

PORT OF SILVERDALE
RESOLUTION NO. 2021 - 04
Port Commissioner Compensation

WHEREAS:

- A. RCW 53.12.260, as amended in 2020, provides:
- (1) Each commissioner of a port district shall receive **ninety dollars**, as adjusted for inflation by the office of financial management . . . , per day or portion thereof spent (a) in actual attendance at official meetings of the port district commission, or (b) in performance of other official services or duties on behalf of the district. The total per diem compensation of a port commissioner shall not exceed eight thousand six hundred forty dollars in a year, as adjusted for inflation by the office of financial management . . .*
 - (3) In lieu of the compensation specified in this section, a port commission may set compensation to be paid to commissioners.**
 - (4) . . . The dollar thresholds for salaries and per diem compensation established in this section must be adjusted for inflation by the office of financial management every five years, **beginning January 1, 2024**, based upon changes in the consumer price index during that time period. [Emphasis added].*
- B. Under a prior amendment in 2011, RCW 53.12.260 provided that the ninety dollars per diem and annual cap was to be adjusted for inflation every five years, beginning July 1, 2008, and effective July 1, 2018 the dollar threshold for per diem compensation had been adjusted for inflation by the Office of Financial Management to \$128, which is the basis for current 2021 compensation for Port of Silverdale commissioners.
- C. Based on legislative history and analysis reported by attorneys for the Washington Public Ports Association, after consulting with the Office of Financial Management and the State Auditor's Office, it appears that the legislative intent was only to change the date of inflationary adjustment in the adjustment years from July 1 to January 1 to coincide with the fiscal years of special purpose districts (including port districts), and that the legislature inadvertently rolled back commissioner compensation to the 2020 level of \$90 per diem and \$8,640 annual cap, with adjustments for inflation not beginning until January 1, 2024. (See attachment).
- D. Although Article XI, Section 8, of the state constitution prohibits port commissioners from increasing their own compensation during their term of office, the port commissioners may use the authority authorized by RCW 53.12.260(3) to address the legislative oversight and set future compensation of newly elected port commissioners before they take office to the level intended by the 2011 amendment to be next adjusted for inflation on January 1, 2024 under the 2020 amendment.

NOW, THEREFORE, IT IS HEREBY RESOLVED BY THE BOARD OF COMMISSIONERS FOR THE PORT OF SILVERDALE TO MAINTAIN THE STATUS QUO REGARDING COMMISSIONER COMPENSATION AS FOLLOWS:

1. Pursuant to RCW 53.12.260(3) the current Port of Silverdale commissioner compensation of \$128 per diem per day and annual cap of \$ 12,288. shall be maintained for all current commissioners and shall apply to all Port of Silverdale commissioners hereafter elected or appointed.
2. The RCW 53.12.260(4) inflationary adjustment that will occur on January 1, 2024, and each five years thereafter will be applied to all Port of Silverdale commissioner compensation.
3. The Port of Silverdale legal counsel and port administrator will inform the Commission (a) if and when the drafting issue in RCW 53.12.260 has been the subject of Legislature action, (b) a definitive legal interpretation from the Washington Attorney General's Office is issued, or (c) Washington courts issue a binding decision so that the Port Commission may consider an appropriate resolution.

ADOPTED in open session at a regular meeting of the Board of Commissioners of the Port of Silverdale on the below date.

Dated: 10/19/2021


Caleb Reese,
Port Commissioner


Ed Scholfield,
Port Commissioner


Doug Kitchens,
Port Commissioner

Knowing the Waters – Commissioner Compensation

By Frank Chmelik

This month we look at the port commissioner compensation and the 2020 amendment to commissioner compensation statute – RCW 53.12.260. We think this amendment requires a close look and perhaps a resolution before year end.^[1] I freely admit I am a paid paranoid. Now that I have your attention, let me explain.

RCW 53.12.260. RCW 53.12.260 sets port commissioner per diem and monthly compensation. Section 1 sets the per diem compensation. Section 2 sets a monthly compensation. Section 3 allows the port commission to override the amounts in sections 1 and 2 and set a different number. Finally, since 2007 section 4 provides for an inflationary adjustment every five years as determined by the Office of Financial Management.

The 2007 Amendment. In 2007, the Legislature amended RCW 53.12.260 in *Engrossed Substitute House Bill 1368* to (i) increase the per diem compensation in section 1 from \$75 to \$90 per day and (ii) to index all the compensation numbers (both per diem and monthly compensation) to inflation with an adjustment every five years with a base date of July 1, 2008. The statute provided:

The dollar thresholds for salaries and per diem compensation established in this section must be adjusted for inflation by the office of financial management every five years, beginning July 1, 2008.

This resulted in an increase in the compensation numbers on July 1, 2013, and again on July 1, 2018, to the amounts paid today.^[2] The next increase was scheduled for July 1, 2023.

The 2020 Amendment. The 2020 Legislature passed *House Bill 2449* by unanimous vote. The bill was originally entitled *An Act Relating to Water-Sewer District Commissioner Compensation*. I think it's fair to say that the intent was only to change the date for the next inflationary adjustment of water-sewer district commissioners from July 1, 2023, to January 1, 2024, to sync up with municipal government calendar year budget (instead of the State budget calendar which runs from July 1st). Along the way the bill was amended to add in twelve special purpose municipal governments, including port districts. The 2020 amendment made a simple change to RCW 53.12.260 as follows (deletions are strikethroughs and additions are underlines).

The dollar thresholds for salaries and per diem compensation established in this section must be adjusted for inflation by the office of financial management every five years, beginning ~~July 1,~~ 2008-January 1, 2024

Unfortunately, the adjustment date was changed but the original \$90 per diem and the \$200/\$700 monthly payments set in the 2007 version of RCW 53.12.260 were not updated. The “plain

reading” is now \$90 per diem and the \$200 or \$500 monthly payments adjusted for inflation on January 1, 2024. It seems the Legislature, in effect and most certainly accidentally, rolled back the numbers to 2007 levels wiping away the inflation adjustments implemented in 2013 and 2018. The best thought about how this happened is that it was a legislative drafting oversight.

The Potential Problem. It seems to me that the “plain meaning” of RCW 53.12.260 now says the per diem compensation is \$90 per day, the monthly compensation is \$200 or \$500, and these numbers will be adjusted on January 1, 2024. As a quick exercise, go to <https://app.leg.wa.gov/rcw/default.aspx?cite=53.12.260> and give RCW 53.12.260 your own “plain meaning” reading and see what you think. As amended in 2020, RCW 53.12.260 seems to rollback commissioner compensation (again unintentionally) for commissioner terms (elected or re-elected) that will start on January 1, 2022.[3]

The View of the Office of Financial Management. I reached out to the assistant director- legal and legislative affairs at the Office of Financial Management (the “OFM”). The assistant director was very responsive and noted that the purpose of the 2020 amendment was (as I previously noted) to merely change the date from July 1st to January 1st. Beyond, that, OFM could not provide an opinion other than it thinks the correct number will remain at the inflation adjusted amounts.

The View of the State Auditor’s Office. Victoria Lincoln at the WPPA reached out to the State Auditor’s Office (the “SAO”) port district liaison. After her inquiry, the liaison consulted with the SAO legal counsel. The liaison indicated that after looking at the issue the SAO would not make this an audit issue. In essence, the SAO is saying “we all know what the Legislature intended.”

A Potential Fix for a Court or Attorney General. Courts generally apply the “plain meaning” rule for a statute and only resort to the Legislative history to resolve an ambiguity. Sometimes our Supreme Court deviates from the “plain meaning” rule to reach a desired conclusion. One might hope it would do so here but that would require a lawsuit involving a port district which is not good even if the port prevails. Perhaps the Attorney general will weigh in and issue an opinion which, while not legally binding, would go a long way to solving the problem. The SAO, the OFM or a state legislator would need to seek that opinion.

My View. Despite the practical view of the SAO and the OFM, I am concerned that a member of the public may read RCW 53.12.260 and come to your commission meeting to claim that anyone elected after 2020 should only receive the \$90 per day and the corresponding monthly pay. True, ports can rest easy knowing that neither the OFM nor the SAO will raise the issue but try explaining this to a member of the public. I have often said that we lawyers are “paid paranoids.” As such we tend to worry about potential lawsuits or citizen claims in public meetings that commissioners elected or appointed after 2020 are being overpaid.[4]

Potential Port Actions. I think the Legislature could easily correct this ambiguity in the next session or it may otherwise be clarified by the Attorney General, or it may be ignored. With that said, port districts should consider the following actions after your port counsel has reviewed this issue.

- Do nothing. It may be fixed or clarified in 2022 or 2023 before the next port district elections in 2023 with new terms of office starting January 1, 2024, and the SAO is not going to take any action. Even if it went to court, the Supreme Court may very well clarify the issue. As a paid paranoid, I do not recommend this course of action because the resolution fix discussed below is relatively easy and guards against lawsuits or complaints.
- Pass a Status Quo Resolution Fixing Compensation at Current Levels. Use Subsection 3 of RCW 53.12.260 to adopt a resolution before year end affirming the current compensation numbers (including per diem, total annual per diem and monthly compensation) for all commissioners.^[5] This resolution would not change compensation for the sitting commissioners but rather only provide that the commissioner(s) taking office January 1, 2024 (newly elected or re-elected) would receive the same compensation as the other commissioners. Since the compensation for sitting commissioners is not changed there is no Article II, section 25 issue. The resolution could likely be a “contingent resolution” which would sunset if the Legislature further amended the statute, a court clarified the statute or if the Attorney General issued definitive guidance.

Model Resolution. WPPA staff and general counsel are working on a model resolution which your port counsel can customize for commission consideration. Expect to see it in the next few weeks. Meanwhile, this is one issue that I think each port ought to seek guidance on from their attorney.

As always, please contact your port counsel with any questions regarding this topic.

And, if you have a particular question for a Knowing the Waters, please email me at fchmelik@chmelik.com.

^[1] I say “we” because this column is the result of work by several lawyers within our firm, James Thompson and Victoria Lincoln at the WPPA and Lisa Lowe, the general counsel for the Port of Vancouver, USA .

^[2] Today, they are \$128 per diem and \$285 per month for ports with gross operating revenue between \$1 million and \$25 million or \$713 for ports with gross operating revenue of \$25 million or more.

^[3] Article II, section 25 of the Washington Constitution prohibits raising or lowering an elected official’s salary during a term of office so this issue will not affect current commissioner compensation but only take effect when a commissioner is elected or re-elected.

^[4] Because Article II, section 25 of the Washington constitution prohibits increasing or decreasing compensation during a term of office, the 2020 “rollback” would only apply to a commissioner elected or re-elected in 2021 with the new term starting January 1, 2022.

[5] If there is an election to fill an unexpired term, that elected commissioner takes office when the election is certified. In such a case the resolution would have to be passed before the November 2021 election is certified.