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IN ARBITRATION PROCEEDINGS PURSUANT TO

COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of

SEIU DISTRICT 1199

and

STATE OF OHIO
DEPARTMENT OF MENTAL HEALTH

Case No. 23-07-20030919-0026-02-11
2003 Blackout Grievance
Cynthia Lauck, et al., Grievants

ARBITRATOR'S

OPINION AND AWARD

This Arbitration arises pursuant to the Collective Bargaining Agreement ("Agreement") between SEIU DISTRICT 1199 ("1199") and STATE OF OHIO ("State"), DEPARTMENT OF MENTAL HEALTH ("DMH"), (the State and DMH will be referred to collectively as "ODMH"); (1199 and ODMH will be referred to collectively as the "Parties"). SUSAN GRODY RUBEN was selected to serve as sole, impartial Arbitrator; her decision shall be final and binding pursuant to the Agreement.

By agreement of the Parties, no hearing was held. Briefs were submitted to the Arbitrator on or about August 18, 2004. The record evidence submitted with the briefs consists of five stipulations and ten joint exhibits.

ON THE BRIEFS:

On behalf of 1199:

MARY ANN HUPP, Administrative Organizer, SEIU District 1199, 1395 Dublin Road, Columbus, OH 43215.

On behalf of ODMH:

KENNETH R. COUCH, Manager of Dispute Resolution, Office of Collective Bargaining, 100 E. Broad Street, 18th Floor, Columbus, OH 43215.

STIPULATED ISSUE

Did ODMH violate Article 35 of the Agreement and if so, what shall the remedy be?

RELEVANT PROVISIONS OF COLLECTIVE BARGAINING AGREEMENT

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ARTICLE 7 - GRIEVANCE PROCEDURE

. . .

7.07 Arbitration

. . .

E. Arbitrator Limitations

1. ...The arbitrator shall have no power to add to, subtract from, or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or

obligation not specifically required by the express language of this Agreement....

. . .

. . .

ARTICLE 35 - EMERGENCIES

Employees directed not to report to work or sent home due to weather conditions or another emergency shall be granted leave with pay at regular rate for their scheduled work hours during the duration of the emergency. Employees required to report to work or required to stay at work during such emergency shall receive pay at time and one-half (1 ½) for hours worked during the emergency. Any overtime worked during an emergency shall be paid at double time.

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 as required during an emergency must show cause that they were prevented from reporting because of the emergency.

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STIPULATED FACTS

1. **The grievance is properly before the Arbitrator.**

2. **On or about August 14 and 15, 2003, a power outage affected Cleveland and surrounding areas.**

3. **The Grievants are all employed as nurses at NorthCoast Behavioral Hospital - Cleveland ("NBH-Cleveland").**[1]

4. **The Hospital Accreditation Standards require NBH-Cleveland to have a backup electrical power source.**

5. **NBH-Cleveland has a backup electrical power source, which properly functioned on August 14, 2003 from approximately 4:00 pm until August 15, 2003 at approximately 6:00 am.**

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[1] According to Joint Exhibit 10, the Grievants are RN's Cynthia Lauck, Doris Roberson, Wanda Fletcher, Patricia Kettren, Robin Primm, Cheryl Taylor, Sandra Frazier, Patricia Singleton, MJ Witthuhn, Jan Stralka, Mable Brown, P.B. Stewart, Joyce Baker, D. Isadore Williams, Linda Taylor, P. Brown Stewart, Sherri Innes, Geneva Sharp, Patricia Ketten, Clay Sterna, Linda Hribar, Steve Pessefall, Karl Skellenger, Rheta Staley, E. Tibayan, Bonita Pierson, Sam Eiken, and J. Cooper. These employees worked on August 14, 2003, and through noon on August 15, 2003.

ADDITIONAL FACTS[2]

1. **In a memorandum to Labor Relations and Human Resources Administrators dated August 15, 2003, Steve Loeffler, Deputy Director, Office of Collective Bargaining, and Carolyn L. Nellon, Interim Deputy Director, Human Resources Division, (the "Department of Administrative Services ("DAS") Memo") states in pertinent part:**

> **Re: Electric and/or Water Outage in Cleveland and Surrounding Areas**
>
> **In light of the electric and/or water outage in Cleveland and surrounding areas on August 14 and August 15, 2003, any employee directed not to report to work, or who reports to work and is sent home, will be compensated for his or her wages under R.C. 124.388, Administrative leave with pay....**
> **...**
> **Employees should be directed to report at noon today, August 15, unless the circumstances at individual facilities dictate otherwise....**

The DAS Memo did not use the word "emergency."

2. **On August 15, 2003, Governor Taft issued a Proclamation (the "Governor's August 15 Proclamation") that states in pertinent**

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[2] From the Joint Exhibits.

part:

> **...I, Bob Taft, Governor of the State of Ohio, do hereby declare that a state of emergency exists for Cuyahoga County and order into service such personnel of the state departments/agencies as necessary....**

3. In a memo dated September 11, 2001 and titled "EMERGENCY CLOSINGS" (the "Governor's 9/11 Memo"), Governor Taft stated:

> **Due to the concern over the events happening around our country this morning, the Governor is notifying all directors of state agencies that all non-essential state employees are to be immediately sent home for the day. Agencies may use the weather-emergency essential/non-essential employees designation as a guide. Employees generally categorized as essential, may be sent home at the discretion of the agency director. Employees will be on paid status as per employee contracts. Employees should plan to work tomorrow as usual, unless the Governor makes otherwise public notification otherwise [sic].**

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POSITIONS OF THE PARTIES

1199's Position

The August 14-15 blackout was an emergency pursuant to Article 35 because:

1. **The DAS Memo, along with the Governor's August 15 Proclamation, make the blackout an "emergency...declared by the Employer."**
2. **Given that the blackout was of "gigantic" proportions, it was not "an occurrence which is normal or reasonably foreseeable" to NBH-Cleveland and/or to the Grievants' position descriptions.**
3. **During the blackout, NBH-Cleveland instructed Grievants to stay on-site and provide care to the residents; these essential employees did not receive Article 35 premium pay for the hours worked during the blackout. However, NBH-Cleveland sent home "non-essential" employees; these employees received paid Administrative Leave for their hours lost during the blackout.**
4. **Though the back-up generator at NBH-Cleveland enabled it to avoid any electrical service disruption, the impact of the blackout beyond the physical borders of the facility was far-reaching, such as at the employees' homes and with their**

families.

5. In 2001, 1199 filed several grievances on behalf of employees who were not paid premium pay for their hours worked on 9/11. At that time, the Parties' collective bargaining agreement provided premium pay for "weather emergencies." The grievances were denied due to the absence of contractual language authorizing premium pay for other kinds of emergencies. In negotiating the current Agreement (2003-2006), the Parties modified Article 35 to provide a broader definition of emergency: "weather conditions or another emergency" "declared by the Employer" that were not "normal or reasonably foreseeable to the place of employment and/or position description of the employee."

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ODMH's Position

The August 14-15 blackout was not an emergency pursuant to Article 35 because:

1. **The Governor's August 15 Proclamation had a two-fold purpose: a) to authorize and permit state agencies, including the Ohio National Guard, to assist as necessary; and b) to set in motion a request to the federal government for assistance. Declaring a state of emergency for these limited purposes does not trigger the "another emergency" language of Article 35.**
2. **While the State has a Directive declaring the Director of Public Safety to be the Governor's designee responsible for declaring a weather emergency,[3] no such Directive exists for declaring "another emergency."**
3. **The only time the State has declared a non-weather emergency that triggered the provisions of Article 35 was the Governor's 9/11 Memo, which specifically stated essential employees who remained at work would "be on paid status as per employee contracts." The Governor specifically invoked the "another emergency" provision of the State's collective bargaining**

[3] DAS Directive 00-03, effective December 27, 1999.

agreement with OCSEA.[4] In contrast to the Governor's 9/11 Memo, the Governor's August 15 Proclamation did not declare "another emergency" pursuant to the State's Agreement with 1199. The Governor's August 15 Proclamation did not order the closing of buildings, specify that only essential employees were to remain on duty, and/or invoke the premium pay provisions of Article 35.

4. **The concept that a Governor's Proclamation is intended solely to permit additional State aid to local municipalities and to request federal assistance, was recognized by Arbitrator Keenan in OCB Award No. 1329 (1998):**

> **A declaration of a state of emergency is declared because it is a prerequisite for authorization for State agencies to render assistance to local governmental entities; for the receipt of State and Federal monetary assistance; and for activating the Ohio National Guard.**

Declaring a state of emergency is not, by itself, sufficient to invoke the "another emergency" provisions of Article 35. Without a statement of intent in the Governor's August 15 Proclamation

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[4] Article 13, Section 13.15 of the collective bargaining agreement between OCSEA and the State contains the "another emergency" language adopted by 1199 and the State in their current Agreement.

to tie the declaration of a state of emergency to compensation under the Agreement, granting the grievance would impose an obligation on the State not specifically required by the Agreement, which would be inconsistent with Article 7, Section 7.07(E), "Arbitrator Limitations."

5. The power outage was "reasonably foreseeable." The fact that NBH-Cleveland has an on-site functioning back-up generator that operates in the event of a power outage makes a power outage "reasonably foreseeable" pursuant to Article 35, and therefore, not an "emergency." In the past two years, NBH-Cleveland has experienced a number of power outages. While these power outages were not as widespread as the August 14-15 outage, the power was out nonetheless and the back-up generator was used. The source and cause of the August 14-15 power outage is irrelevant. The State did not declare an emergency on August 14-15 because no emergency existed.

6. On August 14-15, 2003, NBH-Cleveland operated normally. Staffing levels were unchanged, and overtime worked, both voluntary and mandated, was minimal. During the 6 shifts in question, only 10 of the Grievants worked overtime. Moreover,

Grievant Geneva Sharp, RN worked over 750 hours of overtime in 2003; she worked overtime every pay period except 1 in 2003. Thus, any overtime worked during August 14-15 was not the result of "another emergency" pursuant to Article 35.

7. **The contract language involved in the instant dispute has remained unchanged since the first collective bargaining agreement between the State and OCSEA was signed in 1986. This was the "pattern language" agreed to between the State and 1199 for their 2003-2006 Agreement. The State was well aware during negotiations for the Parties' Agreement of the language and past arbitration decisions' interpretation of the language. 1199, when it agreed to the State's proposal, accepted the language and its interpretations found in past arbitration decisions.**

8. **In OCB Award No. 1137 (1996), Arbitrator Nelson, quoting the 4th Edition of <u>How Arbitration Works</u>, held:**

> **...An award interpreting a collective agreement usually becomes a binding part of the agreement and will be applied by arbitrators thereafter.**
> **This was emphasized by Arbitrator Whitley P. McCoy, who declared that where a "prior decision involves the interpretation of the identical contract**

> **provision, between the same company and union, every principle of common sense, policy, and labor relations demands that it stand until the parties annul it by a newly worded contract provision....**

The 6th Edition of How Arbitration Works also proves instructive. Addressing the precedential value of arbitral awards with permanent umpires, it is written:

> **Prior awards typically have such "authoritative" force in arbitrations conducted by permanent umpires or chairs. In this regard, one umpire offered the following thought: "Where a reasonably clear precedent can be found in prior Umpire decisions, the considerations in favor of following that precedent are very strong indeed, in the absence of relevant changes in contract language or a showing that the precedent decision or decisions were erroneous.**

9. Were it true that a Governor's Proclamation invokes the provisions of Article 35, when would the premium pay provisions of Article 35 stop? The Governor's August 15 Proclamation indicated the date "August 14, 2003 and continuing" and was signed by the Governor on August 15, 2003. An amended Governor's Proclamation, wherein additional counties were added, was signed on October 10, 2003. Are we to believe an

emergency existed from August 14, 2003 until October 10, 2003, and that employees were entitled to premium pay for every hour worked for 58 days?[5] Such an absurd result is certainly not what the Agreement states or what the Parties intended.

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[5] The grievance specifically requests as a remedy premium pay "during the blackout." In the event the grievance is granted, the State believes the blackout includes only the August 14-15 dates.

ARBITRATOR'S FINDINGS AND CONCLUSIONS

This is a contract interpretation grievance brought by 1199. As such, 1199 has the burden of proving whether ODMH violated Article 35 by not paying premium pay to the Grievants for their work on August 14-15, 2003. Within the jurisdiction granted her by the Agreement, the Arbitrator will make this determination by interpreting the language of Article 35.

Consistent with Article 7.07(E), the Arbitrator will not add to, subtract from, or modify any of the terms of the Agreement; nor will she impose on 1199 or ODMH a limitation or obligation not specifically required by the express language of the Agreement.

The grievance presents two questions under Article 35:

1. **Whether the August 14-15, 2003 blackout was "[a]n emergency...declared by the Employer, for the county, area or facility where an employee lives or works"; and**

2. **Whether the blackout was "an occurrence which [was] normal or reasonably foreseeable to the place of employment and/or position description of the employee."**

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1. Whether the Blackout was an Employer-Declared Emergency

For premium pay to apply, Article 35 provides "[a]n emergency shall be considered to exist when declared by the Employer, for the county, area or facility where an employee lives or works."

The August 15 Governor's Proclamation "declare[d] that a state of emergency exists for Cuyahoga County...." The Grievants' workplace, NBH-Cleveland, is located in Cuyahoga County. Thus, on first impression, 1199 has met its burden of proving the August 14-15 blackout was an Employer-declared emergency for the Grievants.

ODMH counters that the Governor's August 15 Proclamation was promulgated for the limited purpose of authorizing State agencies, including the Ohio National Guard, to assist as necessary; and to set in motion a request to the federal government for assistance. For this proposition, ODMH relies heavily on the precedential value of Arbitrator Keenan's statement in what it refers to as OCB Award No. 1329 (1998):

> A declaration of a state of emergency is declared because it is a prerequisite for authorization for State agencies to render assistance to local governmental entities; for the receipt of State and Federal monetary assistance; and for activating the Ohio National Guard.

The Arbitrator does not find the Keenan Award controlling of the instant matter for three reasons. First, the Keenan Award involves an

arbitration between the State (the Ohio Department of Public Safety Division of State Highway Patrol) and the Ohio State Troopers Association ("OSTA"). The union not being the same as in the instant matter makes the Keenan Award persuasive at best, but not controlling.[6]

Second, the grievance decided by the Keenan Award, a weather emergency grievance, involves material facts not present in the instant matter. In the Keenan Award, the Governor's designee to declare weather

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[6] See How Arbitration Works, 6th Ed. (BNA Books, 2003), Chapter 11 (edited by this Arbitrator), "Precedential Value of Awards, pp. 567-603:

> Any well-reasoned and well-written prior arbitration opinion has persuasive qualities where it is "on point" with the subject matter of a current grievance; however to be given preclusive effect it must be between the same parties, must invoke the same fact situation, must pertain to the same contractual provisions, must be supported by the same evidence, and must concern an interpretation of the specific agreement before the arbitrator.

(Emphasis added; p. 577.)

See also, Heinsz, "Grieve It Again: Of Stare Decisis, Res Judicata and Collateral Estoppel in Labor Arbitration," 38 B.C.L.Rev. 275 (1997):

> ...[A]rbitrators should consider a number of factors when faced with relevant prior decisions....These factors include fact considerations, party identity, ...and the parties' contractual expectations."

(Emphasis added; pp. 293-297; cited with approval in How Arbitration Works, 6th Ed., p. 577.)

While the State maintains 1199 "accepted...any previous interpretations rendered by arbitrators" when it agreed in 2003 to the Article 35 "pattern language" from OCSEA's contract, there is insufficient bargaining history record evidence to support this point.

emergencies[7] -- the Director of Public Safety -- did not declare a weather emergency; nor was there any express weather emergency language in that collective bargaining agreement. As Arbitrator Keenan explained, the parties' bargain, as reflected both by provisions in the contract and not in the contract, must be honored:

> **For whatever reason, no provisions according emergency service time or any other unique compensation linked to essential employees working during a weather emergency has been negotiated....The failure of the parties to negotiate into their agreement any concept of emergency service time for working during a weather emergency is most significant....[T]o...infer that emergency service time is due here would serve to deprive the [State] of its negotiated bargain. Faced with no such bargained benefit, the [State] could afford to be less parsimonious *vis a vis* other items of compensation.**

Ohio Department of Public Safety Division of State Highway Patrol and Ohio State Troopers Association, OCB Case No. 1329, pp. 16-17 (1998).

Third, and perhaps most importantly, the Keenan Award does not refer to whatever evidence was relied upon to reach the conclusion that the declaration of a state of emergency in a Governor's Proclamation serves only the limited purposes of authorizing State agencies to render assistance, and initiating a request for federal aid. Arbitrator Keenan's finding that

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[7] See p. 9 above, and footnote 3.

Governors' Proclamations have limited purposes may be perfectly sound, but the conclusory nature of Arbitrator Keenan's holding on this issue, combined with insufficient instant record evidence on this issue, gives the Arbitrator little basis for making a specific finding that Governors' Proclamations have limited purposes.

ODMH bolsters its contention that the Governor's August 15 Proclamation had the limited purpose of providing assistance and triggering federal aid by providing President Bush's September 23, 2003 letters to Governor Taft and Department of Homeland Security Under Secretary Brown. The President's letter to Governor Taft states in pertinent part:

> **I have declared an emergency under the [Stafford Act (42 U.S.C. §§ 5121-5206)] for the State of Ohio due to the conditions resulting from a severe, statewide power outage that affected the State on August 14-17, 2003. I have authorized Federal relief and recovery assistance in the affected area....**

The letter to Under Secretary Brown states in pertinent part:

> **I have determined that the emergency conditions in certain areas of the State of Ohio, resulting from a severe, statewide power outage on August 14-17, 2003, are of sufficient severity and magnitude to warrant an emergency declaration under the [Stafford Act]. I, therefore, declare that such an emergency exists in the State of Ohio.**
>
> **You are authorized to provide appropriate assistance for required emergency measures, authorized under Title V of the Stafford Act to save lives, protect**

> **property and public health and safety, or to lessen or avert the threat of a catastrophe in the designated areas....**

While these two letters from the President demonstrate the Governor's August 15 Proclamation initiated the receipt of federal aid, the letters do not demonstrate the Governor's August 15 Proclamation served only this limited purpose. Again, the Arbitrator emphasizes that Governors' Proclamations may very well serve only this limited purpose, but on the instant record, the Arbitrator cannot confirm this.

In addition to ODMH's contention that the Governor's Proclamation serves only a limited purpose, ODMH contends that a declared state of emergency, by itself, is insufficient to invoke the "another emergency" premium pay provision of Article 35. According to ODMH, for Article 35 premium pay to be required, the Governor must make a specific reference to employee compensation. For this proposition, ODMH relies on the anecdotal evidence provided by its assertion that 9/11/01 was the only time the State has declared a non-weather emergency that triggered the premium pay provisions of Article 35. During that catastrophic emergency, the Governor distributed a memo (the "9/11 Memo") that expressly stated, "Employees will be on paid status as per employee contracts."

ODMH contends the Governor, in his 9/11 Memo, "specifically invoked the 'another emergency' provision" of the State's collective bargaining agreement with OCSEA. That Memo provides in full:

> **EMERGENCY CLOSINGS**
>
> **Due to the concern over the events happening around our country this morning, the Governor is notifying all directors of state agencies that all non-essential state employees are to be immediately sent home for the day. Agencies may use the weather-emergency essential/non-essential employees designation as a guide. Employees generally categorized as essential, may be sent home at the discretion of the agency director. Employees will be on paid status as per employee contracts. Employees should plan to work tomorrow as usual, unless the Governor makes otherwise public notification otherwise [sic].**

It does not appear to the Arbitrator that the 9/11 Memo "specifically invoked the 'another emergency' provision" of the State's contract with OCSEA; the invocation is not express. To reach that conclusion, one has to "connect the dots." In any event, in the instant matter, it is undisputed the State did not issue a August 14-15 blackout document that referenced a non-weather emergency and/or employee pay status. The Arbitrator holds, however, that the lack of such a document is not dispositive.

It is not dispositive because under basic principles of labor law, a collective bargaining agreement exists and is enforceable regardless of whether an employer references that agreement in another document.

Neither the Governor nor the Department of Administrative Services has the legal authority to unilaterally negate the Parties' Agreement. Once a binding contract exists, it exists according to the terms of that contract, unless another document negotiated by the same parties expressly states the latter document supersedes the former document (which is not the case here).

Thus, the question for the Arbitrator is whether the Governor declared an emergency, not whether the Governor chose to reference employee compensation in his August 15, 2003 Proclamation, nor whether the DAS Memo was carefully written to avoid mentioning the "E" word.[8]

ODMH contends that unless the Governor or his designee makes reference to employee compensation in the context of a declared emergency, the emergency pay provisions of parties' collective bargaining agreements are not triggered. But the Parties' Agreement does not say that. Rather, Article 35 provides simply that "[a]n emergency shall be considered to exist when declared by the Employer...."

Bound by Article 7.07(E) to not add to or modify in any way the terms of the Agreement, and based on the record's limitations as set out above, the Arbitrator finds the Governor's August 15 Proclamation created an Employer-declared emergency pursuant to Article 35 of the Parties' Agreement. There

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[8] "Emergency."

is sufficient evidence on this point for 1199 to carry its burden of proof; and insufficient evidence in the record to negate that conclusion.

2. Whether the Blackout was Normal or Reasonably Foreseeable to NMH-Cleveland and/or the Grievants' Position Description

The remaining question for the Arbitrator is whether the August 14-15 blackout was "normal or reasonably foreseeable" to NMH-Cleveland and/or the Grievants' positions as RN's.

1199 contends that because the August 14-15 was of "gigantic" proportions, it was not normal or reasonably foreseeable. Moreover, though NBH-Cleveland was prepared for blackouts by having a back-up generator, the blackout had an impact beyond the physical borders of NMH-Cleveland. The effect of the blackout was far-reaching, such as at the employees' homes and with their families.

ODMH counters that the fact that NBH-Cleveland has an on-site back-up generator that functioned well during the blackout demonstrates the event was reasonably foreseeable.[9] August 14-15 was not the first time the

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[9] ODMH presented three arbitration awards where the arbitrators found the events in question were reasonably foreseeable. In OCSEA and Ohio Department of Corrections and Rehabilitation, OCB Case No. 508 (1990), Arbitrator Rivera held that a prison escape is reasonably foreseeable to a Correctional Officer because "prisons are places where by definition its occupants desire to escape." Id. at p. 13. In OCSEA and State of Ohio Department of Transportation, OCB Case No. 585 (1991), Arbitrator Rivera held a clean-up after a flood where mud covers highways is "reasonably foreseeable to the place of employment, i.e., ODOT, and to the position description of the employees (Highway

(continued...)

back-up generator provided electricity during a power outage, though the August 14-15 blackout was admittedly more widespread than the previous blackouts. The source and cause of the outage is irrelevant, according to ODMH. Moreover, NBH-Cleveland operated normally on August 14 and 15. Staffing levels were normal, and overtime worked -- both voluntary and mandated -- was minimal.

Article 35 provides in pertinent part:

> **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.**

Thus, according to the Agreement, if the blackout was normal *or* reasonably foreseeable to NBH-Cleveland *or* the RN's position description, it is not a covered occurrence pursuant to Article 35. The Arbitrator must therefore review the various permutations:

1) **Whether the blackout was normal to NBH-Cleveland;**

2) **Whether the blackout was normal to the RN's position description;**

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[9](...continued)
Maintenance Workers)." Id. at p. 11. In OCSEA and State of Ohio Department of Transportation, OCB Case No. 678 (1991) Arbitrator Cohen held for ODOT and its Survey Technicians that a road cave-in is reasonably foreseeable. Id. at p. 24.

3) Whether the blackout was reasonably foreseeable to NMH-Cleveland; and/or

4) Whether the blackout was reasonably foreseeable to the RN's position description.

1. Whether the Blackout was Normal to NBH-Cleveland

The Arbitrator interprets "normal" in this context to mean "conforming to what is standard or usual."[10] It is general knowledge the August 14-15 blackout was abnormal, both geographically and durationally. It certainly was not a normal occurrence for the northeastern United States to have a blackout over a period of two days. Nor was it a normal occurrence for Cuyahoga County to have a two-day blackout. Accordingly, the Arbitrator finds the blackout was not "normal" to" NBH-Cleveland.

2. Whether the Blackout was Normal to the RN's Position Description

The RN's position description is not part of the record. Assuming, however, that RN's at NBH-Cleveland have similar responsibilities and duties as RN's at similar facilities, there is no record evidence the blackout caused any changes to the Grievants' normal activities. Moreover, it is inherent in

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[10] Oxford American Dictionary, (Oxford University Press, 1980), p. 454, 1st definition.

an RN's position to care for their patients under varying conditions.

There is speculation in the brief that the Grievants were in an abnormal situation because, while working during the blackout, they were worried about their homes and families. There is no evidence, however, to support this point.

There also is speculation that the hospitalized mental health consumers suffered anxiety due to not knowing their families' situations, making it an abnormal situation for the RN's. Speculation, however, is not equivalent to record evidence. Nor is an unsupported statement in a brief that non-essential employees were sent home from the facility the same as record evidence.

Though there is evidence of some overtime -- both voluntary and mandatory -- worked by the Grievants during the blackout, there is no record evidence the overtime was abnormal to the RN's position description.[11] Without specific record evidence of the RN's taking on duties outside their

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[11] The only mandatory overtime on the schedule was assigned to Cindy Lauck and Wanda Fletcher, both scheduled for August 15/1st shift. Next to Wanda Fletcher's name on the schedule for that day are an asterisk and a notation, "MOT-SENT HOME." The record does not explain what this means. Wanda Fletcher either worked part of her mandatory overtime ("MOT") and was then sent home, or she was scheduled for mandatory overtime, but was sent home before the overtime started. In any event, two slots of mandatory overtime and seven slots of voluntary overtime over six shifts does not appear to be excessive to the point where it was not normal to the RN's position description. However, the only schedules in the record are for August 14 and 15, making it impossible for the Arbitrator to compare the blackout days to other days.

normal position description, the Arbitrator must conclude the Grievants' work activities during the blackout were "normal."

3. Whether the Blackout was Reasonably Foreseeable to NMH-Cleveland

Though the scope of the blackout was not reasonably foreseeable to many residents of the northeastern U.S., it appears it was to NMH-Cleveland. The fact that a back-up generator was in place is the first strong indicator NMH-Cleveland had considered the possibility of blackouts. And the fact that the back-up generator in place had the capacity to function for the duration of the blackout at NMH-Cleveland demonstrates the facility, though it may not have concluded a lengthy blackout was *probable*, did apparently conclude it was possible.[12]

Accordingly, give that the needed equipment had been purchased and was in place at the facility, the prevailing record evidence is that a lengthy power outage such as the August 14-15 blackout had been contemplated. Having been contemplated, and a high-capacity back-up generator having been put in place, it appears the blackout was reasonably foreseeable to

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[12] Though the record makes it undisputed that the Hospital Accreditation Standards required NBH-Cleveland to have a back-up electrical power source, it is not shown in the record that NBH-Cleveland did not know the purpose of having in place a back-up generator; i.e., to provide power in case of an outage. Nor is it shown in the record that the Hospital Accreditation Standards require the back-up generator to have the high capacity of the generator at NMH-Cleveland, though that could be the case.

NMH-Cleveland.

4. Whether the Blackout was Reasonably Foreseeable to the RN's Position Description

The final question is whether the blackout was reasonably foreseeable to the RN's position description. Without a review of the position description, it is awkward at best to reach a conclusion on this issue. However, one observation can be made. The previous arbitration awards presented by the State all involve employees who held job positions created for the emergency (or non-emergency) in question; i.e., a Correctional Officer's duty is to guard prisoners, a Highway Maintenance Worker's duty is to maintain highways, and an ODOT Survey Technician's duty is to survey roads, often in the context of modifying a road. It cannot be said an RN's duty is to end a blackout. Accordingly, the Arbitrator finds the blackout in question was not reasonably foreseeable to the Grievants' position description.

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CONCLUSION

The August 14-15 blackout was not a normal or reasonably foreseeable occurrence to the public at large. If the blackout's effect on the public were what governed this grievance, the Grievants would receive premium pay for August 14-15.

The grievance, however, is governed by Article 35, which has very specific requirements. Working within the structure of Article 35, the Arbitrator holds the August 14-15 blackout was: 1) an Employer-declared emergency that was 2) not normal to NMH-Cleveland; 3) normal to the RN's job duties; 4) reasonably foreseeable to NMH-Cleveland; and 5) not reasonably foreseeable to the RN's job duties. Given that Article 35 is written in the disjunctive "or," the blackout was not a covered occurrence pursuant to Article 35. Accordingly, the Grievants are not entitled to premium pay for August 14-15, 2003.

AWARD

For the reasons set out above, the grievance is denied.

DATED: November 10, 2004

Susan Grody Ruben, Esq.
Arbitrator