**OCB AWARD NUMBER: 2080**

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| **SUBJECT:** | **ARB SUMMARY # 2080** |
| **TO:** | **ALL ADVOCATES** |
| **FROM:** | **KRISTEN RANKIN** |
| **OCB GRIEVANCE NUMBER:** | **23-06-20081023-0020-02-11** |
| **DEPARTMENT:** | Department of Mental Health |
| **UNION:** | SEIU/District1199 |
| **ARBITRATOR:** | Dwight A. Washington, Esq. |
| **GRIEVANT NAME:** | Bob Stinson-Class Action |
| **MANAGEMENT ADVOCATE:** | Ashley Hughes |
| **2ND CHAIR:** | N/A |
| **UNION ADVOCATE:** | Kristie Branch |
| **ARBITRATION DATE:** | By Brief, March 31, 2010 |
| **DECISION DATE:** | May 5, 2010 |
| **DECISION:** | DENIED |
| **CONTRACT SECTIONS:** | Article 35.01 |
| **OCB RESEARCH CODES:** | 114.722 Weather Emergencies; 118.806—Back Pay Awards; 115.55—Hazard Pay  |
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**HOLDING: Grievance DENIED. The Arbitrator found that if the parties intended that Article 35.01(B) cover “all” emergencies that are declared by the Governor or designee, such language would be contained therein. The record failed to support any conclusions that infer that Article 35.01(B) was violated by any act of the Employer.**

On September 15, 2008, Governor Ted Strickland declared a state of emergency. The formal declaration sought federal assistance and contained the following provision: “…does not include a declaration of a weather emergency pursuant to the collective bargaining agreements…” 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.

The Union arguedthat 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. The introduction of the arbitrability issue by the Employer at this stage “…is tantamount to bargaining in bad faith.” The Employer did not present any evidence to justify the lateness of its discovery, considering that the facts have remained unchanged for over seventeen (17) months. The grievance was timely filed under Article 7.04 because the Employer first discovered that the employees were not being paid emergency leave on October 10, 2008. The grievance was filed on October 23, 2008, and thus complied with Article 7.04 by filing this matter thirteen (13) days after obtaining knowledge of the Employer’s failure to pay in accordance with Article 35.01(B). The Union contended that the Governor’s declaration on September 15, 2008, was for “other than weather emergency” as contained in Article 35.01(B). If employees are required to work during an “other than weather emergency” declaration, their pay is governed by Article 35.01(A). 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. 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. The Collective Bargaining Agreement (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 DAS Directive No. HR-D-11, which contains procedures for implementing public safety emergency requirements for all state agencies, fails to take precedence over language within the CBA. The Union contended that all employees who were required to work should have their leave balances restored.

The Employer arguedthat the Union failed to timely file their grievance. From September 15, 2008 to October 23, 2008 is thirty eight (38) days, and is outside the fifteen (15) day filing requirement. The procedural issue 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 Employer states that arbitrability was not waived by its actions nor was the lateness a surprise to the Union. The Union received forty eight (48) hours notice prior to the hearing. The Employer cites past precedent as controlling. Stating that “the right to contest arbitrability is not waived by failing to raise this issue prior to the arbitration hearing…” The Employer argued the declaration issued by the Governor does not activate the application of Article 35 because the issued declaration of a state of emergency by the Governor contained specific language which addressed Article 35. 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. The Employer concludes that no violation of the agreement occurred.

The Arbitrator foundthat the grievance was initiated within fifteen (15) days of October 10, 2008 and satisfied the Article 7.04 filing timeline. The Employer has failed to demonstrate by the evidence that the instant grievance was untimely and not arbitrable under Article 7.04. The Arbitrator held that given the specificity contained in the Governor’s declaration, the evidence indicated, that an emergency of Public Safety purposes was not declared on September 15, 2008. If the Union’s position was accepted, it would create a de facto “public safety” emergency whenever an emergency “other than weather” is associated with widespread damages. If the parties intended that 35.01(B) cover “all” emergencies that are declared by the Governor or designee, such language would be contained in the CBA. The record failed to support any conclusions that infer that Article 35.01(B) was violated by any act of the Employer, and therefore the Arbitrator denied the grievance.