**SUPERIOR COURT OF NEW JERSEY**
**APPELLATE DIVISION**

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| RUTGERS COUNCIL OF AAUP CHAPTERS, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS-AMERICAN FEDERATION OF TEACHERS, AFL-CIO,<br><br>Plaintiff/Appellant,<br><br>v.<br><br>RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,<br><br>Defendant/Respondent. | Appellate Docket No. A-2192-24<br><br>On appeal from:<br><br>SUPERIOR COURT OF NEW JERSEY CHANCELORY DIVISION<br><br>Docket No.: MID-C-118-24<br><br>Hon. Thomas Daniel McCloskey, J.S.C. |

# BRIEF ON BEHALF OF PLAINTIFF/APPELLANT RUTGERS COUNCIL OF AAUP CHAPTERS, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS-AMERICAN FEDERATION OF TEACHERS, AFL-CIO

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## I. PRELIMINARY STATEMENT

In this matter, an arbitrator effectively reversed a decision of the New Jersey Public Employment Relations Commission ("PERC") which had found a university professor's reassignment to be disciplinary and not the exercise of the public employer's managerial prerogative to make educational policy determinations. By so doing, the arbitrator exceeded her authority and procured her award by undue means.

Plaintiff/Appellant Rutgers Council of AAUP Chapters, American Association of University Professors-American Federation of Teachers, AFL-CIO ("Union"), on behalf of Professor Kynan Johns, filed a grievance against Defendant/Respondent, Rutgers, the State University of New Jersey ("University"). The Union alleged in its grievance that the University's reassignments of Professor Johns' Fall 2021 semester courses were "unjust discipline." The Union sought to arbitrate the grievance. In response, the University filed a scope of negotiations petition with PERC seeking a restraint of binding arbitration. The University argued that the reassignments were not disciplinary and not arbitrable because they were the exercise of its non-negotiable, non-arbitrable managerial prerogative.

PERC has primary jurisdiction, subject only to judicial review, to determine whether a grievance is disciplinary and therefore legally arbitrable,

or the exercise of a managerial prerogative and therefore not legally arbitrable. After the parties' submitted evidence and fully briefed the issues, PERC held that the reassignments were disciplinary. PERC appropriately left to the arbitrator the remaining question of whether the University met its burden of proving that the discipline violated the contractual unjust discipline standard. Most significantly, the University did not appeal PERC's decision and order to this Court.

In an interim decision, the arbitrator acknowledged that she was bound by PERC's decision and she reaffirmed that the reassignments grievance would be assessed using the same analysis as PERC instructed, i.e. that the University had the burden of proving that the disciplinary reassignments were not unjust discipline. Yet inexplicitly, in the arbitrator's final opinion and award, she ignored both the PERC decision and her interim decision and found that the University "did not discipline" Professor Johns. The arbitrator also then shifted the burden of proof and concluded that the Union failed to establish that "the University unjustly disciplined Professor Johns."

As public employee reassignments are the exercise of a managerial prerogative unless they are disciplinary, the arbitrator's conclusion means that she found the reassignments to be the exercise of the University's managerial prerogative, the exact opposite of what PERC had decided in a decision the

University chose not to appeal. The arbitrator's final decision erroneously ignored PERC's primary scope of negotiations jurisdiction and usurped this Court's exclusive jurisdiction to review a timely appeal of a PERC decision.

The arbitrator's conclusions also improperly ignored the University's burden to prove that there was just cause for the disciplinary reassignments. She made no finding that the University met its burden of proving that there was just cause for the disciplinary reassignments and instead found that the Union had not proved that the University unjustly disciplined Professor Johns. These material legal errors resulted in the arbitrator exceeding and imperfectly executing her authority and reaching an arbitration award by undue means, contrary to N.J.S.A. 2A:24-8(a) and (d).

The Union filed a Verified Complaint seeking to vacate the arbitrator's final opinion and award, which the Trial Court denied. In doing so, the Trial Court misinterpreted the applicable law granting the arbitrator authority to act and the appropriate standards of review. Accordingly, the Union respectfully requests that this Court vacate the Trial Court's February 14, 2025 order and final judgment and remand for an order consistent with the Union's requested relief.

## II. STATEMENT OF FACTS

At all relevant times, the Union and University were parties to a collective negotiations agreement effective from July 1, 2018 through June 30, 2022 ("CNA"). Pa3; see also Pa56-76. Beginning in 2003, Kynan Johns has been employed as a professor by the University and served as the Director of the Orchestra(s). In 2010, Professor Johns was tenured in his role as Director of Orchestras. Pa3. In 2018, Professor Johns was promoted to Full Professor as Director of Orchestras, Helix, and Professor of Conducting. Pa3.

### A. The University Disciplines Professor Johns

In August 2019, Professor Johns learned for the first time that there were complaints that he sexually harassed students. Pa3. These allegations destabilized him emotionally and caused him extreme anxiety and an inability to sleep. Pa3.

On September 6, 2019, the University placed Professor Johns on paid administrative leave pending review of an incident the previous day where Professor Johns was purportedly intoxicated while judging student auditions. Pa3. Professor Johns has adamantly maintained that the intoxication was the byproduct of consuming alcohol during lunch in compliance with University

policy and which was unintentionally magnified by simultaneously taking a new anti-anxiety medication. Pa4.

On April 16, 2020, the University's Office of Employment Equity ("OEE") concluded its investigation into the allegations of sexual harassment by Professor Johns and exonerated him of any wrongdoing under University policy. Pa4. On June 15, 2020, almost nine months after the intoxication incident and one month after being exonerated of any sexual harassment wrongdoing, the University notified Professor Johns that it was considering an unpaid suspension related to the alleged intoxication incident. Pa4. Such a notification is a prerequisite to suspending faculty at less than full pay under the CNA. Pa4; see also Pa77-78.

Despite the September 2019 paid suspension, the University did not begin its investigation into the alleged intoxication incident until July 2020, almost ten months after the fact and only after the sexual harassment investigation failed to result in Professor Johns' discipline. Pa4. On August 20, 2020, the committee of department chairs, appointed pursuant to the CNA, recommended that Professor Johns not be suspended without pay. Pa4. The University rejected the committee's recommendation and suspended Professor Johns without pay for the Spring 2021 semester. Pa4.

Professor Johns fully expected to return to his regular teaching duties for the Fall 2021 semester. Pa5. However, when he received his course assignments for the Fall 2021 semester after the conclusion of his unpaid suspension, he learned that, for the first time in his approximately two decade tenure as Rutgers faculty, he would no longer be assigned as Director of Orchestras, Director of the Rutgers Symphony Orchestra, or Conductor of Sinfonia as he typically was assigned. Pa5.

**B. The University Unsuccessfully Asserts a Managerial Prerogative**

On October 29, 2021, the Union filed a grievance challenging Professor Johns' disciplinary reassignments. The grievance eventually moved to binding arbitration. Pa5. The Union also grieved and submitted to arbitration the issue of Professor Johns' unpaid suspension for the Spring 2021 semester. Pa5. The arbitrator's decision on the suspension grievance is not challenged through the Union's Verified Complaint and is therefore not an issue before this Court on appeal.

The CNA defines discipline as "the formal imposition of a penalty in response to alleged wrongdoing by a member of the negotiations unit." Pa5; see also Pa63. Discipline which is "unjust" may be grieved as a "Category One grievance" under the parties' CNA. Pa5; see also Pa63. With respect to

Category One grievances, an arbitrator's decision is "final and binding" between the Union and the University. Pa5; see also Pa68.

On May 2, 2022, the University filed a scope of negotiations petition with PERC seeking a restraint of binding arbitration of the reassignment grievance. Pa5. At its core, the University's petition argued that Professor Johns' reassignments were within its educational discretion and therefore the exercise of a managerial prerogative that could not be challenged through binding arbitration. Pa6; see generally Pa80-92. The University adamantly contended before PERC that its reassignment of Professor Johns' courses was "no[t] discipline (or penalty)" and was entirely for purposes of academic judgment. Pa6; see also Pa91. In support of its Petition, the University filed briefs, exhibits, and at least three certifications from the University's management. Pa6.

On November 22, 2022, PERC issued its decision and order. Pa6. PERC reviewed the evidentiary material, rejected the University's arguments, and denied the University's request for a restraint of binding arbitration. Pa6; see generally Pa93-108. Specifically, PERC noted that it had previously found that a transfer or reassignment was predominately disciplinary when it "occurred in close temporal proximity to alleged incidents of misconduct or poor

performance, and . . . was not based on a predominately operational reason." Pa6; see also Pa103.

Upon its review of the record and evidentiary materials provided by the University, PERC concluded that Professor Johns' reassignments "were predominately disciplinary in nature and, therefore, legally arbitrable." Pa6; see also Pa104. PERC found that the University failed to either cite or demonstrate "any particularized educational or policy reason for its decision to reassign" Professor Johns. Pa6; see also Pa107. PERC also found as a matter of fact a "temporal proximity" between the OEE report, the (disciplinary) unpaid suspension for the Spring 2021 semester, and the Fall 2021 reassignment out of his Director of Orchestra and conductor of the Rutgers Symphony Orchestra and Sinfonia positions. Pa7; see also Pa105. Based on the entire record, PERC concluded that the University's actions against Professor Johns were discipline as a matter of fact and a matter of law. Pa7; see also Pa104. As made expressly clear by PERC, "the question of whether such disciplinary action violated the [CNA]'s unjust discipline standard is an issue for determination by an arbitrator." Pa7; see also Pa106.

The University did not seek appellate review of PERC's decision and the time to appeal has long passed. Pa7. Therefore, on the issue of Professor Johns' disciplinary reassignment, the sole question for the arbitrator was

whether the discipline violated the parties' CNA unjust discipline clause, i.e. whether the University met its burden of proving that the discipline was for cause. Pa7.

### C. Arbitrator Townley Initially Concurs with PERC

After PERC's denial of the University's request for a restraint of binding arbitration, the two pending grievances regarding Professor Johns' discipline were consolidated before Arbitrator Townley. Pa7. At the first day of the arbitration hearing, despite PERC's November 22, 2022 decision and order, the University renewed its assertion that Professor Johns' reassignments were not disciplinary. Pa7. Arbitrator Townley thereafter ordered the parties to brief her on the appropriate standard of review to be used when deciding the grievance challenging Professor Johns' reassignments. Pa8.

On January 5, 2024, Arbitrator Townley issued her interim opinion and order on this issue. Pa8; see generally Pa109-25. Arbitrator Townley concurred with PERC that the standard of review for the issue should be under the predominantly disciplinary grievance standard. Pa8; see also Pa120. As such, Arbitrator Townley ordered that "the University shall be precluded from raising contractual defenses and arguments under the CNA that the reassignment did not meet the contractually defined threshold for constituting

discipline pursuant to the CNA or that disputes regarding faculty assignments are subject to advisory and not binding arbitration." Pa8; see also Pa121.[1]

Arbitrator Townley concluded her order was appropriate "because the University failed to appeal PERC's [d]ecision to the Appellate Division." Pa8; see also Pa122. She reiterated that the University was "disallow[ed]" from bringing contractual defenses not already presented to PERC. Pa8; see also Pa124. Arbitrator Townley further elaborated "to be clear" that the issue to decide on the reassignments grievance was whether the discipline was "unjust." Pa8; see also Pa124. On that question, Arbitrator Townley affirmed long standing principles that the University "holds the burden of proof" in establishing that the discipline was justified. Pa8; see also Pa124.

[1] In her interim opinion, the arbitrator rejected the University's argument that Professor Johns' reassignment was subject to advisory, not binding arbitration. Article 15 of the parties' CNA requires that individual faculty workload assignments be consistent with the practice and policies of their department, program, or unit. Pa72. Claims of inconsistency with such practices and policies are subject to only advisory arbitration. The Union did not allege a violation of Article 15 and both PERC and the arbitrator determined that the reassignments were subject to binding arbitration as discipline under Article 9.

### D. Arbitrator Townley Issues a Final Award that Ignores Both the PERC Decision and Her Interim Decision

After arbitration proceedings continued and the parties elicited further testimony in light of Arbitrator Townley's interim opinion and order, Arbitrator Townley issued her July 10, 2024 final opinion and award. Pa9; see generally Pa14-55. As relevant, Arbitrator Townley framed the question on the reassignments as whether the University "discipline[d] Professor Kynan Johns . . . without just cause?" Pa9; see also Pa34.

Notwithstanding both PERC and the arbitrator's previous rulings, the University reasserted its managerial prerogative argument during the evidentiary hearings by claiming that the reason Professor Johns was reassigned was due to a change in goals and objectives of the department he worked under and because Professor Johns purportedly did not align with this new direction. Pa9. Arbitrator Townley, effectively reversing both PERC and her prior rulings, accepted these arguments and found for the first time that the University "did not discipline Professor Johns when it assigned him a different schedule." Pa9; see also Pa51. Arbitrator Townley provided no explanation for how she had the legal authority to reverse PERC's prior findings of fact and conclusions of law that the reassignments were disciplinary. Pa10. Nor did Arbitrator Townley explain her deviation from her interim opinion where she

accepted PERC's findings and legal conclusions and reaffirmed the University's burden to establish just cause for the disciplinary reassignment. Pa10.

Additionally, Arbitrator Townley concluded that "there [wa]s no persuasive evidence that the University unjustly disciplined Professor Johns" with its reassignment. Pa9; see also Pa54.

## III. PROCEDURAL HISTORY

On October 8, 2024, the Union filed a Verified Complaint seeking to summarily vacate Arbitrator Townley's July 10, 2024 final opinion and award pursuant to N.J.S.A. 2A:24-8. On December 9, 2024, the University opposed the Union's application, filed a corresponding Answer, and cross-moved to confirm the arbitration award. The parties presented oral arguments before the Trial Court on February 4, 2025.

On February 14, 2025, the Trial Court issued its order and final judgment denying the Union's application for vacation of the arbitration award and granting the University's cross-motion to confirm the arbitration award. The instant appeal followed.

## IV. STANDARD OF REVIEW

The review of a trial court's order confirming or vacating an arbitration award on appeal is a question of law and this court "owe[s] no special deference to the trial court's interpretation of the law and the legal consequences that flow from the established facts." Yarborough v. State Operated Sch. Dist. of City of Newark, 455 N.J. Super. 136, 139 (App. Div. 2018). The standard of review is thus de novo. Manger v. Manger, 417 N.J. Super. 370, 376 (App. Div. 2010). In addition to the statutory criteria in N.J.S.A. 2A:24-8, "a court, 'may vacate an award if it is contrary to existing law.'" Borough of E. Rutherford v. E. Rutherford PBA Loc. 275, 213 N.J. 190, 202 (2013) (quoting Middletown Twp. PBA Loc. 124, 193 N.J. at 11).

## V. LEGAL ARGUMENTS

A party subject to an arbitration award may "commence a summary action . . . for its vacation" within three months. N.J.S.A. 2A:24-7. Stating the grounds for vacating an arbitration award, N.J.S.A. 2A:24-8 provides in relevant part: "The court shall vacate the award . . . [(a) w]here the award was procured by . . . undue means; . . . [or (d) w]here the arbitrator[] exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made." (emphasis added).

### A. Arbitrator Townley Exceeded and Imperfectly Executed Her Authority Such that a Final and Definite Award Was Not Made (Pa169).

In issuing her July 10, 2024 final opinion and award with respect to the University's reassignments of Professor Johns for the Fall 2021 semester, Arbitrator Townley exceeded and imperfectly executed her authority in two fundamentally flawed ways.[2] First, Arbitrator Townley effectively reversed PERC's scope of negotiations decision and order holding that Professor Johns' Fall 2021 reassignments were disciplinary. She explicitly found that the reassignments were not disciplinary. Second, Arbitrator Townley improperly shifted the burden of proof. It was the University's burden to prove that the discipline was just; not the Union's burden to prove that the discipline was unjust. That improper application of the burden of proof appears to have materially and detrimentally altered her legal conclusions. For the reasons that follow, because Arbitrator Townley exceeded and imperfectly executed her

[2] The Union does not challenge through its Verified Complaint or this appeal the Union's separate grievance challenging Professor Johns' unpaid suspension for the Spring 2021 semester. See Pa5 n.1. To be clear, because Arbitrator Townley found that the University met its burden of proving that this discipline was justified under the appropriate standard, the Union does not make that challenge. While the Union strongly disagrees with this finding, it accepts that the arbitrator applied the appropriate legal standard on that question.

powers, her July 10, 2024 final arbitration opinion and award should be vacated under N.J.S.A. 2A:24-8(d).

### i. Arbitrator Townley Circumvented PERC's Primary Jurisdiction

"[P]ublic employees have the right to engage in collective negotiation[s] . . . ." Council of N.J. State Coll. Locals v. State Bd. of Higher Educ., 91 N.J. 18, 26 (1982). "However, 'the scope of negotiations in the public sector is more limited than in the private sector' due to the government's 'special responsibilities to the public' to 'make and implement public policy.'" In re Cnty. of Atl., 445 N.J. Super. 1, 21 (App. Div. 2016) (quoting In re IFPTE Local 195 v. State, 88 N.J. 393, 401-02 (1982)), aff'd on other grounds, 230 N.J. 237 (2017).

As a result, subjects of public employment negotiations are deemed to be either "mandatorily negotiable terms and conditions of employment [or] non-negotiable matters of governmental policy." Loc. 195, 88 N.J. at 402 (quoting Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 162 (1978)).

Under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("EERA"), the educational policy determinations of a public

university are generally "non-negotiable" as managerial prerogatives, are outside the scope of negotiations, and cannot be addressed through a collective negotiations agreement. Cf. Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n, 64 N.J. 17, 30 (1973). Reassignments for educational policy reasons are the exercise of a non-negotiable managerial prerogative and cannot be the subject of negotiations or binding arbitration. See Ridgefield Park, 78 N.J. at 156.

However, "disciplinary disputes" are expressly included in the EERA as a mandatorily negotiable issue subject to both negotiations and binding arbitration. N.J.S.A. 34:13A-5.3. A public employer and a union may disagree about whether a transfer or reassignment is "predominately disciplinary" and thus within the scope of negotiations and legally arbitrable or whether the reassignment is the exercise of a managerial prerogative and therefore outside the scope of negotiations and not subject to binding arbitration. See, e.g., Rutgers University, P.E.R.C. No. 2020-21, 46 NJPER 188 (¶47 2019), rev'd, 47 NJPER 491 (¶116 App. Div. 2021); Bd. of Ed. of Vocational Sch. in Camden Cnty. v. CAM/VOC Tchrs. Ass'n, 183 N.J. Super. 206, 214 (App. Div. 1982).

PERC has primary jurisdiction to resolve any such dispute. Cnty. of Atl., 445 N.J. Super. at 20. "[PERC] shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a

determination as to whether a matter in dispute is within the scope of collective negotiations." N.J.S.A 34:13A-5.4(d).

Under N.J.S.A 34:13A-5.4(d), PERC is "the forum for the initial determination of whether a matter in dispute is within the scope of collective negotiations." Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 614 (2020) (quoting State v. State Supervisory Emps. Ass'n, 78 N.J. 54, 83 (1978)). "No court of this State is empowered to make this initial determination." State Supervisory Emps. Ass'n, 78 N.J. at 83. "PERC's decision, however, is subject to review by the Appellate Division." Barila, 241 N.J. at 614 (citing N.J.S.A. 34:13A-5.4(d)).

PERC has adopted regulations that set forth the procedures a public employer or union must follow to obtain a determination of whether a particular matter is within the scope of negotiations. N.J.A.C. 19:13-1.1 to -11. Under these regulations, either a public employer or union "may initiate scope of negotiation proceedings by filing with [PERC] . . . a petition for [a] scope of negotiations determination." N.J.A.C. 19:13-2.1. In ruling on such a petition, PERC must make "findings of fact and conclusions of law." N.J.S.A. 34:13A-5.4(d).

In Ridgefield Park, our Supreme Court further explained PERC's primary jurisdiction over issues of negotiability and arbitrability:

> PERC has primary jurisdiction to make a determination on the merits of the question of whether the subject matter of a particular dispute is within the scope of collective negotiations. . . .
>
> . . . . If PERC concludes that the dispute is within the legal scope of negotiability and agreement between the employer and employees, the matter may proceed to arbitration. Where PERC concludes that a particular dispute is not within the scope of collective negotiations, and thus not arbitrable, it must issue an injunction permanently restraining arbitration.
>
> [Ridgefield Park Educ. Ass'n, 78 N.J. at 154 (citations omitted) (emphasis added).]

This Court has also previously rejected arguments that the trial division of the Superior Court maintained "concurrent" jurisdiction with PERC on scope of negotiations questions. Bd. of Ed. of City of Plainfield v. Plainfield Ed. Ass'n, 144 N.J. Super. 521, 526 (App. Div. 1976); see also City of Newark v. Newark Council 21, N.J. Civ. Serv. Ass'n, 320 N.J. Super. 8, 17 (App. Div. 1999) (finding, where a management prerogative was raised in relation to the subject of a grievance, the "trial court should defer to PERC" and "should not . . . address[] the merits").

Moreover, this Court has plainly rejected an arbitrator's ability to rule on a dispute regarding the scope of negotiations. In Bd. of Ed. of Vocational Sch. in Camden Cnty. v. CAM/VOC Tchrs. Ass'n, the union and public employer disputed whether a reduction in force (a non-negotiable managerial

prerogative) necessitated negotiations for additional compensation over increased workloads (a mandatorily negotiable subject). 183 N.J. Super. at 213. This scope of negotiations question, however, was left by PERC to the arbitrator to decide. Id. at 213-14. On appeal, this Court remanded to PERC concluding:

> [T]the controlling statute clearly requires PERC "to make its findings of fact and conclusions of law" as to "whether a matter in dispute is within the scope of collective negotiations." N.J.S.A. 34:13A-5.4(d). PERC's opinion in the present matter seems to suggest that the arbitrator alone must find the facts which determine whether "a matter in dispute is within the scope of collective negotiations." Ibid. We conclude that if scope of negotiability turns on a dispute of facts, as it seems to here, the Legislature contemplated that PERC, not the arbitrator, resolve that factual dispute. PERC's regulations clearly provide for evidentiary hearings in scope of negotiations proceedings. N.J.A.C. 19:13-3.6 and N.J.A.C. 19:13-3.7.
>
> [Id. (emphasis added).]

In Cape May County Bridge Commission, this Court again repeated this conclusion in a public employer-union dispute over whether an employee transfer was disciplinary, and thus legally arbitrable. App. Div. Docket No. A-5186-83T6, NJPER Supp2d 152 (¶ 135 App. Div. 1985). After PERC restrained arbitration and a direct appeal followed, this Court rejected the union's argument that the arbitrator should determine whether the transfer was

non-disciplinary and thus not arbitrable. Id. Rather, it held "PERC, not the arbitrator, must make the determination whether a transfer is non-disciplinary and thus non-arbitrable or disciplinary and arbitrable." Id. This Court further noted that any factual dispute with regard to PERC's scope of negotiations determination must follow PERC's scope proceedings and be left squarely within its jurisdiction. Id.; see also N.J.A.C. 19:13-3.1 to -3.12.

Moreover, in City of Newark, an arbitrator issued an award that denied a union's grievance after concluding that a public employer's transfer of duties from police clerks to civilian employees did not violate the parties' collective negotiations agreement. 320 N.J. Super. at 12. On appeal, among other issues, this Court rejected the union's challenge to that portion of the arbitration award but nonetheless vacated the award under N.J.S.A. 2A:24-8(d) finding that:

> in the circumstances here, [the public employer's] decision to [transfer duties] . . . was a non-negotiable management prerogative. Accordingly, it was also, by definition, non-arbitrable. See, e.g., New Jersey Turnpike Auth. v. New Jersey Turnpike Supervisors, 143 N.J. 185, 204, 670 A.2d 1 (1996). In sum, the issue never should have been submitted to arbitration at all. . . . [T]he arbitrator did not have the authority to treat the matter as an arbitrable grievance in the first instance, and the award was subject to vacation on the ground that he exceeded his powers. N.J.S.A. 2A:24–8d.

[Id. at 16-17.]

City of Newark stands for the proposition that neither an arbitrator nor a trial court has the jurisdiction to decide that a grievance challenges the exercise of a managerial prerogative. That jurisdiction belongs to PERC, subject only to appellate review. Thus, if the University in the instant matter had not filed a scope of negotiations petition, the arbitrator would not have had the authority to determine that the reassignments were not disciplinary but instead were based on non-negotiable educational or operational needs, i.e. the exercise of the University's managerial prerogative. However, the University here did file a scope petition and PERC's decision was not appealed. Thus, this appeal is not about an arbitrator not having the authority to find a managerial prerogative when the employer does not avail itself of its right to go to PERC. This case is about the limits of an arbitrator's authority after an employer went to PERC, lost, and did not appeal. Our Supreme Court has addressed a similar issue under analogous circumstances.

In Scotch Plains-Fanwood Bd. of Educ. v. Scotch Plains-Fanwood Educ. Ass'n, our Supreme Court ruled that arbitrators are "bound by PERC's determination that [a public employer]'s action was taken for disciplinary reasons." 139 N.J. 141, 155 (1995). By the public employer failing to take an

appeal, the Supreme Court held that the arbitrator "had no alternative" other than to accept PERC's finding of discipline. Ibid.[3]

Here, the University filed a timely scope of negotiations petition with PERC and its request for a restraint of binding arbitration was denied. The University filed three briefs, exhibits, and certifications from a Vice-President, an Associate Dean, and a Dean in support of its scope petition. PERC reviewed the University's legal arguments and supporting certifications, made findings of fact, and concluded in a final administrative decision and order that Professor Johns' reassignments were disciplinary and therefore subject to binding arbitration.

The University did not appeal. As such, all that was left was for the arbitrator to decide was whether the University could meet its burden of proving that there was just cause for the disciplinary reassignments. See Pa93-

[3] Scotch Plains-Fanwood was decided under the 1990 "Scope of Negotiations" amendments to the EERA, amendments that are not applicable to the parties in this appeal. See N.J.S.A. 34:13A-22. Nevertheless, the amendments provide in pertinent part that PERC is to make determinations of whether the basis for a transfer or an "increment withholding" is predominately disciplinary. Id. This is the same procedure and same standard that PERC used to determine the scope of negotiations petition in this matter. See Pa103. Scotch Plains-Fanwood, therefore, provides directly relevant guidance about the respective authorities of PERC and an arbitrator where the Legislature has determined that PERC, not an arbitrator, decides whether a matter in dispute is within the scope of collective negotiations. See N.J.S.A. 34:13A-5.4(d).

108. Despite the PERC decision and her interim decision, Arbitrator Townley inexplicitly concluded in her final opinion and award that the University "did not discipline Professor Johns when it assigned him a different schedule." Pa51 (emphasis added).

If the reassignments were not disciplinary, then the reassignments were the exercise of a managerial prerogative and could not have been subject to binding arbitration in the first instance. Finding that the reassignments were made for educational policy or operational reasons directly contravenes PERC's decision and opinion, which rejected the University's claim that the reassignments were not disciplinary and were instead the exercise of its managerial prerogative.

Importantly, PERC's decision made "findings of fact and conclusions of law" after the University was afforded every opportunity to present evidentiary material in support of its contentions. N.J.S.A. 34:13A-5.4(d). The University had the right to appeal PERC's findings of fact and conclusions of law to this Court, id., which it choose not to do.

As in Scotch Plains-Fanwood, PERC had a statutory duty to resolve the University's scope of negotiations petition. As in Scotch Plains-Fanwood, PERC did so and the employer chose not to appeal. 139 N.J. at 155. As in Scotch Plains-Fanwood, Arbitrator Townley, therefore, was "bound" by and

"had no alternative" than to accept PERC's findings that Professor Johns' reassignments were disciplinary. Ibid. By finding otherwise, Arbitrator Townley ignored and thereby effectively reversed PERC long after the University's lawful time to appeal had run. PERC determinations may be challenged only on timely appeal to this Court. See Barila, 241 N.J. at 614.

As this Court has repeatedly held, arbitrators do not have the power to address whether a dispute is within the scope of negotiations in light of PERC's primary jurisdiction on these issues. PERC properly addressed the question of whether Professor Johns' reassignments were disciplinary, leaving the question of whether the discipline was for just cause to Arbitrator Townley to decide. See Bd. of Ed. Of Vocational Sch. In Camden Cnty., 183 N.J. Super. at 213 (emphasis added); Cape May County Bridge Commission, NJPER Supp2d 152. Any dispute about that initial question, therefore, must have been and was resolved by PERC and is not one Arbitrator Townley had the authority to address.

By circumventing PERC's primary jurisdiction, Arbitrator Townley exceeded and imperfectly executed her authority such that a final and definite award was not made. On this issue alone, her final opinion and award must be vacated and the matter remanded for further proceedings consistent with PERC's opinion and order. The arbitrator should be ordered to decide whether

the University met its burden of proving that the disciplinary reassignments were for just cause.

### ii. Arbitrator Townley Improperly Shifted the Burden of Proof

A long-standing principle in disciplinary arbitration is that the employer holds the burden of proving just cause for the discipline. See, e.g., Elkouri & Elkouri, How Arbitration Works at Ch. 15.3.D.i. (ABA Section of Labor and Employment Law, Bloomberg BNA, 8th ed., 2020). Here, the parties' CNA permits the Union to grieve "an allegation of unjust discipline." Pa63. The CNA defines discipline as "the formal imposition of a penalty in response to alleged wrongdoing by a member of the negotiations unit." Id. As initially held by Arbitrator Townley in her interim opinion, "the University . . . holds the burden of proof" in establishing that the disciplinary reassignments of Professor Johns were just. Pa124. At no point throughout the arbitration process did the parties contest this well-established burden.

However, when reaching the ultimate conclusion in her final opinion and award, Arbitrator Townley found "there is no persuasive evidence that the University unjustly disciplined Professor Johns by assigning him to a different schedule during the Fall of 2021." Pa54. By framing the issue in this manner, Arbitrator Townley improperly concluded that the Union had not proven that

the University's action was unjust, when in fact the burden was on the University to prove that the discipline was just.

This difference is not just semantics; it materially shifts the entire analysis to be used in deciding this matter. Further, such a shift fundamentally changes how Arbitrator Townley reached her ultimate conclusion. This is not a harmless error. Because the University was required to establish that the discipline was for just cause, shifting the burden to the Union means Arbitrator Townley's final opinion and award exceeded and imperfectly executed her authority such that a final and definite award was not made. This opinion and award, therefore, requires vacation and a remand back to Arbitrator Townley for a new opinion deciding whether the University met its burden of proving that Professor Johns' disciplinary reassignment was for just cause.

### B. Arbitrator Townley Procured Her Award By Undue Means (Pa169).

As noted, an arbitration award "shall" be vacated when the award "was procured by . . . undue means." N.J.S.A. 2A:24-8(a). Our Supreme Court has explained that "undue means" under N.J.S.A. 2A:24-8(a) "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."

Sanjuan v. Sch. Dist. of W. New York, Hudson Cnty., 256 N.J. 369, 382 n.1 (2024) (quoting Borough of E. Rutherford v. East Rutherford PBA Local 275, 213 N.J. 190, 203 (2013)).

The Supreme Court has further explained that analysis for "undue means" and "exceeded . . . powers" under N.J.S.A. 2A:24-8(d) may be "related" to one another. Id. Undue means has been further construed to include "basing an award on a clearly mistaken view of fact or law." Local Union 560, I.B.T. v. Eazor Express, Inc., 95 N.J. Super. 219, 227-28 (App. Div. 1967); see also In re City of Camden, 429 N.J. Super. 309, 332 (App. Div. 2013) (finding that "an arbitrator's failure to follow the substantive law" can constitute undue means).

Here, for the reasons already described supra Section V.A., Arbitrator Townley failed to follow the applicable law in issuing her final opinion and award. These errors of law, therefore, also amount to "undue means" as contemplated by N.J.S.A. 2A:24-8(a). Accordingly, the arbitrator's final opinion and award should be vacated and the matter remanded for a new opinion deciding whether the University met its burden of proving that Professor Johns' reassignment was discipline for just cause.

### C. The Trial Court Misinterpreted the EERA and Standards of Review (Pa160-70).

In addressing only questions of law, the Trial Court's February 14, 2025 statement of reasons is owed no deference. Yarborough, 455 N.J. Super. at 139. However, the Trial Court's misinterpretation of the EERA and the standards of review highlight the ways in which Arbitrator Townley exceeded and imperfectly executed her authority and procured her final award by undue means. For the reasons that follow, the Trial Court misapplied the EERA and appropriate standards of review.

#### i. Whether a Public Employer Disciplined an Employee or Exercised a Managerial Prerogative Can Never Be a Contract-Based Dispute Left to an Arbitrator

Principally, the Trial Court conflates the grievance process under a CNA—during which a public employer may raise contract-based defenses to a grievance—with the scope of negotiations procedure before PERC, which determines whether an arbitrator can consider the grievance in the first instance. The two are fundamentally different processes that involve separate questions of fact and law.

The Trial Court supported its reasoning, in significant part, on PERC's own regulations which state that PERC will not determine during a scope

proceeding: (1) "whether the grievance is covered by the arbitration clause of [the CNA]"; (2) "whether the facts are as alleged by the grievant"; (3) "whether a contract provides a defense for the employer's alleged action"; (4) "whether there is a valid arbitration clause in an agreement"; or (5) "[a]ny other similar question." Pa157; Pa164; N.J.A.C. 19:13-1.1(b).

However, these limitations only prevent PERC from addressing the merits of the underlying grievance that gave rise to the scope of negotiations dispute. Here, the Union filed a grievance claiming that the University's reassignment of Professor Johns was unjust discipline. PERC's scope of negotiations decision correctly made no determinations about whether that grievance was covered by the parties' CNA, the discipline was unjust under the terms of the CNA, whether the CNA contained a valid arbitration clause, or any other question about underlying CNA provisions. PERC left interpretation of the contract itself to the sound discretion of Arbitrator Townley.

What PERC's decision did not do, however, was leave open the non-contractual question of whether the University disciplined Professor Johns. Again, if he was disciplined then the issue was legally arbitrable. If the reassignments were not disciplinary, then the grievance should never have gone to Arbitrator Townley in the first instance. That initial question was

within PERC's primary jurisdiction to make "findings of fact and conclusions of law" under N.J.S.A. 34:13A-5.4(d).

The Trial Court concluded that the arbitrator found that the University reassigned Professor Johns due to the exercise of its managerial prerogative and operational needs, rather than discipline. Pa165. The court's acceptance of the arbitrator's finding that the reassignments were not disciplinary, but instead the exercise of the University's managerial prerogative, rendered meaningless PERC's decision on that scope of negotiations question. The Trial Court noted that the Union argued that under our Supreme Court's decision in Scotch Plains-Fanwood, the arbitrator was bound by PERC's determination that the reassignments were discipline. However, the court simply disregarded Scotch Plains-Fanwood and any and all case law in concluding that the arbitrator had the authority to ignore PERC's decision and conclude that the reassignments were not disciplinary. The Trial Court also appears to have faulted the Union for not presenting evidence that the reassignments were disciplinary and without cause. Pa169. Thus, the court also improperly placed the burden of proof on the Union in a discipline case where the employer had the burden of proving just cause for the discipline.

Applying the reasoning of Scotch-Plains Fanwood and City of Newark, 320 N.J. Super. at 16-17, the question of whether a public employer's action is

predominately disciplinary or the exercise of a managerial prerogative can never be a question left for an arbitrator to decide. Once PERC decides that a public employer's action was disciplinary and not the exercise of a managerial prerogative, an arbitrator is left to decide only the factual and contract-based issue of whether the employer met its burden of proving that the discipline was for just cause. That is the determination left open by PERC under N.J.A.C. 19:13-1.1. Therefore, contrary to the Trial Court's conclusion that the arbitrator may give weight to the University's managerial prerogative arguments "even if they conflicted with PERC['s] findings," Pa164, Arbitrator Townley did not have the authority to override PERC's determination.

Additionally, in conflating contract-based arguments with PERC's primary jurisdiction, the Trial Court improperly relied on a CNA provision to justify the University's purported exercise of a managerial prerogative. Specifically, the Trial Court relied on Article 15 of the CNA (which permits challenges to workload assignments to be submitted to advisory arbitration) to conclude that the University has the "prerogative to assign personnel" and PERC's decision did not "a fortiori, override" that provision. Pa167.

However, after PERC determined that the reassignments of Professor Johns were "predominately disciplinary," the only question remaining was whether the discipline was for just cause under Article 9, not whether a

violation of Article 15 occurred. Compare Pa63, with Pa72. In fact, the Union never filed a grievance under Article 15 and the arbitrator did not rely on Article 15 in denying the Union's grievance. If this had been an Article 15 arbitration, it would have been advisory arbitration. See Pa63-64; Pa72. The grievance was filed under Article 9 and claimed unjust discipline.

The University argued to PERC that the reassignments were not discipline. PERC disagreed. The University did not appeal. The only question left was whether the University proved that the discipline was for cause. The arbitrator did not rely on Article 15 in denying the grievance. Article 15 has no bearing on the instant matter.

### ii. The Trial Court Impermissibly Applied the Reasonably Debatable Standard to a Non-Contract Based Factual Dispute Already Resolved by PERC

In further eroding the line between the parties' contract-based arguments surrounding the grievance and PERC's authority to resolve scope of negotiations disputes, the Trial Court misapplied the "reasonably debatable" standard. As the case law cited by the Trial Court makes abundantly clear, this standard applies only to interpretations of the CNA. See, e.g., Policemen's Benev. Ass'n v. City of Trenton, 205 N.J. 422, 429 (2011) ("[S]o far as the

arbitrator's decision concerns construction of the contract, the courts have no business overruling him . . . ." (emphasis added) (citation omitted)).

In confirming the arbitration award, the Trial Court found that it was reasonably debatable for Arbitrator Townley to conclude that the University "did not discipline Professor Johns" due to the University's exercise of managerial prerogative and operational needs. That was the application of the wrong legal standard in the wrong forum.

PERC had already determined that the reassignments were disciplinary and not the exercise of a managerial prerogative. Once PERC made that decision, the Appellate Division was the only forum for a timely appeal. The standard of review for the PERC decision is "thoroughly settled" and a "administrative determination will stand unless it is clearly demonstrated to be arbitrary or capricious." City of Jersey City v. Jersey City PBA, 154 N.J. 555, 568 (1998). Instead of applying the reasonably debatable standard, the Trial Court should have vacated the arbitration award because it improperly ignored and effectively reversed PERC's determination that the reassignments were disciplinary.

## VI. CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Court vacate the Trial Court's February 14, 2025 order and final judgment and remand this matter for an order that grants the Union's application to vacate Arbitrator Townley's July 10, 2024 final opinion and award, remands the matter to the arbitrator for a new opinion and award that determines whether the University met its burden of proving that the disciplinary reassignments were for just cause. This Court should thus also dismiss the University's Cross-Motion to Confirm the Arbitration Award.

Respectfully submitted,

**Weissman & Mintz LLC**

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Dated: July 25, 2025

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|---|---|
| RUTGERS COUNCIL OF AAUP CHAPTERS, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS-AMERICAN FEDERATION OF TEACHERS, AFL-CIO,<br><br>Plaintiff/Appellant,<br><br>v.<br><br>RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,<br><br>Defendant/Respondent. | SUPERIOR COURT OF NEW JERSEY<br>APPELLATE DIVISION<br>DOCKET NO.: A-2192-24<br><br>On Appeal From:<br>SUPERIOR COURT OF NEW JERSEY<br>CHANCERY DIVISION<br>MIDDLESEX COUNTY<br>DOCKET NO.: MID-C-118-24<br><br>Sat Below:<br>Honorable Thomas Daniel McCloskey, J.S.C. |

# BRIEF ON BEHALF OF RESPONDENT RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY

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Dated: August 25, 2025

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## PRELIMINARY STATEMENT

Plaintiff/Appellant Union ("Union"), without basis in fact or law, seeks to overturn an arbitration decision grounded in decades of well-settled law pertaining to the limited jurisdiction of the Public Employment Relations Commission ("PERC") in scope of negotiations proceedings. Specifically, on July 10, 2024, Arbitrator Rosemary Townley issued an Arbitration Award in favor of Defendant/Respondent Rutgers University ("University") denying a grievance challenging changes the University made to the teaching assignments of Professor Kynan Johns ("Grievant"). The Union's continuing attempt to vacate this Arbitration Award is legally unsupportable and nothing more than an attempt to escape the Arbitrator's correct determination that the University did not breach the Parties' collective negotiations agreement.

Prior to the arbitration in this matter, the University filed a Petition for Scope of Negotiations with PERC, seeking to restrain the arbitration in part based on statutory managerial prerogative to make reassignment determinations. In response, PERC denied the University's request, determining that because, on the record before it, the reassignments appeared "predominately disciplinary," they were within the scope of negotiations, and therefore arbitrable.

During the ensuing arbitration, the University argued and presented evidence that the reassignments at issue had been contractually permissible based on

educational and operational needs rather than based on a disciplinary reason. On the basis of the evidence, the Arbitrator issued an Arbitration Award, in relevant part, denying the portion of the grievance related to the reassignments and agreeing with the University that there had been no contractual violation.

The Union moved to vacate the Arbitration Award, claiming that the Arbitrator had exceeded the scope of her authority and procured the Arbitration Award through undue means. The Union's argument was essentially that PERC's scope of negotiations decision precluded the Arbitrator from even considering any contractually based defenses other than providing "just cause" for discipline, regardless of any other contractual language. The Trial Court, relying on longstanding law, denied the Union's Motion to Vacate the Arbitration Award.

On appeal, the Union again argues the Arbitrator was not permitted to even consider the University's contractually permissible, non-disciplinary basis for the reassignments and was required by PERC's scope determination to ignore the contract and the evidence presented at the Arbitration and review the reassignments only as discipline. However, the Union's argument is fundamentally flawed.

Decades of well-settled New Jersey case law and PERC's own regulations make it clear that **PERC's jurisdiction in scope of negotiations proceedings is narrow, limited to addressing only the abstract issue of negotiability** and, where an issue is arbitrable, specifically allocate all other issues to the sound discretion of

the arbitrator. PERC has held in cases strikingly similar to the instant dispute that where a reassignment is arbitrable as a result of being deemed predominately disciplinary for scope purposes, the employer remains free to argue in the ensuing arbitration that the reassignments were instead justified by the employer's "operational needs." Accordingly, the Union's allegations that Arbitrator Townley "exceeded and imperfectly executed her authority" and "procured her Award by undue means" fall well short of the high burden required for vacation under the circumstances enumerated in either N.J.S.A. 2A:24-8(a) or 2A:24-8(d).

The Arbitrator was in no way hamstrung in her role by being precluded from determining that the University had contractually permissible, non-disciplinary reasons for the reassignments. The Arbitrator, within the scope of her authority, reviewed the contract and the evidence adduced at the hearing and determined that the reassignments at issue had not been based on discipline under the contract, but rather had been based on operational needs as contractually permitted.

Although the Union may not like or even agree with the Arbitrator's factual and contractual determinations, because there can be no doubt that the Arbitrator's determination was at the very least "reasonably debatable," her determination is entitled to the full measure of deference by this Court. Accordingly, and as detailed below, the University respectfully requests that this Court deny the Union's request to vacate the Trial Court's Order.

## PROCEDURAL HISTORY[1]

Plaintiff/Appellant Rutgers Council of AAUP Chapters, American Association of University Professors-American Federation of Teachers, AFL-CIO (hereinafter, the "Union") seeks to vacate, in part, the Final Opinion and Award issued by Arbitrator Rosemary Townley on July 10, 2024 (hereinafter, the "Arbitration Award") in favor of Defendant/Respondent Rutgers, The State University of New Jersey (hereinafter, the "University"). (Pa15.)

The University and the Union are Parties to a series of collective negotiations agreements, with the agreement relevant to the instant matter being effective from July 1, 2018 to June 30, 2022 (hereinafter, the "CNA"). (Pa57.) The Arbitration Award pertains to a grievance the Union filed on October 29, 2021 (hereinafter, the "Reassignment Grievance"), which challenged certain changes the University made to the teaching assignments of Kynan Johns (hereinafter, "Grievant" or "Professor Johns"), a professor at the Rutgers University Mason Gross School of the Arts ("MGSA") for the fall 2021 academic semester.

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[1] Citations to the record will be abbreviated as follows:
"Da" refers to the Appendix submitted by the University;
"Pa" refers to the Appendix submitted by the Union;
"Pb" refers to the brief on appeal submitted by the Union;
"T" refers to the transcript of the University and Union's oral argument before the Honorable Thomas D. McCloskey, J.S.C. on February 4, 2025.

This matter came before the Superior Court of New Jersey, Chancery Division, Middlesex County (hereinafter, the "Trial Court") on October 8, 2024 based on the Union's application for an Order to Show Cause, accompanied by a Verified Complaint pursuant to R. 4:67-1 and N.J.S.A. 2A:24-7. (Pa1.) The Union's Verified Complaint alleged a single count under N.J.S.A. 2A:24-8(a) and 2A:24-8(d), arguing Arbitrator Townley procured her Final Opinion and Award by "undue means" and exceeded her legal authority by effectively "reversing" PERC's findings of fact and conclusions of law and by shifting the burden of proof to the Union. (Pa10-11.) The Union's application sought an Order: (1) vacating the Arbitration Award as to the Reassignment Grievance; (2) allowing the matter to proceed summarily; and (3) awarding such other relief as the Trial Court deemed equitable and just.

On October 10, 2024, the Trial Court entered an Order to Show Cause and the University subsequently filed its Answer to the Verified Complaint (Pa126) and Cross-Motion to confirm the Arbitration Award. (Pa144.) On February 4, 2025, Judge McCloskey heard extensive oral argument on the Union's Motion and the University's Cross-Motion. On February 14, 2025, the Trial Court entered an Order and accompanying Statement of Reasons, which: (1) denied the Union's Motion for an Order to Show Cause in its entirety; (2) granted the University's Cross-Motion; and (3) confirmed the Arbitration Award. (Pa146.)

The Trial Court held that there was "no evidence suggesting Arbitrator Townley procured the Award through undue means or exceeded her powers" and that the burden of proof in an action to vacate an arbitration "lies on the Plaintiff, who failed to establish that the award violated the statute." (Pa164.) The Trial Court held that Arbitrator Townley was within her authority to determine the merits of the grievances and whether the CNA provided a defense for the reassignments—even if her determinations seemingly differed with PERC's—because PERC's role is limited to determining negotiability only and does not extend to the merits of the Reassignment Grievance and the availability of the University's contractual defenses. (Pa164.) According to the Trial Court:

> PERC does not decide the merits of a grievance. It is specifically restricted from finding "[w]hether the facts are as alleged by the grievant." N.J.A.C. 19:13-1.1 (b)(2). Nor does it decide "[w]hether a contract provides a defense to the employer's alleged action." N.J.A.C. 19:13-1.1 (b)(3). Instead, in connection with any scope of negotiations petition made, as here, it determines the legal arbitrability of a grievance sought to be submitted to binding arbitration pursuant to the collectively negotiated grievance/arbitration procedure that binds the parties.
>
> [(Pa164.)]

The Trial Court found that Article 15 of the CNA clearly grants the University the contractual right to assign personnel in alignment with its mission and faculty duties and PERC's scope of negotiations decision that the

Reassignment Grievance was arbitrable "did not, a fortiori, override this agreement," "[n]or did it preclude or deprive the University of its rights and defenses under this section of the agreement that the reassignments were non-disciplinary, but rather, for operational reasons and thus consonant with provisions of Article 15." (Pa167.) The Trial Court, after quoting the detailed factual findings made by the Arbitrator regarding the University's non-disciplinary operational reasons for Professor Johns' reassignments by MGSA Dean Jason Geary, concluded that Arbitrator Townley "properly executed her authority in denying [the Reassignment] Grievance [] and for the reasons she gave." (Pa169.)

Ultimately, after reviewing the law, the Trial Court agreed that long-standing case law precedent, as well as PERC's own regulations, made clear that PERC's jurisdiction with respect to scope of negotiations decisions was limited to making a determination on the abstract issue of negotiability, leaving to the jurisdiction of the Arbitrator all issues related to the merits of the Reassignment Grievance and interpretation of the CNA. The Trial Court found that Arbitrator Townley's determination of these contractual issues in the University's favor were at least "reasonably debatable," and concluded that the Arbitration Award is "justifiable or fully supportable in the record and therefore meets the highly

deferential reasonably debatable standard." (Pa169 (internal quotations omitted).) The Trial Court further explained:

> [B]ased on well-settled law, Arbitrator Townley was free to evaluate the facts of this matter pursuant to the parties' CNA, and was not precluded from determining that the University had contractually permissible, non-disciplinary reasons to reassign Professor Johns. The Plaintiff's allegations that Arbitrator Townley "exceeded and imperfectly executed [her] authority" and "procured her Award by undue means" are unsupported by the record and fall well short of the high preferential burden required for vacation under the circumstance enumerated in either N.J.S.A. 2A:24-8(a) or N.J.S.A. 2A:24-8(d).
>
> [(Pa169-170 (internal quotations omitted).)]

Thus, the Trial Court correctly concluded that Arbitrator Townley's Arbitration Award was not procured by undue means, nor was it the result of her exceeding or imperfectly executing her authority.

This appeal by the Union now follows. (Pa171.) For the reasons discussed in further detail below, the University respectfully requests that this Court deny the Union's request to vacate the Trial Court's Order and deny its request to remand for a new arbitral opinion.

## STATEMENT OF FACTS

The matter before this Court has its genesis in an October 29, 2021 Reassignment Grievance filed by the Union on behalf of Professor Kynan Johns.[2] (Pa16.) Professor Johns is (and at all times relevant hereto was) a professor in the Department of Music ("Music Department") at MGSA in New Brunswick, New Jersey. (Pa16.) The Reassignment Grievance challenged certain changes the University made to Professor Johns' teaching assignments at MGSA for the fall 2021 academic semester as unjust discipline. (Pa20.)

The CNA between the Parties set forth their negotiated agreement and their respective obligations to each other as to bargaining unit members. (Pa57-79.) In particular, Article 9 of the CNA sets forth the Parties' negotiated grievance procedure and provides, in relevant part, as follows:

> A. The purpose of this Article is to provide a fair and effective procedure for identifying issues, articulating and resolving problems, and disputes.
>
> A. Grievances under this Procedure.
>
> A. 1. A grievance under this Article 9 is defined as:
>
> Category One:
>
> A Category One grievance is a grievance alleging a breach, misinterpretation or improper

[2] As set forth in the Union's brief on appeal, "[t]he Union does not challenge through its Verified Complaint or this appeal the Union's separate grievance challenging Professor Johns' unpaid suspension for the Spring 2021 semester." (Pb14 n.2 (citing Pa5 n.1).)

application of the terms of this Agreement involving a mandatory subject of negotiations, including an allegation of unjust discipline.[4]

Excluded from Category One are all allegations concerning provisions of this Agreement when those provisions specify that grievances concerning them shall be considered as a Category Two grievance.

or

Category Two:

A Category Two grievance is a grievance alleging: a.) a violation, misinterpretation or improper application of the terms of this Agreement involving a non-mandatory subject of negotiations; or b.) there has been a misrepresentation, misapplication or violation of University policies, agreements, or administrative decisions, which intimately and directly affect the work and welfare of members of the unit.

Also included in Category Two are allegations concerning any matter which is mandated by law to be a subject of a grievance procedure of the Agreement, and which has not been provided for under Category One.

Also included in Category Two are allegations of harassment of a member of the negotiations unit that are not covered under Article 4 of this Agreement. For purposes of this paragraph, harassment is intentional persistent or repeated differential treatment that negatively and directly affects the work and welfare of a member of the negotiations unit.

*Footnote 4:* **Discipline is the formal imposition of a penalty in response to alleged wrongdoing**

> by a member of the negotiations unit (proceedings under Appendix H will handled as Category One grievances).
>
> [(Pa63) (emphasis added).]

Article 9 further provides, in relevant part, that "[t]he arbitrator shall not have the authority to amend, alter, or in any way change a University policy, established practice, or provision of [the CNA]." (Pa68.)

Article 15 of the CNA, entitled "Professional Duties," provides as follows:

> The parties recognize that the University accomplishes a variety of academic and professional services including undergraduate, graduate, and professional instruction, research and community service. The professional duties required of the faculty shall be in accordance with the mission of the University.
>
> **Individual workload assignments of members of the negotiations unit shall be consistent with the practice and policies of their department, program, or unit.**
>
> **Claims of inconsistency with such practices and policies by members of the negotiations unit shall be grievable as a Category Two grievance under the contract grievance procedure (Article 9).**
>
> [(Pa72) (emphasis added).]

The Reassignment Grievance proceeded though the contractual grievance process and ultimately the Union advanced the Reassignment Grievance to

arbitration pursuant to the Parties' CNA on or about February 24, 2022. (Pa68; Pa152.)

On May 2, 2022, the University filed a Scope Petition with PERC seeking to restrain arbitration of the Reassignment Grievance, asserting that the teaching load assignment was not within the scope of negotiations and, therefore, not legally arbitrable pursuant to the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("EERA" or the "Act"). (Pa81-92.) On November 22, 2022, PERC issued an Order denying the University's request for a restraint of arbitration. (Pa94-108.) PERC, in its decision regarding the scope of negotiations in this matter, stated that "public employers **may** agree to arbitrate transfers and reassignments that can be categorized as disciplinary based on the facts and assertions in the record." Rutgers, The State Univ. of New Jersey, P.E.R.C. No. 2023-17, 49 NJPER ¶ 62, p. 10 (2022) (emphasis added). (Pa103.) PERC determined that the matter was within the scope of negotiations, and therefore legally arbitrable, based on its assessment that, on the facts presented, the reassignments had been "predominantly disciplinary in nature." Id. at 11. (Pa104.)

The University accepted and did not appeal PERC's decision on the abstract issue that this matter was within the scope of negotiation. Thereafter, the Parties agreed to consolidate before the mutually-selected arbitrator both the

Reassignment Grievance as well as a separate grievance filed on November 20, 2020 which related to discipline imposed on Professor Johns based on certain conduct occurring on September 5, 2019 (referred to in the Arbitration proceedings as the "Intoxication Grievance").[3] (Pa16.) The Arbitration proceeded before Arbitrator Rosemary A. Townley, Esquire, and virtual hearings were conducted on October 10, 2023 and January 18, 2024. (Pa16; Da7; Da13.) During Arbitration, the University argued and presented documentary evidence and witness testimony that it had non-disciplinary, operational reasons to reassign Professor Johns in the fall of 2021. (Pa17; Pa30-33; Pa51-52.) The Parties submitted comprehensive post-hearing briefs to the Arbitrator. (Pa17-18.)

Thereafter, on July 10, 2024, Arbitrator Townley issued a Final Opinion and Award in favor of the University with respect to both grievances. (Pa15-55.) Arbitrator Townley denied the Reassignment Grievance based on the evidence presented by the University that the University based its decision on its operational needs rather than discipline, finding:

> Rutgers did not discipline Professor Johns when it assigned him a different schedule for his return in the

[3] The Arbitration also addressed a separate grievance, referred to as the "Intoxication Grievance," that for the sake of convenience the Parties agreed to have heard before Arbitrator Townley at the same time as the Reassignment Grievance. (Pa16.) As previously mentioned, the Union neither challenged the Intoxication Grievance in its Verified Complaint nor on appeal.

> Fall of 2021 because the Music Department curriculum had changed in focus and direction under the leadership of the new Dean, Jason Geary, who started in 2020 and adopted a new approach to guide the Department.
>
> [(Pa51).]

In reaching her determination that the University did not discipline Professor Johns, Arbitrator Townley made a contractual determination based on the specific factual circumstances underlying the decision to reassign as set forth by various witnesses during the hearing. (Pa51-55.)

## STANDARD OF REVIEW

As noted in the Union's Appellate Brief (Pb13), the Appellate Division's review of the Trial Court's decision in the instant matter is de novo. Serico v. Rothberg, 234 N.J. 168, 178 (2018); Kieffer v. Best Buy, 205 N.J. 213, 222 (2011); Goffe v. Foulke Mgmt. Corp., 238 N.J. 191, 207 (2019). That de novo review, however, remains constrained to the "very limited" scope of judicial review for arbitration awards. Bound Brook Bd. of Educ. v. Ciripompa, 228 N.J. 4, 11 (2017). See also Borough of Carteret v. Firefighters Mut. Benevolent Ass'n, Loc. 67, 247 N.J. 202, 205 (2021) (reversing Appellate Division decision vacating an arbitration award based on the appellate court's substitution of its

own judgement for that of the arbitrator, which the Court found at least reasonably debatable).

N.J.S.A. 2A:24-1 to 2A:24-11 sets out the legal standards to be applied with respect to enforcement of collectively negotiated arbitration agreements, including actions to confirm or vacate awards rendered pursuant to such agreements. New Jersey courts favor arbitration awards, which "are generally presumed to be confirmed unless one of the statutory bases for vacation is proven pursuant to N.J.S.A. 2A:24-8." Loc. No. 153, Off. & Pro. Emps. Int'l Union, AFL-CIO v. Trust Co. of New Jersey, 105 N.J. 442, 442 (1987); Kearny PBA Loc. #21 v. Town of Kearny, 81 N.J. 208, 221 (1979); State v. State Troopers Fraternal Ass'n, 91 N.J. 464, 469 (1982).

N.J.S.A. 2A:24-8 provides, inter alia, that:

> 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.**
>
> [N.J.S.A. 2A:24-8(a)-(d) (emphasis added).]

The complaining party bears the burden of establishing that the award clearly violates the statute. Anco Prods. Corp. v. T.V. Prods. Corp., 23 N.J. Super. 116, 124-25 (App. Div. 1952).

For purposes of N.J.S.A. 2A:24-8(a), "undue means" is narrowly interpreted to include only those cases 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." Sanjuan v. Sch. Dist. of W. New York, Hudson Cnty., 256 N.J. 369, 309 (2024). See also, e.g., Yarborough v. State Operated Sch. Dist. of City of Newark, 455 N.J. Super. 136, 139-40 (App. Div. 2018). "Undue means" does not include situations in which the arbitrator "bases his decision on one party's version of the facts, finding that version to be credible." Loc. No. 153, 105 N.J. at 450 n.1.

With respect to claims pursuant to N.J.S.A. 2A:24-8(d) that an arbitrator exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made," courts must review whether the "arbitrator's award '[was] consonant with the matter submitted. Otherwise, the determination is contrary to the authority vested in

him.'" Sanjuan, 256 N.J. at 382 (quoting Grover v. Universal Underwriters Ins. Co., 80 N.J. 221, 231 (1979)).

As noted above, it is well-settled that a court's "review of an arbitration award is very limited." Bound Brook, 228 N.J. at 11 (quoting Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko, 202 N.J. 268, 276 (2010)). Courts are required to treat an arbitrator's award with "considerable deference" based on the "strong preference for judicial confirmation of arbitration awards." Borough of E. Rutherford v. E. Rutherford PBA Loc. No. 275, 213 N.J. 190, 201 (2013) (quoting Middletown Twp. PBA Loc. 124 v. Twp. of Middletown, 193 N.J. 1, 10 (2007)). "An arbitrator's award is not to be cast aside lightly. It is subject to being vacated only when it has been shown that a statutory basis justifies that action." Ibid. (quoting Kearny PBA Loc. #21, 81 N.J. at 221).

Pursuant to the "extremely deferential" standard of review applicable to arbitration awards issued under a collectively negotiated agreement, "an award will be confirmed 'so long as the award is reasonably debatable.'" Policemen's Benevolent Ass'n, Loc. No. 11 v. City of Trenton, 205 N.J. 422, 428-29 (2011) (quoting Linden Bd. of Educ., 202 N.J. at 276) (emphasis added). An arbitrator's interpretation of a collective negotiations agreement is reasonably debatable if it is "'justifiable' or 'fully supportable in the record.'" Id. at 431 (quoting Kearny PBA Loc. #21, 81 N.J. at 223-24). "[I]f 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.

Further, "[u]nder the 'reasonably debatable' standard, a court reviewing [a public sector] arbitration award '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.'" E. Rutherford PBA Loc. No. 275, 213 N.J. at 201-02 (alteration in original) (quoting Middletown Twp., 193 N.J. at 11). "Courts are not to 'second guess' an arbitrator's interpretation[.]" Id. at 202 (quoting State v. Int'l Fed'n of Pro. & Tech. Eng'rs, Loc. No. 195, 169 N.J. 505, 514 (2001)). "Thus, if the arbitrator's contractual interpretation is 'reasonably debatable,' [this court] must defer to that interpretation." Int'l Fed'n of Pro. & Tech. Eng'rs, 169 N.J. at 514. This is because "where a collective bargaining agreement provides for binding arbitration, 'it is the arbitrator's construction that is bargained for,' and not a court's construction." City of Trenton, 205 N.J. at 429 (quoting Linden Bd. of Educ., 202 N.J. at 276).

## LEGAL ARGUMENT

### I. Contrary to the Union's Allegations, the Arbitrator Did Not Exceed or Imperfectly Execute Her Authority Pursuant to N.J.S.A. 2A:24-8(d).

The Union's entire legal argument offered in support of its Appellate Brief relies on a basic premise that is demonstrably wrong. Just as it did before the

Trial Court, the Union argues that Arbitrator Townley exceeded and imperfectly executed her authority by finding the reassignment decision was not based on discipline and did not violate the Parties' CNA. (Pb14-26; Pa10.) The Union's Appellate Brief does nothing more than rehash its circular arguments below, namely, that by determining the University had operational, non-disciplinary bases for the reassignments, Arbitrator Townley effectively "reversed" PERC's scope of negotiations decision and improperly shifted the burden of proof from the University (to prove the discipline was for just cause) to the Union (to prove the discipline was unjust). (Pb25-26.) However, for the reasons discussed at length in the University's Cross-Motion and during oral argument, and as fully set forth herein, the Union's arguments are fundamentally flawed and lack any basis in law or fact. (T15-5 to 18-8; T20-14 to 25-16.)

### A. PERC's scope of negotiations determination did not legally or factually preclude Arbitrator Townley from determining that the University's operational needs were the basis for the reassignment decision, rather than discipline.

The Union's entire appellate argument rests on the legally unsupported foundation that elides the simple fact that, although PERC's scope of negotiations decision determined that this matter could, on balance, proceed to arbitration, under well-settled case law the Arbitrator retained authority to hear and adjudicate all contractually derived arguments and ultimately determine whether or not the University's decision to reassign some of Grievant's duties

violated the CNA. The law is clear that in this case, Arbitrator Townley was not compelled to determine that the reassignment decision was disciplinary or to ignore the University's contractual arguments and evidence in favor of this conclusion. The Union's arguments to the contrary fly in the face of decades of well-settled legal precedent reinforcing the strict confines of PERC's scope of negotiations jurisdiction, as well as PERC's own regulations.

Since the 1975 amendments to the Act, PERC has been given jurisdiction to adjudicate matters related to the Act, including both unfair practice proceedings pursuant to N.J.S.A. 34:13A-5.4(c) and scope of negotiations proceedings pursuant to N.J.S.A. 34:13A-5.4(d). N.J.S.A. 34:13-A-5.4(d) sets forth an adjudicatory procedure for scope proceedings that is separate and distinct from the process applicable to an unfair practice proceeding. Then, as now, the statutory language provides:

> The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The commission shall serve the parties with its findings of fact and conclusions of law. Any determination made by the commission pursuant to this subsection may be appealed to the Appellate Division of the Superior Court.
>
> [N.J.S.A. 34:13-A-5.4(d).]

PERC's jurisdiction with respect to making scope determinations is both primary and exclusive. State v. State Supervisory Emps. Ass'n., 78 N.J. 54, 83 (1978). Loc. 195, IFPTE v. State, 88 N.J. 393, 404-05 (1982), establishes the legal standard for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
>
> [Ibid.]

Using this standard, PERC is required to make scope of negotiations decisions on a case-by-case basis, balancing the parties' interests in light of the particular facts and arguments presented. Troy v. Rutgers, 168 N.J. 354, 383 (2001); City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-75 (1998).

The substantive decision to transfer or reassign an employee is generally not arbitrable because public 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. See, e.g., Loc. 195, 88 N.J. at 404-05. Although the substantive decision to transfer or reassign an employee is not arbitrable, since the 1982 "disciplinary amendments" to N.J.S.A. 34:13A-5.3, disciplinary review procedures are mandatorily negotiable and parties may (but are not required to) agree to binding arbitration as a means for resolving a dispute over a disciplinary determination. Accordingly, it is well-settled that public employers may agree to arbitrate transfers and reassignments that can be categorized as disciplinary based on the facts and assertions in the record. See, e.g., City of Plainfield, P.E.R.C. No. 2021-32, 47 NJPER ¶ 89 (2021); Rutgers, The State Univ., P.E.R.C. No. 2012-14, 38 NJPER ¶ 45 (2011); Bergen Cnty. Vocational Schs. Dist. Bd. of Educ., P.E.R.C. No. 2005-4, 30 NJPER 296 (¶104 2004). Accordingly, for the purposes of assessing if such an issue is within the scope of negotiations, PERC "must make the determination whether a transfer [or reassignment] is non-disciplinary and thus non-arbitrable or disciplinary and arbitrable." Cape May Cnty. Bridge Comm'n and Loc. No. 196, IFPTE, NJPER Supp. 2d ¶ 135 (App. Div. 1985), aff'ing P.E.R.C. No. 84-133, 10 NJPER ¶ 15158 (1984).

It is also clear that PERC's jurisdiction and authority with respect to scope determinations are significantly different from its authority to adjudicate unfair practice allegations. In In re Bd. of Educ. of the Borough of Tenafly, P.E.R.C.

No. 86, 1 NJPER 18 (1975), PERC addressed the significant differences between unfair practice proceedings and scope of negotiation proceedings. "Scope of negotiations proceedings under subsection (d) are markedly different from unfair practice proceedings under subsection (c), both procedurally and, perhaps more importantly, philosophically." Id. at 9. Unlike unfair practice proceedings,

> [S]cope of negotiations proceedings: do not allege of violation of the law; are not restricted by a period of limitations; do not involve Commission processing or Commission conversion, by complaint or otherwise, into formal proceedings; will not in most cases involve disputed factual issues necessitating evidentiary hearings and thus are not made subject to the technical requirements of the Administrative Procedure Act pertaining to contested cases; do not impose a prosecutorial function, or a burden of proof on either party.
>
> [Ibid.]

Tenafly additionally noted that:

> Perhaps the most fundamental distinction between the two types of proceedings is that, under [unfair practice proceedings], [PERC's] function is to prevent violations of the Act, whereas under [scope proceedings] there is no element of prevention whatsoever – rather [PERC] declares and determines whether a matter in dispute is within the scope of collective negotiations, in order to alleviate uncertainty and insecurity with respect thereto.
>
> [Id. at 10.]

From almost the very inception of scope of negotiations proceedings, PERC and the New Jersey courts have been painstakingly clear regarding the very narrow limits of PERC's jurisdiction in scope of negotiations proceedings, and that such jurisdiction goes no further than making a determination whether, on balance, an issue is within the scope of negotiations or not. In Bd. of Educ. of the City of Englewood, P.E.R.C. No. 76-23, 2 NJPER 72 (1976), PERC stated as follows:

> It is particularly important in cases such as the instant one to initially clarify precisely what the Commission does and does not determine in a scope proceeding. The Commission will not construe the parties' agreement. Rather, it will determine whether the subjects covered by a contractual provision are within the scope of collective negotiations. As has been the case historically, disputes concerning the meaning of a given contractual provision are to be resolved by the courts or, if pertinent, the arbitrator.

In In re Hillside Bd. of Educ., P.E.R.C. No. 76-11, 1 NJPER 55, 57 (1975) (emphasis added), PERC, citing approvingly its prior decision in Englewood, explained the core and limited nature of any scope determination as follows:

> **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 Commission in a scope

> proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

The New Jersey Supreme Court, in its seminal scope of negotiations decision, Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 154 (1978), fully quoted and adopted the above-quoted language from Hillside in setting out the inherent limitations on any decision PERC is empowered to make under its scope of negotiations jurisdiction. According to the Court in Ridgefield Park, "[t]he arbitrator's function is to comply with the authority the parties have given him in the agreement. Assuming that the item is a proper subject of arbitration under the agreement, the arbitrator will reach the merits and render an award." Id. at 155 (emphasis added). The Court specifically noted that PERC and the arbitrator "**have distinct functions under [this] scheme.**" Ibid. (emphasis added).

Of course, while PERC's jurisdiction is confined to addressing the abstract issue, the statute requires PERC "to make its findings of fact and conclusions of law" as to "whether a matter in dispute is within the scope of collective negotiations." N.J.S.A. 34:13A-5.4(d). However, it is clear that these findings and conclusions relate and are limited to the "abstract issue" of whether "the subject matter in dispute is within the scope of collective negotiations." Ridgefield Park, 78 N.J. at 154. Accordingly, it is beyond cavil that PERC's

scope of negotiations decision can neither be considered an interpretation of the Parties' CNA, nor determinative of any contractual result.

Over the years, PERC has on almost innumerable occasions cited both the Court's Ridgefield Park decision, as well as PERC's own earlier decision in Hillside, to highlight the narrow confines of its scope of negotiations jurisdiction. As a result, PERC has consistently declined to engage in contract interpretation and has left entirely to the arbitrator any determination as to the merits of the grievance and the applicability of any proffered contractual defenses. For example, in In re Fairfield Twp. Bd. of Educ., P.E.R.C. No. 98-32, 23 NJPER ¶ 28268 (1997) (emphasis added), PERC stated:

> [W]here a grievance seeks relief that would not significantly interfere with the determination of governmental policy, we will declare the subject of the grievance mandatorily negotiable and legally arbitrable. **In such cases, we do not restrain arbitration. We do so whatever our views might be on the merits of the claim. We consider only the abstract negotiability of the contractual claim and have no power to consider the contractual merits of a claim, even if we believe a claim to be frivolous.**

See also, e.g., Ocean Cnty. Vocational Tech. Sch., P.E.R.C. No. 2019-29, 45 NJPER ¶ 78 (2019) ("The Board's contractual defenses . . . [are] outside of our scope of negotiations jurisdiction and may be raised to the arbitrator."); State of New Jersey (Dep't of Corrs.), P.E.R.C. No. 2019-9, 45 NJPER 114 (¶30 2018) ("We also note that in making a scope of negotiations determination, we do not

interpret the CNA. Our jurisdiction is limited to deciding whether an issue is mandatorily negotiable."); State of New Jersey, Kean Univ., P.E.R.C. No. 2015-18, 41 NJPER ¶ 58 (2014) ("We consider the negotiability of the dispute in the abstract and express no opinion about the contractual merits of the grievance or any contractual defenses the State may have."); Cnty. of Cumberland, P.E.R.C. No. 2012-47, 38 NJPER ¶ 110 (2012) ("We do not consider the merits of the grievance or any contractual defenses the employer may have."); In re Caldwell-West Caldwell Bd. of Educ. and Caldwell-West Caldwell Educ. Ass'n, P.E.R.C. No. 87-136, 13 NJPER 358 (¶18147 1987) ("At the outset of our analysis, we stress the narrow boundaries of our scope of negotiations jurisdiction . . . Thus, we do not consider the merits of the Association's grievance or any of the Board's potential defenses."); Franklin Lakes Bd. of Educ., P.E.R.C. No. 95-24, 20 NJPER 395 (¶25198 1994), aff'd, 21 NJPER 362 (¶26224 App. Div. 1995)¶ ("Our scope-of-negotiations jurisdiction is narrow and precludes us from interpreting or applying contractual provisions to determine the contractual merits of a grievance."); Passaic Cnty. Park Comm'n, P.E.R.C. No. 85-57, 11 NJPER ¶ 16008 n.2 (1984) ("We do not have jurisdiction in scope of negotiations cases to decide questions of contractual arbitrability or to review the merits of a contractual claim or defense.").

The limited nature of PERC's scope of negotiations jurisdiction is also specifically delineated in PERC's own regulations, which provide as follows:

> (a) N.J.S.A. 34:13A-5.4(d) provides that the Commission shall at all times have the power and duty, upon the request of any public employer or exclusive representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations. The procedure set forth in this chapter is intended to avoid protracted administrative litigation with respect to disputes that normally will involve solely questions of law and policy. Accordingly, scope of negotiations proceedings will normally be expeditiously resolved on the basis of the parties' submissions.
>
> (b) Where the dispute concerns the legal arbitrability of a grievance sought to be submitted to binding arbitration pursuant to a collectively negotiated grievance/arbitration procedure, **the Commission will not determine**:
>
> **1. Whether the grievance is covered by the arbitration clause of an agreement;**
>
> **2. Whether the facts are as alleged by the grievant;**
>
> **3. Whether a contract provides a defense for the employer's alleged action;**
>
> 4. Whether there is a valid arbitration clause in an agreement; or
>
> **5. Any other similar question.**
>
> [N.J.S.A. 19:13-1.1 (emphasis added).]

Directly contrary to the entire thrust of the Union's arguments in its Appellate Brief, a determination by PERC that an action is "predominately

disciplinary" for the purposes of making a scope determination does not preclude an employer from presenting evidence at a subsequent arbitration that the contested action was not disciplinary under the contract but rather was justified instead by its "operational needs." For example, in Cnty. of Hudson, P.E.R.C. No. 87-20, 12 NJPER 742 (¶17278 1986), the public employer sought to restrain arbitration of a grievance regarding certain employee reassignments, asserting that such reassignments were within its managerial prerogative to determine how to use its staff to best serve the public, and therefore were neither negotiable nor arbitrable. The union countered that the reassignments were disciplinary, and therefore reviewable through arbitration. Id. PERC, after laying out the "narrow boundaries" of its scope of negotiations jurisdiction and quoting Ridgefield Park, determined that for scope purposes, the reassignments "predominantly involved a form of discipline" and were therefore arbitrable. Id. However, PERC then took pains to emphasize that its decision would not deprive the employer of any contractual defense in the arbitration or from asserting that its action was not actually disciplinary, stating:

> We again emphasize that we have not considered any contractual defenses the County may have. **The County is free to argue before the arbitrator that the reassignments were justified in light of employee's abilities and the County's operational needs.**
>
> [Id. (emphasis added).]

Similarly, in a recent case involving a different Rutgers University matter, the University sought to restrain arbitration of a transfer of a security officer from one campus to another. Rutgers, The State Univ., P.E.R.C. No. 2020-21, 46 NJPER 188 (¶47 2019), rev'd on other grounds, In re Rutgers, The State Univ. of New Jersey and Off. Pro. Emps. Int'l Union, Loc. 153, No. A-1228-19, 2021 WL 2068934 (App. Div. May 24, 2021). In that case, PERC stated that although "the substantive decision to transfer or reassign an employee is preeminently a policy determination and beyond the scope of negotiations or binding arbitration . . . Employers may agree to arbitrate certain types of disciplinary disputes, including transfers and assignments that can be categorized as disciplinary based on the facts and assertions in the record." Id. (emphasis added). PERC then determined that "on balance, the grievant's transfer is predominantly disciplinary and therefore arbitrable." Id. However, immediately thereafter, PERC again emphasized that:

> As in Hudson [supra], the transfer of the grievant was precipitated by an alleged incident of misconduct . . . **and no operational justification was provided by the employer. Rutgers is free to argue before the arbitrator, among other arguments, that the transfer was justified in light of the grievant's abilities and the University's operational needs.**
>
> [Id. (emphasis added).]

Thus, although in the present matter PERC determined in its scope decision that the University had not presented operational justifications for Grievant's transfer, it is clear that in any ensuing arbitration, the University remained free to present argument and evidence that Grievant's reassignments were based on Grievant's abilities and the University's operational needs.

The Union's conclusory allegation in its Appellate Brief that Arbitrator Townley "reversed PERC" and "circumvented PERC's primary jurisdiction" (Pb14-15) is unequivocally wrong—both as a factual and legal matter. PERC determined that this matter was within the scope of negotiations and therefore permitted to proceed to arbitration—and based on fifty years of well-settled law, that was the jurisdictional limit of PERC's scope of negotiations authority. At no time thereafter did the Arbitrator ever make any determination that the underlying Grievance was outside the scope of negotiations, and throughout the arbitration process both Parties and the Arbitrator accepted this matter as fully within the scope of arbitration. From a legal perspective, the Union's claim ignores the highly circumscribed nature of PERC's scope of negotiations jurisdiction—which is to decide solely whether an issue, on balance, is or is not within the scope of negotiations.

In rendering her Final Award, Arbitrator Townley did exactly what PERC has unequivocally stated arbitrators are permitted to do—she made factual

findings regarding the merits of the grievance before her and the availability of the University's contractual defenses. Thus, she acted entirely within her authority in finding that the reassignments were not disciplinary under the CNA, but rather for operational reasons which is consonant with the provisions of Article 15.

### B. Contrary to the Union's allegations, the Scotch Plains-Fanwood decision is wholly inapplicable to the instant dispute.

As support for its claim that Arbitrator Townley was "bound by and 'had no alternative' than to accept PERC's findings that Professor Johns' reassignments were disciplinary," the Union argues for the application of a case involving an entirely different statutory scheme under the EERA than what is applicable to the present case. (Pb23-24 (citing Scotch Plains-Fanwood Bd. of Educ. v. Scotch Plains-Fanwood Educ. Ass'n, 139 N.J. 141, 155 (1995).) Although the Union acknowledges in its Appellate Brief, as it must, that Scotch Plains-Fanwood was decided under the "'Scope of Negotiations' amendments to the EERA . . . [which] are not applicable to the parties in this appeal," the Union continues to baselessly insist that it be applied. (Pb22 (citing N.J.S.A. 34:13A-22).) However, it is clear that the statutory analysis in Scotch Plains-Fanwood is simply not applicable in the present case and, as a result, the Supreme Court's reasoning in that case is **completely inapposite** to the instant dispute.

Unlike the present case, the Scotch Plains-Fanwood decision hinges on the application of N.J.S.A. 34:13A-22 et seq., which are often referred to as the "Scope Amendments" to the EERA. The Scope Amendments, which were initially passed in 1989, are specifically limited in application to employees of local school districts and county colleges, **but do not apply to any other public employers**, including state colleges or universities. N.J.S.A. 34:13A-22.[4] The Scope Amendments, in particular N.J.S.A. 34:13A-29, **mandate that regardless of any contractual agreement**, binding arbitration be the "terminal step" with respect to disputes concerning discipline for covered employees, and that in all such cases, "the burden of proof shall be on the employer covered by this act seeking to impose discipline as that term is defined in this act."[5] N.J.S.A. 34:13A-29, subds. a, b.

[4] Pursuant to N.J.S.A. 34:13A-22, "'Employer' means any local or regional school district, educational services commission, jointure commission, county special services school district, or board or commission under the authority of the commissioner or the State Board of Education, and with respect to section 8 of P.L.1989, c. 269 (C.34:13A-29), any county college under the authority of the Secretary of Higher Education." N.J.S.A. 34:13A-22.

[5] For employees **not covered** by the Scope Amendments (i.e., those not employed by a local school district or a county college employees), the normal standard of N.J.S.A. 34:13A-5.3 applies, which does not mandate binding arbitration but simply permits public employers and employee organizations to agree to "provide for binding arbitration as a means for resolving disputes" and leaves to the parties' negotiated agreement any allocation of burdens or other defenses. N.J.S.A. 34:13A-5.3. **Thus, unions and employers not covered by the Scope Amendments are free**

In addition, among other things, the Scope Amendments were intended to address transfers and increment withholding decisions affecting school board employees. N.J.S.A. 34:13A-25 provides that while transfers between work sites are not negotiable, transfers between worksites of school board employees for disciplinary reasons are outright banned. N.J.S.A. 34:13A-26 addresses increment withholding, stating that increment withholding for predominately disciplinary reasons shall be subject to the procedures set out in N.J.S.A. 34:13A-27.[6] N.J.S.A. 34:13A-27(a) specifically gives PERC the jurisdiction to make a binding determination regarding the actual basis for such decisions, whether they are predominately disciplinary or not, in order to effectuate the specific terms of the Scope Amendments. In cases where a transfer is deemed by PERC to be disciplinary and therefore illegal under the Scope Amendments, the statute provides PERC with the primary authority to order remedial action to reverse such illegal transfer. N.J.S.A. 34:13A-27(b). In cases where PERC determines an increment withholding decision to be predominantly disciplinary,

**to negotiate and have enforced whatever definitions or terms suit them in related to transfers, increment withholdings, or discipline.**

[6] Absent the Scope Amendments, increment withholding of board of education teaching staff members would be exclusively governed by N.J.S.A. 18A:29-14, which specifically permits a board of education to withhold an increment for any teaching staff member "for inefficiency or other good cause." N.J.S.A. 18A:29-14.

the matter is required to be submitted to binding arbitration as a disciplinary determination. See N.J.S.A. 34:13A-27(c) and 34:13A-29(a).

As aptly set forth by this Court in an unpublished decision also involving Rutgers University,

> **The act [N.J.S.A. 34:13A-22 et seq.] has no application here** because by definition the act applies only to employers that are "local or regional school district[s], educational services commission[s], jointure commission[s], county special services school district[s], or board[s] or commission[s] under the authority of the [Commissioner of Education] or the State Board of Education." N.J.S.A. 34:13A-22. Rutgers does not fall within the list of employers to whom the act applies. **As a result, the act's requirements, including those set forth in N.J.S.A. 34:13A-25 and -27, do not establish the standard for a scope of negotiations determination for Rutgers or any other public employer that does not fall within the act's definition of "employer" contained in N.J.S.A. 34:13A-22.**
>
> [In re Rutgers, The State Univ. of New Jersey and Off. Pro. Emps. Int'l Union, Loc. 153, 47 NJPER ¶ 116 n.3, 2021 WL 2474133 (App. Div. May 24, 2021) (emphasis added). (Da6.)]

Further, by their very terms, the Scope Amendments make clear that the rights and authorities set forth therein are not for general application and not intended to apply outside of the specific confines of the matters addressed therein and as to the particular class of covered employees (only local board of

education and county college employees). Indeed, N.J.S.A. 34:13A-28 specifies as follows:

> Nothing in this act shall be deemed to restrict or limit any right established or provided by section 7 of P.L.1968, c. 303 (C.34:13A-5.3); **this act shall be construed as providing additional rights in addition to and supplementing the rights provided by that section [N.J.S.A. 34:13A-5.3].**
>
> [N.J.S.A. 34:13A-28 (emphasis added).]

Instead, this Court's review of the propriety of Arbitrator Townley's Award in light of PERC's earlier scope decision is governed by N.J.S.A. 34:13A-5.3, which provides that grievance and disciplinary review procedures are subject to negotiation and are controlled by the terms of the Parties' Agreement:

> 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.**
>
> [N.J.S.A. 34:13A-5.3 (emphasis added).]

Critically, the Union's continued attempt to resort to the standards and reasoning applied in Scotch Plains-Fanwood flies in the face of the Cnty. of

Hudson and Rutgers decisions, which are directly on point here, and which the Union conveniently fails to address in its Appellate Brief. See Cnty. of Hudson, P.E.R.C. No. 87-20, 12 NJPER 742 (¶17278 1986); Rutgers, The State Univ., P.E.R.C. No. 2020-21, 46 NJPER 188 (¶47 2019). Consistent with PERC's limited jurisdiction in scope of negotiations decisions, and as PERC specifically stated in both Cnty. of Hudson and Rutgers, the University was free to argue before Arbitrator Townley—and Arbitrator Townley was permitted to determine—that the reassignment decision was contractually permitted based on the University's operational needs rather than the result of any actual discipline. Ibid.

Accordingly, for the reasons set forth in Section I.A above, even though PERC, within its limited jurisdiction, determined that the reassignment of Grievant in this matter was, on balance, "predominantly disciplinary" and therefore permissible to arbitrate, when the Reassignment Grievance proceeded to binding arbitration the Arbitrator was not only authorized, but was required to consider any arguments made regarding the terms of the Parties' CNA and whether the reassignments were the result not of discipline but of the University's operational needs as permitted by the terms of the Agreement. PERC's jurisdiction in a scope proceeding is narrow and therefore its decision in this matter is similarly constrained, and does not impact the University's right

to assert contractual defenses or the evidentiary support thereof. See Cnty. of Hudson, 12 NJPER at ¶17278 ("The County is free to argue before the arbitrator that the reassignments were justified in light of employee's abilities and the County's operational needs"); Rutgers, The State Univ., 46 NJPER at ¶47 (Although "no operational justification was provided by the employer" to PERC, "Rutgers is free to argue before the arbitrator, among other arguments, that the transfer was justified in light of the grievant's abilities and the University's operational needs.").

### C. Arbitrator Townley properly considered the University's contractual arguments before her and did not impermissibly shift the burden of proof in determining the reassignment decision was not disciplinary.

The Union next contends, as it did before the Trial Court, that the Arbitrator, in considering the University's arguments at arbitration in support of the operational bases for the reassignments, effectively shifted the burden of proof at arbitration from the University to the Union. (Pb14; Pb25-26.) However, the Union's argument necessarily fails for the reasons discussed in Sections I.A and I.B, above. The Union's continued attempts to reason that the Arbitrator conflated the negotiated grievance procedure under the CNA with PERC's scope of negotiations procedures not only are unsupported by any record evidence, but also continue to mistakenly insist that the Arbitrator somehow is prohibited from doing what New Jersey courts, PERC, and PERC's

own regulations have explicitly stated is the Arbitrator's role—to consider arguments from the University regarding its contractual defenses to the Union's allegation that it violated the CNA.

As set forth at length above, PERC and the New Jersey courts have consistently held that PERC's scope of negotiations determination relates only to the abstract issue of negotiability. Further, PERC itself has repeatedly made clear that even when it determines that a matter is arbitrable based on its determination that the action was, on balance, predominately disciplinary, the employer remains free to argue, and the arbitrator remains free to consider, non-disciplinary bases for the contested action. See, e.g., Cnty. of Hudson, 12 NJPER at ¶17278; Rutgers, The State Univ., 46 NJPER at ¶47. As the University explained in its Cross-Motion below and during oral argument before Judge McCloskey (T15-5 to T16-2; T19-18 to T20-1; T21-6 to T25-8), Arbitrator Townley did not misapply the burden of proof but rather made factual findings based on the evidence and testimony presented before her during arbitration. In evaluating the facts and construing the contract based on these facts, which is indeed her role as an arbitrator, she properly determined that the University had proven that it did not violate the CNA.

## II. Contrary to the Union's Allegations, the Arbitrator Did Not Procure the Arbitration Award by Undue Means Pursuant to N.J.S.A. 2A:24-8(a).

Next, the Union claims the Arbitration Award should be vacated under N.J.S.A. 2A:24-8(a) for the same reasons it asserted with respect to N.J.S.A. 2A:24-8(d). For the same reasons discussed in Section I above, the Union's argument does not pass muster, as it ignores decades of legal precedent highlighting the limited nature of PERC's jurisdiction in scope of negotiations matters, confined only to the abstract issue of negotiability and leaving all other issues to the sound discretion of the Arbitrator. Notably, the entire arbitration process in this matter would have been for naught if PERC, and not the Arbitrator, was indeed responsible for making the types of decisions the Union claims—namely, making factual findings based on the Parties' evidence and testimony to reach the merits of the contractual grievance. This result would be directly contrary to PERC's repeated admonitions that its scope of negotiations determinations are not determinations related to contractual language and do not serve to preclude any defenses available under the parties' agreement. See, e.g., Cnty. of Hudson, 12 NJPER at ¶17278; Franklin Lakes Bd. of Educ., P.E.R.C. No. 95-24, 20 NJPER 395 (¶25198 1994); In re Fairfield Twp. Bd. of Educ., P.E.R.C. No. 98-32, 23 NJPER 541 (¶28268 1997); Cnty. of Cumberland,

P.E.R.C. No. 2012-47, 38 NJPER ¶ 110 (2012). See also Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ.,78 N.J. 144, 154 (1978).

As stated above, consistent with PERC's limited jurisdiction in scope of negotiations decisions, and as PERC specifically stated in both Cnty. of Hudson and Rutgers, the University was free to argue before Arbitrator Townley, and Arbitrator Townley was permitted to determine, that based on the facts in the record, Grievant's reassignments were due to the University's operational needs as specifically permitted in the Parties' CNA rather than the result of any actual discipline as that term is defined in the CNA. See Cnty. of Hudson, 12 NJPER at ¶17278 ("The County is free to argue before the arbitrator that the reassignments were justified in light of employee's abilities and the County's operational needs"); Rutgers, 46 NJPER at ¶47. This in no way amounts to "undue means." Arbitrator Townley did exactly what PERC has unequivocally stated was permitted—she considered the facts and assertions in the record and found that Grievant's reassignments were not disciplinary, but rather were in fact justified in light of Grievant's abilities in the context of the University's operational needs. As such, the Union has no support for its allegation that Arbitrator Townley's decision rests on a mistake of law and must be vacated under N.J.S.A. 2A:24-8(a).

## III. This Court Should Affirm the Order Confirming the Arbitration Award Because the Trial Court Properly Interpreted the EERA and Correctly Applied the "Reasonably Debatable" Standard of Review.

The Union spends the final six pages of its Appellate Brief repeating its legal arguments, but rather than focusing on its claims that Arbitrator Townley erred, here it argues that the Trial Court made the same alleged errors as Arbitrator Townley in "appl[ying] the wrong legal standard in the wrong forum." (Pb28-33.) Yet again, the Union completely misses the mark in arguing that under Scotch Plains-Fanwood and In re City of Newark v. Newark Council 21, N.J. Civ. Serv. Ass'n, 320 N.J. Super. 8 (App. Div. 1999), this Court should apply a different standard of review. (Pb30). For the same reasons outlined in Sections I and II above, the Trial Court properly held that PERC's scope determination does not preclude Arbitrator Townley from considering the contractual defense raised by the University at arbitration, nor was she precluded from finding, based on the evidence and testimony presented before her, that the University had contractually permissible, non-disciplinary reasons for the reassignments. Contrary to the Union's argument, the Trial Court properly concluded that the Arbitration Award in this matter flows from a reasonably debatable interpretation of the Parties' CNA.

With respect to the Union's continued assertion that Scotch Plains-Fanwood applies to this matter, much less dictates the result, as set forth in detail

in Section I.B above, the analysis of Scotch Plains-Fanwood simply does not apply to this matter because is construes a section of the EERA, the Scope Amendments, which provide enhanced rights only to a limited group—school board and county college employees—not at issue in this case. The Scope Amendments give PERC special authority—essentially augmenting PERC's normal scope of negotiations jurisdiction—in order to effectuate the specific provisions of N.J.S.A. 34:13A-22 et seq. applicable to that limited group. However, it is beyond serious dispute that neither the Scope Amendments nor the holding of Scotch Plains-Fanwood appertain to ordinary scope matters such as this one, which are governed by the separate standards applicable to N.J.S.A. 34:13A-5.3. See In re Rutgers, The State Univ. of New Jersey and Off. Pro. Emps. Int'l Union, Loc. 153, 47 NJPER ¶ 116 n.3, 2021 WL 2474133 (App. Div. May 24, 2021). (Da6.)

Contrary to the Union's argument, this Court's decision in City of Newark does not carve out a separate special appellate standard of review to be applied in this case. In City of Newark, reviewing a matter with what it described as a "tortuous and fractionated" procedural history, the Court determined that one of the matters that had been arbitrated should not have been, and that this was grounds for vacating an award. 320 N.J. Super. at 12, 17. However, this is simply not what occurred in the instant case—after the PERC scope of negotiations

decision, there has been no argument by any party, nor any conclusion by the Arbitrator or the Trial Court, that this matter was not subject to arbitration. Indeed, the matter proceeded to arbitration to be decided by the Arbitrator under the CNA. It is this contractual interpretation that is at issue, and it is this contractual interpretation that is subject to the "reasonably debatable" standard.

In interpreting the plain language of the Parties' Agreement, Arbitrator Townley was mandated to abide by the terms of the Parties' CNA, which vests the University with certain rights, irrespective of any statutory "managerial prerogative" to make assignments of personnel as it sees fit. Indeed, the University has the negotiated right under the CNA to make individual work assignments among faculty members, and the undisputed record evidence before the Arbitrator was that that this has been the actual and long-standing past practice. (Da11 at 148-23 to Da12 at 149-6; Da17 at 74-3 to 74-16; Da19 at 186-3 to 186-21.)

PERC, in its decision regarding the scope of negotiations in this matter, stated that "public employers may agree to arbitrate transfers and reassignments that can be categorized as disciplinary based on the facts and assertions in the record." Rutgers, The State Univ. of New Jersey, P.E.R.C. No. 2023-17, p. 10 (2022) (emphasis added). (Pa103). Contrary to the Union's argument on appeal, PERC's decision, made in the abstract, that the issue of reassignment was

arbitrable, does not provide any basis for requiring or even permitting Arbitrator Townley to ignore or set aside the Parties' negotiated Agreement, which both narrowly defines discipline under the CNA[7] and further makes clear that faculty assignments are subject to Article 15.

Given the limited scope of PERC's scope of negotiations jurisdiction, its decision cannot as a matter of law deprive the University of any of its rights or defenses under the CNA. Therefore, with respect to the Reassignment Grievance, the University was permitted to assert that the reassignments at issue did not involve "formal imposition of a penalty in response to alleged wrongdoing by a member of the negotiations unit," the contractual definition of discipline. (Pa63.) Similarly, the University was also permitted to assert that the University's actions did not otherwise violate the CNA, for example constituting a proper exercise of the University's rights under Article 15 of the CNA.

The Union's assertion in its Appellate Brief that "Article 15 has no bearing on the instant matter" is perplexing and nonsensical. (Pb32.) First, the entire CNA was entered into the evidentiary record at the arbitration by mutual agreement of the Parties as Joint Exhibit 1. Second, contrary to the Union's

[7] Article 9 of the Parties' CNA, which sets forth the grievance process, permits the grievance of disciplines, however only as to discipline that is specifically defined as follows: "**Discipline is the <u>formal</u> imposition of a penalty in response to alleged wrongdoing** by a member of the negotiations unit (proceedings under Appendix H will handled as Category One grievances)." (Pa63 n.4 (emphasis added).)

blanket conclusion that Arbitrator Townley "did not rely on Article 15 in denying the grievance," and was not permitted to do so, the Arbitrator was certainly allowed to determine that the reassignment decision did not involve the formal imposition of penalties against the Grievant, as required by Article 9 of the CNA, which she did. She was similarly permitted to determine that Grievant's faculty assignments did not otherwise violate the contract, whether or not she specified Article 15.

The Union also continues to argue that "[i]f the reassignments were not disciplinary, then [they] were the exercise of a managerial prerogative and could not have been subject to binding arbitration in the first instance." (Pb23.) As already discussed, this is simply not the case given that PERC's scope decision is confined to the "abstract issue" of negotiability without consideration of the merits of the grievance or any contractual defenses the employer may have. See, e.g., Ocean Cnty. Vocational Tech. Sch., P.E.R.C. No. 2019-29, 45 NJPER ¶78 (2019); State of New Jersey (Dep't of Corrs.), P.E.R.C. No. 2019-9, 45 NJPER 114 (¶30 2018); State of New Jersey, Kean Univ., P.E.R.C. No. 2015-18, 41 NJPER ¶ 58 (2014); Cnty. of Cumberland, P.E.R.C. No. 2012-47, 38 NJPER ¶ 110 (2012); In re Fairfield Twp. Bd. of Educ., P.E.R.C. No. 98-32, 23 NJPER ¶ 28268 (1997); In re Caldwell-West Caldwell Bd. of Educ., P.E.R.C. No. 87-136, 13 NJPER 358 (¶18147 1987); Franklin Lakes Bd. of Educ., P.E.R.C. No.

95-24, 20 NJPER 395 (¶ 25198 1994); Passaic Cnty. Park Comm'n, P.E.R.C. No. 85-57, 11 NJPER ¶ 16008 n.2 (1984). Accordingly, the University was free to argue, and the Arbitrator to conclude, that the reassignments were not disciplinary as defined in the CNA, and were otherwise permitted by the CNA. This is a completely separate issue than what was determined by PERC, which was simply that the matter, on balance, was subject to negotiation.

In furtherance of its position, the Union argues in its Appellate Brief, as it did in its Verified Complaint and during oral argument, that "the exercise of the University's managerial prerogative[] rendered meaningless PERC's [scope of negotiations decision]." (Pb30; T29-22 to T30-1; T32-21 to T33-8.) In support of its argument, the Union contends that the Trial Court erred in "conclud[ing] that the arbitrator found that the University reassigned Professor Johns due to the exercise of its managerial prerogative and operational needs, rather than discipline." (Pb30).

This could not be further from the truth. The University never once attempted to assert a managerial prerogative during the Arbitration, and the Union fails to cite a single written submission by the University or portion of the oral argument transcript in support of such blanket assertions.[8] The

[8] For example, the University's Post-Arbitration Brief is devoid of any mention of the term "managerial prerogative."

University has consistently maintained that it was permitted to assert contractual defenses with respect to the reassignment decision, and it did so before the Arbitrator. During Arbitration, the University presented uncontested evidence of the educational and operational reasons underlying the reassignment decision. In light of the record evidence, Arbitrator Townley determined that the reasons asserted by the University during Arbitration were the actual reasons for its action, and she thus concluded that the reassignments were not disciplinary in nature. **The Arbitrator in her decision made absolutely NO determination whatsoever that the reassignments at issue were pursuant to a "managerial prerogative."** (See T33-9 to T33-19.)

Finally, it bears repeating that "where a collective bargaining agreement provides for binding arbitration, 'it is the arbitrator's construction that is bargained for,' and not a court's construction." Policemen's Benevolent Ass'n, Loc. No. 11 v. City of Trenton, 205 N.J. 422, 429 (quoting Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko, 202 N.J. 268, 276 (2010)). Even if a reviewing court may have reached a different conclusion than the arbitrator, it must uphold the award as long as it is "justifiable" or otherwise presents a plausible interpretation of the parties' agreement. See, e.g., Borough of Rutherford v. E. Rutherford PBA Loc. 275, 213 N.J. 190, 201 (2013) ("Under the 'reasonably debatable' standard, a court reviewing [a public sector]

arbitration award '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."). As explained above, the Trial Court applied the proper standard of review for public sector arbitration awards in evaluating whether Arbitrator Townley's contractual interpretation was "reasonably debatable"; finding that it was reasonably debatable, the Trial Court appropriately deferred to the Arbitrator's judgment and confirmed the Arbitration Award. For the same reason, this Court must confirm the Arbitration Award.

## CONCLUSION

In light of decades of well-settled legal precedent and PERC's own regulations, Arbitrator Townley was free to evaluate the facts of this matter pursuant to the Parties' CNA and was not precluded from determining that the University had contractually permissible, non-disciplinary reasons for the reassignment decision. As previously discussed, the Union's allegations that Arbitrator Townley "exceeded and imperfectly executed her authority" and "procured her Award by undue means" are unsupported by the record and fall well short of the high burden required for vacation under the circumstances enumerated in either N.J.S.A. 2A:24-8(a) or 2A:24-8(d). For the foregoing reasons, the Union simply cannot establish any statutory grounds for vacating the Arbitration Award. As such, this Court should deny the Union's request to

vacate and remand the Arbitration Award, and should affirm the Trial Court's Order confirming the Arbitration Award.

Respectfully submitted,

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Date: August 25, 2025

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**SUPERIOR COURT OF NEW JERSEY**
**APPELLATE DIVISION**

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| RUTGERS COUNCIL OF AAUP CHAPTERS, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS-AMERICAN FEDERATION OF TEACHERS, AFL-CIO,<br><br>Plaintiff/Appellant,<br><br>v.<br><br>RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,<br><br>Defendant/Respondent. | Superior Court of New Jersey<br>Appellate Division<br>Docket No. A-2192-24<br><br>On appeal from:<br><br>SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION<br><br>Docket No.: MID-C-118-24<br><br>Hon. Thomas Daniel McCloskey, J.S.C. |

# REPLY BRIEF ON BEHALF OF PLAINTIFF/APPELLANT RUTGERS COUNCIL OF AAUP CHAPTERS, AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS-AMERICAN FEDERATION OF TEACHERS, AFL-CIO

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Dated: September 10, 2025

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## PRELIMINARY STATEMENT

Defendant/Respondent, Rutgers, The State University of New Jersey ("University") fully litigated against Plaintiff/Appellant Rutgers Council of AAUP Chapters, American Association of University Professors-American Federation of Teachers, AFL-CIO ("Union") -- and lost -- the issue of whether its reassignments of Professor Kynan Johns were disciplinary. The New Jersey Public Employment Relations Commission ("PERC") made findings of fact and conclusions of law that "bound" Arbitrator Townley and left her to determine only whether the University established that its discipline was just. This was the sole question before her that was mandated by the parties' collective negotiations agreement ("CNA") and the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

Arbitrator Townley repeatedly acknowledged that the grievance would be decided using the same analysis as PERC and that the University had the burden of proving that the disciplinary reassignments were justified discipline. Yet she deviated from her authority to decide the issue of just cause and instead addressed an issue not properly before her. Arbitrator Townley took it upon herself to stand in the shoes of the Appellate Division and reverse PERC's legal determination by finding that the disciplinary reassignments were not discipline. These material legal errors, repeated by the Trial Court,

resulted in Arbitrator Townley's exceeding and imperfectly executing her authority and reaching an arbitration award by undue means, contrary to N.J.S.A. 2A:24-8(a) and (d). Accordingly, the Union respectfully requests that this Court vacate the Trial Court's February 14, 2025 order and final judgment and remand this matter for an order that grant's the Union's underlying application and denies the University's Cross-Motion to Confirm the Arbitration Award.

## STATEMENT OF FACTS & PROCEDURAL HISTORY

The Union relies on its initial merits brief for the relevant facts and procedural history.

## LEGAL ARGUMENT

### I. The University Does Not Dispute the Fact that PERC Had the Authority to Determine that the Reassignments Were Disciplinary

At no point in the University's brief does it refute the underlying principle raised by the Union: PERC, and not Arbitrator Townley, has primary jurisdiction to determine whether a grievance is within the scope of negotiations. If, as is usually the case, a reassignment is not within the scope of negotiations because it is a matter of governmental or educational policy, then PERC will restrain binding arbitration over a grievance challenging that reassignment. An arbitrator will then have no dispute to resolve --regardless

of a CNA's language. See Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 154 (1978). If a reassignment is determined by PERC to be disciplinary, then it comes within the scope of negotiations and a grievance may proceed to arbitration. An arbitrator will then have the limited authority to determine whether the employer proved that the discipline was for just cause.

In this matter, PERC determined as a matter of fact and law that the University's reassignments of Professor Johns were disciplinary and thus subject to binding arbitration. N.J.S.A. 34:13A-5.4(d). (Pa94-Pa108). This was after the University filed a scope of negotiations petition at PERC seeking a restraint of binding arbitration on the ground that the reassignments were not disciplinary and were instead the exercise of its managerial prerogative. The University filed three briefs, exhibits, and certifications from a Vice-President, an Associate Dean and a Dean in support of its scope petition. The issue was fully litigated and PERC issued a final administrative decision determining that the reassignments were disciplinary. The University did not appeal. Therefore, the only question before Arbitrator Townley was whether the University met its burden of proving that the discipline was justified. By answering a different question -- the question that PERC had already answered -- Arbitrator Townley exceeded her authority.

## II. Arbitrator Townley Circumvented PERC's Primary Jurisdiction

The University relies primarily and repeatedly on its interpretation of County of Hudson, P.E.R.C. No. 87-20, 12 NJPER 742 (¶17278 1986) ("Hudson Cty."), and Rutgers, The State University of New Jersey, P.E.R.C. No. 2020-21, 46 NJPER 188 (¶47 2019). However, Hudson Cty. and Rutgers do not support the proposition that an arbitrator may find that an employer's actions were not disciplinary after PERC issues a scope of negotiations decision concluding that the employer's actions were in fact disciplinary.

In Hudson Cty., two employees were temporarily reassigned due to alleged misconduct and poor performance. PERC concluded in a scope of negotiations decision that the employer's actions were disciplinary. PERC distinguished another County of Hudson case where the employer demonstrated that lack of supervision and lack of work necessitated transfers and reassignments and that the employer's actions were not disciplinary. County of Hudson, P.E.R.C. No. 86-147, 12 NJPER 531 (¶171999 1986).

In determining that the reassignments were disciplinary in Hudson Cty., and consistent with the agency's lack of jurisdiction to decide the merits of a grievance, i.e. whether discipline was for just cause, PERC reminded the parties that the employer was "free to argue before the arbitrator that the

[disciplinary actions] were justified in light of the employees' abilities and the [employer]'s operational needs." 12 NJPER at 744 (emphasis added). Similarly, in Rutgers, PERC also stated that the employer was "free to argue before the arbitrator . . . that the [disciplinary action] was justified in light of the grievant's abilities and the [employer]'s operational needs." 46 NJPER at 188 (emphasis added).

In both Hudson Cty. and Rutgers, PERC plainly states that the public employer is permitted to argue to the arbitrator that the disciplinary actions were justified. PERC did not state that an arbitrator can reverse PERC and reject its finding that the actions were in fact disciplinary. The University has not pointed to anywhere in Arbitrator Townley's July 10, 2024 final opinion and award where she found that its disciplinary reassignments of Professor Johns were justified discipline, i.e. that the University met its burden of proving just cause. The University has not done so because it cannot.

With respect to the Suspension Grievance that was consolidated with the Reassignment Grievance, Arbitrator Townley found "that the University had just cause." (Pa44; Pa51). With respect to the Reassignment Grievance that is the subject of this appeal, the arbitrator found that the University "did not violate just cause." The arbitrator used the phrase "did not violate just cause" because, unlike for the Suspension Grievance, she did not find that the

University had proven that it had just cause for the reassignments. She instead concluded that the reassignments were not discipline. (Pa51).

Despite her January 5, 2024 interim opinion, ignored by the University in its brief, which specifically states that she would assess the grievance using the same analysis as PERC and that the University had the burden of proving that the discipline was just, Arbitrator Townley plainly and expressly failed to answer the question that she acknowledged was before her and instead reversed PERC's factual and legal conclusions.

The University fails to mention that this Court, not an arbitrator, overturned PERC's decision in Rutgers because it found that PERC's "factual findings" that the employer's action was disciplinary were "not supported by substantial credible evidence." Rutgers, The State Univ. of New Jersey and OPEIU, Local 153, A-1128-19, 47 NJPER ¶116, 2021 WL 2474133 (App. Div. May 24, 2021) (Da1-Da6)[1] (noting "an administrative agency's fact finding" will be generally upheld as long as it is supported by sufficient credible evidence in the record). Unlike here, the University in that matter appealed PERC's finding of discipline to the Appellate Division. It had the same ability to do so in this matter but choose not to. As such, the University and the

[1] This decision and this Court's decision cited by the University at page 30 of its brief are the same case reported in two different places in Westlaw.

arbitrator were "bound" by PERC's decision. Scotch Plains-Fanwood Bd. of Educ. v. Scotch Plains-Fanwood Educ. Ass'n, 139 N.J. 141, 155 (1995).

As for Scotch Plains, the University seeks to obfuscate the significance of the case by having this Court focus on statutory language specific to K-12 employees that the Union has already noted is not applicable to the University. The University has not and cannot distinguish the main point of the Scotch Plains decision: "the arbitrator was bound by PERC's determination that the [employer]'s action was taken for disciplinary reasons." Id. at 155. By the public employer failing to take an appeal, our Supreme Court has made clear that the arbitrator "had no alternative" other than to accept PERC's finding of discipline.

In seeking to distinguish Scotch Plains, the University quotes from only part of a footnote in Rutgers, The State Univ. of New Jersey and OPEIU, Local 153, A-1128-19, 47 NJPER ¶ 116 n.3, 2021 WL 2474133 (App. Div. May 24, 2021) (Da6) in its brief at page 35. First, the beginning of the footnote that the University selectively quotes from makes clear that it was the University, not that union, which argued that the "predominantly disciplinary" standard applied to it through what the University calls "The Scope Amendments." Second, the remainder of the footnote that the University omits makes clear that even though the statute does not apply to it, PERC's analytical framework

pre-dated "The Scope Amendments" and is the benchmark for assessing grievances alleging whether a transfer, or in this case a reassignment, constitutes discipline. The University omits this Court's analysis from its brief:

> Rutgers does not fall within the list of employers to whom the act applies. As a result, the act's requirements, including those set forth in N.J.S.A. 34:13A-25 and -27, do not establish the standard for a scope of negotiations determination for Rutgers or any other public employer that does not fall within the act's definition of "employer" contained in N.J.S.A. 34:13A-22. Nonetheless, PERC adopted the "predominantly disciplinary" standard prior to the adoption of the act, see In re Cnty. of Hudson, 1986 N.J. PERC LEXIS 345 at 8, as the benchmark for the weighing and balancing of interests required in a scope of negotiations petition involving a grievance alleging a transfer constitutes discipline.
>
> [Id. at n.3 (emphasis added).]

The University also makes little to no mention of the additional cases that the Union cites to show that this Court has consistently held that PERC, not the arbitrator, determines whether a grievance that a union seeks to arbitrate involves arbitrable discipline or the non-arbitrable exercise of a managerial prerogative. See Bd. of Ed. of Vocational Sch. in Camden Cnty. v. CAM/VOC Tchrs. Ass'n, 183 N.J. Super. 206, 214 (App. Div. 1982) ("We conclude that if scope of negotiability turns on a dispute of facts . . . , the Legislature contemplated that PERC, not the arbitrator, resolve that factual

dispute. PERC's regulations clearly provide for evidentiary hearings in scope of negotiations proceedings." (citing N.J.A.C. 19:13-3.6, -3.7)); City of Newark v. Newark Council 21, N.J. Civ. Serv. Ass'n, 320 N.J. Super. 8, 17 (App. Div. 1999) (where a management prerogative was raised in relation to the subject of a grievance, an arbitrator and "trial court should defer to PERC" and "should not . . . have addressed the merits"); Cape May County Bridge Commission, 1 NJPER ¶ 30134B (App. Div. July 9, 1985) ("PERC, not the arbitrator, must make the determination whether a[n employer action] is non-disciplinary and thus non-arbitrable or disciplinary and arbitrable.").

PERC's role in making such determinations, subject only to appellate court review, is well settled in public sector labor law. Therefore, the determination of whether the reassignments of Professor Johns were disciplinary was not before the arbitrator and her conclusion that it was not disciplinary is not owed any deference under a "reasonably debatable" standard. See Policemen's Benev. Ass'n v. City of Trenton, 205 N.J. 422, 429 (2011).

Despite the University's repeated assertions in its brief, what the arbitrator did not do was find that the reassignments were "contractually permissible." See University Brief at 1, 2, 3, 42, 49. The Union argued to the arbitrator that the Reassignment Grievance was subject to binding arbitration

under Article 9 of the parties' CNA. (Pa17). The University argued to the arbitrator that its reassignment of Professor Johns was subject only to advisory arbitration pursuant to Article 15. (Pa17). The arbitrator's Opinion and Award makes no mention of Article 15 or that the reassignments were "contractually permissible." Her analysis is limited to explaining her new conclusion that the reassignments were not disciplinary. (Pa51 to Pa54).

The arbitrator's initial decision, conveniently ignored by the University in its brief, makes clear that the University would be precluded from arguing that the reassignment did not meet the contractually defined threshold for constituting discipline under Article 9 or that the dispute was subject to advisory, not binding, arbitration under Article 15. (Pa121). Nowhere in her final decision does she state that the reassignments were "contractually permissible." Her analysis was an unauthorized redo of PERC's scope of negotiations decision. Since reassignments are the exercise of a managerial prerogative unless disciplinary, by concluding that the reassignments were not discipline, the arbitrator was concluding that the University acted pursuant to its managerial prerogative to make non-disciplinary reassignments. Any challenge to such a non-disciplinary reassignment would not be subject to binding arbitration. Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 156 (1978); City of Newark.

In another irrelevant argument, the University asserts that this Court should ignore City of Newark because it had a different procedural history. (University Brief at 43). When comparing any two cases, they are likely to have different procedural histories. What is important about City of Newark, and what the University fails to respond to, is this Court's holding that where a transfer, or in this case a reassignment, is not disciplinary, it cannot go to binding arbitration. Id. at 16-17. The Court stated that the Chancery Division judge in that case should not have addressed the issue of whether the transfer was disciplinary or the exercise of a managerial prerogative and that the judge should have referred the matter to PERC. Id. at 17. In the instant case, the University went to PERC and unsuccessfully argued that the reassignments were the exercise of its managerial prerogative and not disciplinary. PERC disagreed and found that reassignments to be disciplinary. The University did not appeal. The arbitrator did not have the authority to effectively reverse PERC's decision.

Whether or not the reassignments that were found to be disciplinary by PERC somehow also did not meet the definition of discipline under Article 9 of the CNA is irrelevant here because the arbitrator, whose award is being reviewed by this Court, did not find that reassignments did not meet the Article 9 definition. The only reference to Article 9 was her reporting that the

Union argued that the reassignment grievance must be heard under the "unjust discipline" standard subject to binding arbitration under Article 9, while the University asserted that the Reassignment Grievance was subject only to advisory arbitration pursuant to Article 15. (Pa17).

Ultimately, the arbitrator did not rely on either Article 9 or Article 15. Nowhere in its brief does the University assert otherwise because it cannot. Instead, the arbitrator revisited PERC's unappealed holding that the reassignments were discipline by making her own finding that the reassignments were not discipline.[2]

The University also points to N.J.A.C. 19:13-1.1's limitations on PERC's jurisdiction in scope of negotiation proceedings. No party in this dispute, however, has argued that PERC exceeded that authority. Indeed both parties agree that PERC acted within its authority. The question, however, is whether Arbitrator Townley exceeded her authority when, after PERC found that the University's reassignments of Professor Johns were disciplinary, she

[2] The arbitrator's only reference to punishment with respect to the reassignments was her unfounded and odd assertion that the Union argued that Professor Johns was somehow punished for engaging in the union activity of filing grievances. (Pa54). The Union never alleged nor argued that the reassignments were retaliation or punishment for union activity.

found that the reassignments were not. As detailed in the Union's two briefs, she exceeded her authority and her arbitration award should be vacated.

### III. Arbitrator Townley Improperly Shifted the Burden of Proof to the Union

The University does not dispute that it held the burden of proof in establishing that its discipline of Professor Johns was justified. The record, however, is clear. Arbitrator Townley ignored the University's burden of proof by concluding that there was "no persuasive evidence that the University unjustly disciplined Professor Johns." Pa54. By this express language, Arbitrator Townley improperly placed the burden on the Union to establish that the discipline was unjust when the burden was on the University to prove that the discipline was justified, i.e. for cause. Where, as here, there is a burden of proof and a lack of persuasive evidence, the party with the burden of proof has not met its burden. See, e.g., Elkouri & Elkouri, How Arbitration Works at Ch. 15.3.D.i. (ABA Section of Labor and Employment Law, Bloomberg BNA, 8th ed., 2020).

Contrary to the University's suggestions, the Union has never argued that Arbitrator Townley could not have heard factual arguments on why the discipline against Professor Johns was justified. Because there was a dispute about whether Professor Johns' disciplinary reassignments were for just cause,

the University was fully expected to present evidence on that issue to carry its burden. However, Arbitrator Townley failed to answer whether the University, and not the Union, met this burden. By instead answering the question already answered by PERC -- were the reassignments disciplinary -- Arbitrator Townley significantly and materially exceeded her authority in deciding the matter.

## CONCLUSION

For the foregoing reasons, the Union respectfully requests that the Court vacate the Trial Court's February 14, 2025 order and final judgment and remand this matter for an order that grants the Union's application to vacate Arbitrator Townley's July 10, 2024 final opinion and award and remands the matter to the arbitrator for a new opinion and award that determines whether the University met its burden of proving that the disciplinary reassignments were for just cause. This Court should thus also dismiss the University's Cross-Motion to Confirm the Arbitration Award.

Respectfully submitted,
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