* *

IN THE MATTER OF AN INTEREST ARBITRATION

BETWEEN

THE STATE OF OHIO,
Office of Collective Bargaining,

-and-

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, AMERICAN FEDERATION
OF STATE, COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO

* *

OPINION AND AWARD

ELLIOTT H. GOLDSTEIN
Arbitrator

JUNE 10, 1987

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I. BACKGROUND

The instant matter was heard before Arbitrator Elliott H. Goldstein on November 25 and 26, and December 1, 2 and 8, 1986. The Arbitrator was selected by mutual agreement of the parties to determine the definition of a "work area" as that term is used in Article 13 of the parties' first Collective Bargaining Agreement, specifically, Sections 13.02 - Work Schedules and 13.05 - Reassignments. During the negotiations for this first contract the parties were initially unable to agree upon the definition of the term "work area" and, within the Collective Bargaining Agreement, noted that "Work area is defined in appendices." (Joint Exhibit 1, pp. 18 and 19).

However, the parties never actually negotiated a definition of the term "work area" for inclusion in any appendix to the Agreement, having reached an impasse in negotiations. Consequently, the parties agreed to submit the sole issue of the definition of the term "work area" to an arbitrator for resolution. However, although the parties agreed in principle to submit this issue to an arbitrator, the chief negotiators for both the Union and the State admit that there was no discussion about what procedure would govern the Arbitrator's consideration of the issue and the rendering of the award.

During negotiations, the parties submitted to each other several different proposals concerning the definition of the term "work area". (State Exhibits 3(a) through (g)). Immediately prior to the arbitration hearing, the parties exchanged their final offers defining the term "work area" as it related to the

various departments covered by the Agreement. The Union's and the State's final offers were submitted at the hearing as Joint Exhibits 2 and 3, respectively. (See Joint Exhibits 2 and 3, attached). As noted at the hearing, it is the position of the Employer that the State's final offer reflects a significant change in its previous proposals, evidencing the State's understanding that the parties were to submit their "last best" offers in accordance with the Ohio Collective Bargaining Law. The Union's final proposal, however, represents no material change in its prior "work area" proposal, this Employer maintains. By contrast, the Union believes it has pressed for compromise throughout the bargaining process, including its numerous offers at hearing to agree to a "hybrid" seniority standard, with restrictions based on adequate skills and abilities, rather than insisting on a strict seniority as the sole determinant of selection of a work area. The Union also indicated in the record that some limitation on an individual employee's right to exercise his/her seniority to select a work assignment would be acceptable, as long as seniority as a principle was provided for and that a limitation in the "ripple effect" or on "chasing an aide" when selections for a work assignment in a specific work area are involved also would be subject to negotiation.

Because the parties had never established a procedure defining the Arbitrator's authority and constraints, the question arose as to what is the authority of the Arbitrator and by what constraints his decision is governed. At the direction of the Arbitrator, the parties prepared and submitted briefs solely

concerning the issue of my authority and whether I am required to render my award on a final or "last-best" offer basis, or whether I may devise a contract provision which varies from both of the parties' final contract offers. These briefs were submitted December 31, 1986.

Although I had not yet rendered a formal written award addressing the question of my authority, the Arbitrator did conduct a telephone conversation with the parties' counsel on February 24, 1987. At that time I advised the parties that I had rejected the State's contention -- that the Arbitrator must render the award on a final or "last-best" offer basis -- and that I agreed with the Union's contention that I was free to fashion a contract provision which might vary from both of the final offers of the parties, even though Ohio Revised Code Section 4117.14 D might seem, at first blush, to indicate otherwise.

First, as both parties acknowledge, the chief negotiators for the respective parties did not precisely agree as to what form the interest arbitration would take, i.e., whether the Arbitrator would be presented with a last, best offer or whether "conventional interest arbitration," whereby the Arbitrator formulates the package based on a review of the evidence, was desired. Management argues that the parties did not follow the prescribed standards pursuant to the applicable Ohio statute, since no form indicating a mutually agreed-upon dispute resolution process ("MAD") was filed with the State Employment

Relations Board (SERB). It cited one case 1/ as precedent that a filing with SERB that indicated a MAD had been negotiated by the parties was a prerequisite for a valid alternative to the statutory procedures outlined. In the decision cited, SERB Board Chair Day relied primarily on the fact that mediation was the alternative to the statutory provisions culminating in final offer interest arbitration. In this case, Chair Day found specifically that mediation does not have the requisite finality to constitute a mutually agreed to dispute resolution devise (MAD). Only secondarily did Day rely on the lack of an appropriate filing of a MAD with SERB in his analysis.

As the Union emphasizes, however, the alternative to a MAD is to follow precisely the statutory procedures for interest arbitration. These are not self-actuating; instead, there is a series of procedural requirements that are prescribed prior to an interest arbitration. Mediation, fact finding, and then an appointment through the auspices of SERB of a "conciliator" is spelled out in the statute. ORC §4117.14C and ORC §4117.D. Compare §4117.14E. None of these procedures (See ORC §4117.14C and D) were complied with in the instant case.

1/ In the Matter of City of Columbus, 2 OPER §2124 (SERB Feb. 6, 1985).

Therefore, in weighing the arguments, I find that substantial compliance with a MAD was achieved by the parties. Moreover, even if there is a technical defect, the parties waived it by agreeing to the interest arbitration; getting legislative approval from the Employer and approval from two-thirds of the rank and file of the Union to the interest arbitration; and then presenting the issue to the Arbitrator at a lengthy evidentiary hearing. Last, the structure of the statute indicates that a mutually agreed alternative (MAD) is a favored device under the statute. Given the obvious lack of compliance with the statutory procedures and the substantial compliance with the requirements for an alternative, I find that a mutually agreed alternative dispute resolution mechanism (MAD) is what is involved in the instant dispute. Since that is so, the option of conventional interest arbitration is available. I so hold.

With reference to the standards to be used by the Arbitrator, the parties have stipulated that those set forth in the applicable Ohio statute as to be used by this Arbitrator. Ohio Revised Code Section 4117.14(G)(7) provides:

> "After hearing the conciliator shall resolve the dispute between the parties..., taking into consideration the following:
>
> (a) Past collectively bargained agreement, if any between the parties;
>
> (b) Comparison of the issues submitted to final offer settlement relative to the employees in the bargaining unit involved with those issues related to other public and private employees doing comparable work, giving consideration to factors peculiar to the area and classification involved;

(c) The interests and welfare of the public, the ability of the public employer to finance and administer the issues proposed, and the effect of the adjustments on the normal standard of public service;

(d) The lawful authority of the public employer;

(e) The stipulations of the parties;

(f) Such other factors, not confined to those listed in this section, which are normally or traditionally taken into consideration in the determination of the issues submitted to final offer settlement through voluntary collective bargaining, medication, fact-finding or other impasse resolution procedures in the public service or in private employment. 2/

Without waiving the State's argument concerning the Arbitrator's authority, the State argued that based on these standards its final contract proposal for the definition of the term "work area" is much preferred to the version proffered by the Union, and should be adopted by the Arbitrator as it is proposed. The Union, on the other hand, believes the State has not really offered any serious proposal, but instead has presented a demand for unlimited discretion in work assignments that involves "give-backs" in each involved unit. To the Union, all involved employees should have the right to select their "work areas" on the basis of their institutional seniority. The Union is therefore asking that employees in direct care positions in State institutions be given this "right."

2/ The parties did not enter into any relevant stipulations and there was no past master collective bargaining agreement. Therefore, standards (a) and (e) are irrelevant to this proceeding.

In popular terms, the Union is seeking the implementation of what is known as a "pick-your-post" system which would allow direct care employees to select their work assignments (or work areas) on the basis of their institutional seniority. The Employer is resisting this demand and asking that it be allowed unfettered discretion in making work assignments (or in assigning employees to work areas), based on Management Rights and the interests and welfare of the public, as well as comparability and the other relevant factors outlined above. I shall first review the relevant background and historical considerations and then discuss the issues at each affected State program or department separately, giving both Employer and Union arguments.

II. HISTORY OF COLLECTIVE BARGAINING AND EMPLOYEES AFFECTED BY THE DISPUTE

A. Employees Affected by the Dispute.

The parties are in agreement that this dispute covers a discrete, readily identifiable segment of the workforce. The employees who are seeking the right to select their "work areas" may be termed "direct care" employees. These employees work in State institutions and are employed in full-time care, custodial and security positions. The institutions covered by this dispute are located in the following departments: the Department of Rehabilitation and Corrections; Department of Youth Services; the Department of Mental Health and Mental Retardation/Developmental Disabilities; the Ohio Veterans Home; and the Ohio Veterans

Children's Home. The specific job classifications are identified in Appendix M (which is attached to Joint Exhibit 2).

B. History.

The 1986-89 Agreement is the first collective bargaining agreement negotiated by the parties pursuant to the provisions of the Ohio Public Employee Bargaining Law which went into effect on April 1, 1984. For state employees and their unions, the 1984 law provided, for the first time, a process by which unions could obtain exclusive recognition and negotiate collective bargaining agreements covering hours, wages and conditions of employment under circumstances similar to that afforded private sector employees in the United States.

However, it is important to note that the 1986-89 collective bargaining agreement was not the first such agreement between these parties. In the years prior to the enactment of the 1984 statute, the State and the Union negotiated agreements on a "members only" basis covering employees at several different institutions. Indeed, the Union which exists today is an amalgam of two separate unions which had represented State employees on a "member-only" basis for many years. OCSEA was an independent association prior to affiliating with AFSCME in 1983. OCSEA has a fifty (50) year history of representing State employees in Ohio. AFSCME has been actively representing State employees in Ohio for nearly twenty (20) years. OCSEA and AFSCME were the principal State employee unions in the years when "member-only" agreements were negotiated on an agency-by-agency basis.

This means that, for purposes of this proceeding, there is a very checkered history in terms of precedent with respect to the "pick-your-post" system. At some institutions, OCSEA and/or AFSCME was able to negotiate such a system and the practice became well-established and understood by Management at those institutions. On the other hand, at other institutions the Union was unable to implement the system and Management was able to retain widespread discretion in assigning employees to work areas.

Thus, as a practical matter, the Employer proposal amounts to a "take-away" or "give-back" demand at some institutions, as the Union suggests, while at others it represents an attempt to maintain the status quo, as Management consistently emphasized.

III. ISSUES

The parties are in agreement that the term "work area" means the physical setting within which an employee performs his or her assigned work on a regular basis. (See Joint Exhibit 2 and Joint Exhibit 3) How broad or narrow such a physical setting is constitutes the general question to be resolved.

Article 13 of the parties' collective bargaining agreement is entitled Work Week, Schedules and Overtime. In it, the parties have set forth their agreements with regard to several related matters: standard work week, days off, assigned work shifts, procedures for temporary assignment, overtime policy and related matters. The unresolved issue concerns the method and manner by which employees are assigned to specific "work areas."

In determining the foregoing issue, it will be necessary as I stated in the record to address the following three (3) major questions:

(1) What is the appropriate physical setting for a work area, ward, post or unit or major programmatic unit or entire institutional facility?

(2) Does seniority, whether limited by skills and abilities or other "hybrid" factors constitute the proper basis to control selection and maintenance of an assignment or does management need discretion to shift employees, as needed, based on a host of other considerations? and

(3) Do potential limits in the ripple effect of bidding for a work area and on the number of times an individual employee can exercise selection of a work area by seniority provide a fair resolution to Management's concerns over any provision reserving less than complete discretion to it?

IV. CONTENTIONS OF THE PARTIES

A. The Union

The Union, stressing all factors set out in ORC Section 4117.14(G)(7), quoted above, except for the ability of the Employer to finance provided in paragraph C, argued that its proposal of strict seniority for work area selection in the smallest feasible unit, post, ward, or cottage, with unlimited selection rights and no limitations on "ripple effect," was equitable and reasonable.

1. Ability To Pay And Costs.

At the outset, it is critically important to understand that the Union proposal does not require the Employer to establish or maintain any specific number of positions at any institution, the Union asserts. For the purpose of this proceeding, the Union unreservedly acknowledged that the Employer has the right to create or abolish positions. The Union's proposal speaks only to the assignment of employees to positions which are already established and which require the assignment of full-time personnel, it urges.

To repeat, the Union claimed its proposal covers only positions which already exist and which are staffed on a full-time basis by bargaining unit employees. The Union proposal does not require the Employer to establish any positions, it points out.

This point is critically important because it conclusively establishes that the Union proposal has no budgetary impact. The Union is not seeking the establishment of new positions, the Union is not seeking the hiring of any additional employees, and the Union is not seeking the establishment of staff-client ratios. If adopted, the Union's proposal would only require the Employer to allow employees to select work areas which already exist and which the Employer has determined must be filled on a regular, full-time basis.

The critical element of the Union proposal is that direct care employees would be allowed to select their preferred work

In sum, then, the Union believes its proposal is easy to understand and easy to administer. The Union maintains that its proposal provides for the identification of agreed-upon work areas, the assignment of employees to work areas on the basis of seniority, and for the movement of employees from one work area to another on a seniority basis. In essence, the Union claims that the State obviously can afford to meet the proposal and that it embodies a solution to the impasse in bargaining that is consistent with the financial resources available and public welfare.

2. Comparability and Interests and Welfare of Public and Its Employees.

a. The Union's Proposal was Endorsed by Three Independent Experts. The Employer Offered no Expert Testimony in Support of its Proposal.

The Union provided independent, expert witnesses in the fields of mental retardation, mental health and correction. In each instance, the independent expert testified that the Union's proposal was far superior to the Employer's proposal. The Employer offered no expert testimony, the Union stressed.

According to the Union, Dr. Kenneth Crosby testified as an expert in the field of Mental Retardation and Development Disabilities (MR/DD). Dr. Crosby is the former director of a state institution for MR/DD and has been active in the field since 1949. He was one of the principals involved in establishing a National Accreditation Council and later served as the Executive Director of the Accreditation Council. Currently,

he serves as a member of the Board of Directors of the Accreditation Council and as the President of an MR/DD consulting firm. Crosby furnished the Arbitrator with the Accreditation Council standard concerning the assignment of direct care staff. In relevant part, the standard states as follows:

> "Staff are assigned to work with specified program groups of individuals, and assignments are not changed or rotated except as necessitated by staff promotions, and absences, separation, or as part of a planned program to meet the needs of the individuals served." (See: Union Exhibit 14.)

As the Union interprets Crosby's testimony, it believes that Crosby found that the same staff members should work with the same clients.

Crosby also testified that, to his knowledge, there are no professional organizations which favored the principle or theory underlying the Employer's proposal, avers the Union.

Dr. Kenneth Tardiff testified as a witness in the area of mental health. Tardiff has extensive experience in both the academic and treatment communities. Most recently, he has been assisting the American Psychiatric Association in developing national guidelines for the management of violent patients. The Union suggests that Tardiff testified that he had had an opportunity to review both the Union and Employer proposals and that the Union proposal was far superior in terms of mental health administration.

Tardiff also testified that the Union's proposal was consistent with what is being practiced in the field of mental health administration, according to its view of the evidence.

Richard Vernon testified as an expert in the field of Corrections. Vernon worked in the correctional system in the State of Washington for a period of approximately thirty years until he retired in 1982. During that period he worked in all levels of the system, including serving as the Director of Prisons. Vernon gave extensive testimony with regard to the collective bargaining agreement between the State of Washington and AFSCME which provides for a "pick-your-post" system. He testified that when the bid system was placed into effect it was met with resistance from existing management, but after it was in place it turned out to be a useful Management tool.

As the Union sees it, Vernon also gave extensive testimony of the manner in which the labor and management cooperated to make the "pick-your-post" system work in the State of Washington. He testified that when problems arose, it had been his experience that the Union's leadership was prepared to work out solutions. In this regard, he gave an example of a situation where there was a legitimate management concern that an employee could not perform a specific assignment, the solution was found when Union and Management met and came up with an alternative assignment. Similarly, labor and management agreed that a certain number of posts should be set aside as "training positions" which the Employer could use for the purpose of training new staff. Finally, labor and management agreed to the establishment of a "six-month rule" to prevent employees from switching posts too frequently.

In sum, the Union argues that the testimony of the three experts confirmed that the Union's proposal was superior to the Employer's. The expert testimony showed that the Union's proposal was consistent with modern theories of care, treatment and security, and, finally, the testimony of Mr. Vernon, in particular, showed that the types of concerns raised by Employer representatives in this proceeding could be readily resolved by labor-management committees.

The Employer offered no expert testimony to rebut the testimony offered by these experts, the Union vociferously contended.

b. The Union Offered Unrebutted Evidence That The "Pick-Your-Post" System Has Worked Effectively At Several State Institutions For Several Years.

Jayne Schotts, an employee at Mount Vernon Developmental Center, testified that the "bid-assignment system" has been in place at their facility for a period of nearly fourteen years. Schotts also testified that she is a Chief Steward for the Union at Mount Vernon. She testified that at no time has any Employer representative ever advocated a change in the system, claims the Union.

Richard Sycks, an employee at the Athens Mental Health Center, testified that a "bid" system has been in place at their facility since at least 1975. He testified that the system was a product of local negotiations and had been in effect as long as he could remember.

From the area of corrections, the Union presented Patrick Mayer, a correctional officer employed at Lebanon Correctional Institution. Officer Mayer testified that the "pick-your-post" system had been in effect for several years at Lebanon. He gave extensive testimony to the manner in which the system functioned and provided forms and documents confirming the existence of the system. He also testified that the system was supported by the top management at the institution.

In addition to these three witnesses, the Union also presented several witnesses from other State institutions who testified in support of the Union's proposal for assigned work areas. The common thread running through all their testimony was that the Union's proposal would lead to improved employee morale, improved employee productivity and better service for the clientele.

Finally, the Arbitrator's attention was drawn to the fact that the Employer did not produce any management witnesses from Athens, Mt. Vernon or Lebanon. The Employer, in effect, conceded that the "bid system" was working well at those institutions, the Union postulates.

c. <u>The Union's Proposal Is Consistent With The Practices Being Followed In Other States</u>.

The Union presented Kerry Korpi, a labor economist with the Research Department of the AFSCME International Union, in support of its position that the Union's proposal was consistent with the

prevailing practices in other States. Korpi's testimony was based on the results of her research which was submitted as Union Exhibits 11 and 12.

Korpi testified that AFSCME represents direct care employees and/or correctional officers in State institutions in seventeen states. She testified that she reviewed AFSCME contracts on file in the Research Department and also spoke with Union staff in the various states. She described the results of her research as showing that the overwhelming practice in the other states surveyed is what the Union is proposing in the instant dispute.

Korpi's research data shows that AFSCME has collective bargaining contracts covering mental health employees in fifteen states. In thirteen of those states, employees are allowed to select their work areas in a manner similar to that set forth in the Union proposal. Union Exhibit 12).

Her data also shows AFSCME represents employees who work in mental retardation facilities in sixteen states. In thirteen of those states, work area is defined in accordance with the Union's proposal. (Union Exhibit 12).

And, the research data shows that AFSCME represents correctional officers in twelve states. Of those twelve states, there are ten which follow the practice which the Union is proposing for the State of Ohio. (Union Exhibit 12).

An examination of the collective bargaining agreements and the practices which exist in other states shows that through collective bargaining labor and management have been able to find solutions to the types of "concerns" raised by Employer witness

and Director of Corrections Seiter and some of the other State witnesses in this proceeding. For example, in other States, AFSCME has agreed to:

- Establish A Waiting Period Before Seniority Can Be Exercised --

  It is not uncommon to find that an employee must have 2-3 years seniority before being allowed to participate in a "pick-your-post" system.

- Establish A Limitation On The Frequency Of Exercising Seniority Rights --

  It is not uncommon to find that employees are limited to exercising their right to select a post to once every six months.

- Establish A Limitation On The So-Called "Ripple Effect" --

  It is not uncommon to find that the parties have agreed that the "ripple effect" would stop at some predetermined point, such as after two or, perhaps, three reassignments.

The point is that these issues can be resolved -- through direct negotiations by the parties -- if they are raised in a "problem-solving" context, the Union stressed. Here, unfortunately, the discussion has never reached that stage. The dialogue has been stopped by the State's unyielding insistence that it must have total control to reassign employees on a daily basis, the Union concludes.

3. Other Considerations.

The Union presented several additional arguments in support of its proposal:

a. The Employer's witnesses did not support their own proposal.

b. Prior collective bargaining agreements.

The evidence shows that the system of "pick-your-post" has been present at several state institutions for several years. The practice was established through collective bargaining agreements negotiated by the Union (or its predecessors) on an institution-by-institution basis. The testimony of the Union witnesses confirmed that the "bid system" had worked well and contributed to improved employee morale at those institutions.

The evidence also showed that the employees at those institutions would view the loss of the "bid system" as being a "take-away" by the Employer, according to the Union.

c. Lawful Authority Of The Employer.

There is no question that the Union's proposal is lawful, the Union confidently asserts.

d. Such Other Factors As May Be Traditionally Considered In Interest Arbitration.

The final factor is a "catch-all" factor which directs the Arbitrator to consider the dispute in the context of traditional labor-management relations. (See: "Standards in Public Sector Disputes" in Elkouri and Elkouri, How Arbitration Works, (4th Ed., 1985) at pp. 848-851).

The Union submits that this factor requires the Arbitrator to weigh the positions of the parties within the evolving context of labor-management relations. In so doing, the Arbitrator must look at the conduct of the respective parties during negotiations, the efforts, if any, which the parties have made to reach agreement, and, in effect, look at the equities of the situation.

On this score, there can be no doubt that the Union should prevail, it forcefully contends. The Union's position is more reasonable, the Union has shown a willingness to compromise, and it has offered suggestions to accommodate management concerns, it repeats. Unfortunately, there has been no reciprocal movement by the Employer. The Employer has shown no willingness to moderate its position and continues to insist that it must have absolute control -- even when the evidence shows that the "pick-your-post" system has worked well at several State institutions.

Based on all the above considerations, the Union urges me to adopt the contract language put forward by it and to direct that it be incorporated into the parties' collective bargaining agreement.

B. The State

The State argues that, on the basis of the "criteria traditionally considered in interest arbitration cases", the State's proposal is equitable and should be accepted by the Arbitrator.

(1) The severe contractual restriction on management's right to assign employees and thereby serve the public interest urged by the Union, should be rejected by the Arbitrator in favor of the State's proposal because this is the parties' first contract.

Without yet considering the serious harm which the adoption of the Union's "work area" proposal would cause the State and those entrusted to its care, the Union's radical proposal should

be rejected for the parties' first collective bargaining agreement, the Employer argued. The chief negotiators for the Union and the State, Russell Murray and Gene Brundige, both testified that the instant Agreement was the parties' first contract. They also confirmed each other's testimony that the negotiations for this Agreement were particularly protracted and difficult. Despite that fact, the parties did reach agreement with regard to all but two of the sections contained within the 43 different articles of the Agreement, with many of these provisions creating new employee rights and new restrictions on the State's ability to manage its employees.

According to the Employer, the State's Exhibit 2 contains a summary outline of these many changes. In terms of employee benefits, the State granted employees portal-to-portal pay, call-back pay, stand-by pay, each employee's birthday off with pay, three extra days of paid sick leave, three days of bereavement leave, paid leave to attend professional meetings, advance payment for travel, interest on unpaid travel vouchers, uniform cleaning allowances, roll-call pay, a $450 up-front bonus, increases of 7, 5 and 7% during the next three years, respectively, and a $300 bonus at the end of the contract. The Employer further points out that, in addition to these benefits which have a direct effect on the State's operational costs, many benefits were granted which will undoubtedly have a more subtle effect upon costs: restrictions on hiring temporary, seasonal and intermittent employees; abolishment of split shifts and rotating shifts in the Department of Corrections and wherever

else feasible; guaranteed promotion rights based upon seniority; expansion of bumping rights in layoff situations; and new appeal rights for job audits.

Given the foregoing benefits which were agreed to by the State at a significant cost, the justification for any further restrictions on management's rights or further increase in the State's operational costs must be overwhelming before the Arbitrator should order its inclusion in the parties' contract. However, no such justification was offered by the Union during the hearing and none can be forthcoming. Although a few very senior employees of the various agencies understandably testified that they "wanted" to have the option to select job assignments based upon seniority, none offered any legitimate rationale for this radical change at this time, the State opines.

(2) Comparability.

Moreover, a review of the contracts AFSCME has negotiated for comparable units of employees in other states demonstrates that it has had virtually no success in negotiating a similar proposal in any other state, including those states with whom it has had contracts for many years, insists the Employer. The very thought of adopting the Union's proposal as it is, without the Union having offered anything in return, is also repugnant to the give-and-take philosophy of collective bargaining. Absent the requisite compelling justification for its adoption, the Union's "work area" proposal must be rejected in this, the parties' first master agreement, the Employer concludes.

Management also stresses that the parties presented a great volume of documentary evidence and testimony concerning other jurisdictions, including a great number of contracts between this Union as well as other unions and other state employers. This evidence is particularly relevant under standard (b) of ORC Section 4117.14(G)(7).

Mr. Anton Naess, who testified on behalf of the State, conducted extensive research concerning contracts between many other states and their employees' unions. Naess assembled a research bank of 150 to 200 labor contracts from other states and conducted as extensive analysis of these contracts on a clause-by-clause basis. The results of Naess' research were compiled and submitted as State Exhibit 1, which consists of provisions relating to the assignment of work taken from 147 different state collective bargaining agreements. It is important to note that Naess' research was far more thorough than that of Kerry Korpi, the Union's witness who also testified concerning the contract provisions in other jurisdictions.

In a most simplistic manner, to the State, the Union's research witness, Ms. Korpi, attempted to categorize the "work area" or job assignment provisions found in only 17 contracts throughout the country, all of which were contracts negotiated by AFSCME. In summary fashion, through Union Exhibits 11 and 12, Korpi attempted to bolster the Union's arguments in favor of its "work area" proposal by attempting to establish that similar provisions were fond in other states' collective bargaining agreements. However, it became clear that Naess' analysis of

these same contract provisions was far more detailed and authoritative than that of Ms. Korpi, submits the Employer. Further, in several respects, Korpi's testimony only served to support the State's position that its "work area" proposal be adopted. In fact, she established that no state had the pick-a-post system proposed by the Union in this case. See State Exhibit 1 and Union Exhibit 12. The evidence also shows that a majority of the States reviewed by Korpi provided in their labor contracts for some unit of employees' work area selection rights to conform more closely with Ohio's current practice than the strict seniority provision proposed by the Union in this dispute.

Further, although AFSCME represents State employees in only a minority of jurisdictions, the Union admits that its "research" did not extend to any collective bargaining agreements to which AFSCME was not a party. Conversely, the State conducted extensive research concerning public sector collective bargaining agreements in nearly all of the states and concerning labor organizations other than AFSCME. Following this research covering approximately 150 to 200 contracts, focusing upon contractual language and limitations upon management's right to fill vacancies, Naess testified that the most prevalent method used to fill a vacancy or to assign work is a clause providing for the filling of vacancies based upon an employee's qualifications, with seniority being used as only a factor. In light of Naess' extensive research, and in light of the Union's "work area" proposal herein, it is easy to understand why he has

characterized the Union's proposal as "very rare," the Employer asserts.

(3) Management Rights -- Interest Of The Public.

To the State, the Union's "work area" proposal also ignores the State's legitimate interest in retaining traditional management discretion to assign employees. As two well-known authors put it:

> Management must have some discretion as to the method of carrying on its operations. It 'should not be put in a straight jacket.' Shell Oil Co., 44 LA 1219, 1223 (Turkus, 1965); Thompson Mahogany Co., 5 LA 397, 399 (Brandschain, 1946). A primary function of management is to operate on the most efficient basis. *** In the operation of any plant, management has a fixed obligation to see that unnecessary costs are dispensed with and that production programs are changed to meet changing production demands. This is an inherent right ***

Elkouri and Elkouri, How Arbitration Works, 4th Ed., p. 481 (1985). Nowhere in the Union's contract proposal is there any acknowledgement of management's right, however, to fulfill its obligations, maintain efficiency and contain costs, concludes the Employer.

(4) The Radical Or Unique Nature Of The Proposal.

While there is no per se burden of proof on either party, if one party is making an unusual demand or one that substantially alters past practice, it is incumbent on the interest neutral to place the burden of persuasion upon the proponent of such a

proposal, the Employer argues. For example, the Chairman of the Arbitration Board in Twin City Rapid Transit Co., 7 LA 845, 848 (McCoy, 1947), stated:

> We believe that an unusual demand, that is, one that has not found substantial acceptance in other properties, casts upon the [the party proposing the demand] the burden of showing that, because of its minor character or its inherent reasonableness, the negotiators should, as reasonable men, have voluntarily agreed to it. We do not deny a demand merely because it has not found substantial acceptance, but it would take clear evidence to persuade us that the negotiators were unreasonable in rejecting it.

Similarly, in the often-quoted Tampa Transit Lanes decision, 3 LA 191, 196 (Hepburn, 1946), the Chairman of the Arbitration Panel suggested:

> An arbitrator cannot often justify an award involving the imposition of entirely novel relationships or responsibilities. They must come as a result of collective bargaining or through legislation.

See also Elkouri and Elkouri, How Arbitration Works, 4th Ed., p. 817 (1985):

> [A]rbitrators will require a party seeking a novel change to justify it by strong evidence establishing its reasonableness and soundness. Moreover, the absence of a prevailing practice may be taken to show that a demand has not yet been adequately justified by labor within the industry or area. See Fifth Ave. Coach Co., 4 LA 548, 579 (Wasservogel, 1946). Arbitrators generally agree that demands for unusual types of contract provisions preferably should be negotiated.

Given the foregoing, and given the evidence presented at hearing, it is clear that the Arbitrator should not adopt the Union's pick-a-post proposal since the Union has failed to

establish that there is a "prevailing practice" of assigning jobs by seniority only, and it is an unreasonable radical approach, the Employer emphasizes.

(5) The Employer's Witnesses' Testimony Proved That The Proposal Of The Union Was Unreasonable And Would Adversely Affect The Involved Departments Of Government And Ultimately The Public Welfare.

a. Corrections.

Management asserts that the Union has proposed that the employees whom it represents within the Department of Rehabilitation and Correction be permitted to select their post assignments based upon seniority alone. However, the Union failed to offer any justification for the adoption of such a provision other than isolated allegations that management has abused its discretion based on favoritism and/or nepotism. It is clear that the contract already provides a means of redress for both these situations. There is a specific unit-nepotism provision in the contract. (Article 17.09) In addition, the contract allows employees to grieve any situation where an employer has a "difference, complaint or dispute between the Employer and the Union or any employee." (Article 25.01, Emphasis Supplied) These provisions clearly provide remedies for the isolated complaints contained in the Union's witnesses' testimony.

By contrast, the State has offered substantial evidence demonstrating that the practice of allowing employees to select their assignments by seniority fails to address the needs of the

State to fulfill its mission to safely and efficiently contain inmates, the needs of the State to assign employees where they are most needed and most capable of performing, and the needs of employees to be well-trained to perform their jobs, the State alleges.

Where the Union's pick-a-post system has been used to some degree in correctional institutions, evidence clearly demonstrates that this practice is not advantageous to inmates, management or the employees, the Employer claims. In fact, the Union's own "expert" witness in the field of corrections, Richard Vernon (who worked in adult corrections in the State of Washington for 10 years up until 1982), testified that a straight pick-a-post system was unworkable in Washington; that Washington limited an employee's number of bids; and that management retained the authority to deny an employee a bid. It is also clear from Vernon's testimony that this limited pick-a-post system was not imposed during the State and Union's first contract and that the system still disrupted the operation of the prisons, when implemented, Management points out.

Director Richard P. Seiter testified concerning the changes which corrections systems have been undergoing in recent years. Director Seiter testified about the concept of "Unit Management". The Unit Management approach in the federal corrections system is combined with a shift and assignment rotation of 90 days, Seiter testified. Social workers, educators, psychologists and corrections officers, under the "Unit Management" system, are all

to be located within the inmate housing units to increase security and to more immediately meet the needs of inmates.

This system has offered benefits to employees, management and the inmates. The Unit Management system matches the particular skills of employees with specific job assignments to maximize the effectiveness of employees and the level of care provided, according to Seiter. The rotation system for corrections officers also makes it possible to train them to handle emergencies when they arise and qualifies officers for promotions because of their enhanced training and job knowledge. The rotation system also helps avoid the development of complacency by corrections officers who remain in one position for extended periods and protects against employee stress and "burn out."

Additionally, by retaining the right to assign employees, management can avoid the potential job bias problems that develops when corrections officers group together according to race or sex within a prison. Employees also benefit from the rotation system since the same employees will not always be called upon to quell disturbances and other problems. In the past, having the same employees respond to disturbances has caused those employees to be labeled "goon squads" and subjected them to many inmate claims and law suits alleging abusive force.

The Union's pick-a-post proposal, which amounts to a one-size-fits-all policy for the State's many different institutions, fails to address the specific needs of each institution and the many variables influencing those needs. For example, Director

Seiter notes, some institutions have a very high employee turnover rate -- Orient Correctional Institution with 20 to 30% and Marysville with 18 to 20% -- and others have very low employee turnover, such as Lebanon with 5 to 7% annually. Thus, the need to reassign employees more frequently to enhance their job satisfaction and "promotability" is more critical in these institutions with higher turnover. The Union's proposal fails to address this particular need, Management concludes.

Also, some Ohio prisons, by their physical design, have more difficult job assignments than other prisons. These physical plant differences require that qualified individuals be selected for the most difficult positions on an individual basis. For example, the London correctional institution with 2000 inmates has dormitories with as many as 260 inmates and only one correctional officer. Clearly, the correctional officer selected for this assignment must possess special skills and abilities which can be determined only by management and the officer, the Employer maintains. The staffing of these critical positions cannot be left to the Union's system of "seniority roulette". In the prison setting, corrections officers are at risk. An improper assignment can and sometimes does result in physical harm to the corrections officer and/or inmates.

Last, Management's hands have already been tied to a substantial degree by provisions within the Agreement whereby employees can select their shift and days off based upon seniority. Experience has shown that the least senior and, therefore, least experienced corrections officers tend to end up

on the least desired shift. In addition, the State has already agreed to pay corrections officers (and no other employees) 30 minutes per day for roll call, at which time they are to receive their assignments. (Article 36.05)

Given these constraints under which Management must already operate, some flexibility must be maintained to assign employees within a given shift according to their skills and abilities and according to the needs of the institution. The Union's pick-a-post proposal completely ignores this concern. Accordingly, it is clear that the State's "work area" proposal is superior to the Union's as it relates to the Department of Rehabilitation and Corrections.

(b) The State's work area proposal should be adopted as it relates to the Ohio Veterans Home.

The Union has completely failed in its attempt to persuade the Arbitrator that its work area proposal is advantageous to both the employees and management of the Ohio Veterans Home, according to the State. Furthermore, the State offered convincing support for the proposition that no restriction should be placed on management's right to assign employees in the Ohio Veterans Home.

(c) The State's work area proposal should be accepted insofar as it relates to the Department of Youth Services.

Given the needs of the juvenile offenders detained in the State of Ohio's Youth Corrections facilities and given the varying skills, abilities and needs of the Department of Youth

Services' employees, it is clear that the State's "work area" proposal is more rational than that proffered by the Union, opines the Employer. Mr. Kendal Ball, Superintendent of the Scioto/Riverview Complex within the Ohio Department of Youth Services, testified concerning his 18-1/2 years of experience within the Department. Ball has extensive experience within the Department, having served as a school teacher at the Mohican Youth Center for three years, Director of Education or School Principal for eight years at the Mohican Facility, Deputy Superintendent at the Indian River facility from 1979 to 1983, and Superintendent of the Scioto/Riverview Complex since that time.

Youth Leaders in all facilities do serve a dual function within the Department, according to the testimony of Ball. First, they are responsible for the security and custody of residents, similar to corrections officers in a prison. Second, Youth Leaders serve in the role of counselor, as a member of the treatment team which consists of social workers, teachers, other staff members, recreational directors and Youth Leaders. Third, students are selectively assigned to different cottages based on their needs, problems and the abilities of the Youth Leaders assigned to that cottage. Thus, the Youth Leaders play a vital role in the development of a treatment program for students and in the implementation of that program. In order to accommodate the needs of specific students, staff members are assigned and reassigned accordingly, Ball concluded.

Although Ball conceded that the Department of Youth Services has provided employees the opportunity to select shift assignments based upon their seniority, Management has always maintained the right to assign employees within a shift. On occasion, Ball has denied employees' requests to be reassigned or to work in a particular dormitory based upon the facility's needs and/or problems with compatibility between the Youth Leader and students. When asked about problems in staffing his current facilities' three shifts, Ball testified that, since employees are exercising seniority rights to bid upon shifts, the least senior and least experienced employees are ending up on the shifts requiring the greatest amount of expertise and interaction with students. In Superintendent Ball's opinion, the creation of rights for employees to pick assignments on a given shift based upon their seniority will only exacerbate the current staffing problems.

Since the experience within the Department of Youth Services has been that the more senior, experienced Youth Leaders bid off the three to eleven shift -- the shift on which the most supervision is needed and the most programs are conducted -- it is clear to Management that the Union's work area proposal would only further complicate the Department's delivery of programs and services to the youth offenders charged to its care. The only way to compensate for the problems already arising from shift assignments based upon seniority is to permit Management to evaluate employees' strengths and weaknesses and to try to balance them throughout a shift. Accordingly, the State's "work area"

proposal far better addresses these concerns since Management retains the right to make assignments. Therefore, the State's contract proposal should be adopted as it relates to the Department of Youth Services, concludes the State.

(d) The State's work area proposal should also be adopted as it relates to the Ohio Veterans Children's Home.

Oddly, the Union decided not to present any evidence whatsoever concerning the reasons for adopting its version of the "work area" proposal for the Ohio Veterans Children's Home, Management points out. Accordingly, it should be presumed that neither the operation of this facility nor the employees working at the Children's Home will be served by the adoption of the Union's "work area" proposal.

Even if the Union's arguments are considered, however, the testimony of Employer witnesses as to management rights and the need to assign on an individualized basis should persuade the neutral interest arbitrator that employees should be selected for their assignments based upon the needs of those individuals whose care is entrusted to the particular agency, the operational needs of the particular facility and the individual skills and abilities of each employee, and not on a seniority-determined selection process.

(e) The Union's work area proposal is completely unacceptable for the Department of Mental Retardation and Developmental Disabilities.

The State's "work area" proposal permits employees within the Department of Mental Retardation to select by seniority their preferred "programmatic unit" once each year. Deputy Director Patrick M. Rafter testified concerning the many differences between the 14 developmental centers, including their arrangement by programmatic unit, physical layout, number of residents and staff members, functioning level of residents and types of program activities offered. Each facility differs from the others in these respects, but is similar in that residents are cared for by a "treatment team", consisting of direct care workers and professional staff who work together to develop and implement each resident's individual "treatment program," he testified.

The Union's "work area" proposal as it applies to the Department of Mental Retardation is based upon a false premise, Rafter claimed. The pick-a-post system presumes that an employee is the best judge of where he or she should be assigned to work and where that employee is most effective to Management, though, the Union's own expert, Dr. Crosby, agrees that staffing decisions should be made by the entire professional care team and not by the hospital aide along.

Finally, the Union's proposal fails to consider the fact that the needs of the Department are constantly changing. Approximately 10 to 12 years ago, the Department of Mental Retardation served 10,000 residents. Today, that same department

serves only 1,900 residents. The "shrinking" of the Department, therefore, has had a dramatic effect on facilities in terms of changing programmatic units and the type of residents served. Thus, with the ever changing nature of the Department's units, an employee who has bid into a specific ward under the pick-a-post system might later find himself or herself working with completely different residents than he or she had originally hoped. The Union's proposal is an unacceptably static approach to resolving the inherently dynamic problems of patient care, Rafter asserts.

Gallipolis Superintendent Pamela Matura's testimony reinforced that of Employer witness Rafter. Ms. Matura has worked for the Department of Mental Retardation for 13 years and has been employed in every aspect of the Department's service, including group homes, sheltered workshops, school programs and developmental centers. Matura explained the Gallipolis Center's "interdisciplinary team concept." The interdisciplinary team is comprised of psychologists, physicians, registered nurses, social workers, pathologists, teachers, vocational instructors and direct care workers, who participate in assessing the resident's abilities and needs and thereafter in developing treatment programs geared towards meeting those needs. Assessments of patient needs and progress are made every 90 days and factor into the development of a resident's Individual Habilitation Plan (I.H.P.). The Center's ability to meet the goals of the residents' I.H.P.'s establish the basis for government funding. State and Federal agencies conduct periodic audits of each

Center's progress in meeting patient needs which, to a great degree, depend upon the quality of direct patient care.

The Department's Hospital Aides play a major role in the individual treatment of patients, according to Matura. This is particularly true since Hospital Aides accompany residents in their various activities, either on or off the Center's grounds. Prior to the parties' first contract, direct care workers were permitted to select job assignments at the Gallipolis Center by shift and living area and bids were honored on the basis of seniority. This practice, which was developed in a local agreement with the Union and which existed for several years, had a limitation of two bids per employee per year. (As noted previously, the Union's current final offer contains no such limitation.)

Matura amplified Rafter's testimony concerning the problems created by successive vacancies being created to fill a single position, resulting in a perpetual staff shortage. Matura gave several examples where a hospital aide had resigned and the vacancy was posted under the Gallipolis Center's former job bidding practice. In one such example, a hospital aide resigned and the vacancy was posted on February 5, 1986. Another employee submitted a bid on February 16, 1986. In turn, his position was posted on March 20, 1986. A third employee submitted a bid for this vacancy and was awarded the position on April 13, 1986. The third employee's position was then posted April 30, 1986. A fourth employee bidding on the third employee's vacancy was awarded the position on May 25, 1986. This process continued

until a position was filled by a promotion on July 6, 1986 -- more than five months after the initial vacancy was created.

It is important to note that this five-month period for filling one hospital aide vacancy occurred under the Center's former practice, which provided a two-bids-per-year cap on employee bidding. Obviously, the removal of the cap, as the Union's proposal calls for, would only serve to exacerbate the "chase the H.A." problem further, the Employer reminds the Arbitrator.

Thus, it is clear from Rafter and Matura's testimony concerning the Department of Mental Retardation's experience with the pick-a-post system -- a system less restrictive on management's rights than the one proposed by the Union -- that the Union's proposal utterly fails to consider the Department's mission, its patients' needs and especially the desires of employees. Clearly, the evidence demonstrates that the Union's proposal is completely unmanageable and extremely detrimental to the needs of those entrusted to the State's care. Accordingly, the State's "work area" proposal, which provides employees with the opportunity to select their prefered programmatic unit once each year, is far superior to the Union's proposal, the State concludes.

(f) <u>The State's work area proposal is clearly the better provision insofar as it relates to the Department of Mental Health</u>.

The Department of Mental Health is comprised of 17 separate institutions and the Moritz Forensic Center. These 17

institutions represent facilities with vastly different physical plants, numbers of patients and staff, and types of care delivered. (See State Exhibit 10) It is apparent from the witnesses who testified that Ohio's Mental Health Centers show a great diversity within the State as to the size of each of the Department's facilities, numbers of residents and staff, and types of programs offered.

Mr. Jack Hayes, Personnel Director at the Cambridge Mental Health Center has been employed by the Department of Mental Health since 1974. In 1976, he became the Unit Supervisor of a long-term psychiatric unit at the Cambridge Center. In January, 1979, Hayes began working in the Personnel Department at the Cambridge Center and has been involved in all phases of the personnel process including hiring, discipline, retention, training and staff development. Hayes served on the negotiating team for the Department of Mental Health-AFSCME, 1981 collective bargaining agreement. He also participated in the negotiations for the 1986 master contract with AFSCME.

In 1976, the Department of Mental Health developed an interdisciplinary treatment program in order to provide unique services to its differing patient groupings. This included the effort to cluster patients into homogeneous groupings with common program orientation and direction. Within each of these programs there were wards with some gradation of programmatic delivery. However, during the 1981 negotiations with AFSCME, the parties agreed that the programmatic units would be considered the "work area." Within each programmatic unit, employees were also

assigned to separate work areas or work stations, subject to changes necessary to meet operational needs. Job vacancies were filled pursuant to posting by programmatic unit. Under this practice, seniority was a consideration, together with the operational needs of the facility and an individual's expressed interest in a particular work assignment. This system remained in effect until the effective date of the parties' master agreement, July 1, 1986.

Under the Center's practice, one or two direct care workers each month were reassigned based upon programmatic needs. Prior to 1981, the practice at the Cambridge Center included posting job vacancies by individual wards. However, the Center and the Union negotiated this practice out, replacing it with postings by programmatic unit. Thus, Mr. Hayes has had a number of years experience operating under the Union's proposed pick-a-post system.

The problems Mr. Hayes experienced with the pick-a-post system include the continual posting and re-posting of vacancies resulting from consecutive job bids -- the "chase the H.A." phenomenon observed in the Department of Mental Retardation. The Cambridge Center adopted a cap on successive postings of two postings per vacancy. Additionally, employees were limited to one bid application every six months.

Another problem with the Union's pick-a-post proposal reflects a complaint received from many employees that the smaller the work area, the less important seniority became. For example, an employee with 7 years of seniority may be the least

senior employee in a ward, whereas that same employee might be one of the 10 most senior employees within a programmatic unit. However, as the least senior employee in the ward, under the ward definition of "work area", the employee would be the first individual reassigned to another ward to cover for shortages and would receive the last preference of any employee in the ward to vacations and holidays. Thus, the parties agreed to define "work area" as the programmatic unit.

Under the Cambridge Center's practice -- which is virtually identical to the State's final contract proposal, Management has had the ability to move employees from one ward to another within a programmatic unit for operational reasons, the Employer argues. Examples include movements because of staff personality conflicts, the development of romantic relationships between staff members and patient abuse or neglect. The more common situation requiring the reassignment of staff members within a programmatic unit concerns the development of problems between residents and staff. In one case a resident believed that one of the staff members was Satan. Consequently, the employee, who was a hospital aide, was reassigned to another ward. The Cambridge Center now houses a resident with an intense dislike for black people. In order not to subject black employees to this resident's irrational and violent behavior, the facility has avoided the assignment of black employees to that area.

Occasionally, staff members have been reassigned for the safety of residents. Last year, an investigation uncovered problems with staff in a particular living area who were

apparently misappropriating client possessions. Residents were also not receiving appropriate care. The problem was corrected by reassigning the direct care staff and bringing new employees into the area. Additionally, some direct care employees have been reassigned because they been identified too closely with a resident. In one example, an employee has undermined the interdisciplinary team's therapeutic efforts where the employee disagreed with the approach taken by the Team's psychiatrist. Instead of disciplining the employee, the employee was reassigned to give him a fresh start, the State emphasizes.

Dan Miller, Superintendent at the Central Ohio Psychiatric Hospital also testified on behalf of the Department of Mental Health. Miller, who joined the Department in 1962 as a social worker, worked his way up through the system to become a Superintendent at COPH, which has several programmatic units. COPH has an admission programmatic unit, a deaf unit, an extended care-program, and a forensic unit. According to Miller, COPH has primarily assigned employees by programmatic unit.

The hospital's practice of assignment of employees within a programmatic unit, includes consideration of the employee's desires, patient needs and the hospital's programmatic concerns. Before an employee is assigned to work full time in a particular unit, he or she must undergo six weeks of training, during which time staff members observe the employee's interactions and abilities. These staff members then make recommendations concerning the assignment of the employee, taking into consideration the employee's expressed interests.

On occasion, employees have been moved within and outside of a programmatic unit. This has resulted from situations where a resident has incorporated an employee in his or her delusional system. Another example where an employee has been moved includes the situation where a patient has accused an employee of abuse. Employees have also been reassigned after developing a "non-therapeutic" relationship with a resident.

As State Exhibit 11, Miller offered a list of 33 employees who had been reassigned temporarily or indefinitely under circumstances similar to those described above during a recent one-year period. Not one of these reassignments, however, was the subject of an employee grievance. This serves to illustrate the fact that employees welcome reassignments within or between programmatic units under certain circumstances. However, the Union's "work area" proposal does not permit these welcome reassignments, insists the State.

In support of its proposal, the Union called upon Dr. Kenneth Tardiff as its expert in the field of mental health. Interestingly, Dr. Tardiff's testimony fully supports the State's position that direct care staff employees should not be responsible for determining their work assignments by themselves based upon seniority alone. Tardiff also agreed with the State's position that the final decision, insofar as an employee's job assignment goes, should rest with Management. In noting that Management should have the "major say so" in assigning employees, Tardiff characterized the system under which employees would have the sole right to determine their job assignments as "complete

chaos." Thus, the Union's own expert witness implicitly condemned the Union's "work area" proposal and endorsed the proposal of the State.

Thus, it is clear from the foregoing evidence that, for the Department of Mental Health, the Employer's work area proposal best addresses the sometimes conflicting needs of the Department's patients, employees and programmatic concerns. The Union's proposal supported only by the testimony of a few senior employees who simply "want" to be able to select ward or cottage assignments based upon seniority, clearly fails to address these important competing needs. In contrast, the State's "work area" proposal offers employees the opportunity to select the prefered programmatic unit in which they will work each year. Accordingly, the State's proposal is much more preferable than that of the Union, Management concludes.

V. DISCUSSION AND FINDINGS

A. Preliminary Matters

As noted above in Section 1, Background, several preliminary points were raised by the parties and merit attention. First, for my purposes, it is immaterial whether the Ohio Statute involved, ORC Section 4117.14, calls for "final offer" interest arbitration. My sole concern is whether the mutually agreed-upon dispute resolution process (MAD) requires a choice of last and best offers or whether conventional interest arbitration is my charter for this proceeding. As I discussed extensively above, I agree with the Union that the final offer requirement incorporated in the applicable Ohio Statute is the culminating step of a comprehensive scheme for dispute resolution. None of the procedural requirements preliminary to that final offer have been met in the present case. On the other hand, the Statute specifically provides for voluntary agreements to structure an alternative interest arbitration option. See, ORC 4117.14(E). The Statute which permits the grant of the possibility of an alternative process does not either expressly or impliedly condition such procedures upon any requirement that a final offer choice must be made by the interest neutral. The parties are given the option to negotiate their own procedures to resolve the impasse. It was stipulated on the record that the parties did

not agree or directly discuss whether conventional interest arbitration or a final "best offer" option was to be used in this case by me. However, except for the failure to file with SERB, all other provisions for a proper MAD are in place. Accordingly, since the final offer requirement was not specifically made part of my charter, I find that the standard to be applied is that of conventional interest arbitration. Therefore, I have the authority to frame the provisions of the contract concerning work area based on criteria which are normally and traditionally taken into consideration in interest arbitration. Second, I reiterate that I am guided and controlled by the standards for interest arbitration codified in Section 4117.14 of the Act.

B. The Merits

In every impasse proceeding, opposing parties draw varying conclusions from the evidence and data presented. Frequently, they rely on different data or reach different results from the same data. As reviewed in detail above, the parties to this dispute disagree about the weight I should give to the statutory factors to be used in framing my judgment. As I understand the applicable statute, these factors have not been listed by the Legislature in order of importance, nor does the act state what weight is to be accorded these factors. "Their importance and weight are left for argument and may be critical to the award..." Laner & Manning, Interest Arbitration: A New Terminal Impasse Resolution Procedure for Illinois Public Sector Employees", 60

Chicago Kent L.Rev. 839, 856 (1984). See also, Houston Chronical Publishing Co., 56 LA 487, 491 (Platt, 1971):

> "While there are familiar objective wage criteria to guide an arbitrator in a task of this kind, there is an area of discretion left to him in deciding which criteria are most appropriate or controlling."

In weighing the factors used to determine the final result in this area, I shall apply normal and traditional standards, but also give greater weight to comparisons among similar employees (Factor B) and to Factor C, involving the interest and welfare of the public and the ability to administer each department under the respective proposals presented by the parties, giving consideration to the normal standard of public service. Because I perceive substantial differences between the impact of both proposals on the functioning of the Department of Rehabilitation and Corrections and the remaining affected state agencies, I will discuss Corrections first and then proceed to the remaining agencies.

(1) Department of Rehabilitation and Corrections.

a. Cost and Ability to Pay.

Financial considerations are usually a major element in interest disputes. In this case, the Employer argues that the Union proposal would impinge directly or indirectly on the financial ability of the Employer and the overall cost of this labor contract, the first between the parties. The Union argues that the issue involved in this case has no impact on the budget or on financial ability to pay in any way whatsoever. Essentially,

this argument justifies the use of seniority and discounts and criticizes the claim by Management that any extra job assignments or indirect costs would be required merely by a device which permits selection of work area once the actual posts and numbers of employees to man these posts have been determined by the Employer.

I agree with the Union that it is easy to overestimate the importance of economics in an interest arbitration where issues of Management prerogative control and contend with the individual employee's desire to select his or her own post. I also assume, even if there is an absence of hard evidence, that some economic cost may be involved. Nevertheless, it is obvious from the proofs adduced on this record that this dispute does not primarily involve ability to pay or the usual economic and financial issues. Finances therefore loom much smaller in this case than is customarily true and also play a small role in my decision.

b. Comparability.

As in any case involving a state-wide unit, comparability plays a special role. State-wide units are usually large and costly. Their settlements are in the public eye and the public (especially the 1987 Ohio public) is most concerned with the quality of its public services. Management and the employees working in the agencies are equally concerned with how the system will work. Finally, because of the absence of the key cost or financial factor, accurate comparabilities, the other traditional

yardstick of looking at what others are getting, is of more significance.

Indeed, the parties have acknowledged that comparability is a major consideration in this case. The amount of hearing time devoted to the issue was extensive. I find that comparability is certainly one of the keys to this case.

I recognize that:

> "The heavy reliance placed upon the comparability factor has been criticized by both unions and employers. Labor organizations complain that the use of this standard has a conservative effect by encouraging the rejection of new and innovative language. *** Employer critics of the comparability criteria suggest that it has lead to a 'domino effect' of victory for unions." Laner & Manning, supra, at 858.

Nevertheless, comparability "clearly is the most important factor to arbitrators." Ibid. at 856. I agree.

The State's witnesses on comparability were Anton Naess, who testified generally on the comparability issue, and the Department of Corrections Director, Richard P. Seiter, who testified specifically as to comparability and the feasibility of administering the contract proposal for his department. I find Mr. Seiter to be a superb witness. He took a difficult subject area and testified in a candid, clear and concise manner. His conclusions were balanced and he had the demeanor of an impartial expert, as well as being an articulate advocate for the State.

It is the substance of Seiter's testimony that a Pick a Post system is not the normal method of work area assignment in Corrections in the United States. In his testimony, Seiter emphasized the system he apparently knows best, i.e., the Federal Corrections establishment. Here, he noted that a system of

rotation is required in Federal prisons and that the unit manager concept reinforces that particular procedure. Moreover, Seiter testified that most state systems follow a rotation procedure and not a form of Pick a Post.

Employer witness Naess was substantially less persuasive in his general assertions that AFSCME has had virtually no success in negotiating a pure Pick a Post proposal in any other state, including those states with whom it has had contracts for many years. Naess testified that he had reviewed from 150 to 200 labor contracts from other states and had conducted an extensive analysis of these contracts on a clause-by-clause basis. The results of his research were compiled and submitted as State Exhibit 1, which consists of provisions relating to the assignment of work taken from 147 different state corrective bargaining agreements. In several, such as Illinois, Naess' analysis differs from that of Union witness Korpi. For example, the analysis of the two differs as to the provisions of the Illinois AFSCME contract relating to Corrections. Naess claimed that in Illinois there are no permanent work assignment areas other than that of the entire institution. As State Exhibit 1 illustrates, Naess claimed, the State's offer will maintain the Department of Corrections' comparability with similar employees working in Corrections at both State and Federal levels.

Conversely, the testimony of Union witness Korpi and the data upon which her analysis was based were much less persuasive with reference to the prevailing practice on a national comparability approach. Additionally, I am somewhat surprised

that Korpi used only AFSCME contracts, and did not use data from other groups represented by different unions, or unrepresented employees. In this regard, see, generally, Cummins Sales, 54 LA 1069, 1070-1071 (Seinsheimer, 1970); University of Chicago Hosps., 63 LA 824, 826 (Mueller, 1974); and Town of Dedham, 67 LA 384, 386 (Holden, 1975). Comparability, at least with respect to comparisons of average working conditions, may not accurately be translated as "the best."

The Union certainly argues that a Pick a Post system is in existence in the State of Washington. Its expert, former Superintendent Vernon, extensively testified on that point. However, for comparability data to be persuasive, it must involve comparisons of employees in the private and public sector performing similar services in the same geographic area or in jurisdictions of similar size. The following list suggests that type of comparative data which arbitrators have considered relevant in arbitration: number of employees; number of prisons in the system; standards of physical security and the type of physical plant; the nature of the prison population (ratio of urban to rural, racial mix, etc.); and the overall size of the respective agencies or departments to be compared. Under these factors, the State of Ohio and the State of Washington do not make a particularly persuasive point of comparison, in my view.

As the parties themselves note, closely akin to comparability is the prior practice of the parties. In fact, past labor contracts is a specific statutory factor or standard. The parties stipulated that no such comprehensive, state-wide

agreement existed prior to the current labor agreement. The Union argues that the prior practice and separate memoranda of understanding in Ohio should be used as the starting point tc suggest what is the "going rate" for a definition of work area. The Union also strongly emphasizes that one correctional facility, had a modified Pick a Post system in place prior to the negotiations for this contract. Therefore, any modification would be a "give back", at least for those employees working at Lebanon.

As the parties note, however, neutrals are reluctant to change prior negotiated working conditions unless there have been demonstrated problems about which the complaining party has not been able to secure relief at the bargaining table. Although Management presents some argument that Pick a Post has not worked perfectly at Lebanon, the bulk of the evidence produced indicates the opposite.

The problem, however, is that Lebanon is only one facility in the state-wide system. It is apparent that all other prison facilities have used some form of rotation in the recent past. Further, based on Seiter's testimony, a uniform rotational system was being implemented throughout the State of Ohio at the time of the hearing in this case. In light of the evidence that only one prison facility has a Pick a Post system, I find that the Union's claim of a prior practice going against Management's proposal, as applied to Corrections, is simply unpersuasive.

c. Ability to Administer and Potential Effect on the Providing of Public Service

Generally, comparability data is used as the starting point; it suggests the "going rate" of the particular benefit, in this case work area assignment. Thereafter, arbitrators consider other factors to resolve the issue. In conventional interest arbitrations, the arbitrator is not required to choose between competing "final offers." An arbitrator may rely on his informed judgment to resolve the dispute, in the light of the evidence and the arguments of the parties. Much in this case militates against using the Union proposal for the Department of Rehabilitation and Corrections, when the elements of Factor C of the Standards for Interest Arbitration codified in the pertinent statutory sections outlined above are considered.

First, I note that the prison system is a para-military organization, with clear lines of authority coming from the director of the agency down intermediate channels to the correctional officer him or herself. There is a plain and immediate need to have clear lines of authority and a capability of rapid response and flexibility in emergency situations. Furthermore, there is a grave responsibility on the entire apparatus to avoid emergencies and to maintain control of the prison population in a fair and even-handed manner. In my view, the State has offered substantial evidence demonstrating that the practice of allowing employees to select their assignments by seniority fails to address the needs of the department to fulfill its mission to safely and efficiently contain inmates, as well as

the particular and specific needs of this Employer to assign employees where they are most needed and most capable of performing.

Moreover, Director Seiter and several other witnesses who testified presented considerable data on the general need and requirement of employees to be well-trained to perform their jobs, not just at a particular post but throughout a particular institution. As noted above, Seiter testified concerning the importance of the concept of "unit management" in his plans for the Corrections system. Since the unit management system matches the particular skills of employees with specific job assignments, special skills and abilities may indeed be involved. On the other hand, the rotation system for Correction officers also makes it possible to train them to handle emergencies when they arise and qualifies officers for promotions because of their enhanced training and job knowledge.

By contrast, there was some evidence presented on the record that, in specific correctional facilities, there has been an abuse of power in making assignments to specific work areas. Clearly, the concept of "slow rotation" testified to by several union witnesses flies in the face of everything Director Seiter indicated was important in rationally organizing the work force of a particular correctional facility. The State's unwillingness to (1) precisely define a procedure for rotation with a specific time limit for each assignment; (2) assign work so that each correctional officer rotates through the four distinct types of work areas within a limited and defined time period; (3) to

balance the number of assignments, and (4) to design written guidelines for work area assignment and rotation, has created a situation which, in this Neutral's opinion, has indeed resulted in an abuse of power, just as the Union maintains. It is to be remembered, though, that at least to some extent the grievance procedure of the contract will rectify at least some of these abuses.

Ultimately, I have a concern that AFSCME's proposal goes too far in the other direction. Indeed, the lack of recognition for Management's special needs in the Department of Corrections for flexibility in assignments might result in an inability to staff the "ghetto" with a balance of experienced officers, as well as new employees, under the Union's strict seniority proposal. The lack of any skill and ability language in its proposal, and its complete rejection of job reassignments to prevent osification or the development of improper relationships between inmates and "permanent" officers all militates against a Pick a Post system. I find myself in sympathy with Management's claim that the State needs the flexibility to assign staff in Corrections and that it is the responsibility of Management in this para-military structure to make sure the first-line correctional officer obtains the skills necessary to perform their duties. Correctional officers are professionals and they should be dealt with as such as the Union argues. They are not service personnel from some Victorian novel to be sent "hither and yon for a farthing and a reminder of the spiritual benefits of esprit de corps." Unpublished award by Arbitrator Harvey Nathan in

Maquoketa Valley Community School District and Maquoketa Valley Education Association, State of Iowa Public Employment Relations Board, February, 19, 1987, at p. 12. However, the claim of the need for a permanent post system, based on seniority, is quite another matter. Rotation is too traditionally embedded in the correctional field, and has too many practical reasons for its maintenance, to permit the Union to finally rest its claim for pick-a-post on fairness or equity. The Employer has legitimate needs that must be addressed through the development, placement, and fair implementation of a structured rotation system for its corrections officers. The bulk of the evidence presented above dictates such a conclusion and I so hold.

In sum, the "final offer" proposals by both Union and the State are not deemed by me to be within a "zone of reasonableness." I find that I must totally reject the Union proposal for a specific work assignment, i.e., its "Pick a Post." However, the claim of the Employer to unfettered discretion to rotate employees throughout the entire institution in any manner it sees fit is also unacceptable. Consequently, in line with Director Seiter's testimony, I find that a rotation system invclving work assignment at a particular post for a 6 month period, with rotation through the four distinct types of job areas indicated to exist by Seiter, over a two year period, would give full play to the needs of Management while eliminating "slow rotation" and the abuse of power by representatives of the Employer.

d. Other Factors

Several other factors, as noted above in the Contentions of the Parties, seem also to favor the State's rejection of Pick a Post by seniority. One equitable consideration is the fact that this is an initial contract between these parties, as Management strongly contends. I frankly do not understand fully the actual "value" of the other provisions cited by Management as the basis for its claim that the Union negotiated an extremely favorable labor agreement during these negotiations. It is perfectly clear to me, however, that under the usual precepts in interest arbitration, arbitrators recognize that comparability, even if it exists, does not require that the level of benefits obtained by some employees after years of bargaining must immediately become the floor for a unit which is just beginning the collective bargaining process. To begin with, under these circumstances, discussions of comparability on a single fringe benefit, even one as important as the definition of work area, is difficult at best. A look at who has what does not tell how it got there and what other benefits were lost or gained as the price. In truth, then, I believe that the Employer's relative unwillingness to propose any changes in what it believes are its current inherent management rights can be explained by the fact that this is the first time the parties have negotiated on a state-wide basis.

All these factors cause me to find that a rotation system for job assignment, institution-wide in scope, must be the system of work area designation for the Department of Rehabiliations and Correction.

(2) The Remaining State Agencies and Departments

Although Management contended that the remaining four units must be individually considered by the Neutral, I find that a common pattern of proofs and shared characteristics permits me to analyze the proposals of each party as applied to all four agencies. This is indeed a complex case and I understand its importance to the parties. The omission of reference to a number of arguments should not be construed as a dismissal of them or indicative that all arguments were not fully considered, but only as an acceptance of the fact that some arguments have more direct pertinence to my final decision on the claim. This approach, parenthetically, enables the preparation and issuance of a timely decision of some reasonable length under the specific time schedule.

a. Ability to Pay and Budgetary Impact.

The basic insignificance of this factor has been analyzed immediately above in the section discussing the Department of Corrections. I see no need to repeat that discussion here.

b. Comparability.

Again, the lack of a prevailing industry-wide standard for any of the affected agencies based on comparability data has been generally set forth above. The testimony of both Union witness Korpi and Management witness Naess has been highlighted. See, State Exhibit 1 and Union Exhibit 12. As these charts

illustrate, and as the parties know, there is considerable diversity in both the general outlines and the particular procedures evidenced in the 17 AFSCME contracts reviewed by Union witness Korpi. There also seem to be more of a variance in the nearly 150 contracts reviewed by Employer witness Naess. One problem with the data presented by both these witnesses is that each was acting as a "contract reader" in reviewing provisions of labor agreements solely by their literal terms. Neither Korpi no Naess presented significant testimony other than what the four corners of the agreement appeared to provide to each at a cold reading. No actual practices or application on a day-to-day basis was presented into the record. This is a serious defect, limiting the potential accuracy of any attempt to analyze the data presented in this matter, in relation to what each comparable unit "really" does.

Having so said, the Arbitrator does note that the use of seniority in selecting a work area is much more common in departments outside Corrections, according to both the testimony of Korpi and Naess. Further, the use of a small administrative unit as the focus of "work area" is also significantly more prominent in the contract for other State agencies outside Ohio, putting aside the Department of Corrections. There is, however, perhaps an even greater deviation in precise terms and conditions of employment among the "similar" employees covered by the comparison for the several kinds of state agencies or departments under discussion. I so hold.

Accordingly, while I find substantially more evidence on the record disclosing that seniority is used as one criterion for work area selection, the evidence is by no means dispositive or even clear-cut when a fair assessment of the gross comparability data is made. Simply put, there is no "going rate" or "prevailing standard" for the fringe benefit in question.

By contrast, however, there is much stronger evidence in favor of the Union's argument that there was a prior practice in Ohio in line with its proposal in the instant case. Several Union witnesses presented testimony concerning the use of seniority for work area selection in facilities in the Department of Mental Retardation and the Department of Mental Health. Further, there is no question that all four agencies under discussion regularly assign employees to the same job, on a routine basis, without the need for a "rotation" or daily, semi-annual or even annual basis. Employees for each agency now enjoy an expectation that they will report to work in a specific work area and do generally the same work tasks each day.

In this sense, Management's proposal that work area be defined as the "major programmatic unit" within the institutional facility is a major change from prior practice. The record is replete with evidence that the smallest subdivision of regular work assignment, whether denominated ward, unit, module, cottage or building, has been the basic work area in the four departments under scrutiny prior to the current negotiations.

While this is the first state-wide contract, Management's proposal thus clearly potentially changes one current term and

condition of employment (definition of work area in the physical sense) and also deletes for some employees seniority rights already in place. Although Management asserts that it would not actually change any employee work assignment, and only seeks to maintain its "inherent" right so to do, I am always suspicious of claims the key contract rights are "mere boilerplate" or that hard-won contractual rights will not actually be used, as noted by several Management witnesses. The practice of work assignments based on seniority in work area was already changed when this initial master agreement went into effect and prior Memoranda of Understanding were superceded. To assert that other changes would not occur if the Employer has complete discretion over work area, after an initial selection in the major programmatic unit, is naive at best. Prior practice in Ohio does seem to favor the Union proposal, on balance, in my view.

c. Factor C: Ability to Administer and Effect on the Normal Standard of Public Service.

Once again, Management presented substantial testimony that it is required to retain maximum flexibility to adequately carry out its mission in the four agencies involved. It further asserts that seniority has been a bone of contention wherever it has been implemented and has, over all, impacted in an unfair way on employees and patients/consumers. Management witnesses complained that the displacement or ripple effect throughout an institution when seniority is utilized lengthens the selection process to fill the job openings in an intolerable way. Some of these staffing problems last for several months. Moreover,

seniority and the selection of a particular work area consonant with a ward or module limits flexibility when personality conflicts or similar work maladjustments are involved. While the Management can employ discipline to rectify some of these problems, a transfer within a problematic unit would be cheaper and fairer for all. In any event, because seniority does not take into account skills and abilities or the professional needs or institutional prerequisites, strict seniority is simply inappropriate in the public sector generally and the four specific agencies in particular.

The Union, on the other hand, argues that employees do work in a specific, physical work area and do similar tasks each day in the four state agencies in question. Management's claims for a need for flexibility are not reconcilable with the day-to-day operation of each agency. In some cases, blatant favoritism is at bottom in assignments to a particular work area. In other instances, when seniority has not been followed, employees have been assigned to work in areas that made them so uncomfortable that they left government service. At any rate. Management's claim that it needs a power to change work areas at will, when it does not intend to use this flexibility, reveals on its face the irrational core premise. Promises by the various agencies that individual abilities will be fairly assessed have not borne fruit, largely because the person who is most familiar with an employee's skills and abilities is the individual employee him or herself, the Union contends.

Finally, AFSCME charges that the State has fudged on assignments by combining activities of merely shifting employees because of some fad or other irrelevant consideration. Thus, Black or other minority employees have been shifted to make a false showing of affirmative action compliance (or, in one instance, White employees have been discriminated against in work assignments when Blacks are in the majority). Other examples of irrational and unfair work assignments are replete on this extensive record, according to the Union.

The Union proposal, as it conceives of it, anticipates that all work areas within an institution would be posted and that employees in that institution would be given a one-time opportunity to select their preferred work area. Once an employee selected a work area, the employee would remain in that work area unless and until the employee exercised his or her right to bid for a different work area when a vacancy arose. When a vacancy arose in a work area, other employees in the same job classification in that institution would be allowed 10 days to bid on the vacant position. If multiple bids were received, the employee with the most institutional seniority would receive the work assignment.

In summary terms, then, the Union believes its proposal is easy to understand and easy to administer. It provides for identification of agreed-upon work areas, in line with the actual practices existing today at the affected institutions. The assignment of employees to work areas on the basis of seniority is also consistent with benefits accorded both private and public

sector employees, and allows for movement of employees from one work area to another, but on a seniority basis reflecting the employee's own desires.

The Union does not deny that its proposal might cause problems for the Employer. It has attempted during the hearing to indicate that it is willing to modify strict seniority with skills and abilities limitations, with further limitations on the number of times an employees may opt for a new work area, and also a limitation on the number of work areas to be affected by any one vacancy or change. The one area where the Union has indicated it will not budge is on the definition of the physical component to a work area, i.e., the smallest subdivision of regular work assignment.

The State explains that under its proposal the programmatic unit is the physical work area, but employees would still regularly be assigned to their normal work tasks. Management asserts that the proposal as contemplated is not to change daily operations, but to reserve the decision as to particular work assignments to the Employer, to assure proper and necessary professional judgment and flexibility. The Employer states that the conditions set out in its proposal represent normal managerial prerogatives in the public sector. Using expert testimony, the State asserts its proposal complies with the requirement of complete and total discretion to institutional management for daily work assignments.

As I noted at hearing, considerable professional expert testimony was presented relating to the needs of residents,

consumers, and patients to have consistent and regular care from a stable work force, with personal bonds to each service receiver. Dr. Crosby was perhaps the most articulate exponent of this position. However, virtually all of this testimony provided by each party is off-point, in my view. No one is seriously contending that jobs shall be changed on a daily or even monthly basis in the four departments currently under discussion. Instead, the real dispute lies with who makes the work assignment decision, Management using unfettered discretion, or each individual employee selecting an assignment based on strict or pure seniority.

Unlike the Department of Rehabilitation and Corrections, the other four departments are not para-military in nature. Certainly, skills and abilities are critical in these agencies too. However, there is no pressing need for a change of work assignment inherent in the nature of the work itself. Quite to the contrary, stability and a bonding between user and worker is desirable in virtually every job, except perhaps that of youth officer, and even then, the evidence shows that long-term consistency is at least somewhat vital. Therefore, the factors which weigh so strongly for management in the Department of Rehabilitation and Corrections are not present for the other state agencies. I so find.

Quite frankly, the unwillingness of the State to propose any changes in what is clearly a source of friction between it, the Union and its employees is surprising, given the prior practice in defining work area and in using seniority for some aspects of

job selection relating to work area in at least some facilities in several of the agencies involved. The State is certainly aware that there are devices to incorporate seniority, while balancing that factor with Management's assessment of skills and abilities or professional needs. The Union has offered to establish a waiting period before seniority can be exercised; to establish a limitation on the frequency of exercising seniority rights; and to establish a limitation on the so-called "ripple effect." Whether the State's failure to propose any relief in this area represents its concerns over the fact that this is an initial contract, an inability to work with Union and local management to resolve a true problem, or simply a bargaining tactic, it demonstrates to me that some relief has to come from a neutral.

As I analyze the Union's proposal, its claim that the smallest subdivision of regular work assignments should be the work area is what functionally is presently done on a day-to-day level throughout each agency under discussion. Management's claim that a "programmatic unit" is the normal work area simply is not reflected by the facts presented, except perhaps for an isolated particular institution or facility. In that sense, the Union is correct that Management is claiming a "give back," and not merely engaging in hard bargaining for a first contract. Accordingly, I agree with the Union that the basic definition of work area for the four agencies under discussion must be as contained in its proposal rather than that as presented by the Employer. I so find.

On the other hand, I have a concern that the Union's proposal does, in fact, limit Management's discretion to an unnecessary extent. Indeed, the strict seniority standard contended for by the Union must be modified by skill and ability language or there genuinely might result an inability to staff properly a large number of work assignments. I think the State needs the flexibility to assign staff, not as needed, but in line with qualifications, professional needs, and seniority, as only one factor involved, although, when other factors are equal, the determinative factor.

Accordingly, I recognize that the needs to administer the Agency to provide public service must be balanced with individual employee rights created through collective bargaining. I find that work area must be defined for the four agencies as the smallest subdivision of the regular work assignment in the physical setting where an employee performs his or her assigned work on a regular basis. Seniority shall be used as one criterion for work assignment; skills and abilities, as well as professional needs in the particular unit or subdivision, also
constitute criteria to be incorporated by the parties. Furthermore, the parties are to limit the right to exercise seniority to select a work area to once every six months; no bumping rights are to be provided under this section; and the parties are to limit reassignments to two reassignments resulting from the filling of a particular vacancy.

C. Concluding Findings.

As I indicated on the record, in the event I found conventional interest arbitration to be the applicable standard, I would still not impose precise contract language on the parties but would use the flexibility granted to me to fashion principles not proposed by either party. However, the parties know best the details flowing from the decision as to general principles defining work area. Moreover, in the initial contract, I am extremely reluctant to foist specific contract sections onto Union or Management. If the parties were further along the road of collective bargaining, they would have been able to submit more reasonable and rationale final offers, and still perhaps would have been unable to reach agreement. The parties have acted responsibly by submitting their single remaining dispute to interest arbitration, rather than pursuing other avenues. Under these circumstances, I am reluctant to substitute my judgment as to the precise language and details of the agreement for their judgment and negotiation across the table. My reluctance is reinforced by the words of A.W. Carrothers in a paper prepared for the National Academy of Arbitrators. Mr. Carrothers argued that the task is to give interest arbitration a "focus." To use the words of Carrothers:

> "The task then is to give interest arbitration a focus, as the 'event' focuses grievance arbitration. That is where 'forced choice' or 'final offer' arbitration claims attention. It produces a kind of wonderful concentration of mind which Samuel Johnson attributed to the knowledge that one is to be hanged in a fortnight." [A.W. Carrothers, The Cuckoo's Egg in the Mare's Nest -- Arbitration of Interest Disputes in Public-

Service Collective Bargaining: Problems of Principle, Policy, and Process, in Arbitration-1977 Proceedings of the Thirtieth Annual Meeting, National Academy of Arbitrators (BNA Books, 1977) at 23.]

Accordingly, I find that the final Agreement should be the product of hard bargaining, yet with an incentive to reach a final agreement.

In light of the above, I order that the parties meet and attempt to negotiate the details and contractual language to implement the findings I have made above, both as to the definition of work area for the Department of Rehabilitation and Corrections and the definition of work area for the four remaining State Agencies. In the event the parties cannot agree within sixty (60) days of receipt of this award, the parties shall within fifteen days present final written offers to me consistent with this opinion, incorporating precise and detailed contract language, and the Arbitrator shall then select and adopt the offer I find most consonant with the purport of this award. Jurisdiction is retained specifically for this purpose only.

to submit a final offer to this Arbitrator, who will select the "best offer" from the detailed proposals as the actual provision to be incorporated in the labor contract. The submission of the final offer from each respective party shall occur within fifteen (15) days of the conclusion of the sixty (60) day negotiation period.

4. The Arbitrator retains jurisdiction solely for the purposes of implementing paragraph 3 immediately set forth above.

ELLIOTT H. GOLDSTEIN
Arbitrator

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June 9, 1987