RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, Plaintiff-Appellant, v. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS – BIOMEDICAL AND HEALTH SCIENCES OF NEW JERSEY, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003986-23T4 CIVIL ACTION On Appeal From a July 3, 2024 Order of the Superior Court of New Jersey, Middlesex County (Docket No. MID-L-4768-23) Sat Below: Hon. Patrick J. Bradshaw, J.S.C.

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

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PRELIMINARY STATEMENT

This brief is submitted on behalf of Plaintiff-Appellant Rutgers, The State University of New Jersey ("Rutgers" or "University") in support of its appeal from the trial court's July 3, 2024 Order: (1) denying the University's Order to Show Cause seeking to vacate the May 22, 2023 Arbitration Award involving Dr. Liy Arora; (2) granting the cross-application of Defendant-Respondent American Association of University Professors – Biomedical and Health Sciences of New Jersey ("AAUP-BHSNJ or "Union") to confirm the Arbitration Award; (3) directing that Dr. Arora be reinstated and otherwise made whole in accordance with the terms of the Arbitration Award; and (4) directing that Rutgers pay the Union "reasonable attorneys fees and costs associated with this matter."

The parties arbitrated their dispute over Dr. Arora's termination under their collective negotiations agreement ("CNA"). The issue at the arbitration was whether the University had just cause to terminate the employment of Dr. Lily Arora ("Dr. Arora" or "Grievant"). Dr. Arora was a psychiatrist employed by Rutgers who was required to work 20 hours per week. However, for nearly a year, she refused to perform four hours per week of patient care duties, which were assigned to maintain her at 20 hours per week following a reduction from 20 to 16 hours per week in the hours required for her other duties. Dr. Arora also refused for months to attend a mandatory meeting with her supervisor in connection with her annual performance

evaluation contrary to the applicable CNA. As a result of this sustained insubordination, the University terminated her employment effective December 14, 2020.

The Union subsequently challenged Dr. Arora's termination through arbitration. In the resulting Arbitration Award in favor of the Union, the Arbitrator violated the New Jersey Arbitation Act ("Act"), N.J.S.A. 2A:24-1, et seq., by: (1) ignoring the governing law and reaching his dispositive conclusions through undue means; (2) exceeding his arbitral authority by effectively and inappropriately rendering a scope of negotiations ruling that, by statute, falls within the primary jurisdiction of the New Jersey Public Employment Relations Commission ("PERC"); and (3) further exceeding his authority by modifying University policy contrary to the Act and the plain language of the CNA.

Despite well-settled law establishing that public employers have a managerial prerogative to assign duties to their employees, the trial court accepted the Arbitrator's imposition of a public employer duty to provide information to an employee concerning the potential impact that assigned duties may have upon an employee's outside business as a precondition to disciplining the employee for refusing to perform her assigned duties. The trial court concluded that the limitation on the exercise of that managerial prerogative did not constitute undue means under N.J.S.A. 2A:24-8(a) warranting the vacatur of the Arbitration Award.

Quite simply, the Arbitrator imposed an obligation that does not exist in law - that an employer's managerial prerogative to assign duties is somehow limited by an unsupported requirement to provide documents to allow an employee to perform a job for someone other than the employer. Yet, the trial court rejected the University's position that the Arbitrator intruded upon the University's fundamental managerial prerogative to assign job duties, improperly concluding that the Arbitrator's award did not usurp the right to assign such duties. The Arbitration Award and the trial court's holding trespass upon the primary jurisdiction of the New Jersey Public Employment Relations Commission ("PERC") to determine the scope of public sector negotiations. The parties' dispute over Dr. Arora's refusal to perform her assigned patient care duties occurred in the context of Rutgers' pandemic era efforts to have its employees address the pressing healthcare needs of the public, a period during which the right to assign duties was particularly acute.

Finally, the trial court concluded that the Arbitrator did not exceed his authority by effectively modifying the University's Outside Employment Policy by determining that the policy did not apply to part-time employees, such as Dr. Arora, even though that determination contradicts the policy's express statement that it applies to both full- and part-time employees and its express prohibition of full-time and part-time Rutgers employees from engaging in outside business activities that constitute a conflict of interest. Accordingly, the decision below must be reversed.

PROCEDURAL HISTORY

Following the termination of Dr. Arora's employment, the Union appealed the December 11, 2020 termination decision to arbitration, as provided by Article XXVI of the CNA. Following the conclusion of the arbitration proceedings, Arbitrator Daniel Brent issued his Award on May 24, 2023. He determined that:

> After a thorough review of the charges and the evidence presented by the Employer, I find that the charges on which the Grievant's discharge was predicated have not been established by a preponderance of the evidence. The Employer's refusal to provide adequate documentation explaining the insurance company contracting requirements precludes a finding that the Grievant's delayed responses regarding scheduling her annual evaluation and procrastination about accepting the tele-psychiatry constituted gross insubordination sufficient to impose substantial discipline. Given the protracted delays, the Employer's prerogative was not to terminate her, but to cut her hours to sixteen and let the arbitration process play out in her pending grievance before another arbitrator.
>
> Based on the evidence submitted, the Employer has not demonstrated by a preponderance of the evidence that there was just cause to sustain the discharge of Dr. Lily Arora[.]"

(Pa46-Pa47).

In the Award, the Arbitrator also directed that Dr. Arora be reinstated to her position with uninterrupted seniority and afforded the option to work for 16 hours

per week or, alternatively, to work for 20 hours per week, provided that the additional four hours of duties to be determined by the Employer are duties to which Dr. Arora can agree (Pa47).

On August 24, 2023, Rutgers filed its Verified Complaint (Pa1-Pa8) and application for an Order to Show Cause and a supporting certification (Pa9-Pa616) seeking an Order vacating the May 22, 2023 Arbitration Award.

On August 31, 2023, the trial court granted the University's Order to Show Cause and scheduled the Show Cause hearing for September 29, 2023 (Pa624-Pa628). On September 20, 2023, the trial court rescheduled the Show Cause hearing to October 27, 2023 (Trans. ID LCV202302889777). On October 3, 2023, the trial court rescheduled the Show Cause hearing to November 3, 2023 (Trans. ID LCV20233029264).

On October 9, 2023, the Union filed its Answer and Counterclaim (seeking confirmation of the Arbitration Award) (Pa631-Pa637), along with opposition to the Order to Show Cause, including the Certification of Justin Schwam (Pa639-Pa692; Trans. ID LCV20233078179). On October 17, 2023, Rutgers submitted its reply submission on the Order to Show Cause (Trans. ID LCV20233141666).

On November 2, 2023, the trial court adjourned the scheduled November 3, 2023 Show Cause hearing (Trans. ID LCV20233294732).

On November 15, 2023, Rutgers filed its Answer to the Union's Counterclaim (Pa693-Pa696).

On March 18, 2024, the trial court rescheduled the Show Cause hearing for April 8, 2024 (Trans. ID LCV2024703716).

On April 8, 2024, the trial court held oral argument (Pa699).

On July 3, 2024, the trial court entered an Order, inter alia, denying the Order to Show Cause and granting the Union's cross-application to confirm the Arbitration Award (Pa697-Pa698). Also on July 3, 2024, the court uploaded its Statement of Reasons in the form of a July 3, 2024 letter to counsel for the parties (Pa699-702).

On August 19, 2024, Rutgers e-filed, inter alia, its Notice of Appeal and Civil Case Information Statement (Pa703-Pa705 and Pa712-Pa714).

On September 9, 2024, the Certification of Transcript Completion and Delivery was uploaded in eCourts Appellate (Pa717).

STATEMENT OF FACTS

Dr. Arora's Employment History with UMDNJ and then Rutgers.

By letter dated January 5, 2009, Dr. Arora received her first appointment from the former University of Medicine and Dentistry of New Jersey ("UMDNJ") as a Regular Part-Time Physician Specialist for University Behavioral Health Care ("UBHC") (Pa410-Pa412). Dr. Arora signed the appointment letter. Ibid. As a

Regular Part-Time Physician Specialist, Dr. Arora evaluated patients for medication as a psychiatrist and reported to Dr. Theresa Miskimen (Pa598; Pa410).

By letter dated July 8, 2010, UMDNJ appointed Dr. Arora as a part-time Clinical Assistant Professor, non-tenure, in the Department of Psychiatry of UMDNJ – New Jersey Medical School ("NJMS") with job duties that included "patient care," effective August 15, 2010 (Pa414 and Pa416).[1] Dr. Arora signed the appointment letter (Pa418). Under the terms of this appointment, Dr. Arora agreed "to take steps to ensure that [her] services [were] provided in accordance with requirements of the Medicare and Medicaid Programs and third-party payors." (Pa415). Under the terms of this appointment, Dr. Arora's jobs duties and responsibilities included, but were not limited to, "teaching, research and patient care activities"; providing "direct clinical care to UBHC patients"; developing, implementing, and evaluating "plans for treatment for UBHC patients"; and other duties as may be assigned by the Department Chair. Id. Dr. Arora also agreed to comply with the bylaws, policies, and procedures of UMDNJ and NJMS (Pa416). UMDNJ confirmed these terms of Dr. Arora's appointment in a subsequent letter dated October 8, 2010 (Pa419-420).

Around this same time, Dr. Arora started her private practice, which she maintained while treating patients at UBHC through June 2012 (Pa597 and Pa599).

[1] At that time, Dr. Arora's part-time appointment was 60% of a full-time equivalent appointment (Pa414).

Over the next several years, UMDNJ reappointed Dr. Arora several times in various non-tenure positions. UMDNJ first reappointed Dr. Arora via a letter dated July 25, 2011 (Pa422-Pa425). That letter, which Dr. Arora did not sign, reiterated the requirements that she ensure her services were provided in accordance with the requirements of Medicare, Medicaid, and third-party payors and, among other things, that she provide direct clinical care to UBHC patients. (Pa423). On August 31, 2011, UMDNJ changed Dr. Arora's appointment from 60% FTE to 53% FTE (Pa427).

In July 2012, UBHC contracted with the State of New Jersey, Department of Health ("DOH") to provide an independent psychiatrist– acting as the independent clinical chair - to support the Involuntary Medication Administrative Review ("IMAR") panels at the State psychiatric hospitals, which made determinations about the administration of psychotropic medications to patients at State psychiatric hospitals without informed patient consent (Pa451-Pa459; Pa582-Pa583).

At or about that time, Dr. Arora began chairing the IMAR panels (Pa600). Dr. Arora was the primary UBHC psychiatrist who provided independent psychiatric services for the IMAR contract from July 2012 to December 2020 (Pa551 and Pa555-556).

By letter dated August 24, 2015, Dr. Arora's next was reappointed as a Clinical Assistant Professor; the letter confirmed her reappointment, effective

retroactive to July 1, 2015 (Pa429). That letter, which Dr. Arora did not sign, once again required that she "ensure that [her] services are provided in accordance with requirements of the Medicare and Medicaid Programs and third-party payors[,]" and included patient care requirements (Pa429).[2]

By letter dated June 13, 2016, Rutgers assigned Dr. Arora to the Professional Practice Track, non-tenure, in the NJMS Department of Psychiatry, effective July 1, 2016 (Pa433). That letter, which Dr. Arora did sign, noted among other things that the guidelines for appointment and promotion within the Professional Practice Track were outlined in the RBHS Policies and Guidelines Governing Appointments, Promotions, and Professional Activities of the Faculty (the "Appointments and Promotions Guidelines"). (Pa433).

By letter dated April 26, 2018, Rutgers again reappointed Dr. Arora (Pa435). That letter, which Dr. Arora did not sign, reappointed her as an Assistant Professor, non-tenure, on the Professional Practice Track, in the NJMS Department of Psychiatry (Pa435). Her appointment was part-time (0.53 FTE) for the one-year period covering July 1, 2017 to June 30, 2018. (Pa435). The letter again directed

[2] On July 1, 2013, the New Jersey Medical and Health Sciences Education Restructuring Act (the "Restructuring Act"), N.J.S.A. § 18A:64M-1, et seq., incorporated certain schools, centers and institutes of the former University of Medicine and Dentistry of New Jersey ("UMDNJ") into Rutgers. At that time, UBHC became part of Rutgers.

that Dr. Arora "enroll in Medicaid and Medicare Programs as required" and that Dr. Arora "ensure that [her] services are provided in accordance with the requirements of the Medicare and Medicaid Programs and third-party payors." (Pa435). The letter further stated that "[Dr. Arora would be] "expected to participate fully in the teaching, patient care and service activities as assigned by [her] Department Chair or Division Chief/Program Director (Pa435). Dr. Arora also was required to comply with "the Bylaws, policies and procedures of the University," including but not limited to the Code of Ethics (Pa436). The letter also provided a hyperlink to the Appointments and Promotions Guidelines previously provided to Dr. Arora (Pa437).

One of the University Policies with which Dr. Arora was required to comply under the terms of multiple appointment letters was Policy 60.9.21, entitled, "Outside Employment" (Pa516-Pa524; see e.g., Pa428-Pa431 and Pa434-Pa437). In pertinent part, the Policy, applicable to full- and part-time faculty members, states that their "primary work obligation . . . is to the University, school or other operational unit where he or she is employed." (Pa517). Faculty members are permitted to engage in outside employment only if it "does not constitute a conflict of interest" and "does not diminish" the faculty member's "efficiency in performing his or her primary work obligation at the University." (Pa518). Failure to comply with the Policy "shall result in disciplinary action up to and including termination." (Pa520). Dr. Arora was made aware through multiple appointment letters that she

was obligated to comply with University Policies applicable to a person in her job title throughout her employment with UMDNJ and Rutgers (Pa606-Pa608; Pa428-Pa431 and Pa434-Pa437).

By letter dated June 22, 2018, the University notified Dr. Arora of her promotion to Associate Professor, non-tenure, on the Professional Practice Track in the NJMS Department of Psychiatry for a one-year term from July 1, 2018 to June 30, 2019 (Pa439). Dr. Arora did not sign the letter. (Ibid.). According to the promotion letter, Dr. Arora's job duties and responsibilities were those "assigned by [her] Department Chair and/or Division Chief/Program Director." (Ibid.). The letter reiterated that she was "required to comply with the Bylaws, policies and procedures of the University and the School, including Rutgers compliance program." (Ibid).

The IMAR contract expired on June 30, 2019, but the contract remained in holdover status from July 1, 2019 through August 2020 (Pa451). Thereafter, the parties executed a new contract under which UBHC was expected to provide an independent psychiatrist to the DOH for 20 hours per week for the six months ending on December 31, 2019 (Pa453). UBHC was expected to provide the independent psychiatrist for 16 hours per week (Pa453).

After the reduction of the weekly IMAR contract hours from 20 hours per week to 16 hours per week and the resultant reduction of Dr. Arora's work hours - from 20 to 16 hours per week was confirmed in December 2019, Dr. Arora's

supervisor, Ms. Miller, contacted Dr. Arora via email dated December 30, 2019 to discuss replacing the four hours of work per week, which would keep Dr. Arora eligible for benefits (Pa476-Pa477 and Pa557-Pa565). Ms. Miller provided Dr. Arora the ability to make up those four hours – and retain her 0.53 FTE part-time status and benefits - by performing psychiatric evaluations (Pa478-480). Ms. Miller also gave Dr. Arora the option of reducing her employment to 16 hours per week, but Dr. Arora was not willing to accept the loss of benefits that would result from such a reduction (Pa615-Pa616; Pa608). Accordingly, Dr. Miller assigned Dr. Arora to perform four hours of telepsychiatry each week to allow Dr. Arora to maintain her current FTE and benefits.

On January 8, 2020, Ms. Miller confirmed to Dr. Arora that she was to begin working four telepsychiatry hours during the week of January 13, 2020 and requested that Dr. Arora contact her assistant to facilitate Dr. Arora's orientation to telepsychiatry (Pa478-480). On January 15, 2020, Ms. Miller asked Dr. Arora for a meeting to plan for the delivery of telepsychiatry services (Pa481-482).

By letter dated January 17, 2020, Rutgers reappointed Dr. Arora as Associate Professor on the Professional Practice Track, non-tenure, again stating, *inter alia*, that "[y]ou will be expected to participate fully in the teaching, patient care, and service activities as assigned by your Department Chair." (Pa443; Pa531-533***;*** Pa604). Much of the content of the letter was the same as in Dr. Arora's most recent,

previous reappointment letter (See Compare Pa438-439 and Pa440-443). The January 17, 2020 letter also delineated Dr. Arora's job duties and responsibilities with respect to the IMAR panels and her obligation to "provide four hours of telepsychiatry evaluations weekly for Rutgers UBHC to ensure part time employment at 20 hours per week." (Pa441-Pa444).

On January 21, 2020, Ms. Miller emailed Dr. Arora and requested that she provide her availability for telepsychiatry training (Pa526-Pa527).

On January 23, 2020, Ms. Miller again emailed Dr. Arora to contact Ms. Miller's assistant to schedule her telepsychiatry hours (Pa529).

On January 24, 2020, Dr. Arora replied by email stating: "Please respond to all messages sent to you by Mr. Monitto (from the AAUP) and direct all communications to him." (Id.). Dr. Arora was insisting that the University communicate with her through Mr. Monitto, a union representative, regarding her assigned job duties and was failing to communicate directly with her supervisor (Id.). Further, after Ms. Miller emailed Dr. Arora on February 5, 2020 to schedule a meeting to review Dr. Arora's current responsibilities, Dr. Arora responded that she would not meet with Ms. Miller until she received "her current contract and the past and current contract between UBHC and DOH." (Pa486).

On February 27, 2020, Dr. Arora and Ms. Miller met at a Rutgers office in Newark (Pa566-Pa569; Pa584-Pa589; Pa591-Pa593 and Pa595; Pa612). Carl

O'Brien, the Chief Financial Officer of UBHC, joined the meeting by telephone. (Pa566-Pa569). The purpose of the meeting was for Dr. Arora to identify the telepsychiatry hours she could work and for Ms. Miller to provide Dr. Arora with a laptop to use for the telepsychiatry work (Id.). Dr. Arora expressed concerns during the meeting regarding how billing for services through UBHC could impact her private practice. (Id.). Mr. O'Brien addressed the concerns and said that "there was no concern about her being required to see Medicaid or commercial patients in her private practice." (Pa591-Pa593).

After the meeting, Dr. Arora emailed Ms. Miller and confirmed her interest in exploring "non-clinical activities" to fulfill the four hours per week (Pa508-Pa510). Despite the assurances Mr. O'Brien provided during their meeting, Dr. Arora did not begin providing the telepsychiatry services. (Id.). According to Dr. Arora, she refused to perform the assigned work because, in her view, there would have been "conflict with [her] private practice, since [she does] not contract with insurance companies." (Pa601-Pa602, Pa603 and Pa605).

On February 28, 2020, Ms. Miller advised Dr. Arora by email that no such non-clinical opportunities were available and directed Dr. Arora to make up the four hours per week that she had not been working for the last four weeks by providing four hours per week of clinical services. Ms. Miller further directed Dr. Arora to provide her availability for those services no later than March 3, 2020 (Pa509). Ms.

Miller stated that Dr. Arora's failure to communicate her availability or to complete the duties as assigned would be considered insubordination and could result in disciplinary action (Id.).

Nevertheless, after the February 28, 2020 email, Dr. Arora did not begin providing the assigned clinical services to UBHC patients (Pa570).

Then, on March 4, 2020, the Union filed a grievance claiming the University violated the CNA by changing the terms of Dr. Arora's appointment and violated the Appointments and Promotions Guidelines by offering a one-year appointment in the January 17, 2020 letter instead of a two- to five-year appointment (Pa538-Pa539). The University denied the grievance on June 29, 2020 because the allegations of the grievance were not substantiated (Pa541-Pa544).

On April 24, 2020, Ms. Miller again wrote to Dr. Arora about her failure to perform the telepsychiatry services, again directed Dr. Arora to provide her availability and perform the assigned services and again advised Dr. Arora that failure to communicate her availability or to complete the duties as assigned will be considered insubordination and may result in disciplinary action (Pa488).

On June 30, 2020, Rutgers provided Dr. Arora a letter reappointing her for the period of July 1, 2020 through June 30, 2022 which reiterated, *inter alia*, "[y]ou will be expected to participate fully in the patient care, teaching, research and service activities of the Department of Psychiatry in all assigned locations to the satisfaction

of the Chair of the Department of Psychiatry as set forth below." (Pa446). Dr. Arora's job duties under the June 30, 2020 letter were the same as those under the January 17, 2020 letter (See Pa441-Pa443 and Pa446-Pa449).

On July 6, 2020, Ms. Miller again directed Dr. Arora to provide her availability and performed the assigned services and again advised Dr. Arora that failure to communicate her availability or to complete the duties as assigned would be considered insubordination and could result in disciplinary action up to and including termination (Pa473). Dr. Arora did not provide her availability or perform the assigned telepsychiatry services (Id.).

On July 31 2020, Ms. Miller sent Dr. Arora an email warning of the consequences of her continued insubordination, noting that the University would be reviewing her continued refusal to perform her duties over the last several months and would be proceeding accordingly (Pa490).

Dr. Arora's Annual Evaluation Meeting in 2020

On July 1, 2020, Ms. Miller contacted Dr. Arora to schedule her annual evaluation meeting (Pa512-Pa515).[3] Dr. Arora responded first that she was waiting to hear from her union representative, and she later responded that she would attend

[3] A Side Letter of Agreement to the 2013-2018 CNA provides, among other things, that "[t]he chair/supervisor and faculty member shall meet to discuss the evaluation by July 15 of each year." (Pa161).

with her union representative present (Pa534-Pa536; Pa511-Pa515). Ms. Miller told Dr. Arora that the meeting was for Ms. Miller and Dr. Arora (Pa572-Pa573).

On July 31, 2020, Ms. Miller emailed Dr. Arora to advise that her failure to meet with Ms. Miller regarding the evaluation constituted insubordination and could result in disciplinary action up to and including termination (Pa491-Pa492). Ms. Miller sent additional emails trying to schedule the evaluation meeting on August 31 and September 15, 2020 (Pa493-495).

On October 12, 2020, the evaluation meeting finally occurred – approximately three months after the July 15 deadline had passed (Pa460-472; Pa496-497; Pa575-581).

Relevant Contract Provisions

Article XXVI ("Termination for Cause") of the Collective Negotiations Agreement between Rutgers and the Union (July 1, 2018 – July 31, 2022) (the "CNA") governs terminations for cause.[4] With respect to the grounds for termination, Article XXVI states:

> AAUP-BHSNJ unit members who are tenured or under a term contract shall not be terminated except for the reasons and pursuant to the procedures in this Article.

[4] The Union ratified the CNA on or about December 22, 2020, which was eight days after the effective date of Dr. Arora's termination. (Pa179-394; Pa546; Pa610). As such, Article XXVI of the 2013-2018 CNA governed this matter prior to Dr. Arora's termination, and the Article XXVI in the 2018-2022 CNA governed the arbitration proceeding.

A. **Grounds**

The following may constitute grounds for termination:

1. failure to perform the duties of the position effectively;
2. misconduct;
3. conduct unbecoming a member of the faculty of the University;
4. physical or mental incapacity to perform the duties of the position; and
5. serious violation of School or University policies and procedures or other codifications governing faculty conduct.

(Pa105).[5]

With respect to the procedures governing termination proceedings, Article XXVI states, in pertinent part:

B. **Initiation**

1. The Dean, or the Dean's designee, shall initiate a proceeding by providing notice to the unit member setting forth all the charges pending against the unit member, along with a summary of the facts supporting the charges (such summary, however, shall not limit the University in any way from amending or supplementing such facts during the course of any proceedings under this Article). The Executive Vice President for Academic Affairs, or the Executive Vice President's designee, shall meet with the unit member to ascertain the validity of the charges and shall provide the unit member the opportunity to respond to the charges.
2. The unit member shall have seven (7) calendar days from receipt of the notice of intended discipline to request a meeting. The unit member shall be entitled to representation by the AAUP-BHSNJ at such meeting. The meeting shall be held within thirty (30)

[5] Section A of Article XXVI in the CNA is identical to Section A in Article XXVI of the collective negotiations agreement between Rutgers and the Union for the time period of July 1, 2013 to June 30, 2018 (Pa105).

calendar days from receipt of the notice of intended discipline by the unit member.

3. The date for the meeting shall be set by mutual agreement of the parties . . ..

. . . .

5. Documents upon which the University relies in support of the charges will be provided to the AAUP-BHSNJ at least seven (7) calendar days in advance of the meeting at which the unit member has the opportunity to respond to the charges. The University shall not be precluded from relying upon documents that are not provided in advance of the meeting. Such documents shall be provided to the AAUP-BHSNJ by the date of the meeting . . . .

C. **Appeal**

1. Within thirty (30) calendar days of receipt of the notice of intended discipline, the AAUP-BHSNJ may seek binding arbitration by giving notice to the Office of Academic Labor Relations. The arbitrator shall be selected from the panel of arbitrators jointly agreed to by the parties for the arbitration of grievances pursuant to Article V. If notice to proceed to binding arbitration is not filed within thirty (30) calendar days of receipt of the notice of intended discipline, the unit member shall have waived the right to arbitration, and the intended discipline shall be final and binding.

. . . .

D. **Hearing**

1. At least four (4) business days prior to a hearing, the parties shall exchange the names of all witnesses who may be called at the hearing understanding that the need to call additional witnesses may arise based on the developments in a particular hearing. In such cases, the parties shall not be precluded from calling such additional witnesses. At least four (4) business days prior to the

> hearing, the parties shall also exchange copies of exhibits that may be introduced at the hearing, with the understanding that based on developments at the hearing there may be a need to introduce additional exhibits. The University shall be permitted to rely on documents at the arbitration proceeding not previously produced to the Union prior to the meeting discussed in Paragraph B of this Article.
>
> . . . .
>
> 4. . . . . The burden of proving all charges by a preponderance of the credible evidence shall be on the University. The arbitrator shall determine whether the charges are valid and constitute just cause for discipline, and, if so, shall prescribe a penalty. The arbitrator's decision shall be final and binding on the University, the AAUP-BHSNJ and the unit member. The parties shall request that the arbitrator render a decision within thirty (30) days after the close of the hearing, unless the parties agree to request a longer time.
>
> 5. In no event shall the arbitrator's decision have the effect of adding to, subtracting from, modifying or amending the Agreement, the University's Bylaws, or any other University policies or procedures.
>
> . . . .

(Pa300-Pa302).[6]

The 2013-2018 CNA includes a Side Letter of Agreement setting forth the process and timeline for the conduct of performance evaluations (Pa160). Paragraph 1 of the Side Letter provides, inter alia, that "[t]he chair/supervisor and faculty member shall meet to discuss the evaluation by July 15 of each year." (Id.).

[6] The Union ratified the CNA on or about December 22, 2020, which was eight days after the effective date of Dr. Arora's termination. (Pa546; Pa610). As such, Article XXVI of the 2013-2018 CNA governed this matter prior to Dr. Arora's termination, and the Article XXVI in the 2018-2022 CNA governed the arbitration proceeding.

Rutgers Terminates Dr. Arora's Employment

On September 30, 2020, the University issued a pre-termination letter to Dr. Arora (Pa396-397). The letter explained that Rutgers had assigned Dr. Arora telepsychiatry work, had instructed her on numerous occasions to provide her availability and commence working telepsychiatry hours, and had informed her that failure to do so could result in disciplinary action up to and including termination. The letter further explained that, she nonetheless had failed to perform any assigned telepsychiatry hours and continued to refuse to perform those duties, and, further, that for three months, she had refused to meet with her supervisor, Ms. Miller, to discuss her annual evaluation as required under the Side Letter of Agreement (Id.).[7]

On December 1, 2020, Rutgers convened a pre-termination meeting in accordance with Article XXVI of the CNA, at which Rutgers and the Union presented (Pa399). On December 11, 2020, the University issued a detailed letter finding that the charges in the September 30, 2020 pre-termination letter were valid and sustained the termination of Dr. Arora's employment, effective December 14, 2020 (Pa399-Pa407; Pa409; Pa548-Pa549).

[7] As noted above, Dr. Arora ultimately attended the evaluation meeting on October 12, 2020 (Pa460-Pa472; Pa496-Pa497; Pa575-Pa581).

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW

New Jersey appellate courts review a trial court's decision on a motion to vacate an arbitration award de novo. See Yarborough v. State Operated Sch. Dist. of City of Newark, 455 N.J. Super. 136, 139 (App. Div. 2018) (citing Minkowitz v. Israeli, 433 N.J. Super. 111, 136 (App. Div. 2013)).

Although courts engage "in an extremely deferential review" in adjudicating actions seeking to vacate an arbitration award, "[t]hat is not to suggest that an arbitrator's award is impervious to attack." Policemen's Benevolent Ass'n Local 11 v. City of Trenton, 205 N.J. 422, 429 (2011). "Courts should intervene only where the arbitrator has exceeded his authority or acted improperly." Office and Professional Employees Local 153 v. The Tr. Co. of N.J., 105 N.J. 442, 448-49 (1987). The limitations to the arbitrator's authority "are defined by statute, N.J.S.A. 2A:24-8, and by the collective bargaining agreement between the parties." Id. "The arbitrator may also be limited by the questions framed by the parties in a particular dispute." Id.

The New Jersey Arbitration Act, N.J.S.A. 2A:24-8, provides that a court shall vacate an arbitration award involving a collectively negotiated agreement for any of the following causes:

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

"[I]t is axiomatic that an arbitrator's award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award." City of Trenton, 205 N.J. at 429 (quoting United Steelworkers v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

While an arbitrator's award will be confirmed if the award is "reasonably debatable," Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko, 202 N.J. 268, 276 (N.J. 2010), "our courts have vacated arbitration awards as not reasonably debatable when arbitrators have, for example, added new terms to an agreement or ignored its clear language." City of Trenton, 205 N.J. at 429 (collecting cases). Additionally, "'[w]hen parties have agreed, through a contract, on a defined set of rules that are to govern the arbitration process, an arbitrator exceeds his powers when

he ignores the limited authority that the contract confers.'" PBA Local 160 v. Township of North Brunswick, 272 N.J. Super. 467, 474 (App. Div. 1994) (quoting County College of Morris Staff Ass'n v. County College of Morris, 100 N.J. 383, 391 (1985)).

POINT II

THE TRIAL COURT ERRED IN CONFIRMING AND IN DECLINING TO VACATE THE ARBITRATION AWARD BECAUSE THE ARBITRATOR ENGAGED IN UNDUE MEANS PROHIBITED UNDER N.J.S.A. 2A:24-8(a) BY CONCLUDING THAT RUTGERS HAD A DUTY TO CONFER WITH, PRESENT INFORMATION AND DOCUMENTS TO DR. ARORA AND EFFECTIVELY NEGOTIATE HER WORK ASSIGNMENT BEFORE IT COULD REQUIRE HER TO PERFORM HER ASSIGNED WORK (Ruling: Pa700-Pa702).

Under N.J.S.A. 2A:24-8(a), "undue" means occur due to "an arbitrator's failure to follow the substantive law." Sanjuan v. Sch. Dist. Of W. N.Y., 473 N.J. Super. 416, 424 (App. Div. 2022), citing In re City of Camden, 429 N.J. Super. 309**,** 332 (App. Div. 2013). "Undue means," as referenced under N.J.S.A. 2A:24-8(a), involves a "situation in which the arbitrator has made an acknowledged mistake of fact or law or a mistake that is apparent on the face of the record." Office of Emp. Rels. v. Commc'ns Workers of Am., 154 N.J. 98, 111-12 (1998).

As the Appellate Division stated in In re City of Camden, supra:

> Although private parties may authorize an arbitrator "to decide legal issues as he deems fit irrespective of the governing law, this freedom is not available in the public sector." Comm'ns Workers of Am., Local 1087 v. Monmouth Cnty. Bd. of Soc. Servs., 96 N.J. 442, 450, 476 A.2d 777 (1984). Instead, "the arbitrator in a public employment case is obliged to resolve it in accordance with the law and the public interest." Id. at 453, 476 A.3d 777.
>
> Therefore, a court may vacate an award in a public sector case if it is contrary to law. N.J. Tpk. Auth., supra, 190 N.J. at 294, 920 A.2d 88 [footnote omitted]. Even under the criteria of N.J.S.A. 2A:24-8(a), an arbitrator's failure to follow the substantive law may also constitute "undue means" which would require the award to be vacated. Jersey City Educ. Ass'n, Inc. v. Bd. of Educ., 218 N.J. Super. 177, 188, 527 A.2d 84 (App. Div.), certif. denied, 109 N.J. 506, 537 A.2d 1295 (1987); see also Held v. Comfort Bus Line, Inc., 136 N.J.L. 640, 641-42, 57 A.2d 20 (Sup.Ct.1948). Thus, in Monmouth Cnty. Bd. of Soc. Servs., supra, 96 N.J. at 453-55, 476 A.2d 777, the Court vacated an arbitration award in part because the award *may* have violated applicable statutes and regulations. See Weiss, supra, 143 N.J. [420 (1996)] at 431, 672 A.2d 1132. Similarly, we vacated an award based upon an arbitrator's finding that any affirmative action hiring plan was illegal as "inconsistent with existing law and violative of the guidelines applicable to public sector arbitration." Jersey City Educ. Ass'n, supra, 218 N.J. Super. at 194, 527 A.2d 84.

429 N.J. Super. at 332 (Emphasis supplied).

"A government employer has a managerial prerogative to determine how government services will be delivered and the staffing levels associated with the delivery of those services." Warren Hills Regional High School District, P.E.R.C. 2022-6, 48 N.J.P.E.R. ¶ 28, 21 NJ PERC LEXIS 79, *12 (2021) (see Pa718-Pa723) (citing Paterson Police PBA, Local 1 v. Paterson, 87 N.J. 78 (1981)). Therefore, the decision to assign employees for operational reasons is a non-negotiable managerial prerogative. In re Rutgers, the State University of New Jersey, No. A-1228-19, 2021 N.J. Super. Unpub. LEXIS 992* (App. Div. May 24, 2021). See Pa731-Pa735; see also Teaneck Bd. of Educ. V. Teaneck Teachers Ass'n, 94 N.J. 9, 16 (1983) ("The decision to hire, retain, promote, transfer, or dismiss employees" is an "inherent managerial prerogative[.]"). Indeed, "it is well-settled that a decision . . . to assign tasks to employees is a decision within managerial prerogative." In re New Jersey State Judiciary, No. A-6013-12T3, 2015 N.J. Super. Unpub. LEXIS 578, 810 (App. Div. Mar. 12, 2015). See Pa718-Pa723; see also Warren Hills Regional School District, 48 N.J.P.E.R. ¶ 28 (concluding that an employer had a non-negotiable managerial prerogative to assign job duties that were "encompassed within the[] job descriptions" of the grievants).

Our Supreme Court has recognized that a managerial prerogative is non-negotiable and, thus, by definition, not arbitrable. New Jersey Turnpike Auth. V. New Jersey Turnpike Supervisors, 143 N.J. 185, 204 (1996).

In this matter, on pages 13-14 of the Award, the Arbitrator acknowledged that Dr. Arora's "faculty appointment and subsequent promotion in June 2018 from Assistant Professor to Associate Professor expressly contemplated duties other than the IMAR assignment" (Pa30-Pa31). The Arbitrator also clearly acknowledged that Rutgers had the managerial right to determine Dr. Arora's job duties (Pa45).

Nonetheless, on page 29 of the Arbitrator's Award and Opinion, the Arbitrator ignored these facts to determine that Rutgers somehow did not have just cause to terminate Dr. Arora's employment when she refused to perform the duties that Rutgers assigned, stating:

> After a thorough review of the charges and the evidence presented by the Employer, I find that the charges on which the Grievant's discharge was predicated have not been established by a preponderance of the evidence. The Employer's refusal to provide adequate documentation explaining the insurance company contracting requirements precludes a finding that the Grievant's delayed responses regarding scheduling her annual investigation and procrastination about accepting the tele-psychiatry constituted gross insubordination sufficient to impose substantial discipline. Given the protracted delays, the Employer's prerogative was not to terminate her, but to cut her hours to sixteen and let the arbitration process play out in her pending grievance before another arbitrator.

(Pa46; emphasis added).

In its Statement of Reasons, the trial court concluded that the Arbitrator did not require the University to negotiate before it was entitled to assert its managerial authority to assign work. The trial court concluded that the Arbitrator only determined that if the University refused to provide "reasonable" documentation requested by Dr. Arora, it was acting arbitrarily and unreasonably, which precluded a preponderance of evidence showing just cause for termination (Pa700-702).

In short, the trial court's determination is completely unfounded. Indeed, the Arbitrator's decision is unequivocal, finding that, despite Rutgers' managerial right to assign work, it nonetheless was required to negotiate such assignment with Dr. Arora.

In New Jersey public sector labor law, there is no authority that supports the Arbitrator's proposition that, despite an employer's managerial prerogative to assign employees work consistent with their job duties and responsibilities, as established by the numerous authorities cited above, an employer can exercise that prerogative only after responding to information requests propounded by its employee. However, without citation to any provision in the CNA or any case law, that is precisely what the Arbitrator concluded is required, and what the trial court accepted. If, as the Arbitrator concluded, University-employed physicians, such as Dr. Arora, are to entitled to demand information and documents, as a condition precedent to such assignment, to assure that that the duties of their primary job with the University

would not have a negative impact on their side jobs, and to refuse to perform the patient care duties assigned to them by the University until a "reasonable" extent of documents and information is provided, the University's public health care mission would be placed in jeopardy by the employee's ability to override unilaterally the right of an employer to assign duties as needed to fulfill the needs of the University.

Neither the Arbitrator nor the trial judge cited any authority for the propositions that Dr. Arora was entitled to determine her own job duties or that Rutgers had any obligation to confirm that Dr. Arora was able to perform outside employment or to otherwise support Dr. Arora's outside employment. A requirement that Rutgers provide information as requested by an employee as a precondition to performing assigned duties could enable an employee to prevent an employer from taking disciplinary action to require the performance of assigned duties. With such a right to demand information before performing assigned duties, the employee simply could persist with continuing demands for information and, thereby, hold up both the performance of the work and the employer's corrective or disciplinary action in response to the employee's refusal to perform assigned duties.

Since, as shown above, a public employer's decision to make job assignments to a public employee is neither negotiable nor arbitrable, the trial court's adoption of the Arbitrator's determination that the University could not discipline Dr. Arora for insubordination because it purportedly failed to sufficiently negotiate and

provide information to her concerning the non-negotiable and non-arbitrable assignment of the telepsychiatry work is flatly contrary to well-settled law, constitutes "undue means" under N.J.S.A. 2A:24-8(a), and required that the trial court vacate the Award and Opinion.

POINT III

THE TRIAL COURT ERRED IN CONFIRMING AND IN DECLINING TO VACATE THE ARBITRATION AWARD BECAUSE THE ARBITRATOR EXCEEDED AND SO IMPERFECTLY EXECUTED HIS POWERS THAT A MUTUAL, FINAL AND DEFINITE AWARD UPON THE SUBJECT MATTER SUBMITTED WAS NOT MADE IN THAT THE ARBITRATOR ERRONEOUSLY CONCLUDED THAT THE UNIVERSITY'S MANAGERIAL PREROGATIVE TO ASSIGN JOB DUTIES AND RESPONSIBILITIES TO THE GRIEVANT WAS NEGOTIABLE.
(Ruling: Pa700-Pa702)

"[P]ublic employees have the right to engage in collective negotiation[s]" Council of N.J. State Coll. Locals v. State Bd. of Higher Educ., 91 N.J. 18, 26 (1982). "[T]he majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate . . . terms and conditions of employment." N.J.S.A. 34:13A-5.3**.** "However, 'the scope of negotiations in the public sector is more limited than in the private sector' due to the government's 'special responsibilities to the public' to 'make and implement public policy.'" In re Cnty. of Atl., 445 N.J. Super. 1, 21 (App. Div. 2016) (quoting In re IFPTE Local

195 v. State, 88 N.J. 393, 401-02 (1982)), aff'd on other grounds sub nom, Matter of Cnty. of Atl., 230 N.J. 237 (2017).

PERC is charged with administering the New Jersey Employer-Employee Relations Act ("EERA") and has "'primary jurisdiction'" to determine "'whether the subject matter of a particular dispute is within the scope of collective negotiations.'" Cnty. of Atl., 445 N.J. Super. at 20 (quoting Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 154 (1978)). To that end, N.J.S.A. 34:13A-5.4(d) provides in pertinent part:

> The commission shall at all times have the power and duty, upon the request of any public employer or majority representative, to make a determination as to whether a matter in dispute is within the scope of collective negotiations.

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

In Ridgefield Park, the Court further explained the primacy of PERC's jurisdiction over issues of negotiability and arbitrability:

> PERC has primary jurisdiction to make a determination on the merits of the question of whether the subject matter of a particular dispute is within the scope of collective negotiations.
>
> . . . .
>
> If PERC concludes that the dispute is within the legal scope of negotiability and agreement between the employer and employees, the matter may proceed to arbitration.
>
> Where PERC concludes that a particular dispute is not within the scope of collective negotiations, and thus not arbitrable, it must issue an injunction permanently restraining arbitration.

Ridgefield Park Educ. Ass'n, 78 N.J. at 154 (citations omitted).

Here, although the University had a managerial prerogative to assign telepsychiatry work to Dr. Arora – an assignment that was not subject to negotiation or related information and document demands – the Arbitrator failed to defer to PERC's primary jurisdiction to determine scope of negotiations matters either by applying well-settled PERC and New Jersey Courts case law establishing that the right to make work assignments is a managerial prerogative. Indeed, our Supreme Court has recognized that a managerial prerogative is non-negotiable and, thus, by definition not arbitrable. New Jersey Turnpike Auth. v. New Jersey Turnpike Supervisors, 143 N.J. 185, 204 (1996). Instead, without citing to any legal authority whatsoever, the Arbitrator effectively created a new legal right for employees in the unit represented by the Union to negotiate concerning job assignments and to refuse

to comply with employer directives to perform those job assignments with impunity (Pa46).

The University respectfully submits that PERC is the only entity empowered by statute, i.e., N.J.S.A. 34:13A-5.4(d), with primary jurisdiction to determine scope of negotiations issues. By insisting that the managerial prerogative to assign job duties is limited by an employer duty to provide documents and information and to engage in a back-and-forth dialogue with an employee as a precondition to taking action to require an uncooperative employee to perform his or her assigned job duties, the Arbitrator violated N.J.S.A. 2A:24-8(d) and exceeded his authority.

In its Statement of Reasons, the trial court states that the Arbitration Award did not require Rutgers to negotiate before it was entitled to assert its managerial prerogative to assign work to Dr. Arora. Rather, according to the trial court, the Arbitrator's Award does not make a "blanket determination" that Rutgers could not assign job duties to or discipline Dr. Arora; rather, the trial court stated that the Arbitrator only determined that Rutgers did not have just cause to terminate Dr. Arora for refusing to perform her assigned duties "based on the history of her employment, and her request for more information in the context of her ability to make a decision[.]"(Pa701). Yet, it is clear that just like the Arbitrator, the trial court effectively has usurped the managerial right to assign duties by imposing an obligation that is contrary to law – i.e., a requirement to provide information to the

employee so that the employee can negotiate the duties before performing them. Such a rule transforms the managerial prerogative to assign duties into the right to assign duties only after negotiating such duties by making the assignment of duties subject to a process of discussion and information exchange at the behest of an employee. Whether a long-recognized managerial prerogative may be so constrained is not a determination that should be made in the first instance by the Arbitrator or the trial court.

Therefore, the University respectfully submits that the trial court's Order denying Rutgers' Order to Show Cause seeking to vacate the arbitration award must be reversed.

POINT IV

THE TRIAL COURT ERRED IN CONFIRMING AND IN DECLINING TO VACATE THE ARBITRATION AWARD UNDER N.J.S.A. 2A:24-8(d) BECAUSE THE ARBITRATOR IMPERMISSIBLY MODIFIED THE UNIVERSITY'S OUTSIDE EMPLOYMENT POLICY AND IGNORED ITS CODE OF ETHICS AND THE REQUIREMENTS OF THE NEW JERSEY CONFLICTS OF INTEREST LAW. (Ruling: Pa700-Pa702).

Article XXVI(D) of the CNA prohibited the Arbitrator from "adding to, subtracting from, modifying or amending the Agreement, the University's Bylaws, or any other University policies or procedures" (Pa302); emphasis added). Here, the

Arbitrator exceeded his authority under both the CNA and N.J.S.A. 2A:24-8(d) by modifying the University's Outside Employment Policy to eliminate its application to part-time employees, such as Dr. Arora.

Dr. Arora refused to perform patient care services for patients of UBHC because she claimed that she was concerned that providing care to patients with private medical insurance would jeopardize her ability to refuse to accept private medical insurance in her private practice, unless and until Rutgers provided her with documents and information sufficient to persuade her that it would not have that effect (Pa601-602, Pa603, Pa605).

If she wished to remain employed at Rutgers, Dr. Arora had an obligation to perform the job duties assigned to her, particularly those specified in her appointment letters. The fact that Dr. Arora's concern about her outside business prevented her from performing her assigned duties to provide patient care to UBHC patients is not an acceptable excuse for a public employee's refusal to provide patient care to Rutgers' patients. Rather, Dr. Arora's decision to place her private practice before her Rutgers' practice created an impermissible conflict of interest that violated Rutgers' Outside Employment Policy (Pa516-Pa524), its Code of Ethics policy (Pa498-Pa507), and the New Jersey Conflicts of Interest Law, N.J.S.A. 52:13D-12, et seq.

Section A of Rutgers' Outside Employment Policy provides, in relevant part, as follows:

> 60.9.21 OUTSIDE EMPLOYMENT
>
> A. Requirements
>
> 1. This covers employees within legacy UMDNJ positions. The primary work obligation of a full or part-time officer, dean, faculty administrator, faculty, staff member or housestaff of Rutgers Health Sciences; other Rutgers units is to the University, school or other operational unit where her or she is employed.
>
> 2. Full or part-time employees, including Rutgers Biomedical Health Sciences Chancellors, deans, faculty administrators, faculty, staff members and housestaff may engage in outside employment only if appropriate approval is obtained from the immediate supervisor and if the outside employment:
>
> a. does not constitute a conflict of interest[.]

(Pa517-Pa518) (Emphasis added).

Under the Outside Employment Policy, for Dr. Arora to conduct her private practice while employed at Rutgers in compliance with Rutgers' published policy, at minimum, Dr. Arora needed to (1) obtain approval from her immediate supervisor and (2) ensure that the structure of her private practice did not create a conflict with her job duties and responsibilities in her Rutgers employment (Pa518). Here, although Dr. Arora contended that a previous supervisor had approved her outside business, that approval, standing alone, is insufficient to satisfy the Outside

Employment Policy. For the outside business to be permissible, it cannot create a conflict of interest. Id. Putting aside whether there would have been any conflict for Dr. Arora to continue to provide patient care in her private practice and perform the duties required by Rutgers, the undisputed fact that Dr. Arora refused to provide patient care to UBHC patients out of concern for the resultant impact on her outside business establishes that her outside business, per se, created a conflict of interest. Therefore, Dr. Arora's outside business violated the requirements of the Outside Employment Policy.

For the same reason, the conflict of interest created by Dr. Arora's outside business also violated the University's Code of Ethics, which expressly provides that:

> University governors, trustees, officers, faculty or staff members shall not have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction, or professional activity which is in substantial conflict with the proper discharge of his or her duties in the public interest.[8]

(Pa501-Pa502). Plainly, the conflict of interest that caused Dr. Arora to refuse to provide any patient care services for the University constitutes a substantial conflict with the proper discharge of those patient care duties.

[8] The New Jersey Conflicts of Interest Law expressly requires that this provision be included in each entity's conflict of interest policy. See N.J.S.A. 52:13D-23(e)(1). Consequently, Dr. Arora's conflict of interest also violated the statue.

Here, by structuring her private practice as one that does not accept private medical insurance, Dr. Arora created a substantial conflict of interest because her interest in preserving her ability to operate her private practice as a cash-only business conflicted with her Rutgers employment by rendering her unwilling to provide any patient care services for patients of UBHC as assigned in her role as a psychiatrist (Pa601-602, Pa603, Pa605). A more stark and complete conflict of interest would be difficult to imagine.

Although the Outside Employment Policy expressly covers part-time employees and, thus, plainly applied to Dr. Arora, the Arbitrator effectively modified the policy to exclude part-time employees:

> The Employer contended that the Grievant was obligated to subordinate her outside ventures to her Rutgers employment. This concept would be applicable in the manner the Employer contended if the Grievant were a full-time Rutgers employee with a side job that impinged on her primary job obligation. The situation in the instant case is different.

(Pa34-35) (Emphasis added). Further, the Arbitrator stated:

> As stated above in Policy 60.9.21, all employees have a duty not to engage in conflicts of interest with their employer or to compete financially with the employer's business. Side jobs should be subordinate to an employee's duty to a full-time employer. Inherent in the concept of part-time employment, however, is the possibility that an employee will engage in other employment to make a living. The Grievant's private psychiatric practice focusing

> on substance abuse and addiction did not draw patients away from treatment by UBHC, especially given the confidentiality afforded by an all-cash payment policy. There was no conflict of interest in scheduling private patients around her IMAR schedule. Only the Employer's unprecedented demand[9] that the Grievant provide four hours per week of tele-psychiatry to be billed through commercial insurance companies created a potential conflict of interest.

(Pa36; emphasis added). Contrary to the Arbitrator's assertion, it is clear that any and every patient care assignment that Rutgers made to Dr. Arora would trigger the same conflict.

Finally, the Arbitrator observed that:

> The Employer had a right to assign duties consistent with the Grievant's 2018 appointment letter, but could not ignore the Grievant's reasonable request for sufficient relevant information to react to the new tele-psychiatry assignment given her unusual circumstances of a half-time appointment and a cash-only private psychiatric practice treating patients with addiction of drug abuse problems of which the Employer was aware.

[9] The evidence shows that the "demand" that Dr. Arora provide care to patients was far from unprecedented. Dr. Arora received two letters in 2018 concerning her appointment and job responsibilities. The first, dated April 26, 2018, stated that "[y]ou will be expected to participate fully in the teaching, patient care and service activities as assigned by your Department Chair or Division Chief/Program Director." (Pa434-437; emphasis added). The second, dated June 22, 2018, stated that "[y]our duties and responsibilities are as assigned by your Department Chair and/or Division Chief/Program Director." (Pa438-439).

(Pa45; emphasis added).[10]

The Arbitrator's statements in the above-quoted paragraph are entirely incongruent. If Rutgers had the managerial prerogative to assign Dr. Arora duties consistent with the Grievant's 2018 appointment letter – which it does - it necessarily follows that that prerogative is not subject to dilution or suspension by an arbitrator. The fact that the Arbitrator stated that the University's managerial prerogative to assign duties is subject to limitation by an Arbitrator makes clear that the Arbitrator failed to recognize that managerial prerogative is a well-settled legal doctrine under New Jersey law which the Arbitrator was not free to ignore.

Moreover, the above-quoted statement in the Arbitration Award makes clear that the Arbitrator's determination that the University had a duty to provide "reasonable" information to Dr. Arora before requiring her to perform her assigned patient care duties depended upon two factors: (1) her "half-time appointment" and (2) her "cash-only private psychiatric practice[.]" (Pa45). The Arbitrator's statement that Dr. Arora's "half-time appointment" was one of two factors that purportedly insulated her from performing her duties as directed constitutes an effective

[10] There is no evidence on the record to support the Arbitrator's assertion that a "half-time appointment" is unusual for physicians employed at Rutgers. Thus, evidence shows that Dr. Arora was on notice more than a full-year before she was assigned tele-psych duties that Rutgers expected her to perform patient-care duties upon request.

admission by the Arbitrator that he declined to apply the University's Outside Employment Policy as written.

Since the Outside Employment Policy by its plain terms explicitly applies equally to full-time and part-time faculty, the Arbitrator was not at liberty to ignore or rewrite that plain language. As noted, the Arbitrator's decision to ignore the plain language in the Policy unquestionably contravened Article XXVI.D.5. of the CNA, which provides that "[i]n no event shall the arbitrator's decision have the effect of adding to, subtracting from, modifying or amending the Agreement, the University's Bylaws, or any other University policies or procedures." (Pa106; Pa302). Thus, the primary rationale the Arbitrator constructed to insulate Dr. Arora from the consequences of her insubordinate refusal to perform her assigned duties is based directly on the unilateral modification by the Arbitrator of the Outside Employment Policy. Accordingly, the Arbitrator exceeded his powers under the CNA and likewise violated N.J.S.A. 2A:24-8(d).

Notwithstanding the foregoing, the trial court concluded that the Arbitrator did not modify or fail to apply the Outside Employment Policy (Pa515-Pa524). Further, the trial court stated that the Arbitrator's interpretation of the Policy as not applicable to part-time employees contrary to the express language of the Policy was reasonably debatable (Pa701).

Contrary to the trial court's determination, the Arbitrator's construction of the University's Outside Employment Policy as not applying to part-time employees (such as Dr. Arora) or as applying differently to part-time employees is **not** reasonably debatable. The Arbitrator is bound to limit his findings to the plain meaning of the Policy and did not do so. The Arbitrator either ignored the plain language of the Policy or decided that the Policy, as written, should not be applied to part-time employees. The Arbitrator does not have such discretion and, in either case, the Arbitrator unquestionably violated Article XXVID.5. of the CNA. In so doing, the Arbitrator blatantly exceeded his powers and violated N.J.S.A. 2A:24-8(d). The trial court erred in holding to the contrary.

Therefore, the decision below should be reversed and remanded to the trial court for entry of an Order vacating the Arbitration Award.

POINT V

THE TRIAL COURT ERRED BY AWARDING THE UNION ATTORNEYS' FEES AND COSTS (No Express Ruling was Provided. See Pa697-Pa698).

In its July 3, 2024 Order, the trial court directed on the form of Order submitted by the Union, inter alia, that "the Plaintiff pay Defendant reasonable attorneys' fees and costs associated with this matter." (Pa697-698).

Although the Union demanded in its Answer and Counterclaim an award of its "attorneys fees and costs of suit" (Pa631-637), it never identified any authority

for its purported entitlement to a fee-shifting award. Further, the Union did not present any factual or legal argument at oral argument before the trial court or elsewhere concerning any basis for its purported entitlement to an award of attorneys' fees and costs).

Notwithstanding the absence of any asserted legal or factual basis for an award of attorneys' fees, the trial court signed the form of Order submitted by the Union and granted the Union an award of attorneys' fees and costs with no findings or explanation provided in its Statement of Reasons (Pa699-Pa702). No provision in the collective negotiations agreement, N.J.S.A. 2A:24-1, et seq., or the New Jersey Court Rules (see Rule 4:42-9(a)) provides for awards of attorneys' fees or costs in an action to vacate an arbitration award under N.J.S.A. 2A:24-8.

Accordingly, the provision in the trial court's July 3, 2024 Order directing Rutgers to pay the Union "reasonable attorneys fees and costs associated with this matter" is erroneous and must be reversed.

CONCLUSION

For all the foregoing reasons, Plaintiff-Appellant Rutgers, The State University of New Jersey respectfully submits reverse the trial court's July 3, 2024 Order, vacate the May 22, 2023 arbitration award and reverse the trial court's confirmation of the arbitration award.

Respectfully submitted,

McELROY, DEUTSCH, MULVANEY & CARPENTER, LLP

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

By: /s/ James P. Lidon

Dated: December 5, 2024

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RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, Plaintiff-Appellant, v. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS – BIOMEDICAL AND HEALTH SCIENCES OF NEW JERSEY, Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-003986-23T1 Civil Action On Appeal From a July 3, 2024 Order of the Superior Court of New Jersey, Middlesex County (Docket No MID-L-4768-23) Sat Below: Hon. Patrick J. Bradshaw, J.S.C.

BRIEF OF RESPONDENT IN OPPOSITION TO APPELLANT'S APPEAL

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Dated: January 6, 2024

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PRELIMINARY STATEMENT

The Court's July 3, 2024 Order confirming the May 24, 2023 Opinion and Award issued by Arbitrator Daniel F. Brent, Esq. (the "Arbitrator") (the "Award"), reinstating Dr. Lily Arora (the "Grievant") was consistent with well-established law favoring the finality of labor arbitration awards. The Award was entirely consistent with the Arbitrator's powers established in the Collective Negotiations Agreement between Defendant-Respondent Association of American University Professors – Biomedical Health Services New Jersey ("AAUP-BHSNJ" or the "Union") and Plaintiff-Appellant Rutgers University ("Appellant" or "University") (the "CNA"). Appellant's arguments that the Award was allegedly procured by undue means and that the Arbitrator exceeded his authority lack any merit and are contrary to the legal presumption of legitimacy that our courts apply to arbitration awards. The Union submits this brief in opposition to Appellant's brief and appeal seeking to reverse the Court's well-reasoned Opinion and to vacate the Award.

The underlying grievance arbitration concerned whether the University had just cause to terminate the Grievant's employment on charges of insubordination for allegedly refusing to perform newly assigned duties and to meet with her supervisor to review her performance evaluation. The Grievant, a psychiatrist with a stellar performance record, who had not performed direct patient care duties for the University for nearly a decade, believed that the assignment of 4 hours per week of

such duties would require her to participate in, and abide by, commercial insurance contracts, which she believed would imperil her ability to continue to serve her private practice patients. This was because the Grievant's private practice – known to and approved by the University under its Outside Employment Policy – did not accept insurance, to maintain her clients' privacy, and the Grievant believed that participating in the University's insurance contracts would require her to abide by those carriers' terms in her private practice as well. After the University refused to provide the Grievant with information she requested about such potential insurance issues, it terminated her appointment. The Union appealed the termination to binding arbitration pursuant to the parties' CNA.

The sole, stipulated issue before the Arbitrator was whether the University had just cause to terminate the Grievant, and if not, what shall be the remedy. Following seven days of hearing and extensive post-hearing briefs, the Arbitrator determined that the University lacked just cause to terminate the Grievant and ordered her reinstatement. The University refused to comply with the Arbitrator's Award and sought a court order to vacate the award.

After briefing and oral argument, the trial court denied the University's complaint and issued an Order confirming the Award. The University refused to comply with the Order and instead filed the instant appeal. However, the University offers no new substantive arguments on appeal. The University merely repeats its

arguments with respect to the Award that the trial court found entirely unavailing.

The University's prime argument for vacating the Award is that it allegedly diminished the University's managerial prerogative to assign work. That is simply not true. The sole issue the Arbitrator decided was whether the University had just cause to terminate the Grievant for insubordination. The University nevertheless contends that the Award decided an issue that is within the primary jurisdiction of the Public Employment Relations Commission ("PERC") – i.e., whether the assignment of job duties was a subject within the scope of negotiation under the NJ Employer-Employee Relations Act. This is a red herring, as this was not a "scope of negotiations" case; it was a "just cause for discipline" case, and the University never filed a scope of negotiations petition with PERC. The University's remaining argument that the Arbitrator modified the University's Outside Employment Policy is entirely meritless. The record is undisputed that the University was aware of, and approved, the Grievant's private practice. The University never revoked that approval. Likewise, the University's argument that the Grievant somehow violated the University's Code of Conduct and the New Jersey Conflicts of Interest Law was never raised in the underlying arbitration.

Accordingly, the University's appeal should be denied.

PROCEDURAL HISTORY

Defendants adopts the Procedural History as set forth in Plaintiff's brief. (Pb4-Pb6).

STATEMENT OF FACTS

For the purpose of this appeal, the Union incorporates by reference the factual findings of the events that gave rise to the appeal to arbitration as set forth in the Arbitrator's Opinion. (Pa17-Pa51).[1]

A. Article XXVI of the CNA

The AAUP-BHSNJ is the exclusive majority representative for all full-time teaching and/or research faculty and librarians who are employed by Rutgers University in legacy UMDNJ positions pursuant to a CNA. (Pa60). Article XXVI of the CNA dated July 1, 2013 to June 30, 2018, provides that unit members on a term contract "shall not be terminated except for the reasons and pursuant to the procedures in this Article." (Pa105). The Article further enumerates five charges that "may constitute grounds for termination," which include "(2) misconduct; (3) conduct unbecoming a member of the faculty of the University;" and "(5) serious violation of School or University policies and procedures or other codifications governing faculty conduct." (Pa105). The Article also provides that at hearing:

[1] To avoid duplication, citations to documents attached to Plaintiff-Appellant's Appendix are referenced as "Pa".

> The burden of proving all charges by a preponderance of the credible evidence shall be on the University. The arbitrator shall determine whether the charges are valid and constitute just cause for discipline, and, if so, shall prescribe a penalty.
>
> [(Pa105-Pa106).]

B. Facts Developed at Hearing.

The facts are largely undisputed. The Grievant, Dr. Lily Arora, is a psychiatrist. (Pa25). Dr. Arora began her private practice in 2009. (Pa26). The nature of her private practice is the treatment of addiction. (Id.). For that reason, it has always been an out-of-network practice that does not accept insurance. (Id.). Her patients pay in cash and she was not registered as a provider with commercial insurance carriers. (Id.). In September 2010, Dr. Arora became a Clinical Assistant Professor at the University of Medicine and Dentistry (UMDNJ) on a twenty-hour per week, part-time basis. (Pa25).

The University knew Dr. Arora operated a private practice. (Pa33). The parties CNA explains that outside employment is governed by Rutgers Policy 60.9.21. (Pa137; Pa516-Pa524). Dr. Arora disclosed her practice to the University pursuant to this policy and that the University approved it. (Pa35). None of her supervisors at UMDNJ or Rutgers raised any concern to Dr. Arora about her private practice. (Pa35-Pa36). Indeed, her supervisor from 2010 to mid-2019 had referred patients to the Grievant and provided the Grievant's name to colleagues for referrals. (Pa35).

Dr. Arora only provided direct patient care at UMDNJ until June 2012. (Pa25). At that time, her supervisor asked her to serve as the Chair of a new panel that would review State hospital psychiatric patients' objections to medication orders rendered by their treating psychiatrists – the Involuntary Medication Administration Review ("IMAR") panel. (Pa25). From 2012 forward, Dr. Arora's sole assignment for the University was as the psychiatrist provided by the University for 20 hours per week to three State Hospitals pursuant to a contract between the University and the State Department of Health ("DOH Contract" or "IMAR Contract"). (Pa26, Pa30-Pa31). This required her to visit the three state hospitals and perform other IMAR-related duties for approximately two days per week. (Id.). The Grievant did not have an office at Rutgers. (Pa30-Pa31). The Grievant did not treat University patients after she began her IMAR assignment in 2012. (Id.).

On June 22, 2018, the University notified the Grievant that she was promoted to Associate Professor, effective July 1, 2018, for a term of one-year. (Pa434-Pa437). The University considered her private practice positively in connection with her promotion. (Pa683 at 87). Dr. Arora did not receive an appointment letter for the term starting June 1, 2019, though she continued her work on the IMAR Contract.

On December 6, 2019, Michelle Miller, a Registered Nurse who served as a UBHC Vice President and had recently been made the Grievant's supervisor with respect to the administration of the IMAR Contract, told the Grievant that the DOH

was reducing the number of hours on the IMAR Contract from 20 to 16 hours per week. (Pa26). Miller also told the Grievant that she would therefore now be required to perform four (4) hours per week of telepsychiatry work for UBHC – i.e., direct patient care – so that she could maintain her 20-hour part-time status and remain eligible for health benefits. (Id.). Miller directed the Grievant to enroll as a provider for insurance carriers so the University could be paid for her treatment work. (Id.).

The Grievant asked Miller whether she could perform other, non-patient care duties for the four-hour shortfall because she was concerned about the effect on her private practice of having to contract with insurance providers. (Pa27). The Grievant explained to Miller that based on her knowledge and belief – from colleagues who accepted insurance in their own private practices – if she agreed to accept insurance in one location, she would have to be on that insurance carrier's panel wherever she provided services, including her private practice. (Pa27). This would mean that she could no longer maintain her private practice on a cash-only basis, which would have a severely negative impact on her private patients' treatment. (Pa27).

In addition, the Grievant requested copies of the commercial insurance contracts that she might have to sign or participate in so she could determine whether her concerns about her private patients from performing telepsychiatry duties at UBHC were valid. (Pa27). The University refused to provide Dr. Arora with any documents. (Id.).

As of January 2020, the Grievant had not received a reappointment letter for the term beginning July 1, 2019. However, on January 27, 2020, the University sent the Grievant a reappointment letter purportedly effective July 1, 2019 through June 30, 2020. (Pa440-Pa444). The letter contained a number of errors and added new job duties that also appeared to be effective retroactively to July 1, 2019. (Id.). Specifically, the letter misstated her title as "Assistant Professor," rather than "Associate Professor" and included a new, bulleted list of duties. (Id.). The final bullet stated that she had to provide 4 hours of telepsychiatry work weekly. (Id.). That requirement had not been in any of the Grievant's prior appointment letters. (See Pa421-Pa439). In addition, the one-year term of appointment in the letter was not the proper minimum term of reappointment for an Associate Professor pursuant to Union-negotiated guidelines, which required a minimum two-year reappointment. (Pa684 at 131-32).

Most troubling, the purported reappointment letter now expressly required Dr. Arora to participate in "commercial health plans and third-party payor programs, as they are determined by Rutgers in its sole discretion," and directed that she "must ensure that [her] services are provided in accordance with the requirements" of such commercial health plans and third-party payors. (Pa440-Pa444).

On February 27, 2020, the Grievant met in person with Miller. (See Pa624-Pa648). At that time, the Grievant had still not received the DOH contracts nor a

corrected appointment letter. (Pa677 at 94:19-25). Nonetheless, Miller directed the Grievant "to start doing telepsychiatry and sign the contracts." (Id.). The Grievant again explained her professional concerns about performing that work. (Pa668 at 198:1-25). At hearing, Miller admitted that Arora did not refuse to do four hours of non-clinical work nor insist that she would only work on the IMAR Contract. (Pa669 at 204:17-21). Rather, the Grievant reiterated to Miller that she would be "happy to do anything, including any administrative work, teaching, program development, anything that would not be detrimental to [her] private practice." (Pa678-Pa678 at 105:25 to 106:3).

Miller brought in UBHC Chief Financial Officer Carl O'Brien ("O'Brien") via speakerphone briefly to address Dr. Arora's insurance participation concern. (Pa668 at 199:5-13). O'Brien told Dr. Arora that, in his opinion, there was no concern about her being required to see commercial patients in her private practice. (Pa672 at 32:1-10; Pa668 at 199:5-13). At hearing, however, O'Brien admitted that he did not explain to Dr. Arora ***why*** it was his opinion that her patient-insurance concerns were not valid. (Pa673 at 40:7-10).

The day after the meeting, Miller asserted that the Grievant's appointment terms required her to work "20 hours given your part-time status (.53 FTE)." (Pa646-Pa648). Miller claimed that the Grievant had not "fulfilled [her] contractual obligations" for the past 8 weeks. (Id.). Miller demanded Dr. Arora to "make up the

4 hours per week that [she] ha[d] not been working over the last eight weeks by providing 4 hours via clinical services for UBHC[.]" (Id.). Miller further threatened Dr. Arora that if she did not communicate her availability for and perform clinical work by March 3, 2020, it "will be considered insubordination and failure to perform [her] assigned duties, [which] may result in disciplinary action. (Id.).

Dr. Arora tried again to explain her patient concerns to Miller and included an excerpt from an insurance contract that a colleague in private practice had sent her:

> "The Cigna Behavioral Health agreement is specific to practitioner, rather than to location or tax identification number. Practitioners must treat all Cigna behavioral health participants equally **and must behave as contracted at all service locations**."
>
> [(Pa649-Pa652 (emphasis added)).]

The Union filed a grievance dated March 4, 2020. (Pa537-Pa539). The grievance contended that the addition of the four-hours of telepsychiatry work constituted a change in working conditions without prior negotiation, that the term length in the appointment letter was inappropriate for an Associate Professor and challenged the timing of the appointment letter. (Id.). The University denied the grievance in a written response dated June 29, 2020. (Pa540-Pa544). With respect to Dr. Arora's insurance concern, the University's response simply averred that such concern "has no relevance in this matter." (Id.). The Union moved the grievance to arbitration, where it is still pending. (Pa32).

In late June 2020, the University sent Arora another reappointment letter. (Pa445-Pa449). This letter purported to require Dr. Arora to perform **five (5)** hours of telepsychiatry duties per week. (Id.). At hearing, Miller admitted that this was an error, and it should have said "four." (Pa670 at 235:19-25). However, the record does not reflect that the University ever provided the Grievant with a corrected appointment letter. This letter also contained the same language the University had attempted to add to the January 2020 proposed reappointment letter that required the Grievant to comply with commercial health insurance plans. (Compare Pa440-Pa444 with Pa445-Pa449).

On July 31, 2020, Miller again threatened the Grievant with termination for insubordination if she did not perform telepsychiatry duties. (Pa658-Pa659). Miller warned that the University "will be reviewing your continued refusal to perform your duties over the last several months and will be proceeding accordingly." (Id.).

A few weeks earlier, Miller requested that the Grievant meet with her to discuss her performance evaluation, to which the Grievant replied that she was "pleased to meet with [Miller] to discuss" the evaluation and requested that Miller provide times that they could meet. (Pa656). Miller did not respond to the Grievant for nearly a week. (Pa655). Miller did not tell the Grievant it was problematic that they had not met by July 15. (See id.). Rather, Miller indicated that her assistant would be in touch to schedule a meeting. (Id.). On July 30, 2020, the Grievant again

indicated her availability to meet with Miller on August 6 at any time between 12 and 1:30 pm. (Pa654). Miller did not accept the invitation to meet. Instead, on July 31, Miller asserted that the Grievant's "continued refusal to meet with me, your supervisor, constitutes insubordination and failure to follow directives and may result in disciplinary action up to and including termination." (Pa660-Pa661). However, Miller admitted at hearing that a meeting in August with the Grievant was otherwise delayed because of COVID conditions unrelated to the Grievant. (Pa675 at 34:22 to 35:23). In September 2020, the Grievant was away on vacation for about 3 weeks. (Pa680 at 128:24 to 129:2; Pa682 at 71:19-23). The Grievant subsequently met with Miller via Zoom on October 12, accompanied by a faculty member, pursuant to the CNA. (Pa663).

Nonetheless, following a pre-termination letter dated September 30, 2020, the University issued a termination letter dated December 11, 2020, in which it found that cause existed to terminate the Grievant because her "refusal to perform the duties and the refusal to meet to discuss the evaluation were insubordinate [and] unprofessional."[2] (Pa398). The University terminated the Grievant's employment effective December 14, 2020. (Pa408-Pa409).

[2] Notably, although the University determined that the Grievant violated University policies, the termination letter failed to specify any such policy. (Pa398-Pa407).

The Union timely appealed the termination to arbitration and hearings were held via Zoom before Arbitrator Daniel F. Brent, Esq., on the following dates: July 7, 2021, October 21, 2021, November 30, 2021, February 25, 2022, April 27, 2022, August 23, 2022 and November 21, 2022. (Pa18). At hearing the parties agreed to the issue before the Arbitrator: "Did Rutgers University have just cause to terminate Lily Arora; and if not, what shall be the remedy?" (Pa19). Both parties were represented by counsel, who submitted post-hearing briefs. (Id.).

C. The Arbitrator's Opinion and Award

In an Opinion and Award dated May 22, 2023, and delivered to the parties on May 24, 2023, the Arbitrator concluded that the University lacked just cause to terminate Dr. Arora's employment. (Pa49-Pa51). The Arbitrator recognized that the central issue was insubordination: "In essence, the Grievant was terminated for gross insubordination when she declined to accept an amendment to her employment contract to include direct patient care because the revised assignment would require her to treat patients whose insurance carriers would be billed to pay the Employer for the Grievant's services." (Pa28).

The Arbitrator expressly recognized that "the Grievant could not unilaterally decide to continue spending twenty hours per week performing IMAR duties as a basis for refusing other valid work assignments." (Pa31-Pa32). He further found that the University's expectation that the Grievant perform twenty hours of work per

week in order to receive the same level of compensation and benefits to be reasonable. (Pa32).

Nonetheless, the Arbitrator concluded that the University had acted arbitrarily and unreasonably under the circumstances. (Pa27, Pa40). The Arbitrator found that, notwithstanding general language in some of her appointment letters about duties including patient care, "the Grievant's sole assignment since 2012 was to chair the IMAR Panel." (Pa30-Pa31). Under those circumstances, the University could not "unilaterally and materially alter the terms of her employment contract" and "dictate that the Grievant sacrifice her private practice, of which the Employer was aware and approved since before the Grievant was hired." (Pa32-Pa33). Nor could the University "demand that the Grievant register with insurance companies in a way that the Grievant believed would destroy an essential element of her private practice without at least providing relevant documentation to dispel what the Employer believed was the Grievant's misconception of the consequences of accepting patients for Rutgers." (Pa33-Pa34).

The Arbitrator determined that the Grievant's request to review contracts or registration documents she would be asked to sign was reasonable. (Pa34). The Arbitrator found that the "non-specific conclusory assurances" UBHC CFO's made to the Grievant by phone at her February 2020 meeting with Miller were "inadequate" to address the Grievant's reasonable concerns that she had "clearly

articulated on multiple occasions." (Id.). The Arbitrator observed that if the CFO was correct that no professional concern or conflict existed, the University had an obligation to "respond to its employee['s] reasonable professional and ethical concerns." (Id.).

Specifically, the Arbitrator determined that once the Grievant had explained her professional concerns, the University should have shared with her the "details of any insurance contracts that the Grievant would be required to sign or that would potentially have an impact on the Grievant's private practice so that the Grievant could seek advice from an attorney or her Union in order to make a timely informed decision about accepting the four-hour tele-psychiatry assignment pending resolution of her grievance."[3] (Pa33). That was a reasonable request by the Grievant, because the University was in "sole control of this information." (Id.). Instead, the University's denial of access to such documents "exacerbated a protracted standoff resulting in escalation of the discipline imposed." (Pa34). This was "arbitrary and unreasonable" conduct, since it would have been relatively simple to share pertinent documents and provide an explanation why the University did not believe the Grievant's concerns were valid. (Pa37). The Arbitrator further explained:

> The refusal of the Employer to provide sufficient information to permit the Grievant to make an informed professional decision was unfortunate, as it deprived the Grievant of an opportunity to

[3] The Arbitrator expressly recognized that that grievance (the March 4, 2020 grievance) was not before him in this Article XXVI termination appeal under the CNA. (Pa36-Pa37).

> verify her understanding or to reassure herself that she could accept the tele-psychiatry assignment and preserve her private practice clients' desire for privacy. The Employer's refusal to deal with a Union representative as a resource to help the Grievant obtain more than oral assurances that there was no problem was arbitrary, counterproductive, and exacerbated the tensions underlying the instant case.
>
> [(Pa38).]

The Arbitrator found that the Grievant "was hired for a half-time position with the understanding when she was hired that she conducted and would continue to maintain a previously existing specialized private practice." (Pa35). He found that it was credible, and that the University had failed to effectively refute, that the Grievant had disclosed the "terms of her particular specialized private practice" when she was hired, and that her supervisor approved of this subsequently referred patients to the Grievant's private practice. (Id.). Further, the Arbitrator was persuaded by the fact that the Grievant consistently maintained her private practice through her Rutgers employment "with no adverse impact" nor conflict with her Rutgers duties. (Pa35-Pa36). Rather, "[o]nly the Employer's unprecedented demand that the Grievant provide four hours per week of tele-psychiatry to be billed through commercial insurance companies created a potential conflict of interest." (Pa36).

The Arbitrator made clear that the Grievant would have been grossly insubordinate but for her "sincere professional ethical concerns" that the directive to perform telepsychiatry work was likely to cause irreparable harm to her private

patients' treatment. (Pa38). This constituted an exception to the maxim, "Work now, grieve later." (Id.). The Arbitrator found that the Grievant made a "clear and repeated expression of professional concern about the ramifications for her private patients from her accepting insurance payments for treating Rutgers patients" that the University should not have "summarily dismissed." (Pa39).

The Arbitrator found that the Grievant is a "seasoned medical professional with a stellar job performance record during her decade of employment for Rutgers." (Pa39). Her performance record was "unblemished" and her excellent provision of service to the University, for which she was promoted, showed that "she deserved to be treated as the valuable professional she had demonstrated herself to be." (Id.). Even assuming the Grievant's concerns were "patently unfounded," the University's failure to provide any information to the Grievant "cannot be ignored in assessing the Employer's discharge of a ten-year successful employee." (Pa40).

The Arbitrator found that, under these circumstances, the University's failure to "address[] the Grievant's sincere belief, even if mistaken," was "arbitrary and capricious, **thereby violating a basic tenet of just cause**." (Pa40 (emphasis added)).

> The Employer's course of conduct from December 2019 when the State of New Jersey announced the reduction in IMAR contract hours through the Grievant's discharge was arbitrary and unreasonable, and thus precludes finding that the Employer demonstrated by a preponderance of the evidence misconduct justifying summary discharge, unprofessional conduct, or non-feasance attributable to the Grievant sufficient to prove the four

> charges as just cause to terminate her employment for insubordination.
>
> [(Pa41)].

Furthermore, with respect to delayed meetings between the Grievant and her supervisor, the Arbitrator found that the evidence established that such delays were "partly attributable to conduct by the Grievant's supervisor." (Pa40). The Arbitrator found that "[t]he source of the difficulty in arranging a timely annual performance evaluation meeting was the impact of the supervisor's insistence that the Grievant immediately commence her tele-psychiatry assignment, the Grievant's insistent inquiry about the insurance contracts, and the threat of discipline if she did not acquiesce to performing tele-psychiatry." (Pa43). The Arbitrator faulted the University for failing to timely advise the Grievant that she could bring a faculty colleague to the meeting after it denied her request to bring a union representative. (Id.). That failure "substantially discounted" the University's charge that the Grievant had "unduly delayed" the meeting such that it supported just cause for termination. (Id.). In any event, the Arbitrator recognized that "the Grievant was not terminated for delaying an annual performance evaluation review. She was terminated because she refused to jeopardize her approved specialized professional practice treating patients suffering from substance abuse and addiction, including many who wanted to avoid using their employer-based insurance benefits in order to keep their treatment confidential." (Pa44).

The Arbitrator concluded that under these circumstances, the University "should have reduced the Grievant's salary by twenty per cent until the tele-psychiatry dispute was resolved rather than summarily terminating her employment." (Pa44-Pa45).

Again, the Arbitrator expressly recognized that the University "had a right to assign duties consistent with the Grievant's 2018 appointment letter." (Pa45). However, "[g]iven the Grievant's expressed professional concerns," the University's "protracted insistence that she immediately commence the tele-psychiatry assignment was arbitrary and capricious because providing the requested information would have either convinced the Grievant to accept the assignment or persuaded her to accept the offer of sixteen hours of employment with a reduction in pay and loss of benefits." (Pa46). At that point then, if the Grievant "persisted and refused the sixteen-hour offer," that conduct could have been "construed as a resignation or would have established a clear case of gross insubordination sufficient to justify summary discharge." (Id.).

Accordingly, the Arbitrator's review of the evidence led him to conclude that the University "has not demonstrated by a preponderance of the evidence that there was just cause to sustain the discharge of Dr. Lily Arora or the four charges on which the discharge of the Grievant was predicated." (Pa46). Therefore, the Arbitrator ordered that the Grievant be reinstated to her position with the option to choose

whether to work for 16 or 20 hours per week, with the duties of the additional four hours **to be determined by the Employer**. (Pa47). The Arbitrator also awarded back pay reduced by 20 per cent – consistent with the reduction in hours from 20 to 16 – and other remedies to make the Grievant whole. (Pa47). The Arbitrator expressly retained jurisdiction "to resolve any dispute that may arise regarding the implementation and computation of the remedies ordered pursuant to this Award and to make applicable corrections and clarifications to this Award and Opinion." (Pa48).

The University refused to comply with the Arbitrator's Award, and on August 24, 2023, filed a complaint and order to show cause why the court should not vacate the Award. (Pa1-Pa8). On October 9, 2023, AAUP-BHSNJ filed an answer and counterclaim to confirm the Award. (Pa631-Pa637). On April 8, 2024, the trial court heard oral argument. (Pa708).

D. The Trial Court Issues An Order Confirming the Award.

On July 3, 2024, the Hon. Patrick J. Bradshaw, J.S.C., issued an Order dismissing the University's complaint and granting the Union's counterclaim to confirm the Award. (Pa706-Pa707). Judge Bradshaw also issued a Statement of Reasons. (Pa708-Pa711).

First, the trial court rejected the University's argument that the Award was a product of undue means because the Arbitrator failed to follow the law with respect

to the assignment of job duties and responsibilities being a managerial prerogative. (Pa709). Judge Bradshaw reviewed the Award and concluded that it did not require the University "to negotiate before it was entitled to assert its managerial prerogative to assign work." (Pa709). Rather, Judge Bradshaw recognized that the Arbitrator "specifically indicate[d]" that the University "had a right to assign duties." (Id.). The trial court explained that the Arbitrator's determination was that the University failed to meet its burden to show that it had just cause for termination because of its "arbitrary and unreasonable" refusal to provide reasonable documentation that Dr. Arora requested. (Pa709).

Second, the trial court rejected the University's argument that the Arbitrator "trespassed on PERC's jurisdiction to determine negotiability." (Pa709). Rather, Judge Bradshaw recognized that the Award was "not a scope of negotiations determination," this was "not a scope of negotiations case" – as demonstrated by the stipulated issue the parties submitted to the Arbitrator – and that the Award "did not 'effectively create a new legal right for employees to negotiate job assignments.[']" (Pa709 (quoting University's Complaint)).

Third, the trial court rejected as meritless the University's argument that the Arbitrator "impermissibly modified" the University's outside employment policy and "ignored its code of ethics and conflict o[f] interest law." (Pa709-Pa710).

The instant appeal by the University followed.

ARGUMENT

The University advances the same three arguments in support of its complaint to vacate the Award that the trial court analyzed and dismissed:

1. The Award was "the result of undue means" because the Arbitrator determined that the University lacked just cause for termination because the University "fail[ed] to negotiate to Dr. Arora's satisfaction" the telepsychiatry duties;
2. The Arbitrator exceeded his authority by determining a scope of negotiations issue, namely whether the University was required to negotiate with the Grievant over the work assignment, to provide her information and documentation she requested, and to satisfy the Grievant's concern about whether she would be required to be covered by commercial health insurance contracts in connection with the work assignment; and
3. The Arbitrator modified the University's Outside Employment Policy and ignored the University's Code of Ethics and the New Jersey Conflict of Interest Law.

As analyzed and determined by the trial court, and as discussed further below, all of the asserted grounds for vacating the Award are invalid and contrary to the clear standards developed by our courts to ensure that arbitration awards are given substantial deference and are "not a springboard for litigation." Local 153, Office &

Prof'l Employees Int'l Union v. Trust Co. of N.J., 105 N.J. 442, 449 (1987). The University's appeal should be denied.

POINT I

THE STANDARD FOR VACATING AN ARBITRATION AWARD.

New Jersey appellate courts review de novo a trial court's decision on a complaint to vacate an arbitration award. See Yarborough v. State Operated Sch. Dist. of City of Newark, 455 N.J. Super. 136, 139 (App. Div. 2018). Under established New Jersey law, "the role of the courts in reviewing arbitration awards is extremely limited." Local 153, 105 N.J. at 448. As such, courts generally do not review the merits of an arbitration award. See United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & G. Nav. Co., 363 U.S. 574 (1960); United Steelworkers of America v. Enterprise Corp., 363 U.S. 593 (1960).

N.J.S.A. 2A:24-8 establishes four narrow grounds upon which an award may be vacated. In pertinent part, the statute provides for vacatur:

> a. Where the award was procured by corruption, fraud or undue means;
> ...
>
> d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.
>
> [N.J.S.A. 2A:24-8.]

The plaintiff bears the burden to establish that the statutory grounds exist. A court reviewing a claim that an arbitrator exceeded his powers and disregarded the terms of the parties' agreement must determine whether "the interpretation of contractual language contended for by the parties is reasonably debatable in the minds of ordinary laymen." Selected Risks Ins. Co. v. Allstate Ins. Co., 179 N.J. Super. 444, 451 (App. Div. 1981). An arbitrator's award will be confirmed if the award is "reasonably debatable." Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko, 202 N.J. 268, 276 (2010).

POINT II

PUBLIC POLICY FAVORS FINALITY IN ARBITRATION.

New Jersey courts have long recognized that arbitration is "'a substitution, by consent of the parties, of another tribunal for the tribunal provided by the ordinary processes of law,' and its object is 'the final disposition, in a speedy, inexpensive, expeditious and perhaps less formal manner, of the controversial differences between the parties.'" Barcon Assoc., Inc. v. Tri-County Asphalt Corp., 86 N.J. 179, 187 (1981) (citing Eastern Eng'g Co. v. City of Ocean City, 11 N.J. Misc. 508, 511 (Sup. Ct. 1933)).

More than sixty years ago, the United States Supreme Court recognized and

enshrined the unique role that labor arbitrators perform in the resolution of labor disputes:

> The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts. . . . The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally part of the collective bargaining agreement although not expressed in it. . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.
>
> [Warrior & Gulf Nav. Co., 363 U.S. at 581-82.]

Generally, "[a]rbitration is viewed favorably by our courts, and every doubt is resolved in favor of the validity of the award." Ukrainian Nat. Urban Renewal Corp. v. Muscarelle, Inc., 151 N.J. Super. 386, 396 (App. Div.), certif. denied, 75 N.J. 529 (1977). An arbitrator's award "is not to be cast aside lightly." Kearny PBA Local 21 v. Town of Kearny, 81 N.J. 208, 221 (1979). Thus, absent any alternative and only with the greatest reluctance should a reviewing court vacate an arbitrator's award. Here, the University's appeal presents no such circumstances.

POINT III

THE TRIAL COURT'S ORDER CONFIRMING THE ARBITRATOR'S AWARD DID NOT EXCEED HIS POWERS OR AUTHORITY UNDER THE CNA WAS CORRECT AND SHOULD BE AFFIRMED.

The trial court correctly concluded that the Award was consistent with the

authority the parties negotiated for as expressed in Article XXVI of the CNA governing appeals of terminations. The only issue before the Arbitrator was whether the University had just cause to terminate the Grievant. There is no dispute that Article XXVI of the CNA expressly empowered the Arbitrator to make that determination.

The Arbitrator and the trial court recognized the University's prerogative to assign duties. The Arbitrator concluded that the Grievant had a reasonable professional concern that performing direct patient care work through UBHC would require her to participate in commercial health insurance contracts that she did not participate in with her private practice and that this could irreparably harm her private practice patients. The Arbitrator determined that under those circumstances it was reasonable for the Grievant to request the insurance contracts so that she could make an informed decision about whether her concerns were valid before performing direct patient care duties to which she had not been assigned for nearly a decade. The Arbitrator determined that the University acted arbitrarily and unreasonably when it refused to provide Dr. Arora any of the information she reasonably requested.

Under those circumstances, the Arbitrator determined that the University lacked just cause to terminate the Grievant's employment. The trial court carefully reviewed the Award and the parties' arguments and concluded that the Arbitrator's

just cause determination was precisely the issue the parties agreed to have him decide.

A just cause analysis is familiar to New Jersey courts reviewing labor arbitration awards. The New Jersey Supreme Court and Appellate Division reverse trial court orders vacating arbitration awards where the plaintiff claims the arbitrator exceeded his authority by modifying the disciplinary penalty. See, e.g., Linden Bd. of Educ., 202 N.J. 268 (2010).

Our courts recognize that arbitrators are empowered to be flexible with respect to remedy, absent a contractual limitation. See Local 153, 105 N.J. at 448-49. Our Supreme Court adopted the United States Supreme Court's rationale for deferring to the unique expertise of a labor arbitrator:

> When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating the remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency.
>
> [Local 153, 105 N.J. at 449 (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960) (quotation marks omitted).]

Accordingly, in Local 153, the New Jersey Supreme Court confirmed an arbitration award reinstating a bank employee who had been terminated for cashing a fraudulent check. The arbitrator ordered reinstatement with back pay based in part on a finding

that the employee acted negligently, not intentionally, and in consideration of her years of service and lack of disciplinary history. Local 153, 105 N.J. at 446. The Court explained that "the arbitrator has broad discretion and authority to draw on his own knowledge and experience in analyzing the facts and fashioning an appropriate remedy." Id. at 448.

The Court explained that while the arbitrator may not issue a remedy that contradicts the contract, the issue presented at the arbitration – whether the employer had sufficient cause, and "if not, what shall be the remedy" – implied that the arbitrator had some discretion to determine an appropriate remedy, within the bound of the collective bargaining agreement. Id. at 451-52. The Court recognized the need for arbitrator flexibility, finding that the arbitrator's "gap-filling' function" does not impermissibly add to the terms of the parties' contract. Id. at 452. The Court confirmed the award, finding that:

> The award recognized the merits of each side's position and is apparently designed to strike a fair balance between the competing contentions of the employer and the Union. We see no basis for substituting our judgment for that of the arbitrator concerning how that balance can best be achieved.
>
> [Id. at 453.]

Indeed, in a case in which the arbitrator erroneously read into a contract a progressive discipline requirement, the Court nonetheless made clear that an arbitrator that determines an employer met its burden with respect to the charges

may still evaluate whether just cause exists for termination:

> Even after finding the employee guilty of the specified charges of misconduct, the arbitrator was free to apply his special expertise and determine that these offenses do not rise to a level of misconduct that constitutes just cause for discharge. Had the arbitrator so concluded, we assume that the proper remedy would have been a disciplinary penalty less severe than that of discharge.
>
> [County College of Morris Staff Association v. County College of Morris, 100 N.J. 383, 394 (1985).]

A panel of this court recently rejected the same argument that the University now makes (and which the trial court below properly rejected). Trenton Bd. of Educ. v. Trenton Educ. Ass'n., 2019 WL 333051 (N.J. Super. Ct. App. Div. January 28, 2019) (Pa685-690). There, "the arbitrator found that plaintiff proved that [the grievant] 'engaged in unprofessional and unbecoming conduct.'" Id. at *2. However, the court recognized that "[w]hile the arbitrator found [the grievant's] conduct provided just cause for discipline, she found the [penalty of an] indefinite salary increment withholding to be too harsh." Id. The public employer filed a complaint to vacate the award on the basis that the arbitrator had exceeded her authority under the contract by modifying the penalty for the conduct to a one-year increment withholding. Id.

The trial court vacated the award on the basis that once the arbitrator had "said yes" to the question whether the public employer had "just cause" to withhold the grievant's increment, "that is the end of the analysis." Id. at *3. In reversing, the

appellate panel faulted the trial court for vacating the award on that basis:

> The arbitrator here was within her authority to determine whether there was just cause to impose an indefinite salary increment or some other remedy once she determined [the grievant's] conduct was 'unbecoming.' The fact that the question put to the arbitrator did not contain the word 'permanent' did not limit the arbitrator's authority to modify the discipline imposed once she determined it was not warranted. Her determination was consistent with the questions posed by the parties, which, as in Linden, included a request for the arbitrator to exercise her expertise and fashion a remedy if just cause did not exist for an indefinite salary withholding.
>
> [Id. at *5.]

Here, the CNA and the parties' stipulated issue provided the Arbitrator with the same discretion to determine the appropriate penalty that our courts consistently uphold as a valid exercise of the arbitrator's negotiated-for expertise. Applying that expertise, the Arbitrator found that while the University had the right to assign job duties to the Grievant, the University failed to meet its burden to show that the Grievant's refusal to perform telepsychiatry duties constituted gross insubordination that supported just cause for termination. This conclusion was based on the Arbitrator's determination that the Grievant had credible and reasonable professional concerns about the proposed additional job duties. Based on those concerns, the Grievant requested relevant information from the University. The Arbitrator determined that the University's refusal to provide **any** information to the Grievant was unreasonable and exacerbated the dispute. For those reasons, and

under those circumstances, the Arbitrator concluded that the University lacked just cause to terminate the Grievant's employment for insubordination.

The trial court, in confirming the Award, recognized that the Arbitrator's analysis and determination of whether just cause for termination existed and, if not, what shall be the remedy, was entirely consistent with the Arbitrator's powers and authority under the CNA and properly rejected the University's arguments to the contrary.

Accordingly, the Award is consistent with the Arbitrator's powers and authority under the CNA and the trial court's Order should be affirmed.

POINT IV

THE TRIAL COURT'S ORDER CONFIRMING THAT THE ARBITRATOR'S AWARD WAS NOT PROCURED BY UNDUE MEANS WAS CORRECT AND THE ORDER SHOULD BE AFFIRMED.

A. The Award was not the Product of "Undue Means".

The University's principal argument to vacate the Award, both to the trial court and to this court, is that the Arbitrator's just cause determination allegedly failed to follow "substantive law" regarding a public employer's non-negotiable prerogative to assign job duties and responsibilities and was therefore procured by "undue means." (Pb24). The University contends that the Award allegedly diminishes the University's managerial prerogative to assign work. That is simply not true.

First, as discussed above, the sole – and stipulated – issue before the Arbitrator was whether the University had just cause to terminate the Grievant for insubordination. This is not odd or uncommon. For example, the termination of an employee who objects to a work order because of reasonable health and safety concerns may be reviewed by an arbitrator and found to lack just cause for discipline. There, as here, the issue is not whether the employer has a non-negotiable right to assign the duties to which the employee reasonably objected to performing; rather, the issue is whether evidence demonstrates that the employer had just cause to terminate the employee. That latter, and wholly distinct, question is specifically what the parties agreed in the CNA to submit to binding arbitration. As discussed above, the Arbitrator concluded that the University lacked just cause to terminate the Grievant.

There is no dispute that the University has a managerial prerogative to assign the Grievant's job duties within her job description. The Arbitrator's Award does not question that principle. Nor does the trial court's decision and Order. Indeed, as discussed above, the Arbitrator expressly asserts that principle. Nonetheless, the University contends that the Arbitrator concluded that the University was "required" to "respond to information requests propounded by its employee," and because the University did not, it lacked just cause to terminate the Grievant for insubordination. (Pb28). Review of the Award, and the Order, confirms that the Arbitrator did not

"require" the University to do anything before it was entitled to assert its managerial prerogative to assign work.

The record is clear that the University was aware of the Grievant's information request. The record is clear that the University did not provide any information she requested. The record is clear that, after the Grievant did not immediately comply with the directive to perform telepsychiatry duties, the University did not unilaterally reduce her work hours to align with the reduced hours under the IMAR contract.

The Arbitrator simply determined that, under the circumstances developed in the credible evidentiary record, because the University was aware of the Grievant's reasonable, sincere professional concerns about her private practice patients, the University's refusal to provide reasonable documentation she requested was arbitrary and unreasonable and thus precluded just cause for termination for insubordination. (Pa46). The Arbitrator did not determine or conclude that the University was required as a matter of law to negotiate with Dr. Arora before assigning her job duties. Nor did the trial court. The Arbitrator did not determine that "the University could not discipline Dr. Arora for insubordination" where it failed to "sufficiently negotiat[e] and provide information to her" about new job duties it wanted to assign her. (Pb29-Pb30). Nor did the trial court. Rather, the Arbitrator recognized that where the University could have simply reduced her hours, its unreasonable and arbitrary refusal to assist a stellar employee to assess her

reasonable professional concerns meant that its decision to instead terminate a ten-year employee's employment lacked just cause. The trial court recognized that this did not meet the standard to vacate the Award on the basis that it was procured by undue means.

Accordingly, the University's argument that the Award was procured by "undue means" lacks any merit and the Order should be affirmed.

B. The Arbitrator's Award Is Not A Scope of Negotiations Determination.

The University similarly contends that the trial court erred because Arbitrator's Award allegedly decided an issue that is within the primary jurisdiction of the Public Employment Relations Commission ("PERC") – i.e., whether the assignment of job duties was a negotiable/arbitrable subject under the New Jersey Employer-Employee Relations Act ("NJ EERA"). Again, this is a red herring. This was not a "scope of negotiations" case. It was a "just cause for discipline" case. The University unquestionably understood – and indeed stipulated – that the issue before the Arbitrator was whether just cause existed for it to terminate the Grievant's employment for insubordinate conduct.

There is no dispute that PERC has "primary jurisdiction" under the NJ EERA to determine "'whether the subject matter of a particular dispute is within the scope of collective negotiations.'" (Pb31). N.J.S.A. 34:13A-5.4(d) "assign[s] . . . PERC . . . 'the power and duty'" to determine "in the first instance . . . 'whether a matter in

dispute is within the scope of collective negotiations.'" Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 614 (2020). "PERC is [thus] the forum for the initial determination of whether a matter in dispute is within the scope of collective negotiations." Ibid. (alteration in original) (quoting State v. State Supervisory Emps. Ass'n, 78 N.J. 54, 83 (1978)). "Where PERC concludes that a particular dispute is not within the scope of collective negotiations, and thus not arbitrable, it must issue an injunction permanently restraining arbitration." Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd., 78 N.J. 144, 154 (1978).

Notwithstanding the multiple pages of Plaintiff's brief setting forth hornbook law on this subject (see Pb30-Pb32), the record is clear that at no time did the University ever file a scope of negotiations petition with PERC. Not after January 2020 when Dr. Arora and the Union first requested information from the University in connection with its directive that she perform telepsychiatry work; not upon the May 24, 2023 delivery of the Award; and not to date. That is because no scope of negotiations issue was ever raised. The University's argument is therefore wholly disingenuous. The trial court correctly recognized the significance of these facts and found the University's argument that the Arbitrator "failed" to refer a scope matter to PERC lacked merit.

The University further argues that the Arbitrator failed to apply PERC law establishing that the University had a managerial prerogative to assign job duties.

Contrary to the University's contention, the Award did not "effectively create[] a new legal right for employees" to negotiate job assignments and "to refuse to comply with employer directives to perform those job assignments with impunity." (Pb32-Pb33). That is simply an absurd interpretation of the Award and the trial court's Order.

Again, no scope issue "arose here." The trial court appreciated this fact. If the University legitimately believed a scope issue existed, the University had ***three years*** to bring that issue to PERC before the Award was issued. It did not. As the trial court recognized, the University's attempt here to reframe a simple "just cause" determination into a scope of negotiations issue fails.

C. The Award Did Not Modify the University's Outside Employment Policy or Ignore the University's Code of Ethics or the New Jersey Conflicts of Interest Law.

The University's final argument, that the trial court erred in rejecting its contention that the Arbitrator impermissibly modified the University's Outside Employment Policy and ignored its Code of Ethics and the New Jersey Conflicts of Interest Law, is just as unpersuasive and meritless as its principal arguments.

First, the Award does not modify the University's Outside Employment Policy by "eliminat[ing] its application to part-time employees." (Pb34-Pb35). The record is clear that the University had approved the Grievant's Outside Employment/private practice since 2010. The University never rescinded that

approval. The record shows that the University considered the Grievant's private practice positively when it promoted her to Associate Professor in 2018. The record shows that the Grievant's supervisor referred patients to her private practice.

Likewise, the record is clear that at no time did the University inform the Grievant that her private practice created a conflict with her University employment. Yet, the University on appeal reasserts an argument it made for the first time in its filing to the trial court below – that "Dr. Arora's outside business violated the requirements of the Outside Employment Policy." (Pb37). If that were the case – which it was not – then the University failed to follow the processes in its own Policy for assessing and advising an employee that their outside employment created a conflict under the Policy, as the record is bereft of any such action by the University with respect to Dr. Arora.

Similarly, until the underlying action in the trial court, the University never asserted that Dr. Arora's private practice violated its Code of Ethics or the COIL. The record is clear that from 2012 to 2020, the University never assigned Dr. Arora to perform patient care duties, so there was never a conflict. Nonetheless, the University contends that Dr. Arora structured her private practice in a manner that "constitutes a substantial conflict with the proper discharge of those patient care duties." (Pb37). Again, the record is clear that the University was, for more than a decade, aware of Dr. Arora's private practice and its structure. The University never

claimed that this conflicted with her University employment. It is wholly disingenuous for the University to now contend that Dr. Arora's private practice was a conflict of interest that "violated" the COIL. (Pb37 n.8).

All the Arbitrator did was recognize and consider those facts in the context of the University's "unprecedented demand that the Grievant provide four hours per week of tele-psychiatry to be billed through commercial insurance companies." (Pa34-Pa35). It was that demand that "created" a "potential conflict of interest." (Id.).

Thus, the University's argument that the trial court erred in rejecting the argument that the Arbitrator created an "exception" to the University's policies lacks merit and its appeal should be dismissed.

CONCLUSION

For the foregoing reasons, Plaintiff-Appellant's appeal of the trial court's July 3, 2024 Order should be denied.

Respectfully submitted,

WEISSMAN & MINTZ LLC

/s/Justin Schwam
By: Justin Schwam, Esq.

Dated: January 6, 2025

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, Plaintiff-Appellant, v. AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS – BIOMEDICAL AND HEALTH SCIENCES OF NEW JERSEY, Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-003986-23-T4 CIVIL ACTION On Appeal From a July 3, 2024 Order of the Superior Court of New Jersey, Middlesex County (Docket No. MID-L-4768-23) Sat Below: Hon. Patrick J. Bradshaw, J.S.C.

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

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PRELIMINARY STATEMENT

This brief is submitted on behalf of Plaintiff-Appellant Rutgers, The State University of New Jersey ("Rutgers" or "University") in reply to the brief of Defendant-Respondent Association of American University Professors – Biomedical Health Services New Jersey ("AAUP-BHSNJ" or "Union").

As is clear from his Award, the Arbitrator engaged in extraordinary contortions of the law to arrive at his rulings, which ignore well-settled decisions of the New Jersey Public Employment Relations Commission ("PERC") and the New Jersey Courts concerning the managerial prerogative of public employers to assign job duties to their employees without negotiation. The Arbitrator concluded that Rutgers' non-negotiable prerogative to assign Dr. Arora, a psychiatrist, to treat its patients was limited by a requirement to assure her that performing her assigned duties would not negatively impact her outside practice, despite the fact that she had been put on notice numerous times over a period of several years that she was required to prioritize her employment with Rutgers, and to treat its patients, including privately insured patients.

Further, the Arbitrator declined to apply Rutgers' Outside Employment Policy as written to Dr. Arora, a part-time employee, because the Arbitrator judged that part-time employees are subject to different expectations.

As shown herein, the liberties taken by the Arbitrator in ignoring the law and effectively amending Rutgers' Policy require that the Award be vacated.

PROCEDURAL HISTORY

The University incorporates by reference the Procedural History set forth in its main brief, which the Union has adopted without qualification (Db4).[1]

REPLY STATEMENT OF FACTS

The University relies on the Statement of Facts set forth in its main brief, except as follows.

Several of Dr. Arora's appointment letters with the former University of Medicine and Dentistry and Rutgers required her - before and after she began working on Involuntary Medication Administrative Review ("IMAR") panels at the State psychiatric hospitals in July 2012 (Pa551 and Pa555-Pa556) - "to takes steps to insure that [her] services [were] provided in accordance with the requirements of the Medicare and Medicaid Programs and third-party payors." (See e.g., July 8, 2010 – Pa415; July 25, 2011 – Pa423; August 24, 2015 - Pa429; April 26, 2018 - Pa435; January 17, 2020 - Pa441; and June 30, 2020 – Pa447).

In addition, several of Dr. Arora's appointment letters with the former University of Medicine and Dentistry and Rutgers required her - before and after she

[1] References to "Pb_", "Pa_, and "Db_," respectively, are to the University's main brief on appeal, its Appendix, and the Union's brief on appeal.

began working on Involuntary Medication Administrative Review ("IMAR") panels at the State psychiatric hospitals in July 2012 (Pa551 and Pa555-Pa556) - to perform duties that included patient care and/or such duties as were assigned to her (See e.g., July 8, 2010 – Pa416; July 25, 2011 – Pa423; August 24, 2015 - Pa430; April 26, 2018 - Pa435; June 22, 2018 - Pa439; January 17, 2020 - Pa443; and June 30, 2020 – Pa447).

LEGAL ARGUMENT

POINT I

STANDARD OF REVIEW

Rutgers relies upon the discussion of the standard of review set forth in Point I of its main brief except to emphasize that, under the plain language of N.J.S.A. 2A:24-8, the Legislature expressly specified that a reviewing court "shall" vacate an arbitration award when a statutory ground set forth in N.J.S.A. 2A:24-8(a), (b), (c), or (d) has been established.

POINT II

CONTRARY TO THE UNION'S ARGUMENT, THE TRIAL COURT ERRED BY CONCLUDING THAT THE ARBITRATOR'S AWARD REQUIRING THE UNIVERSITY TO NEGOTIATE DR. ARORA'S WORK ASSIGNMENT BEFORE IT COULD DISCIPLINE HER FOR REFUSING TO PERFORM HER ASSIGNED WORK DID NOT CONSTITUTE UNDUE MEANS PROHIBITED UNDER N.J.S.A. 2A:24-8(a).(Ruling: Pa700-Pa702).
(Responding to Point IV.A. of the Union's Brief)

The Union argues that the Arbitrator did not ignore the law or restrict the University's managerial prerogative (Db32). Rather, the Union urges that in preconditioning the exercise of the University's managerial prerogative on a requirement that it first engage in discussions with Dr. Arora and provide her with "reasonable" documents to address her concern that treating patients with private insurance might result in her being required to accept private insurance in her private practice, the Arbitrator was not improperly infringing upon Rutgers' managerial prerogative to assign job duties to Dr. Arora, but rather, simply devising ad hoc requirements that he deemed necessary to warrant enforcement of the assignment of duties through disciplinary action as reasonable and non-arbitrary (Db33-34). Whether or not the Arbitrator set out with the objective of improperly reducing the scope of the University's managerial prerogative, his determination that Rutgers lacked just cause to terminate Dr. Arora unless it first satisfied those ad hoc preconditions plainly does exactly that without any support in the governing collective negotiations agreement, reasonably debatable or otherwise.

The Union also argues disingenuously that the Arbitrator did not impose those ad hoc requirements on Rutgers, but rather, determined that Rutgers "could have simply reduced [Dr. Arora's] hours" from 20 hours to 16 hours in response to the State's reduction of her hours under the IMAR contract and, because it did not do so, its failure to satisfy the Arbitrator's ad hoc notice and document production

requirement rendered the termination of Dr. Arora's employment without just cause (Db32-33). Notably, neither the Arbitrator, nor the trial court, nor the Union pointed to any provision in the collective negotiations agreement that authorized the University to unilaterally reduce Dr. Arora's hours, pay or benefits. Accordingly, it is clear that the Arbitrator exceeded his authority by requiring this of the University.

Further, and significantly, the Union did not dispute or otherwise mention in its brief that Dr. Arora indeed had been offered and rejected the option to reduce her weekly hours from 20 to 16 long before the termination of her employment on December 14, 2020 (Pa408-Pa409). As set forth in the University's initial brief, Dr. Arora's former supervisor (Vice President Michelle Miller) testified that the University offered to reduce Dr. Arora's weekly hours from 20 to 16 in late December 2019 or early January 2020 and that Dr. Arora refused to accept that option (Pb12; see also Pa615-Pa616). Dr. Arora testified that the option to reduce her hours was offered to her in February or March of 2020, but she acknowledged that she never agreed to accept a reduction of her work hours to 16 hours per week (Pa608). Thus, the evidence is clear that Dr. Arora had been offered and rejected that option long before the termination of her employment on December 14, 2020 (Pa408-Pa409).

In the Award (Pa17-Pa51), the Arbitrator determined that Dr. Arora was entitled to back pay "from the date of her discharge to the date she declined the

Employer's offer of working sixteen hours, less any substitute interim earnings" (Pa47). Later in the Award, the Arbitrator repeated his statement that Dr. Arora was entitled to back pay from the date of her termination to the date that she refused Rutgers' offer to reduce her working hours from 20 hours to 16 hours (Pa50).

As noted, the arbitration hearing testimony of Ms. Miller and Dr. Arora establishes that Dr. Arora's refusal of the University's offer to reduce her weekly hours from 20 hours to 16 hours occurred in late December 2019 or January 2020 based upon Ms. Miller's recollection (Pa615-Pa616) or in February or March 2020 based upon Dr. Arora's recollection (Pa608). Thus, the testimony of both witnesses places the offer and refusal of the 16-hour option as occurring between nine and 12 months before Dr. Arora's termination.

Notwithstanding the evidence, the Arbitrator determined that the back pay period would run from Dr. Arora's December 14, 2020 termination (Pa408-Pa409) to the date she declined Rutgers' offer to reduce her weekly hours from 20 to 16 (Pa47 and Pa50). Since the foregoing evidence demonstrates that Dr. Arora declined the University's offer to reduce her hours several months before her December 2020 termination (Pa615-Pa616 and Pa608), the Arbitrator ordered a back pay period that anomalously terminated several months before it began.

The only logical explanation for the anomalous back pay period determined by the Arbitrator is that he wrongly assumed that Dr. Arora's declination of the

option to reduce her work hours occurred after the termination of her employment. Since the participants in that discussion – Dr. Arora and Ms. Miller – clearly testified that it took place several months before Dr. Arora's termination, it is clear that the Arbitrator was far wrong about the timing of that discussion. Moreover, since the Arbitrator determined that back pay should cease as of the date that Dr. Arora refused Ms. Miller's offer to reduce the former's weekly work hours from 20 to 16 and the evidence shows Dr. Arora refused that offer long before her termination (Pa615-Pa616, Pa608, Pa47 and Pa50), it necessarily follows under the Arbitrator's reasoning, and contrary to the Award, that Dr. Arora has no entitlement to back pay.

It is unclear what the Arbitrator's assessment of the reasonableness of the actions taken by the University and of Dr. Arora's conduct would have been had the Arbitrator reviewed the record of the arbitration proceedings sufficiently to understand the actual sequence of events. However, no logical rationale based on the actual facts of record could have produced the Arbitrator's determination that Rutgers was at fault for not unilaterally reducing Dr. Arora's work hours even though the uncontroverted evidence is that Rutgers offered Dr. Arora the opportunity to retain her employment and end her dispute with the University over her refusal to perform her assigned job duties by reducing her weekly hours from 20 to 16 and that Dr. Arora had refused the University's offer.

Further, the Arbitrator's determination that Rutgers' exercise of its managerial prerogative to assign patient care duties to Dr. Arora and to direct her to perform those duties constituted an arbitrary and unreasonable departure from just cause contravened well-settled decisions of the New Jersey Public Employment Relations Commission ("PERC") and the New Jersey Courts. Our Supreme Court has held that whether a subject matter is negotiable under the New Jersey Employer-Employee Relations Act ("EERA"), N.J.S.A. 34:13A-1, et seq., or a non-negotiable managerial prerogative depends upon an analysis that, among other things, balances the public employer and public employee interests at issue.[2] The Arbitrator's determination that he was empowered to revisit and override that long-established balance of interests and his declaration that Rutgers' exercise of the well-settled, non-negotiable managerial prerogative of public employers to assign job duties to their employees was a departure from just cause constitutes a failure and refusal to follow governing law and a blatant resort to undue means that, under N.J.S.A. 2A:24-8(a), required the trial court to vacate the arbitration award.

Therefore, the judgment below must be reversed.

[2] See Local 195, IFPTE, AFL-CIO v. State, 88 N.J. 393, 401 (1982) (holding that whether or not a particular matter is negotiable "depends on careful consideration of the legitimate interests of the public employer and the public employees. The process of balancing those competing interests is constrained by the policy goals underlying relevant statutes and by the Constitution.").

POINT III

CONTRARY TO THE UNION'S CONTENTION, THE ARBITRATOR DETERMINED THAT THE UNIVERSITY'S ASSIGNMENT OF DUTIES TO DR. ARORA WAS SUBJECT TO NEGOTIATION AND THE TRIAL COURT ERRED BY DECLINING TO VACATE THE ARBITRATION AWARD BECAUSE THE ARBITRATOR EXCEEDED AND SO IMPERFECTLY EXECUTED HIS POWERS THAT A MUTUAL, FINAL AND DEFINITE AWARD UPON THE SUBJECT MATTER SUBMITTED WAS NOT MADE IN VIOLATION OF N.J.S.A. 2A:24-8(d). (Ruling: Pa700-Pa702)
(Responding to Point IV.B. of the Union's Brief)

The Union argues that the Arbitrator's determination that Rutgers had a duty to engage with Dr. Arora concerning her objections to providing patient care and to provide her with information and documents she demanded did not involve a determination of negotiability of her assigned job duties because, according to the Union, this is not a scope of negotiations case, but rather, a just cause for discipline case (Db34-36). The University maintains that this matter properly should have been addressed by the Arbitrator only as a just cause for discipline case; however, the Arbitrator's derivation and imposition of negotiation-related duties upon the University through his just cause analysis improperly injected scope of negotiations issues into this case that the Arbitrator should not have deigned to decide. [3]

[3] The Union asserts that Rutgers' argument is disingenuous because it did not file a scope petition (Db35). Contrary to the Union's conjecture, Rutgers did not file a scope petition because it maintains that this matter is a just cause case and the

For these reasons and those set forth in its main brief, Rutgers respectfully submits that the trial court's Order denying the University's Order to Show Cause seeking to vacate the Award must be reversed.

POINT IV

THE UNION'S CONTENTION THAT THE ARBITRATOR DID NOT MODIFY THE UNIVERSITY'S OUTSIDE EMPLOYMENT POLICY IS INCORRECT AND, THUS, THE TRIAL COURT ERRED BY DECLINING TO VACATE THE ARBITRATION AWARD UNDER N.J.S.A. 2A:24-8(d).
(Ruling: Pa700- Pa702).
(Responding to Point IV.C. of the Union's Brief)

The Union's first argument challenging the University's showing that the Arbitrator improperly modified the University's Outside Employment Policy (Pa516-Pa524) is that the University approved Dr. Arora's private practice "since 2010" and "never rescinded that approval" (Db36-37).

The record contains no evidence that Dr. Arora advised the University at the time she commenced employment with the former UMDNJ in 2010 with her pre-existing private practice, or at any time prior to her refusal to treat Rutgers' patients in or about January 2020, that she would refuse to provide patient care to Rutgers' patients who were privately insured in order to protect her private practice from

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Arbitrator's flagrant trespass on the managerial prerogative to assign job duties was both flatly wrong.

speculative concerns that treating those patient might adversely impact her private practice. Likewise, the Union did not and could not present any evidence that the University authorized Dr. Arora to engage in activities that would conflict with her Rutgers employment or the University's Outside Employment Policy. To the contrary, the Union affirmatively asserts that Dr. Arora was actively engaged in her outside practice when she commenced employment with the former University of Medicine and Dentistry of New Jersey ("UMDNJ") in September 2010 (Db5) and that she provided patient care to UMDNJ patients from 2010 until June 2012, while continuing to operate her private practice (Db5-6). There is no evidence in the record that Dr. Arora refused to private patient care to any UMDNJ patients during that approximately 20-month period due to concerns about her private practice or for any other reason. Nor does the record contain any evidence that Rutgers had any reason to know that Dr. Arora would refuse to provide patient care to its patients when assigned to do so in late 2019 (Db6-7) based upon a concern that treating Rutgers' patients who had private medical insurance might result in a requirement to accept private medical insurance in her private practice or for any other reason.

In this context, the Union dismisses the notion that Dr. Arora's outside practice was in conflict with her position as a physician at Rutgers while, at the same time, carefully avoiding any reference to the fact that Dr. Arora admittedly refused to perform her assigned patient care duties at Rutgers because of her concerns about

the potential impact that providing care to privately-insure Rutgers' patients might have upon her outside practice (Db7). Whether the conflict that caused Dr. Arora to refuse to treat Rutgers' patients is characterized as stemming from her private practice or from her decision as the proprietor of that private practice to prioritize that practice over her assigned duty to treat Rutgers' patients is a matter of semantics.

The Union also failed to address the passage in the Award (see Pb38-40) in which the Arbitrator stated without qualification that the provision in Rutgers' Outside Employment Policy that "[t]he primary work obligation of a full or part-time … faculty . . . member is to the University, school or other operational unit where he or she is employed" (Pa517) would have obligated Dr. Arora to subordinate her outside venture to her Rutgers employment if she were a full-time Rutgers employee with a side job that impinged upon her primary job obligation (Pa34-Pa35). However, the Arbitrator declined to apply that provision to Dr. Arora – a part-time employee – despite the fact that the policy expressly provides that it is applicable to both full- and part-time employees (Pa517, Pa34-Pa36).

By adopting that construction of the University's Outside Employment Policy, which is flatly inconsistent with the plain language of the Policy, and then applying it to excuse Dr. Arora for her insubordinate failure and refusal to comply with the Policy, the Arbitrator modified the Outside Employment Policy as surely as if he had crossed the words "part-time" out of the Policy.

In so doing, the Arbitrator altered the Policy and used that unauthorized alteration, in whole or in part, as a justification for excusing Dr. Arora from accountability for her failure and refusal to abide the Policy's requirements. At the same time, the Arbitrator violated Article XXVI.D.5 of the collective negotiations agreement, which provides:

> In no event shall the arbitrator's decision have the effect of adding to, subtracting from, modifying or amending the Agreement, the University's Bylaws, or any other University policies or procedures.

(Pa105; Pa302).

Accordingly, the Arbitrator exceeded his powers under the collective negotiations agreement, adopted an erroneous construction of the Outside Employment Policy that cannot be said to be reasonably debatable and, thereby, violated N.J.S.A. 2A:24-8(d). Therefore, the decision below should be reversed and remanded to the trial court for entry of an Order vacating the Arbitration Award.

POINT V

THE UNION FAILED TO BRIEF AND, THUS, WAIVED ANY ARGUMENT THAT THE TRIAL COURT'S ERRONEOUS AWARD OF ATTORNEYS' FEES AND COSTS WAS PROPER.
(No Express Ruling was Provided. See Pa697- Pa698).

In Point V of its main brief, Rutgers showed that the trial court erred by ordering the University to pay the Union reasonable attorneys' fee and costs associated with this matter (Pa697-Pa698).

No authority for the proposition that fee shifting is available in an action to vacate or confirm an arbitration award was cited by the Union or the trial court and no finding of fact was rendered to support the trial court's conclusion that an award of attorneys' fees or costs is warranted in this matter.

Moreover, the trial court did not cite any provision of the prevailing collective negotiations agreement that would support a reasonably debatable conclusion that it provides for fee or cost shifting.

In its brief, the Union did not even respond to Rutgers' showing in Point V of Rutgers' main brief that the trial court's grant of attorneys' fees and costs to the Union was unsupported by reason, explanation or authority and, therefore, the Union waived its right to argue in support of the fee and cost shifting provision the trial court included in its July 3, 2024 Order (Pa697-Pa698). See State v. Shangzhen Huang, 461 N.J. Super. 119, 125 (App. Div. 2018), aff'd o.b., 240 N.J. 56 (2019).

Accordingly, the trial court's Order should be reversed.

CONCLUSION

For all the foregoing reasons, Plaintiff-Appellant Rutgers, The State University of New Jersey respectfully submits that this Court should reverse the trial court's July 3, 2024 Order, vacate the May 22, 2023 arbitration award and reverse the trial court's confirmation of the arbitration award.

Respectfully submitted,

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