IN THE MATTER OF ARBITRATION

BETWEEN

STATE OF OHIO – DEPARTMENT OF MENTAL HEALTH

AND

SEIU/DISTRICT 1199

Grievant: Bob Stinson – Class Action

Case No. 23-06(20081023)-0020-02-11

APPEARANCES:

For the Union:
Advocate: Kristie Branch, SEIU Organizer

For the Employer:
Advocate: Ashley Hughes, Attorney, OCB

OPINION AND AWARD

ARBITRATOR: Dwight A. Washington, Esq.

Date of Award: May 5, 2010

INTRODUCTION

The matter before the Arbitrator is a Grievance pursuant to the Collective Bargaining Agreement ("CBA") in effect June 1, 2006 through May 31, 2009, between the State of Ohio Department of Mental Health ("Health") and the SEIU/1199 Chapter ("Union").

The issue before the Arbitrator is whether 35.01(A) and (B) were violated when the Employer failed to pay a stipend to certain employees as a result of a declaration of an emergency by the Governor of Ohio beginning September 15, 2008 and lasting until October 8, 2008. This is a class action grievance and was filed on October 23, 2008. The Employer has raised a procedural objection that the grievance was not timely filed in accord with Article 7.04 and therefore is not properly before the Arbitrator.

This matter was submitted by written position statements, joint exhibits and exhibits with both parties waiving a hearing before the Arbitrator. Post-hearing briefs were submitted by both parties on or about March 31, 2010. This matter is properly before the Arbitrator for resolution of all issues presented by the parties.

BACKGROUND

The facts in this matter are not in dispute regarding the events which occurred on or about September 14, 2008. Storms reaching hurricane level gusts of wind moved across the State of Ohio causing damages throughout. These windstorms were the remnants associated with Hurricane Ike. The effect of the windstorms caused: widespread power outages; debris on the roads; property damage; and personal injuries which resulted in seven (7) deaths. (Union's Written Statement (UN Stmnt.) p. 6).

The storm prompted Governor Ted Strickland ("Strickland") to declare a state of emergency on September 15, 2008. (Joint Exhibit (JX) 3). The formal declaration sought federal assistance and contained the following provision:

> 7. This Determination of Emergency is not a Weather (Public Safety) Emergency. This emergency declaration does not implement the Department of Administrative Services Directive 08-03 or the EMA 'Weather Emergency Procedure' (revised February 12, 2007) and does not include a declaration of a weather emergency pursuant to the collective bargaining agreements. Accordingly, all state employees' obligation to travel to and from work is not limited as a result of this emergency declaration.

The Employer and Union contend that the primary dispute in this matter involves the interpretation and application of Article 35. The Employer submits that the declaration did not affect an employee's obligation to travel to and from work because it was not an emergency declaration covered under the Department of Administrative Services ("DAS") Directive 08-03 involving a public safety emergency. In short ". . . both the declaration of emergency and the DAS Directive state that any application of Article 35.01 was not triggered by this emergency declaration because it was neither a weather nor a public safety emergency." (Employer's Written Statement (EM Stmnt.) p. 5).

The Union contends that Article 35.01(B) controls since the Governor's declaration was an emergency "other than weather", which triggered Article 35.01(A) payment obligations depending on whether employees were directed to work or sent home. Under Article 35.01(A), employees would receive an additional eight dollars ($8.00) per hour of pay, if they were either required to report to work or required to stay at work during the emergency declaration.

According to the Employer, Article 35 is titled "Emergency Leave" and has been applied when a public safety emergency occurs under DAS 08-03 to protect the employees. The Union, on the other hand, contends that a "public safety" emergency is not required under Article

35.01(B), and the Employer has refused to pay the emergency leave in accord with Article 35.01(A).

As a threshold issue, the Employer argues that this matter is procedurally defective since the Union failed to file this grievance within fifteen (15) days of the Governor's declaration on September 15, 2008. Article 7.04 provides in part:

> " . . . class grievances shall be filed by the union within fifteen (15) days of the date on which the grievant(s) knew or reasonably could have known of the event giving rise to the class grievance." (JX 1).

The grievance was filed October 23, 2008, thirty eight (38) days after the Union knew of the declaration by the Governor which indicated that the emergency leave Article was inapplicable. The Employer submits that the Union was aware that emergency pay would not be provided to employees based upon the language within Governor Strickland's declaration. Although the grievance was filed on October 23, 2008, the Employer did not raise the arbitrability of the grievance during any stage of the grievance steps.

The Employer contends that the procedural issue was discovered only two (2) days prior to submission of its evidence to the Arbitrator and informed the Union on March 29, 2010 of the defect. The Employer argues that the procedural defect was not waived for its failure to previously discuss the defect because the right to contest arbitrability exists up until the hearing itself. The Union opines that this alleged procedural issue is a twenty four (24) hour attempt to derail this hearing. The Union further asserts that the defect is without merit in that the facts have not changed since the grievance's inception and that the Union complied with Article 7.04 by filing the grievance when it had knowledge of nonpayment by the Employer.

The Union contends that it complied with Article 7.04 in that the employees received their pay on October 10, 2008 and only then did it become known that emergency pay was not

included in their pay checks. The grievance was filed thirteen (13) days later, well within the fifteen (15) day procedural requirement. The Union argues the Employer's procedural defect must be dismissed due to the Employer's failure to satisfy its burden of proof on this issue.

The class remedy sought by the Union is the following: pay the emergency stipend of eight dollars ($8.00) per hour plus interest for employees who worked during the declaration; and employees who were required to use accrued leave such as vacation, personal, etc. should have such leave balances restored. The Employer requests that the grievance be denied in its entirety.

ISSUE

The parties stipulated to the following as the issue:

Did the Ohio Department of Mental Health violate Article 35.01(B) of the 2006-2009 Collective Bargaining Agreement between the State of Ohio and SEIU District 1199, and if so, what shall the remedy be?

RELEVANT PROVISIONS OF THE CBA AND DAS DIRECTIVES

CBA
ARTICLE 7 – GRIEVANCE PROCEDURE

7.04 Grievant

A grievance under this procedure may be brought by any bargaining unit member who believes himself/herself to be aggrieved by a specific violation of this Agreement. When a group of bargaining unit employees desires to file a grievance involving an alleged violation that affects more than one (1) employee in the same way, the grievance may be filed by the Union. A grievance so initiated shall be called a Class Grievance. Class Grievances shall be filed by the Union within fifteen (15) days of the date on which the grievant(s) knew or reasonably could have known of the event giving rise to the Class Grievance. Class Grievances shall be initiated directly at Step Two (2) of the grievance procedure if the entire class is under the jurisdiction of the Step Two (2)

management representative, or at Step Three (3) of the grievance procedure if the class is under the jurisdiction of more than one (1) Step Two (2) management representative. The Union shall identify the class involved, including the names if necessary, if requested by the agency head or designee.

Union representatives, officers or bargaining unit members shall not attempt to process as grievances matters which do not constitute an alleged violation of this Agreement.

ARTICLE 35 – EMERGENCIES

35.01 Emergency Leave (emphasis added)

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 obligation of State employees **to travel to and from work**. Employees required to report to work or required to stay at work during such weather emergency 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 dollars ($8.00) 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.

Each year, by the first day of October, all agencies must create and maintain a list of essential employees. Essential employees are those employees whose presence at the work site is critical to maintaining operations during any weather emergency. Essential employees normally consist of a skeletal crew of employees necessary to maintain essential office functions, such as those State employees who are essential to maintaining security, health and safety, and critical office operations.

Employees who are designated as essential employees shall be advised of the designation and provided appropriate documentation. Essential employees shall be advised that they should expect to work during weather emergencies unless otherwise advised. However, they are not guaranteed work. Nothing in this

section prevents an appointing authority from using his or her discretion in sending essential employees home or instructing them not to report for work once a weather emergency has been declared. Essential employees who do not report when required during an emergency must show cause that they were prevented from reporting because of the emergency. Employees not designated essential may be required to work during a weather 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 judgment 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 a weather emergency, is declared by the Governor or designee and Administrative leave with pay is granted for employees not required to work during the declared emergency, such leave is to be incident specific and only used only in circumstances where the health or 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 35.01(A) above.

DAS DIRECTIVE
NO. 08-03 (in part) (emphasis added)

PROCEDURE

A. Types of Emergencies

'Public Safety emergency' is a term of art which refers to all formal declarations or proclamations which may limit state employee's obligation to travel to and from work for a specific period of time. Such emergencies may include, but are not limited to, severe weather conditions like snowstorms. A **public safety emergency** declaration or proclamation can only be made by the Governor or the Governor's designee. Emergency declarations that are not public safety emergency declarations **do not affect a state employee's obligation to travel to**

and from work. A public safety emergency cannot be declared by an individual agency, department or director.

F. Compensation for Bargaining Unit Employees during Public Safety Emergencies

- Bargaining Unit employees who are excused from work during a public safety emergency.

  Excused bargaining unit employees who do not report for work or who are sent home as a result of a declared public safety emergency shall be paid for those hours of work that they were scheduled to work at their regular rate of pay.

  Bargaining unit employees who are expected to work during a public safety emergency must report to work as scheduled regardless of the conditions. These employees shall be paid at the premium rate, if any, as provided under contract.

POSITIONS OF THE PARTIES

UNION'S POSITION

The parties met on March 24, 2010 to review the file, prepare joint exhibits and joint stipulations and agree upon a joint issue in this matter. At the conclusion of this meeting, the parties executed joint stipulations, one of which contained the following:

1. The grievance is properly in front of the arbitrator.

2. There are no procedural objections. (Union Exhibit (UX 1).

At no time during the processing of the grievance or during the meeting on March 24, 2010 did the Employer raise any concern that a procedural defect existed. Moreover, after the meeting on March 24, 2010 the Union did not hear from the Employer until March 29, 2010, when this matter was first brought to the Union's attention. The introduction of the arbitrability issue by the Employer at this stage ". . . is tantamount to bargaining in bad faith." (UN Stmnt. p.

2). The Employer has presented no evidence to justify the lateness of its discovery, considering that the facts have remained unchanged for over seventeen (17) months.

In any event, the grievance was timely filed under Article 7.04 because the employees first discovered that they were not being paid emergency leave on October 10, 2008. The employees did not have actual knowledge of the alleged violation until October 10th when they received their paychecks. The grievance was filed on October 23, 2008. The Union complied with Article 7.04 by filing this matter thirteen (13) days after obtaining knowledge of the Employer's failure to pay in compliance with Article 35.01(B). The Employer's procedural arbitrability defect should be dismissed in its entirety.

Regarding the merits, the Union contends that the Governor's declaration on September 15, 2008 was for "other than weather emergency" as contained in Article 35.01(B). When an "other than weather emergency" is declared, employees may be required to work or employees may be placed on leave with pay if not required to work. Also, certain employees classified as "not designated essential" may also be required to work pursuant to Article 35.01(B). Regardless of the foregoing, if employees are required to work during an "other than weather emergency" declaration, their pay is governed by Article 35.01(A).

Article 35.01(A) provides that employees who are required to report and/or required to stay at work during the emergency, are entitled to their regular rate of pay plus an additional stipend of eight dollars ($8.00) per hour worked.

The Union submits that the extreme weather conditions which prompted the declaration made the travel to and from work hazardous due to the debris, downed power lines and power outages. As a result of the hazardous travel, a "public safety" emergency existed whether declared or not. The contention by the Employer that the Governor's declaration was to secure

federal resources only and not to address the conditions that existed is immaterial. The Union asserts that the intent of the Governor does not supplant Article 35.01(B) language that addresses when an emergency is declared, not **why** it was declared. According to the Union, the health and safety of the employees were at risk and any assertion which attempts to minimize the danger on October 15, 2010 is absurd. In other words, DAS Directive defines a Public Safety emergency as one which limits an employee's obligation to travel to and from work, which were the conditions that existed on September 15, 2008.

The Union points out that the Employer's position, as evidenced in its Step 3 response, that this emergency was not declared a public safety emergency which would automatically satisfy the inability of an employee to travel to and from work criteria under DAS Directive No. 08-03 is not controlling. (UX 4). The CBA does not require that the Governor declare a "public safety emergency" but only that an emergency be declared under Article 35.01(B).

The Union further contends that any administrative directive such as DAS Directive No. HR-D-11 (JX 4) which contains procedures for implementing public safety emergency requirements for all state agencies fails to take precedence over language within the CBA. In other words, the legal obligation in Article I of the CBA which states in part that ". . . [It] is the purpose of this Agreement . . . [and] the provisions of this Agreement shall automatically modify or supersede (1) conflicting rules, regulations and interpretive letter of Department of Administrative Services pertaining to wages, hours and conditions of employment . . ." (JX 1). Hence, the foregoing language precludes the Employer from successfully arguing that any policy or directive of DAS takes precedence over express language within the CBA.

Finally, the Union believes that the appropriate remedy under Article 35.01(A) indicates that all employees required to work during the emergency duration and/or who were required to

stay at work are entitled to the stipend and that employees who were required to use accrued leave (personal, vacation, compensatory time) should have such leave balance restored.

EMPLOYER'S POSITION

The Governor's declaration was issued on September 15, 2008, and this matter was not filed until October 23, 2008. The thirty eight (38) days' lapse makes this grievance procedurally defective in violation of the fifteen (15) day filing requirement.

The Employer asserts that this procedural issue of untimeliness was not raised during any of the grievance steps because it was discovered and only surfaced after the parties met on March 24, 2010 to prepare joint exhibits. The parties executed a joint stipulation on March 24, 2010 stating that this matter had no procedural objections and that this matter was properly before the Arbitrator. (UX 1). However, on March 29, 2010 the Employer discovered the defect and informed the Union via email of its intent to raise arbitrability. The Employer also withdrew its consent from the joint stipulation executed on March 24, 2010.

The Employer submits that arbitrability was not waived by its actions nor was the lateness a surprise the Union. In this matter, the Union received forty eight (48) hours notice prior to this hearing, of its intent to argue the arbitrability. The Employer indicates that it informed the Union as soon as it discovered the late filing and did not ". . . hold on to the timeliness argument to surprise the Union." (EM Stmnt. p. 3). The Employer cites past precedent as controlling in that Arbitrator Nels Nelson ("Nelson") denied a grievance as untimely even though this issue was not raised until the day of the arbitration hearing. Arbitrator Nelson concluded: (1) the right to contest arbitrability is not waived by failing to raise this issue prior to the arbitration hearing; and (2) there was no evidence to indicate the Employer deliberately failed to disclose this defect in an effort to surprise the Union at the hearing. Ohio

Civil Service Employees Association, AFSCME Local 11 v. State of Ohio, Department of Agriculture, 04-00(199911007)-0059-01-07 (Arb. Nelson 1993). Simply, the Employer argues arbitrability was not waived, this grievance is not properly before the Arbitrator, and the grievance should, therefore, be dismissed.

Regarding the stipulated issue in this matter, the Employer contends this dispute involves the interpretation and application of Article 35. It contends the declaration issued by the Governor does not activate the application of Article 35 because the issued declaration of state of emergency by the Governor contains specific language which addressed Article 35. Item 7 stated:

> 7. This Determination of Emergency **is not a Weather** (Public Safety) Emergency. This emergency declaration **does not implement** the Department of Administrative Services Directive 08-03 or the EMA 'Weather Emergency Procedure' (revised February 12, 2007) and **does not include** a declaration of a weather emergency pursuant to the collective bargaining agreements. Accordingly, all state employees' obligation to travel to and from work **is not limited** as a result of this emergency declaration. (Emphasis added).

The Governor's declaration did not impact any of the State of Ohio employees from traveling to and from work as is required under DAS Directive 08-03. (UX 4). DAS Directive 08-03 indicates that a "public safety emergency" declaration is one which may limit an employee's ability to travel to and from work. Conversely, this was not a public safety emergency declaration under the DAS directive and the employees' obligation to travel was not affected by this emergency – hence, no violation of the CBA occurred.

The Employer points out that the declaration of emergency by the Governor and DAS Directive 08-03 both indicate that the CBAs were not activated by this emergency. All state employees were expected to report to work on September 15, 2008 and during the declaration.

Article 35 is not, and cannot be, invoked each time an "other than weather emergency" declaration is issued whether to secure assistance from the federal government or for other governmental reasons. The Governor determined that additional resources were required on September 15, 2008, and the declaration was a legitimate exercise of governmental authority to effectively address the situation. The Employer concludes that the September 15th through October 8th, 2008 emergency declaration was not a public safety emergency under DAS 08-03 or pursuant to Article 35, and no violation of the agreement occurred.

DISCUSSION AND CONCLUSION

Based upon the written statements, joint stipulations, and exhibits submitted by the parties, the grievance is denied. My reasons are as follows:

The Employer's position regarding the arbitrability of this class action grievance is initially addressed, and rejected, due to the following rationale. The evidentiary burden rests with the Employer to prove that the grievance is untimely and not arbitrable. The facts are undisputed that this concern was not raised by the Employer until March 29, 2010, approximately seventeen (17) months after the filing of the grievance. It is also apparent from the record that the Employer executed a joint stipulation on March 24, 2010 affirmatively stating that the grievance was properly before the Arbitrator and that no procedural objections existed. (UX 1). Given the foregoing, it is clear by the actions of both parties that as of March 24, 2010, the Employer had not raised any issues concerning the procedural arbitrability of this grievance.

However, after March 24th, the Employer somehow "discovered" that the grievance was not filed until thirty eight (38) days after the September 15, 2008 declaration. No evidence was submitted by the Employer to indicate under what circumstances it now becomes aware of this procedural issue after March 24th. Given the record in this matter, the Employer's email on

March 29th certainly "surprised" the Union since this issue was previously addressed and **mutually** resolved by the parties on March 24th. (UX 1).

The Employer's reliance upon Arbitrator Nelson's decision in concluding that the grievance is untimely and not arbitrable, requires a closer look.

Arbitrator Nelson's decision is consistent with the longstanding principle "that the failure to raise the timeliness issue prior to the arbitration hearing does not result in waiving the argument." (OCSEA v. Dept. of Agriculture, p. 8). I agree with this principle as well. The Employer may raise arbitrability at the hearing, but it will not necessarily be successful. In the present matter, the Employer should have had knowledge of the alleged untimeliness on or before March 24th when it executed a joint stipulation indicating that the instant case was timely and properly before the Arbitrator. The Union, however, was not aware of this issue until the Employer raised it on March 29th. Regardless, I find this matter to be procedurally arbitrable. The unrefuted facts indicate that the employees did not have actual notice until they received their pay verification on October 10, 2008. Nothing in the record indicates that the Grievants were aware that the emergency pay and/or their leave balances were not credited until they received their pay documents. This fact alone refutes the Employer's position and indicates that the Grievants acted prudently in filing this matter on October 23, 2010. The grievance was initiated within fifteen (15) days of October 10, 2008 and satisfies the Article 7.04 filing timeline. The Employer has failed to demonstrate by the evidence that the instant grievance is untimely and not arbitrable under Article 7.04.

The Union contends that the September 15th declaration activated Article 35.01(B) of the Agreement. The premise of the Union's position rests upon its determination that the declaration

for an emergency "other than weather", created the necessary nexus to activate the payment provisions under Article 35.01(A).

An analysis of the Governor's declaration is in order and reveals several areas directly related to this dispute: (1) that the emergency is not a weather and/or public safety emergency; and (2) that the declaration does not implement DAS 08-03 or the emergency (leave) provision in employees' collective bargaining agreements.

An emergency declaration as defined in DAS 08-03 could involve a "natural disaster, man-made disaster, hazardous materials incidents or civil disturbance." (UX 4, p. 1). The Public Safety component is defined under emergency as ". . . **all** formal declarations or proclamations which may limit a state employee's obligation **to travel to and from work for a specific period of time**." (UX 4, p. 1; emphasis added). Given the specificity contained in paragraph 7 of Governor Strickland's declaration, the evidence indicates, and I find, that an emergency for Public Safety purposes was not declared on September 15th.

A further look at the September 15th declaration states that not only was DAS 08-03 not implemented but also emergency leave provisions of the employees' collective bargaining agreements were not implemented.

Despite the windstorm damage throughout Ohio's eighty-eight (88) counties, a conscious decision was made by the Employer that employees' obligation to travel to and from work was not impacted on a statewide basis. Otherwise, a "public safety" emergency would have been declared. The Union position, if accepted, would create a de facto "public safety" emergency whenever an emergency "other than weather" is associated with widespread damages. Article 35 as interpreted fails to provide the application sought by the Union.

The Union argues that the intent or the reason for the declaration is immaterial, only that an emergency was declared to trigger Article 35.01(B). I disagree. If the parties intended that 35.01(B) cover **"all"** emergencies that are declared by the Governor or designee, such language would be contained therein. To that extent, the Union further argues that the totality of the circumstances indicates that the declaration was for "public safety", thereby activating the emergency pay for employees under Article 35.01(A). Unfortunately, no evidence was offered by the Union to infer that Governor Strickland's declaration was anything other than what was actually stated in his State of Emergency.

The record fails to support any conclusions that infer that Article 35.01(B) was violated by any act of the Employer. The record also fails to demonstrate that the Employer violated the parties' agreement by its conduct on September 15, 2008 and thereafter, regarding the declaration of an emergency.

AWARD

The grievance is denied.

Respectfully submitted,

Dwight A. Washington, Esq.
Arbitrator

Dated: May 5, 2010