IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
GENERAL DIVISION

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11, AFSCME AFL-CIO UNION,	:	CASE NO.: 22 CV 5232
	:	JUDGE HOLBROOK
Petitioner/Movant,	:	
vs.	:	
STATE OF OHIO,	:	
Respondent.	:	

MAGISTRATE DECISION

WATTERS, MAGISTRATE

On May 16, 2022, Arbitrator Gregory P. Szuter issued an Arbitration Decision and Award in *State of Ohio, Department of Administrative Services and Ohio Civil Service Employee's Association,* Case No. OCS-2020-00918, in favor of the State of Ohio on a grievance filed by OCSEA on March 12, 2020. The Arbitration Decision and Award found that Employer State of Ohio, Ohio Department of Administrative Services did not violate Articles 13.15 and 11 of its collective bargaining agreement with Employee Organization OCSEA/AFSCME Local 11, effective May 12, 2018 through February 28, 2021, by failing to pay emergency pay when Governor Mike DeWine issued Executive Order 2020-01D, which declared a State of Emergency regarding the coronavirus.

On July 29, 2022, Petitioner/Movant Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO Union (the "Union") filed an action and Motion to Vacate Arbitration Award with this Court pursuant to R.C. 2711.10 and R.C. 2711.13. On September 30, 2022, Respondent State of Ohio, Ohio Department of Administrative Services (the "State") filed an Application To

Confirm the May 16, 2022 Arbitration Award. Pursuant to Civil Rule 53 and Local Rule 99.02, the case was referred to this Magistrate for a hearing on December 12, 2022 on the parties' respective motions regarding the arbitration award. *See Order of Reference* filed on November 10, 2022.

Movant Union appeared at the hearing via its legal counsel, Richard L. Stopper, Jr., Esq. of Joyce Goldstein & Associates, LPA. Respondent State appeared at the hearing via its legal counsel, Jonathan J. Downes, Esq. and Jantzen D. Mace, Esq. of Zashin & Rich Co., LPA. The hearing was recorded by electronic means on the Court's JAVS recording system.

Accordingly, having weighed the record on appeal and considered the arguments of the parties, the Magistrate hereby renders the following Decision.

FINDINGS OF FACT

1. The Union represents employees employed by the State of Ohio.

2. At all times relevant, the State and the Union were parties to a collective bargaining agreement ("CBA") for the period of May 18, 2018 to February 28, 2021. Joint Exh. 1.

3. At all times relevant, Section 13.15, "Emergency Leave," was a part of the CBA. Specifically, "Section 13.15 was incorporated into the CBA in the 2006-2009 contract negotiations. It remained unchanged in each CBA, including the 2018-2021 CBA," which is at issue here. *See* Arbitration Decision and Award dated May 16, 2022 attached as Exhibit C to the Union's Motion to Vacate ("*Arbitration Award")* at p. 4.

4. At all times relevant, CBA Section 13.15(A), "Weather Emergency," read, in pertinent part, as follows: "Employees directed not to report to work or sent home . . . shall be granted leave with pay at regular rate for their scheduled work hours during the duration of the

weather emergency . . .. 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." Pet. Mot. Exh. A, p. 2-3.

5. At all times relevant, CBA Section 13.15(B), "Other Than Weather Emergency," read in its entirety as follows: "Employees not designated essential may be required to work during an emergency. When an emergency, other than a weather emergency, is declared and leave is granted such leave is to be used 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 hour worked for other than weather emergencies shall be pursuant to Section 13.15(A) above." Pet. Mot. Exh. A, p. 4.

6. Department of Administrative Services Directive HR-D-11 entitled "Public Safey Emergency Procedures" was developed and effective on October 6, 2011 ("DAS Directive HR-D-11"). It was revised on January 12, 2018. Pet. Mot. Exh. A, p. 5. It addresses "the declaration of a public safety emergency and the granting of leaves and compensation in connection therewith." *Id.* p. 6. DAS Directive HR-D-11 defines "Public Safety Emergency" as "all formal declarations or proclamations <u>which limit a State employees' obligation to travel to and from work for a specific period of time</u>. Such emergencies may include, but are not limited to, severe weather conditions like snowstorms." *Id.* (emphasis added).

7. On March 9, 2020, Governor Mike DeWine issued Executive Order 2020-01D, "Declaring a State of Emergency," described as a "public health emergency," due to the COVID-19 respiratory disease "that can result in serious illness or death, . . ."("Executive Order 2020-

01D"). Joint Exh. 27. Executive Order 2020-01D expressly states several times in the order that an emergency exists. *Id.* Pet. Mot. Exh. B.

8. There is no mention or reference to any of the State's collective bargaining agreements in Executive Order 2020-01D. *Id.*

9. Paragraph 1 of Executive Order 2020-01D provides: "A state of emergency is declared for the entire State to protect the well-being of the citizens of the State of Ohio from the dangerous effects of COVID-19, to justify the authorization of personnel of State departments and agencies as are necessary, to coordinate the State response to COVID-19, and to assist in protecting the lives, safety, and health of the citizens of Ohio." *Id.*

10. Executive Order 2020-01D also provides that "it shall take effect immediately and remain in full force and effect until the emergency no longer exists, ..." *Id.* It did not declare a "public safety emergency."

11. Paragraph 5 of Executive Order 2020-01D provides: "State agencies shall develop and implement procedures, including suspending or adopting temporary rules within an agency's authority, consistent with recommendations from the Department of Health designed to prevent or alleviate this public health threat." *Id.*

12. Paragraph 6 of Executive Order 2020-01D provides: "This Proclamation does not require the implementation of the Department of Administrative Services Directive HR-D-11. Accordingly, State employees' obligations to travel to and from work is not to be limited as a result of this proclamation." *Id.*

13. There is no intention expressed in Executive Order 2020-01D that the State of Emergency is an occasion for furlough of State employees. *See* Jt. Exh. 27, Pet. Mot. Exh. C & *Arbitration Award*, p. 6.

14. During the State of Emergency due to COVID-19, both essential and nonessential workers continued to work, either by reporting to their job sites or be teleworking. *See Arbitration Award*, p. 8-9. At no point during the State of Emergency did the State grant general leave to a class of employees. *Id.*, p. 8.

15. On March 12, 2020, the Union filed a class action grievance, OCS-2020-00918, claiming that the State had violated Articles 13.15 and 11 of the CBA by failing to pay the additional $8.00/hour stipend, i.e. by failure to pay emergency pay. *Arbitration Award,* p. 1. The Union sought payment of the $8.00 dollar stipend for all hours worked by all members during the emergency (i.e. $8.00 for every hour each of its 27,000 members worked from March 9, 2020 until the emergency was lifted on June 18, 2021). *See* Joint Exh. 2.

16. The grievance was referred to arbitration, and a hearing was held on February 3 and 17, 2022 before Arbitrator Gregory P. Szuter on the issue of "Did Management violate § 13.15(B) of the contract, if so, what shall the remedy be?". *Arbitration Award*, p. 4.

17. At the arbitration, the Union presented three theories of how the State violated section 13.15(B) of the CBA: (1) There was a declaration of an emergency by both the Governor and Health Director which triggered Section 13.15(B); (2) the State's extraordinary actions and the State's operations in response to the exceptional circumstances were a de facto/implied declaration of emergency per Section 13.15(B) of the CBA; and (3) if there was not an official declaration of an emergency per Section 13.15(B), there was an abuse of discretion when objectively viewing the decisions of the State. *Arbitration Award,* p. 11, 13 & 15. The State argued that each of the Union's alternative theories failed to meet the Union's burden of proving that Section 13.15(B) was violated by the State. *Id.* p. 16-18.

18. At the arbitration, Mike Duco, Chief Legal Counsel of OCSEA, Chris Mabe,

OCSEA President, and Kristen Rankin, Deputy Director of the State Office of Collective Bargaining each testified that "leave was not granted." *Arbitration Award*, p. 8. The parties stipulated that all employees, essential and nonessential workers, either did their work by teleworking or by reporting in to the workplace. *Arbitration Award*, p. 8; Stipulation #3, 11, 12, 13 & 14.

19. On May 16, 2022, the Arbitrator Gregory P. Szuter issued an Arbitration Decision And Award in *OCSEA/AFSCME, Local II v. State of Ohio and Ohio Department of Administrative Services (DAS),* Case No.: OCS-2020-00912, denying the Union's grievance. *See* Exhibit C to the Union's Motion to Vacate.

20. The Arbitrator determined that no evidence outside of the CBA was needed to interpret the contract language of the CBA. *Arbitration Award*, p. 20. Specifically, the Arbitrator noted in his Award: "Extrinsic evidence is unnecessary in this matter in that a [] resolution can be found in the plain language applied to the facts found. This dispute is one of language only. There is no ambiguity to be resolved by bargaining history and there is no agreed upon practice that varies the terms of the Agreement that can be resolved by resort to past practice. The matter being resolved is clearly and only one of the plain meaning within the four corners of the Agreement." *Id.*

21. The Arbitrator found that in 2006 the parties incorporated Section 13.15, "Emergency Leave," into the CBA and that Section 13.15 remained unchanged as of the 2018-2021 CBA. *Arbitration Award*, p. 4.

22. The Arbitrator found that Governor DeWine's Executive Order 2020-01D was the declaration of an "Other Than Weather Emergency" under the terms of section 13.15 of the CBA notwithstanding its exclusion of DAS Directive HR-D-11 for Weather Emergencies. *Id.* p.

20, 21 ("only the Governor has the right to declare other than emergencies. That is what he did."), 25 (the March 9, 2020 proclamation of the Governor was an "Other Than Weather Emergency."), & 25 ("The Employer argues that the proclamation did not declare an emergency "for the purpose" of §13.15(B). The Executive Order did not exclude any of the State's CBA's or their provisions. So, the proclamation must be taken at its word that an emergency was declared.").

23. In so finding, the Arbitrator rejected the State's claim that DAS Directive HR-D-11 governs the actions of all State agencies where a Public Safety Emergency is concerned and by excluding DAS Directive HR-D-11 from Executive Order 2020-01D, the Governor's Executive Order did not qualify as an "Emergency Declaration" as required by section 13.15(B) of the CBA. *Id.* p. 16, 20-21. Instead, the Arbitrator found that "[t]he State cannot override the CBA through a unilateral directive." *Id.* p. 20. *See also* p. 13 ("Directive HR-D-11 recognizes public safety emergency and emergency declarations that are not a public safety emergency. The State presented no evidence that the Union negotiated or agreed to Directive HR-D-11. There is no definition of Public Safety Emergency contained in the CBA. The State cannot override the CBA through the promulgation of a unilateral directive.").

24. The Arbitrator did find, however, that DAS Directive HR-D-11 distinguishes between an "emergency" and a "public safety emergency" and a that public safety emergency "refers to all and any proclamations or declarations that have the effect of limiting *state employees'* obligations to travel to and from work." *Arbitration Award*, p. 7 (emphasis in original). As a result, the Arbitrator found that Public Safety Emergencies under DAS Directive HR-D-11 have a stipend payment component.

Arbitrator's Findings Regarding The Language Of CBA Section 13.15(B)

25. As noted above, Section 13.15(B) of the CBA states "[e]mployees not designated

essential may be required to work during an emergency. When an emergency other than weather emergency is declared **and leave is granted** such leave is to be used in circumstances where the health 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 13.15(A) above." Pet. Mot. Exh. A, p. 4 (emphasis added).

26. In deciding the meaning of CBA Section 13.15(B), the Arbitrator first considered the arguments of the parties. The Arbitrator noted that the Union acknowledged the "and leave is granted" language in Section 13.15(B) but argued "there is no requirement in Section 13.15(B) that employees must be on administrative leave as a condition precedent to an emergency or to the $8.00 stipend." *Arbitration Award*, p. 20. The Union claimed that the leave language contained in second sentence of Section 13.15(B) "merely clarifies when leave is appropriate and for what purpose" and is not a "condition precedent to an emergency or to the $8.00 stipend." *Id.*

27. Next, the Arbitrator considered the State's arguments in response that under "the plain language" of the CBA "for §13.15(B) to be triggered (1) an emergency must be declared; AND (2) leave must be granted." *Arbitration Award,* p. 21. The Arbitrator noted that the State claimed that Executive Order 2020-01D did "not qualify as an 'Emergency Declaration' as required by Section 13.15(B)" of the CBA and so the first requirement was not met. The State also argued that "the second element, leave must be granted, is not optional." *Id.* The State asserted the second element was not met because Executive Order 2020-01D "unambiguously did not require the implementation of DAS Directive HR-D-11" with its inherent leave. *Id.* The State additionally asserted that all testimony at the arbitration supported a finding that no leave was granted, and so the second requirement of Section 13.15(B) of the CBA was not met. *Id.*

28. In considering the parties' respective arguments, the Arbitrator found that the

State had "the more probably correct interpretation of §13.15(B)" of the CBA *Id.* p. 21.

29. The Arbitrator found that the language "an emergency . . . is declared and leave is granted" "describe actions to be taken by the Employer" under Section 13.15(B) *Arbitration Award*, p. 22 (emphasis added). "Next, the sentence states the consequences of the Employer's declaration/grant. Continuing the sentence, where both [actions] occur, the leave is to be used by employees for the [ ] health and safety of persons and property in their care that could be adversely affected by the non-weather emergency. The second consequence of the declaration/grant is payment for hours worked for non-weather emergencies. This is modified by referring to §13.15(A) above." *Id.* (emphasis added).

30. As a result, the Arbitrator found "the actions expressly prescribed for the State under §13.15(B) are: (1) to have nonessential employees work, (2) to declare an emergency, (3) to grant leave, and (4) pay for work during a non-weather emergency." *Id.* p. 22.

31. Additionally, the Arbitrator found that the pay regulations of Section 13.15(A) of the CBA are expressly incorporated into Section 13.15(B) of the CBA. *Id.* p. 24. Specifically, the regulations that if employees work during a weather emergency under Section 13.15(A) they receive the regular rate of pay same as those on leave and they receive an eight dollar stipend for working during the weather emergency while others are on leave. *Id.* p. 24.

32. The Arbitrator found that "[h]aving some employees idle and some employees working is critical to the application of the stipend" under Section 13.15(A) of the CBA. *Id.* at 24. The Arbitrator found Section 13.15(A) "juxtaposes the two classes of employees," those working and those not working. *Id.* Those who do not work receive the regular rate of pay and those who do work receive their regular rate of pay and the stipend. *Id.* As a result, the Arbitrator determined that "[t]he $8.00 dollar per hour payment is compensation for working during an

emergency when others, who are not working, are also receiving their regular pay." *Id.*

33. The Arbitrator found and concluded "[t]his regime" of Section 13.15(A) of the CBA "transfers explicitly to §13.15(B)" based on the provision in Section 13.15(B) of the CBA that "[p]ayment for hours worked for other than weather emergencies shall be pursuant to Section 13.15(A) above." *Id.* The Arbitrator found "[t]his is interpreting the intent of §13.15(B) by reference to usages within the four corners of the agreement, i.e. §13.15(A)." *Arbitration Award*, p. 26.

34. Consequently, the Arbitrator determined that "[t]o receive the stipend during an Other Than Weather Emergency, § 13.15(B) requires that there be employees working during such an emergency while other employees, who are not working, are receiving the regular rate of pay." *Arbitration Award*, p. 24.

35. As to the first action required – the declaration of an emergency – the Arbitrator clearly found and concluded that Executive Order 2020-01D declared a state of emergency for the entire State and "it was an 'Other Than Weather Emergency.'" *Arbitration Award*, p. 25. The Arbitrator rejected, however, the Union's assertion that all the "features and benefits" of section 13.15(B) "cascade immediately from the mere declaration." *Id.*

36. The Arbitrator found that the "first detail of notice" under section 13.15(B) is that non-essential employees may be required to work during an emergency and this is different than a weather emergency. "Thus, the default concept of an 'Other Than Weather Emergency' is that all employees continue to work" during the emergency and "everyone receives their regular rate" of pay. *Id.* p. 25. The Arbitrator further found that "[l]eave is not only an exception for a § 13.15(B) emergency it is a limited exception based on the employee's necessity to attend to the care of persons and property." *Id.*

37. As a result, the Arbitrator held that Section 13.15(B) of the CBA has two prerequisites to the $8.00 stipend being paid: (1) that an emergency be declared by the State and (2) that leave be granted to a class of employees. *See Arbitration Award*, p. 25-26 ("Section 13.15(B) undoubtedly has two requirements, the declaration of an emergency and the granting of leave."). While the Arbitrator found that an "Other Than Weather Emergency" was declared by Executive Order 2020-01D, he concluded that because leave was not granted to a class of employees in Executive Order 2020-01D, "the stipend is not due any employee" under the terms and conditions of Section 13.15(B) of the CBA. *Id.* p. 26.

Arbitrator's Findings Regarding The Executive Order and Directive

38. The Arbitrator next addressed the argument made by the State at the arbitration that no leave was granted (and no emergency declared) because Executive Order 2020-01D ordered that implementation of DAS Directive HR-D-11 was not required and State employees' obligations to travel to and from work was not limited. *See Arbitration Award,* p. 26-27. By excepting the implementation of DAS Directive HR-D-11, the State asserted that Executive Order 2020-01D did not limit State employees' obligation to travel to and from work. *Arbitration Award,* p. 26. The Arbitrator noted that the Union, in response, argued that neither Executive Order 2020-01D nor DAS Directive HR-D-11 use the terms of Section 13.15 and that the Directive "is a unilateral statement of the Employer." *Id.* p. 27.

39. The Arbitrator found that while both Executive Order 2020-01D and DAS Directive HR-D-11 "have to do with emergencies," "[i]t is specifically in the 'Declaration of Emergency' [2020-01D] where it is stated that no leave is to be effective by the proclamation." *Arbitration Award*, p. 27.

40. The Arbitrator found that "leave is the exception to the rule for §13.15(B)

emergencies" and "[s]ick leave taken by individual employees could not qualify the entire State workforce to the stipend." *Id.*

41. Although the Arbitrator noted that DAS Directive HR-D-11 defines "emergency" absent any other definition in the CBA and can safely be relied upon by the State to provide the parties' working definition of "emergency" because of the Union's knowledge of DAS Directive HR-D-11 and the State's history of establishing a written protocol for declaring emergencies, the Arbitrator actually found that DAS Directive HR-D-11 was not relevant. Instead, the Arbitrator found Executive Order 2020-01D did declare an Emergency for purposes of CBA Section 13.15, "but it did not declare a 'Public Safety Emergency' according to the terms of the Directive." *See Arbitration Award*, p. 27.

42. The Arbitrator noted that the Union "was plainly on notice" of what the State intends when it declares a Public Safety Emergency, which includes weather and non-weather forms, but "[t]he Executive Order declaring a statewide emergency for Covid excluded the application of the Directive that described public safety emergencies." *Id.*

43. The Arbitrator determined that Executive Order 2020-01D was an Other Than Weather Emergency under Section 13.15(B), but not in any form, such as a Public Safety Emergency, "that had implicit any form of leave of absence." *Arbitration Award,* p. 27. The Executive Order "did not declare any form of Other Than Weather Emergency in which a leave is inherently granted." *Id.*

44. As a result, the Arbitrator found that "[w]ithout any leave of absence, the predicate for the §13.15 stipend is absent" and the State's "interpretation of § 13.15(B) is more probably correct." *Arbitration Award,* p. 27.

Arbitrator's Findings Regarding The Union's Alternative Theories Of Breach (circumstantial evidence and abuse of discretion)

45. Alternatively, the Union argued at the arbitration that the facts surrounding the COVID-19 pandemic, the State's knowledge thereof, and the response thereto constituted circumstantial evidence that a Public Safety Emergency (in which leave is inherently granted and does not have to be proven) was declared. *See Arbitration Award*, p. 28.

46. This circumstantial evidence argument was rejected by the Arbitrator based on his finding that that State did, in fact, declare an emergency in Executive Order 2020-01D. *Arbitration Award*, p. 28 ("the one failure in the Union's chain of inference is that the Employer did declare an emergency in the March 9, 2020 proclamation."). The Arbitrator found that Executive Order 2020-01D just "did not declare a 'Public Safety Emergency.'" *Id.* Instead, it declared a different Other Than Weather Emergency with no leave inherently granted. *Id.* The Arbitrator also found that the Union's circumstantial argument failed because "all the facts and circumstances do not establish that a Public Safety Emergency was declared because such an emergency by definition has implicit within it a general leave of absence which was disclaimed and never happened." *Id.* As a result, the Arbitrator found that the Union "failed to prove its case that a Public Safety Emergency was declared on circumstantial evidence." *Id.*

47. With regard to the Union's second alternative theory that the State's failure to declare an emergency (or public safety emergency) was an abuse of discretion, the Arbitrator noted that the Union had the burden of proof that the State exercised a management right in a manner that was arbitrary, capricious, motivated by bad faith or was illegal. *Arbitration Award,* p. 28.

48. The Arbitrator found the Union's "premise that an emergency was not declared is faulty" because "[a]n emergency was declared." *Arbitration Award,* p. 29. A "Public Safety

Emergency" was not declared. *Id.* The Arbitrator found that Executive Order 2020-01D specifically disclaimed the declaration of a Public Safety Emergency pursuant to DAS Directive HR-D-11. *Id.*

49. The Arbitrator found that the State "chose not to implement a Public Safety Emergency which entails the granting of leave." *Id.* The Arbitrator additionally found that failure of the State "to declare a Public Safety Emergency which includes leave is not an abuse of discretion per §13.15(B) which does not ordinarily include leaves." *Id.*

50. Instead, the Arbitrator found that the State made the "considered and rational choice" to devote its resources to providing the services of State agencies throughout the pandemic to the extent it could, which was not an abuse of discretion. *Id.*

51. The Arbitrator thus concluded that the Union failed on it burden of proof on its circumstantial evidence and abuse of discretion arguments. *Id.* p. 29.

Arbitrator's Conclusions

52. Consequently, the Arbitrator concluded that the Union "failed to prove as to the merits, that its reading of Section 13.15(B) of the CBA is the more probable" and that the State breached its terms. *See Arbitration Award,* p. 29. The Arbitrator concluded that the State had the more probably correct reading of Section 13.15(B) of the CBA. *Id.* p. 29-30. Specifically, the Arbitrator concluded that Section 13.15(B) of the CBA has two prerequisites to the $8.00 stipend being paid: (1) that an emergency be declared by the State and (2) that leave be granted to a class of employees. The Arbitrator found that an Other Than Weather Emergency was declared by the State under Section 13.15(B) of the CBA but leave was not granted to a class of employees.

53. The Arbitrator concluded that the Union failed to meet its burden "to establish that an Emergency or Public Safety Emergency was declared by circumstantial evidence." *See*

Arbitration Award, p. 30 (emphasis added). The Arbitrator concluded, instead, that there was direct evidence that the State declared an Emergency under Section 13.15(B) that was not a Public Safety Emergency and with no leave granted to a class of employees.

54. Additionally, the Arbitrator concluded that the Union "failed to prove that a failure to declare an Emergency or Public Safety Emergency was an abuse of managerial discretion." *See Arbitration Award,* p. 30. The Arbitrator found that an emergency was, in fact, declared and it was not an abuse of discretion to choose not to implement a Public Safety Emergency with the granting of leave to a class of employees.

55. On July 29, 2022, the Union filed this action and moved to vacate the arbitration award based on the arguments that "1) the arbitrator exceeded his powers as defined by the collective bargaining agreement between the parties and applicable law, and 2) the award departs from the essence of the collective bargaining agreement because it conflicts with the express terms of the agreement, is without rational support, and cannot be rationally derived from the terms of the agreement." Motion to Vacate, p. 1.

56. On September 30, 2022, the State filed an application to confirm the arbitration award. The State also filed a memorandum in opposition to the Union's motion to vacate the arbitration award.

57. In its application to confirm the arbitration award, the State argues that the Union "seeks an impermissible *de novo* review of the Arbitrator's decision" by asking the Court to "substitute its judgment" for that of the Arbitrator and give it "an impermissible 'second bite at the apple.'" Motion to Confirm, p. 3. The State also argues that the Arbitrator interpreted the language of Section 13.15(B) of the CBA correctly in finding that it contains two prerequisites to the stipend being paid: "(1) that an emergency be declared by the

State and (2) that leave be granted to a class of employees." *Id.* The State contends that because "[a]ll employees, both essential and nonessential, either teleworked or reported to the workplace," the State never granted general leave to a class of employees as a result of the emergency. As a result, the State contends that "the two prerequisites of the stipend were not met." *Id.*

58. The State also argues that the Arbitrator's references to DAS Directive HR-D-11 in his Decision and Award "did not provide new requirements to the CBA but were simply *obiter dicta* that provided context to the requirements already written into the CBA." Motion to Confirm, p. 10-11 (emphasis in original). Instead, "the Arbitrator referenced the State's annotations and HR-D-11 to provide of an example of the type of emergency that would have met the two requirements" of an emergency being declared and leave being granted to a class of employees. *Id.* p. 11 (emphasis in original).

CONCLUSIONS OF LAW

This case arises from a contract interpretation arbitration between the State and the Union regarding an emergency pay provision of the parties' CBA. The Union asked the Arbitrator to grant a grievance and find that its members were entitled to an additional $8.00 per hour stipend for the period after March 9, 2020, when Governor Mike DeWine issued Executive Order 2020-01D and declared a State of Emergency in response to the COVID-19 pandemic. Governor DeWine rescinded Executive Order 2020-01D on June 18, 2022. After two days of testimony and reviewing both parties' post-hearing briefs, the Arbitrator issued an Award denying the Union's grievance in its entirety. This action followed.

"Ohio law favors arbitration and reviewing courts only have limited authority to vacate an arbitrator's award." *FOP v. City of Columbus,* 2022-Ohio-4102, ¶ 4 (10th Dist.). *See also Board of Trustees v. FOP, Ohio Labor Council,* 81 Ohio St.3d 269, 273, 1998-Ohio-629 ("Once the

arbitrator has made an award, the award will not be easily overturned or modified."). "To that end, an arbitration award is generally presumed to be valid." *FOP Capital City Lodge No. 9 v. City of Columbus,* 2006-Ohio-1520, ¶ 7 (10th Dist.). "'The public policy favoring arbitration requires that courts have only limited authority to vacate an arbitrator's award.'" *Id.*, quoting *Assn. of Cleveland Fire Fighters, Local 93 of the International Assn. of Fire Fighters v. Cleveland,* 99 Ohio St.3d 476, 2003-Ohio-4278, ¶ 13. "Therefore, judicial review of an arbitration decision is quite narrow." *Id. See Goodyear Tire & Rubber Co. v. Local Union No. 200*, 42 Ohio St.2d 516, 520 (1975). A reviewing court may not merely substitute its judgment for that of the arbitrator. *Champion Chrysler v. Dimension Serv. Corp.,*, 2018-Ohio-5248, ¶ 9 (10th Dist.).

On a motion to vacate, a trial court "may not evaluate the merits of an award and must limit its review to determining whether the appealing party has established that the award is defective within the confines of R.C. Chapter 2711." *Id.* at ¶ 10. R.C. 2711.10 defines the limited authority trial courts have for vacating an arbitration award. The four grounds contained in R.C. 2711.10 upon which a common pleas court may vacate an arbitration award are fraud, corruption, misconduct, an imperfect award, or that the arbitrator exceeded his or her authority.

"When reviewing a trial court's decision to confirm, modify, vacate, or correct an arbitration award, an appellate court should accept findings of fact that are not clearly erroneous but should review questions of law de novo." *Portage Cty. Bd. of Developmental Disabilities v. Portage Cty. Educators' Ass'n. for Developmental Disabilities,* 153 Ohio St.3d 219, 2018-Ohio-1590, ¶ 2. A Court of Appeals' review on appeal "is not a de novo review of the merits of the dispute as presented to the arbitrator." *Id.* "Instead, [appellate] review is confined to the trial court's order and the question of whether any of the statutory grounds for vacating an award exists." *Id.*

Relevant here is the ground set forth in R.C. 2711.10(D), under which a court of common pleas must vacate an arbitration award if "[t]he arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definitive award upon the subject matter submitted was not made." "An arbitrator derives his power from the parties' contract." *Professional Guild of Ohio v. Franklin County Children Servs.,* 2008-Ohio-6682, ¶ 13 (10th Dist.). An Arbitrator's authority is limited to that granted to the arbitrator under the terms of the parties' agreement. Thus, "'an arbitrator exceeds his powers when the award conflicts with the express terms of the agreement or cannot be derived rationally from the terms of the agreement." *Cleveland Construction, Inc. v. Ruscilli Construction Co.,* 2023-Ohio-363, ¶ 17 (10th Dist.), quoting *Summit County Children Servs. Bd. v. Commun. Workers, Local 4546,* 113 Ohio St.3d 117 (1991), syllabus. On the other hand, where "'there is a rational nexus between the agreement and the award, and where the award is not arbitrary, capricious or unlawful,'" the arbitrator's award "draws is essence from the parties' agreement and will not be vacated under R.C. 2711.10." *Cleveland Construction, supra* at ¶ 17, quoting *Mahoning Cty. Bd. of Mental Retardation & Developmental Disabilities v. Mahoning Cty. TMR Edn. Assn.*, 22 Ohio St.3d 80 (1986), paragraph one of the syllabus. *See also Ohio Patrolmen's Benevolent Assn. v. City of Findlay,* 149 Ohio St.718, 2017-Ohio-2804, ¶ 16, quoting *Cedar Fair, L.P. v. Falfas,* 140 Ohio St.3d 447, 2014-Ohio-2943, ¶ 7 ("Arbitrators act within their authority to craft an award so long as the award 'draws its essence' from the contract – that is, 'when there is a rational nexus between the agreement and the award, and where the award is not arbitrary, capricious or unlawful.'").

"So long as arbitrators act within the scope of the contract, they have great latitude in issuing a decision." *Cedar Fair, supra* at ¶ 6. "An arbitrator's improper determination of the facts or misinterpretation of the contract does not provide a basis for reversal of an award by a reviewing

court, because '[i]t is not enough . . . to show that the [arbitrator] committed an error – or even a serious error.'" *Id., quoting Nielsen, S.A. v. AnimalFeeds Internatl. Corp.,* 559 U.S. 662, 671 (2010). "'If parties could challenge an arbitration decision on the ground that the arbitrators erroneously decided the legal or factual issues, no arbitration would be binding.'" *FOP v. City of Columbus,* 2022 Ohio Misc. LEXIS 3755, *3 (Franklin Cty. C.P.), affirmed 2022-Ohio-4102 (10th Dist.), quoting *Miller v. Management Recruiters Int'l, Inc.*, 180 Ohio App.3d 645, 653, 2009-Ohio-236 (8th Dist.), citing *Huffman v. Valletto,* 15 Ohio App.3d 61, 63, 742 N.E.2d 740 (8th Dist. 1984). Hence, every reasonable intendment is indulged to give effect to such proceedings and favor the regularity and integrity of the arbitrator's acts. *Prosper Bus. Dev. Corp. v. Penn. L.L.C.,* 2012-Ohio-2992, ¶ 22 (10th Dist.).

1. The Union's Claim That The Arbitrator Exceeded His Authority Under The CBA By Deciding That Executive Order 2020-01D Did Not Declare An "Other Than Weather Emergency" Entitling Employees Who Worked During The Emergency To The Stipend.

"The language of the parties' contract determines the parameters of an arbitrator's authority." *Stoner v. Salon Lofts, LLC,* 2019-Ohio-5354, ¶ 10 (10th Dist.). Here, Section 25.03 of the CBA gives an arbitrator the power to resolve disputes regarding the interpretation, application or alleged violation of a provision of the CBA, but no power to add to, subtract from, or modify any terms of the CBA. *See* Jt. Exh. 1. Nor may an arbitrator impose on either the State or the Union a limitation or obligation not specifically required by the express language of the CBA. *Id.* Arbitrators act within their authority to craft an award so long as the award draws its essence from the contract. An arbitration award departs from the essence of a CBA and an arbitrator exceeds his/her powers when "(1) the award conflicts with the express terms of the agreement, and/or (2) the award is without rational support or cannot be rationally derived from the terms of the agreement." *Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Emps. Assn., Local 11, AFSME, AFL-CIO,* 59

Ohio St.3d 177 (1991), syllabus.

Despite admitting that (1) the Arbitrator found that the emergency declared in Executive Order 2020-01D "was an 'Other Than Weather Emergency'" under CBA Section 13.15(B), (2) that Executive Order 2020-01D "did not exclude any of the State's CBAs or their provisions," and (3) that "the proclamation must be taken at its word that an emergency was declared," the Union incorrectly claims in its Motion to Vacate that the Arbitrator exceeded his powers by adding terms and imposing limitations "not specifically required by the express language of the CBA" so as to decide that the "'emergency' declared by the Governor was not an 'emergency' for purposes of §13.15(B).'" Mot. to Vacate, p. 6. Specifically, the Union argues that the Arbitrator exceeded his powers by importing a "contract annotation" and DAS Directive HR-D-11 into the CBA. The Union asserts that by doing this, the Arbitrator "rewrote the CBA to require that an 'Other Than Weather Emergency' pursuant to §13.15(B) be a 'public safety emergency' subject to HR-D-11, even though the CBA contained no such limitation." *Id.* p. 6. The Union's argument is not supported by the arbitration record or the *Arbitration Award* and is without merit.

As set forth in detail in the Magistrate's findings of facts, the Arbitrator repeatedly found the emergency declared in Executive Order 2020-01D was an 'Other Than Weather Emergency' and was an emergency under Section 13.15(B) of the CBA. *See* Findings of Facts ¶ 22. In fact, the Arbitrator found that the emergency declared in Executive Order 2020-01D was the declaration of an "Other Than Weather Emergency" under the terms of section 13.15(B) of the CBA notwithstanding the declaration's exclusion of DAS Directive HR-D-11. *Id.* The Arbitrator considered but rejected the State's arguments about the application of DAS Directive HR-D-11 to section 13.15(B), including the State's claim that Executive Order 2020-01D did "not qualify as an 'Emergency Declaration' as required by Section 13.15(B)" of the CBA. *Arbitration Award,* p.

21. *See* Findings of Fact ¶ 27.

Looking solely at the plain language of Section 13.15(B) and "giving the language its plain meaning within the four corners of the Agreement," the Arbitrator found that Section 13.15(B) had two requirements: the declaration of an emergency and the granting of leave. Specifically, the Arbitrator focused on the first two and last sentences of 13.15(B), which state "[e]mployees not designated essential **may** be required to work during an emergency. When an **emergency other than a weather emergency is declared and leave is granted** such leave is to be used in [certain] circumstances. . . . **Payment for hours worked** for other than weather emergencies **shall be pursuant to Section 13.15(A) above**." (emphasis added). The Arbitrator found this language describes the actions to be taken by the State under Section 13.15(B). Based upon the express language in section 13.15(B) regarding when an emergency other than a weather emergency is declared and leave is granted, the Arbitrator found that "Section 13.15(B) undoubtedly has two requirements, the declaration of an emergency and the granting of leave." *Arbitration Award,* p. 26. In making this finding, the Arbitrator did not consider any terms from DAS Directive HR-D-11. The Arbitrator did not add any terms from DAS Directive HR-D-11 to section 13.15(B) of the CBA. Nor did the Arbitrator import the State's definition of "public safety emergency" from DAS Directive HR-D-11 into the CBA. Instead, the Arbitrator found that the employee leave requirement was expressed by terms and conditions of the CBA itself.

Specifically, the Arbitrator found that the last sentence of Section 13.15(B) provides that "[p]ayment for hours worked for other than weather emergencies **shall be pursuant to Section 13.15(A) above**." *Arbitration Award*, p. 22 (emphasis added). Based on this language of Section 13.15(B), the Arbitrator found that the pay regulations of Section 13.15(A) are expressly incorporated into Section 13.15(B), including the "regime" that if employees work during a

weather emergency under Section 13.15(A) they receive the regular rate of pay same as those on leave and they receive an eight dollar stipend for working during the weather emergency while others are on leave. *Arbitration Award,* p. 24; Findings of Fact ¶¶ 30-33. Consequently, the Arbitrator determined that "[t]o receive the stipend during an Other Than Weather Emergency, §13.15(B) requires that there be employees working during such an emergency while other employees, who are not working, are receiving the regular rate of pay." *Arbitration Award,* p. 24; Findings of Fact ¶ 34. In making this finding, the Arbitrator did not consider any terms from DAS Directive HR-D-11. The Arbitrator did not add any terms from DAS Directive HR-D-11 to section 13.15(B) of the CBA. Nor did the Arbitrator import the State's definition of "public safety emergency" from DAS Directive HR-D-11 into the CBA.

The Union also argues that on page 25 of the Arbitration Award "the Arbitrator decided that the 'emergency' was not an 'emergency for purposes of §13.15(B)." Mot. to Vacate, p. 6. That is not what the Arbitrator decided. The Arbitrator noted that "<u>the Employer argues</u> that [Executive Order 2020-01D] did not declare an emergency 'for the purpose' of §13.15(B)." *Arbitration Award,* p. 25 (emphasis added). The Arbitrator found as compared to a weather emergency under Section 13.15(A), the first sentence of Section 13.15(B) provides that non-essential employees may be required to work "during an emergency" and so, "the default concept of an 'Other Than Weather Emergency' is that all employees continue to work. *Id.*

Next, looking at the second sentence of Section 13.15(B) that states when a non-weather emergency is declared "and leave is granted" the Arbitrator found that "[t]he default condition of employees working in such emergency can have an exception when leave is granted." *Id.* The Arbitrator also found that this sentence of Section 13.15(B) "goes on to describe how the Other Than Weather Emergency leave is to be used." *Id.* He noted that this is different than Section

13.15(A), which does not designate how weather emergency leave is to be used. *Id.* As a result, based solely on the language of Section 13.15(B), the Arbitrator found that "[l]eave is not only an exception for a §13.15(B) emergency it is a limited exception" and, in this situation, "a general leave was not granted according to all the testimony." *Id.*

Nor did the Arbitrator rewrite the CBA to require that an "Other Than Weather Emergency" pursuant to Section 13.15(B) be a "public safety emergency" subject to DAS Directive HR-D-11. Despite commenting that "[t]he Union participated with the State in developing pandemic plans," and that the State shared its "annotation documents" with the Union, the Arbitrator rejected the State's claim that DAS Directive HR-D-11 governs the actions of all State agencies where a Public Safety Emergency is concerned and by excluding DAS Directive HR-D-11 from Executive Order 2020-01D, the Governor's Executive Order did not qualify as an "Emergency Declaration" as required by section 13.15(B) of the CBA. *Arbitration Award.* p. 16, 20-21; Findings of Fact ¶ 23. The Magistrate agrees with the Union (and the Arbitrator) that nothing in the CBA conditions the stipend on there being a Public Safety Emergency or compliance with DAS Directive HR-D-11. This is why the Arbitrator found that "[t]he State cannot override the CBA through a unilateral directive." *Arbitration Award,* p. 20. *See also Arbitration Award,* p. 13 ("Directive HR-D-11 recognizes public safety emergency and emergency declarations that are not a public safety emergency. The State presented no evidence that the Union negotiated or agreed to Directive HR-D-11. There is no definition of Public Safety Emergency contained in the CBA. The State cannot override the CBA through the promulgation of a unilateral directive.").

Additionally, the State is correct in asserting that the Arbitrator's discussion regarding a "Public Safety Emergency" was to provide an example of an emergency that would have met the two requirements for payment of the stipend under Section 13.15(B), i.e. declaration of an

emergency and the granting of leave. Appl. to Confirm, p. 11. In doing so, the Arbitrator found that a Public Safety Emergency has been defined in DAS Directive HR-D-11 as a proclamation which limits "a State employees' obligation" to work. *Arbitration Award*, p. 27. As a result, the Arbitrator found that a Public Safety Emergency under DAS Directive HR-D-11 has a stipend payment component and "can be a weather emergency but it can also be an 'Other Than Weather Emergency." *Id.* Whereas leave, and thus payment of a stipend, is an exception for Other Than Weather Emergencies under Section 13.15(B) of the CBA. *Id.* As a result, the Arbitrator rejected the Union's argument that "the leave element in the CBA is simply implied or somehow included in the declaration element." *Arbitration Award*, p. 26. The Arbitrator did not find, as the Union argues, that the Union established that the CBA's plain language requires that employes who work during an Other Than Weather Emergency always receive their regular pay and stipend.

Instead, he found that because Executive Order 2020-01D expressly excluded DAS Directive HR-D-11, the "Other Than Weather Emergency" declared by the Governor was not a Public Safety Emergency with the inherent, automatic triggering of the payment of a stipend. *Arbitration Award*, p. 27. "The Executive Order did not declare an emergency that had implicit any form of leave of absence. It did not declare any form of Other Than Weather Emergency <u>in which leave is inherently granted</u>." *Arbitration Award,* p. 27 (emphasis added). It was a different type of an Other Than Weather Emergency and "the predicate for he §13.15 stipend is absent." Thus, the Union had to prove the two prerequisites of Section 13.15(B) for payment of a stipend, i.e. declaration of an emergency and the granting of leave to a class of employees. In addition to finding that a general leave was not granted according to all the testimony at the arbitration, the Arbitrator found that the "Union failed to prove its case that a Public Safety Emergency was declared on circumstantial evidence." *Arbitration Award,* p. 28.

Simply put, based on the language of the CBA and the requirement that a 13.15(B) stipend be paid "pursuant to Section 13.15(A)" and its leave requirements, the Arbitrator found that Section 13.15(B) of the CBA has two prerequisites to the $8.00 stipend being paid: (1) that an emergency be declared by the State, and (2) that leave be granted to a class of employees. *See Arbitration Award*, p. 25-26; Findings of Fact ¶ 37. While the Arbitrator found that an "Other Than Weather Emergency" was declared in Executive Order 2020-01, he concluded it was not a Public Safety Emergency with inherent leave. He also found that because leave was not granted to a class of employees in Executive Order 2020-01 and because the Union could not meet it burden of establishing that leave was granted to a class of employees, "the stipend is not due any employee" under the express language of Section 13.15(B) of the CBA. *Arbitration Award*, p. 26.

Accordingly, the Magistrate finds and concludes that the Arbitrator's analysis of the requirements of Section 13.15(B) for the payment of a stipend was rationally derived from the applicable terms of the CBA. The record establishes that the Arbitrator relied on Section 13.15(A) and Section 13.15(B) of the Agreement in analyzing the issue. Additionally, the Magistrate finds and concludes that the Arbitrator did not exceed his powers and did not rewrite Section 13.15(B) of the CBA to condition payment of the stipend on the Union establishing a "public safety emergency" pursuant to DAS Directive HR-D-11.

Nor did the Arbitrator exceed his authority under the CBA by deciding that Executive Order 2020-01D declared an "Other Than Weather Emergency" under Section 13.15(B). The Magistrate finds and concludes that in finding that Section 13.15(B) has two requirements for the payment of a stipend (an emergency is declared by the State and leave is granted to a class of employees), the Arbitrator's analysis drew from the essence of the CBA. It did not depart from the essence of the collective bargaining agreement and only considered the language of Section 13.15 of the CBA.

Because the Arbitrator's decision was rationally derived from the applicable terms of the CBA, the Union's attempt to vacate the award on this basis is not found to be well-taken.

2. The Union's Claim That The Arbitrator Exceeded His Authority By Finding That The Stipend For Hour Worked During A "Other Than Weather Emergency" Did Not Apply Where No Leave Was Granted.

The second argument made by the Union in its Motion to Vacate is that the Arbitrator exceeded his powers by "rewriting the CBA" to provide that employees who work during an "Other than Weather Emergency" do not receive a stipend unless other employees were on paid leave. Mot. p. 13. The Union argues that the CBA does not condition payment of the stipend on leave being granted. The Union claims that the Arbitrator imposed this limitation by reference to DAS Directive HR-D-11 and by speculating that the parties intended to include a leave requirement in the CBA but failed to do so. *Id.* This argument ignores the fact that Section 13.15(B) clearly contains the phrase "[w]hen an emergency, other than weather emergency, is declared and leave is granted." (emphasis added). The argument also ignores the fact that Section 13.15(B) clearly provides that "[p]ayment for hours worked for other than weather emergencies shall be pursuant to Section 13.15(A) above" (emphasis added), and that the Arbitrator found that Section 13.15(A) has a two-tiered payment system based upon a class of employees being on leave. As a result, the Magistrate finds the Union's argument is not supported by the arbitration record or the *Arbitration Award* and is without merit.

Once again looking only at the plain language of section 13.15(B) of the CBA, the Arbitrator found that the pay regulations of Section 13.15(A), including payment of a stipend, are expressly incorporated into Section 13.15(B) through the language in Section 13.15(B) that "[p]ayment for hours worked for other than weather emergencies shall be pursuant to Section 13.15(A) above." *Arbitration Award,* p. 24 (emphasis added). The Arbitrator found that having some employees

idle and some employees working is critical to the application of the stipend under Section 13.15(A), and that 13.15(A) "juxtaposes the two classes of employees," those working and those not working with regard to payment. *Id.* Under Section 13.15(A), those who do not work receive the regular rate of pay and those who do work receive their regular rate of pay and the stipend. *Arbitration Award*, p. 24-26, Findings of Fact ¶ 29-32.

Consequently, based solely on the language of Section 13.15(A) and 13.15(B) of the CBA, the Arbitrator determined that to receive the $8.00 an hour stipend during an Other Than Weather Emergency, section 13.15(B) requires that there be employees working during such an emergency while other employees, who are not working, are receiving their regular pay. In making this determination, the Arbitrator found that the default concept of an "Other than Weather Emergency" is that all employees continue to work during the emergency and everyone receives their regular rate of pay. *Arbitration Award,* p. 24-25; Findings of Fact ¶ 36. As a result, the Arbitrator concluded that leave is an exception for a Section 13.15(B) other than weather emergency and in such exceptional circumstances a stipend is paid to the class of employees who work and not the class of employees who are not working. *Arbitration Award,* p. 24. When looking at the language of Executive Order 2020-01D, the Arbitrator found that Executive Order 2020-01D declared an emergency that was an Other Than Weather Emergency for purposes of CBA Section 13.15(B) but was not in any form, such as a Public Safety Emergency, "that had implicit any form of leave of absence." *Arbitration Award,* p. 27; Findings of Fact ¶ 43.

In making these findings, the Arbitrator did not consider any terms from DAS Directive HR-D-11. The Arbitrator did not add any terms from DAS Directive HR-D-11 to Section 13.15(B) or Section 13.15(A) of the CBA. Nor did the Arbitrator import the State's definition of "public safety emergency" from DAS Directive HR-D-11 into the CBA. Instead, the Arbitrator found that the

employee leave requirement was expressed by terms and conditions of the CBA itself.

Next, the Union argues that the Arbitrator rewrote the CBA to limit the stipend to emergencies where there were employees on leave who did not work and, therefore, did not receive the stipend, because of the definition of a "public safety emergency" in DAS Directive HR-D-11. Motion to Vacate, p. 11. The Union asserts that "arbitrator added this limitation to the CBA because a 'public safety emergency,' per HR-D-11 'by definition has *implicit* within it a general leave of absence which was declaimed and never happened." *Id.* In its memorandum in opposition to the State's Motion to Confirm, the Union takes its argument a step further and baldly asserts that the Arbitrator added this leave condition by "imposing his own brand of industrial justice" based on "the arbitrator's views regarding the appropriateness of a stipend . …" Mem in Opp. p. 10.

First, the Arbitrator did not find that the Union had a burden of establishing that a public safety emergency was declared. In considering the Union's alternative theories of breach, specifically, the Union's claim that the facts surrounding the COVID-19 pandemic and the State's response thereto constituted circumstantial evidence that a Public Safey Emergency was declared, the Arbitrator found the Union's argument failed because Executive Order 2020-10D did declare an emergency. *Arbitration Award,* p. 28; Findings of Fact ¶ 46. The Arbitrator found it just did not declare a public safety emergency. *Id.*

Second, the Arbitrator found that Executive Order 2020-01D specifically disclaimed the declaration of a Public Safety Emergency pursuant to DAS Directive HR-D-11. *Arbitration Award,* p. 29; Findings of Fact ¶ 49. As a result, the Arbitrator recognized that the State chose not to implement an emergency "which entails the granting of leave." *Id.* Instead, the Arbitrator found that the Union was required to prove that an emergency was declared and leave was granted to a class of employees. The Arbitrator found that the Union could have proved that both of these

occurrences had taken place if it proved that (a) public safety emergency had been declared (with inherent leave) or (b) an ordinary other than a weather emergency had been declared and the State had also leave to a class of employees. The Arbitrator found that an other than weather emergency was declared but rejected the Union's claim that a public safety emergency had been declared by circumstantial evidence. The Arbitrator also found that the Union did not meet its burden of establishing that leave was granted to any employees based upon each party testifying that "leave was not granted." *Arbitration Award,* p. 8.

Third, to the extent that the Union essentially argues bias on the part of the Arbitrator, under Ohio law, arbitration awards are entitled to a presumption of regularity and formality, and every reasonable construction of the Arbitrator's award will be indulged to give effect to such proceedings. *Campbell v. Automatic Die & Products Co.,* 162 Ohio St. 321, 329 (1954). Even where it is alleged that the arbitrator exceeded his or her authority, a reviewing court's inquiry is necessary limited by the presumed validity of the arbitrator's award. *Findlay City School Dist. Bd. of Edn. v. Findlay Edn. Assn.,* 49 Ohio St.3d 129 (1990), paragraph one of the syllabus. Moreover, to overcome the presumption of regularity because of an alleged bias on the part of the arbitrator, a party must demonstrate "evident partiality." R.C. 2711.10(B). "The mere imaginative appearance or suspicion of partiality does not sufficiently establish "evident partiality" within the meaning of R.. 2711.10(B)." *Reynoldsburg City Schools Dist. Bd. of Edn. v. Licking Heights Local Schools Dist. Bd. of Edn.,* 2011-Ohio-5063, ¶ 25 (10th Dist.).

Here, the Union does not assert, and the arbitration record does not support a finding of, "evident partiality" on the part of the Arbitrator. The Magistrate find that the Arbitrator's conclusions were based on his interpretation of the CBA with full recognition and acknowledgment of his duty "to determine and carry out the mutual intention of the parties. . . first

drawn from the language alone . . . without resorting to any extrinsic evidence, i.e. any source other than the four corners of the Agreement." *Arbitration Award,* p. 19. The Arbitrator did not make up his own contract. Rather, the Arbitrator made it clear that he did not need to resort to any evidence other than the CBA itself in order to resolve this matter. He determined "the resolution can be found in the plain language applied to the facts found" because "[t]his dispute is one of language only" and the "matter being resolved is clearly and only one of the plain meaning within the four corners of the Agreement." *Id.* p. 20.

Based on the foregoing, it was the Arbitrator's opinion that the Union failed to prove that its reading of Section 13.15(B) is the more probable and that the State breached its terms. *Id.* p. 29-30.

Conclusions of Law

The Magistrate finds and concludes that the arbitrator's analysis of this issue and the payment of leave under Section 13.15(B) was rationally derived from the applicable terms of the CBA.[1] Having reviewed the record of the arbitration, including Executive Order 2020-01D, the CBA, the arbitration exhibits, the Arbitration Award, as well as the motions and briefing of the parties, as well as conducted an evidentiary hearing on the motions, the Magistrate finds and concludes that a rational nexus exists between the CBA, specifically section 13.15, and the Arbitrator's Award.

The Magistrate further finds and concludes that there is not sufficient evidence in the record from which the Magistrate can recommend to the Court that the Arbitrator's interpretation of

[1] Additionally, it was the Arbitrator's opinion that the Union failed to meet its burden with regard to its alternative theories. The Arbitrator found that the Union failed to "establish that an Emergency or Public Safety Emergency was declared by circumstantial evidence" because the direct, express evidence was that an Other Than Weather Emergency was declared. *Arbitration Award,* p. 28, 30 (emphasis added). The Union also failed to prove its theory that a failure to declare an Emergency or Public Safety Emergency was an abuse of managerial discretion. *Id.* p. 30. In addition to finding that an emergency was declared, the Arbitrator found that the State's choice to devote its resources toward providing the services of State agencies throughout the pandemic did not constitute an abuse of discretion. *Id.*

Section 13.15(B), as it relates to emergency pay for an Other Than Weather Emergency, is inconsistent with the CBA and that the State breached its terms.

The Magistrate finds and concludes the Award issued by the Arbitrator should be upheld. The Arbitrator did not exceed his powers as defined by the collective bargaining agreement between the parties and applicable law. Nor did the Arbitrator's award depart from the essence of the collective bargaining agreement. The award did not conflict with the express terms of the CBA. The award was not without rational support. More importantly, the award was rationally derived from the terms of the CBA. The Union's disagreement with the Arbitrator's interpretation of section 13.15 of the CBA and its application to the emergency declared in Executive Order 2020-01D is not sufficient to vacate or modify the Arbitration Award.

DECISION

Pursuant to Civ.R. 53(D)(3)(a)(ii) and upon consideration of the foregoing Findings of Fact and Conclusions of Law, this Magistrate **RECOMMENDS** that the Court (i) **DENY** Petitioner/Movant Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO Union's Motion to Vacate Arbitration Award filed on July 29, 2022 and (ii) **GRANT** Respondent State of Ohio's Application To Confirm The May 16, 2022 Arbitration Award filed on September 30, 2022**.**

Respondent **shall** submit a proposed entry to Judge Holbrook pursuant to Local Rule 25.

A PARTY SHALL NOT ASSIGN AS ERROR ON APPEAL THE COURT'S ADOPTION OF ANY FACTUAL FINDING OR LEGAL CONCLUSION IN THIS DECISION, WHETHER OR NOT SPECIFICALLY DESIGNATED AS A FINDING OF FACT OR CONCLUSION OF LAW UNDER CIV.R. 53(D)(3)(a)(ii), UNLESS THE PARTY TIMELY AND SPECIFICALLY OBJECTS TO THAT FACTUAL FINDING OR LEGAL CONCLUSION AS REQUIRED BY CIV.R. 53(D)(3)(b).

Copy via electronic notification: Counsel and parties of record

Franklin County Court of Common Pleas

Date: 10-10-2024

Case Title: OHIO CIVIL SERVICE EMPLOYEES ASSOC LOCAL -VS- STATE OF OHIO

Case Number: 22CV005232

Type: MAGISTRATE DECISION

So Ordered

/s/ Magistrate Elizabeth J Watters