In the Matter of
THE LABOR ARBITRATION BETWEEN:

OCSEA/AFSCME, Local 11 Employee Organization	)	Case No.:OCS-2020-00918
	)	Grievance : Emergency Pay Termination
vs.	)	Grievant: Patty Rich
State of Ohio and Ohio Department of Administrative Services (DAS) Employer Organization	)	ARBITRATOR GREGORY P. SZUTER **ARBITRATION** **DECISION AND AWARD**

for the Employee Organization/Grievant

Union 1st chair : Patty Rich
Union Chair : Michael Duco
Union Chair : Jessica Chester
Union Chair : Mike Tenney
Union Chair : Adam Ruth

for the Employer

Management 1st Chair : Victor Dandridge
Management 2nd Chair : Thomas Dunn
Management Chair : Katharine Nicholson

Date of Decision: May 16, 2022
Briefing Date: April 1, 2022
Grievance Date: March 12, 2020
Hearing Date: February 3 & 17, 2022 (9:00 AM Eastern)
Hearing Locale: Westerville OH 43082

I. INTRODUCTION

The parties to this arbitration are the State of Ohio, Ohio Department of Administrative Services (DAS or State or Employer) and OCSEA/AFSCME, Local 11 (Union or OCSEA) which are the signatories to a collective bargaining agreement effective May 12, 2018 through February 28, 2021 (Agreement or CBA).

II. RECORD OF HEARING

The hearing was held in Worthington, Ohio on February 3 and 17, 2022 at which time the parties presented their evidence. The parties entered written stipulations of fact and procedure (S#) and submitted a written timeline. The parties submitted thirty Joint Exhibits (JX). The Union offered four exhibits (UX) UX 3 having 11 tabbed subparts. The Employer offered one exhibit (MX). A transcript of the testimony was not made. The parties submitted post hearing briefs on April 1, 2022 in lieu of closing arguments. The testimony, stipulations and timeline with the exhibits and briefs constitute the record of hearing.[1]

III. THE GRIEVANCE

The Union filed Grievance OCS-2020-00918 on March 12 2020 claiming the Employer has violated Articles 13.15 and 11 of CBA by failure to pay emergency pay:

> Statement of Grievance: Governor Mike Dewine Issued a State of Emergency regarding of the Coronavirus. This had direct impact on the OCSEA bargaining unit members. The health and safety of our members are at risk.
> Resolution Requested: To implement the 13.15 stipend of $8.00 dollars for all hours worked by our members. Employees that are not essential should not be required to report to work.
> Amendments to Resolution Requested: the stipend is covered under non-weather (13.15 B). This is changing daily of who is reporting to work and who is teleworking.

The parties met over the grievance on April 3, 2020 and was denied. The grievance moved to the mediation process on October 29 2020 without resolution.

IV. PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT[2]

The following excerpts from the Agreement indicate some of the terms considered or construed

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[1] Appendix A Persons in Attendance
Appendix B List of Exhibits
Appendix C Stipulations
Appendix D Timeline of Events - Executive & DOH Orders

[2] *Italics* are inserted in the quoted matter in this section are not for emphasis but for ease of location for the reader. The *italics* used elsewhere are for emphasis added except when noted as being in the original. Bold face in originals is not used.

herein by the parties or by the Arbitrator. As to the merits in dispute:

ARTICLE 5 – MANAGEMENT RIGHTS (JX 1, p. 11)
The Union agrees that all of the functions, rights, powers, responsibilities, and authority of the employer, in regard to the operation of its work and business and the direction of its workforce which the Employer has not specifically abridged, deleted, granted, or modified by the express and specific written provisions of the Agreement are, and shall remain, exclusively those of the Employer.

ARTICLE 11 HEALTH AND SAFETY
11.01 General Duty

Occupational health and safety are the mutual concern of the Employer, the Union and employees. The Union will cooperate with the Employer in encouraging employees to observe applicable safety rules and regulations. ...

ARTICLE 13- WORK WEEK, SCHEDULES AND OVERTIME

13.02 - Work Schedules
...Work schedules for employees who work in seven (7) day operations shall be posted at least fourteen (14) calendar days in advance of the effective date. ...

13.15 - Emergency Leave
A. Weather Emergency

Employees directed not to report to work or sent home due to a weather emergency as declared by the Director of the Department of Public Safety, *shall be granted leave with pay at regular rate for their scheduled work hours during the duration of the weather emergency*. The Director of the Department of Public Safety is the Governor's designee to declare a *weather emergency* which affects the obligation of State employees to travel to and from work. *Employees required to report to work or required to stay at work during such weather emergency shall receive their total rate of pay for hours worked during the weather emergency. In addition, employees who work during a weather emergency declared under this section shall receive a stipend of eight dollars ($8.00) per hour worked.*

An *emergency* shall be considered to exist when declared by the Employer; for the county, area or facility where an employee lives or works.

For the purpose of this Section, an *emergency shall not* be considered to be an occurrence which is normal or reasonably foreseeable to the place of employment and/or position description of the employee.

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

Employees who are designated as essential employees shall be advised of the designation and provided appropriate documentation. Essential employees shall be advised that they should expect to work during weather emergencies unless otherwise advised. However, they are not guaranteed work. Nothing in this section prevents an appointing authority from using his or her *discretion* in sending *essential employees* home or instructing them not to report for work once a weather emergency has been declared. Essential employees who do not report when required during an

emergency must *show cause* that they were prevented from reporting because of the emergency. During the year, extreme weather conditions may exist and roadway emergencies may be declared by local sheriffs in certain counties, *yet no formal weather emergency is declared by the Governor* or designee *and State public offices remain open*. Should this situation occur, Agency Directors and department heads are encouraged to exercise their judgment *and discretion* to permit *non-essential employees* to use any accrued vacation, personal or compensatory leave, if such employees choose not to come to work due to extenuating circumstances caused by extreme weather conditions. *Non-essential employees* with no or inadequate accrued leave may be granted *leave without pay*. Nothing in this section prevents an appointing authority from using his/her *discretion* to temporarily *reassign non- essential* employees to indoor job duties, consistent with their job classification, so that such employees are not performing unnecessary road or travel-related duties during days or shifts of especially inclement weather.

B. Other Than Weather Emergency

Employees not designated essential may be required to work during *an emergency*. *When an emergency, other than a weather emergency, is declared 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.

Appendix N: Work Areas for Mental Health and Addiction Services, Developmental Disabilities, Department of Youth Services and Veteran Services
B. Selection of Work Area Process
. . .
The Employer retains the right to deny a bid and/or change an assignment for good management reasons, including but not limited to the best interests of the client, patient, residents or youth after consultation with the affected employee and the Union. JX 1, Appendix N, p. 254.

Appendix Q: Agency Specific Agreements
Dept. Rehabilitation and Corrections
. . .
Any immediate threat to the health, safety and security of the institution shall take priority over the Pick-A-Post agreement. JX 1,Appendix Q, p. 335.

As to the grievance and arbitration procedure:

ARTICLE 25 GRIEVANCE PROCEDURE
25.03 Arbitration Procedures...
The expenses and fees of the arbitrator shall be shared equally by the parties.

The decision and award of the arbitrator shall be final and binding on the parties. The arbitrator shall render his/her decision in writing as soon as possible, but no later than forty-five (45) days after (1) the conclusion of the hearing; or (2) the date written closings are due to the arbitrator, unless the parties agree otherwise.

Only disputes involving interpretation, application or alleged violation of a provision of the Agreement shall be subject to arbitration. The arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement, nor shall he/she impose on either party a limitation or obligation not specifically required by the express language of this Agreement.

V. STIPULATIONS

The parties agreed they have an arbitration contract and that the dispute arose under the CBA. The parties have agreed that the grievance is properly before the Arbitrator for a final and binding decision on the merits (S #1) and agreed on the statement of the issue.

VII. STATEMENT OF THE ISSUES FOR DECISION

1. Did Management violate §13.15 (B) of the contract, if so, what shall the remedy be?

VIII. THE FINDINGS OF FACT BASED ON THE RECORD AS A WHOLE.

A. CHRONOLOGY OF THE DECLARATION OF EMERGENCY

1.0 Background

Section 13.15 was incorporated into the collective bargaining agreement ("CBA") between the two parties in the **2006-2009** contract negotiations. It remained unchanged in each CBA, including the **2018-2021** CBA, which is at issue in this case.

The State annotated the CBA language in a separate document for each contract for the years between 2006 and 2015. See (2006-2009, JX 5; 2009-2012, JX 6; and 2012-2015, JX 7). Mike Duco in his role at the time as the Deputy Director at the Office of Collective Bargaining was responsible for the creation and distribution of the documents. These annotation documents were intended to jointly express the intent of the leadership of OCSEA and the Office of Collective Bargaining. The annotation documents were distributed to the Union and Agency personnel. While at the arbitration Mr. Duco, in his role now as Chief Legal Counsel for the OCSEA claimed that the CBA annotation document was a management creation, it was nonetheless published and shared by the parties over time.

Tim Shafer, the OCSEA Operations Director, testified that he participated over time in discussions within the State regarding its pandemic plans. In **2006 or 2007** the H5N1 virus (Bird Flu) was a possible threat to the health and safety of State employees. The Union participated with the State in developing pandemic plans.

A gubernatorial emergency declaration was issued on **September 15, 2008** by Governor Ted Strickland for purposes of seeking federal assistance. The declaration utilized the pattern language established similar to Article 13.15(B). It contained the following provision:

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

In interpreting this language Arbitrator Dwight A. Washington opined that "Given the specificity, contained in paragraph 7 of Governor Strickland's declaration, the evidence indicates, and I find, that an emergency for Public Safety purposes was not declared on September 15th." *In the matter of State of Ohio-Department of Mental Health and SEIU/District 1199* Case No. 23-06(20081023)-0020-02-11 (Footnote 1).

The State's pandemic plans were updated throughout the years to address continued threats from the H1N1 virus (Swine Flu) in **2009** that also had pandemic possibilities. The threat posed by MERS in **2012** was another occasion for review of the plans. Although those viruses never fully developed to pandemic levels, the State's plans were maintained. The Department of Administrative Services Directive HR-D-11entitled "Public Safety Emergency Procedures" was developed and effective on **October 6, 2011.** It was revised **January 12. 2018.**

After the **2009-2012** CBA was negotiated, the State and Union conducted a joint training session. The annotation for §13.15 was the same in each iteration. It required that emergencies for purposes of the provisions of § 13.15, shall be declared only pursuant to DAS directive HR-D-11 or its successor.

2.0 SARS -Co-V-2 (Covid-19) Pandemic in Ohio

In early **2020**, the citizens of the United States and of the State of Ohio gradually began to learn of the Covid 19 outbreak and the eventual worldwide spread. The State and nation had not faced a pandemic of this magnitude since the 1918 Spanish Flu. On **January 23, 2020** the Ohio Department of Health recognized that Covid 19 is a reportable disease and within days hosted a statewide call the health departments and providers. On **January 30, 2020** the World Health Organization declared the Covid outbreak public an international public health concern. The U.S. Secretary of Health and Human Services declared a public health emergency on **January 31, 2020.**

The Ohio Department of Health (DOH) engaged in several activities in the following weeks by various means educate state agencies on the issue. In **February 2020** issued a statewide health alert network organized and trained call center employees, notified the media, updated agency heads in cabinet meetings, and conducted advance planning including a "pandemic tabletop exercise. "It held additional conference calls to healthcare providers throughout the State and published the Governor's updated Covid 19 Prevention and Preparedness Plan. On **March 1, 2020** the President of United States issued a proclamation declaring a National Emergency. JX 9. In **March 2020** the call center was activated. The Department hosted the Governor's Summit on Covid 19 Preparedness.

By early March the CDC reported 98,000 cases and over 3000 deaths worldwide. On **March 9, 2020** the Governor Mike DeWine signed EO 2020-01D "Declaring a State of Emergency" (JX 27, "Declation fo Emergency") which was the State's response to what eventually became Covid-19 pandemic. That day the first three cases in Ohio had tested positive. The Ohio Emergency Management Agency activated the Emergency Operations Center.

The Executive Order ("EO") expressly states several times that an emergency exists. It begins:

> Now therefore I, Mike DeWine, Governor Of the State of Ohio, by virtue of the authority vested in me by the Constitution and laws of the State and in accordance with Section 5502.22 of the Ohio Revised Code do hereby order and direct that:
> 1. *A state of emergency is declared for the entire State* to protect the well-being of the citizens of Ohio from the dangerous effects of Covid 19, to justify 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.

The express purpose of the Declaration of Emergency is to muster the personnel of the State, without excluding any of the bargaining units, to coordinate in assisting the protection of lives of Ohio citizens and residents. There is no intention expressed at EO 2020-01D ¶1 that the state of emergency is an occasion for furlough of State employees. It did not reference any of the State's collective bargaining agreements. The EO does not expressly declare an emergency for purposes of CBA §13.15 (B).

The Executive Order addresses certain agencies requesting particular responses. DAS was requested to suspend purchasing regulations during the emergency for the purposes of resources or supplies to assist in the emergency. EO ¶2. The DOH was directed to issue guidelines healthcare providers and institutions and businesses. EO ¶ 3, 4. The Governor addresses all State agencies directing them to implement procedures consistent with the recommendations from the DOH. EO ¶5. In the closing paragraphs it mentions citizens' responsibilities.

The Governor specifically excluded the DAS Directive HR-D-11 JX 15. The Proclamation at EO ¶ 6 (p. 3) states:

> This Proclamation does not require the implementation of Department of Administrative Services Directive HR-D-11. Accordingly, *State employees' obligation to travel to and from work is not to be limited as a result of this proclamation*.

EO 2020-01D expressly and explicitly saves Directive HR-D-11 from implementation. Directive HR-D-11 addresses *inter alia* the declaration of public safety emergency and the granting of leaves and compensation in connection therewith. In addition to the Governor, the Directive specifies that the Director of Department of Public Safety (DPS) is the Governor's designee for declaring a public safety emergency. Directive HR-D-11(JX15) reads as follows:

> 1.0 Purpose
> To establish a uniform policy for all agencies to implement during a public safety emergency.
> ...
> 2.0 Policy
> It is the policy of the State of Ohio to consistently apply this policy to all employees regardless of whether they are classified, unclassified, exempt from collective bargaining, or subject to applicable collective bargaining agreements.
>
> 2.1 A public safety emergency declaration or proclamation can only be made by the Governor or the Governor's designee. The Director of DPS is the Governor's designee to declare a public safety

> emergency.… A public safety emergency cannot be declared by an individual agency, department, or director.

Directive HR-D-11 defines Public Safety Emergency at Section 6.0 Appendix A(a)&(d) p.7:

> A term of art which refers to all formal declarations or proclamations *which limit a State employees' obligation to travel to and from work for a specific period of time*. Such emergencies may include, but are not limited to, severe weather conditions like snowstorms.

It further defines the term Emergency as:

> Any period during which Congress of the United States or a chief executive officer has declared or proclaimed that an emergency exists. This formal declaration or proclamation, can be made by the chief executive of any political subdivision, including the Governor, for a natural disaster, man-made disaster, hazardous materials incidents or civil disturbance.

DAS HR-D-11 is a comprehensive regulation. It reaches every classification of employee in the State. For the purposes stated it accomplishes several important tasks. It identifies the Governor and the Director of DPS as the only State officials with authority to declare a Public Safety Emergency, and the Director's authority is derivative of the Governor.

Through its definitions it clarifies the differences between an "emergency" and a "public safety emergency." An "ordinary"[3] emergency can be declared by any chief executive from the President down to a local mayor concerning almost every class of public disaster or crisis. However, a "public safety emergency" is a species of that genus. It refers to all and any proclamations or declarations that have the effect of limiting *state employees'* obligation to travel to and from work. It has the further limitation of being for a specified time period. Some types of public safety emergencies are listed ("severe weather conditions like snowstorms"). However, the regulation specifies that public safety emergencies "may include, but are not limited to" bad weather.

Consequently a worldwide pandemic could certainly fall within the subject matter scope of the public safety emergency definition. To actually become a public safety emergency it requires certain additional steps. It requires a proclamation by the Governor or Director of DPS. It requires a directive to limit State employees attendance at work. It needs a statement of duration. Therefore while the Covid pandemic in Ohio could have been a public safety emergency, the necessary components of the definition were not completed. It was not a public safety emergency. Rather than leave it to interpretation, EO 2020-01D suspended the implementation of the DPS HR-D-11.

Neither did EO 2020-01D modify the requirements set forth in HR-D-11. Director of DPS is the Governor's designee for declaring a public safety emergency both before and after EO 2020-01D.

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[3] This term is used qualitatively as in "ordinary negligence" as opposed to "gross negligence." As such it denotes an ordinary harm in contrast with a greater harm of similar type having additional qualities. In the case of negligence it is " a lack of due care" as opposed to "reckless and wanton."

In the EO the Governor did not appoint the Health Department Director as a designee for declaring an emergency. Rather than delegate to the Director of the DOH any authority with respect to Directive HR-D-11, the EO 2020-01D delegates to the various State agencies the responsibility to adopt procedures consistent with the public health objectives at EO ¶5, short of being delegated to declare a public safety emergency.

The Union filed this grievance on **March 12, 2020**.

On **March 12, 2020**, many employees were directed to telework from home. There was no indication of the duration of the telework. Approximately 14,000-16,000 OCSEA members/employees eventually worked from home by telework.(S# 2).

The Director of the Department of Health issued a Stay-at-Home order to the public on **March 22, 2020.** JX 27. Many steps were taken in the proactive planning and actions taken by the State to address the pandemic. They are summarized in the Appendices hereto. Among them are the following. The DOH issued orders on **April 30**, and **May 14, 2020**, that allowed certain Ohio businesses to resume operations. The Governor even postponed the May primary election to reduce the possibility of voters contracting the COVID-19 virus while standing in line to vote.(S# 5) On **May 20, 2020** the stay at home order was modified followed by reopening orders by various categories. Not listed was the order by the Governor revoking the March 9, 2020 EO 2020-01D on **June 18, 2021.**

B. STIPULATIONS AND TESTIMONY

The agencies are categorized as Institutional and Administrative agencies. EO 2020-01D ¶5 reads:

> State agencies shall develop and implement procedures including suspending or adopting temporary rules with in an agency's authority, consistent with recommendations from the Department of Health designed to prevent or alleviate this public health threat.

This is a broad delegation to each of the State agencies to take prudential actions to address the pandemic in a bottom-up fashion.

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." The State had both essential and nonessential workers report to their worksites. The State also had essential and nonessential workers working from home.(S# 11,12,13,14). The parties have stipulated that all employees either did their work by teleworking or by reporting in to the workplace.(S# 3)

1.0 Administrative Agencies

A majority of the teleworking policies stated the purpose for teleworking was for emergency reasons. JX 26.The State also had employees sign teleworking agreements that stated the purpose was for an

emergency. There were policies in place stating that employees with discipline, on probation or who had performance issues were not candidates for teleworking. However, those policies were not enforced by the State during the pandemic. Other policies stated that only management level classifications are able to telework but bargaining unit employees also did telework from home. The Union claims that such actions violated these policies. The State claims that the emergency suspended the need to follow those policies and are consistent with the EO 2020-01D.

Though there were OCSEA bargaining unit employees sent home for emergency teleworking, many continued to report to work. The Union put on testimony from a sampling of classifications. The facilities requiring employees to report in-person changed drastically. New protocols were established regarding physical contact (facial masks, social distancing, etc.). All agencies started health screenings in March 2020.(S# 9) Everyone reporting to work who was subject to health screening that showed any type of symptom was sent home and was on their own time.

Deneise Reed, **Ohio Department of Health**, testified that the DOH Lab employees reported to work daily. The DOH had the responsibility of Covid testing. Ms. Reed explained that a significant portion of their job is impossible to social distance because they run the various tests on machines that are not moveable by the employees.

Willis McClure from the **Ohio Department of Public Safety** (DPS) testified that several classifications continued to report to the worksite. He testified that as a Document Delivery Tech, he could not social distance. He also testified to all the unprecedented changes that took place at DPS, such as: Driver License renewals were extended a year, driver's license examinations were shut down, and driver's license and vehicle registration expirations were extended. (S# 5) Fewer tickets were written by the Highway Patrol.

Rob Frost, **Ohio Department of Agriculture**, testified the meat plants took a hard hit with outbreaks of Covid. He testified to the Agriculture Essential Employee Policy (JX 17) which outlines who are considered essential employees and required to report to work. This policy outlines two (2) types of emergencies: (1). Public Safety Emergency (e.g. extreme weather conditions), (2). other emergency circumstances. Mr. Frost testified that several classifications needed to report to work daily. During meat inspections, it is difficult for an inspector to social distance because they have contact with other plant employees on a regular basis. Meat Inspectors completed their reports at the plant facilities within a confined area where plant and other Agriculture employees would be.

Agriculture bargaining unit employees who were exposed had to subsequently quarantine at home on their own time. Mr. Frost believed that management could have improved safety by limiting the number of employees showing up at a plant at the same time. He did not mention efforts he made to accomplish that.

Chuck Koch, **Ohio Department of Transportation** (ODOT), testified that he reported to work daily along with several other ODOT classifications. As a Highway Technician, Mr. Koch testified that positions cannot always social distance. Highway projects routinely require outside work with other

ODOT employees and outside contractors. Even though ODOT did attempt to social distance while in their assigned truck, this caused multiple ODOT vehicles to be parked along the highways which could present safety concerns.

ODOT stopped training for many classifications in 2021. Some of these classifications have negotiated training that allows for automatic progression from one level to the next in the classification series. By stopping the training employees were prolonged in their progression to the next level which also impacts receiving the required pay increase.

ODOT used to send letters around December of each year to employees who were required to work during emergencies. The December 2019 letter, stated: "This letter authorizes you to travel to and from work during any weather or other emergency declared…." JX 13, p. 1. The 2020 letter was sent in September, three months early, and stated: "During an emergency, you must carry [this letter]…. this letter authorizes you to travel to and from work during an emergency…" JX13, p 2. The letter had removed "weather." The 2021 letter was changed yet again to state: "During a public safety emergency"… JX 13, p 3. The ODOT Director testified about sending ODOT employees home to telework and implementing various new procedures for those reporting-in. Several times he mentioned that Covid-19 is an emergency JX 29.

2.0 Institutional Agencies

Many employees reported to work on site in institutional settings. All the 24/7 operations such as inmate and patient programs changed. The agencies changed work schedules report-in locations work assignments and "pick a post". (S# 6) DRC halted visitation and suspended other programs particularly those of enrichment. (S# 7) It also stopped the internal lateral transfers of employees under the terms of the CBA.(S# 8). These programs play a vital role for recovery of inmates and patients. An unprecedented decision was made to release low-level and non-violent inmates from the State correctional facilities for emergency purposes. JX 11.

Tim Shafer, the OCSEA Operations Director, testified that changes to the Pick-A-Post happened nearly every day during the Covid 19 pandemic. Some Work Area Agreements in Appendix Q allowed employees to chose work area, assignment and schedules. The negotiated language requires positing schedules in advance and Appendix Q allows the selection. During the pandemic, management unilaterally changed work area assignment and schedules. *Carl Vanbibber, Wilson Humphrey and Jeana Campolo* each testified that changes were occurring constantly and with very little consistency. Employees were given little, if any, notice of schedule changes. Management explained that the contract allows such variation on Appendix Q.

Chris Mabe, the OCSEA Union President testified that **Marion Correctional Facility** was the epicenter of Covid cases in Ohio at one point. The Governor had to deploy the Ohio State Highway Patrol and Ohio National Guard to help staff prisons. (S#15) These were used to provide perimeter checks usually performed by correction officers. Inmates were released early for their safety. The Covid vaccine was rolled out starting in the institutional settings at the end of **January 2021**. JX 20,

p 9.

Tim Watson testified about the inconsistencies of implementing cohorts and overtime in the Department of Rehabilitation and Correction (DRC).The DRC employees could only work volunteer overtime within their assigned cohort. When management mandated overtime, employees were allowed to cross into another cohort. Mr. Shafer that this has never happened in his 30 plus years working with DRC.

Management unilaterally instituted hazard pay into institutional settings under the Ohio Revised Code. Hazard pay under ORC 124.181(F) is a supplemental pay when a temporary or permanent hazard exists that is not common to the employee's classification. The State determined that this condition existed for many employees who worked in congregate care settings where social distancing was difficult, and individuals were housed in the State's care, making risk of transmission of the virus higher. This supplemental pay was established in **July, 2020** and existed until **December 2021.** A total of $24,144,365.90 was paid out to OCSEA members via the supplemental hazard pay.

OCSEA President Mabe testified that the State implemented a hazard pay which was not contractually mandated. It had not been negotiated like the §13.15(B) stipend. Many other agencies or classifications did not receive it. It was also implemented to begin at various times in various agencies.(S# 10). No one in the administrative agencies received any type of hazard pay.

Adam McKenzie testified regarding American Rescue Act of 2021. This Act allows the State to up to $25,000 per employee who did not telework. UX 3, Tab 8, p. 9. Those employees were defined as employees who did not report to their physical work locations. The funds can be used independently of CBA to pay State employees a premium pay for those who did not telework during the pandemic.

IX. POSITIONS OF THE PARTIES

A. THE UNION POSITION

The Union has three theories of how the State violated §13.15(B).

1.0 There was a declaration of an emergency by both Governor and the Health Director which triggers §13.15 (B).

The State did not offer any reason as to why Covid was not logically an emergency in the workplace beyond the fact that the Director of Public Safety did not declare the emergency. The State's position that only the Director of Public Safety could trigger an emergency is contrived. There would be no need to include language that the Governor or designee could declare an emergency if the Governor's executive order would not trigger an emergency pursuant to §13.15 (B) of the CBA. The Director of Health can be the designee in public health matters and her declarations are independent declarations of an emergency per §13.15(B).

It is possible that an executive order may exclude an emergency under §13.15 when such an emergency does not impact the workers or the workplace. But if excluded an emergency that impacts the health and safety of the workforce and/or the terms and conditions of the workforce, would render §13.15 superfluous and meaningless. The State defectively tried to write §13.15 out of the EO 2020-01D. That is proof of bad faith or unreasonable and arbitrary decision making. *infra.*

The State also tried to argue that §13.15 (B) requires that employees must be on administrative leave as a condition precedent to an emergency existing. The language clearly is not a condition precedent. It merely clarifies when leave is appropriate. It clearly is not a condition precedent to a declared emergency and payment of the $8.00 an hour stipend.

1.1.. The Plain meaning rule requires the arbitrator to derive the meaning entirely from the nature of the language used.

The words are plain and clear. Section 13.15 (A) conveys that the Director of Public Safety is the Governor's designee to declare weather emergencies which affect the obligation of State employees to travel to and from work. It does not extend this designation to other than weather emergencies by the plain meaning of the language of §13.15 (A). The absence of similar language in §13.15 (B) makes clear that the parties did not agree to the Director of Public Safety being the designee for all other emergencies. The fact that §13.15 (B) is its own subsection makes clear that there are to distinct concepts: (1) Weather Emergency and (2) Other than Weather emergency. The last sentence of §13.15 (B) clearly indicates that only payment for hours worked during other than weather emergencies shall be made pursuant to§13.15 (A) above.

The annotated contract by the Office of Collective Bargaining (OCB) states the Governor can declare an emergency. The Employer's annotation states: "Only the Governor or the Governor's designee may declare an emergency"JX 5, p. 6, JX 6, p. 6.

In the 2012-2015 annotated contract, OCB clarified: "only the Director of Public Safety may declare a weather emergency and only the Governor, or the Governor's designee may declare an emergency other than weather. JX 7, p. 5. By their own directive the Governor has the right to declare an emergency and only the Director of Public Safety can declare a weather emergency.

1.2. The mention of one thing is the exclusion of another thing.

Since the parties clearly stated that the Director of Public Safety is the designee for declaring a weather emergency, they made clear that he is not the designee for other than weather emergencies. Also, since the parties made clear that payment for hours worked for other than weather emergencies shall be made pursuant to section §13.15 (A), all other concepts contained in section §13.15 (A) are excluded from§13.15 (B).

1.3. Department of Administrative Service Directive HR-D-11 is irrelevant to this dispute and not binding on the parties.

In the CBA there are two distinct concepts:(1) Weather Emergency and (2) Other than Weather Emergencies. Directive HR-D-11 recognizes public safety emergency and emergency

declarations that are not a public safety emergency. See §2.1, ¶2, p1 JX 16. 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 a promulgation of a unilateral directive.

1,4. Even if there were some ambiguity in the CBA, Directive HR-D-11 does not provide the clarity the Employer claims.

The State is arguing that it could avoid the bargain of §13.15 by merely ignoring the facts that Covid was an emergency in the workplace. They attempted, albeit deficiently, to technically craft the declaration so as not to trigger it.

Clearly, Covid is not severe weather conditions like a snowstorm. Depending on whether you believe Covid came from animals or a lab, it is either a non-weather natural disaster, or a man-made natural disaster. The impact of Covid is not like a weather- related event. Its impact is broader than a geographic area, its transmission happens both at work and outside of work. It impacts the State employees just like it impacts the general public. It is therefore disingenuous to claim that it is an emergency for the general public but not an emergency under §13.15(B) and is evidence of the Employer's abuse of discretion

1.5. Specific language overrides general language.

The State emphasized the first sentence of Article 11 of the CBA and Article 5 to justify their actions during the pandemic. Those are general clauses. The more specific language of §13.02 regarding scheduling and Appendix N and Q govern these topics. Extraordinary unilateral action of management choosing to violate the CBA for health and safety reasons is indicia of an emergency and is an independent declaration. Actions speak louder than words.

The Governor's declaration of an emergency is sufficient to trigger §13.15 (B) of the CBA. The State's technical argument that the Governor exempted §13.15 is flawed. Executive orders can confer more rights than legislation provides but they cannot take rights away. Thus, if the nature of the emergency is such that it impacts the workforce and workplace the Governor cannot erase his contractual obligations with an exemption.

2.0 The State's extraordinary actions and the State operations in response to the exceptional circumstances were a de facto declaration of emergency per §13.15(B).

An Emergency existed. It started in March 2020 with Governor Mike Dewine's declaration of an Emergency. It started in March 2020 with Director Acton's declaration. Even if those declarations were not declarations, it started in March when the State began impacting workers' terms and conditions of employment by taking extraordinary actions as an effort to mitigate the virus. In March the State sent approximately 16,000 State employees home to do emergency telework. In March it began to change employee schedules without the required contractual notice. In March the job assignment language was overridden and overtime procedures unilaterally changed. These all happened when:

1. The State's knew the severity of the Virus;
2. The State knew about the workplaces, workforce and functions at the beginning of the pandemic;
3. The State introduced mitigation actions (eg. emergency teleworking);
4. The State took regulatory actions of its citizens and businesses operating in Ohio;
5. The State used language in the workplace, (i.e. policies, memos and other communication) to employees and Union officials describing the situation as an emergency;
6. The language used by the Governor to the general public through his briefings described the situation as an emergency or crisis;
7. The State's knew the impact that Covid had upon the employee population's safety, terms and conditions of employment and health to include the unnecessary deaths;
8. The State's knew the impact that Covid had on those in the State's care and custody;
9. The State's knew the impact that Covid had on the State's citizens including, but not limited to, hospitalizations, deaths and daily life.

Reliance-based estoppel involves the reliance of one party on something the other party said or did. This is also known as "promissory estoppel." The employees covered by the CBA accepted/relied on the statements made by the Governor that an emergency "other than a weather emergency" existed - a statement that was made on numerous occasions, at numerous press conferences. It is not unreasonable for the Employees to expect that the Employer would comply with the Agreement and fairly compensate its employees for work performed in a difficult and unprecedented period of time in our history. The Employer acted as if it were an emergency in both its actions and its speech, which is in itself a declaration.

3.0 If there was not an official declaration of an emergency per §13.15(B), there was an abuse of discretion when objectively viewing the decisions of the State.

The State's position in this case is that it did not declare an emergency per §13.15. The Union argues that this taken on its face that is an act of bad faith. It is an arbitrary, unreasonable, unfair and unjust act wholly inconsistent with the totality of facts.

In general, abuse of discretion can be shown through four different ways: Improper purposes, Irrelevance, Bad Faith, and Unreasonableness. Unlike other contractual matters where the employer has discretion, the declaration of a weather emergency pursuant to §13.15 (A) or Other than Weather Emergency pursuant to §13.15 (B) is a regulatory act. The State's discretion is not in question, but that discretion must be exercised in good faith. It must not be exercised arbitrarily. It is discretion to be exercised reasonably, fairly and justly. The implied covenant of good faith and fair dealing serves as the basis for the proposition that discretionary managerial decisions will be reviewed to determine if they were arbitrary, capricious, or discriminatory. HOW ARBITRATION WORKS, ELKOURI AND ELKOURI (8th Ed. 2016, K. May Editor) p. 9-51.

The bargaining history indicates that §13.15 was reformed in 2006 to lessen costs so that the State could declare emergencies when warranted. Here the facts warranted the declaration. To allow the State to act as if no emergency was taking place denies the employees the benefit of the bargained language. From the testimony and evidence presented you can glean the facts that the State should have taken into consideration.

- The Virus was highly transmittable.
- The Virus could potentially cause severe injury or death.
- The State had no stockpile of PPE (Personal Protective Equipment, e.g., masks, gloves, sanitizer, or full body suits).
- The staffing levels in many State agencies were depleted because of the many austerity measures taken since 2001.
- Many Agencies had significantly sized workforces that could not telework.
- Many of the agencies were congregate settings. Many agencies beyond those in congregate settings had conditions where social distancing was not a reality.

The lack of PPE and the inability to social distance in the workplace ultimately resulted in sickness and death of both employees and others in the State's charge. The Virus seemed to defeat the mitigation measures implemented at the workplaces. Covid, unlike any snowstorm, tornado, flood or windstorm had a direct impact on the workplace and workers. It presented both health and safety risks as well as changes in terms and conditions of employment. For society to function these employees had to be placed in harm's way. They had to come to work every day without adequate PPE, without the ability to social distance and to be reminded daily management need not follow the contract because of Covid.

The totality of facts demonstrates the State acted in bad faith or in an arbitrary manner. Its position that an emergency was not declared under §13.15 (B) is unreasonable, unjust and unfair to the workers and therefore a violation of §13.15 (B).

In summation, the State is trying to use its discretion to deny reality. The State has discretion under the contract to declare an emergency; but the State, as a party to the contract, must exercise that discretion in good faith, rationally and reasonably based on the facts. That duty is what the parties bargained for and it is what the law requires of parties to the contract. The Employer abused its discretion and violated the covenant of good faith and fair dealing.

4.0 Appropriate Remedy

- Grant all OCSEA Bargaining Unit employees the $8.00 an hour stipend outlined in the contract for all hours worked during the emergency.
- Grant the next of kin the $8.00 an hour stipend for any OCSEA Bargaining Unit members that lost their life during the awarded time frame for all hours the member worked during the emergency.
- Grant any retired OCSEA Bargaining Unit employee the $8.00 an hour stipend for all hours worked for the awarded time frame during the emergency.
- Order Management to follow the negotiated contract language.
- The Union requests the arbitrator retain jurisdiction for 90 days from the date of the decision.

B. THE EMPLOYER'S POSITION

The Union presented alternative theories that the State violated §13.15(B). Because the Union failed to meet its burden of proof, the grievance should be denied in its entirety.

1.0 Section 13.15(B)

The Union failed to meet that burden of proving that the section was violated by the State. 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.

Both of those elements must exist for §13.15(B) to apply.

The second element (leave granted) is not optional as the Union claims. Section 13.15(B) does not state or imply that either one element or the other is sufficient. Management and Union testimony agrees that no leave was granted. None of the Union's theories address this element. That is fatal to the Union's claim that §13.15(B) was violated.

The Union also failed to present evidence to meet its burden that an emergency was declared within the scope of §13.15(B)

On March 9, 2020, Governor Mike DeWine signed Executive Order 2020-01D (JX 27) in response to the Covid 19 pandemic. The Executive Order states its purpose was to suspend regulatory barriers to an expeditious response to the pandemic such as public contracting laws for the public purchasing process. This Order also enabled the State of Ohio to request Federal Assistance. The Governor's Executive Order unambiguously states that it did not require the implementation of the DAS Directive HR-D-11. (JX 15) HR-D-11That Directive governs the action of all State agencies where a Public Safety Emergency is concerned. It expressly states that the Director of DPS is the Governor's designee to declare a public safety emergency. By excluding the DAS Directive HR-D-11 from Executive Order 2020-01D, the Governor's Executive Order does not qualify as an "Emergency Declaration" as required by §13.15(B). No argument has been made and no evidence has been presented that the Director of DPS declared a public safety emergency.

Section 13.15(B) does not specify who must declare an emergency, but it does require that an emergency be declared. The Governor did not appoint anyone as his designee. The Union argued that Dr. Amy Acton as the Director of DOH declared an emergency but EO 2020-01D did not appoint the Health Director as the Governors' designee. It merely permitted Dr. Acton to set guidelines for "private businesses regarding work and travel restrictions, if necessary."

2.0 Circumstantial Evidence

The Union argues that notwithstanding whether a declaration was made, the circumstances demonstrate that the State functioned as if an emergency declaration was made. The State's actions in response to the Covid 19 pandemic involved exercising management rights under Article 5 and under §11.01 Safety and Health to best protect the health and safety of employees.

While the pandemic has most definitely been a critical incident, the proactive planning and actions taken by the State of Ohio under Article 5 and Article 11 of the CBA enabled the State to remain open for business for the duration of the Covid 19 pandemic. The State has developed and updated pandemic plans for over 10-years in preparation for a pandemic to continue its business operation should those circumstances arise. Careful and thorough pre-pandemic planning of the State

provided the Employer with its ability to remain open throughout the pandemic, continue its business operations, and give the citizens of Ohio continued service. An emergency does not exist when preconceived plans are enacted and a continuity of business operations exists. The totality of the actions taken by the State implementing a response do not represent a declaration of emergency. Instead, the proactive, planned measures to maintain its continuity of operations were consistent with Article 5, and Article 11.

Technology, medicine, and business have evolved. New and different measures allowed the State to provide the residents with the services that they needed. Telework plans allowed employees to continue to complete their work duties and assignments in the safest viable manner. For employees who continued to report-in on location, the State put measures in place to best protect the health and safety of those employees using information available at the time. Providing permissive pay supplements (eg. hazard pay) that are otherwise allowed by Ohio law does not trigger the elements of §13.15(B). It is a separate statutory provision.

The Union cited abrogation of "Pick-A-Post" rights at the DRC during the State's implementation of its pandemic plan. The State determined that Covid 19 posed a threat to the health, safety, and security of the DRC institutions, so modifications of the Pick-A-Post agreements neither constitute a contract violation, nor prove the existence of an emergency under§13.15(B). The contract expressly allows health, safety and security to take priority over the Pick-A-Post agreement. JX 1, Appendix Q, p.335. Other institutional agencies are governed by similar language. JX 1, Appendix N, p 254. This contractual language does not state or imply an §13.15(B) emergency must be declared in order to preempt the Pick-A-Post agreement.

Rather than being evidence of an emergency, the State's enactment pre-pandemic plans diverted a critical incident from becoming an emergency.

3.0 Abuse of Discretion

The determination of whether to declare a state of emergency under §13.15(B) is within the sole discretion of the Governor and his designee. There was no such declaration. Section 13.15(B) does not define any parameters nor does the contract does contain an article that dictates the Governor's exercise of that authority. Without such parameters, the State has sole discretion. Where the CBA is silent §44.03 – Total Agreement preserves the matter to the discretion of the Employer.

Arbitrator Jenifer Flesher found in *Cleveland State University and the Fraternal Order of Police,* Grievance No. 2020-001 (Footnote 5) that "Absent proof of an abuse of discretion, this arbitrator has no authority to ignore the express contract language." The Union failed to present evidence that this was an abuse of discretion under the terms of the CBA.

The State explicitly chose not to declare an emergency for purposes of HR-D-11 and §13.15(B). If the State had chosen to declare an emergency and granted leave that would have ground State operations to a halt. Service to the citizens of Ohio would have ceased. In the year 2020, when the capability existed to have employees telework and to implement mitigating measures to slow the spread of disease for employees who continued to work from their normal report-in locations. The State made the considered and planned decision to continue operations for the citizens and residents of Ohio. That is not an abuse of discretion.

4.9 Appropriate Remedy

The Union failed to prove that the State declared an emergency and the Union failed to prove that leave was granted. If it is determined that the Union proved both requirements, the Union's requested remedy must not be granted because it creates an absurd result, not contemplated by the contract language.

The language in §13.15(B) was never intended to be utilized for an extended period such as is being requested by The Union is requesting the emergency pay of $8 per hour for over 27,000 OCSEA employees since March 9, 2020 for a period with no end stated. That calculates to over $1 billion and growing. That would subject the State to a massive, and unbudgeted, liability.[4]

The bargaining unit employees and retirees and their next of' kin are not due any remedies as no emergency was declared and no leave was granted. Any remedy must be limited in who qualifies under §13.15(B). For example, there is no compelling evidence that employees who were teleworking should receive the stipend.

Any remedy awarded also must be limited by length of time and by the number of employees. Any employees who received the hazard pay supplement during the time period in question, must have the hazard pay supplement considered to offset. Second, the length of time of must be clearly defined. The Union's allegation that this started on March 9, 2020 and is ongoing without any logical endpoint is nonsensical. The Governor issued an order on May 29, 2020, that allowed Ohio businesses to resume operations. That time frame of 81 days would clearly be a limit of any potential order of remedies for the grievance at hand. Additionally, the Governor revoked the March 9, 2020, Executive Order on June 18, 2021.

The State of Ohio continued to operate and remained open to its employees and the general public even after the Governor's issued Executive Order 2020-01D. It is also undisputed that during this period both essential and non-essential employees did in fact work. Section 13.15(B) was not triggered. The State acted responsibly by employing pre-pandemic plans which diverted a critical incident from becoming an emergency. This also allowed the Governor to use his discretion appropriately and in a non-arbitrary or capricious manner. The Union failed to satisfy its burden of proof.

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[4] The Union offered Mr. McKenzie's testimony on the remedies sought. The Union admitted that he was not a subject matter expert. The Union also admitted that he had merely gathered information that was readily available through public information and the internet. Thre fore Mr. McKenzie was not a subject matter expert, and his testimony was of little relevance. He lacked any actual first-hand knowledge on the monies available and did not participate in any discussions with the actual authors of the documents he presented. His testimony was merely that of a collector of public information. Mr. McKenzie did admit that the State's Covid 19 funding from the federal government for Coronavirus State and Local Fiscal Recovery Funds was not meant for disbursement among State agencies but was instead meant to be used for the benefit of private businesses, local governments, and the citizens of Ohio. He could not speak with certainty regarding the State's planned disbursements aside from the State's published budget. Mr. McKenzie's testimony was too deficient, to be used in determining what monies are, or are not, available for disbursement as alleged remedies.

X. DISCUSSION AND DECISION

A. DID THE EMPLOYER VIOLATE SECTION 13.15(B) OF THE AGREEMENT?

1.0 Standards for Contract Interpretation

The Union bears the burden of proving a contract violation. It must persuade the Arbitrator that the position it has taken is correct and consistent with the language of the Agreement.

> "The general rule, followed by most arbitrators in non-disciplinary proceedings, is that the grieving party, typically the union, bears the initial burden of presenting sufficient evidence to prove its contention . . . that the action taken by the management is inconsistent with some limitation, contractual or otherwise, in the labor agreement."[5]

The Union's burden of proving a contractual violation is slight. a preponderance of the evidence, which is, that its reading of the CBA is the more probable.[6]

The primary duty of the Arbitrator is to determine and carry out the mutual intent of the parties. The mutual intent must be first be drawn from the language alone. Unambiguous language must be given its plain meaning.[7] A writing is unambiguous where the meaning can be determined the without more than the facts and the language.[8] Plain meaning of contract language augmented by dictionary definitions is often sufficient to resolve interpretation issues. Initially the interpretation of a writing should be possible without resorting to any extrinsic evidence, i.e. any source other than the four corners of the Agreement.[9]

If the disputed contract language is reasonably susceptible to more than one meaning, the language may be considered ambiguous and the Arbitrator may rely on other interpretative aids such as bargaining history or past practice of the parties. The prudent application of the plain meaning rule is to look at as little evidence outside the four corners of the agreement as is necessary to resolve the ambiguity. That is, the words themselves, their definition in the agreement, or their dictionary meaning, along with their usage within the four corners of the agreement are the key initial sources. Meaning can also be found in law, eg. arbitral jurisprudence, the maxims of contractual construction, etc.) or by the usage in other contexts like the industry or some other relevant field.

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5 *Johnston-Tombigbee Mfg. Co.Inc*., 113 LA 1015, 1020 (Howell 2000), cited in *Earley & Ross*, 128 LA 834, 838 (Smith 2010). Preponderance of the evidence is defined: *City of New Philadelphia* 132 LA 117 (Goldberg 2013) at footnote 2.

6 *Certainteed Corp*., 88 LA 995, 998 (Nicholas, 1987); *Shepard Niles Inc.,* 115 LA 1447, 1451 (Fullmer, 2000); *City of Jackson,* 121 LA 1582, (McDonald, 2005).

7 *National Service,* 95 LA 829 (Abrams, 1990) *Potlach Corp*., 95 LA 737 (Goodstein, 1990) and *Metro Transit Authority*, 94 LA 349 (Richard, 1990). Also: *North Carolina Association of Educators*, 125 LA 114 (Pritzker, 2008); *US Food Service,* 124 LA 114 (Fitzsimmons, 2008).

8 *Community Memorial Hospital*, 95 LA 581 (1990).

9 ELKOURI & ELKOURI HOW ARBITRATION WORKS,(BNA, 8th Ed. 2016) Ch. 9.2.A, p. 9-8 fn. 19, and cases cited therein esp. *Primeline Industries, Inc.*, 88LA 700 (1986).

When the interpretation is obvious enough to apply to the facts, then nothing else is needed. If not, the scope widens to extrinsic evidence beginning with pre-contractual expressions of meaning by the parties during bargaining and the history of the term over several agreements.[10] Finally, behavior evidence can be consulted. That behavior evidence, termed "past practice" in labor arbitration, is a last resort. In sum:

> "The arbitrator will declare an agreement to be clear and unambiguous where he is able to determine its meaning without any other guide at than a knowledge of the simple facts on which, from the nature of the language, in general, it is meaning depends. Where, however, the simple facts allow both sides to advance plausible contentions for conflicting interpretations, the arbitrator will declare the language to be unenforceable, and will make reference to precontract bargaining history, past practice and other applicable rules of construction in order to arrive at the true meaning of the disputed provision."[11]

Extrinsic evidence is unnecessary in this matter in that a the 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.

2.0 The Union's Theory of Breach

The Union argued that (1) there was a breach of §13.15(B) by its terms, with two alterative arguments: (2) there was an implicit declaration of emergency based on the circumstantial evidence, or (3) if there were no declaration of emergency, there was an abuse of discretion in not declaring an emergency.

There is no reason why Covid was not an emergency in the workplace beyond the State's claim that the Director of DPS did not declare it so. Section 13.15(A) states that the Director of DPS is the Governor's designee to declare Weather Emergencies. That does not extend this designation to Other Than Weather Emergencies under §13.15(B). The concepts contained in §13.15 (A) are excluded from§13.15 (B). If an emergency that impacts the health and safety of the workforce and/or the terms and conditions of the workforce were not an Other than Weather Emergency it would render §13.15 superfluous and meaningless.

There is no requirement in §13.15 (B) that employees must be on administrative leave as a condition precedent to an emergency or to the $8.00 stipend. The leave language merely clarifies when leave is appropriate and for what purpose.

There can be no question that the Governor declared Covid an Other than Weather Emergency under §13.15(B) notwithstanding its exclusion of Directive HR-D-11 for Weather Emergencies. The State cannot override the CBA through a unilateral directive. Also by the

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[10] *Peoria Bd. of Education*, 118 LA 1514, 1521 (Kenis 2003).

[11] *Earley & Ross*, 128 LA 834, 838 (Smith 2010); also *Penn-Union Corp*., 128 LA 875, 877 (Fullmer 2010); *Degussa Corp*., 119 LA 1467, 1471 (Wendt 2004). *Keego Harbor, Michigan, Police Department* 114 LA 859, 863, (Roumell, Jr. 2000) quoting *Inland Empire Paper Company* 88 LA 1096, 1102 (Levak, 1987). See ELKOURI, (7th ed.) 12-26.

Directive only the Director of Public Safety can declare a weather emergency and only the Governor has the right to declare an other emergencies. That is what he did.

There is also circumstantial evidence that an Other than Weather Emergency was declared. The extraordinary unilateral actions of management choosing to violate the CBA for health and safety reasons is indicia of an emergency and is an independent declaration. Covid transmission happens both at work and outside of work. It impacts the State employees just like it impacts the general public. It is therefore disingenuous to claim that it is an emergency for the general public but not an emergency under §13.15(B). The Employer acted as if it were an emergency in both its actions and its speech, which is in itself a declaration.

If the State did fail to declare an emergency per §13.15(B), that is an act of bad faith, and is arbitrary, unreasonable, unfair and unjust act wholly inconsistent with the totality of facts. Here the facts warranted such a declaration. To allow the State to act as if no emergency was taking place denies the employees the benefit of the bargained language. The State, as a party to the contract, must exercise that discretion in good faith, rationally and reasonably based on the facts. The totality of facts demonstrates the State acted in bad faith or in an arbitrary manner.

The Employer answers that under the plain language of for §13.15(B) to be triggered:(1) an emergency must be declared; AND (2) leave must be granted. The Governor's Executive Order unambiguously did not require the implementation of DAS Directive HR-D-11. The Governor's Executive Order does not qualify as an "Emergency Declaration" as required by §13.15(B). The Executive Order did not appoint the Health Director as the Governors' designee for that purpose. In addition the second element, leave must be granted, is not optional. All testimony supports finding no leave was granted.

The State had developed and updated pandemic plans for over 10-years in preparation for a pandemic in order to continue its operations should those circumstances arise. Proactive planning and actions taken by the State enabled the State to remain open for business for the duration of the Covid 19 pandemic. Telework plans, statutory hazard pay, abrogation of "Pick-A-Post" rights are examples of proactive steps that are not proof of the declaration of an emergency. They diverted a critical incident from becoming an emergency.

The State explicitly chose not to declare an emergency for purposes of HR-D-11 and §13.15(B). Not declaring an emergency is not an abuse of discretion but the use of sound discretion to remain open and available for the residents of Ohio.

The Employer has the more probably correct interpretation of §13.15(B).

3.0 Interpretation of Section 13.15(B).

Subsection 13.15 (B) appears in Article 13, Workweek, Schedules and Overtime. It covers many of the common terms and conditions of employment. Section 13.15 - Emergency Leaves appears there and has two subparts, (A) Whether Emergency and (B) Other Than Whether Emergency. From the organization of §13.15 it is clear that it considers two types of emergency leaves. It is not so much interested in the establishment of the types of emergencies, which is a management function, but with the consequences or effects of management exercising that function when it produces a leave of absence for employees. Here it is been alleged that the provision for leaves for Other Than Whether Emergencies under §13.15 (B) has been breached.

The plain meaning is the beginning, often the end, of the inquiry. Section 13.15(B) states:

> B. Other Than Weather Emergency
> Employees not designated essential may be required to work during an emergency. When an emergency, other than a weather emergency, is declared 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.

In order to establish that the Employer violated this provision there must be facts that what is required by the clause had not occurred or had not occurred in the way described. The first sentence is that employees not designated essential may be required to work in an emergency. The clause does not define on "nonessential employee." It only partially defines "emergency" in the next sentence. That is an "emergency" that is something other than a weather emergency. Beyond that it is not defined in the subsection. The next action required after the permissive statement of nonessential employees working is more imperative: "an emergency ... is declared and leave is granted." Here are two unmodified verbs that describe actions to be taken by the Employer. Next, the sentence states the consequences of the Employer's declaration / grant. Continuing the sentence, where both 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.

Therefore, 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.

What is unexpressed by the plain meaning in §13.15 (B) are exactly (a) what is an emergency and what is a non-weather emergency, (b) what is an essential worker and nonessential worker, and (c) what is the amount of pay. To tease out the meaning of §13.15 (B) requires looking at the entirety of §13.15 which consists of only two parts, subpart (A) and subpart (B). That is generally referred to in arbitration as looking to resolve ambiguities by reference to the "four corners of the document."

3.1 Weather and Non-weather Emergencies.

Section 13.15 (A) says little about the definition of an emergency for benefit of §13.15 (B).

> The Director of the Department of Public Safety is the Governor's designee to declare a *weather emergency* which affects the obligation of State employees to travel to and from work.

The Director of DPS being the Governor's designee implies that the Governor may also declare such an emergency. That is reinforced later where it mentions the an emergency that the Employer may declare:

> An *emergency* shall be considered to exist *when declared by the Employer*; for the county, area or facility where an employee lives or works.

Then§13.15 (A) limits an emergency by focusing on what it is not.

> For the purpose of this Section, an *emergency shall not* be considered to be an occurrence which is normal or reasonably foreseeable to the place of employment and/or position description of the employee.

Section 13.15 (A) also differentiates between locally declared weather emergencies and the action by the State where the State does not declare an emergency and remains open. The scope of the State declaration is explained:

> ...extreme weather conditions may exist and roadway emergencies may be declared by local sheriffs in certain counties, *yet no formal weather emergency is declared by the Governor* or designee *and State public offices remain open.*

For §13.15 (A) a weather emergency has something to do with weather; it is declared by the Employer; it can extend to the area where an employee lives or works, and it is not an occurrence that is ordinarily foreseeable in the job classification. Curiously, other than who declares the weather emergency, the other descriptions of "emergency" do not explicitly mention weather emergency which implies that they may apply to any emergency, weather or otherwise. As to ordinary emergencies, the scope and limitation expressed in §13.15 (A) may also apply to §13.15(B). What can be taken with assurance from §13.15(A) for the benefit of §13.15(B) is that the role of the Director of DPS includes declaring a weather emergency but it does not state the Director of DPS could not also serve as a designee to declare a non-weather emergency.

3.2 Essential and Non-essential Workers.

Section 13.15(A) has more instruction on the role of essential/nonessential workers. Since §13.15(B) has reference to nonessential employees, it follows that the dichotomy between the two established in §13.15(A) applies equally to that section. Other than the definition, the section sheds little light for the benefit of §13.15(B). Essential employees are defined:

> *Essential employees are those employees whose presence at the work site is critical to maintaining operations during any weather emergency. Essential employees normally consist of a skeletal crew of employees necessary to maintain essential office functions, such as those State employees who are essential to maintaining security, health and safety, and critical office operations*. §13.15 (A)

Under that section the Employer is to maintain a list of essential workers. Generally employees designated essential are advised of their designation and are expected to work during a weather emergency but they are not guaranteed to work in a weather emergency. Essential workers who do not report to work during the weather emergency must show cause for the reason why.

Section 13.15(A) also mentions regulation of the nonessential workers. That chiefly has to do with the situation where there are local weather emergencies but not a formal State whether emergency. In that situation nonessential workers who choose not to attend are to be placed on paid time off such as vacation or personal or compensatory leave. They may also be reassigned to avoid unnecessary road travel. This does not appear to have much direct relevance to §13.15 (B) although

it is possible that a non-weather emergency could be locally declared. In that case §13.15(A) may express the contractual intent with regard to nonessential workers.

3.3 Pay in a Non-weather Emergency.

The pay regulations of §13.15(A) are expressly incorporated into §13.15(B). Section 13.15(A) regulates both essential and nonessential workers when it comes to leave by referring to "employees:"

> *Employees directed not to report to work or sent home* due to a weather emergency as declared by the Director of the Department of Public Safety, *shall be granted leave with pay at regular rate for their scheduled work hours during the duration of the weather emergency*.

Both essential and nonessential workers may be sent home in a declared weather emergency and if so they are placed on paid leave at their regular rate, possibly for the duration. Similarly, §13.15(A) does not distinguish between essential and nonessential workers when it comes to compensation for their work during 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.*

If employees work during the weather emergency they receive the regular rate of pay just as those on leave but in addition they receive an eight dollar per our stipend for working during the weather emergency while others are on leave.

Having some employees idle and some employees working is critical to the application of the stipend. Section 13.15 (A) juxtaposes the two classes of employees, those working in those not working, without differentiating whether they are essential or nonessential. Inherently in a weather emergency some employees will be unable to attend because of the weather emergency. They receive the regular rate of pay. Those that are required to work are typically the essential employees but others can be directed to work. Those who do work, receive their regular rate of pay also but in addition receive the stipend. The $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.

This regime transfers explicitly to §13.15 (B):

> Payment for hours worked for other than weather emergencies shall be pursuant to Section 13.15 (A) above.

To 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.

4.0 Application of the Contract Terms to the Facts Found.
4.1 Was an "Emergency" declared?

On March 9, 2020 Gov. DeWine issued a proclamation entitled "Declaring a State of Emergency" which in its first declaratory sentence stated:"A state of emergency is declared for the entire State." Under the terms of §13.15 this was clearly not a weather emergency as weather was not in the least mentioned. Thus, it was an "Other Than Weather Emergency." To the Union this means that all the features of §13.15(B) cascade immediately from the mere declaration. They do not. As noted, §13.15 is the parties' description of what happens when an "Emergency Leave" arises in one form or other. This one is an "Other Than Weather Emergency" which behooves looking at §13.15(B) to determine the consequences of such a declaration.

The Employer argues that the proclamation did not declare an emergency "for the purpose" of §13.15(B).[12] 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.

The first detail of notice under §13.15(B) "Other Than Weather Emergency" is that non-essential employees may be required to work "during an emergency." That suggests that the "Other Than Weather Emergency" is different from a weather emergency where part of the exigent circumstance is that workers cannot attend work due to weather conditions. Thus, the default concept of an "Other Than Weather Emergency" is that all employees continue to work.

The next sentence states that when a non-weather emergency is declared and leave is granted..." The default condition of employees working in such emergencies can have an exception when leave is granted. The sentence goes on to describe how the Other Than Weather Emergency leave is to be used. What is unusual is that §13.15(A) does not designate how the weather emergency leave is to be used. Leave is not only an exception for a §13.15(B) emergency it is it a limited exception based on the employee's necessity to attend to the care of persons and property.

In this situation a general leave was not granted according to all the testimony. No State employee was given leave due to the emergency declaration. Section 13.15(B) emergencies do not anticipate that leaves would be the norm. That and the appearance of §13.15(B) under §13.15 "Emergency Leave" might be sufficient to resolve the matter, but not so precipitously.

The final sentence of §13.15(B) incorporates the payment for hours worked from §13.15(A). As noted in a weather emergency the default description is that nonessential employees who cannot work due to weather do not work, and essential employees do report to work. Both receive their usual regular rate but the working employees receive an additional stipend. It is extra compensation for working otherwise they would receive exactly what non-working employees received. In that situation there would be friction introduced in the compensation system against employees reporting to work.

Translating pay provisions of §13.15(A) to §13.15(B) there are several distinctions. First, non-essential employees are expected to continue working. Hence the default is that everyone receives their regular rate but also that everyone is working during the emergency. Only in the case

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[12] The Employer in part argues this is because the Director of DPS did not declare it. However, the Employer also argued that the Governor has authority to declare an emergency so this distinction in argument is ignored.

of a leave being granted would there be a class of employees not working and a class of employees working. Since that did not occur, the stipend is not due any employee.

The argument may proceed that some employees did take leave on account of the Covid virus if they were infected or exposed such as by family. That was not emphasized on the record but it was mentioned. However, both §13.15 and the Executive Order dispose of the claim that the stipend would be due on account of individual leaves.

4.2 The definition of "Public Safety Emergency."

4.2.1 The Four Corners of the Agreement

"Emergency" was not defined in §13.15, but it is described. Although §13.15(A) refers to weather emergency it also uses also the term "emergency" without the modifier. For example, an "emergency" declared by the State can be limited to a specific area in §13.15(A). Also §13.15(A) states an "emergency" does not refer to an "occurrence" that is "normal or reasonably foreseeable" in the workplace or in the job classification. These are general terms of scope and limitation in §13.15(A). They have no obvious or unique connection to weather. The parties' intent must be that they apply to emergencies in general including those under §13.15(B). This is interpreting the intent of §13.15(B) by reference to usages within the four corners of the agreement, ie. §13.15(A).

Obviously per §13.15(A) local weather may occasion a State declaration of emergency that is not statewide. The localized emergency could affect employees locally including their necessity of reporting to work. However, it does not mention weather in that sentence so some other kind of local emergency may also be declared, a jail break for example.

The exception for certain "occurrences" relating to the workplace or job does not appear to be susceptible of applying to weather at all, so it must mean other critical conditions. Again, a jail beak. Sick leave is the most "reasonably foreseeable" cause for not attending work. Thus, personal illness is not an emergency as described in §13.15(A). Moreover, where a personal leave was mentioned on the record, it was followed with statements to the effect that the employee "was on their own time." The predicate under §13.15(B) for the stipend is a paid leave for a class of employees which did not happen because there was no general leave granted and because the personal leaves were not paid. It is also not an "emergency."

4.2.2 The Executive Order and Directive

Section 13.15(B) undoubtedly has two requirements, the declaration of an emergency and the granting of leave. The Union infers that the leave element in the CBA is simply implied or somehow included in the declaration element. It is not. That was disposed in the prior two subparts. The intent of the plain meaning of the CBA can also be discerned by concurrent usages by the parties. Therefore, this part addresses the role of the EO 2020-01D and DAS HR-D-11.

The Employer rests on the Directive being exempted by the Executive Order to argue that no leave was granted and also that no emergency was declared. By excepting the implementation of that Directive, the EO¶ 6 recites: "...State employees' obligation to travel to and from work is not to be limited as a result of this proclamation." The Union counters that the Executive Order and Directive do not use the terms of §13.15. To the Union's point, the answer is that is true, but §13.15

has to do with leaves and that both the Executive Order and Directive have to do with emergencies. It is specifically in the "Declaration of Emergency" where it is stated that no leave is to be effected by the proclamation. The Union argues that the "Declaration of Emergency" is effective for §13.15(B) but the same instrument in declining leaves is not. That is not sufficient.

The Executive Order declares an emergency for the entire State of Ohio, not a part thereof. Since leave is the exception to the rule for §13.15(B) emergencies, any leave to be granted in a statewide emergency would be expected to be statewide also. Sick leaves taken by individual employees could not qualify the entire State workforce to the stipend.

The Employer pressed the point further based on the express exclusion in the Executive Order of Directive HR-D-11. The State has long pursued a history of establishing a written protocol for declaring emergencies which, in the Employer's terms, is an action under management rights, Article 5. The Directive defines "Emergency" as being declared effectively by any government entity, the State or otherwise, "for a natural disaster, man-made disaster, hazardous materials incidents or civil disturbance." It defines a "Public Safety Emergency" as a proclamation which limits "a State employees' obligation" to work. A "Public Safety Emergency" is a State of Ohio proclamation effectuating leaves of absence for State employees. It adds that they "include, but are not limited" to adverse weather. Hence a Public Safety Emergency can be a weather emergency but is can also be "Other Than Weather Emergency." To complete the explanation, the Directive specifies the Director of DPS as the Governor's designee to declare a Public Safety Emergency, weather or otherwise.

The Union argues that the Directive is a unilateral statement of the Employer. While the Directive is a management document, and even though it was saved from implementation in the Executive Order, it exists as a statement of which the Union has notice and may rely. It does not conflict with §13.15 - Emergency Leave and, as the Union noted, it does not even use many of the terms of that section. Where the Directive defines "emergency," absent any other definition in the CBA, it completes the management interpretation of that term. Given the long history of the Directive through several iterations, it can safely be relied upon to provide the parties' working definition of "emergency" unless and until some other basis can be shown to have been adopted by the parties.

Union was plainly on notice of what the Employer intended in declaring a Public Safety Emergency which includes weather and non-weather forms. The Executive Order declaring a statewide emergency for Covid excluded the application of the Directive that described public safety emergencies. The hallmark of Public Safety Emergency under the Directive is not the source of the crisis, but its consequence. Public Safety Emergency is one that requires furloughing some or many employees for the duration. The Executive Order expressly excluded the Directive. The Directive was known to the Union which has relied upon it in the past.

The Declaration of Emergency on March 9, 2020 did declare an "Emergency," but it did not declare a "Public Safety Emergency," according to the terms of the Directive. That is to say, 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 in which a leave is inherently granted. Without any leave of absence, the predicate for the §13.15 stipend is absent. The Employer's interpretation of §13.15 (B) is more probably correct.

5.0 The Union's Alternate Theories of Breach.

The Union failed in its burden of proof on both of its alterenate theories of breach.

5.1. Circumstantial Evidence.

Against the harbinger of the Employer that no emergency was declared, the Union argued that the facts surrounding the Covid pandemic and the State's knowledge thereof and response thereto constitute circumstantial that an emergency had been declared.

Circumstantial evidence is indirect. It is the weaving of inferences from facts to other factual conclusions to establish the chain of evidence. When but one link of the chain fails, the entire proof fails. "If the evidence producing the chain of circumstances pointing to [an ultimate fact] is weak and inconclusive, no probability or fact may be inferred from the combined circumstances."[13] In other words,the remaining facts are insufficient to support the inference towards the ultimate fact.

The Union has raised a great many facts and inferences in pursuit of the proof of an emergency declaration. However, the one failure in the Union's chain of inference is that the Employer did declare in emergency in the March 9, 2020 proclamation. It did not declare a "Public Safety Emergency." The second failure in the Union's chain of inference is that 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. Union failed to prove its case that a Public Safety Emergency was declared on circumstantial evidence.

5.2 Abuse of Discretion.

The last alternative to which the Union turns assumes failure to declare an emergency (or public safety emergency) and argues that such failure is an abuse of discretion. The parties and Arbitrator agree that the declaration of an emergency is within the sound discretion of the Employer.

Any discretion that is subject to the arbitration clause must be reviewed for its abuse on the basis of its reasonableness.[14] The Union has the burden of proof that the Employer exercised a management right in a manner that was arbitrary, capricious or motivated by bad faith or was illegal.[15] The abuse of discretion standard has often been identified with arbitrariness and capriciousness. Aspects of arbitrary and capricious were summarized:

> "[An] action is *arbitrary and capricious* if the agency contravenes the legislature's intent, fails to consider a crucial aspect of the problem, or offers an explanation which is so implausible that it runs

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13 ELKOURI AND ELKOURI, *HOW ARBITRATION WORKS*, 6th Edition, at 384.

14 *Elkouri & Elkouri, How Arbitration Works,* (6th Edition, BNA, 2003) p. 480, and fn. 248; *Schein Body & Equip. Co., Inc*., 69 LA 930, (Roberts, 1977), at 935-36.

15 *Wellsville Local School Dist*. 124 LA 117, 121 (Roomkin, 2007), *Jackson-Milton Bd. of Ed.* 113 LA 8 (Morgan, 1999).

> contrary to agency expertise. [Citation.] 'While an agency is not required to adhere to a certain policy or practice forever, sudden and unexplained changes have often been considered arbitrary. [Citation.]"[16]

When there is a reasoned explanation based on the evidence, it is not an arbitrary or capricious decision.[17] Another description is whether there is a "rational connection between the facts found and the choice made."[18] Without a showing of internal inconsistency or bad faith or some other ground for calling a decision into question, the outcome may not be reversed as arbitrary or capricious.[19]

The premise that an emergency was not declared is faulty. An emergency was declared. A "Public Safety Emergency" was not declared. The argument that it was an abuse of discretion not to declare a Public Safety Emergency cannot be sustained under the abuse of discretion standard. The Employer chose not to implement a Public Safety Emergency which entails the granting of leave. Granting leave is a constituent requirement of §13.15(B). That section has as its default condition employees working, not employees taking leave. Failure to declare a Public Safety Emergency which includes leaves is not an abuse of discretion per §13.15(B) which does not ordinarily include leaves.

An abiding assumption of §13.15(B) with employees working is that the State would be dedicating its operations towards ameliorating the emergency. Considering the forms it may take that is fairly obvious. It could be, to name a few, civil disturbance, air pollution (gas leaks), water pollution (water table contamination),even flood, tornado and earthquake damage as well as pandemic. In 2020 the State made the considered and rational choice to devote its resources toward providing the service of State agencies throughout the pandemic to the extent it could. The great extent it succeeded by valiant efforts of its employees.

Where there are two rational choices to motivate two actions, the choice of one action over the other does not constitute an abuse of discretion. A rational choice opposed, or not preferred by one party, may nonetheless be satisfactorily related to the facts. It is only where such choice is unexplainable or its explanation is so implausible that abuse of discretion can be established. The choice to maintain operations and provide service in the face of the pandemic the citizens and residents of the State of Ohio is the highest purpose of a state and cannot possibly be irrational.

B. CONCLUSION

Based on the record in this matter taken as a whole, it is found that the Union failed to prove, as to the merits, that its reading of Section 13.15(B) is the more probable and that the Employer

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16 *General Services Employees Union*, 285 Ill. App. 3d at 515-16.

17 *Pokratz v. Jones Dairy Farm* (C.A.7, 1985), 771 F.2d 206, 209.

18 *Motor Vehicle Manufacturers Association v. State Farm Mutual Life Insurance Co.,* 463 U.S. 29, 41-44 (1983) at 43.

19 *Davis v. Kentucky Finance Cos. Retirement Plan* (C.A.6, 1989), 887 F.2d 689, 695, (cert. den. 1990), 495 U.S. 905, 110 S.Ct. 1924, 109 L.Ed.2d 288.

breached that terms. The Employer has the more probably correct reading of that section. The Union failed its burden to establish that an Emergency or Public Safety Emergency was declared by circumstantial evidence. The Union failed to prove that a failure to declare an Emergency or Public Safety Emergency was an abuse of managerial discretion. The grievance is denied.

This award draws its essence from the Arbitrator's interpretation of the parties' contract with respect the grievance procedure and with respect to Section 13.15 together with all other cited provisions of the contract and the evidence of record.

Made and entered this May 16, 2022
at Cuyahoga County, Ohio

GREGORY P. SZUTER, ARBITRATOR