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November 20, 2024

Joseph H. Orlando, Clerk
Superior Court of New Jersey
Appellate Division
Hughes Justice Complex
25 W. Market Street
PO Box 006
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RE: STATE TROOPERS FRATERNAL ASSOCIATION v. STATE OF NEW JERSEY, DIVISION OF STATE POLICE
Appellate Division Docket No.: A-002145-23

On Appeal from Superior Court; Law Division; Mercer County
Docket No.: MER-L-2396-23

Dear Justices of the Appellate Division:

This office represents the Appellant, State Troopers Fraternal Association, in the above captioned matter. Please accept this reply letter brief in lieu of a

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TABLE OF JUDGMENTS, ORDERS, AND RULINGS

more formal brief on behalf of the Appellant, State Troopers Fraternal Association.

PROCEDURAL HISTORY

The Appellant, State Troopers Fraternal Association, relies on the Procedural History submitted in its original brief as if set forth herein in its entirety.

STATEMENT OF FACTS

The Appellant, State Troopers Fraternal Association, relies on the Statement of Facts submitted in its original brief as if set forth herein in its entirety.

LEGAL ARGUMENT

POINT I

THE DECISION BELOW MUST BE REVERSED BECAUSE THE ARBITRATION AWARD IS NOT REASONABLY DEBATABLE. (Raised Below: T6-25).

A. The Plain Language of the Contract Should Prevail.

While a Court may not substitute its own judgement for that of the arbitrator, a Court cannot uphold an award that violates N.J.S.A. 2A:24-8 & 9. An arbitration award procured by undue means, where a mistake of fact or law is apparent, cannot pass muster. Additionally, where, as here, an arbitrator ignores clear and unambiguous language or contradicts plain contract language, the arbitration award must be vacated.

The Division's reliance on Borough of East Rutherford v. East Rutherford PBA Local 275, 213 N.J. 190, is misguided. The determination in East Rutherford upheld plain contractual language *over* statutory language which increased insurance copayments above what the contract specified. Id. The Arbitrator ordered reversion back to the copayment specified in the plain language of the contract and also ordered reimbursement to the affected employees.

> Ultimately, the Arbitrator concluded that the CBA was violated when PBA members were required to pay the increased co-payment… [S]he found "no legal or contractual reason" that prevented her from "direct[ing] the Borough to reimburse the employees for the amount of the [increased] co-payments" for the duration of the contractual period. She added that the Borough could impose a "reasonable documentation" requirement that compelled bargaining unit employees to support each request for reimbursement.
>
> Borough of East Rutherford v. East Rutherford PBA Local 275, 213 N.J. 190, 198.

The underlying rationale for the New Jersey Supreme Court upholding the arbitration award in East Rutherford, supra, is the same reason the within arbitration award should be vacated. Specifically, the arbitration award hereinbelow ignored the plain language of the contract and instead followed the Treasury Circulars; similarly, East Rutherford ignored the plain language of the contract and instead followed statutory amendments.

In State (Div. of State Police) v. State Troopers Fraternal Ass'n, 2017 N.J. Super. Unpub. LEXIS 927, the Court vacated an arbitration award which granted reimbursement of commuting expenses to State Troopers on major toll roads. In that case, State Troopers were previously reimbursed for the tolls they paid while traveling to work in their personal vehicles. The Court affirmed the Superior Court's vacatur of the arbitration award, holding:

> We agree with the motion judge that the arbitrator **exceeded his authority and made a mistake of law, by reading into the contract a term that was not found there and was not "reasonably debatable"** as an interpretation of the contract. See N.J.S.A. 2A:24-8(a), (d); Borough of E. Rutherford v. E. Rutherford PBA Local 275, 213 N.J. 190, 203, 61 A.3d 941 (2013); Office of Emp. Relations v. Commc'ns Workers of Am., 154 N.J. 98, 111-12, (1998).
>
> State (Div. of State Police) v. State Troopers Fraternal Ass'n, 2017 N.J. Super. Unpub. LEXIS 927, *4. (Emphasis added).

Similarly, herein, the arbitrator exceeded his authority and made a mistake of law by reading in a contract term that is not present in the contract. The Kendellen Award must therefore be vacated by This Court.

Despite Division's attempt to argue the contrary, when viewing the contract as a whole, the plain language actually supports the STFA's interpretation of the contract. The collective bargaining agreement states in Article V:

> All overtime shall be compensated as paid compensation at the time and one-half (1-1/2) rate, (**the overtime rate *shall be* base plus maintenance divided by 2,080 x 1.5**), unless the employee, at said employee's sole option, elects to take compensation for overtime in compensatory time off (C.T.O.) which shall accumulate in a C.T.O. bank. Compensatory time compensation in the C.T.O. bank shall accumulate at time and one-half (*one and one-half hours banked for each hour of*

> *overtime worked in quarter hour units)*. (Emphasis added). Pa27.

Language in parenthesis is most often used to define a term. The Division's contention that the parenthetical equation is "illustrative" is nonsensical.

When looking at this clause as a whole, it is clear that the language contained in parentheses defines how overtime must be calculated for overtime paid as compensation or compensatory time. The language contained in parentheses was specifically included in the contract to ensure that the clause was not ambiguous.

The language in Article V is not one of several examples of how to calculate overtime, it is the definition of how to calculate overtime. If the Division stopped including "maintenance" in the calculation of overtime, it would be a clear contract violation. Furthermore, if the Division started calculating compensatory time in tenth of an hour units, that would also be a clear contract violation. When viewing Article V as a whole, it only becomes more evident that the parentheticals are not mere examples.

The Division claims, and the Arbitrator and Court held, that when reviewing the contract as a whole it is clear that the parentheses are merely illustrative. Yet, neither the Arbitrator, nor the Division, nor the Court, relied on any specific language in any other clause in the contract to support their

contention that parentheses at issue herein is illustrative. The Division merely asserted a baseless claim with no factual support, and the Arbitrator and the Court inexplicably adopted the fallacy.

Upon review of the contract as a whole, there are other locations where parentheticals are present. When examining these clauses, it becomes even more obvious that the Division's argument that language in parentheticals is somehow devalued contract language lacks merit. Most notably, Article VI, B. Holidays, states:

> 3. a Troopers working in any of the units set forth on the attached appendix C may cash out some or all of their holidays each calendar year in lieu of using them as paid time off. A qualifying Trooper seeking to cash out holiday time must submit a written notice to the Station Commander or Unit Head or their respective designee no later than January 31st of the calendar year in which the holiday will take place. Qualifying Troopers who have provided proper written notice and who work the holiday (*or in the event the holiday falls on a qualifying Trooper's regularly scheduled day off*) may cash out the earned holiday and will receive pay in lieu of paid time off. Troopers will receive payment for all holidays cashed out in a given calendar year by January 31st of the calendar year following the calendar year in which the holiday occurred. Such payment shall be paid on an hour-for-basis (**i.e., eight (8) hours' pay if the Trooper works eight (8) hours on the holiday, ten (10) hours' pay for ten (10) hours work on the holiday, or twelve (12) hours' pay for twelve (12) hours worked on the holiday**), and shall be paid at the

> rate in effect as of the date of the payment. Pa29. (Emphasis added).

This section of the contract contains two parenthetical notations, one of which clearly states "i.e." The inclusion of "i.e." in the second parenthetical in Article VI.B.3. obviously denotes that parenthetical is an example. It also demonstrates that if the parties are aware of how to explicitly denote language as an example. Therefore, if the parties meant for any of the other parentheticals to be "merely examples" they know how to and would have included "i.e." – as they did in Article VI.B.3. – but they did not.

Furthermore, in Article XXI, it states:

> A. A Trooper may engage in "outside employment or other activity" (as that term is defined in SOP B 17, and any amendments thereto) with prior approval of the Superintendent. Pa45.

Under the Division's assertion of parentheses as mere examples, the definition of outside employment or other activity contained in SOP B 17 would not apply to the contract simply because it is present in parenthesis.

The Division's entire case relies on its claim that the divisor 2,080 is illustrative and that listing out the other possibilities for divisors would be cumbersome. With respect to the within grievance, that allegation is simply not true. There is a finite number of fiscal year work hours that are possible in a

given fiscal year. In fact, there are only three possibilities for fiscal year work hours – 2,080, 2,088, and 2,096. Had the parties intended for the divisor to fluctuate with the number of fiscal year work days or work hours, they very easily could have either 1. not included any language or 2. they could have written the contractual equation as base plus maintenance divided by fiscal year work hours times 1.5. They did neither. In the most recent contract negotiations, the parties agreed to amend the language to reflect the latter. Therefore, the language now states that the divisor is the number of fiscal year work days converted to hours.

Additionally, the Division's contention that the STFA presented a one-sided issue that presupposed its conclusion is erroneous. The Union's issue submission and the Division's issue submission were very similar – and neither reference utilizing Treasury Circulars instead of the contract – which was what the Arbitrator determined the issue to be. Pa187. Essentially, the Division did not even submit the issue of the Treasury Circulars to the Arbitrator, and the Arbitrator took it upon himself to include that in the issue.

B. The Arbitrator Improperly Exceeded His Authority and Rewrote the Contract Language.

Where contract language is not unspecific or vague, there is no justification for examining whether a past practice exists. As conceded by the Division, where the language of a contract is unambiguous, as it is here, a past practice cannot overcome plain language. Furthermore, the Division also conceded that arbitrators may not look beyond the four corners of the agreement to alter plain language.

Whether the meaning of the language is disputed does not automatically mean that the language is ambiguous solely because the parties disagree. Whether a past practice existed is quite frankly irrelevant. The parties are permitted to police the agreement and revert back to the plain language at any time. Relying on external documents outside the collective bargaining agreement was improper.

Alternatively, even if the past practice is examined, the party asserting the practice has the burden to prove the practice existed. Listing the number of times a fiscal year had 2,080 work hours does not prove the rate troopers were compensated for their overtime. The Arbitrator's finding that Troopers were

paid overtime utilizing a different divisor is a mistake of fact and therefore the Award was procured by undue means.

The Division argues that STFA Vice President Kuhn was not present during the initial negotiations for the language, and then attempts to argue that, for that reason, Kuhn could not rebut the testimony of Monte and Burkhalter. This argument ignores the fact that both Monte and Burkhalter were also not present during those initial negotiations. It also ignores the fact that Monte testified that she references the contract for multiple items related to compensation and payroll, including but not limited to, trooper's base salary, food maintenance, holiday payout, education pay, and clothing allowance for New Jersey State Troopers. Both base salary and food maintenance are contained within the equation at issue (base + maintenance), and those numbers are admittedly derived from the contract. It is nonsensical that the Division would obtain those numbers from the contract but then ignore the "2,080." The Kendellen Award improperly rewrites the contract language concerning the manner in which overtime compensation is calculated in direct violation of the clear and unambiguous language in the contract.

An arbitrator cannot rewrite the terms of the parties' agreement. In doing so, the arbitrator exceeded his powers and the determination below must be

reversed. The collective bargaining agreement states in Article XII, F., 3(b)(3), that the Arbitrator is prohibited from adding to, subtracting from, modifying, or amending the provisions of the contract. Pa39. The Arbitrator relied on the Treasury Circulars instead of interpreting the language in the collective bargaining agreement. The Arbitrator's determination that the Division was not required to follow the plain language in the contract and was instead permitted to follow the annual Treasury Circulars was a mistake of law. The Arbitrator has exceeded his authority by ignoring the clear and unambiguous language of the agreement and instead relied on a past practice. Therefore, we respectfully request that the Kendellen Award be vacated.

CONCLUSION

For the foregoing reasons, we respectfully request that the determination below be reversed and that The Court vacate the Arbitration Award dated October 2, 2023, in P.E.R.C. Docket No.: AR-2022-251.

Respectfully submitted,

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cc: Jana DiCosmo, DAG

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Re: State Troopers Fraternal Association v. State of New Jersey, Division of State Police
Docket No. A-2145-23T4

Dear Mr. Orlando:

Please accept this letter brief on behalf of Respondent, New Jersey State Police ("NJSP").

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PROCEDURAL HISTORY AND STATEMENT OF THE FACTS[1]

This case arises out of an action filed on behalf of the State Troopers Fraternal Association ("STFA") under N.J.S.A. 2A:24-8 seeking to vacate the arbitration award and opinion ("Award") issued by Gary Kendellen ("Arbitrator"). (T19:8-12).[2] By way of background, as one of the State's many agencies, the State of New Jersey, Division of State Police ("NJSP") follows the guidance from the Department of Treasury's ("Treasury") annual circulars regarding the calculation of overtime for each fiscal year ("circulars"). (T22:23-23:8). The parties' Collective Bargaining Agreement ("contract") also contains a provision for calculating overtime and uses an example, included as a parenthetical, to illustrate the calculation. (Pa27). Consistent with Treasury's circulars, since 1987, the parties historically interpreted the contractual provision for overtime as "time and a half" the regular rate of pay. (Pa192).

On August 29, 2019, STFA filed a group grievance on behalf of all NJSP Troopers, alleging a violation of the overtime provision of the parties' contract. (Pa57). The grievance alleged a violation of the overtime provision because NJSP calculated the annual overtime rate according to the number of working days in each

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[1] The Procedural History and Statement of Facts are combined for the court's convenience.

[2] "T" refers to the transcript of the order to show cause hearing on February 9, 2024; "Pb" refers to the appellant's brief; "Pa" refers to the appellant's appendix.

fiscal year. Ibid. STFA asserted that because a parenthetical example was included within the overtime provision, NJSP violated the parties' agreement by using the fiscal year working days instead of the exact parenthetical example to calculate overtime. Ibid. STFA's requested remedy was for NJSP to "[c]orrect all members' overtime rates to comply with the equation explicitly provided by the STFA Contract. Retroactively compensate all members for any monies owed since the improper adjustment of the overtime rates." Ibid. NJSP issued a Phase Two Determination denying the grievance on December 8, 2021, and STFA filed a request for a panel of arbitrators on December 10, 2021. (Pa21; Pa58-59).

On February 3, 2023, the arbitration was held. (Pa64-169). STFA asserted that the parenthetical language amounted to "plain language" from which NJSP was not permitted to deviate. (Pa190-91). NJSP explained that the parenthetical example was just that—an example—and must be read in the context of the full paragraph in order to give effect to the meaning of the entire contractual provision. (Pa191-92).

Because the parties could not agree to an issue statement at the hearing, they agreed to defer to the Arbitrator to craft the issue statement. (T19:13-21; Pa66). The Arbitrator framed the issue as, "Did the Employer violate the collective bargaining agreement when it used the annual State of New Jersey-Department of The Treasury Circulars (Treasury Circulars) to calculate the Overtime Rate instead of language contained in the Agreement at Article V: E. (3)?" (Pa187). In deciding the

grievance, the Arbitrator thus had to interpret Article V (Hours of Work and Overtime), Section E (Compensatory Time Off), Paragraph 3 of the parties' contract, which provides:

> All overtime shall be compensated as paid compensation at the time and one-half (1-1/2) rate, (the overtime rate shall be base plus maintenance divided by 2,080 x 1.5), unless the employee, at said employee's sole option, elects to take compensation for overtime in compensatory time off (C.T.O.) which shall accumulate in a C.T.O. bank. Compensatory time compensation in the C.T.O. bank shall accumulate at time and one-half (one and one-half hours banked for each hour of overtime worked in quarter hour units).
>
> [Pa27.]

The parenthetical "2,080" figure is the product of 260, the number of working days in a fiscal year with exactly twenty-six pay periods, and eight, the number of hours in a workday.[3] (Pa142). At the arbitration, STFA presented a single witness, Steven Kuhn, STFA's vice president. (Pa69-104). NJSP presented Zachary Burkhalter, the payroll manager for Treasury's Office of Management and Budget, Centralized Payroll (Pa107-28), as well as Stacey Monte, the payroll manager for NJSP. (Pa129-52).

Kuhn testified that he had been an officer with NJSP since September 24, 2004. (Pa70). He was not present for the 1987 contract negotiations (the time when

[3] For purposes of this letter brief, "2,080 divisor" refers to the use of 2,080 within the agreement's parenthetical example.

the "2,080" divisor was first included into the contract), nor was he ever employed by Treasury, which issues the fiscal year circulars. (Pa103-04). Kuhn offered no factual testimony supporting his interpretation that the parenthetical was dispositive, even in fiscal years with more than 260 days and regardless of the Treasury Circulars governing overtime calculation. Kuhn also failed to provide any factual basis supporting his position that the parenthetical example should be read in isolation to override the remainder of the provision in which the parenthetical was located.

Burkhalter was the supervisor of the payroll audit section in Treasury's Office of Management and Budget, Centralized Payroll. (Pa107-08). In that capacity, he was responsible for ensuring overtime rates are correctly paid to state employees. (Pa108). Burkhalter testified that the circulars mandated that state employee salaries be paid according to the number of working days in each fiscal year for any agency that processes its payroll through Treasury's Centralized Payroll, including the Division of State Police. (Pa110-11; Pa123). As Burkhalter testified, overtime pay "is determined by the number of working days in the fiscal year[,] which can vary between 260, 261, and 262." (Pa113). Therefore, to maintain a consistent overtime pay rate of "time-and-a-half" the regular rate of pay, the formula to calculate overtime would depend on the number of working days each fiscal year. (Pa113; Pa121).

Monte, a Human Resources manager of the Payroll and Time Management Unit within the NJSP, was responsible for processing overtime for both civilian and enlisted members of NJSP. (Pa129-30). Monte testified that the calculation of overtime pay for NJSP was the regular rate of pay multiplied by 1.5, and she emphasized the importance of using the correct number of working days in a fiscal year. (Pa131; Pa138-39; Pa142; Pa151). She explained that, when calculating the overtime rate, the divisor listed in the contract, 2,080 (the product of an eight-hour workday and 260 working days in a fiscal year), is only used in fiscal years with 260 working days. (Pa132; Pa142-43). In the case of fiscal years with 261 working days, the divisor would be 2,088. (Pa133). And in the case of fiscal years with 262 working days, the divisor would be 2,096. Ibid. In other words, the rate of overtime (time and one-half) remains the same each year, but the divisor used to calculate the time-and-one-half hourly rate is dependent on the number of working days in that fiscal year. (Pa151-52). Thus, the 2,080 divisor used in the parenthetical in the contract was merely an example of how to calculate the "time and a half" rate in fiscal years with 260 working days. (Pa143; Pa151). Monte specified that "[t]he 2,080 multiplier only pertains to 260 working days in a fiscal year. It does not pertain to a 261-day working day fiscal year or a 262-day working day fiscal year." (Pa143).

After a careful review of all evidence presented, the Arbitrator adopted NJSP's position, finding that STFA's argument could only be accepted if all other evidence,

including the remainder of the contractual provision, were ignored. (Pa186-94). The Arbitrator held that, "[w]hile the words in the Agreement's language may at first reading appear to require use of 2,080 in determining the divisor," the evidence weighed against such an interpretation. (Pa192). The Arbitrator held that the parenthetical "was merely illustrative and descriptive, instead of prescriptive," and thus could not overcome the meaning of the entire paragraph in which that parenthetical was located. Ibid. Because STFA did not meet its burden of proof, the Arbitrator appropriately denied the grievance. (Pa192-94).

STFA then filed an action to vacate the Award in Mercer County Superior Court, and NJSP cross-filed an action to confirm the Award. (T19:8-12; T24:10-20). The trial court disagreed with STFA's position "that the language in question is so abundantly clear." (T21:24-22:22). Instead, the court found that "the obligation of the Arbitrator is to take a look at the contract as a whole." (T22:15-22). To that end, the court found that it "was reasonably debatable for [the Arbitrator] to focus [on] evidence as the State urges, upon the beginning language that is not in parenthesis about time and a half . . . ." (T22:18-20). Acknowledging that another arbitrator may have found in favor of STFA when reviewing the same evidence, the court reminded the parties that its role is not to determine whether the Arbitrator reached the best conclusion, but rather that the Arbitrator's conclusion was "reasonably debatable." (T23:23-T24:3). The court warned that it is not supposed to function

"as an overseeing arbitrator." (T20:21-23). The court thus rejected STFA's plain language argument and confirmed the Award as reasonably debatable. (T22:11-14; T24:5-8).

This appeal followed.

LEGAL ARGUMENT

THIS COURT SHOULD AFFIRM THE TRIAL COURT'S DECISION BECAUSE THE ARBITRATION AWARD IS REASONABLY DEBATABLE.

It is well established that a court "may not substitute its own judgment for that of the arbitrator, regardless of the court's view of the correctness of the arbitrator's position." Borough of E. Rutherford v. E. Rutherford PBA Local 275, 213 N.J. 190, 201-02 (2013); N.J. Transit Bus Operations v. Amalgamated Transit Union, 187 N.J. 546, 554 (2006); Policemen's Benevolent Ass'n v. City of Trenton, 205 N.J. 422, 432-33 (2011); Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko, 202 N.J. 268, 276-77 (2010). "[T]o ensure 'finality, as well as to secure arbitration's speedy and inexpensive nature, there exists a strong preference for judicial confirmation of arbitration awards.'" Middletown Twp. PBA Local 124 v. Twp. of Middletown, 193 N.J. 1, 10 (2007) (quoting N.J. Tpk. Auth. v. Local 196, I.F.P.T.E., 190 N.J. 283, 292 (2007)). As the New Jersey Supreme Court observed, arbitration is not a springboard for additional litigation, especially in public-sector disputes. E. Rutherford PBA, 213 N.J. at 209; see also Cnty. Coll. of Morris Staff Ass'n v. Cnty.

Coll. of Morris, 100 N.J. 383, 390 (1985) (finding that "arbitration should spell the conclusion of the litigation rather than the beginning of it"). Even if a court disagrees with an arbitrator's decision, such disagreement alone is an insufficient basis for vacating an arbitration award. N.J. Tpk. Auth. v. Local 196, 190 N.J. at 293 (citing W.R. Grace & Co v. Local Union 759, Int'l Union of the United Rubber, Cork, Linoleum & Plastic Workers of Am., 461 U.S. 757, 764 (1983)).

Therefore, parties who choose to submit their disputes to arbitration agree to ordinarily be bound by the award rendered, no matter how disappointing it may be. Int'l Ass'n of Machinists Lodge 1292, Ind. v. Bergen Ave. Bus Owners' Ass'n, 3 N.J. Super. 558, 566 (Law Div. 1949). As the Supreme Court has held, "[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his." E. Rutherford PBA, 213 N.J. at 202 (quoting Weiss v. Carpenter, Bennett & Morrissey, 143 N.J. 420, 433 (1996) (additional citations omitted)).

The court's statutory authority to vacate an arbitration award "serves as a check on whether the arbitration award 'draw[s] its essence from the bargaining agreement.'" New Jersey Transit, 187 N.J. at 554 (citing Cnty. Coll. of Morris Staff Ass'n, 100 N.J. at 392) (alteration in original)). However, this check on arbitral authority does not alter the traditional scope of review of an arbitration award, which

holds that the award is to be affirmed if the arbitrator's interpretation of the parties' CNA is open to reasonable debate. Ibid. Indeed, "[m]any of the benefits of arbitration would be lost if reviewing courts were permitted to conduct de novo examinations of the merits of an arbitration award." Local No. 153, Off. and Pro. Emps. Int'l Union, AFL-CIO v. Trust Co. of N.J., 105 N.J. 442, 448 (1987).

Accordingly, an arbitration award will be vacated only in the following narrow circumstances:

> a. Where the award was procured by corruption, fraud or undue means;
> b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;
> c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefore, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;
> d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.
>
> [N.J.S.A. 2A:24-8.]

Under N.J.S.A. 2A:24-8(a), "undue means" encompasses those situations where the arbitrator has made a mistake of fact or law that is either apparent on the face of the record or admitted to by the arbitrator. State, Off. of Emp. Relations v. CWA, AFL-CIO, 154 N.J. 98, 111 (1998). "[U]ndue means" has also been construed to mean "basing an award on a clearly mistaken view of fact or law." Loc. Union

560, I.B.T. v. Eazor Express, Inc., 95 N.J. Super. 219, 227-28 (App. Div. 1967). And under N.J.S.A. 2A:24-8(d), an arbitrator "exceed[s] or imperfectly execute[s] [his] powers" if he ignores the clear and unambiguous language of an agreement and relies "solely on past practices." City Ass'n of Sup'rs & Adm'rs v. State Operated Sch. Dist. of the City of Newark, 311 N.J. Super. 300, 308, 311-12 (App. Div. 1998). An arbitrator thus cannot disregard or contradict the language of the agreement and its terms and conditions. Local No. 153, 105 N.J. at 452.

The standard of review of arbitration awards is equally well-established. "Under the reasonably debatable standard, a court 'may not substitute its own judgment for that of the arbitrator, regardless of the court's view of the correctness of the arbitrator's position.'" Borough of Carteret v. Firefighters Mut. Benevolent Ass'n, Loc. 67, 247 N.J. 202, 212 (2021) (citing E. Rutherford PBA, 213 N.J. at 202). "Put differently, if two or more interpretations of a labor agreement could be plausibly argued, the outcome is at least reasonably debatable." Borough of Carteret, 247 N.J. at 212 (citing E. Rutherford PBA, 213 N.J. at 206). "The 'reasonably debatable' standard embodies this Court's deference to the arbitral process for public-sector labor disputes." E. Rutherford PBA, 213 N.J. at 209 (citing Policemen's Benevolent Ass'n, 205 N.J. at 428-29 ("The well-established standard . . . is that an arbitrator's award will be confirmed so long as the award is reasonably debatable") (internal citation and quotation marks omitted) (alteration

in original)). "Thus, even if the remedy the Arbitrator fashioned was not the preferred or correct outcome, a reversal would be contrary to the deferential standard for reviewing arbitral decisions." Borough of Carteret, 247 N.J. at 212 (quoting E. Rutherford PBA, 213 N.J. at 206). In short, an arbitrator's decision will be affirmed under the "reasonably debatable" standard if it is a plausible interpretation of the parties' contract. Borough of Carteret, 247 N.J. at 212.

The Appellate Court "reviews the denial of a motion to vacate an arbitration award de novo." Manger v. Manger, 417 N.J. Super. 370, 376 (App. Div. 2010).

With this appeal, STFA argues that the Arbitrator exceeded his authority and that the award was procured by undue means. (Pb13-14). Contrary to STFA's assertions, the Arbitrator's reference to the Treasury circulars did not amount to using "an external document 'instead of' the plain language of the contract" as argued by STFA. (Pb27). Furthermore, the Arbitrator's consideration of the parties' past interpretation of the contract does not amount to crediting past practice over clear language. (Pb23-24; Pb32). As discussed more fully below, the Award in this matter is reasonably debatable, and STFA has not met its burden of proving any of the narrow statutory requirements to overturn a trial court's confirmation of that Award. Therefore, the trial court's decision should be affirmed.

A. The trial court correctly rejected STFA's plain language argument.

"When interpreting the contract, the document must be considered as a whole and interpreted so as to harmonize and give reasonable meaning to all of its parts." NVT Techs., Inc. v. United States, 370 F.3d 1153, 1159 (Fed. Cir. 2004) (citing McAbee Constr., Inc. v. United States, 97 F.3d 1431, 1434-35 (Fed. Cir. 1996)). Moreover, "[a]n interpretation that gives meaning to all parts of the contract is to be preferred over one that leaves a portion of the contract useless, inexplicable, void, or superfluous." Ibid. (citing Gould, Inc. v. United States, 935 F.2d 1271, 1274 (Fed. Cir. 1991)).

Notably, the Supreme Court has previously upheld an arbitrator's decision to consider a contract as a whole when interpreting particular contractual language. See Policemen's Benevolent Ass'n, 205 N.J. at 425 ("[i]n reaching his conclusion, the arbitrator relied on the actual words of the Agreement, wove together its relevant provisions, and read it holistically, without emphasizing isolated provisions. As a result, he derived a plausible conclusion regarding its meaning"). There, the arbitrator determined that the contract must be read as a whole, without isolating any particular portion. Ibid. The Court found that such an approach resulted in a reasonably debatable interpretation of the contract and declined to vacate the arbitration award. Ibid. As the Court explained, "even if the arbitrator's decision appears to conflict with the direct language of one clause of an agreement, so long

as the contract, as a whole, supports the arbitrator's interpretation, the award will be upheld." Id. at 430; see also N.J. Transit Bus Operations, Inc., 187 N.J. at 555 (accord); Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1132-33 (3d. Cir.1969) (a facially unambiguous clause may, in fact, become ambiguous when considering the entire contract and other facts in the record).

Here, the same rings true. The contractual language referencing "2,080" is a mere parenthetical example of a broader formula for overtime, which states, "[a]ll overtime shall be compensated as paid compensation at the time and one-half (1-1/2) rate . . . ." (Pa27). The 2,080 divisor only appears in a parenthetical that illustrates that the calculation of overtime shall be based on the base rate of pay plus maintenance: "(the overtime rate shall be base plus maintenance divided by 2,080 x 1.5) . . . ." Ibid. This is further confirmed by the language following the parenthetical, which specifies an alternative compensation method, namely using compensatory time off, which is calculated as, "time and one-half (one and one-half hours banked for each hour of overtime worked in quarter hour units)." Ibid.

The placement of the 2,080 divisor in a parenthetical, as opposed to the beginning of the paragraph, only further demonstrates that the parties intended it to be illustrative. (Pa192). Specifically, the court held that the Arbitrator was permitted to consider "the beginning language that is not in parenthesis about time and a half" when crediting NJSP's position that the 2,080 divisor was descriptive, not

prescriptive. (T22:18-20). Thus, the court was correct in finding that the overarching language of the entire contractual provision demonstrated that the 2,080 divisor was intended to be illustrative rather than prescriptive. (T22:18-20; Pa192).

STFA asserts on appeal that the Arbitrator exceeded his power under N.J.S.A. 2A:24-8(d) when he "did not follow the grievance submission presented by the STFA." (Pb21). However, there is no obligation on the part of the Arbitrator to use the issue statement presented by STFA if it does not accurately depict the actual issue, and the parties agreed to defer to the Arbitrator when they could not agree to an issue statement at the arbitration. (T19:13-15). Thus, when STFA presented a one-sided issue statement that presupposed the very conclusion it sought the Arbitrator to reach, the Arbitrator appropriately reframed the issue statement to accurately depict the issue between the parties. (Pa187).

Further, the court correctly found that issue statement's reference to the Treasury circulars was also reasonably debatable. (T22:15-23:8). The court held that such information was relevant to the issue before the Arbitrator, which was whether the NJSP violated the parties' contract based upon its compliance with the Treasury circulars. (T19:16-21; T22:15-22). As the court held, NJSP was correct in following Treasury's annual fiscal year circulars that require overtime to be calculated according to the number of working days in a given fiscal year. (T22:23-23:8). Because the regular rate of pay is paid according to Treasury's circulars, so

too must the overtime rate comply with Treasury's requirement that overtime be calculated using the formula based on the number of working days in the fiscal year. Ibid. Thus, as the Arbitrator and trial court correctly determined, the 2,080 divisor demonstrates the mechanics of how to calculate overtime, rather than a mandate to use the 2,080 divisor in all years. (Pa192; T21:4-5; T24:5-8).

B. The trial court correctly considered the parties' past practice when interpreting the overtime provision.

As our Supreme Court has held, "[i]f contract terms are unspecific or vague, extrinsic evidence may be used to shed light on the mutual understanding of the parties." Hall v. Bd. of Educ., 125 N.J. 299, 305-06 (1991) (citing Michaels v. Brookchester, Inc., 26 N.J. 379, 388 (1958); The Journeymen Barbers, Hairdressers and Cosmetologists' Int'l Union of Am. v. Pollino, 22 N.J. 389, 394-95 (1956); Koshliek v. Board of Chosen Freeholders of Passaic County, 144 N.J. Super. 336 (Law Div. 1976)). Furthermore, "[t]he past practice of the contracting parties is entitled to 'great weight' in determining the meaning of ambiguous or doubtful contractual terms." Hall, 125 N.J. at 306 (citing Kennedy v. Westinghouse Elec. Corp., 16 N.J. 280, 294 (1954)); Bd. of Educ. v. Woodstown-Pilesgrove Reg'l Educ. Ass'n, 164 N.J. Super. 106, 109-10, (App. Div. 1978).

Admittedly, past practice cannot overcome plain language. However, where the meaning of the language is in dispute—where, as here, the parties legitimately disagree as to the meaning of a contractual provision—an arbitrator can and should

look to other sources of evidence to determine the parties' intentions when they entered the contract. Policemen's Benevolent Ass'n, 205 N.J. at 430 ("[a]lthough arbitrators may not look beyond the four corners of a contract to alter unambiguous language, where a term is not defined, it may be necessary for an 'arbitrator to fill in the gap and give meaning to that term'") (quoting Linden Bd. of Educ., 202 N.J. at 277). Because there was no one who could testify to the original contract negotiations when this language was first added to the contract in 1987, the Arbitrator had to ascertain the parties' intent by the language of the contract and, because the parties legitimately disagreed about the meaning of the language, external factors such as past practice informed the parties' intent. (T21:24-22:14; Pa192).

And the parties' past practice reflected their consistent interpretation of the contractual language since the calculation was first delineated in 1987. Ibid. That past practice overwhelmingly demonstrated that the parties agreed that NJSP's historical implementation of the contract—using 2,080, 2,088, and 2,096 divisors depending on the number of working days in a fiscal year—was consistent with the 2,080-divisor language in the parenthetical. Ibid. In fact, since the language first appeared in the parties' 1987 contract, there have been a mere nine fiscal years with 260 days, but nineteen fiscal years with 261 days, and six fiscal years with 262 days. (Pa296-97).

Here, as the Arbitrator noted, troopers were paid overtime using a divisor other than 2,080 for twenty-five out of the last thirty-four years since the language first appeared in the contract. (Pa191-92). In fact, even though that language first appeared in the contract in 1987, it was not until 1990 that the 2,080 divisor was used because the prior years had more than 260 fiscal days. (Pa192). And then it was not until 2019 that STFA first claimed that the contract had been violated. Ibid. Put simply, the Arbitrator did not err in finding that the fact that STFA acquiesced to varying divisors for over thirty years, especially in the years immediately after the new contractual language was added, showed that the parties intended the 2,080 divisor to serve as an example, not a mandate, of the mechanical application of the overtime provision. (Pa191-92). And the court did not err in accepting the Arbitrator's analysis. (T22:23-24:8).

Indeed, STFA offered no evidence to rebut NJSP's position that the State's past practice reflected the parties' consistent interpretation of the language of the contract since the calculation was first delineated in 1987. On the contrary, to accept STFA's position that the parenthetical's reference to the 2,080 divisor is plain language, this court would have to read those eleven words in isolation of the entire paragraph in which that parenthetical is located, and Kuhn, STFA's sole witness, could not provide any factual basis for that conclusion. He was not present during the negotiations or drafting of the contract as he only joined NJSP twenty-five years

after the first instance the 2,080 divisor was included in the contract. (T21:11-5; Pa103). As such, STFA was unable to meet its burden of proof or rebut NJSP's interpretation, which was confirmed by both Monte and Burkhalter's testimony. (Pa113-14; Pa131-33; Pa192).

To be sure, at no time did the trial court determine that past practice or external documents should usurp a contract's plain language. Rather, the trial court carefully examined the Award and found the Arbitrator's analysis to be more nuanced than STFA asserted. (T21:24-22:22). As the Arbitrator explained, "the intent of the parties in 1987 was that the Agreement's reference in 1987 to 2080 as the basis for determining the divisor to be used in computing overtime was merely illustrative and descriptive, instead of prescriptive." (Pa192). The Arbitrator determined that the meaning of the contractual language at issue, when read as a whole, was not necessarily the same as when the parenthetical example was read in isolation, which is why past practice was considered. Ibid. The Arbitrator explained that the parties' conduct demonstrated a shared understanding that the parenthetical referencing "2,080" was merely illustrative, not prescriptive, and that NJSP's interpretation was supported by STFA's acquiescence over the last thirty-four years. Ibid. The court found the analysis "thorough" and the Award reasonably debatable. (T23:22-24:8).

This court should not disturb the Arbitrator's factual findings and credibility determinations. See Local No. 153, 105 N.J. at 449 ("Courts should intervene only

where the arbitrator has exceeded his authority or acted improperly."). STFA not only had the benefit of a fair hearing at arbitration but also a second review of all the evidence by the trial court who affirmed the Award. As found by the court, the Award satisfied the reasonably debatable standard, and STFA did not meet the narrow exceptions carved out under N.J.S.A. 2A:24-8(a) to justify reversing an arbitration award. Local No. 153, 105 N.J. at 450 n.1. As such, the court correctly denied STFA's action to vacate. That decision should be affirmed.

CONCLUSION

For all the foregoing reasons, the NJSP respectfully requests that the court affirm the trial court's confirmation of the Award.

Respectfully submitted,

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	SUPERIOR COURT OF NEW JERSEY
	APPELLATE DIVISION
STATE TROOPERS FRATERNAL ASSOCIATION,	**Docket No.: A-002145-23**
Plaintiff-Appellant,	**On Appeal From**
	SUPERIOR COURT OF NEW JERSEY
v.	**LAW DIVISION, MERCER COUNTY**
	Docket No.: MER-L-2396-23
STATE OF NEW JERSEY, DIVISION OF STATE POLICE,	
Defendants-Respondent.	**Sat Below:**
	Honorable Brian McLaughlin, J.S.C.

BRIEF ON BEHALF OF APPELLANT

Of Counsel and On the Brief:
Lauren Sandy, Esq.

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[1] "T" references the transcripts from the Order to Show Cause Hearing in Superior Court on February 9, 2024. The first number indicates the page, the second number indicates the line.

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APPENDIX TABLE OF CONTENTS

[2] Per R.2:6-1(a)(2), Pa61 is included in the Appendix because it is germane to the appeal and was submitted to the Court below as an Exhibit attached to the Certification of Lauren Sandy, Pa20.

TABLE OF JUDGMENTS, ORDERS, AND RULINGS

PROCEDURAL HISTORY

The State Troopers Fraternal Association (hereinafter referred to as the "STFA" or "Union") and the State of New Jersey, Division of State Police (hereinafter referred to as the "Division" or "Employer") are parties to a series of collective bargaining agreements. Pa23. On or about August 29, 2019, the STFA filed a grievance with the Employer based on the Division's failure to compensate bargaining unit members at the overtime rate specified in the collective bargaining agreement. Pa57. The Employer denied the Grievance on or about December 8, 2021, and the matter proceeded to arbitration. Pa58.

The arbitration hearing took place on February 3, 2023, before Arbitrator Gary Kendellen. Pa61. Arbitrator Kendellen issued his Opinion and Award on or about October 2, 2023, denying the Union's grievance (hereinafter referred to as the "Kendellen Award"). Pa186. On or about December 29, 2023, the STFA filed a Verified Complaint and Order to Show Cause to vacate the Kendellen Award. Pa11. On or about January 29, 2024, the Employer filed an Answer and Counterclaim to confirm the Kendellen Award. Pa213. Pa219. On or about February 5, 2024, the STFA filed its Answer to Division's Counterclaim. Pa227. On or about February 9, 2024, the Honorable Brian McLaughlin, J.S.C. denied the STFA's application to vacate the Kendellen

Award and granted the Division's application to confirm the Award. Pa8. This appeal ensued. Pa1.

STATEMENT OF FACTS

The collective bargaining agreement between the STFA and the Division in force and affect at the time of the grievance ranges from July 1, 2019, through June 30, 2023. Pa23. The STFA is the sole and exclusive representative for all New Jersey State Troopers (excluding Sergeants, Lieutenants, Captains, Majors, Lt. Colonels, and the Colonel) employed by the State of New Jersey. Pa23. The collective bargaining agreement contains a multi-step grievance procedure for the purpose of resolving disputes arising between the parties, with binding arbitration, in accordance with the rules and regulations of the Public Employment Relations Commission (hereinafter referred to as "PERC"), as the terminal procedure if a dispute was not resolved. Pa23.

This matter involves the issue as to whether the Kendellen Award violates N.J.S.A. 2A:24-8 and 9. The underlying grievance pertains to whether the Division violated the parties' collective bargaining agreement when it failed to follow the contractual language for computing overtime. Pa57.

The contractual overtime rate is set forth in the collective bargaining agreement at Article V: Hours of Work and Overtime which states:

> All overtime shall be compensated as paid compensation at the time and one-half (1-1/2) rate, (the overtime rate shall be base plus maintenance divided by 2,080 x 1.5), unless the employee, at said employee's

> sole option, elects to take compensation for overtime in compensatory time off (C.T.O.) which shall accumulate in a C.T.O. bank. Compensatory time compensation in the C.T.O. bank shall accumulate at time and one-half (one and one-half hours banked for each hour of overtime worked in quarter hour units). (Emphasis added). Pa27.

The collective bargaining agreement also states in Article XII, F., 3(b)(3), in pertinent part:

> In no event shall the arbitration decision have the effect of adding to, subtracting from, modifying or amending the provisions of this Agreement. Pa39.

On or about December 8, 2021, the grievance was denied at Phase Two on the grounds that biweekly overtime rates "are based on the number of working days in a fiscal year and not based on contractual mandates." Pa59.

The matter proceeded to arbitration and a stenographic record of the hearing before Arbitrator Gary Kendellen which took place on February 3, 2023, was taken. Pa61. STFA First Vice President, Steven Kuhn, testified on behalf of the Union. Pa61. Kuhn testified that the grievance pertains to an improper adjustment of the overtime rate applicable to STFA members due to there being two more days working days in fiscal year 2020. Pa73. Kuhn testified:

> The reason we only became aware of this once the fiscal year changed and the first overtime check was issued was because up until that point we were unaware that

> the state was calculating the overtime rate using a variable and adjusting the divisor instead of the divisor in the contract.
>
> So for the instant scenario of the filing of the grievance, we went from 2,080 hours in fiscal year 2018 and 2019 to 2,096 hours in fiscal year 2020 resulting in a reduction of the overtime rate at the beginning of this new fiscal year 2020. Pa73.

When a fiscal year has 2,080 hours, or 260 working days, the overtime rate is in compliance with the contract language. However, in fiscal year 2020, which began in July 2019, there were 262 workdays or 2,096 work hours. Pa233. This resulted in a reduction in the overtime compensation rate because the Division used 2,096 as the divisor, instead of 2,080 contained in the contract; meaning the Division altered the contractual equation to read base + maintenance divided by 2,096 x 1.5. Pa233. Pa73.

Vice President Kuhn testified extensively about how this affected his compensation by examining individual pay stubs. Pa232. Specifically, at the start of fiscal year 2020, as a result of the Division utilizing 2,096 as the divisor, Kuhn's overtime compensation was reduced by 62 cents an hour. Pa233.

Zachary Burkhatter, supervisor of the payroll audit section at the Department of Treasury, Office of Management and Budget, Centralized Payroll testified on behalf of the Employer. Burkhatter testified that an employees'

overtime rate is dependent "upon their salary and whether they meet criteria to have the additional money added into their regular salary." Pa125. He would rely on the collective bargaining agreement for annual salary rates, shift differentials, food maintenance, and number of workweek hours to determine an employees' overtime rate. Pa125. Pa127.

Stacey Monte, Human Resource Manager in charge of the payroll and the time and leave unit for the New Jersey State Police, testified that "we have to refer to the contract for multiple things." Pa140. Monte acknowledged that she refers to the collective bargaining agreement for payroll purposes on various occasions:

> for example, holiday pay - unused holiday payment, which is part of the STFA contract, we refer to the contract for different things, as far as, you know, differential payment, clothing allowance payments, you know, there's multiple different things in the contract that pertain to the payroll that we refer to, so, yes, I'm familiar with the contract. Pa140.

Monte admitted that she obtains a trooper's base salary, food maintenance, holiday payout, education pay, and clothing allowance amounts from the collective bargaining agreement. Pa146.

At the end of the arbitration proceedings both parties reserved the right to file post-hearing written summations, and both parties filed summations on

behalf of the respective parties. Pa153. In addition to its post hearing brief, the STFA provided a copy of Arbitrator Susan Wood Osborn's November 25, 2014 Opinion and Award in Town of Newton and PBA Local 138, P.E.R.C. Docket No. AR-2014-753, which found that the PBA's applicable contract language regarding overtime compensation was plain and unambiguous. Pa61. Arbitrator Osborn also noted that "**[n]otwithstanding any practices and customs, the plain language of the agreement controls in this case**." (Emphasis added). Pa182. The decision in Newton held that the Town violated the collective bargaining agreement when it set an overtime rate different from the provision contained in the contract and ordered the Town to make the affected officers whole. Pa185.

The Union proposed that the issue be framed as follows:

> Whether the Employer violated the collective bargaining agreement when it failed to calculate the overtime rate as base plus maintenance divided by 2080 times 1.5? If so, what shall be the remedy? Pa187.

The Division proposed the issue be framed as:

> Whether the state violated the collective bargaining agreement when it calculated the overtime rate consistent with the number of working days in a fiscal year? Pa187.

Neither party proposed the inclusion of the Treasury Circulars in the issue. Pa187. Arbitrator Gary Kendellen issued his Opinion and Award on or about October 2, 2023, denying the Union's grievance. Pa186. Arbitrator Kendellen framed the issue as:

> Did the Employer violate the collective bargaining agreement when it used the annual State of New Jersey-Department of The Treasury Circulars (Treasury Circulars) to calculate the Overtime Rate **instead of language contained in the Agreement** at Article V: E. (3)? (Emphasis added). Pa187.

In Arbitrator Kendellen's Award he acknowledged that "the words in the Agreement's language may at first reading appear to require use of 2080 in determining the divisor" but found that the explicit equation in the contract was "merely illustrative and descriptive" and not "prescriptive." Pa192.

> The Undersigned finds, therefore, that the Union's later reliance on the language being plainly and simply clear, as it might at first appear, is swept aside by the weight of the record evidence that establishes the manner in which both parties had actually conducted their relationship otherwise over the three decades preceding the Union's first raising the prescriptive issue in 2019. Accordingly, the Undersigned finds that the Union's grievance is unsupported by the record evidence and should be denied.
>
> AWARD

> The Employer did not violate the collective bargaining agreement when it used the annual Treasury Circulars to calculate the Overtime Rate instead of language contained in the Agreement at Article V: E. (3).
>
> The Union's Grievance is denied. Pa192.

Arbitrator Kendellen held that the Division did not violate the collective bargaining agreement when it relied on annual Treasury Circulars to calculate the overtime rate for STFA members *instead of* following the language contained in the contract. Pa192. Notably, Arbitrator Kendellen acknowledged that the language contained in the parties' collective bargaining agreement is "plainly and simply clear." Pa192.

The STFA filed a Verified Complaint and Order to Show Cause to vacate the Kendellen Award. Pa11. The Division filed an Answer and Counterclaim to confirm the Kendellen Award. Pa213. Pa219. At the Order to Show Cause hearing, the Court questioned whether it was improper for the Arbitrator to address the Treasury Circulars when framing the issue presented:

> THE COURT: In reviewing the arbitrator's decision, again, there was no meeting of the minds as to the issue presented, but it's the arbitrator that actually ties it into Treasury circulars, is that an error?
>
> MS. DICOSMO: I believe so, Your Honor. My apologies. I intersponded (sic) to (indiscernible). Could Your Honor finish your sentence?

> THE COURT: *** I think I finished the – I think I did finish the question and you answered it, so you can move on. T11-17.[1]

The Court also acknowledged that "it's not the job of anyone to rewrite the contract" noting that it would "be better if instead of 2,080 they put – an award of value for what that number should be, which could change?" T17-14.

The Division argued that the contractual equation "was just an actual example of one of the divisors that can be used with the time and a half rate." T18-6. The Division claimed that the language "emphasizes time and one half the regular rate," and that the "regular rate changes every year." T17-1. And yet, the phrase "regular rate" does not exist *anywhere* in the collective bargaining agreement. Pa23.

The Division further asserted that "time and a half is time and a half is time and a half" or "time and a half is time and a half." T16-19. T18-13. However, time and a half *is not <u>just</u>* time and a half; under the contract, time and a half, or overtime, is actually "base plus maintenance divided by 2,080 x 1.5." Pa27.

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The Court denied the STFA's application to vacate the award, stating:

> So, the arbitrator took testimony from both sides and considered all the evidence presented and, ultimately, made the determination that, basically, that the employer did not violate the CBA when it used the Treasury circulars to calculate the overtime rate instead of the language contained in the agreement that Article 5:E(3), therefore, (indiscernible). T20-10.
>
> ***
>
> But also, the Union states that the language in question is so abundantly clear that there should not have been any kind of reference to past practices. But, that's a little more nuance than if the court reads the analysis of the arbitrator's opinion in finding that the employer was correct in its interpretation going back to 1987. T21-24.

The Court found that the Kendellen Award was reasonably debatable, holding:

> The Court is persuaded that, and again, the Court is not supposed to (indiscernible) arbitrator, **but the Court can find that it's a strong argument that the time and a half language, which is also abundantly clear, from the parenthetical**, and that – the Court is not making (indiscernible) acting as the arbitrator, but it is merely finding that the arbitrator's conclusion to that affect, is reasonably debatable. (Emphasis added). T23-9.

For the reasons that follow, the Kendellen Award was not reasonably debatable and is violative of N.J.S.A. 2A:24-8 and 9. We respectfully request that This Court vacate the Arbitration Award dated October 2, 2023, in P.E.R.C. Docket No.: AR-2022-251.

STANDARD OF REVIEW

The New Jersey Arbitration Act, N.J.S.A. 2A:24-8 and 9 sets forth the grounds upon which an arbitration award may be modified or vacated. N.J.S.A. 2A:24-8 states:

> The court shall vacate the award in any of the following cases:
>
> a. Where the award was procured by corruption, fraud or undue means;
>
> b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;
>
> c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;
>
> d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.

There are ample grounds to vacate an arbitration award. The Act requires that an arbitration award be vacated by the Court where "the award was procured by corruption, fraud or undue means" or where "the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made." N.J.S.A. 2A:24-8.

The scope of judicial review in the public sector is limited to determining whether there has been a mistake of law, a violation of public sector guidelines, and/or whether the interpretation of contract language by the arbitrator is "reasonably debatable." Tretina Printing, Inc. v. Fitzpatrick & Associates, Inc., 135 N.J. 349, 358-365 (1994); College of Morris Staff Association v. County College of Morris, 100 N.J. 383, 389-391 (1985); Faherty v. Faherty, 97 N.J. 99, 109-111 (1984); Local No. 21 v. Town of Kearny, 81 N.J. 208, 217 (1979).

Public employee arbitration awards are reviewed more extensively than their private counterparts. City Ass'n of Sup'rs and Adm'rs v. State Operated School Dist. of City of Newark, 311 N.J. Super. 300, 309. (Citation omitted). Where an arbitrator is not arguably construing or applying the contract language and is acting outside the scope of his authority, the Court must overturn his decision. United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987). "The arbitrator may not ignore the plain language of the contract." United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 38 (1987).

For the reasons that follow, This Court must vacate the Kendellen Award because it was procured by undue means and the interpretation of the relevant contract language is not reasonably debatable (Point I, infra); furthermore, the Arbitrator has acted outside the scope of his authority and exceeded or so

imperfectly executed his powers that a mutual, final, and definitive award upon the subject matter was not made (Point II, infra).

LEGAL ARGUMENT

POINT I

THE ARBITRATION AWARD MUST BE VACATED BECAUSE IT WAS PROCURED BY UNDUE MEANS AND IS NOT REASONABLY DEBATABLE.
(Raised Below: T6-25).

The essential facts of this matter are not disputed. The collective bargaining agreement explicitly and clearly states the equation agreed to by the parties to calculate Troopers' overtime rates. Article V, Hours of Work and Overtime, states "**the overtime rate shall be base plus maintenance divided by 2,080 x 1.5**." Pa27. The Division has conceded that they have not followed the explicit terms of the collective bargaining agreement, and that they instead utilized the number of workdays or work hours in a fiscal year per the Treasury Circular(s) to calculate the STFA member's overtime rates. Despite the Division's admission that they did not follow the clear contract language, the Arbitrator denied the STFA's grievance.

The New Jersey Arbitration Act, N.J.S.A. 2A:24-8 and 9, sets forth the grounds upon which an arbitration award may be modified or vacated, one of which is "[w]here the award was procured by corruption, fraud, or undue means." N.J.S.A. 2A:24-8(a).

> "'**[U]ndue means'** ordinarily **encompasses a situation** in which the arbitrator has made an acknowledged mistake of fact or law or a mistake that is apparent on the face of the record," **whereas an arbitrator exceeds his or her "authority by disregarding the terms of the parties' agreement**." Borough of East Rutherford v. East Rutherford PBA Local 275, 213 N.J. 190, 203, citing Office of Emp. Relations, supra, 154 N.J. at 111-12. (Emphasis added).

In Held v. Comfort Bus Line, 136 N.J.L. 640, 641-642, the Court noted that there are two classes of cases where "undue means" is concerned:

> (1) where the arbitrator meant to decide according to law, and clearly had mistaken the legal rule, and the mistake appears on the face of the award or by the statement of the arbitrator; and (2) where the arbitrator has mistaken a fact, and the mistake is apparent on the face of the award itself, or is admitted by the arbitrator himself. Bell v. Price, 22 N.J.L. 578, 590; Taylor v. Sayre and Peterson, 24 N.J.L. 647; Leslie v. Leslie, 50 N.J. Eq. 103.

A court must vacate an award in public sector labor arbitration because of a mistake of law. CWA, Local 1087 v. Monmouth County Board of Social Services, 96 N.J. 442, 453 (1984).

Here, the Arbitrator disregarded plain and unambiguous contract language and thus, committed a mistake of law. Because he ignored the plain language of the contract, he was not arguably construing or interpreting the contract language. His determination should have been confined to the four corners of

the Agreement. Instead, he determined that the annual Treasury Circulars control over negotiated plain and unambiguous language in the contract. Therefore, the interpretation of contract language by the arbitrator is not "reasonably debatable."

Pursuant to the plain language of the collective bargaining agreement, STFA members must be compensated for overtime at a rate of base plus maintenance divided by 2,080 x 1.5 unless the Trooper elects to take compensatory time. The collective bargaining agreement states in Article V that:

> All overtime shall be compensated as paid compensation at the time and one-half (1-1/2) rate, (**the overtime rate *shall be* base plus maintenance divided by 2,080 x 1.5**), unless the employee, at said employee's sole option, elects to take compensation for overtime in compensatory time off (C.T.O.) which shall accumulate in a C.T.O. bank. Compensatory time compensation in the C.T.O. bank shall accumulate at time and one-half (one and one-half hours banked for each hour of overtime worked in quarter hour units).(Emphasis added). Pa27.

The parenthetical notations contained in this clause dictate how overtime must be calculated for overtime paid as compensation, as well as overtime elected by the Trooper as compensatory time. The use of the word “shall” is a mandatory, imperative command. There is no discretion afforded in this contract language.

Nowhere in the contract does it state that Troopers' overtime rates shall be calculated based on the number of working days in a fiscal year or the number of working hours in a fiscal year. Nowhere in the contract does it state that overtime rates will be dictated by annual Treasury Circulars. Furthermore, nowhere in the contract does it state that the Division can follow the Treasury Circular over the negotiated and agreed upon terms in the contract. Finally, the contract is devoid of language indicating that the equation for calculating overtime is merely an example or for illustrative purposes. To the contrary, it is clear that the equation in Article V is prescriptive.

Elkouri & Elkouri, How Arbitrator Works, 5th Ed. 484 (1997) states:

> If the language of an agreement is clear and unequivocal, an arbitrator generally will not give it a meaning other than that expressed... **an arbitrator cannot "ignore clear-cut contractual language,"** and "may not legislate new language, since to do so would usurp the role of the labor organization and the employer." Even though the parties to an agreement disagree as to its meaning, an arbitrator who finds the language to be unambiguous will enforce the clear meaning. at 482-483. (Emphasis Added).

The "plain meaning rule" states that "if the words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used." *Elkouri & Elkouri*, How Arbitration Works, 7th Ed. 9-8 (2012).

> Where language is clear it is not prudent or necessary to give it meaning other than that which is plainly expressed. To do so usurps the roles of the employer and the union in negotiating the language in the first place. Town of Newton and PBA Local 138, P.E.R.C. Docket No. AR-2014-735 (Arbitrator Osborn, 2014), citing *Elkouri & Elkouri*, How Arbitration Works, 7th Ed. 2012 (Section 9-8). Pa180.

The following has been stated as a test for determining if the language is clear and unambiguous:

> The test most often cited is that there is no ambiguity if the contract is so clear on the issue that the intentions of the parties can be determined using no other guide than the contract itself. This test borders on tautology, however, for it comes perilously close to a statement that language is clear and unambiguous if it is clear on its face. Perhaps a better way of putting it would be to ask **if a single, obvious and reasonable meaning appears from a reading of the language** in the context of the rest of the contract. If so, **that meaning is to be applied**. *Elkouri & Elkouri*, How Arbitration Works, 7th Ed. 9-8 n.20 (2012) citing United Grocers, 92 LA 566, 569 (Gangle, 1989) (quoting *Nolan*, Labor Arbitration Law and Practice, 163 (1979)). (Emphasis added).

"**The language of mathematics is precise**." *Elkouri and Elkouri*, How Arbitration Works, 7th Ed. 9-13 (2012). (Emphasis added). Exact terms are given greater weight than general language unless a contrary intention appears. *Elkouri and Elkouri*, How Arbitration Works, 7th Ed. 9-41 (2012).

The plain language at issue in this matter is one of "mathematics." The mathematical equation is unambiguous. This language unequivocally states the manner in which STFA members' overtime rates should be calculated. The Arbitrator's disregard for this very specific and exact mathematical equation is therefore not reasonably debatable.

In Town of Newton and PBA Local 138, P.E.R.C. Docket No.: AR-2014-735, Arbitrator Susan Wood Osborn ordered the Town to reimburse police officers that were paid a lower overtime rate than what the contract provided for a distracted driving detail. Pa170. Arbitrator Osborn found that the contract language was clear and unambiguous, stating:

> The contract does not authorize the Town to carve out exceptions to the overtime article for grant-funded projects which provide a set compensation rate, as the project here did. It did not authorize the Town to reconfigure the compensation for such projects, and the PBA did not agree to the Town's proposed reconfiguration. Pa181.

In Newton, the Employer alleged that the State set the rate for the distracted driving detail, not the Town. The Town was still contractually obligated to abide by the terms of the contract with the PBA, despite the rate set by the third party. The same logic applies to this matter. The collective bargaining agreement does not carve out an exception for the Division to follow

Treasury Circulars when calculating overtime rates. The State cannot evade its contractual responsibility by relying on the Treasury Circulars. Like Newtown, the language in the contract is clear and the Employer set a different overtime rate than is specified in the contract. The Kendellen Award is not a reasonably debatable interpretation of the language in the parties' contract because the Arbitrator found that the Treasury Circulars are controlling "instead of" the collective bargaining agreement.

In County of Passaic, Office of the Passaic County Sheriff v. PBA Local 286, Docket No.: A-1814-10T3 (App. Div. June 29, 2011), the Appellate Division upheld the Superior Court's order vacating an arbitration award that was procured by undue means where the Arbitrator "**improperly applied past practices to override unambiguous terms of the contract for which the parties had bargained**." (Emphasis added). Pa196. In PBA Local 286, supra, the PBA filed a grievance when the County ceased paying a night shift differential to Detectives. In or about 2002, the parties established a practice of awarding detectives a five percent salary differential in lieu of overtime. The County paid detectives the five percent differential for six years. The Arbitrator found that this differential was a past practice clearly established as an unwritten benefit not contained in the contract.

The County moved to vacate the Arbitration Award on the grounds that the Arbitrator exceeded the scope of his authority when he ignored clear and unambiguous contract language concerning night differentials and overtime payment. The Appellate Division summarized the Superior Court's decision to vacate the Arbitration Award, noting, in pertinent part:

> [T]he **"award must be vacated because the arbitrator ignored the express terms of the [CBA] by substituting a past practice for the express provisions applicable to overtime pay," in violation of N.J.S.A. 2A:24-8(a). Specifically, "[t]he [CBA] expressly contained provisions for overtime."** Thus, "**[t]he arbitrator did not have to look any further than the contract to resolve the parties dispute**." The judge noted that although it is appropriate to consider past practices to help resolve an ambiguity in the language of the agreement, **consideration of past practices is not appropriate where, as here, the agreement's language and meaning were clear.** County of Passaic, Office of the Passaic County Sheriff v. PBA Local 286, Docket No.: A-1814-10T3 (App. Div. June 29, 2011). (Emphasis added). Pa204.

The Appellate Division confirmed the Superior Court's decision to vacate the award, holding that "the arbitrator's resort to past practices was a mistake of law" and therefore constituted an award procured by undue means pursuant to N.J.S.A. 2A:24-8(a). Pa209.

In the within matter, the Employer admitted that it has utilized a different divisor than the one present in the parties' contract. Additionally, the Division's

witnesses admitted that they rely on the collective bargaining agreement for essentially everything compensation-related except the overtime equation, which they continue to disregard. For the overtime equation, they instead consult the annual Treasury Circulars, which basically only serve to memorialize the number of working days in the fiscal year. Pa242. In the Treasury Circulars, overtime is referenced solely to specify which pay period is to be charged to which fiscal year, since the fiscal year does not coincide with a calendar year. Pa242.

The Kendellen Award acknowledges that the Division violated the contract through holding that the Division followed the Treasury Circulars *instead of* the contract. There is no contractual support for the Arbitrator's determination to follow Treasury Circulars *over* plain language in the contract. Because the language was plain and clear on its face, there was no reason to look at outside documents. For this reason alone, the Kendellen Award was procured by undue means and is not reasonably debatable.

The Kendellen Award was procured by undue means and is not reasonably debatable because it resorted to a past practice where the contract language is clear. The Kendellen Award acknowledged the contract language is "plainly and simply clear." Pa192. Furthermore, the Court below also acknowledged the

language was clear, stating "the Court can find that it's a strong argument that the time and a half language, which is also abundantly clear, from the parenthetical." T23-10.

The Kendellen Award ignored the plain language and in doing so committed a mistake of law. Furthermore, the Kendellen Award is not a reasonably debatable interpretation of the contract. The Kendellen Award must be vacated because the arbitrator ignored the express terms of the contract and substituted an alleged past practice for express contract provisions applicable to the calculation of overtime compensation. It also replaced negotiated clear language with an external document not negotiated by the parties. We respectfully request that the Kendellen Award be vacated because it was procured by undue means and not a reasonably debatable interpretation of the language collective bargaining agreement.

POINT II

THE ARBITRATION AWARD MUST BE VACATED BECAUSE THE ARBITRATOR EXCEEDED OR SO IMPERFECTLY EXECUTED HIS POWERS THAT A MUTUAL, FINAL, AND DEFINITE AWARD UPON THE SUBJECT MATTER SUBMITTED WAS NOT MADE. (Raised Below: T7-18, T16-2).

Under N.J.S.A. 2A:24-8 subsection (d), an arbitrator exceeds or imperfectly executes his or her powers if the arbitrator ignores the clear and unambiguous language of an agreement and relies solely on past practices. City Ass'n of Sup'rs and Adm'rs v. State Operated School Dist. of City of Newark, 311 N.J. Super. 300 (App. Div. 1998). Where an arbitration award does not "draw its essence from the [collective] bargaining agreement, it will not be enforced by the courts." County College of Morris Staff Ass'n v. County College of Morris, 100 N.J. 383, 392 (1985) (citation omitted).

> In order for the process of arbitration to merit the confidence of parties to labor disputes, arbitrators must at all times adhere to the rules that have been agreed upon by the parties as set forth in their contract. We conclude that in this case the instant arbitrator's award exceeded the parties' grant of authority. Although an arbitrator is empowered to use much of his own knowledge and experience to resolve a dispute, **his guide is at all times the agreement of the parties. To that contract he must be faithful.** County College of

> Morris Staff Asso. v. County College of Morris, 100 N.J. at 398. (Emphasis added).

In Port Authority Police Sergeants Benev. Ass'n of New York, New Jersey v. Port Authority of New York, New Jersey, 340 N.J. Super. 453 (App. Div. 2001), the court noted:

> When parties have agreed, through a contract, on a defined set of rules that are to govern the arbitration process, an arbitrator exceeds his powers when he ignores the limited authority that the contract confers. The scope of an arbitrator's authority depends on the terms of the contract between the parties. Both the jurisdiction and the authority of the arbitrator are circumscribed by the powers delegated to him by the contract of the parties. Thus, **an arbitrator may not disregard the terms of the parties' agreement, nor may he rewrite the contract for the parties**. Citing, County Coll. of Morris Staff Ass'n v. County Coll. of Morris, 100 N.J. 383 (1985). (Emphasis added).

The Court has held that where a narrow arbitration clause is present, which restricts the arbitrator's power, the arbitrator must confine his decision solely to the interpretation and application of the collective bargaining agreement. Comm. Workers of America, Local 1087 v. Monmouth County Bd. of Soc. Servs., 96 N.J. 442 (1984). The Court observed that "[u]nder such narrow arbitration clauses, disputes that do not involve rights traceable to the agreement are beyond the jurisdiction of the arbitrator and therefore are not properly arbitrable." Port Authority Police Sergeants Benev. Ass'n of New York, New

Jersey v. Port Authority of New York, New Jersey, 340 N.J. Super. at 458-459 citing Comm. Workers of America, Local 1087 v. Monmouth County Bd. of Soc. Servs., 96 N.J. at 450.

The Arbitrator did not follow the grievance submission presented by the STFA or the Division. The issue presented by the STFA was whether the Division violated the collective bargaining agreement when it failed to calculate the overtime rate as base plus maintenance divided by 2080 times 1.5. The Division proposed a very similar issue. The Arbitrator determined the issue to be; whether the employer violated the collective bargaining agreement when it used the annual Treasury Circulars ***instead of the language contained in the contract*** to calculate overtime rates. (Emphasis added). First, the issue crafted by the arbitrator affirms the contract violation by the Employer. Second, it admits that the arbitrator used an external document "instead of" the plain language of the contract. Both are evidence that the arbitrator greatly exceeded his power.

The collective bargaining agreement states in Article XII, F., 3(b)(3), in pertinent part:

> In no event shall the arbitration decision have the effect of adding to, subtracting from, modifying or amending the provisions of this Agreement. Pa39.

The Arbitration Award issued in this matter is the epitome of rewriting, subtracting from, or modifying the terms of the contract in violation of the authority bestowed upon him in the collective bargaining agreement. The Arbitrator has violated Article XII, F., 3(b)(3) by rewriting the language contained in Article V to now state that the overtime rate shall be base plus maintenance divided by *the fiscal year work hours contained in the annual treasury circulars* times 1.5. The patent disregard for the contract language, which restricts the arbitrator's power and specifies that overtime be calculated by using the equation "base plus maintenance divided by 2,080 x 1.5" requires that the Award be vacated. Pa27.

There is no evidence to support the Arbitrator's finding that the equation for calculating overtime contained in the contract was "merely an example." Pa192. The STFA argued, and the Arbitration Award acknowledged, that there are only three possibilities for the number of fiscal hours. If the parties intended to use fiscal hours in the contractual equation, they could have written the contract to state base plus maintenance divided by fiscal year work hours times 1.5 - but they did not. Additionally, there is no language stating "for example" or "i.e." to support the Arbitrator's finding that this language is "merely illustrative." Pa192. Furthermore, the award acknowledged that the STFA argued that the Division's witnesses admitted that "except for the divisor, they

otherwise consult the Agreement's language for many items and their computations." Pa191. The Arbitration Award permits the Division to choose which contractual language to follow and which language to disregard, and as such, the Arbitrator greatly exceeded his power.

It is of no consequence that this equation is in parenthesis because the contract is clear that overtime *shall* be calculated in the manner proscribed. By way of example, if the Employer no longer include "maintenance" in the overtime equation, that would be an obvious and clear violation of the contract. The same must be true for the use of "2,080."

Additionally, contained in the same section of the collective bargaining agreement as the overtime equation is another parenthetical which specifies how overtime taken as compensatory time is to be calculated. The compensatory time calculation specifies that overtime taken as compensatory time accumulates at one and one-half hours for each hour of overtime worked "in quarter hour units." Pa27. By way of example, if the Division unilaterally reduced the manner in which it calculates troopers compensatory time to 6-minute increments, as opposed to the contractual 15-minute increments, that would be a clear contractual violation as well. These parenthetical equations are not merely "examples," they are mandatory calculations applicable to overtime.

An arbitrator cannot disregard or contradict the language of the agreement and its terms and conditions. Local No. 153, Office & Professional Employees International Union v. Trust Co. of New Jersey, 105 N.J. 442, 452 (1987). A past practice cannot unilaterally change written contract terms, there must be a mutual agreement in writing to modify any terms.

Where an arbitration panel ignored clear language of an agreement and reached a different result than bargained for by the parties, the arbitration panel was found to have exceeded its authority. City Ass'n of Sup'rs and Adm'rs v. State Operated School Dist. of City of Newark, 311 N.J. Super. 300 (App. Div. 1998).

> **The arbitration panel exceeded its authority by ignoring the clear and unambiguous language of the agreement** concerning the manner in which vacation days were earned. **First, the panel added to the agreement the concept of past practices**. However, the agreement does not give the arbitrators the power to make any decision "contrary to, inconsistent with, modify or vary in any way, the terms of this agreement." **Second, the panel ignored the clear language of the agreement and reached a different result than that bargained for by the parties**. The panel violated its responsibilities to "be bound by and comply with the provisions of this agreement." The agreement clearly circumscribed the panel's substantive authority to change the terms of the vacation provision. City Ass'n of Sup'rs and Adm'rs v. State Operated School Dist. of City of Newark, 311 N.J. Super. 300, 312. (Emphasis added).

An arbitrator is empowered to interpret contract language. The language at issue is not subject to two conflicting interpretations. There is no ambiguity. The STFA asserted that there was a violation of the plain language in the contract specifying the exact equation that the Division is supposed to use to calculate overtime rates for STFA members. In fact, the Arbitrator noted that the language was plainly and simply clear. However, instead of ending his inquiry there, the Arbitrator relied on extrinsic evidence that has no bearing on the meaning or intendment of this plain and unambiguous language.

During the hearing, the STFA presented evidence and testimony to illustrate that the Division was violating the plain language of the contract and shorting STFA members on their overtime compensation. STFA Vice President Steven Kuhn presented his pay stubs and calculations from the time frame in question to illustrate the Division's contractual violation. Furthermore, the Division did not deny their contractual violation - they merely alleged that they do not have to honor the contract. The Division presented their calculations, which are wholly contrary to the specific and unquestionable equation present in the contract.

In this matter, the Arbitrator has gone outside the four corners of the contract and has held that an external document, not negotiated by the parties, overrides plain and unambiguous negotiated contract language. The Arbitrator's

determination should have analyzed whether there is a clause that governs the issue, and then ascertained whether that clause clear. In this case, there is a clause on point and it is plain and unambiguous. The contract, therefore, governs this matter.

The Kendellen Award does not draw its essence from the contract; it is not "faithful" to the contract. The Arbitrator has disregarded the terms of the collective bargaining agreement. The Arbitrator has committed a mistake of law and has exceeded his authority in determining that the Division was not required to follow the plain language in the contract and was instead permitted to follow the annual Treasury Circulars. He exceeded his authority by ignoring the clear and unambiguous language of the agreement and instead relied on a past practice. The Kendellen Award improperly rewrites the contract language concerning the manner in which overtime compensation is calculated in direct violation of the clear and unambiguous language in the contract. Therefore, we respectfully request that the Kendellen Award be vacated.

CONCLUSION

For the foregoing reasons, we respectfully request that the Court vacate the Arbitration Award dated October 2, 2023, in P.E.R.C. Docket No.: AR-2022-251.

Respectfully submitted,
The Law Offices of Lauren Sandy, LLC

Lauren Sandy, Esq.

Dated: August 6, 2024