

ARBITRATOR'S INTEREST AWARD

I. PROCEEDINGS

MATTER: Interest Arbitration, by and between
State of Washington, (WSP)
and
Washington State Patrol Lieutenants Association (WSPLA)
In re: 2013-2015 CBA Negotiation

HEARING: August 20, 21, and 22, 2012
Offices of the Attorney General, Room N485
Tumwater, WA

TRANSCRIPTS: Received August 28, 2012
Seattle Deposition Reporters: Harty/Steinman

HEARING CLOSED: Post Hearing Briefs Received September 13, 2012

DATE OF AWARD September 25, 2012

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David Karnitz, Deputy Chief, WSP
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Robert Maki, Budget/Fiscal Services Div Cmndr
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WITNESSES APPEARING
FOR WSPLA Leann Paluck, Attorney/Negotiator for WSPLA
Michael Groesch, Contract Lobbyist for WSPLA
David Scherf, LT., WSP
Wes Rethwill, CPT., WSP

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III. CASE BACKGROUND and ARBITRATOR'S AUTHORITY

The Washington State Patrol Lieutenants Association, hereinafter “WSPLA” or “Union”, represents a bargaining unit of commissioned Lieutenants and Captains employed by the Washington State Patrol, hereinafter “WSP,” “employer,” or “the state.”¹ These parties are in the process of negotiating a Collective Bargaining Agreement, hereinafter “CBA,” for the 2013-2015 biennium.

¹ For the purposes of collective bargaining the unit members are considered employed by the state. *Brief of State* at p. 1. The state is represented by the Governor’s designee, here the Labor Relations Division of the OFM. *Id.*

Unable to reach agreement on a number of issues after bargaining in May and June, 2012, the parties submitted to mediation via the offices of the Washington Public Employment Relations Commission (PERC). The mediation process concluded with the following issues declared at impasse:

Article 10 – Hours of Work and Overtime

- 10.3 Lieutenants' Workday
- 10.5.E Lieutenants Compensatory Time Accrual and Cash Out Provisions
- 10.8.B Captains' Exchange Time Maximum Accrual

Article 11 – Holidays

- 11.5 Holiday Maximum Credit Accrual

Article 26 – Compensation

- 26.1 Wage Adjustments
- 26.3 Longevity Premium Pay – Lieutenants
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- 26.5 Education Incentive²
- 26.7 Premium Pay
- 26.9 Out of Class Work
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- 26.11 Parking
- 26.12 HS/EP Contract Supplemental Pay for Captains

New Section

- *** Physical Fitness Incentive

U-2.

The parties have stipulated that relevant contractual and statutory authority was followed in the process leading to their selection of the interest arbitrator, Michael Merrill. *TR 6.* The parties further stipulated to the following items:

² By agreement of the parties, this issue was not presented to the Arbitrator.

- One: The WSPLA is the exclusive bargaining representative for the WSP lieutenants and Captains.
- Two: The parties stipulate to the June 2009 Organizational Chart from the WSP website
- Three: The State of Washington commissioned a 2012 salary survey through the Segal Company.
- Four: The parties stipulate to the February 17th, 2012, salary survey which is 142 pages.
- Five: The parties stipulate that it is the opinion of the Segal Company representative that an agency is "competitive" when it is paying base pay between 95% and 105% of the market average."

J-1; TR 7-8.

The Arbitrator acknowledges the following statutory dictates. RCW 41.56.430 provides in relevant part:

(T)here exists a public policy in the state of Washington against strikes by uniformed personnel as a means of settling their labor disputes; that the uninterrupted and dedicated service of these classes of employees is vital to the welfare and public safety of the state of Washington; that to promote such dedicated and uninterrupted public service there should exist an effective and adequate alternative means of settling disputes.

RCW 41.56.430.

RCW 41.56.473 defines subjects and representational requirements for bargaining. RCW 41.56.475 sets forth the mediation and arbitration process, and establishes the role of the arbitrator and the extent of his authority. Of particular relevance to this process are the standards which an arbitrator is required to apply when settling disputes, notably including the following in subpart (4):

In making its determination, the [arbitrator] shall be mindful of the legislative purpose enumerated in RCW 41.56.430 and, as

additional standards or guidelines to aid it in reaching a decision, shall take into consideration the following factors:

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

(b) Stipulations of the parties

(c) Comparison of the hours and conditions of employment of personnel involved in the proceedings with hours and conditions of employment of like personnel of like employers of similar size on the west coast of the United States;

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

(e) Such other factors, not confined to the foregoing, which are normally and traditionally taken into consideration in the determination of matters that are subject to bargaining under RCW 41.56.473.

RCW 41.56.475.

Accordingly, and with focus on the foregoing required considerations throughout, the Arbitrator convened the interest arbitration hearing in Tumwater, WA, on August 21, 22, and 23, 2012. The hearing proceeded in an orderly manner. Both parties had full opportunity to make opening statements, examine and cross-examine sworn witnesses, present documentary evidence and make arguments in support of their positions. A certified written record of the proceedings was taken and copies provided to the parties and the Arbitrator. *TR*. At the close of this evidentiary hearing, the Parties agreed to present final arguments by written brief, to be served by close of business on September 13, 2012. *TR 683*. These were timely received and the hearing closed on September 13, 2012. The Arbitrator agreed to provide his analysis and Award by close of business on September 25, 2012. *Id.*

Following is the Arbitrator's analysis of each issue certified for interest arbitration.

IV. ISSUE BY ISSUE ANALYSIS

Arbitrator's Introduction

The order of presentation begins with what the Arbitrator considers to be the single most pressing and salient issue before him: the Wage Adjustment issue in section 26.6. The included analysis of the state's financial condition of necessity will be referenced repeatedly throughout the remainder of all the economic issues that will follow.

The Arbitrator at all points weighed the evidence, testimony and arguments of the parties with great care and extended deliberation. The statutory dictates on the appropriate considerations were a constant touchstone, as required. In the end, the condition of the state's finances demonstrated on the record was a concern that could not be laid aside and weighed most heavily in the Arbitrator's awards.

The Arbitrator, as a matter of introduction, regrets being required by these mandatory considerations to come to what will undoubtedly seem to be a miserly overall award. It would have perhaps have been easier to ignore the budget constraints that were made so evident and put a wish-list in front of the Legislature that would take greater strides toward remedying the competitive shortcomings that were also plainly established. But, the Arbitrator will not abdicate his role by presenting such an unrealistic award to the Legislature.

The words used by arbitrator Lankford in his 2008 award in his Washington State Patrol Troopers Associations (WSPTA) interest finding – which itself was ultimately deemed “unfeasible” financially by the OBM – are apt, regrettably, once again:

In the face of the State's current financial conditions, those [economic] proposals must wait for a better day.

U-9; U-10; WSPTA and WSP, Case 21892 (PERC, 2008).

26.1 Wage Adjustment

Current Language:

26.1 Effective January 20, 2010 all salary ranges and steps for captains and lieutenants of the WSP Commissioned Officer Salary Schedule that were in effect on June 30, 2009, as shown in Appendix B, will remain in effect until June 30, 2011.

WSPLA Proposal:

26.1 Effective ~~January 20, 2010~~ **July 1, 2013**, all salary ranges and steps for captains and lieutenants of the WSP Commissioned Officer Salary Schedule that were in effect on June 30, ~~2009~~ **2013**, **shall be increased by **** as shown in Appendix B ~~A will remain in effect until June 30, 2011.~~ **Effective July 1, 2014 all salary ranges and steps for captains and lieutenants of the WSP Commissioned Officer Salary Schedule that were in effect on June 30, 2014 shall be increased by ** as shown in Appendix B.**

**** All adjustments to salary ranges and steps for the WSPLA under this section shall be the same wage increase(s) as agreed to with the WSPTA or awarded to the WSPTA in interest arbitration. If the WSPTA receives an interest arbitration award regarding salary ranges and steps, that interest arbitration award shall be considered the interest arbitration award of the WSPLA for purposes of salary ranges and steps under RCW 41.56.473(5) and not subject to financial feasibility.**

State Proposal:

26.1 Effective ~~January 20, 2010~~ **July 1, 2013** all salary ranges and steps for captains and lieutenants of the WSP Commissioned Officer Salary Schedule that were in effect on June 30, ~~2009~~ **2013**, as shown in Appendix B, will remain in effect until June 30, ~~2011~~ **2015.**

Summary Position of Union³

The WSPLA holds three over-arching goals in base compensation: To be comparable to agreed-upon comparable agencies; to improve salary compression issues among commissioned ranks; and, to be consistent with the Troopers Association in wage and pay type adjustments.

In the latter regard, the Union offers a “me-too” to the results of the roughly contemporaneous Troopers interest arbitration. There, the WSPTA has proposed three wage increases: (1) 6.8% effective 7/1/13; (2) 100% of the CPI-W, Seattle-Tacoma-Bremerton, with a 2% floor and 5% ceiling, effective 1/1/14; and, (3) 100% of the same CPI-W, with a 2% floor and 6% ceiling effective 7/1/14. The Union asserts this me-too is within the power of the Arbitrator, and confirms the parties agreed to a structurally identical me-too showing a mutual goal of obtaining consistent awards between the Troopers and Commissioned Officers.

With regard to comparability, the stipulated definition of “competitive” is to be within 95% to 105% of the market average in base pay. The Segal Company salary survey proves WSPLA members lag behind almost all comparable jurisdictions in base pay at most levels of service.

Lieutenants’ base pay is not competitive at all years of service. The nearest range disparity in a single case is 0.12% (King County officer base), and the widest is 67.50% (California lieutenant with 5+ years service). Captains’ base pay is only competitive at a single stop – the minimum entry level. The nearest range disparity is 0.08% (Kennewick sergeant) and the widest is 60.48% (California Captain with 5+ years service).

Using Segal data, WSPLA computes the following increases are necessary to reach even 95% of “market average” base at each step, for lieutenants and captains:

³ In all following summaries of party positions, citations provided by the parties have been omitted.

<u>Service Step</u>	<u>Lieutenants</u>	<u>Captains</u>
Minimum	3.58% (\$3,020)	-0.73 (\$-723)
6 Mos	6.28% (\$5,290)	3.31% (\$3,268)
1 Yr	8.52% (\$7,179)	5.11% (\$5,151)
5 Yrs	16.76% (\$14,125)	13.59% (\$13,432)
10 Yrs	19.88% (\$16,759)	16.54% (\$16,348)
15 Yrs	19.88% (\$16,759)	16.71% (\$16,523)
20 Yrs	19.88% (\$16,759)	16.86% (\$16,671)
25 Yrs	19.88% (\$16,759)	16.86% (\$16,671)
Maximum	18.98% (\$16,000)	16.33% (\$16,148)

Even when geo-pay and longevity pay figures are added to the base pay computation, when compared to every other state surveyed lieutenants achieve the competitive level (and then at only 98%) for a single step – at the minimum. After that, the levels drop all along the progression, hitting a low of 75% at the 5/10/15 year points. For captains the geo and longevity additions create competitive levels at only the first three steps, and they fall into mid-80% levels at all five steps thereafter.

With regard to the compression problem, even the State concedes the issue when it notes that captains and lieutenants make more than the Chief and Deputy Chief. 31.4% of WSP sergeants (and even 3% of troopers) earn more than the lowest paid lieutenant. Even the highest paid captain was surpassed in compensation by two lieutenants, and 26.3% of lieutenants, 7.85% of sergeants, and even four troopers earned more than the lowest paid captain. The compression issue is undeniably real.

The cost of the WSPLA proposals to address these demonstrated issues is reasonable, affordable and sustainable. Using the State's own figures, the cost of the WSPLA me-too is \$1,228,860 (at the floors) and \$1,834,507 (at the ceilings). Using the \$351 million in the State Patrol Highway Account for the 2013-15 biennium these numbers are, respectively, only 0.35% and 0.523% of the SPHA.

The bulk of the WSP operating budget (74%) comes from the transportation budget, of that amount, 98% comes from the transportation budget subcategory of the SHPA. 93% of WSP trooper/sergeant/lieutenant salaries are paid from the SHPA segment of the transportation budget. The State's revenue calculations for the SPHA did not include the more recent, June 2012, forecast. The June forecast shows growth in the SPHA revenue forecast in the current biennium compared to the older forecast (from February, 2012) used by the State. This trends only upward for the next biennium (2013-15) and on to the 15-year forecast through 2027. The SPHA is forecast to continue to grow for at least the next 16 years. Given this, the magnitude of the gap between the WSP and its comparables can and should at least begin to be bridged in this interest arbitration process.

The Legislature has tools available to meet this need. The Legislature where permissible can transfer funds between available accounts; it has transferred funds into the SPHA in the last two bienniums. It can also create new revenue sources that directly benefit the WSP, as it did in the most recent past session when it increased the driver abstract fee. This revenue alone creates \$9.5 million in the coming biennium which is currently unallocated in the Highway Safety Fund. As such, the Legislature has this amount available to transfer to the SPHA if it wishes to do so. Federal funds are a separate source of possible gains. The State had projected a 20% decrease in federal funds transportation reauthorization funds, but this source has been renewed.

The interest arbitration process is designed to produce comparable conditions of employment for comparable jurisdictions. The compensation data for the comparables survey is convincing and compelling. The WSPLA will only grow further behind its comparables as the cost of living increases if nothing is done. The proposed compensation increases are reasonable, affordable and sustainable.

Summary Position of the State

Consideration of any compensation increase properly begins with the State's ability to pay. This falls under the statutory dictate in RCW 41.56.475 requiring the Arbitrator to consider, "Such other factors...which are normally or traditionally taken into consideration in the determination of matters that are subject to bargaining [here]."

The two major funding sources for the WSP operating budget – the Transportation Budget (76%) and the Omnibus Budget (24%) – are in critical condition. Both funds are projected to have deficits at the close of the 2013-15 biennium and beyond. There are insufficient revenues to pay for a salary increase for WSPLA members.

The Transportation Budget funds some 79% of WSPLA member salaries. The major WSP funding source within the Transportation Budget is the SPHA (98% of WSP transportation-sourced funds). The Highway Safety Account (HSA) and the Multimodal Account make up the other 2%. As such, the super majority of WSP salaries are drawn from the SPHA.

The Legislature was moved to supplement the SPHA with \$16 million in order to end the current 2011-13 biennium with only a \$684,000 positive balance. For the coming 2013-15 biennium, the SPHA is earmarked for another \$18.5 million transfer from the HSA – and even

with that transfer and an additional \$9.5 million in new revenues – the SPHA is projected to end with a \$15.255 million negative balance.

The Governor has a statutory duty to propose a balanced budget within projected revenues as per RCW 43.88.033. The statute further provides the budget must be written in a way that does not assume or require additional revenues. The State's proposal to maintain current salaries is not even within current budget expectations; an increase in compensation cannot be contemplated.

The latest (June, 2012) forecast emphasized by the Union in fact shows even a further reduction in anticipated revenues for the SPHA. The downward estimate of 1.9% means that even the predicted bare \$684,000 balance for the end of the current biennium will likely not exist to carry forward.

The identified source of any increasing revenue predictions is the newly hiked fees collected for Abstract of Driver Record (ADR). These anticipated added monies were, however, already included in the aforementioned SPHA projections prepared by the Alyson Cummings of the OFM Budget Division. In fact, Cummings used higher figures for her calculations than were used in the June 2012 forecast cited by the Union – an added \$3.5 million in 2011-13 and \$9.5 million in 2013-15 used by Cummings compared to only \$2.5 and \$8 million in the June 2012 forecast.

These latter two points mean the June 2012 forecast actually produces lower numbers than in the State's presentation showing anticipated SPHA deficits in the coming biennium. Not only is the starting positive balance predicted by Cummings now likely to be removed, the \$1.5 million in lower expected ADR revenues means the 2013-15 biennium ending deficit predicted at \$15.255 million will very likely approach if not exceed \$17.5 million.

It is true there are five other projected transportation fund changes in the June 2012 forecast compared to the prior quarter. Of the four positive changes, \$28 million had already been included in Cumming's projections. This leaves a net positive "good news" forecast of \$89.7 million – which, when removed from the projected \$159.6 million deficit, still leaves an ending Transportation Budget deficit for the 2013-15 biennium of \$69.9 million.

The State's overall financial health is also critical. The Omnibus Budget, essentially known as the "general fund," is the other source of funds for WSP salaries. The bipartisan Economic and Revenue Forecast Council forecasts have informed the governor's budgeting process. The four-year outlook budget shows the \$47 million balance at the end of fiscal year 2013 will turn to a \$650 million negative balance in FY 2014. By the end of the biennium in 2015 the negative balance will exceed \$1 billion dollars. Even if a two-third's vote of the Legislature allows use of the \$551 in the budget stabilization account, the deficit remains at \$492 million. These figures notably do not consider a coming \$1 billion estimated expense for basic education.

The most reasonable and relevant apples-to-apples comparables are found in the five "west coast" states highlighted in the Segal Report. However, regardless of the comparables date, the cost of the WSPLA me-too proposal is not a viable option. The Omnibus Budget shortfall is predicted at nearly \$2 billion, and the Transportation Budget shortfall at \$159.6 million. The WSPLA expects the state to increase these deficits so that WSPLA employees with a median income of \$106,866 can enjoy a raise.

Using the maximum and minimum percentages in the proposal, and including compounding, and trailing costs for pension and taxes, the costs of the proposed increases are

significant. The increases over the biennial term are as follows, broken into Omnibus and Transportation Budget shares:

<u>Biennial Share Source</u>	<u>Minimum</u>	<u>Maximum</u>
Omnibus:	\$244, 903	366,604
Transportation:	\$983,957	1,468,903

The totals at \$1,228,860 minimum and \$1,834,507 maximum represent percentage increases of, respectively, 11.11% and 18.87%. This comes after a period where other state employees suffered a 3% wage reduction that was not visited on the WSPLA commissioned officers. The WSP command staff and non-commissioned officers had to bear these 3% reductions as well. The governor is committed to restoring wages to all these employees; the state cannot afford to offer increases to the WSPLA members who maintained their wages during this period.

As a more general, but overarching, matter the me-too proposal the Arbitrator is asked to confer is not a viable option. A me-too is a legitimate option for bargaining parties, but only during the course of their direct bargaining. When requested of an interest arbitrator a me-too asks the arbitrator to defer to a proceeding he can have no knowledge of. The concept also renders the WSPLA effort on comparability meaningless, as a wage increase pattern based on another unit can not be expected to be consistent with this unit's alleged needs. Left with the choice of only an illogical and speculative me-too proposal or the state's proposal to maintain current salary levels, the Arbitrator should choose to maintain the salary levels.

Arbitrator's Analysis

The Me-Too Concept and the Compression Issue

The Arbitrator ties these two elements together because they are two sides of the same coin. The evidence and testimony confirms that compression of pay ranks in the bargaining unit, and among the commissioned staff throughout the WSP, is recognized as a problem by both the WSPLA and the state. The state pointed to the fact that WSP Chief Batiste was paid less than three bargaining unit members in 2011 total compensation. *TR 20; U-31*. At the same time, the data reflects for that year the top two of these leaders were lieutenants who earned more than the highest captain. *U-31*. In fact, eleven lieutenants were paid more than the lowest earning captain. *Id.* The issue continues down to the sergeant and trooper level. Eleven sergeants were paid more than the lowest earning captain – as were four troopers. *Id.* The Arbitrator recognizes the compression problem.⁴

The WSPLA describes its me-too proposal as an effort to address this by ensuring the same amount gained by the WSPTA goes equally to WSPLA unit. The Arbitrator recognizes that while the parity provided by a me-too posture would not act to correct existing compression, it would at least prevent the problem from growing. It is evident why these parties in preceding bargaining executed such an agreement, deferring wage decisions for their agreement beginning in 2009 to the interest arbitration decision then pending from the WSPTA bargaining. *U-8*.

The state objects to the current me-too proposal by making a distinction. The prior me-too was the product of mutual bargaining reached in negotiation with acceptance of both parties; this me-too proposal made to an interest arbitrator differs. The state does not go so far as to say granting a me-too is outside of the power given to an interest arbitrator by governing statute, but it does hold that the me-too effectively gives this arbitrator only two possible options: to adopt

⁴ The commonly understood negative elements of compression did not appear to be the subject of contest. The Arbitrator need not belabor by noting them here, for reasons that will be made clear, *infra*.

the WSPLA's proposal verbatim and create the me-too provision, or, to adopt the state's proposal. *Brief of State* at 18.

. The WSPLA made clear in testimony from its representative Leann Paluck that in its view the Arbitrator could adopt "any or all" elements of the WSPTA proposal behind the me-too "or change those proposals."⁵ *TR 34*. The Arbitrator agrees with this, but does side with the state in material part.

The request to an interest arbitrator to make a material finding that is wholly dependent on the finding of another arbitrator in another proceeding appears to be a case of first impression under the governing statute. (Neither party has offered point authority, and the Arbitrator's research revealed none.) A close reading of the enabling statute does not reveal prohibitive language. To the contrary, the "catch all" dictate of part 4(e) or RCW 41.56.475 permitting the arbitrator to consider factors "normally or traditionally taken into consideration" in determining matters of collective bargaining would enable the possibility. *RCW 41.56.475*.

The Arbitrator takes note that the common purposes behind a good faith me-too proposal include interests of parity, equity, competitive ability and comparative status. These are factors normally taken into consideration in determining the compensation issues in collective bargaining.

It is not, then, for statutory reasons the Arbitrator declines the me-too concept for resolving the wage issue. The Arbitrator is indeed uncomfortable as a general matter with a ruling that of necessity removes from his direct consideration the ultimate resolution of an issue of such import. The record here has been painstakingly built to provide the Arbitrator with all the information needed to come to a reasoned decision. On the other extreme, the Arbitrator

⁵ Paluck is also the WSPLA advocate. She testified as a witness without objection from the state.

quite literally has no idea what the full record contains in the WSPTA case he is being asked to, in effect, bring in through a side door of this proceeding.

Even so, the justifications for the proposal based on equity, balance, uniformity and even historical bargaining patterns confirming a me-too posture are strong. But, they do not carry the day for the proposal in the end, largely due to the strength of the separate consideration noted at the outset of this section. A straight me-too of any increase would be certain to do nothing to ease the compression problems in this unit. It is possible that the WSPTA decision, compared to the end result in wages here, could exacerbate the compression situation. But, by declining the me-too and making his own wage decision tailored to this unit and this record, the Arbitrator creates the only possibility of easing the compression situation from a straight wage modification. The Arbitrator's reasoning will be developed more fully following.

The Comparative Case for Wage Increase

The Arbitrator is specifically directed to consider comparison of hours of conditions of like employers on the west coast.⁶ *RCW 41.56.475(4)(c)*. This case features only a single salary survey, and it is expressly agreed upon by the parties. *TR 7*. The record establishes the survey is thorough, well-designed, fully-documented and skillfully presented. *S-8; S-12; U-24, TR 149-186*. The survey included geographical regions within the "west coast" designation of the statute.⁷ The WSPLA referenced comparables data from cities and counties included in the

⁶ It has been noted that this phrase omits the term "wages" from the more common phrase "wages, hours and other conditions." The Arbitrator is in agreement with arbitrator Howell Lankford, *WSPLA and WSP*, Decision 21892 (PERC 2008), holding that even if the omission were to change the meaning, the language arbitrator Lankford called the "etc." provision (4)(e) allows consideration of the traditional factor of wage comparables.

⁷ The Arbitrator is in agreement that this term does not restrict the comparables to counties, cities and states that have a coastline, and, for the purposes of this case, the survey agreed-upon rightly included OR, NV, CA, AZ, ID and WA.

survey, in addition to state police forces, while the WSP focused on the other state units as its controlling comparables.

The subject of proper comparables is often a source of extensive argument and requires detailed analysis by an interest arbitrator; certain formulas exist (the “50-150” rule, for example) to assist in this process. The stipulated agreement of the parties here, without more, would eliminate much need for such consideration but another factor wholly shortcuts the discussion.

The survey shows – regardless of the jurisdictions used – that in terms of WSPLA base wages the WSP is deeply and widely non-competitive with the great bulk of comparables, with examples at every level. *U-25*. Indeed, in many cases, even comparisons to sergeant-level officers are outside of the stipulated measure of competitiveness (base pay that is 95% to 105% of the market average). *Id.*; *TR* 7-8. The Union’s highlighted data does move among various levels and various non-state jurisdictions in a somewhat cherry picking manner, but the ultimate point of alarming competitive weakness is fairly made overall. Indeed, the summary “key findings” of the Segal survey lead with the following:

Regarding compensation, we found that when comparing Washington State Patrol to the unadjusted market data, compensation for all ranks is consistently less comparable than that of surveyed peers.

S-8, p. 1 (of 197).

The closest and best comparison is between other state police forces and this was the comparison most emphasized by the state.⁸ Moreover the Arbitrator agrees that the best comparison uses “adjusted” base pay. This is because Washington is alone among the surveyed

⁸ The Arbitrator is inclined to agree as a shorthand rule with the entry-point principle expressed by arbitrator Alan Krebs in *Pierce Co. and Pierce Co. Captains Assoc.*, Decision 2269 (PERC, 2010): “Like employers to [a county] are other counties.” In this way, like employers to a state patrol are other states.

state peers to use both longevity and geographical pay premiums.⁹ *S-8; TR 161; 167-68.* In addition, the best adjusted rate compensates for differences in cost-of-labor between states, using a measure based on costs in the various state capitals. *S-8; TR 154-55.* Even so, the end composite result for comparability of the adjusted base pay versus all five survey states was:

Steps →	Min/0	1yr	5yr	10yr	15yr	20yr	25yr
Adj. Pay LT	98%	92%	81%	75%	75%	75%	77%
Adj. Pay CPT	100%	96%	84%	80%	80%	83%	86%

S-8.

The overall competitive disadvantage is stark. For purposes of simple illustration, if these adjusted figures are averaged one more step to make a composite competitive figure across all progression steps, the totals are:

Competitive Average for Lieutenants:	81.8
Competitive Average for Captains:	87.0

The record surprisingly includes no testimony or evidence about retention or recruitment issues in the bargaining unit, but with the figures so far below competitive standard it is reasonably concluded that if these are not serious issues at present, they will become serious issues in time if not addressed.

When one looks at the history of wage increases in recent years – or lack thereof – one begins to appreciate how the comparative situation could become so lopsided. The WSPLA presented this data:

⁹ Nevada does use a longevity premium, but not a geo-pay premium, and unlike Washington, Nevada’s longevity amount is a set rate, not a percentage modifier. *TR 157-58.*

Date of Increase	Increase	CPI-W June to June	CPI-U June to June
		Sea/Tacoma/Brem	Sea/Tacoma/Brem
7/1/2007	4%	3.3%	3.5%
7/1/2008	4%	6.2%	5.8%
7/1/2009	0	-0.7%	-0.4
7/1/2010	0	-0.1%	-0.5%
7/1/2011	0	3.7%	3.2
7/1/2012	0	2.7%	14.3%
Total	8%	15.1%	14.3%

U-21.

In the six years ending this past July, the bargaining unit fell behind CPI-W by over 7%. The unit has not received a single addition to base wages in the last four years. During those four years, the CPI-W has increased 5.6%. Clearly this a unit that whose wages, buying power and competitive position have deteriorated markedly over the last three biennial periods and is deserving of a catch-up increase in wages. The next session will discuss the reasons why this situation became so pronounced.

State Finances and Ability to Pay

“Ability to pay” is not set as a specific consideration factor in the relevant statute. But, as the late, and much respected, northwest arbitrator Prof. Carlton Snow opined, “Serious attention must be given to an employer’s contention that it is unable to fund a wage proposal. *** Once raised...this factor normally and traditionally is taken into consideration in public sector interest arbitration disputes.” *Whatcom Co. and Teamsters 231, Sheriff Dept. Unit, Case 06094 (PERC, 1986).*

The WSP budget is created, via Legislative appropriations, from two main funding sources: The Omnibus Budget and the Transportation Budget. *S-7; S-10; TR 97.* Seventy-four

percent of the WSP's operating budget, \$376 million in the current biennium, is allocated from the Transportation Budget. *Id.* The remaining 26 percent is allocated through the Omnibus Budget, of which \$67 million is General Fund and \$61 million is from other funding sources. *S-7; S-10; TR 90.* Sixty-four million of the Omnibus Budget funds are "proviso-ed" funds and are restricted to only be spent on designated programs. *S-7; TR 90-91.* Both funds have projected deficits at the close of the coming 2013-15 biennium, and beyond. *S-3; S-8.*

The "Four-Year Outlook Enacted 2012 Supplemental Budget" was prepared using data from the State Economic and Revenue Forecast Council. *TR 73; TR 77-78; S-3.* This budget shows the General Fund began FY 2012 with a \$60 million deficit. *S-3.* By the start of FY 2013 the deficit is predicted to grow to \$434 million. *Id.* While FY 2014 shows a small \$47 million positive balance to start, by the end of the year, the GF will begin FY 2015 with a \$649 million deficit. *Id.* The trend continues, growing ever larger, with deficits of \$1.043 billion at the end of FY 2015 and \$1.31 billion at the end of FY 2016. *Id.* Even if the optional budget stabilization "rainy day emergency" funds are accessed by legislative action, these last four deficit years will still carry deficits in the hundreds of millions. *S-3; TR 81-82.* On top of this sits the looming spectre of an education funding bill recently passed that is expected to require some \$1 billion in the coming 2013-15 biennium that is not included in these numbers. *TR 83-84.* Within the WSP budget, funds flowing from this budget currently account for approximately 20% of salary funding for the WSPLA unit. *TR 220.*

The remaining 80% for unit salaries comes in almost entire measure from the State Patrol Highway Account sub-fund of the Transportation Budget. *S-7.* This SPHA in fact accounts for 98% of the funds the WSP obtains from the Transportation Budget. *TR 97.* (The remaining 2%

comes from the Highway Safety Account (HSA) and the Multimodal Account. *TR 98; S-10*. The SPHA, and indeed the overall Transportation Budget, is in similar critical funding condition.

The SPHA derives primary funding from a single source: sale of vehicle registration tabs and renewals. *TR 99*. Smaller portions come from an array of sources including everything from farm vehicle trip permits to fees for driver abstract records. *S-7*. All transportation-source-related funding to SPHA is restricted by the State Constitution's 18th Amendment to use for transportation purposes. *TR 91*.

The SPHA is estimated in the 2012 Legislative Financial Plan to end the 2011-13 biennium with a bare \$684 thousand balance (on a \$375 million budget). *S-7*. This small hoped-for surplus is attributable to a one-time \$16 million transfer to SPHA from the Motor Vehicle Account (MVA) which receives gas tax funding. *S-7; TR 101-102; TR 110*. Moreover, even with an anticipated \$18.5 million legislative injection from the HSA set for the coming biennium of the CBA currently at issue, the numbers in the SPHA end in the red. *TR 110*. The deficit figure projected for the end of the 2013-15 period is \$15.25 million. *S-7; TR 110-111*.

Yet the record reflects that this situation does not amount to a full and complete "inability" to pay. Rather, it falls into a slightly less dark and unyielding category. In *Whatcom County* the term used by Prof. Snow was "unwillingness to pay" but this expresses too great a level of discretion to aptly apply here. *Whatcom Co.*, Decision 06094, *supra*, at IV(3). The situation at hand falls more accurately into the realm of "limited or impaired ability" to pay discussed by arbitrator Sandra Smith-Gangle in *Yakima County and Yakima Co. LE Officers Guild*, Case 17918 (PERC, 2004) (citing "Ability to Pay: A Search for Definitions and Standards in Factfinding and Arbitration," U of O LERC Monograph No. 3 (1984)). In *Yakima County*, arbitrator Smith-Gangle referenced an impaired ability to pay as the troubled status short of flat

bankruptcy and the “rare” true inability to pay. *Id.* Evidence of limited or impaired ability to pay referenced in *Yakima County* is present here: dramatic downturn in revenue receipts; showing of severely depressed economic conditions; access to and exhaustion of contingency funds; and, freezes in other bargaining units. *Id.*

Indeed the record reflects that “every other” bargaining unit and civil employee group under state employment did undergo not just freezes, but wage rollbacks and in some cases furloughs in the current biennium. *TR 630-631.* This included the civilian, non-commissioned and even non-represented commissioned employees working alongside this bargaining unit at the WSP. All of these employees’ wages were reduced by 3% while the unit’s wages, at the governor’s discretion, remained intact. *TR 333; 630-631.* The Arbitrator finds the state has an impaired and limited ability to fund increased costs under the CBA at issue.

Reconciling the Comparative Case for Increase with the State’s Impaired Ability to Pay

Arbitrator Smith-Gangle further held that “especially in cases where there is compelling evidence shown by comparability or cost of living factors” the state must “convince the arbitrator that it is unable to raise sufficient revenues to meet an established need for a raise.” *Id.*

As indicated, the evidence is compelling that the unit conditions justify an increase in base pay. On the other hand, there are indications that the state has it within the power of its budgeting discretion to take steps, however minor compared to unit expectations, to address the need for base pay improvements.

The first of these reasons are steady and quite recent indicators of economic improvement. In terms of the Omnibus Budget, the June, 2012 report of the Economic and Revenue Forecast Council, while couched in moderating language, in fact showed a net revenue increase of \$156.2 million for the 2011-13 biennium prediction, and an even greater \$197.3

million predicted increase for the 2013-2015 biennium. *E-5*. Speaking more broadly, the report states “the recovery has continued” and even that the “Washington economy [is expected] to continue to outperform the U.S. economy in the recovery...”. *E-6* at 25.

The Transportation Revenue Forecast Council also produced a June, 2012, report. *U-29*. Total Transportation Budget predicted revenues for the current biennium had increased since the February report by \$57 million and 1.3%. *Id.* at 5. More relevantly still, the predicted revenues for the SPHA in the same period grew by \$1.5 million for a 0.4% increase. *Id.* The predictions for the coming 2013-15 biennium fared even better. The overall budget revenue number grew by \$173 million, and 3.9%. *Id.* The SPHA prediction added \$7.5 million for a 2.2% increase since the February report. *Id.*

To be sure, the Arbitrator is no pie-in-the-sky Pollyanna. The negative numbers remain scattered throughout even the July forecasts. Cautionary language and negative expectations abound. The state rightly points out that some of the gains seen had already been computed into budget predictions, such as the added SPHA income from legislated fee increases for driver abstracts. *TR 111-114*. The state has made its case well with overwhelming data. The requested increases of an overall 11% (minimum) and 18.87% (maximum) are out of the question in this brightly red-inked environment.

And yet, even before the unexpected positive elements in the July reports, in this same environment the state had indicated that it intended to restore the 3% reductions visited upon so many employees during the most recent FYs. *TR 126*. Further, the Legislature publicly announced its commitment to the Governor to appropriate the over \$33 million that will need to be added to the Ferry Operations Account in the Transportation Budget in the coming biennium to maintain existing service. *S-11; S-7*. This is evidence that the situation is not the rare flat

inability to pay. If funds can be budgeted for salaries in that manner amidst the red figures of the Omnibus and Transportation Budgets, then the ability to pay does exist. The record shows that 2013-15 black-number funds such as the HSA can be accessed to meet needs in a the SPHA red-number account.

The state's impaired status is recognized, but it is not impotent to address serious competitive and earning-power damage visited upon bargaining units that have gone for truly lengthy periods with no increases. The Arbitrator does not intend in any way to cast relative aspersions on other elements of state labor, all of whom are undoubtedly worthy, but will say this. The state's interest in addressing this particular unit (after what will end up being, even under this ruling, a five-year freeze) should be sharply pronounced for an honored force whose work the legislature has declared by statute as "uninterrupted and dedicated service [that] is vital to the welfare and public safety of the state of Washington...". *RCW 41.56.430*.

The WSPLA bargaining unit, however, was undeniably and understandably less badly damaged in the past biennium than other state units and employees. Noting that the state must be expected to make up the damage to those employees first is simply taking into consideration a factor that is normally and traditionally considered in determining matters subject to bargaining.¹⁰

Accordingly, in light of all the foregoing, the Arbitrator will leave all WSPLA base wages intact for the first year of the CBA, FY 2013. An increase not tied to any CPI will be awarded for the second year, FY 2014. The amount chosen flows, in part, from the notion of

¹⁰ Noted northwest arbitrator Jane Wilkinson has held that during difficult economic times when a government entity finds it necessary to ask all employees to make sacrifices, internal parity can be a valid consideration: "Obviously, it does nothing for the morale of one employee segment to accept, for instance, a wage freeze, and then see another group receive a whopping increase, no matter how deserving the latter group is of that increase." *City of Redmond and Redmond Police Assoc.*, Decision 16791 (PERC, 2004).

equality to the restored 3% planned for the other WSP employees in reparative funds anticipated from the state at the start of coming biennium. This fixed three percent (3%) increase will help address the multiple comparatively established factors shown above. These include the lack of competitive status, the lost income as a result of unmatched rises in CPI, and, perhaps (depending on WSPTA increases, or, more accurately, a comparative lack thereof) the compression issue with sergeants and troopers as well.

Using the basic methodology of the parties, the cost of a 3% increase computed on the \$84,300 base rate for 38 lieutenants is \$96,102. Computed on the \$98,868 base rate for 19 captains the cost of a 3% increase is \$56,354. The combined total is \$152,456, or, using a \$386 million dollar budgeting amount for WSP's dominant-source SPHA, 0.039 % percent of that budget.

Arbitrator will Award:

26.1 Effective July 1, 2013 all salary ranges and steps for captains and lieutenants of the WSP Commissioned Officer Salary Schedule that were in effect on June 30, 2012, as shown in Appendix B, will remain in effect until June 30, 2014. Effective July 1, 2014, all salary ranges and steps for captains and lieutenants of the WSP Commissioned Officer Salary Schedule that were in effect on June 30, 2013 shall be increased by three percent (3%), as shown in Appendix B, and will remain in effect until June 30, 2015.

Arbitrator's Note: Appendix B rates shall be calculated, amended and republished as necessary to reflect this increase.

26.3 and 26.4 Longevity Premiums (Multi-Section Proposal)

Current Language:

26.3 Longevity Premium Pay – Lieutenants

Lieutenants will receive longevity pay in accordance with the following schedule:

- A. Two percent (2%) longevity pay based upon the top pay step of the Commissioned Officer Salary Schedule for lieutenants shall be added to the salaries identified in the applicable Appendix for all employees with five (5) through nine (9) years of commissioned service.
- B. An additional two percent (2%) longevity pay shall be added for all employees with ten (10) through fourteen (14) years of commissioned service.
- C. An additional two percent (2%) longevity pay shall be added for all employees with fifteen (15) through nineteen (19) years of commissioned service.
- D. An additional two percent (2%) longevity pay shall be added for all employees with twenty (20) or more years of commissioned service.

26.4 Longevity Premium Pay – Captains

Captains will receive longevity pay in accordance with the following schedule:

- A. Two percent (2%) longevity pay based upon the top pay step of the Commissioned Officer Salary Schedule for captains shall be added to the salaries identified in the applicable Appendix for all employees with fifteen (15) through nineteen (19) years of commissioned service.

- B. An additional two percent (2%) longevity pay shall be added for all employees with twenty (20) or more years of commissioned service.

WSPLA Proposal:

26.3 Longevity Premium Pay – Lieutenants and Captains

Lieutenants **and Captains** will receive longevity pay in accordance with the following schedule:

- A. Two percent (2%) longevity pay based upon the top pay step of the Commissioned Officer Salary Schedule for lieutenants **and captains** shall be added to the salaries identified in the applicable Appendix for all employees with five (5) through nine (9) years of commissioned service.
- B. An additional two percent (2%) longevity pay shall be added for all employees with ten (10) through fourteen (14) years of commissioned service.
- C. An additional two percent (2%) longevity pay shall be added for all employees with fifteen (15) through nineteen (19) years of commissioned service.
- D. An additional two percent (2%) longevity pay shall be added for all employees with twenty (20) or more years of commissioned service.

~~**26.4 Longevity Premium Pay – Captains**~~

~~Captains will receive longevity pay in accordance with the following schedule:~~

- ~~A. Two percent (2%) longevity pay based upon the top pay step of the Commissioned Officer Salary Schedule for captains shall be added to the salaries identified in the applicable Appendix for all employees with fifteen (15) through nineteen (19) years of commissioned service.~~
- ~~B. An additional two percent (2%) longevity pay shall be added for all employees with twenty (20) or more years of commissioned service.~~

State Proposal:

No change to existing language

Summary Position of the WSPLA

The proposal adds captains to the 4-step longevity schedule applied currently to lieutenants. Troopers and sergeants also have 4-step longevity schedules. The purpose of this proposal is to address compression issues that have lieutenants and some sergeants making more than captains, who are overtime exempt.

Testimony confirms that captains are typically appointed with 17 to 20 years of service. At that point on the lieutenant scale they are earning 6% (step 3), or 8% (step 4). But, once appointed to captain their longevity starts over at the new rank, featuring only the 2 steps at 2% each. This means their maximum longevity sits at 4% without compounding, while the maximum on the lieutenant side is 8% without compounding.

The difference between a two-step/4% scale and a 4-step/8% scale is undeniable. Equally apparent is the obvious compression and disparity impact.

The net impact of this proposal is approximately \$173,000. Assuming a \$351 million SPHA fund for the coming biennium this cost is 0.049% of SPHA. This is certainly reasonable, affordable and sustainable, especially to address an obvious disparity.

Summary Position of the State

It is extremely rare for an individual to be promoted to captain with less than 15 years of service. Typically the number is between 17 and 20 years. Hence, the impact of the proposal would be to give all current WSP captains four longevity steps of 2% each. The state cannot

afford the impact of this proposal, which (together with the premium pay additions of Article 26.7 were costed together at \$102,741.

Arbitrator's Analysis

Longevity pay is an area where the WSP stood apart from its state agency peers. S-8, p. 80. No other state agency pays longevity increases as a percentage of base salary, and only one other state pays longevity increases at all. *Id.*

The longevity pay applied to the WSPLA unit was factored into the overall adjusted base pay competitive analysis discussed hereinabove under the section 26.1 wage proposals. To that extent, then, any longevity weakness (or strength) has already been taken into consideration by the Arbitrator as necessary under the statutory dictates.

Accordingly, the award made under 26.1 addresses the WSPLA longevity proposal to the extent possible given the financial ability to pay issues also considered in the 26.1 wage proposal analysis.

Arbitrator will Award:

Existing Language remains unchanged.

26.7 Premium Pay

Current Language:

- A. The Employer will pay premium pay as follows to employees assigned primarily to the following responsibilities:

Assignment	Monthly Rate
Legislative Liaison*	Five Percent (5%)

Multi-Engine Pilot**	Ten Percent (10%)
OPS, CID and IAD	Three Percent (3%)
Single Engine Pilot**	Five Percent (5%)
SWAT Member	Three Percent (3%)

*Provided only during legislative session.

**An employee may only receive one (1) pilot premium pay.

- B. The above percentages will be based upon the employee's base rate of pay.
- C. An employee may hold up to two (2) full-time percentage premium pay assignments, except that an employee may hold only one (1) pilot premium pay.

WSPLA Proposal:

- A. The Employer will pay premium pay as follows to employees assigned primarily to the following responsibilities:

Assignment	Monthly Rate
Academy Staff	Five Percent (5%)
Legislative Liaison*	Five Percent (5%)
Multi-Engine Pilot**	Ten Percent (10%)
CVD, OPS, CID and IAD	Three Percent (3%)
Single Engine Pilot**	Five Percent (5%)
SWAT Member	Three Percent (3%)
Special Operations	Three Percent (3%)
Homeland Security	Three Percent (3%)

*Provided only during legislative session.

**An employee may only receive one (1) pilot premium pay.

- B. The above percentages will be based upon the employee's base rate of pay.
- C. An employee may hold up to two (2) full-time percentage premium pay assignments, except that an employee may hold only one (1) pilot premium pay.

State Proposal:

No change to existing language.

Summary Position of WSPLA

The purpose of the additions proposed to the premium list is to bring the WSPLA members to parity with the WSPTA members they supervise. Adding the premium categories will also help to address negative compression pay issues.

The troopers and sergeants assigned to academy duty receive the 5% premium. This was done after the WSP had trouble recruiting troopers and sergeants to fill the roles. The state responds that lieutenants and captains can be forced to accept the assignment involuntarily. The last opening for a lieutenant vacancy at the academy did go unfilled on a voluntary basis. This is a recruitment problem.

The state attempted to minimize the role of lieutenants at the academy by noting they are not “specialized” as they are not hands-on instructors. Yet, only troopers, not sergeants, are instructors as the academy – and sergeants under the WSPTA agreement receive the 5% premium along with troopers nevertheless.

All other proposed additions are equally areas of specialty learning, with, as Deputy Chief Karnitz admitted, unique learning curves that are required after transfer.

The cost of these added premium categories is \$101,287 for the biennium. This equates to 0.0289% of the \$351 million projected for the SPHA during the biennium. If the longevity additions for captains are accepted, then the biennial cost is \$102,741 (base plus longevity then premiums). This equates to 0.0293% of the \$351 SPHA amount for the biennium.

In past cases the state confirms that lieutenant and captain premiums were added simply to bring them to equality with the troopers, sergeants and detectives they supervise in a given specialty assignment. This proposal merely maintains that with each new premium proposed.

Summary Position of the State

The current premium positions, as explained by Deputy Chief Karnitz, apply to duties with a high degree of uniqueness or challenge.

The academy premium in the WSPTA addressed a recruitment issue. The lieutenants are not similarly situated. They do not actively instruct and need no specialized training or knowledge. Nor is there are recruitment issues; involuntary transfer is possible, but career growth is a positive aspect of the assignment and WSPLA members do not have to be “dragged” to the assignment.

The Commercial Vehicle Department (CVD) is largely made up of limited commission enforcement officers. These officers, and the few troopers assigned, go through specialized training but the lieutenants and captains do not.

Special Operations has two sections, Executive Services and Aviation. Executive Services does not require specialized training for its capitol campus security, L & I Building security and Governor protection duties. The Aviation lieutenant is already a specialized pilot receiving pilot premiums.

Finally, in Homeland Security, duties include State Ferry System protection and working in the Fusion Center (FBI HQ) in Seattle. This brings 10% geo pay, and the positions do not require specialized skill or training.

The total biennial cost of the premium pay proposal is \$101,287, an amount the state cannot afford. Nor is there justification for this expense available in merely supervising subordinates who do hold a special responsibility and accountability. That supervision is part of the officers' job regardless of assignment and this proposal would have the effect of premium pay additions merely by virtue of the higher rank where no specialized skill or knowledge is required. The proposal should be rejected.

Arbitrator's Analysis

The record establishes the current list of responsibilities providing premium pay are all true specialties for which significant training, skill and knowledge are required. *TR 354*. The Arbitrator finds the proposed new premium areas do not fit within this pattern.

The Commercial Vehicle Division (CVD) positions for WSPLA members are supervisory assignments over largely limited commission commercial vehicle enforcement officers. *TR 357*. The few WSPTA members who work under them are in fact specially trained, but the lieutenants and captains do not undergo any equivalent training. *TR 358-359*.

The Special Operations assignments actually are in two sections, Executive Services and Aviation. *TR 359*. Aviation is home to a truly specially trained and skilled pilot – this officer is already on the premium list for that status. *TR 359-360*. Executive Services provides security for the capitol campus, the L&I Building, and the Governor. *TR 359*. This work for WSPLA members also receives and requires no specialized training. *Id.*

Homeland Security assignments for WSPLA members requires work in Seattle providing State Ferry System security and security for the Fusion Center at FBI headquarters. *TR 360*. This

work location brings a 10% geographic pay premium, and it does not require any specialized training. *TR 360-361.*

The Training Academy assignment for WSPLA members is an administrative supervisory position over the WSPTA members who perform cadet training at the academy. *TR 357.* There is no specialized training required for this position. *Id.* The academy is the single proposed premium position where the WSPLA pointed to a “recruitment” issue. A difficulty the WSP experienced in attracting WSPTA instructors required a premium application to remedy. *TR 356.* There is no disagreement that this is not a problem with regard to WSPLA assignments since in cases where no volunteers apply (the location of the academy in Shelton is apparently considered disadvantageous) mandatory assignments may be made for WSPLA members. *TR 426.*

Other than this single recruitment position, the WSPLA based the bulk of its argument in favor of these premiums on a “parity” or “equity” claim recognizing that the WSPLA members in these new premium areas often must supervise WSPTA members who are receiving premium pay under their CBA. The Arbitrator is not persuaded that either a parity or an equity situation exists where the WSPTA performance role is operationally different – requiring no specialized skill or knowledge – compared to the WSPTA members they supervise.

None of this even begins to consider the ability to pay element discussed herein with primary regard to 26.1. The cost of these proposed premiums for the 2013-2015 biennium approaches \$50,000 per year. *TR 513-515.* While there may be some merit in a supervisor holding a premium benefit no less than the subordinate employees he or she supervises (for compression and morale reasons at least), in this economic climate a proposal with such an expense carrying no other persuasive factors is not supportable.

For all of these considerations the Arbitrator declines to accept the proposal.

Arbitrator Will Award:

Existing language remains unchanged.

26.9 Out of Class Work

Current Language:

A. Requirements

Any employee who is assigned the responsibilities of a position higher than he/she presently holds for forty (40) or more consecutive hours shall be paid at the rate of that position or rank while so acting. The rate of pay for the purposes of this Section shall be the rate that the employee would receive had he/she been promoted to that position from his/her normal position. However, if more than one (1) employee is assigned at different times to fill the same position of the higher classification for five (5) or more consecutive working days, the employees filling the position will be paid at the higher rate for all time worked in the higher classification. Compensation shall not be paid more than once or the same hours under any provision of this Section or Agreement.

B. Lieutenant Acting Pay Options

1. Lieutenants appointed to acting captain positions will be allowed to choose between one (1) of the following two (2) pay options prior to the beginning date of that appointment:
 - a. The lieutenant can elect to continue to receive lieutenant's pay and benefits while in the acting captain position; or
 - b. The lieutenant can elect to receive acting captain pay and benefits while in the acting captain position.
2. A lieutenant who elects to receive captain pay and benefits during the acting appointment and earns exchange time during that appointment must use the accumulated exchange time within sixty (60) calendar days after the acting appointment

ends, unless the captain determines operational necessity prevents it.

WSPLA Proposal:

No change to existing language.

State Proposal:

A. Requirements

Any employee who is assigned **or appointed** the responsibilities of a position higher than he/she presently holds for forty (40) or more consecutive **working** hours shall be paid at **the employee's choice of one of the two options described below in Sub-sections B and C** ~~the rate of that position or rank while so acting. The rate of pay for the purposes of this Section shall be the rate that the employee would receive had he/she been promoted to that position from his/her normal position.~~ However, if more than one (1) employee is assigned at different times to fill the same position of the higher classification for five (5) or more consecutive working days, the employees filling the position will be paid at the higher rate for all time worked in the higher classification. Compensation shall not be paid more than once or the same hours under any provision of this Section or Agreement.

B. Lieutenant Acting Pay Options

1. Lieutenants appointed to acting captain positions will be allowed to choose between one (1) of the following two (2) pay options prior to the beginning date of that appointment:
 - a. The lieutenant can elect to continue to receive lieutenant's pay and benefits while in the acting captain position; or
 - b. The lieutenant can elect to receive acting captain pay and benefits while in the acting captain position.
2. A lieutenant who elects to receive captain pay and benefits during the acting appointment and earns exchange time during that appointment must use the accumulated exchange time within sixty (60) calendar days after the acting appointment ends, unless the captain determines operational necessity prevents it.

C. Captain Acting Pay Options

- 1. Captains appointed to acting assistant chief positions will be allowed to choose between one (1) of the following two (2) pay options prior to the beginning date of that appointment:**
 - a. The captain can elect to continue to receive captain's pay and benefits while in the acting assistant chief position; or**
 - b. The captain can elect to receive assistant chief pay and benefits while in the acting assistant chief position.**
- 2. A captain who elects to receive captain (SIC) pay and benefits during the acting appointment and earns exchange time during that appointment must use the accumulated exchange time within sixty (60) calendar days after the acting appointment ends, unless the captain determines operational necessity prevents it.**

Summary Position of the State

This is a clarifying proposal.

The addition of the word "appointed" removes any possible doubt that "assigned" is different than "appointed."

The addition of "working hours" clarifies to confirm the existing intent that only time actually worked out of class is paid via the out of class mechanisms, and only time actually worked is counted toward the existing forty (40) hour requirement for out of class pay.

The remaining new (and deleted) language confirms an optional second choice for pay in out of class situations that exist for captains. An employee working out of class may wish to remain in his or her current pay class, and this language clarifies that option exists for captains. The language for captains is an exact mirror of the existing language for lieutenants.

Summary Position of the Union

None submitted.

Arbitrator's Analysis

The “appointed” and “working hours” added terms are accepted to be clarifying of existing conditions.

Testimony reflected that captains do have out of class opportunities to work in an assistant chief capacity, and they too might wish to retain their regular pay in that event. *TR 654-656*. This has been an option in practice at present. *TR 655*.

The Arbitrator finds the WSP proposal for this new captains’ language to be a true mirror of the existing lieutenants’ language, with one exception. In the proposed C.2 the reference is to a “...captain who elects to receive captain pay and benefits...”. *S-2*. However, in the lieutenants’ parallel language the phrase reads, “...a lieutenant who elects to receive captain pay and benefits...”. *Id.* The difference is that the existing language refers to the out of class pay in this phrase; the proposed language refers twice to the same class pay.

Because the record reflects the C.2 language was to “mirror” B.2 in “copy/paste” fashion, the Arbitrator will apply a full mirror and make the change in the phrase necessary to do so. *TR 656*. The noted “mirroring” difference is presumed to be only a typographical error in the WSP proposal. If there is a material difference not appreciated by the Arbitrator that justifies the lack of true mirroring, and if the proposed wording remains a clarifying proposal, and if the parties are in agreement upon receipt of this Award that there was no error in the WSP proposal, then the new language awarded by the Arbitrator may be changed to reflect their agreement.

Arbitrator Will Award:

26.9 Out of Class Work

A. Requirements

Any employee who is assigned or appointed the responsibilities of a position higher than he/she presently holds for forty (40) or more consecutive working hours shall be paid at the employee's choice of one of the two options described below in Sub-sections B and C. However, if more than one (1) employee is assigned at different times to fill the same position of the higher classification for five (5) or more consecutive working days, the employees filling the position will be paid at the higher rate for all time worked in the higher classification. Compensation shall not be paid more than once or the same hours under any provision of this Section or Agreement.

B. Lieutenant Acting Pay Options

1. Lieutenants appointed to acting captain positions will be allowed to choose between one (1) of the following two (2) pay options prior to the beginning date of that appointment:
 - a. The lieutenant can elect to continue to receive lieutenant's pay and benefits while in the acting captain position; or
 - b. The lieutenant can elect to receive acting captain pay and benefits while in the acting captain position.
2. A lieutenant who elects to receive captain pay and benefits during the acting appointment and earns exchange time during that appointment must use the accumulated exchange time within sixty (60) calendar days after the acting appointment ends, unless the captain determines operational necessity prevents it.

C. Captain Acting Pay Options

1. Captains appointed to acting assistant chief positions will be allowed to choose between one (1) of the following two (2) pay options prior to the beginning date of that appointment:
 - a. The captain can elect to continue to receive captain's pay and benefits while in the acting assistant chief position; or

- b. The captain can elect to receive assistant chief pay and benefits while in the acting assistant chief position.
2. A captain who elects to receive assistant chief pay and benefits during the acting appointment and earns exchange time during that appointment must use the accumulated exchange time within sixty (60) calendar days after the acting appointment ends, unless the captain determines operational necessity prevents it.

26.10 Clothing Allowance

Current Language:

Employees assigned to IAD, CID, and OPS shall receive a six hundred dollar (\$600) annual clothing allowance.

WSPLA Proposal:

~~Clothing Allowance~~ **Uniform/Professional Appearance Allowance**

~~Employees assigned to IAD, CID, and OPS shall receive a six hundred dollar (\$600) annual clothing allowance~~ **Employees assigned to IAD, CID, and OPS shall receive a twelve hundred dollar (\$1200) annual allowance for the cleaning of clothing and uniforms as well as the purchase of clothing.**

Employees who transfer to a non-uniformed assignment shall receive a one-time one-thousand dollar (\$1,000) payment to purchase clothing.

State Proposal:

No change to existing language.

Summary Position of the WSPLA

The current \$600 clothing allowance amount has remained unchanged for a very long time. The value of the allowance has been reduced over the years by inflationary pressures. The real amount is further reduced because the money is pre-tax.

The proposal will not only rectify the losses in this area, by extending the value to all members it will equalize the uniformed and non-uniformed assignments by assisting with the purchase of professional civilian clothes and also reflect the cost of cleaning uniforms which has risen over the years (the blues must be dry-cleaned).

The origin of the existing amount was to equate to the cost of providing all uniform items to an officer when that officer transferred into a position that was primarily civilian clothes. Deputy Chief Karnitz confirmed this was done to provide “parity” with the uniformed personnel. That estimated \$600 uniform cost has since risen. Now, some half of the WSPLA members wear civilian clothes. This effort at parity is entirely reasonable.

Survey data shows that many participants have both a clothing and a cleaning allowance. The survey showed a participant average of \$514 for cleaning alone. This average includes 3 of the 5 states included in the survey, as well as 2 counties and 3 cities, for a total of 8 of the 24 participants. One-third of the full group of comparables provides a cleaning allowance.

The average survey clothing allowance is \$635. This average includes 2 of 5 states, as well as 8 counties and 11 cities, for a total of 21 of 24 participants. This shows 87.5% participation in a clothing allowance.

The estimated cost of this proposal for a \$1200 annual allowance to all members is \$140,623 annually. For the biennium this amount equates to 0.04% of the projected \$351 million SPHA fund.

The low cost and the high comparable results support this proposal to update the payment amount and expand the coverage.

Summary Position of the State

When an employee comes to the WSP as a cadet, then a trooper, the agency provides him or her with virtually every garment and accessory needed for the job. The employee must provide only his own “timepiece, socks and underwear.”

The language operates so that if a person transfers to a civilian attire position the \$600 allowance was the agreed amount as an estimate of what would be provided in cost for uniform items in a given year or so if the employee had remained in the uniformed position. The amount was generous, because in some years an employee may not need to request any uniform items.

A change that provides an allowance for the entire WSPLA would thus be a substantial and unwarranted windfall for line lieutenants and captains. Moreover, the increase in cost is not affordable.

The cost includes Medicare expense and the payments would be retirement-credit reportable. The estimated biennium amount is \$140,623.68. This is not an affordable increase.

Arbitrator’s Analysis

This issue was persuasively presented by the WSPLA with particular respect to funding for cleaning expenses for uniformed employees. Further, the static history of the set amount is quite likely in need of updating to reflect increased costs with the passage of time since the figure was set. The amount requested, however, was not related to the reason established for the existence of the “civilian” clothes element of the proposal – which was based on equating to the approximate value of the uniform benefit provided to uniformed members. *TR 363.*

Regardless, though, this subject is not demonstrated to be of a priority even approaching that of the needs in the base wage area addressed in 26.1. The discussion there regarding the state’s ability to pay is applicable here. The current and anticipated revenue and funding

climate for the coming biennium does not support an added biennial expense of \$146,623 for clothing-related costs.

Arbitrator Will Award:

Existing language remains unchanged

26.11 Parking

Current language:

The Department of General Administration will manage parking on the Capitol Campus in accordance with RCW 46.08.172. Employees assigned to the Capitol Campus or General Administration Building will pay for all applicable parking fees.

WSPLA Proposal:

The Department of ~~General Administration~~ **Enterprise Services** will manage parking on the Capitol Campus in accordance with RCW 46.08.172. **The Employer will pay all applicable fees for parking of Department issued vehicles for** Employees assigned to the Capitol Campus or General Administration Building ~~will pay for all applicable parking fees.~~

State Proposal:

No change to existing language.

Summary Position of the WSPLA

All members of the WSPLA are assigned vehicles, with a purpose to benefit the WSP. Members are required to respond to emergencies all hours, and be ready for call out as necessary. Personal use is restricted, and the officers also may be expected to take traffic enforcement activities while driving. Their vehicles must be driven to work, including to work at HQ on the Capitol Campus.

This means the officers do not have the option to vanpool, to rideshare, or use transit. And, since the parking at this facility is on a fee basis, these officers also do not have the option to avoid paying for parking.

The state pays parking for the WSPLA officer assigned to the State Fusion Center in Seattle. Certain meetings in Seattle have also been covered with paid parking. The troopers and sergeants who work at the HQ in Olympia also receive paid parking.

The cost of this proposal is estimated at just under \$5,000 per year. Over the biennium, the total parking bill amounts to 0.0028% of the projected SPHA budget amount. Like the members of the WSPTA, the members of the WSPLA who drive cars as a requirement of the job should have the parking paid when working at the Capitol Campus.

Summary Position of the State

The state provides all lieutenants and captains with a vehicle that is maintained at state expense, including all fuel costs. The parking fee charged at the Capitol Campus is quite minimal at some \$25 per month and not a hardship.

But, when the cost is multiplied by the 16 members who work at the facility, the amount sought in this proposal approaches nearly \$10,000 over the biennial term. This aggregate cost is prohibitive given the state's financing status.

Arbitrator's Analysis

The use of a vehicle for work-related transportation, along with paid fuel and full maintenance costs would be an outstanding and undeniable benefit to most workers. While this is also a benefit to the WSPLA unit, the nature of the work involved puts the situation on

different footing. For a WSP commissioned officer, a vehicle is more than mere transportation. It is an essential work tool.

Accordingly, the unit officers' use of their vehicles is restricted. *TR 657*. The officers driving them will be expected to use them to respond to service needs as necessary. *Id.* The officers driving them must use them for work-related, not personal, purposes. *TR 267*. The evidence overall reflected that officers driving them are not permitted to transport themselves in any other matter while on duty.

The WSPLA arguments here are persuasive. Unlike the civilian WSP employees who are free to control their parking costs on the Capitol Campus as they see fit and as they may, these means are not available to the commissioned officers. *TR 200*. Carpools, vanpools, transit and even walking or biking or not viable choices for unit members. *Id.* The unit members are in a real sense required to pay for their parking on the Capitol Campus. *TR 200; TR 266*. In addition, the state has accepted parking expense for WSPLA officers working at the Seattle "Fusion" center, as well as for members of the WSPTA working at Olympia headquarters. *TR 200-201; TR 269*. The traditional and normally considered factors of equity and parity support accepting this proposal.

The amount of expense calculated at the \$25 monthly rate is not unreasonable and, in view of its relative size compared to the WSP operating budget as a whole, it can be managed even in the face of the acknowledged ability to pay considerations. However, given these considerations, every effort must be made by the bargaining unit to assist where reasonably possible to reduce expenses. Accordingly, payment for "reserved" parking spaces shall not be covered under the language. This will be accomplished with the addition the proposal of the following two words: "non-reserved."

Arbitrator Will Award:

The Department of Enterprise Services will manage parking on the Capitol Campus in accordance with RCW 46.08.172. The Employer will pay all applicable fees for non-reserved parking of Department issued vehicles for employees assigned to the Capitol Campus or General Administration Building.

26.12 Homeland Security /Emergency Preparedness Contract Supplemental Pay for Captains

Current Language:

Where permissible under contracts funded by non-Department funds, captains performing work in excess of their established workweeks related to the planning and conduct of Homeland Security or Emergency Preparedness exercises shall receive supplemental pay of an additional one hundred fifty percent (150%) of their base rate of pay for all hours actually worked on such projects. This Section shall not apply to Washington Traffic Safety funded projects.

WSPLA Proposal:

Where permissible under contracts funded by non-Department funds, captains performing work in excess of their established workweeks ~~related to the planning and conduct of Homeland Security or Emergency Preparedness exercises~~ shall receive supplemental pay of an additional one hundred fifty percent (150%) of their ~~base~~ **regular** rate of pay for all hours actually worked on such projects. This Section shall ~~not~~ apply to Washington Traffic Safety funded projects.

The Employer may also pay special project pay to Captains who work on special projects. For such projects, Captains shall receive supplemental pay of an additional one hundred fifty percent (150%) of their regular rate of pay for all hours actually worked on such projects. Examples of such projects are the Olympics, National Governors Association (NGA) meetings, and other national and international events.

Employer Proposal:

No change to existing language.

Summary Position of WSPLA

This proposal expands current language to allow supplemental pay for captains in all situations available from non-WSP funds, including the currently prohibited Traffic Safety funded projects. The current safeguards remain in place: The work performed must be permissible under contracts funded by non-Department funds; the captains' work would be subject to approval of their supervisor; captains would be subject to the terms of the underlying contracts.

The operational decisions on who actually is assigned to work a given contract remains unchanged; the WSPLA seeks only to open the possibility that a captain can work non-WSP funded project.

Agency objections based on fears of underperformance by captains un-used to road duty are not supported. The current contract requires captains to work in traffic enforcement or Homeland Security for five days a year, and Deputy Chief Karnitz testified the WSP wants captains to "stay connected to the road" and "lead out front." There is no evidence that lieutenants or captains have underperformed on past special project contracts.

Fear of contract losses and ethical issues are unfounded as well. There would be no impact from this proposal on the estimating and bidding process for the contracts. The ethical fears on assigning work to benefit themselves personally is a red herring. Internal processes can be developed as necessary to insulate from this, but the fact is that captains routinely administer all WACs, RCWs and WSP policies in their current areas of responsibility. Captains also are subject to audits, and all pay documents must be signed by supervisors.

The proposed new second paragraph will allow for special project pay for captains. The state cites the availability of exchange time as compensation for captains for working these special projects, but the state actively opposes expanding exchange time accrual. This is a mask for the real fear of having captains manage the funds and personally benefit. The WSP is currently working on internal controls for these issues, so there is no reason contracts of this nature cannot be expanded to allow the possibility for captains to work non-WSP funded projects.

Summary Position of the State

The existing language resulted from federal grant money in the wake of 9/11 for the WSP's Homeland Security division to conduct joint emergency drills with the WSP. Because lower ranked officers could take advantage of this work for overtime opportunities this language was added to allow captains to participate under those very limited circumstances while being compensated in the same fashion as the lower ranks.

Opening this concept up to other contracts brings multiple problems. The WSP has received millions of dollars over the years for traffic safety purposes in Washington Traffic Safety Commission contracts. These patrols are best done by officers whose daily job is to perform the traffic work at issue. Captains may not have current DUI certification and may be unable to process a DUI. Captains are not issued radar equipment, and do not generally carry the other equipment a traffic trooper does such as Taser, baton and portable radio. To pay a more expensive, less prepared captain for this work is not a wise use of funds. In a real sense it would be paying a captain twice as much to do half the work; better to use two regular troopers who do that work every day for that same amount. And the contracting entities, while not directing the

WSP's assignments, do take note of the performance provided and seek the best return for their investment.

A resulting ethics concern is also a key factor opposing this change. Traffic Safety grant money is parceled to district captains and they administer the grants at their level. To personally be able to benefit from the grant dollars you are managing presents an arguable ethical issue. RCW 42.52.030 prohibits a state employee from being beneficially interested in a grant under their own supervision. Moving the management of the grants from the captain level would injure the operation, as the captains are in the best operational position to handle the day to day assignments and management required to perform. The "special projects" permissive language raises the same problems.

This new language would not be prudent or a cost effective use of resources and would pose serious ethical concerns. It must be rejected.

Arbitrator's Analysis

Financially, this proposal, at least in part, does not seek to directly tap generally sourced revenues that are within the relevant discretionary budget(s), and to that extent it is outside the ability to pay concerns addressed elsewhere in the Arbitrator's analysis.

The state's two main arguments on the problems inherent in captains performing contracted work in certain situations are well taken. First, a particular contracting party may not be best served if the WSP supplies performance at a captain's rate, and with a captain's particular existing skills, tools and certifications. Secondly, the potential for ethics complications and exposures presents a legitimate concern as well.

However, the Arbitrator observes that under existing language the possible ethical issue has already been extant with the two forms of non-departmentally-funded contracts noted in the language. The only fair conclusion is that the WSP must feel this is an operational element within its control, either by dutiful monitoring, or policies and/or rule interpretations developed to address the potential risk. As for matching the best level of service and providers of service to a given contracting party, this too is within WSP control.

The key to any expansion of this opportunity for enhancing earning opportunities for captains is supervisory control by the WSP leaders outside the bargaining unit. This is not to say day-to-day assignment control. The state's arguments on that score are also well taken. It makes obvious sense for the captains close to the contracted work in their districts to manage the work assignments on a routine basis. Rather, this control would be imposed on an overarching level at the point a contract is first placed in the field for execution by a given captain.

This single caveat overcomes the objections of the WSP to this possible opportunity addressing the negative competitive position, the loss of earnings, and even the compression problems indentified elsewhere herein. And this may be done without further taxing the state's limited ability to pay for these positive opportunities.

There is insufficient support in the record to accede to the WSPLA request to eliminate the prohibition on inclusion of Washington Traffic Safety projects. Nor is there support for opening up "special projects" as a 150% pay opportunity for captains' work contemplated in that clause.¹¹ The Arbitrator also does not wish to disturb any practices and understandings relating to the already permitted captains' work for the referenced Homeland Security and Emergency Preparedness exercises, so this language too must be left intact.

¹¹ The state rightly points out the existing exchange time provisions of the CBA address this area already.

However, the Arbitrator is convinced that adding a single line to the remainder of the proposal overcomes the stated bases for state objection. At the same time, this language works no change to existing practices in this area, while at least creating possible opportunities for captains to make strides in identified areas of compensation weakness shown to need addressing under the statutory consideration factors. That sentence shall read:

For other contracts funded by non-Department funds, where permissible under those contracts and where captains' work under the contract is expressly authorized in advance prior to field implementation of the contract, captains performing work in excess of their established workweeks shall receive supplemental pay of an additional one hundred fifty percent (150%) of their base rate of pay for all hours actually worked on such projects

Arbitrator Will Award:

26.12 Homeland Security /Emergency Preparedness Contract
Supplemental Pay for Captains

Where permissible under contracts funded by non-Department funds, captains performing work in excess of their established workweeks related to the planning and conduct of Homeland Security or Emergency Preparedness exercises shall receive supplemental pay of an additional one hundred fifty percent (150%) of their base rate of pay for all hours actually worked on such projects. For other contracts funded by non-Department funds, where permissible under those contracts and where captains' work under the contract is expressly authorized in advance prior to field implementation of the contract, captains performing work in excess of their established workweeks shall receive supplemental pay of an additional one hundred fifty percent (150%) of their base rate of pay for all hours actually worked on such projects. This Section shall not apply to Washington Traffic Safety funded projects.

26.15 New Section Proposed – Fitness Incentive

Current Language:

None

WSPLA Proposal:

26.15 Physical Fitness Incentive

The Employer shall annually pay each employee who meets the Cooper Institute Physical Fitness Norms for Law Enforcement according to the schedule listed below:

Fortieth percentile (40%): \$250 lump sum

Fiftieth percentile (50%): \$375 lump sum

Sixtieth percentile (60%): \$500 lump sum

Payment to the employee is contingent upon the Training Academy's certification of each employee's results at In-Service Training.

State Proposal:

No new language.

Summary Position of WSPLA

The purpose of this new language is to recognize that based on the nature of police work it is incumbent on all ranks to maintain physical fitness in order to be prepared for the dangers of the line of duty. Witnesses from both sides agreed fitness is a benefit to the agency and it is emphasized from the beginning of an officer's career.

The percentage standard on entry to the academy is set at 40% of the standard. On exit from the academy the 60% standard is required. Thereafter, the WSP does set make fitness standard requirements.

The state is incorrect in characterizing this proposal as a request for more money to do the job required. The proposal does obligate the state to pay money to every WSPLA member, just those who choose to meet the criteria.

Deputy Chief Karnitz expressed doubt the proposal would have any motivational impact. But, there is an athletic association open to all WSP employees funded by individual membership fees that is used, and the increased physical fitness goals align with the Governor's Health initiatives to promote preventative care and reduce long term medical costs.

The state claimed through Deputy Chief Karnitz that fitness should be an important and valuable goal for an officer and pursued regardless of pay. Yet, although the same could be said about education, the WSP does pay an education incentive based on the type of degree held and well as offering tuition reimbursement. There is an undeniable corollary here to fitness, and the incentive program should be equally applied to the employees' benefit.

Summary Position of the State

The standards used in the WSPLA proposal reward relatively low levels of fitness achievement. The 40% standard, meaning that six in ten people in your level would be more fit than you, would return the \$250 level. The academy graduation standard of 60% is proposed to return the highest level of reward at \$500.

Using the most minor assumption that all WSPLA members could achieve the cadet-entry level 40% standard the proposal would cost approximately \$15,000 annually. The number of course doubles at only the 60% graduation level.

WSP lieutenants and captains do not need a cash incentive to stay in shape; physical fitness for commissioned officers is emphasized at every level. The WSP has an existing athletic association. It also sponsors a public rewards program for officers who meet the 90%.

Fitness stands as a personal benefit, and a professional asset (especially for line officers) and is an existing emphasized expectation for officers from their beginning. The proposal should be rejected.

Arbitrator's Analysis

Like the proposal for 26.10 clothing, this proposal finds some support in the comparative data (though less than for the clothing allowance), and it also speaks to an area the Arbitrator believes is a legitimate subject for exam. There are benefits to be had, in areas of performance and financially in terms of health expenses, from fitness emphasis. It is an area that incentives can bring rewards to all concerned.

However, the conditions are not right at present to justify entry into the CBA at this point. A first consideration notes there is insufficient data in the record to allow a reasoned evaluation of the concept. More evidence would be required on the state of fitness of the unit, especially vis-s-vis the relevant standards, to be able to evaluate what percentage performance reasonably support a given award amount. With the limited data in the record, the Arbitrator feels too much speculation would be required to determine not only the expense of the proposal, but the value of the suggested levels of fitness.

But, again, as in the case elsewhere in the various analyses, it is the ability to pay issues discussed herein at 26.1 that trump all considerations in a proposal of this kind. The current and anticipated revenue and funding climate for the coming biennium does not support an added expense for new fitness incentive language at this time.

Arbitrator Will Award:

New language will not be added.

11.5 Holiday Credits

Current Language:

Lieutenants and Captains may accumulate holiday credits, up to a maximum of eighty (80) hours.

A. Accrual

Employees who accrue a holiday credit balance in excess of the maximum shall take the excess hours before their next anniversary date of employment or the excess hours shall be lost. The employee is responsible for working with his/her supervisor to ensure that excess holiday credit hour are used prior to the anniversary date. If the employee is not allowed to use holiday credit hours due to operational necessity, the credits will not be lost.

B. Retirement

The employee on his/her retirement date will lose any holiday credit hours in excess of eighty (80) hours; except that the Employer may allow retiring employee to use up to eighty (80) hours of excess holiday credits prior to the employee's retirement date by extending the employee's retirement date. Only those hours (up to the maximum of eighty (80) hours) accrued for holidays actually worked during the two (2) years on which retirement benefits are based will be used to compute final average salary.

The decision of the Employer to extend the retirement date pursuant to this Section will result in the Employer granting an exception to the loss of accumulated annual leave if the extension

of the retirement date takes the employee past his/her anniversary date.

C. Separation

Employees shall be paid for all accrued holiday credits up to eighty (80) hours when separating from employment; this does not include the personal holiday.

WSPLA Proposal:

Lieutenants and Captains may accumulate holiday credits, ~~up to a maximum of eighty (80) hours.~~ **in accordance with Section 11.1.**

A. Accrual

Employees who accrue a holiday credit balance in excess of ~~the maximum~~ **two hundred forty (240) hours** shall take the excess hours before their next anniversary date of employment or the excess hours shall be lost. The employee is responsible for working with his/her supervisor to ensure that excess holiday credit hour are used prior to the anniversary date. If the employee is not allowed to use holiday credit hours due to operational necessity, the credits will not be lost.

B. Retirement

~~The employee on his/her retirement date will lose any holiday credit hours in excess of eighty (80) hours; except that t~~ **The Employer may allow retiring employee to use up to eighty (80) hours of excess holiday credits prior to the employee's retirement date by extending the employee's retirement date and any remaining accrued holiday credits will be cashed out in accordance with Section 11.5.C below.** Only those hours (up to the maximum of ~~eighty (80)~~ **two hundred forty (240)** hours) accrued for holidays actually worked during the two (2) years on which retirement benefits are based will be used to compute final average salary.

The decision of the Employer to extend the retirement date pursuant to this Section will result in the Employer granting an exception to the loss of accumulated annual leave if the extension of the retirement date takes the employee past his/her anniversary date.

C. Separation

Employees shall be paid for all accrued holiday credits up to eighty (80) hours when separating from employment; this does not include the personal holiday.

State Proposal:

No change to existing language.

Summary Position of the WSPLA

WSPLA members earn holiday credits at the rate of time and one half for working holidays. The proposal leaves the cash out level untouched, and only increases the maximum accrual by 160 hours. The cost of this proposal presented by the WSP assumes all WSPLA members carry a maximum bank and they carry them to retirement for cash out.

However, the maximum that can count for state retirement for WSPLA members is 80 hours. Because the proposal leaves the cash out at 80 hours, the proposal does not change the current financial impact or liability to the state.

When an employee leaves the WSP, they cash out vacation, compensatory time, holiday credits and sick leave. The state calculated the average annual buyout for FY 2010 was \$36,000, and for FY 2011 \$33,000. The estimate offered was that increasing the compensatory time to 240 hours and the holiday credits to 240 hours would increase the total liability by about \$17,000 per person, based on averages. The flaw is the WSPLA proposal does not increase the cash out to 240; it remains at 80 hours, so the calculation includes an extra 160 hours of holiday credit expense. The \$17,000 figure is error.

Summary Position of the State

There can be two possible reasons for the proposed holiday credit bank increase. The first is a goal to create a larger bank of time to allow employees to additional large blocks of time

away from work. The second conclusion is that WSPLA is seeking to inflate the final average salary calculation and thereby the retirement benefit the officer would receive.

Additional blocks of time away from duty produce costs associated with the “acting” fill-in chain. If a captain takes time off, the WSP incurs an additional captain salary for the acting replacement by a lieutenant, then an additional lieutenant salary for the sergeant filling the lieutenant gap, then an additional sergeant for the trooper filling the sergeant gap. An operational impact joins the added expense by work not being accomplished at the normal rate or quality. And if a captain leaves the loss of an appointing authority level activity that can only be shifted to another captain causes further negative impact from the added burden.

If the hours are carried to the maximum and held at time of retirement, as is the common practice, the additional expense from the proposal would be significant. If all WSPLA members carried the additional 160 hours the calculated future total carried liability would be \$463,506, with an annual average buy out cost of and added \$50,960. Yet the increase to retirement calculations over 80 hours is inconsistent with retirement system rules. WAC 415-103-100 sets the 80 hour maximum.

The current cap of 80 hours fairly compensates WSPLA members who work on some holidays, while not creating oppressive operational constraints or significant financial liability. It is also consistent with retirement system rules. The current language should be maintained.

Arbitrator’s Analysis

The WSPLA accurately points out that state financial cost assumptions based on any cash out in excess of eighty (80) hours are in error. The proposal indeed does not increase the cash out limit beyond that current threshold.

However, the state is correct in indicating that the WSPLA has not presented any definite indication of the intent behind this proposed change. There is no specific evidence in the record about the level of current holiday credit banks in the bargaining unit. Nor is there any anecdotal information on the amount, if any, that members might be losing due to the cut off for use of hours banked in excess of the current limit. Further, there is no evidence of a competitive disadvantage in the area of holiday credit amounts allowed.

The only indication of a basis for the proposal comes from a reference in the Brief of the WSPLA to an abandoned effort from earlier in bargaining to increase vacation accrual. *Brief of WSPLA* at 20. This effort was derailed because vacation accrual is set by WAC provision. *Id.* Accordingly, the WSPLA stated it then “attempted to address this disparity through increasing other accruals where there is room...”. *Id.* Holiday credits was one such listed area. *Id.*

Without independent supporting data beyond that statement of motive, there is no persuasive evidence in the area of any statutory factor, including the normal and traditional consideration elements, to support the holiday credits proposal. Moreover, the state persuasively indicates that this proposal has realistic potential for inconsistency with the Washington State Patrol Retirement Systems managed by the Department of Retirement Systems. *TR 502*. The DRS has limits for at least some employees (depending on their dates of hire) on the amount of holiday credit hours that can be applied to impact retirement computations. *TR 502-505*. Hours in excess of eighty (80) are not permitted for any employee. *Id.* The situation is by no means made clear in testimony or argument from the parties. Arbitrator Jane Wilkinson has stated that “a cautious approach to change is justified when the consequences of the change are not certain.” *IAFF Local 1488 and Pierce Co. FD No. 2*, Decision 06881 (PERC, 1988).

Given this uncertainty, and, moreover, the lack of the other aforementioned factors that would be necessary to support this proposal, the Arbitrator declines to apply the change.

Arbitrator Will Award:

Existing language remains unchanged.

10.3 Workday

Current Language:

Workday

- A. The workday for lieutenants shall consist of an eight (8) hour period within a twenty-four (24) hour period including the paid meal period and rest periods. Lieutenants' workdays shall begin and end at their assigned work station; provided, however, that if the lieutenant takes traffic law enforcement action (field supervision, responding to an accident, traffic contact and citation, assisting a disabled motorist) while responding to his/her workstation, the workday shall begin or end at the time of the traffic law enforcement activity.
- B. In exchange for the ability to work a straight shift, the Association and the Employer have agreed to a paid meal period and rest periods that vary from and supersede the paid meal and rest periods required by WAC 296-126-092. These agreed-to meal and rest periods do not require a relief from duty and may occur intermittently.
- C. Employees who have been scheduled to attend training for one (1) or more full workdays may be scheduled to a workday with an unpaid meal period. For such employees and for all non-line lieutenants and captains, the workday shall be either a regularly-scheduled nine (9) hour day with a one (1) hour unpaid meal period or an eight and one-half (8-1/2) hour day with a one-half (1/2) hour unpaid meal period.

WSPLA Proposal:

Workday - Lieutenants

- A. The workday for lieutenants shall consist of an eight (8) hour period within a twenty-four (24) hour period including the paid meal period and rest periods. Lieutenants' workdays shall begin and end at their assigned work station; provided, however, that if the lieutenant takes traffic law enforcement action (field supervision, responding to an accident, traffic contact and citation, assisting a disabled motorist) while responding to his/her workstation, the workday shall begin or end at the time of the traffic law enforcement activity.

- B. In exchange for the ability to work a straight shift, the Association and the Employer have agreed to a paid meal period and rest periods that vary from and supersede the paid meal and rest periods required by WAC 296-126-092. These agreed-to meal and rest periods do not require a relief from duty and may occur intermittently.

- C. ~~Employees~~ **Lieutenants** who have been scheduled to attend training for one (1) or more full workdays may be scheduled to a workday with an unpaid meal period. ~~For such employees and for all non-line lieutenants and captains, t~~ **The training** workday shall be either a ~~regularly-scheduled~~ nine (9) hour day with a one (1) hour unpaid meal period or an eight and one-half (8-1/2) hour day with a one-half (1/2) hour unpaid meal period.

State Proposal:

Workday -- Lieutenants

- A. The workday for **line** lieutenants shall consist of an eight (8) hour period within a twenty-four (24) hour period including the paid meal period and rest periods. Lieutenants' workdays shall begin and end at their assigned work station; provided, however, that if the lieutenant takes traffic law enforcement action (field supervision, responding to an accident, traffic contact and citation, assisting a disabled motorist) while responding to his/her workstation, the workday shall begin or end at the time of the traffic law enforcement activity.

- B. In exchange for the ability to work a straight shift, the Association and the Employer have agreed to a paid meal period and rest periods that vary from and supersede the paid meal and rest periods required by WAC 296-126-092. These agreed-to meal and rest periods do not require a relief from duty and may occur intermittently.

C. ~~Employees~~ **Lieutenants** who have been scheduled to attend training for one (1) or more full workdays may be scheduled to a workday with an unpaid meal period. ~~For such employees and for all non-line lieutenants and captains, t~~ **The training** workday shall be either a regularly-scheduled nine (9) hour day with a one (1) hour unpaid meal period or an eight and one-half (8-1/2) hour day with a one-half (1/2) hour unpaid meal period.

D. The workday for non-line lieutenants shall be either a regularly-scheduled nine (9) hour day with a one (1) hour unpaid meal period or an eight and one-half (8-1/2) hour day with a one-half (1/2) hour unpaid meal period.

Summary Position of the WSPLA

The state's original proposal of May 9, 2012, offered only a change to section (C), "clarifying" it applied only to training days. Section (A) remained unchanged, drawing no distinctions between line or non-line lieutenants. Testimony confirms the WSP negotiating team had reviewed and accepted the proposal as drafted and viewed it as a "cleanup" item. But, had the proposal been agreed upon, it is clear the language throughout would have made no distinction between line and non-line lieutenants. This status was maintained through the morning session following on June 6.

The state's posture changed only after an email from Assistant Chief Miller went out on June 6 to advise all captains to "get in compliance with the current language of 10.3.C" with respect to lunch scheduling for non-line lieutenants. This email memo was passed to the WSPLA negotiating team, and only after they shared it with the state team did the state return with a new proposal.

This new proposal is not a clarification; it is a change. Since the current language came in the contract in 2007 both line and non-line lieutenants have commonly worked straight 8-hour shifts with a paid lunch break.

There is no evidence that productivity suffered from this practice. State witnesses admitted no research had been done into any alleged productivity issues looking back to this period. It is unclear if non-line lieutenants even took paid lunches away from work. Any claim of lost work time is purely speculative.

There is no evidence of damage to the workplace from the practice. Covering normal 8:00 to 5:00 business hours at the GA building is not an issue; staggered shifting and the use of a rotating “duty” lieutenant eliminates any problems here. Nor is there any evidence or reason for a morale issue from the current practice by comparing non-commissioned employee lunch rules to WSPLA member rules. WSPLA commissioned officers are in response-mode 24/7, including lunch; no parallel exists.

The history of the language confirms the intent matched the practice the state is trying to overturn. The language separating “field force” lieutenants apart from “non-field force” (equivalent to line and non-line) was removed in 2007. No protests or questions arose after the language came out. As of 2007 and since, the workday definitions were for all lieutenants, without distinction between line and non-line.

Standard rules of contract interpretation are in the WSPLA’s favor. The language of 10.3 covering all lieutenants is not ambiguous, but, if it were to be viewed as such, the ambiguity must be interpreted against the drafter. The state drafted this language. Further, to read the language as the state proposes would be to remove all meaning for part (B) – which also does not distinguish between line and non-line lieutenants.

The words of the section are the best evidence of its meaning. But, if other interpretive aids are needed, the bargaining history, past practice and lack of protest or confusion on the language since 2007 all support the WSPLA position.

Summary Position of the State

Line lieutenants are “in the field” with primary oversight of the line field force working traffic safety functions. The straight-eight shift with a paid lunch reflects their connection to the troopers and sergeants they oversee, who have primarily non-office work. Non-line lieutenants are administrative in nature, working closely in all respects to an office-type assignment. As such, reasons for a paid lunch do not exist as compared to the line lieutenants.

The existing 10.3.C speaks to three classes of employee: employees undergoing training; non-line lieutenants, and captains. 10.3.C establishes that employees on training assignment and non-line lieutenants and captains have a different workday than line officers. Only when it became known the WSPLA was applying the straight eight language of 10.3.A to all lieutenants did the WSP move to clarify with the proposed change to 10.3.A. 10.3.C is a proposed clarifying change as well; by working in tandem with the newly proposed 10.3.D, it clarifies the existing workday language has always separated lunch break terms for non-line officers from non-line.

The distinction between the scheduling for the two position classes is logical, and will avoid possible negative morale issues. Productivity gains will come from non-line officers not having to try and fit in a lunch break while working. The clarified workday will put the non-line officers in step with the civil service employees with whom they work. The civilian employees are already in dubious morale territory due to taking a 3% salary reduction not visited upon the

WSP commissioned officers, and with this clarification they will not have another issue to create concerns.

Arbitrator's Analysis

This issue features elements of a language grievance arbitration. While all the relevant arguments will be considered, in the end the matter remains about a proposal for changed language in an interest arbitration and it will be treated as such.

The Arbitrator is in full agreement that the state's 10.3 proposal at the start of the bargaining day on May 9 would have provided for a common work day for all lieutenants. *U-10*. This workday would have been a "straight-eight" with no unpaid lunch period. *Id.* The single exception would have been for unit members attending training. *Id.*

The Arbitrator does not agree the proposal was "binding" in any way. Further, even though that proposal was characterized as "clean up" only, the Arbitrator does not agree it reflected any considered intentional admission by the state to the interpretation the WSPLA gives to the existing language. The WSP leaders' subsequent conduct, including the change of proposal and contrary interpretation, was the product of good faith.

With no disrespect intended, it does appear that to a certain extent it was a case of "pure heart and empty head," at least with respect to the May 9 initial proposal and any subsequent characterization of that as a "clarification." The lead state negotiator had newly come to the contract, taking over for the previous representative.¹² *TR 620*. The explanation provided,

¹² The May 9 negotiator, who was about to leave the OFM, was also preparing his own replacement during the bargaining process. *TR 620*. The Arbitrator simply takes notice that in bargaining of contracts of this size, detail and complexity, language errors are made even by negotiators intimately familiar with the language from past experience. An incoming, indeed transitory, representative shoulders a heavy burden taking over a process of this depth.

including the candid admission that the first draft of the proposal was “in error,” is perfectly understandable. *TR 621*.

The impact of this error without the intervening memo from Assistant Chief Miller coming to the Union’s attention is unknown. *U-11*. It is also irrelevant. In terms of interpersonal and emotional impact, it is clear the error was upsetting to the WSPLA negotiating team. Even though the proposal had not been “TA’ed” it was on the table...before it wasn’t. The WSPLA is to be credited for its obviously professional and measured response after it realized it was its own communication that presaged the changed proposal. *TR 620-621; 641*. Its focused and exhaustive presentation arguing its position in this proceeding is to its representatives’ credit as well. But, the fact remains that unless the change of course is viewed as bad faith and reflective of an honest and fully-considered interpretation contrary to the state’s ultimate position it means little to the process at hand.

Nevertheless, the Arbitrator agrees that looking to the meaning and history of the current language is appropriate and of utility here.¹³ The Unit was formed in 1994. *WSP*, Decision 4775 (PECB, 1994). The relevant language of the CBA from 1995 to 1998 provided:

C. Work Day. For field lieutenants, the work day shall consist of an eight (8) hour period within a twenty-four (24) hour period, including the meal period and rest periods. As per past practice, employees two have been scheduled to attend training for one (1) or more full work days may be scheduled to work a day with an unpaid meal period. For such employees, the work day shall be a nine (9) hour day with a one (1) hour meal period or an eight and one-half (8-1/2) hour day with a one-half (1/2) hour meal period.

¹³ The WSPLA has impressively briefed contract interpretation rules and authorities. Were this an arbitration considering only a single existing piece of language, these rules would be of greater import, and even of perhaps greater impact on the ultimate decision. However, for an interest arbitrator considering different opposing language proposals, reference to existing and past language (as well as use of other interpretative rules and aids) stands on a materially different footing. As such, reference to these elements is simply part of the Arbitrator’s effort to consider matters “normal and traditional” to the bargaining process as per RCW 41.56.475(4)(e).

For non-field lieutenants and all captains, the work day shall consist of a nine (9) hour period within a twenty-four (24) hour period, including the one (1) hour meal period and rest periods.

U-13.

This language very clearly distinguishes between field (now known as line) lieutenants and non-field (non-line) lieutenants. Only field lieutenants work the straight-eight workday.

For the next two CBAs, running from 1998 through 2003, the language provided (additions in bold and underlined):

C. Work Day. The workday for field force lieutenants shall consist of an eight (8) hour period within a twenty-four (24) hour period, including the meal period and rest periods. As per past practice, employees two have been scheduled to attend training for one (1) or more full work days may be scheduled to work a day with an unpaid meal period. For such employees **and for all non-field force lieutenants and captains**, the work day shall be either a regularly scheduled nine (9) hour day with a one (1) hour meal period or an eight and one-half (8-1/2) hour day with a one-half (1/2) hour meal period.

Intent: When this Article refers to “field force lieutenant”, the intent is that these positions are District Line Lieutenant positions. The term “non-field force lieutenant” refers to all lieutenant positions except for District Line Lieutenant positions.

Id.

Here we see the genesis of the current 10.3.C, only the key phrase identifying the unpaid lunch for non-line (and training day) officers that was in paragraph two is now part of the same paragraph discussing the field lieutenants' straight-eight workday.

The next two CBAs from 2003 through 2007 changed the language again:

C. Work Day. The workday for field force lieutenants, the work day shall consist of an eight (8) hour period within a twenty-four (24) hour period, including the meal period and rest periods. **Field lieutenants' workday shall begin and end at their assigned work station, provided, however, that if the lieutenant takes**

traffic law enforcement action (field supervision, responding to an accident, traffic contact and citation, assisting a disable (sic) motorist) while responding to his/her work station, the workday shall begin or end at the time of the traffic enforcement activity.

In exchange for the ability to work a straight shift, the union and management have agreed to a paid meal period and rest periods that vary from and supersede the paid meal and rest periods required by WAC 296-126-092. These agreed to meal and rest periods do not require a relief from duty and may occur intermittently.

As per past practice, employees two have been scheduled to attend training for one (1) or more full work days may be scheduled to work a day with an unpaid meal period. For such employees and for all non-field force lieutenants and captains, the work day shall be either a regularly scheduled nine (9) hour day with a one (1) hour meal period or an eight and one-half (8-1/2) hour day with a one-half (1/2) hour meal period.

Id.

As is perhaps to be expected in a maturing CBA, the language is bloating with this iteration, but for the purposes here its meaning has not changed. The core statement about the straight-eight workday for field force lieutenants remains the opening, but now leads its own paragraph with added material about start and end times relating to the nature of a line lieutenant's work. A new second paragraph protects the parties from WAC lunch and break rules peril and remains today as a simple caveat to the straight-eight paragraph. The reference to the unpaid meal period for non-line lieutenants remains in the final paragraph, but is still part of the single "C" workday section.

The next CBA for 2007-2009 brought the language to its current form (see above). There have been two notable changes. The word "field" has been removed from the first reference to lieutenants on a straight-eight workday. And, the three paragraphs have been set out in A-B-C fashion.

The important element to the current meaning lies not in the removal of “field” from the opening straight-eight language. The material addressing the nature of line work (traffic stops, etc.) confirms this paragraph – as in every preceding iteration – applies to line lieutenants.

If any doubt somehow still remained, the third untouched third paragraph ends that unequivocally. The statement “and for all non-line lieutenants and captains” must be given meaning, and it evinces the same meaning it has always had. The addition of a “C” in front of it in no way changes the meaning. If the change in the first paragraph were intended to add non-line lieutenants to the coverage of the first paragraph the clearly contrary meaning of the third paragraph would have also been removed.

As the state points out, there is operational significance and value to the WSP in the distinction between the two workdays.¹⁴ *TR 332-334*. Accordingly, it is of great impact to note there is no evidence of any consideration given for the gain the WSPLA purports to have obtained with this last change. Had the WSPLA been able to point to something it gave in return for the change the interpretation could stand on different footing. But in light of the clear history above, and given the operative “non-line” statement in paragraph “C”, there is no reasonable basis to conclude the removal of the word “field” from the first paragraph was intended to end the two separate workdays. The explanation of the WSP 2007 negotiator is entirely consistent with this finding.¹⁵ *TR 471-477*.

The matter of “practice” remains to be addressed. Again, this is a factor more suited if the WSPLA was proceeding in a grievance over a change during the course of an existing contract.

¹⁴ The Arbitrator simply takes note that employers prefer unpaid lunch and break periods to paid lunches and breaks.

¹⁵ The WSP was moving away from “field” to “line” terminology, and the use of the field term in the first paragraph was a victim of the semantic attack. *TR 471*. The negotiator agreed the third paragraph, with two subjects (training and non-line workdays), was against her grammatical inclinations, but asserted that its meaning remained apparent and the section, when read, as a whole, established the two different workdays. *TR 472-473*. The Arbitrator agrees.

But, inasmuch as the element clearly is of import to the unit under this bargaining proposal it should be discussed. There is no disagreement that at least some non-line lieutenants had been scheduled for straight-eight workdays; indeed, the very fact of the June 6 memo that started this bargaining exchange confirms this.¹⁶ *U-11*. The Arbitrator sees no evidence sufficient to create any sort of binding practice in the error Assistant Chief Miller found. Where language is clear, as in paragraph “C” here, most arbitrators (and courts) will apply the plain meaning without regard to contrary practice. See generally, Elkouri, *How Arbitration Works*, (6th Ed., BNA, 2003), at 627-629 (citing cases). Even if the language were deemed less than clear, a mistake does not a practice make. Binding practices must be mutual and unequivocal. Elkouri, *supra*, at 607-609. Suffice to say, members of the bargaining unit scheduling fellow members in a fashion contrary to management’s interpretation cannot be held to have created a practice contrary to that interpretation.

In sum, the Arbitrator finds that to accept the WSPLA proposal would amount to a change from the intended operation of the current 10.3. On the other hand, the state’s proposal merely re-frames the current language in crystal-clear fashion, and is truly a clarifying proposal. The Arbitrator holds that clearer language is an improvement in any CBA and accepts the state’s language.

Arbitrator Will Award:

10.3 Workday

¹⁶ The operative paragraph in the memo to captains stated: “Additionally, I noticed assigned shifts indicating 8 hours. Please advise me of any Lieutenants that are not currently assigned to either 9 or 8 1/2 hour (non-line) workdays consistent with the WSPLA contract (10.3.C) which says that all *non-line* lieutenants and captain’s workday (sic) shall either be a 9 hour day with an hour unpaid meal period or an 8 and ½ hour day with ½ hour meal period. If you have any Lieutenants assigned to straight 8 hour work days please call me to explain the reason why.” *U-11* (emphasis in original).

- A. The workday for line lieutenants shall consist of an eight (8) hour period within a twenty-four (24) hour period including the paid meal period and rest periods. Lieutenants' workdays shall begin and end at their assigned work station; provided, however, that if the lieutenant takes traffic law enforcement action (field supervision, responding to an accident, traffic contact and citation, assisting a disabled motorist) while responding to his/her workstation, the workday shall begin or end at the time of the traffic law enforcement activity.
- B. In exchange for the ability to work a straight shift, the Association and the Employer have agreed to a paid meal period and rest periods that vary from and supersede the paid meal and rest periods required by WAC 296-126-092. These agreed-to meal and rest periods do not require a relief from duty and may occur intermittently.
- C. Lieutenants who have been scheduled to attend training for one (1) or more full workdays may be scheduled to a workday with an unpaid meal period. The training workday shall be either a regularly-scheduled nine (9) hour day with a one (1) hour unpaid meal period or an eight and one-half (8-1/2) hour day with a one-half (1/2) hour unpaid meal period.
- D. The workday for non-line lieutenants shall be either a regularly-scheduled nine (9) hour day with a one (1) hour unpaid meal period or an eight and one-half (8-1/2) hour day with a one-half (1/2) hour unpaid meal period.

10.5.E Compensatory Time

Current Language:

- E. The Employer may grant compensatory time in lieu of cash payment for overtime to a lieutenant, upon agreement between the Employer and the lieutenant. Compensatory time must be granted at the rate of one and one-half (1-1/2) hours of compensatory time for each hour of overtime worked.
 - 1. Maximum Compensatory Time

Lieutenants may accumulate no more than forty (40) hours of compensatory time. All time in excess of forty (40) hours at the end of each month will be cashed out as paid overtime except as provided below in Subsection 10.5 E 2. All overtime cashed out at the end of each month in accordance with this Subsection shall be paid on the tenth (10th) of the following month. It is the responsibility of the employee and his or her supervisor to monitor accrued compensatory time and to make mutually agreeable arrangements for its use. Compensatory time hours in the separate bank created by the April 29, 2003 Settlement Agreement between the Association and the WSP (see Appendix C) will not count against this limit.

2. Compensatory Time Cash Out

With the exception of compensatory time hours in the separate bank created by the April 29, 2003 Settlement Agreement between the Association and the WSP (see Appendix C), and with the exception of compensatory time hours for employees with twenty-two (22) or more years of service, all compensatory time must be used by June 30th of each odd-numbered year (the end of the biennium). Employees with compensatory time hours in the separated bank created by the April 29, 2003 Settlement Agreement and employees with twenty-two (22) or more years of service shall be allowed to carry those hours to their retirement. The lieutenant's compensatory time balance (excluding the separately banked hours mentioned above) will be cashed out on June 30th of each odd-numbered year or when the lieutenant:

- a. Leaves state service for any reason,
- b. Transfers to a position within the WSP with different funding sources, or
- c. Transfers to another state agency.

WSPLA Proposal:

- E. The Employer may grant compensatory time in lieu of cash payment for overtime to a lieutenant, upon agreement between the Employer and the lieutenant. Compensatory time must be granted at the rate of one and one-half (1-1/2) hours of compensatory time for each hour of overtime worked.

1. Maximum Compensatory Time

Lieutenants may accumulate no more than ~~forty (40)~~ **two hundred forty (240)** hours of compensatory time. ~~All time in excess of forty (40) hours at the end of each month will be cashed out as paid overtime except as provided below in Subsection 10.5 E 2. All overtime cashed out at the end of each month in accordance with this Subsection shall be paid on the tenth (10th) of the following month.~~ It is the responsibility of the employee and his or her supervisor to monitor accrued compensatory time and to make mutually agreeable arrangements for its use. Compensatory time hours in the separate bank created by the April 29, 2003 Settlement Agreement between the Association and the WSP (see Appendix C) will not count against this limit.

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- a. Leaves state service for any reason,
- b. Transfers to a position within the WSP with different funding sources, or
- c. Transfers to another state agency.

State Proposal:

No change to current language

Summary Position of the WSPLA

This proposal first simplifies the cash out procedures. The monthly cash out requirement and the biennial cash out are not RCW or WAC mandates so have been eliminated. The increase in total possible compensatory hours does not justify the speculative fears placed on it by the state.

In order to fear the 240 hours of compensatory time as “a possible six weeks of vacation or time off per year” two unlikely assumptions are required: (1) that lieutenants will work the overtime and put in for compensatory time; and (2) as a result, the lieutenants bank the maximum possible hours. Further, the language requiring employees to negotiate use of the time with a supervisor remains. Any operational concerns over this language are speculative at best.

Increased use of compensatory time would result in reduced overtime wage costs. On the other hand, the cash out exposure is overstated. Currently, the state is paying out only 280 hours a year in compensatory time cash outs. Extreme cost assumptions based on every WSPLA member carrying and cashing a maximum bank are highly speculative. None of these assumptions are supported by concrete evidence. Even so, it should be noted that even the \$42,000 annual buyout exposure amounts to only 0.012% of the \$351 million SPHA biennium forecast amount. The speculative assumption fears of the state are not enough to overcome the inherent logic of this proposal.

Summary Position of the State

This proposal creates operational problems and financial liability for the WSP. Operationally, the exposure to an additional 240 hours for a lieutenant to be absent from a work has extended negative impacts (240 hours is already available in vacation leave). Field

lieutenants actively manage operations in the eight WSP districts, including up to eight direct sergeant-reports. When a lieutenant takes leave, a sergeant must fill the spot in almost all cases. A sergeant will then be outside his or her regular position and less versed, less able. Work will be accomplished at a slower rate. At the next level, a trooper will also now perform the sergeant's work with the same productivity and work quality issues.

The impact of Compensatory time is magnified by its nature. Compensatory Time is granted at a rate of time and one-half, meaning for every "extra" hour worked the lieutenant electing Compensatory Time is entitled to a free 30 minutes of paid time off. In essence, to take three weeks off, the employee must work only two weeks of covered time.

The financial impacts are both current and future. The "acting" fill-in chain moves less-costly employees up in pay class. The trooper is paid as a sergeant, and the sergeant acting receives lieutenants pay – all while the lieutenant on leave continues to earn normal salary. In this scenario instead of paying one lieutenant and one sergeant, the WSP is paying two lieutenants and one sergeant, for a net increase each time a lieutenant is on leave.

In terms of the cash out element, increasing the bank maximum while eliminating cash out requirements turns the Compensatory Time program into an investment tool. Employees approaching retirement customarily max out their leave balances. To accrue 240 hours with no cash out requirements allows a minimal seniority lieutenant to book leave and then cash it out on retirement at a rate much elevated from when it was earned. Using this method, if a 14-year lieutenant maxes his 240 hours, then waits to cash out at 20 years, the two 4% longevity increases between those two points will add 8% to the value of those hours. Base rate increases only add to this payout differential. In fact, even promotion to captain will not cash out this proposed bank, which would then be paid out at the still higher captain rate, plus longevity gains.

Retaining existing is sound fiscal policy as the current language allows the agency to avoid an unfunded liability. In 2011 the cash out cost for 208.42 hours was \$13,136. This proposal would almost quadruple this figure. Each year on average 4.5 lieutenants leave the WSP. The proposal increases the liability here to \$42,160 per year. But total exposure far exceeds this. Current language creates a liability of \$74,952. Adding 200 hours would add liability of some \$374,754 overall, which will only increase as salary growth, longevity and other increases take effect.

The carried balance would act in an analogous way to a credit card bill. An hour of overtime paid when worked is a known cost, that will not change. A hour of overtime banked, and not cashed out at regular intervals, is like a credit balance building instead of being paid off regularly. This bill could have a micro impact, in addition to the macro overall liability. A small WSP division that takes a lieutenant with a full balance, then has to pay that departing lieutenant off if he or she leaves the service while there, can be exposed to the budget expense built on the account of the prior division.

The operational impacts and the negative financial implications support leaving existing language unchanged.

Arbitrator's Analysis

The state's argument on the real, but difficult-to-calculate, multiplied expenses of the replacement chain for WSPLA members using increased compensatory time would seem to have merit, but more detailed consideration of the pros and cons is stopped short by the double element of expense exposure in this proposal.

The proposed 6x multiplication of the compensatory time bank is coupled with removal of the multiple periodic cash out requirements. The state rightly points out that without these measures the nature and use of the compensatory account is likely to change, at least with regard to employees nearing retirement. (The record features no contest by the WSPLA to the frequently expressed opinion of state witnesses that employees nearing retirement commonly max out available time banks.)

The simple fact of the increased financial cost from exposure to the new bank size with unfettered carry over is an increased unfunded liability of approximately, in total, \$374,754 for a 40-person bargaining unit. *S-21; TR 492 - 495*. In terms of actual yearly expense, based on the average of 4.5 employee separations per year, the increased bank exposure adds some \$42,160 per annum to existing amounts based on the 40-hour bank. *Id.*

The WSPLA is correct that calculations of anticipated levels of use for the increased bank are “speculative.” However, the new potential to see gains in the value of a bank due to the ability to carry the account through multiple progression and premium stages due to the proposed removal of periodic mandatory cash out triggers is an undeniable reality.

Furthermore, there is nothing on the record to place this particular benefit on the comparables scale and show a competitive need. *E-8, p 4-5*. Considering all these factors, and especially in the face of the ability to pay situation discussed above in 26.1, there is not sufficient justification for the proposal at this time.

Arbitrator Will Award:

Existing language remains unchanged.

10.8 Exchange Time for Captains

Current Language:

Captains

- A. In accordance with federal and state law, the Employer has determined that captain positions are overtime exempt and as such are not covered by federal or state overtime laws. Compensation is based on the premise that captains are expected to work as many hours as necessary to provide public services for which they were hired. The salary paid to captains (including any supplemental compensation accordance with Article 26.12) is full compensation for all hours worked. Normally captains will be expected to work a maximum of forth (40) hours in a workweek.
- B. Captains may earn exchange time for extraordinary and excessive hours worked. Captains shall use the appropriate code on the Time and Activity Report (TAR) to record exchange time, which they will submit to the supervisor for approval. Exchange time may be accrued at straight time to a maximum of eighty (80) hours. Exchange time has no cash value.

WSPLA Proposal:

- A. In accordance with federal and state law, the Employer has determined that captain positions are overtime exempt and as such are not covered by federal or state overtime laws. Compensation is based on the premise that captains are expected to work as many hours as necessary to provide public services for which they were hired. The salary paid to captains (including any supplemental compensation accordance with Article 26.12) is full compensation for all hours worked. Normally captains will be expected to work a maximum of forth (40) hours in a workweek.
- B. Captains may earn exchange time for **time worked on days off and** extraordinary and excessive hours worked. Captains shall use the appropriate code on the Time and Activity Report (TAR) to record exchange time, which they will submit to the supervisor for approval. Exchange time may be accrued at straight time to a maximum of ~~eighty (80)~~ **two hundred forty (240)** hours. Exchange time has no cash value.

State Proposal:

No change to existing language.

Summary Position of the WSPLA

As exempt employees, captains are not eligible for overtime pay. Exchange time is allowed for extraordinary and excessive hours beyond the 40 hour week, which covers such things as extended periods due responding to an injured trooper or major planned events. The current culture frowns on captains accruing exchange time, and opening up exchange time to cover time worked on scheduled days off will address the workload the captains are weary of.

Checks and balances exist to address any fear of unfettered accrual and use of exchange time. Accrual must be approved by a captain's supervisor, as well as use. Exchange time has no cash value, and is without cash out concerns. There is no direct financial impact.

The proposed increase to 240 hours is well below the 480 amount suggested for law enforcement by the State Department of Personnel Management. Fears of "3 month" departures by captains are unfounded. The criteria for earning the time remain; all leave must be approved by an assistant chief; absences of even 3 consecutive weeks off are rare; and, back-fill or acting replacements are not always required.

Existing use of exchange is so low that tying it to an expense item is unfounded, especially since it lacks a cash value. Average exchange time earned in FY 2011 was 6.83 hours, and the current average balance is 1.82 hours, with a high of 13 and a low of less than one hour. Accepting this proposal can only benefit the captains, a group who are suffering in light of the state's position that it cannot address the wages that are admittedly not competitive.

Summary Position of the State:

No reason exists to change this contract language. The current use of exchange time is limited, with the 1.82 hour average, but the hours do fluctuate monthly (the July 2012 figure was a 6.8 hour average).

The purpose of exchange time is not to compensate captains who may need to use a Saturday to catch up on administrative tasks. Rather it for the “long, long hours” of a sudden emergency or a planned event requiring extended attention.

The operational difficulty of having captains away for extended periods is the negative associated with increasing the maximum time available. The longer a captain is away, the greater the operational issues. A lieutenant will take acting status, and the chain of replacements will move down the line. The end of this domino effect is fewer troopers on the road, which has a direct impact on the core mission of the WSP.

Additionally, paying the higher rates for acting employees with lower experience means doing the job in a lesser fashion. The increase in cost from the required wage increase is a direct financial impact as well.

Finally, the nature of a captain’s work is critical due to their appointing authority status that allows hire/fire/discipline. This function cannot be delegated to an acting lieutenant, and must be doubled up on another captain. Captains’ presence is crucial to the control of their district/division responsibility.

There is no evidence of any problem this proposal can address. It presents only the potential to create problems and should not be adopted.

Arbitrator’s Analysis

If it is too strong to say that this proposal is a solution in search of a problem, it is at least correct that this proposal does not solve the main problem discussed on the record by unit members. The testimony about a culture discouraging requests for exchange time was both regrettable and believable. *TR 675-676*. But, the connection between this proposal and that problem is not established.

The proposal seeks to increase the bank size for captains' exchange time, but the record reflects that no captain is at all close to filling the current 80-hour bank. *TR 496-497*. The largest current banked amount is 13.5 hours, and the six captains carrying a bank averaged 6.8 hours collected. *TR 497; S-22*.

Further, the Arbitrator is in agreement this proposed language to expand the eligibility circumstances goes too far in opening a door that has not been established as improperly shut. The existing "extraordinary and excessive hours worked" does not appear to eliminate exchange time for hours worked on days off even now. The language indicates nothing about when the extraordinary time is worked; there is nothing to indicate there is any distinction made between excessive hours worked beyond a regularly scheduled shift, and excessive hours worked on a day that was not otherwise scheduled. The example given at hearing concerned an officer's death causing many consecutive days of long hours. *TR 676*. There is every reason to believe that at some point one of those days would have been a regularly scheduled day off, and there is no reason to believe – looking at the language at least – that excessive and extraordinary hours worked on a day off in that case would have been excluded from coverage under the exchange time section.

Assistant Chief Kranitz's fear that allowing the new language would open the door to exchange time for merely going to the office on a Saturday to catch up on routine paperwork is a

legitimate one. Covering such onerous, but realistically expected, work for a leader would be an expansion to the “extraordinary and excessive” concept that is not justified by either experience, level of usage, or currently available resources. This proposal is not accepted by the Arbitrator.

Arbitrator Will Award:

Existing language remains unchanged.

V. ARBITRATOR’S AWARD

In accordance with the reasoning and application of statutory considerations above, the Arbitrator makes the following Interest Arbitration Award in accord with his statutory authority:

26.1 Wage Adjustment

26.1 Effective July 1, 2013 all salary ranges and steps for captains and lieutenants of the WSP Commissioned Officer Salary Schedule that were in effect on June 30, 2012, as shown in Appendix B, will remain in effect until June 30, 2014. Effective July 1, 2014, all salary ranges and steps for captains and lieutenants of the WSP Commissioned Officer Salary Schedule that were in effect on June 30, 2013 shall be increased by three percent (3%), as shown in Appendix B, and will remain in effect until June 30, 2015.

Arbitrator’s Note: Appendix B rates shall be calculated, amended and republished as necessary to reflect this increase.

26.3 and 26.4 Longevity Premiums (Multi-Section Proposal)

No change to existing language.

26.7 Premium Pay

No change to existing language.

26.9 Out of Class Work

A. Requirements

Any employee who is assigned or appointed the responsibilities of a position higher than he/she presently holds for forty (40) or more consecutive working hours shall be paid at the employee's choice of one of the two options described below in Sub-sections B and C. However, if more than one (1) employee is assigned at different times to fill the same position of the higher classification for five (5) or more consecutive working days, the employees filling the position will be paid at the higher rate for all time worked in the higher classification. Compensation shall not be paid more than once or the same hours under any provision of this Section or Agreement.

B. Lieutenant Acting Pay Options

1. Lieutenants appointed to acting captain positions will be allowed to choose between one (1) of the following two (2) pay options prior to the beginning date of that appointment:
 - a. The lieutenant can elect to continue to receive lieutenant's pay and benefits while in the acting captain position; or
 - b. The lieutenant can elect to receive acting captain pay and benefits while in the acting captain position.
2. A lieutenant who elects to receive captain pay and benefits during the acting appointment and earns exchange time during that appointment must use the accumulated exchange time within sixty (60) calendar days after the acting appointment ends, unless the captain determines operational necessity prevents it.

C. Captain Acting Pay Options

1. Captains appointed to acting assistant chief positions will be allowed to choose between one (1) of the following two (2) pay options prior to the beginning date of that appointment:
 - a. The captain can elect to continue to receive captain's pay and benefits while in the acting assistant chief position; or
 - b. The captain can elect to receive assistant chief pay and benefits while in the acting assistant chief position.
2. A captain who elects to receive assistant chief pay and benefits during the acting appointment and earns exchange time during that appointment must use the accumulated exchange time within sixty (60) calendar days after the acting appointment ends, unless the captain determines operational necessity prevents it.

26.10 Clothing Allowance

No change to existing language.

26.11 Parking

The Department of Enterprise Services will manage parking on the Capitol Campus in accordance with RCW 46.08.172. The Employer will pay all applicable fees for non-reserved parking of Department issued vehicles for employees assigned to the Capitol Campus or General Administration Building.

26.12 Homeland Security /Emergency Preparedness Contract Supplemental Pay for Captains

Where permissible under contracts funded by non-Department funds, captains performing work in excess of their established workweeks related to the planning and conduct of Homeland Security or Emergency Preparedness exercises shall receive

supplemental pay of an additional one hundred fifty percent (150%) of their base rate of pay for all hours actually worked on such projects. For other contracts funded by non-Department funds, where permissible under those contracts and where captains' work under the contract is expressly authorized in advance prior to field implementation of the contract, captains performing work in excess of their established workweeks shall receive supplemental pay of an additional one hundred fifty percent (150%) of their base rate of pay for all hours actually worked on such projects. This Section shall not apply to Washington Traffic Safety funded projects.

26.15 New Section Proposed – Fitness Incentive

No addition to CBA.

11.5 Holiday Credits

No change to existing language.

10.3 Workday

- A. The workday for line lieutenants shall consist of an eight (8) hour period within a twenty-four (24) hour period including the paid meal period and rest periods. Lieutenants' workdays shall begin and end at their assigned work station; provided, however, that if the lieutenant takes traffic law enforcement action (field supervision, responding to an accident, traffic contact and citation, assisting a disabled motorist) while responding to his/her workstation, the workday shall begin or end at the time of the traffic law enforcement activity.
- B. In exchange for the ability to work a straight shift, the Association and the Employer have agreed to a paid meal period and rest periods that vary from and supersede the paid meal and rest periods required by WAC 296-126-092. These agreed-to meal and rest periods do not require a relief from duty and may occur intermittently.

- C. Lieutenants who have been scheduled to attend training for one (1) or more full workdays may be scheduled to a workday with an unpaid meal period. The training workday shall be either a regularly-scheduled nine (9) hour day with a one (1) hour unpaid meal period or an eight and one-half (8-1/2) hour day with a one-half (1/2) hour unpaid meal period.
- D. The workday for non-line lieutenants shall be either a regularly-scheduled nine (9) hour day with a one (1) hour unpaid meal period or an eight and one-half (8-1/2) hour day with a one-half (1/2) hour unpaid meal period.

10.5.E Compensatory Time

No change to existing language.

10.8 Exchange Time for Captains

No change to existing language

This interest arbitration award is respectfully submitted on this 25 day of September, 2012, and the foregoing Award is so ordered, by:

Michael G. Merrill

LABOR ARBITRATOR