

Thomas J. Nowel, NAA  
Arbitrator, Mediator, Fact Finder  
Lakewood, Ohio

IN ARBITRATION PROCEEDINGS PURSUANT TO  
AGREEMENT OF THE PARTIES

Arbitration Proceedings Between:	)	1199/ARB/
	)	Ann Halpin
The State of Ohio Bureau of Workers Compensation	)	BWC-2021-
	)	03003-11
and	)	
	)	ARBITRATION
SEIU District 1199 WV/KY/OH	)	OPINION AND
	)	AWARD
	)	
Re: Ann Halpin, Class Action. Forced Lunch	)	DATE:
	)	January 4, 2023

APPEARANCES:

Krista Downs, Labor Relations Officer 3, for the Ohio Bureau of Workers Compensation and Joshua D. Norris, Executive Vice President, SEIU District 1199 WV/KY/OH.

## INTRODUCTION

This arbitration arises pursuant to a collective bargaining agreement between the State of Ohio and the Service Employees International Union District 1199 WV/KY/OH. The Union represents various classifications across a number of State of Ohio Departments and Agencies including the Ohio Bureau of Workers Compensation. The Grievant, Ann Halpin, is a Union Delegate representing bargaining unit employees at the Bureau of Workers Compensation. Delegate Halpin filed a class action grievance regarding the scheduling of lunch periods for bargaining unit employees at the Bureau on September 17, 2021. The Employer denied the grievance at the various steps of the Grievance Procedure, and the Union appealed the matter to arbitration. Prior to the arbitration hearing, the Employer asserted that the grievance was not arbitrable as it was untimely filed and should be denied on that basis. During the arbitration hearing, the parties presented their cases regarding arbitrability and on the merits.

The arbitrator was selected to hear the arbitration pursuant to Article 7 of the collective bargaining agreement. The hearing was conducted on October 12, 2022 at the offices of the Ohio Office of Collective Bargaining in Columbus, Ohio. Each party had full opportunity to present their cases including witnesses and exhibits. Post hearing briefs were submitted, and the record of hearing was closed on December 12, 2022. The arbitrator indicated that the award would be rendered no later than thirty days from the date post hearing briefs were submitted.

## WITNESSES

### TESTIFYING FOR THE UNION:

Ann Halpin, Medical Service Specialist and Union Delegate

## TESTIFYING FOR THE EMPLOYER:

Rhonda Bell, Director of Employment and Labor Relations

### RELEVANT PROVISIONS OF THE AGREEMENT

#### Article 1, Purpose and Intent of the Agreement

##### 1.03 Total Agreement

This Agreement represents the entire agreement between the Employer and the Union and unless specifically and expressly set forth in the express written provisions of this Agreement, all rules, regulations, practices and benefits previously and presently in effect, may be modified or discontinued at the sole discretion of the Employer. This Section alone shall not operate to void any existing or future ORC statutes or rules of the OAC and applicable Federal law. This Agreement may be amended only by written agreement between the Employer and the Union.

#### Article 7, Grievance Procedure

##### 7.06 Grievance Steps

##### Step 2 (Agency step)

All complaints not resolved at the supervisory level shall be filed in the electronic grievance system as a formal grievance within twenty (20) days of the date on which the grievant knew or reasonably should have had knowledge of the event. Grievances submitted beyond the twenty (20) day limit will not be honored. The parties shall reference the date the grievance was submitted in the electronic grievance system to confirm timeliness . . . . .

#### Article 24, Hours of Work and Overtime

##### 24.07 Meal Periods

Employees shall be granted an unpaid meal period of not less than thirty (30) minutes and no more than sixty (60) minutes near the midpoint of each shift, if feasible. If it is not feasible near the midpoint of the employee's shift, every attempt will be made to reschedule it at the earliest available time during that shift. If it is impossible to reschedule the meal period during the shift, the employee will be compensated according to provisions of this Agreement. Employees who are required by the Agency to remain in a duty status with no scheduled meal period shall receive compensation for time worked at their regular rate except when the employee is in an overtime status at which time the employee will be compensated at his/her overtime rate.

## ISSUE

The parties stipulated to the following issue before the arbitrator. “Did the Employer violate the terms of the parties’ CBA when they forced/required employees to take a one-half hour unpaid lunch/meal period, and, if so, what shall the remedy be?”

## GRIEVANCE

Statement of Grievance: Mandatory lunch period when working from home or in the office. Restricted flexible work schedules.

Resolution Requested: No mandatory lunch period. Restored flexible work schedules when teleworking per past practice of the last 18 months.

## JOINT STIPULATION

1. Ohio BWC requires some employees who are members of SEIU District 1199 to take a one-half hour unpaid meal period during their workday.

## BACKGROUND

Employees, who are members of the SEIU District 1199 bargaining unit and who are employed by the Ohio Bureau of Workers Compensation, were required to work from home when a state of emergency was declared by the Ohio Governor due to the COVID 19 pandemic beginning in March 2020. During the state of emergency and while assigned to work from home, bargaining unit employees were not required to include a lunch or meal break during the work day. Again, all affected bargaining unit employees were required to work from home during this time.

In August 2020, the management of the Agency was planning for the return of employees to the various work sites across the state and canvassed staff regarding potential work schedules including lunch periods. Employees continued to work from home for the duration of 2020 and well into 2021. During this time, bargaining unit employees continued to work a schedule which did not require the taking of a lunch/meal break.

On August 27, 2021, the Employer notified bargaining unit employees, by email, that they would be required to schedule a lunch/meal break during the work day. Employees had the option of requesting either a 30 minute or 60 minute unpaid break. Implementation of the requirement to take a lunch break was effective on September 7, 2021. Many staff were to continue working from home or in a hybrid capacity, home and office, although the plan was to eventually return to office duty.

The Union filed a class action grievance in behalf of all affected employees who were required to schedule a lunch/meal break on September 17, 2021. The grievance was denied by the Employer and the dispute was appealed to arbitration. Prior to the arbitration hearing, the Employer challenged the arbitrability of the grievance on the basis that the Union was aware of the policy requiring the scheduling of a lunch break based on the issuance of said policies going back to 2015 and more recently when the Employer notified employees, on August 27, 2021, that breaks would again be required. The collective bargaining agreement requires the filing of a grievance no later than 20 days following an Employer action or knowledge of such.

The Employer maintains policies regarding hours of work with reference to lunch periods. Policy HR – 4.07 states that BWC employees are entitled to an unpaid lunch period of either 30 or 60 minutes. This section mirrors Section 24.07 of the collective bargaining

agreement. The policy states further that management may assign scheduled lunch periods to ensure adequate office coverage during core hours. This policy has been in existence since 2008, and it has been revised a number of times, the latest being July 17, 2022. Employer Policy HR-4.23 outlines Flex Time and Alternate Work Schedules. The policy states that lunch periods are for a duration of 30 or 60 minutes. It also allows for a schedule deviation if approved by the immediate supervisor. Employer Policy HR-4.30 is the Teleworking Policy. It has been in existence for a number of years and was revised on November 29, 2021. This policy governed the working conditions of bargaining unit employees who were assigned to work from home during the pandemic. The policy states that teleworking is a management option and not an employee right. The policy states that all hours of work will comply with various Employer policies and the collective bargaining agreement. There is no specific reference to lunch periods. Reference has been made to the language of 24.07 of the CBA in the policy.

#### POSITION OF THE UNION

The Union states that bargaining unit employees were required to work from home when Governor DeWine declared a state of emergency due to the COVID 19 pandemic. During this time, employees were not required to include a lunch period during their work schedules. On August 27, 2021, the Employer notified employees that they would be required to take a lunch “against their will.” The Union states that this was a change of the interpretation of the language contained in Section 24.07 of the CBA. The Union states further that the language has not changed in a number of past collective bargaining agreements. Employees who have been forced to take a lunch period have not been compensated for said hours.

The Union responds to the Employer's assertion that the grievance was filed untimely. The Employer advised bargaining unit members that they would be required to schedule a lunch period via email on August 27, 2021. This directive and change in policy was scheduled to begin on September 7, 2021. The grievance was filed on September 17, 2021, ten days after the implementation of the revised policy. The collective bargaining agreement requires that grievances be filed no later than 20 days following the event and potential violation. Clearly, the grievance was filed in a timely manner. The Employer's argument, that the Union was in agreement with the policy change, is false and was disproven based on the Employer's own testimony regarding the rights and practice of employees to not schedule a lunch break when required to work from home.

The Union states that the granting of an unpaid lunch period is a negotiated benefit. The Employer is attempting to convert it to a management right and a scheduling tool. The word "required" appears in the CBA in many provisions. It does not appear in Section 24.07 except in the provision which requires the Employer to compensate employees who worked beyond their assigned hours. The Union states that the Employer's reliance on the Management Rights provision of the Agreement cannot be sustained as the right to an unpaid lunch is a negotiated benefit. This means that the Employer has relinquished the right to force an employee to schedule a lunch period.

The Union states that the Webster online dictionary defines the word "granted" as a right or privilege when a request is made. The Employer therefore has no right to make the taking of a lunch period mandatory. If it is requested by an employee, it cannot be denied. But the Employer has no contractual right to impose an unpaid lunch.

Neither the Fair Labor Standards Act or Ohio Revised Code require an Employer to provide a lunch period, paid or unpaid. Lunch breaks are, therefore, mandatory subjects of bargaining. The Union cites a number of contractual benefits which “shall be granted” to employees. The right to take an unpaid lunch must be granted by the Employer, but it cannot be imposed on bargaining unit employees. The Union respectfully requests that the arbitrator determine that the Employer violated the collective bargaining agreement as BWC employees have been forced to take lunch periods. The Union requests the arbitrator to provide a remedy for those employees who have been forced to schedule lunch periods and to retain jurisdiction to resolve issues of back pay and benefits.

#### POSITION OF THE EMPLOYER

The Employer states that all BWC bargaining unit employees were permitted to work from home beginning in March 2020 due to the COVID 19 pandemic. Staff were permitted to work through their lunch while working from home. In August 2020, a schedule canvas was conducted which included either a 30 minute or 60 minute lunch period. This was in accordance with BWC policies. The Employer states that the Union has been aware that employees are required to schedule a lunch period for several years. The BWC Flex Time policy states that lunch periods must be scheduled unless a schedule deviation is approved by management. This policy has been in effect since 2015. Other policies confirm that employees are expected to take an unpaid lunch period of 30 or 60 minutes. The Union has been provided copies of the policies over the years and is welcome to make comment. The Employer states



that the grievance was filed in an untimely manner, and the arbitrator should find that it is not arbitrable.

The Employer states that Article 5 of the collective bargaining agreement allows BWC management to determine starting and quitting time and the number of hours to be worked. Article 1 of the CBA provides management with the right to modify or discontinue policies at its sole discretion. HR Memo 4.23 states that management may determine the time and duration of the lunch period. Language in HR Memo 4.07 is taken directly from Section 24.07 of the CBA. “Full time employees scheduled to work more than four (4) hours in a day are entitled to an unpaid lunch period of not less than 30 or not more than 60 minutes.” These policies were not modified or changed during the time employees worked at home due to the pandemic. Working through lunch may only occur with approval from a manager. Management has always allowed flexibility allowing employees to work through their lunch period for a legitimate reason. Management allowed this to occur when employees were directed to work from home due to the COVID pandemic. Management had the right to change this past practice. The Employer states that it clearly had the right to require lunch breaks when bargaining unit employees returned to work in BWC offices or when working in a hybrid capacity.

Section 24.08 of the CBA states that a rest period may be combined with the lunch break “at the request of the employee” and approval of management. If the intent of the parties was for employees to request a lunch period per Section 24.07, the language would have mirrored that which is found in Section 24.08. The Employer states that, based on policy

and contract language, management has not violated the collective bargaining agreement. The Employer requests that the arbitrator deny the grievance in its entirety.

#### ANALYSIS AND OPINION

As a contract interpretation dispute, the Union has the burden to prove that the Employer has violated the collective bargaining agreement when it requires BWC bargaining unit employees to take either a 30 minute or 60 minute lunch break. The Employer states that the class action grievance filed by the Union is not arbitrable as it was submitted untimely. The question of arbitrability is considered first.

The Employer canvassed employees in August 2020 regarding scheduled lunch breaks but did not implement required lunch breaks as employees continued to work at home due to the COVID 19 pandemic. One year later, on August 27, 2021, the Employer again notified employees that they would be required to schedule a 30 or 60 minute lunch break. Employees were permitted to select either option, 30 or 60 minutes, and were notified, by email, that the modified work schedules, which included an unpaid lunch, would become effective on September 7, 2021. The class action grievance, filed by Union Delegate Ann Halpin, was submitted to the electronic grievance processing system on September 17, 2021. The collective bargaining agreement requires the filing of a grievance within 20 days of knowledge of possible contractual violation. The Employer argues that the Union was aware of the unpaid lunch policy as far back as 2015 and then again in August 2020. Employees were notified of their modified work schedules on August 27, 2021. The Union takes the position that the filing of the

grievance within 20 days of knowledge was not required until the modified schedules were implemented on September 7, 2021.

A party sometimes announces its intention to perform a given act, but does not culminate the act until a later date. Similarly, a party may perform an act whose adverse effect on another does not result until a later date. In such situations arbitrators have held that “occurrence” for purposes of applying time limits is at the later date.

*How Arbitration Works, Elkouri & Elkouri, Sixth Edition, pg. 224*

The implementation of the modified work schedules, which now included an unpaid lunch period, occurred on September 7, 2021. The Union grieved ten days following implementation. The CBA requires the filing of grievances no later than 20 days following occurrence of the incident giving rise to the dispute. The grievance in this matter, BWC-2021-03003-11, was timely filed and is therefore arbitrable.

The Employer cites a number of agency policies which have been promulgated over the past few years and which indicate that BWC bargaining unit employees are required to schedule either a 30 minute or 60 minute lunch period. This allows the Employer to adequately staff the various BWC office locations which serve the public. Employees were required, by order of the Governor, to work from home. Employees were not engaged in in-person contact with the public, and staffing various BWC work sites was not an issue. It made sense, therefore, to forego the need for the unpaid lunch periods. They were not necessary. There was little or no evidence presented at the arbitration hearing by either party regarding work schedules prior to March 2020. Were bargaining unit employees required to schedule the unpaid lunch periods prior to the order to work from home during the pandemic? It is not known if the Employer's lunch policies were enforced prior to March 2020. It was suggested that the work at home

period, during which lunch breaks were not taken, may have established a past practice. The Union's class action grievance refers to a past practice which was established during the work from home order due to the pandemic. The work from home requirement, due to the COVID 19 pandemic, was an unprecedented and unusual circumstance, and the cessation of taking a lunch period during this time would not have established a past practice. It made sense to suspend a requirement to take an unpaid lunch when employees worked from home.

The Union places a great deal of emphasis on the wording of Section 24.07. The Union states that the words "shall be granted" must be interpreted to mean that the Employer has no discretion. The Union asserts that the language was bargained as an employee benefit. An employee may request a lunch period but cannot be forced to include it in the work schedule. The Union refers to the *Webster* online definition. But the question the arbitrator is confronted with is the intent of the parties as opposed to a dictionary interpretation. What was the intent of the parties when this language was negotiated? Although the Union's witness, Delegate Halpin, testified that she participated in contract negotiations, there was no evidence as to the intent of the parties when Section 24.07 was negotiated. Intent may be determined by the practice of the parties, but, as mentioned previously, there was a lack of evidence whether employees were required to take a lunch period prior to the work at home order or if work schedules included an unpaid lunch only for those employees requesting such. Evidence suggests that, prior to the work from home order, individual employees may have been permitted to work without a lunch break (Rhonda Bell testimony), but this was based on permission from individual supervisors.

Although this grievance and arbitration applies only to BWC bargaining unit employees, this provision, Section 24.07, is part of the master agreement between the parties. There was no evidence regarding the application of Section 24.07 in other covered agencies which may have been helpful in determining intent. The collective bargaining agreement includes a number of Agency Agreements and Memorandum of Understanding including an agency specific Agreement for BWC bargaining unit employees. There is no reference to lunch periods in the agency specific Agreement.

Section 24.07 includes language regarding the scheduling of lunch periods during the middle of the work shift or at the earliest time if not possible during the middle of the shift. The provision also states that employees who are required to remain in a duty status by the Agency, with no scheduled lunch, will receive compensation for the hours worked including overtime if applicable. The inference here is management discretion. Section 24.08 of the CBA provides for the combining of rest periods with lunch breaks unless operational needs preclude such. It appears generally that the intent of the parties was for scheduled unpaid lunch periods with employees being granted either a 30 minute or 60 minute lunch with the understanding that individual supervisors could grant an employee, from time to time, a schedule without an unpaid lunch period.

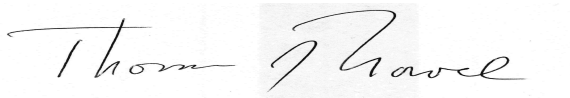
The Union is correct in its assertion that provisions of the collective bargaining agreement clearly take precedence over and supersede Employer issued policies. The arbitrator has attempted to determine the intent of the parties regarding the interpretation of the opening lines of Section 24.07. There is insufficient evidence by way of bargaining history or practice, prior to the work at home order, to support the Union's position and remedy

requested. There is no evidence of a violation of Section 24.07. The grievance is, therefore, denied.

#### AWARD

The Employer did not violate the terms of the CBA. Grievance is denied.

Signed and dated this 4th day of January 2023 at Lakewood, Ohio.

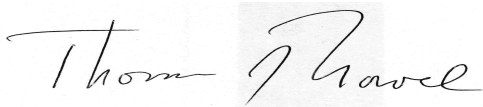
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Thomas J. Nowel, NAA  
Arbitrator

# CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of January 2023, a copy of the foregoing Award was served by electronic mail upon Krista Downs, Labor Relations Officer 3, for the Ohio Bureau of Workers Compensation and Joshua D. Norris, Executive Vice President, SEIU District 1199 WV/KY/OH.

A handwritten signature in cursive script that reads "Thomas J. Nowel". The signature is written in black ink on a light-colored background.

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Thomas J. Nowel, NAA  
Arbitrator