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STATE EMPLOYMENT
RELATIONS BOARD

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STATE OF OHIO

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In the Matter of Fact-Finding	*	
Between	*	<u>FINDINGS</u>
	*	<u>AND</u>
COMMUNICATIONS WORKERS	*	<u>RECOMMENDATIONS</u>
OF AMERICA,	*	
LOCAL 4501, AFL/CIO	*	Case No. 97-MED-04-04⁶/₁
and	*	July 28, 1997
STATE OF OHIO,	*	
SECRETARY OF STATE	*	Anna DuVal Smith
	*	Fact-Finder

Appearances

For the Communications Workers of America:

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For the Secretary of State:

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I. BACKGROUND AND SUBMISSION

The Communications Workers of America ("Union" or "CWA") represents approximately seventy (83) clerical and data processing employees of the Secretary of State of Ohio ("Employer"). Its contract with the Secretary expired on June 30, 1997. Negotiations for a successor contract began May 20, 1997, with the parties meeting ten times through July 10, three of which were with State mediators. Tentative agreement was reached on all issues except wages and duration. The parties accordingly proceeded to fact-finding under §4117.14(C) O.R.C. The undersigned, who was appointed Fact-Finder pursuant to 4119-9-05(E) of the Ohio Administrative Code on May 30, 1997, met with the parties on July 14 in an attempt to mediate the dispute. This effort proved unsuccessful, so the parties proceeded to hearing. Pre-hearing statements were waived. The oral hearing was convened at 11:00 a.m. on July 21, 1997, at the Office of Collective Bargaining, 107 North High Street, Columbus, Ohio, following a final attempt to achieve a mediated settlement. Present for the Union in addition to counsel were Rich Murray (Vice President, Local 4501), Cynthia Stewart (President, SOS Branch), Carmen Dixon (Vice President, SOS Branch), Martha Brown (Executive Vice President), and Candace McGuire (Steward). Present for the Secretary in addition to counsel were Terry A. Leach (Assistant Secretary of State), Jeff Stamford (Deputy Director, Business Services), and Thomas Durkee (Deputy Director, Human Resources). The parties presented one issue, Wages. They were afforded a complete opportunity to examine witnesses, who were sworn, to present written evidence, and to argue their respective positions. The oral hearing concluded at 5:30 p.m. whereupon the record was closed. In rendering this Report and Recommendation, the Fact-Finder has

given full consideration to all reliable information relevant to the issues and to all criteria specified in §4117.14(C)(4)(e) and Rule 4117-9-05 (J) and (K) O.A.C., to wit:

- (1) Past collectively bargained agreements between the parties;
- (2) Comparison of the unresolved issues relative to the employees in the bargaining unit with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;
- (3) The interest and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;
- (4) The lawful authority of the public employer;
- (5) Stipulations of the parties;
- (6) Such other factors, not confined to those listed above, which are normally or traditionally taken into consideration in the determination of issues submitted to mutually agreed-upon dispute settlement procedures in the public service or in private employment.

II. THE ISSUE IN DISPUTE: POSITIONS OF THE PARTIES

The Employer proposes a hybrid merit pay system, a three-year duration, and current language in all other sections except where there has already been tentative agreement. The proposal on the merit pay system, which is set forth at length in the Appendix, consists of across-the-board pay increases of 3 percent in the first year and 2 percent a year in each of the remaining two years. Bargaining unit employees would receive additional amounts, ranging from zero to 2 percent of their base, depending on their performance in the previous year. Those who meet expectations would receive 1 percent on the base, those who exceed would receive 1 percent on the base plus 1/2 percent as a supplement, those who are rated outstanding would receive 1 percent on the base plus a supplement of another 1 percent. Thus, pay increments in the second and third year would range from 2 percent (below expectations) to 4 percent (outstanding), though not all would be in the form of an annuity. The Employer also proposes that a joint committee be established to develop the performance appraisal system. In the event the committee cannot come to an

agreement by September 30, 1997, it would be dissolved and the Employer would be authorized to implement such a system. It objects to the Fact-Finder considering grievability of performance evaluations on the grounds that this section of the Contract has been tentatively agreed to.

The Union seeks a three-year agreement retaining current language and an across-the-board increase in pay of 4 percent in 1997, and 3 percent in each of the two succeeding years, provided, however, that if the Fact-Finder recommends the merit pay system proposed by the Employer, she also recommend that performance appraisals be subject to the grievance procedure, either by language in the tentatively-agreed to Grievance Procedure article or in the Wages article.

III. EVIDENCE AND ARGUMENT

The Employer's Evidence and Argument

The Employer contends that parity with the private sector has been advanced by unions in Ohio's public sector and in the instant relationship with some success. The layoff benefits of this unit, for example, are unique to the public sector. It claims that its wage proposal, pay-for-performance, is a concept widely used and growing in the private sector but still remains to be included in most public sector agreements. However, it points out that it is not unknown in Ohio's public sector and is growing in importance. It offers a number of labor agreements, drawing the Fact-Finder's attention particularly to those of the recently negotiated Treasurer of the State of Ohio/OCSEA (which is very similar to what is proposed here) and Franklin County Engineer/AFSCME (which system was established in 1984 after factfinding and later became a hybrid system). The Employer also argues that

its proposal is a continuation of the theme of these negotiations, which centered around providing both incentives and disincentives on a number of issues, such as sick leave usage, to achieve better performance.

Furthermore, the Employer views pay-for-performance as a component of the modernization program begun in 1995 and about to come onstream. Assistant Secretary of State Terry Leach testified that although it is generally referred to by the parties as "imaging," the program involves much more than the acquisition of scanners and implementation of OCR software with the consequent reduction of paper handling. In fact, the office is transitioning from a mainframe computer technology to a client/server environment. The parties have worked together to manage and adapt to this change, which is affecting job design and organization structure. He testified the increased volume of work and overtime in some sections is largely because of the transition period although there has also been a modest (3 percent) increase in volume. The office has been using temporaries as per its agreement with the Union. However the number 24 does not represent full-time equivalents, and the Employer does not intend to have temporaries after the new system is implemented. As for the reduction in staff, the intent is that people not lose jobs though positions will be cut. The Employer will use attrition and reassignment, and new positions have been created. The new system requires new skills for which training has and is being provided. The pay-for-performance system will reward employees for learning and adapting to the modernization program.

Thomas Durkee, Deputy Directory of Human Resources, researched the concept and practice, and gave a presentation at the hearing of what he had learned. He testified that

there are a number of reasons to link pay with performance among which are to attract high-performing personnel, to validate employees' beliefs that they should be rewarded commensurate with their contributions, to motivate employees to acquire and hone job skills, to overcome rigid pay scales and classifications, and to reward performance above acceptable standards. He further testified and brought data to show that 87.5 percent of the bargaining unit met or exceeded expectations in the last three years. Thus, 12.5 percent received equal pay without providing equal effort or performance. Moreover, a number of employees exceeded performance expectations but received no additional benefit (the Employer's brief at page 6 has this as 12.5% of the unit, but presentation slides have it as 10%). In addition, 61 of 85 bargaining unit members are at the end of their pay scale. Thus, the majority of the unit would be no worse off and many would benefit by adoption of this plan because they would have the ability to earn pay increases greater than inflation and what other state employees receive. It is unfair, said Leach, for the majority of employees to be at the mercy of the few who do not measure up. Over time, the Employer intends and expects performance will improve so that even more would benefit. As evidence of expected success, Durkee cited the Franklin County Engineer, whose employees have had no zero ratings since 1995. The Employer would benefit, too, because of its ability to attract better candidates for job openings and as performance of existing employees improves.

The Employer understands that performance evaluation is critical, and asserts it is committed to developing an objective, comprehensive, and valid instrument. It has already identified software to assist in the design and implementation of the program. This software

was demonstrated in Durkee's presentation. The Employer recognizes that objectivity, clear goals, weighted factors specific to the classification or position, employee participation, periodic supervisor feedback, narrative elements, and checks and balances are important features and is prepared to provide them. Indeed, Durkee testified he believed there is more motivational impact from employee input, open dialogue, mutual agreement, and seeing one's place within the whole than from the money.

The Employer hears the concerns of the Union and responds saying that its proposal provides for Union participation in the development of the instrument, which it insists must be ready soon enough to provide data for the 1998 pay increases. Terry Leach testified the performance appraisal component could be onstream within two months. It asserts the instrument will be consistent and fair because it will commit the time and other resources necessary to its development, including use of a facilitator by the joint committee. Monitoring of the system will be provided through computerization and review by managers of supervisory staff who will themselves be evaluated in part on their ability to provide timely and accurate performance appraisals. The system will also be applied to nonbargaining unit employees. Regarding the Union's concern about successor administrations, the Employer responds that the Union will have an opportunity to bargain again in the year 2000 after it has had some experience with both the program and the new administration. It rejects a contract shorter than three years, saying one year of experience is too short a time for meaningful evaluation. Finally, regarding accountability and fairness, the Employer contends allegations of unfairness must be handled internally and the Union already has several forums in which to be heard, such as the labor-management committee

and involvement in the joint committee to develop the system. Making performance evaluations subject to the grievance procedure would make them adversarial instead of collaborative. Furthermore, the other public sector pay-for-performance systems do not provide for external appeal.

During their testimony, Durkee and Leach expressed their views on whether and how control of the employee would be affected. Both believed the employee would have greater control. Durkee testified this would come through employee involvement in the selection of goals and criteria and the choice of objective criteria such as absenteeism and quantitative measures of output. Leach said the problem with the existing performance appraisal system is that it is subjective and does not hold employees accountable. Management could use the discipline procedure to correct unacceptable performance, but it never has. In any event, the intent is not just to increase the percent of employees who meet expectations, but those who exceed them. The proposed scheme would do that by attracting better job candidates and holding all employees accountable, giving them greater control and rewarding them for their achievements.¹

The Union's Evidence and Argument

The Union argues that productivity increases achieved both through an increase in workload and a reduction in size of the unit, all while undergoing major technological change justifies a departure from the state pattern that was established by the 1997 OCSEA agreement providing for three percent a year in each year of a three-year contract. Carmen

¹The Employer also presented evidence and argument on other sections of the wage article, but inasmuch as the Union dropped its demands, the Employer's case will not be summarized.

Dixon, Martha Brown and Candace Maguire all testified about the changes in staffing (including use of temporary employees), workload and overtime in the past several years in their various sections. The greatest impact has fallen on the Corporation Section, though all three said their unit's workload had increased. Cynthia Stewart testified that in the past fourteen years she had not seen as much overtime as was experienced in the last eighteen months. In her opinion, more staff, fewer temporaries, and more money is justified.

The Union argues the Fact-Finder should reject the Employer's proposal and recommend the Union's because the Employer's is out of step not only with the OCSEA settlement, but with smaller state units. It submits SERB data for elected state officials and the Turnpike Commission for 1993-96 whose wage increases ran between three and five percent a year. Looking at all contracts on file with SERB, merit pay is a factor in only 44 of 2806 on file. It is also marks a significant departure from the history of the unit and even the Employer's own position in the 1994 factfinding when the Employer argued for parity with other state employees to prevent whipsawing.

The Union also contends the Employer has not demonstrated a need to depart from historical practice and state pattern. The bargaining unit is still shrinking and imaging is not yet up and running, suggesting that efficiency is increasing without the scheme. Furthermore, 87 percent of the unit is performing at or above expectations and the Employer has failed to use existing Contract provisions such as the discipline procedure to correct inefficiencies. None of the witnesses knew of any discipline for performance issues and only one negative evaluation was known by any of them.

The Union is opposed to merit pay in general and the Employer's proposal in particular for other reasons. It argues making pay a function of performance evaluations dramatically increases management's control over employee earnings, diminishing employee control and the role of collective bargaining. The Employer could address employee fears of subjectivity and loss of control by agreeing to the Union's proposal that disagreements over evaluations be submitted to the grievance procedure, and it has failed to provide a satisfactory explanation for rejecting this proposal. A check and balance on managerial authority is called for to prevent punitive use of the system. The Union offers the University of Cincinnati/AAUP contract, which provides for external review, and the Ohio State University/ONA contract which has specific performance goals and criteria rather than broad, open-ended factors amenable to arbitrary utilization.

In sum, the Union argues that the Employer has failed to carry its burden to justify deviation from the state pattern and current practice. Giving consideration to the statutory criteria, it asks the Fact-Finder to recommend the Union's submission on the unresolved issues.

IV. FINDINGS AND RECOMMENDATION

The question here is what shall be the basis of pay in the Secretary of State's Office and, indirectly, what components of the human resource management system shall be used to drive performance. In my opinion, the time is not ripe for making compensation contingent on performance for this unit. I have several reasons for so concluding:

1. The record establishes that this would be a departure from past collectively-bargained agreements between the parties. Indeed, the most recent

agreement followed state pattern of across-the-board increases. The Employer has not demonstrated any compelling reason to break from the past. In fact, all evidence is that productivity is up and other measures have been mutually agreed to in order to address specific productivity issues such as sick leave usage.

2. Although the large majority of private employers claim to have merit pay or pay-for-performance systems, the fact of the matter is very few public employers do (less than 2 percent in Ohio according to SERB data submitted by the Union). The Employer did submit a number of contracts with such systems, but there is no evidence any of their merit pay provisions came about as the result of factfinder recommendations based on statutory criteria. Moreover, the evidence of their success is equally lacking. Continuation of a program and nonzero performance ratings can occur for any number of reasons quite apart from true performance increments.

As for the private sector experience, the Fact-Finder takes note that there are differences between public and private sector employment that are material to the public interest, namely that the periodic changes in administration place even competent employees at risk of political retribution and, therefore, the public at risk of receiving poor service. It is a fact that there will be a new Secretary of State before this Contract expires. Even if the present Secretary's successor does not use the system punitively, there is no guarantee he or she will have the same commitment to it or the same

constructive relationship with the Union that this Secretary and his staff do. This leads me to my third point.

3. The Union's concern that performance evaluations can be used punitively and the Employer's unwillingness to address their concern in a meaningful way causes me to have additional reason to find that the interest of the public would not be served by adoption of the Employer's proposal at this time. The Employer properly observes that a credible, comprehensive measure of performance is critical to the success of merit pay systems. Unless employees trust the performance appraisal system, they will not believe their pay increments will result in the promised and desired rewards, and will have little reason to exert the needed effort. Rather than building a positive culture and motivating employees to achieve, merit pay can thus nourish a climate of distrust and cynicism, and undermine what it is the Employer is trying to accomplish. For a more complete discussion of this, I commend to the parties *Strategic Pay* or other works by Edward Lawler, a leading authority on compensation systems.²

One thing the parties agreed on is that the present performance appraisal system is defective, yet it produces the number the Employer relies on to demonstrate the value of the program to the bargaining unit. The problem is that the Union is being asked to make its members' wages contingent on the results of a performance appraisal system that has yet

²Lawler, Edward. *Strategic pay: aligning organizational strategies and pay systems*. San Francisco: Jossey-Bass, 1990.

to be designed, let alone proved trustworthy in practice. The Employer is to be commended for its commitment to involving the Union in the design of the new system, and to training supervisors and evaluating them on their fair and effective utilization of it. These would surely build employee commitment and trust, but the necessary credibility of the system can only be built in its application, and this requires time. In my opinion, it is premature and counterproductive to adopt a pay-for-performance system when the performance appraisal component has yet to be proven. As of the date of the hearing, the modernization program was still in testing, thus no reliable base data will be available for some time anyway. And although the Employer believes the committee can make all design decisions, train and implement within two months, I am skeptical that the human element can be brought along as quickly. Providing effective feedback and negotiating mutually-agreeable goals and the like are skills that require practice to develop. Employees will need to know long before July 1998 what is expected of them and how they are to achieve it, and be receiving helpful feedback. Even then, they need to trust that the evaluation on which their pay will be based will be fair. This is a tall order for any organization, and more so for one in the midst of implementing significant technological change, preparing for the 1998 election, and knowing there will be leadership change thereafter.

In sum, the Secretary wants the Union to participate in an experiment which is highly likely to fail if the bargaining unit is an unwilling subject. I cannot recommend that the parties depart from past agreements and overwhelming public sector practice to engage in such an experiment unless they voluntarily choose to do so themselves as evidently a few others have done. I do recommend, however, that the parties work together to improve the

performance appraisal system as proposed by the Employer, but with provision for a mutually-agreed to deadline instead of the September 30 date. Mr. Durkee's point that the motivational impact occurs more through mutual goal setting, feedback, etc. than through the financial reward is well taken. Moreover, this would provide the groundwork for reconsidering merit pay at a later date.

As for wages, the Union has also not met its burden to prove that the unit move off historical practice and the state pattern. I find the experienced workload increases are transitory, being primarily due to the technological transition and unfilled vacant positions, both of which are coming to an end. I therefore recommend wage increases of 3 percent in each year of a three-year agreement.

Finally, as for the grievability of performance evaluations, since I have not recommended that pay be contingent on performance, the Union's request is moot and so is the Employer's objection.

Respectfully submitted,



Anna DuVal Smith, Ph.D.
Fact-Finder

Cuyahoga County, Ohio
July 28, 1997

APPENDIX

Secretary of State and CWA
State Proposals/July 21, 1997

ARTICLE 37 - WAGES

Section 37.1 Definitions of Rates of Pay "Classification salary base" is the minimum hourly rate of the pay range for the classification to which the employee is assigned.

"Step rate" is the specific value within the pay range to which the employee is assigned.

"Base rate" is the employee's step rate plus longevity adjustment.

Section 37.2 Effective with the pay period which includes July 1, 1995~~7~~ and July 1, 1996, the pay schedules shall be increased by ~~four (4%)~~ THREE (3%) percent ~~and three (3%) percent respectively. The Appendix reflects the terms of the wage agreement for the life of the contract, including percent increases and the dates they will be effective.~~ EFFECTIVE WITH THE PAY PERIOD WHICH INCLUDES JULY 1, 1998 AND JULY 1, 1999 THE PAY SCHEDULE SHALL BE INCREASED BY TWO (2%) PERCENT.

A. **PERFORMANCE PAY SUPPLEMENT IN THE PAY PERIOD INCLUDING JULY 1, 1998 AND JULY 1, 1999, EMPLOYEES SHALL BE ELIGIBLE FOR A PERFORMANCE PAY (MERIT) SUPPLEMENT CALCULATED ON THE EMPLOYEE'S STEP RATE IN ACCORDANCE WITH THE FOLLOWING SCHEDULE:**

MEETS JOB REQUIREMENTS	1.0%
EXCEEDS JOB REQUIREMENTS	1.5%
OUTSTANDING JOB PERFORMANCE	2.0%

THOSE EMPLOYEES WHO QUALIFY FOR A MERIT PAY SUPPLEMENT OF 1% OR GREATER SHALL HAVE THE FIRST 1% ADDED TO THEIR BASE RATE AND THE REMAINING AMOUNT, WHERE APPLICABLE, SHALL BE RECEIVED AS A PAY SUPPLEMENT.

THE PERFORMANCE PAY SUPPLEMENT SHALL BE ADDED TO THE EMPLOYEE'S RATE OF COMPENSATION FOR THE ONE YEAR PERIOD (26 PAY PERIODS). THE MERIT SUPPLEMENT SHALL BE DETERMINED ANNUALLY BY THE RATING AN EMPLOYEE RECEIVES FROM HIS/HER APPRAISAL REVIEW.

B. THE EMPLOYER AND THE UNION SHALL ESTABLISH A JOINT COMMITTEE FOR THE DEVELOPMENT OF A PERFORMANCE APPRAISAL SYSTEM. THE (3 MEMBERS EACH PARTY) COMMITTEE SHALL IDENTIFY THE CRITERIA TO BE USED IN EVALUATING EMPLOYEE PERFORMANCE AND DEVELOPING A FACTORING SYSTEM FOR MEASURING THE CRITERIA. SUCH CRITERIA SHALL INCLUDE, BUT NOT NECESSARILY BE LIMITED TO, THE EMPLOYEE'S PERFORMANCE COVERING THE TWELVE (12) MONTH PERIOD PRIOR TO JULY 1 EACH YEAR, RECORD OF ATTENDANCE, AND DISCIPLINE. THE COMMITTEE

SHALL BE DISCONTINUED UPON REACHING AGREEMENT ON THE IMPLEMENTATION PLAN, OR SEPTEMBER 30, 1997 WHICHEVER COMES FIRST. IN THE EVENT THAT THE COMMITTEE IS UNABLE TO REACH AGREEMENT ON AN IMPLEMENTATION PLAN BY SEPTEMBER 30, 1997, THE EMPLOYER SHALL BE AUTHORIZED TO IMPLEMENT A PERFORMANCE APPRAISAL SYSTEM.

Section 37.3 Step Movements Movement from one step to another after either initial or promotional probation shall occur after one (1) year of service following the completion of probation in the classification, if performance has been satisfactory.

Section 37.4 STEP INCREASES FOLLOWING PROBATIONARY PERIODS ~~Initial Hires~~
An employee initially hired by the EMPLOYER ~~State (i.e. agencies paid by warrant of the Auditor of State) prior to September 1, 1992 shall receive a step increase upon the completion of the initial probationary period or promotional probationary period if he/she is subsequently promoted. An employee hired after September 1, 1992, shall receive a step increase only~~ after one (1) year of service, or if he/she is subsequently promoted after one (1) year of service in the new position SHALL RECEIVE A STEP INCREASE.

Section 37.5 Longevity Employees that have completed five (5) years of total service shall receive the longevity pay supplement which shall be one-half percent (1/2%) for each year of service. A maximum of ten percent (10%) shall be applicable after twenty (20) years of total service.

Section 37.6 Step on Promotion Employees who are promoted shall be placed in a step to guarantee them at least an increase of 3%.

Section 37.7 Shift Differential The Employer may apply provisions of the Ohio Revised Code Section 124.181 (I) to members of this bargaining unit as it may deem appropriate.

NOTE: FORMER SECTION 37.8, TUITION REIMBURSEMENT, TENTATIVELY AGREED AND MOVED TO BECOME SEPARATE ARTICLE.