#195

IN THE MATTER OF ARBITRATION

BETWEEN

OFFICE OF COLLECTIVE BARGAINING
STATE OF OHIO

AND

OCSEA/AFSCME LOCAL 11

ARBITRATION AWARD

CASE NUMBER: 11-05-910813-0123-01-09 (Smith)
11-09-910911-0195-01-09 (Tinkler)
11-09-910828-0190-01-09 (Epstein)
ARBITRATOR: John E. Drotning
HEARING DATE: January 31, 1992

I. HEARING

The undersigned Arbitrator conducted a Hearing on January 31, 1992 at 1680 Watermark, Columbus, Ohio. Appearing for the Union were: Brenda Goheen, Reita Smith, Donna Glanton, and Lester Lush. Appearing for the Employer were: Janice L. Viau, Rachel Livengood, Michael Duco, Gene Brundige, Pat Power, and Mike Valentine.

The parties were given full opportunity to examine and cross examine witnesses and to submit written documents and evidence supporting their respective positions. Post hearing briefs were filed on or about March 27, 1992. The State filed a rebuttal brief on May 27 and the case was closed. The discussion and award are based solely on the record described above.

II. ISSUES

1. Whether the issue is arbitrable?

2. Did the Ohio Bureau of Employment Services violate the Agreement when they implemented the early retirement incentive plan in August 1991 only in the PASO-JOBS program? If so, what shall be the remedy?

III. STIPULATIONS

The parties jointly submitted the exhibits marked Joint Exhibits #1 through #21.

The following joint stipulations were submitted.

1. This is a group grievance.

2. An abolishment of approximately 96 positions in OBES took place in September of 1991.

3. As a result of the abolishments the Employer offered an Early Retirement Plan that was statutorily required.

4. The Employer limited participation in that plan to the positions originally targeted for abolishment.

5. Pursuant to Article 18 employees occupying positions targeted for abolishment held contractual rights for bumping which resulted in displacement of employees who were not offered the Early Retirement.

6. Positions originally targeted for abolishment were in the Public Assistance Service Operations Program.

7. The Public Assistance Service Program is also referred to as PASO, WIN, and JOBS.

8. The PASO program received its Federal Funds through an Inter-agency Agreement between Human Services and OBES. This accounted for approximately 84% of the funding.

9. Some Employment Service employees and some PASO employees had overlapping duties with the Employment Services Division.

10. The codes utilized on the activity reports are as follows: UC 2210; ES 3XXX; LMI 1XXX;
PASO B251 Fed 8285 Fed 5252 State

IV. ARBITRABILITY

A. TESTIMONY, EVIDENCE, AND ARGUMENT

1. MANAGEMENT

a. TESTIMONY

Mr. Gene Brundige testified he was a neutral and a human resource consultant. He also noted he had been Director of the Office of Collective Bargaining and he negotiated for the State in 1986.

Brundige said that Mr. Murray wanted to make sure benefits not enumerated in the Contract would still exist.

Brundige testified about Section 145.297 of ORC which he said sets forth how an early retirement incentive plan is to be implemented.

Brundige testified that Article 43.02 is the same in the 1989 Contract as in the 1986 Contract and neither side changed the language.

Brundige said that in 1989 House Bill 178 was used to provide benefit increases to employers and the employees should get similar benefits.

Brundige went on to say that if things occurred before the Collective Bargaining Agreement, they would be maintained and he pointed out such things as court leave.

b. ARGUMENT

The grievances, notes the Employer in its brief, arose after the OBES reduced its force in August 1991. OBES, in July of 1991, said it could no longer operate the Public Assistance

Service Operation (PASO) largely because of the termination of an inter-agency agreement between OBES and the Ohio Department of Human Services (ODHS).

Management notes that the PASO Program received federal funds which accounted for about 84% of program funding. OBES determined it could not absorb all of the positions utilized in the PASO program.

Procedural Arbitrability:

Management asserts that David Epstein's grievance form indicates no citation with respect to a specific contractual article. It goes on to say that Article 25, Section .02 states that written grievances should contain a statement of the grievance complaint and that did not occur.

Management goes on to say that the Epstein grievance might have a de minimus effect on the outcome of the case because the grievance filed by Lulu Smith involved a class action.

Management goes on to say that the grievance process can be effective only if the grievance clearly sets forth the section or sections of the Contract that has been allegedly violated.

For these reasons, Management asks that the Epstein grievance be viewed as defective.

Substantive Arbitrability:

The State asserts that the grievances are not substantively arbitrable. It states that the implementation of an early retirement incentive plan is protected from arbitral interpretation

by ORC 4117.10(A). The State also identifies ORC 145.297 which is a retirement incentive plan and ORC 145.298 called State Institution closings or layoffs and it goes on to say that those ORC designations do not fall under the umbrella of Article 43.02.

The State identified 4117.10(A) and it cites the appropriate language on page 4. It argues that the Arbitrator cannot interpret ORC 145.297 or 145.298. While the language of 4117.10(A), notes Management, states that existing law prevails over conflict between a labor agreement and such law, that is immaterial in this case.

Management notes that Lulu Smith, in her grievance, stated that the OBES violated ORC 145.297 by only offering an early retirement incentive plan to PASO employees. The grievance asks that the OBES offer the early retirement plan to all eligible employees and that it be in effect for one year and that five years be offered or one-fifth of the total service credited to the participant (eligible employee).

Management goes on to say that the laws pertaining to the retirement of public employees encompass ORC 145.297 and such an interpretation would violate the provisions of ORC 4117.10(A).

Management asserts that there are no specifications about retirement within the four corners of the Contract.

The State cites Section 25.03 of the OCSEA Contract and it reiterates the language of that section. The State argues that the Arbitrator would essentially have to add to the Contract to find this grievance arbitrable. In that sense, the Arbitrator would have to find that early retirement is a subject that is part of the

Contract and that action would exceed the powers granted to the arbitrator by the parties.

The State argues that the ERI plan was not a benefit which existed at the time the language of Article 43.02 was negotiated which talks about the preservation of benefits. That language was originally negotiated in 1986 and placed in the first agreement and that language as testified by Mr. Brundige was not changed in the subsequent negotiations in 1989.

The Management also cites arbitral awards on page 6 of its brief and it also cites Elkouri and Elkouri as well as Webster's New World Dictionary.

Management goes on to say that 4117.10(A) in part states:

> Where an agreement makes no specification about a matter, the public employer and public employees are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees.

Management asserts that the issue of early retirement is not addressed in the Contract. Thus, the public employer and public employees, the grievants, etc. etc. are all subject to the applicable laws as stated under 4117.10(A). Management notes that ORC 145.298 and 145.297 do not provide for final and binding arbitration of disputes about the application of those provisions.

Thus, the Arbitrator is not empowered to review the matter and it cites the Constance Leedy case on page 7 of its brief.

Management asserts that the Union will argue that the grievance is arbitrable and the reference to the grievance

procedure in Joint Exhibit #7 creates a waiver by the Employer but that is an illogical argument. ORC 145.297 requires in Section B that every retirement incentive plan shall provide for the timely and impartial resolution of grievances and disputes arising under the plan and it emphasizes that point. Management goes on to say that OBES, the Employer, is not empowered by statute to negotiate collective bargaining agreements and OBES has no power to add to or modify existing agreements negotiated by the Office of Collective Bargaining and it cites ORC 4117.10(D) which states the purpose of the Office of Collective Bargaining whose task it is to negotiate and enter into written agreements between state agencies etc. etc. In short, even if the Arbitrator found the Union's argument credible, it is clear that OBES is not vested with the authority to make such agreements.

Management noted that the Union in its opening cited arbitral decisions by Pinckus, Graham, and Rivera but in each of those cases, the "benefit" in question was not addressed by 4117.10(A).

For all these reasons, Management asserts that the grievance is not arbitrable.

2. UNION

a. TESTIMONY

The Union did not call its own witnesses but cross examined Mr. Brundige, the only individual testifying about arbitrability.

On cross, Brundige testified that Article 43.02 was to cover benefits. He said the early retirement plan took place in 1986 before the 1989 Contract.

Brundige said that Article 43.02 was not discussed in 1989.

On recross, Brundige said the language of the 1989 Contract which dealt with 43.02 did not change; rather, 43.02 stayed as is.

Brundige said the Union did not use 43.02 to deal with retirement.

b. ARGUMENT

In its brief, the Union claims that the initial issue is whether the establishment of an early retirement incentive is arbitrable?

The Union argues that Section 145.297 of the ORC states that when required, the ERI must contain a grievance procedure. The State complied with this requirement.

Arbitrator Graham, notes the Union, said that the grievance procedure is the exclusive method of resolving grievances; thus, that serves as the avenue of appeal. The Union goes on to describe the definition of a grievance as noted in 25.01(a). Thus, the Union argues that the issue is arbitrable. Moreover, the Union argues that Article 43.02 which talks about the preservation of benefits, in effect, incorporates rights established by the Code into the Contract. Therefore, claims the Union, disputes focusing on various benefits are subject to the grievance procedure. The Union cites Arbitrator Rivera's award in support of its position.

The Union argues that the State's interpretation of 43.02 is grasping for straws and is not supported by Contract language.

The Union goes on to say that the Code is subject to change and not a vehicle that either OCSEA or the State controls. The State essentially argues that the legislature would be unable to change any provisions of the Code and it would in effect be frozen but that is not the case, notes the Union. The Code has undergone many revisions since 1986.

The Union argues that Brundige's testimony drastically alters the meaning of Article 43.02 and there is no persuasive argument, notes the Union, that the parties intended to restrict this article to the status quo which existed prior to July 1, 1986.

The Employer also argued that ORC 4117.10(A) prohibits the parties from bargaining over the subject of retirement. That argument, asserts the Union, mischaracterizes the meaning of the words in that Article.

The Union asserts that there is no conflict between the Contract and the statutory provision governing early retirement incentive plans. In fact, it notes, the two provisions complement one another.

The Union goes on to say that Section 43.02 of the Contract incorporated benefits established by the ORC 145.297. In short, the Contract does not change rights, it merely changes the forum and the factfinding by which the benefits will be interpreted.

The Union states that the Contract changed the forum in which disputes would be litigated from the State Personnel Board of

Review to arbitration. The Union goes on to say that ORC 145.297 establishes benefits to State employees and Article 43.02 of the Contract incorporates the statute's benefits.

B. DISCUSSION AND AWARD (Arbitrability)

First, it must be determined if the question - Did the OBES violate the Agreement when they implemented the ERI plan in August 1991 only in the PASO-JOBS program? - is arbitrable.

The Employer claims that Epstein's grievance is procedurally defective because it did not reference the specific contract article allegedly violated as required in Article 25, Section .02. It is important that only "proper" grievances are filed, but in this case, the defect is unimportant and is not the basis to deny Epstein's grievance.

The grievances, asserts the Employer, are not substantively arbitrable for two reasons. First, they deal with an early retirement incentive plan which is protected from arbitral interpretation by ORC 4117.10(A). Second, the subject of early retirement plans is not contained within the four corners of the Contract nor falls under the general "maintenance of benefits" language of 43.02 and, thus, does not fit the definition of a grievance in Article 25.

An early retirement incentive plan is a legislated provision and is not a specific benefit resulting from Contractual negotiations. ORC 4117.10(A) mandates that if the Contract makes

no specification about a matter, the parties "are subject to all applicable state or local laws or ordinances pertaining to the wages, hours, and terms and conditions of employment for public employees". Furthermore, it goes on to state that if the Contract contains provisions which conflict with "laws pertaining to .... the retirement of public employees,....", the laws prevail on these subjects. Clearly, the subject of retirement is a matter of law but does the fact that early retirement plans are not specifically in the Contract and are governed by law dictate that the grievances are not arbitrable?

The Union points to Article 43.02, the preservation of benefits, which states that:

> To the extent that State statutes, regulations or rules promulgated pursuant to ORC Chapter 119 or Appointing Authority directives provide benefits to state employees in areas where this Agreement is silent, such benefits shall continue and be determined by those statutes, regulations, rules or directives.

The Union argues that this section incorporates employee rights and benefits established by ORC into the Contract and disputes over them are subject to the Grievance process.

The Union cites awards by Arbitrators Rivera and Graham which concluded that a "benefit" not specified in the Contract was subject to arbitral review because the benefit was preserved by paragraph 43.02 of the Contract. In those cases the preserved "benefits" were reinstatement after disability separation and the maintenance of criteria for reviewing layoff decisions.

In this case, ORC 145.298 mandates that a proposal to lay off over 50 employees must be accompanied by an early retirement

incentive plan. The contractually preserved "benefit" is that when a large number of layoffs are proposed, eligible employees are offered an early retirement incentive plan in lieu of being laid off or bumping into another position.

However, even if 43.02 preserves benefits in areas where the Agreement is silent, this does not mean that each and every disagreement regarding a preserved benefit is arbitrable under the Collective Bargaining Agreement. This would, indeed, conflict with Article 25.01(A) which defines a grievance and 25.03 which limits the subject of arbitration to a provision of the Agreement and limits arbitral authority. The fact that a "preserved benefit" via 43.02 exists is not sufficient to declare a grievance concerning a non-negotiated benefit arbitrable. There has to be some "leaping logic" - a bridge to cross.

In this case,, there are two bridges. First, the Employer's Early Retirement Incent Plan for the JOBS Employing Unit (see Joint Exhibit #7) states in item 6:

> Grievances pertaining to this Plan will be dealt with for Collective Bargaining Unit people in accordance with Article 25 of the OCSEA/AFSCME agreement, and for Collective Bargaining Unit exempt people in accordance with Section 123:1-41-23 of the Ohio Administrative Rules.

The Employer argues that only grievances of JOBS (PASO) employees are valid and grievances brought forward by other OBES bargaining unit employees are not arbitrable, but item 6 suggests that the plán, itself, can be questioned through the grievance process set forth in Article 25.

The second bridge is that although the merit question involves the early retirement incentive plan, in reality the grievances are over being laid off. The Union brief questions whether the grievants were improperly bumped and unnecessarily laid off. Layoffs and bumping can be challenged in the arbitral forum. The grievances fit the definition in 25.01(A) as being "a difference, complaint or dispute between the Employer and the Union or any employee affecting terms and/or conditions of employment regarding the application, meaning or interpretation of this Agreement".

The impact of contractual provisions concerning layoff and bumping employees is changed by the implementation of the mandated early retirement incentive plan. The definition in question is the "employing unit" and ORC 145.297(A)(2) states that this basic concept is "any entity of the state including any department, agency, institution of higher education, board, bureau, commission, council, office, or administrative body or any part of such entity that is designated by the entity as an employing unit". The law does not set the "employing unit" but provides that the Employer determines the "employing unit". If the determination of "employing unit" is narrow, fewer employees are eligible to retire early and more are laid off and if the determination is broad, more employees may opt for early retirement necessitating fewer layoffs. Under ORC, the Employer makes the decision, but when different decisions are possible which have varying affects on employees' "terms and conditions of employment" and on the impact of contractual provisions, the decision can be grieved.

In conclusion, the Employer has not shown that because the retirement of public employees is a matter of law and because an early retirement plan benefit is not specifically a contractual benefit are sufficient factors to preclude the grievances from being arbitrable.

V. MERITS

A. TESTIMONY AND EVIDENCE

With respect to the merits, there was only one person testifying; namely Reita Smith testifying on behalf of the Union. She said the Ohio Bureau of Employment Service (OBES) and the Joint Training Partnership Act (JTPA) were coordinated by her.

Smith said there were 800 employees in her chapter and she was involved in layoffs of the Bureau and she advised the employees of layoffs.

Smith said she was involved in the PASO unit.

Smith said that a Renda Copes took the minutes of Union Exhibit #1.

Smith testified that she was told that the PASO unit became part of the OBES so the employees would be part of the Service.

There was no cross examination of Reita Smith.

B. ARGUMENTS (Merits)

1. UNION

The Union explains that the Ohio Bureau of Employment Services signed a contract with the Department of Human Services to provide services for the JOBS program under the authority of Title IV(A-F) of the Social Security Act. The whole purpose of that was to help individuals avoid long term dependency on welfare.

The Ohio Department of Human Services in September of 1991 assumed responsibility for the JOBS program. OBES lost the funding and as a result, 94 (96) jobs were abolished and those jobs were in the Public Assistance Service Operations (PASO) part of the OBES.

The PASO employees exercised bumping rights and the grievants Mary Christman, Duane Tinkler, Lula Smith, and David Epstein were laid off even though they were not PASO employees.

The employees whose jobs had originally been abolished were offered an early retirement incentive option.

The Union goes on to say that the ORC requires that a early retirement incentive be offered whenever more than 50 employees are laid off in an employing unit.

The Union goes on to say that when the original 96 positions were abolished, the affected employees bumped other employees in accordance with Article 18. The grievants who were affected by the bumping process of Article 18 are those who could have benefited from the early retirement incentive. The Union recites ORC 145.197(a)(4)(i).

The Union goes on to argue that the question is whether the State properly identified the PASO division as an employing unit. The Union argues that the Code states that an employing unit is a unit through whose payroll the employees are paid. PASO employees were paid out of the Employment Service's division of OBES and did not have a separate payroll of their own (see Joint Exhibit #12). Joint Exhibit #11 reflects that PASO employees were laid off and these employees are clearly Employment Service employees.

Union Exhibit #1, notes the Union, reflects the minutes of the Statewide committee. The Union notes that Management acknowledged at the Arbitration Hearing that the minutes of Union Exhibit #1 were signed by Janice Viau, the Labor Relations Officer. The Union goes on to say that John Gore, Director of the Operations Division, stated that the local offices had line authority over PASO staff and that such staff could be assigned ES activities and they both perform the same function. In short, there was a melding of ES and PASO staff and their duties were the same and the supervisors were the same. In short, there was no distinction made between PASO and ES employees until the State implemented the early retirement incentive. The Ohio Bureau of Employment Services, notes the Union, then improperly separated PASO employees from ES employees for the purposes of the early retirement incentive.

The Union argues that the employing unit of PASO employees is clearly the Ohio Bureau of Employment Services.

The Union goes on to say that even if that argument is not persuasive, the Union would point out that while the unemployment

compensation units and employment service units are separate, PASO is part of the Employment Service and the early retirement incentive should have been extended to Employment Service Division employees as well.

The Union goes on to identify PASO employees who were obviously Employment Service employees and their positions were abolished as PASO employees. These were, however, Employment Services personnel.

The Union asked the Arbitrator to make note of Joint Exhibit #7 which is a letter from the Public Employees Retirement System which acknowledges the adoption of the mandatory retirement incentive plan. The Union goes on to say that this is clearly an arbitral issue and the Union submits that the State improperly created an employing unit for PASO employees and thereby eliminating the rights of employees who were laid off to receive one year service credit for retirement.

The Union argues that the State should offer the ERI plan to all employees in the employing unit. The Union goes on to say that after all the employees eligible to participate in the plan are allowed to do so, then any employees who were adversely affected should be made whole. Moreover, employees that were improperly laid off or bumped should be reinstated and shall receive all back pay, PERS employer contribution, and any other benefits if the layoff had not occurred and it cites the Holten Pinckus awards.

The Union asks the Arbitrator to retain jurisdiction for at least 30 days to oversee the implementation.

2. MANAGEMENT

If the Arbitrator finds the grievance is arbitrable, the State argues that the grievance be denied on its merits. The State points to ORC 145.298 which is a statute setting forth the circumstances about an early retirement incentive (ERI) plan. Management goes on to say that a reading of the language in the statute establishes that the determination of the employing unit is at the discretion of the entity which makes the declaration. Thus, Management asserts that even if the ERI plan is encompassed under the language of 43.02, the matter must be determined by the Employer under Article 5 of the Contract. That language, notes the Employer, gives it the right to manage and operate its facilities and programs and those rights shall not be inconsistent with the Contract.

Management goes on to say that the Union will probably spend a lot of time going through Joint Exhibits and explaining the similarities between the job duties of employees assigned to PASO who were eligible to participate in the ERI plan and employees assigned to other divisions within the OBES. The Union might argue that OBES erred in its declaration of the PASO unit as the employing unit for purposes of an early retirement plan. Management claims that an examination of Joint Exhibit #4 shows that all the persons employed in the PASO program were on what is called the WIN payroll.

Management concludes that the arguments and facts demonstrate that the issues are not within the purview of the Arbitrator and to

do so would exceed the power granted to the arbitrator by the parties. Even if the Arbitrator finds the grievances are arbitrable, the State argues they should be denied on their merits and it cites the language of ORC 145.297. That language is clearly discretionary and as such, the Employer's actions cannot be grieved by the Union. The Employer was not in this case inconsistent nor was the Employer arbitrary or capricious and therefore, all the grievances should be denied in their entirety.

In its rebuttal brief, the Employer reemphasizes that the payroll for the "employing unit" was identified as "WIN" and the positions had been funded by federal dollars from Human Services to OBES. The Employer objects to the Union's reliance on total budget allocation as the basis to conclude that OBES is the employing unit.

The Employer further questions the Union's inference that ES and PASO staff performed the same duties and noted that it was stipulated that "Some" EX employees and "some PASO employees had overlapping duties".

The Employer also asserted that Article 18 (Layoff & bumping) does not challenge or change ORC 145.297 and 145.298, as the Union brief implies.

B. DISCUSSION AND AWARD (Merits)

The question is whether the OBES violated the Agreement when they implemented the ERI plan in August 1991 only in the PASO-JOBS program?

ORC 145.298 states:

> (C) In the event of a proposal, other than a proposal described in division (B) of this section, to lay off, within a six-month period, a number of employees of a state employing unit that equals or exceeds the lesser of fifty or ten per cent of the employing unit's employees, the employing unit shall establish a retirement incentive plan for employees of the employing unit.

The "employing unit" is defined in 145.297(A)(2) as:

> With respect to state employees, any entity of the state including any department, agency, institution of higher education, board, bureau, commission, council, office, or administrative body or any part of such entity that is designated by the entity as the employing unit.

As legally required, OBES accompanied its proposed layoff of 90 to 96 employees with an early retirement incentive plan. It designated the Public Assistance Service Operations (PASO), a "part of" OBES also referred to as WIN or JOBS, as the "employing unit". The early retirement incentive was only for employees working in the PASO-JOBS program which was to be eliminated. The Union argues that OBES, the entity, is itself the "employing unit" and all OBES employees who met the eligibility standards should have been offered the early retirement incentive. The Union went on to assert that if OBES, itself, were not the proper "employing unit, then the appropriate part of OBES which should have been designated as the employing unit was Employment Services (ES).

The Union's position that OBES should have been the "employing unit" and early retirement offered to all eligible employees for one year is not persuasive. Setting up an ERI for one year is a 145.297 provision for plans voluntarily set up and generates a gradual general reduction of staff. 145.298 mandates early retirement incentives be offered for a brief time when there is an abrupt simultaneous elimination of a large number of positions.

However, the Union's alternative that ES rather than PASO is the appropriate "employing unit" is somewhat understandable. The Union claims that organizationally, PASO employees were a part of ES and ES and PASO skills and tasks were similar. Incentives to retire early reduces staff by speeding up attrition rather than by laying off. The entire PASO unit was eliminated from OBES and offering early retirement incentives only to these employees limits the effectiveness of the incentives to reduce the number of layoffs. If only 10%, 25%,, etc. of an employing unit's positions were eliminated and an ERI plan offered to all 100%, there would be absorption of employees potentially laid off within the employing unit. In this case, however, with 100% of PASO eliminated, a ERI reserved only for PASO meant no absorption within the employing unit. All PASO employees not eligible or not accepting early retirement must necessarily bump to positions outside PASO. The effect of the ERI benefit is minimal whereas if ES were the "employing unit", the need for bargaining unit layoffs might have been reduced dramatically.

The Union's view that ES was the "proper employing unit" is understandable, but the Employer's designation of PASO as the employing unit also makes sense. The Employer claims PASO was a distinctive unit with specific functions. Apparently, although PASO and ES were combined, each still had its own duties to perform. The organizational charts showed PASO as a distinct unit in various OBES offices (see Joint Exhibit #11). That the PASO manager reported to the local office manager does not lessen the distinctiveness of the job tasks. It was stipulated that some PASO employees had overlapping duties with ES employees, but apparently, ES and PASO had distinctly unique functions and responsibilities.

ORC 145.297(A)(4) states:

> In the case of an employee whose employing unit is in question, the employing unit is the unit through whose payroll the employee is paid.

The testimony and evidence indicated separate funds were provided by the State of Ohio directly to OBES for the JOBS Program to provide coordinated employment and training services. It was stipulated that 84% of this funding came from federal sources. It is reasonable to conclude that funding for PASO was separate and distinct from the funding for regular OBES functions even though included in the State budget under OBES (Joint Exhibit #12).

Thus, there are reasonable aspects to both positions that ES and PASO are the appropriate "employing unit". There are, however, reasons to support the Employer's position. The employer, for both voluntary and mandatory ERI plans, has discretion to designate the "employing unit". Presumedly, an ERI plan offered to all OBES or

for all ES employees would not open up the correct positions in locations to match the positions and locations applicable to laid off PASO employees. In situations of a massive total elimination of a unit or segment, it would be less chaotic for the Employer to designate a narrow employing unit and have contractual bumping to put the proper people in correct slots.

Further, the Employer can make decisions to manage programs and facilities (see Article 5, Management Rights) as long as they are not inconsistent with the Agreement. Its decision to designate PASO as the "employing unit" probably resulted in more bargaining unit layoffs than if ES had been the "employing unit" but the Union did not show how the decision was inconsistent with the Contract or how the Contract prohibits the Employer from designating PASO as the employing unit.

Thus, it is concluded that the Employer's decision to use PASO as the "employing unit" when it set up the mandatory early retirement incentive plan was appropriate and offering the incentive to all eligible OBES or ES employees is not contractually required.

However, there is something inherently unfair and inequitable that a non-PASO employee meeting the standards for early retirement who is bumped because of the elimination of PASO could not take advantage of the incentive. Presumedly, the likelihood of this occurring would be quite infrequent as the employee bumping would presumedly be a ex-PASO employee also eligible for early retirement who decided not to accept the incentives.

In any event, Epstein's grievance was that he "was displaced in the bumping process and laid off...". He apparently met the standards of eligibility for and would have chosen early retirement rather than be laid off. The grievance of Tinkler, et. al. provides no clear indication whether he was actually laid off/displaced as a result of the layoffs in PASO or just would have opted for early retirement rather than continuing employment.

The Employer explained that according to Section 145.298(C), the early retirement incentive plan was reserved only for those employees within the employing unit where the proposed job abolishments occurred. 145.298(C) states "..for employees of the employing unit", but there is some indication that the Employer not only has discretion to designate the "employing unit" but also has discretion regarding the particulars of the plan. The review of the ERI plan (see Joint Exhibit #7) notes it meets the "minimum statutory requirements" so presumedly, there would be no legal restriction if the Employer were to set up a plan with more than minimum statutory requirements. Is there any reason why the Employer could not have extended coverage to other individual employees outside the employing unit indirectly facing layoff or perhaps the need to bump to a position which for some reason is undesirable?

There are parts of the Contract which may, in fact, provide a basis to find that early retirement incentives ought to have been offered to individual employees outside the designated "employing unit" who are adversely affected by the PASO elimination. If the

43.02 "preserved benefit" for bargaining unit members is that when a great number of layoffs is proposed, early retirement is an alternative to being laid off, reserving that benefit only to PASO employees and restricting other employees who are laid off because of eliminating PASO from using the benefit is arbitrary and discriminatory.

Also, PASO was eliminated from OBES, not because there was no need for it or because there was no funding for the program, but because it was agreed by OBES and ODHS that the functions and funding for the PASO function would be assumed by ODHS. Thus, the elimination could be viewed as similar to the situation under 43.04 wherein the Employer plans to close an institution or part thereof. The general idea of 43.04 is that the Employer make good faith, concerted efforts to minimize the affect of closings. Although perhaps not directly applicable, 43.04 provides some basis for finding that the Employer should have extended early retirement incentives to OBES employees indirectly affected by being bumped as a result of PASO functions being transferred to ODHS.

The basis for finding that non-PASO employees laid off because of the elimination of all PASO positions should have been offered early retirement may not be overwhelming but it is sufficiently compelling.

To conclude, the Employer's designation of PASO as the "employing unit" was appropriate and there is no basis to offer early retirement incentives to all eligible OBES or ES employees. There is, however, reason to offer the ERI plan to eligible

employees outside the employing unit who faced the alternative of being laid off from active employment as the indirect result of the abolishment of the PASO "employing unit".

John E. Drotning
Arbitrator

July 9, 1992

#795 clarif.

IN THE MATTER OF ARBITRATION

BETWEEN

OFFICE OF COLLECTIVE BARGAINING
STATE OF OHIO

AND

OCSEA/AFSCME LOCAL 11

ARBITRATION AWARD
CLARIFICATION

CASE NUMBER:	11-05-910813-0123-01-09 (Smith)
	11-09-910911-0195-01-09 (Tinkler)
	11-09-910828-0190-01-09 (Epstein)
ARBITRATOR:	John E. Drotning
HEARING DATE:	January 31, 1992
AWARD DATE:	July 9, 1992
CLARIFICATION:	September 30, 1992

I. REQUEST FOR CLARIFICATION

On September 29, 1992, the Arbitrator met with the parties at the Offices of Collective Bargaining, Columbus, Ohio.

The parties submitted the following request:

> The parties agree that the Arbitrator clarify the Award; specifically, whether the people outside the employing unit of PASO have a contractual right to be offered ERI?

II. CLARIFICATION

There is no language in the Collective Bargaining Agreement which specifically defines early retirement incentive plans. The 1989-1991 Collective Bargaining Agreement does not support the claim that people outside the PASO unit have a contractual right to be offered Early Retirement Incentives.

John E. Drotning
Arbitrator

September 30, 1992