In the Matter of RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, Petitioner-Appellant, -and- INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 97, Respondent-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002430-24T4 Civil Action On Appeal from Final Decision and Order of the New Jersey Public Employment Relations Commission PERC Docket No. SN-2025-009 Sat Below: New Jersey Public Employment Relations Commission

BRIEF OF PETITIONER-APPELLANT RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

PRELIMINARY STATEMENT

This brief and appendix are submitted on behalf of Petitioner-Appellant Rutgers, The State University of New Jersey ("Rutgers" or "University") in support of its appeal from the February 27, 2025 final Decision and Order of the New Jersey Public Employment Relations Commission ("PERC") denying Rutgers' petition for a scope of negotiations determination restraining arbitration of the grievance filed by the International Brotherhood of Teamsters, Local 97 ("Local 97" or "Union"). The grievance seeks to arbitrate the merits of the University's determinations under Rutgers' University's Immunization Policy for Covered Individuals ("Mandatory Vaccine Policy" or "Policy") denying the request of former University employee Rosemary Herrschaft ("Grievant") for a religious exemption from the Seasonal Influenza vaccination requirement and terminating Grievant's employment due to her failure and refusal to comply with that requirement.

Rutgers petitioned PERC for a scope of negotiations determination restraining arbitration of the grievance on the grounds that the Mandatory Vaccine Policy constitutes a determination of public health policy that the University has a managerial prerogative to implement, and that Grievant's challenges to those determinations under the contractual grievance procedure are neither negotiable nor arbitrable. Permitting arbitrators to determine the scope and application of the Policy would significantly interfere with the determinations of University health and

safety experts concerning the appropriate and effective means of preventing the spread of communicable infectious diseases within Rutgers' healthcare facilities.

The New Jersey Supreme Court repeatedly has held PERC must balance the interests of public employees and the public employer to determine whether a negotiated agreement would significantly interfere with the determination of government policy and that a subject may not be included in collective negotiations when the dominant concern is the government's managerial prerogative to determine policy. Applying that binding precedent, this Court held in In re City of Newark, 469 N.J. Super. 366 (App. Div. 2021), a case involving a vaccine mandate for a different communicable infectious disease (i.e., COVID-19), that the City had a managerial prerogative to implement its vaccine mandate and that requiring the City to negotiate over disciplining City employees who fail to comply with the mandate would undercut the effectiveness of the mandate.

In its decision below, PERC did not conduct the balancing test mandated by the New Jersey Supreme Court to determine the negotiability of the subjects at issue in the grievance. PERC failed to balance the interests of the University and the affected public employee to determine whether permitting the Grievant to challenge Rutgers' determinations under the Mandatory Vaccine Policy before a grievance arbitrator would significantly interfere with the determination of governmental policy.

Instead, PERC simply distinguished prior decisions cited by Rutgers in its Petition, specifically including In re City of Newark, which made clear that Rutgers' policy decision to put in place its Mandatory Vaccine Policy, its decisions concerning employees' entitlement to exemptions from vaccination requirements, and disciplinary determinations resulting from violations of the Policy, all fall within the University's managerial prerogative to implement vaccination requirements. The grievance here seeks to challenge through arbitration precisely what this Court, in In re City of Newark, deemed outside the scope of negotiations – an individual employee's exemption from a mandatory vaccine requirement. PERC denied Rutgers' scope petition without conducting the required balancing test based on the Commission's unfounded quasi-medical determination that the threat to public health, including the substantial annual toll of illness, hospitalization and death caused by Seasonal Influenza, is not analogous to those posed by COVID-19.

PERC also erroneously construed In re City of Newark as holding that employees disciplined under Newark's COVID-19 mandatory vaccination program were permitted to challenge that discipline through grievance arbitration under the labor contract. By stark contrast, in In re City of Newark, the Appellate Division determined that requiring negotiations over a mandatory vaccination mandate "would undercut the effectiveness of the mandate."

Accordingly, PERC's decision below must be reversed.

PROCEDURAL HISTORY

On March 1, 2024, Rutgers issued a termination notice to the Grievant, effective that day, for her failure to comply with the Mandatory Vaccine Policy by not receiving her influenza vaccination or an approved exemption (Aa74; Aa121).[1]

On March 1, 2024, Local 97 filed a grievance contesting the Grievant's termination (Aa104; Aa121).

On May 1, 2024, Local 97 submitted to PERC a Request for Submission of a Panel of Arbitrators seeking the selection of an arbitrator to conduct binding arbitration of the disciplinary grievance (Aa106-Aa107; Aa121).

On October 29, 2024, Rutgers filed with PERC a Petition for Scope of Negotiations Determination seeking the restraint of binding arbitration of the grievance filed by Local 97 (Aa1-Aa2; Aa116; Aa109).

On November 27, 2024, Rutgers filed with PERC its submission in support of the Petition, including the November 27, 2024 Certification of David Alberts (Aa3-Aa97), the November 25, 2024 Certification of Dr. Milind Shah (Aa98-Aa99), and the November 25, 2024 Certification of Dr. Jill York (Aa100-Aa101). See also Aa110-Aa111.

[1] References to "Aa__" are to Rutgers' Appendix on appeal.

On December 11, 2024, Local 97 filed with PERC its submission in opposition to the Petition, including the Certification of James M. Mets (Aa102-Aa107; Aa111-Aa112).

On February 27, 2025, PERC issued its Decision and Order denying Rutgers' Petition seeking restraint of arbitration of the grievance (Aa115-Aa129).

STATEMENT OF FACTS

A. The Parties

Rutgers is the State University of New Jersey. N.J.S.A. 18A:65-2. Rutgers is the instrumentality of the State for the purpose of operating the state university (see N.J.S.A. 18A:65-2), as well as a public entity charged with operating various healthcare facilities, including the John H. Cronin Dental Center (Aa99).

Local 97 is a labor organization that represents a unit of healthcare workers employed by Rutgers, including practical nurses, clerical staff, healthcare services staff, and operations, maintenance and service staff (Aa12-Aa13; Aa117).

Grievant worked as a secretary at the University's John H. Cronin Dental Center in Northfield, New Jersey (Aa117). The University terminated her employment on March 1, 2024 because she failed to comply with the Mandatory Vaccine Policy (Aa74; Aa121; Aa76-Aa80).

B. The Mandatory Vaccine Policy

The University's Mandatory Vaccine Policy requires certain individuals employed by the University to obtain vaccinations against particularized diseases (Aa76-Aa80). The Policy is tailored to enhance the safety of the University's patients, visitors, students, clinical faculty, and clinical staff, and to promote the public health by protecting these individuals from exposure to certain communicable diseases (Aa76; Aa98-Aa99 at ¶2). The Mandatory Vaccine Policy expressly states

that Seasonal Influenza is a communicable infectious disease that can cause mild to severe illness and "lead to the hospitalization and death of many individuals each year" (Aa76).[2] The University has determined that the most effective way to prevent infection from the pathogens identified in the Mandatory Vaccine Policy is through vaccination (Aa76; Aa98-Aa-99). Thus, the Mandatory Vaccine Policy seeks to maximize immunization against these diseases by University employees who work in health care settings and by public safety personnel whose assignment requires or could require them to be in contact with patients for any amount of time (Aa77-Aa78; Aa99).

The Mandatory Vaccine Policy provides, among other things, that all "Covered Individuals" must receive a Seasonal Influenza vaccine, unless the person receives an exemption from the vaccine requirement (Aa76). "Covered Individual" is defined to mean "all Health Care Personnel and all Rutgers University Public Safety Personnel (defined below), at all locations, regardless of whether they have routine presence in Patient Care Areas or have routine contact with patients." (Aa77). "Health Care Personnel" is defined to mean all "individuals who work directly or

[2] The Centers for Disease Control and Prevention ("CDC") estimates that the seasonal influenza resulted in 9.3 million to 41 million illnesses, 120,000 to 710,000 hospitalizations and 6,300 to 52,000 deaths in the United States annually between 2010 and 2024. (redaction)cdc.gov/flu-burden/php/about/index.html (Aa132-Aa134).

have other close contact with patients or who handle material that could spread infection in a Patient Care Area." (Ibid.). This includes, but is not limited to, the following: physicians, nurses, emergency medical personnel, dental professionals, laboratory technicians, pharmacists, individuals who volunteer in Patient Care Areas, and administrative staff." (Ibid.; emphasis added). The Mandatory Vaccine Policy provides that all Covered Individuals "must provide proof of Seasonal Influenza vaccination prior to the start date of Flu Season or submit any exemption request(s) by November 1 of the current Flu Season." (Aa78).

The Mandatory Vaccine Policy contains both medical and religious exemptions from the mandatory vaccine requirements (Aa78-Aa79). With regard to medical exemptions, the Policy provides:

> 1. Covered Individuals may be eligible for a medical exemption in accordance with applicable law and on a case-by-case basis, if they have a medical condition which precludes them from being vaccinated against the specified Communicable Infectious Disease(s), and if the condition is supported by appropriate documentation from a treating health care provider.
>
> 2. Any Covered Individual requesting a medical exemption shall complete and submit a Request for Medical Exemption From Vaccination Form, located in the Rutgers Vaccination Portal. The completed request must be submitted online via the Rutgers Vaccination Portal by November 1 of the current Flu Season and/or the date(s) specified by the Executive Vice President for Health Affairs for other Communicable Infectious Diseases. If the Executive Vice President for Health

> Affairs specifies additional Communicable Infectious Diseases for which Covered Individuals must be immunized, the Executive Vice President for Health Affairs will specify how exemption requests can be submitted.

(Ibid.). Regarding religious exemptions, the Policy provides:

> 1. Covered Individuals may be eligible for a religious exemption in accordance with applicable law and on a case-by-case basis.
>
> Any Covered Individual requesting a religious exemption must complete and submit an online Request for Religious Exemption From Vaccination Form, located in the Rutgers Vaccination Portal. The completed request must be submitted online via the Rutgers Vaccination Portal by November 1 of the current Flu Season and/or by the date(s) specified by the Executive Vice President for Health Affairs for other Communicable Infectious Diseases. If the Executive Vice President for Health Affairs specifies additional Communicable Infectious Diseases for which Covered Individuals must be immunized, the Executive Vice President for Health Affairs will specify how exemption requests can be submitted.

(Aa79).

The Mandatory Vaccine Policy makes clear that Covered Individuals who fail to become vaccinated, and who do not qualify for an exemption to the vaccine requirement, "will not be permitted to work in a Patient Care Area and will be subject to discipline, up to and including termination." (Aa80).

C. Grievant's Non-Compliance with the Mandatory Vaccine Policy

The University employed Grievant as a secretary at the University's John H. Cronin Dental Center (Aa117), which is one of the University's medical facilities where patients and health care providers are present. Accordingly, she was considered a Covered Individual under the Mandatory Vaccine Policy (Aa99, ¶3).

In January 2023, Rutgers notified Grievant that she failed to upload proof of seasonal influenza vaccination for the 2022-2023 flu season (Aa82). Rutgers directed Grievant to upload such proof immediately (Ibid.). In response to this notification, Grievant applied for a religious exemption to the vaccine requirement (Aa84). Because she sought an exemption, Rutgers temporarily excused Grievant from the vaccine requirement while her request remained pending (Ibid.). The University could not adjudicate Grievant's request before the 2022-2023 flu season ended (in March 2023), and as a result Grievant was *de facto* excused from the vaccine requirement for the entire 2022-2023 flu season (Ibid.).

When the 2023-2024 influenza season arrived in the fall of 2023, Grievant reapplied for a religious exemption to the vaccine requirement (Aa86-Aa-88). On October 18, 2023, Grievant submitted a letter requesting to be exempt as a "baptized Catholic." (Aa86). Grievant explained that in the Catholic faith a person "is morally required to obey [her] sure conscience" and has a right to "refuse a medical intervention, including a vaccination, if [her] informed conscience comes to this sure

judgment." (Ibid.). Although Grievant acknowledged that the "Catholic Church does not prohibit the use of any vaccine, and generally encourages the use of safe and effective vaccines as a way of safeguarding personal and public health," she believed vaccination is "not a morally obligatory principle and so must be voluntary." (Ibid.). According to Grievant, it was for this reason that she requested excusal (Aa86-Aa-88).

On December 13, 2023, the University notified Grievant that her religious exemption request had been denied (Aa91). Rutgers provided Grievant seven days to become vaccinated and demonstrate proof of vaccination (Ibid.).

On January 2, 2024, the University issued a counseling notice to Grievant because she still had not provided proof of Seasonal Influenza vaccination (Aa93). The counseling notice made clear Grievant's actions violated the Mandatory Vaccine Policy and her continued non-compliance would result in discipline, up to and including termination (Ibid.).

On January 25, 2024, the University issued to Grievant a pre-termination notice, advising that a conference to discuss the reasons for the possible termination of her employment for non-compliance with the Mandatory Vaccine Policy and to provide Grievant an opportunity to respond to those reasons was scheduled for January 31, 2024 (Aa97). The notice further advised Grievant that after the

conference the University would decide whether to terminate her employment or take other disciplinary action (Ibid.).

Rutgers convened Grievant's pre-termination conference on January 31, 2024 (Aa100, ¶2). Grievant attended (Ibid.). During the conference, Grievant argued that her employment should not be terminated because her religious exemption should have been granted (Ibid.). She further claimed that the flu vaccine requirement should not have applied to her position because she allegedly was not advised of the requirement at the time of her hire (Ibid.). The University rejected these arguments and, therefore, proceeded with the termination of Grievant's employment (Aa74; see also Aa91).

LEGAL ARGUMENT

POINT I

SCOPE OF REVIEW

The question of whether a public employer has a managerial prerogative is primarily a question of law, which our appellate courts review *de novo*. In re City of Newark, 469 N.J. Super. 366, 377 (App Div. 2021), citing In re Belleville Educ. Ass'n, 455 N.J. Super. 387, 406 (App. Div. 2018) (describing question of law as "subject to de novo review"). Moreover, where, as here, there was no evidentiary hearing and the parties did not dispute material facts, appellate courts apply the law to undisputed facts. Here, PERC accepted the facts in the record and then applied the law to those facts. In such situations, appellate review of PERC's application of the law to the undisputed facts is less deferential. See In re City of Newark, 469 N.J. Super. at 378, citing In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020) (observing that "when [a PERC] decision is based on . . . its determination of a strictly legal issue, [appellate courts] are not bound by the agency's interpretation") (internal quotation marks omitted).

POINT II

PERC'S DENIAL OF RUTGERS' SCOPE PETITION WAS ERRONEOUS BECAUSE THE COMMISSION FAILED TO BALANCE THE INTERESTS OF RUTGERS AND THE EMPLOYEE INVOLVED TO DETERMINE WHETHER ARBITRATION OF GRIEVANCE ALLEGATIONS CONCERNING THE APPLICATION OF THE UNIVERSITY'S MANDATORY VACCINE POLICY WOULD SUBSTANTIALLY INTERFERE WITH THE DETERMINATION OF GOVERNMENT POLICY AND ERRONEOUSLY CONCLUDED THAT THE MANDATORY VACCINE POLICY IS MANDATORILY NEGOTIABLE. (Aa128-Aa129)

As PERC correctly stated in its decision below (Aa121-Aa122), the standards for determining whether a subject is mandatorily negotiable were set forth by our Supreme Court in Local 195, IFPTE v. State, 88 N.J. 393, 404-05 (1982), as follows:

> [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.

[Id. at 404-05; emphasis added]. Citing City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998), PERC also acknowledged that it was required to "balance the parties' interests in light of the particular facts and arguments presented" (See Aa122).

A. This Matter Squarely Presents the Question of Whether Arbitral Review of Disciplinary Decisions Made Under the Negotiated Agreement Would Significantly Interfere with the Determination of Governmental Policy. (Aa121-Aa122)

Here, PERC erroneously denied Rutgers' October 29, 2024 scope petition, thus finding that the University's decision to terminate Grievant's employment for failure to comply with its Mandatory Vaccine Policy was mandatorily negotiable and, thus, arbitrable (Aa1-Aa2). Quite simply, PERC's determination ignores that arbitral review of a disciplinary decision pertaining to a violation of the Mandatory Vaccine Policy would significantly interfere with the determination of governmental policy, i.e. Rutgers' non-negotiable managerial right to impose a vaccination mandate to protect the University community.

Rutgers is the instrumentality of the State for the purpose of operating the state university (see N.J.S.A. 18A:65-2), as well as a public entity charged with operating various healthcare facilities, including the John H. Cronin Dental Center (Aa99). Recognizing that Seasonal Influenza is a communicable infectious disease caused by pathogens that can cause mild to severe illness and lead to the hospitalization and death of many individuals each year (Aa76), Rutgers issued its Mandatory

Vaccination Policy to enhance the safety of the University's patients, visitors, students, clinical faculty, and clinical staff by "reduc[ing] the risk of [such] diseases being acquired in the University community, particularly in the University's clinical settings, by maximizing immunization for Covered Individuals[3] and making provisions for mandatory face mask usage[4] for Exempted Individuals" (Aa76-Aa77).

As set forth in its Mandatory Vaccine Policy, Rutgers has a significant interest in establishing protocols to reduce the likelihood that patients, students, clinical faculty, clinical staff, and visitors to its health care facilities, including the University's John H. Cronin Dental Center, will contract Seasonal Influenza at the Dental Center or other Rutgers clinics, face the concomitant mild to severe illness and join the many individuals who are hospitalized or die from Seasonal Influenza each year (Aa76). In addition, Rutgers has an interest in reducing the likelihood that the education of its students will be interrupted by influenza and that its clinical faculty and clinical staff avoid Seasonal Influenza and remain available to provide health care services to the public (Aa76-Aa77).

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[3] All employees who work at the University's John H. Croni Dental Center are considered "Covered Individuals" under the Mandatory Vaccine Policy (Aa99, ¶3).

[4] The Mandatory Vaccination Policy notes that "Rutgers encourages and supports other methods for preventing the spread of Communicable Infectious Diseases, including initiatives to promote good hand hygiene, encouragement for sick co-workers to stay home, and cleaning of high-touch surfaces (for example, counters, doorknobs, light switches, handles, stair rails, elevator buttons, desks, keyboards, phones, toilets, faucets, and sinks)." (Aa76).

Local 97 asserted that arbitration should not be restrained because the Union is not challenging Rutgers' managerial prerogative to implement a vaccine mandate (Aa123). PERC accepted that assertion (See Aa124).

Yet, contrary to Local 97's assertion that it is not challenging Rutgers' managerial prerogative to implement the vaccination mandate, that is precisely what the Union seeks to do. More specifically, the Union seeks explicitly to challenge the applicability of the Mandatory Vaccine Policy to Grievant. In fact, the Union's argument is based on Grievant's erroneous contention that the Seasonal Influenza vaccination requirement did not apply to her position prior to her hire (see Aa100, ¶2).

As a preliminary matter, it is clear that the Mandatory Vaccine Policy, as implemented, applies to all Covered Individuals (Aa77). Grievant, like all other employees at the John H. Cronin Dental Center, is a Covered Individual (Aa99). Indeed, in its brief to PERC in opposition to Rutgers' scope petition, Local 97 asserted that it could argue that Grievant's termination was without just cause "without challenging the policy directly" by arguing that the Mandatory Vaccine Policy "had not historically been applied to her title." (Aa131). Local 97 thereby effectively conceded that it seeks a ruling from the Arbitrator that the Mandatory Vaccine Policy does not apply to Grievant. In short, this it cannot do.

Local 97 punctuated that argument by noting that "the arguments of the parties at arbitration are beyond the Commission's jurisdiction." (Aa131). Thus, contrary to Local 97's contention, it unquestionably is challenging Rutgers' managerial prerogative to implement the vaccination mandate as applied to Grievant, and it seeks to persuade the arbitrator to override Rutgers' managerial prerogative and nullify the application of the Mandatory Vaccine Policy to Grievant. The Union has made it clear that the Union and Grievant intend to argue at arbitration that Rutgers should have exempted Grievant from the mandatory vaccine requirement which, if permitted, would vest the arbitrator with the authority to decide to whom the ***Mandatory*** Vaccine Policy applies, i.e., whether the Policy applies to Grievant, a question squarely within the University's managerial prerogative under In re City of Newark.

If this Court affirms PERC's decision below, Local 97 would be free to challenge before the Arbitrator the scope of applicability of the Mandatory Vaccine Policy as implemented. Thus, Local 97 unquestionably is challenging Rutgers' managerial prerogative to implement the Mandatory Vaccine Policy.

Moreover, Grievant also disputes the University's determination that she was not entitled to a religious exemption from the Policy's vaccination requirement (Aa100, ¶2). PERC has found that grievances challenging protected class-based accommodation decisions are not arbitrable. See Rockaway Valley Regional

Sewerage Authority, P.E.R.C. No. 2023-11, 49 NJPER ¶53, 2022 WL 16900166 (2022) (religious accommodation request for an exemption from vaccine requirement not arbitrable). In Rockaway Valley, the union sought to arbitrate the employer's exercise of its discretion to deny the grievant's request for a religious exemption from a COVID-19 mandatory vaccine policy. P.E.R.C. No. 2023-11, 49 NJPER ¶53, 2022 WL 16900166. In restraining arbitration, PERC found that the employer's vaccine mandate "was undisputedly implemented pursuant to a non-negotiable managerial prerogative," and that allowing the grievant to challenge through contractual arbitration the denial of her religious exemption request would infringe upon the employer's managerial rights. Specifically, PERC concluded that the grievance challenged the employer's denial of the grievant's accommodation request as "being an act of discrimination against the employee." Id. Applying the principles established in Teaneck Bd. of Ed. v. Teaneck Teachers Ass'n, 94 N.J. 9 (1983), PERC concluded that the "grievant's claim of discrimination challenges a personnel action involving a managerial prerogative that may not be submitted to binding arbitration," and that the claim was "more appropriately charged to a forum such as the New Jersey Division on Civil Rights, the U.S. Equal Employment Opportunity Commission, and/or the courts." Id. Even to the extent Local 97 urges that Grievant's challenge to the denial of a religious exemption is not a religious claim, at its core it is a religious accommodation claim. See N.J.S.A. 10:5-12q.

Further, Local 97 argued that, as with any other employer policy, Rutgers' managerial prerogative to implement its policy is separate from an employee's right to challenge the discipline resulting from an alleged violation of the policy (Ibid.).[5] However, in this case, the discipline is inextricably linked to the prerogative to implement the Policy itself. The University promulgated a ***mandatory*** vaccine requirement that Grievant refuses to follow. Termination is the only appropriate penalty; else the vaccine requirement is not truly mandatory. If an arbitrator decides termination is not the appropriate penalty (i.e. that an employee can willfully decline the vaccine for a specific reason the arbitrator deems appropriate, and continue her employment at Rutgers), that decision will effectively transmogrify the Policy from a mandatory one to a permissive one. Arbitration will then become the vehicle through which employees can challenge the extent of the Policy's permissiveness.

PERC ignored this consideration entirely.

B. PERC Erroneously Denied Rutgers' Scope Petition Without Balancing the Interests of Rutgers, the Affected Employee and the Public. (Aa124-Aa129)

PERC acknowledged in its Decision and Order below that, in Local 195, 88 N.J. at 404-405, and City of Jersey City, 154 N.J. at 574-575, our Supreme Court

[5] By this argument, which PERC accepted (Aa128-Aa129), Local 97 effectively contends that the balancing test prescribed by Local 195, 88 N.J. at 404-05, is not applicable to determine whether enforcement of the arbitration provisions of the parties' collective negotiation agreement would significantly interfere with the determination of governmental policy.

held that whether a negotiated agreement would significantly interfere with the determination of government policy – and, thus, fall outside the scope of negotiations - is decided by means of a balancing of the interests of the public employees and the public employer and, more specifically, a balance of their respective interests in light of the particular facts and arguments presented (Aa121-Aa122).

However, review of PERC's Decision and Order reveals no indication that the Commission conducted a balancing test that weighed the competing interests prescribed by our Supreme Court in Local 195, 88 N.J. at 404-05, and City of Jersey City, 154 N.J. at 574-575. Accordingly, PERC's decision below must be reversed.

Notably, in In re City of Jersey City, 154 N.J. at 574-575, the Supreme Court held that PERC erred by failing to conduct the Local 195 negotiability test. Yet, PERC repeated that same error here.

Had the Commission conducted the appropriate analysis, as shown above, its Decision would have reflected that Rutgers' Mandatory Vaccine Policy was implemented because the University has a significant interest in establishing protocols to reduce the likelihood that patients, students, clinical faculty, clinical staff, and visitors to its health care facilities, including the University's John H. Cronin Dental Center, will contract Seasonal Influenza, face the concomitant mild to severe illness, and join the many individuals who are hospitalized or die from

Seasonal Influenza each year (Aa76). In addition, Rutgers has an interest in reducing the likelihood that the education of its students will be interrupted by Seasonal Influenza and that its clinical faculty and clinical staff avoid Seasonal Influenza and remain available to provide health care services to the public (Aa76-Aa77).

The effectiveness of the Mandatory Vaccine Policy constitutes a policy determination by University healthcare personnel concerning the steps that are needed to protect the health of patients and others present in Rutgers healthcare facilities from the dangers of illness, hospitalization and death posed by the spread of communicable diseases, including Seasonal Influenza (See Aa76-Aa80).

Neither PERC nor Local 97 has identified countervailing interests that outweigh the health risks that would result from negotiation over healthcare policy designed to fight the spread of dangerous diseases and arbitration rulings concerning the scope of applicability and "just" application of policies designed to protect health and safety. It bears repeating that Grievant's interest in challenging discipline was addressed in the In re City of Newark decision and found to be outweighed by the employer's interest in preventing the spread of communicable disease. Indeed, Grievant had other avenues through which to challenge her discipline. The University, however, has no more effective avenue through which to protect against the spread of influenza. As a result, labor relations principles prevent Grievant from challenging her discipline through the grievance and arbitration process.

In its decision, PERC nowhere stated that it had analyzed the facts in accordance with the three-part negotiability test set forth in Local 195 and nothing in its decision provides any indication that it undertook that analysis.

For these reasons, PERC's decision should be reversed.

C. PERC Erroneously Recharacterized, Misconstrued and Failed to Follow this Court's Published Decision in In re City of Newark, 469 N.J. Super. 366 (App. Div. 2021). (Aa125-Aa126)

In its decision below, PERC recognized that the Appellate Division in In re City of Newark, a case on which Rutgers relied held that, "[i]n the context of a public health emergency, negotiating procedures for the implementation of a COVID-19 vaccination mandate, or the enforcement or timing of the mandate, would interfere with the managerial prerogative" to implement the vaccine mandate." (Aa124-Aa125). Yet, PERC inexplicably failed to follow the precedent set in In re City of Newark.

While PERC acknowledged the Court's sound rationale for concluding that negotiation over the timeline for the implementation of Newark's COVID-19 vaccination mandate would undercut the effectiveness of the mandate[6] (Aa125) (citing In re City of Newark 469 N.J. Super. at 385), PERC held that "the flu vaccine

[6] Since Local 97 professes that it does not challenge Rutgers' managerial prerogative to implement its Mandatory Vaccine Policy for, *inter alia*, Seasonal Influenza (Aa122-123), there was no issue in this matter before PERC and there is no issue before this Court concerning the appropriateness of the timeline under which it was implemented.

requirement at issue here is not analogous to the unprecedented COVID-19 public health emergency in Newark that prompted the court to allow wide latitude to swiftly implement a COVID-19 vaccination mandate."

In its decision, PERC provided no basis for its medical judgment, which is unworthy of any deference from this Court. It bears noting that the record before PERC showing that Seasonal Influenza leads to the hospitalization and death of many individuals each year is not disputed (Aa76). The fact that many individuals infected with Seasonal Influenza are hospitalized and die each year should be reason enough not to delegate the effective final word on the application of the Mandatory Vaccine Policy to arbitrators with no necessary background in combating communicable diseases and no necessary political or other accountability for the impact of their decisions on the health of the patients, visitors, students, clinical faculty, and clinical staff who are present in the John H. Cronin Dental Center during each Seasonal Influenza season.[7] Although Rutgers does not contend that Seasonal Influenza causes the same extent of serious illnesses, hospitalizations and deaths as did pandemic era COVID-19, the fact that Seasonal Influenza does not produce the

[7] Moreover, in contrast with the City of Newark's vaccination mandate that applied to all City employees (469 N.J. Super. at 373), the Rutgers Mandatory Vaccine Policy is more narrowly tailored and applies only to healthcare and public safety personnel (Aa77).

same toll of serious illness, hospitalization and death as did pandemic era COVID-19, it unquestionably kills thousands to tens of thousands of Americans each year.

Moreover, the question before PERC was not whether Seasonal Influenza is analogous in all respects with COVID-19. Rather, the question before PERC was whether permitting discipline imposed under Rutgers' Mandatory Vaccine Policy to be challenged before unaccountable private arbitrators would significantly interfere with the effectiveness of Rutgers' policy determination embodied in the Mandatory Vaccine Policy to protect the health of the patients, visitors, students, clinical faculty, and clinical staff who are present in the John H. Cronin Dental Center while Seasonal Influenza makes its annual foray. PERC failed to answer that question after weighing the parties' competing interests.

It bears noting that the record before PERC showing that Seasonal Influenza leads to the hospitalization and death of many individuals each year is not disputed (Aa76). The fact that many individuals infected with Seasonal Influenza are hospitalized and die each year should be reason enough not to delegate the effective final word on the application of the Mandatory Vaccine Policy to arbitrators with no necessary background in combating communicable diseases and no necessary political or other accountability for the impact of their decisions on the health of the

patients, visitors, students, clinical faculty, and clinical staff who are present in the John H. Cronin Dental Center during each Seasonal Influenza season.[8]

PERC also erred in concluding that the In re City of Newark court "did not say at any point that employees who are disciplined pursuant to the City's COVID-19 vaccination mandate are bereft of their ordinary statutory and contractual disciplinary review procedures." (Aa125).

Contrary to this conclusion by PERC, the In re City of Newark court left no doubt that in the context of governmental determinations of health and safety policy requiring vaccination against communicable infectious diseases to protect the public and public employees from the risks of illness, hospitalization and death, the balance of interests weighs strongly in favor of public health and safety:

> The Unions focus on the impact of the mandate to some of their members who have chosen not to be vaccinated. That focus, however, ignores the impact their "choice" has on coworkers and their families who have been vaccinated. Just as importantly, it ignores the impact on people with whom unvaccinated City employees come into contact. . . . Given the scientifically undisputed risk of spreading this deadly virus, the City has the right to protect the public.
>
> Similarly, requiring the City to negotiate over disciplining City employees who fail to comply with the mandate would undercut the effectiveness of the mandate.

[8] Moreover, in contrast with the City of Newark's vaccination mandate that applied to all City employees (469 N.J. Super. at 373), the Rutgers Mandatory Vaccine Policy applies only to healthcare and public safety personnel (Aa77). Thus, the breadth of Newark's policy is not narrowly targeted analogously to the Rutgers policy.

> The City, as a public employer, has the prerogative to determine the basis for discipline. *In re Newark*, P.E.R.C. No. 2019-21, 45 N.J.P.E.R. ¶ 55, 2018 NJ PERC LEXIS 103, *2018 WL 7106593*. Accordingly, in a COVID-19 pandemic, the impacts of the City's COVID-19 vaccination mandate on City employees are non-negotiable. *See Local 195*, 88 N.J. at 405, 443 A.2d 187; *see also Paterson Police PBA*, 87 N.J. at 86, 432 A.2d 847.
>
> There are many actions that we take as a society to protect the common good. Sometimes the protection of the many requires an individual, especially a public servant, to act for the public good. The Unions have not cited any facts that would support the purported rights of what appears to be a minority of City employees to pose a risk to coworkers and City residents.[footnote omitted]. The people they are committed to serve, in particular, the aged who are among the most vulnerable to COVID-19, and children who currently cannot be protected by a vaccine, are placed at greater risk by unvaccinated City workers.
>
> . . . City employees have the right to get vaccinated and keep their jobs or decide that they do not want to work for the common good.

469 N.J. Super. at 385-89 (emphasis added).

Plainly, the In re City of Newark court recognized that requiring a public employer to negotiate over disciplining employees who fail to comply with a communicable infectious disease vaccination mandate would undercut the effectiveness of such a mandate. 469 N.J. Super. at 386. Thus, contrary to PERC's conclusion that In re City of Newark held that employees who are disciplined pursuant to a communicable infectious disease vaccination mandate do have access

to ordinary statutory and contractual disciplinary review procedures" is incorrect (See Aa125).

Although Rutgers does not contend that Seasonal Influenza causes the same extent of serious illnesses, hospitalizations and deaths as did pandemic era COVID-19, the fact that Seasonal Influenza does not produce the same toll of serious illness, hospitalization and death as did pandemic era COVID-19, it unquestionably kills thousands to tens of thousands of Americans each year.

Allowing the Union to arbitrate the merits of the University's determinations that Grievant was required to comply with Rutgers' Mandatory Vaccine Policy, that Grievant failed to establish that she was entitled to a religious exemption from the Seasonal Influenza vaccination requirement under the Policy and that Grievant's failure and refusal to comply with the Policy required the termination of her employment would substantially interfere with Rutgers' policy determination that the Mandatory Vaccine Policy is necessary to protect the health of patients, employees and other individuals who are present in Rutgers' health care facilities.

CONCLUSION

For all the foregoing reasons, Petitioner-Appellant respectfully submit that the decision below of the Public Employment Relations Commission must be reversed and remanded for entry of an Order restraining arbitration of the grievance.

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Attorneys for Petitioner-Appellant Rutgers, The State University of New Jersey

By: /s/ John J. Peirano
JOHN J. PEIRANO

DATED: September 12, 2025

#13568954v1

In the Matter of RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, Petitioner-Appellant, -and- INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 97, Respondent-Appellee.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-2430-24T4 Civil Action On Appeal From the Final Administrative Action of the New Jersey Public Employment Relations Commission PERC No.: 2025-29 Docket No.: SN-2025-009

OPPOSITION ON BEHALF OF RESPONDENT INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 97

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS

TABLE OF AUTHORITIES

State Cases

State Administrative Cases

Statutes

Legislative History

PRELIMINARY STATEMENT

Respondent, International Brotherhood of Teamsters, Local 97 ("Local 97" or "the Union"), submits this brief in opposition to Rutgers, the State University of New Jersey's ("Rutgers" or "Employer") appeal of the Public Employment Relations Commission's ("PERC" or "Commission") February 27, 2025 scope of negotiation determination. In its decision, PERC properly concluded that Local 97's grievance contesting the termination of a unit member was within the scope of collective negotiations and must proceed to arbitration. The Commission's decision was properly decided and must not be disturbed.

Here, Rutgers seeks to restrain arbitration of a grievance contesting the termination of Local 97 member Rosemary Herrschaft ("Ms. Herrschaft" or "Grievant") from her employment at the John H. Cronin Dental Center. Ms. Herrschaft was terminated for allegedly violating the Employer's Immunization Policy for Covered Individuals ("Policy"). Local 97 is not challenging Rutgers' prerogative to implement the Policy. Rather, the Union simply seeks to arbitrate the disciplinary termination of one of its members pursuant to the collective negotiations agreement ("CNA") in effect between the parties.

The New Jersey Legislature, our Supreme Court, the Appellate Division and PERC have all determined that disciplinary review procedures, including arbitration, are mandatorily negotiable and arbitrable. See N.J.S.A. 34:13A-5.3; N.J. Tpk. Auth.

v. N.J. Tpk. Supervisor's Ass'n, 143 N.J. 185 (1996); County of Monmouth v. Commc'ns Workers of Am., 300 N.J. Super. 272 (App. Div. 1997); In re City of Newark, P.E.R.C. No. 2025-8, 51 N.J.P.E.R. ¶ 30, 2024 WL 4581125 (2024).

Since 1982, the Legislature has specifically required public employers to negotiate grievance and disciplinary review procedures. N.J.S.A. 34:13A-5.3, which has been amended through the years, mandates that public employers negotiate written grievance and disciplinary review procedures, which may end in binding arbitration. N.J.S.A. 34:13A-5.3. Long standing case law is, unsurprisingly, in accord with N.J.S.A. 34:13A-5.3. In New Jersey Turnpike Authority v. New Jersey Turnpike Supervisor's Ass'n, 143 N.J. 185, 202 (1996), the Supreme Court held that "disciplinary procedures, including binding arbitration . . . do not implicate matters of inherent managerial prerogative, and therefore, constitute terms and conditions of employment that are negotiable."

In its February 27, 2025 decision, PERC appropriately determined that Local 97's grievance contesting Ms. Herrschaft's termination could proceed to binding arbitration. (Aa116-Aa129). PERC recognized that Local 97 was not challenging the implementation of the Policy and was simply exercising its right to bring disciplinary grievances to arbitration in accordance with the CNA. (Aa124-Aa129). PERC noted that Ms. Herrschaft does not have any other statutory appeals procedures available to her to challenge her termination. (Aa128).

Despite PERC's legally correct decision, Rutgers makes several nonsensical arguments in support of its appeal. The Employer argues that arbitrating discipline would significantly interfere with the determination of governmental policy, that PERC failed to properly balance the interests of the public employer, and that PERC misconstrued this Court's decision in In re City of Newark, 469 N.J. Super. 366 (App. Div. 2021). Rutgers' arguments have no merit, and its appeal must be dismissed.

Rutgers purposely ignores the distinction between its managerial prerogative to implement a policy and the ability to challenge discipline flowing from an alleged violation of the policy, which is mandatorily negotiable. See N.J.S.A. 34:13A-5.3. Rutgers similarly refuses to acknowledge that the Policy itself does not mandate termination. Rather, the Policy states that if an employee fails to comply, the employee "will not be permitted to work in a Patient Care Area and will be subject to discipline, up to and including termination." (Aa80) (emphasis added).

PERC properly analyzed the facts of this matter and applied the appropriate test to determine whether Local 97's grievance can proceed to arbitration. Based on the Legislature's clear mandate, codified at N.J.S.A. 34:13A-5.3, that disciplinary review is both mandatorily negotiable and arbitrable, PERC's February 27, 2025 decision must be affirmed.

PROCEDURAL HISTORY

Grievant was unjustly terminated from her employment at Rutgers on March 1, 2024, for allegedly failing to comply with the Employer's Mandatory Vaccine Policy. (Aa74; Aa121).

Local 97 filed a grievance contesting Grievant's termination on March 1, 2024. (Aa104; Aa121). The grievance states: "Rosemary Herrschaft has been unjustly terminated and an immediate hearing is requested on [the] matter." (Aa104). As a remedy, the Union requested: "Remove discipline, rescind termination, make whole for all lost wages, benefits and time relating to discipline."

On May 1, 2024, Local 97 filed a Request for Submission of a Panel of Arbitrators with PERC pursuant to Article 4 of the CNA. (Aa107). An arbitration hearing was scheduled for November 18, 2024, before Arbitrator Arnold Zudick. (Aa4).

On or about October 29, 2024, Rutgers filed a Petition for Scope of Negotiation Determination with PERC. (Aa1-Aa2). The Employer sought to restrain arbitration over the Union's grievance contesting the Grievant's discipline. See id.

On or about November 27, 2024, Rutgers submitted its initial papers in support of its Petition for a Scope of Negotiations determination. (Aa3-Aa5).

On December 11, 2024, Local 97 submitted its opposition to Rutgers' Petition, which included its opposition brief and the Certification of James M. Mets, Esq. (Aa111-Aa112).

On February 27, 2025, PERC properly denied Rutgers' Petition and permitted the grievance to be heard before a neutral arbitrator. (Aa115-Aa129).

STATEMENT OF FACTS

A. THE PARTIES

Local 97 is the exclusive collective negotiations representative of licensed practical nurses, clerical staff, health care and services staff, and operations, maintenance and service staff employed by Rutgers. (Aa12). Rutgers is the State University of New Jersey and operates the John H. Cronin Dental Center. See N.J.S.A. 18A:65-2.

At all times relevant, the Union and the Employer were parties to a CNA. The CNA in effect at the time the grievance was filed in this matter is dated July 1, 2018, through June 30, 2022. (Aa7-Aa71). By operation of law, the terms of the CNA continue until a successor agreement is reached. See N.J.S.A. 34:13A-5.3.

The Grievant, Rosemary Herrschaft, was employed as a secretary at Rutgers' John H. Cronin Dental Center. (Aa117). Through her employment, she was a member of the Local 97 negotiations unit. Grievant was terminated from her

employment on March 1, 2024, allegedly because she failed to comply with the Employer's Immunization Policy for Covered Individuals. (Aa121).

B. THE COLLECTIVE NEGOTIATIONS AGREEMENT

Article 4 of the CNA between Local 97 and Rutgers contains the grievance procedure to be utilized by the parties to resolve contractual disputes. Article 4, Section C(3) states: "[a]ny claim of unjust discipline against a staff member shall be processed in accordance with the provisions of this Article." (Aa17). Article 4, Section C(9) provides: "[j]ust cause for discipline including dismissal from service shall include those causes set forth in the University Rules and Regulations. This list of causes is not exclusive and discipline up to and including dismissal from service may be made for any other combination of circumstances amounting to just cause." (Aa17).

Article 4, Section D outlines the two steps in the grievance procedure. (Aa18-Aa21). At Step One, the grievance must be reduced to writing and submitted to the Office of Labor Relations within fourteen (14) days of the date the employee knew or should have known of the violation. (Aa18). A hearing is then held and a Step One decision must be rendered within twenty (20) calendar days. (Aa19).

If the grievance is not resolved at Step One, Local 97 may file for arbitration through PERC. (Aa19). Pursuant to Section D, Step 2, Paragraph 1, the CNA specifically permits arbitration concerning the following discipline: suspensions and

written warnings in lieu of suspensions, demotion and discharge. (Aa19). Article 4, Section D, Step 2(4) provides, in part:

> Arbitrators in disciplinary matters shall confine themselves to determinations of guilt or innocence and the appropriateness of penalties and shall neither add to, subtract from, nor modify any of the provisions of this Agreement by any award. The arbitrator's decision with respect to guilt, innocence or penalty shall be final and binding on the parties. In the event the arbitrator finds the staff member guilty, he/she may approve the penalty sought or modify such penalty as appropriate to the circumstances, in accord with discipline as set forth in paragraph C, above . . . .
>
> [(Aa20).]

In short, the CNA expressly authorizes the parties to grieve and arbitrate discipline imposed by the Employer.

C. THE IMMUNIZATION POLICY FOR COVERED INDIVIDUALS

Rutgers maintains a policy entitled "Immunization Policy for Covered Individuals" ("Policy"). (Aa76-Aa80). The Policy was adopted in December 2017. (Aa76). It requires covered employees to obtain a seasonal influenza vaccine each year and provide proof of their vaccination status "prior to the start of Flu Season." (Aa78). With regard to seasonal influenza, the Policy states:

> A. Under this Policy, a Seasonal Influenza vaccine is mandatory for all Covered Individuals[1] unless such

[1] The Policy defines "Covered Individual" as "[a]ll Health Care Personnel (defined below) and all Rutgers University Public Safety Personnel (defined below), at all

> covered individual is an Exempted Individual.[2] Each year, Covered Individuals must provide proof of a Seasonal Influenza vaccination prior to the start date of Flu Season or submit any exemption request(s) by November 11 of the current Flu Season. Proof of influenza vaccination must be uploaded to https://rtr.ipo.rutgers.edu/influenz_upload or as the University otherwise directs.
>
> B. A Covered Individual who has received the Seasonal Influenza vaccination at a non-Rutgers facility, pharmacy, or physician's office must provide proof of immunization by uploading appropriate documentation to

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locations, regardless of whether they have routine presence in Patient Care Areas (defined below) or have routine patient contact." (Aa77).

"Health Care Personnel" are defined as "[i]ndividuals who work directly or have other close contact with patients or who handle material that could spread infection in a Patient Care Area. This includes but is not limited to, the following: physicians, nurses, emergency medical personnel, dental professionals, laboratory technicians, pharmacists, individuals who volunteer in Patient Care Areas, and administrative staff."

"Patient Care Area" is defined as: "[a]ll areas in which care is provided to patients, even if the Covered Individual is not providing patient care. These areas may include, but are not limited to, outpatient offices and clinics, patient waiting rooms, patient rooms, patient reception areas, meeting rooms used for patient / family consults, any location where a patient is evaluated or treated, and all hallways and similar passage that connect such areas to the outside or non-Patient Care Areas." (Aa77).

"Public Safety Personnel" are defined as "[e]mployees of Rutgers University under the command of the Rutgers University Executive Director of Public Safety/Chief of University Police whose assignment requires or could require them to be in contact with patients for any amount of time." (Aa77).

[2] "Exempted Individual" is defined as "[a] Covered Individual who receives an approved medical exemption or religious exemption from Rutgers University." (Aa77).

> https://rtr.ipo.rutgers.edu/influenz_upload or as the University otherwise directs.
>
> C. Following the effective date of this Policy, any new Covered Individual, prior to commencement of their relationship with Rutgers or upon becoming a Covered Individual, will be required to provide proof of Seasonal Influenza vaccination for the current year/season, receive a Seasonal Influenza vaccine, or furnish any exemption request(s), if the relationship begins during Flu Season or a person becomes a covered individual during Flu Season. Failure to do so will result in rescission of the Covered Individual's conditional offer of employment. If the relationship begins before Flu Season, then the Covered Individual will be required to abide by this Policy prior to the start of Flu Season.
>
> [(Aa78).]

Section III of the Policy permits employees to seek exemptions from the vaccination requirement. (Aa78). Exemptions may be requested for medical or religious reasons. (Aa78-Aa79). If an employee secures an exemption, he or she is required to wear a face mask. (Aa79).

Section IV of the Policy outlines the potential penalties for failing to comply with the vaccination requirement. (Aa80). The Policy itself does not mandate termination if an employee does not comply. Rather, the Policy states, in relevant part:

> Any covered individual who fails to be vaccinated by the applicable deadline, fails to be approved for a valid medical or religious exemption by the applicable deadline, or otherwise fails to comply with the provisions of this Policy, will not be permitted to work in a Patient Care Area

> and will be subject to discipline, up to and including termination of employment . . . .
>
> [(Aa80).]

Thus, by its terms, the Policy does not require termination for non-compliance, and leaves open the possibility of reassignment or some other level of discipline short of termination.

D. ROSEMARY HERRSCHAFT

Ms. Herrschaft was employed as a secretary at the Cronin Dental Center. (Aa117). According to Rutgers, Ms. Herrschaft's employment at that facility qualified her as a "Covered Individual" under the Policy. (Aa99). On January 18, 2023, Ms. Herrschaft was issued a counseling notice alleging that she was not in compliance with the Policy. (Aa82). That counseling notice advised her that she would need to comply with the Policy.

Ms. Herrschaft sought a religious exemption from the immunization requirement. See (Aa84). In a March 31, 2023 email, Rutgers advised Ms. Herrschaft that she was no longer required to receive the influenza vaccine because the flu season ended before it could conclude its review of her exemption request.

Ms. Herrschaft again sought a religious exemption to the immunization requirement on or about October 18, 2023, and outlined her faith-based reasons for seeking an exemption. (Aa86). On or about December 13, 2023, she was advised that her "request and documentation were fully reviewed and found insufficient to

warrant an exemption to the University." (Aa91). The December 13, 2023 email further advised that the Employer's decision was final. (Aa91). Ms. Herrschaft questioned Rutgers' allegation that her documentation was insufficient and inquired as to who made the decision. (Aa90). Rutgers refused to provide the information requested. (Aa90).

By letter dated January 2, 2024, Ms. Herrschaft received a counseling notice because she had not received the influenza vaccine. (Aa93). The counseling notice further stated that if Ms. Herrschaft failed to comply with the Policy, she would "be subject to disciplinary action, up to and including termination." (Aa93). On or about January 25, 2024, Andrea C. West, the Chief Financial Officer of the Rutgers School of Dental Medicine, wrote a letter to Ms. Herrschaft indicating that she was considering terminating her employment and invited her to a pre-termination conference on January 31, 2024. (Aa97). At the pre-termination conference, Ms. Herrschaft provided documentation to support her contention that the influenza vaccine requirement did not apply to her position prior to hiring her. (Aa100). She was subsequently terminated from employment.

On or about March 1, 2024, Local 97 filed a grievance contesting Ms. Herrschaft's termination. (Aa104). The grievance states: "Rosemary Herrschaft has been unjustly terminated and an immediate hearing is requested in this matter." (Aa104). The remedy requested by the Union was "remove discipline, rescind

termination, make whole for lost wages, benefits and time relating to discipline." (Aa104).

On or about May 1, 2024, Local 97 invoked the contractual arbitration process by filing a Request for Submission of a Panel of Arbitrators with PERC. (Aa106-Aa107). On or about October 29, 2024, the Employer filed a Petition for a Scope of Negotiations Determination with PERC. (Aa1-Aa2).

E. PERC'S FEBRUARY 27, 2025 DECISION

On February 27, 2025, PERC determined that Local 97's grievance was within the scope of collective negotiations and the grievance could proceed to arbitration. (Aa116-Aa129). The Commission considered the briefs, exhibits and certifications provided by both Rutgers and the Union. (Aa117).

The Commission examined the facts provided by the parties, which were largely not in dispute. (Aa117-Aa121). PERC then addressed the issue it was called upon to determine: "whether [the] subject matter in dispute is within the scope of collective negotiations." (Aa121). The Commission analyzed both parties' arguments and applied the law to the facts. (Aa116-Aa129). PERC noted that "Local 97 does not seek to challenge Rutgers' managerial prerogative to implement a vaccination mandate . . . . Rather, Local 97's grievance seeks arbitral review to determine whether Rutgers had just cause for terminating the grievant based on her

alleged noncompliance with its Vaccine Policy, specifically its influenza requirement." (Aa124) (internal citations omitted).

PERC then properly analyzed Rutgers' arguments and its reliance on In re City of Newark, 469 N.J. Super. 366 (App. Div. 2021). The Commission determined that the "flu vaccine requirement at issue here is not analogous to the unprecedented COVID-19 public health emergency in Newark that prompted the court to allow the City wide latitude to swiftly implement a COVID-19 vaccination mandate." (Aa125). PERC further noted that "even under the extreme circumstances in Newark, the court did not at any point state that employees who are disciplined pursuant to the City's COVID-19 vaccination mandate are bereft of their ordinary statutory and contractual disciplinary review procedures." (Aa125).

The Commission then balanced the interests of both the public employer and its public employees. In that regard, PERC held: "Rutgers' managerial prerogative to implement a Vaccine Policy and require certain vaccinations, as well as to determine that noncompliance may result in discipline, does not abrogate the grievant's rights, pursuant to the Act and the parties' CNA, to seek review of her disciplinary termination before a neutral arbitrator." (Aa128-Aa129). Ultimately, the Commission denied the Employer's request for a restraint of binding arbitration.

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW

The New Jersey Legislature has charged PERC with administering the New Jersey Employer-Employee Relations Act ("Act"), N.J.S.A. 34:13A-1 to -64, and vested the agency "with '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.'" In re Jersey City v. Jersey City Police Officers Benevolent Ass'n, 154 N.J. 555, 567-68 (1998) (quoting N.J.S.A. 34:13A-5.4(d)). "Accordingly, substantial deference is given to PERC's interpretation of the Act." Township of Franklin v. Franklin Twp. PBA Local 154, 424 N.J. Super. 369, 377 (App. Div. 2012).

The Appellate Division's scope of review of a PERC decision permitting arbitration is "sensitive, circumspect and circumscribed." Township of Teaneck v. Teaneck Firemen's Mut. Benevolent Ass'n Local No. 42, 353 N.J. Super. 289, 300 (App. Div. 2002). The Court will not "upset a State agency's determination in the absence of a showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence, or that it violated a legislative policy expressed or implicit in the governing statute." Commc'ns Workers of Am., Local 1034 v. N.J. State Policemen's Benevolent Ass'n, Local 203, 412 N.J. Super. 286, 291 (App. Div.

2010) (quoting In re Camden Cnty. Prosecutor, 394 N.J. Super. 15, 22-23 (App. Div. 2007)).

The Court's role is restricted to determining (1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency bases its action; and (3) whether, in applying the legislative policies to the facts, the agency erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors. In re Jersey City, 154 N.J. at 567.

The Employer's position, that based on In re City of Newark, 469 N.J. Super. 366, 377 (App. Div. 2021) this Court should review this matter de novo, is simply incorrect. City of Newark is clearly distinguishable from this matter. City of Newark concerned the Appellate Division's review of applications for injunctive relief seeking to prevent the *implementation* of a vaccination mandate during the COVID-19 pandemic. Further, the issue in City of Newark was whether the public employer had a managerial prerogative to implement the mandate, which is "primarily a question of law, which [the Appellate Division] review[s] de novo." Id. This case, on the other hand, concerns a scope of negotiations determination concerning discipline that was properly decided by PERC. This Court regularly grants deference to PERC's expertise on that subject. Township of Franklin, 424 N.J. Super. at 377.

As set forth more fully below, PERC properly decided this matter, regardless of what standard of review is applied.

POINT II

PERC'S FEBRUARY 27, 2025 DECISION PROPERLY DETERMINED THAT LOCAL 97'S GRIEVANCE CONTESTING MS. HERRSCHAFT'S GRIEVANCE MUST PROCEED TO BINDING ARBITRATION. (Aa116-Aa129).

PERC's February 27, 2025 decision was proper and it must be affirmed. In its decision, PERC denied the Employer's request for a restraint of arbitration and held that Local 97's grievance was within the scope of collective negotiations and was legally arbitrable. (Aa129). PERC's decision was based on applicable case law and N.J.S.A. 34:13A-5.3, which specifically makes disciplinary review procedures mandatorily negotiable. Accordingly, Rutgers' appeal must be dismissed and the Union's grievance challenging Ms. Herrschaft's termination must be allowed to proceed to binding arbitration.

In its decision, PERC identified the relevant facts and identified the applicable legal standard for making scope of negotiations determinations. Initially, PERC identified the limits of its analysis, stating:

> The Commission's inquiry on a scope of negotiations petition is quite narrow. We are addressing a single issue in the abstract: whether the subject matter in dispute is within the scope of collective negotiations. The merits of

> the Union's claimed violation of the agreement, as well as the employer's contractual defenses, are not in issue, because those are matters for the arbitrator to decide if the Commission determines that the question is one that may be arbitrated.
>
> [(Aa121) (citing Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978)).]

PERC next outlined the inquiry necessary to make a scope of negotiations determination. Citing Local 195, IFPTE v. State, 88 N.J. 393 (1982), the Commission identified the 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 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 employee's working conditions.
>
> [(Aa122).]

The Commission then properly analyzed the facts and law in making its determination. PERC began its analysis with the longstanding principle that disciplinary review procedures are mandatorily negotiable. "Pursuant to N.J.S.A.

34:13A-5.3 of the New Jersey Employer-Employee Relations Act (Act), disciplinary review procedures are mandatorily negotiable and binding arbitration may be used as a means for resolving a dispute over a disciplinary determination." (Aa123) (citing N.J. Tpk. Auth. v. N.J. Tpk. Supervisor's Ass'n, 143 N.J. 185 (1996)). The Commission recognized that Local 97 was not seeking to impede the Employer's managerial prerogative to implement a vaccine mandate but was simply seeking arbitral review to determine whether Rutgers had just cause to terminate Ms. Herrschaft. (Aa124).

Ultimately, PERC held that Local 97's grievance contesting Ms. Herrschaft's termination was legally arbitrable. (Aa128). PERC's holding is in accord with the applicable statutes and case law. See N.J.S.A. 34:13A-5.3 ("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 . . . ."); N.J. Tpk. Auth., 143 N.J. at 195 ("Thus, under the Act an employer may agree to submit a disciplinary dispute to binding arbitration pursuant to the negotiated disciplinary procedures, provided those procedures neither replace nor are inconsistent with any other statutory remedy."); In re City of Newark, P.E.R.C. No. 2025-8, 51 N.J.P.E.R.

¶ 30, 2024 WL 4581125 (2024) (holding "it is well-settled that disciplinary procedures and sanctions are mandatorily negotiable").

Despite the fact that the Legislature, the New Jersey Supreme Court, the Appellate Division and PERC have all determined that disciplinary review procedures are mandatorily negotiable in the absence of an alternative statutory review procedure, PERC did not end its analysis at that point. Rather, it considered the Employer's arguments and appropriately rejected them.

PERC's decision was proper and must not be disturbed. This Court must not permit Rutgers to repudiate the mutually agreed upon grievance and arbitration procedure set forth in Article 4 of the CNA. Rutgers agreed to arbitrate disciplinary actions taken against Local 97 unit members. It must be required to do so here.

A. Arbitral Review of Disciplinary Actions Does Not Interfere with the Determination of Governmental Policy. (Aa121-Aa122).

PERC's February 27, 2025 decision must be affirmed and Local 97's grievance contesting Ms. Herrschaft's termination must be decided by a neutral arbitrator. In Point II of its appellate brief, Rutgers argues that arbitral review of Ms. Herrschaft's termination would "significantly interfere with the determination of governmental policy." (Ab15). This argument fails because Local 97 is seeking arbitral review of Ms. Herrschaft's termination and is not contesting the implementation of the Policy.

Rutgers next argues that "termination is the only appropriate penalty" for violating the Policy. (Ab15-Ab20). This contention is absurd as the Policy itself does not require that employees who fail to be vaccinated must be terminated. Moreover, the parties' CNA specifically provides that it is up to an arbitrator to determine "the appropriateness of penalties" in disciplinary matters. (Aa20).

PERC's decision must be affirmed because N.J.S.A. 34:13A-5.3 requires public employers to negotiate disciplinary review procedures which may include arbitration. Local 97 is simply seeking to enforce its contractual right to require Rutgers to prove that it had just cause to terminate its unit member.

In its decision, PERC properly recognized the distinction between Rutgers' managerial prerogative to implement a policy and the Union's right to disciplinary review of alleged policy violations through binding arbitration. (Aa123). The question of whether Rutgers had the right to implement the Policy is irrelevant, as Local 97 is not challenging the Employer's ability to implement or even maintain the Policy. Rather, the Union is seeking to enforce its rights under Article 4 of the CNA to ensure that Rutgers had the requisite just cause required to terminate Ms. Herrschaft. See (Aa104).

The Commission properly recognized this distinction in its decision. PERC cited New Jersey Turnpike Authority v. New Jersey Turnpike Supervisor's Association, 143 N.J. 185 (1996) for the proposition that a public employer's

adoption and implementation of a policy does not preempt an employee's right to appeal discipline to arbitration for allegedly violating that policy. (Aa123).

In New Jersey Turnpike Authority, a supervisor employed by the New Jersey Turnpike Authority was disciplined for allegedly sexually harassing a subordinate in violation of the Authority's policy against sexual harassment. Id. at 188. The supervisor's union filed a grievance challenging the discipline. Id. The Authority refused to hear the grievance or submit it to arbitration, alleging that because the discipline was based on a claim of sexual harassment, the appropriate procedures for determining the discipline were governed by the New Jersey Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 to -50, and were therefore beyond the scope of collective negotiations. Id.

In support of its contention that the disciplinary grievance was outside the scope of collective negotiations, the Authority argued that arbitration was preempted because the LAD required employers to adopt policies to eradicate sexual harassment from the workplace. Id. at 190-91. Both PERC and the Appellate Division concluded that the grievance was arbitrable. Id. at 191.

Our Supreme Court analyzed whether the LAD preempted discipline resulting from alleged violations of the sexual harassment policy. Id. at 194-201. The Court found that when the Legislature amended N.J.S.A. 34:13A-5.3 in 1982, the bill sponsors noted that "[d]isciplinary actions have an unquestionably intimate and

direct effect on the work and welfare of public employees and should be viewed as only indirectly related to the right of public officials to determine substantive governmental . . . policy. . . . [These] amendments . . . empower public employers to negotiate binding arbitration procedures for disciplinary disputes." Id. at 193 (emphasis omitted) (quoting Assembly, No. 706, Statement Appended to Bill Amending P.L. 1968, c. 303 (Feb. 1, 1982)). The Court further noted that "[t]he Legislature . . . has unmistakably addressed 'disciplinary procedures' in the context of terms and conditions of employment, and has clearly determined that they are negotiable." Id. at 202.

The New Jersey Turnpike Authority Court held that the supervisor's disciplinary grievance could proceed to binding arbitration. Id. at 197-98. It explained that public employers have a duty to "enact and enforce policies and procedures to eliminate sexual harassment discrimination in the workplace. That duty is not undermined by a collectively negotiated agreement requiring fair disciplinary procedures and permitting neutral review when an employee is accused of sexual harassment." Id.

Our Supreme Court's decision in New Jersey Turnpike Authority is controlling here. Local 97 and Rutgers have agreed to a contractual grievance procedure that culminates in binding arbitration. (Aa17-Aa21). The Union filed a grievance contesting Rutgers' imposition of discipline upon Ms. Herrschaft.

(Aa104). Local 97's grievance states, "Rosemary Herrschaft has been unjustly terminated and an immediate hearing is requested on the matter." (Aa104). As a remedy, Local 97 requests that Rutgers "remove discipline, rescind termination, make whole for all lost wages, benefits and time relating to discipline." (Aa104). The grievance solely contests Ms. Herrschaft's termination. It does not challenge the Employer's ability to implement or enforce the Policy. While Rutgers may have a managerial prerogative to implement the Policy, that prerogative is not undermined by permitting arbitration of a disciplinary action for an alleged violation of the Policy.

As our Supreme Court held in New Jersey Turnpike Authority, any governmental policy interest that Rutgers may have about the implementation of the Policy does not diminish Local 97's right to challenge discipline flowing from the Policy in arbitration. Enforcement of the contractual grievance procedure only indirectly relates to the implementation of governmental policy. As the Legislature has specifically determined that disciplinary action is mandatorily negotiable and arbitrable, Rutgers' claimed managerial prerogative to implement the Policy does not infringe the Union's right to bring disciplinary grievances to arbitration. See N.J.S.A. 34:13-5.3.

Rutgers' arguments become increasingly infirm when the Policy itself is examined. Although the Employer claims that "[t]ermination is the only appropriate

penalty; else the vaccine requirement is not truly mandatory," the language of the Policy itself eviscerates that argument. The Policy's Section IV, Non-Compliance, states:

> Any Covered Individual who fails to be vaccinated by the applicable deadline, or otherwise fails to be approved for a valid medical or religious exemption by the applicable deadline, or otherwise fails to comply with the provisions of this Policy, will not be permitted to work in a Patient Care Area and will be subject to discipline, up to and including termination of employment.
>
> [(Aa80) (emphasis added).]

Thus, the Policy itself does not mandate termination, but provides the Employer with other options short of termination. Ms. Herrschaft could be removed from a Patient Care Area, suspended or receive another form of discipline. (Aa80).

Rutgers next argues that Local 97's grievance actually seeks to challenge the Policy directly, which the Employer claims is impermissible. This argument similarly fails. First and foremost, neither the Commission nor this Court are tasked with analyzing the facts of this case. Rather, both are tasked with determining whether the subject matter, in the abstract, is subject to collective negotiations. See Ridgefield Park Ed. Ass'n, 78 N.J. at 154. The Commission, and this Court on appeal, are addressing the abstract issue of whether the subject matter of the grievance is within the scope of negotiations. The arguments of the parties, or even whether the contract contains a valid arbitration clause, are outside the scope of

review in a petition for a scope of negotiations determination. Id. Thus, Local 97's prospective arguments at the arbitration hearing are outside the current analysis in a scope of negotiations determination.

The Employer's arguments in this regard make littles sense. As set forth above, the Policy itself does not mandate termination. Rather, it provides that an employee that is not immunized for seasonal influenza "will not be permitted to work in a Patient Care Area and will be subject to discipline, up to and including termination of employment." (Aa80). Thus, the Policy itself leaves room for discipline short of termination. More importantly, the Policy itself allows for Local 97 to argue why a termination for an alleged violation of the Policy is without just cause.

By way of example but not limitation, Local 97 could argue at arbitration that Ms. Herrschaft should not have been terminated but simply removed from a Patient Care Area as her job is not related to patient care. This argument would wholly comport with the Policy, which states that employees that are not vaccinated will not work in Patient Care Areas. (Aa80). Local 97 could also argue that Rutgers' failure to even respond to her initial accommodation request in 2021, and its failure to immediately terminate her after her religious exemption request was denied, and Rutgers' own lax enforcement of the Policy mitigates against termination. In short,

there are multiple arguments that Local 97 will make before an arbitrator that do not encroach upon Rutgers' ability to maintain the Policy.

Rutgers' claims in this regard are overblown. In New Jersey Turnpike Authority, our Supreme Court analyzed a similar argument and concluded that the employer "misperceive[d] the duties of an arbitrator engaged in public sector arbitration." 143 N.J. at 198. "In the public sector, the public interest, welfare, and other pertinent statutory criteria are inherent in the standards that inform and govern public sector arbitration." Id. Moreover, the Commission has recognized that if a public employer believes that an arbitrator has issued a remedy that infringes upon a managerial prerogative, the public employer may re-file a scope of negotiations determination. See In re Township of Rockaway, P.E.R.C. No. 2009-19, 34 N.J.P.E.R. ¶ 109, 2008 WL 8569598 (2008).

Local 97 is not challenging the Employer's ability to implement the Policy. Whether the Union argues that the Policy had not been historically applied to Ms. Herrschaft's title must still be examined by the arbitrator in light of the public interest and welfare. If the arbitrator issues a decision that infringes upon a prerogative, Rutgers may make a *post hoc* application for relief from the Commission. Thus, the Employer's arguments must be denied and PERC's decision must be affirmed.

Finally, Rutgers argues that its denial of Ms. Herrschaft's request for a religious accommodation is not subject to arbitration. (Ab18-Ab20). In support of

this argument, the Employer cites In re Rockaway Valley Regional Sewerage Authority, No. P.E.R.C. 2023-11, 49 N.J.P.E.R. ¶ 53, 2022 WL 16900166 (2022) for the proposition that arbitration should be restrained. This argument fails for several reasons. First, Local 97 is not challenging the Employer's denial of Ms. Herrschaft's religious accommodation request. Rather, it is challenging her termination. (Aa104). Second, the case cited by the Employer does not concern the denial of a religious accommodation request that resulted in discipline. Accordingly, PERC's decision must be affirmed.

Rutgers argues that Rockaway Valley Regional Sewerage Authority precludes arbitration here. This is simply not the case. Rockaway Valley Regional Sewerage Authority concerned a grievance filed because a public employer denied an employee a religious exemption to the COVID-19 vaccination requirement. In re Rockaway Valley Regional Sewerage Authority, No. P.E.R.C. 2023-11, 49 N.J.P.E.R. ¶ 53, 2022 WL 16900166 (2022). The grievance solely alleged discrimination, as the employee was not disciplined. Id. Under those facts, PERC concluded that "a claim seeking enforcement of the public policy of preventing discrimination is more appropriately charged to a forum such as the New Jersey Division on Civil Rights (DCR), the U.S. Equal Employment Opportunity Commission (EEOC) and/or the courts." Id.

The facts present in Rockaway Valley Regional Sewerage Authority are simply not present here. Ms. Herrschaft was not only denied a religious exemption, but she was also terminated from employment. While the aggrieved employee in Rockaway Valley Regional Sewerage Authority had alternate means to challenge the employer's decision, through either the DCR or EEOC, Ms. Herrschaft has no other means by which to challenge her termination.

Indeed, the grievance procedure in Article 4 of the CNA is the exclusive means by which a Local 97 member may contest an unjust termination. Article 4, Section C(3) states "[a]ny claim of unjust discipline against a staff member shall be processed in accordance with the provisions of this Article." (Aa17). Rutgers is not a Civil Service employer,[3] so Ms. Herrschaft has no right to contest her termination through the Civil Service Law and Rules, N.J.S.A. 11A:1-1 to 12-6. She does not have statutory appeal rights like municipal police officers and fire fighters pursuant to Title 40A of the New Jersey Revised Statutes. She may only resort to the contractual grievance procedure through Local 97 to contest her termination.

Rutgers simply has no colorable arguments supporting its position. Accordingly, PERC's February 27, 2025 decision must be affirmed and Local 97's

[3] The Civil Service Commission maintains a list of all New Jersey Civil Service employers, which is available at nj.gov/csc/about/divisions/slo/jurisdictions.html. Rutgers is not on the list.

grievance contesting Ms. Herrschaft's termination must be heard by a neutral arbitrator.

B. PERC Exercised its Statutory Duty in Determining that Local 97's Grievance was Arbitrable. (Aa124-Aa129).

Rutgers next argues that PERC's decision must be reversed because the agency failed to balance the interests of the Employer, the effected employee and the public. This argument is without merit. First and foremost, PERC is not required to engage in the balancing test when the Legislature has specifically determined that a term and condition of employment is negotiable. See N.J. Tpk. Auth. v. N.J. Tpk. Supervisor's Ass'n, 276 N.J. Super. 329, 334 (App. Div. 1994), aff'd, 143 N.J. 185 (1996). Moreover, PERC did balance the competing interests of all parties in its decision. Accordingly, PERC's February 27, 2025 decision must be affirmed, and the Union's grievance must proceed to binding arbitration.

Initially, PERC was not required to analyze this matter pursuant to the three-part test set forth in In re Local 195, IFPTE and State, 88 N.J. 393, 403-05 (1982), because the Legislature has already determined that disciplinary review procedures are mandatorily negotiable. To determine whether a matter is within the scope of collective negotiations, PERC and the courts examine three factors: (1) whether the item intimately and directly affects the work and welfare of public employees; (2) whether the subject has not been fully or partially preempted by statute or regulation;

and (3) whether a negotiated agreement would not significantly interfere with the determination of governmental policy. Id.

This Court held in New Jersey Turnpike Authority that the three-part balancing test adopted by our Supreme Court in Local 195, IFPTE only governs those disputes or terms and conditions of employment which the Legislature has not addressed. N.J. Tpk. Auth., 276 N.J. Super. at 334. Thus, PERC was not required to balance the interests of the public employer, public employee and the public in this matter.

In New Jersey Turnpike Authority, a supervisor working for the New Jersey Turnpike Authority allegedly sexually harassed a subordinate toll collector. Id. at 331. After a hearing in which the supervisor was not permitted to cross-examine witnesses, the employer found he committed an act of sexual harassment and accordingly imposed a three (3) day suspension. Id. at 332. The supervisor's union filed a grievance alleging a violation of the disciplinary procedures contained in the applicable CNA. Id. The employer asserted that it had not violated the CNA and the claim was pre-empted by federal and state statutes prohibiting discrimination and was therefore not grievable. Id. The employer filed a petition for a scope of negotiations determination, which was denied by PERC. Id.

The New Jersey Turnpike Authority argued that a grievance contesting the discipline was preempted by the LAD and Executive Order No. 88, which requires

State employers to adopt policies to eradicate sexual harassment from the workplace. Id. It further argued that allowing arbitration of discipline "would significantly interfere with its duty to adopt and implement a policy against sexual harassment." Id. at 333.

After analyzing the CNA in effect, which permitted binding arbitration of grievances and minor discipline, the Court analyzed the disciplinary amendment of the Act. Id. This Court recognized that since 1982, the Act requires public employers to negotiate written policies setting forth disciplinary review procedures, provided that those policies are not inconsistent with and do not replace any alternative statutory appeal procedures. Id.

The New Jersey Turnpike Authority Court then turned its attention to the Turnpike Authority's argument that the three-part test set forth in Local 195, IFPTE precluded arbitration of the disciplinary dispute. After outlining the test, the Court recognized the inherent tension between the second and third elements once the Legislature has specifically identified a term and condition of employment as negotiable. Id. at 334. In that regard, the Court held:

> We are entirely satisfied the above three-part test governs only those disputes or terms and conditions of employment which the Legislature has not addressed. Because the Legislature 'has not chosen to set forth [all] of the individual subjects which are to be negotiable,' the judiciary has undertaken to determine on a case by case basis 'what are terms and conditions of employment within the meaning of N.J.S.A. 34:13A-5.3.' Dunellen Bd.

> of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 31 (1973). Indeed, the judiciary applied the three-part test in 1981 and decided minor disciplinary disputes were not arbitrable. State v. Local 195, IFPTE, 179 N.J. Super. 146, 152-53 (App. Div. 1981). In response to the Local 195 decision, the Legislature enacted the discipline amendment to the Act in 1982 to overturn that decision. See State v. State Troopers Fraternal Ass'n, 134 N.J. 393, 411-12 (1993) (which describes the legislative history of the discipline amendment). In view of the clear and unambiguous legislative expression, there is no need for a court to apply the judicially established three-part test for determining arbitrability. Here, it is undisputed that the toll supervisor has no appeal rights under LAD or any other statute respecting the minor discipline. Consequently, the discipline amendment controls this case.
>
> [Id. at 334-35.]

The Court further reasoned that even if the balancing test was applied, the result would remain the same. Id. at 335. The Court noted that the "test for whether arbitration is preempted by statute or regulation is whether the provision establishes a specific term or condition of employment that leaves no room for discretionary action." Id. (internal quotation marks omitted). The Court not only recognized that the LAD strictly prohibited sexual harassment, but also noted that the employer's right to implement policies against sexual harassment was distinct from the employee's ability to seek review of disciplinary actions based on allegations of sexual harassment. Id.

The New Jersey Supreme Court affirmed the Appellate Division's decision. N.J. Tpk. Auth. v. N.J. Tpk. Auth. Supervisor's Ass'n, 143 N.J. 185 (1996). The

Court opined: "[w]e conclude that N.J.S.A. 34:13A-5.3 clearly provides, consistent with the expressed intention of the legislature, that disciplinary procedures shall be subject to collective negotiations and that those procedures may include binding arbitration." Id. at 193. The Court agreed that an employer's obligation to adopt and implement policies against sexual harassment is distinct from the employee's ability to seek review of disciplinary actions based on allegations of sexual harassment. Id. at 197. The Court noted that "[t]he LAD, Executive Order No. 88 and Lehman[v. Toys 'R' Us, Inc., 132 N.J. 587, 601 (1993)] impose a duty on public employers to enact and enforce policies and procedures to eliminate sexual harassment from the workplace." Id. at 197-98. It specified that this "duty is not undermined by a collectively negotiated agreement requiring fair disciplinary procedures and permitting neutral review when an employee is accused of sexual harassment." Id. at 198.

The Supreme Court did not address the Appellate Division's circumscribed test when a specific term and condition of employment is specifically determined to be negotiable by the Legislature. Id. Rather, the Supreme Court, like the Appellate Division, addressed the employer's arguments concerning its inherent managerial prerogative by providing two responses. The first response was "[t]he Legislature . …has unmistakably addressed 'disciplinary procedures' in the context of terms and conditions of employment, and has clearly determined that they are negotiable." Id.

at 202. Second, the Supreme Court applied the Local 195, IFPTE balancing test, similar to the Appellate Division, and came to the same conclusion - that disciplinary review procedures are arbitrable. Id. at 203.

Here, PERC properly determined that N.J.S.A. 34:13A-5.3 expressly made disciplinary review procedures mandatorily negotiable and binding arbitration may be used as a means for resolving disputes over a disciplinary action. (Aa123). The Commission could have ended its analysis at that point. Local 97 was seeking to arbitrate the discipline imposed upon Ms. Herrschaft and the Legislature expressly made such discipline arbitrable. Thus, pursuant to the applicable law, Rutgers' petition for a scope of negotiations decision had to be denied.

However, like the Supreme Court and the Appellate Division, PERC then analyzed the Employer's claimed managerial prerogative and balanced it with the Union's countervailing right to have disciplinary matters reviewed by a neutral arbitrator. (Aa124-Aa128). PERC first identified Rutgers' claim that it had a managerial prerogative to implement the Policy. (Aa123). It then identified Local 97's position that it was not seeking to challenge the implementation of the Policy but instead was simply seeking arbitral review of whether the Employer had just cause to terminate Ms. Herrschaft. (Aa124). Following this determination, PERC painstakingly addressed, and rejected, each of Rutgers' arguments supporting its contention that it had an inherent managerial prerogative to implement the Policy

and that this managerial prerogative superseded the Union's statutory right to arbitrate discipline. (Aa124-Aa129).

Ultimately, PERC held:

> Consistent with City of Newark and Maplewood, Rutgers' managerial prerogative to implement a Vaccine Policy and require vaccination, as well as to determine that noncompliance may result in discipline, does not abrogate the grievant's rights, pursuant to the Act and the parties CNA, to seek review of her disciplinary termination before a neutral arbitrator. Based on the foregoing, we find that Local 97's grievance is legally arbitrable.
>
> [(Aa128-Aa129).]

PERC's decision clearly balanced the prerogative of management (to implement a vaccine policy and determine that noncompliance will result in discipline) with the rights of the public employee (to have his or her discipline reviewed by a neutral arbitrator). PERC's decision clearly indicates that it balanced the interests of the public employer and the public employee.

The Employer's claim that PERC did not engage in the proper balancing test is simply untrue. Although Rutgers may be dissatisfied that PERC's balancing resulted in the denial of its petition, this does not and cannot result in the conclusion that PERC failed to balance the interests of Rutgers and Ms. Herrschaft. Moreover, Rutgers' arguments in this regard focus solely on whether an employer has the right to implement a mandatory vaccine policy, a position that is not disputed by PERC or Local 97.

Rutgers' contention that PERC and Local 97 failed to identify any countervailing interest that outweighs the health risks of seasonal influenza clearly misses the mark. See (Ab22). Again, neither PERC nor Local 97 dispute Rutgers' prerogative to implement its Policy. The countervailing interest at issue here is the Union's contractual and statutory rights to have disciplinary grievances heard by a neutral arbitrator. This right is clearly set forth in N.J.S.A. 34:13A-5.3. PERC, along with the New Jersey Legislature, New Jersey Supreme Court and Appellate Division have determined that this right supersedes any managerial prerogative to implement policy. Accordingly, PERC's decision must be affirmed.

As part of its argument on this point, Rutgers claims that Ms. Herrschaft had alternate means to appeal her discipline. (Ab22). However, the Employer never identifies what those alternate means might be. This is because there are no alternative means for Ms. Herrschaft to challenge her termination. As set forth above in Point A of this brief, the CNA provides the sole remedy challenging disciplinary actions, including termination. (Aa17-Aa21). Accordingly, this argument must be ignored and PERC's February 25, 2025 decision must be affirmed.

C. PERC Properly Analyzed this Court's Decision in In re City of Newark, 469 N.J. Super. 366 (App. Div. 2021), and Therefore the Commission's Decision Must be Affirmed. (Aa125-Aa126).

Rutgers further argues that PERC failed to properly analyze this Court's decision in In re City of Newark, 469 N.J. Super. 366 (App. Div. 2021). This is

clearly wrong. PERC properly analyzed In re City of Newark, and its decision must not be disturbed. Once again, Rutgers is impermissibly conflating its managerial prerogative to implement a policy with the Union's statutory and contractual right to challenge discipline resulting from that policy. In its determination, PERC was not making a medical judgment concerning the seriousness of seasonal influenza. Rather, it was following this Court's sound reasoning in In re City of Newark to ultimately hold that Rutgers' request to restrain arbitration of Ms. Herrschaft's grievance must be denied. Accordingly, PERC's decision must be affirmed, and the Union must be permitted to advance its grievance contesting Ms. Herrschaft's termination to arbitration.

The Employer first argues that PERC erred by determining "the flu vaccine requirement at issue here is not analogous to the unprecedented COVID-19 public health emergency in Newark that prompted the court to allow wide latitude to swiftly implement a COVID-19 vaccination mandate." (Ab24). Rutgers then posits that PERC was, for reasons unclear, required to provide a basis for its "medical judgment" that seasonal influenza is not analogous to COVID-19. Id. These arguments are belied by this Court's reasoning in City of Newark.

City of Newark was before this Court as an appeal of PERC's interim relief decision. City of Newark, 469 N.J. Super. at 375. In that matter, the Commission held the City could implement a mandatory vaccination policy, but it was required

to negotiate terms and conditions of employment that were severable from the mandate. Id. The severable terms and conditions of employment were whether discipline could be imposed for violating the policy, the time periods, costs and locations for COVID-19 testing, and privacy concerns related to testing and vaccines. Id.

This Court vacated PERC's determination that the City must negotiate the severable issues of the policy with the unions prior to implementation. Id. at 389. However, that holding was based largely on the fact that the COVID-19 pandemic was a public health emergency. This Court found:

> [s]ignificantly, in issuing the COVID-19 vaccination mandate, the Mayor was not acting in a vacuum. The President of the United States has declared a national emergency concerning the novel COVID-19 outbreak. Our Governor has also declared a public health emergency and state of emergency because of the spread of COVID-19.
>
> [Id. at 380-82.]

This Court further noted that the President of the United States, the Governor of New Jersey and the Chief Justice of the New Jersey Supreme Court all required employees under their control to either be vaccinated or comply with testing requirements. Id. at 381.

This Court's decision in City of Newark was ultimately decided based on the unique circumstances arising from the COVID-19 pandemic. With regard to the

City's contention that respective union contracts reserved the right to "hire employees and determine their qualifications for continued employment," this Court made clear that its holding was limited to the COVID era. Id. at 384. It highlighted that "[w]hile [the Appellate Division] does not construe the language concerning the right to hire and determine qualifications for employment to expressly authorize a city or municipality to impose a mandatory vaccine requirement, that language supports the City's authority to impose a mandatory vaccination requirement in a public health emergency." Id. at 385 (emphasis added).

In the February 27, 2025 decision, PERC recognized the Appellate Division's limitations on its decision in City of Newark. (Aa125). The Commission cited this Court's reasoning for that decision:

> COVID-19 has created an immediate and ongoing public health emergency that requires swift action to protect not only the City's employees, but the public they are hired to serve. Tens of thousands of people are sickened each day in our country. Hundreds are dying each day. Delaying, even on a temporary basis, the timeline for implementing the vaccine mandate undercuts the effectiveness of the mandate.
>
> [(Aa125).]

Contrary to Rutgers' claims, PERC did not "make a medical judgment" in making its decision. (Ab24). Rather, it applied this Court's reasoning in distinguishing the (hopefully) once in a lifetime COVID-19 pandemic with seasonal influenza. This reasoning is in line with our Supreme Court's determinations in this

regard. As this Court noted in City of Newark, "our Supreme Court has recognized that the COVID-19 pandemic is an extraordinary situation justifying extraordinary responses." City of Newark, 469 N.J. Super. at 382 (citing generally N.J. Republican State Comm. v. Murphy, 243 N.J. 574, 580-81 (2020)).

PERC did not err in finding that the Employer's seasonal influenza vaccination requirement was not similar to the vaccination requirements that arose during the COVID-19 pandemic. PERC was simply relying on this Court's decision in City of Newark to make the distinction.

More importantly, PERC correctly determined that City of Newark did not strip employees of their statutory or contractual rights to challenge discipline arising from potential violations of the vaccination policy. (Aa125). Indeed, City of Newark only permitted the City to authorize discipline in the event of noncompliance, however, even that holding was limited to the pandemic-era. City of Newark, 469 N.J. Super. at 386 ("[S]imilarly, requiring the City to negotiate over disciplining City employees who fail to comply with the mandate would undercut the effectiveness of the mandate. . . . Accordingly, in a COVID-19 pandemic, the impacts of the City's COVID-19 vaccination mandate on City employees are non-negotiable."). Thus, it is clear that this Court intended to limit the holding in City of Newark to the particular circumstances in which it arose - the COVID-19 pandemic.

Rutgers further incorrectly argues that the holding of City of Newark strips public employees of their contractual and statutory disciplinary review procedures if an employee does not receive a COVID-19 vaccination. (Ab26). This argument once again confuses two concepts: (1) the ability to authorize discipline for a particular transgression, and (2) the ability to challenge discipline imposed for the transgression. City of Newark permitted public employers to "determine the basis for discipline" when an employee fails to obtain the proper vaccination. City of Newark, 469 N.J. Super. at 386. However, the Court's holding in City of Newark does not infringe upon public employees' right to challenge the discipline in arbitration.

The section of City of Newark that Rutgers relies upon does not support its position. In its brief, the Employer provides the following quote, with emphasis added by Rutgers:

> The Unions focus on the impact of the mandate to some of their members who have chosen not to be vaccinated. That focus, however, ignores the impact their 'choice' has on coworkers and their families who have been vaccinated. Just as importantly, it ignores the impact on people with whom unvaccinated City employees come into contact... Given the scientifically undisputed risk of spreading this deadly virus, the City has the right to protect the public.
>
> Similarly, requiring the City to negotiate over disciplining City employees who fail to comply with the mandate would undercut the effectiveness of the mandate. The City, as a public employer, has the prerogative to determine the basis for discipline. In re Newark, P.E.R.C.

> No. 2019-21, 45 N.J.P.E.R. ¶55, 2018 NJ PERC Lexis 103, 2018 WL 7106593. Accordingly, in a COVID-19 pandemic, the impacts of the City's COVID-19 vaccination mandate on City employees are non-negotiable. See Local 195, 88 N.J. at 405, 443 A.2d 187; see also Paterson Police PBA, 87 N.J. at 86, 432 A.2d 847.
>
> There are many actions that we take as a society to protect the common good. Sometimes the protection of the many requires an individual, especially a public servant to act for the public good. The Unions have not cited any facts that would support the purported rights of what appears to be a minority of City employees to pose a risk to coworkers and City residents. [Footnote omitted]. The people they are committed to serve, in particular, the aged who are among the most vulnerable to COVID-19, and children who currently cannot be protected by a vaccine, are placed at greater risk by unvaccinated City workers.
>
> …City employees have the right to get vaccinated and keep their jobs or decide that they do not wasn't to work for the common good.
>
> [(Ab26-Ab27) (emphasis in original).]

Putting aside the fact that Rutgers cherry picked four pages of a decision to make it seem like City of Newark supports its decision, the above quotation does not advance the Employer's argument. Indeed, Rutgers underlined certain portions of the quoted language but failed to emphasize the following: "[t]he City, as a public employer, has the prerogative to determine the basis for discipline." City of Newark, 469 N.J. Super. at 386. Contrary to Rutgers' claims, this Court determined that the City did not have to negotiate before authorizing discipline. Id. at 389. It did not,

as Rutgers contends, remove the ability to challenge discipline from the scope of collective negotiations.

PERC's decision recognizes this distinction. In City of Newark, this Court cited PERC's decision in In re City of Newark, P.E.R.C. No. 2019-21, 45 N.J.P.E.R. ¶ 55, 2018 WL 7106593 (2018). In that decision, PERC held:

> In general, a public employer has a prerogative to determine the basis for discipline, i.e. what transgressions by employees warrant the imposition of discipline. However, a public employer's prerogative to determine the basis for discipline is not impeded by negotiated agreements over sanctions or penalties to be imposed for specific transgressions. Negotiating about such issues comports with the bar set by N.J.S.A. 34:13A-5.3 against unilateral action over 'proposed new rules or modifications of existing rules affecting working conditions;' and that law's further mandate that public employers and majority representatives shall 'negotiate in good faith with respect to…disciplinary disputes.'
>
> [Id. (omission in original) (internal citation and footnote omitted).]

In footnote six, which is a part of the above quote, PERC added: "[s]anctions can be challenged through the negotiated grievance procedure or statutory disciplinary procedures. The ability to contest disciplinary penalties is not at issue here." Id.

PERC fully analyzed Rutgers' argument in this regard and properly found it unpersuasive. (Aa126). The Commission's analysis of City of Newark is consistent with this Court's ruling. While this Court did not permit negotiations on whether discipline could be imposed for failing to comply with the vaccine mandate, it never

stripped employees of the right to a neutral arbitral review of any discipline imposed. PERC thoroughly explained its reasoning in this regard. (Aa124-Aa126). Because the Commission's reasoning is in conformance with this Court's decisions, PERC's decision must be affirmed.

CONCLUSION

For the foregoing reasons, PERC's February 27, 2025 decision must be affirmed and Local 97's grievance contesting Ms. Herrschaft's termination must be allowed to proceed to binding arbitration.

Respectfully submitted,

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Dated: October 20, 2025

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A002430-24T4

In the Matter of	:	
	:	Civil Action
RUTGERS, THE STATE UNIVERSITY, OF NEW JERSEY,	:	
	:	On Appeal From the
	:	Final Administrative
Petitioner-Appellant,	:	Action of the New Jersey
-and-	:	Public Employment
	:	Commission
INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 97,	:	
	:	PERC No. 2025-29
	:	Docket No. SN-2025-009
Respondent-Appellee.	:	

LETTER BRIEF ON BEHALF OF THE NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION

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DATED: OCTOBER 22, 2025

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS

PRELIMINARY STATEMENT

The issue here is straightforward: whether a union's statutory right to negotiate for binding arbitration of discipline depends on the employer's reason for imposing the discipline. The answer is unequivocally no. To hold otherwise would contravene the explicit provisions of the Employer-Employee Relations Act (Act) guaranteeing the right to negotiate for binding disciplinary arbitration, and would overturn decades of Supreme Court precedent recognizing and reinforcing that right. No statutory or judicial authority supports Rutgers' novel assertion that a negotiated disciplinary arbitration clause may be disregarded – and neutral arbitral review avoided – merely because the employer deems the alleged misconduct sufficiently serious.

This case does not challenge Rutgers' managerial prerogative to adopt and enforce its vaccination policy, nor its authority to determine that a violation may warrant severe discipline, including discipline. However, once Rutgers elects to impose discipline, the parties' negotiated disciplinary review procedures – established pursuant to the Act - must govern. Having agreed through collective negotiations to binding arbitration of terminations, Rutgers and IBT Local 97 are bound by that agreement. The grievant's statutory right to binding disciplinary arbitration cannot be eroded based on Rutgers' unilateral characterization of the alleged offense.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

The International Brotherhood of Teamsters Local 97 (IBT Local 97) represents a negotiations unit of healthcare workers employed by Rutgers, the State University of New Jersey (Rutgers), including nurses, clerical staff, healthcare services staff, and operations, maintenance and service staff. (Aa12-13). Rutgers and IBT Local 97 are parties to a collective negotiations agreement (CNA) with a term of July 1, 2018 through June 30, 2022. (Aa7-72). The CNA's grievance and disciplinary procedure ends in binding arbitration. (Aa15-21). Article 4 of the CNA is entitled "Grievance Procedure" and Article 4.C(3) provides: "Any claim of unjust discipline against a staff member shall be processed in accordance with the provisions of this Article." (Aa15-16). Article 4's "Step Two Arbitration" section provides that "a request for arbitration may be brought" for certain disciplinary penalties including "discharge," provides for binding arbitration, and sets forth the parameters of such disciplinary arbitration. (Aa19-20).

Rutgers' Immunization Policy for Covered Individuals (Vaccine Policy) mandates vaccinations for certain employees. (Aa76-80). The Vaccine Policy provides, among other things, that all covered individuals must receive a

[1] As the Procedural History and Statement of Facts are intertwined, they are presented here as one combined section for the convenience of the Court.

Seasonal Influenza vaccine unless they receive a medical or religious exemption. Id. All Rutgers employees who work at the Cronin Dental Center are "covered individuals" under the Vaccine Policy. (Aa99). The grievant was employed by Rutgers as a secretary in the Cronin Dental Center and was informed that she is a covered individual and would need to get her influenza vaccine or an approved exemption request for the 2023-24 flu season. (Aa117-118; Aa82-84).

On October 18, 2023, the grievant applied for a religious exemption from the Vaccine Policy's requirements based on her Catholic faith. (Aa86-88). On December 13, 2023, the Rutgers Immunization Group notified the grievant that it had declined her request for a religious exemption from the influenza vaccine. (Aa91). The letter advised that failure to vaccinate within seven days "may result in disciplinary action, up to and including termination." Id. On January 2, 2024, Rutgers issued a counseling notice reminding the grievant that she is noncompliant with the Vaccine Policy because she had not received the flu vaccine or a Rutgers-approved exemption. (Aa93). On January 25, 2024, Rutgers issued the grievant a pre-termination notice, and a pre-termination conference was held on January 31. (Aa97; Aa100). On March 1, 2024, Rutgers terminated the grievant for failing to comply with the Vaccine Policy. (Aa74).

On March 1, 2024, IBT Local 97 filed a grievance contesting the grievant's termination. (Aa104). On May 1, 2024, IBT Local 97 submitted a request for binding arbitration of the disciplinary grievance. (Aa106-107). On October 29, 2024, Rutgers filed a scope of negotiations petition with the Commission seeking to restrain binding arbitration of IBT Local 97's grievance. (Aa1-2). The grievance arbitrator adjourned the arbitration hearing pending resolution of the scope of negotiations petition. (Aa4). On February 27, 2025, the Commission issued its decision denying Rutgers' request for a restraint of binding arbitration. P.E.R.C. No. 2025-29, 51 NJPER 287 (¶65 2025) (Aa115-129). On April 15, 2025, Rutgers filed its amended Notice of Appeal with the Superior Court, Appellate Division.

LEGAL ARGUMENT

I. STANDARD OF REVIEW: THE APPELLANT MUST ESTABLISH THAT THE COMMISSION'S DECISION WAS "ARBITRARY OR CAPRICIOUS."

It is well-established that the "[t]he scope of appellate review of a final agency decision is limited." In re Carter, 191 N.J. 474, 482 (2007). "An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." In re Herrmann, 192 N.J. 19, 27 (2007); P.F. v. New Jersey Div. of Developmental Disabilities, 139 N.J. 522, 529-530

(1995). "The burden of demonstrating that the agency's action was arbitrary, capricious or unreasonable rests upon the [party] challenging the administrative action." Lavezzi v. State, 219 N.J. 163, 171 (2014) (quoting In re J.S., 431 N.J. Super. 321, 329 (App. Div. 2013), certif. denied, 216 N.J. 365 (2013)).

The Commission has been granted "broad authority and wide discretion in a highly specialized area of public life" and is entrusted with deciding cases based upon its "expertise and knowledge of circumstances and dynamics that are typical or unique to the realm of employer-employee relations in the public sector." Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 328 (1989). The Commission has primary jurisdiction to determine whether the subject matter of a particular dispute is within the scope of collective negotiations. N.J.S.A. 34:13A-5.4(d); In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 16 (2020); State v. State Supervisory Emps. Ass'n, 78 N.J. 54, 83-84 (1978).

Furthermore, "an administrative agency's interpretation of a statute that it is charged with enforcing is entitled to due deference." In re Bridgewater, 95 N.J. 235, 244 (1984). Thus, the Supreme Court has held that "PERC's interpretation of the Act is entitled to substantial deference" and that it "will yield to PERC unless its interpretations are plainly unreasonable, contrary to the language of the Act, or subversive of the Legislature's intent." N.J.

Turnpike Authority v. AFSCME, Council 73, 150 N.J. 331, 352 (1997) (internal citation omitted). Rutgers bears the burden of demonstrating that the Commission's decision was an arbitrary application of the agency's expertise and is not entitled to deference on appeal. Lavezzi v. State, 219 N.J. at 171.

II: THE COMMISSION'S DETERMINATION THAT THE DISCIPLINARY TERMINATION IS LEGALLY ARBITRABLE IS CONSISTENT WITH THE ACT AND JUDICIAL PRECEDENT.

A. The Act makes disciplinary review procedures mandatorily negotiable, including binding arbitration of discipline.

Pursuant to the Act, the majority representative (union) and public employer must "negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment." N.J.S.A. 34:13A-5.3 (emphasis added). Furthermore, a union's ability to negotiate disciplinary procedures and contest disciplinary actions, including through binding arbitration, is explicitly required by the Act, which mandates:

> 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. . . . Grievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.
>
> [N.J.S.A. 34:13A-5.3 (emphasis added).]

The New Jersey Supreme Court has consistently held that disciplinary review procedures are mandatorily negotiable and, except for police officers and employees with alternate statutory appeal procedures,[2] such disciplinary review may include binding arbitration. See, e.g., State of New Jersey (OER) v. CWA, 154 N.J. 98, 114 (1998) ("N.J.S.A. 34:13A-5.3 authorizes the State to negotiate disciplinary review procedures, including binding arbitration."); State v. State Troopers Fraternal Ass'n, 134 N.J. 393, 412-413, 417-420 (1993); Pascack Valley Reg'l High Sch. Bd. of Educ. v. Pascack Valley Reg'l Support Staff Ass'n, 192 N.J. 489 (2007); Mount Holly Tp. Bd. of Educ. v. Mount Holly Tp. Educ. Ass'n, 199 N.J. 319 (2009); and New Jersey Turnpike Authority v. New Jersey Turnpike Supervisors' Association, 143 N.J. 185 (1996).

[2] N.J.S.A. 34:13A-5.3 provides, in pertinent part: "Except as otherwise provided herein, the procedures agreed to by the parties may not replace or be inconsistent with any alternate statutory appeal procedure nor may they provide for binding arbitration of disputes involving the discipline of employees with statutory protection under tenure or civil service laws . . ."

In New Jersey Turnpike Authority, the Supreme Court held that an employee disciplined for sexual harassment maintained his right under the Act and his union's CNA to appeal his discipline to a neutral grievance arbitrator even though the merits of the grievance concerned the State's statutory duty to implement policies prohibiting sexual harassment. The Court held:

> We conclude that N.J.S.A. 34:13A-5.3 clearly provides, consistent with the expressed intention of the Legislature, that disciplinary procedures shall be subject to collective negotiations and that those procedures may include binding arbitration. See County College of Morris Staff Ass'n v. County College of Morris, 100 N.J. 383, 397, 495 A.2d 865 (1985) (recognizing that a public employer may contractually agree to abide by principles of procedural fairness, which include deferral to binding arbitration, when determining an accused employee's guilt or innocence).
>
> [Turnpike Authority, 143 N.J. at 193-194.]

The Supreme Court rejected the employer's assertion that disciplinary arbitration should be restrained because it would significantly interfere with its managerial prerogative to prevent sexual harassment, holding: "The Legislature, however, has unmistakably addressed 'disciplinary procedures' in the context of terms and conditions of employment, and has clearly determined that they are negotiable." Turnpike Authority, 143 N.J. at 202.

B. There is no dispute that Rutgers agreed to binding arbitration of discipline in its CNA with IBT Local 97.

In this case, Rutgers does not contest that it has, pursuant to N.J.S.A. 34:13A-5.3, negotiated disciplinary review procedures with IBT Local 97 that include binding arbitration of terminations. Article 4 of the CNA provides for binding grievance arbitration of certain disciplinary penalties including discharge. (Aa15-20). Pursuant to that negotiated disciplinary procedure, IBT Local 97 grieved the employee's termination and filed a request for submission of a panel of arbitrators with the Commission. (Aa103-110). The Act compels Rutgers to abide by the disciplinary review procedure it negotiated, mandating: "Grievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement." N.J.S.A. 34:13A-5.3 (emphasis added).

There is no legal basis within the Act or judicial interpretations thereof to permit Rutgers to circumvent the parties' negotiated disciplinary review procedures simply because Rutgers asserts that termination of the grievant was justified. Such arguments speak to the merits of Rutgers' disciplinary action and are therefore for the arbitrator to decide. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978). Just as the Supreme Court in Turnpike Authority, 143 N.J. 185, supra, upheld the union's right,

under the Act and the CNA, to appeal an employee's discipline to binding arbitration despite the employer's significant managerial interest in enforcing non-discrimination policies, so too does IBT Local 97 maintain its statutory and contractual right to appeal the grievant's termination to a neutral arbitrator despite Rutgers' strong interest in enforcing its vaccination policies. Accordingly, the Commission properly held: "Rutgers' managerial prerogative to implement a Vaccine Policy and require certain vaccinations, as well as to determine that noncompliance may result in discipline, does not abrogate the grievant's rights, pursuant to the Act and the parties' CNA, to seek review of her disciplinary termination before a neutral arbitrator." (Aa128-129).

C. **As the grievance does not contest Rutgers' managerial prerogative to implement a vaccination mandate and issue discipline in the first instance, no negotiability balancing test was required.**

The Commission decision properly found that IBT Local 97's grievance does not challenge Rutgers' creation of a Vaccine Policy or its determination to issue discipline to employees who do not obtain the required vaccinations or exemptions. (Aa124; Aa128). Rather, the grievance seeks only to appeal the issued discipline to a neutral arbitrator pursuant to the CNA's "just cause" standard and disciplinary arbitration procedures. In accordance with the explicit language of the Act and Supreme Court jurisprudence discussed above,

disciplinary review procedures, including binding arbitration, are mandatorily negotiable, and there is no exception based on the asserted gravity of the alleged employee violation.

D. The Commission decision is consistent with the Appellate Division's City of Newark decision concerning emergency implementation of COVID-19 vaccination policies.

Rutgers' assertion that City of Newark, 469 N.J. Super. 366 (App. Div. 2021) effectively repealed section 5.3 of the Act's mandate that parties utilize their binding disciplinary arbitration procedures is unsupported. First, as noted in the Commission decision, the Appellate Division's opinion in City of Newark was premised on its finding that "COVID-19 has created an immediate and ongoing public health emergency that requires swift action to protect not only the City's employees, but the public they are hired to serve." Newark, 469 N.J. Super. at 385. Therefore, the Appellate Division held: "In the context of a public health emergency, negotiating procedures for the implementation of a COVID-19 vaccination mandate, or the enforcement or timing of the mandate, would interfere with the managerial prerogative" to implement the vaccine mandate. Ibid. Notably, the request for grievance arbitration at issue here does not involve any effort from the union to negotiate over Rutgers' Vaccine Policy.

Furthermore, the Newark Court did not find, as Rutgers contends, that employees who are disciplined pursuant to Newark's COVID-19 vaccination policy are stripped of their ordinary statutory and contractual disciplinary review procedures. Instead, the Court's discussion of the vaccine policy's disciplinary penalties correctly recognized: "The City, as a public employer, has the prerogative to determine the basis for discipline. In re Newark, P.E.R.C. No. 2019-21, 45 N.J.P.E.R. ¶ 55, 2018 WL 7106593." Newark at 386. Moreover, the Commission case cited by the Court for that proposition, City of Newark, P.E.R.C. No. 2019-21, 45 NJPER 211 (¶55 2018), after finding that a public employer generally "has a prerogative to determine the basis for discipline, i.e. what transgressions by employees warrant the imposition of discipline[,]" went on to state: "Sanctions can be challenged through the negotiated grievance procedure or statutory disciplinary procedures." City of Newark, 45 NJPER at 212-213. The Court's discussion of City of Newark, P.E.R.C. No. 2019-21 demonstrates its understanding of the critical distinction between a public employer's managerial prerogative to determine that violation of a vaccine policy may be a basis for discipline, and the employee's right to nevertheless appeal such discipline via negotiated disciplinary procedures. To construe City of Newark, 469 N.J. Super. 366 as Rutgers proposes would contradict the Act and reverse decades of Supreme Court

precedent supporting the negotiability and enforcement of binding disciplinary arbitration.

E. The Commission decision is distinguishable from the Rockaway Valley Sewerage Authority case relied on by Rutgers.

As discussed in the Commission decision, the cases Rutgers relied on that restrained arbitration of statutory religious discrimination claims are factually distinguishable from this case. (Aa127-128). Rockaway Valley Regional Sewerage Authority, P.E.R.C. No. 2023-11, 49 NJPER 236 (¶53 2022), involved a request for binding arbitration of an alleged contractual violation – not a disciplinary appeal – based on claimed religious discrimination after the employer denied an employee's COVID-19 vaccine religious exemption request and the employee was required to wear a face mask and take weekly COVID-19 tests. No discipline had been imposed or was being challenged. Rockaway Valley, 49 NJPER at 244. Relying on Teaneck Bd. of Ed., 94 N.J. 9, 14-18 (1983), the Commission restrained arbitration, finding that because the union's discrimination claim challenged the employer's managerial prerogative to implement a vaccination policy, it should be adjudicated in the proper forum such as the New Jersey Division on

Civil Rights.[3] Here, by contrast, there is no contractual grievance challenging Rutgers' vaccination policy on religious discrimination or any other grounds; IBT Local 97 filed a grievance challenging the grievant's disciplinary termination and binding arbitration of discipline is mandatorily negotiable.

III. RUTGERS' CHARACTERIZATION OF PUBLIC SECTOR LABOR ARBITRATION IS ANTITHETICAL TO NEW JERSEY LAW AND POLICY.

Rutgers' warning of "unaccountable private arbitrators" deciding disciplinary appeals is an affront to the Act's provisions that allow binding arbitration of disciplinary disputes and mandate adherence to such negotiated procedures. (Appellant Brief at 25). Furthermore, the Supreme Court has regularly recognized New Jersey's policy favoring arbitration of public sector labor-management disputes: "Arbitration is a favored form of dispute resolution, whose usefulness for labor-management issues is well-recognized in this state." Borough of Carteret v. Firefighters Mut. Benevolent Ass'n, Local 67, 247 N.J. 202, 211 (2021), quoting Borough of East Rutherford v. E. Rutherford PBA Local 275, 213 N.J. 190, 201 (2013); see also Middletown

[3] Under Teaneck, binding arbitration is barred when a grievance claims that a managerial decision was tainted by discrimination. However, binding arbitration of alleged discrimination is permitted so long as the grievance does not challenge a managerial prerogative. Turnpike Authority, 143 N.J. at 202.

Twp. PBA Local 124 v. Twp. of Middletown, 193 N.J. 1, 10 (2007), quoting State of New Jersey (OER), supra, 154 N.J. at 111 ("Arbitration is a favored means of settling labor-management disputes."). In N.J. Tpk. Auth. v. Local 196, 190 N.J. 283 (2007), the Supreme Court provided the following guidance:

> For the guidance of trial and appellate courts in future labor arbitration disputes, we iterate, yet again, the fundamental principle that New Jersey law encourages the use of arbitration to resolve labor-management disputes. See, e.g., N.J.S.A. 34:13A-2 (declaring State's "best interests . . . are served by the prevention or prompt settlement of labor disputes" in public sector); Scotch Plains-Fanwood Bd. of Educ. v. Scotch Plains-Fanwood Educ. Ass'n, 139 N.J. 141, 149, 651 A.2d 1018 (1995) ("Our courts view favorably the settlement of labor-management disputes through arbitration.").
>
> [N.J. Tpk. Auth. v. Local 196, 190 N.J. at 291.]

Moreover, in 2006, the Legislature amended N.J.S.A. 34:13A-5.3 to provide the following presumption in favor of public sector arbitration:

> In interpreting the meaning and extent of a provision of a collective negotiation agreement providing for grievance arbitration, a court or agency shall be bound by a presumption in favor of arbitration. Doubts as to the scope of an arbitration clause shall be resolved in favor of requiring arbitration.
>
> [N.J.S.A. 34:13A-5.3; See P.L. 2005, c. 380, § 1.]

See Alpha Bor. Bd. of Ed. v. Alpha Ed. Ass'n, 190 N.J. 34, 48 (2006); and Pascack Valley, supra, 192 N.J. at 496. In Mount Holly, 199 N.J. 319, supra,

the Supreme Court upheld a custodian's right under his union's CNA to pursue binding arbitration of his termination for allegedly physically striking another custodian. The Court held that the 2006 amendment to the Act further supported the employee's right to binding disciplinary arbitration, stating:

> Requiring arbitration in this case is consistent with the Legislature's amendment to N.J.S.A. 34:13A-5.3 extending a presumption in favor of arbitration to public employees. That statutory presumption also reaffirms the principle that "[a]rbitration is a favored means of resolving labor disputes." Pascack Valley, supra, 192 N.J. at 496 (citations and internal quotation marks omitted).
>
> [Mount Holly, 199 N.J. at 333.]

Finally, we note that public sector labor arbitrators are not "unaccountable." Arbitrators' decisions are subject to judicial review and N.J.S.A. 2A:24-8 identifies the reasons a court may vacate an arbitration award. State of New Jersey (OER), 154 N.J. at 111. The scope of an arbitrator's authority depends on the terms of the contract between the parties, and any action taken beyond that may be vacated. Scotch Plains-Fanwood Bd. of Educ. v. Scotch Plains-Fanwood Educ. Ass'n, 139 N.J. 141, 149 (1995). "When reviewing an arbitrator's interpretation of a public-sector contract, in addition to determining whether the contract interpretation is reasonably

debatable, the court must also ascertain whether the award violates law or public policy." State of New Jersey (OER), 154 N.J. at 112.[4]

In the instant case, Rutgers' novel position that disciplinary arbitration may be restrained based on its assessment of the seriousness of the alleged offense would be antithetical both to the Act's mandate that parties negotiate disciplinary review procedures that may "provide for binding arbitration as a means for resolving disputes" and New Jersey's policy of favoring arbitration for the settlement of labor-management disputes. N.J.S.A. 34:13A-5.3; see, e.g., Turnpike Authority, 143 N.J. 185; State of New Jersey (OER), 154 N.J. 98; and Mount Holly, 199 N.J. 319. Rutgers' approach would invite challenges to disciplinary arbitration any time an employer believes its reason for discipline is so important that its imposed sanctions are beyond reproach, regardless of the negotiated right to review by a neutral. This would create an administrative and judicial patchwork of exceptions to the statutory right to negotiate for binding arbitration of discipline, making the disciplinary appeals process unpredictable and unmoored to the CNA. Such an uncertain process would be contrary to the letter and spirit of the Act.

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[4] Additionally, arbitrators on the Commission's panel, which Rutgers and IBT Local 97 have agreed to utilize, must meet certain eligibility requirements and conform to the Code of Professional Responsibility for Arbitrators of Labor-Management Disputes.

CONCLUSION

The Commission's application of its administrative expertise to the issues and facts presented is entitled to deference inasmuch as its decision was not arbitrary, capricious, or unreasonable. The Commission adequately explained its reasoning in its written decision and appropriately applied its expertise of public employment labor relations in New Jersey. The Commission's determination that the grievant's disciplinary termination may be appealed to binding arbitration according to the parties' negotiated grievance and disciplinary procedure is consistent with the Act and well supported by pertinent Commission and judicial precedent. Accordingly, the Commission's decision is neither arbitrary nor capricious, but is sound and should be affirmed.

Respectfully submitted,

FRANK C. KANTHER
Deputy General Counsel

DATED: October 22, 2025

In the Matter of RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, Petitioner-Appellant, -and- INTERNATIONAL BROTHERHOOD OF TEAMSTERS LOCAL 97, Respondent-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-002430-24T4 Civil Action On Appeal from Final Decision and Order of the New Jersey Public Employment Relations Commission PERC Docket No. SN-2025-009 Sat Below: New Jersey Public Employment Relations Commission

REPLY BRIEF OF PETITIONER-APPELLANT RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY

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TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS AND RULINGS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

PRELIMINARY STATEMENT

This reply brief is submitted on behalf of Petitioner-Appellant Rutgers, The State University of New Jersey ("Rutgers" or "University") in further support of its appeal from the February 27, 2025 Decision and Order of the New Jersey Public Employment Relations Commission ("PERC") denying Rutgers' petition for a scope of negotiations determination restraining arbitration of the grievance filed by Respondent-Respondent International Brotherhood of Teamsters, Local 97 ("Respondent," "Local 97" or "Union").

As shown herein, PERC misinterpreted and misapplied this Court's decision in In re City of Newark, 469 N.J. Super. 366 (App. Div. 2021), erroneously distinguished this matter from City of Newark and failed to recognize that the Union seeks to challenge in arbitration the University's managerial prerogative to implement its Mandatory Vaccination Policy.

PERC's decision below must be reversed.

PROCEDURAL HISTORY

Rutgers relies on the Procedural History set forth in its initial brief.

STATEMENT OF FACTS

Rutgers relies on the Statement of Facts set forth in its initial brief.

LEGAL ARGUMENT

POINT I

PERC ERRED BY FAILING TO FULLY AND PROPERLY APPLY THE HOLDINGS OF THIS COURT'S DECISION IN IN RE CITY OF NEWARK, 469 N.J. Super. 366 (App. Div. 2021).

In its decision below, PERC stated that pursuant to N.J.S.A. 34:13A-5.3 disciplinary review procedures are mandatorily negotiable and that binding arbitration may be used for resolving disputes over disciplinary determinations (Aa123-Aa124).

Nonetheless, PERC acknowledged that this Court's reported decision in In re City of Newark, 496 N.J. Super. 366, 386 (App. Div. 2021), held that negotiations over implementation and enforcement of the Newark vaccine mandate would significantly interfere with the City's policymaking powers aimed at protecting the health and safety of its employees and the public (Aa124-Aa125). PERC also acknowledged the City of Newark Court's holding that "[i]n the context of a public health emergency, negotiating procedures for the implementation of a COVID-19 mandate, or the enforcement or timing of the mandate, would interfere with the managerial prerogative" to implement the vaccine mandate (Aa124-Aa125) (citing City of Newark, 469 N.J. Super. at 385). However, PERC omitted the following from its quotation of the City of Newark Court's holding: "in a COVID-19 pandemic, the

impacts of the City's vaccination mandate on City employees are non- negotiable." Compare Aa125 and City of Newark, 469 N.J. Super. at 386.

In its brief on appeal (PEb6-8),[1] PERC effectively backtracks from its purported adherence to the holding of City of Newark and implicitly argues that City of Newark is wrongly decided to the extent that PERC's draconian interpretation of N.J.S.A. 34:13A-5.3 leaves no room for this Court's holding in City of Newark, that in the life or death conditions presented by the COVID-19 pandemic, the subject of disciplining City employees under the City's COVID-19 vaccine mandate is non-negotiable. See 469 N.J. at 386.

PERC's construction of N.J.S.A. 34:13A-5.3 would significantly interfere with efforts of public bodies to adopt and implement responsible, science-based measures to protect the public against deadly health and safety risks and, thus, would lead to absurd results.

[1] References to "Aa__", "Pb__," "PEb__ and "Rb__," respectively, are to Rutgers' Appendix, Rutgers' initial brief, PERC's brief and Local 97's Brief on appeal.

POINT II

PERC ERRED IN CONCLUDING THAT THE HEALTH AND SAFETY RISKS POSED BY SEASONAL INFLUENZA ARE INSUFFICIENT TO WARRANT APPLICATION OF THIS COURT'S HOLDING IN CITY OF NEWARK. (Aa124-Aa125)

PERC also distinguished this matter from City of Newark based on the Commission's view that the COVID-19 pandemic presented an urgent and emergent need for the swift imposition of vaccination mandates and that Seasonal Influenza is not analogous to COVID-19 (Aa124-Aa125).

Although pandemic era COVID-19 unquestionably was catastrophic, the United States Centers for Disease Control and Prevention ("CDC") estimates that Seasonal Influenza has resulted in 9.3 to 41 million illnesses, 120,000 to 710,000 hospitalizations and 6,300-52,000 deaths annually in the United States between 2010 and 2014 (Aa132-Aa134). Based on those estimates, the total estimated U.S. death toll from Seasonal Influenza during that period exceeds 350,000 (Ibid.). During the 2023-2024 flu season alone, the CDC estimates that Seasonal Influenza resulted in 28,000 deaths in this country (Ibid.). Both pandemic era COVID-19 and the annual Seasonal Influenza in recent history have caused the deaths of hundreds of thousands of people in this country.

Science-based efforts of public entities and institutions in this State to reduce the risk of Seasonal Influenza-caused serious illnesses and deaths of New Jerseyans

in public healthcare clinics, such as the clinic at issue here, should not be thwarted because COVID-19 has been more deadly in recent years.

In addition, PERC observed that the City of Newark Court did not hold that City employees who are disciplined pursuant to the City's COVID-19 vaccination mandate are "bereft of their ordinary statutory and contractual disciplinary review procedures." (Aa125). PERC neglected to mention that City of Newark arose out of unfair practice charges, rather than a contractual grievance, and that no question of arbitrability was presented. However, the City of Newark Court's holding, notwithstanding the provisions of N.J.S.A. 34:13A-5.3, that in the context of the COVID-19 pandemic, the impacts of the City's vaccination mandate on City employees were non-negotiable, strongly suggests that the Court sought to avoid absurd and deadly results by concluding that mandatory negotiability must flex to accommodate public institution's policies designed to protect the public from the health and safety of risks of widespread communicable diseases that cause the death of thousands of Americans each year. See City of Newark, 469 N.J. Super. at 386.

COVID-19 is one such disease. Seasonal Influenza is another.

POINT III

PERC ERRED IN CONCLUDING THAT THE CITY OF NEWARK COURT CLEARLY INDICATED THAT ITS NEGOTIABILITY HOLDING DID NOT APPLY TO DISCIPLINARY PROCEDURES, SUCH AS ARBITRATION. (Aa125-Aa126)

In its decision, PERC also concluded that the City of Newark Court clearly understood that discipline imposed under the City's COVID-19 vaccine mandate was subject to challenge through contractual grievance procedure because the Court cited PERC's decision in City of Newark, P.E.R.C. No. 2019-21, 45 NJPER 211 (¶¶55 2018). The City of Newark Court cited that PERC decision for the sole proposition that the City, as a public employer, has the prerogative to determine the basis of discipline (See Aa126 and 469 N.J. Super. at 386). Nothing in City of Newark supports PERC's attribution of such unstated intentions to this Court, particularly because this Court is fully capable of expressing its reasoning, and because no grievance or demand for arbitration was before the Court.

Indeed, the next two paragraphs of the City of Newark Court's decision reflect quite a view that is quite distinct from that of PERC and that provides no support for PERC's assertion that this Court concluded that the application of previously negotiated disciplinary or grievance procedures are unaffected during a health emergency:

> There are many actions that we take as a society to protect the common good. Sometimes the protection of the many

> requires an individual, especially a public servant, to act for the public good. The Unions have not cited any facts that would support the purported rights of what appears to be a minority of City employees to pose a risk to coworkers and City residents [Footnote omitted]. The people they are committed to serve, in particular, the aged who are among the most vulnerable to COVID-19, and children who currently cannot be protected by a vaccine, are placed at greater risk by unvaccinated City workers.
>
> In that regard, it has long been established that there is no constitutional or statutory right to a government job. *State-Operated Sch. Dist. of City of Newark v. Gaines*, 309 N.J. Super. 327**,** 334**,** 707 A.2d 165 (App. Div. 1998) ("Our laws, as they relate to discharges or removal, are designed to promote efficient public service . . . . The welfare of the people as a whole, and not exclusively the welfare of the civil servant, is the basic policy underlying our statutory scheme."). Consequently, City employees have the right to get vaccinated and keep their jobs or decide that they do not want to work for the common good.

469 N.J. Super. at 386-387.

In its brief, PERC argues that Rutgers' position is that City of Newark effectively repealed N.J.S.A. 34:13A-5.3's "mandate that parties utilize their binding disciplinary arbitration procedures[.]" (PEb11). That argument is misguided. Plainly, City of Newark's holding that the impacts on City employees of the City's COVID-19 vaccination mandate, including the disciplinary provisions of that mandate, were not negotiable in the context of the COVID-19 public health emergency is inconsistent with PERC's narrow construction of N.J.S.A. 34:13A-5.3.

By its plain terms, N.J.S.A. 34:13A-5.3 renders disciplinary procedures mandatorily negotiable and contains no language providing for an exception in the case of public health emergencies. Recognizing the dangerous situation that COVID-19 pandemic presented, the City of Newark Court declared the impacts on City employees of the City's COVID-19 vaccination mandate non- negotiable (469 N.J. Super. at 386) and, thereby, avoided the absurd result of delaying proactive steps to save numerous lives.

Although the COVID-19 pandemic and the annual onslaught of Seasonal Influenza are not identical, the heavy toll of serious illnesses, hospitalizations and deaths that Seasonal Influenza produces year after year requires similar consideration.

POINT IV

PERC ERRED IN CONCLUDING THAT LOCAL 97 DOES NOT SEEK TO CHALLENGE IN ARBITRATION RUTGERS' MANAGERIAL PREROGATIVE TO IMPLEMENT ITS MANDATORY VACCINATION POLICY FOR SEASONAL INFLUENZA. (Aa124)

In its decision, PERC sought to distinguish this matter from City of Newark on the ground that the Union is not seeking to challenge the University's managerial prerogative to implement its vaccine mandate, but simply seeks an arbitral determination of whether the undisputed failure and refusal of Grievant Rosemary Herrschaft ("Grievant") to accept a flu shot in order to continue working in a University healthcare facility constitutes sufficient cause to terminate Grievant's employment (Aa124).[2]

Contrary to PERC's conclusion, the Union explicitly challenges the implementation of Rutgers' Mandatory Vaccine Policy as written by urging that, despite Grievant's her undisputed status as a Covered Individual (all of whom are subject to the Policy's vaccine mandate), the Policy should not be applied to her based on Grievant's erroneous contention that the Seasonal Influenza vaccination requirement did not apply to her position prior to her hire (see Aa100, ¶2; Aa131). Plainly, by that contention, the Union is challenging the implementation of the

[2] PERC repeats that assertion in its brief. See PEb10.

Policy's "Covered Individual" definition and, thus, the University's managerial prerogative to implement its vaccine mandate for the broadest possible measure of employees who work in its health clinics and who, on any given day during the flu season, could bring Seasonal Influenza to work with them.

Although Rutgers showed in its initial brief that, by seeking through appeals to an arbitrator to restrict the scope of applicability of Rutgers' Mandatory Vaccination Policy, Local 97 unquestionably is challenging the University's managerial prerogative to adopt and implement the Policy (Pb17-18), PERC does not address that argument in its brief.

In its brief, Local 97 argues that it is not challenging Rutgers' managerial prerogative to implement the Mandatory Vaccination Policy. However, in the same breath, the Union argues that, even if it does seek to challenge the plain language of the Policy's definition of Covered Individual and the applicability of the Policy to Grievant, the arbitrator nonetheless would examine the Union's argument that the Policy does not apply to the Grievant despite its plain language to the contrary "in light of the public interest and welfare." (Rb26). Moreover, Local 97 argues that, even if its effort to challenge the scope and applicability of implemented policy succeeds and the arbitrator issues an award that infringes on the University's managerial prerogative, "Rutgers may make a *post hoc* application for relief from the Commission." (Ibid.).

Local 97 first denies out of one side of its mouth that it is challenging the University's managerial prerogative to implement its Mandatory Vaccination Policy and then, out of the other, it effectively concedes that is precisely what it intends to do.

PERC was silent in its decision and in its brief concerning Local 97's blatant effort to challenge the implementation of its Mandatory Vaccination Policy by arbitrating the scope of Rutgers' managerial prerogative to apply the Policy and its definition of "Covered Individual" to Grievant. PERC appears to have concluded that Local 97 is not challenging the implantation of the Policy because the Union said so out of one side of its mouth, while ignoring the evidence to the contrary.

Therefore, PERC erred in holding that Local 97 does not seek to challenge Rutgers' managerial prerogative to implement is mandatory vaccination policy at arbitration and, consequently, PERC's decision below must be reversed and this matter remanded to PERC for entry of an Order restraining arbitration of Local 97's allegation that the Policy does not apply to Grievant, despite the Policy's plain language to the contrary.

CONCLUSION

For all the foregoing reasons and for the reasons set forth in its initial brief, Petitioner-Appellant Rutgers, The State University of New Jersey respectfully submits that the decision below of the Public Employment Relations Commission must be reversed and remanded for entry of an Order restraining arbitration of the grievance.

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