

STATE OF OHIO

STATE EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

CASE NO. 01-MED-10-1051

**UNITED ELECTRICAL, RADIO &
MACHINE WORKERS OF AMERICA,
LOCAL 791**

"Employee Organization"

and

OHIO TURNPIKE COMMISSION,

"Employer"

STATE EMPLOYMENT
RELATIONS BOARD
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**REPORT OF FACT-FINDER
AND RECOMMENDATIONS**

DATE OF REPORT AND DATE OF MAILING: FEBRUARY 11, 2002

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I. INTRODUCTION

This matter comes before the Fact-Finder as a result of a referral on November 30, 2001 by the State Employment Relations Board ("SERB") pertaining to fact-finding protocol between the United Electrical, Radio & Machine Workers of America, Local 791 (hereinafter referred to as "Union" or "Employee Organization") and the Ohio Turnpike Commission (hereinafter referred to as "Commission" or "Employer").

The fact-finding hearing was conducted for the taking of evidence, submission of issues and presentation of the parties' respective positions on Thursday, January 31, 2002, and Friday, February 1, 2002, with the hearing being conducted at the Radisson Hotel, Middleburg Heights, Ohio. No post-hearing briefs were submitted, and the hearing was considered closed as of February 1, 2002.

The Fact-Finder received and has taken into consideration numerous exhibits and extensive material presented by both parties, including the parties' respective pre-hearing position statements.

Included in the material presented and received by the Fact-Finder was the parties' current Collective Bargaining Agreement dated March 17, 1999 (the effective date of the Agreement) through January 1, 2002. Some of the exhibits and documents submitted by the parties will be referenced in more detail, *infra*, as they relate to the specific issues under review.

In addition, the Fact-Finder has taken into consideration the statutory guidelines enunciated in Revised Code §§4117.14(C)(4)(a) through (f), the guidelines set forth in Revised Code §§4117.14(G)(7)(a) through (f), and SERB Regulations, Ohio Administrative Code 4117-9-05(J) and (K)(1) through (6).

Appearing on behalf of the parties, in addition to the respective representatives designated on the face sheet of this Report, were the following:

On Behalf of the Union

John Arvay, Chief Steward
Danell Brown, Chief Stewart
Terry F. Crandall, UE Chief Steward
Gene Elk, UE International Representative
Lisa Frank, UE Research Director
John Hovis, UE General President
Sherri Kasson, Chief Steward
James E. Lustik, UE Chief Steward
James Roudebush, Steward
Shawne P. Wise, UE Local 791 President

On Behalf of the Commission

Dan Castrigano, Deputy Executive Director
Gary W. Cawley, Superintendent of Toll Operations
Kathleen Dolbin, Human Resources Manager
Sharon Isak, Director of Toll Operations
James T. Steiner, CFO/Comptroller
Timothy Ujvari, Maintenance Engineer

II. BACKGROUND

The Ohio Turnpike Commission is an independent instrumentality of the State of Ohio charged with operating and maintaining the Ohio Turnpike, a limited access thoroughfare of 241 miles running in a generally east-west direction connecting with the Pennsylvania Turnpike at the easterly boundary and connecting with the Indiana Turnpike at the westerly boundary. See, generally, Ohio Revised Code Chapter 5537. The Commission consists of four members appointed by the Governor with the advice and consent of the Senate, the Ohio Director of Transportation (Ex Officio) and two members of the General Assembly representing the Senate and the House of Representatives. See, generally, Revised Code §5537.02. The day to day operations are supervised by the Executive Director. The Turnpike has 30 toll plazas staffed by approximately 325 full-time

and 285 part-time toll collectors. The roadway itself is maintained by approximately 280 field employees in the Maintenance Department located at eight installations situated along the Turnpike.

In the Maintenance Department, employees are divided into sections, sign and shop and division. Section employees are situated at the eight installations, each installation being responsible for approximately a 30 mile portion of the Turnpike. Each section consists of roadway personnel, mechanics and custodians. Section personnel are also involved in various functions including snow plowing during winter and maintenance and safety services as required on the Turnpike.

Division personnel are located at two installations and are responsible for providing specialized services including trade work such as plumbers, electricians, carpenters, technicians and clerks.

The Bargaining Unit consists of all regular, full-time, non-supervisory field employees in the Toll Operations and Maintenance Department. The Commission employs approximately 900 persons of whom 600 constitute the Bargaining Unit.

The Union is the present exclusive bargaining representative of the Bargaining Unit. The Union began representing the Bargaining Unit in 1992 pursuant to a SERB conducted election. The parties negotiated contracts covering the periods from May 13, 1992 to December 31, 1996;

January 1, 1996 to December 31, 1998; and January 1, 1998 to December 31, 2001.¹ The parties met ten times between November 15, 2001 and January 29, 2002 to negotiate a new Collective Bargaining Agreement. A substantial number of issues were agreed to by the parties and are not discussed or referenced in this Report, except in such limited extent that they have a particular applicability to this Report.²

A significant and substantial amount of material has been presented to the Fact-Finder and he would be remiss if he did not commend the representatives of both the Union and the Commission for presenting their respective positions in an articulate, detailed and highly professional manner. In preparing this Report and Recommendations, the Fact-Finder has attempted to summarize the salient aspects involved, however, any brevity therein should not be construed as an attempt to diminish the significance of each report or the volume of material presented in support. This Report and Recommendations would be of considerable size if all the arguments, pro and con, and all of the material were discussed at length. Additionally, the Fact-Finder is cognizant of the caveat expressed by Justice Douglas in *Johnson v. University Hosp. of Cleveland* (1989), 44 Ohio

¹Although the Commission, at Page 3 of its position statement, states that the latest contract is for the period January 1, 1998 to December 31, 2001, the Fact-Finder was not presented with a copy of such a contract. The last contract which the parties presented to the Fact-Finder is dated March 17, 1999, Section 27.1 of which states as follows: "This Collective Bargaining Agreement shall be effective as of the date of execution, unless otherwise provided, and shall be in full force and effect until 12:01 a.m. January 1, 2002 . . ." There are, however, provisions which reference a "January 1" time line. See, e.g., Sections 8.1, 8.2, 11.1, and 18.4. For purposes of discussion throughout this Report, the Fact-Finder will consider that the parties last Collective Bargaining Agreement is for the period March 17, 1999 through 12:01 a.m. January 1, 2002 and not January 1, 1998 to December 31, 2001 as referenced by the Commission.

²Although not pertinent nor influencing this Report and Recommendations, the parties have noted that Teamsters Local 436 has filed a petition with SERB to serve as the exclusive collective bargaining representative for the same Bargaining Unit now represented by Local 791 and that a SERB conducted election has apparently been scheduled for sometime in March 2002. No stay order was entered by SERB as to the instant fact-finding process pending a determination of the outcome of the election.

St.3d 49, 58, wherein he stated: “Our occupational duty continuously requires us to balance rights and responsibilities of persons regardless of their color, sex, position or station in life. We accomplish that balancing in this case while recognizing that our decision will be something less than universally accepted.”

III. RECOMMENDATIONS

Section 1 (Employee Organizations)

Initially, there was an issue pertaining to the question of leave to be granted to negotiating committee members. The Fact-Finder finds that the parties have now agreed and stipulate to a new Section 1.12 to read as follows:

“Employees who serve as members of the Union Negotiating Committee during negotiations for a renewal Collective Bargaining Agreement shall be released by the Commission from their scheduled work assignments for this purpose, shall accrue no ‘occurrences’ under Section 26 of the Collective Bargaining Agreement for such negotiating leave, shall not be compensated by the Commission for such leave, but each day of such leave, up to the first ten (10) days of bargaining, shall be treated as eight (8) duty hours for purposes of accrual of benefits, including sick leave and vacation leave.”

Section 6.1 (Uniforms)

At the beginning of the fact-finding, the Union had submitted a proposal to amend Section 6.1 dealing with toll collectors being provided shorts as part of a summer uniform. The Fact-Finder finds that the parties have agreed and stipulated that Section 6.1 shall be amended by adding the following language:

“The Commission hereby agrees that the Toll Collectors Manual shall be revised to provide shorts as a partial complement of the summer uniform. Shorts shall be made available for those individuals who request them.”

Section 6.2 (Uniforms)

Section 6.2 presently provides, in pertinent part, that work uniforms are provided to full-time maintenance workers, the uniforms remaining the property of the Commission, and that the uniforms as so provided would be worn at all times when employees are on duty. The costs of the uniforms and the costs of cleaning are borne by the Commission. The Union has proposed that Section 6.2 be amended by providing that the Commission pay a winter clothing allowance reimbursement of up to \$200.00 to each maintenance worker, except mechanics, during the life of the Agreement. Of the approximately 280 maintenance workers, 24 are mechanics. The Commission contends that the maintenance workers already receive a “generous clothing allowance” and that mechanics are, in effect, paid a premium on their wages in order to adjust for tool purchases (an issue to be discussed *infra*) and winter clothing. Further, the Commission argues that maintenance employees are already provided with work uniforms which include such things as rubber boots, winter hard-hat liners, gloves and overalls. The Commission further points out that the total average cost of clothing for the 278 maintenance employees who are members of the Union is \$72,485.00, which averages to \$261.00 per year per employee. Although no specific cost was determined pertaining to this proposal, it would not be complicated mathematics to arrive at a conclusion that the projected costs of a reimbursement maximum of \$200.00 to each maintenance worker, except for the 24 mechanics, would approximate \$40,000.00.

Although recognizing that a cost factor would be involved if the Commission provided winter work uniforms to the maintenance employees, the Fact-Finder is of the view that there is a certain anomaly between the uniform provided to toll collectors and the uniform apparently provided to maintenance workers. Section 6.1 specifically provides that there are two different types of uniforms provided, one for winter and one for summer, for toll collection

personnel. Although it is recognized that toll collectors may be exposed to the winter elements for a longer duration than maintenance personnel, nevertheless, the testimony was clear that maintenance personnel certainly do spend a portion of their work time outside and in a cold weather atmosphere during the winter months. Presently, these maintenance workers wear and provide their own selection of outerwear for which there is no uniformity. The Fact-Finder also notes that the current language of Section 6.2 states “uniforms, as provided by the Commission, shall be worn at all times when employees are on duty.” Thus, a maintenance employee may be wearing a designated work uniform under his or her outer-garments and then be wearing that individual’s personally selected outer-gear. This aspect of individual selection appears to run contrary to the Commission’s policy of uniformity of clothing among employees, if, for no other reason, than for identification. The Fact-Finder can find no reasonable rationale for differentiating between winter wear for toll collectors who are outside during winter months and for maintenance workers, who are likewise outside in winter months. Consistent with Section 6.1, however, the Fact-Finder is of the view that it would be more appropriate for the winter work uniform to be provided by the Commission rather than providing for a reimbursement. For no other reason, this would enable the Commission to determine the exact nature, type, style, etc. of the particular winter clothing.

The Fact-Finder, therefore, recommends that Section 6.2 be amended to state as follows:

“Work uniforms, including appropriate winter clothing, shall be provided to full-time, hourly paid maintenance workers and such uniforms shall remain the property of the Commission. Uniforms, as provided by the Commission, shall be worn at all times when employees are on duty. Costs of the uniforms and of cleaning them shall be borne by the Commission.”

Section 6.2 (Uniforms)

In addition to the winter clothing issue raised by the Union as discussed above, the Union has also proposed an amendment to Section 6.2 to provide a tool allowance reimbursement of up to \$300.00 be granted to each mechanic (over the life of the Contract) to enable the mechanic to purchase tools or tool insurance. The estimated cost of this benefit over the life of the Contract would be approximately \$7,200.00. During the course of the testimony, it was indicated that some employees have apparently invested thousands of dollars in tools and that mechanics are expected to supply their own hand tools. One witness, James Rodebush, a welder-mechanic, indicated that he spends approximately \$200.00 to \$300.00 per year on tools. Further, the Union contended that other trades, such as carpenters, plumbers and electricians, have all of their tools provided by the Commission.

The Commission conceded that the mechanics are requested to provide their own basic tools which apparently is not a precondition for carpenters, plumbers and electricians. The Commission pointed out, however, that this requirement is specifically indicated as a job requirement prior to a mechanic being hired or assuming that position. The Commission, during the fact-finding, provided an "application invitation" pertaining to the mechanic position which indicated, in pertinent part that the applicant "must possess own tools." Although the scope of the word "tools" is not defined and is open to speculation, it was nevertheless indicated that if a particular tool was necessary in order to accomplish a certain assignment, the employee had an available remedy to contact a superior requesting that the Commission purchase the particular tool. Further, the testimony during the fact-finding did not indicate that this issue was an insurmountable one or one that was creating a series of grievances based on need by the mechanics versus refusal to supply a necessary tool by the Commission.

The Fact-Finder recommends that, except as amended in the preceding Recommendation, Section 6.2 of the current Contract should remain unchanged.

Section 7 (Sick Leave)

Section 7.1 of the Collective Bargaining Agreement contains a provision that the Commission will provide a sickness and accident insurance plan for the employees which pays 66-2/3% of the employee's regular hourly rate after 15 work days of continuous absence up to a maximum of \$500.00 per week for 26 weeks. Employees are permitted to use their sick leave for the 15 days of absence or for any other absence shorter than 15 work days. The Contract also provides that employees are entitled to an initial sick leave credit of five work days charged against sick leave subsequently earned and are entitled to sick leave at the rate of one work day for each 138-2/3 hours of duty while in continuous service.

The Union has proposed that the maximum dollar allowance be increased to \$515.00 per week effective January 1, 2003 and to \$530.00 per week effective January 1, 2004. In all other respects, the Union proposes to keep the current contract language of Section 7.1.

During the fact-finding hearing, it was indicated that the sickness and accident provision is self-funded by the Commission and that the Commission also provides a separate sickness and accident policy from that discussed in Section 7.1, but the premium for this separate policy is paid entirely by the employee and the benefit is based on the type of program selected by the individual employee.

The Commission proposes increasing the minimum qualification time from 15 work days to 30 work days.³ It was also indicated that the present formula of 66-2/3% of the employee's

³The Commission indicated that the average length of sickness and accident used was 43 days in 2000 and 35 days in 2001.

regular hourly rate up to a maximum of \$500.00 per week has been in effect since 1992 without any change.

Considering the change in overall economic circumstances over the last decade and the dollar amount requested, although there is some resulting increased costs to the Commission, the Fact-Finder does not believe that the Union's requested increase to \$515.00 per week commencing January 1, 2003 and increase to \$530.00 per week commencing January 1, 2004 is unreasonable. Additionally, the Fact-Finder is satisfied that the present 15 day eligible waiting period for this sick leave pay is a reasonable waiting period because it is tied to or correlated with the 15 day sick leave provision. Although the Fact-Finder recognizes that extending the waiting period to 30 days from 15 days would result in a savings, estimated by the Commission to be \$410,000.00, the 15 day waiting period appears to be more realistically tied to the utilization of the 15 day sick leave provision.

For the reasons set forth herein, the Fact-Finder recommends that Section 7.1 be retained in its current contract language except that the following sentence shall be inserted after the first sentence in the second paragraph of Section 7.1, said sentence to read: "The maximum shall increase to \$515.00 per week on January 1, 2003 and to \$530.00 per week on January 1, 2004."

Section 8.7 (Vacation Leave)

Initially, there was an issue pertaining to Section 8.7 dealing with vacation leave. However, the Fact-Finder finds that the parties have now agreed and stipulate that Section 8.7 of the current Contract shall remain unchanged.

Sections 10.1 and 10.2 (Personal and Other Leave)

Initially, there was an issue dealing with proposed changes to Sections 10.1 and 10.2 pertaining to "personal leave." The Fact-Finder finds that the parties have now agreed and stipulate that the current contract language for Sections 10.1 and 10.2 shall remain unchanged.

Section 12 (Hospitalization, Surgical and Major Medical Benefits, and Dental and Vision Care Coverage)

Under the Commission's current major medical benefit under its health insurance policy, there is a current lifetime maximum of \$1,000,000 for medical benefits. The Union proposes the addition of a new Section 12.5 to provide that the maximum benefit would be increased to \$1,250,000 for each employee or dependent. The Commission indicated that to provide such additional coverage for the group would result in an estimated additional cost of \$12,000. The Fact-Finder realizes and appreciates that any type of benefit afforded to an employee is going to create a cost, whether that cost be paid entirely by the employee, by the employer or by both. However, in this instance, weighing the additional costs of approximately \$12,000 against the potential benefit of an additional lifetime increase of \$250,000, the Fact-Finder is of the view that the benefit far outweighs the projected costs. The Fact-Finder therefore recommends that a new Section 12.5, effective July 1, 2002, be set forth as follows:⁴

"The maximum lifetime medical benefit shall be in the amount of \$1,250,000 for each employee or dependent, which maximum lifetime benefit shall be applicable to hospitalization, surgical and major medical benefits, and dental and vision care

⁴The Commission indicated that it is in the process of seeking bids for a healthcare policy as the present policy will expire on June 30, 2002 and a new policy, whatever it may be, would be effective July 1, 2002. The Fact-Finder does not believe that the Commission should be required, in "mid-stream," to now amend its present policy. The better, and more appropriate course, is for the Commission to include this benefit as part of its bid package which thus would be effective July 1, 2002.

benefits, as permitted under the health policy maintained by the Commission.”

Section 12 (Dental Coverage)

Under the current hospitalization and major medical contract, employees are entitled to dental coverage up to a maximum of \$1,000 per calendar year. However, there is no dental coverage pertaining to orthodontia care as part of the dental coverage. The Union proposes to add an orthodontia coverage of a lifetime amount of \$1,000 per child to be added to the current dental coverage, to be effective as of January 1, 2002. Although it is certainly difficult to specifically determine how many children would be utilizing this provision in any given calendar year, it was estimated that this provision would cost approximately \$10,000 per year. Inasmuch as dental coverage is already a benefit provision of the health package, the Fact-Finder is of the view that the addition of orthodontia care, which is very common and relevant to dental care, particularly for children, the inclusion of a lifetime coverage for orthodontia of \$1,000 per child is not unreasonable. Again, the Fact-Finder recognizes the cost element, but the overall benefit and applicability outweighs the projected costs. If dental coverage were not a part of the health policy, the Fact-Finder might, arguably, reach a different conclusion, but inasmuch as dental coverage is part of the healthcare package, the addition of the orthodontia coverage is not out of line.

The Fact-Finder therefore recommends that an additional benefit of orthodontia care in a lifetime amount of \$1,000 for the benefit of each child of an employee be added to the current level of dental benefits. For the reasons set forth in Footnote 4, the effective date shall be July 1, 2002.

Section 12 (Vision Care Coverage)

The current healthcare policy provides certain vision care benefits set forth as follows. Also set forth are the Union’s proposed increases to those levels of coverage:

<u>Service</u>	<u>Present Maximum Coverage</u>	<u>Union Proposed Maximum Coverage</u>
Frames (one pair per year)	\$20.00	\$40.00
Lenses (one pair per year) (single vision)	\$20.00	\$40.00
Bifocals	\$40.00	\$80.00
Trifocals	\$56.00	\$112.00
Lenticular	\$72.00	\$144.00
Contact Lenses	\$40.00	\$40.00
Medically Necessary	\$96.00	\$96.00 (permitted to use for multiple pairs of disposable lenses)

In essence, the proposed increases in vision care are asserted to be justified in order to keep up with current levels of inflation and current costs, based on the Union's "unscientific survey" of certain leading vision care providers which indicate that the Union's proposed level of benefits will provide approximately 80% of the expense of a routine eye exam by an optometrist and between approximately 1/3 and 1/2 of the cost of lenses, including frames. Once again, the Fact-Finder recognizes that the overall cost may not be extremely large and that there is some entitlement to an increase based on inflationary factors, again since vision care is already encompassed within the healthcare policy. Accordingly, the Fact-Finder recommends that the vision program be increased to provide the following benefits:

<u>Service</u>	<u>Maximum Coverage</u>
Examination (one per year)	\$30.00 per exam
Frames (one pair per year)	\$30.00 per frame
Lenses (one pair per year) (single)	\$30.00 per pair
Bifocals	\$60.00 per pair
Trifocals	\$75.00 per pair
Lenticular	\$100.00 per pair
Contact Lenses (cosmetic purposes)	\$40.00 per pair
Contact Lenses (medically necessary)	\$96.00 per pair (permitted to use for multiple pairs of disposable lenses)

Again, for the reasons set forth in Footnote 4, the effective date shall be July 1, 2002.

Section 12 (Prescription Coverage)

Under the current healthcare plan, members of the Bargaining Unit receive a prescription drug coverage benefit allowing a \$5.00 deductible for a brand name drug, \$2.00 deductible for a generic drug and \$10.00 deductible for mail order prescriptions. The Union has proposed that the coverage continue unchanged, however, the Commission has sought a co-pay program. The Commission argued that its prescription liability costs have increased from \$858,759 for the period August 1, 1998 through July 31, 1999 to \$1,686,395 for the period August 1, 2001 through July 31, 2002 on an estimated basis. The Commission argues that over the past three years alone, it has seen 32.82%, 27.10% and 16.33% increases. (Commission Exhibit T) The Commission has advocated the utilization of a co-pay system rather than a "flat dollar" deductible. During the fact-finding, the Commission presented testimony that if a 20% co-pay with a \$30 "cap" per prescription were utilized, there would be a resulting savings of \$212,000. In that same context, if a 25% co-pay with a \$30 "cap" per prescription were utilized, the Commission estimates a savings of approximately \$285,000. On the other hand, if there was a flat dollar co-pay "deductible" of \$7.50 for generic drugs and \$15.00 for brand name drugs, there would be a resulting savings of approximately \$125,000.

It was also indicated, by way of some comparison, that employees covered under the Collective Bargaining Agreement between the State of Ohio and the Ohio Civil Service Employees' Association, which encompasses a significant number of departments and agencies within the Government of the State of Ohio, provides a prescription co-pay on the basis of \$5.00 co-pay for generic medications, \$10.00 co-pay for brand name medications when no generic medication is available and a \$15.00 co-pay for brand name medications when a generic medication is available.

The Fact-Finder recognizes that meritorious arguments can be made on both sides for maintaining the status quo, but on the other hand, there is the realization that prescription costs have increased significantly over recent years. On balance, the Fact-Finder is of the view that the prescription drug co-pay utilized by a vast number of Ohio agencies is fair, reasonable and appropriate. (See Commission Exhibit W.)

Accordingly, the Fact-Finder recommends that retail prescription drug co-pays (30 day medication prescription) be as follows: generic medications - \$5.00 deductible; brand name medications - \$10.00 deductible; brand name medications when generic medication is available - \$15.00; mail order prescriptions - \$10.00 deductible. Consistent with the other provisions applicable to the hospitalization coverage and the Commission's current Contract which extends to July 1st, the within modification is effective July 1, 2002. See Footnote 4.

Section 12 (Health Care Contribution)

The Commission has proposed a modification to the health care contributions from the present system of 100% premium funding by the Commission to a proposed contributory system of \$25 per month per employee for single coverage and \$50 per month per employee for family coverage. The Commission asserted that for the period 1998 to 1999, the premium for single coverage was \$199.67 and the premium for family coverage was \$502.30, which translated to a total cost for that period of \$4,479,974. That rate steadily increased each year, and for the same period from 2001 to 2002, the premium for single coverage is \$272.03 and the premium for family coverage is \$683.79, with a total cost of \$6,610,753. (Commission Exhibit T) The Commission also asserted in its position statement at Page 15: "The Commission's overall health care costs have increased 30% from August 1998 through July 2001 and are estimated to increase a total of 48% from August 1998 through July 2002. The Commission has also argued that state employees

covered under the Ohio Civil Service Employee Association Collective Bargaining Agreement with the State of Ohio pay 10% of the premium. In that context, the Commission asserts that at the current level of premium contribution, the single coverage payment of \$25 per month would equate to 9.2% of single coverage premium and the \$50 per month for family coverage by an employee would equate to 7.3% of the family coverage premium.

The Union has requested that the present system of 100% of funding by the Commission be continued.

The Fact-Finder is sensitive to the reality that any requirement for healthcare contributions by an employee decreases the net amount of "take home pay." Equally evident, however, is that healthcare costs now constitute the single largest benefit provided by an employer. At one time, hospitalization premiums were significantly less impacting on an overall budget than it is today. Some sharing of the applicable premium between employer and employee today is not the exception but, rather, the rule. The Fact-Finder is of the view that by utilizing a flat \$25 per month and \$50 per month rather than a percentage basis for the life of the Collective Bargaining Agreement provides some equity to the employees in that any increase in premium dollars would be absorbed by the Commission rather than being passed along or shared by the employees under a percentage of premium formula.

Accordingly, the Fact-Finder recommends that the healthcare contribution by employees be \$25 per month per employee for single coverage and \$50 per month per employee for family coverage, with a "opt out" provision that allows an employee the option of declining the family coverage, in which event the employee who elects the "opt out" provision is to be paid \$75.00 per month. This option is available for any employee provided the employee provides proof

of insurance from an alternate source. For the reasons set forth in Footnote 4, this recommendation shall be effective July 1, 2002.

Section 16.13 and 16.14 (Seniority)

The Union has proposed adding a new Section 16.13 which, in essence, would provide that in the event the Commission should institute a “toll automation system,” which results in a reduction in force, that no employees would be laid off. In that same context, the Union also proposes a new Section 16.14 indicating that in connection with Section 16.13, the Commission would not replace full-time collectors with part-time collectors nor decrease the proportion of full-time collector hours as opposed to the hours assigned to part-time collectors in the event of an automation system. The current Contract concludes with a Section 16.13, and it is therefore proposed that the current Section 16.13 would be renumbered as Section 16.15.

The Union has expressed a concern regarding the toll collectors’ employment status in the event that the Commission should adopt some type of toll automation system. The Union contends that other “sister” toll roads either have adopted or are contemplating adoption of automated toll systems and one of the consequences flowing therefrom is a reduction in personnel. Additionally, the Union points to comments made by the Commission’s Executive Director in a speech on July 18, 2000 in which the Director stated: “A system in which regular turnpike travelers can use electronic debit cards to pay their tolls will be available ‘in two to three years’” (Union Exhibit B-1). The Union also contends: “In the year 2002, it is not unreasonable to be concerned about the displacement of toll collectors through automation. Should electronic toll collection come to the Ohio Turnpike, we quite naturally want it to come in a way consistent with the protection and well-being of our members.” (Union Analysis of Issues, Page 6) The Commission has opposed the adoption of Sections 16.13 and 16.14 on the grounds, as represented during fact-finding, that it had

no present intention or plans to institute a toll automation system. The Deputy Executive Director of the Commission testified that although the subject of toll automation is always a topic of general discussion among toll road authorities, the Commission has no present intention of instituting any automation system nor is anything on the “drawing board” during the life of this Contract. Further, the Commission asserts that it would be speculative and, therefore, inappropriate to discuss the implementation of an automation system and its impact on toll collectors when the project is not in existence.

Although the Fact-Finder appreciates that new technology is always developing and, certainly, no less than in the way toll roads are operated, and that toll automation may well be an event coming to the Ohio Turnpike in the future, there is no indication that this is something imminent. Certainly, the institution of an automated system would have some impact, whether large or small, on the toll collectors. In that context, in the event that the Commission should institute some type of automation system resulting in a reduction in force or otherwise having some impact on toll collectors, it would appear to the Fact-Finder that, at that time, the Union would have the right to bargain over the effect and consequences of the institution of such a system. At this point in time, there is clearly insufficient information, let alone a suggestion, pertaining to all of the particulars of a possible toll automation system and what impact such a system would have on the toll collectors. At least for the projected life of the present Collective Bargaining Agreement, the Fact-Finder is of the view that it is premature to recommend the adoption of proposed Sections 16.13 and 16.14. Accordingly, the Fact-Finder recommends that present Section 16 of the Collective Bargaining Agreement remain unchanged.

Section 18 (Wages and Salaries)

As is not uncommon, the major area of discussion and the most contentious issue was that pertaining to wages. The parties had presented various demands and positions during the course of their bargaining sessions, however, for purposes of their position statements, the Union proposed a 5% increase effective January 1, 2002, a 4-1/2% increase effective January 1, 2003 and a similar 4-1/2% increase effective January 1, 2004. The Commission's position during fact-finding was 3% the first year and 2% for each of the next two years. There was also a "side issue" of when the wage adjustments would take effect, i.e., as of January 1, 2002 or upon the date that a Collective Bargaining Agreement was executed.

The basic position of the Union can be summarized at Page 18 of its analysis, wherein it stated: "Our Union's position, not unreasonable, is that wage increases exist not just to keep workers even [vis-a-vis inflation] but to allow them to get just a bit ahead." The Union also presented comparable compensation figures applicable to toll collectors for the New York, Pennsylvania and Indiana toll roads. The Commission, *inter alia*, by way of comparison, argued that maintenance workers with the Commission earn more than comparable employees with county maintenance workers, using Cuyahoga County as one example.

The Union, in support of its position, also referred to SERB's Quarterly (1st Quarter 2001), wherein the statistical analysis concluded: "The Year 2000 showed a slight decrease in state-wide public sector wage settlement rates, but rates continue to exceed the average for the decade." (Union Exhibit D-3) The average of 3.62% for the State of Ohio as of 2000 used by SERB took into consideration a number of different types of jurisdictions and different types of bargaining units within those jurisdictions.

The Commission has also argued that unlike the State of Ohio, it does not engage or have the authority to impose taxes and that its revenue source is arrived from the fees it collects on the toll road. In that context, the Commission indicated that the toll rates were increased 10% in 1995, 15% in 1996, 20% in 1997, 10% in 1998 and 9% in 1999. Some of those increases were used to finance capital improvements that were made to the Ohio Turnpike, principally the addition of a third lane, both eastbound and westbound from Toledo to Youngstown, as well as reconstruction of 16 service plazas. The Commission indicated that one-half of its capital improvement costs were being funded on a "pay as you go basis" from current revenues and the other half was being funded from bond borrowing. In that regard, it was indicated that during the period 1994 to 2001, the Commission had issued bonds totaling \$845 million to pay the construction costs, and obviously the bonds have to be retired and interest is being charged on those bonds.

Although the Fact-Finder appreciates the necessity for improvements and capital expenditures, certainly, the general financial picture of the Commission's operations must be considered reasonable if it was capable of obtaining \$845 million of bonds. The Commission indicated that the debt service for principal and interest on the bonds was over \$49 million in 2001 and will increase to more than \$55 million in 2002, this notwithstanding the current economic slowdown and a Commission projection of a decrease in revenues of approximately \$8 million and a projected increase in expenses of \$1.7 million.

The Fact-Finder could examine and comment upon every minutia of fact and argument asserted by both the Union and the Commission in support of their respective positions pertaining to an adjustment in wages. On balance, the Fact-Finder is of the view and so recommends a wage increase of 3-1/2% effective January 1, 2002, a wage increase of 3% effective January 1, 2003 and a wage increase of 3-1/2% effective January 1, 2004. The wage increase

effective January 1, 2002 would include all regular and overtime hours worked from January 1, 2002 forward.

Section 24 (Miscellaneous)

Initially, there was an issue pertaining to the Commission's processing and deducting of municipal income taxes. The Fact-Finder finds that the parties have agreed on the insertion of a new Section 24.5 to read as follows:

“The Commission will withhold municipal income taxes only for the city that encompasses the employee's primary work location. However, for employees hired on or after the date of the signing of this Agreement, the Commission will also withhold taxes for an employee's city of residence for those municipalities for which the Commission is already withholding taxes.”

Section 24 (Miscellaneous)

The Union proposes to add a new provision to Section 24 dealing with an educational assistance policy. On the surface, this proposal might appear rather simplistic and even, arguably, noncontroversial. However, during the course of the fact-finding, this issue was one generating significant contention and disagreement.

The Commission indicated that an educational assistance policy was first introduced around August 12, 1987, not as a result of collective bargaining negotiations but as a discretionary benefit by the Commission. On September 30, 1994, the Commission issued “revised educational assistance guidelines” providing, in essence, for 100% reimbursement of tuition expenses for courses directly related to the employee's job; 75% reimbursement of tuition if the course was not directly related to the employee's job but was being taken as part of a program leading to an undergraduate degree in a field related to the employee's job; 50% reimbursement of tuition if the course is not directly related to the employee's job and the undergraduate degree toward which the employee is working is not related to the employee's job; and a 50% reimbursement of tuition

expenses incurred for courses leading toward a graduate degree. On June 14, 2000, the Commission unilaterally changed its policy providing, in part, for example, that the Commission would only reimburse 75% of tuition expenses incurred for courses directly related to the employee's job. (See Commission Exhibit Z.) As a result of that action, the Union filed an unfair labor practice charge against the Commission before SERB under Case No. 2001-ULP-05-0294. On December 11, 2001, SERB's General Counsel filed a Complaint against the Commission based upon the Union's unfair labor practice charge.

In Paragraphs 7 and 8 of the Complaint, General Counsel stated as follows:

“7. On or about June 14, 2000, the Commission amended its educational assistance policy, but it did not give notice or an opportunity to bargain to the Union. As a result, the Union filed an unfair labor practice charge against the Commission. See Case No. 2000-ULP-09-0543. On November 21, 2000, the Commission rescinded its actions and returned to the status quo. On November 28, 2000, the Union withdrew its charge.

8. By a letter dated December 20, 2000, the Commission informed the Union of its desire to negotiate over changes to the educational assistance policy.”

The General Counsel further noted that the Union had requested certain data and information “that was needed to bargain collectively over the changes to the educational assistance policy.” (Complaint, ¶11) Ultimately, the requested information was provided by the Commission and the Union withdrew its unfair labor practice charge. The Commission noted that its June 2000 revision not only provided for a reduction from 100% to 75% for directly related courses, but eliminated any reimbursement for textbooks and further provided that the maximum reimbursement amount was increased from \$2,000 to \$3,500.

At Page 18 of its position statement, the Commission stated: “The Commission has continuously objected to negotiating this policy during negotiations of the Collective Bargaining

Agreement.” It then goes on to state: “The Commission offered to maintain the status quo until at least July 1, 2002 and then give 30 days notice of an intent to negotiate changes to the policy. This proposal was rejected [by the Union].”

Ohio Revised Code §4117.08(A) states that "all matters pertaining to wages, hours, or terms and other conditions of employment and the continuation, modification or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative, except as otherwise specified under Section 4117.08." Section 4117.08 delineates nine categories that are "employer rights" and the concluding paragraph in subsection (C) thereof states: "the employer is not required to bargain on subjects reserved to the management and direction of the governmental unit except as affects wages, hours, terms and conditions of employment, and the continuation, modification or deletion of an existing provision of a collective bargaining agreement."

In *Cincinnati v. Ohio Council 8, AFSCME* (1991), 61 Ohio St.3d 658, the Supreme Court indicated that there are three classes of collective bargaining subjects. The first is mandatory subjects. Mandatory subjects "are those which the applicable statute requires the parties to bargain over in good faith." *Id.* at 663. The mandatory subjects of bargaining are those listed in R.C. §4117.08(A). The second class of collective bargaining subjects are those provisions which, by law, cannot be included in a collective bargaining agreement, for example, R.C. §4117.09(C) precludes requiring membership in an employee organization as a condition of employment. *Id.* at 664. In other words, so-called "illegal" subjects of bargaining, if contained in a collective bargaining agreement, are void and unenforceable. Accord, see *Streetsboro Edn. Assn. v. Streetsboro City School Distr. Bd. of Edn.* (1994), 68 Ohio St.3d 288.

Between the above two classifications, there is a large range of matters that fit within the third classification known as "permissive subjects of bargaining." "A permissive subject is one whose inclusion in the agreement is not prohibited by law, but which is also not a mandatory subject of bargaining. While parties to a collective bargaining relationship are required to bargain over mandatory subjects, they are not required to bargain over permissive subjects, although nothing prevents them from doing so. Indeed, the possibility of bargaining over a permissive subject is expressly recognized in Revised Code Section 4117.08(C). The only constraint on permissive bargaining is that it is impermissible to insist to the point of impasse on inclusion of a permissive subject in an agreement." *Cincinnati v. Ohio Council 8, supra* at 664-665.

Significantly, the Supreme Court concluded in the *Cincinnati* case by noting: "If, however, the parties choose to bargain on a permissive subject, and reach agreement on a provision relating to it, the provision is just as much a part of the contract (and therefore just as enforceable) as a provision governing a mandatory subject of bargaining." *Id.* at 665.

In *City of St. Bernard v. State Employment Relations Bd.* (1991), 74 Ohio App.3d 3, motion to certify overruled (1991), 62 Ohio St.3d 1434, the City's fire fighters had commenced negotiations and among the items included was the issue of residency. The City refused to bargain on this subject, contending that residency was not a subject of mandatory bargaining. Ultimately, SERB determined that the City had committed an unfair labor practice, which view was upheld by the Court. Within its decision, the Court noted at pages 5-6:

"Mandatory subjects of collective bargaining are deemed to be matters of immediate concern that vitally affect the terms and conditions of employment of the bargaining-unit employees.

* * *

As further required by R.C. 4117.08(C), public employers must also bargain in areas that are subjects of management rights and

direction of the governmental unit if they 'affect wages, hours, terms and conditions of employment.' Therefore, a public employer's decision to exercise a management right which affects the terms and conditions of the unit's employment becomes a mandatory subject for bargaining." (Emphasis added.)

The Court ultimately concluded that inasmuch as employment was contingent upon residency, it was thus within the scope of mandatory bargaining.

The Fact-Finder was not provided with a copy of the December 20, 2000 letter referred to in Paragraph 8 of the General Counsel's unfair labor practice complaint in Case No. 2001-ULP-05-0294, but a fair reading of the Complaint implicitly, if not explicitly, seems to reflect that the Commission was willing to negotiate proposed changes to the educational assistance policy. The past history referred to in the Complaint, as well as the correspondence from the Union to the Commission dated December 19, 2001 and the Commission's response of December 21, 2001 (Union Exhibit C3-1 and C3-2) certainly suggest that, at a minimum, the question of revisions to the Commission's educational assistance policy was a subject of bargaining. The Fact-Finder is of the view that the educational assistance policy is a permissive subject for bargaining.

The Fact-Finder is somewhat disturbed that the Commission offers to maintain the status quo until July 1, 2002 and then give 30 days notice of an intent to negotiate any changes, as opposed to addressing the question of the educational assistance policy and any proposed changes during the present collective bargaining negotiations. The issue does not appear to be going away by the mere passage of time and the policy is a subject of negotiations. As previously noted in *Cincinnati v. Ohio Council 8, AFSCME, supra*, at 664-665: "The only constraint on permissive bargaining is that it is impermissible to insist to the point of impasse on inclusion of a permissible subject in an agreement." The Fact-Finder is not going to speculate on the nature or the course of negotiations. Whether the parties are bargaining in good faith and/or whether an unfair labor

practice exists is a matter subject to the exclusive jurisdiction of SERB. See *Coleman v. Cleveland School District* (2001), 142 Ohio App.3d 690, 693. On the basis of what was presented to the Fact-Finder, it does not appear that there was any significant bargaining between the Commission and the Union pertaining to the Commission's educational assistance policy or proposed changes thereto.

In light of the above, the Fact-Finder finds that the parties have yet to negotiate over changes to the educational assistance policy. The Fact-Finder therefore recommends that the Commission and the Union meet and negotiate pertaining to any changes to the Commission's educational assistance policy, and until the subject matter has been resolved or the issue reaches a point of impasse and that both parties are negotiating in good faith, the status quo under the Commission's Guidelines dated September 30, 1994 shall remain in effect.⁵

Respectfully submitted,



DONALD N. JAFFE
Fact-Finder

⁵In *State Emp. Relations Bd. v. Perkins* (2001), 144 Ohio App.3d 460, the Court held that where SERB has determined probable cause of an unfair labor practice, but where SERB and the charged party reached a settlement rejected by the charging party, SERB is required to proceed with a complaint and a hearing.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Report of Fact-Finder and Recommendations has been forwarded to the Administrator, Bureau of Mediation, State Employment Relations Board, 65 East State Street, Columbus, Ohio 43215-4213; Alan Hart, EU Field Organizer, and Polly J. Halfkenny, Esq. at 3260 Raleigh Drive, Toledo, Ohio; and Thomas S. Amato, Esq., 682 Prospect Street, Berea, Ohio 44017, via overnight mail, postage prepaid, this 11th day of February, 2002.


DONALD N. JAFFE
Fact-Finder