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STATE OF OHIO, OHIO DEPARTMENT OF REHABILITATION & CORRECTION AND OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION VOLUNTARY ARBITRATION PROCEEDING

REVIEWED BY
JUN 16 2004
6-16-04
GRIEVANCE COORDINATOR

IN THE MATTER OF THE ARBITRATION BETWEEN:

THE STATE OF OHIO, OHIO DEPARTMENT OF REHABILITATION & CORRECTION

-AND-

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 11, AFL-CIO

GRIEVANT: PICK-A-POST (CLASS ACTION)
GRIEVANCE NO.: 27-01-(03-07-28)-0248-01-06

ARBITRATOR'S OPINION AND AWARD
ARBITRATOR: DAVID M. PINCUS
DATE: JUNE 14 2004

APPEARANCES

For the Employer

Terry Collins	Deputy Director of Prisons
Teri Decker	Chief, Bureau of Labor Relations
Beth Lewis	Assistant Chief of Labor Relations
Michael P. Duco	Counsel

For the Union

Timothy P. Shafer	President, Corrections Assembly
Robert L. Goheen	Operations Director
Butch Wyle	Staff Representative
Michael A. Hill	Staff Representative
David A. Simpson	Researcher
Charles Williamson	Vice President, Corrections Assembly
Robert J. White	RICI, Chapter President
Chris Mabe	LORCI Chapter President
Raymond M. Bradshaw	MANCI, Chapter President
Walter Patterson	Trumbull, Chapter President
James McElvain	Staff Representative and Advocate
Mark E. Lindgr	Assistant General Counsel

ISSUE

Did the Employer violate Appendix Q of the parties' collective bargaining agreement when it temporarily altered Local Pick-A-Post Agreement? If so, what shall the remedy be?

INTRODUCTION

This is a proceeding pursuant to a negotiated grievance procedure in a labor agreement (Joint Exhibit 1) executed between the State of Ohio, Ohio Department of Rehabilitation and Correction (hereinafter referred to as the Employer), and Ohio Civil Service Employees Association, AFSCME, Local 11, AFL-CIO (hereinafter referred to as the Union). The parties selected Dr. David M. Pincus as the Arbitrator.

An arbitration hearing was held on December 10, 2003 at the Union's Polaris facility located in Westerville, Ohio. At the hearing, the parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross-examine witnesses. At the conclusion of the hearing, the parties were asked by the Arbitrator if they planned to submit post-hearing briefs. The parties submitted post-hearing briefs in accordance with the guidelines agreed to at the hearing.

It should be noted the parties mutually advised the Arbitrator to hold his Opinion and Award in abeyance pending settlement discussions regarding the disputed matter. As such, the normal timetable agreed to by the parties and Arbitrator was held in abeyance mutually pending on-going discussions. In compliance with the parties' request, the Arbitrator delayed any analysis or review of the record until advised to do so by the parties. An alternative undertaking could have resulted in expense requirements without a useful work product.

PERTINENT CONTRACT PROVISIONS

ARTICLE 5- MANAGEMENT RIGHTS

Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in The Ohio Revised Code, Section 4117.08 (C), Numbers 1-9.

(Joint Exhibit 1, Pgs. 7-8)

APPENDIX Q – AGENCY SPECIFIC AGREEMENTS

The following supplemental agreements apply to OCSEA/AFSCME bargaining unit employees within the specified agencies only:

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DEPARTMENT OF REHABILITATION AND CORRECTION

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B. Pick-A-Post
The Union and the DR&C shall continue Pick-A-Post for Corrections Officers and Correction Counselors during the term of this Agreement.

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8. Any immediate threat to the health, safety and security of the institution shall take priority over the Pick-A-Post Agreement.

Correction Officer Pick-A-Post

1. The respective Regional Director shall at least annually supply each warden with a funding letter for each institution indicating the following: a) the number of authorized correction officer positions, b) total weekly post, and c) a relief factor designated for that prison's staff.
2. All Pick-A-Post agreements negotiated at the local level shall comply with the limit imposed by the funding letter of the Regional Director.
3. All established posts under the agreements will be filled, barring any unforeseen circumstances that affect the daily operational needs of the institution or a change in the mission of that Institution.

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(Joint Exhibit 1, Pgs. 251-252)

JOINT STIPULATIONS

1. This grievance is properly before the Arbitrator.

2. On January 22, 2003, Governor Bob Taft announced the closure of the Lima Correctional Institution ("LCI").

3. On March 20, 2003, the Department of Rehabilitation and Correction ("DR&C") filed its rationale for Abolishment of Positions at LCI with the Department of Administrative Services ("DAS"). The closure of LCI was to be effective on July 12, 2003.

4. On April 14, 2003, OCSEA filed a Complaint for Temporary Restraining Order and Preliminary Injunction regarding the closing of LCI related to issues of bargaining. After much litigation, and various orders the parties agreed to arbitrate the issue in front of Nel Nelson.

5. OCSEA filed a grievance challenging DR&C's layoff rationale and plans to close LCI. On July 18, 2003, OCSEA's grievance was denied by Arbitrator Nels Nelson.

6. DR&C implemented Terry Collins' letters of July 18, and August 29, 2003.

CASE HISTORY

Governor Taft announced the closure of Lima Correctional Institution (LCI) on January 22, 2003. Shortly thereafter, on March 20, 2003, the Employer filed a layoff rationale with the Department of Administrative Services (DAS) dealing with the same closure. The closure was to be effective on July 12, 2003.

This decision to lay off triggered potential prohibitions contained in OAC 123:1-41-08 (F). It precludes the filling of vacancies for the classifications being laid off within the geographical jurisdiction of the layoff. In this instance, bargaining unit members had bumping rights in the geographical jurisdiction identified as the Northern Geographical Jurisdiction. The provision, therefore, serves as a safety value requiring the Employer to hold positions open for qualified displaced bargaining unit members.

On April 14, 2003, the Union initiated a cause of action in the Allen County Common Pleas Court. It filed a temporary restraining order and preliminary injunction to prevent the closure and related lay off at LCI.

In an attempt to settle this disputed matter, the parties agreed to arbitrate two issues: whether the Employer had a duty to bargain over an institutional closure and the validity of the layoff rationale. As such, the parties decided to arbitrate a dispute prior to an "actual" layoff; an unprecedented decision. The Employer prevailed at arbitration with Arbitrator Nels Nelson ruling the layoff rationale as valid. Based on the ruling, the Employer thought it could proceed with the closure of LCI and the related layoff.

Further legal action to delay the closure and layoff was initiated by the Union. On July 18, 2003, the Union filed a second complaint for preliminary injunction and writ of mandamus in the Allen County Common Pleas Court.

On or about the same date, July 18, 2003, Terry Collins, Deputy Director Office of Prison, informed Bob Goheen, the Union's Operations Director, that the Employer intended to utilize Appendix Q of the Agreement (Joint Exhibit 1) to temporarily suspend portions of local Pick-A-Post Agreements. Provisions to be suspended included not filling all established posts and the freezing of bids for shifts and good days. Collins, moreover, invited the Union to engage in impact bargaining regarding these terms and conditions of employment. The imposition of Appendix Q was delayed until August 24, 2003 allowing for impact bargaining during the interim period (Joint Exhibit 3).

On July 24, 2003, the Union agreed to engage in impact bargaining (Joint Exhibit 4). A number of negotiation sessions took place between July 28, 2003

and August 13, 2003. A "Temporary Agreement" was e-mailed to the Employer on August 20, 2003 (Joint Exhibit 7). In the Employer's view, however, several material changes had been made by the Union causing the documents subsequent rejection.

While impact bargaining was taking place, the Allen County Common Pleas Court issued a number of rulings. On August 7, 2003, the Common Pleas Court granted the Union's complaint for preliminary injunction (Joint Exhibit 5 (b)). On August 21, 2003, Judge Richard K. Warren granted a permanent injunction and writ of mandamus (Joint Exhibit 5 (c)). The order contains two sections critical to the presently disputed matter:

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90. That as a result of the above, a Permanent Temporary Injunction is hereby issued against Governor Robert A. Taft, Director Reginald A. Wilkinson and Warden Terry Tibbals from transferring inmates out of LCI; from closing LCI; and the cease from proceeding with lay-off notices as to employees of LCI.

91. That a Writ of Mandamus is hereby issued directing and compelling the above named Defendants to comply with their clear legal duty as set forth by the General Assembly and to take whatever steps necessary to re-instate the status quo operation as it existed at LCI immediately prior to the governor's directive of January 22, 2003 and that he allocate sufficient funds to accomplish same.

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(Joint Exhibit 5 (c), Pg. 18)

The Employer responded to Judge Warren's order by appealing the matter to the Third District Court of Appeals; and by filing a motion for Stay Pending Appeal with Judge Warren.

As a consequence of the Judge Warren's order, Goheen notified the Employer on August 22, 2003 that the Permanent Injunction nullified "the

purpose upon which DR&C based its (Appendix Q) action" (Joint Exhibit 6). The Union opined that the closure matter had been resolved with the Court ordering that LCI remain open, all layoff actions to cease and the status quo as it existed prior to the Governor's directive of January 22, 2003 be restored. Since layoffs could not be processed, hirings in the Northern Regional Jurisdiction could proceed (Joint Exhibit 6).

The Union's interpretation of Judge Warren's Order caused it to withdraw from negotiating the impact of modifications engendered by applying Appendix Q. It appeared to the Union that the litigation stage of the process was now over.

A further ruling by Judge Warren, submitted on August 28, 2003, modified the Judgment Entry of August 21, 2003. Judge Warren stayed the Judgment Entry of August 21, 2003, pending appeal except as to paragraph 90. Per the previously articulated paragraph, the Employer was still enjoined from: transferring inmates out of LCI; from closing LCI; and to cease from proceeding with lay-off notices as to employees of LCI.

It should be noted none of Judge Warren's orders invalidated the layoff or related rationale. The layoff rationale had been deemed valid through the arbitration process. As far as the Employer was concerned, a valid layoff rationale still resided at the Department of Administrative Services. Judge Warren's ruling precluded the processing of lay-off notices. Still, the Employer was prohibited from filling vacancies in the Northern Geographical Jurisdiction.

On August 29, 2003, the Union was notified by the Employer that it intended to proceed with temporary modifications of the local Pick-A-Post

agreement (Joint Exhibit 8A). The Union subsequently filed a grievance which protested the Employer's modifications.

Neither party raised procedural nor substantive arbitrability issues. As such, the disputed grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Union's Position

The Union opined the Employer violated Appendix Q of the parties' collective bargaining agreement when it temporarily altered local Pick-A-Post Agreements. Evidence and testimony clearly establish the Employer had neither legal nor contractual justification for the unilateral action in the Northern Geographic Jurisdiction.

As of August 21, 2003, notwithstanding Judge Warren's Permanent Injunction, the Employer had the legal authority to hire additional correction officers to address any concerns regarding overtime issues. Collins admitted Judge Warren's decision removed any contractual or legal restrictions precluding the hiring of employees. Nothing in the record, moreover, supports the notion that vacancies could not be filled by operation of Article 18 and OAC 123:1-41-08.

The record does indicate the decision to hire correction officers, announced on November 4, 2003, was solely based on financial considerations; and nothing more. The situation between August 21, 2003 and November 4, 2003 did not change in terms of contractual and legal requirements. As such, the Lima litigation never truly served as the unforeseeable event triggering a series of staffing and overtime problems. Reluctance to engage a legitimate option

served as the unforeseen event causing many of the staffing shortages identified by the Employer.

The Employer could have implemented other contractual options to remedy the staff shortage problem. Worker's Compensation, Disability and/or Military Leave extended absences could have been filled by interim appointments. TWL appointments could have been cancelled to further mitigate the staffing shortage. These very options were proposed by Collins in a letter sent on August 29, 2003 (Joint Exhibit 7). Options available at a much earlier date, which should have been implemented, rather than unilaterally altering all Pick-A-Posts in the Northern Geographical Jurisdiction.

The Employer's Appendix Q justification was imposed as punishment for the litigation in Allen County and the Union's refusal to accept the Temporary Agreement. All of the Pick-A-Post agreements were altered even though the Pick-A-Post Temporary Agreement (Joint Exhibit 7) identified several institutions where Pick-A-Post Agreements would not be suspended. Collins' fairness or consistency argument in support of altering all fourteen of the parties' Pick-A-Post Agreements seems misplaced. Being "fair" does not relate to an unforeseen circumstance defense. This conclusion is especially true since the Employer failed to fill all established posts in six institutions where overtime and staffing problems were never identified as issues needing adjustment.

Appendix Q, Subsection 3 was violated when the Employer exceeded its authority. The provision only authorizes the Employer to change correction officers' work areas. Yet the Employer exceeded this criteria by:

1. Changing the work shift of correction officers who held relief positions.

2. Changing the work shift of correction officers who held established posts.

3. Changing the workdays and days off of correction officers holding either relief positions and/or established posts.

4. Violating the parties' institutional seniority system of bidding shift assignments by requiring correction officers with more seniority than others to move to a different shift and/or workday.

The Employer's was overbearing rather than narrow. All fourteen Pick-A-Post agreements in the Northern Region were simultaneously impacted without regard to individual differences in overtime and staffing difficulties. Without any identified objective criteria dealing with the length of required implementation, the decision was arbitrary in terms of duration.

Appendix Q, Subsection No. 3 was violated in a number of ways. Unforeseen circumstances did not exist. The litigation surrounding LCI's closing should have been anticipated. Historically, the Union has been litigious in protecting bargaining unit members' rights. These actions took place prior and subsequent to the Lima dispute. The Employer was merely unprepared and out-maneuvered. As such, the Employer should not be allowed to reap a benefit realized by any lack of foresight.

Any comparison between the Orient closing and the present dispute appears misplaced. The fact situations can easily be distinguished; supporting the Union's differing responses.

Self-imposed administrative decisions caused the alleged hardship realized by the Employer. Hardships that should have been anticipated and were, therefore, foreseen. Historically, the Employer has realized a turnover rate of 15 to 25 correction officers per pay period, while a new hire takes 3 to 5 months to go through orientation and training. Within this context, the Employer still imposed a hiring freeze

approximately three and one half years prior to the Lima closing. Staff shortages, moreover, could have been mitigated by using interim and TWL appointments.

The Employer could have used Judge Warren's August 21, 2003 decision to hire more correction officers. Contractual and legal hurdles were not in play, and the hiring shortage should have been addressed. As such, these circumstances were not unforeseen, but did impact the daily operations of the institutions.

Proofs linking excessive overtime and the daily operation of the institutions were never adequately documented. Although generalized observations were solicited, an actual empirical relationship was never established. Also, the Employer failed to articulate which of the 14 facilities were actually experiencing this circumstance, and how the daily operational needs were impacted.

The unilateral changes initiated by the Employer were based on some form of animus rather than any unforeseen circumstances. The Employer merely wished to punish the Union by pitting LCI employees against their brothers and sisters in the Northern Region.

Criteria contained in Appendix Q (B) (8) were never fully satisfied nor articulated. An immediate threat at a particular institution was never articulated. Again, the only support proffered was too general to serve any meaningful basis for altering the Pick-A-Post agreements. In fact, Collins testified that he was unaware of any threat to the health, safety, and security of any institution in the Northern Region.

The Employer's Position

Appendix Q gives the Employer the ability not to fill all established posts when unforeseen circumstances affect the daily operational needs of the institution. This provision contains language which provides an exception to the articulated principle

requiring that all established posts be filled. The delay and related consequences were the conditions considered in determining the course of action taken.

Unforeseen circumstances did, in fact, exist. The delay in LCI's closure was unforeseen or not anticipated in the past. The Union had never challenged the closure of an institution or a layoff rationale in court. Historically, the parties had never arbitrated a layoff case prior to implementation. The Union had never challenged a Governor's or Director's authority to close an institution.

The Employer's previous interpretation is adequately supported by bargaining history. Teri Decker served as Chief Spokesperson for the Department's Agency Specific Bargaining. She provided unrebutted testimony regarding the parties' intent when negotiating portions of Appendix Q. Item #3 under the Correction Officer Pick-A-Post was incorporated as a consequence of a trade. The Employer agreed to fill all established posts under the local Pick-A-Post agreements, with exceptions, by agreeing to eliminate language on the prohibition against "pull and move" decisions.

In terms of exceptions, Appendix Q, item #8 was discussed by referencing fires and riots. The Employer, however, desired additional protection by insulating itself against unforeseen circumstances. This goal resulted in the eventual inclusion of Appendix Q B. Pick-A-Post, Corrections Officer Pick-A-Post, Item #3. The parties never articulated what would constitute unforeseen circumstances. They merely discussed what would not constitute an unforeseen circumstance in light of Appendix Q, B. Pick-A-Post, Item #8 discussions.

The situation, and related unforeseen circumstances, affected the daily operational needs of the institutions in the Northern Geographic Jurisdiction. Staffing impacts an institution's operational needs. Vacancy rates continued to increase over a

period of time, causing an excessive amount of mandatory overtime. The Employer was required to continue a hiring freeze since an arbitrator determined LCI's layoff rationale was indeed valid.

Appendix Q, Corrections Officer Pick-A-Post B. Pick-A Post, Item #8, allows the Employer to modify Pick-A-Post agreements when there is any immediate threat to the health, safety, and security of the institution. Again, staffing shortages led to excessive voluntary overtime and mandations, which impacted the health and safety of the institutions. Under these circumstances, Appendix Q allows the Employer to close non-critical posts, and utilize officers where a critical need is obviously necessary.

Once the overtime rates decreased to appropriate levels, the Employer returned the Pick-A-Post structures to their "pre-threat" configurations. In fact, five institutions eventually had posts returned based on empirical changes in mandatory overtime ueage.

The Employer's actions were reasonable under the circumstances. The Union by its apctions created the disputed situation. The Employer merely responded in a measured way for a temporary period of time. The Employer never attempted to impose its will on the Union, but sought the Union's support by soliciting impact bargaining over the decision to temporarily alter Pick-A-Post agreements.

One could not view the Employer's response to the Union's unreasonable actions as retaliatory. The more active institutions in the Northern Region were never singled out. Collins testified the Department could have imposed permanent changes by changing Institutions' funding letters. Instead, the Employer eventually returned posts, in certain institutions, to status quo levels, once overtime statistics returned to acceptable levels. Finally, the Employer hired Correction Officers in the Northern

Geographic Jurisdiction, even though it could have allowed staffing levels to shrink as litigation continued.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony adduced at the hearing, a complete and impartial review of the record including contract language and the parties' briefs, it is the opinion of the Arbitrator that the Employer did not violate Appendix Q of the parties' Collective Bargaining Agreement. The exception articulated in Appendix Q, B. Pick-A-Post, Correction Officer Pick-A-Post, Item #3 was properly implemented. Posts were temporarily reduced since unforeseen circumstances affected the daily operational needs of the institutions.

It is axiomatic that arbitrators give words their ordinary and popular meaning in the absence of specific evidence to the contrary. Here, the Union failed to provide any evidence of a variant contract definition, or extrinsic evidence that the terms in question were used in a different way or that the parties' intended some special colloquial meaning. In fact, the Union never provided any argument containing an alternate definition. It merely attempted to counter the Employer's application of the circumstances surrounding the disputed matter.

The delay in the closing of LCI and the factors which caused the delay, are viewed by the Arbitrator as unforeseen circumstances. Clearly, these conditions were not anticipated in advance (unforeseen), but had to be considered in determining a course of action (circumstances).

The Union engaged in a series of legitimate actions, but actions that the Employer could not have anticipated. These unforeseen circumstances affected the operational needs of the institutions. Once these conditions were met, the Union could

no longer opine that the Employer's response was unilateral, or an attempt to gain a benefit. It was unable to attain through bargaining. This scenario was exactly what the parties had agreed to as evidenced by the language contained in Appendix Q. The language, itself, is clear and unambiguous and reflects the parties' intent.

The Union had never before chosen similar alternative actions when faced with the closure of an institution. Testimony provided by Goheen and Decker support the following unrebutted findings: The Union had never challenged the closure of an institution or a layoff rationale in court. In the parties' seventeen-year contractual relationship, the parties never arbitrated a layoff grievance prior to actual implementation. Also, the Union had never filed an action challenging the Governor's or Director's authority to close an institution.

Bargaining history, although unnecessary in this instance, to determine the parties' intent, does support the prior analysis. Decker's testimony was virtually unrebutted regarding this matter. Discussion did, in fact, take place when negotiating terms and conditions contained in Appendix Q, B. Pick-A-Post, Item 8. Pick-A-Post Agreements could be modified when institutions were faced with an immediate threat to their health, safety, and security. The parties discussed fires and riots as types of events permitting changes to the Pick-A-Post Agreements.

By identifying via bargaining events which would constitute immediate threats, and then negotiating in tandem different language in Appendix Q, B. Pick-A-Post, Correction Officer Pick-A-Post, Item #3 regarding unforeseen circumstances, the parties distinguished varying categories of pre-conditions or events necessary to trigger the two provisions. Obviously, the same types of incidents cannot be used to justify actions under both provisions. Especially when Item #3 deals with unforeseen circumstances,

which could not be anticipated by the parties, nor were they discussed during bargaining.

The previously articulated unforeseen circumstances did affect the daily operational needs of the institutions in the Northern Geographic Jurisdiction. These circumstances engendered an unanticipated delay, which in turn impacted staffing levels. Vacancy rates continued to increase perplexing staffing schedules in the form of excessive mandatory and voluntary overtime. None of these conditions were properly rebutted by the Union.

These staffing issues were further impacted by contractual and statutory obligations, which perpetuated a hiring freeze decision by the Employer. On March 30, 2003, the Employer filed a layoff rationale with the Department of Administrative Services. In accordance with OAC 123:1-41-08 (F) and Article 18 of the 2000-2003 Agreement, the Employer was precluded from filling vacancies for the classification to be laid off, within the geographical jurisdiction of the layoff. This caused the Employer to implement a hiring freeze causing an increase in the vacancy rates. The matter was further compounded by Arbitrator Nelson's ruling on July 18, 2003. He validated the layoff rationale six days after the original closure date of July 12, 2003. The Union responded by filing a second complaint for preliminary injunction and writ of mandamus. Obviously, the hiring freeze was a direct result of the Union's tactics.

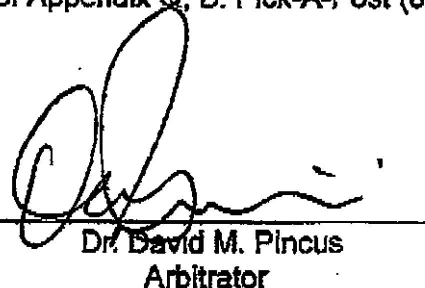
The Arbitrator must emphasize that the Union's strategies were not illegal nor inappropriate. The disputed contract provisions had never before been executed nor reviewed. But clearly within this present context, the strategies viewed as a whole and individually, constitute unforeseen circumstances affecting daily operational needs. As

such, the Employer was not required to fill all established posts, and thus, could modify existing Pick-A-Post Agreements.

Neither party argued that Appendix Q B. Pick-A-Post Item #8 and (Arbitrators' Emphasis) Correction Officer Pick-A-Post Item #3 particulars had to be met in order to justify modification of Pick-A-Post Agreements. As such, this Arbitrator refuses to proffer any interpretation regarding this particular potential argument. Neither the record nor the parties' briefs specifies such an understanding. The Employer was able to support its claims pertaining to Appendix Q B. Pick-A-Post, Correction Officer Pick-A-Post, Item #3. There is, therefore, no need to address arguments dealing with Appendix Q B. Pick-A-Post Item #8.

AWARD

The grievance is denied. The Employer did not violate Appendix Q-Correction Officer Pick-A-Post (3). It was able to demonstrate through evidence and testimony that a series of unforeseen circumstances existed generated by the desired closing of the Lima Correctional Institution. As a consequence, these circumstances provided a valid contractual basis for the changes in the Pick-A-Post Agreements. With this threshold finding, a determination regarding the propriety of Appendix Q, B. Pick-A-Post (8) need not be reached.



June 14, 2004
Moreland Hills, OH

Dr. David M. Pincus
Arbitrator