IN THE MATTER OF THE INTEREST ARBITRATION BETWEEN	)	
	)	**INTEREST ARBITRATION**
CITY OF YAKIMA	)	**OPINION AND AWARD**
	)	
and	)	**PERC No. 20624-I-06-0477**
	)	
YAKIMA POLICE PATROLMANS ASSOCIATION	)	**Date Issued: December 4, 2007**
	)	

OPINION OF THE NEUTRAL CHAIRMAN

Neutral Chairman

Michael H. Beck

Counsel

City of Yakima:	**Rocky L. Jackson**
Yakima Police Patrolmans Association:	**James M. Cline** **Rebecca Lederer**

OPINION AND AWARD OF THE NEUTRAL CHAIRMAN

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and

YAKIMA POLICE PATROLMANS ASSOCIATION

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OPINION OF THE NEUTRAL CHAIRMAN

I. PROCEDURAL MATTERS

The Neutral Chairman selected by the parties is Michael H. Beck. The parties did not provide for an Arbitration Panel as described in RCW 41.56.450, and, instead, this matter was presented to the Neutral Chairman as a single Arbitrator. The Employer, City of Yakima (also referred to as the City), was represented by Rocky L. Jackson of the law firm of Menke Jackson Beyer Elofson Ehlis & Harper, LLP. The Union, Yakima Police Patrolmans Association (also referred to as the Association), was represented by James M. Cline, with Rebecca Lederer on brief, both of Cline & Associates.

A hearing in this matter was held at Yakima, Washington on June 26, 27 and 28, 2007. At the hearing the testimony of witnesses was taken under oath and the parties presented documentary evidence. The record in this matter was extensive, comprising a stack of documents nearly 10 inches high. The hearing was tape-recorded and a

transcript was made available to the Neutral Chairman for his use in making his determination of the issues in dispute. The parties agreed upon the submission of posthearing briefs and response briefs which were timely filed. The final reply brief was received in the office of the Arbitrator on September 12, 2007. At the request of the Neutral Chairman, the parties agreed to waive the requirement contained in RCW 41.46.450 that the Neutral Chairman issue his written determination of the issues within 30 days following the conclusion of the hearing.

II. BACKGROUND AND NATURE OF DISPUTE

On September 1, 2006 Executive Director Marvin L. Schurke of the Public Employment Relations Commission (PERC) certified 17 issues for interest arbitration pursuant to RCW 41.56.450. The parties have settled 16 of those issues and, therefore, only one issue was submitted to the Neutral Chairman for resolution in this interest arbitration. That issue is referenced as "Article 11, Mandatory Drug Testing" in Executive Director Schurke's September 1, 2006 certification letter.

With respect to mandatory drug testing, the parties are in dispute with regard to the implementation of a random drug testing program. The Employer wants to implement such a program as an addition to the "reasonable suspicion" testing program currently in effect, while the Union opposes the addition of a random drug testing program. The parties are also apart regarding certain provisions of the reasonable suspicion testing program, all of which have been lumped together under the one certified issue of mandatory drug testing.

One of the issues certified for interest arbitration but settled by the parties prior to the arbitration was the duration of the Agreement. The terms of that settlement are not in the record. However, it is my understanding that the Agreement in question before the Neutral Chairman is the successor agreement to the parties' January 1, 2004-December 31, 2005 Agreement, in evidence as Union Exhibit No. 1. The bargaining unit has approximately 120 members and includes both police officers and sergeants.

III. STATUTORY CRITERIA

RCW 41.56.430 provides that the intent and purpose of the dispute resolution procedures for uniformed personnel is as follows:

> [T]o recognize that there exists a public policy in the state of Washington against strikes by uniformed personnel as a means of settling their disputes; that the uninterrupted and dedicated service of these classes of employees is vital to the welfare and public policy of the state of Washington; that to promote such dedicated and uninterrupted public service their should be an effective and adequate alternative means of settling disputes.

RCW 41.56.465 provides that in making its determination the Arbitration Panel, "shall be mindful of the legislative purpose enumerated in RCW 41.56.430 (set forth above) and then goes on to provide "additional standards or guidelines to aid [the Arbitration Panel] in reaching a decision." These standards which the Neutral Chairman is required to take into consideration are the following:

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

> (c)(i) For employees listed in RCW 41.56.030(7)(a)[1] through (d), comparison of the wages, hours, and conditions of employment of personnel involved in the proceedings with the wages, hours, and conditions of employment of like personnel of like employers of similar size on the west coast of the United States;
>
> * * *
>
> (d) The average consumer prices for good and services, commonly known as the cost of living;
>
> (e) Changes in any of the circumstances under (a) through (d) of this subsection, during the pendency of the proceedings; and
>
> (f) Such other factors, not confined to the factors under (a) through (e) of this situation that are normally or traditionally taken into consideration in the determination of wages, hours, and conditions of employment. . . .

Neither party contends that (d), regarding the cost of living is relevant to a determination of whether or not a random drug testing program should be implemented.

Both parties argue vigorously that (a), the constitutional and statutory authority of the Employer is relevant, with the Union taking the view that the implementation of a random drug program would be unconstitutional under both the U.S. and State of Washington constitutions, while the Employer contends that such a program would be constitutional under both of these documents. I have carefully reviewed the parties' arguments in this regard and have determined that none of the cases they cited definitively resolves this dispute. I have determined, however, by considering other statutory factors that the random drug testing program proposed by the Employer should not be implemented.

[1] RCW 41.56.030(7)(a) lists law enforcement officers employed by the governing body of any city or town with a population of 2,500 or more and law enforcement officers employed by the governing body of any county with a population of 10,000 or more.

IV. THE COMPARATORS

In addition to the two specific statutory criteria, the constitutional and statutory authority of the Employer and the cost of living, RCW 41.56.465 provides a third specific criteria for the Neutral Chairman to consider, namely a comparison of wages, hours, and conditions of employment of personnel involved in the proceedings with the wages, hours, and conditions of employment of "like personnel of like employers of similar size on the west coast of the United States." Here we are dealing with law enforcement officers employed by the City of Yakima which, according to the record in this case, has a population of approximately 83,000.

At the beginning of the hearing, there was a discussion between counsel and myself regarding the comparable jurisdictions. That discussion started by my asking Mr. Cline to set forth on the record a stipulation the parties had reached regarding comparable jurisdictions. As I began to write my Opinion and Award, I find myself unsure of the exact meaning of their stipulation. I have set forth below our discussion regarding this matter, followed by my understanding of that stipulation.

> CLINE: Okay, we believe the stipulation is that both sides are presenting, both sides had presented different sets of comparable jurisdictions, that both sides concluded that the outcome of this proceeding would not be affected by which set was selected. And, that, in order to efficiently move through this proceeding, we did [not] believe the Arbitrator needed to make a determination as to comparables, so we agreed that evidence from both competing sets of comparables would be presented and that, that would then become non-precedential as to future proceedings.
>
> JACKSON: I believe I heard most of that [the] stipulation is that the comparables are not precedential, that is merely both sides are submitting evidence from jurisdictions they believe to be comparable. And, my understanding is that no ruling on comparables would be made by the Arbitrator.
>
> BECK: Alright, is that, that's interesting when you say no ruling would be made, when I, if I rely on comparables, would I indicate in there what I thought were the appropriate comparables?

CLINE: No, we would ask you not to do that, because we didn't go through and put on the various demographic evidence that would fill another one of these binders that might help you make that decision, and since they had seven or eight, we had seven or eight, there was overlap of four or five of those, it didn't affect the result. But, because in terms of this pertinent working (inaudible) it wasn't affected so we just didn't find it was necessary to litigate that issue and we'd rather just say, have you say, these are the jurisdictions both sides have presented, but they're not a joint stipulated set other than for purposes of this hearing and so they wouldn't be a precedent for the next proceeding.

BECK: Well, I appreciate that, they wouldn't be a precedent for the next proceeding, but what, do you, I mean, I guess I'm having difficulty understanding if the comparables are going in evidence, I mean I'm going to be able to use. . .

CLINE: You would be able to, for this proceeding, they would all be considered comparable.

BECK: Okay.

CLINE: So you would be able to rely on those as comparables.

BECK: But, I wouldn't pick and, I would not, in any way pick and choose among them?

CLINE: You would give them all equal weight.

BECK: Is that best?[2]

JACKSON: Correct. But, I think the rest of the stipulation was that this hearing is not going to establish a set of comparables for future arbitrations.

BECK: And that, I fully understand. That, in considering the group of comparables that both sides put in evidence here, in doing so, they're doing so on a non-precedential basis. Is that fair?

CLINE: Correct.

JACKSON: That's correct. (Tr. pgs. 3 and 4.)

None of the witnesses called by either party during the hearing were asked to set out the comparables that either the Employer or the Union believed to constitute the appropriate comparable jurisdictions. I note that Employer Exhibit No. 9 sets forth six

[2] This transcription appears incorrect in view of the context. Perhaps I said, "Do you agree," directing my remark to Mr. Jackson

cities under the heading, "Comparable Jurisdictions Proposed by Parties." These cities are Bellingham, Kennewick, Lakewood, Olympia, Pasco and Richland. None of the Union exhibits provides a list of comparable jurisdictions. However, Union Exhibit No. 11 lists 34 Washington State cities and Yakima County under the heading "Drug Testing Clause in Police Departments for all Cities Greater Than 20,000 Population." This list includes the six cities listed by the Employer on Employer Exhibit No. 9. I do note that at page 23 of its reply brief, the Union in discussing its proposal for mandatory rehabilitation (Section F.9) states:

> Furthermore, the Association notes that the City once again attempts to use selected provisions from all of the collective bargaining contracts submitted without explaining which contracts were only submitted to indicate industry standard and which contracts were submitted as comparables. In fact, only three of the seven provisions submitted to support the City's proposal on Section K.3 come from the parties' comparables: Bellingham, Olympia, and Richland. The other four provisions are only helpful to the Arbitrator in so far as they indicate an industry standard.

As I indicated above, the record does not indicate which of the 35 jurisdictions on Union Exhibit No. 11 the Union considers as comparable jurisdictions and which it considers "industry standard" jurisdictions. As to the six jurisdictions listed on Employer Exhibit No. 9 as "comparable jurisdictions proposed by the parties," it appears these were the jurisdictions that overlapped with respect to the comparables each had proposed in bargaining.

The Employer has provided information regarding the drug testing policies and procedures in place in five of the six comparables listed on Employer Exhibit No. 9. The one exception is the City of Kennewick. The Union has presented information regarding the policies and procedures in place for all of the jurisdictions listed on Union Exhibit No. 11 except Des Moines, Edmonds, and Wenatchee, which are listed as having no

clause in the collective bargaining agreement nor a city policy regarding drug testing. In their briefs, both parties have cited policies and procedures in place at one or more of the six cities listed by the Employer on Employer Exhibit No. 9 and have done the same with respect to jurisdictions other than those six cities listed on Union Exhibit No. 11.

Based on all the foregoing, I find that it was the intent of the parties' stipulation that the Neutral Chairman is authorized to consider as evidence in these proceedings information from the 34 cities listed on Union Exhibit No. 11, which includes the six cities listed by the Employer on Employer Exhibit No. 9, as well as Yakima County. In an attempt to give effect to the stipulation of the parties, I will refer to the six cities on Employer Exhibit No. 9 as the "comparable" jurisdictions and the other 29 jurisdictions as other jurisdictions which I am authorized by the parties to consider, hereinafter "other authorized" jurisdictions.

V. MANDATORY DRUG TESTING

A. Method of Review

The Washington Administrative Code, specifically WAC 391-55-220 entitled, "Interest arbitration – Submission of proposals for arbitration" provides as follows:

> At least fourteen days before the date of the hearing, each party shall submit to members of the panel and to the other party, written proposals on all of the issues it intends to submit to arbitration. Parties shall not be entitled to submit issues which were not among the issues certified under WAC 391-55-200.

Each party submitted its proposals under date of June 14, 2007 which is only 12 days from the start of the hearing on June 26, but 14 days from the last day of the hearing on June 28. In any event, neither party contends that the other parties' proposal

submission was untimely. However, at the hearing, the Union presented a new proposal which contained different language from that contained in its June 14 proposal with respect to many of the issues then in dispute regarding the overall question of mandatory drug testing. The Employer objected to the Neutral Chairman considering this new proposal. I ruled that to the extent the language contained in the Union's new day of hearing proposal was regressive, it would not be considered. I hereby confirm that ruling. I will, on an issue by issue basis, determine if the Union's new proposed language is regressive and if it is, it won't be considered. On the other hand, new language proposed by the Union which moves closer to the Employer's position will be considered by your Neutral Chairman as reflecting the Union's position.

One other matter needs to be considered before moving to consider each of the open issues regarding mandatory drug testing. By letter dated August 29, 2007, Employer counsel provided to Union counsel and myself the agreement of the parties regarding the issues to be resolved by your Neutral Chairman. These issues all relate to the Yakima Police Department Substance Abuse Policy. It is not clear whether this policy will actually be included in the new collective bargaining agreement as an appendix or whether it would be incorporated by reference in Article 11 of that agreement. In any event, this question has not been presented to the Neutral Chairman as an open issue.

B. Random Drug Testing

1. The City's Proposal

Members of the bargaining unit, police officers and sergeants, have been subject to reasonable suspicion drug and alcohol testing since 1990. However, these employees have not been subject to random drug or alcohol testing. The main dispute between the parties involves the Employer's proposal to institute random drug testing which the Union opposes. The Employer's random drug testing proposal is set forth below:

> **L. RANDOM DRUG TESTING**
> In addition to alcohol and drug testing identified above, employees shall be subject to random drug testing pursuant to the following provisions:
>
> 1. Up to 25% of the bargaining unit shall undergo random drug testing per calendar year.
>
> 2. No employee may be subject to more than two random tests in any calendar year.
>
> 3. The process for selecting employees for random testing shall be done by a mutually agreed to contracted third party using a computer-based random number generator that is matched with numbers associated with each employee. Under the selection process used, each covered employee shall have an equal chance of being tested each time selections are made.
>
>   The contracted third party will supply the identification of the randomly selected employees to the Human Resources Manager, who will notify the appropriate Police Department supervisor for scheduling the test.
>
> 4. Random drug tests shall take place while an employee is on-duty or on any other paid status. The City will attempt to schedule the test during the employee's shift, however, if that is impossible or impractical the test may be performed on an overtime basis at the beginning or end of his/her shift or on a day that would otherwise be the employee's regularly scheduled workday.
>
> 5. Random drug tests shall be unannounced and the dates for administering the tests shall be spread reasonably throughout the calendar year.
>
> 6. The protocols for drug testing set forth in this policy shall be applicable to random drug tests, including but not limited to the substances tested and the relative cut-off levels.

2. Comparable Jurisdictions vs. Internal Equity

The party seeking to have a new provision placed in the collective bargaining agreement through the interest arbitration process bears the burden of establishing that the inclusion of such a provision is appropriate.

In its brief, the City acknowledges that "no comparable jurisdiction has random drug testing in its police contract." (City brief, pg. 4.) However, the City points to three smaller cities in eastern Washington, namely Moses Lake, Selah, and Sunnyside which have implemented some form of random drug testing. The City has not contended that any of these three cities would constitute a jurisdiction comparable to Yakima pursuant to the statutory criteria. In this regard, the evidence indicates that the cities of Moses Lake, Selah, and Sunnyside do not have populations in excess of 20,000, while the record indicates the population of Yakima to be approximately 83,000.

The Employer contends that pursuant to RCW 41.56.465(1)(f) there are other factors "that are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment" that are present in this case. First, the Employer points to the factor of internal equity. In this regard, the Employer did establish that 172 employees in the City of Yakima are presently subject to random drug testing. These include the Police Chief and the Command Staff of Captains and Lieutenants. This random drug testing program was placed into effect in October of 2005. Additionally, the 911 call takers for the Fire Department have been subject to random drug testing since January 1, 2007 as have the Public Safety Dispatchers. The Battalion Chiefs in the Fire Department will be subject to random drug testing effective

January 1, 2008. Finally, those employees of the City of Yakima whose position requires a commercial driver's license are subject to random testing pursuant to federal regulations regarding random drug testing of employees holding a commercial drivers license.

The record does not establish the number of employees employed by the City of Yakima and, therefore, your Neutral Chairman cannot discern the percentage of City of Yakima employees subjected to random testing. Additionally, all of the employees listed above who are subjected to random drug testing have voluntarily agreed to the imposition of this measure with the exception of those employees requiring a commercial drivers license, who are subjected to random drug testing pursuant to federal regulations. Here the bargaining unit police officers and sergeants have not volunteered to submit to random drug testing, nor has the City established that there is a legal requirement that the Yakima police officers be subjected to random drug testing.

Based on all of the foregoing, I find that the Employer has not established that considerations of internal equity are of such significance that the statutory criteria regarding comparable jurisdictions should be set aside. Here, the evidence indicates that only three cities in the State of Washington, all of which are considerably smaller than Yakima require random drug testing for police officers.

3. Officers A and B

In support of its random drug testing proposal, the Employer also points to two situations involving officers and the use of drugs. These two officers were referred to at the hearing as Officer A and Officer B in order to protect their identities. With respect to

Officer A, that officer was prescribed a drug, referred to at the hearing as oxycodone, apparently for pain. Officers are required to report to their supervisors the use of any prescription drugs. Officer A failed to report use of this prescription drug until after having undergone a medical examination, apparently in connection with a worker's compensation claim. Realizing that his use of this prescription drug would be reported to the Employer as a result of the medical examination, Officer A revealed the use of this prescription drug which, according to the evidence in the record, can affect the job performance of an officer who is taking it. As it turned out, Officer A was not only using the drug as prescribed, but as a result of abusing this drug had developed a chemical dependency on the drug, which the evidence in the record indicated was an opiate based drug.

Officer A was eventually terminated in July, 2005. The termination did not list drug use as a reason for that action, but instead referred to a number of areas of misconduct including harassment, discourteous conduct, threats, and insubordination. More importantly, it is not disputed that if the Employer's proposed random drug testing proposal had been in place, and if Officer A had been tested pursuant to that program, the test result would have shown up as negative. This is because if an individual tests positive for a drug for which he/she has a prescription, the test is deemed negative because the individual is legally authorized to use the drug involved.

There was a suggestion in the record that perhaps if a test revealed an amount of the prescribed drug substantially in excess of what one would expect based on the amount of the drug prescribed, the result could be a positive rather than a negative. However, Connie Heater, an official with Central Washington Occupational Medicine, the

organization which performs the drug tests for the City, was unable to answer this specific question. She testified that a prescription drug would "normally result in a negative test" if the tested individual did have a prescription for the drug revealed by the test. (Tr. pg. 102-103.) Shortly after this testimony she was asked the following question and gave the following answer:

> JACKSON: Okay. If somebody had an oxycodene (sic.) prescription, would it be possible that over use would result in a positive test?
>
> HEATER: You know, I'm not the pharmacologist. I really can't answer that, I'm sorry. Dr. Cohen is the pharmacologist. (Tr. pg. 103.)

In any event, the Employer does not contend that its random drug testing program would have resulted in a positive test for oxycodone for Officer A. In this regard, the Employer concludes its discussion regarding Officer A in its brief by stating that:

> [T]he City is not proposing random drug testing to 'catch' police officers. Random drug testing is a deterrent to use by the officers. (Employer brief, pg. 13.)

However, the record does not contain evidence sufficient to establish that random drug testing would serve as a deterrent to drug use by police officers, particularly where, as here, reasonable suspicion testing is in place.

Since it is admitted that no jurisdiction which might be deemed comparable to Yakima has a random drug testing program, it is fair to conclude that these jurisdictions either do not believe that a random drug testing program would serve as a deterrent to drug use, or if a random drug testing program can be considered a deterrent to drug use, such a program presents other difficulties which have persuaded these jurisdictions not to implement random drug testing.

With respect to Officer B, the evidence established that this officer had an extremely poor driving record in connection with police officer duties. Officer B's driving record is set forth below:

1. July 31, 1999: Officer B was involved in an accident while driving a patrol car that was deemed preventable by the Accident Review Board, resulting in damage to Officer B's patrol vehicle of $3,240.99.
2. August 21, 1999: Officer B was involved in another collision found to be preventable by the Accident Review Board, resulting in a written reprimand given to Officer B.
3. March 13, 2000: Office B was involved in another vehicle accident while on duty driving a patrol vehicle and responding to a possible burglary in progress without the emergency siren being activated. The Accident Review Board determined that Officer B violated three separate department policies. There was $1,069.07 damage to the patrol vehicle and the other driver filed a damage claim against the City, the amount of which is not contained in the record. Officer B received a 10 hour suspension for "causing the accident." (Employer Exhibit No. 27, pg. 2.)
4. November 4, 2000: Officer B failed to terminate a pursuit in violation of department policy. Officer B was given a verbal reprimand.
5. August 18, 2002: Officer B was found to have violated three department policies in connection with a vehicle pursuit and received a verbal reprimand.
6. October 13, 2002: Officer B's fourth on-duty vehicle accident involved crossing in front of another vehicle while attempting to make a right turn. The Accident Review Board determined that the accident had been preventable and was Officer

B's fault. Officer B received a 20 hour suspension for this misconduct. The claim filed by the injured citizens for their injuries as well as damage to their vehicle was $36,400. The cost of a new patrol car at that time was somewhere between $20,000 to $25,000 according to the testimony of Captain Jeffrey Schneider, who was involved in the discipline of Officer B.

7. April 20, 2003: Officer B violated department policy during a vehicle pursuit, resulting in Officer B receiving a 30 hour suspension.
8. November 28, 2003: Officer B while operating a patrol vehicle struck from behind a vehicle stopped in traffic. This collision resulted in the injury to three civilians in the stopped vehicle as well as to Officer B along with substantial damage to both vehicles. Schneider testified that officer B was placed on administrative leave after the November 28 accident "due to concerns about her ability to operate a car safely." (Tr. pg. 196.)

A pre-disciplinary hearing was set for January 21, 2004 and on February 3, 2004 Officer B executed a last chance agreement. The last chance agreement provided that before returning to duty Officer B would submit to a fitness for duty evaluation which would include both a medical and psychological examination as well as a drug test. Captain Schneider testified that during the period Officer B was on administrative leave, he was having difficulty making contact and when he did, Officer B was evasive. As a result, he suspected possible drug use and ordered Officer B to report immediately for a drug test, which Officer B took on February 13, 2004 resulting in a positive test for marijuana. Three days later on February 16, Officer B resigned.

The Union points out that Officer B's positive drug test came while Officer B was on administrative leave and that there was no proof that Officer B actually used marijuana while on duty. Here there were grounds for the Employer to have performed a drug test pursuant to the reasonable suspicion testing program prior to Officer B being placed on administrative leave in view of Officer B's extremely poor driving record while driving a police patrol vehicle. In this regard, I note that Captain Schneider, with 23 years of service with the City of Yakima Police Department, testified that with respect to Officer B's driving record that the Police Department had had "some really bad drivers, but never had we had anybody this bad." (Tr. pg. 195.) In this regard, Officer B had been involved in five accidents all deemed Officer B's fault and had been disciplined in connection with three pursuits all within a period of less than 4 ½ years. Surely, at some point along the way, Officer B could have been required to submit to a reasonable suspicion test. In this regard, I note that the Employer in its brief states:

> Although this Officer B had one of the worst driving records of any officer in the City, the officer had not been subject to reasonable suspicion drug testing prior to February 2004. (Employer brief, pg. 11.)

The record lacks evidence indicating that the City of Yakima Police Department has a drug problem greater than that in any "comparable" or "other authorized" jurisdiction.

Based on the foregoing, I do not find that the situations involving Officer A and Officer B provide sufficient support for the imposition of the Employer's proposed random drug testing program.

4. Employer Contention that the Association Does Not Oppose Random Testing

The City contends that Union President, Sergeant Robert Hester has stated to the press, in collective bargaining negotiations, and at the hearing that the Association is not opposed to random testing and, therefore, it is appropriate on this basis alone to award the random drug testing proposal sought by the Employer. There is some indication in the record that Sergeant Hester has indicated in the past that the Association might be willing to accept random drug testing provided certain safeguards for police officers were in place. However, it is clear that the Association was unwilling to accept the random drug testing program proposed by the Employer. In fact, as indicated earlier in this Opinion, 17 issues were certified by PERC for interest arbitration and the parties were able to settle all of those issues except for mandatory drug testing. It is not disputed that the Employer's random drug testing proposal was the issue of greatest significance and concern to the parties with respect to mandatory drug testing.

Finally, as I stated during the hearing, I recognize that the parties have hired lawyers to represent them and in that capacity to provide to the Neutral Chairman the position of their respective clients with respect to each issue before the Neutral Chairman. I confirm that ruling here.

5. Community Standards

The Employer contends that the citizens of the City of Yakima support random drug testing for police officers and that this is another relevant factor that the Arbitrator should consider pursuant to RCW 41.56.465(1)(f) as a factor that is "normally or traditionally taken into consideration in the determination of wages, hours and conditions

of employment." RCW 41.56.430 quoted above makes clear that there is a public policy in Washington State against strikes by uniform personnel as a means of settling their labor disputes and that because the services of these employees is vital to the welfare and public safety of its citizens, "there should exist an effective and adequate alternative means of settling disputes." Those means are set forth in the statutory framework.

In my experience as an Arbitrator and as a PERC Commissioner, I have never seen community standards used as a relevant factor in determining whether or not a particular proposal by a party should be accepted or rejected. Furthermore, the Employer has not cited any cases in which community standards or sentiments have been cited as a relevant factor in determining whether or not a particular proposal should be accepted or rejected.

In fact, as the Union points out in its brief, the statutory criteria serve the purpose of ensuring that the rights of uniformed employees are respected even in the face of strong local political sentiments. As the Union further states in its brief:

> Employee rights and working conditions are not to simply be established on some type of "flavor of the month" approach. For that reason, comparability provides an important counterweight to check against the volatility of public opinion. The interest arbitration factors are not simply relevant during interest arbitration proceedings; experienced labor negotiators can attest to the overriding role they play in contract negotiations. Of these factors, none more clearly guides contract negotiations than comparability. (Union brief, pg. 42.)

Furthermore, even if I were to find that community sentiment was a factor to be considered with respect to determining whether or not the Employer's random drug testing proposal should be adopted, the evidence presented by the Employer was not sufficient to establish that a majority of the citizens of Yakima are in favor of the

implementation of any random drug testing program, no less the random drug testing proposal of the Employer.

6. Conclusion

Based on all of the foregoing, the random drug testing proposal of the Employer is hereby rejected. The Union's proposal of no random drug testing shall be awarded.

VI. OPEN ISSUES REGARDING MANDATORY DRUG TESTING OTHER THAN RANDOM DRUG TESTING

These issues are discussed in the order they were presented in the August 29, 2007 letter from Mr. Jackson identifying the open issues.

A. Section D.12 – Reasonable Suspicion

The Employer proposes the following language:

> Reasonable suspicion means facts and circumstances sufficiently strong to lead a reasonable person to suspect that the employee is under the effects of drugs and/or alcohol.

The Union's proposal is identical except that it would remove the period at the end of the sentence and add to the language the phrase:

> which is corroborated by a second individual other than the designated Association[3] representative.

[3] In its day of hearing proposal the Union substituted the word "Association" for the word "Guild" which had appeared in its 14 day proposal. The Employer has indicated that it has no objection with respect to this issue or any issue in having the Union referred to as the Association as opposed to the Guild.

I have carefully reviewed the language in the 15 collective bargaining agreement provisions cited by the Employer in its brief regarding reasonable suspicion and find, as the Employer contends, that only one of those provisions (Kirkland) specifically requires corroboration by a second individual.[4] It may well be that in order for the supervisor involved to make a determination of reasonable suspicion based on the definition set forth in the Employer's proposal, that supervisor will need a second individual for purposes of corroboration, depending upon the circumstances. This also may be the case in order to sustain any discipline imposed pursuant to the just clause. However, the lack of a specific provision requiring corroboration by a second individual in any comparable jurisdictions convinces your Neutral Chairman that it would not be appropriate to adopt the Union's proposal.

The Employer's reasonable suspicion proposal shall be awarded.

B. Section F.1 – Employee Rights and Responsibilities

The Employer proposal provides:

> The City shall not require an employee to undergo a reasonable suspicion drug and/or alcohol test unless there is reasonable suspicion to indicate the employee is under the influence of a substance which causes the employee to pose a hazard to the safety of the employee, the public, or other employees.

The Union would add a second sentence which states:

[4] Four of the 14 other than Kirkland are "comparable" jurisdictions, namely Bellingham, Lakewood, Olympia and Richland. With respect to the other two "comparable" jurisdictions, Kennewick and Pasco, there is no evidence in the record indicating they have a drug testing program for police officers.

> However, an employee may be required to undergo a re-examination drug and/or alcohol test as provided in Section K.3 of this policy.[5]

I agree with the Employer that the additional sentence proposed by the Union is unnecessary and perhaps even somewhat confusing. Whatever drug or alcohol test may be required with regard to the rehabilitation and return to duty provisions should be set forth at that portion of the substance abuse policy.

The Employer's proposal shall be awarded.

C. Section F.9 – Employee Rights and Responsibilities

The Employer proposes the following language:

> The employees having knowledge of another employee's condition/behavior that poses a potential threat to the safety of employees and/or the public shall immediately advise their immediate supervisor.

The Union's proposal provides as follows:

> Employees having knowledge of another employee's condition/behavior that poses potential threat to the safety of employees and/or the public are to assist the employee with getting help with the problem. This may be in the form of advising the immediate supervisor, assisting the employee in contacting the City's EAP, or by encouraging the employee to leave the workplace on sick leave. If the employee refuses intervention, the employee having the knowledge shall immediately inform the supervisor.

The Union proposal allows an employee who has knowledge of another employee's potential substance abuse problem to assist that employee with getting help before being required to report the matter to the supervisor. The Employer contends in its

[5] The Union, in its day of hearing proposal changed the section citation from J.2 as it was in its 14 day proposal to K.3. The Employer has not objected to this change.

brief that the language used in various jurisdictions support its position. I agree with the Union that a careful review of the language cited by the Employer with respect to three of the six jurisdictions cited in its brief do not provide support for the Employer's position.[6]

The Union does not cite any jurisdictions in support of its position, but states that its proposal "more reasonably balances the City's interest and the employees' interests. . . ." (Union reply brief, pg. 16.) However, I do not find this to be the case. For example, what would happen if a police officer X goes to fellow police officer Y who X believes poses a potential threat to the safety of fellow employees, confronts Y telling him that he is willing to assist Y in contacting the City's EAP. Continuing the example, suppose Y tells X he wants to think about the matter and does not specifically, that day or even weeks later, "refuse intervention," using the language of the Union's proposal.

It is fair to ask, when under the Union's proposal does the obligation fall upon X who observed the condition or behavior in question to go to his immediate supervisor? In my view, the Union's proposal is fraught with problems. Furthermore, it seems the better policy to require police officers who have knowledge of another employee's condition or behavior that poses a potential threat to the safety of employees and/or the public to immediately advise their immediate supervisor as is required under the Employer proposal.

The Employer proposal shall be awarded.

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[6] These are Auburn, Bellevue, and Federal Way. The Lakewood provision cited by the Employer addresses only supervisory employees. Bellingham and Yakima County do require the employee aware of substance abuse to report the employee in question immediately to the supervisor.

D. Section G.1 – Supervisory Guidelines

The Union has proposed four separate forms related to reasonable suspicion testing. These forms are entitled, "Supervisor's Guidelines," "Consent/Release Form," "Report Form," and "Interview Form." The Employer proposes only two forms, the "Sergeants' Guidelines for Reasonable Suspicion Testing" and "Reasonable Suspicion Test Form." The current substance abuse policy contains only one form entitled, "Substance Abuse Report Form – Reasonable Cause/Suspicion." (Union Exhibit No. 6.)

The Union does not rely on the "comparable" or "other authorized" jurisdictions in support of its position, but contends that unless all four of its proposed forms are in place, the Employer may well not be able to sustain reasonable suspicion for testing and, therefore, would lack just cause for any discipline imposed. In my view it does appear that the Employer's "Sergeants' Guidelines for Reasonable Suspicion Testing" and the "Reasonable Suspicion Test Form" do provide a reasonable method of recording the observations leading to the conclusion that reasonable suspicion testing is appropriate.

Furthermore, I agree with the Employer that the Union's "Supervisor's Guidelines" form interferes with the Employer's prerogative to direct its work force including to some extent its command staff. See, for example, Section 4 of the "Supervisor's Guidelines" which provides:

> After your supervisor has arrived, advise the employee you wish to interview him/her and provide a private location to conduct the interview.
>
> - Be sure to advise the employee that you suspect him/her of being under the influence of a prohibited substance (defined in the policy) and that s/he may have an Association representative present during the interview.
> - Do not argue with a belligerent or threatening employee. Advise him/her that his/her cooperation during the interview and testing procedure (if warranted) are direct orders and that continued disruptive behavior, preventing completion of the

interview, shall be the same as refusal to submit to testing and shall be cause for discipline (cooperation **does not** mean that the employee must give facts or evidence which may incriminate himself/herself).

- Complete the Interview Form with your supervisor.

Regarding the "Consent/Release Form" there apparently are such forms in existence as the Union, at page 72 of its brief, states that "the City would desire that an employee sign a waiver form." However, no such form was placed in evidence. If there is such a waiver form in existence, and if the Union believes use of this form constitutes an unfair labor practice as it states at page 72 of its brief, then it is up to the Union to file an unfair labor practice. Based on the state of this record, I cannot rule on the Union's proposed "Consent/Release Form."

With respect to the "Interview Form" proposed by the Union, it states in its brief, at page 71, the following:

> Finally, the City has not even provided a form similar to the Association's proposed Interview Form. Without giving the employee an opportunity to explain the perceived signs of his problem, the City patently invites liability on its decision to subject an employee to a drug or alcohol test based on reasonable suspicion.

However, I note that the Employer's proposed "Reasonable Suspicion Test Form" directs the supervisor to record employee comments and provides a space to record those comments. (See Section D "Written Summary" at page 2.)

The Employer proposed forms shall be awarded.

E. Section G.3(a) – Searches

In its 14 day proposal the Union proposed the following language:

> The Department has the right to search, without employee consent, City – owned property to which the employee has no reasonable expectation of privacy. These areas may include office space, desks, file cabinets, and the like, that several different individuals may use or access. A reasonable expectation of privacy shall exist for personal containers marked and locked inside an officer's desk drawer.

The Employer has accepted the Union's 14 day proposal. However, in its day of hearing proposal, the Union proposed the following language.

> The Department has the right to search, without employee consent, City-owned property or area jointly or fully controlled by the City. A reasonable expectation of privacy shall exist for personal closed containers.

I agree with the Employer that the Union's day of hearing proposal is regressive. In this regard, I note that under the Union's 14 day proposal the reasonable expectation of privacy existed only for personal containers marked and locked inside an officer's desk drawer. However, under the Union's day of hearing proposal, a reasonable expectation of privacy exists for personal closed containers in any location as long as they are closed and they need not be marked and locked inside an officer's desk drawer.

The Union contends the language in its 14 day proposal violates both the U.S. and Washington State constitutions. The Union does not cite any new case that was decided between its submission of its 14 day proposal and the submission of its day of hearing proposal. Furthermore, if in fact the Employer conducts a search pursuant to the language contained in the Union's 14 day proposal and imposes discipline on employees as a result of what is found pursuant to such a search, the Union would be free to file a grievance and proceed to arbitration claiming that the search was unlawful and, therefore, discipline based on that search would not meet the test of just cause. In such a situation,

unlike the situation before me, there would be a specific set of facts upon which a determination of unconstitutionality could be made.

The Union's 14 day proposal shall be awarded.

F. Section I.2(b) – Leave Status

The Employer's 14 day proposal states in the last sentence:

> The employees shall be placed on leave status (sick leave, vacation, holiday leave bank, compensatory time, leave without pay (pending completion of the investigation and/or disciplinary action, and/or return to duty.

The Union's day of hearing proposal provides the following last sentence:

> The employee shall be placed on administrative leave status pending completion of the investigation and/or disciplinary action, and or return to duty.

The Union's 14 day proposal did not address the question of leave status for an employee who receives a positive drug test result.

The Union states at page 64 of its brief that both the 1990 and 1996 version of the City of Yakima Substance Abuse Policy contains the following section:

> An employee suspected of substance abuse shall be relieved of duty, with pay, following any required examination and shall be required to notify the office of his/her department head or his/her whereabouts at all times during the duration of the investigation.

I have not been able to find this clause in the exhibits cited at footnotes 190 and 191 of the Union's brief at page 64. However, the Employer's reply brief does not dispute the Union's assertion in this regard.

The Union states that it made the day of hearing proposal adding the language regarding an employee with a positive test result being placed on administrative leave to make clear its position that it had all along been relying on the similar provision in the substance abuse policy. Based on the foregoing, I do not find that the Union's day of hearing proposal was regressive.

Additionally, it is not disputed that the past practice of the parties is to place employees on administrative leave, that is leave with pay, pending investigation of alleged misconduct. Here, in fact, Officer B was on administrative leave for over two months before the positive drug test for marijuana resulted in resignation. Furthermore, the City has not presented evidence sufficient to cause your Neutral Chairman to adopt the City's proposal over the normal process in industrial relations, whereby an employee is placed on administrative leave pending investigation and a decision regarding whether or not discipline will be imposed.

The Union's proposal contained in its day of hearing proposal shall be awarded.

G. Section K.3 – Rehabilitation and Return to Duty

The Employer's proposal is set forth below:

> Any employee who tests positive for a prohibited substance, and is not terminated from employment, may be referred to an SAP for a medical evaluation, counseling and/or rehabilitation treatment. If the employee is required to participate in such a program by the City, his/her reinstatement or continued employment shall be contingent upon:
>
> 1) Successful completion of the program and remaining drug-and/or alcohol-free for its duration; and
> 2) Passing a return to duty drug and/or alcohol test as recommended by the SAP; and
> 3) Obtaining a final release for duty by the SAP (the final release for duty may be preceded by a temporary release for duty).
> 4) Nothing in this section prohibits the City from disciplining or terminating an employee who tests positive for a prohibited substance.

The Union's 14 day proposal is as follows:

> Any employee who tests positive for a prohibited substance or is otherwise required to submit to a drug and/or alcohol test by this policy shall be medically evaluated, counseled, and treated for rehabilitation as recommended by the SAP. If the employee is required to participate in such a program, his/her reinstatement or continued employment shall be contingent upon:
>
> a. Successful completion of the program and remaining drug-and/or alcohol-free for its duration; and
> b. Passing a return to duty drug and/or alcohol test as recommended by the SAP; and
> c. Obtaining a final release for duty by the SAP (The final release for duty may be preceded by a temporary release for duty.

The Union also made a day of hearing proposal in which it changed the period to a comma after SAP in the first paragraph and added the following language:

> provided that an employee who tests positive for unlawful substances would not ordinarily be eligible for rehabilitation.

I agree with the Union that its day of hearing proposal is not regressive. In fact, it moves toward the Employer position because it does not require rehabilitation for all employees who test positive as did the Union's 14 day proposal, but rather provides that an employee tested positive for unlawful substance would not ordinarily be eligible for rehabilitation.

In its brief, the Union discusses extensively an arbitration award by Arbitrator Gary Axon involving the policy in City of Pullman, PERC No. 09223-I-91-00204 (Axon, 1992). The Union points out that Arbitrator Axon adopted the Union proposal, which gave the policy officer who tested positive, "a guaranteed right to pursue treatment after testing positive for a prohibited substance." (Union's brief, pg. 54.) Although there were

some differences between the proposals in that case, both the Employer and the Union proposals contained the following language:

> SECTION 10 REHABILITATION COSTS:
>
> Any employee who tests positive for illegal drugs or alcohol shall be medically evaluated, counseled and treated for rehabilitation as recommended by an E.A.P. counselor. (City of Pullman, supra at pages 55 and 61.)

The Employer cites seven jurisdictions which provide similarly to the Employer's proposal here that the Employer has the authority to impose discipline rather than providing for rehabilitation. The Union has not cited any jurisdiction where the Employer is under an obligation to provide rehabilitation[7] instead of discipline for positive drug tests. While I agree with the Union that seven jurisdictions out of 35 are hardly a majority, I also note that as the Union recognizes, three of the jurisdictions cited by the Employer; Bellingham, Olympia, and Richland, constitute one half of the "comparable" jurisdictions listed on Employer Exhibit No. 9. Based on the foregoing, it is appropriate to award the Employer proposal. If he Employer does not administer discipline in a reasonable manner pursuant to this proposal, the employees and the Union have the protection of the just cause clause.

The Employer proposal shall be awarded.

[7] The City of Pullman retains the language awarded by Arbitrator Axon including the language quoted above. (Union Exhibit No. 36.)

H. Section K.7 (Association), Section K.4(a)(City) – Rehabilitation and Return to Duty

The parties' positions are relatively similar on this matter. As I read the three proposals, it seems to me that the Union's proposal at the hearing is the clearest of the three proposals and it is not regressive. It provides as follows:

> If an employee voluntarily enters a drug/alcohol rehabilitation program, it shall not be considered an offense under this policy. Such employees are, however, still subject to this policy and may be required to undergo a drug and/or alcohol test if reasonable suspicion exits. Employees who voluntarily enter a drug or alcohol rehabilitation program shall be required to use sick leave, vacation, holiday leave bank, compensatory time, or leave without pay. All appointments with the SAP may be scheduled as vacation, sick leave, or leave without pay pursuant to City policies.

The Union's day of hearing proposal shall be awarded.

I. Section K.12 (Association), Section K.6 (City) – Rehabilitation and Return to Duty

The Employer proposes the following language:

> Once an employee provides his/her supervisor with a final release for duty, the employee may be returned to his/her regular duty assignment. Any records in the employee's personnel file regarding the incident will be retained and purged in accordance with the collective bargaining agreement.

The Union proposal is as follows:

> Once an employee provides the supervisor with the final release for duty the employee shall be returned to his/her regular duty assignment. After three years of no further violation of this policy, the employee's personnel file shall be purged of any reference to the incident, including any disciplinary actions taken, provided, however, records may be retained beyond 3 years when retention is required by applicable law. Should applicable law require retention of records past

> 3 years, and if allowed by such law, such records shall be sealed and may not be opened without consent of the employee.

The Union contends that its proposed language is necessary because Article 11, Section 2(j) of the 1994 – 1995 Agreement applies only to disciplinary records and, therefore, separate language is needed to ensure that the documents pertaining to drug testing and rehabilitative procedures will be removed from the employee's file in a timely manner. However, the Union's proposal does not limit itself to drug testing and rehabilitative procedures, but provides for purging the personnel file of any reference to the incident involved "including any disciplinary action taken." Furthermore, the Union's proposal does not include the language in the collective bargaining agreement that states:

> [A]ll of such records may be retained until a period of three (3) years has elapsed during which there has been no further disciplinary action for the same or similar behavior. (Article 11, Section 2.j.)

Finally, it is clear that disciplinary records described in Article 11, Section 2(j) of the Agreement would include drug testing and rehabilitative procedure records which are related to the implementation of a particular discipline.

The Employer's proposal shall be awarded.

J. Section K.13 (Association), Section 6(b)(City) – Rehabilitation and Return to Duty

The Employer proposes the following language:

> If an employee tests positive during the 24 month period following rehabilitation, the employee will be subject to discipline, up to and including discharge.

The Union made a day of hearing proposal, which the Employer does not contend is regressive and which I do not find to be regressive. That proposal is as follows:

> If an employee tests positive following rehabilitation on an unannounced drug or alcohol test, the employee will be placed on leave without pay during the period the SAP makes a decision on the need for further treatment. The employee will remain on leave without pay during any treatment period and until they have provided the employer with a return to duty form signed by the SAP. If such an employee completes the return to duty process and again tests positive on either a for cause or unannounced drug or alcohol test, they shall be subject to discharge.

The Employer states in its brief (page 21) that none of the jurisdictions except for Kirkland submitted by either party provides for a second chance for rehabilitation following an initial positive drug test and following rehabilitation. The Union does not specifically address this contention by the Employer, although I note the Axon awarded proposal in City of Pullman, supra, is in the current City of Pullman Agreement and provides:

> If an employee re-tests positive during the twenty-four (24) month period, the employee will be re-evaluated by an E.A.P. counselor to determine if an employee requires additional counseling and/or treatment. (Union Exhibit No. 36.)

The Union argues rehabilitation should be exhausted before discipline is imposed. However, neither the "comparables" nor the "other authorized" jurisdictions support this contention.

Based on the foregoing the Employer proposal shall be awarded.

K. Section L.2 (Association), M.2 (City) – Hold Harmless

The Employer's proposal is as follows:

> This policy as it applies to random drug testing was initiated at the request of the City and the City shall assume sole responsibility for its administration. The Association does not stipulate that the random drug testing provisions of this policy are lawful and the City agrees to indemnity and hold the Association and its officers harmless from any and all claims of any nature (except those arising from the negligence of the Association and/or its officers) where the legality or constitutionality of this policy as it applies to random drug testing is at issue. This indemnification provision does not extend to claims that the Association or anyone acting on its behalf improperly or negligently advised, represented, or performed services for an employee disciplinary proceeding arising from violations of the policy, or any other right or liability of an employee related to this policy.

The Union's proposal is as follows:

> This policy was initiated at the request of the City and the Employer shall assume sole responsibility for the administration of this policy. The City agrees to indemnify and hold the Association and its officers harmless from any and all claims of any nature (except those arising from the negligence of the Association and/or its officers) arising from the Employer's laboratories', or Medical Review Officer's implementation of this policy.

The Employer's language refers to random drug testing which has been rejected by your Neutral Chairman. It is appropriate that the City, which administers the reasonable suspicion drug testing policy, indemnify and hold harmless the Union in accordance with the Union's proposal.

The Union proposal shall be awarded.

L. Section L.5 (Association), Section M.5 (City) – Regarding Forms

The question of the forms to be included in the substance abuse policy was discussed and resolved during my discussion under Section G.1, "Supervisory

Guidelines." Based on that discussion, only the two forms proposed by the Employer shall be included in the substance abuse policy, namely the "Sergeants' Guidelines for Reasonable Suspicion Testing" and the form entitled "Reasonable Suspicion Test Form."

AWARD OF THE NEUTRAL CHAIRMAN

The Award of the Neutral Chairman is as follows:

V.B **Random Drug Testing**

The random drug testing proposal of the Employer is rejected. The Union proposal of no random testing is awarded.

VI.A **Section D.12 – Reasonable Suspicion**

The Employer proposal is awarded.

VI.B **Section F.1 – Employee Rights and Responsibilities**

The Employer proposal is awarded.

VI.C **Section F.9 – Employee Rights and Responsibilities**

The Employer proposal is awarded.

VI.D **Section G.1 – Supervisory Guidelines**

The Employer proposal is award.

VI.E **Section G.3(a) – Searches**

The Union 14 day proposal is awarded.

VI.F **Section I.2(b) – Leave Status**

The Union day of hearing proposal is awarded.

VI.G **Section K.3 – Rehabilitation and Return to Duty**

The Employer proposal is awarded.

VI.H **Section K.7 (Association), Section K.4(a)(City) – Rehabilitation and Return to Duty**

The Union day of hearing proposal is awarded.

VI.I **Section K.12 (Association), Section K.6 (City) – Rehabilitation and Return to Duty**

The Employer proposal is awarded.

VI.J **Section K.13 (Association), Section 6(b)(City) – Rehabilitation and Return to Duty**

The Employer proposal is awarded.

VI.K **Section L.2 (Association), M.2 (City) – Hold Harmless**

The Union day of hearing proposal which is identical to its 14 day proposal except for the substitution of the word "Association" for the word "Guild" is awarded.

VI.L **Section L.5 (Association, Section M.5(City) – Regarding Forms**

The Employer proposal is awarded.

Dated: December 4, 2007

Seattle, Washington

S/Michael H. Beck
Michael H. Beck, Neutral Chairman

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December 10, 2007

Majel C. Boudia
Executive Assistant
Public Employment Relations Commission
P.O. Box 40919
Olympia, WA 98504-0919

Re: Interest Arbitration
City of Yakima and
Yakima Police Patrolmans Association
PERC No. 20624-I-06-0477

Dear Majel:

Enclosed for your file is a copy of my Interest Arbitration Opinion and Award in the above referenced matter.

Yours very truly,

Michael H. Beck

MHB:cac
Enclosure