IN THE COURT OF COMMON PLEAS
FRANKLIN COUNTY, OHIO

SERVICE EMPLOYEES INTERNATIONAL UNION, DISTRICT 1199, THE HEALTH CARE AND SOCIAL SERVICE UNION CHANGE TO WIN, CLC 1395 Dublin Road Columbus, OH 43215 Movant/Plaintiff,	:	CASE NO. JUDGE
v.	:	
STATE OF OHIO c/o Kathleen Madden, Director Kristen Rankin, Deputy Director Ohio Department of Administrative Services Office of Collective Bargaining 4200 Surface Road Columbus, OH 43228 Respondent/Defendant.	:	

MOTION AND APPLICATION OF SERVICE EMPLOYEES INTERNATIONAL UNION (SEIU), DISTRICT 1199, THE HEALTH CARE AND SOCIAL SERVICE UNION, CHANGE TO WIN, CLC TO VACATE ARBITRATION AWARD WITH MEMORANDUM OF SUPPORT

Now comes Service Employees International Union (SEIU), District 1199, the Health Care and Social Service Union, Change to Win, CLC ("SEIU District 1199" or "Union"), by and through counsel, and moves pursuant to Ohio Rev Code §§2711.10 and 2711.13, for an order vacating the arbitration award ("Award") entered by Arbitrator William J. Miller, Jr. on May 10, 2023 in favor of the State of Ohio ("State" or "Employer").

As set forth in the Memorandum below, the award should be vacated because: (1) the arbitrator exceeded his powers under the collective bargaining agreement between SEIU District 1199 and the State (known collectively as "Parties") and applicable law, and (2) the award departs from the essence of the collective bargaining agreement because it conflicts with the express terms of the agreement, is without rational support, and cannot be rationally derived from the terms of the agreement.

Additional support for this Motion and Application is set forth in the attached Memorandum. As required by Ohio Rev. Code §2711.14, attachments include the Parties' collective bargaining agreement (Exhibit A) and Arbitrator Miller's Award (Exhibit B). There is no transcript of the arbitration, however a record of the arbitration, including motions, exhibits, and briefs is filed contemporaneously with this Motion.

Respectfully submitted,

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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This matter arises as a result of an arbitration award issued on May 10, 2023 by Arbitrator William J. Miller Jr. pursuant to the collective bargaining agreement ("Agreement") between the Movant SEIU District 1199 and the State of Ohio that was in effect from 2018 to 2021. *Exhibits A (referred to in filed arbitration briefs as Joint Ex. 1), B*. Disputes over the interpretation of the Agreement are subject to a grievance process which ends in final and binding arbitration. *Exhibit A, Article 7, pp.21-22*. Under the plain reading of the Agreement, employees of the State within the bargaining unit represented by the Movant Union were entitled to an $8.00 per hour stipend when required by the State to work during an emergency (other than a weather emergency) declared by the Ohio Governor from March 9, 2020 until the state of emergency ended on June 18, 2021. *Exhibit C (referred to in filed arbitration briefs as Joint Ex. 3).*

The Arbitrator exceeded the powers granted to him by the Parties through the Agreement by ignoring the plain language and adding requirements to its plain language, including: (1) a requirement that the State must require some employees to work during an emergency while other employees did not work; (2) that some employees were required to have been given a particular time of administrative leave for not working; and (3) the implementation of Department of Administrative Services ("DAS") Directive HR-D-11 ("Directive"), a document unilaterally created by the State that was not subject to the collective bargaining process and specifically excluded by the plain language of the collective bargaining agreement. *Exhibit D (referred to in filed arbitration briefs as Joint Ex. 16)*. Such requirements and limitations were not expressly agreed to by the Parties and was not rationally derived from its terms. In addition, the Arbitrator's

decision violated express provisions of the Agreement- including Articles, 1, 7, and 35. As such, the Award should be vacated pursuant to Ohio Rev. Code §2711.10(D).

II. STATEMENT OF FACTS

Movant SEIU District 1199 and the State of Ohio have been parties to a series of collective bargaining agreements throughout decades. The Agreement relevant in this matter was in effect from 2018-2021 and is marked as *Exhibit A*. During the beginning of the COVID epidemic, Ohio Governor Mike DeWine declared a State of Emergency through the implementation of Executive Order 2020-01D entitled 'Declaring a State of Emergency' on March 9, 2020. *Exhibit C*. This Order included at paragraph 6, the following: "[t]his Proclamation does not require the implementation of the Department of Administrative Services Directive HR-D-11."

The Governor rescinded the declared emergency on June 18, 2021, through Executive Order 2021-08D. During the period of time an emergency, which was not weather related, was declared by the Governor, both essential and non-essential members of SEIU District 1199 within the State's service continued to work. Pursuant to the collective bargaining agreement between the State and District 1199:

> Employees not designated essential may be required to work during an emergency. When an emergency, other than a weather emergency, is declared by the Governor or designee and Administrative leave with pay is granted for employees not required to work during the declared emergency, such leave is to be incident specific and only used only 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 35.01A above.
>
> *Exhibit A*, *Article 35.01(B)- Other than Weather Emergencies, p. 117*.

Article 35.01(A) reads, in pertinent part, as follows:

> …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) per hour worked…

Id. pp.115-116.

SEIU District 1199 members were not paid an additional $8.00 per hour during the time period of the Governor's declared emergency, which was not weather related, from March 9, 2020 to June 18, 2021. The Movant Union filed a grievance against State for failure to pay the emergency stipend. The State denied the grievance and the matter was appealed to arbitration. A hearing was held on February 7, 2023, before Arbitrator William J. Miller, Jr. The parties stipulated to the following facts at hearing:

1. The grievance is properly before the Arbitrator and there are no procedural objections.

2. State of Ohio Governor Mike DeWine declared a State of emergency on March 09, 2020, via Executive Order 2020-01D.

3. State of Ohio Governor Mike DeWine rescinded the declared emergency on June 18, 2021.

4. No 1199 members were laid off during this period of the declared emergency from March 09, 2020 – June 18, 2021.

5. No layoff process was instigated at any agency in which SEIU District 1199 represents members during the period of declared emergency from March 09, 2020 – June 18, 2021.

6. Covid-19 was not a weather emergency.

7. Both essential and non-essential State of Ohio employees were required to work during the period of the declared emergency from March 09, 2020 – June 18, 2021.

8. SEIU District 1199 WV/KY/OH is the recognized exclusive bargaining agent for all bargaining unit members in bargaining units 11 and 12.

9. The State of Ohio utilized The Ohio National guard and the Ohio State Highway Patrol to work in the institutional facilities.

Exhibit B, pp.1-2

The parties also stipulated to the following issue: "Did the State of Ohio violate Article 35 of the collective bargaining agreement, and if so, what shall the remedy be?" *Id.*

On May 10, 2023, Arbitrator Miller issued an award denying the grievance. The award is set forth as *Exhibit B*. Upon review of Executive Order 2020-01D, Arbitrator Miller found that paragraph 6 was a key part of making his determination regarding whether Article 35.01(B) had been violated. *Id. at p.20*. Paragraph 6 of the Executive Order reads: "this proclamation does not require the implementation of the Department of Administrative Services Directive HR-D-11.". Accordingly, State employee's obligation to travel to and from work is not to be limited as a result of this proclamation." *Exhibit C, ¶6.* The Arbitrator found that the State's intent was therefore not to activate its Public Safety Emergency Policy (Directive HR-D-11), attached as *Exhibit D*. It is the Arbitrator's belief that the Governor's declaration of an emergency was not the sort of declared emergency the parties envisioned in Article 35. Because of this, the "state of emergency" language found in Article 35 was not triggered and District 1199's members were not entitled to the $8.00 per hour of emergency pay for working during a declared emergency. *Exhibit C, pp. 20-21*.

Further, the Arbitrator determined that because both essential and non-essential employees were required to work during the emergency, there was no reasonable way for Article 35 to be come operative. *Id*. p.21. And that employees were not given a particular kind of administrative leave, though the relevancy of this is not explained in the Award. *Id.*

III. LAW AND ARGUMENT

Pursuant to Ohio Rev. Code §2711.13, any party to an arbitration may file for an order "vacating, modifying, or correcting the award…" Notice of a motion to vacate an award "must be served upon the adverse party within three months after the award was delivered to the parties in interest…" In this matter, the Award is dated May 10, 2023.

Ohio Rev. Code §2711.10 sets forth instances in which the Court shall make an order vacating an arbitration award. Specifically:

A. The award was procured by corruption, fraud, or undue means.

B. There was evident partiality or corruption on the part of the arbitrators, or any of them.

C. The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

D. The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

In this matter, the Arbitrator exceeded the powers granted to him under Article 7 of the Agreement by adding terms and requiring limitations not included in the plain language of the collective bargaining. Further, his decision is directly in conflict with the plain meaning of the Article 35 language and ignores the express limitations placed on the Arbitration in Articles 1 and 7 of the Agreement.

An arbitrator's power to issue an award is "not unlimited in the resolution of labor disputes." *Ohio Office of Collective Bargaining v. Ohio Civil Service Employees Assn., Local 11, AFSCME, AFL CIO*, 59 Ohio St.3d 177, 180 (1991). Pursuant to Ohio Rev Code §2711.10(D), a court of common pleas shall vacate an arbitration award if an arbitrator "exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." The purpose of Ohio Revised Code §2711.10(D) is to ensure that an arbitrator has not overstepped the bounds of the authority granted by the parties through their collective bargaining agreement. *Queen City Lodge No. 69, Fraternal Order of Police v. Cincinnati*, 63 Ohio St.3d 403, 407 (Ohio 1992), see generally, *State Farm Mutual Insurance Co. v. Blevins*, 49 Ohio St.3d 165, 167 (Ohio 1990).

a. THE ARBITRATOR EXCEEDED HIS AUTHORITY BE ADDING LANGUAGE TO THE AGREEMENT REQUIRING THE DECLARATION OF A "PUBLIC SAFETY EMERGENCY"

The duty of the court in determining how to rule on a motion to vacate is "to ascertain whether the arbitrator award is derived in some rational way from the collective bargaining agreement." *Detroit Coil Co. v Int'l Ass'n of Machinists & Aerospace Workers*, 594 F.2d 575, 579 (6th Cir. 1979); see also *Mahoning Cty Bd of Mental Retardation & Developmental Disabilities v. Mahoning Cty. TMR Ed Assn*, 22 Ohio St.3d 80, ¶ 1 of syllabus (1986). An arbitrator must adhere to the terms as written and not create their own version of the agreement between the parties. The Ohio Supreme Court has found that "[t]he arbitrator is confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions." *Ohio Office of Collective Bargaining,* 59 Ohio St. at 180, quoting *Detroit Coil Co*, 594 F.2d at 579.

In *Ohio Office of Collective Bargaining*, *supra*, the Ohio Supreme Court found the arbitrator exceeded his authority by ignoring the express language in the collective bargaining agreement between the parties, which stated that "…if the arbitrator finds that there has been an abuse of a patient or another in the care of the State of Ohio, the arbitrator does not have the authority to modify the termination of an employee committing such abuse." *Id*. at 182. The agreement further stated that: "[t]he 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 expressed language of this Agreement." *Id*.

The arbitrator in that matter found that the grievant was guilty of abuse, but also found that the State did not fulfill its requirements under the "just cause" standard for termination and

returned the employee to work. The Ohio Supreme Court quoted the U.S. Supreme Court's decision in *United Steelworkers of America v. Enterprise Wheel & Car Corp*, 363 US 593, 597 (1960), finding:

> …an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.
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> *Ohio Office of Collective Bargaining,* 59 Ohio St.3d at 180.

Almost a decade later, the Ohio Supreme Court used similar reasoning when affirming the lower court's decision to vacate an arbitration award in *Int'l Assn. of Firefighters, Local 67 v. Columbus*, 95 Ohio St. 3d 101 (2002). In that case, two (2) firefighters were diagnosed with carpal tunnel syndrome and sought injury leave under their collective bargaining agreement. The collective bargaining agreement stated that injury leave: "shall be granted to any such employee only for injuries or other disabilities determined by the Finance Department Director or designee as caused or induced by the actual performance of his or her position." *Id*. The city refused to allow the use of injury leave because the city's board of industrial relations defined the term "injury" and "disability" as occurring due to a single traumatic event. As carpal tunnel is not cause by a single event, but by repetition over a long period, the city claimed there was no "injury" or "disability", and the members were not entitled to the leave. *Id*.

The Ohio Supreme Court found:

> An arbitrator is confined to interpreting the provisions of a CBA as written and to construe the terms used in the agreement according to their plain and ordinary meaning. *Ohio Office of Collective Bargaining v. Ohio Civ. Serv. Emp. Assn., Local 11, AFSCME, AFL-CIO* (1991), 59 Ohio St.3d 177, 180, [internal citations omitted]. Even though the CBA does not define what is meant by the term "other disabilities," this does not give the arbitrator the authority to rely on the city's own definition of that term. Instead, since the CBA is silent on this point, the term "other

> disabilities" must be given its ordinary meaning. Black's Law Dictionary (7 Ed.1999) 474 defines "disability" as "the inability to perform some function; an objectively measurable condition of impairment, physical or mental." It further defines "physical disability" as "an incapacity caused by a physical defect or infirmity, or by bodily imperfection or mental illness." It is clear that the firefighters' carpal tunnel syndrome falls within the ordinary definition of a disability.
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> *Id.* at 104.

In the instant matter, Arbitrator Miller similarly went outside the Agreement when making his determination. Instead of relying on the plain language of the Agreement and the plaint meaning of the terms, he relied on the State's own definition of terms contained in DAS Policy HR-D-11- just as the employer did in the IAFF Local 67 case, *supra*.

The 2018-2021 Agreement between the Parties reads at Article 35.01(B):

> Employees not designated essential may be required to work during an *emergency*. When an *emergency, other than a weather emergency, is declared by the Governor* or designee and Administrative leave with pay is granted for employees not required to work during the declared emergency, such leave is to be incident specific and only used only 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 35.01(A) above.
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> *Exhibit A, Article 35.01(B)- Other than Weather Emergencies, p. 117 (emphasis added)*

Article 35.01(A) reads, in pertinent part, as follows:

> …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) per hour worked*…
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> *Id. pp.115-116 (emphasis added)*

The Parties tasked the Arbitrator with interpreting Article 35.01(B) including the last sentence: "[p]ayment for hours worked for *other than weather emergencies* shall be pursuant to Section 35.01(A) above." (emphasis added). The Parties agreed that the Governor of the State of

Ohio declared an emergency on March 9, 2020. *Stipulation 2, Exhibit B, pp.1-2*. The Declaration was based entirely on the emergence of COVID-19. *Exhibit C*. The Parties agreed that COVID-19 was not a weather-related emergency. *Stipulation 6, Exhibit B, pp.1-2*.

The plain language of emergency is straightforward:

> Black's Law Dictionary: [s]ituation requiring immediate attention and remedial action. Involves injury, loss of life, damage to the property, or catastrophic interference with the normal activities. A sudden, unexpected, or impending situation. *"emergency", lawdictionary.com accessed July 5, 2023.*
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> Merriam-Webster: an unforeseen combination of circumstances or the result state that calls for immediate action; an urgent need for assistance or relief. "emergency" merriam-webster.com accessed *July 5, 2023.*

COVID-19 was an unforeseen event that required immediate attention. It involved "a catastrophic interference with normal activities." But instead of using the plain meaning of the phrase "emergency" or looking to other parts of the Agreement for a definition, the Arbitrator chose to use the definition of "emergency" in the State's unilaterally created policy, which was never bargained with the Union and imposed terms upon Movant SEIU District 1199 to which it never agreed.

Arbitrator Miller states:

> 'Upon carefully reviewing the Executive Order, a key part of such order is paragraph 6 which provides "this proclamation does not require the implementation of the Department of Administrative Services Directive HR-D-11. According, State employees obligations to travel to and from work is not limited as a result of this proclamation." In effect, the Employer was not activating its Public Safety Emergency Policy, and in fact employees were being directed to report to work.
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> *Exhibit B, p. 20.*

The purpose of the DAS Directive is "to establish a uniform policy for all agencies to implement during a public safety emergency." *Exhibit D, p.1*. In essence, the Arbitrator has determined that "emergency other than a weather emergency" means a "public safety emergency"

as defined by DAS Directive. A "public safety emergency" is defined in the Directive as: "[a] term of art which refers to all formal declarations or proclamations which may limit a state employee's 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." *Id. p.6*.

It should be noted that the State's definition of "public safety emergency" differs from its own definition of an "emergency." The definition of "emergency" under DAS Directive HR-D-11 is: "[a]ny period during which the Congress of the United States or a chief executive 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 natural disaster, man-made disaster, hazardous materials incidents or civil disturbance." *Id*.

The Arbitrator has clearly read into Article 35.01(B), and subsequently impose through his decision, the requirement of a declaration of a "public safety emergency" in order for the Article to apply, which clearly exceeds his power under Article 7.07(E), which states:

> Only disputes involving the interpretation, application or alleged violation of a provision of this 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.
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> *Exhibit A, p.22*.

Article 35.01(B) applies when an emergency, other than a weather emergency, is declared by the Governor. There is no requirement that "a public safety emergency" be declared or an emergency that implements DAS Policy HR-11 be declared. Those are requirements and obligations that Arbitrator added to the language of the Agreement. In so doing, he clearly exceeded his authority. Not only did he add to the language and violate the express terms of Article

35, his interpretation also clearly violates other provisions of the collective bargaining agreement, including Article 7 above and Article 1 of the Agreement which reads:

> …the provisions of this Agreement shall automatically modify or supersede: (1) conflicting rules, regulations and interpretive letters of the Department of Administrative Services pertaining to wages, hours and conditions of employment; and (2) conflicting rules, regulations, practices, policies and agreements of or within departments/agencies pertaining to terms and conditions of employment; and (3) conflicting sections of the Ohio Revised Code except those incorporated in Chapter 4117 or referred to therein.
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> *Id. at p.1.*

Whether or not the State decided to implement its public safety emergency policy when the Governor declared an emergency is wholly irrelevant to the plain meaning of Article 35. Nothing contained in the DAS Directive HR-D-11 can violate the terms of the collective bargaining agreement between the State and the Movant as set for in Article 1. The Agreement supercedes policy. The Agreement does not give the Arbitrator the right to rely on the definitions in the State's own policies to interpret the collective bargaining agreement, especially when such definitions change the obligations of the Parties. By ignoring the plain language of Article 35.01 and Article 1, the Arbitrator "went outside the scope of the CBA and unilaterally abrogated the bargained-for provision." *IAFF Local 67*, 95 Ohio St. 3d at 104-105 (finding that by applying the city's definition of "disability" found in the industrial service rules, the arbitrator imposed additional requirements and obligations upon the parties and violating the plain terms of the collective bargaining agreement).

The Arbitrator clearly exceeded the powers granted to him under the terms of the collective bargaining agreement when he determined that a public safety emergency was a prerequisite the triggering of Article 35.01(B) and the Award should be vacated.

b. THE ARBITRATOR EXCEEDED HIS AUTHORITY BE ADDING LANGUAGE TO THE AGREEMENT REQUIRING THAT SOME EMPLOYEES REPORTING TO WORK WHILE OTHER DID NOT

In his Award, the Arbitrator further stated:

> [w]hen Article 35 is carefully reviewed and considered, it becomes readily apparent that such provision contemplates some employees reporting for work, and other employees not reporting for work. In this instance based upon the specific Executive Order issued by Governor DeWine, there was no opportunity for employees to refrain from working, and in fact, as established by the jointly stipulate facts 'both essential and non-essential State of Ohio employees were required to work during the period of the declared emergency… This being the case, there is no reasonable way for Article 35 to become operative…"
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> *Exhibit B, p.21.*

The Governor's Executive Order declared an emergency, which is not weather related. The requisite declaration was made by the Governor. This triggered the language agreed to by the parties in Article 35.01(B). The declaration did not limit a State employee from traveling to work. *Exhibit C, ¶6*. It also did not require (though it did not prohibit) the implementation of DAS Directive HR-D-11. As drafted, the Executive Order in no way violates the provisions of the collective bargaining agreement and does not affect its terms.

The unilateral decision of the State to require its employees to work during an emergency other than a weather emergency is expressly granted under Article 35.01(B): "[e]mployees not designated essential may be required to work during an emergency." *Exhibit A, p.117*. The language does not require a requisite portion of the bargaining unit to stay home while others work. There are no such prerequisites, limitations, or requirements in the plain language agreed to by the Parties. The State has the right to require non-essential employees to work and it did.[1] The Parties

[1] The State also had the authority, if it so desired, for people to stay home during the emergency other than a weather emergency. If it did that, it would have to provide them with a specific form of administrative leave that it was never prepared to provide. The State decided not to provide it, which was also their right under the Agreement. *Id*.

agreed that this occurred. The fact that no one stayed at home has no bearing on the State's obligations that follow when it requires employees to work during an emergency other than a weather emergency.[2]

The Agreement is clear on this: "[p]ayment for hours worked for *other than weather emergencies* shall be pursuant to Section 35.01(A) above." *Id*. Article 35.01(B) pays employees their normal rate of pay for hours worked during an emergency plus a stipend of $8.00 per hour. *Id*., pp.116-117. This language is crystal clear, yet the Arbitrator persists on adding additional language to avoid costing the State the money it owes its workers.

The Supreme Court has emphasized on numerous occasions that an arbitrator cannot create his own collective bargaining agreement by imposing new requirements, limitations, and obligations on the parties not expressly provided for in the agreement. See *IAFF Local 67*, 95 Ohio St.3d at 104; *Ohio Office of Collective Bargaining*, 59 Ohio St.3d at 183; *Southwest Ohio Regional Transit Auth* v. *Amalgamated Transit Union, Local 627*, 91 Ohio St.3d 108, 111 (2001). That is exactly what has been done in this case.

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[2] Further, the Arbitrator implies that because no employees were on incident-specific administrative leave during the other than a weather emergency this somehow negates the need to follow Article 35.01(B)- though it is unclear how the Arbitrator's finding affects his determination of the outcome:

> While there was considerable discussion and argument during the hearing relating to whether or not administrative leave was granted, the record evidence showed that the employer had no intention of providing administrative leave to employee as a result of executive Order 2020-01D…The unrefuted evidence shows that no employee received administrative leave as a result of the Executive Order being issued. *Id. at p.21.*

It is unclear whether this fact alone was determinative for the Arbitrator, but this is also an additional requirement in order for a bargaining unit member to paid for working during an other than weather emergency. The ability to have employees work during an other than weather emergency or be set home and receive administrative leave is latitude the State was given by the Union through the bargaining process to be used in ONLY specific instances where the health and/or safety of the employee or someone entrusted to the employee's care could be negatively affected. This was a restriction placed on the state's ability to use the leave, not a prerequisite for the stipend.

According to the Arbitrator, instead of the plain language written into the Agreement and Agreed to by the Parties, Article 35.01(B) reads thusly:

> Employees not designated essential may be required to work during an emergency **but not all employees**.[3] When ~~**an emergency, other than a weather**~~ **a public safety** emergency **as defined by Department of Administrative Services Directive HR-D-11**, [4] is declared by the Governor or designee and **only when** Administrative leave with pay is granted for employees not required to work during the declared **public safety** emergency **as defined by Department of Administrative Services Directive HR-D-11**, such leave is to be incident specific and only used only 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**~~ **public safety** emergencies **as defined by Department of Administrative Services Directive HR-D-11** shall be pursuant to Section 35.01(A) above **unless no other employee was paid incident-specific Administrative leave**.[5]

This is a matter in which the Arbitrator had his own ideas regarding what the Agreement should say and how it should apply. However, that is well beyond the authority granted to him by the Parties. The Award conflicts with the express terms of the Agreement of the parties and cannot be rationally derived from its plain, clear terms. It does not draw its essence from the collective bargaining agreement. Under Ohio Rev. Code §2711.10(D), the Award must be vacated.

IV. CONCLUSION

Article 35.01 (B) states that: "[p]ayment for hours worked for other than weather emergencies shall be pursuant to Section 35.01(A) above." The Governor declared an

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[3] "[E]ssential and non-essential State of Ohio employees were required to work during the period of the declared emergency… This being the case, there is no reasonable way for Article 35 to become operative…" *Exhibit B, p.21***.**

[4] "Upon carefully reviewing the Executive Order, a key part of such order is paragraph 6 which provides 'this proclamation does not require the implementation of the Department of Administrative Services Directive HR-D-11. According, State employees obligations to travel to and from work is not limited as a result of this proclamation.' In effect, the Employer was not activating its Public Safety Emergency Policy, and in fact employees were being directed to report to work…The Executive Order clearly excluded any public safety emergency, and in fact required employees to work…" *Id.*

[5] See FN 2.

emergency that was not weather related pursuant to Executive Order 2020-01(D) "Declaring a State of Emergency." It is uncontroverted that SEIU District 1199 members worked during the term of the declared emergencies and under the terms of the Parties' Agreement, they must be paid accordingly.

For all the foregoing reasons, the Award should be vacated, and the case remanded to the Arbitrator for a calculation of the backpay award.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been filed electronically on August 8, 2023. A copy of SEIU District 1199's Motion and Application to Vacate the Arbitration Award with accompanying exhibits was sent on August 8, 2023 pursuant to Ohio Rule of Civil Procedure 5(B)(2)(d) and (f) by UPS Overnight Delivery and e-mail to the following:

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