

OPINION AND AWARD

In the Matter of Arbitration

Between

Ohio State Troopers Association, Inc.

And

The State of Ohio, Ohio Department of Public Safety

Case Designation

OST-2020-00930-0

Date of Hearing: May 10, 2023

Date of Briefs: June 16, 2023

Date of Award: June 27, 2023

APPEARANCES

**For the Union**

Ronald Snyder, Esq., Cloppert, Latanick, Sauter, & Washburn, Advocate  
Robert Sauter, Esq., Cloppert, Latanick, Sauter, & Washburn, Advocate  
Larry Phillips, OSTA Staff Representative  
Kari Root, OSTA President

**For the Employer**

Victor Dandridge, OCB Labor Relations Administrator, Advocate  
Thomas Dunn, OCB Policy Analyst  
Chris Haselberger, OCB Policy Analyst  
Staff Lieutenant Aaron Williams, OSHP Representative

**Witnesses**

Elaine Silveira, Former OSTA Executive Director  
Lonnie Michael Butler, Sergeant, OSHP  
Brett Hannum, Trooper, OSHP  
Brian W. Oldham, Electronics Technician, OSHP  
Sara Morgan, Dispatcher, OSHP  
Josh Jones, Trooper, OSHP  
Charles J. Linek III, Lt. Colonel, OSHP  
Kristen Rankin, Deputy Director, OCB

An arbitration hearing was conducted on May 10, 2023, at the Ohio State Troopers Association office in Gahanna, Ohio.

The parties agreed that the matter was properly before the Arbitrator and ready for a final and binding determination. The stipulated issue is, did the Employer violated CBA Section 66.04 by not paying the \$8.00/hr. stipend during the emergency declared by the Governor on March 9, 2020? If so, what shall the remedy be? Both parties were given full opportunity to examine and cross-examine witnesses, pose arguments, and present their respective cases.

The parties submitted the following joint exhibits: the Collective Bargaining Agreement (CBA) between the parties designated as Joint Exhibit 1 (J1); grievance # OST-2020-00930-0 filed March 13, 2020 designated as Joint Exhibit 2 (J2); Executive Order 2020-01D signed into effect by Governor Mike DeWine on March 9, 2020 designated as Joint Exhibit 3 (J3); Executive Order 2021-08D signed into effect by Governor Mike DeWine on June 18, 2021 designated as Joint Exhibit 4 (J4); State of Ohio Administrative Policy HR-11 dated January 12, 2018 designated as Joint Exhibit 5 (J5); OSHP COVID-19 Medical & Exposure Plan designated as Joint Exhibit 6 (J6).

The Employer submitted the following documents as exhibits: 2006-2009 CBA negotiations Article 66 fact finding proposal dated February 22, 2007 designated as Management Exhibit 1 (M1); OSHP Continuity of Operations Program (undated) designated as Management Exhibit 2 (M2); Office of Criminal Investigation/OIU Pandemic Plan & Security & Comms/Security Services/Expo Capital Ops/EPU Pandemic Plan (undated) designated as Management Exhibit 3 (M3); Administrative Policy HR-49 dated March 6, 2020 designated as Management Exhibit 4 (M4).

The Union submitted the following documents as exhibits: OSTA and State of Ohio 2006-2009 CBA excerpted Article 66 designated as Union Exhibit 1 (U1); OSTA and State of Ohio 2003-2006 CBA excerpted Article 66 designated as Union Exhibit 2 (U2); OSTA Fact Finding Pre-Hearing Statement SERB Case #06-MED-02-0146 & -0147 dated February 14, 2007 excerpted pages 52-53 pertaining to Article 66 designated as Union Exhibit 3 (U3); Fact Finding Report by Harry Graham SERB Case No. 06-MED-02-0147 (undated) excerpted pages 2, 59-61 pertaining to Article 66 designated as Union Exhibit 4 (U4); Employer's annotated version of OSTA contract Article 66 dated September 2007 designated as Union Exhibit 5 (U5); and OSHP IOC dated March 27, 2020 issued by Major Charles Linek III designated as Union Exhibit 6 (U6).

All exhibits were admitted into the record. Both parties timely submitted post hearing briefs. All materials were reviewed and considered by the Arbitrator in reaching this decision.

**RELEVANT CONTRACT PROVISION:**

Negotiated agreement between Ohio State Troopers Association, Inc., Units 1 & 15 and The State of Ohio effective 2018-2021

**ARTICLE 66 – MISCELLANEOUS**

\*\*\*\*\*

## **66.04 Emergency Leave**

### **A. Weather Emergency**

Employees directed not to report to work or sent home due to a weather emergency as declared by the Director of the Department of Public Safety, shall be granted leave with pay at regular rate for their scheduled work hours during the duration of the weather emergency. The Director of the Department of Public Safety is the Governor's designee to declare a weather emergency which affects the obligations of State employees to travel to and from work. Employees required to report to work or required to stay at work shall receive their total rate of pay for hours worked during the weather emergency. In addition, employees who work during a weather emergency declared under this section shall receive a stipend of eight (\$8.00) dollars per hour worked.

An emergency shall be considered to exist when declared by the Employer for the county, area or facility where an employee lives or works.

For the purpose of this section, an emergency shall not be considered to be an occurrence which is normal or reasonably foreseeable to the place of employment and/or position description of the employee.

Essential employees shall be required to work during emergencies. Essential employees who do not report when required during an emergency must show cause that they were prevented from reporting because of the emergency. During the year, extreme weather conditions may exist, and roadway emergencies may be declared by local sheriffs in certain counties, yet no formal weather emergency is declared by the Governor or designee and state public offices remain open. Should this situation occur, agency directors and department heads are encouraged to exercise their judgement and discretion to permit non-essential employees to use any accrued vacation, personal or compensatory leave, if such employees choose not to come to work due to extenuating circumstances caused by extreme weather conditions. Non-essential employees with no or inadequate accrued leave may be granted leave without pay. Nothing in this section prevents an appointing authority from using his/her discretion to temporarily reassign non-essential employees to indoor job duties consistent with their job classification, so that such employees are not performing unnecessary road or travel related duties during days or shifts of especially inclement weather.

### **B. Other than Weather Emergency**

Employees not designated essential may be required to work during an emergency. When an emergency, other than weather emergency, is declared and leave is granted, such leave is to be used in circumstances where the health and safety of an employee or of any person or property entrusted to the employee's care could be adversely affected. Payment for hours worked for other than weather emergencies shall be pursuant to Section 66.04(A) above.

\*\*\*\*\*

## **BACKGROUND**

Beginning in early 2020 a deadly novel coronavirus began to spread across the world. The first case in the United States was confirmed on January 18, 2020 in the State of Washington. Within days the first confirmed coronavirus death occurred in California on February 6, 2020. One month later on March 5, 2020 in acknowledgement of the fast pace of spread of the virus in the United States and in accordance with new mass gathering guidelines issued by the Center For Disease Control (CDC) Governor DeWine announced that the Arnold Sports Festival and Expo due to be held March 5-8, 2020, in Columbus, Ohio would not be open to spectators. On March 9, 2020 the first three coronavirus cases were confirmed in Cuyahoga County, Ohio and Governor DeWine declared a state of emergency. Also, on March 9, 2020 the Ohio Emergency Management Agency activated its Emergency Operations Center. Within a week Governor DeWine order all bars and restaurants to close for dine-in services. As of March 22, 2020 Governor DeWine issued a stay-at-home order allowing only businesses designated as essential to remain open and authorizing county health departments to enforce the specifics of the Order. The State's stay-at-home order expired on May 1, 2020 and was replaced by Governor DeWine's Stay-Safe Ohio order which continued many of the same restrictions in place under the stay-at-home order such as limiting gatherings to 10 or fewer and maintaining social distancing requirements.

From the start of Ohio's declared state of emergency on March 9, 2020, employees of the Ohio Department of Public Safety (ODPS) serving in jobs represented by the Ohio State Trooper Association (OSTA) were required to continue to report to work. ODPS implemented a variety of health and safety protocols to limit the spread of the coronavirus through its workforce. The State's emergency declaration expressly noted the Declaration effective on March 9, 2020 was not a public safety emergency as established and defined in Department of Administrative Services (DAS) Directive HR-11 pertaining to state employee. As a result, the State of Ohio did not initiate payment of the negotiated \$8.00/hr. stipend for hours worked during the general state of emergency which began on March 9, 2020 and ended with Governor DeWine's Executive Order 2021-08D on June 18, 2021. When it became apparent that the State of Ohio did not intend to provide the \$8.00/hr. stipend the OSTA filed a class action grievance on March 13, 2020 on behalf of its membership. The grievance was denied at the Agency Step of the grievance procedure and therefore appealed to arbitration.

## **POSITION OF THE UNION**

The Union relies on the plain language of Section 66.04(B) to make its case that OSTA bargaining unit members should be granted an \$8.00 per hour stipend for all hours worked between the dates of March 9, 2020 and June 18, 2021. The Union urges the Arbitrator to do likewise and simply read and apply the language of the contract as it is written without resort to conjecture, supposition and speculation about the parties' likely intent as other arbitrators have done.

There are three sentences that make up the entirety of Section 66.04(B) dealing with other than weather emergencies. The first sentence of the section establishes that non-essential employees may be required to work during a non-weather emergency. The second sentence establishes that when leave is granted to employees during a declared non-weather emergency, it must only be for circumstances of

health and safety of the employee, or a person or property entrusted to the employee. The third and final sentence of the section establishes that payment for hours worked during a non-weather emergency is to be pursuant to Section 66.04(A), which is the preceding section addressing weather emergencies. Section 66.04(A) grants an \$8.00 per hour stipend for hours worked during an emergency. Aligning the factual circumstances of the COVID-19 state of emergency and the straightforward language of the contract demands that the OSTA bargaining unit members, who were required to continue to work during the entirety of the state of emergency, are due the emergency pay stipend for all hours worked.

The Employer's arguments for not paying the stipend are twofold. First, they argue that the Governor's emergency declaration expressly exempted state employees from the state of emergency by inserting a provision in the Governor's proclamation that said Administrative Services Directive HR-D-11 was not required to be implemented. Said Directive is the State's Public Safety Emergency Policy. Second, the Employer argues that the emergency stipend granted in Section 66.04(A) & (B) is only payable when both an emergency is declared and some non-essential employee(s) somewhere in state government is not required to work and is put on administrative leave. This mandatory two-pronged pre-requisite is inconsistent with the Employer's own annotated guidance to the State's management personnel. In the annotated guidance, the State's explanation of how the contract language is to be implemented states that the \$8.00 per hour stipend is to be paid to those who work, and during a declared emergencies other than weather emergencies Agencies may grant Administrative Leave with pay to employees not required to work. The distinction is clear, the Employer has always considered the payment of Administrative Leave as a permissive aspect of how compensation is managed during an emergency, not a mandatory pre-requisite for authorization of the emergency stipend.

The Union asks that the Arbitrator apply the plain meaning of the contract language and award the emergency pay stipend as required by Section 66.04 of the CBA.

#### **POSITION OF THE EMPLOYER**

There are two pre-requisite elements needed to trigger the provision of Section 66.04(B). First, the 'other than weather emergency' must be declared. Second, leave must be granted for employees who are not required to work during the emergency. Both of these elements must exist.

As for the first element – the declaration of an emergency, the CBA establishes that it is the Governor or the Governor's designee who declares that an emergency exists. The contract does not define what constitutes an emergency. The definition of an emergency, and thereby the declaration of an emergency, is a right reserved to management. In the case of Executive Order 2020-01D, the emergency declaration addressing the COVID-19 pandemic, the Order unambiguously establishes that for purposes of state employment DAS Directive HR-D-11 was not being implemented. This DAS Directive speaks to the circumstances of a public safety emergency which may limit the obligation of state employees to travel to and from work for specific periods of time. The Governor or the Governor's Designee (for these purposes the Director of the Department of Public Safety) retains the right to declare an emergency and to limit the terms of any such emergency. Based on the exclusionary

language of item #6 in Executive Order 2020-01D there was no declaration of emergency that activated the contractual provisions of Section 66.04.

The State, through its ongoing preparedness planning was able to implement its Critical Event Preparation and Response Policy which was developed in anticipation of just such circumstances that resulted from the spread of the coronavirus. Through planning and adherence to health and safety regulations the State was able to continue to remain open for business and provide needed services to the citizens of Ohio. State of Ohio employees continued to work throughout the pandemic applying mitigation measures that kept a critical event from becoming a public safety emergency as contemplated in Section 66.04 of the CBA.

The second element – the granting of paid leave, was not undertaken. This is not an optional element it is a second required element. The plain meaning of Section 66.04(B) language is that an emergency is declared and leave (pursuant to this CBA Section on Emergency Leave) is granted. State employees, including all OSTA bargaining unit employees, were required to use available leave balances, or avail themselves of the federally provided Family First Coronavirus Response Act (FFCRA) leave benefit when taking time off during the months Executive Order 2020-01D was in effect. No employees were ever placed on paid administrative leave by the Employer. Since administrative leave with pay is a pre-requisite condition for activating the emergency pay stipend, and no such leave was activated by the Employer, there is no basis for the claim that emergency pay is due to any bargaining unit member.

Finally, it is important to note that the language at the heart of the Union's claim is pattern contract language which is found in other State of Ohio labor contracts. In three other cases with three other unions representing state bargaining unit employees, and the same fact pattern and contract language, three arbitrators have found in favor of the Employer's simple reading and application of the emergency pay provision.

The Employer asks that the grievance be denied in its entirety.

### **DISCUSSION**

This dispute is over a question of contract interpretation. In such cases the arbitrator's mandate is a narrow one. It is to read the language and discern its intended meaning from the written passages and the written passages within the context of the four corners of the contract. In contract interpretation cases the Union has the burden of proof. The quantum of proof is low – a preponderance of evidence is all that is required.

#### **The Plain Meaning of the Disputed Contract Language**

The language at the heart of this dispute is subsection 66.04(B). It is a subsection of Section 66.04 which is titled Emergency Leave. The title of the section is significant. It sheds light on the purpose of the provision, which is to establish and authorize a specific type of leave benefit – emergency leave. Section 66.04 is included in the contract to explain when the Employer will authorize itself to grant emergency leave, which is a type of administrative leave. Administrative leave, and specifically

emergency leave, is not earned or accrued through service as other leave benefits are; rather It is granted by the Employer in specific circumstances.

The first subsection 66.04(A) is titled Weather Emergency. This subsection is primarily about the granting of the unearned benefit identified as emergency leave during a weather emergency. The provision establishes that emergency leave is to be granted to non-essential employees who are not required to report to work when a weather emergency is declared by the Employer (i.e., the Governor or the Governor's designee – the Director of the Department of Public Safety). Non-essential employees who are granted emergency leave receive their regular rate of pay for not working during their normal hours of work that transpire for the duration of a declared emergency. Subsection 66.04(A) establishes a separate benefit for essential employees who are required to work during an Employer declared weather emergency. These employees are to be compensated over and above what non-essential employees receive on emergency leave (i.e., their regular rate of pay) by receiving their total rate of pay and an \$8.00 per hour stipend for each hour worked during the Employer-declared weather emergency. Subsection 66.04(A) goes on to explain that these emergency benefits apply when an emergency is declared for *"the county, area or facility where an employee lives or works;"* furthermore, an emergency is not *"an occurrence which is normal or reasonably foreseeable"* for the type of work the employee does. The subsection concludes with a paragraph describing circumstances in which an employee can be permitted to use accrued leave benefits to cover an absence that occurs as the result of extreme conditions when the Employer does not declare a weather emergency. The language in this paragraph specifically provides that non-essential employees with no or inadequate accrued leave may be granted leave without pay. Just like administrative/emergency leave, leave without pay is an unearned leave – it is a benefit granted by the Employer.

The second subsection 66.04(B) is titled Other than Weather Emergency. This subsection is the one currently in dispute. The language of the subsection is as follows:

*Employees not designated essential may be required to work during an emergency. When an emergency, other than weather emergency, is declared and leave is granted, such leave is to be used in circumstances where the health and safety of an employee or of any person or property entrusted to the employee's care could be adversely affected. Payment for hours worked for other than weather emergencies shall be pursuant to Section 66.04(A) above.*

Subsection 66.04(B) consists of three sentences. The first sentence establishes that unlike in a weather emergency, non-essential employees may be required to work during an other than weather emergency. In a weather emergency as described above in subsection 66.04(A) the norm is that non-essential employees do not work; they are granted emergency leave. In an other than weather emergency it is not the norm for non-essential employees to be on paid emergency leave. Non-essential employees may be required to work. The second sentence speaks to the granting of leave during an other than weather emergency. What leave do we understand to be referenced in this sentence? It is the leave which this entire Section 66.04 is about – emergency leave – an unearned administrative leave granted by the Employer to non-essential employees during a declared emergency. Because the first

sentence of this subsection establishes that non-essential employees may be required to work, the second sentence specifies that the granting of emergency leave (the unearned benefit) is only for those *“circumstances where the health and safety of an employee or of any person or property entrusted to the employee’s care could be adversely affected.”* The Union argues that the second sentence of this subsection is about the use of any type of leave benefit during a declared emergency. But such an interpretation of the sentence is inconsistent with the title and purpose of Section 66.04 and inconsistent with the way the phrase *“leave is granted”* or *“granted leave”* is used within this Section. The third sentence of subsection 66.04(B) provides that *“payment for hours worked for other than weather emergencies shall be pursuant to Section 66.04(A) above.”* This sentence affirms that the emergency pay stipend for an other than weather emergency is the same as for a weather emergency - \$8.00 per hour.

#### The Application of The Disputed Language to the Grieved Circumstances

It is undisputed that OSTA bargaining unit members were required to work throughout the COVID-19 pandemic from March 9, 2020 when Governor DeWine signed into effect Executive Order 2020-01D until fifteen months later when he signed into effect Executive Order 2021-08D on June 18, 2021. However, establishing that bargaining unit members were required to work, even at a heightened risk of serious illness or death, is insufficient to obligate the Employer to activate the emergency pay stipend incorporated by reference into subsection 66.04(B).

As discussed above, subsection 66.04(B) sets forth in the second sentence the same operative circumstances as are found in subsection 66.04(A) – an emergency is declared that affects the obligation of State employees to travel to and from work and emergency leave (the subject of Section 66.04) is granted to those non-essential employees who do not have to work. There is no definition of an other than weather emergency in the CBA. The language of subsection 66.04(B) which states, *“[w]hen an emergency, other than weather emergency is declared and leave is granted...”* must be read in light of its context within Section 66.04 and the four corners of the agreement as a whole. The prior subsection 66.04(A) clearly establishes that the Governor or the Director of Public Safety as the Governor’s designee has the authority to declare an emergency that would allow non-essential employees to be granted emergency leave. Furthermore, as to the matter of who can declare an emergency and the particular parameters of any such declared emergency, one can look to Article 4-Management Rights to see that this authority is reserved for the Employer. The opening paragraph of Article 4 reads as follows: *“The Union agrees that all of the functions, rights, powers, responsibilities and authority of the Employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted or modified by the express and specific written provision of the Agreement are, and shall remain, exclusively those of the Employer.”* Without specific defining characteristics or circumstances set forth in the CBA the responsibility falls to the Employer to determine the extent of an emergency. Turning then to the specifics of Executive Order 2020-01D to find the particulars of the COVID-19 pandemic emergency declaration, item 6 orders and directs that, *“This Proclamation does not require the implementation of the Department of Administrative Services Directive HR-D-11. Accordingly, State employees’ obligations to travel to and from work is not to be limited as a result of this proclamation.”* Directive HR-D-11 is the State’s Public Safety Emergency Policy.



The Employer, through the words of the Governor in his executive order, did not activate a public safety emergency for state employees and thereby did not activate emergency leave and the resulting emergency pay stipend.

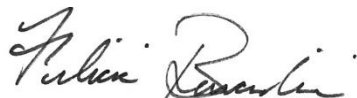
The result of Executive Order 2020-01D item #6 is that State Agencies remained open for business and State employees continued to work. The Union has provided no evidence that paid emergency leave was granted to any State employee. The way Section 66.04 of the CBA is worded in both subsection A and B, is that when non-essential employees are permitted not to work and are granted their regular rate of pay via emergency leave then essential employees who are required to work are paid not only their normal total rate of pay but also receive an emergency pay stipend. The wording of the executive order precluded the granting of emergency leave to non-essential employees and the emergency pay stipend to essential employees. All State employees continued to work during the months that Executive Order 2020-01D was in effect and they earned their normal regular rate of pay.

I find no inconsistency in the plain meaning of the disputed contract language and the Employer's application of the contract language to the specific circumstances of the COVID-19 pandemic emergency. Furthermore, I do not find an inconsistency between the contract language, the Employer's actions, and the Employer's September 2007 annotated version of the contract language (U5). The sentence from Union Exhibit 5 that reads, "*[a]gencies may grant Administrative Leave with Pay to employees not required to work during the declared emergency.*" is consistent with the purpose and wording of contract Section 66.04. It is simply explaining to State managers and administrators that emergency leave is a benefit that may be used in a declared emergency for those employees not required to work. The wording of the Employer's explanatory document does not change or override the actual language of the contract, which makes the granting of emergency leave one of two preconditions for authorizing the emergency pay stipend. And as has been pointed out, no State employees were told they could stay home on emergency leave and not work. All State employees were required to continue working between March 9, 2020 and June 18, 2021.

#### **AWARD**

For the reasons stated herein the grievance is denied.

Respectfully submitted at Columbus, Ohio, June 27, 2023.

A handwritten signature in cursive script, appearing to read "Felicia Bernardini".

Felicia Bernardini, Arbitrator