SUSAN GRODY RUBEN, Esq.
Labor Arbitrator and Mediator
30799 Pinetree Road, No. 226
Cleveland, OH 44124

#1075(A)

IN ARBITRATION PROCEEDINGS PURSUANT TO THE

COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME Local 11 AFL-CIO

and

PUBLIC UTILITIES COMMISSION OF OHIO

Case Nos. 26-00-20090630-0021-01-07, 26-00-20090807-0030-01-07, 26-00-20090720-0016-01-07, 26-00-20090626-0018-01-07, 26-00-20090706-0024-01-07, 26-00-20090630-0020-01-07, 26-00-20090720-0022-01-07, 26-00-20090720-0028-01-07, 26-00-20090624-0013-01-07, 26-00-20090824-0015-01-07, 26-00-20090819-0031-01-07, 26-00-20090819-0032-01-07

ARBITRATOR'S OPINION AND AWARD REGARDING ARBITRABILITY

This Arbitration arises pursuant to the collective bargaining agreement ("the Agreement") between the Parties, the OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION ("the Union") and the STATE OF OHIO ("the State"), under which SUSAN GRODY RUBEN was appointed to serve as sole, impartial Arbitrator. Her decision shall be final and binding pursuant to the Agreement.

Hearing was held October 6, 2010. The Parties agreed to bifurcate the grievances. The October 6, 2010 hearing and this Opinion and Award are on the issue of arbitrability only. The Parties had full opportunity to present evidence

regarding arbitrability. Post-hearing briefs on arbitrability were timely filed by both Parties.

APPEARANCES:

On behalf of the Union:

THOMAS COCHRANE, Associate General Counsel, OCSEA, 390 Worthington Road, Westerville, Ohio 43082.

On behalf of the State:

MARISSA HARTLEY, Labor Counsel, OCB, 100 East Broad Street, 14th Floor, Columbus, Ohio 43215.

ISSUE

Are the grievances arbitrable?

RELEVANT PORTIONS OF THE PARTIES' COLLECTIVE BARGAINING AGREEMENT
April 15, 2009 – February 29, 2012

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ARTICLE 25 – GRIEVANCE PROCEDURE

25.01 – Process

A. A grievance is defined as any difference, complaint or dispute between the Employer and the Union or any employee regarding the application, meaning or interpretation of this Agreement. The grievance procedure shall be the exclusive method of resolving grievances....

...

J. The receipt of a grievance form or the numbering of a grievance does not constitute a waiver of a claim or a procedural defect.

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25.02 – Grievance Steps

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...All grievances must be presented not later than ten (10) working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty (30) days after the event....

...

25.03 – Arbitration Procedures

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Questions of arbitrability shall be decided by the arbitrator. Once a determination is made that a matter is arbitrable, or if such preliminary determination cannot be reasonably made, the arbitrator shall then proceed to determine the merits of the dispute.

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FACTS REGARDING ARBITRABILITY

Beginning in late 2008, PUCO management and some Union bargaining unit members who worked at PUCO engaged in discussions about employee scheduling. On May 8, 2009[1], PUCO Human Resources Director Stephanie Whitis emailed field staff, the Grievants among them, informing them there would be upcoming changes to report-in locations:

> **...A management team has been assembled and will begin working on transition issues related to the change of your report-in location....It is anticipated that the first changes will occur on or about July 20, 2009 and the transition is expected to be completed by the end of September 2009. As information is available it will be shared.[2]**

On June 17, the Grievants (and other field employees) were instructed by email to provide information about the personal vehicles they would be parking at the new report-in locations. On June 18, PUCO Enforcement Division Chief Milan Orbovich sent staff an email stating:

> **Yesterday, you were asked to provide information about your personal vehicle that will be parked at an ODOT facility. This information is needed because ODOT needs to have an understanding of what vehicles will be parked at their facilities on a regular basis by non-ODOT staff. If you will never park a personal vehicle at their locations, you must indicate so.**

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[1] All dates are 2009 unless otherwise indicated.

[2] As stated by the Union in its post-hearing brief at p. 5: "The wording of the memo suggests prior discussions of the changes had occurred. No evidence of these communications appears on the record, however, and they are not relevant for purposes of deciding the arbitrability issue."

In addition, many of you have been asking for more details on the report-in locations. At this point in time I can tell you that HR will provide this information in the coming days.

In the meantime, everyone must provide the vehicle information to their immediate supervisor by the end of their workday as instructed in the emails sent yesterday.

On June 19, Grievant Brent Kiser sent HR Director Whitis an email asking:

Since Butch [Enforcement Division Chief Orbovich] is out-of-the-office until the 29th, I would like to ask you the same question.[3]

Can this [Orbovich's June 18 email] be considered an Official Notice that our Report-in-Locations will be changing from our Residence to an ODOT Facility?

The record indicates Grievant Kiser did not receive an immediate response to his email.

On June 22, HR Director Whitis emailed field staff:

This is a follow-up to my April and May e-mails concerning changes in report-in locations.

The attachment identifies your new report-in location at [an ODOT] facility effective on or after July 27, 2009. We are sharing this information on your new report-in location early so that you may be prepared for the field staff meetings listed below. Since all arrangements for this change are being made between the management staff of PUCO and ODOT, ODOT employees will not be able to answer any questions that you may have concerning this change at this time. Therefore, please save any questions you have for your field staff meeting.

On July 6, 2009 PUCO Transportation will hold a field staff meeting, after annual training, where your supervisors will go over the details of this change and answer any questions you may have....

On June 24, 26, 28, 29, and 30, nine of the Grievants filed grievances regarding the change in report-in locations.

On June 29, Union Staff Representative Marva McCall[4] hand-delivered a letter to HR Director Whitis which stated:

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[3] Presumably, Grievant Kiser first sent his question to Enforcement Division Chief Orbovich and was informed Orbovich would not be in the office for ten days, probably by an out-of-office reply email from Orbovich.

[4] Staff Representative McCall retired September 11. The Union transferred the matter to Staff Representative Jeff Freeman.

> **The [Union] considers the [PUCO] decision to change the report-in location for field staff a change in the condition [sic] of employment and, therefore, subject to impact bargaining. The change, to be effective July 27, 2009 will significantly affect the efficiency of said staff.**
>
> **OSCEA demands impact bargaining on this issue and response to this request within five (5) working days of receipt of this communication.**

On July 6, PUCO management held a meeting with field staff, the Grievants among them, discussing the change in report-in locations from their homes to publicly-owned facilities. On July 7, HR Director Whitis emailed Grievant Kiser a response to his June 19 emailed question regarding whether the official notice date of the change in report-in locations was June 18:

> **I believe this was answered at yesterday's [July 6] meeting. But the answer to your question is yes.**

On July 23, Enforcement Division Chief Orbovich emailed field employees, including the Grievants, informing them they were all to report to their new report-in locations July 27, except Grievant Kelly Hedglin, who was to report July 28.

On August 7, Grievant Joseph Dunn filed a second grievance regarding the report-in location change. On August 19, Grievant Shawn Zurfley filed two grievances on the report-in change.[5]

Between August 12 and September 30, the Parties held Step Three meetings on all the instant grievances. With the exception of her Step Three response to Grievant Zurfley's second grievance, HR Director Whitis wrote in each of the Step Three responses the Parties had no "procedural objections."[6]

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[5] Grievant Zurfley had not filed a grievance in June; Grievant Dunn had. For purposes of this Award, the Zurfley grievance with the lower number (26-00-20090819-0031-01-07) is referred to as Zurfley's first grievance, and the Zurfley grievance with the higher number (26-00-20090819-0032-07) is referred to as Zurfley's second grievance.

[6] See, e.g., HR Director Whitis' Step Three response to Grievant's Dunn's second grievance which reads in pertinent part:

> To the question of procedural objections, the Grievant and the Union representatives had none and the hearing was considered properly constituted.

In HR Director Whitis' Step Three response to Grievant Zurfley's second grievance, she wrote in pertinent part:

> **The move to the ODOT report-in location for the majority of the field staff was done on July 27, 2009. Mr. Zurfley, as well as all field staff, received multiple notifications about the ODOT report-in locations. In addition, Mr. Zurfley, as well as other field staff was made aware by their union representatives of the content of the discussions held by union and management from December 2008 to May 2009. Grievances are to be filed within 10 working days from the date the grievant(s) became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed 30 days after the event. Mr. Zurfley stated that he could not file his grievance until the action had taken place. The actual move for Mr. Zurfley took place on July 27, 2009; however he was informed of the move as early as 5/8/09. The grievance should have been filed within 10 working days when he became or reasonably should have become aware – at the very latest that date was August 10th. The grievance was signed on August 14th; mailed on August 17th; received at PUCO on August 18th; and, received in the Human Resources Department on August 19th.**

On September 24, Union Staff Representative Freeman, along with PUCO employees Haskins and Miller, met with HR Director Whitis, along with three other members of PUCO management and three representatives from OCB. The State characterizes this meeting as impact bargaining; the Union characterizes it as just a meeting to air employee concerns about the new report-in locations. Based on some of these concerns, HR Director Whitis made some changes to some employees' report-in locations.

The grievances were advanced to arbitration in September and October. Other than in the Step Three response to Grievant Zurfley's second grievance, there is no record evidence the State raised any procedural objections until the day of the arbitration hearing. Similarly, there is no record evidence the State raised any substantive objections on any of the grievances until the day of the arbitration hearing.[7] The Parties agreed to bifurcate the hearing.

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[7] As stated by the Union in its post-hearing brief at p. 12, fn. 21: "In actuality, PUCO first informed OCSEA of its ripeness argument on September 22, 2010, during a meeting of the

PARTIES' POSITIONS ON ARBITRABILITY

State's Position on Arbitrability

All the grievances are not substantively arbitrable because the Union requested and engaged in impact bargaining. Also, some of the grievances allege retaliation under ORC § 4117.11, which is not properly before the Arbitrator.

By engaging in impact bargaining over the effects resulting from the change to report-in locations, the Union acknowledged the State's right to make the change. The Union has waived any right to argue otherwise. While the Union attempts to argue impact bargaining did not occur, the evidence shows otherwise. The Parties met to discuss the effects the change had on employees. As a result of this discussion, the State modified the plan. These modifications, coupled with the Union's letter demanding impact bargaining, establish the Parties engaged in impact bargaining. By sending that letter and actually engaging in impact bargaining, the Union has waived its right to argue it has any right to contest the State's decision to change the report-in location. If the Union believed the State was unilaterally implementing a mandatory subject of bargaining, the letter would have demanded mid-term bargaining.

The Union is trying to get a second bite of the apple. But it waived its right to argue the State violated Article 13.06 when it chose to pursue the matter through impact bargaining.

Additionally, some of the grievances allege the only motivation behind the report-in locations change was retaliation stemming from a previous contractual matter. The proper forum for such claims, however, is SERB, which has exclusive jurisdiction over disputes arising from ORC § 4117.11. The subject of these

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parties' respective counsel. For purposes of adjudicating the arbitrability issue, however, this two week difference is immaterial."

retaliation grievances should have been filed as alleged unfair labor practices at SERB.

The grievances are not procedurally arbitrable because they were either untimely filed or filed before the event giving rise to the grievance. Article 25.02 states grievances are untimely filed if they are "presented...later than ten working days from the date the grievant became or reasonably should have become aware of the occurrence giving rise to the grievance not to exceed a total of thirty days after the event."

Grievances filed before the date the employee's report-in location was changed are not ripe for determination. Until the event actually occurs, no harm has occurred and no remedy exists.

Grievances filed after the ten-day/30-day timeframe of Article 25.02 are not arbitrable because they are untimely. The grievances filed too late are both Zurfley grievances and the second Dunn grievance.

The Union contends the State waived its right to contest arbitrability because it did not do so prior to arbitration. "The right to contest arbitrability before the arbitrator is not waived merely by failing to raise arbitrability until the arbitration hearing." How Arbitration Works, (5th Ed.). Moreover, Article 25.03 provides arbitrability is decided by the arbitrator. It logically follows arbitrability is not waived by failing to raise it before the arbitration hearing.

Union's Position on Arbitrability

The State waived its procedural arbitrability arguments by waiting until arbitration to raise them. How Arbitration Works 290 (6th Ed., 2003). When an employer waits months after the grievance is filed and raises a procedural objection only weeks before the arbitration, a union may justifiably bring a waiver defense. In State of Wisconsin, 126 LA 1095 (Dichter, 2009), the grievance was

filed in June 2007, but the employer waited until January 2009, two months before the scheduled arbitration hearing, to raise timeliness. "If the defense of waiver is to have any significance, which the Arbitrator finds it does, then it was up to the Employer when it reviewed the file in August or September to raise the issue. By not doing so, it relinquished its right to bring this question forward later." Id., at 1102.

Here, the State was fully apprised of all the relevant facts when the grievances were filed, yet it did not raise a procedural objection on the first ten grievances until the arbitration. In fact, the State stated in the Step Three answers the first ten grievances were procedurally ripe for arbitration. The State went so far in one answer to state the proper window for filing was May 8—August 10. The first ten grievances were all filed within this window.

The remaining grievances and the occurrence are close enough in time to preclude a ripeness argument. Additionally, Grievant Brent Kiser asked HR Director Whitis for the date of the "official notice" of the report-in change. She responded by email that date was June 18. The grievances the State is alleging are unripe were filed June 24, 26, 28, 29, and 30. Most of the report-in locations changed July 27; a few changed on July 28.

The grievances are substantively arbitrable. The Union did not waive its right to grieve by submitting a letter asking for impact bargaining and attending a meeting with management. In fact, the Union representatives at the meeting were not authorized to bargain, and no bargaining took place. Nor is SERB's jurisdiction over retaliation claims exclusive. Miamisburg School Dist. Bd. Of Ed., SERB 86-001. The Parties' contractual grievance procedure is not inactivated merely because a grievance contains an allegation that may also be an unfair labor practice.

OPINION ON ARBITRABILITY

The arbitrability of the grievances breaks down into four categories: timeliness, ripeness, impact bargaining, and retaliation claims. Timeliness and ripeness are procedural arbitrability questions[8]; impact bargaining and retaliation jurisdiction are substantive arbitrability questions. The State, having raised the arbitrability issues, has the burden of proving the grievances are not arbitrable.

1. Procedural Arbitrability

A. Timeliness

The State contends Dunn's second grievance and both of Zurfley's grievances are not procedurally arbitrable because they were filed too late. At Step Three, the Parties deemed the second Dunn grievance to have been filed August 7, and both Zurfley grievances to have been filed August 19.

The changed report-in locations for both Grievant Zurfley and Grievant Dunn were effective July 27. The effective date of the changed report-in locations is the latest date by which to count the ten working day deadline provided for in Article 25.02. July 27 was a Monday. Ten working days from Monday, July 27 was Monday, August 10.

Accordingly, the second Dunn grievance is arbitrable because it was filed Friday, August 7, which was within ten working days of the first day Grievant Dunn was required to report to his new report-in location, Monday, July 27.[9]

With regard to the first Zurfley grievance, HR Director Whitis wrote in her Step Three response (as she did in other Step Three responses) that both Parties had no "procedural objections." Thus, even though the first Zurfley grievance

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[8] In certain situations, ripeness could be a substantive arbitrability question; e.g., whether the act complained of meets the definition of a grievance in the collective bargaining agreement. Here, though, the State's ripeness argument is a purely calendar-based one, making it a question of procedural arbitrability.

[9] There is no late filing issue with regard to Grievant Dunn's first grievance. With regard to the second Dunn grievance, another ground for its arbitrability is the State's waiver of a procedural arbitrability objection in its Step Three response. See infra the discussion of waiver with regard to Zurfley's first grievance.

was filed outside the ten-day deadline of Article 25.02, the Arbitrator deems it timely due to the State's Step Three response, which operates as an express waiver of the State's procedural arbitrability objection on this grievance.

With regard to the second Zurfley grievance, though the State wrote in the Step Three response there were no procedural objections, it also wrote later in the document, the grievance was not arbitrable because it was untimely. Though these two statements obviously are contradictory, the Arbitrator finds the specific and detailed explanation of the untimeliness of the grievance saves the general and brief "no procedural objections" earlier language from constituting a waiver of the State's procedural arbitrability objection. Thus, the second Zurfley grievance is not arbitrable because it was not filed by August 10; i.e., within ten working days of the latest possible "trigger date"; i.e., July 27, the first day Grievant Zurfley was required to report to his new report-in location, and the State did not expressly waive its procedural arbitrability challenge by having set out a specific and detailed untimeliness objection in its Step Three response.

B. Ripeness

The State contends the remaining grievances are procedurally arbitrable because they were filed too early. These grievances were variously filed on June 24, 26, 28, 29 and 30. The State is contending these grievances are unripe because they were filed before July 27 and 28, the dates the changes in report-in locations became effective.

The weakness in the State's ripeness argument is the record support for a variety of dates as the date the Grievants "became or reasonably should have become aware of the occurrence giving rise to the grievance[s]...." While the State's position at arbitration is the effective dates of the changes are the trigger dates, the State has no means of disavowing the earlier "official notice" date it had identified. HR Director Stephanie Whitis indicated in her July 7 email to

Grievant Kiser the "official notice" date of the report-in changes was June 18. The grievances in question were filed between June 24 and 30, all after June 18. Accordingly, having been filed after June 18, the deemed "official notice" date of the report-in changes, the grievances filed in late June were ripe for determination; i.e., they are arbitrable.[10]

2. Substantive Arbitrability

A. Impact Bargaining

The State contends the grievances are not substantively arbitrable because the Union waived its ability to file them because it engaged in impact bargaining on the same subject. The Parties disagree whether impact bargaining took place at the September 26 meeting.

Even if impact bargaining took place, there is no record evidence the Union agreed as a result of such bargaining to withdraw and/or settle the instant grievances. This lack of an agreement, coupled with SERB's holding in Miamisburg School District Board of Education, 86-001, does not support the State's contention the grievances are not substantively arbitrable because the Parties engaged in impact bargaining. I.e., even if impact bargaining took place, the grievances are substantively arbitrable.

B. Retaliation Claims

The State also contends some of the grievances are not substantively arbitrable because they allege ORC § 4117 retaliation, which should be heard by SERB. But in Miamisburg, supra, SERB held that when a grievance contains an allegation that may also be a ULP, SERB does not have exclusive jurisdiction over the allegation:

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[10] It should also be noted ten working days after Thursday, June 18 was Thursday, July 2. Accordingly, the grievances filed in late June, in addition to being ripe, were also timely, having met the ten working day deadline of Article 25.02.

> **...If the facts of a controversy make it susceptible to resolution either in a grievance procedure topped by arbitration or by processing as an unfair labor practice (a) are the remedies mutually exclusive, (b) does one displace the other, or (c) can these two remedial processes be compatible?**
> **Part (a) is answered, "No."**
> **Part (b) is answered, "No."**
> **Part (c) is answered, "Yes."**

Id., at p. 213. Accordingly, the grievances alleging retaliation are not inarbitrable on the basis of SERB jurisdiction because SERB's jurisdiction in this type of matter is concurrent with a collective bargaining grievance and arbitration process.

AWARD

For the reasons set out above, the grievances are found to be arbitrable, with the exception of the second Zurfley grievance, which was untimely filed.

Dated: December 15, 2010

Susan Grody Ruben
Susan Grody Ruben, Esq.
Arbitrator