

STATE OF WISCONSIN

PERSONNEL COMMISSION

EUNICE PETERSON,

Appellant,

v.

DEPARTMENT OF REVENUE,

Respondent.

Case No. 78-178-PC

CARL HOEL, ROY CALLIES, JEROME PIONKOWSKI, THOMAS, REID, LYNN WILLIAMSON,
BEVERLY CRAMER, KENNETH BARR, ROBERT JENSEN, SHIGERLI NAKAHIRA, CECILIA
COYLE, DEAN WHITING, DIANE BRAUN, RONALD WHITE, GLORIA STANGE, MELVIN
HEISER, THEODORA SCHROEDER, DANIEL STANCEL, EUGENE MINCY, L. GEORGE
MOHR, WALTER DUCHOW, ARNOLD WEISS, STANLEY JAEGER, BURDETTE LARSON,
ROBERT POWERS, WARREN ARNDT, VERNON EULERT, JOSEPH POLLEY, KARL KOLBE,
CHARLES WNUKOWSKI, DONALD MURPHY,

Appellants,

v.

DEPARTMENT OF REVENUE,

Respondent.

Case No. 78-193-PC

THOMAS E. HANSEN, ROLAND K. BERGER, THOMAS S. PEDRETTI, LOYD W. MILLER,

Appellants,

v.

DEPARTMENT OF REVENUE,

Respondent.

Case No. 78-177-PC

THEODORE J. KREUSER, ORVILLE E. HENDRICKSON, JR., WILLIAM F. BOLLOW,
LAWRENCE A. GLOEDE, SR., CHRISTINE M. GOEDEN,

Appellants,

v. '

DEPARTMENT OF REVENUE,

Respondent.

Case No. 78-176-PC

DECISION AND ORDER

NATURE OF THE CASE

These are consolidated appeals pursuant to §230.45(1)(c), Stats., of non-contractual grievances. The subject matter concerns the distribution of discretionary performance awards in the Department of Revenue.

FINDINGS OF FACT

The parties have submitted this case for decision on the basis of a written stipulation of facts. The Commission adopts as its findings the facts as set forth in the attached stipulation, paragraphs numbered 1 - 33. (Copies of the voluminous exhibits attached to the stipulation are not attached to the copies of this decision.)

OPINION

The parties have disagreed as to the jurisdictional basis for this appeal, the appellants having argued that it is §230.44(1)(b) and the respondent, §230.45(1)(c), Stats. (1977). In an Interim Decision dated April 19, 1979, the Commission determined that §230.45(1)(c)

provided the jurisdictional basis. That subsection provides that the Commission shall:

Serve as final step arbiter in a state employe grievance procedure relating to conditions of employment, subject to rules of the secretary providing the minimum requirements and scope of such grievance procedure.

As was pointed out in the Interim Decision, while the secretary of DER has not yet promulgated rules pursuant to §230.45(1)(c), the transitional provisions of Chapter 196, Laws of 1977, §129(4q), provide that the rules of the director continue in effect until modified, and thus §Pers. 25.01 and the derivative APM and departmental grievance procedures, including respondent's, remain in effect.

The grievance procedure, Exhibit B, provides that grievances may be appealed to the Board (now Commission) if it is alleged that the department "has violated, through incorrect interpretation or unfair application either" a personnel rule or civil service statute or a function delegated by the director (now administrator) to the department.

The Commission held in the Interim Decision that the decision of grievances by the respondent does not constitute the exercise of delegated power of the administrator. Therefore, the legal standard to be applied here involves the question of whether the respondent has violated, through incorrect interpretation or unfair application, a personnel rule or civil service statute.

The key statutory provisions are §230.12(4)(a), (5), and (7), Stats. (1977):

(4) COMPENSATION PLAN IMPLEMENTATION PROVISIONS. (a) When an approved compensation plan or an amendment thereto becomes effective, required individual pay adjustments

shall be made in accordance with determinations made by the administrator to implement the approved plan.

* * *

(5) WITHIN RANGE PAY ADJUSTMENTS. (a) Pay advancement techniques, application. The varying circumstances and needs of the widely diverse occupational groups of state service must be recognized and met through several methods of systematic pay advancement. To this end the compensation program shall contain either individual or combinations of pay advancement techniques, and the pay schedules therein may contain provisions for a variety of methods of within range progression, including, but not limited to discretionary awards, equity adjustments, 'time in grade' adjustments, and other appropriate within range adjustments as may be provided in the compensation schedule.

(b) Date. Any authorized pay adjustments under this section shall be awarded by each appointing authority for the agency subject to par. (d) on the date or dates in the approved plan.

(c) Increase limits. Unless otherwise defined in the pay schedule the total amount for all such within range increases shall not exceed the amount for such increases specified and approved by the joint committee on employment relations in its action on the secretary's proposal for such increases.

(d) Individual increase limit. No appointing authority shall award an employe cumulative performance award increases or other types of cumulative within range pay adjustments exceeding a total of 10% of the employe's base pay during a fiscal year.

* * *

(7) EXCEPTIONAL PERFORMANCE AWARDS. Consistent with applicable provisions of sub. (5) it is the declared public policy that pay awards to employes in the classified service shall be granted consistent with sound personnel practice to recognize exceptional performance. Such exceptional performance awards shall be noncumulative and awarded to employes in accordance with eligibility determinations of the secretary consistent with the provisions of the approved compensation plan and the schedules contained therein. Funding for such exceptional performance awards shall be derived from any unspent moneys under sub. (5) and from the within range awards granted to an employe during the current fiscal year under sub. (5) who terminates with the agency. Exceptional performance awards shall be made on a lump sum basis, within the limits approved for such awards and shall not be considered part of an employe's basic pay.

The main issue and matter in dispute involves the respondent's decision to distribute discretionary performance award (DPA) money among the divisions in relationship to the overall performance evaluation of the divisions. All employes who were rated "needs improvement" or "unsatisfactory" were denied DPA's, regardless of their division. All employes rated "superior" received 5% DPA's, regardless of their division. Employes rated "consistently meets job requirements" received varying DPA's depending on their division's performance evaluation. These DPA's ranged from 1.835 to 3.0%.

The respondent argues that there are no provisions in the statutes or the administrative code which by their terms prohibit the approach used in the distribution of DPA's with regard to "average" employes and that that approach is within the range of permissible discretion vested in agency heads.

The appellant's primary argument is that the respondent's DPA plan conflicts with certain guidelines issued by the director, now administrator, State Division of Personnel. These guidelines are contained in Exhibit D, "Wisconsin Personnel Manual-Compensation, Chapter 550, Statewide Guidelines for Performance awards." In the opinion of the Commission the respondent's DAP plan, to the extent that it varies the amount of similarly evaluated ("consistently meets job requirements") employes' DPA's on the basis of the performance evaluations of the divisions, is in conflict with these guidelines. There are a number of parts of the guidelines which reinforce this opinion, particularly the following:

550.050 Performance Award Fund Distribution Intent

Distribution of performance award funds are intended to reward and recognize the relative contribution that each employe's job-related performance accomplishments have made toward the achievement of the programs and objectives of state government.

* * *

550.060 Cumulative Performance Awards

1. Discretionary Award-Variable Amount

* * *

Once relative levels of employe performance have been delineated (see section 550.040) the agency should insure that the same levels of discretionary awards, i.e., percentages of base pay, are granted for relatively the same levels of individual performance throughout the agency. (Emphasis added).

Under these provisions and the guidelines as a whole, DPA's must be awarded on the basis of individual employe performance and percentages of base pay must be the same for similarly rated employes throughout the agency. This leads to the question of the effect of the guidelines.

Section 230.12(1)(a), Stats., provides in part:

Provisions for administration of the compensation plan and salary transactions shall be provided in either the rules of the administrator or the compensation plan. (Emphasis added).

The legislature clearly has provided that provisions such as these guidelines can be set forth either in the administrative rules or the compensation plan.¹

¹See also §227.01(11)(1), Stats., which exempts from the definition of "rule" agency action which: "Establishes personnel standards, job classifications, or salary ranges for state, county or municipal employes who are in the classified civil service."

The compensation plan in question, Exhibit A, provides at
page 6:

Administrative procedures of this schedule are developed
and implemented in accordance with the directives issued
by the Administrator, Division of Personnel.

While this language is not altogether clear, when read in conjunction
with the language contained in the guidelines, the conclusion is
inescapable that the intention in issuing the document was to provide
explicit guidelines for administering the pay plan. See Exhibit D:

550.010 PURPOSE

The purpose of this manual is to provide administrative
guidelines to agencies for the distribution of performance
awards to classified employes in state service. These
guidelines provide a uniform framework for the distribution
of funds for cumulative and non-cumulative performance awards
established as part of the pay plan for non-represented
employes and as part of the applicable negotiated contractual
provisions for represented employes. (Emphasis added).

Based on the above provisions, it is the opinion of the Commission
that the above-quoted language from the compensation plan in effect
incorporates by reference the provisions of the statewide guidelines
for performance awards, Exhibit D, and that these guidelines are
binding on the agencies in their administration of the compensation
plan.

Even if the foregoing conclusion were not reached, the Commission
would still conclude that the guidelines were binding on the agencies.
Section 230.12(4)(a), Stats., provides:

When an approved compensation plan or an amendment thereto
becomes effective, required individual pay adjustments shall
be made in accordance with determinations made by the administra-
tor to implement the approved plan.

This is an additional source of authority for the administrator to

implement the compensation plan.

Finally, the Commission notes that even if it were concluded that the guidelines lacked any formal effect, they would be entitled to a certain amount of deference. Regardless of the conclusion reached on the formal, binding effect of the guidelines, there is no question that by §§230.12(1)(a) and (4)(a), the legislature has conferred on the administrator considerable authority for implementing the compensation plan; and the guidelines, if they did nothing else, would provide an indication of how the plan and the relevant statutes are interpreted by the officer responsible for the administration of the compensation plan.

Another matter of contention has to do with the respondent's decision to subtract and set aside from the amount available in the departmental merit fund, prior to the distribution of the remainder as DPA's, the sum of \$5000 for payment of Exceptional Performance Awards (EPA's). The appellant argues that this runs afoul of §230.12(7), Stats., which includes, in part, the following:

Funding for such exceptional performance awards shall be derived from any unspent moneys under sub. (5) and from the within range awards granted to an employe during the current fiscal year under sub. (5) who terminates with the agency.

The respondent argues that this provision does not create any priorities. The Commission cannot agree that language directing that EPA funding "shall be derived from any unspent money under sub. (5) [which relates to DPA's] ..." does not create a priority for DPA's over EPA's. When something is spent it is "used up," see Webster's

New World Dictionary, Second College Edition, p. 1369. That which is "unspent" is not "used up." For the agency to take money "off the top" for EPA use prior to making DPA allocations in the manner that was done here violates §230.12(7).

In the opinion of the Commission the appellants are entitled to be granted the DPA's they would have received had the awards originally been calculated on an agency-wide basis and without the initial allocation of EPA money. The DOR unilateral grievance procedure (Exhibit B) provides at paragraph II. N., in part:

Settlement of grievances may be retroactive depending on the equities of the particular case. In grievance settlements, the maximum period of retroactivity allowed shall be a date not earlier than seven work days prior to the date the grievance was first filed in writing or the date the employee filed the grievance in writing, unless the circumstances of the case made it impossible for the employee(s) to know he/she had a claim prior to that date, in which case the retroactivity shall be limited to a period of thirty days prior to the date the grievance was first filed in writing."

There has been no showing that circumstances made it impossible for these appellants to know they had a claim prior to filing of their grievances. Retroactivity should be limited to the point in time seven work days prior to first filing of the grievances. The files of these cases indicate that first step grievances were filed on the following dates: 78-193-PC, August 3, 1978; 78-178-PC, August 3, 1978; 78-176-PC, August 10, 1978; 78-177-PC, August 8, 1978.

CONCLUSIONS OF LAW

1. This matter is properly before the Commission pursuant to §230.45(1)(c), Stats.

2. The provisions of the Wisconsin Personnel Manual-Compensation, Chapter 550, Statewide Guidelines for Performance Awards, Exhibit D, are binding on the respondent with respect to administration of the compensation plan as to DPA's and EPA's pursuant to §230.12(1) (a) and (4) (a), Wis. Stats.

3. The respondent's actions violated the provisions of Exhibit D and §230.12, Wis. Stats., by allocating the appellants' DPA's in part on the basis of divisional performance evaluations and by setting aside \$5000 for EPA's prior to making DPA allocations.

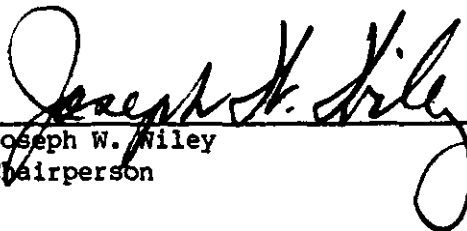
4. The appellants are entitled to be granted the DPA's they would have received had the awards originally been granted on an agency-wide basis without reference to divisional performance evaluations and without the initial allocation of EPA money, retroactive to the seven work days prior to the filing of the grievances.

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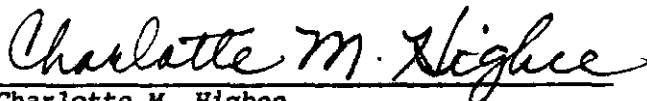
ORDER

The action of the respondent allocating DPA's among the appellants in part on the basis of division performance evaluations and after allocating \$5000 for EPA's is rejected and this matter is remanded for action in accordance with this decision.

Dated: Oct 12, 1979. STATE PERSONNEL COMMISSION



Joseph W. Wiley
Chairperson



Charlotte M. Higbee
Commissioner

AJT:jmg

STATE OF WISCONSIN

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(Case No. 78-193-PC)

STIPULATION OF FACTS
Case No. 78-178-PC
Case No. 78-193-PC

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Personnel
Commission

It is stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following facts are admitted for the purposes of the hearing to be held before the Personnel Commission in the above-entitled action:

1. Appellants are general, non-represented, classified employees of the State of Wisconsin Department of Revenue (Department) subject to the provisions of Pay Schedule #1 of

the State of Wisconsin Classification and Compensation Plan 1978-1979 (Compensation Plan), a copy of which is attached hereto as Exhibit A.

2. The Department, by Administrative Directive 370-1.3, dated February 10, 1975, established a Department grievance procedure, a copy of which is attached hereto as Exhibit B.

3. The Director of the Bureau of Personnel in the Department of Administration, by Administrative Practices Manual, Bulletin #12, dated May 30, 1975 established guidelines for a statewide employee performance evaluation and development program, a copy of which is attached hereto as Exhibit C.

4. The Director of the Bureau of Personnel in the Department of Administration, by Informational Bulletin #P-842, dated May 3, 1976 established Statewide Guidelines for Performance and Equity Awards, which include Discretionary Performance Awards (DPA's), a copy of which is attached hereto as Exhibit D.

5. The Department, by Administrative Directive 307-2.1 dated May 17, 1977, established guidelines for the implementation of DPA's, a copy of which is attached as Exhibit E.

6. On April 14, 1978, the Secretary of Revenue (Secretary) established a FY1979 Merit Plan (Plan) to govern the distribution of the Department Merit Fund (referred to in Paragraph 9 below.) The Plan included instructions regarding the distribution of DPA's. A copy of the Plan is attached hereto as Exhibit F.

7. On June 2, 1978, Robert H. Milbourne, Administrator of the Division of Research and Analysis, sent a memorandum to

the Secretary relative to the merit evaluation criteria for the Division of Research and Analysis, a copy of which is attached hereto as Exhibit G.

8. The Department of Employment Relations, by Bulletin #P-6 dated June 5, 1978 set forth instructions for processing DPA's, a copy of which is attached hereto as Exhibit H.

9. The Department generated 2% of its total June 17, 1978 hourly base payroll rate for all employees within the Department for potential distribution as merit awards (Department Merit Fund).

10. The total Department Merit Fund available for potential distribution as merit awards was \$275,517.87.

11. The Department, an agency of the State of Wisconsin, is divided into four separate divisions (Divisions), a Legal Staff, and an Office of the Secretary of the Department. For the purposes of this Stipulation, the Divisions are designated as follows: (1) Division of Income, Sales, Inheritance and Estate Tax (ISI&E); (2) Division of State and Local Finance (S&LF); (3) Division of Administrative Services (AS); (4) Division of Research & Analysis (R&A). The Divisions are further subdivided into Bureaus and Sections as appears from the organizational charts attached hereto as Exhibit I.

12. The Secretary determined the respective generations of each Division, the Legal Staff and the Office of the Secretary to the total Department Merit Fund of \$275,517.87, based upon the number of employees in each as follows:

	<u>Division</u>	<u>No. Employees</u>	<u>Division Merit Generation</u>
1.	ISI&E	508	\$ 168,944.26
2.	S&LF	222	75,884.19
3.	AS	63	19,938.31
4.	R&A	25	8,377.06
5.	Legal Staff	2	1,000.15
6.	Office of the Secretary	4	<u>1,373.90</u>
		TOTAL	\$ 275,517.87

13. The \$2,374.05 generated by the Legal Staff and Office of the Secretary was disregarded for purposes of distribution of merit awards to Division personnel, and was subtracted from the total Department Merit Fund for a new total of \$273,143.82. The respective generations of the Divisions to the total Department Merit Fund of \$273,143.82 are hereinafter referred to as "Division Merit Generations."

14. The Secretary retained 25% of each Division Merit Generation as follows:

	<u>Division</u>	<u>25% Retained by Secretary</u>
1.	ISI&E	\$42,236.07
2.	S&LF	18,971.05
3.	AS	4,984.58
4.	R&A	<u>2,094.27</u>
	TOTAL	\$68,285.97

15. The remaining 75% of the Division Merit Generations was made directly available to the respective Divisions for eventual distribution as DPA's in the following amounts:

	<u>Division</u>	<u>Remaining 75% Available To Divisions</u>
1.	ISI&E	\$ 126,708.19
2.	S&LF	56,913.14
3.	AS	14,953.73
4.	R&A	<u>6,282.79</u>
	TOTAL	\$ 204,857.85

16. From the 25% retained by the Secretary, the Secretary subtracted and set aside \$5,000 for payment of Department Exceptional Performance Awards (EPA's); \$4,040.33 for

payment of Legal Staff and Secretary's Office merit awards; and \$2,672.66 for payment of Division Administrators merit awards. The total amount subtracted and set aside for the above-stated uses was \$11,712.99.

17. The Secretary allocated the \$11,712.99 among the Divisions based upon their respective Division Merit Generations to the Department Merit Fund and subtracted each Divisions' allocation from the 25% retained by the Secretary as follows:

<u>Division</u>	<u>Amount Subtracted</u>	<u>Net Amount Available to Secretary for Distribution to Divisions</u>
1. ISI&E	\$ 6,473.80	\$ 35,762.27
2. S&LF	3,140.96	15,830.09
3. AS	1,185.75	3,798.83
4. R&A	<u>912.48</u>	<u>1,181.79</u>
TOTAL	\$11,712.99	TOTAL \$ 56,572.98

18. Following the subtraction stated in paragraph 17 above, the Secretary had available for distribution to the respective Divisions a total of \$56,572.98.

19. To distribute the \$56,572.98 to the Divisions, the Secretary independently evaluated Divisional performance based upon the following criteria: (1) Operational Deadlines; (2) Affirmative Action; (3) PAR Objectives; and (4) Secretary's Analysis of Divisional Performance. (All as more fully set forth in Exhibit F). Based upon such independent evaluation, the Secretary assigned a percentage rating to each Division as follows:

<u>Division</u>	<u>Secretary's Rating</u>
1. ISI&E	.9108
2. S&LF	1.0243
3. AS	1.0378
4. R&A	1.0270

20. Following a three-step process (more fully explained in Exhibit J), the Secretary distributed the \$56,572.98 to the Divisions based upon the percentage rating assigned to each Division pursuant to paragraph 19 above and the number of eligible employees in each Division as follows:

<u>Division</u>	<u>Amount Distributed to Division</u>
1. ISI&E	\$ 33,138.09
2. S&LF	17,113.56
3. AS	4,312.92
4. R&A	<u>2,003.30</u>
TOTAL	\$ 56,567.87

21. Following the Secretary's distribution pursuant to paragraph 20 above, the Divisions had available the following amounts (Division Merit Amounts) for distribution as DPA's:

<u>Division</u>	<u>Amount</u>
1. ISI&E	\$159,846.28
2. S&LF	74,026.70
3. AS	19,266.65
4. R&A	<u>8,286.09</u>
TOTAL	\$261,425.72

22. The Secretary prepared and distributed to the Divisions a calculation/explanation sheet explaining the Department Merit Fund allocation as described in paragraphs 12 through 20 above, a copy of which is attached hereto as Exhibit J.

23. Through subordinate supervisory personnel, Division Administrators evaluated the individual work performance of each eligible employee within the respective Divisions based on criteria directly related to individual job performance as delineated in previously stated guidelines and directives (Exhibits C, D and E). All eligible employees were rated in one of the following categories: (1) Superior; (2) Consistently Meets Job Requirements; (3) Needs Improvement; and (4) Unsatisfactory.

24. The Division ratings of eligible employees are set forth as follows:

<u>Division</u>	<u>Superior</u>	<u>Consistently Meets Job Req.</u>	<u>Needs Improv.</u>	<u>Unsatisfactory</u>
1. ISI&E	59	342	20	6
2. S&LF	28	158	8	0
3. AS	11	36	2	0
4. R&A	3	17	1	0

Merit Program Summary Analysis forms were prepared by each Division showing the number of eligible employees in various pay ranges, who received ratings in the various categories, copies of which are attached hereto as Exhibit K.

25. Pursuant to the Plan, all employees in the Department receiving a "Superior" evaluation were awarded 5% of their hourly wage as a DPA increase. All employees in the Department receiving "Needs Improvement" or "Unsatisfactory" evaluations were awarded no DPA increases.

26. The 5% DPA increases awarded to employees receiving a "Superior" rating were made at the Division level from the respective Division Merit Amounts, except in the case of R&A, as more fully explained below.

27. All employees in the Department receiving "Consistently Meets Job Requirements" evaluations received DPA increases based upon the amounts remaining in each respective Division Merit Amount after the "Superior" awards had been made, except in the case of R&A.

28. Following the Divisional level payment of DPA awards to employees rated "Superior", the Divisions made DPA payment awards to the employees rated "Consistently Meets Job Requirements" in the following percentages:

<u>Division</u>	<u>DPA Award</u>
1. ISI&E	1.835%
2. S&LF	1.860%
3. AS	1.900%
4. R&A	2.25-3.00%

29. On June 29, 1978, the Administrator of the Division of R&A issued a memorandum relative to the Division's merit distributions which set forth the percentage of hourly wage increases for Sections within the Division and for individual employees in the Division, a copy of which is attached hereto as Exhibit L.

30. If DPA awards to employees rated "Consistently Meets Job Requirements" had been made on a Divisional level from Division Merit Amounts after the Secretary's retention of \$11,712.99 referred to in Paragraph 16 above, but without the Secretary's redistribution referred to in Paragraph 20 above, the awards would have been in the following percentages:

<u>DIVISION</u>	<u>AWARD (RETENTION; NO REDISTRIBUTION)</u>
1. ISI&E	1.88%
2. S&LF	1.80%
3. AS	1.75%
4. R&A	1.84%

31. If DPA awards to employees rated "Consistently Meets Job Requirements" had been made on a Divisional level from Division Merit Amounts without the Secretary's retention of \$11,712.99 referred to in Paragraph 16 above and without the Secretary's redistribution referred to in Paragraph 20 above, the awards would have been in the following percentages:

<u>DIVISION</u>	<u>AWARD (NO RETENTION; NO REDISTRIBUTION)</u>
1. ISI&E	1.98%
2. S&LF	1.87%
3. AS	1.97%
4. R&A	1.62%

32. If DPA awards to employees rated "Consistently Meets Job Requirements" had been made on a Departmental level after the Secretary's retention of \$11,712.99 referred to in Paragraph 16 above, but with no distributions or redistributions on the Divisional level, the awards would have been in the following percentages:


<u>DIVISION</u>	<u>AWARD (RETENTION; NO REDISTRIBUTION)</u>
1. ISI&E	1.85%
2. S&LF	1.85%
3. AS	1.85%
4. R&A	1.85%


33. If DPA awards to employees rated "Consistently Meets Job Requirements" had been made on a Departmental level without the Secretary's retention of \$11,712.99 referred to in Paragraph 16 above, and without distribution or redistribution on the Divisional level, the awards would have been in the following percentages:

<u>DIVISION</u>	<u>AWARD (NO RETENTION; NO REDISTRIBUTION)</u>
1. ISI&E	1.93%
2. S&LF	1.93%
3. AS	1.93%
4. R&A	1.93%

34. This Stipulation does not preclude any party from requesting the Personnel Commission to take official notice of publications relative to personnel practices. No party admits that any such material presented for such purposes by other parties has any relevance or authoratative weight to the matters at issue.

Dated: January 15, 1979.


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