IN THE MATTER OF TOWNSHIP OF MOUNT OLIVE, AND, FOP LODGE 122	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001219-24 Civil Action On Appeal From: PUBLIC EMPLOYMENT RELATIONS COMMISSION DOCKET NO.: SN-2025-003 Date of Submission: March 13, 2025

BRIEF OF PETITIONER-APPELLANT TOWNSHIP OF MOUNT OLIVE

Cleary, Giacobbe Alfieri & Jacobs LLC
955 State Route 34, Suite 200
Matawan, New Jersey 07747
Attorneys for Township of Mount Olive
Anthony G. LoBrace, Esq.
Attorney ID No: 304682019
alobrace@cgajlaw.com
Adam S. Abramson-Schneider, Esq.
Attorney ID No: 021072004
aabramson@cgajlaw.com

Of Counsel:
Adam S. Abramson-Schneider, Esq.

On the Brief:
Anthony G. LoBrace, Esq.

TABLE OF CONTENTS

R. 2:6-2(a)(2) TABLE OF JUDGMENTS, ORDERS, AND RULINGS APPEALLED

TABLE OF AUTHORITIES

Cases

PRELIMINARY STATEMENT

This brief is submitted on behalf of Petitioner-Appellant, the Township of Mount Olive (the "Township") in support of its appeal from the Public Employment Relations Commission's (the "Commission") denial of the Township's Scope of Negotiations petition seeking to restrain arbitration filed by Fraternal Order of Police, Lodge 122 (the "Union") to the extent that the Union sought to challenge the Township's reassignment of Officer Thomas Cuff ("Cuff") from the Corporal assignment existing within the Mount Olive Police Department (the "Department").

As explained more fully below, the Township's petition should be granted, the Commission's November 26, 2024 decision declining to restrain arbitration should be reversed, and arbitration of the issue of Cuff's reassignment should be restrained because the Township's reassignment of Cuff was a matter of its managerial prerogative and, therefore, beyond the scope of negotiations or arbitration.

PROCEDURAL HISTORY

Following departmental disciplinary proceedings, and by mutual agreement of the Township and the Union, on December 27, 2022, the Union filed a Request for Submission of a Panel of Arbitrators with the Commission

seeking to arbitrate the disciplinary action to be imposed following such departmental disciplinary proceedings. (Pa093). In response, on July 30, 2024, the Township filed a Scope of Negotiations petition with the Commission requesting that the Commission restrain arbitration to the extent that the Union sought the challenge the Township's determination to reassign an officer from the Corporal assignment within the Department. (Pa001-Pa006).

On November 26, 2024, the Commission issued its decision that is the subject of this appeal and declined to restrain arbitration of the issue of Cuff's reassignment. (Pa180-Pa189). This appeal followed. (Pa190-Pa197).

STATEMENT OF FACTS

The Township of Mount Olive and Fraternal Order of Police, Lodge 122 were parties to a collective negotiations agreement which was in effect from January 1, 2020 to December 31, 2023 (the "Agreement"). (Pa019-Pa063). At all relevant times, Officer Thomas Cuff was a Police Officer employed with the Mount Olive Police Department.

On or about July 14, 2021, Cuff received an internal affairs administrative advisement form advising him that he was the subject of an internal affairs investigation in connection with a citizen complaint filed against him with the Department. (Pa064). The citizen complaint arose out of Cuff and another

Department officer's improper entry into a citizen's residence to effectuate an arrest of such resident in response to a temporary restraining order violation issued by another municipality. (Pa068). At the time of the incident, Cuff was assigned as a corporal in the Department and was functioning as an Acting Sergeant responsible for supervising the other officer with whom he attempted to effectuate the resident's arrest. (Pa068, Pa079, Pa083).

Pursuant to the Department's Rules and Regulations, a "corporal" is "an officer assigned by the Chief of Police to supervise a squad or unit in the absence of a sergeant." (Pa099). The corporal assignment is not part of the Department's official rank structure. (Pa108; Pa179). The corporal assignment is also not recognized on the salary guide set forth under the Agreement. (Pa060-Pa061). Rather, the Corporal is solely an assignment that may be made in the ultimate discretion of the Department's Chief of Police. (Pa099).

Following the internal affairs investigation into the complaint filed against Cuff, on or about August 26, 2021, Cuff received a Notice of Disciplinary Action advising him that the Department would be pursuing disciplinary action against him. (Pa065). Specifically, the Notice of Disciplinary Action advised Cuff that the Department would be seeking a suspension for sixteen (16) hours. (Pa065). The Notice of Disciplinary Action advised Cuff that he would be reassigned from the Corporal assignment and that he would likewise be required to undergo

remedial training in domestic violence and arrests, searches, and seizures. (Pa065). Cuff's reassignment from the Corporal assignment was noted on the Notice of Disciplinary Action in order to give him notice of the fact that he was being reassigned. (Pa017; Pa148-Pa149, 24:6-26:23). The reassignment and remedial training were listed under the "Other Disciplinary Action" portion of the Notice of Disciplinary Action form because such form is promulgated by the Attorney General's Office and it was the most appropriate area to note such additional actions within the confines of such form in order to provide Cuff with notice that such actions would be taken and/or required of him. (Pa149). On or about August 26, 2021, then-Chief of Police of the Department, Stephen Beecher ("Beecher"), issued a personnel order advising the Department that another Department officer was being "assigned as a Corporal" and that Cuff was being "re-assigned as an Officer." (Pa066).

Thereafter, departmental disciplinary proceedings were conducted before a hearing officer, Raymond J. Hayducka ("Hayducka"), in connection with the August 26, 2021 Notice of Disciplinary Action instituted against Cuff.[1] (Pa067-Pa085). During his testimony as part of the disciplinary proceedings, Beecher testified, under oath, that Cuff's reassignment from Corporal was based, in part,

[1]Citations to the transcript of Beecher's testimony have been provided where such testimony is referenced, in addition to the page in Petitioner-Appellant's appendix where such testimony can be found.

upon Cuff's actions giving rise to the citizen complaint filed against Cuff. (Pa149, 27:21-24). However, Beecher related that the decision to reassign Cuff was also premised upon a prior major disciplinary action sustained against Cuff, as well as Cuff's response to an inquiry made during his internal affairs interview regarding his belief that he could chase a suspect into a dwelling on a seatbelt warrant. (Pa149, 28:1-14). As Beecher explained in his sworn testimony,

> The corporals are the officer in charge in the absence of the sergeants, and what I found troubling was, first off, the incident that night and then I find troubling that during that discussion he mentioned that he believed he could chase somebody into a dwelling on a seatbelt warrant. When the corporals are out there on the road the officers that work the road under their guidance and I believe that it would be negligent for me to leave him in a corporal position with guidance being given to junior officers of that nature.

(Pa150, 29:16-25). Beecher further testified that assignments to Corporal are temporary and within his ultimate managerial prerogative as the Department's Chief of Police and that he maintained the discretion to assign and reassign officers to and from Corporal based upon their performance, availability, and desire to perform the functions of the assignment. (Pa150, 30:21-31:3).

On November 26, 2022, following three (3) days of hearing before him, Hayducka sustained the disciplinary charges against Cuff and agreed that a sixteen (16) hour suspension without pay was appropriate in light of the sustained disciplinary violations. (Pa069, Pa085). In his decision, Hayducka

found that Cuff's assignment designation was changed from Corporal to Officer, which was an assignment and a matter of the Township's managerial prerogative. (Pa069). Hayducka further found that Cuff acknowledged that he was Acting Sergeant in charge of the shift at the time of the incident giving rise to the citizen complaint and that Cuff was acting in a supervisory capacity and should be held to a higher standard of conduct as the supervisor on the scene. (Pa079, Pa081). Accordingly, Hayducka sustained the charges and disciplinary action against Cuff. (Pa085).

In the interim, on September 16, 2021, Cuff filed an Order to Show Cause with the Superior Court of New Jersey seeking injunctive relief reinstating him to the Corporal assignment pending the outcome of the disciplinary proceedings. (Pa087). On December 3, 2021, the Honorable Stuart A. Minkowitz, A.J.S.C., denied Cuff's application for injunctive relief, finding that, pursuant to the Department's policies, the role of Corporal was an assignment that Beecher maintained the discretion to assign officers to as he deemed appropriate. (Pa091-Pa092).

On December 27, 2022, the Union filed a Request for Submission of a Panel of Arbitrators with the Commission seeking to arbitrate the disciplinary action taken against Cuff. (Pa093). In response, the Township filed a scope of negotiations petition with the Commission requesting that the Commission

restrain arbitration to the extent that Union sought to arbitrate the issue of Cuff's reassignment from Corporal, as the selection and removal of personnel from assignments are within the managerial prerogative of the Township to meet the governmental policy goal of matching the best qualified employees to particular jobs. (Pa001-Pa006).

On November 26, 2024, the Commission denied the Township's scope petition, finding that Beecher's determination to reassign Cuff from the Corporal assignment was predominately disciplinary and, as a result, was legally arbitrable. (Pa188-Pa189). According to the Commission, while reassignments of personnel are beyond the scope of arbitration where arbitration would significantly interfere with the determination of governmental policy, it was required to assess whether the reassignment was predominately disciplinary and, therefore, subject to arbitration. (Pa188-Pa189). The Commission specifically noted that the Corporal assignment is not a promotional position or title within the Department, that the sole function of the Corporal is to assume the role of Acting Sergeant when a Sergeant is unavailable, and that the Corporal is a temporary assignment. (Pa188).

Notwithstanding these observations, the Commission found that Cuff's reassignment was predominately disciplinary because it occurred at the same time as the suspension to be imposed against Cuff and because it was indicated

on the Notice of Disciplinary Action served upon Cuff, which the Commission characterized as the "strongest 'indicia of disciplinary action.'" (Pa188-Pa189). While the Commission found that there was "some operational justification" for Cuff's reassignment, it also found that the only facts relating to the underlying incident were those found by Hayducka in upholding the disciplinary action against Cuff, which the Union explicitly sought to challenge as part of its arbitration request. (Pa189). Accordingly, the Commission held that arbitration of the issue of Cuff's reassignment could proceed. (Pa189).

STANDARD OF REVIEW

An appellate court may reverse an administrative agency decision if it is arbitrary, capricious, or unreasonable. Township of Franklin v. Franklin Twp. PBA Local 154, 424 N.J. Super. 369, 377 (App. Div. 2012). Typically, the judicial role in reviewing agency decisions involves four inquiries: (1) whether the agency's decision offends the State or Federal constitution; (2) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (3) whether the record contains substantial evidence to support the findings on which the agency based its action; and, (4) whether, in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors. See In re Jersey City v. Jersey City Police Officers Benev.

Ass'n, 154 N.J. 555, 567 (1982) (citing In re Musick, 143 N.J. 206, 216 (1996)); George Harms Constr. Co. v. N.J. Turnpike Auth., 137 N.J. 8, 27 (1994).

In reviewing agency decisions, the Appellate Division has explained that its "function is to determine whether the administrative action was arbitrary, capricious, or unreasonable." Burris v. Police Dept., Twp. of W. Orange, 338 N.J. Super. 493, 496 (App. Div. 2001) (citing Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980)). Thus, the main issue for consideration "is whether the findings of the agency could have been reached on the credible evidence in the record, considering the proofs as a whole." In re Monmouth Univ., No. A-5635-042T, 2006 WL 2051272, *2 (App. Div. July 25, 2006) (citing Close v. Kordulak Bros., 44 N.J. 589, 599 (1965)). In doing so, the entity challenging the agency action has the burden of demonstrating that the action was arbitrary, capricious, or unreasonable. McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002).

Further, a reviewing court is not bound by the agency's interpretation of a statute or its determination of a strictly legal issue and is to review same *de novo*. Educ. Law Ctr. ex rel. Abbott v. Burke Plaintiff Schoolchildren v. N.J. State Bd. of Educ., 438 N.J. Super. 108, 115-16 (App. Div. 2014). See also Biancardi v. Waldwick Bd. of Educ., 139 N.J. Super. 175, 177 (App. Div. 1975), *aff'd*, 73 N.J. 367 (1977) (where the issue is one of laws the agency's decision

does not carry a presumption of validity and it is for the court to decide whether the decision is in accordance with the law). Additionally, the Commission is required to follow judicial precedent interpreting the Employer-Employee Relations Act (the "Act"). Franklin, 424 N.J. Super. at 378 (citing In re Byram Bd. of Educ., 152 N.J. Super. 12, 22 (App. Div. 1977).

In this matter, the Commission's decision denying to restrain arbitration concerning Cuff's reassignment from the Corporal assignment should be reversed, as it is arbitrary and capricious for the following reasons: (1) the Commission's decision is contrary to a vast body of case law concerning an employer's managerial prerogative to assign personnel to meet its governmental policies and goals; and, (2) the Commission's decision was not based upon substantial, credible evidence.

POINT I: THE COMMISSION'S CONCLUSION THAT CUFF'S REASSIGNMENT WAS ARBITRABLE AND DID NOT INFRINGE ON THE TOWNSHIP'S MANAGERIAL PREROGATIVE WAS ARBITRARY, CAPRICIOUS, AND UNREASONABLE (Pa180-Pa189).

The Commission's jurisdiction in a scope of negotiations proceeding is limited to addressing the abstract issue of whether the subject matter in dispute is within the scope of collective negotiations. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 154 (1978). The scope of negotiations

for police officers is broader that for other public employees because N.J.S.A. 34:13A-16 provides for permissive as well as mandatory subjects of negotiations. Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78 (1981). Paterson outlines the steps of a scope of negotiations analysis for police officers as follows:

> First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

Paterson, 87 N.J. at 92-93 (internal citations omitted). A matter that is not subject to negotiation is not subject to arbitration. Bd. of Educ. of Ocean Twp. v. Ocean Twp. Teachers' Ass'n, 165 N.J. Super. 427, 436 (App. Div. 1979); Ridgefield

Park Educ. Ass'n, 78 N.J. at 160; Old Bridge Twp. Bd. of Educ. v. Old Bridge Educ. Ass'n, 98 N.J. 523, 527 (1985).

The scope of negotiations in the public sector is limited because a public sector employer "is government which has special responsibilities to the public," including "the unique responsibility to make and implement public policy." In re Local 195, IFPTE, AFL-CIO v. State of New Jersey, 88 N.J. 393, 401-402 (1982). As a result, "certain matters predominately involving the exercise of management prerogative have been entrusted to the exclusive discretion of the government and, accordingly, the public employer may not even voluntarily include them in the negotiated agreement. Paterson, 87 N.J. at 92. Thus, matters involving the exercise of the public employer's managerial prerogative pertain to the determination of governmental policy and, therefore, "cannot be delegated to an arbitrator." State Policemen's Benevolent Ass'n, Local 29 v. Town of Irvington, 80 N.J. 271, 296 (1979). See also Kearny PBA Local, #21 v. Town of Kearny, 81 N.J. 208, 215 (1979). Accordingly, in determining whether a subject is arbitrable, the courts consider whether the public employer is exercising a managerial prerogative and, "[i]f the public employer has acted pursuant to a managerial prerogative, the inquiry may end at this point." Bd. of Educ. of the Woodston-Pilesgrove Reg'l Sch. Dist. v. Woodston-Pilesgrove Educ. Ass'n, 81 N.J. 582, 588 (1980).

In Local 195, the New Jersey Supreme Court recognized that a topic intimately affecting the work and welfare of public employees is not negotiable where it would interfere with the exercise of managerial prerogatives pertaining to the determination of public policy. Local 195, 88 N.J. at 404-05. Thus, any terms and conditions of employment that would significantly interfere with the exercise of managerial prerogatives are neither negotiable nor arbitrable. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 67 (1978); Irvington Policemen's Benevolent Ass'n, Local #29 v. Town of Irvington, 170 N.J. Super. 539, 544 (App. Div. 1979).

A. The Commission's Decision was Contrary to Long-Standing and Well-Settled Case Law.

New Jersey appellate courts have repeatedly held that "the substantive decision to transfer or reassign an employee is preeminently a policy determination" and "[t]he power of the employer to make the policy decision would be significantly hampered by having to proceed through negotiation." Local 195, IFPTE, 88 N.J. at 404-05. See also State Supervisory Emp. Ass'n, 78 N.J. at 94-95 (finding that public employers possess managerial prerogative to "maintain order and efficiency and to control transfers and assignments . . . ." and to "hire and promote on the basis of merit"); Paterson PBA No. 1, 87 N.J. at 97-98 (holding contractual provision that deprived city of its discretion "to

deploy officers as it deems best" as outside the scope of negotiations and unenforceable); Ridgefield Park Ed. Ass'n, 78 N.J. at 156 (holding that a public employer has managerial prerogative to deploy personnel in the manner it finds most likely to promote its overall public purposes); Dunellen Bd. of Educ. v. Dunellen Ed. Ass'n, 64 N.J. 17, 26 (1973) (finding that control over transfers and reassignments of personnel are matters falling exclusively within managerial prerogative of employer); Rutgers, State Univ. v. Rutgers Council of AAUP Chapters, 256 N.J. Super. 104, 116 (App. Div. 1992), aff'd, 131 N.J. 118 (1993) ("the decisions to hire, retain, promote, transfer, assign and dismiss are not negotiable.").

In this regard, the Appellate Division has explained that

> the regulation of the police force by assignment of its members to particular duties, according to the requirements of the service and the special fitness of the individual members for these duties, must certainly be left to the discretion of the appointing authority, if they are to have any control or any liberty to act for the promotion of the efficiency of their department.

Irvington Policemen's Benevolent Ass'n, 170 N.J. Super. at 546 (internal citations omitted).

The cumulative effect of these prior judicial determinations is that matters going to "the substantive question of the fitness of an employee for a given position" are managerial prerogative of the public employer and beyond the

scope of negotiations or arbitration. State Supervisory Emp. Ass'n, 78 N.J. at 92. Thus, arbitration or negotiation over the substantive determination to assign a particular employee based upon the employee's qualifications would "restrict an employer's prerogative to control assignments" and "impinge[] too far into management's functions." Id., at 94. This is because the decision "to transfer or reassign an employee is preeminently a policy determination," which, if subjected to negotiations or arbitration, would hinder a public employer's ability "to make rational decisions on how best to reassign employees to achieve the greatest efficiency." Local 195, IFPTE, 88 N.J. at 417-18. As a result, a public employer has an overwhelming interest in ensuring that its personnel are deployed in a manner most likely to promote its overall governmental purposes, meaning that the substantive decision to transfer or reassign an employee based upon that employee's fitness to discharge the public duties entrusted to them are not negotiable or arbitrable terms and conditions of employment. See Ridgefield Park Ed. Ass'n, 78 N.J. at 156.

Moreover, consideration of whether a matter may be properly submitted to negotiation or arbitration must take into account whether doing so would be "inimical to the public welfare." Irvington Police Benevolent Ass'n, 170 N.J. Super. at 544. Negotiations over a term and condition of employment "as to which negotiation would be detrimental or injurious to the public welfare is also

forbidden." Ibid. In this regard, it cannot be overstated that "the role of the police in every community has always been of extreme importance to our social well-being." Id., at 346. As it pertains to arbitration over disputes concerning a public employer's determinations as to how to the public interest would be best served through deployment of its workforce, delegating such responsibility to an arbitrator "would confer upon an arbitrator, albeit a stranger to the municipality, the decision which rightfully belongs to the [municipal employer]." Ibid.

Likewise, the Commission has been consistent in finding that reorganizational decisions relating to staffing and temporary assignments are basic managerial prerogative and are beyond the scope of negotiation and/or arbitration. See City of Vineland, P.E.R.C. No. 2013-37, 39 NJPER ¶ 74 (2012) (restraining arbitration of grievance which, if arbitrated, would substantially limit police chief's managerial prerogative to determine most qualified officers to fill discretionary assignments and to match best qualified employees to particular jobs). Indeed, the Commission has long recognized that a public employer, and a local police department in particular, has a substantial interest in allocating its workforce amongst discretionary assignments so that the individual considered best-equipped receives such assignments.

Cases to this effect are myriad. For example, in City of Atlantic City, the union sought to arbitrate a police officer's reassignment from patrol duties to

internal security duties. P.E.R.C. No. 87-161, 13 NJPER ¶ 18218 (1987). The employer explained that the officer's reassignment was necessary because the officer was frequently sick or injured when performing patrol duties. Id. The Commission held that "the substantive decision to transfer or reassign an employee is preeminently a policy determination and beyond the scope of negotiations or binding arbitration." Id. (internal quotations omitted). This was held to be the case even where the transfer results in the employee's loss of shift differentials or premium pay. Id. In City of Garfield, the union protested the employer's reassignment of a police lieutenant from the detective bureau to the patrol bureau, where the police chief had determined that the lieutenant's assignment to patrol would be of most value to the police department. P.E.R.C. No. 90-106, 16 NJPER ¶ 21131 (1990). The Commission restrained arbitration, finding that "[d]ecisions about organizing police departments and deploying command or supervisory personnel involve governmental policy," such that the chief's reassignment of the lieutenant was beyond the scope of arbitrability. Id.

Again, in Township of Wayne, the Commission restrained arbitration of a grievance concerning the reassignment of two (2) officers from the detective to patrol division, finding that "[m]anagement has a prerogative to transfer an employee to meet the governmental policy goal of matching the best qualified employee to a particular job." P.E.R.C. No. 92-60, 18 NJPER ¶ 23016 (1991).

Similarly, in City of Jersey City, the Commission held that transfers of employees based on an assessment of the employees' skills or qualifications is not subject to binding arbitration, even where such transfers have a concomitant effect on the employees' working conditions. P.E.R.C. No. 2006-29, 31 NJPER ¶ 133 (2005). And, in City of Vineland, the union disputed the employer's decision to limit overtime from a grant assignment to detectives in the juvenile bureau. P.E.R.C. No. 2013-37, 39 NJPER ¶ 74 (2012). There, the police chief determined that the goals and purposes of the grant, as well as the health, safety, and welfare of residents and the youth to be served by the grant project would be best served by assigning detectives from the juvenile bureau. Id. The Commission restrained arbitration, finding that, where the employer had determined that juvenile detectives were the most qualified to administer the grant objectives, "[p]ermitting an arbitrator to second-guess that determination would substantially limit the employer's prerogative to match the best qualified employees to the particular job. Id.

As the above-cited case law makes clear, the substantive decision to transfer an employee based upon the employer's substantial policy goal of matching the best candidate with a particular job is a matter of managerial prerogative beyond the scope of arbitration. Here, Beecher testified, under oath, that his determination to reassign Cuff was based not just upon the incident

giving rise to the citizens complaint filed against Cuff, but also upon concerning responses that Cuff provided during his internal affairs interview, as well as the fact that Cuff had been subjected to major disciplinary action less than one (1) year prior to that incident. (Pa148- Pa150, 24:6-32:1). As set forth in the Department's Rules and Regulations, and as the Commission noted in its decision, as a Corporal, it was Cuff's responsibility to act as a supervisor in the absence of a Sergeant and he was, in fact, functioning in that capacity at the time that he and another Department officer illegally entered a residence to effectuate an arrest without a warrant. (Pa099, Pa188).

This compounding of concerning circumstances in light of the supervisory authority delegated to Cuff as a Corporal certainly gave Beecher a moment to consider whether Cuff could or should be permitted to continue functioning in a role where his responsibilities included oversight of other Department officers. In line with his managerial prerogative to do so, Beecher ultimately determined that maintaining Cuff as a Corporal was counter to the interests of the Department. (Pa150, 29:16-31:3). Indeed, as Beecher testified, he felt that it would be "negligent" of him to allow Cuff to continue as a Corporal given the supervisory nature of that assignment and the expectation that individuals filling such assignment would provide proper and lawful guidance to subordinate officers. (Pa150, 29:16-31:3).

As a result, Beecher's determination to reassign Cuff fell squarely within his managerial prerogative to assess the qualifications and fitness of his officers for the various assignments through which the Township's police services are rendered. It is without question that, from Beecher's perspective, the combination of multiple factors related to Cuff's service with the Department required that he be removed from an assignment where the individual assigned is not only entrusted to comport themselves in accordance with the Department's rules, regulations, and procedures, as well as state and federal law, but to further ensure that others under their supervision did so, too. Accordingly, Beecher's determination to reassign Cuff represented a determination concerning Cuff's fitness to continue discharging the lofty and important responsibilities that are part-and-parcel with the Corporal assignment that he held.

The Commission's holding that Beecher's determination in this regard could be challenged before, and potentially overturned by, an arbitrator unfamiliar with the Department, the Township, Cuff, or the officers that Cuff was charged with supervising, flies in the face of the Commission's and our courts' long-standing precedent that such matters are not reachable via negotiations or arbitration. Beecher's reassignment of Cuff is a matter of the Township's sole managerial prerogative, which cannot be delegated to an arbitrator to reconsider or possibly reverse. To hold otherwise, and to allow an

arbitrator to substitute their own judgment as to Cuff's fitness to hold the Corporal assignment, would eviscerate the managerial prerogative accorded to the Township. More importantly, it would present a situation in which an officer who has already been determined to be unfit for the Corporal assignment by the individuals responsible to the Township public for the lawful and effective delivery of police services could be returned to that assignment, despite the Township and Beecher's finding that Cuff was not fit for it.

B. Whether Cuff's Reassignment was Disciplinary is Irrelevant

Pursuant to the Act, public employers and their represented employees may agree to adjudicate certain types of disciplinary disputes. As set forth therein,

> Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, provided that such grievance and disciplinary review procedure shall be included in any agreement entered into between the public employer and the representative organization. Such grievance and disciplinary review procedures may provide for binding arbitration as a means of resolving dispute. Except as otherwise provided herein, the procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline

> of employees with statutory protection under tenure or civil service laws, except that such procedures may provide for binding arbitration of disputes involving the minor discipline of any public employees protected under the provisions of section 7 of P.L. 1968, c. 303 (C.34:13A-5.3), other than public employees subject to discipline pursuant to R.S. 53:1-10. Grievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement. For the purposes of this section, minor discipline shall mean a suspension or fine of less than five days unless the employee has been suspended or fined an aggregate of 15 or more days or received more than three suspensions or fines of five days or less in one calendar year.

N.J.S.A. 34:13A-5.3.

In State v. State Troopers Fraternal Ass'n, the New Jersey Supreme Court analyzed a prior, but substantially similar version of the above statutory language in the context of whether New Jersey State Troopers could avail themselves of such statutory language in seeking to arbitrate certain disciplinary actions taken against them. 134 N.J. 393, 395-96 (1993). There, after canvassing the then-current updates in the statutory language and recent decisions interpreting same, the Court found that "[a]s adopted, the discipline amendment would not appear to apply to municipal police officers either in Civil Service or non-Civil Service communities . . . ." Id., at 412. Thus, the Court held that the statute, in light of the legislative history behind it, did not require arbitration of

disputes concerning the discipline of State Troopers, nor did it apply "either to municipal or county police departments." Id., at 418.

State Troopers was decided in 1993. In its decision denying the Township's request for restraint of arbitration over Cuff's reassignment from Corporal, the Commission relied on two (2) of its prior decisions for the proposition that it was required to assess whether the reassignment was non-disciplinary and thus non-arbitrable or disciplinary and arbitrable. Both cases—Cape May County Bridge Commission and City of East Orange—were decided in 1985, eighteen (18) years prior to the New Jersey Supreme Court's decision in State Troopers.

However, following State Troopers, and in direct reliance upon same, the Commission rendered a series of decisions reaffirming the notion that assignments of police personnel to discretionary assignments within a police department were not arbitrable or negotiable, even when done for disciplinary reasons. In 1998, the Commission decided Borough of New Milford, which involved a public employer's request for restraint of binding arbitration of a grievance filed by a police union alleging that a detective's reassignment to patrol duties constituted discipline without just cause. P.E.R.C. No. 99-43, 25 NJPER ¶ 30003 (1998). The grievance alleged that a police chief's decision to reassign the detective two (2) hours after the detective complained to the chief

regarding alleged harassment that he was facing in the police department constituted discipline subject to arbitration, with the police chief disclaiming any intent to discipline the detective and positing that the reassignment was done for the good of the department. Id. The union argued that the disciplinary amendments to Section 5.3 of the Act permitted arbitration of reassignments found to be disciplinary. Id.

The Commission disagreed. Id. First reiterating its long-standing holding that the substantive decision to transfer a public employee is a policy determination beyond the scope of arbitration, the Commission held that, pursuant to State Troopers, Section 5.3 of the Act did not apply to State Troopers or any other police officers. Id. Noting its prior case law post-State Troopers restraining arbitration of grievances asserting that reassignments of police officers were disciplinary, the Commission ultimately held that "section 5.3 authorizes agreements to arbitrate minor disciplinary disputes, but we do not believe the text or spirit of this authorization extends to reassignments of police officers." Id. This was because, while the statutory language permitted an agreement to arbitrate "minor discipline," which was defined in the statutory language of Section 5.3 of the Act, the Appellate Division had previously determined that such language did not include reassignments of police officers when it summarily affirmed the Commission's prior ruling in South Brunswick

Township. Id. (citing Monmouth County v. CWA, 300 N.J. Super. 272 (App. Div. 1997). Accordingly, arbitration needed to be restrained, "regardless of whether [the reassignment] was disciplinary." Id.

Thereafter, and in accordance with State Troopers and New Milford the Commission followed suit in scope of negotiations proceedings seeking restraint of arbitration over assignments of police personnel. In 2001, the Commission decided that arbitration of a grievance concerning a police officer's reassignment from the midnight to the day shift needed to be restrained, even if disciplinary, as the discipline amendment to Section 5.3 of the Act did not extend to reassignments of police officers. Township of West Orange, P.E.R.C. No. 2001-62, 27 NJPER ¶ 32086 (2001). The Commission did the same in 2002 and again in 2005, finding that reassignments of police personnel were beyond the scope of arbitration afforded under Section 5.3 of the Act, that grievances challenging such reassignments needed to be restrained, and that the proper method for a police officer to challenge such reassignment as disciplinary was via prerogative writ filed with the Superior Court. See Union County Sheriff, P.E.R.C. No. 2003-02, 28 NJPER ¶ 33113 (2002); City of Trenton, P.E.R.C. No. 2005-59, 31 NJPER ¶ 27 (2005)

After additional revisions of the discipline amendment to Section 5.3 of the Act, the most recent of which occurred in January, 2006, the Commission

continued its line of jurisprudence concerning the transfers of police personnel for disciplinary or non-disciplinary reasons. For example, in New Jersey Transit Corp., the Commission restrained arbitration of a police union's grievance challenging the reassignment of certain officers from the department's Field Training Officer program. P.E.R.C. No. 2006-54, 32 NJPER ¶ 9 (2006). Highly analogous to the instant case pending before the Court, Field Training Officers provided on-the-job training, guidance, and leadership to probationary police officers and served as coaches and role models to less experienced officers. Id. Field Training Officers remained in their regular assignments except when required to train probationary officers, during which time they were entitled to additional compensation for duties and time associated with their field training work. Id. According to the chief of the department, assignment of police officers to and from the Field Training Program was a matter of his managerial prerogative to "select and retain the best persons for the assignment." Id.

The Commission determined, again, that "[p]ublic employers have a non-negotiable managerial prerogative to assign employees to meet the governmental policy goal of matching the best qualified employees to particular jobs." Id. Accordingly, and more importantly, the Commission held that "reassignments of police officers, either into or out of positions involving special skills and qualifications, are not arbitrable, even when the employer acts

for disciplinary reasons." Id. See also County of Hudson, P.E.R.C. No. 2010-57, 36 NJPER ¶ 18 (2010) (finding that discipline amendment, as enacted in 1982 and amended in 1996, authorized agreements to arbitrate minor discipline but did not extend to reassignments).

Similarly, in Town of Hammonton, a grievance disputed a local police employer's determination to remove an officer from a special detail assignment at the municipality's schools following an incident that prompted the superintendent of the schools to request the officer's removal from such assignments. P.E.R.C. No. 2011-50, 2010 WL 6766105 (2010). The Commission found that the police chief's decision was based upon a determination that the grievant was not qualified for the duties involved in the assignment and that the department would be better served by reassigning the officer, rather than on any intention to discipline the grievant for misconduct. Id. However, as the Commission further found, "[e]ven if the assignment decision were disciplinary, . . . it could not be challenged through binding arbitration," as only "minor disciplinary determinations involving police officers are legally arbitrable and the statutory definition of minor discipline does not include reassignments." Id. (citing N.J.S.A. 34:13A-5.3; Borough of New Milford, P.E.R.C. No. 99-43).

Indeed, as recently as 2019, the Commission assessed a scope of negotiations proceeding involving a police officer's reassignment and

requirement to undergo remedial training in response to citizen complaints filed against him. City of Elizabeth, P.E.R.C. No. 2019-53, 46 NJPER ¶ 3 (2019). The grievance sought to be arbitrated alleged that the grievant had been disciplined without just cause when he was reassigned and demanded that the grievant be returned to his normal assignment and permitted to continue working overtime and extra-duty assignments. Id. In line with its prior precedent, the Commission determined that "[i]n general, a public employer has the right to determine if public safety personnel are fit to perform the duties of the positions to which they are assigned." Id. Further, and in response to the union's claim that the officer's reassignment was disciplinary action without just cause, the Commission held that "the reassignment of police officers, disciplinary or not, may not be challenged through binding grievance arbitration." Id. Thus, any such challenge to the reassignment in arbitration needed to be restrained. Id.

Despite the Commission jurisprudence interpreting Section 5.3 of the Act as not allowing for binding arbitration of reassignments of police personnel by their employers, regardless of whether such reassignments were intended to be disciplinary, the Commission still determined that the Township's reassignment of Cuff from Corporal was predominately disciplinary and, therefore, could be arbitrated. There has been no change in the statutory language of Section 5.3 following the 2006 amendments to same that would explain this change in

treatment by the Commission and, clearly, the decisions relied upon by the Commission for its holding that Cuff's reassignment was legally arbitrable were decided long before State Troopers and the Commission's decisions interpreting and applying its holding in the context of reassignments of municipal police officers by their employers. Certainly, there has been no modification of Section 5.3 following the Commission's 2019 decision in City of Elizabeth, at which time the Commission was apparently still operating under the rule that reassignments of police officers were not subject to arbitration. As set forth above, the Commission is required to adhere to and follow judicial precedent interpreting the Act and, presumably, should be bound by the prior determinations it has made in factually analogous circumstances involving the exact same statutory language it cited as compelling its holding that is subject to the instant appeal.

It is also worth noting that, while Section 5.3 allows public employers and employee unions to negotiate and agree on procedures for the review and adjudication of disciplinary disputes, the Township and the Union have not done so for managerial determinations concerning reassignment of Township police officers, whether done for disciplinary purposes or not. There is no provision of the Agreement that binds the Township to negotiate or arbitrate disputes arising out of its decisions regarding the assignments that its police officers are qualified

to hold; rather, and as will be explored more fully below, the Agreement reserves to the Chief of Police the authority to assign personnel as he deems fit. (Pa049). Likewise, under the Department's Rules and Regulations, while suspensions or fines of five (5) days or less may be appealed under the grievance procedure set forth under the Agreement where the Agreement so provides, reassignments are not subject to, or even mentioned in, the portion of the Rules and Regulations allowing for appeals of certain minor disciplinary actions. (Pa131).

Additionally, and as the Commission's post-State Troopers cases have held, since disciplinary reassignments are not subject to binding arbitration, the only forum for an officer to adjudicate a claim that a reassignment was disciplinary is in the Superior Court via prerogative writ. Here, Cuff has already availed himself of that right, albeit via order to show cause rather than prerogative writ action, with Judge Minkowitz of the Morris Vicinage finding, like the Commission has long held, that Cuff's reassignment was a managerial prerogative of the Township's Chief of Police. (Pa091).

Therefore, and while the Township disputes any suggestion that Cuff's reassignment from Corporal was done solely as disciplinary action against him for the reasons set forth in Point II, *infra*, even if his reassignment was disciplinary, it would still be beyond the scope of arbitration, as the Commission has held time and time again in the almost thirty-two (32) years since State

Troopers was decided. Accordingly, the Commission's decision under appeal here is contrary to its well-settled case law and, as a result, was arbitrary, capricious, and unreasonable.

POINT II: THE COMMISSION'S FINDING THAT CUFF'S REASSIGNMENT WAS PREDOMINATELY DISCIPLINARY WAS NOT BASED UPON, AND CONTRARY TO, SUBSTANTIAL CREDIBLE EVIDENCE IN THE RECORD (Pa180-Pa189).

In finding that Cuff's reassignment from Corporal was "predominately disciplinary" and, therefore, subject to binding arbitration, the Commission disregarded substantial credible evidence included in the record before it. According to the Commission, this finding was premised upon the fact that Cuff's reassignment was noted on a Notice of Disciplinary Action and included as part of disciplinary action taken against Cuff by the Township. (Pa188-Pa189).

Pursuant to the Agreement, the Township, through its Chief of Police, has reserved to itself the "authority to promote, **assign**, and transfer employees and determine personnel manning requirements." (Pa049). The Corporal assignment is not a recognized rank under the applicable salary guides set forth in the Agreement, nor is it a rank to which an officer can be promoted pursuant to the terms of the Agreement. (Pa058, Pa060-Pa061).

Similarly, under the Department's Rules and Regulations in effect at the relevant time, the Corporal assignment is defined as "[a]n officer **assigned by the Chief of Police** to supervise a squad or unit in the absence of a sergeant." (Pa099) (emphasis supplied). The Township's Chief of Police also serves as "the head of the [Department]," is "directly responsible for its efficiency and day-to-day operations," and retains the "rights, authorities, powers and responsibilities reserved solely to the Chief of Police as set forth in N.J.S.A. 40A:14-118." (Pa108). The authorities reserved to the chief of police of a local police department include the authority to "[p]rescribe the duties and assignments of all subordinate officers." N.J.S.A. 40A:14-118(d). The same is confirmed under the Township's ordinances, which specify that the Chief of Police is responsible for the "efficiency and routine day-to-day operations of the Police Department and the employees thereof," including the responsibility to "prescribe the duties and assignments of all subordinates and other personnel." (Pa134).

The Department's Rules and Regulations also make clear that a Corporal is not within the recognized rank structure of the Department such that an officer's removal from the Corporal assignment could be plausibly considered a demotion or reduction in rank. (Pa1008). This is further set forth under the Township's ordinances, which specify the ranks comprising the Department and

the number of individuals that may be employed in each rank, with no mention being made to the Corporal assignment. (Pa179).

Similarly, on August 26, 2021, Beecher issued a Personnel Order, entitled "Patrol Division **Re-Assignments**," advising the Department that Cuff had been **reassigned** as an Officer, while another officer was being **assigned** to the Corporal assignment. (Pa066) (emphasis supplied). The reassignment occurred before any proceedings were conducted before Hayducka in connection with Cuff's departmental disciplinary hearing, suggesting that the reassignment itself was not part of the disciplinary action to be taken against Cuff following conclusion of such proceedings. Indeed, in his decision as part of the departmental disciplinary proceedings, Hayducka specifically noted that Cuff's reassignment was pursuant to the Township's managerial prerogative over assignments of personnel and, in rendering his disciplinary decision and penalty recommendation, there is no reference to Cuff's reassignment as being part of the discipline to be taken against Cuff. (Pa069, Pa085). Then, on November 29, 2022, Beecher issued a memorandum to Cuff notifying him that, based upon Hayducka's decision, a sixteen (16) hour suspension would be imposed against him in response to his illegal entry into a residence; again, there is no reference to Cuff's reassignment in this memorandum memorializing the disciplinary

action to be taken against Cuff as a result of the citizens complaint filed against him. (Pa178).

Likewise, Beecher specifically testified during the departmental disciplinary proceedings that the disciplinary action he proposed to be taken against Cuff was a sixteen (16) hour suspension, and that he also notified Cuff that he was being removed from the Corporal assignment and directing Cuff to attend remedial training. (Pa148-Pa149, 24:6-26:23). Beecher testified, without exception, that the training to be undergone by Cuff and the reassignment were not part of the disciplinary action that was going to be taken against him, but that they were noted on the Notice of Disciplinary Action in order to provide Cuff with notice of what was going to be expected of him as a result of his conduct giving rise to the citizens complaint. (Pa148-Pa149, 24:6-26:23). Beecher further testified that the reassignment and training requirement were noted under "Other Disciplinary Action" on the Notice of Disciplinary Action because that form is promulgated by the Attorney General's Office and it seemed like the most appropriate place to indicate those matters within the confines of the form in order to provide Cuff with notice of same. (Pa149, 25:11-22).

With regard to the Notice of Disciplinary Action, and as Beecher testified, the remedial training and reassignment were noted therein to provide Cuff with notice that such actions would be taken. Under the disciplinary procedures set

forth in the Department's Rules and Regulations, reassignments are not a form of discipline that may be taken against Department personnel. (Pa129-Pa131). As for training, the Rules and Regulations specify that, "[i]n lieu of discipline, training and counseling shall be corrective actions used to modify an employee's performance." (Pa129). Thus, despite the fact that the remedial training was noted on Cuff's Notice of Disciplinary Action, it was not a disciplinary action that would be taken against him. By the same token, the fact that Cuff's reassignment was noted on the Notice of Disciplinary Action does not somehow transform such reassignment into a form of discipline to be taken against Cuff, particularly where reassignments are not an available disciplinary measure that the Department may impose against its employees. This significantly cuts against the Commission's conclusion that, just because Cuff's reassignment was listed on the Notice of Disciplinary Action and occurred around the same time as the actual disciplinary action proposed to be taken against him—a sixteen (16) hour suspension—the reassignment was, in and of itself, also disciplinary.

More importantly, Beecher provided legitimate operational and managerial reasons for Cuff's reassignment, none of which related to any punitive or disciplinary purposes to be served by such reassignment. As Beecher testified, in light of Cuff's conduct giving rise to the citizens complaint against him for illegally entering someone's home, concerning responses Cuff provided

during the internal affairs investigation into that complaint which were not in line with the law or departmental practices, and the fact that Cuff had received a major disciplinary action not long before the citizens complaint being filed against him, he decided to remove Cuff from the Corporal assignment. (Pa149-Pa150, 26:25-32:1). Not only that, but Beecher specifically testified that he felt it would be "negligent" of him to leave Cuff in the Corporal assignment in light of his concerning conduct and understanding of the law and departmental policies and practices, as well as the supervisory position that Cuff would hold over subordinate officers in any instance in which he was functioning as Corporal. (Pa150, 29:16-25). This assessment of Cuff's overall fitness to perform the duties incumbent of the Corporal assignment and Beecher's determination to reassign him from that role because he was not fit to hold it anymore were directly in line with the managerial prerogative accorded to Beecher as Chief of Police.

The import of the foregoing is that assignments to Corporal were just that: assignments. Reassignment is not a permissible disciplinary action that may be taken against an officer and, in accordance with the authority and discretion vested in the Chief of Police by contract, ordinance, rule, regulation, and practice, Beecher exercised such discretion and authority in determining that, based upon legitimate and documented shortcomings in Cuff's performance as

Corporal, Cuff was no longer suitable to hold that designation or to be responsible for providing oversight and guidance to less experienced officers. The Commission found that, based solely on the fact that the reassignment was noted on the Notice of Disciplinary Action issued to Cuff and occurred in close temporal proximity to actual disciplinary action to be taken against him, the reassignment had to have been disciplinary, as well.

However, those items—the Notice of Disciplinary Action and close temporal proximity—are the only record evidence that the Commission hung its decision on. Not only is the Commission's finding that Cuff's reassignment was disciplinary and, therefore, arbitrable, contrary to its own long-standing precedent that reassignments are not arbitrable, even if disciplinary, it was also contrary to all other record evidence demonstrating that reassignments are not disciplinary actions and that the specific reassignment of Cuff was also non-disciplinary. The Commission disregarded Beecher's sworn testimony that such reassignment was not disciplinary and was only undertaken for the betterment of the Department and the public it is bound to serve. The Commission disregarded the fact that the issue of Cuff's reassignment was not germane to the departmental **disciplinary** proceedings before Hayducka because it was not part of the discipline to be imposed against Cuff. The Commission disregarded the notion that remedial training was also noted on the Notice of Disciplinary

Action, even though, pursuant to common sense and the Department's Rules and Regulations, training is non-disciplinary. And, the Commission disregarded Judge Minkowitz's prior determination that Cuff's reassignment was within the Township's managerial prerogative when he denied Cuff's request for injunctive relief. (Pa091-Pa092).

In finding that Cuff's reassignment was disciplinary, the Commission disregarded substantial record evidence indicating that Beecher maintained the managerial prerogative to reassign Cuff from Corporal based upon his performance and failure to perform in that role. The fact that Cuff's conduct giving rise to the citizens complaint against him was the proverbial "straw that broke the camel's back" that, when coupled with Cuff's other questionable conduct, compelled Beecher to remove him from the Corporal assignment, does not miraculously transform such removal into a disciplinary action. As in the post-State Trooper line of cases cited in Point I, *supra*, Beecher specifically disclaimed any indication that Cuff's reassignment was done for disciplinary purposes. However, the Commission failed to credit Beecher's sworn testimony or the other record evidence before it in finding that Cuff's reassignment was disciplinary and could be submitted to arbitration.

Accordingly, the Commission's decision must be reversed and arbitration over Cuff's reassignment must be restrained, as the Commission's decision that

the reassignment was disciplinary was not based upon, and actually contrary to, substantial credible evidence in the record before it.

CONCLUSION

For all of the foregoing reasons, the Township respectfully submits that the Commission's November 26, 2024 decision denying the Township's request for restraint of arbitration be reversed and arbitration be restrained.

Respectfully submitted,
CLEARY GIACOBBE ALFIERI JACOBS, LLC
Attorneys for Petitioner-Appellant,
Township of Mount Olive

/s/ Anthony G. LoBrace
ANTHONY G. LoBRACE, ESQ.

Dated: March 13, 2025

IN THE MATTER OF TOWNSHIP OF MOUNT OLIVE, AND, FOP LODGE 122	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001219-24 CIVIL ACTION ON APPEAL FROM: PUBLIC EMPLOYMENT RELATIONS COMMISSION DOCKET NO.: SN-2025-003 Date of Submission: May 14, 2025

RESPONDENT BRIEF ON BEHALF OF RESPONDENT FOP LODGE 122

CARUSO SMITH PICINI, PC
60 Route 46 East
Fairfield, NJ 07004
(973) 667-6000
Attorneys for Respondent,
FOP Lodge 122

Of Counsel and
On the Brief:

Nicholas Poberezhsky, Esq.
New Jersey Attorney ID #: 017392010
npoberezhsky@carusosmith.com

TABLE OF CONTENTS

Page

TABLE OF JUDGMENTS, ORDERS AND RULINGS

Page

TABLE OF AUTHORITIES

Cases **Page**

Statutes **Page**

TABLE OF APPENDIX

Page

PRELIMINARY STATEMENT

In this case, Appellant, the Township of Mount Olive (the "Township"), has appealed a decision by the Public Employment Relations Commission (the "Commission"), which denied the Township's Scope of Negotiations petition that sought to restrain arbitration filed by Appellee Fraternal Order of Police, Lodge 22 (the "Union") on behalf of its member, Patrol Officer Thomas Cuff ("Mr. Cuff"). The issue in dispute was the removal of Mr. Cuff's corporal distinction, a "predominately disciplinary" action imposed by the Township, which the Commission determined was arbitrable under N.J.S.A. 34:13A-5.3. The Commission properly rejected the Township's argument that the act constituted a "reassignment" within its managerial prerogative that would fall outside the scope of negotiations or arbitration.

Among the factors the Commission weighed when arriving at its decision were that the Township rescinded Mr. Cuff's corporal distinction contemporaneously with the service of disciplinary charges, and Mr. Cuff's job duties and workplace assignment did not change because of it.

The Commission's decision was neither arbitrary nor capricious and was based on substantial credible evidence in the record. Moreover, in New Jersey, courts accord great deference to an agency's interpretation of a statute it is empowered to enforce, particularly in public labor relations. As such, and

for the reasons explained more fully below, the Commission's determination that the rescission of Mr. Cuff's corporal distinction was a mandatorily negotiable issue, and therefore arbitrable, must be upheld.

PROCEDURAL HISTORY

Respondent-Appellee relies on the procedural history provided in Petitioner-Appellant's legal brief in support of its appeal.

STATEMENT OF FACTS[1]

Mr. Cuff is a veteran police officer who has been employed with the Township for at least eighteen years. (Ra001). He is a member of the Respondent-Appellee Fraternal Order of Police, Lodge 122 (the "Union"). On August 26, 2021, he was served with a Notice of Disciplinary Action ("NDA") of even date, predicated on eight charges, including violations of various internal regulations and administrative code provisions. (Pa065). The NDA emanated from a citizen's complaint that was filed against Mr. Cuff and another officer, which accused them of effectuating an unlawful arrest and utilizing excessive force. (Pa064). Subsequently, an Internal Affairs ("IA") investigation ensued, which culminated in the filing of the NDA.

[1] A portion of the Respondent-Appellee's brief to the Commission was included in the Appendix because it contains facts that were certified by Mr. Cuff.

Along with the charges, the NDA specified that the Township would seek an unpaid suspension of sixteen (16) hours, Mr. Cuff's "removal from corporal assignment," and remedial training related to domestic violence arrests. (Pa065). The corporal assignment penalty was noted in the "Other Disciplinary Action" section of the NDA. (Pa065). The Union filed a grievance challenging, among several other things, the removal of Mr. Cuff's corporal distinction, which was imposed immediately upon the issuance of the NDA, and prior to the commencement of the departmental hearing. (Pa066, Pa093).

Following the departmental hearing on the charges in the NDA, the hearing officer, Raymond J. Hayducka ("Mr. Hayducka"), issued a decision dated November 26, 2022, which found Mr. Cuff guilty of all charges and sustained the Township-proposed penalty of a sixteen-hour suspension. (Pa085). Mr. Hayducka further determined, in a footnote in the decision, that the rescission of Mr. Cuff's corporal distinction was "an assignment and managerial prerogative." (Pa069). It was noted that Mr. Cuff effectuated the underlying arrest while working in the capacity of Acting Sergeant. (Pa079).

Subsequently, on December 27, 2022, the Union filed a Request for Submission of a Panel of Arbitrators with the Commission, which sought to arbitrate the disciplinary charges filed against Mr. Cuff. (Pa093). The

Township then filed its scope of negotiations petition with the Commission to restrain arbitration on the issue of the removal of Mr. Cuff's corporal distinction, which the Township argued constituted a reassignment within its managerial prerogative. (Pa001-Pa006).

The Union's opposition, dated September 25, 2024, included a narrative of facts that were certified by Mr. Cuff. It stated that the corporal distinction was awarded to him by then-Chief of Police Stephen Beecher ("Chief Beecher") in or around 2016. (Ra001). He further explained that the distinction was recognized as a "steppingstone," or a precursor to a potential promotion to the position of Sargeant. (Ra002). The corporal distinction did not constitute a promotion in and of itself – it resulted in no changes to Mr. Cuff's work location, job duties, salary and benefits, and he did not receive a new or updated employment contract. (Ra002).

Aside from serving as a commendation, the primary benefit derived from a corporal distinction was the opportunity to earn "extra pay" during shifts in which the designated sergeant was absent. (Ra002). An officer awarded a corporal distinction would assume the absentee sergeant's supervisory authority to preserve the department's chain-of-command, but it did not change the officer's job duties. (Ra002). Mr. Cuff estimated that when he held the distinction from 2016 to 2021, he worked an average of five shifts per

month that qualified for extra compensation, which boosted his pay during each such shift by around ten percent. (Ra002).

Moreover, as the Township conceded in its own appellate brief, "corporal officer" was not recognized as an official position in the controlling collective negotiations agreement (the "Agreement") between the Township and the Union. (Pa019-Pa063). It is also not a component of the Department's official rank structure. (Pa108; Pa179). Furthermore, in his testimony during the departmental hearing, Chief Beecher admitted that the removal of Mr. Cuff's corporal distinction was predicated on the violations alleged in the NDA, along with an objectionable statement he made during the ensuing Internal Affairs investigatory interview, and a prior disciplinary matter that resulted in a seventy-two-hour suspension. (Pa150, 30:11-13).

The Commission weighed these unrebutted facts when it determined, via final agency decision dated December 3, 2024, that the rescission of Mr. Cuff's corporal distinction was "substantially disciplinary" in nature, and therefore arbitrable and negotiable (Pa180–Pa189). In the Order, the Commission clearly and comprehensively articulated its rationale:

> The Corporal designation is not a promotional position or a title. It is undisputed that police officers who are designated as Corporals do not receive a higher rate of pay, or perform substantially different work from police officers. The sole function, according to the record, is that Corporals assume the role of Acting

> Sergeant when a Sergeant is unavailable to perform their duties. Acting Sergeants do receive a shift differential when assigned in that capacity. Thus, the Corporal designation allows for temporary assignment as an Acting Sergeant and earning a shift differential.
>
> The Grievant's Corporal designation was rescinded as part of a Notice of Disciplinary Action, in addition to other penalties. This temporal aspect weighs strongly in favor of a finding that the rescission of the Corporal designation was disciplinary. Additionally, the recission was included as part of the disciplinary action taken against the Grievant, one of the strongest "indicia of disciplinary action." State, supra, 50 NJPER 30 (¶10 2023). (Pa188-Pa189).

By virtue of the Commission's November 26, 2024, Order, the Township's request for a restraint of binding arbitration was denied. (Pa189).

STANDARD OF REVIEW

In New Jersey, it is well settled that an agency's interpretation of a statute that it is tasked with enforcing is "entitled to great weight." Nelson v. Bd. of Educ., 148 N.J. 348, 364 (1997) (internal citations omitted). This applies to the Commission's interpretation of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to 34:13A-30, which will not be disturbed absent "a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence, or that it violated legislative policy expressed or implicit in the governing statute." Commc'ns Workers of

Am., Local 1034 v. N.J. State Policemen's Benev. Ass'n, Local 203, 412 N.J. Super. 286, 291 (App. Div. 2010) (internal citations and emphasis omitted).

The entity challenging an agency's interpretation has the burden of demonstrating that it was arbitrary, capricious or unreasonable. McGowan v. N.J. State Parole Bd., 437 N.J. Super. 544, 563 (App. Div. 2002). Because the interpretation of the express language of a statute or legislative intent is strictly a legal issue, it is subject to a de novo review by the courts. Educ. Law Ctr. ex rel. Burke v. N.J. State Bd. of Educ., 438 N.J. Super. 108, 116 (App. Div. 2014) (internal citations omitted). Nonetheless, deference is accorded to administrative agency decisions to reflect "the specialized expertise agencies possess to enact technical regulations and evaluate issues that rulemaking invites." Id. citing N.J. Ass'n of Sch. Adm'rs v. Schundler, 211 N.J. 535, 549 (2012).

LEGAL ARGUMENT

POINT I

THE COMMISSION'S NOVEMBER 26, 2024, ORDER DENYING THE TOWNSHIP'S PETITION TO RESTRAIN ARBITRATION ON THE ISSUE OF THE RESCISSION OF MR. CUFF'S CORPORAL DISTINCTION MUST BE UPHELD BECAUSE IT WAS NOT ARBITRARY, CAPRICIOUS, OR UNREASONABLE, AND DID NOT OTHERWISE RUN AFOUL OF THE LAW. (COMMISSION ORDER DATED NOVEMBER 26, 2024 (DA185–DA187)).

The core issue in dispute here is whether the Township's stripping of Mr. Cuff's corporal distinction upon the issuance of disciplinary charges constituted a "reassignment" that fell within its managerial prerogative and beyond the scope of negotiations.

There is no doubt that "[a]n item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable." Paterson Police PBA No. 1 v. Paterson, 87 N.J. 78, 92-93 (1981). On the flip side, if an item "places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away." Ibid. As the Township correctly noted in its appeal brief, a matter that is not negotiable cannot be subject to arbitration. Bd. of Educ. of Ocean Twp. v. Ocean Twp. Teachers' Ass'n, 165 N.J. Super. 427, 436 (App. Div. 1979).

Whether an act falls within the scope of a department's managerial prerogative turns on whether it is within its "unique responsibility to make and implement public policy." In re Local 195, IFPTE, AFL-CIO v. State of New Jersey, 88 N.J. 393, 401-402 (1982). The Township was also correct in asserting that control over personnel deployment, including hiring, promoting,

transfers and assignments typically falls within a department's managerial prerogative as feature of policy decisions to "maintain order and efficiency…" State v. State Supervisory Employees Ass'n, 78 N.J. 54, 97-98 (1978).

While the caselaw cited in the Township's brief is sound, none of the cases bear resemblance to the facts of the instant matter. That is quite simply because the rescission of Mr. Cuff's corporal distinction did not constitute a "reassignment," either in the literal sense or to the extent that it would qualify as a managerial prerogative. That is evident from the very cases cited in the Township's brief.

For example, Ridgefield Park Ed. Ass 'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144 (1978), involved the involuntary transfers of teachers who were reassigned to teach new courses and grade levels, and were required to move to different schools. Id. at 150-51. As for Dunellen Bd. of Educ. v. Dunellen Ed. Ass'n, 64 N.J. 17 (1973), that case concerned the board of education's consolidation of the Chairmanships of the Social Studies Department and the English Department into a newly created Humanities Chairmanship, which was done to promote educational policy and had no effect whatsoever on any individual employees. Id. at 29-30.

Another case cited in the Township's brief was Rutgers, State Univ. v. Rutgers Council of AAUP Chapters, 256 N.J. Super. 104, 116 (App. Div.

1992), aff'd, 131 N.J. 118 (1993). That matter concerned a change in the evaluation process conducted by a university to determine the awarding of reappointments and promotions of faculty members. It specifically applied to the promotion of assistant professors to the position of associate professor, which came with a host of enhanced employment protections, including the conveyance of tenure and due process rights. Id. at 108.

In its brief, the Township also relied on Irvington Policemen's Benevolent Ass'n, Local 29 v. Town of Irvington, 170 N.J. Super. 539 (App. Div. 1979), which concerned a town's implementation of changes in shift assignments and the work schedules of its police personnel. Specifically, the changes resulted in officers being required to "work on full rotating around the clock shifts," where they had previously been assigned nonrotating, staggered, schedules including fixed midnight shifts. Id. at 542.

The Township further pointed to State v. State Supervisory Employees Ass'n, 78 N.J. 54, 60-61 (1978), which dealt with the seniority rights of employees in the context of "large scale layoffs," and Local 195, supra, which also concerned layoffs and, specifically, management's ability to subcontract while implementing workforce reductions. Id., 88 N.J. at 389-99.

None of these cases are analogous to the instant action for several reasons, but primarily because Mr. Cuff was never "reassigned" from his

position. Unlike the teachers in Ridgefield, Mr. Cuff was not involuntarily transferred to a new position that required him to take on different responsibilities and duties, or report to a different worksite location. Likewise, contrary to the circumstances of Local 29 and State Supervisory, Mr. Cuff was not subject to a department-wide layoff, nor were any changes made to his work schedule, as was the case in Local 195.

Furthermore, the rescission of Mr. Cuff's corporal distinction was not part of a broader policy initiative on the part of the Township, which distinguishes this case from the departmental consolidation featured in Dunellen and the amended evaluation procedure of AAUP Chapters.

None of the cases cited in the Township's brief featured disciplinary charges, and none of the disputed administrative actions were disciplinary in nature (in whole or in part). The administrative measures taken in these cases were not focused on individual employees, but were part of broad, agency-wide, initiatives that were clearly designed to further their policy objectives. That is simply not the case here.

In this matter, Mr. Cuff was stripped of his corporal distinction contemporaneously with the issuance of disciplinary charges against him for allegedly mishandling the effectuation of an arrest. (Pa066, Pa093). The loss of distinction did not result in any changes to his work schedule, duties, or

assigned location. (Ra02). He continued to report to the same location and carried out the same functions he performed as an officer with-or-without the corporal distinction. (Ra02).

As explained in the Statement of Facts section of this brief, the corporal distinction was akin to a commendation that served as a steppingstone to a *potential* promotion to the position of Sergeant. (Ra02). This is supported by the fact that there is no "corporal" position recognized by a collectively negotiated agreement or the police department's internal organizational structure and hierarchy, and the officer continued to work for the same salary and under the contractual terms he was bound to prior to having been accorded the distinction. (Pa108; Pa179).

While it is acknowledged that an officer with a corporal distinction would assume the role of Acting Sergeant whenever the designated sergeant was absent, the officer's duties did not change. (Ra002). The only material benefit derived from the distinction was the opportunity to earn a modest pay increase while serving as Acting Sergeant, which only typically occurred over a handful of shifts per month. (Ra002).

In consideration of all these factors, it cannot be seriously disputed that the stripping of Mr. Cuff's corporal distinction did not qualify as a "reassignment" within the Township's managerial prerogative. It certainly

bore no resemblance to the facts of any of the court cases relied on by the Township in its brief. And there can be no doubt whatsoever that the rescission was disciplinary in nature since this fact was acknowledged by Chief Beecher in his departmental hearing testimony, and it was effectuated upon the issuance of disciplinary charges. (Pa150, 30:11-13). In fact, the NDA explicitly referred to the rescission of the corporal distinction as "other discipline." (Pa065).

While the Township cited a litany of Commission decisions, which are not precedential, they were equally unhelpful to its cause. They all involved *actual* reassignments (i.e. transfers) and/or department-wide staffing decisions, such as discretionary appointments (City of Vineland, P.E.R.C. No. 2013-37, 39 NJPER if 74 (2012)), the transfer of an officer from patrol to internal security duties (City of Atlantic City, P.E.R.C. No. 87-161, 13 NJPER il 18218 (1987)) and officers from the detective to the patrol bureau (City of Garfield, P.E.R.C. No. 90-106, 16 NJPER, 21131 (1990) & Township of Wayne, P.E.R.C. No. 92-60, 18 NJPER, 23016 (1991)). In all these cases, the officers were legitimately reassigned to the extent that they were transferred from one position to another with substantively different duties, responsibilities, and requirements.

By contrast, Mr. Cuff was not transferred anywhere. The loss of his corporal distinction precluded his ability to earn nominal extra pay, but did not result in a substantive change to his duties, assignments, and responsibilities. (Ra002). For these reasons, it met the three-prong test to determine whether a subject matter is mandatorily negotiable under Local 195, supra, which the Court held to be as follows:

An (1) "item [that] intimately and directly affects the work and welfare of public employees;" (2) a topic that "has not been fully or partially preempted by statute or regulation;" and (3) involves a matter where "a negotiated agreement would not significantly interfere with the determination of governmental policy." Id., 230 N.J. at 253.

The Union's grievance as to the rescission of Mr. Cuff's corporal distinction satisfies the first prong of Local 195 because a disciplinary action that resulted in the loss of a commendation and promotional steppingstone, along with the opportunity to earn extra pay, directly affected his work. The second prong is met because there is no statute or regulation that preempts the negotiability of this subject matter, and the third prong is met for all the reasons discussed in the foregoing.

Ultimately, no matter how many times the Township mischaracterizes the stripping of Mr. Cuff's corporal distinction as a "reassignment," it does not

change the fact that it was a textbook disciplinary action that is mandatorily negotiable under both the Agreement and the law. Furthermore, the facts belie the Township's assertions that the act was tantamount to a "personnel deployment" measure in furtherance of its public policy objectives. In fact, no personnel were deployed anywhere, and nothing of substance was presented to establish that any policy objective was bolstered by virtue of the discipline imposed.

Accordingly, the Commission's determination as reflected in its November 26, 2024, Order, which denied the Township's request for a restraint of binding arbitration was correct and fully comported with the law. Even assuming, *arguendo*, that this issue is debatable, it must be reiterated that an agency's interpretation of a law that it is charged with enforcing is "entitled to great weight." Nelson, supra, 148 N.J. at 364. By the same token, the Township failed to meet its substantial burden of demonstrating that the Commission's decision was "arbitrary, capricious, or unreasonable."

POINT II

STATE TROOPERS IS BOTH DISTINGUISHABLE FROM AND INAPPLICABLE TO THE INSTANT MATTER BECAUSE IT CONCERNED CHANGES IN DEPARTMENT-WIDE PROCEDURES GOVERNING THE IMPOSITION OF MINOR DISCIPLINE AGAINST SEVERAL TROOPERS, WHILE THE SUBJECT OF THIS APPEAL IS A PENALTY IMPOSED AGAINST ONE OFFICER THAT WAS NOT PART OF A BROADER CHANGE IN DISCIPLINARY PROCEDURES.

In its brief, the Township argued, in essence, that the New Jersey Supreme Court's decision in State v. State Troopers Fraternal Ass'n, 134 N.J. 393 (1993), precluded the arbitrability of any dispute over discipline imposed against a municipal or county police officer. That is an incorrect interpretation of the Court's holding and, in any case, is not relevant to the analysis of the arbitrability of the Union's grievance in the instant matter.

The issue at the heart of State Troopers was the State Police Superintendent's utilization of "summary disciplinary hearings" to impose minor discipline against troopers, which was challenged by the police union. The troopers contended that this circumvented established protocol because such minor infractions had customarily resulted in written reprimands. Id. at 397-98. The State Police filed a scope of negotiations petition on the basis that the Superintendent had managerial prerogative to establish disciplinary procedures, and this issue was therefore not mandatorily negotiable. Id. at 399.

The Court sided with the State Police and held that the procedures governing the imposition of discipline against troopers were not arbitrable or negotiable because it fell within the Superintendent's managerial prerogative. Id. at 413. It did not hold, as the Township suggested in its brief, that all

manners of disciplinary disputes involving troopers, municipal or county police were non-arbitrable.

The Township then pointed to a slew of prior decisions by the Commission that it claimed reinforced the Court's holding in State Troopers and contradicted its own ruling in the instant action. Yet again, the problem for the Township is that these cases applied exclusively to reassignments (i.e. transfers) of personnel from one position to another.

As such, the Township's arguments fail for the same reasons discussed in Point I of this brief, primarily, that Officer Cuff was never reassigned from one position to another, and the rescission of his corporal distinction was not a department-wide procedure, or a procedure of any sort. It was a penalty imposed against him for allegedly violating rules and regulations during the effectuation of an arrest. This point will be discussed further in Point III of this brief.

It is also worth noting that, while not constituting binding precedent, the holding of the Appellate Division in an unpublished opinion in the matter of In re Cape May Cty. Bridge Comm'n, No. A-5186-83T6, 1985 N.J. Super. Unpub. LEXIS 5 (Super. Ct. App. Div. July 9, 1985), fully comported with the law. Specifically, that the Commission must make "the determination whether a transfer is non-disciplinary and thus non-arbitrable or disciplinary and

arbitrable." Id., slip op. at 7. What distinguishes Cape May from the various cases relied on by the Township is that it focused on the involuntary transfer of one employee due to various safety violations that could have resulted in disciplinary action. Id., slip op. at 2-3. It was not a department-wide reallocation or deployment of personnel, or a procedure that applied to all employees. As such, the statutory framework and precedent relied on by the Township is inapplicable to the issue in Cape May and is equally unavailing in the matter at hand.

POINT III

THE COMMISSION'S FINDING THAT THE RESCISSION OF MR. CUFF'S CORPORAL DISTINCTION WAS PREDOMINATELY DISCIPLINARY WAS FULLY SUPPORTED BY THE SUBSTANTIAL EVIDENCE IN THE RECORD. (COMMISSION ORDER DATED NOVEMBER 26, 2024. (PA185 – PA189)).

In its brief, the Township ostensibly argued that the rescission of Mr. Cuff's corporal distinction was a non-disciplinary reassignment, and that the Commission's determination to the contrary was not based on the substantial evidence in the record. This asserted position flies in the face of the facts.

To begin with, Chief Beecher, who imposed the penalty against Mr. Cuff, admitted in his testimony during the departmental hearing that it was based on incidents that resulted in disciplinary charges. (Pa150, 30:11-13). The disciplinary nature of the removal of Mr. Cuff's corporal distinction was

further supported by the explicit language in the NDA, which described the penalty as "Other Disciplinary Action." (Pa065). Also, it was imposed simultaneously with the issuance of the NDA, which the Commission considered as a factor in its decision, noting the "temporal proximity." (Pa188–Pa189).

It appears that the only facts in support of the Township's argument to the contrary are the self-serving mischaracterizations of the discipline as a "reassignment," as it was labeled in the NDA, referred to in an internal communication, and described in Chief Beecher's testimony, who noted that it would have been "negligent" to allow Mr. Cuff to keep the corporal distinction, which was ultimately accorded to another officer. (Pal50, 29: 16-25).

However, during the hearing, Chief Beecher admitted that this measure was taken in-part because he found Mr. Cuff's actions "troubling" during the January 3, 2021, incident that gave rise to the charges. (Pa150, 29:16-25). The only other considerations mentioned in his testimony were an objectionable statement Mr. Cuff allegedly made during the ensuing Internal Affairs investigation, and his disciplinary history, which included a twenty-seven-hour suspension. "It was the 72 hour suspension, it was his actions that day, January 3rd, and his statement during the interview." (Pa150, 30:11-13).

So, to summarize, disciplinary charges were filed against Mr. Cuff for his role in effectuating an allegedly unlawful arrest on January 3, 2021. Upon the issuance of the charges, Chief Beecher rescinded his corporal distinction. This penalty was expressly referenced as discipline in the NDA. And Chief Beecher acknowledged in testimony that it emanated from the January 3 incident. If the rescission of Mr. Cuff's corporal distinction did not qualify as substantially disciplinary under these circumstances, it is difficult to imagine what would.

For all these reasons and those provided in the foregoing sections of this brief, the Commission's determination as to the disciplinary nature of the penalty imposed against Mr. Cuff was soundly predicated on the substantial evidence in the record.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Order of Commission, which denied the Township's application to restrain arbitration, must be upheld.

CARUSO SMITH PICINI, PC
Attorneys for Respondent
Fraternal Order of Police, Lodge 22

By: /s/ *Nicholas Poberezhsky*
NICHOLAS POBEREZHSKY

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

PO Box 429
TRENTON, NEW JERSEY 08625-0429

www.nj.gov/perc

ADMINISTRATION/LEGAL
(609) 292-9830
CONCILIATION/ARBITRATION
(609 292-9898
UNFAIR PRACTICE/REPRESENTATION
(609) 292-6780

For Courier Delivery
495 WEST STATE STREET
TRENTON, NEW JERSEY 08618

FAX: (609) 777-0089
EMAIL: mail@perc.nj.gov

June 13, 2025

VIA E-MAIL
Marie C. Hanley, Clerk
Appellate Division
R.J. Hughes Justice Complex
P.O. Box 006
Trenton, NJ 08625-0006

Filing Attorney: William J. Campbell, IV, Deputy General Counsel
Attorney I.D. #272382018, E-mail: wcampbell@perc.nj.gov

RE: In the Matter of Township of Mount Olive, Appellant -and- Fraternal Order of Police, Lodge 122, Respondent;
App. Div. Dkt. No.: A-001219-24
Agcy. Dkt. No.: SN-2025-003

Dear Ms. Hanley,

The New Jersey Public Employment Relations Commission (PERC or Commission) submits this letter brief pursuant to R. 2:6-4(c) in opposition to the Township of Mount Olive's (Township) appeal from the Commission's final agency decision dated November 26, 2024, P.E.R.C. No. 2025-16. (Pa180a-189a).

TABLE OF CONTENTS

PRELIMINARY STATEMENT

The question before the court is whether a majority representative, in this case, FOP Lodge 122 (Lodge or Union), may arbitrate whether the Township had just cause to discipline a police officer (the Grievant) by removing his Corporal commendation/designation. PERC did not view the underlying dispute as a challenge to a "transfer" or "reassignment" of police personnel, nor did it overturn established precedent that prohibits arbitration of such disputes. The Township's characterization of the matter as a transfer or reassignment is contradicted by the record before PERC, which shows that the Grievant's day-to-day duties remain unchanged. The only differences were that the Grievant was no longer eligible to wear Corporal stripes and was disqualified from working as Acting Sergeant, a role for which he previously received a shift differential.

Moreover, PERC correctly determined that the removal of the Corporal status was primarily disciplinary in nature. It was referenced in the Preliminary Notice of Discipline and stemmed from the same incident that led to the Grievant's suspension. The New Jersey Employer-Employee Relations Act (EERA), N.J.S.A. 34:13A-1 to -64, permits binding arbitration of disciplinary disputes where there is no alternate statutory appeals process. Since no such provision exists here, the issue, in the abstract, is legally arbitrable. Accordingly, dispute should proceed to

arbitration so that the merits of the underlying discipline can be properly adjudicated.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF MATERIAL FACTS[1]

The Township is a non-civil service jurisdiction that provides police services to its community. The rank-and-file police officers employed by the Township have selected Fraternal Order of Police Lodge No. 122 as their majority representative for collective negotiations concerning their terms and conditions of employment. (Pa21a). The Township and FOP are parties to a series of collective negotiations agreements (CNA), the relevant of which was in effect from January 1, 2020 through December 31, 2023. (Pa19a). The CNA includes a grievance procedure for resolving disputes arising out of the interpretation or application of the CNA which ends in binding arbitration as authorized by N.J.S.A. 34:13A-5.3. (Pa40a-42a).

The Grievant has at all relevant times been employed as a police officer by the Township. (Pa17). Since 2016, the Grievant was designated as a "Corporal," which, as defined by Department rules, is "[a]n officer assigned by the Chief of Police to supervise a squad or unit in the absence of a sergeant. This absence is not limited to scheduled days off or vacation, but may also include times where a

[1] The procedural history and statement of facts are combined because the facts material to the issues on appeal are largely procedural in nature.

Sergeant is unable to assist due to a meeting, prior assignment, or previous call for service." (Pa99). While the Corporal designation is not a "rank," it creates eligibility to work in the Acting Sergeant capacity and thus the ability to earn a shift differential. (Pa23). Corporals also wear "Corporal stripes" identifying themselves as having the enhanced status, which the FOP likened to a "stepping stone" in an officer's career. (Ra1-2). Otherwise, a Corporal's day-to-day responsibilities are no different from regular police officers. (Ra2).

In response to a citizen's complaint and concerns raised by the Mercer County Prosecutor's Office, an internal affairs investigation was initiated into the Grievant's conduct following the service of a criminal complaint and arrest of an individual. (Pa68-69). While serving as acting sergeant, the Grievant allegedly issued a complaint-summons against an individual accused of violating a temporary domestic violence restraining order despite the Attorney General guidelines requiring the issuance of a complaint-warrant in such cases. (Pa79-80). The Township further alleges that the Grievant and another officer, while serving the summons, entered the suspect's private residence without a warrant, consent, or exigent circumstances, and arrested the suspect. (Pa79-80). Additionally, the Township alleges that the suspect was neither charged with an indictable offense nor referred for psychiatric treatment, despite the Grievant's assertion that the suspect was experiencing a psychiatric episode. (Pa81-82).

On August 26, 2021, the Grievant received a Notice of Disciplinary Action for violations of Department policies related to the service of a complaint-summons and arrest of an individual while serving as Acting Sergeant. (Pa65a). The notice provided that he would be suspended for 16 hours, be removed from the Corporal position, and receive additional training. (Pa65a).

After several days of hearing, a Township Hearing Officer determined the allegations against the Grievant were true, and found he violated the suspect's civil rights, Department policies, and N.J.S.A. 40A:14-147. (Pa67-85). The Hearing Officer also upheld the discipline recommended by the Chief. (Pa85a).

By mutual agreement of the parties on December 22, 2022, the FOP filed a Request for Submission of a Panel of Arbitrators with PERC and an arbitrator was appointed. (Pa93). After the first day of the arbitration hearing, the instant scope of negotiations petition was filed and the proceedings before the arbitrator remain pending a final resolution in this matter. (Pa3-4).

The Township's scope of negotiations petition sought to restrain arbitration over "his removal from an assignment," contending that "the selection and removal of personnel from assignments are within the managerial prerogative of the Township." (Pa3). After briefing by the parties, PERC issued a decision denying the Township's request to restrain arbitration, thereby permitting the Grievant to contest the merits of his loss of Corporal status. (Pa180-189). The Commission

held that because the recission of the Corporal designation was predominately disciplinary, as opposed to operational, the grievance is arbitrable. (Pa189).

LEGAL ARGUMENT

I. Standard of Review: Was the Commission's Decision Arbitrary or Capricious?

The Commission has "broad authority and wide discretion in a highly specialized area of public life" and is entrusted with deciding cases based upon its "expertise and knowledge of circumstances and dynamics that are typical or unique to the realm of employer-employee relations in the public sector." Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 328 (1989). Judicial review is narrow:

> The matter is simply one as to the reasonableness of a quasi-legislative policy decision by a statutory administrative agency in the area of its duly delegated authority. The role of judicial review in that regard is thoroughly settled. The administrative determination will stand unless it is clearly demonstrated to be arbitrary or capricious.
>
> State v. Professional Ass'n of N.J. Dept. of Ed., 64 N.J. 231, 258-259 (1974).

II. The Disciplinary Removal of the Grievant's Corporal Designation is Arbitrable.

A. PERC correctly applied the *Paterson* scope of negotiations test.

The EERA governs collective negotiations between public employers and public employees. N.J.S.A. 34:13A-1 to -64. Pursuant to the EERA, once

employees select an exclusive representative, both the union and the employer must "negotiate in good faith with respect to grievances, **disciplinary disputes**, and other terms and conditions of employment." N.J.S.A. 34:13A-5.3 (emphasis added). Where, as here, a party seeks "a determination as to whether a matter in dispute is within the scope of negotiations," N.J.S.A. 34:13A-5.4d, the Commission has a limited role:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

> First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. State v. State Supervisory Employees

> Ass'n, 78 N.J. 54, 81 (l978). If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

Arbitration is permitted if the subject of the grievance is mandatorily or permissively negotiable. See Middletown Tp., P.E.R.C. No. 82-90, 8 NJPER 227 (¶13095 1982), aff'd, 1983 N.J. Super. Unpub. LEXIS 11 (App. Div. 1983)[2]. Paterson bars arbitration only if the agreement alleged is preempted or would substantially limit government's policy-making powers. PERC correctly applied this test when determining the grievance was legally arbitrable.

[2] The Commission published this decision in its NJPER administrative reporter at NJPER Supp. 2d 130 (¶111 App. Div. 1983)

B. Binding arbitration of employee discipline is expressly authorized by the EERA unless an alternate statutory appeals process is available.

The EERA explicitly allows public employees the right to negotiate disciplinary procedures and submit grievances challenging discipline to binding arbitration:

> **Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures** by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, **including disciplinary determinations**, affecting them, provided that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization. **Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes.** Except as otherwise provided herein, the procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws, except that such procedures may provide for binding arbitration of disputes involving the minor discipline of any public employees protected under the provisions of section 7 of P.L.1968, c.303 (C.34:13A-5.3), other than [State Troopers].
>
> [N.J.S.A. 34:13A-5.3 (emphasis added).]

Municipal police officers, along with all other public employees except for State Police, may challenge minor discipline[3] via binding arbitration even where there is an alternate statutory appeals process. Id. The discipline in this case, in addition to the classic minor discipline of a 16-hour suspension, also included the Grievant's loss of the Corporal designation. Discipline of this nature is not governed by N.J.S.A. 40A:14-147, which provides an alternate statutory appeals process for non-civil service police officers only where an officer is "suspended, removed, fined or reduced in rank." While unusual, "Corporal" is not a recognized rank within the Township's police department that would allow access to this statutory appeals process.

C. PERC's determination that Corporal status was neither an assignment nor a position was not arbitrary or capricious.

The Township's labeling of the Corporal designation as an "assignment" is not dispositive, it is the underlying facts that determine whether or not the Grievant was "reassigned," when his corporal designation was removed or whether it was less than a "reassignment." Here, the facts differ from every case cited by the Township, the vast majority of which involve the wholesale transfer or reassignment of an employee. The record before PERC was clear that Corporals

[3] Minor discipline is defined as "a suspension or fine of less than five days unless the employee has been suspended or fined an aggregate of 15 or more days or received more than three suspensions or fines of five days or less in one calendar year." N.J.S.A. 34:13A-5.3.

are eligible to work as acting sergeants, not that they must work in that capacity or are entitled to specific shifts working in a higher position. This undermines the Township's assertion that officers are "assigned" to the Corporal position. The record shows that this status, although not a recognized promotional rank, is a "stepping-stone" in an officer's career that comes with the trappings of a higher rank even if Mt. Olive lacks the operational justification for an intermediate promotional position of Corporal. The factual determination made by the Commission that the Corporal designation was not a wholesale transfer or reassignment was not arbitrary or capricious and is supported by the record.

With this threshold issue decided, the Township's citations to the longstanding prohibition against arbitrating transfers for police officers misses the mark. PERC did not alter its precedent or seek reversal of existing caselaw. The Commission acknowledges its own precedent and applicable caselaw, succinctly stated as "section 5.3 authorizes agreements to arbitrate minor disciplinary disputes, but that authorization does not extend to reassignments of police officers." County of Hudson, P.E.R.C. No. 2010-57, 36 NJPER 40 (¶18 2010); see also Borough of New Milford, P.E.R.C. No. 99-43, 25 NJPER 8 (¶ 30003 1998) (reassignment of police officer is not legally arbitrable regardless of whether it was disciplinary).

These cases, and the Township's additional references to the concept that police officers may not arbitrate transfers or reassignments are inapposite to the current case. Township of West Orange, P.E.R.C. No. 2001-62, 27 NJPER 243 (¶32086 2001); Union County Sheriff, P.E.R.C. No. 2003-02, 28 NJPER 303 (¶ 33113 2002); City of Trenton, P.E.R.C. No. 2005-59, 31 NJPER 58 (¶27 2005); New Jersey Transit Corp., P.E.R.C. No. 2006-54, 32 NJPER 18 (¶9 2006); Town of Hammonton, P.E.R.C. No. 2011-50, 37 NJPER 43 (¶14 2010). Most of these cases involve a wholesale transfer or reassignment of police personnel from one position to another. The instant case does not align factually with those cases because it is undisputed that the Grievant worked as a regular police officer when he was designated Corporal unless he was assigned to be acting sergeant. Two of the cases, NJ Transit and Hammonton, involve the removal of an officer from specialty assignments. These cases are also distinguishable because the grievances in those cases requested the restoration of a specific work assignment, which does not exist here.

In PERC's view, the grievance in the instant matter seeks restoration of the Corporal designation, not an order compelling the Chief of Police to assign the Grievant as Acting Sergeant to any particular shift. This issue, in the abstract, is negotiable, and thus arbitrable, where it is shown to be disciplinary. The assignment of the Grievant to individual shifts as Acting Sergeant is a discrete and

separate issue not directly challenged by the grievance. It is inappropriate in a scope of negotiations proceeding to assume that an arbitrator would interfere with the Chief of Police's assignment of police personnel where "[a]n arbitrator in the public sector is bound to apply pertinent statutory criteria and to consider the public interest and welfare." Jackson Tp. Bd. of Educ. v. Jackson Educ. Ass'n ex rel. Scelba., 334 N.J. Super. 162, 174-75 (App. Div. 2000). Moreover, grievance arbitration awards are subject to a broad scope of judicial review in the event of error. See State v. Communication Workers, AFL-CIO, 154 N.J. 98, 112 (1998).

D. PERC's determination that the removal of the Grievant's Corporal designation was primarily disciplinary, and not primarily operational, was not arbitrary or capricious.

PERC's finding that the Township Chief of Police's decision to remove the Grievant's Corporal designation was primarily disciplinary is not arbitrary or capricious and is supported by the record. The Township may raise its arguments about whether there was just cause for the discipline when the merits of the dispute are adjudicated before the arbitrator.

Here, the Township complains that PERC did not consider the Chief's sworn testimony where he averred that the "transfer" from the Corporal assignment was not effectuated for disciplinary reasons. PERC did consider the testimony and facts surrounding the Grievant's loss of Corporal designation including the Chief's

explanation and weighed those facts differently than the Township would have preferred. This exercise is neither arbitrary or capricious.

PERC, in various contexts, routinely weighs whether an employer's action is predominantly operational or predominantly disciplinary. See, e.g. Union Cty. Sheriff's Office, P.E.R.C. 2018-47, 44 NJPER 451 (¶125 2018) (determining whether assignment of work was changed for operational or economic reasons); Camden Bd. of Ed. P.E.R.C. No. 2025-5, 51 NJPER 112 (¶ 27 2024) (determining whether a school employee's transfer was predominantly disciplinary or operational); Asbury Park Bd. of Ed. P.E.R.C. No. 2024-31, 50 NJPER 306 (¶74 2024) (adjudicating whether an increment withholding was for disciplinary reasons or to correct performance).

In this case, PERC, consistent with its precedent determined whether the Township's actions were predominantly disciplinary or predominantly operational. See Cape May Cty. Bridge Comm. and Local No. 196, IFPTE, 1985 N.J. Super. Unpub. LEXIS 5 (App. Div. 1985)[4] aff'g P.E.R.C. 84-133, 10 NJPER 344 (¶15158 1984); see also City of East Orange, P.E.R.C. No. 86-70, 12 NJPER 19 (¶17006 1985).[5] This balancing is central to the Paterson negotiability test.

[4] The Commission published this decision in its NJPER administrative reporter at 10 NJPER 344 (¶15158 1984).

[5] While these cases involved the disciplinary transfer of non-police personnel, that fact does not change their precedent of the balancing required under Paterson to

In this matter, the facts show that the incident in which the Grievant was disciplined also resulted in the loss of the Corporal designation. The Notice of Discipline also contained this information under "other discipline." These details led PERC to conclude that the removal of the Corporal designation was primarily disciplinary, not wholly disciplinary. PERC reviewed the Chief's operational justification for removing the Corporal designation and credited it, but found it did not outweigh the disciplinary nature of the circumstances. Whether or not the removal occurred the same day as the notice of discipline, they arose out of the same set of facts and it is this temporal proximity that PERC relied on in making its conclusion that this matter was primarily disciplinary and thus legally arbitrable. PERC's analysis here is not arbitrary or capricious, but is based on the facts in the record. This dispute may proceed to arbitration where the Township can justify its issuance of discipline before the arbitrator.

---

determine whether the issue is predominantly a term and condition of employment (i.e. disciplinary) or whether arbitration would substantially interfere with policy-making (i.e. operational).

CONCLUSION

For these reasons, PERC's decision was not arbitrary or capricious and therefore, the appeal should be dismissed.

Respectfully submitted,

s/ William J. Campbell, IV
William J. Campbell, Esq.
Deputy General Counsel

DATED : June 13, 2025

c: Service List

IN THE MATTER OF TOWNSHIP OF MOUNT OLIVE, AND, FOP LODGE 122	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001219-24 Civil Action On Appeal From: PUBLIC EMPLOYMENT RELATIONS COMMISSION DOCKET NO.: SN-2025-003 Date of Submission: June 27, 2025

REPLY BRIEF OF PETITIONER-APPELLANT TOWNSHIP OF MOUNT OLIVE

Cleary, Giacobbe Alfieri & Jacobs LLC
955 State Route 34, Suite 200
Matawan, New Jersey 07747
Attorneys for Township of Mount Olive
Anthony G. LoBrace, Esq.
Attorney ID No: 304682019
alobrace@cgajlaw.com

Adam S. Abramson-Schneider, Esq.
Attorney ID No: 021072004
aabramson@cgajlaw.com

Of Counsel:
Adam S. Abramson-Schneider, Esq.

On the Brief:
Anthony G. LoBrace, Esq.

TABLE OF CONTENTS

R. 2:6-2(a)(2) TABLE OF JUDGMENTS, ORDERS, AND RULINGS APPEALLED

November 26, 2024 Decision of the Public Employment Relations Commission (Pa180-Pa189)

TABLE OF AUTHORITIES

Cases

Administrative Decisions

STATEMENT OF FACTS AND PROCEDURAL HISTORY

The Township hereby incorporates the Statement of Facts and Procedural History set forth in its March 13, 2025 initial brief in support of the above-captioned appeal as if same were set forth at full herein.

POINT I: THE CORPORAL IS AN ASSIGNMENT WITHIN THE MOUNT OLIVE POLICE DEPARTMENT AND CUFF'S REMOVAL FROM SAME CONSTITUTED A REASSIGNMENT WITHIN THE TOWNSHIP'S MANAGERIAL PREROGATIVE (Pa180-Pa189).

Respondents' contentions that the Corporal assignment existing within the Department is a "designation," "stepping-stone" to promotion, "distinction," or "commendation" are wholly unsupported by the record in this matter.

Under the Department's Rules and Regulations, the Corporal is defined as "[a]n officer assigned by the Chief of Police to supervise a squad or unit in the absence of a sergeant." (Pa099). Thus, the Corporal is clearly an assignment made by the Chief of Police. Further, the Corporal is not a recognized rank under the Township's ordinances, nor is the Corporal included in the applicable salary guide set forth under the Agreement or included as a possible rank that an officer may be promoted to. (Pa058; Pa060-Pa061; Pa179) These exclusions of the Corporal from the official rank structure of the Department establish that an officer is not required to obtain the assignment of Corporal in order to then be promoted to Sergeant. There

is also nothing included in the record, aside from Cuff's self-serving certification in connection with the underlying scope of negotiations proceedings, that the Corporal assignment functioned as a "distinction" or "commendation." Similarly, Beecher's August 26, 2021 Personnel Order, entitled "Patrol Division Re-Assignments," advised the Department that Cuff had been reassigned as an officer, while another officer was being assigned to the Corporal assignment. (Pa066). There is no reference in any of these materials to the rescission of a "commendation," "designation," or "distinction."

Additionally, and as Respondents' point out, Cuff received Corporal "stripes" on his uniform to indicate that he was a Corporal, held the assignment from 2016 to 2021, and functioned as a Sergeant at least five (5) times per month during that period due to the absence of a Sergeant. (Ra002). These facts cut against Respondents' assertions that the Corporal assignment was a one-off assignment that Cuff was only required to fill on a sporadic basis. Rather, Cuff was assigned as Corporal in 2016 and, following such assignment, consistently functioned as a Corporal responsible for supervision of a squad or unit in the regular Sergeant's absence for five (5) years without interruption. (Ra002).

With regard to Respondents' claims that Cuff's reassignment from Corporal did not constitute a reassignment within the ambit of the Commission case law cited in the Township's initial brief in this matter, such claims strain credulity. As

Corporal, Cuff was responsible for discharging the supervisory responsibilities of a Sergeant over a squad or unit in the Sergeant's absence. (Pa099). Of course, the duties of a Sergeant and the duties of a patrol officer are not the same. This requirement to stand in the place of a Sergeant in the Sergeant's absence was automatic in the sense that, when the Sergeant was absent, the Corporal was the individual automatically required to assume the Sergeant's supervisory duties and responsibilities for that squad. A patrol officer not assigned as Corporal would not inherit a Sergeant's supervisory authority by virtue of the Sergeant's absence; that is the purpose of having an assigned Corporal. Thus, and contrary to Respondents' assertions, Cuff's duties did substantively change when he was reassigned from the Corporal assignment. While assigned as Corporal, Cuff was responsible for discharging the supervisory duties of a Sergeant in the Sergeant's absence and, following his reassignment from Corporal, he no longer was required to do so and only performed the duties of a patrol officer, which did not include supervision of other officers.

Finally, both Hayducka and Judge Minkowitz found that Cuff's assignment to and reassignment from Corporal were assignment decisions made by Beecher within his managerial prerogative over the assignment of Department personnel. Hayducka specifically noted that Cuff's assignment designation was changed from Corporal to patrol officer and that such modification constituted "an assignment and managerial

prerogative." (Pa069, at n. 2). As for Judge Minkowitz, he specifically determined that the Chief of Police maintained the discretion to assign patrol officers as Corporal as he deemed appropriate and further found that Cuff's reassignment from Corporal was not the type of discipline contemplated by the Commission or the New Jersey courts as requiring a hearing prior to such reassignment. (Pa091-Pa092).

Plainly, and as the record clearly demonstrates, Cuff's long-standing assignment as Corporal was exactly that: an assignment made and subsequently removed by the Chief of Police in his discretion over matching the best-qualified candidate to a particular assignment. Respondents' assertions that Cuff's reassignment from Corporal was anything other than a decision made within the managerial prerogative of the Chief of Police over assignment of departmental personnel are factually baseless.

POINT II: RESPONDENTS' ATTEMPTS TO DISTINGUISH COMMISSION CASE LAW ARE WITHOUT MERIT (Pa180-Pa189).

According to Respondents, the Commission case law cited in support of the Township's instant appeal is inapplicable to the current dispute because those cases involved a "wholesale" transfer or reassignment of the employee in question. As Respondents claim, Cuff's reassignment from Corporal "did not count" because it did not involve a substantive change to his duties or responsibilities. However, and for the reasons set forth in Point I, *supra*, Cuff's reassignment from Corporal did

result in a substantive change in his work responsibilities and duties. Put simply, as Corporal, his duties and responsibilities included discharging the supervisory duties of a Sergeant in the Sergeant's absence; as a patrol officer, his duties and responsibilities did not. (Pa099).

Despite Respondents' attempts to distinguish Commission case law standing for the proposition that reassignments are not arbitrable, even if disciplinary, none of those cases involved any consideration of whether the transfer or reassignment in question was "wholesale." There is nothing in any of those decisions suggesting or establishing that the Commission conducted an assessment of whether the reassignment or transfer at issue involved a change in the employee's job duties, compensation, work location, work hours, or the like. Rather, the Commission held in each of those decisions, often in a single sentence, that transfers and reassignments of personnel are not arbitrable, even if done for disciplinary reasons. See e.g. Borough of New Milford, P.E.R.C. No. 99-43, 25 NJPER ¶ 30003 (1998) (Pa223-Pa226); Township of West Orange, P.E.R.C. No. 2001-62, 27 NJPER ¶ 32086 (2001) (Pa227-Pa230); Union County Sheriff, P.E.R.C. No. 2005-59, 31 NJPER ¶ 27 (2005) (Pa231-Pa233); City of Trenton, P.E.R.C. No. 2005-59, 31 NJPER ¶ 27 (2005) (Pa234-Pa236); County of Hudson, P.E.R.C. No. 2010-57, 36 NJPER ¶ 18 (2010) (Pa242-Pa245); New Jersey Transit Corp., P.E.R.C. No. 2006-54, 32 NJPER ¶ 9 (2006) (Pa237-Pa241); Town of Hammonton, P.E.R.C. No. 2011-50, 2010 WL

6766105 (2010) (Pa246-Pa250); City of Elizabeth, P.E.R.C. No. 2019-53, 46 NJPER ¶ 3 (2019) (Pa251-Pa257).

It also bears mentioning that each of the above-cited Commission decisions involved an allegation that the transfer or reassignment in question was done for disciplinary reasons. In none of those decisions did the Commission analyze or consider whether the transfer or reassignment was predominately or substantially disciplinary. The Commission also conducted no review to determine whether the transfer or reassignment was a "wholesale" transfer or reassignment in those cases. Instead, and as set forth above, the Commission summarily determined that arbitration over the transfer or reassignment needed to be restrained, regardless of whether it was done for disciplinary reasons, in light of the fact that the disciplinary amendment to N.J.S.A. 34:13A-5.3 did not encompass transfers or reassignments, as well as the fact that public employers enjoy substantial latitude and discretion in matching the best-qualified employee to particular work assignments.

Three (3) of these cases are useful in the Court's consideration of this dispute. New Jersey Transit Corp. involved a grievance challenging officers' reassignment from the department's Field Training Officer program, with the grievants claiming that the reassignment was disciplinary. P.E.R.C. No. 2006-54, 32 NJPER ¶ 9 (2006) (Pa237-Pa241). Field Training Officers remained in their regular assignments except when required to train probationary officers, during which time they were entitled to

additional compensation for duties and time associated with their field training work. Id. The Commission not only held that "[p]ublic employers have a non-negotiable managerial prerogative to assign employees to meet the governmental policy goal of matching the best-qualified employees to particular jobs," but further held that "reassignments of police officers, either into or out of positions involving special skills and qualifications, are not arbitrable, even when the employer acts for disciplinary reasons." Id.

In Hammonton, the grievance disputed the employer's determination to remove an officer from a special assignment at the municipality's schools following an incident that prompted the superintendent of the schools to request the officer's removal. P.E.R.C. No. 2011-50, 2010 WL 6766105 (2010) (Pa246-Pa250). The Commission found that the police chief's decision was based upon a determination that the grievant was not qualified for the duties involved in the assignment and that the department would be better served by reassigning the officer, rather than on any intention to discipline the grievant for misconduct. Id. However, the Commission further found, "[e]ven if the assignment decision were disciplinary, . . . it could not be challenged through binding arbitration," as only "minor disciplinary determinations involving police officers are legally arbitrable and the statutory definition of minor discipline does not include reassignments." Id. (citing N.J.S.A. 34:13A-5.3; Borough of New Milford, P.E.R.C. No. 99-43).

And, in City of Elizabeth, the Commission restrained arbitration of a grievance regarding a police officer's reassignment following the employer's receipt of citizens complaints regarding his work conduct and performance. P.E.R.C. No. 2019-53, 46 NJPER ¶ 3 (2019) (Pa251-Pa257). The Commission held that "the reassignment of police officers, disciplinary or not, may not be challenged through binding grievance arbitration." Id.

Applying the foregoing, like New Jersey Transit Corp., the fact that Cuff did not function as a Corporal on a daily basis or the fact that his regular duties outside of his Corporal assignment did not change following his reassignment have no impact on the established legal principle that reassignments, whether disciplinary or non-disciplinary, are not subject to binding arbitration. Like Hammonton and Elizabeth, Cuff's reassignment from Corporal was based, in part, upon the citizen's complaint received by the Department following Cuff's unlawful entry into a residence to effectuate an arrest, at which time he was serving in his assignment as Corporal. But the fact that there were potential disciplinary ramifications for Cuff's conduct while functioning as a Corporal does not alter the Commission's prior determinations that such reassignments of police personnel are non-arbitrable.

The Commission case law cited by the Commission in opposition to the Township's appeal is actually inapplicable here. Union County Sheriff's Office involved the Commission's consideration of whether arbitration over the employer's

transferring of certain weekend duties from one group of employees to another group was subject to negotiation or arbitration. P.E.R.C. No. 2018-47, 44 NJPER ¶ 125 (2018). Asbury Park Board of Education concerned the Commission's determination that a violation of contractual provisions regarding teacher evaluations was legally arbitrable. P.E.R.C. No. 2024-31, 50 NJPER ¶ 74 (2024). Finally, Camden City School District involved a dispute over a transfer of a teacher between worksites, where separate statutory authority specific to school employees prohibited transfers of such employees for disciplinary reasons. P.E.R.C. No. 2025-25, 51 NJPER ¶ 27 (2025). None of these cases say anything about the issues in dispute regarding Cuff's reassignment.

POINT III: CUFF'S REASSIGNMENT FROM CORPORAL WAS NOT SUBSTANTIALLY OR PREDOMINATELY DISCIPLINARY (Pa180-Pa189).

As the Commission stated, the notation of Cuff's reassignment on the Notice of Disciplinary Action was the sole basis for its determination that the reassignment was arbitrable. (Pa188-Pa189). However, there was significant record evidence establishing that Cuff's reassignment was not disciplinary at all, let alone predominately or substantially disciplinary.

For example, and as Beecher testified under oath, Cuff's reassignment was not just based upon his conduct giving rise to the citizens complaint filed against him, but also upon concerning responses he provided during the Internal Affairs

process which suggested his lack of understanding of important concepts of proper criminal procedure, as well as the sustained major disciplinary action against Cuff less than one (1) year prior to that citizens complaint. (Pa149-Pa150, 26:25-32:1). As Beecher testified, Cuff's reassignment was not intended to be disciplinary; rather, he noted it on the Notice of Disciplinary Action because that form is promulgated by the Attorney General's Office and he wanted to provide Cuff with notice of what would be expected of him beyond the proposed suspension that would be sought in connection with the departmental disciplinary proceedings against Cuff. (Pa148-Pa149, 24:6-26:23). Additionally, Beecher specifically testified that he felt it would "negligent" of him to leave Cuff in the Corporal assignment given the supervisory authority delegated to the individual holding such assignment. (Pa150, 29:16-25). Thus, Beecher's determination to reassign Cuff was based upon his assessment of Cuff's fitness, or unfitness, to continue holding such assignment. (Pa150, 30:21-31:3).

Additionally, like the reassignment, the remedial training that Cuff would be required to undergo were noted on the Notice of Disciplinary Action. (Pa065). However, pursuant to the Department's Rules and Regulations, training is not a disciplinary action, nor are reassignments an available disciplinary measure that the Township may institute against police personnel. (Pa129-Pa131). Likewise, Cuff's reassignment from Corporal occurred before any departmental disciplinary

proceedings had been conducted concerning the conduct giving rise to the citizens complaint against him and, when Beecher issued his memorandum to Cuff advising of the discipline to be implemented following the departmental hearing, there is no reference to his reassignment. (Pa065; Pa066; Pa067-Pa085; Pa178). Presumably, if the reassignment were disciplinary, it could not have been implemented before a determination was made by a disciplinary hearing officer regarding whether the Township had proven the charges against Cuff as set forth in the Notice of Disciplinary Action and would have been noted on Beecher's memorandum as to the disciplinary action that Cuff would be facing.

Along the same lines, when Hayducka issued his decision following the departmental disciplinary proceedings, he made no mention of Cuff's reassignment in opining on the penalty to be imposed for the sustained disciplinary charges. (Pa082-Pa085). Rather, Hayducka specifically noted that Cuff's reassignment was made pursuant to the Township's managerial prerogative over assignments of personnel. (Pa069, at n. 2). Similarly, when Cuff filed his order to show cause alleging a violation of his due process rights where he was reassigned before a departmental hearing had been conducted, Judge Minkowitz found that Cuff's reassignment was not discipline for which a departmental hearing was required and further found that such reassignment was within the Township's managerial prerogative to make as it deemed appropriate. (Pa090-Pa092).

Thus, at all junctures, there was substantial record evidence establishing the non-disciplinary nature of Cuff's reassignment which the Commission disregarded in declining to restrain arbitration over that issue. And, as set forth in Point II, *supra*, even if Cuff's reassignment were disciplinary, which it was not, that still would not render the dispute over such reassignment arbitrable.

This situation brings important public policy questions to the forefront. According to the Commission, Cuff's reassignment was disciplinary because, and only because, it was noted on the Notice of Disciplinary Action. But the facts of record demonstrate that Beecher made a determination that Cuff's reassignment was necessary based not just on the conduct underlying the citizens complaint, but also on prior major discipline sustained against him and highly concerning statements Cuff made during his Internal Affairs interview. (Pa149-Pa150, 26:25-32:1). Why should a Chief of Police, responsible to a municipality and the public it is bound to serve, be prohibited from reassigning an officer deemed unfit to hold a certain assignment just because the officer's conduct leading to the Chief's determination of unfitness also warrants disciplinary action against the officer? If Beecher had waited a day, or a week, or advised Cuff of his reassignment on a document other than the Notice of Disciplinary Action, would that change the Commission's determination concerning the arbitrability of that reassignment?

As for the former inquiry, it seems incongruous that a Chief of Police should be hamstringed in his overall control of a municipal police department and its constituent members where an officer's conduct warrants both removal from an assignment the officer holds and warrants disciplinary action against that officer. Indeed, the Commission's, and our courts', jurisprudence both suggest that this is not the correct result. See Irvington Policemen's Benevolent Ass'n, Local #29 v. Town of Irvington, 170 N.J. Super. 539, 546 (1979); Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 156 (1978); New Jersey Transit Corp., P.E.R.C. No. 2006-54, 32 NJPER ¶ 9 (2006) (Pa237-Pa241); Town of Hammonton, P.E.R.C. No. 2011-50, 2010 WL 6766105 (2010) (Pa246-Pa250). As for the latter inquiry, it seems hard to imagine that the Commission and our Legislature envisioned that the relevant consideration in determining the arbitrability of police personnel reassignments is when or whether the reassignment was announced soon after an officer's conduct also warranting disciplinary action.

Finally, the Commission's decision to decline restraint of arbitration in this matter runs counter to the clear principle of law that it would be improper to delegate to an arbitrator, wholly unfamiliar with the internal factors of a given municipality, the authority to second-guess or even reverse a municipal Chief of Police's determination regarding an officer's fitness to hold a given assignment. Irvington Policemen's Benevolent Ass'n, 170 N.J. Super. at 346. Plainly, an arbitrator is not

responsible to the municipal public in the event that, by allowing an officer to continue holding an assignment they are not qualified to hold, further damage to life or liberty or the creation of possible civil liability occurs through the officer's performance in that assignment. But, the municipal Chief of Police is so responsible to the public.

CONCLUSION

Based upon the foregoing, as well as the arguments and law raised in the Township's initial brief in this matter, it is respectfully submitted that the Commission's November 26, 2024 decision denying the Township's request for restraint of arbitration should be reversed and arbitration should be restrained.

Respectfully submitted,
CLEARY GIACOBBE ALFIERI JACOBS, LLC
Attorneys for Petitioner-Appellant,
Township of Mount Olive

/s/ Anthony G. LoBrace
ANTHONY G. LoBRACE, ESQ.

Dated: June 27, 2025