattle's progressive minimum wage ordinance, even though the State would not be subject to that ordinance. The ten percent total increase (6% and 4%)

movement through the steps of the salary schedule. It used to take about 25 years to get to the top step, which is about 50% above the base, rather than the average 34%. (Survey at 5.) The new amendments to the step progression now allow an employee to top out in fourteen and a half years, rather than in twenty-five. Step increases retain the same value—most are either 4.5% or 5%—but the periods between more advanced steps have been reduced from an inevitable five years down to, mostly, three years.[4]

Salary Survey. Those agreements about details of the Wage article did not address the Agency's most pressing problem in the case at hand, i.e., comparability. OFM's statutorily mandated 2016 *Marine Employees' Compensation Survey* ("Survey") found the average base compensation in this bargaining unit to be 21.7% behind the Survey average and found compensation including benefits to be 19.7% behind. This deficit is not a sudden development. Arbitrator Zane Lumley (now NAA) noted in his 2010 Interest Award that this unit was 18% behind market in the *2010* Survey. Things have only gotten worse in that respect since 2010.[5] At the bottom end of the salary schedule the picture is far worse: base compensation trails the average by a shocking 32.7%.

The Agency emphasizes the smaller, 19.7% lag when benefits are included. But the Union points out a problem in the Survey's reflection of health insurance benefits. The Survey apparently does not reflect *employee* costs in its treatment of insurance benefits. (Survey at 10-11.) Total compensation surveys always have to grapple with whether or not to reflect employee medical costs. Employee *out-of-pocket* care costs come in so many patterns that it is usually judged impossible to reflect those costs in a compensation survey; but employee *premium* costs are relatively simple to reflect and have a direct effect on the "compensation received" in the form of medical premiums. If a survey ignores employee premium costs it misleadingly treats two employees as equally compensated in terms of medical benefits if the first employee receives a $500 / month medical premium from his or her employer and pays no premium above that, and the second employee receives $500 / month medical premium from his or her employer but *must* personally pay an additional $200 / month.[6] Here, the Survey shows (on p. 72) that the average employer cost (full family) of medical, dental and vision coverage is $1,675 per month

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for a tiny SEIU unit of six custodians who were 23% behind the survey average may have shared that minimum wage motivation. Moreover, the Union points out that the less than 5% value of a range increase still leaves Buyer II over 57% behind and Buyer III 45% behind. (Union Exhibit 8.)

[4] The current negotiations also fit under factor (g), "changes...during the pendency of the proceedings," because, as discussed below, the change in the step schedule was made after the biennial Survey and has some effect on the proper interpretation of that study.

[5] Arbitrator Lumley's Award does not specify whether the 18% lag is without or with benefits, so we cannot tell, on this record, whether the Agency has fallen an additional almost two percent behind or an additional almost four percent.

[6] Paragraph (j) requires me to take an "overall compensation" approach. An employee who receives a $1,675 monthly medical benefit at the personal cost of $81 nets $1,594, and an employee who receives a $1,464 monthly medical benefit at the personal cost of $241 nets $1,223. It is misleading not to reflect employee premium costs.

with an average $81 per month employee cost, while the average WSF cost is $1,464 and the OPEIU employees have to pay another $$241. But if we include the average $83 month premium cost for other employers and the $241 monthly premium cost for WSF employees, the percent difference for medical benefits drops from the survey's -14.4% to -22%, so the -22.7% lag in average rate would be virtually unaffected by including medical benefit costs. The -21.7% lag in average base pay is a more dependable number than the -19.7% reflecting only the employer part of medical insurance premium costs.

Adding in retirement benefits and vacation time would not improve the picture from the Agency's point of view. The Survey shows an average 6.77% employer retirement contribution on average but only 6.12% retirement contribution from WSF and an average vacation accrual cap of 219 hours, while the bargaining unit cap was 192 hours (Survey at 71).

The Agency points out that the survey participants in the Administrative portion of the Survey included the City of Seattle, King and Pierce Counties, the Ports of Seattle and Tacoma, and the Washington State General Government and Higher Education. (*Id.* P. 73.) I agree with the Agency that King County and the City of Seattle are at or near the top of most compensation surveys in Washington. But so, too, are they at the top of most lists of housing costs. All but two of the employees in this bargaining unit work in the WSF headquarters in downtown Seattle. People who work in downtown Seattle must either pay the high costs of housing in Seattle or pay the high costs—time and money—of commuting from downtown to somewhere where housing costs are not quite so high. The Survey was quite justified in accepting these comparator employers.

In short, this year's Survey shows the employees of this bargaining unit to be, on average, 21.7% behind the survey average; and it shows employees at the bottom of the schedule to be 32.7% behind.

(I), Retention. There are currently thirteen bargaining unit employees at the A or B steps that comprise the first five years of service. (Union Exhibit 17.) From August 2014 to August 2015 there were eight resignations of employees with no more than five years of service and four trial service separations on top of those eight. (Union Exhibit 9.) Assuming the current A&B step population is representative of the step distribution over that period, that amounts to a 30% annual resignation rate at the bottom of the salary schedule. A 30% resignation rate is not surprising for employees who are almost a third behind the local market pay rate.

(a), Ability to pay. Washington's $8.7 Billion Transportation Budget is legally quite separate from its $79.6 Billion Operating Budget and $3.8 Billion Capital Budget. At $6.01 Billion, WSDOT accounts for about 68.5% of the Transportation Budget; and of that $6.01 Billion WSF accounts for $862.5 million, split into 54.4% Operations ($484.3 million) and 45.6% Capital ($406 million).[7]

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7 The Operating and Capital sides are strictly segregated by statute. RCW 47.60.315, .322 and .335.

No public transportation service I have ever heard of is financially self-supporting (which is the point of "*public* transportation service"), but WSF projected fare box revenue (as of June, 2016) comes to about $370.7 million, which is an unusually high 74.5% of the total operating side of the budget. The remaining part of the operating costs come from fuel tax ($51.7 million), License and Permit Fees ($17.1 million), non-fare box revenue ($7.9 million) and federal revenue ($5.9 million). The rest must be backfilled from elsewhere in the WSDOT budget. On the expenditure side, labor accounts for 65.6% of the operating costs and fuel accounts for 16.2%.

Washington's new sixteen year revenue package began in the 2015-2017 biennium with the first part of staggered gas tax increases and increases in licensing fees. That plan assumes a $300 million expenditure to backfill ferry operating costs in order to maintain the current level of services within the legislatively adopted fare structure.

The current and projected financial health of WSF is vastly brighter than it has been in the recent past. The estimated ending fund balance ("EFB") for the operating account for 2015-2017 is a positive $23.8 million. Other parts of WSDOT's financial picture are somewhat similar. The estimated biennium EFB for the Motor Vehicle Account is $110.9 million, for the Multimodal Account $54.2 million, for the State Patrol Highway Account $19.3 million, and for the Highway safety Account $22.9 million. All of those accounts— except the Motor Vehicle Account—are currently projected to continue with positive EFBs through 2023-2025; and the Ferry Operations Account is projected to grow each biennium, reaching an EFB of $83.1 million in 2023-2025.

Against the background of that financial picture, the difference in costs between the 2% and 2% proposed by WSF ($207,814) and the 8% and 8% proposed by the Union in this case ($847,852) is about $640,000.

Even under the best designed budgeting process a projected EFB is not the same as "money in the bank" or goods "free on board." And OFM points to a litany of threats to the fair picture of growing positive EFBs stretching into the future. First in the list is the June, 2016 opinion by the Ninth Circuit in *United States et. al., v. State of Washington*, the "culvert case." Next, OFM points to increased passenger railroad operating costs of perhaps $20 million for 2017-2019; to the legislative shift of some licensing revenues from the Motor Vehicle Fund—where it was potentially a source of ferry operating cost backfill—to the State Patrol Highway Account; to the next phase of the DOL computer system ($40 million) and WSDOT timekeeping system; and to the expense of general maintenance level requests that has averaged $65 million over the last five biennia. Those costs are not reflected in the projected EFB and are in addition to $5.8 million for current levels of employee health care premiums, $25.7 million for pensions, and $11.3 million for continuation of 2015-2017 salary increases.

The Union points out, in response, that there are *always* potential expenses outside the calculations that produce a budget's ending fund balance. And the Union points to the "upward revision [revenue] forecast" in the June *Transportation Economic and Revenue Forecast,* both for the next biennium and 'for the ten year forecast horizon"(Union Ex. 10 at 3), and to the

"stronger than expected" for Washington with "higher than expected" revenue collections in the June *Washington State Economic and Revenue Forecast*. (Union Exhibit 12 at 3.)

Finally, as I noted in my 2014 interest arbitration award between WSF and IBU, "Neither the union nor the Agency benefits from an award which is struck down by OFM, and it makes no sense for an interest arbitrator operating in this statutory framework not to attempt to apply the term 'financial ability...to pay' in the way that OFM apparently will apply that term when it considers the financial feasibility of the resulting award. Long-term financial consequences are part of 'financial ability.'" WSF offers two examples. First, OFM found *all* interest awards not financially feasible in 2010. But in that instance, "well after all agreements and awards were submitted to OFM, the Economic and Revenue Forecast Council reduced the state revenue forecast by $1.2 billion...[and] the transportation accounts which fund ferry operations have negative balances." No amount of care, and no reasonable drive to conserve financial resources would have saved those awards from financial developments after their issue dates. It is difficult to draw a moral from that example, except that an interest arbitrator, like the legislature itself, may be helpless in the face of unexpected adverse financial developments. WSF's second example is the more focused rejection of the 2012 IBU award which, quoting OFM's rejection message, would have been "a structural change to IBU member pay, which creates a bow-wave of costs that cannot be sustained." Every rate increase creates a bow-wave of future costs, but the modest increase driven by comparability, retention, and bargaining history in the case at hand is by no means a "structural change;" and it seems to me that holding that WSF cannot reasonably afford to make up part of the comparability lag under current economic conditions, would exalt ability to pay—and concern over OFM's review—and would require me to virtually ignore all the other listed statutory factors.

CONCLUSION

In a nutshell, the Union points, first, to a massive retention problem at the bottom of the pay schedule; second, to the 32.7% lag behind the survey average at that same point in the schedule; third, to the six percent loss in real purchasing power that these employees have never made up since the years of salary rollback; and finally, to express statutory policy of "just and fair compensation" for WSF employees.

WSF does not seriously contest any of the Union's fundamental arguments. The separation data is undisputed; the survey was conducted by OFM itself; and there is no dispute about the CPI and wage rate history resulting in the six percent loss in purchasing power. Given that posture of the case, one would expect the employer's position to be driven by a dramatic ability to pay defense. There is no such defense in this case. The *Union's* closing argument commented on WSF's claim to be "strapped for cash;" but that was the argument I *expected* rather than the argument I got. Rather, OFM quite properly presented the undisputed parade of healthy and growing EFB projections tempered by the inevitable collection of not-yet-budgeted possible financial challenges to that rosy picture. It is important to note that the very first monster in that list has been somewhat defanged. The Culvert case has been dimming WSDOT's financial outlook for some time. In 2014, it was Arbitrator Levak's first listed ability-to-pay concern. In 2016, too, OFM gives that possible liability pride of place, but the Ninth Circuit's most recent opinion somewhat deflated that case's cost significance. In federal court,

the State of Washington estimated the cost of correcting salmon-prohibiting culverts to be "approximately $1.88 billion over the course of the seventeen-year schedule ordered by the [trial] court" (Slip Opinion at 51); but the Ninth Circuit found those "cost estimates are not supported by the evidence [at 52]" and "federal and state law require Washington to correct its barrier culverts 'in any case'... The net costs imposed on Washington by the injunction are...only the 'marginal costs attributable to an accelerated culvert correction schedule.'" (At 53, quoting the trial court.) That does not eliminate the prospective cost of accelerating the replacement schedule—even if I planned on replacing my roof sometime in the next few years, being told to do it right now is likely to be a financial shock—but it somewhat deflates the State's $1.88B cost estimate.

The other listed liabilities not yet reflected in the budget are undoubtedly genuine.[8] But such potential additional liabilities are an inevitable feature of the budgeting process. If this list were found to render the Agency unable to afford $640,000 in order to correct a market lag of up to 32.7% and a 30% annual turnover at the bottom of the salary schedule, it is hard to imagine a disputed increase that the Agency *would* be able to pay.

The Union explained the size of its proposal as what is required to catch up to, at least, the least lagging part of the schedule, i.e. its top where the Survey shows WSF 16.2% behind average. I am not convinced that the Agency's financial situation justifies actually catching up on any part of the schedule. As long as an employer faces genuine financial challenges in the period of a new contract, it seems to me that the announced policies behind the statutory scheme are best served by bringing a bargaining unit up near the average over multiple contracts. Washington requires biennial salary surveys as part of the collective bargaining process, but unlike many other public employers, Washington has neither rule nor policy establishing a goal for compensation rates in relation to the required survey. It is not uncommon for public employers to strive to remain ±5% of a survey average, and that seems to me to be a reasonable goal here.

Increases of 8% and 8% would cover about half of the lag at the bottom and bring the base up to 16.7% below the survey average. But it would bring the top up to very near the average as figured in the Survey, a single jump that is hard to accept in light of the potential economic hazards in the record before me.

On the other hand, the WSF top rate as shown by the Survey does not really take into account the extraordinary "width" of the step structure, i.e., how many years it takes to get to the top. The Survey duly notes (at 5-6):

> Salary range maximums appear to be approximately 16 percent more competitive with the market than the minimums on average (the maximums were closer to 10 percent more competitive than the minimums in the 2014 MECS report).
> this range in competitiveness is a result of the significantly larger salary range width the bargaining unit represented by OPEIU has in comparison to the market:

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[8] I second arbitrator Levak's judgment that OFM representative Eric Hansen "was entirely neutral, credible, and forthright." (Award at 7.) Mr. Hansen offered not even a guestimate of the State's liability in the culvert case.

OPEIU – Approximately 50 percent range width from minimum to maximum

Market – Average range width of 34 percent from minimum to maximum.

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OPEIU progresses through the structure based upon the employee's continuous (or adjusted) length of service within the bargaining unit. OPEIU employees can reach the salary range maximums after 25 years within the bargaining unit.

Participants reported that it takes an average of six years to reach the salary range maximum. ***

Those notes set out the peculiarity of the OPEIU step schedule quite clearly; but what they signify is that the Survey itself illustrates the hazard of comparing top-to-top without exercising some care about just what "top" (or "range maximum" in the Survey's terms) means on the ground. The Survey notes suggest three different ways of roughly overcoming the peculiarities of the OPEIU step schedule. If we look at only "10 percent more competitive than" the base, that would adjust the lag at the top to about 22%-23%. If we calculate an adjusted top on the basis of the 34% average index of participants' schedules, that would increase the lag at the top to about 20% (based on the class by class numbers set out on p. 66 of the Survey). Or, if we look at where employees of survey participants would be on the WSF schedule when they top out on their own schedule, they would be is about 19% (four steps of 4.5% each) short of the schedule maximum. The agreed revisions to step movement shorten up that difference to about 14% because employees will get to a higher step in six years of service. Still, that 14% on top of the Survey's 16.2 % after 25 years once again brings the adjusted difference into the 30% range not unlike the 32% range at the base. In short, any way you look at it, the somewhat artificial competitiveness of WSF at the top of this schedule is substantially a product of the peculiarities of the schedule structure itself.[9]

I will therefore award increases of 6.5% for each year of the new contract. That will bring these employees almost two thirds of the way toward average compensation (although it will still leave them substantially outside the common ±5% target). Considering how far these employees have been behind a competitive pay rate, and how long that shortfall appears to have gone on without redress, and considering the Agency's relatively solid financial footing for this

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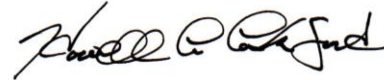
9 Salary schedule *bases* are almost always simple and direct and can be compared from employer to employer with few potential traps. Schedule tops, on the other hand, are more nuanced, as this case illustrates. Schedules differ not only in index but in width, not to mention the delights of "longevity steps" or "merit longevity steps" and the like. For the purposes of a genuine labor market analysis (which is not involved in this case although it is in some sense the gold standard of analysis) or collective bargaining the question at the base is simple: What will I be paid if I go to work for these different employers? But at the top there are multiple questions: What will I get at the top of my classification? And, How long will it take to get there? It makes sense for a salary survey to address only the first of those questions, but from a collective bargaining or interest arbitration point of view the second cannot be ignored.

biennium and for the foreseeable future and the modest cost of the increase, the policy of a “just and fair compensation” compared to comparable employers demands no less.



AWARD

The Wage Rates provision of the 2017-2019 collective bargaining Agreement shall provide:

The wage rates set forth in this Agreement shall be increased as follows:
A. Effective 7/1/2017 — six and a half percent (6.5%) Wage Increase
B. Effective 7/1/2018 — six and a half percent (6.5%) Wage Increase

Respectfully submitted,

Howell L. Lankford,
Arbitrator.