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ARBITRATION DECISION

July 18, 2003

In the Matter of:

State of Ohio, Department of Rehabilitation and Correction	)	
and	)	Case No. 27-12-20030328-1790-01-03
Ohio Civil Service Employees Association, AFSCME Local 11	)	

APPEARANCES

For the State:

Michael Duco, Manager, Dispute Resolution, Office of Collective Bargaining, Advocate
Beth A. Lewis, Labor Counsel, Office of Collective Bargaining, Assisting
Steven J. Loeffler, Deputy Director, Office of Collective Bargaining
Matthew Banal, Legal Intern, Office of Collective Bargaining
Reginald A. Wilkinson, Director, DR&C
Douglas Forbes, Chief of Fiscal Operations, DR&C
Steve Gulyassy, Former Deputy Director, Office of Collective Bargaining
Gary Johnson, Chief Labor Counsel, State of Ohio
Bradley Rahr, DR&C
Steve Little, Office of Collective Bargaining
Teri Decker, Labor Relations Administrator, DR&C
Terry Collins, Deputy Director of Institutions, DR&C
Dave Calhoun, Chief of Bureau of Construction, DR&C
Brian Eastman, Budget Chief, DR&C
Steve VanDine, Chief, Bureau of Research, DR&C
Barbara Matttei-Smith, Office of Financial Management, Office of Collective Bargaining
Kay Northrup, Deputy Director, Office of Correctional Health Care, DR&C

For the Union:

Carrie N. Varner, Associate General Counsel, OCSEA, Advocate
Lynn Belcher, Staff Representative, OCSEA, Assisting
Timothy P. Shafer, Correction Officer, Pickaway Correctional Institution

Craig Bradford, President, Lima Correctional Institution Chapter
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Joshua Miller, Researcher, AFSCME
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Mike Kaskel, Correction Officer, Lima Correctional Institution
Charles Williamson, Correction Officer, Southern Correctional Institution
Peter Wray, Director of Communications, OCSEA
David Ashby, Correction Officer, Allen Correctional Institution
Christopher Mabe, Correction Officer, Lima Correctional Institution
Kevin Birchfield, Correction Officer, Pickaway Correctional Institution
Robert White, Correction Officer, Richland Correctional Institution
Rich Wooding, Correction Officer, Belmont Correctional Institution
Kevin Flake, Correction Officer, North Central Correctional Institutional
David Simpson, Researcher, OCSEA

Arbitrator:

Nels E. Nelson

BACKGROUND

Ohio, like most states, is facing a serious budget crisis. In response to the situation, on January 28, 2003, the DR&C notified the union that the Lima Correctional Institution (LCI) would be closed. On March 21, 2003, the Rationale for Abolishment of Positions at LCI was delivered to the union. On March 24, 2003, Irwin Scharfeld, the union's executive director, sent a letter to the state claiming that the decision to close LCI was a mandatory subject of bargaining. The state replied that the decision to close LCI was not a mandatory subject under SERB case law, and, even if it was, it had already been bargained in Section 44.04 of the collective bargaining agreement but it offered to meet to discuss the closing.

While these events were occurring, the parties were preparing for conciliation. Prior to the conciliation hearing on April 17, 2003, the parties agreed that Article 18 of the expired contract would govern the layoff and signed a memo of understanding to that effect.

On April 14, 2003, the union filed a motion in Allen County Court of Common Pleas requesting a temporary restraining order and an injunction halting the closure of LCI. The union charged that the state had violated Section 44.02, of the contract by refusing to negotiate the decision to close LCI. Judge Reed granted the TRO on April 16, 2003, and scheduled a hearing on the injunction for April 30, 2003. The state responded by filing a Writ of Prohibition with the Ohio Supreme Court challenging Judge Jeffrey L. Reed's jurisdiction over the dispute.

Following the granting of the TRO, a number of actions occurred. However, the parties ultimately agreed to arbitrate the dispute. The hearing was held on June 5, 6, and

12, 2003. Post-hearing briefs were filed on June 23, 2003. Reply briefs were filed on June 28, 2003. The Arbitrator then had 20 days, or until July 19, 2003, to render his award.

ISSUES

The parties agreed that the issues are:

1) Did the State violate Article 44? If so, what shall the remedy be?

2) Did the State violate Article 18? If so, what shall the remedy be?

3) Did the State violate Article 11? If so, what shall the remedy be?

RELEVANT CONTRACT PROVISIONS

Article 5, Article 11, Article 18, and Article 44

UNION POSITION

The union argues that the state violated Article 44. It also charges that the state failed to prove that the closure of LCI met the requirements of the Ohio Revised Code and Ohio Administrative Code that are incorporated in Article 18. The union also alleges that the closure created a threat to health and safety in violation of Article 11.

Article 44 - The union argues that the Arbitrator has the authority regarding matters within the essence of the collective bargaining agreement. It claims that the state's reliance on SERB as an exclusive remedy to Section 44.02 is erroneous when the issue is a breach of the contract. The union states that pursuant to In re Upper Arlington Ed. Assn., SERB 92-010 (6-30-92), SERB will defer an issue to arbitration if the contract

controls the dispute. It asserts SERB will only directly address a violation of ORC 4117.11 (A) or (B). The union states that the bargaining rights in Section 44.02 of the contract do not depend on Chapter 4117.

The union contends that the collective bargaining rights of Chapter 4117 have not been incorporated in the contract. It points out that this is in contrast to Article 5 where the parties specifically incorporated management rights under ORC 4117.08(C) in the agreement. The union, however, recognizes that some value may be placed on SERB and NLRB case law to provide meaning to the term "mandatory subjects of bargaining."

The union contends that in Brown v. Sterling Aluminum Products Corp., 365 F.2nd 651 (8th Circuit, 1966), the court held that despite the fact that conduct may be an unfair labor practice, an action for damages and specific performance for the contract breach may be maintained by a union in arbitration. It claims that the Ohio courts have also applied this rule. (39A Employment Relations, Section 532, page 229)

The union rejects the claim that SERB would be the only arena in which to seek a remedy regarding management's failure to bargain. It points out that in many instances the contract whittles away at the broad management rights clause including the joint process for determining the posts necessary at a prison. The union states that it follows that the decision to close an institution is also a mandatory subject of bargaining.

The union maintains that an unfair labor practice remedy under the jurisdiction of SERB is not an adequate remedy at law for a contract breach. It points out that In re Cuyahoga County Sheriff's Department, SERB 90-017 (9-28-90), states:

> Ordinarily, a breach of a collective-bargaining agreement, including a refusal to arbitrate, does not constitute a per se violation of Section 8(a)(5) of the Act. See, Taft Broadcasting Company, WDAF AM-FM-TV, 185 NLRB 202 (1970). The Board in such cases leaves the parties to enforce their contractual

> rights through civil litigation under Section 301 of the Act or perhaps through other means provided under the collective-bargaining agreement itself.

The union argues that its grievance does not address the state's refusal to bargain in a vacuum. It points out that there is specific language in the collective bargaining agreement related to the state's obligations regarding layoffs, safety, and the duty to bargain. The union states that it is trying to enforce the contract

The union charges that the state has failed to demonstrate why LCI was selected for closure rather than a private correctional facility. It claims that the state was unable to support its reasoning for closing LCI when crowding will continue to increase. The union feels that the state has not met its burden of persuasion that its decision to close LCI was carefully and logically thought out.

The union argues that Section 44.02 grants it the right to bargain issues related to wages, hours, terms, and other conditions of employment. It contends that the state has ignored its duty to bargain the decision to close LCI, the decision to reassign employees and duties, and the decision to lay off employees. The union stresses that the case is not about how these decisions are going to be implemented but about the decisions themselves.

The union acknowledges a balancing test exists under SERB precedent but it claims that the test does not decide the issues in favor of broad management rights. It states that under OCR 4117.08(C), which is referenced in Article 5 of the contract, an employer is not required to bargain on subjects reserved to management except as they affect wages, hours, terms and conditions of employment, and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement. The union observes that at the same time ORC 4117.08(A) states:

> 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 state and the exclusive representative, except as otherwise specified in this Section.

The union reports that In re SERB v. Youngstown City School District Board of Education, SERB 95-010 (6-30-95), sets forth the balancing test adopted by SERB to determine whether a given subject is a permissive or mandatory subject for bargaining. It notes that SERB stated:

> [T]he following factors must be balanced: (1) The extent to which the subject is logically and reasonably related to wages, hours, terms and other conditions of employment; (2) the extent to which the state's obligation to negotiate may significantly abridge its freedom to exercise those managerial prerogatives set forth in and anticipated by O.R.C. 4117.08(C), including an examination of the type of state involved and whether inherent discretion on the subject matter at issue is necessary to achieve the state's essential mission and obligation to the general public; and (3) the extent to which the mediatory influence of the collective bargaining and, when necessary, any impasse resolution mechanisms available to the parties, are the appropriate means of resolving conflicts over the subject matter.

The union insists that it never waived its right to bargain the decision to close LCI, to relocate and reassign bargaining unit members, or to lay off bargaining unit employees. It claims that "recent past practice has not demonstrated a communication between the parties that either enlightened the Union or offered the Union the opportunity to discuss alternatives to the proposed closure." (Union Brief, page 9.) The union complains that in the instant case it was "cut off from the get-go from even discussing alternatives or concessions" and that Reginald Wilkinson, the director of DR&C, testified that "under no circumstances would the prison be reopened." (Ibid.)

The union contends that the decisions at issue undeniably affect the wages, hours, or terms and conditions of employment of its members. It states that it has a clear duty to

its members to demand that the state negotiate. The union indicates that the purpose of Section 44.02 is to establish a check and balance on the rights of employers.

The union claims that despite the self-serving twist placed on the intent of Section 44.02 by the state, it agreed that the intent of the language was to preserve the union's say in unilateral attempts to change the wages, hours, or terms and conditions of employment of its members. It observes that Steve Gulyassy, the former deputy director of the Office of Collective Bargaining, testified that SERB never ruled on the necessity of management's obligation to bargain a decision and stated that he was aware of discussions regarding the decision to close Orient Correctional Institution and the exchange of proposals by the parties. (Transcript, pages 127, and130-133) The union states that according to Gulyassy, the state's annotated contract did not explicitly indicate that Article 44 prohibited it from bargaining decisions to close an institution. (Transcript, page 145)

The union stresses that the decisions at issue must be bargained because they are simply a relocation of the work done at LCI. It suggests that in Lorain City School District Board of Education v. SERB, 40 Ohio St. 3d 257, SERB determined that a relocation of work decision is very much like a decision to subcontract bargaining unit work and is a mandatory subject of bargaining.

The union rejects the state's argument that under the second prong of the balancing test their decisions are essential to the state's mission and obligation to the general public. It states that there is no evidence that the obligation to bargain would significantly abridge the state's public duty. The union asserts that bargaining would only give it the opportunity to present and have the state consider alternatives or

concessions that it could offer in exchange for keeping LCI open. It insists that bargaining would not nullify the state's management rights but would expand its thinking and place its duties in a more public light.

The union maintains that the third prong of the test supports its position. It indicates that "the mediatory influence of collective bargaining is the appropriate means of resolving conflicts over decisions such as presented here that require employees to expend additional funds and great personal sacrifice." (Union Brief, page 11) The union claims that there is no compelling evidence that a decision to close a state prison, reassign/relocate bargaining unit work, and lay off employees is not amenable to the mediatory influence of collective bargaining.

The union concludes that the three prongs of the balancing test indicate that the decisions at issue are mandatory subjects of bargaining and that the state violated Section 44.02 of the contract by its unilateral action.

Articles 11 & 18 - The union states that "it has clearly presented in this case ample evidence and testimony to support its assertion that the State of Ohio has not exercised their decision to close LCI and conduct a layoff of DR&C employees based upon a clear and precise understanding of the consequences of this choice." (Union Brief, page 14) It points out that Joshua Miller, an AFSCME researcher and expert on prisons, stated:

> In the public sector, we see the mission as being different. We see the mission as truly protecting public safety and also rehabilitating inmates, so in the vein – in light of that, we can't just look at cutting costs; because if you're doing things, for example, that are going to increase your recidivism, then its insufficient. So it's not just a matter of looking at budget numbers or looking at, you know, an audit report or anything like that. It's putting that information in the context of what is the agency's mission." (Transcript, pages 379-80)

The union adds that Robert White, a correction officer at Richland Correctional Institution, stated that his institution was "dumped on," jeopardizing its goal of educational improvement.

The union indicates that Section 18.01 requires that layoffs be made pursuant to ORC 124.321-.327 and OAC 123: 1-41-01 through 22 except as modified by Article 18.01. It notes:

> Ohio Revised Code § 124.321 (Jt. Ex. 42) states, in pertinent part:
>
> > A) Whenever it becomes necessary for an appointing authority to reduce its work force the appointing authority shall lay off employees or abolish their positions in accordance with sections 124.321 to 124.327 and the rules of the director of administrative services.
> >
> > B) Employees may be laid off as a result of a lack of funds within an appointing authority. For appointing authorities which employ persons whose salary or wage is paid by warrant of the auditor of state, the director of budget and management shall be responsible for determining whether a lack of funds exists. The director of budget and management shall promulgate rules, under Chapter 119 of the Revised Code, for agencies whose employees are paid by warrant of the auditor of state, for determining whether a lack of funds exists.
>
> Further, Ohio Revised Code § 124.321 states, in pertinent part:
>
> > C) Employees may be laid off as a result of lack of work within an appointing authority. For appointing authorities whose employees are paid by warrant of the auditor of state, the director of administrative services shall determine whether a lack of work exists.
>
> And finally, Ohio Revised Code § 124.321 states, in pertinent part:
>
> > D) Employees may be laid off as a result of abolishment of positions. Abolishment means the permanent deletion of a position or positions from the organization or structure of an appointing authority due to lack of continued need for the position. An appointing authority may abolish positions as a result of a reorganization for the efficient operation of the appointing authority, for reasons of economy, or for lack of work. The determination of the need to abolish positions shall indicate the lack of continued need for positions within an appointing authority. Appointing authorities shall themselves determine whether any position should be

abolished and shall file a statement of rationale and supporting documentation with the director of administrative services prior to sending the notice of abolishment.

Ohio Administrative Code 123:1-41-02 (Jt. Ex. 43) sets forth the following rules for determining lack of funds, lack of work:

> A) Determination of lack of funds. The director of the office of budget and management shall be responsible for determining whether a lack of funds exists for appointing authorities whose employees are paid by warrant of the auditor of state. ...
>
> (B) Determination of lack of work. The director shall determine whether a lack of work exists for appointing authorities whose employees are paid by warrant of the auditor of state. The appointing authority shall file along with a request for determination of lack of work, adequate information to establish that a lack of work exists. Such information may consist of a comparison between current work levels and work levels when a lack of work did not exist, which may include statistical data and additional supporting materials.

Ohio Administrative Code 1234:1-41-04 (Jt. Ex. 43) states:

> (A) Reasons for abolishment. An appointing authority may abolish positions in the classified civil service for any of the following reasons: as a result of a reorganization for the efficient operation of the appointing authority; for reasons of economy; or for lack of work which is expected to be permanent. A lack of work shall be deemed permanent if it is expected to last more than one year.

And finally, the Ohio Administrative Code Rule 124-7-01(A)(1) (Jt. Ex. 46) states in pertinent part:

> (A) Job abolishments and layoffs shall be disaffirmed if the action is taken in bad faith. The employee must prove the appointing authority's bad faith by a preponderance of the evidence. (1) Appointing authorities shall demonstrate by a preponderance of the evidence that a job abolishment was undertaken due to the lack of continuing need for the position, a reorganization for the efficient operation of the appointing authority, for reasons of economy or for a lack of work expected to last more the twelve months." (Union Brief, pages 13-15)

The union contends that the language contained in ORC 124.321 (D) requires a sequential analysis of any abolishment decision. It maintains that the statute indicates that the language defining abolishment must initially be confronted because it serves as the threshold issue. The union claims that the permanent elimination of a position contemplates that the work performed or services provided are no longer required or needed.

The union claims that "[a] permanent deletion, more specifically, does not exist when substantially the same work previously performed by the ousted employee is presently performed or needed to be performed, as a function of a mere transfer, by others in a similar capacity." (Union Brief, pages 17-18) It maintains that some of an employee's duties can be consolidated or redistributed to other employees but if the work needs to be performed, the position cannot be legitimately abolished.

The union challenges the claim that closing LCI and conducting the layoff will lead to cost-savings. It claims that it is outrageous to assert that for less money a government agency can provide prison services of equal quality by downsizing the workplace and consolidating the inmates.

The union argues that there is not a realistic or rational reason for the closure and layoff without looking at the projected impact, the indirect costs, and "the numbers." It points out that Ruth Ruttenberg, a consultant, testified that the documents the state used to analyze efficiency were not enough to make a decision. The union adds that she indicated that the documents did not include the marginal costs that economists use to measure efficiency. It stresses that when examining efficiency, one looks at alternatives

but Douglas Forbes, the chief of fiscal operations for DR&C, testified that this analysis was not even prepared until after the decision was made to close LCI.

The union challenges the assertion that "the labor source is the efficient and economical target for cost-savings." It claims that this belies the fact that labor is the most important ingredient of the service being provided so that the majority of the spending must be in this area. The union insists that the state can "only minimize labor to a point where the operation of the institutions are not being threatened and are being operated at a proper running level." (Union Brief, page 18)

The union claims that the state achieved great savings in labor costs without downsizing. It points out that the bargaining units will not see a pay increase this year or next; longevity will be frozen for two years; payments for missed overtime have been eliminated; and roll call pay for correction officers has been minimized. The union claims that the Conciliator states that his award was based on the state's assertion that it would save jobs.

The union contends that despite the reductions in the quality of service, the evidence fails to support the assurance of cost savings. It charges that the state's analysis fails to account for the indirect costs highlighted by Miller, Ruttenberg, and David Simpson, an OCSEA researcher. The union states that "while Forbes' analysis may account for a few costs, the root of the problem lies in the fact that he went too far and even as Ruttenberg recognizes, Simpson may not even have gone for enough." (Union Brief, page 20)

The union maintains that its assessment of the OCI closure directly refutes the assessments of Forbes and Brian Eastman, DR&C's budget chief, that there was a cost-

savings. It indicates that correction officers have attested to the fact that operations "have gone from bad to worse." The union stresses that the OCI closing was also justified as improving economy and efficiency.

The union claims that the philosophy of the state in the closure of OCI was the same as in the closure of LCI. It complains, however, that when OCI closed, Pickaway Correctional Institution received only half the posts to continue three dorms and the Frazier Health Center plus several posts to maintain the camp. The union notes that Kevin Birchfield, a correction officer at PCI, testified that the staff-to-inmate ratio decreased, dormitories were more crowded, and overtime soared dramatically.

The union indicates that there was an outbreak of methicillin resistant staphylococcus aureus (MRSA) at PCI. It reports that the majority of the cases appeared to be in a crowded, open-bay dorm. The union notes that two inmates diagnosed with MRSA have died in the last two months. It observes that Birchfield testified that staffing levels make it difficult to supervise the sanitation necessary to contain the spread of MRSA.

The union charges that the state has ignored the stress being created. It claims that filling vacancies will only minimally improve the situation. The union asserts that stress on staff as well as services and facilities have been ignored by the state.

The union challenges the claim that the closure of LCI is based on efficiency and economy. It asserts that Terry Collins, DR&C's deputy director of institutions, Forbes, and Wilkinson repeatedly stated that they were acting because of the lack of funds. The union stresses, however, that a layoff cannot be based on a lack of funds unless the lack of funds is certified by the Office of Budget and Management.

The union charges that the state has self-servingly focused on only the financial aspects of operations. It claims that Ruttenberg best defined efficiency as:

> It's really maximizing value. It's taking technology and the resources that you have and finding the best possible use of resources. And its in classical situation, an efficient decision is one where it's not possible to make someone better off without making someone worse off. And it's really the marginal cost issue. In most efficient models, you are looking at a place when marginal cost and benefit are equal, and it's all a marginal analysis. .. Economists start out really theoretically, and the model is supposed to – is supposed to apply lots of different industries. ...So whether its education or correction, there usually is a social value that comes into the efficiency decision, and that's a social value that determines that even if the market isn't going to allocate in a particular way, that social benefit is sufficiently important to add that into the equation so that aspects of public safety that Correction are supposed to be dealing with become part of that efficiency equation when you are dealing with market failure in the public sector. (Union Brief, page 24)

The union maintains that the testimony regarding the structure and capital improvements show that the closure of LCI will likely "backfire." It claims that the result will be an overburdened workforce, higher turnover, higher sick leave usage, and other costs. The union adds that "the structure [of LCI], second only to the pentagon, is a resource very few buildings nationally can attest to especially offering security like that demanded by the mission of the pentagon and prison institutions." (Union Brief, page 24)

The union argues that the layoff at LCI will not eliminate the state's burden to repay the loans for the capital improvements already performed. It contends that a review of the pictures and testimony of correction officer Michael Kaskel and the testimony of Dave Calhoun, the chief of DR&C's bureau of construction, demonstrates that LCI has been "fully restored and is as good as if it were new." The union notes that the improvements include new heating, cooling, windows, and roofs.

The union claims that Peter Wray, its director of communications, and Simpson demonstrated that the calculations done by the state are inaccurate. It reports that in closing LCI the state will be paying on bonds or debt on construction that has been squandered. The union further charges that the state is playing a shell game by including costs that have not been funded for FY 2004. It notes that at the hearing Calhoun adjusted the figures eliminating several claimed savings.

The union asserts that there are many alternatives to a layoff that would be more efficient. It charges that the state is abandoning a completely revamped structure where repair and maintenance work is continuing and equipment is waiting to be installed. The union insists that these are projects that the agency will continue to pay for down the road.

The union argues that a look at future spending is even more revealing. It states that not all of the money listed in the rationale will be saved because some projects have already been funded and the agency already owes the money. The union indicates that other projects will only be funded if DR&C selects them as priorities. The union asserts that there is no one institution that seems to be more of a burden in terms of capital spending.

The union charges that the state's entire claim in regard to the use of capital improvement expenditures is false. It states that when sunk costs are considered, the state will lose $10 million.

The union maintains that there has been an increase in the number of inmates. It indicates that the institutions currently hold 44,553 (not including LCI) even though the

design capacity of the institutions is only 35,011. It stresses that the state projects increases in inmate populations over the next ten years.

The union reports that the prison population has recently increased. It points out that between September 3, 2002, and May 22, 2003, the population increased by 551 inmates, and that the closure of LCI will add 1233 inmates to institutions that are already overcrowded. The union adds that on May 27, 2003, there were 3915 inmates at reception centers waiting to be moved into the institutional system.

The union contends that despite the opening of three units, staff ratios will get worse. It observes that prior to the closure of LCI the staff ratios averaged 6.51 and that the ratios are projected to increase even if the vacant positions are filled. It adds that the calculations are wrong because they fail to take into account increases in the population. The union believes that the state is "maintaining a dangerous correction officer to inmate ratio that hinders the ability of the Correction Officers to provide services needed for the efficient operation of the institution." (Union Brief, page 29)

The union charges that to justify closing LCI the state presented a rationale that misrepresents the truth. It observes that the state acknowledges that the population will grow but justifies the closure because the population is down from 1998. The union asserts that 1998 was the year that the population was the highest and that it would be naïve to characterize it as an ideal situation. It claims that Wilkinson, Collins, and Forbes all indicated that action had to be taken because they anticipate less funding for FY 2004 and FY 2005.

The union argues that decreasing the number of beds by closing LCI is not the answer to the problem. It states that the transferee institutions will experience a

substantial increase above their officially rated capacities. The union indicates that by the end of May 2003, when LCI was not yet empty, the prisons were operating at an average of 129% of capacity and the two reception centers were at 234% and 274% of capacity.

The union reveals that there are alternative measures of crowding. It points out that design capacity is the number of individuals an institution was designed to house and unencumbered space, which is used by the American Correctional Association, is the number of unencumbered square feet per person in a housing unit. The union reports that Miller indicated that the ratio of inmates to security staff is another measure of crowding.

The union observes that the closing of LCI will increase crowding. It claims the effect will be as follows:

Effect of Lima Transfers On Overcrowding

Institution	Current Population Level	Population Level With Lima Inmates	Inmates Per Security Staff After Lima
Grafton	143%	154%	7.4
Southeastern	119%	140%	7.8
North Central	115%	127%	8.9
Richland	122%	126%	9.4
Allen	160%	192%	8.0
Belmont	127%	134%	7.3
Marion	101%	107%	6.6
Nobel	108%	114%	8.1

(Union Brief, page 32)

The union notes that Miller testified that the increase in crowding was reason enough not to close Lima.

The union argues that another factor not considered in closing LCI was the effect on the Special Response Teams that respond to institutional disturbances. Correction officer David Ashby from Allen Correctional Institution testified that the SRT's of three institutions would be depleted to the point that they would not be functional. The union notes that this would create additional costs of recruiting and training new SRT teams at those institutions.

The union maintains that the most immediate and visible effect of crowding is demonstrated in the lack of space for storage. It points out that inmates are allowed 2.4 cubic feet of storage space for personal belongings. The union claims that overcrowding increases the difficulties and that correction officers are discouraged from enforcing the rules.

The union contends that when institutions are filled beyond capacity, buildings and systems are overtaxed. It reports that ACI has received 90 of the 248 inmates it is scheduled to receive from LCI. The union observes that ACI is already experiencing difficulties with sewage processing that can expose the outside community to hazards and subject the prison system to EPA fines.

The union argues that its witnesses indicated that crowding has three types of effects on the daily prison environment. It points out that crowding means that there is less of everything to go around so that inmates have less opportunity to participate in self-improvement and rehabilitation programs. The union claims the same applies to bathrooms, recreation areas, library books, and television lounge seating. It states this leads to frustration and aggression and violence.

The union contends that the crowding is most obvious at the reception centers. It reports that Lorain Correctional Institution was built for 730 inmates but it has 2083 listed on its rolls. The union complains that inmates are housed on the floors and in the infirmary. It adds that the institution plans to empty the cadre dorm to make room for prisoner intake.

The union argues that the second effect of crowding is on inmate behavior. It states that crowding creates stress that leads to withdrawal, aggression, and depression. The union claims that none of these responses enhance the health of the inmates.

The union claims that communicable diseases thrive in overcrowding. It observes that John Bonnage, an expert on infectious diseases from AFSCME's Department of Occupational Safety and Health, testified that MRSA is on the rise in Ohio prisons. The union states that MRSA is spreading because the recommendations for frequent hand washing and disinfection of contact surfaces are not being followed.

The union complains that many institutions are crowded to the extent that shower and toilet facilities are inadequate. It observes that Collins' solution of lengthening the schedule for showers inhibits the ability of the correction officers to supervise the porters in a continuous cleaning of the facilities.

The union states that contact with family members is also seriously curtailed by crowding. It contends that this leads to recidivism. The union states that the lack of social interaction results in more gang activity. It reports inmates identified as gang members has doubled at Northcoast Correctional Institution.

The union argues that the third effect of crowding is the misclassification of offenders. It claims that overcrowding results in the offenders being classified on the

basis of space available rather than the security level or the programs most suitable for them. The union notes that Miller reported that inmates under 18 years old were being classified with a mental diagnosis because of the lack of bed space and correction officer Rich Wooding from Belmont Correctional Institution testified that people who are being placed in preferred housing do not have the qualifications to get in.

The union maintains that the misclassification of offenders creates problems. It claims that it slows the progress of individuals through the correction system, which perpetuates or increases the overcrowding problem. The union complains misclassification also results in poor programming for inmates.

The union claims that testimony demonstrated that there is a link between the amount of space available or the number of inmates per room and various measures of personal and institutional strain. It states that crowding is related to higher rates of psychiatric commitment, more complaints of illness, and increased recidivism. The union adds that it is also connected to suicide, violence, and disciplinary infractions.

The union observes that the ACA is on record as indicating that crowding is the most significant aspect of the quality of prison life. It points out that many Ohio prisons have failed the standards related to crowding and unencumbered space. The union acknowledges that DR&C proposed several plans to alleviate the undesirable effects of crowding but complains that the plans are based on a decline in inmate population.

The union reports that many correction officers feel a power shift because of the increase in the number of inmates. It points out the correction officer Robert White from RCI testified that recreation areas and yards are packed beyond design capacity. The union notes that the lack of beds in segregation has reduced the time prisoners can stay

there and has lowered correction officer morale and made them less likely to attempt to enforce the rules.

The union argues that the cost avoidance model demonstrates that the state has not pursued the layoff for efficiency and economy. It states that the total costs of a particular correctional institution should include both the direct costs, the operating and capital expenditures to provide the services in question, and the indirect costs, those costs borne by government or nongovernmental parties to support a particular activity. The union charges that the state has ignored the indirect costs in its analysis of the closure of LCI.

The union contends that the state's analysis failed to properly account for capital spending. It indicates that the true cost of delivering a service includes operating costs as well as some portion of the capital expenditures made that year and the debt service owed on capital expenditures made in past years. The union claims that the state inappropriately assumed that the upcoming capital improvements would be incurred in FY 2004 and FY 2005 and that this cost included the amount of interest paid on the debt during the time period measured.

The union asserts that it is suspect how the state believes that closing LCI is either an efficient use of resources or economical. It points out that the state has spent $23.4 million to renovate the facility so that it is in "mint condition." The union states that LCI has the second thickest walls and is second only to the Pentagon in structural reliability. The union adds that correction officer Mike Kaskel from LCI testified that the state has purchased equipment that is still in the garage waiting to be installed and cannot be used elsewhere.

The union maintains that the state failed to consider the direct costs that other agencies will incur in serving DR&C's mission. It claims that ignoring the costs of services provided by the other agencies and levels of government may result in significant undercounting of the total direct costs related to the closing of LCI.

The union charges that the failure to count the added costs of certain benefits and plans results in less savings than estimated by the state. It points out that when a state employee is laid off, the employee can pursue unemployment benefits and is entitled to pay for accrued leave. The union notes that where an early retirement incentive program is offered, the state must make a large payment to the retirement system.

The union maintains that Simpson's cost analysis properly accounts for the direct and indirect costs that Forbes failed to account for. It points out that his cost avoidance model, which is certified and applied by both management and union advocates, demonstrates that the state will not see the savings it projects.

The union claims that Collins improperly assumes that "the more inmates you stuff under an institution's roof," the more cost effective the system. It acknowledges that a study of New York prisons found that average per capita costs were generally lower at larger prisons. The union noted, however, costs differed depending on the way prisons were staffed.

The union suggests that "it is not cost effective to squeeze more prisoners into smaller spaces (probably because staffing costs will rise in these circumstances.)" (Union Brief, page 46) It cites two books in relation to this point, which appear to rely on various multi-variate statistical techniques to control for the variety of factors beyond size that impact cost.

The union concludes that the state violated Articles 11,18, and 44 of the collective bargaining agreement. It claims that the state has a mandatory duty to bargain the decision to close the Lima prison, the decision to relocate/reassign the bargaining unit work and the decision to lay off bargaining unit employees as set forth in the terms of the collective bargaining agreement and provided for under state law. The union points out that Section 44.02 specifically states that "the State will satisfy its collective bargaining obligation before changing a matter which is a mandatory subject of bargaining."

The union charges that the state has violated Article 11. It indicates that the transfer of inmates from LCI to other institutions will increase crowding and result in a direct threat to the health and safety of members of the bargaining unit as well as the public and inmates. The union claims the threat takes the form of increased violence, stress, and communicable disease.

The union maintains that the state has breached Article 18. It points out that this provision requires the state to follow the ORC and OAC in implementing a layoff. The union charges that the decision to close LCI was merely a political decision and the justification of economy and efficiency was merely an afterthought. It insists that there "was no sincere consideration of any other factors or comparisons within the prison system that the Broadview decision requires." (Union Brief, page 48)

The union asks the following:

1) the rationale be withdrawn;
2) the actions involved the closing of LCI to cease and desist; and
3) for DR&C to be required to bargain the decisions to close LCI, to reassign/relocate bargaining unit work, and to conduct a layoff of bargaining unit employees. (Union Brief, page 49)

STATE POSITION

The state argues that the union is the moving party with respect to the alleged violation of Article 44 and, as such, it bears the burden of proof. With regard to Article 18, the states acknowledges that it must show by a preponderance of the evidence that the closure of LCI met the conditions for the abolition of jobs in the ORC and OAC that are incorporated in Article 18. It denies any violation of Article 11.

Article 44 - The state argues that the Arbitrator does not have jurisdiction to determine whether it failed to bargain over a mandatory subject of bargaining. It points out that in State ex re. Fraternal Order of Police, Ohio Labor Council, Inc. v. Franklin County Court of Common Pleas, 76 Ohio St 3d 287,289 (1996), the court held:

> Exclusive jurisdiction to resolve charges of unfair labor practices is vested in SERB in two general areas: (1) where one of the parties files charges with SERB alleging an unfair labor practice under R.C. 4117.11; or (2) where a complaint brought before the common pleas court alleges conduct that constitutes an unfair labor practice specifically enumerated in RC. 4117.11.

The state indicates that SERB's exclusive jurisdiction applies in the instant case because the union previously filed charges alleging a similar unfair labor practice and because it brought the instant case before the Court of Common Pleas in Allen County.

The state reports that when it decided to close OCI the union filed case 2002-ULP-01-0007 with SERB claiming that it failed to engage in good faith bargaining or any meaningful negotiations. It responded that it had satisfied its duty to bargain by negotiating Section 44.04 and that it had made its decision to close OCI pursuant to Article 5, Article 18, and Section 44.04. The state stresses that SERB dismissed the case and suggested that any alleged contractual violations should be arbitrated.

The state observes that the union also brought the instant case before the Allen County Court of Common Pleas. It points out that in its motion for a temporary restraining order the union charged that the state violated ORC 4117 by refusing to bargain over its decision to close LCI, reassigning bargaining unit work, relocating bargaining unit, and laying off bargaining unit employees. The state indicated that it invoked SERB's jurisdiction by alleging conduct that constituted an unfair labor practice. It stresses that the Ohio Supreme Court granted its Writ of Prohibition challenging the Allen County court's jurisdiction.

The state contends that even if the Arbitrator finds that he has jurisdiction to reach the issue, the decision to close LCI is not a mandatory subject for bargaining. It states that the decision involves a change in the scope and direction in its duty to house and protect inmates. The state indicates that its decision is not based on a reduction in wages or benefits or the cost of employment but on the fact that LCI is inefficient because it is outdated and not designed to be a prison. It stresses that "since the decision does not implicate basic bargaining rights, and because the decision is not amenable to the collective bargaining process, it is not a mandatory subject of bargaining." (State Brief, page 6.)

The state observes that the mandatory subjects of bargaining and management's rights are set forth in ORC 4117.08. It points out that ORC 4117.08(A) makes matters pertaining to wages, hours, or terms and conditions of employment and their continuation, modification, or deletion, mandatory subjects for bargaining. The state notes that ORC 4117.08(C) lists nine subjects that are the right and responsibility of an employer and that these have been incorporated in Article 5 of the contract. It adds that

the concluding paragraph of ORC 4117.08 (C) clarifies that an employer is not required to negotiate on a subject reserved to management except as it "affects" wages, hours, and terms and conditions of employment.

The state observes that differentiating between an exclusive management right and what "affects" the mandatory subjects of bargaining has been the subject of extensive litigation. It reports that originally SERB held that any matter having an effect on wages, hours, and terms and conditions of employment was a mandatory subject of bargaining. (In re City of Lakewood, SERB 88-009 (7-11-88), affirmed 1988 SERB 4-141 (CP Cuyahoga, 12-27-88); affirmed 66 Ohio App 3d 387, 1990 SERB 4-35; Lorain City School Dist. Bd. Of Ed. (1988), 40 Ohio State 3d 257, 1989 SERB 4-2.)

The state observes that in 1993 SERB reversed the Lorain/Lakewood definition. It points out that In re Transportation Dept., SERB 93-005 (4-29-93), SERB realized that there were few subjects that did not affect wages, hours, and other terms and conditions of employment and concluded that a balancing test would best protect the parties' interests.

The state maintains that SERB reviewed the law in other jurisdictions to determine which test best fulfilled the General Assembly's goals. It indicates that In re Transportation Dept. looked to the balancing test adopted in First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981). The state indicated that after considerable litigation SERB held that the following three factors had to be considered:

> 1) The extent to which the subject is logically and reasonably related to wages, hours, terms and conditions of employment;
>
> 2) The extent to which the state's obligation to negotiate may significantly abridge its freedom to exercise those managerial prerogatives set forth in and anticipated by ORC 4117.08(C), including an examination of the type of

employer involved and whether inherent discretion on the subject matter at issue is necessary to achieve the employer's essential mission and its obligations to the general public; and

3) The extent to which the mediatory influence of collective bargaining and, when necessary, any impasse resolution mechanisms available to the parties are the appropriate means of resolving conflicts over the subject matter. (In re SERB v. Youngstown City School Dist. Bd. Of Ed., SERB 95-010 (6-30-95)

The state observes that balancing tests have been applied by the NLRB to plant shut downs, partial closures, and relocations. It points out that in First National Maintenance Corporation the U.S. Supreme Court stated that "Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union's members are employed [and that] there is an undeniable limit to the subjects about which bargaining must take place." (452 U.S. 666,676.) The state acknowledges that the court also recognized that closing or relocating a business was a grave concern to employees and, thus, created a balancing test to resolve disputes over the conflicting rights. It notes that in applying the test the Court concluded that the harm to the employer's need to decide whether to shut down part of its business for economic reasons outweighs the benefit of the union's participation in making the decision.

The state maintains that Otis Elevator Company and Local 1989 International Union, United Automobile, Aerospace, Agricultural Implement Workers, 269 NLRB 891 (1984), illustrates how the NLRB applied the rule in First National Maintenance. It points out that when Otis decided to move its research facility to Connecticut, the Board declared that the critical factor for determining whether a subject must be negotiated is whether it turns on a change in the nature or direction of the business or labor costs and

not on its effect on employees or a union's ability to offer alternatives. The state reports that on that basis a plurality of the Board decided that Otis' decision to relocate was not a mandatory subject of bargaining.

The state claims that the Board's attempt to infuse labor costs as a factor was short-lived. It observes that in Arrow Automotive v. NLRB, 853 F.2d 223 (4th Cir. 1988), the Fourth Circuit found that labor costs are an important factor for a failing operation to consider in deciding to close and that there is no obligation to negotiate the decision even if the union offers concessions. The state notes that the court declared the company's decision to close or relocate did not involve a term or condition of employment and that it had no obligation to negotiate.

The state indicates that the First National Maintenance balancing test was adopted by the Sixth Circuit in Fivecop, Inc. v. NLRB, 294 F.3d 768 (2002). It points out that the court held that "where an employer makes a fundamental business change based solely on economic reasons, that employer is not required to bargain over terms." (at 789).

The state argues that pursuant to the balancing tests applied by both SERB and federal authorities, the decision to close LCI is easily outside of mandatory subjects of bargaining. It states that the decision to close the institution had nothing to do with obtaining cheaper labor or was even remotely based on anti-union animus. The state stresses that all of the employees perform similar work, are members of the same union, and receive the same wage.

The state maintains that the decision to close part of an enterprise is universally recognized as an "absolute right," and that this is especially true when the decision is based on economic issues apart from the employer-employee relationship. It points out

that it decided to close LCI because it became too costly due to outdated facilities and infrastructure. The state claims that the reorganization is essential and the obligation to negotiate would significantly abridge its rights set forth in ORC 4117.08 (C).

The state contends that bargaining over the decision to close LCI would not be a feasible means of resolving any conflicts. It indicates that its decision is not based on employees' hourly rates and negotiations would not change the fact that it will have to spend "terrific" sums of money to operate LCI. The state maintains that "pursuant to a 'per se' rule handed down by the United States Supreme Court, and based on the balancing of interests, the decision to close LCI is an exercise of management's discretion and is non-negotiable." (State Brief, page 14.)

The state argues that even if it has the duty to bargain over the closure of LCI, it met that duty. It points out that Section 44.04 of the collective bargaining agreement provides:

> In the event the State plans to close an institution or part thereof it shall give ninety (90) days advance notice to the Union. The Union shall be given the opportunity to discuss the planned closure with the State. Should it become necessary to close an institution or part thereof, the following guidelines will be utilized:
>
> A) Where individual institution(s) or part(s) thereof are closed, the provisions of Article 18 will apply;
>
> B) The Agency(s) will seek to absorb all affected employees or help displaced workers obtain employment in other areas of the public sector;
>
> C) A concerted effort will be made to relocate displaced employees within the framework of any new delivery system. The State will seek to involve the Union in any newly-created structure in a positive program for the hiring and possible retraining of any displaced employee;
>
> D) In cooperation with the Union, the Agency(s) will aggressively search for any available program assistance for the purpose of job training and/or placement. The Union and the State will closely examine all possible

> avenues for human resource assistance in both the public and private sectors.

The state indicates that this language clearly gives it the exclusive right to "plan to close an institution."

The state maintains that the Ohio Supreme Court has recognized the significance of this provision. It observes that the court stated in its decision on the Writ of Prohibition that "the agreement provides that the union be given advance notice if the state 'plans to close an institution of a part thereof' and be given only the 'opportunity' to discuss the planned closure with the State." (Joint Exhibit 49, Paragraph 28.) The state notes that the court added that "the agreement does not provide that this action must be bargained." (Ibid.)

The state charges that the union is trying to achieve in arbitration what it failed to obtain in negotiations. It points out that the union negotiated the right to discuss a closure rather than the right to negotiate a decision to close. The state notes that the American Heritage Dictionary, Second College Edition, defines discuss as, "to speak together about; talk over" and defines negotiate as, "to confer with another in order to come to terms or reach an agreement."

The state charges Linda Fiely, the union's general counsel, offered a misleading interpretation of the standard set by SERB in In re Transportation Dept. It claims that Fiely implied that SERB had indicated that the parties were to negotiate because the contract included the term "discuss." The state indicates that SERB's decision did not turn on the meaning of "discuss" but on the fact that the parties had not included specific language in the contract dealing with the issue. It stresses that for this reason SERB required the parties to discuss the issue.

The state argues that bargaining history indicates that Section 44.02 was not meant to apply to the instant case but to changes in statutes, rules, or regulations that provide benefits to state employees. It claims that the language at issue in Section 44.02 came about when the legislature passed Senate Bill 99 that required employees who were promoted to receive an increase of "approximately" rather than "at least" 4% so that some bargaining unit employees moved one step rather than two steps on the salary schedule. The state indicated that both Gulyassy and Gary Johnson, the state's chief negotiator, testified that the second paragraph requiring it to bargain over mandatory subjects was added to deal with situations like that created by Senate Bill 99. It notes that Gulyassy testified that the language at issue "was specifically designed to impact the changes that were external to the contract, those issues that might be mandatory subjects of bargaining where the rule or law could be changed and might be changed outside the context of the contract." (Transcript, page 123)

The state maintains that the union provided no other reasonable explanation for the changes made to Section 44.02. It points out Fiely testified that she was concerned about deleting the "continue and" phrase so that conditions could be changed by law during the contract. The state observes, however, that on cross-examination she acknowledged that the reason for changing the preservation of benefits clause could have been the lawsuit over Senate Bill 99.

The state contends that there is no violation of Section 44.02. It indicates that a violation of the provision would require the union to prove that there was a change in "State statutes, regulations or rules promulgated pursuant to ORC Chapter 119 or Appointing Agency directives," which provide benefits to employees, that the contract

was silent on the matter, and that the matter was a mandatory subject of bargaining. The state asserts that the union failed to prove all three elements.

The state charges that the union's interpretation of Section 44.02 would require it to bargain over every change even if the contract already deals with the subject matter. It observes that it is widely recognized that Arbitrators should avoid a contract interpretation that leads to harsh or absurd results.

The state contends that the union failed to show that Section 44.02 overrides Section 44.04. It points out that the union relies on the last sentence of Section 44.02 that requires bargaining over a change in a mandatory subject of bargaining while Section 44.04 deals specifically with institutional closures. The state notes that it is well established that where there is a conflict between general language and specific language, the specific language controls.

The state asserts that both before and after the change in Section 44.02, history shows that the parties understood that closures of institutions are governed by Section 44.04. It indicates that it presented numerous witnesses who testified that it never bargained over the decision to close an institution. The state claims that if requested, it met with the union to discuss the impact of the closure pursuant to Section 44.04 and may have reached agreements that differed from or supplemented existing contract language.

The state reveals that in the instant case the union demanded to bargain the decision to close LCI. It reports that it refused to bargain but offered to discuss the closing pursuant to Section 44.04. The state indicates it later offered to meet for impact bargaining but reports that the union did not respond to either offer.

The state argues that the most analogous situation to the instant case is the OCI closure. It points out that in that case Scharfeld demanded to "impact bargain the effects of the Department's decision." The state rejects the testimony of Robert Goheen, the union's operations director, that it engaged in decisional bargaining and indicates it merely explored cost-saving options over which it had no obligation to bargain. It stresses that if it had bargained the decision to close OCI, the union would not have filed an unfair labor practice charge accusing the state of failing to engage in "any meaningful negotiations." It stresses that in any event, a one-time discussion of cost-saving options does not constitute a break in the parties' practice.

The state rejects the union's charge that it violated its duty to bargain the transfer of duties and reassignment and/or layoff of employees. It insists that it has not and will not transfer duties or reassign employees; rather, it will fund existing vacancies at other institutions and fill them pursuant to Article 17.02(E) of the contract. The state indicates that the closing of LCI will lead to the permanent abolishment of positions.

The state maintains that Section 44.04 specifically incorporates Article 18 as the mechanism for reassigning employees. It reports that the 44 vacancies set forth in the LCI Reorganization and Abolishment Plan are made available to employees according to Section 17.02(E), which states:

> Vacancy is an opening in a permanent full-time or permanent part-time position with a specified bargaining unit covered by this Agreement which the agency determines to fill and does not include those positions identified through mutual agreement in appointment category (type) or movement that constitutes a demotion.
>
> Vacancies shall be filled by adhering to the following processes in the order set forth:
>
> 1) Permanent transfer as set forth in Section 17.07;

2) Bumping or displacement as set forth in Article 18;
3) Recall as set forth in Section 18.13;
4) Reemployment as set forth in Section 18.13;
5) Cross geographical jurisdiction bidding as set forth in Section 18.12.

The state emphasizes that the parties have already bargained the mechanism for moving employees when an institution closes and no further bargaining is required.

The state rejects the union's argument that it has a duty to bargain the decision to layoff. It points out that the parties have incorporated the ORC sections on layoffs in the contract which vests the sole authority to abolish positions in the appointing authority. The state notes that in the instant case Wilkinson determined to abolish the positions at LCI and the decision requires no further bargaining.

The state argues that it acted pursuant to ORC 4117.08(C), which is incorporated in Article 5 of the contract. It observes that the union acknowledges that this provides management with many rights subject to limitations in the contract. The state stresses that the union has negotiated no provisions to change the inherent right, or appointing authority's sole discretion, to close an institution, transfer duties, reassign and layoff employees and, in fact, the union has exhaustively bargained provisions to deal with these issues.

The state rejects the union's contention that Section 44.04 is not a clear waiver of its right to bargain the decision to close LCI. It claims that accepting the union's contention would require the Arbitrator to ignore the plain meaning of Section 44.04 and the incorporation of ORC 124.321 into Article 18. The state asserts that the Ohio Constitution, the ORC, SERB's decision in Youngstown, and bargaining history do not support such a conclusion.

Article 18 - The state argues that it has proven by a preponderance of evidence that it has properly reorganized its operation. It points out that the parties have incorporated into the contract the section of the ORC that allows an appointing authority to abolish positions. The state notes that the OAC provides for job abolishment for "the efficient operation of the appointing authority ... or for reasons of economy." The state maintains that it is not required to prove a lack of funds or to provide a certificate from the Office of Budget and Management to abolish positions.

The state accuses the union of attempting to shift the focus to the fact that it did not seek a certification for lack of funds. It notes that a lack of funds justification is only one reason a layoff may be instituted. The state stresses that positions may be abolished when the state reorganizes for efficiency and economy.

The state acknowledges that OBM's proposed budget cuts forced it to examine its operation in order to save money. It indicates that reorganizing to make its operation more efficient and economical was one method to cut costs. The state insists that the fact that DR&C faced a budget shortfall did not require it to seek a lack of funds certification from OBM.

The state contends that the decision to close LCI will result in cost-savings. It points out that at the hearing it indicated that it would save $9,617,765 in capital improvements. The state rejects the union's claim that it will not save any money because it will spend the money elsewhere. It states that it will be able to make needed improvements at other institutions that it could not otherwise have made.

The state notes that the union did acknowledge that some capital expenses could be avoided by closing LCI. It indicates that the union submitted a table showing that the state would not spend $12 million at LCI.

The state maintains that it will save utility and maintenance costs at LCI. It states that Forbes estimated that utility and maintenance costs will fall by $600,000 or nearly one-half. It notes that the union does not dispute that utility costs will be saved but the methodology to calculate the savings.

The state asserts that it will save an undetermined amount of money by using LCI equipment at other facilities. Collins testified that DR&C can move computers, mattresses, beds, and other items to prisons that it would otherwise have to purchase. The state observes that these savings have not been included in its rationale.

The state estimates that it will save $25 million in operating expenses in FY 2004 by closing LCI. It reports that it calculated this amount by taking the total payroll of $27.7 million and backing out the cost of staffing dormitories and housing inmates at other institutions. The state claims that this saving alone justifies the abolishment of the positions.

The state claims that the union does not dispute that DR&C will save money by closing LCI but only the methodology used in making the projections. It indicates that Ruttenberg's testimony that "economy is kind of a general word of use rather than a term of art" reflects her lack of knowledge of the law surrounding layoffs. The state maintains that in layoff cases the term "economy" is equated to savings other than salary savings. It stresses that even the union's projections show that money will be saved.

The state asserts that the department has a very good track record in making projections. It indicates that the individuals making the projections have vast experience and their projections for the OCI closure proved to be accurate. The state complains that the union's delay of the process has prevented it from proving definitively the amount of the savings.

The state argues that it has also proved that its operations will be more efficient by the closing of LCI. It points out that the American Heritage Dictionary defines "efficiency" as "the ratio of the effective or useful output to the total input in any system." The state notes that Barbara Mattei-Smith, from the Office of Financial Management at OCB, defined "efficiency" as "allocating your resources in a way that allows you to meet your financial and operational goals" and Ruttenberg defined it as "looking at how various resources are used and what value you get from them."

The state reports that in closing LCI it will reopen units in three fully operational prisons to accommodate half of the LCI prisoners and the rest will be absorbed into existing units. The state indicates that this will eliminate work that is being duplicated.

The state reports that the inmates from LCI will be transferred to ACI, NCCI, and SCI. It states that it will fill an additional 44 positions to staff the reopened units. The state claims that even if there is an increased cost associated with transferring inmates, it is difficult to imagine a more efficient allocation of resources.

The state charges that the union does not seem to mind crowding. It points out that the union proposed closing the two private prisons and claimed that the state-operated institutions could absorb the inmates with minimal increases in facility costs.

The state notes that if the two private prisons were closed, the other prisons would have to absorb 1,902 inmates while closing LCI involves only 1,233 to 1,500 inmates.

The state emphasizes that closing LCI will allow DR&C to reduce the number of positions. It observes that the 495 employees who monitored approximately 1,500 inmates at LCI will be replaced by 82 positions created at other institutions. The state maintains that the population increases at the other institutions are not beyond their capacity and will be well under their 1998 populations.

The state indicates that the physical layout of LCI does not lend itself to efficient operations. It reports that LCI was built as a mental hospital so that the layout requires more staff to monitor fewer inmates. The state observes that by closing LCI it is able to take advantage of the more efficient design of ACI, NCCI, and SCI.

The state contends that by closing LCI it will eliminate the duplication of effort. It asserts that it will eliminate one set of administrators and the vast majority of 65 exempt positions. The state adds that there will be one less perimeter fence to patrol and one less food service to operate.

The state indicates that it intends to fully staff the remaining northern prisons. It claims that fully staffed prisons operate more efficiently and eliminate voluntary and mandatory overtime. The state observes that Collins testified that filling vacancies will significantly cut overtime costs.

The state claims that DR&C and employees will realize other benefits from being fully staffed. It states that employees who are required to work a lot of overtime will not have to use sick leave just to get away from the institution. The state observes that the ratio of correction officers to inmates will increase, which most would agree enhances

safety. It adds that employees will realize less tangible benefits including the ability to be with their families.

The state argues that the union did not show that its decision to close LCI will not result in a more efficient operation. It charges that Simpson's paper, "The Economics of Closing Private Prisons," which compared the cost of closing the two private prisons and OCI, was seriously flawed because it attributed the entire cost of the state-wide early retirement incentive program to the OCI closing even though only 24 employees from OCI accepted early retirement. The state claims that correcting for this error showed a savings in closing OCI using Simpson's cost-avoidance model.

The state claims that Simpson's paper is not the only example of his biased analysis. It asserts that in conciliation when he costed the union's proposal, he failed to account for a 4% wage increase granted in July 2003. The state claims that instead of embarrassing Simpson in front of the union's bargaining team, the error was brought to the attention of Conciliator Robert Stein in a conversation with Johnson and Scharfeld.

The state charges that the union compounded Simpson's error by submitting an artfully worded affidavit from Scharfeld. It points out that in the affidavit Scharfeld does not deny the hallway conversation with Johnson and Stein where Johnson disputed Simpson's methodology. The state acknowledges that during the hearing Johnson did not object to Simpson's methodology and that Scharfeld did not withdraw the document. It stresses, however, that the document was withdrawn outside the hearing and Conciliator Stein made no reference to Simpson's analysis in his report.

The state argues that Simpson's analysis of the LCI closure contained at least one significant flaw. It states that he treated the filling of the vacancies as a cost of closing

LCI when they were already funded at the institutions where the vacancies existed. The state claims that by adding the cost of funded vacancies to the savings in closing LCI, the savings increase to $14,845,363 under the cost-avoidance model.

The state contends that Ruttenberg's testimony does not justify her conclusions. It points out that she stated that she relied on Simpson's analysis of the OCI and LCI closures but she and the others reviewing the paper missed the obvious flaw of charging the statewide early retirement program to OCI. The state claims that this indicates that Ruttenberg's analysis was cursory and that she did not engage in an in-depth analysis.

The state contends that Ruttenberg admitted that she could not determine whether the decision to close LCI would result in efficiency. It observes that she questioned Simpson and Carrie Varner and Lynn Belcher, the union's advocates, but did not talk to the financial and operational experts of DR&C.

The state acknowledges that it did not use a cost-avoidance model. It indicates that it used historical data from the closure of OCI as well as its experience in operating on a daily basis. The state asserts that DR&C did not have the time or manpower to conduct an efficiency study using the cost-avoidance model.

The state emphasizes that it is not required to prove that its decision is the "best" or "most efficient." It points out that in McAlpin v. Shirey, 121 Ohio App. 3d 68, 76, the court held that it was only required to prove that the decision is intended to result in cost-savings or economy and a more efficient operation. The state observes that the union's witnesses could not provide evidence to show that closing LCI will not improve efficiency.

The state rejects the union's attempt to demonstrate that its decision to close LCI was inefficient because of concerns about crowding and recidivism. It acknowledges that crowding levels would increase slightly but indicates that the union failed to show that the closing of LCI would significantly impact the recidivism rate. It insists that the mere identification of concerns is not sufficient to overcome the efficiencies it has described.

The state also rejects the argument that the transfer of inmates from LCI has resulted in the transfer of duties to other institutions. It observes that a review of the correction officer position description reveals that duties attach to a specific division or institution rather than to specific inmates who move throughout the system. The state maintains that filling the 44 existing vacancies and reopening units does not constitute a transfer of duties because those separate and distinct duties existed prior to the closing of those units.

Article 11 - The state argues that the union has failed to meet its burden to prove a violation of Article 11. It points out that while the union has reported that MRSA exists in state institutions, MRSA exists in the general population. The state claims that the union has failed to prove a causal link between the incidence of MRSA and crowding, and, more specifically, the closing of LCI.

The state contends that there has been no violation of Section 11.05. It indicates that it had informational meetings with employees regarding MRSA. The state further instructed institutions on the importance of maintaining clean restrooms and shared facilities. It stresses that it consulted with the Ohio Department of Health and complied with its recommendations.

The state claims that there has been no violation of Section 11.03. It insists that the union has not shown any conditions caused by crowding that are "abnormal to the employee's workplace." The state acknowledges that crowding exists but maintains that it is not an abnormal situation and notes that crowding levels in Ohio are within the normal range compared to other states.

The state maintains that the closing of LCI will not significantly impact crowding. It indicates that crowding will be below the level of 1998 when the inmate population was at an all-time high. The state stresses that the crowding levels caused by closing LCI are not abnormal.

The state questions Miller's testimony that crowding will lead to a cutback in services, compromised security, competition for limited resources, reduced privileges, and recidivism. It charges that he presented anecdotal evidence based on hearsay from union activists. The state adds that he had no knowledge of whether the department had taken any steps to correct the perceived problems.

The state reports that every institution in the state has passed its ACA audit. It points out that Collins testified that the crowding standard is a non-mandatory standard and that institutions are only required to pass 90% of the non-mandatory areas. The state observes that it has taken the steps required by the ACA to mitigate the effects of crowding.

The state maintains that it is working to abate the problems associated with crowding. It indicates that as soon as LCI closes it will take the further step of filling vacancies to increase the correction officer-to-inmate ratio.

The state concludes that the union can point to no specific violation of Article 11 but can only claim that crowding may cause problems in an already dangerous profession. It states that even if the Arbitrator were to find a violation of Article 11, the proper remedy would be to order it to study the problem and to take steps to mitigate the effects of crowding.

ANALYSIS

The instant case involves the state's decision to close LCI. The union charges that the state's action violated Article 11, Article 18, and Article 44. The parties agreed that the state bore the burden of proof regarding Article 18 while the union had the burden of proof with respect to Article 11 and Article 44. The Arbitrator will consider the issues in the order they were addressed at the hearing.

Article 44 - The first charge is the union's claim that the state violated Article 44. More specifically, it charges that the state ignored the second sentence of Section 44.02, which states that "the State will satisfy its collective obligation before changing a matter that is a mandatory subject of bargaining." The union claims that the Arbitrator has the authority to determine whether the decision to close LCI is a mandatory subject of bargaining and that under SERB precedent he should find that it is a mandatory subject.

The Arbitrator does not believe that Section 44.02 applies to the issue at hand. Prior to the 1997-2000 contract this section required the state to continue benefits provided by statutes, regulations, and rules where the contract was silent. In negotiations for the 1997-2000 agreement, the language requiring the continuation of such benefits was dropped and the sentence requiring bargaining before changing a mandatory subject of bargaining was added. The fact that the changes were made at the same time and the

placement of the sentence requiring bargaining suggest that the obligation to bargain refers only to those benefits created by statutes, regulations, and rules where the contract is silent

This conclusion is consistent with the testimony of Johnson. He indicated that the state was anxious to remove the requirement that the non-contractual benefits be continued. Fiely offered somewhat conflicting testimony but ultimately admitted that her recollection was somewhat limited.

In addition, the Arbitrator does not believe that the decision to close LCI is a mandatory subject of bargaining. The key case is In re SERB v. Youngstown City School District Board of Education, SERB 95-010 (6-30-95). In that case, SERB established a balancing test to take into account ORC 4117.08(A), which suggests that bargaining is appropriate for all matters that relate to wages, hours, or terms and conditions of employment, and ORC 4117.08(C), which indicates that nothing in Chapter 4117 interferes with the right of public employers to determine matters of inherent managerial policy. According to SERB:

> If a given subject is alleged to affect and is determined to have a material influence upon wages, hours, or terms and other conditions of employment and involves the exercise of inherent management discretion, the following factors must be balanced to determine whether it is a mandatory or permissive subject of bargaining:
>
> > 1) The extent to which the subject is logically and reasonably related to wages, hours, terms, and conditions of employment;
> >
> > 2) The extent to which the state's obligation to negotiate may significantly abridge its freedom to exercise those managerial prerogatives set forth in and anticipated by O.R.C. 4117.08(C), including an examination of the type of employer involved and whether inherent discretion on the subject matter at issue is necessary to achieve the state's essential mission and its obligations to the general public; and

> 3) The extent to which the mediatory influence of collective bargaining and, when necessary, any impasse resolution mechanisms available to the parties are the appropriate means of resolving conflicts over the subject matter.

Whether the balancing test is applied by SERB or the Arbitrator, it is clear that the decision to close LCI is not a mandatory subject of bargaining. First, the decision to close the institution is not based on obtaining cheaper labor or anti-union animus since members of the same union will do the work at the same rate of pay. The decision, therefore, is unrelated to wages, hours, terms, and conditions of employment.

Second, DR&C is obligated to the public to house inmates in an economical fashion. It is essential for the department to reorganize in order to accomplish its mission.

Third, bargaining over the decision to close LCI would not be a feasible means to resolve the dispute. The decision to close LCI is based on the money that would have to be spent to continue to operate an inefficient facility that was not built to be a prison.

The Arbitrator further believes that even if the decision to close LCI was a mandatory subject of bargaining, the state has already met its burden. Section 44.04 states that "in the event that the State plans to close an institution or part thereof it shall give ninety (90) days advance notice to the Union." The section then goes on to describe the guidelines to be followed should an institution be closed.

While the sentence quoted above gives the state the right to close an institution, Section 44.04 also states that "the Union shall be given the opportunity to discuss the planned closure with the State." However, as the state points out, "discuss" means "to speak together about; talk over." An obligation to bargain involves far more.

The conclusion that the state is not required to bargain the closure of LCI is consistent with the judgment of the Ohio Supreme Court. When the union sought injunctive relief in the Allen County Court of Common Pleas for the state's alleged violation of ORC 4117.11(A)(5), the requirement to bargain collectively, the state filed a Writ of Prohibition challenging the jurisdiction of the court. The Ohio Supreme Court in a Per Curium decision stated:

> Here, the agreement provides that the union be given advance notice if the state 'plans to close an institution or part thereof' and that the union be given only the 'opportunity to discuss the planned closure with the state.' (Emphasis added) The agreement does not provide that this specific action must be bargained. (Joint Exhibit 48, Paragraph 28.)

The decision that the state was not required to bargain its decision to close LCI is also consistent with past practice. The state indicated that in its 17-year relationship with the union it closed many institutions and never bargained a decision to close an institution with the union. It does not, however, deny discussing closures with the union or bargaining the effects of the closures.

The Arbitrator must reject the union's claim that it bargained with the state over the closing of OCI. Goheen's testimony reveals that there were discussions between the parties regarding the decision to close the institution. However, the union ultimately filed an unfair labor practice charge alleging a violation of ORC 4117.11(A)(5) which makes it an unfair labor practice to refuse to bargain.

Despite the filing of the unfair labor practice charge, the union suggests that bargaining regarding the closure of OCI did occur. It states that it "filed a charge before SERB not strictly because the state failed to bargain, but because the state did not fully bargain in good faith." (State Reply Brief, page 26)

The Arbitrator, however, cannot accept this analysis. The duty to bargain requires a party to bargain in good faith with an intent to reach agreement. It appears that when OCI was closed, the state simply discussed the closure with the union, as required by Section 44.04 of the contract, and when the discussions proved fruitless, engaged in bargaining with the union over the effects of the closure. This is entirely consistent with the state's practice to refuse to bargain the decision to close an institution.

Article 18 - The second issue is the union's charge that the state violated Article 18. Section 18.01 requires that layoffs be made pursuant to ORC 124.321-.327 and OAC 123:1-41-01 through 22. The remaining 15 sections of Article 18 deal with the procedures to be followed in a layoff.

ORC 124.321 establishes the reasons and requirements for layoffs. It states:

> (A) Whenever it becomes necessary for an appointing authority to reduce its work force the appointing authority shall layoff employees or abolish their positions in accordance with sections 124.321 to 124.327 of the Revised Code and the rules of the director of administrative services.
>
> (B) Employees may be laid off as a result of a lack of funds within an appointing authority. For appointing authorities which employ persons whose salary or wage is paid by warrant of the auditor of state, the director of budget and management shall be responsible for determining whether a lack of funds exists. For all other appointing authorities which employ persons whose salary or wage is paid other than by warrant of the auditor of state the appointing authority shall itself determine whether a lack of funds exists and shall file a statement of rationale and supporting documentation with the director of administrative services prior to sending the layoff notice.
>
> A lack of funds means an appointing authority has a current or projected deficiency of funding to maintain current, or to sustain projected, levels of staffing and operations. This section does not require any transfer of money between funds in order to offset deficiency or projected deficiency of federal funding of a program.
>
> (C) Employees may be laid off as a result of lack of work within an appointing authority. For appointing authorities whose employees are paid by warrant of the auditor of state, the director of administrative services shall

> determine whether a lack of work exists. All other appointing authorities shall themselves determine whether a lack of work exists and shall file a statement of rationale and supporting documentation with the director of administrative services prior to sending the notice of the layoff.
>
> A lack of work, for purposes of layoff, means an appointing authority has a current or projected temporary decrease in the workload, expected to last less than one year, which requires a reduction of current or projected staffing levels. The determination of a lack of work shall indicate the current or projected temporary decrease in the workload of an appointing authority and whether the current or projected staffing levels of the appointing authority will be excessive.
>
> (D) Employees may be laid off as a result of abolishment of positions. Abolishment means the permanent deletion of a position or positions from the organization or structure of an appointing authority due to lack of continued need for the position. An appointing authority may abolish positions as a result of a reorganization for the efficient operation of the appointing authority, for reasons of economy, or for lack of work. The determination of the need to abolish positions shall indicate the lack of continued need for positions within an appointing authority.

The statute provides three reasons to abolish positions -- "for the efficient operation of the appointing authority, for reasons of economy, or for lack of work." In the instant case, the state abolished the positions for economy and efficiency. This requires the appointing agency to file a statement of rationale and supporting documentation with the director of administrative services. DR&C filed a rationale and the required documentation for the closing of LCI on March 20, 2003. (Joint Exhibit 2)

The Arbitrator must reject the union's argument that the guidelines in ORC 124.321 require that an appointing authority establish a lack of funds. The statute states "the determination of the need to abolish positions shall indicate the lack of continued need for positions within an appointing agency." (Union Reply Brief, page 2) The statute does not limit the abolishment of jobs to a lack of funds.

The union challenged the methodology used by DR&C in its rationale. It argued that the analysis was flawed because it failed to use the cost-avoidance model. The union pointed out the cost-avoidance model takes into account not only the direct but the indirect cost of a governmental action that may be borne by other governmental and nongovernmental agencies.

The Arbitrator must discount this contention. First, there is nothing in the statute or in practice that would require the state to adopt any particular methodology. Second, it appears to the Arbitrator that even the cost-avoidance model demonstrates the economy and efficiency of closing LCI.

The union questions many of the figures included in DR&C's analysis. It challenges the claimed capital savings arguing that in some instances the loans will still have to be repaid so no savings will occur. The union also accuses DR&C of playing a "shell game" by including the costs of projects that have not been funded.

The Arbitrator has carefully considered the union's objections. He believes that while the capital savings may be overstated, they will still be substantial.

The union also challenges the alleged $600,000 savings in utilities. The state indicates that its projected savings are based on the closing of OCI. While the union may be correct that savings may turn out to be less than projected, significant savings do appear certain.

The largest savings is labor cost. The state declares that the current expense for caring for the LCI inmates is $27.7 million while staffing the units that will be reopened will cost only $2.7 million, resulting in a $25 million savings.

The union denies that DR&C will save this money. It claims that "the figure is flawed given the complete failure of DR&C to account for the social and indirect costs associated with this particular closure." (Union Reply Brief, page 18) However, social and indirect costs are relatively difficult to estimate and unlikely to erase the projected savings of $25 million.

The Arbitrator does not believe that it is necessary to consider the disagreement regarding the figures that Simpson prepared for conciliation. It is the norm in the conciliation process for each side to present data in the most favorable light. The fact that Johnson and Scharfeld may have somewhat different recollections of the events is not surprising given the nature and timing of the off-the-record discussions at issue.

The parties also disagreed strongly about the efficiency of LCI. The union characterized the facility as thoroughly updated with more equipment waiting to be installed. It characterized the physical plant as "like new" and emphasized the soundness of the construction, particularly the thickness of the walls.

The state's view is almost diametrically opposed. It complains that LCI was originally built as a mental health facility and cannot be efficiently operated as a prison. The state also stressed the age of LCI and the capital investments needed to keep it operational.

The Arbitrator cannot accept the union's claim regarding LCI. An older building is inevitably going to require updating and maintenance. In addition, not having been constructed as a prison is sure to make it less efficient than an institution designed to be a prison.

The Arbitrator understands the union's argument that closing LCI might not be the optimal decision. While he appreciates the argument of the union's expert witnesses for a more sophisticated approach to the decision making process, the Arbitrator must conclude that DR&C met the standard for efficiency and economy included in the ORC and OAC that are incorporated in Article 18 of the collective bargaining agreement.

Article 11 - The final issue before the Arbitrator is the union's charge that the state violated Article 11. Section 11.01 requires the state to comply with applicable federal, state, and local safety rules and regulations. Section 11.03 protects employees who report unsafe conditions and requires an agency or facility safety designee to abate a problem or report to the employee or his representative why the problem cannot be abated in an expeditious manner. Section 11.04 requires agencies to develop programs to reduce the risk of violence. Section 11.05 deals with communicable diseases and, among other things, requires the state, upon written request, to provide information about communicable diseases to which an employee may have been exposed. Section 11.12 calls for creation of Labor/Management Health and Safety Committees and governs their structure and operation. The remaining 14 sections of Article 11 cover specific topics related to safety.

The union did not focus on violations of specific sections of Article 11 but alleged that the closure of LCI increased crowding and that the increase in crowding threatened health and safety in numerous ways. There is no question that the closing of LCI increased crowding. This is apparent in the data provided by the state as well as the union.

The union presented the testimony of numerous correction officers regarding the impact of crowding. For example, there was testimony that crowding reduces access to self-improvement and rehabilitation activities, showers, and TV lounges. The correction officers stated that this resulted in withdrawal, aggression, or depression among the inmates. The union claimed in its reply brief that Wilkinson was in full agreement with it regarding the harmful effects of overcrowding. (Union Reply Brief, page 4) The testimony of the correction officers on the potential effect of crowding was supported by the testimony of Miller. (Transcript, pages 396-416)

There was also considerable testimony regarding the double-bunking that results from crowding. The correction officers who testified, as well as the state's witnesses, reported that double-bunking considerably reduces visibility and leads to many problems that may threaten the safety of correction officers as well as inmates.

The union placed significant emphasis on MRSA in Ohio prisons. Birchfield testified regarding an outbreak at PCI following the closing of OCI. He attributed the problem to increased crowding in a large open-bay dorm.

The views of the correction officers appeared to be summarized by Charlie Williamson, who has been a correction officer at SCI for 12 years and is vice president of the union's Corrections Assembly and a member of the statewide Health and Safety Committee. He stated:

> Well, you've got a prison that's built for 'X' number of inmates which is, we'll just say 400 as a hypothetical number. All the facilities related to the institution were built to basically care for 400 inmates. When you put three to four times the number of inmates in the same area, the maintenance facilities start breaking down. It's much harder to maintain hygiene because you have a lot more people in a smaller space than they are intended to be in. The staffing plays a big part in it because you can barely watch the security functions, let alone, you know, is

people being clean, are they keeping things cleaned up, so forth and so on. I mean it plays into it heavily, in my opinion. (Transcript, pages 555-556)

Bonnage also addressed the threat posed by MRSA. He testified that it thrives in overcrowded conditions. He emphasized that stopping the spread of MRSA requires frequent hand washing and the disinfection of contact surfaces such as exercise equipment.

Despite the testimony and evidence presented by the union concerning health and safety problems in the prisons, the Arbitrator cannot halt the closure of LCI based on an alleged violation of Article 11. First, while there is absolutely no doubt that the prisons are a difficult and dangerous workplace, it does not appear that the relatively small increase in crowding increases the threat to health and safety. Second, as is recognized by the ACA, there are actions that can be taken to ameliorate the effects of crowding. The state and the union must work together to take all of the appropriate actions.

AWARD

The grievance is denied. The state did not violate Article 11, Article 18, or Article 44.

Nels E. Nelson
Arbitrator

July 18, 2003
Russell Township
Geauga County, Ohio