



Career Change

**Comprehensive Report Follow-up
November 20, 2013**

Issue

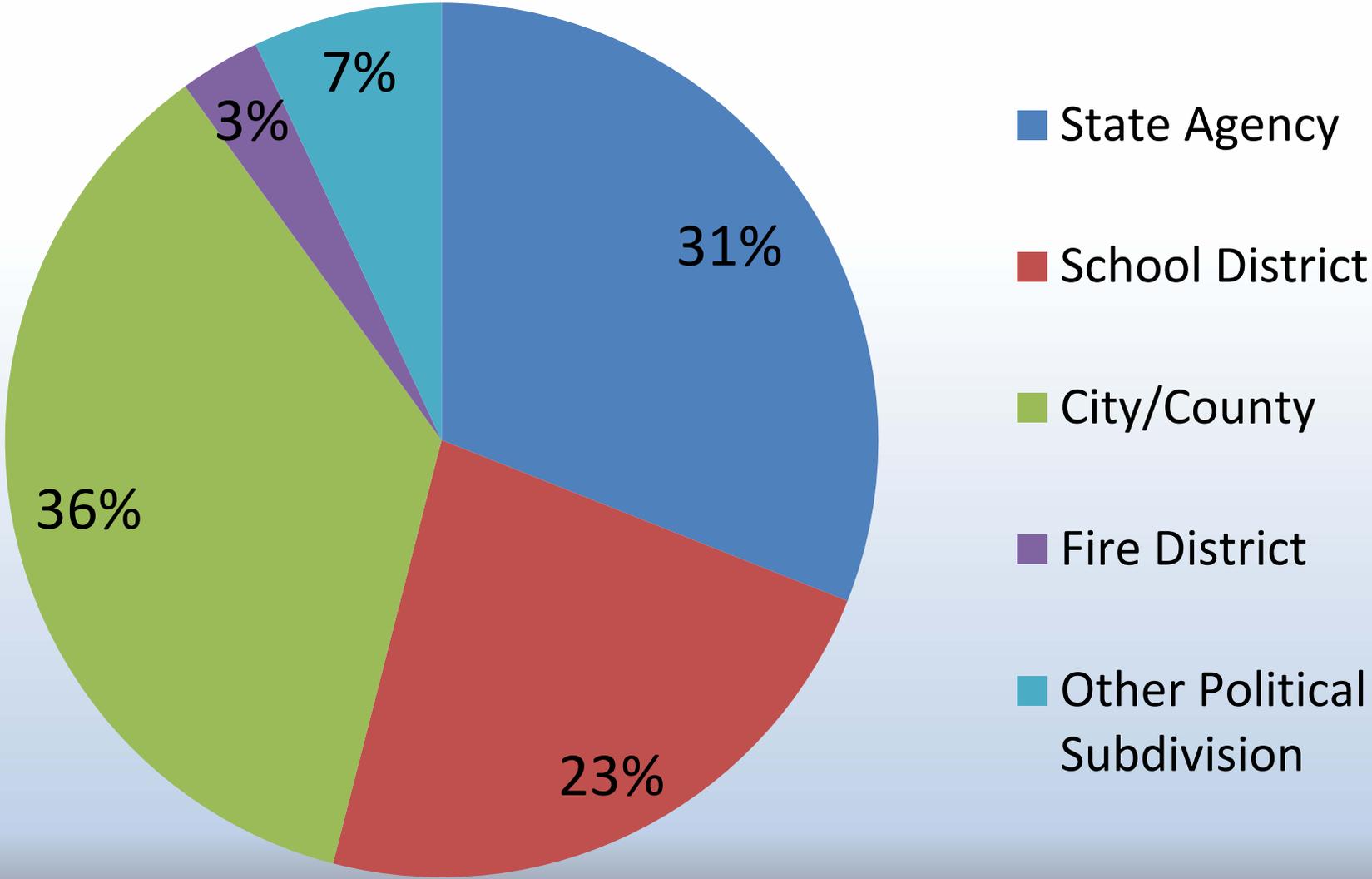
- Abuse of “Career Change” legislation could undermine public trust that the plan is responsibly designed and professionally managed.
- At September 25 hearing, Board asked for further information on:
 - Option 1: Close DuPont loophole;
 - Option 2: Allow post-retirement employment in LEOFF position, possibly limited.



Background

- Recent action by City of DuPont re-designating Police Chief position as “part-time” in order to facilitate a LEOFF Plan 2 retiree filling the position and continuing to draw his pension.
- Unintended consequence of 2005 Career Change legislation undermines legitimate policy of the law.

LEOFF Plan 2 Retirees: Second Public Career Distribution



Option 1

Clarify that law enforcement or fire fighter jobs do not qualify for the Career Change law regardless of whether they are full time, fully compensated.

Policy Issues:

- Re-designation of jobs from full-time to part-time avoid LEOFF membership/Career Change law.
- Some bona fide part-time jobs are properly excluded from LEOFF.



Option 1

Factors Could be Balanced:

- Require LEOFF Plan 2 retirement suspension if position duties would qualify for LEOFF if full-time fully compensated.
- Allow for bona fide part-time employment by retaining exclusion if the job falls below threshold requirement:
 - Up to 867 hours per year;
 - Under 25 hours per week; or
 - Other.

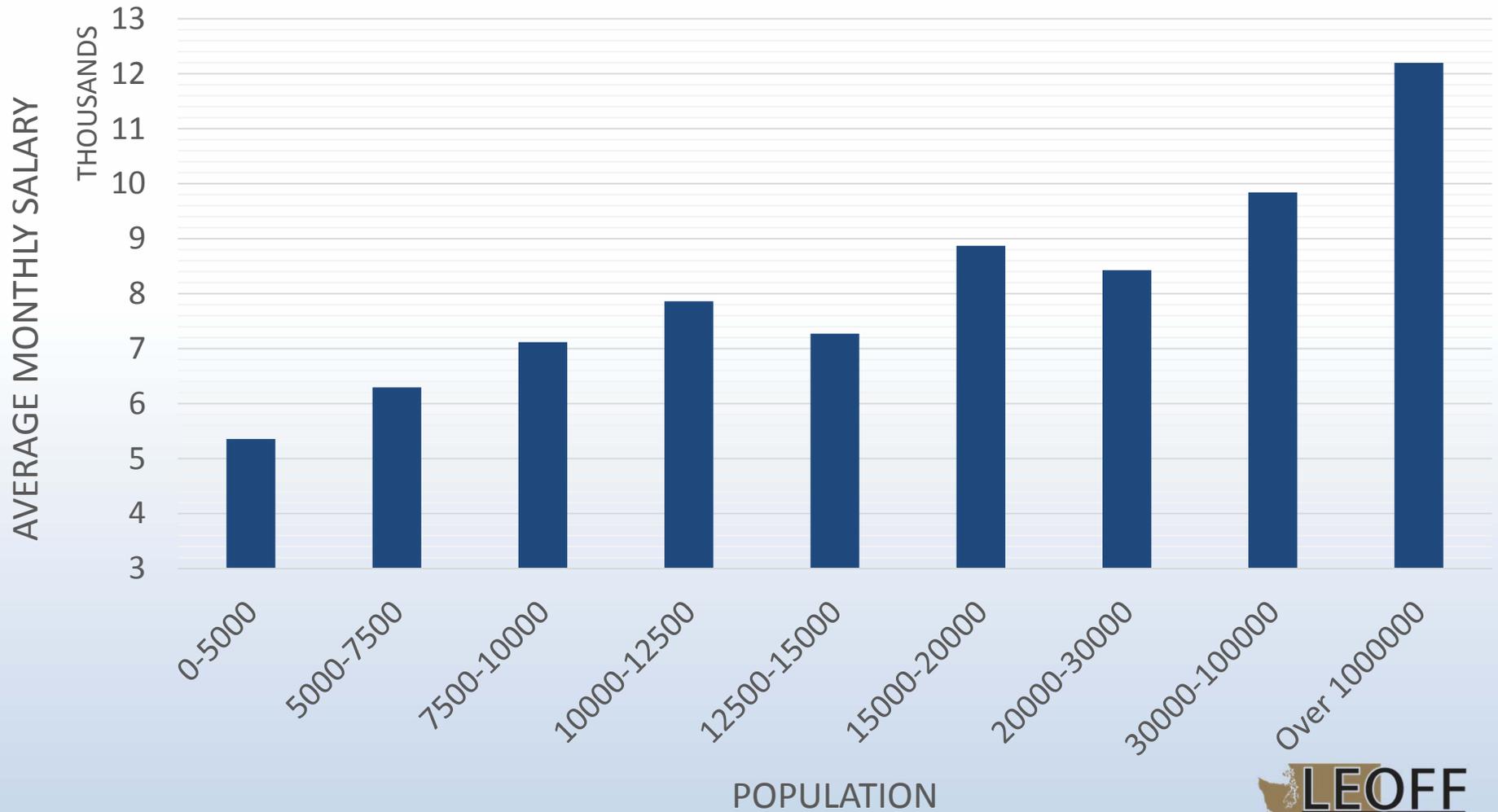
Option 3

Allow reemployment in LEOFF position without suspension of pension in limited circumstances.

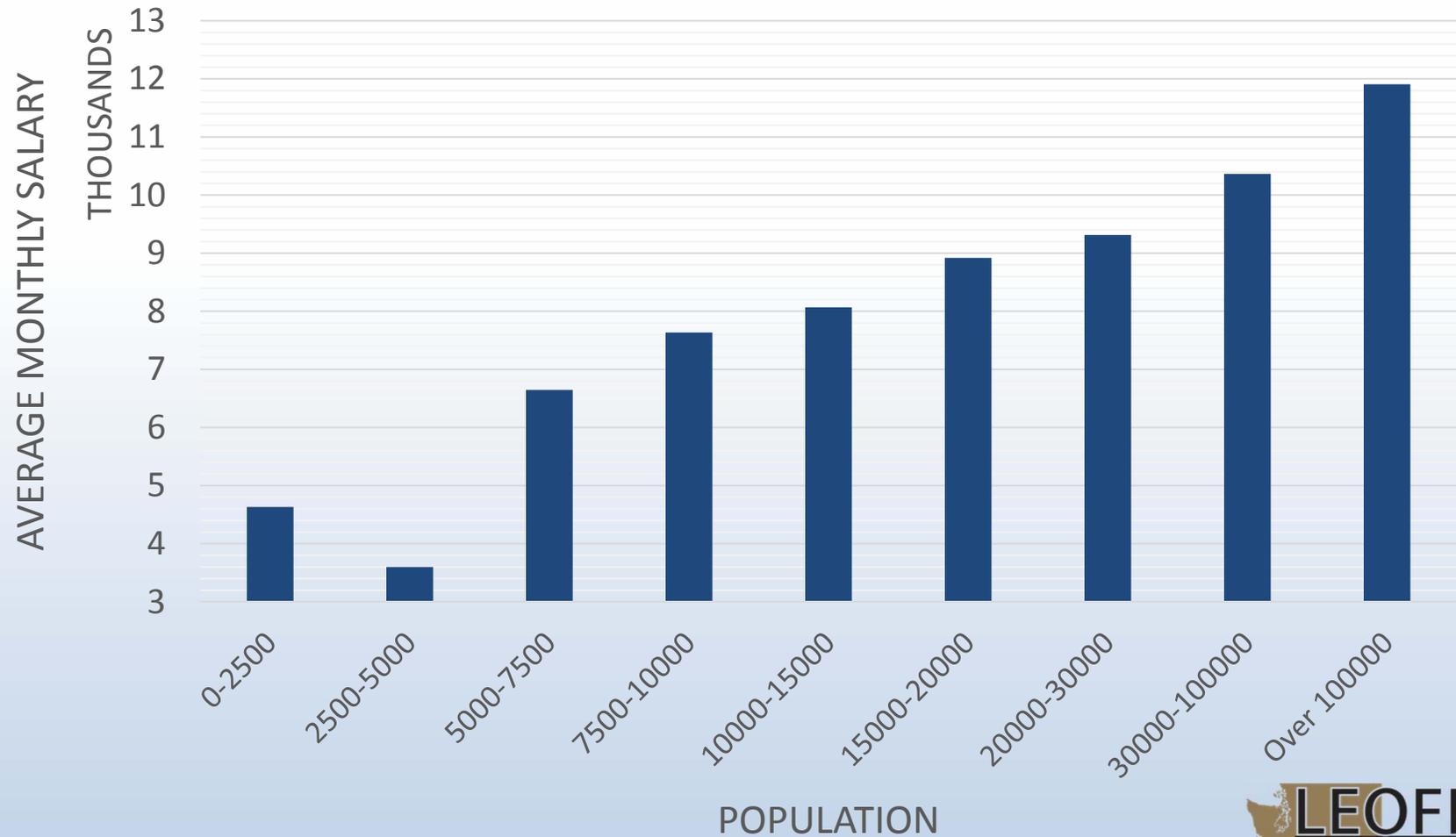
Policy Issues:

- Smaller jurisdictions to hire retirees as chiefs because of difficulty of competing with large jurisdictions on salary.
- Correlation between population and chief's salary.

Average City Fire Chief Salary by Population



Average City Police Chief Salary by Population



Population/Salary Correlation Can be Weak

City	County	Population	Average Monthly Police Chief Salary
DuPont	Pierce	8,855	7,647
College Place	Walla Walla	8,875	6,698
Grandview	Yakima	11,010	5,897
Cheney	Spokane	11,070	7,084
Enumclaw	King	11,100	7,685
Snoqualmie	King	11,700	9,548

Option 3A

Limited Reemployment

Allow lower population, lower paying jurisdictions to attract experienced chiefs.

- Safeguards:
 - Population limitation;
 - Tracking pre-retirement employment;
 - Duty Limitations.
- Conditions make administration more complex, can inadvertently open loophole.

Option 3B

Unlimited Reemployment

Extend Career Change policy to LEOFF Plan 2 retirees returning to any LEOFF position.

- Changes original policy of legislation from Career Change to retire/rehire.
- Formally adopts new policy instead of current “back door” approach.
- Potential for unfavorable public & legislative reaction.



Next Steps

- Direct staff to draft legislation and prepare presentation on one of the three options; or
- Decide not to take action at this time.

Any Questions?

- **Contact:**

Paul Neal

Senior Legal Counsel

360.586.2327

paul.neal@leoff.wa.gov

2100 Evergreen Park Dr, Olympia, WA 98502
PO Box 40918 Olympia, WA 98504
360.586.2320 or www.leoff.wa.gov





November 20, 2013
CAREER CHANGE

COMPREHENSIVE REPORT FOLLOW-UP

By Paul Neal
Senior Legal Counsel
360-586-2327
paul.neal@leoff.wa.gov

ISSUE

Abuse of “Career Change” legislation could undermine public trust that the plan is responsibly designed and professionally managed.

MEMBERS IMPACTED

Two hundred sixty-five LEOFF Plan 2 retirees have utilized the provisions of the career change law since its inception in 2005¹. Assuming utilization continues at the same rate, a similar number of members would be impacted by any changes to the law. The public trust issues implicated by manipulation of the original bill impact all LEOFF Plan 2 members.

OVERVIEW

Purpose of Follow-up

This report follows-up on the September 25th Board presentation. Three options were presented at that meeting. The Board requested further information on two of those options: 1) Restricting the career change legislation to ensure LEOFF Plan 2 retirees could not return to work as law enforcement officers or firefighters and continue to receive their LEOFF 2 pension; and 2) Expressly allow that situation, with possible limitations on the allowable circumstances.

Background Summary

Before 2005 a LEOFF Plan 2 retiree’s pension stopped upon return to work in a job covered by any state-wide public retirement system. The LEOFF Plan 2 Board (Board) recognized members could age out of LEOFF positions before they were ready or could afford to leave the workforce. The Board proposed Career Change legislation in 2005 enabling retired LEOFF Plan 2 retiree to start a second career in non-LEOFF public employment. A retiree accepting such a job can either establish membership in another public system, thus suspending their LEOFF Plan 2 pension, or waive membership in the new system and continuing to receive a pension.

¹ Data on career change usage from report produced by DRS.

The Board intended to facilitate transition from a physically demanding profession to another, often less-well compensated, job. The average annual compensation of LEOFF Plan 2 retirees returning to work under the career change law was \$28,268¹. It did not intend to enable LEOFF Plan 2 retirees to return to work as a law enforcement officer or firefighter and continue to receive their pension. The Legislature passed the LEOFF Plan 2 Career Change bill in 2005.

The City of DuPont recently utilized an unintended loophole in the Career Change legislation to hire a LEOFF Plan 2 retiree as police chief and continue his pension. Although DuPont's former police was a full-time employee covered by LEOFF, DuPont found a way to ostensibly place their new Chief, a LEOFF Plan 2 retiree, outside of LEOFF. The City did this by redefining the position as "part-time," i.e. 35 hours a week. The sole reason for this action was to move a law enforcement officer position into PERS to take advantage of the Career Change legislation.

This report will explain the difference between the Board's Career Change policy and the retire-rehire policy in PERS and TRS; identify unintended consequences of the Career Change law, explain how the loophole works, and discuss media reaction to DuPont's utilization of that loophole.

BACKGROUND INFORMATION & POLICY ISSUES

When creating LEOFF Plan 2 in 1977, the Legislature prohibited members from receiving a pension while engaged in retirement system covered employment. If a LEOFF Plan 2 retiree entered public employment covered by LEOFF, the Public Employees' Retirement System (PERS), or the Teachers' retirement system (TRS), that member's pension would be suspended. Over subsequent years the suspension requirement was expanded to include employment in positions covered by the School Employees' Retirement System (SERS) or the Public Safety Officers' Retirement System (PSERS). RCW 41.26.500.

CAREER CHANGE VS. RETIRE-REHIRE

The LEOFF Career Change bill is sometimes confused with retire-rehire provisions governing PERS and TRS. Retire-rehire was enacted in 2001 and has been in the news, and before the Legislature, repeatedly since then. The retire-rehire law was intended to allow PERS and TRS retirees to supplement their pensions by working in part-time or temporary positions. Current retire-rehire provisions allow PERS and TRS retirees to work 867 hours per year while collecting their full pension. This allows part-time work or a temporary assignment to full-time work.

The retire-rehire law does not apply to LEOFF Plan 2. Its policy of assisting both employers and employees by facilitating part-time or temporary work by experienced workers stands in marked contrast to the Career Change policy.

Career Change Legislation

The Board studied the LEOFF Plan 2 pension suspension provisions in 2004. The policy considerations underlying the action ultimately taken by the Board were discussed in the LEOFF Plan 2 staff presentation:

The normal retirement age for LEOFF Plan 2 (53) is an age at which a person is generally considered to still be in the prime of their productive employment period although they may no longer be capable of performing the duties of a law enforcement officer or fire fighter. A LEOFF Plan 2 member who separates from LEOFF employment at age 53 may be expected to seek continued full-time employment in a non-LEOFF capacity for a number of reasons including income, access to health care coverage and the ability to qualify for social security or earn additional pension benefits to supplement those provided by LEOFF Plan 2.

Public employment offers a number of potential second careers to LEOFF 2 members where the skills developed in their LEOFF positions can be utilized. However, LEOFF Plan 2 members who seek to continue in public employment following separation or retirement from LEOFF may be restricted from establishing membership in a second public retirement system or receiving their LEOFF pension. Thus, there are barriers to transitioning to public employment after completing a career in LEOFF.

When a LEOFF Plan 2 retiree becomes employed in an eligible position covered by another state pension system the retiree will have their LEOFF pension suspended. Additionally, the retiree would normally be prohibited from participating as a member in the other state pension system and accruing a second pension. These pension provisions may make continued public employment an unviable option for LEOFF Plan 2 retirees.

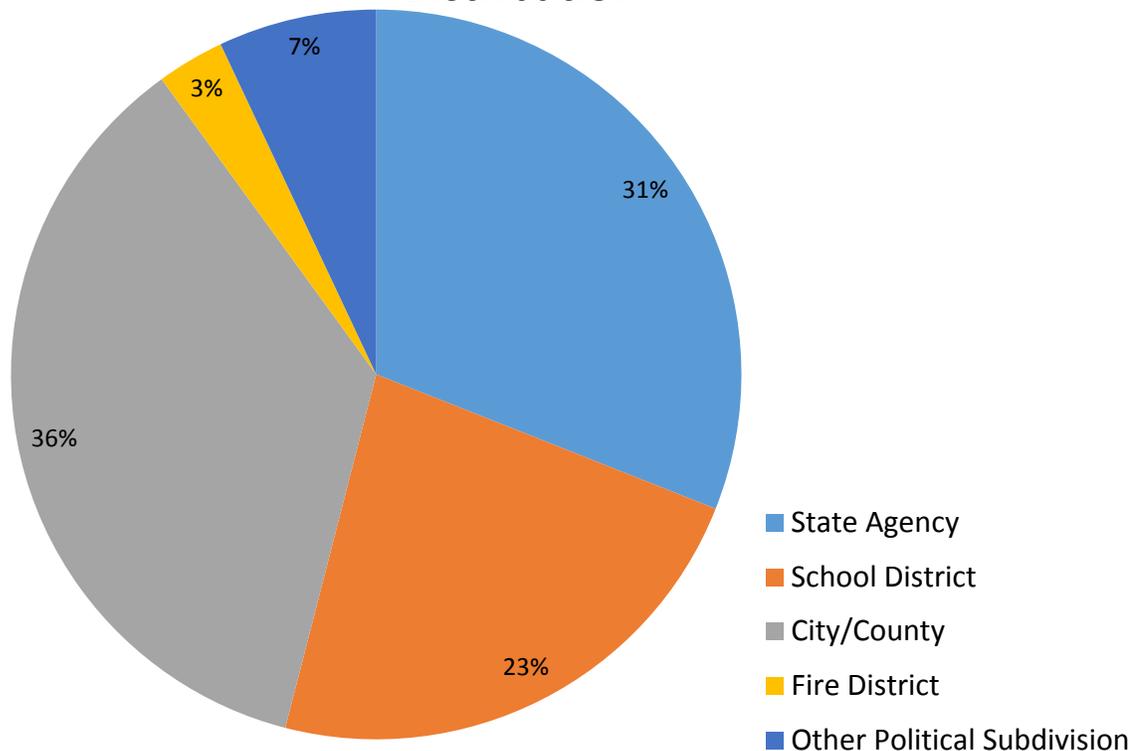
LEOFF Plan 2 staff presented three different options to the Board, including providing the same retire-rehire provisions available in PERS and TRS. But the Board's concern was not supplementing a pension with part-time work. Its issue was transitioning from a law enforcement officer or fire fighter career to a new career. Accordingly, the Board declined the option to adopt retire-rehire instead proposing Career Change legislation. Those provisions,

enacted in RCW 41.26.500, allow a LEOFF Plan 2 retiree who starts a new career in public employment other than as a law enforcement officer or fire fighter to either:

- Establish membership in a new public retirement system suspending their LEOFF Plan 2 pension; or
- Opt out of the second public retirement systems and continue to receive their LEOFF Plan 2 pension while pursuing their second career.

The Career Change law has mostly functioned as intended: facilitating a second public career for LEOFF Plan 2 retirees as something other than a law enforcement officer or fire fighter. According to recent data compiled by DRS, 265 LEOFF Plan 2 retirees have reentered public employment without suspension of their pension. The average annual compensation for these second career employees is \$28, 268. They work as employees for a number of different public employers, the majority of which are not LEOFF employers.

LEOFF Plan 2 Retirees: Second Public Career Distribution



It was not the intention of the Board nor the Legislature to allow a retired LEOFF Plan 2 member to return to work as a law enforcement officer or fire fighter and continue receiving a LEOFF Plan 2 pension. The City of DuPont has taken advantage of a loophole created by the intersection of the Career Change law and the pre-existing LEOFF definition of law enforcement officer to do exactly that.

UNINTENDED CONSEQUENCE OF CAREER CHANGE LAW

The City of DuPont's full-time Chief of Police recently retired from LEOFF. The City hired a LEOFF Plan 2 retiree to replace him. The new Chief was originally hired on an interim basis and served full-time for approximately 3 months. Following DRS's recent disallowance of DuPont's claim that its Fire Chief was an independent contractor and the resulting suspension of the Fire Chief's LEOFF Plan 1 pension, the interim Police Chief "...notified the city of his intention to terminate his interim contract 'out of fear and confusion from the recent audit findings,'²"

To allow the retiree to work as Police Chief and receive his LEOFF Plan 2 pension, the City reclassified the Police Chief's position from full-time to "part-time" requiring 35 hours per week. It does not appear any change in duties accompanied the change in hours. The City redefined the position to reclassify it from LEOFF to PERS to fit within LEOFF Plan 2's Career Change provisions.

This loophole relies on an aspect of LEOFF's definition of a "Law Enforcement Officer":

"Law enforcement officer" beginning January 1, 1994, means any person who is commissioned and employed by an employer on a **full time, fully compensated** basis to enforce the criminal laws of the state of Washington generally, with the following qualifications:

...

(c) Only such **full time** commissioned law enforcement personnel as have been appointed to offices, positions, or ranks in the police department which have been specifically created or otherwise expressly provided for and designated by city charter provision or by ordinance enacted by the legislative body of the city shall be considered city police officers;

² *DuPont police chief to work part time, retain benefits*, The Olympian, July 31, 2013.

RCW 41.26.030(18) (emphasis added). Fire fighters must also be full-time, fully compensated to qualify for LEOFF, RCW41.26.030(16). LEOFF is somewhat unique in limiting membership to full-time employees. PERS, TRS, SERS, include part-time employees if they work at least 70 hours per month³. A review of the role of volunteer firefighters and reserve police officers helps explain why the Legislature set the bar for LEOFF membership so high.

Part-time Law Enforcement Officers and Fire Fighters

LEOFF's full-time requirement springs from a unique aspect of the fire fighter and law enforcement officer professions. A number of Washington's communities are served by Volunteer Fire Fighters and/or Reserve Police Officers. These part-time public safety officers belong to the Volunteer Firefighters and Reserve Police Officers' Retirement System, Chapter 41.24 RCW.

Volunteer Firefighters and Reserve police officers have the same authority and duties as their full-time counterparts when called into service. The distinction is they do not work full-time:

"Reserve officer" includes any law enforcement officer who does not serve as a law enforcement officer of this state on a full-time basis, but who, when called by such agency into active service, is fully commissioned on the same basis as full-time officers to enforce the criminal laws of this state⁴;

Washington's Courts recognize a similar distinction between LEOFF eligible fire fighters and volunteer fire fighters, noting the distinction between full-time vs. part-time/volunteer controls whether the fire fighter goes into LEOFF or the Volunteer system⁵. Similarly, when discussing LEOFF eligibility for police matrons the Court noted: "that plaintiffs are full-time employees, they are regularly employed as opposed, for example, to police reservists...⁶"

"Full-time" is not defined in the LEOFF statute, nor has it been defined by the Courts⁷. DRS adopted a rule in 1995 defining full-time as "regularly scheduled to work at least 160 hours per

³ An "eligible position" for PERS, PSERS, and TRS Plan 2/3 is a position that normally requires 70 or more hours per month for at least 5 months per year. The relatively new retirement system of PSERS, created for public safety officers who are not fully commissioned law enforcement officers, also requires full-time employment.

⁴ WAC 139-05-810(1).

⁵ *Schrom v. Board for Volunteer Fire Fighters*, 153 Wn.2d 19, 27, 28, 100 P.3d 814 (2004).

⁶ *Beggs v. City of Pasco*, 93 Wn.2d 682, 685, 611 P.2d 1252 (1980).

⁷ *Tucker v. Department of Retirement Systems of State*, 127 Wn.App. 700, 706, 113 P.3d 4 (2005); The closest the Court has come is to uphold DRS determinations that persons performing law enforcement or firefighter duties

month,” i.e. at least 40 hours per week for at least 20 days, WAC 415-104-011(3). Coming ten years before the Career Change law, the rule had no impact on post-retirement employment laws when adopted. The 2005 Career Change legislation unintentionally created the loophole used by DuPont. Prior to that time a LEOFF Plan 2 retiree’s pension would be suspended upon reentering covered employment regardless of what public position he or she entered. Redefining a LEOFF position as a PERS position would have been pointless, as it would not prevent suspension of the retiree’s pension.

That is no longer the case. Even though the DuPont’s Police Chief is a commissioned position created by the city to enforce the criminal laws of the State of Washington generally, i.e. a law enforcement position, DuPont has reduced the hours to make it a PERS position so its Police Chief can continue to receive a LEOFF Plan 2 pension.

DRS has fielded similar inquiries seeking the same result by focusing on the “fully compensated” eligibility requirement. Some examples include questioning whether a LEOFF Plan 2 retiree is not fully compensated, and therefore not LEOFF eligible, if he or she did not receive health care benefits, or earned annual leave at a lesser rate than other employees with similar experience. These inquiries are designed to take advantage of the high bar to LEOFF membership used to distinguish between LEOFF eligible law enforcement officers and fire fighters and volunteer or part-time law enforcement officers and fire fighters. They seek to use that policy for an unintended purpose: to enable retirees to work as a law enforcement officer or fire fighter and continue to receive their pension.

MEDIA RESPONSE TO PART-TIME DUPONT POLICE CHIEF

The Associated Press and the Daily Olympian recently published articles reporting on DuPont’s arrangement⁸. Publishers of the Associated Press article include the Seattle Times, the Bellingham Herald, the Spokesman Review, and the Kansas City Star.

The Olympian followed up with an editorial confusing the 2005 Career Change bill with the 2001 Retire-Rehire provisions legislation, mistakenly claiming the 2001 law allowed LEOFF Plan 2 retirees to return to work as law enforcement officers or fire fighters for 1800 hours per year

less than half time do not meet the statutory full time requirement, see *Buckley v. Department of Retirement Systems*, 116 Wn.App. 1, 65 P.3d 1216 (2003); *International Ass'n of Fire Fighters Local 3266, AFL-CIO v. Department of Retirement Systems, State of Wash.*, 97 Wn.App. 715, 987 P.2d 115 (1999).

⁸ *DuPont police chief will collect salary, \$90,000-a-year pension*, Associated Press, published in Seattle Times August 3, 2013.

(35 hours per week x 52) while receiving a benefit. Neither the 2001 law nor the 2005 career change legislation intended that result. Further, that result cannot be accomplished without redefining a full-time position as a part-time job. Nonetheless, the Olympian included the Career Change law in its call for a full repeal of retire-rehire⁹.

POLICY OPTIONS

The 3 policy options below were presented to the Board on September 25, 2013 for consideration.

Option 1: Clarify that Law Enforcement or Firefighter Jobs do not qualify for the Career Change law regardless of whether they are full-time, fully compensated.

The original intent of the career change law limited its application to situations where a retired LEOFF Plan 2 member began a second career as something other than a law enforcement officer or fire fighter. The policy looked to the duties of the position, not whether it was full time and/or fully compensated.

Under this option, the Board would propose remedial legislation to clarify its original intent that a LEOFF Plan 2 retiree who returned to work as a law enforcement officer or fire fighter would not qualify for the career change law even if the position was technically not LEOFF eligible.

This would reaffirm the original policy of the Career Change law, closing the loophole utilized by Dupont to place a LEOFF Plan 2 retiree into a Law Enforcement Officer position, in this case police chief, without suspension of his pension.

Option 2: Take no action

Under this option the Board would retain the Career Change law in its current form.

Option 3: Allow LEOFF Plan 2 retirees to accept a LEOFF position without pension suspension.

Under this option a LEOFF Plan 2 retiree would have the same option upon entering a LEOFF position as he or she has under current law when entering a PERS position. That is, the retiree could either: 1) reenter LEOFF Plan 2 membership and have their pension calculated upon re-retirement; or 2) Choose not to reenter membership and continue to receive a LEOFF Plan 2 retirement allowance while employed as a law enforcement officer or firefighter.

This would alter the original policy of the Career Change law by including retirees who return to work in a LEOFF position. This would allow the option for all LEOFF Plan 2 retirees without requiring adjustment of employee hours or compensation.

⁹ *Time for Retire-Rehire to End in This State*, Daily Olympian, August 8, 2013.

POLICY OPTION FOLLOW-UP

At its September 25th meeting the Board requested follow-up on option 1, clarifying original intent by closing loophole and option 3, allowing LEOFF Plan 2 retirees to accept a LEOFF position without suspension of pension.

Option 1: Reinforce Original Intent

LEOFF Plan 2 retirees accepting employment covered by the Public Employees' (RCW 41.40), Teachers' (RCW 41.32), School Employees' (RCW 41.35) or Public Safety Employees (RCW 41.37) retirement systems may 1) enter membership in the new system and have his or her retirement allowance suspended; or 2) decline membership and continue to receive retirement checks.

LEOFF Plan 2 retirees who enter LEOFF positions do not have that option. They are not changing careers and so remain subject to suspension of benefits. It is the redefinition of LEOFF positions as PERS positions, primarily by converting them to "part-time" that allows circumvention of the original intent.

On the other hand, legitimate part-time positions, such as part-time assistant chief of a fire district, are properly outside the scope of LEOFF and thus within the original intent of the Career Change law. Such positions are designated as part-time regardless of who fills them.

These two considerations, closing the loophole while not restricting bona fide non-LEOFF employment, could be met by amending the statute to require suspension of LEOFF plan 2 retirees pension if:

- They work in a job with LEOFF duties but are outside of LEOFF because the job is not full-time and/or fully compensated; and
- Exceed a given number of hours:
 - An 867 hour annual maximum would be consistent with restrictions in place for other plans;
 - 25 hours per week, slightly more than half-time; or
 - Another standard deemed appropriate by the Board.

If these or similar standards were adopted and employers intentionally misreported they would be guilty of either a class B felony in LEOFF, RCW 41.26.062; or a misdemeanor in PERS, RCW 41.40.055.

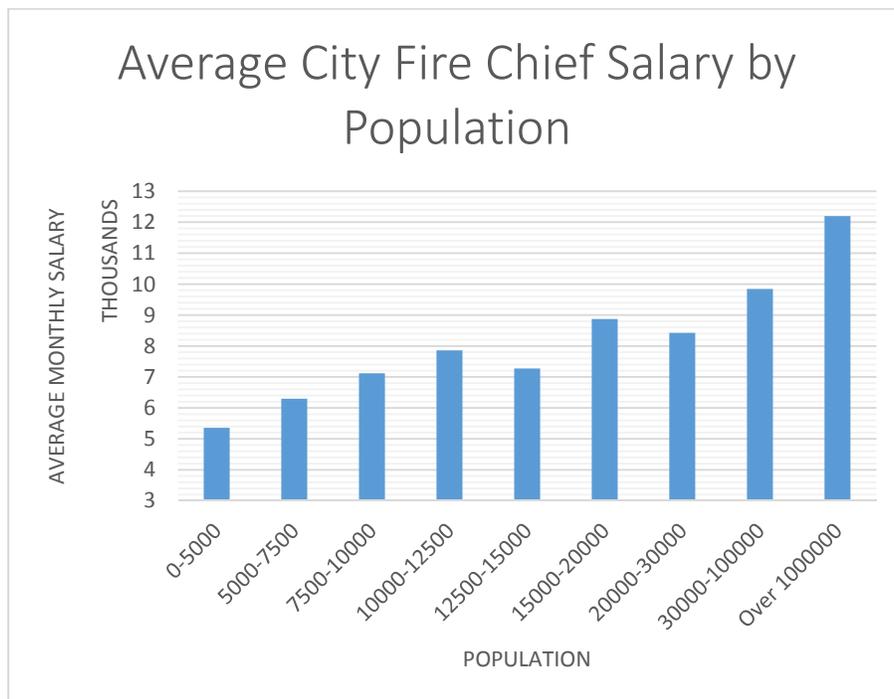
Option 3: Allow Reemployment in a LEOFF Position without Pension Suspension.

Another policy option is allowing reemployment without pension suspension. This could either be done for a defined class of LEOFF Plan 2 reemployment or for all LEOFF Plan 2 reemployment.

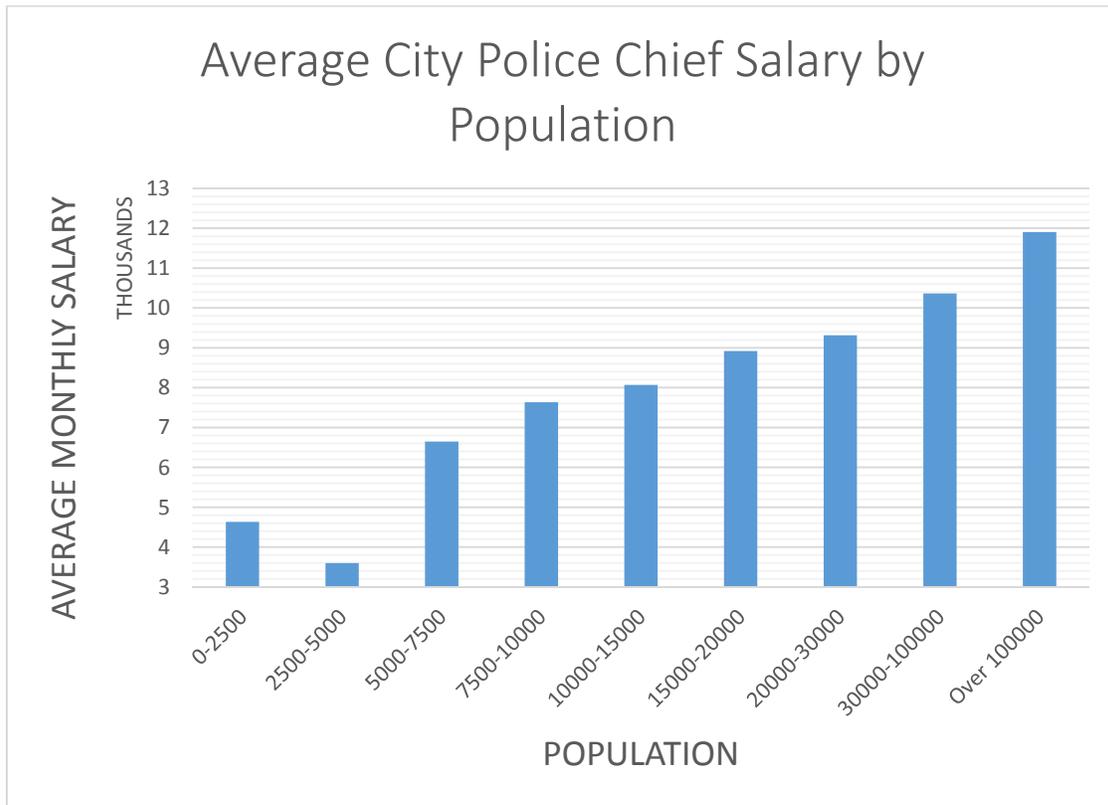
Option 3a: Allow limited reemployment

Some Board members noted that skilled LEOFF 2 retirees could be valuable to smaller jurisdictions lacking the resources to compete with larger jurisdictions on salaries. Allowing limited reemployment in a LEOFF position could enable those smaller jurisdictions to hire experienced chiefs they could not otherwise afford.

Reviewing salary and population data from police and fire chiefs supplied by the Association of Washington Cities (AWC) shows a salary gap between smaller and larger jurisdictions. The charts below were extrapolated from AWC’s 2012 salary survey of Cities and Towns¹⁰:



¹⁰ Salaries were reported in ranges, from which salary midpoints were determined. Salary midpoints within a population group were then averaged to estimate average Chief salaries within a particular population cohort.



From the AWC data, it appears possible to enable smaller, lower paying jurisdictions access to hire chiefs retired from more populous jurisdictions by allowing reemployment in smaller jurisdictions without loss of pension. The AWC data shows that cities and towns with less than 10,000 people tend to pay less for their police and fire chiefs.

Other LEOFF provisions use employer population as an eligibility criteria. Public safety officers, who perform both police and fire duties, qualify for LEOFF Plan 2 only if employed in a City or town less than 10,000 people, RCW 41.26.030(18)(e).

Population is an easily verifiable objective measure, but is not necessarily a good predictor of salary. Police Chief salary data shows a wide variance between cities of nearly identical size:

City	County	Population	Average Monthly Police Chief Salary
DuPont	Pierce	8,855	7,647
College Place	Walla Walla	8,875	6,698
Grandview	Yakima	11,010	5,897
Cheney	Spokane	11,070	7,084
Enumclaw	King	11,100	7,685
Snoqualmie	King	11,700	9,548

Population is not the most robust predictor of salary levels. For instance, DuPont’s Police Chief’s average salary is \$1750 per month higher than Grandview though Grandview has over 1000 more people. A City’s location, i.e. urban vs. rural, appears a better predictor of salary levels.

There would also be challenges crafting statutory language accomplishing the policy goal without creating new loopholes. Without limiting language, any LEOFF Plan 2 retiree could work and draw a pension as long as the employer had less than 10,000 inhabitants. Consistency with the underlying policy requires developing standards to ensure new provisions accomplished the goal of allowing LEOFF Plan 2 retired Chiefs to transition from larger better-paying employers to smaller lower-paying employers:

- Tracking pre-retirement employment:
 - Ensuring retiree came from more populous, higher paying employer, otherwise transfer is lateral, not necessarily to a lower-paying district;
 - Ensuring retiree retired from a different employer; otherwise a current employee is simply retiring before taking a promotion – no real advantage to the employer.

- Duty Limitations:
 - Limiting availability to chief or similarly high level positions; otherwise any LEOFF member may take essentially the same job with another employer, or even the same employer, drawing both full salary and full pension without furthering the policy goal.

Tracking these kind of limitations would probably be administratively difficult for DRS. It also presents the possibility for more manipulation. Generally speaking, the more complicated an administrative standard, the more susceptible to gaming.

Option 3B: Unlimited Reemployment in LEOFF Positions

The Board could propose allowing LEOFF Plan 2 retirees to take a LEOFF position without suspension of pension. This would increase transparency as returning to work in a LEOFF position would no longer require redefining the position to disqualify it from LEOFF. It would, however, raise some issues.

- Inconsistent with the Original Intent: The Career Change law would no longer be targeted towards LEOFF Plan 2 retirees changing careers, but would instead look more like a standard retire-rehire program, allowing LEOFF Plan 2 retirees to earn a salary and collect their pensions regardless of the type of post-retirement employment.
- Negative Public Response: Given the recent negative public response to LEOFF members drawing both pension and salary at the same time, it appears likely that loosening the current restrictions on post-retirement employment would engender more of the same.
- Inconsistent with Current Legislative Policy: The Legislature's recent actions rolling back retire-rehire provisions in other public retirement systems¹¹ indicate that introducing a bill moving in the opposite direction may not be well received.

¹¹ ESHB 1981 (ch. 47, laws of 2011), repealed provisions allowing PERS 1 and TRS 1 retirees to work up to 1500 hours in a calendar year without impacting their pension.