EAST ORANGE EDUCATIONAL SUPPORT PROFESSIONALS' ASSOCIATION AND EAST ORANGE MAINTENANCE ASSOCIATIONS, Plaintiffs-Petitioners, v. EAST ORANGE BOARD OF EDUCATION, Defendant-Respondent.	SUPREME COURT OF NEW JERSEY DOCKET NO.: 090489 CIVIL ACTION ON APPEAL FROM FINAL JUDGMENT OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO.: A-3657-21 SAT BELOW: Hon. Robert Gilson, P.J.A.D. Hon. Patrick DeAlmeida, J.A.D.

BRIEF OF PROPOSED AMICUS CURIAE MATTHEW J. PLATKIN, ATTORNEY GENERAL OF THE STATE OF NEW JERSEY

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MATTHEW J. PLATKIN
ATTORNEY GENERAL OF
NEW JERSEY
Hughes Justice Complex
25 Market Street
P.O. Box 117
Trenton, New Jersey 08625-0117
609-376-2960
Gary.Baldwin@law.njoag.gov

Benjamin M. Shultz
Sookie Bae-Park
Assistant Attorneys
General Of Counsel

Gary W. Baldwin
(150732015)
Deputy Attorney General
On the Brief

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PRELIMINARY STATEMENT

At the outset of the COVID-19 pandemic, the State's public schools abruptly closed their doors to in-person instruction and moved to virtual learning. This transition quickly presented a host of legal, practical, and financial issues—one of which concerned the salaries and benefits for the many school employees dealing with the extended school closures. Some of these employees, including those whose paychecks depended on being able to report to work in person, faced a significant loss of income. And on the other side of the equation, local governments were staring down the barrel of a major financial disruption to the State and national economies, which was expected to have significant effects on the public fisc.

The Legislature settled on a compromise solution in April 2020 through its enactment of N.J.S.A. 18A:7F-9(e)(1). Passed as part of a broader statute dealing with the transition to virtual instruction, the statute expressly declares that when a school district is closed for more than three consecutive school days due to a declared emergency or public-health directive, "public school employees covered by a collective negotiations agreement shall be entitled to compensation . . . as if the school facilities remained open" unless they negotiate "additional compensation . . . for additional work performed." N.J.S.A. 18A:7F-9(e)(1). The Legislature thus unambiguously set both a floor and a

ceiling: it required school districts to pay its employees even though schools were closed, yet simultaneously limited districts' potential financial exposure by ensuring they did not have to pay additional premium pay to employees who did not perform additional work.

That clear statutory command should have resolved this case. Instead, a labor arbitrator applied a provision from a pre-pandemic collective bargaining agreement that paid certain custodial staff 2½ times their regular pay, and certain security staff 1½ times their regular pay, during declared emergencies. The arbitrator did so without even analyzing the text of the relevant statute, tersely brushing the matter aside based on a bald and unsupported assertion that the statute's sole purpose was to set a pay floor. The arbitrator did not acknowledge that his interpretation created superfluous statutory terms; did not recognize that the statute expressly contemplated that it overrode contrary collective bargaining agreements; and did not appear to notice that the statute's savings clause for certain collective bargaining agreements was expressly made inapplicable to the provision at issue.

Under these circumstances, the Appellate Division correctly ruled that the arbitrator's award had to be modified because his conclusion was not reasonably debatable. The relevant statute is clear and unambiguous, and the arbitrator plainly lacked the authority to override it. This Court should affirm.

PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

The Attorney General adopts Defendant-Respondent's Procedural History and Statement of Facts, Rb2-6, adding the following.[2]

On March 9, 2020, Governor Murphy declared a state of emergency and public health emergency in response to the COVID-19 pandemic. Exec. Order No. 103 (Mar. 9, 2020). The public health emergency lasted until June 2021, and the state of emergency ended the following month. Exec. Order No. 244 (June 4, 2021). (Pa5). One consequence of the COVID-19 emergency was that New Jersey's public schools transitioned to largely remote operations for significant portions of the pandemic. See Exec. Order No. 104 (Mar. 16, 2020) (closing public schools to students, authorizing virtual learning, and creating delineated exceptions for schools to remain open "for the provision of food" and certain other services).

Against this backdrop, the Legislature enacted P.L. 2020, c.27, on April 14, 2020. Prior to the statute's enactment, N.J.S.A. 18A:7F-9 had generally required that the state's school districts "provide public school facilities for at least 180 days" as a condition of receiving state aid. P.L. 2007, c. 260. The

[1] These sections are combined for efficiency and the convenience of the Court.

[2] "Rb" refers to Defendant-Respondent's opposition to certification brief. "Pb" refers to Plaintiffs-Petitioners' petition for certification. "Pa" refers to the appendix accompanying the petition for certification.

new statute amended N.J.S.A. 18A:7F-9, creating (among other things) a new subsection (b) that allows virtual instruction to count for the 180-day minimum and for other purposes if certain requirements are met; a new subsection (c) that gives powers to superintendents to provide for virtual instruction; and a new subsection (d) that directs the Commissioner of Education to provide guidance to school districts about virtual instruction. P.L. 2020, c.27 (codified at N.J.S.A. 18A:7F-9(b)-(d)).

The April 2020 statute also created a new subsection (e). Relevant here, subsection (e) declares that "nothing in subsection b., c., or d. of this section shall be construed to limit . . . the rights, privileges, compensation, remedies, and procedures afforded to public school employees . . . or any provision of a collective bargaining agreement entered into by the school district." P.L. 2020, c.27 (codified at N.J.S.A. 18A:7F-9(e)(1)). After setting that proviso solely for subsections (b), (c), and (d), the new subsection (e) adds that when a school district is closed for more than three consecutive school days due to a declared emergency or public-health directive, "public school employees covered by a collective negotiations agreement shall be entitled to compensation, benefits, and emoluments . . . as if the school facilities remained open . . . except that additional compensation, benefits, and emoluments may be negotiated for additional work performed." Ibid (emphasis added).

The East Orange Board of Education (Board) has collective negotiations agreements with unions covering custodial, security, and maintenance employees. The custodial agreement states that custodians who work "on any day when schools are closed for an emergency shall be paid 1½ times their salary in addition to their regular day of pay," while those who do not work are not paid. (Pa88). It also provides that no custodian shall be required to work when the Governor orders citizens not to leave their homes. (Ibid.). The agreement with security employees provides that security personnel receive their regular day's pay whenever schools are closed for an emergency, and "time and one-half" if required to work during a gubernatorial state of emergency. (Pa128). The maintenance employee agreement contains similar extra-compensation language tied to emergency closure days, but exempts any extra-compensation days during a gubernatorial state of emergency. (Pa6).

For most of the declared COVID-19 emergency, East Orange public schools were operating under virtual instruction, though they remained open for certain non-instructional purposes such as providing school lunches. (Pa6). During this time, the Board's custodial, maintenance, and security employees were regularly reporting to work in person. Id. For the first few months of the pandemic, the Board paid these employees their regular pay plus 1½ times their regular pay (even though the contracts did not require this level of premium pay

for all three categories of employees). (Pa8-9 & n.1). Then, in July 2020, the Board ceased paying additional closure-day premiums for work performed during the ongoing emergency closures. (Pa8). The relevant labor unions filed grievances seeking additional emergency compensation for the custodians, security, and maintenance personnel, claiming their respective agreement provisions still required premium pay whenever unit members were assigned work on days the buildings were closed to students. (Pa7; Pa25).

The grievances proceeded to arbitration, and the arbitrator issued an award in January 2022. (Pa26-31). That award sustained the custodians' grievance and directed the Board to pay 1½ times their salary "in addition to their regular day of pay" for work performed while schools were closed for students during the state of emergency from March 9, 2020, to July 4, 2021. (Pa31). The award also allowed the security personnel to receive premium pay (though their pay was limited to time-and-a-half given the differing language in their agreement as compared to the custodians' agreement). (Pa30-31). The arbitrator denied the maintenance employees' grievance, citing their agreement's express clause barring extra pay during a state of emergency. (Pa31).

The arbitrator's decision also briefly considered the effect of the April 2020 statute, which had enacted N.J.S.A. 18A:7F-9(e)(1). After quoting the statute, the arbitrator tersely asserted that "[w]hile the provision was not entirely

clear to [him], its purpose would appear to be to protect bargaining unit employees from *losses* - not additional pay - sustained due to closures longer than three days." (Pa29-30). He also questioned "the legislature's authority to invalidate [his] jurisdiction which springs from the parties' agreement to interpret and render an award based solely on that agreement." (Pa30). His decision did not otherwise address the statute.

The relevant unions filed an action in the Chancery Division to confirm the award, and on June 16, 2022, the court confirmed the award in full, including its portion denying relief to the maintenance workers. (Pa12-15). The Board timely appealed and the unions cross-appealed. (Pa16).

The Appellate Division reversed in part, holding that the arbitrator had failed to apply the "unequivocal" mandate of N.J.S.A. 18A:7F-9(e)(1), which foreclosed the premium-pay awards tied to prolonged emergency closures. (Pa20-23). As the Appellate Division explained, N.J.S.A. 18A:7F-9(e)(1) both ensured compensation as if facilities remained open and "limited the financial exposure of school districts for extra compensation arising from school facility closures," and the Appellate Division concluded that the arbitral award was "directly contrary" to the statute and "not reasonably debatable." (Pa21-23). The Appellate Division affirmed the trial court's decision to confirm the award's denial of relief to the maintenance workers. (Pa23-24).

This Court granted the unions' petition for certification.

ARGUMENT

THE ARBITRATOR'S AWARD OF PREMIUM PAY MUST BE VACATED BECAUSE N.J.S.A. 18A:7F-9(e)(1) UNAMBIGUOUSLY SUPERSEDES THE RELEVANT AGREEMENTS

Under the New Jersey Arbitration Act, N.J.S.A. 2A:24-1 to -11, reviewing courts may vacate an arbitration award for a variety of listed reasons, including fraud, partiality, misconduct, or excessive power. See N.J.S.A. 2A:24-8. In addition, this Court has long recognized that a reviewing court "may vacate an award if it is contrary to existing law or public policy." State v. International Federation of Professional and Technical Engineers, Local 195, 169 N.J. 505, 514 (2001). That is especially true when public employees are involved, since "parties in a public employment case cannot clothe the arbitrator with unbridled discretion, 'for public policy demands that inherent in the arbitrator's guidelines are the public interest, welfare and other pertinent statutory criteria.'" Communications Workers of Am., Local 1087 v. Monmouth County, 96 N.J. 442, 450-51 (1984); see also Kearny PBA Local No. 21 v. Town of Kearny, 81 N.J. 208, 221 (1979) (agreeing "an arbitrator's award in the public sector should be consonant with the criteria peculiarly applicable in this area").

Sources of public policy that can justify the court vacating an arbitration award include "legislative enactments, administrative regulations, or legal

precedents." N.J. Tpk. Auth. v. Local 196, 190 N.J. 283, 295 (2007); see also Weiss v. Carpenter, 143 N.J. 420, 447-48 (1996) (vacating an arbitrator's award and holding the arbitrator's decision violated public policy as expressed in the Rules of Professional Conduct for attorneys). At a minimum, when a statute unambiguously forecloses a particular outcome in a labor arbitration, reviewing courts must refuse to confirm an arbitral award reaching that outcome. See Borough of East Rutherford v. East Rutherford PBA Local 275, 213 N.J. 190, 206-07 (2013) (recognizing that an arbitration award in "direct contradiction" with governing law cannot stand). Put another way, when it is not "reasonably debatable" that a statute applies over the conflicting provision in a particular collective bargaining agreement, id. at 207, then the clear statute controls over an arbitrator's contrary understanding of the governing law.

That principle resolves this case because the meaning of the statute at issue is not reasonably debatable. Instead, the Legislature has spoken directly on the very subject of the grievances—it set a clear formula for the amount that public-school employees may be compensated during prolonged, emergency-driven closures. Since the arbitrator's award disregarded that unambiguous cap, the Appellate Division correctly concluded that it had to be set aside.

This conclusion follows from the statute's plain text, which this Court follows when its meaning "is clear and unambiguous." Keyworth v. CareOne at

Madison Ave., 258 N.J. 359, 380 (2024); see also State v. J.V., 242 N.J. 432, 443 (2020) (explaining that if "a plain and ordinary reading of the statute" is "clear and unambiguous," the Court's interpretative task is at an end and the court applies "the law as written"). The relevant statute, N.J.S.A. 18A:7F-9(e)(1), applies when schools are closed for an extended period due to a public health emergency. N.J.S.A. 18A:7F-9(e)(1). In those circumstances, all "public school 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," but it specifies "that additional compensation, benefits, and emoluments may be negotiated for additional work performed." N.J.S.A. 18A:7F-9(e)(1) (emphases added). This provision contemplates that it is overriding collective bargaining agreements, as it applies only to employees who fall within such an agreement. And it sets out a clear rule for how it is overriding those agreements: the relevant employees should be paid however the agreements would have paid them "if the school facilities remained open." Ibid.

The statute's plain text also clearly shows that it does more than just set a pay "floor" for school employees during an extended closure: it also operates as

a cap on pay. In interpreting statutes, this Court "strive[s] for an interpretation that gives effect to all of the statutory provisions and does not render any language inoperative, superfluous, void or insignificant." G.S. v. Department of Human Servs., 157 N.J. 161, 172 (1999). Yet the arbitrator's "pay floor only" interpretation runs afoul of that principle.

In the same sentence that the statute declares a default rule (pay what the collective bargaining agreement says for days when school is open), the statute has an explicit exception that allows for "additional compensation, benefits, and emoluments [to] be negotiated for additional work performed." N.J.S.A. 18A:7F-9(e)(1). This provision would be entirely superfluous if the statute merely set a pay floor, since there would have been no need to create an exception permitting additional pay for additional work. The fact that the Legislature instead included this exception permitting extra compensation demonstrates that the Legislature believed it was also setting a pay cap that could not be exceeded unless the exception was satisfied.[3]

Other parts of the statutory text reinforce this point. In its very first sentence, N.J.S.A. 18A:7F-9(e)(1) contains a savings clause clarifying that

[3] The arbitrator's decision did not conclude that any of the workers had performed any "additional work" contemplated by this exception, nor did the unions contend as much in their petition for certification. Presumably, due to the absence of students, the security and custodial workers had less work to perform than would have been the case if schools had been fully open.

"[n]othing in subsection b., c., or d. of this section shall be construed to limit, supersede or preempt the . . . compensation . . . afforded to public school employees or a collective bargaining unit under . . . any provision of a collective bargaining agreement entered into by the school district." N.J.S.A. 18A:7F-9(e)(1). Crucially, this savings clause was made applicable only to "subsection b., c., or d. of this section." Ibid. But it is subsection (e)—not (b), (c), or (d)—that contains the provision at issue in this case. The Legislature's conscious decision not to include subsection (e) in this savings clause thus provides yet more textual evidence of the legislature's clear decision to override contrary collective bargaining agreements.

This interpretation of the statute makes eminent sense. In the early days of the pandemic (when the statute was passed), the State and local governments were facing significant fiscal uncertainty in the midst of unprecedented financial upheaval. See, e.g., New Jersey Republican State Committee v. Murphy, 243 N.J. 574, 607 (2020) (describing how the COVID-19 pandemic "has taken a toll on . . . the global and national economies, and on the public fisc in our State," and further describing how drops in tax collections have threatened "the State's ability to provide important public services"); Searching for A 'New Normal' in New Jersey's Public Schools, N.J. School Boards Ass'n, An NJSBA Special Report on How the Coronavirus is Changing Education in the Garden State, at

25 (May 20, 2020)[4] (describing how early in the pandemic, state leaders were predicting massive layoffs "unless Congress approves more federal aid for states and schools"). It makes sense that the Legislature would thus try to help local governments stay fiscally sound by limiting an extended period of premium pay for school employees absent their performing additional work. And that is especially true given the then-unprecedented length of the continuing school closures, which at the time had an uncertain end date.

This case illustrates the point quite vividly. In a pre-pandemic world, where emergency closures had presumably been limited to short-term weather events and the like, East Orange's custodial workers bargained to be paid two-and-a-half times their normal salary for every day they worked during a state of emergency. The COVID-19 emergency, however, caused extended closures that the arbitrator acknowledged were "unforeseen by both parties" at the time of contract negotiation, and it is fair to say that the Board did not imagine it would have to pay anywhere close to the amount in salaries that was encompassed by the arbitrator's award. (Pa29). The Legislature thus chose to relieve the school district of that unforeseen liability for what its members might have viewed as "windfall" payments that should not have to be borne by taxpayers.

[4] Available at njsba.org/wp-content/uploads/2020/05/Searching ForNewNormal.pdf (web address redacted to prevent reactivation of hyperlink).

Nothing in the arbitrator's decision undermines that clear conclusion or demonstrates that the statutory question is reasonably debatable. Tellingly, the arbitrator made no attempt to grapple with the statutory text at all, and instead simply asserted his belief about the statute's "purpose." (Pa29-30). Moreover, the arbitrator apparently resolved the public policy question at least in part based on his doubt that the Legislature had authority to "invalidate" his "jurisdiction," (Pa30), even though the arbitrator identified no actual reason why the Legislature would lack the ability to modify a collective bargaining agreement. Indeed, the unions do not appear to defend this aspect of his analysis, and indeed, this Court has already recognized the basic principle that statutes can override otherwise applicable terms in collective bargaining agreements. See Weiss, 143 N.J. at 434-435..

Nor do the unions succeed in their attempts to rehabilitate the arbitrator's decision. They assert that the statute does not sufficiently identify a "term or condition of employment" in a collective bargaining agreement, Pb13-14, but the statute itself answers that point. It plainly applies to "employees covered by a collective negotiations agreement," N.J.S.A. 18A:7F-9(e)(1), making crystal clear that its terms are designed to override such agreements. And among other things, it describes employees' entitlement to "compensation," ibid., which is unquestionably a term or condition of employment.

Finally, the unions cite this Court's decision in Young v. Schering Corp., 141 N.J. 16 (1995), but it does not support them here. That case interpreted an entirely different statute (a provision of the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1 to 34:19-14). Id. at 19. In the face of an argument from one party that its interpretation was the "plain meaning" of the language, this Court instead held that the relevant language was unclear, and it adopted a competing interpretation after applying "[s]everal . . . canons of statutory construction." Id. at 25; see also id. at 25-31 (conducting an extensive analysis of the broader statutory scheme, the common law backdrop, and pre-existing decisional law, to conclude that the legislature intended a particular interpretation). Young does not stand for the proposition that an otherwise clear statute is ambiguous whenever a party can hypothesize a reason why the Legislature might have chosen to enact a different statute. Nor does Young establish that text of this entirely separate statute means anything other than its unambiguous meaning.

In short, the arbitrator in this case did not choose between two reasonable readings. Instead, he ignored a clear and unambiguous statutory command that overrode a term in the collective bargaining agreements. The Appellate Division recognized this and correctly concluded that the award required modification.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: */s/ Gary Baldwin*
Gary W. Baldwin (150732015)
Deputy Attorney General

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