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**SUPREME COURT OF THE STATE OF WASHINGTON**

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BARBARA WERNER

Petitioner,

v.

THE STATE OF WASHINGTON, WASHINGTON STATE  
PATROL, JEFFREY DEVERE, JAY CABEZUELA,  
TIMOTHY WINCHELL, and JOHN BATISTE,

Respondents.

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**STATE'S RESPONSE TO MEMORANDUM OF  
AMICUS CURIAE RESERVE ORGANIZATION  
OF AMERICA IN SUPPORT OF PETITIONER'S  
MOTION FOR DISCRETIONARY REVIEW**

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## I. INTRODUCTION

WSP recognizes that “reservists play an integral role in the modern military,” and “continued support for our all-volunteer military force is crucial to a number of important military objectives . . . .” Andrew P. Sparks, *From the Desert to the Courtroom: The Uniformed Services Employment and Reemployment Rights Act*, 61 *Hastings L.J.* 773, 783 (2010). State law promotes this important interest by granting “military leave with pay not to exceed twenty-one working days during each year” to all public employees. WAC 357-31-360; *see also* RCW 38.40.060 (governing military leave and resulting pay).

However, contrary to the arguments of amicus Reserve Organization of America, neither the well-reasoned Court of Appeals nor trial court decision legitimizes discrimination against military service members. Br. of Amicus at 1. On the contrary, the policy at issue was created “to ensure all WSP employees are treated equally while on *any* type of long-term

leave.” *Martin v. State*, No. 38332-6-III, 2023 WL 3116657, at \*3 (Apr. 27, 2023) (unpublished) (emphasis added).

The courts below properly granted summary judgment because the Washington State Patrol’s (WSP’s) paid leave policy, TAR § 2.020, yields a greater benefit to public employees working an alternative four day per week schedule than employees working a standard five day per week schedule during the first 15 days of long-term leave. CP 321. After the 15<sup>th</sup> day, all employees’ schedules are normalized to a standard workweek, which achieves an equitable outcome.

Moreover, amicus does not identify any harm to the original plaintiffs in this case, Petitioner Werner, or reservists generally giving rise to an issue of substantial public interest. Consequently, amicus’ concerns about military recruitment and retention are unfounded, and this Court should deny review.

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## II. ARGUMENT

### A. Amicus Does Not Articulate Any Grounds Supporting Supreme Court Review

Amicus does not identify a basis for Supreme Court review under RAP 13.4(b). The implication in its briefing, however, is that Petitioner Werner presents an issue of “substantial public interest.” RAP 13.4(b)(4). Amicus is incorrect, as this case is limited to the application of an internal WSP policy to employees of that agency, and Werner does not have standing.

Amicus also erroneously claims that the decision below violates the Uniformed Services Employment and Reemployment Rights Act (USERRA) and discriminates against military service members. Br. of Amicus at 17. But TAR § 2.020 does precisely the opposite: it levels the field among employees who work an alternate four tens schedule and those who work a standard five eights schedule. CP 317. Moreover, four tens employees receive *greater* compensation value than their five

eights colleagues during the first 15 days of military leave.  
CP 310.

**B. Amicus Does Not Demonstrate How TAR § 2.020 Discriminates Against Reservists, When the Policy Instead Promotes Equity**

Amicus refers to the Court of Appeals’ analysis of “hypothetical, extreme, discriminatory end-runs around” the paid military leave benefit in RCW 38.40.060 as showing how TAR § 2.020 *could* be altered to create negative effects that violate USERRA. Br. of Amicus at 1. But this case concerns how TAR § 2.020 is actually implemented in a fair manner, as shown in three ways.

First, unlike in cases such as *Washington Federation of State Employees v. State Personnel Board*, 54 Wn. App. 305, 773 P.2d 421 (1989) and *Butterbaugh v. Department of Justice*, 336 F.3d 1332 (Fed. Cir. 2003), which Petitioner Werner relies on, this matter involves a policy that charges a WSP employee paid leave “only for days that he or she is scheduled to work.” *Martin*, 2023 WL 3116657 at \*6.



TAR § 2.020 simply does not force WSP employees serving in the military reserves to use leave time that otherwise would not be counted absent that service. *Martin*, 2023 WL 3116657 at \*4 (Petitioner Werner “did not present evidence of any occasion when WSP personnel required or forced a class member to use paid leave.”); *cf.* Br. of Amicus at 5.

Second, the benefit that four tens employees enjoy before TAR § 2.020 brings them in line with a normal five eights workweek is outlined in the expert report of certified public accountant Sean Black, who analyzed the policy. CP 309-11.

Mr. Black explains:

According to the military leave provision, an officer participating in a four (4) day/ten (10) hour workweek, during the first fifteen (15) working days of military leave, is paid the equivalent of 150 hours; or 15 days x 10 hours. During the remaining six (6) working days of military leave, an officer is paid the equivalent of 48 hours; or 6 days x 8 hours. This results in a total of 198 hours of paid military leave (150 hours + 48 hours).

In contrast, an officer participating in a five (5) day/eight (8) hour workweek, during the first fifteen (15) working of military leave, is paid the

equivalent of 120 hours; or 15 days x 8 hours. During the remaining six (6) working days of military leave, an officer is paid the equivalent of 48 hours; or 6 days x 8 hours. This results in a total of 168 hours of paid military leave (120 hours + 48 hours).

CP 310.

This indisputable math reveals no “dilution” in time as amicus contends. Br. of Amicus at 1. Rather, a four tens employee, during the first 15 days of military leave, receives “an additional 30 hours of paid military leave” relative to a five eights employee. CP 310. With an illustrated pay rate of \$30.00 per hour, the outcome is an *extra* \$900.00 in value of paid military leave given to four eights employees over the same period of time. CP 310.

Third, as WSP Chief Financial Officer Bob Maki—who developed TAR § 2.020—adds, the policy exists to “ensure *all* WSP employees are treated equally while on any type of long-term leave,” not just military leave. CP 316 (emphasis in original). CFO Maki describes that TAR § 2.020 “only applies in

very limited situations – only when employees are on alternate schedules and taking more than 15 consecutive days of leave.” CP 317.

The record confirms that the vast majority of WSP employees whose schedules changed pursuant to TAR § 2.020 were not taking military leave. CP 317. Notably absent from amicus’ argument is any explanation of how the equitable application of TAR § 2.020 across all forms of paid leave will specifically “hinder military recruitment and retention efforts.” Br. of Amicus at 5. In fact, *none* of the eight original plaintiffs in this case “changed their schedule because of TAR § 2.020 while on paid military leave,” and Petitioner Werner never exhausted her paid military leave *at all*, resulting in no injury and a lack of standing to pursue USERRA claims as a class representative. CP 317, CP 548-55, CP 556-57.

The Court of Appeals unpublished opinion correctly held that TAR § 2.020, as applied, does not violate either 38 U.S.C. § 4316(a) or (d).

### III. CONCLUSION

This case does not involve an issue of substantial public interest for this Court to decide. Contrary to amicus' assertions, there is no discrimination inherent in the equitable application of TAR § 2.020. Likewise, there is no evidence that bringing alternative work schedules in line with standard schedules will hinder military recruitment or retention. This Court should deny Werner's Petition for Review.

This document contains 1,222 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 23rd day of August, 2023.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of August 2023, at Olympia, Washington.

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**ATTORNEY GENERAL'S OFFICE, TORTS DIVISION**

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