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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, P.J.A.D. Patrick DeAlmeida, J.A.D.

BRIEF OF DEFENDANT-RESPONDENT IN OPPOSITION TO PETITION FOR CERTIFICATION

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PRELIMINARY STATEMENT

On April 14, 2020, in light of the COVID-19 emergency, Governor Murphy signed an amendment to N.J.S.A. 18A:7F-9(e)(1) ("Statute"), which states in the event of a school district closure lasting more than three days because of a state of emergency, employees covered by a collective negotiation agreement shall be entitled to their compensation, benefits, and emoluments as if the school had remained open. Ibid. The East Orange Board of Education ("Board" or "Respondent") followed that directive, and paid all employees as if the schools were open during the COVID-19 pandemic; however, the East Orange Educational Support Professionals' Association ("EOESPA") and East Orange Maintenance ("EOMA") (collectively, the "Associations" or "Petitioners") contended that they were still entitled to overtime pay pursuant to their collective bargaining agreements. The Appellate Division ultimately decided in favor of the Board, holding the Statute did not entitle employees to overtime payments. The Associations have now filed a Petition for Certification to the Supreme Court ("Petition") for review.

In opposition to the Petition, the Board argues that the Appellate Division decision was proper and should not be disturbed. Specifically, the Court correctly held the arbitration award in question was not reasonably debatable, as the arbitrator had not identified, defined, and attempted to vindicate the pertinent public policy. The Associations' position that the analysis was not thorough enough is patently

false. In other words, the Statute is clear, and the Appellate Division decision was comprehensive.

Further, the Statute preempts the language in the collective bargaining agreement. It is well settled law that statutory language can preempt contractual language, as is the case here. The Associations do not offer any persuasive arguments or cases that would offer otherwise.

Additionally, the Legislature was clear in its drafting of the Statute, it is unambiguous and must be read in its plain and ordinary meaning. The Appellate Division properly considered the pertinent statutory criteria and understood the legislative intent. The Associations' argument that other language should be contemplated, such that the Statute only applied to remote workers, is baseless and unfounded.

Lastly, the Board argues that certification would be unwarranted in this matter as the decision does not create uncertainty or require further clarification from this Court.

FACTS AND PROCEDURAL HISTORY

This matter arises out of a grievance filed by the Petitioners seeking additional emergency compensation on behalf of three categories of employees – custodians, maintenance, and security personnel. With respect to custodians, Article XXIII, Subsection B of the parties' collective bargaining agreement provides:

> Custodians who do not work on any day when schools are closed for an emergency shall not be paid and shall be docked an amount equal to one (1) day of pay.
>
> Custodians who do work on any day when schools are closed for an emergency shall be paid 1 ½ times their salary in addition to their regular day of pay.
>
> No custodian shall be required to work and shall be paid their regular salary on any day when the Governor orders citizens not to leave their homes.
>
> See Pa88.

As to security personnel, Article XIII of the collective bargaining agreement provides:

> The Board agrees to compensate all security personnel for their regular day's pay whenever schools are closed for reasons of emergency. A regular day is defined as the number of hours contained in a normal workday for the security staff member involved. All members of the Union required to work during a State of Emergency, as declared by the Governor, shall be compensated time and one-half.
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> See Pa128.

On March 9, 2020, Governor Murphy issued Executive Order No. 103 declaring a State of Emergency and Public Health Emergency. One month later, on April 14, 2020, the New Jersey Legislature enacted P.L. 2020, c. 27 which provides, in relevant part, that:

> ***In the event of the closure of the schools of a school district due to a declared state of emergency***, declared public health emergency, or a directive by the appropriate health agency or officer to institute a public health-related

> ***closure for a period longer than three consecutive school days, 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, except that additional compensation, benefits, and emoluments may be negotiated for additional work performed.

N.J.S.A. 18A:7F-9(e) (emphasis added).

In accordance with the legislation, and in addition to the Board's position that the schools were not "closed" during the time in question, the Board ceased providing additional emergency compensation on July 13, 2020. Petitioners subsequently filed a grievance, and the matter was referred to PERC Arbitrator Jack D. Tillem. Pa25. On January 16, 2022, Arbitrator Tillem issued the following Award (the "Award"):

> I. The grievance on behalf of the custodial employees is sustained.
>
> In accordance with Article XXIII(B)2 of their CBA, the Board of Education is directed to pay 1 ½ times their salary in addition to their regular day of pay to custodians who worked while schools were closed for students during the State of Emergency declared by the Governor from March 9, 2020 to July 4, 2021.
>
> II. Article XIII of their CBA provides for time and one half to be paid to security employees required to work during a State of Emergency declared by the Governor. Accordingly, the grievances seeking time and one half in addition to their regular day of pay is denied. III. Article

> VII Section 9(k) of their CBA states that maintenance employees are not entitled to extra pay on any day when the State of Emergency is declared by the Governor. Accordingly, the grievance is denied.
>
> See Pa30-31.

As seen above, the Award has three parts. Part I addresses custodial personnel, Part II addresses security personnel, and Part III addresses maintenance personnel. In the Award, Arbitrator Tillem dedicated a single paragraph to the Board's argument that the additional emergency compensation sought was foreclosed and preempted by P.L. 2020, c. 27:

> While the provision is not entirely clear to me, its purpose would appear to be to protect bargaining unit employees from losses – not additional pay – sustained due to closures longer than three days. Even less clear is the legislature's authority to invalidate my jurisdiction which springs from the parties' agreement to interpret and render an award based solely on that agreement.
>
> Pa29.

Thereafter, Respondents filed an action to confirm the Award in its entirety before the Superior Court, Essex County Chancery Division. The Board opposed confirmation and sought vacation of the Award as to the portion concerning custodial personnel. On June 16, 2022, the Honorable Jodi Lee Alper, P.J. Ch., issued an order confirming and enforcing the Award in its entirety. Pa32 Following Judge Alper's June 16, 2022 Order, the Board filed the instant appeal on July 29,

2022. On August 12, 2022, Respondents filed a cross appeal seeking vacation of the Award as to Part III, which denied the grievance as to maintenance personnel.

On February 25, 2025, the Appellate Division reversed the Chancery Division's decision. Pa2**.** On March 11, 2025, the Associations filed a Motion to Stay the February 25, 2025 Appellate Division decision. On March 24, 2025, the Appellate Division denied the Associations' Motion to Stay. Da1. On March 27, 2025, the Board was served with the Associations' Petition for Certification to the Supreme Court of New Jersey. Pa1.

STANDARD OF REVIEW

Pursuant to Rule 2:12-4, certification should be granted:

> [o]nly if the appeal presents a question of general public importance which has not been but should be settled by the Supreme Court or is similar to a question presented on another appeal to the Supreme Court; if the decision under review is in conflict with any other decision of the same or a higher court or calls for an exercise of the Supreme Court's supervision and in other matters if the interest of justice requires. Certification will not be allowed on final judgments of the Appellate Division except for special reasons.

LEGAL ARGUMENT

A. THE APPELLATE DIVISION CORRECTLY HELD THE ARBITRATION AWARD WAS NOT REASONABLY DEBATABLE AS THE ARBITRATOR HAD NOT IDENTIFIED, DEFINED, AND ATTEMPTED TO VINDICATE THE PERTINENT PUBLIC POLICY, AND THEREFORE WAS PROPERLY VACATED.

Our Supreme Court has held that "a court 'may vacate an award if it is contrary to existing law or public policy.'" Middletown Twp PBA Local 124 v. Twp of Middletown, 193 N.J. 1, 11 (2007) (quoting N.J. Tpk. Auth. v. Local 196, I.F.P.T.E., 190 N.J. 283, 294 (2007). More specifically, judicial intervention in warranted unless the arbitrator's decision was "reasonably debatable" and "accurately has identified, defined, and attempted to vindicate the pertinent public policy. . . . Borough of E. Rutherford v. E. Rutherford PBA Local 275, 213 N.J. 190, 203 (2013) (quoting Weiss v. Carpenter, 143 N.J. 420, 443(1996) (alteration in original)).

Here, the Award was not "reasonably debatable", therefore, judicial intervention was warranted. An arbitrator's award is reasonably debatable only if it is "justifiable" and "fully supportable in the record." Policemen's Benevolent Ass'n v. City of Trenton, 205 N.J. 422, 431 (2011) (quoting Kearny PBA Local #21 v. Town of Kearny, 81 N.J. 208, 223-24 (1979)).

Importantly, "arbitrators cannot be permitted to authorize litigants to violate either the law or those public-policy principles that government has established by statute, regulation or otherwise for the protection of the public." Weiss, 143 N.J. at

443. Our courts have frequently vacated various arbitration awards for violating public policy. For example, in Township of Green Brook v. PBA Loc. 398, the Appellate Division vacated an arbitration award that granted free health benefits to an employee with less than twenty-five years of service before the enactment date of the law, as the award was in direct contravention of the governing statute. No. A-3657-21 (App. Div. Feb. 21, 2025) (slip op. at 13-14). See also Twp. of Toms River v. FOP Lodge No. 156, No. A-0827-14 (App. Div. Mar. 16, 2016) (Slip op. at 25) (where the Appellate Division vacated an arbitration award because it was "contrary to law"). As is the case here, the language of the Statute is clear and to ignore it would be contrary to law.

It is crucial to note the long established case law that, "[a]s always, [the] primary 'objective [in] statutory interpretation is to discern and effectuate the intent of the Legislature.'" In re N.J. Firemen's Assoc. Obligation to Provide Relief Applications Under Open Public Records Act**,** 230 N.J. 258, 274 (2017) (quoting Murray v. Plainfield Rescue Squad, 210 N.J. 581, 592 (2012)). "[A]nalysis of a statute begins with its plain language, giving the words their ordinary meaning and significance." In re Estate of Fisher, 443 N.J. Super. 180, 190 (App. Div. 2015). "It is a basic rule of statutory construction to ascribe to plain language its ordinary meaning." Bridgewater-Raritan Educ. Ass'n. v. Bd. of Educ. of Bridgewater-Raritan Sch. Dist., Somerset Cnty., 221 N.J. 349, 361 (2015). "When that language

'clearly reveals the meaning of the statute, the court's sole function is to enforce the statute in accordance with those terms.'" State v. Olivero, 221 N.J. 632, 639 (2015) (quoting McCann v. Clerk of Jersey City, 167 N.J. 311, 320 (2001)).

Moreover, "'[w]hen the Legislature's chosen words lead to one clear and unambiguous result, the interpretive process comes to a close, without the need to consider extrinsic aids.'" State v. Rivastineo, 447 N.J. Super. 526, 529 (App. Div. 2016) (quoting State v. Shelley, 205 N.J. 320, 323 (2011)). The court does "not 'rewrite a plainly-written enactment of the Legislature [or] presume that the Legislature intended something other than that expressed by way of the plain language.'" Id. at 529-30 (quoting Marino v. Marino, 200 N.J. 315, 329 (2009)).

i. Arbitrator Tillem's Award Did Not Meet The Reasonably Debatable Standard, Therefore the Appellate Division Decision was Warranted and Necessary .

The Award cannot be "reasonably debatable" in light of P.L. 2020, c. 27, therefore reversal of Judge Alper's decision was necessary . Arbitrator Tillem was not at liberty to engage the use of interpretive devices in concluding that the schools were "closed" because the Legislature had already supplied an answer to that question.

In public sector arbitration, an arbitrator's award will be confirmed so long as the award is "reasonably debatable." Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko, 202 N.J. 276 (2010). An award is "reasonably debatable" if it is

"justifiable" or "fully supported in the record." Policemen's Benevolent Ass'n, 205 N.J. at 431 (2011).

Here, it is clear that Arbitrator Tillem's Award was not "reasonably debatable" or "justifiable" because his interpretation of the term "closed" was preempted by P.L. 2020, c. 27. Through the legislation, the Legislature had mandated an outcome for these precise situations. Arbitrator Tillem did not have the authority to reach a contrary conclusion based upon his use of interpretive devices because the Legislature had already answered the question – ***if schools are closed for three days on account of a state of emergency or public health emergency, then public school employees under a collective bargaining agreement are compensated as if the schools had remained open for any purpose.***

The Award did not analyze the Statute, which explicitly states that all school employees, subject to a collective bargaining agreement, will operate as if schools were open, in the event of a school closure lasting more than three days due to a state of emergency. This was ***to ensure that schools remained open for the purpose they were meant to serve***. Arbitrator Tillem failed to vindicate the pertinent public policy in conjunction with the Associations' collective bargaining agreement.

Rather, he conceded, "[w]hile the provision is not entirely clear to me, 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.

The Appellate Division's decision properly analyzed the plain language of the Statute as well as the Legislative intent, and rightfully decided the Award was not "reasonably debatable".

> 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 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.
>
> [E. Orange Educ. Support Professionals' Ass'n v. E. Orange Bd. of Educ., No. A-3657-21 (App. Div. Feb. 25, 2025) (slip op. at 19-20).]

The Appellate Division was not persuaded by the Associations' arguments that the Statute was intended to prevent employee losses nor that it violated the rights of any provision in the collective bargaining agreement. Id. at 19. The Appellate Division unequivocally agreed with the Board's contention that the arbitrators "award is directly contrary to N.J.S.A. 18A:7F-9(e)(1)" and that ***"[t]he arbitrator's interpretation of the statute as permitting custodial employees to receive extra***

compensation because the school facilities were closed to students is not reasonably debatable." (emphasis added.) Id. at 20.

Accordingly, the Appellate Division Decision was justified because the Award cannot be "reasonably debatable" as Arbitrator Tillem's interpretation of the term "closed" was expressly preempted by P.L. 2020, c. 27.

ii. The Associations Cite Case Law that is Inapplicable to the Instant Matter.

Lastly, the Associations cite a myriad of case law to bolster their argument regarding the "reasonably debatable" standard; however the cases are distinguishable from the matter at hand. In Scotch Plains-Fanwood Board of Education v. Scotch Plains-Fanwood Education Association, the Court reversed the Appellate Division's decision vacating an arbitration award that provided a salary increase to a teacher with excessive absences. 139 N.J. 141 (1995). Pursuant to the statutory language in that case, a teacher's increment could be withheld only for predominantly educational reasons, not disciplinary. Ibid. However, the arbitrator was bound by a Public Employee Relations Commission ("PERC") decision which held the respondent's increment withholding was solely disciplinary. Ibid. The Supreme Court reinstated the award because it was consistent with the statutory language. Ibid.

However, the Court noted that "if PERC were to have determined that the basis for withholding [their] increment had been for predominantly educational reasons, the Appellate Division's conclusion that the Board had demonstrated sufficient cause to withhold the increment would have been sustainable." Id. at 158. This conclusion is far different than the matter at hand. In our case, the Appellate Division firmly held that Arbitrator Tillem's award was in direct contradiction with the pertinent statute. There was no indication, whatsoever, that Arbitrator Tillem attempted to vindicate the statute in line with the collective bargaining agreement.

Two other cases cited by the Associations, Borough of Carteret v. Firefighters Mut. Benevolent Association, Local 67, 247 N.J. 202 (2021) and Linden Board of Education v. Linden Education Association, 202 N.J. 268 (2010), are completely different than the instant matter and of no import. There, the courts were not tasked with analyzing an arbitration agreement against a preemptive statute, but the terms of a collective bargaining agreement itself. Accordingly, as the cases are vastly different, it is respectfully submitted that their holdings should not be considered in the Court's analysis as to the "reasonably debatable" standard or otherwise.

In sum, the Appellate Division performed a thorough analysis in its decision and properly vacated the terms of the Award.

B. THE LANGUAGE OF N.J.S.A. 18A:7F-9(e)(1) LEAVES NO ROOM FOR DISCRETIONARY ACTION AND PREEMPTS THE LANGUAGE IN THE COLLECTIVE BARGAINING AGREEMENT.

The Associations' reliance on In re Local 195, IFPTE, 88 N.J. 393 (1982) is misguided and not applicable to the instant matter. In that case, the Court analyzed the range of subjects that could be discussed and agreed upon during the negotiation process. Ibid. However, that is not the question before the Court, nor is the holding persuasive in favor of the Associations.

In fact, the Court in In re Local 195, IFPTE stated "an item is not negotiable if it has been preempted by statute or regulation. ***If the Legislature establishes a specific term or condition of employment that leaves no room for discretionary action, then negotiation on that term is fully preempted***." Id. at 403 (emphasis added). Here, because the Legislature established a specific condition of employment, the language in the Associations' contracts is fully preempted. The text of P.L. 2020, c. 27 reads:

> In the event of the closure of the schools of a school district due to a declared state of emergency . . . for a period longer than three consecutive school days . . . public school employees covered by a collective negotiations agreement shall be entitled to compensation . . . as if the school facilities remained open . . . for any purpose and for any time lost as a result of school closures.
>
> [N.J.S.A. 18A:7F-9(e)(1).]

This is clear, unambiguous and leaves no room for discretionary action.

Moreover, In Re Arbitration Between FOP Lodge #97, the Appellate Division overturned an arbitration award that violated statute and public policy. 364 N.J. Super. 294 (2003). There, the arbitrator issued her interpretation in the arbitration award without considering a controlling statutory provision. Id. at 296. Like the instant matter, in that case, ***the Associations "[did] not cite any authority for [their] proposition that the contract's language***, or previously unchallenged past practices, should take precedence over our case law and the statute, both sound expressions of public policy." Id. at 298-99 (emphasis added). "'Matters of public policy are properly decided, not by negotiation and arbitration, but by the political process. This involves the panoply of democratic institutions and practices, including public debate, lobbying, voting, legislation and administration.'" Id. at 299 (quoting In re Local 195 v. State, 88 N.J. 393, 402 (1982)).

Invalidating this statute would be entirely antithetical to the democratic process and unjustified as the language is clear. The statute underwent legislative review in both houses, was signed by the Governor, and serves an important public policy purpose of protecting taxpayer dollars and ensuring children could continue their education during the COVID-19 emergency.

Accordingly, as there is no room for discretionary language and the Statute preempts the Associations' CBA language.

C. THE STATUTE IS CLEAR AND UNAMBIGUOUS AND MUST BE READ IN ITS PLAIN AND ORDINARY MEANING.

The Associations' argument that the Appellate Division's decision was contrary to the intent of the Statute is simply false. The case they rely upon, Young v. Schering, involved the language in a waiver provision, that was found to be "far from clear" and relied on "other rules of statutory interpretation." 141 N.J. 16, 24 (1995). That is significantly different than the instant matter.

As analyzed above in Section A, when a statute is clearly written, courts will not look beyond its plain language to determine intent. When the Legislature's words lead to a single, unambiguous outcome, courts will not look to outside sources to determine its meaning. Rivastineo, 447 N.J. Super. at 529. Moreover, courts do not revise clearly written laws or assume the Legislature intended something other than what is expressed in the statute's plain text.

Here, the Statute is unambiguous — employees covered by a collective bargaining agreement must be paid as if schools were open during a state of emergency.

In sum, the Appellate Division's decision should not be disrupted as the language in the Statute is clear and unambiguous.

D. THE APPELLATE DIVISION'S PROPERLY CONSIDERED PERTINENT STATUTORY CRITERIA.

The Associations argue that their employees will not be able to repay their wages. However, this issue was not raised below. "Ordinarily, an issue may not be raised on appeal if not raised in the proceedings below." N.J. Dep't of Env't Prot. v. Huber, 213 N.J. 338, 372 (2013); see Rule 2:6-2. Nonetheless, even though the issue was not raised below, the merits of the argument weigh in favor of the Board. While the Appellate Division has held that "consideration of public interest and welfare, including fiscal impact . . . [are] relevant consideration[s]" in an arbitration award, "determinations . . . are subject to pertinent statutory criteria." S. Plainfield Bd. of Educ. V. S. Plainfield Educ. Ass'n, 320 N.J. Super. 281, 290, 291 (App. Div. 1998).

The Board has the legal right to recoup wages that were overpaid during the COVID-19 emergency. Recouping these funds ensures over two million dollars of taxpayer money is used for legal district operations. It is in the best interest of the Board, its staff and students, as well as residents of East Orange, to recoup this money.

E. REASONS WHY CERTIFICATION SHOULD NOT BE GRANTED.

The Appellate Division properly reviewed the Statute and reversed the Award based on its explicit language. There have been no other Appellate Division decisions that have addressed this issue, and there is no conflict requiring resolution. While the matter relates to public welfare and is undoubtedly important, the Appellate Division's ruling strikes the appropriate balance between ensuring school employees continue to receive pay during the COVID-19 emergency and safeguarding taxpayer dollars. This outcome aligns with the Legislature's clear intent and avoids unnecessary judicial intervention. The decision does not create uncertainty or require further clarification from this Court. Accordingly, certification is unwarranted under the applicable standard.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the Association' Petition for Certification should be denied.

Respectfully submitted,

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