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EAST ORANGE EDUCATIONAL SUPPORT PROFESSIONALS' ASSOCIATION AND EAST ORANGE MAINTENANCE ASSOCIATION, Plaintiffs-Petitioners, , vs. EAST ORANGE BOARD OF EDUCATION, Defendant-Respondent.	SUPREME COURT OF NEW JERSEY CIVIL ACTION DOCKET NO.: 090489 On Petition for Certification of the Final Order of the Superior Court, Appellate Division Appellate Division Docket No. A-3657-21 Sat Below: Robert Gilson, J.P.A.D. Patrick Dealmeida, J.A.D.

BRIEF OF AMICI CURIAE IFPTE LOCAL 195 IN SUPPORT OF THE PETITION FOR CERTIFICATION FILED BY THE EAST ORANGE EDUCATIONAL SUPPORT PROFESSIONALS' ASSOCIATION AND EAST ORANGE MAINTENANCE ASSOCIATION

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Of Counsel and on the Brief

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STATEMENT OF INTEREST OF AMICUS CURIAE

The International Federation of Professional and Technical Engineers, Local 195 ("Local 195") is the majority representative of approximately 5,500 employees throughout the State of New Jersey ("state"). It seeks an order granting it amicus curiae status in this matter.

The bargaining unit that Local 195 represents includes operations, maintenance, security, inspections and crafts titles throughout the state. In addition to state workers, Local 195 represents blue collar workers at various state colleges in New Jersey. Workers at Kean University, Montclair State University, William Paterson University, The College of New Jersey, New Jersey City University, and Ramapo College are included in the Local 195 bargaining unit. Many of these workers may be affected by the statute in question, N.J.S.A. 18A:7F-9.

Some members of Local 195 may be directly impacted by the Appellate Division's February 25, 2025 decision, as it will restrict their emergency pay during a pandemic. In addition, the Appellate Division's construction of N.J.S.A. 18A:7F-9 would potentially affect any blue collar worker who is directed to report for work during a pandemic. Accordingly, it is respectfully requested that certification be granted and amicus curiae status be ordered.

Additionally, the public has a strong interest in the far-reaching implications of this case: (1) for the emergency pay of the State's public sector employees working during a pandemic, and (2) for the scope of review of the instant arbitrator's opinion and award, which interprets N.J.S.A. 18A:7F-9. The participation of *amici curiae* is particularly appropriate in cases with broad implications or general public interest such as the instant case. See Taxpayers Assoc. of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6, 17 (1976), cert. denied, 430 U.S. 977 (1977). At issue is the ability of a public employer and its unions to voluntarily agree to utilize an arbitrator to determine whether N.J.S.A. 18A:7F-9 restricts the amount of emergency pay for which public workers can be compensated during a pandemic.

Local 195 has participated as either a party or as an amici in a number of cases spanning more than four decades. They were a party, for example, in State v. State Supervisory Employees, 78 N.J. 54 (1978); in The Matter of Local 195, IFPTE, 88 N.J. 393 (1982); in State, Department of Corrections v. Local 195, 169 N.J. 505 (2001), and in Commc'ns Workers of Am., AFL-CIO v. New Jersey Civil Serv. Comm'n, 234 N.J. 483 (2018). They were amicus in Linden Bd of Ed v. Linden Ed Assoc, 202 N.J. 268 (2010) and Rozenblit v. Lyles, 245 N.J. 105 (2021). Local 195, then, has a forty seven year history of participating in significant public sector cases of first impression. In State, Department of

Corrections, the Supreme Court overturned 150 years of outdated common law precedent on overtime compensation. Accordingly, it is respectfully submitted that this Court should grant Local 195's Motion to appear as *amici curiae.*

ARGUMENT

The Appellate Division Improperly vacated An Arbitration Award on Public Policy Grounds Instead of Using the "Reasonably Debatable Test"

The legal question here is simple but extremely significant.

Background

Local 195 submits that whether an arbitrator interprets contract language or statutory language, the same level of judicial deference must be afforded to the arbitrator's opinion and award. Although this precise question is not a matter of first impression, it still must be resolved by the Supreme Court, as the Appellate Division was woefully mistaken in the lack of deference it gave to the arbitrator's opinion and award, which will set an erroneous precedent. It is submitted that the "reasonably debatable" standard for reviewing an arbitrator's opinion and award applies equally for interpreting a statute or contract language. When statutory language "speaks in the imperative" is the only time that a statute preempts contract language. In re IFPTE, Local 195, 88 NJ 393, 404-405 (1979).

In its review of N.J.S.A. 18A:7F-9, the Appellate Division incorrectly interjected into its analysis a "public policy" component, which erroneously led to the vacation of the arbitration award. As N.J.S.A. 18A:7F-9 does not speak in the imperative, it does not preempt. It is as simple as that. Thus, the award must be confirmed as its logic is reasonably debatable.

The interpretation by the Appellate Division of N.J.S.A. 18A:7F-9, is just wrong for at least three reasons. First, the statutory language should not have been reinterpreted by the Appellate Division once it became clear that it does not speak to the imperative. Second, the arbitrator's interpretation, as confirmed by the Chancery Division, demonstrate that it is reasonably debatable. Third, as the interpretation was agreed upon by the arbitrator and the Chancery court, it is obviously reasonably debatable. The Appellate Division's strained reading of the statute conflicts with decades of case law. Given the serious consequences of the decision below, the issue before this court is particularly relevant to Local 195 and its membership. Moreover, the decision is contrary to the normal formula for vacating an arbitrator's award on public policy grounds.

The Appellate Division's opinion creates a state of uncertainty regarding an arbitrator's authority to review. It incorrectly contracted the scope of review. The seminal authority to be applied here is New Jersey Turnpike Authority v. Local 196 IFPTE, 190 NJ 283 (2007). While on his way home from work, a toll

collector employed by the New Jersey Turnpike Authority, shot a paint ball gun at a slower moving vehicle. He filed a grievance challenging his immediate discharge. The arbitrator reinstated the toll collector to his former position, but imposed an eleven month unpaid suspension and required periodic psychological evaluations. The Turnpike Authority sought vacation of the arbitration award on public policy grounds. The Superior Court, Chancery Division confirmed the arbitrator's decision. The Appellate Division vacated. The Supreme Court, however, reversed and confirmed the award, ruling that the arbitrator's award reinstating the toll collector did not implicate any statutory, regulatory or procedural embodiment of public policy requiring vacation of the award. The Supreme Court in Local 196 found that,

> Adoption of that broad view of the public policy exception poses a risk to the finality of arbitration awards and jeopardizes the stability of labor relations.

The Supreme Court added,

> Courts must not allow the invocation of a convenient talisman – "public policy" -- unless circumstances demand it. Otherwise, public policy becomes an excuse to set aside an award, a facile method of substituting judicial for arbitral judgment.

The Instant Case

In the instant case, the issue decided by the Appellate Division was whether the Emergency Pay provision of the Collective Negotiations Agreements the East

Orange Board of Education had with the East Orange Educational Support Professionals Association and the East Orange Maintenance Association (which provided an enhanced rate of pay for anyone forced to report to work during a declared state of emergency) was preempted on public policy grounds by N.J.S.A. 18A:7F-9. Having found a public policy violation, the Appellate Division essentially bypassed the question of whether the "reasonably debatable" test established in Kearny PBA Local 21 v Town of Kearny, 81 NJ 208, 223-224 (1979) was violated.

In Borough of East Rutherford v East Rutherford PBA Local 275, 213 NJ 190 (2014), our Supreme Court found that Collective Negotiations Agreement language interpreted by an arbitrator should not be vacated unless there is a direct contradiction of law or public policy. The first question for the Supreme Court to address here is whether it was "reasonably debatable," for the arbitrator to sustain the grievance. The second question is whether the arbitrator's opinion violated public policy. The statutory language was found to be ambiguous by the arbitrator, and therefore the contract language was not preempted by the statutory language.

In Township of West Windsor v. PERC, 78 N.J. 98 (1978), the Supreme Court found that statutes are incorporated by reference into public sector labor agreements. Thus, it could not be asserted that the statutory language in question was not contractual and could not be interpreted by the arbitrator. Said the court:

> An important difference does exist between what may be grieved and what may be negotiated. We have today held that the parties may not agree to contravene specific statutes or regulations setting particular terms and conditions of public employment and therefore that proposals to do so are not mandatorily negotiable. State v. State Supervisory Employees Ass'n, supra, 78 N.J. at 80, 393 A.2d at 233. We have further held that such statutes and regulations are effectively incorporated by reference as terms of any collective agreement covering employees to which they apply. Id. As such, disputes concerning their interpretation, application or claimed violation would be cognizable as grievances subject to the negotiated grievance procedure contained in the agreement. However, as is the case with negotiated agreements, no grievance resolution may contravene a statutory or regulatory mandate. Nevertheless, the issues of whether and how such statutes and regulations apply to authorize or prohibit particular actions by the public employer or the employees are proper subjects of "appeal" pursuant to N.J.S.A. 34:13A-5.3. The inability of the parties to agree to contravene statutory or regulatory imperatives pertaining to the terms and conditions of public employment precludes negotiability. However, the fact that no grievance may be resolved in a manner that would contravene any applicable statutes or regulations does not mean that the grievability of disputes concerning their alleged violation in a particular case is similarly precluded. To this extent, the scope of grievability is more expansive than the scope of negotiability. (78 N.J. at 116).

New Jersey's History of Favoring Arbitration

New Jersey courts have a long history of deferring to arbitration awards in both the public and private sector. In this connection, the Supreme Court has a history, for example, of permitting the waiver of constitutional rights through a

written agreement. In N.J. Mfrs. Ins. Co., 198 NJ.Super. 9, 12-13 (App.Div. 1984), the court held that "the waiver of appeal provision in the inter-company arbitration agreement authorized by [the PIP statute] is valid." And in Mt. Hope Dev. Assocs. V. Mt. Hope Waterpower Project, L.P., 154 NJ. 141, 151 (1998), the Court held that a voluntary statutory procedure (the Alternative Procedure for Dispute Resolution Act, N.J.S.A. 2A:23A-l to -30) allowing parties to waive the right to appeal beyond the Chancery Division did not violate either the court rules or the State Constitution.

Moreover, even without express agreement, "[p]arties invoking arbitration to settle a dispute also waive some constitutional rights." Dev Assocs. at 149. For example, they waive their rights to trial by jury. Id.; see also Allgor v. Travelers Ins. Co., 280 NJ.Super. 254, 263 (App.Div. 1995). Because an arbitration award "may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators," Tretina Printing, Inc. v. Fitzpatrick Assocs., 135 N.J. 349, 358 (1994) (quoting Perini Corp. v. Create Bay Hotel Casino, Inc., 129 NJ. 479, 548 (1992) (Wilentz, C.J., concurring)), parties to arbitration also waive, to some extent, their right to appeal. Mt. Hope Dev. Assoc., supra, 154 NJ. At 149. Thus, except for "rare circumstances" grounded in public policy, id. At 152; Tretina Printing, supra, 135 NJ. at 364-65, countervailing public policies favoring arbitration, Faherty v. Faherty, 97 NJ.

99, 105 (1984), "finality and limited judicial involvement[,]" Tretina Printing, supra, 135 NJ. at 361, precludes full judicial review. Indeed, these public policies favoring restricted review of arbitration awards are embodied in the Arbitration Act, N.J.S.A. 2A:24-l to -11, applicable here, which limits judicial review to the "narrow grounds" delineated in N.J.S.A. 2A:24-8:

> The court shall vacate the award in any of the following cases:
>
> a. Where the award was procured by corruption, fraud or undue means;
>
> b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;
>
> c. Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause being shown therefor, or in refusing to hear evidence, pertinent and material to the controversy, or of any other misbehaviors prejudicial to the rights of any party;
>
> d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.
>
> [N.J.S.A. 2A:24-8.][1]

See Barcon Assocs. V. Tri-County Asphalt Corp., *86 N.J. 179*, 186 (1981).

Courts routinely enforce agreements that waive the right to appellate review over trial court decisions. MACTEC, Inc., supra,; see also 15A Charles

[1] See also N.J.S.A. 2A:23B-23a(l)-(6).

Alan Wright, et al., Federal Practice and Procedure § 3901 at 18-19 (2d ed. 1992). Likewise, as the court found in MACTEC, Inc., the clearly worded and unambiguous agreement in issue, executed between two parties of equal bargaining power, which limits judicial review of an arbitration award, is enforceable.

N.J.S.A. 18A:7F-9

N.J.S.A. 18A:7F-9 provides in relevant part:

> Nothing in subsection b., c., or d. of this section [which provided for remote teaching] shall be construed to limit, supersede or preempt the rights, privileges, compensation, remedies, and procedures afforded to public school employees or a collective bargaining unit under federal or State law or any provision of a collective bargaining agreement entered into by a school district. In the event of the closure of the schools of a district…for a period longer than three consecutive school days, public schools employees covered by a collective negotiations agreement shall be entitled to compensation, benefits, and emoluments as provided in the collective negotiations agreement as if the school facilities remained open for any purpose and for any time lost as a result of school closures or use of virtual or remote instruction, except that benefits may be negotiated for additional work performed.

As a plain reading of this statute clearly demonstrates that it does not speak in the imperative, it does not preempt.

Lower Court's Analysis

The Chancery Division here concluded, in language directly applicable to this case, and in full accordance with East Rutherford:

> Even if I were to disagree with his ultimate decision I can't replace his decision as long as it's reasonably debatable. I do find it to be that.
>
> Under these circumstances it would be inappropriate for me to overrule his award.
>
> Again, here the award is based on the contract language and is not contrary to any law, regulation or precedent. And I do not find that there are any public policy grounds, which have been articulated upon which it should be vacated.
>
> For these reasons I will confirm the award of Arbitrator Jack Tillem of January 16th, 2022. (T. 29-10 to 30-2) (46 a-47 a).

It is submitted that the Chancery Division's holding, after its exceedingly thorough analysis (six full pages of transcript; 44 a-47 a), must be reinstated by this Court. Although it is well-established that review of a trial judge's conclusions of law is de novo, Manalapan Realty, L.P. v. Twp. Comm. Of Manalapan, 140 N.J. 366, 378 (1995) ("A trial court's interpretation of the law and the legal consequences that flow from the established facts are not entitled to any special deference"), the Appellate Division is not free to issue an opinion that overturns a lower court's order, which correctly follows the germane law.

The party opposing confirmation ha[s] the burden of establishing that the award should be vacated pursuant to N.J.S.A. 2A: 24-8. Twp. Of Wyckoff v. PBA

Local 261, 409 N.J. Super. 344, 354 (App. Div. 2009) (quoting Jersey City Educ. Ass'n v. Bd. of Educ. Of City of Jersey City, 218 N.J. Super. 177, 187 (App. Div.), certif. denied, 109 N.J. 506 (1987)). That burden was not met here.

Appellate Division's Reasoning

The Appellate Division was not free to cavalierly disagree with the arbitrator's interpretation of the N.J.S.A. 18A:7F-9. Because it never supported its determination to reverse the Chancery Division and vacate the award of the arbitrator, by applying the reasonably debatable standard, its decision must be reversed by the Supreme Court, as being violative of East Rutherford and its progeny.

None of the facts in the instant matter are disputed. Nor can it be disputed that the Appellate Division did not even pay lip service to the East Rutherford decision and the standard for the review of an arbitrator's interpretation of a statute. It is incredible that at no time in its analysis of why it reversed the Chancery Division, did the Appellate Division even attempted to review the reasonably debatable standard to the arbitrator's interpretation of the statute. Thus, the opinion is entirely bereft of any analysis whatsoever, especially as to why the arbitrator's award was not even reasonably debatable. Significantly, when confirming the award, the Chancery Division, not only found the award to be

reasonably debatable, she also found it to be "much more than that." (T.25-18 to 19) (44 a)

The arbitrator correctly ruled that:

> …[The] purpose [of the statute] would appear to be to protect bargaining unit employees from *losses* – not additional pay – sustained due to closures of more than three days…

In this regard, the arbitrator reasonably analyzed the intent of the statute. It was enacted to protect a certain category of school employees from economic loss when schools are closed for more than three days. There were days when schools were closed and remote instruction was not yet established. Thus, without the benefit of the statute, professional teaching staffs may not have been paid for those days. As the statute was enacted to protect the salaries of professional staff, such as teachers, it is inconceivable that the very same statute could be construed in such a way as to take money away from non-certificated support staff.[2]

[2] Another significant provision of the CBA which the Appellate Division also ignored is Paragraph 1 of the Emergency School Closing provision (Article XXIII), which by agreement of the parties authorizes the Board to dock an employee who does not report for work during an emergency "an amount equal to one (1) day of pay." This penalty is in addition to not getting paid for the day. The Appellate Court's analysis leads the absurd result that the Board lacks such authority, despite the clear contract language, as the school was not closed for an emergency.

N.J.S.A. 18A:7F-9(e)(1) is obviously intended for employees to get paid as if a school is open. It is a protection to get paid even though school is closed. Young v Schering, 141 NJ 16 (1995). It is a floor of entitlement of a guaranteed salary, not a detriment.

In this connection, the Appellate Division created out of whole cloth its interpretation of the statute, when it wrote as follows:

> The purposes of the statute are evident. Through enactment of 18A:7F-9(e)(1), the Legislature introduced financial certainty and stability in an otherwise fluid situation. The statute was enacted shortly after the start of the COVID-19 state of emergency. It is common knowledge that the COVID-19 pandemic's impact on the operation of public schools was dramatic. Access to school facilities for instruction was extremely limited. The few occasions when school facilities reopened proved short lived. N.J.S.A. 18A:7F-9(e)(1) both ensured school employees would be compensated as if school facilities remained open, regardless of the vagaries of the pandemic, and limited the financial exposure of school districts for extra compensation arising from school facility closures, which prior to the COVID-19 state of emergency, would not have reasonably been expected to endure for over a year.

This recitation of the so-called purposes of the statute is purely speculative, as there is no legislative history to support the conclusions drawn. The Appellate Division misconstrued its role. It is not the function of a court to "presume that the Legislature intended something other than that expressed by way of the plain language." O'Connell v. State, 171 N.J. 484, 488 (2002). After finding that

N.J.S.A. 18A:7F-9(e)(1) does not speak in the imperative, its analysis should have ended. "[A]Court may not substitute its judgment for that of a labor arbitrator and must uphold an arbitral decision so long as the award is "reasonably debatable." Bd of Ed of Alpha v. Alpha Ed Assoc, 188 N.J. 595 (2006). The public policy exception will only be met in "rare circumstances." Tretina Printing, Inc. v. Fitzpatrick Assocs., 135 N.J. 349 (1994)

This court must decide whether an arbitrator's interpretation of statutory language, which conflicts with a reviewing Court's interpretation, is still reasonably debatable. Parties to an arbitration cannot be saddled with an appellate opinion that incorrectly applies the law.

In United Steelworkers of Am. V. Warrior & Gulf Nav. Co., 363 U.S. 574, 582 (1960), the Supreme Court found:

> "For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. *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*." [Emphasis added]

In its analysis, the Appellate Division lost its way.

The instant case, then, highlights that the Supreme Court's admonition from sixty-five years ago continues to be uniquely fitting.

CONCLUSION

For the reasons set forth above, the judgment of the Appellate Division should be reversed and Local 195 should be granted amicus standing.

Respectfully submitted,
OXFELD COHEN, P.C.

/s/ Arnold Shep Cohen

ARNOLD SHEP COHEN, ESQ.

Dated: April 9, 2025