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NEWARK HOUSING AUTHORITY, Appellant, v. EASTERN ATLANTIC STATES REGIONAL COUNSEL OF CARPENTERS, LOCAL 253, Appellee.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001169-23 On Appeal from: CHANCERY DIVISION: ESSEX COUNTY DOCKET NO.: ESX-C-000219-22 Sat Below: JODI LEE ALPER, JSC CIVIL ACTION

APPELLANT, NEWARK HOUSING AUTHORITY'S APPELLATE BRIEF

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PRELIMINARY STATEMENT

Plaintiff Newark Housing Authority ("Plaintiff," or "NHA") terminated Grievant Cheniqua Sims because she no longer could perform the essential functions of her position as a carpenter. NHA had authority to do so under its collective bargaining agreement ("CBA") with Defendant Eastern Atlantic States Regional Counsel of Carpenters, Local 253 ("Defendant," or the "Union"), which expressly grants NHA the exclusive right to determine employees' qualifications for work. During arbitration of Sims' grievance concerning her discharge, NHA relied upon documentary evidence presented by Sims herself, demonstrating conclusively that, at the time of her discharge, she clearly was physically incapable of performing the essential functions of her job.

In fact, NHA produced a note approved by Sims' doctor shortly before Sims' discharge, dated December 30, 2019, stating that Sims could return to work on January 7, 2020 only with the following physical restrictions for a period of 6 months: no heavy lifting; no squatting; no climbing; no kneeling; no prolonged standing for more than 3 hours. NHA demonstrated conclusively that each of the above listed restricted physical activities was an essential function of Sims' carpenter position, testimony that neither the Union nor Sims disputed in any way. Shortly after Sims presented the doctor's note, NHA made the decision to terminate her employment because she was not capable of

performing the essential functions of her job and thus, not qualified as a carpenter, a decision virtually any reasonable employer would have made, and a decision the CBA placed within the NHA's managerial prerogative.

Moreover, the CBA contains no provision guaranteeing any employee a contractual right to retain her job where they are physically incapable of performing the essential functions of that job. The CBA's Grievance Procedure also makes clear that an arbitrator is without power or authority to make any decision contrary to or inconsistent with the agreement, or to modify or amend its terms or to insert new terms for which the parties did not bargain. Finally, the parties' CBA does not require NHA to reconsider a decision to discharge an employee, or to undertake an investigation of the underlying events subsequent to that employee's discharge. NHA's duties end at the point of discharge.

Notwithstanding these clear contractual provisions, buttressed as they are by decades of case law, the Arbitrator issued a decision finding that Sims was discharged without just cause. The Arbitrator based that decision not on credibility determinations or other findings of fact adduced through the arbitration hearing, but on his own creation of a new work rule that is divorced from, and in contravention to, the CBA's plain language. In essence, the Arbitrator's new work rule undercuts NHA's prerogative to determine its employees' qualifications by prohibiting NHA from ever terminating an

employee who is on a temporary disability leave. To compound the error, and as a direct consequence of that error, the Arbitrator also faulted NHA for failing to "warn" Sims of the potential disciplinary action she faced, and for failing to investigate properly a suspicious second doctor's note she produced after her termination that directly contradicted the limitations contained in the original doctor's note. The CBA requires neither; indeed, the Arbitrator did not interpret or rely upon the parties' agreement to impose such conditions. The NHA neither is required to "warn" an employee who cannot perform that she might be terminated -- nor would any such requirement make sense under the circumstances -- nor to undertake any post-discharge reconsideration of a decision to terminate an employee who cannot perform. Simply put, the Arbitrator's new work rule usurps from the NHA its contractual and legal authority to set the standards of performance for its employees, contravenes the CBA's clear terms, and exceeds the Arbitrator's statutory and legal authority.

After acknowledging many of NHA's above points during oral argument, the trial court issued a written decision devoid of meaningful analysis, rubber-stamping the Arbitrator's decision. This Court now should undertake the careful and scrupulous review that the trial court did not, and reverse the Arbitrator's decision because it is an ultra vires attempt at industrial justice divorced from the parties' agreement and beyond the scope of what courts permit.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Plaintiff is a public entity created under the Federal Housing Act of 1938 which oversees more than 12,000 public, affordable housing units throughout the City of Newark, New Jersey. (Pa42)[2] Defendant is a skilled trade organization affiliated with the Essex County and Vicinity Building and Construction Trades Council that represents carpenters across four counties in New Jersey, including Essex County where the NHA is located. (Pa42) Plaintiff and Defendant are parties to a Collective Bargaining Agreement ("CBA") which sets forth the parties' respective rights and duties, as well as grievance procedures for covered employees. (Pa43)

In particular, Article III of the CBA provides, in pertinent part, the following:

> **ARTICLE III**
> **EMPLOYER'S RIGHTS**
>
> A. The Authority hereby retains until itself all powers, rights, authority, duties and responsibilities conferred upon and vested in it prior to the signing of this Agreement by the laws and Constitution of the State of New Jersey and of the United States, including:
>
> 1. The executive management and administrative control of the Authority Government

[1] The procedural history and statement of facts have been combined for the Court's convenience because they are inextricably intertwined.

[2] "Pa" refers to the appellate appendix of Plaintiff NHA.

and its employees by utilizing personnel, methods and means of the most appropriate and efficient manner possible as may from time to time be determined by the Authority.

***

3. The right to make, maintain and amend such reasonable rules and regulations as it may from time to time deem appropriate for the purposes of maintaining order, safety and/or the effective operation of the Authority after advance notice thereof to the employees and to require compliance by the employees.

4. To hire all employees, and subject to the provisions of law, **to determine their qualifications and conditions of continued employment, or assignment, and to promote and transfer employees**.

5. To suspend, discharge or take any other appropriate disciplinary action against any employee for just cause according to law.

***

7. To make such changes as it deems desirable and necessary for the efficiency and effective operation of the Authority.

***

B. No rules, customs, or practices shall be permitted or observed which limit or restrict production, or limit or restrict the joint or individual working efforts of employees.

***

D. No rules, customs, or practices shall be permitted or observed which limit or restrict production, or limit or

> restrict the joint or individual working efforts of employees.
>
> (Pa43-44) (emphasis added)

A. Sims' Injury History And Underlying Grievance.

Grievant Cheniqua Sims was referred to employment with Plaintiff in June 2018. (Pa20) As a carpenter, she is a member of the Union and subject to the terms of the parties' CBA. (*Id.*) In March 2019, Sims was injured in an automobile accident. Soon after, she began an extended medical leave and sought treatment for pain in her right knee. NHA approved an initial leave until August 26, 2019, and then later extended her leave to October 25, 2019. (Pa28)

Sims underwent arthroscopic surgery in the summer of 2019. During the procedure, Sims' surgeon, Dr. Keith Johnson, discovered that Sims had torn her ACL. After discovering that Sims' injury was much worse than initially believed, Dr. Johnson removed and replaced the torn ligament and prescribed a course of rest and physical therapy. Sims remained out of work for most of the next six months, and well past the extended leave end date of October 25, 2019. (Pa27-28)

Sims was reexamined at Dr. Johnson's office, Oasis Medical and Surgical Wellness Group, by physician assistant Umara Suri on December 30, 2019. (Pa33) Despite over 9 months of recovery time, Sims still was not close to

resuming her normal job duties. Oasis Medical and Surgical Wellness Group issued a doctor's note in Suri's name that same day stating:

> Cheniqua Sims is currently under my medical care and may not return to work at this time. She may return to work on 01/07/20 with the following restriction for 6 months: **No heavy lifting, no squatting, no climbing and no kneeling. Patient is to avoid prolonged standing over 3 hours at a time**. If you require additional information please contact our office.
>
> (Pa21, Pa33 (emphasis added))

The letter thus clarified that Sims would not be able to return to her prior work activities until June 7, 2020 -- at the absolute earliest -- well over two years after her initial injury. Sims produced the note to NHA shortly after it was issued. After receiving the doctor's note and gaining confirmation that Sims would not be able to perform her job duties for the foreseeable future, NHA responded on January 6, 2020, informing Sims that her initial leave of absence had expired, that NHA had no light duty work available for her and suited to the restrictions contained in the doctor's note, and that her employment therefore had to be terminated. NHA's letter stated in full:

> Dear Ms. Sims: Your approved leave of absence expired on October 25, 2019. You submitted medical documentation date[d] December 30, 2019, which states that you are able to return to work on January 7, 2020 with restrictions for 6 months. The following restriction[s] were noted: No heavy lifting, no squatting, no climbing and no kneeling.

> Unfortunately, we do not have light duty. Due to business need Newark Housing Authority will not be able to continue to hold your position open for you and as a result your employment will terminate effective January 6, 2020.
>
> (Pa21)

Accordingly, as of January 6, 2020, Sims no longer was an employee of NHA.

On January 22, 2020, after her employment with NHA already had been terminated, Sims produced a second doctor's note. (*Id.*) Suspiciously, and in direct contradiction to the original doctor's note produced several weeks earlier, the new note cleared Sims to return to work immediately. The second note stated: "Cheniqua Sims is currently under my medical care and may return to work at this time. She may return to work on 01/22/20, **Activity is restricted as follows: none**. If you require additional information please contact our office." (*Id.*) (emphasis added).

NHA refused to reconsider its prior decision to discharge Sims, or otherwise to return her to her prior position. The Union then filed a grievance on Sims' behalf under the CBA's grievance procedure, alleging wrongful termination. Article XIII of the CBA, Grievance Procedure, provides, in pertinent part, the following:

ARTICLE XIII
GRIEVANCE PROCEDURE

A. A grievance is a dispute arising from the interpretation, application or alleged violation of this Agreement and may be raised by the Union on its own behalf where applicable or on the behalf of an employee or group of employees or by the Authority.

B. STEPS OF THE GRIEVANCE PROCEDURE (UNION GRIEVANCES)

The following grievance procedure constitutes the sole and exclusive method for resolving grievances between the parties covered by this Agreement, and shall be followed in its entirety unless any step is waived in writing by mutual consent.

****

Step Three—Arbitration

If the grievance is not resolved at Step Two, the Union representative may submit the grievance to arbitration by filing a Request for Panel of Arbitrators with the New Jersey Public Employment Relations Commission no later than fifteen (15) calendar days after receiving the Authority's Step Two decision. The arbitrator shall be selected in accordance with the rules and regulations of the New Jersey Public Employment Relations Commission.

The arbitration shall be conducted in accordance with the following:

***

2. **The arbitrator shall comply with and be bound by the provisions of this Agreement. The arbitrator shall have no power to add to, delete or modify any provisions of this Agreement**.

> 3. **The arbitrator shall be without power or authority to make any decision contrary to or inconsistent with or modifying or varying in any way the terms of this Agreement, or applicable law or rules or regulations having the force or effect of law**.
>
> 4. **The arbitrator's decision shall not usurp the functions of power of the Authority as provided by law**.
>
> ***
>
> 7. The cost of the arbitrator shall be borne equally by the Union and the Authority and all other expenses incurred by either side, including the presentation and witness, will be borne by the party incurring same.
>
> (Pa44-45 (emphases added).)

Relatedly, Article XIV of the CBA, Discharge, provides, in pertinent part, the following:

> **ARTICLE XIV**
> **DISCHARGE**
>
> A. The Employer may discharge any employee for just cause. Upon the Union's request, the Employer shall give notice of said discharge to the Trades Council, in writing, stating the reasons therefore.
>
> B. In the event the Union or employee disputes said discharge, the matter shall be handled in according with the applicable procedures set forth in Article XIII. It is mutually understood and agreed that Article XIII sets forth the exclusive remedy in the event of a disputed discharge.
>
> (Pa45)

NHA maintained that Sims had been discharged for just cause because it had based its decision upon the original doctor's note she had submitted restricting her from performing the essential functions of her position as a carpenter. Accordingly, NHA denied the grievance and refused to return Sims to her prior position. Thereafter, on June 22, 2020, Defendant filed for arbitration, submitting a request for a panel of arbitrators with the Public Employment Relations Commission. (Pa46)

B. The Arbitration Hearing And The Arbitrator's Awards.

The matter then proceeded to arbitration before Arbitrator J.J. Pierson, Esq. The Arbitrator conducted virtual hearings on January 29, 2021, February 3, 2021, and March 9, 2021. Ultimately, the parties agreed that the arbitration should proceed on a single issue: Did NHA have just cause to terminate Sims? And if not, what shall be the remedy? (Pa19)

During the three days of hearings, Arbitrator Pierson heard testimony from a number of witnesses, including Sims; Dr. Johnson; Umara Suri, the physician assistant who had worked under Dr. Johnson on Sims' medical case; and Yohelin Meza, a medical assistant employed at Dr. Johnson's office during the events in question. On September 5, 2022, Arbitrator Pierson issued an interim award in Sims' favor, finding that NHA did not terminate her employment for just cause. (Pa19)

Despite the decision in Sims' favor, Arbitrator Pierson's written decision noted a number of key fact findings that favored NHA's position. First, he found that Sims' position as a carpenter "required bending, kneeling and climbing while installing . . . building materials," as well as the "lift[ing] and carr[ying] [of] heavy materials." (Pa20) Second, there was no dispute that Sims presented a doctor's note on December 29, 2019 stating that she could not engage in certain tasks for six months upon her return to work in January, including bending, kneeling, squatting, heavy lifting, and climbing. (Pa21) Third, there was no dispute that Sims would not have been able to perform the essential duties of her position as a carpenter if limited to the restrictions listed in the first doctor's note. (Pa30)

Arbitrator Pierson also referred to Dr. Johnson's testimony regarding Sims' recovery time. In particular, he noted Dr. Johnson's testimony that Sims' recovery from ACL reconstruction surgery would require at least six months of limited activity, and probably longer in Sims' case because the type of surgery he performed on her typically causes "stiffness and function of the joint" during the healing process. (Pa32-33) Dr. Johnson also testified that he recommends restrictions on squatting, kneeling, and other similar activities for patients who have undergone similar ACL surgeries. (*Id.*) He confirmed that he was "concerned" whether Sims could perform carpentry work during her recovery

period, and agreed with the assessment contained in the first doctor's note that Sims should be limited to light duty with clear restrictions for a period of six months. (*Id.*) Dr. Johnson also clarified that Sims had been seen at his office by Physician Assistant Umara Suri in December 2019, that the first doctor's note was produced after that visit, and that Sims was scheduled to return for a follow-up visit on February 12, 2020. (Pa33) Arbitrator Pierson summarized Dr. Johnson's testimony without discrediting any of it.

Arbitrator Pierson's interim award decision also discussed Dr. Johnson's testimony concerning the second doctor's note, procured on January 22, 2020 -- after Sims' employment was terminated on January 6 and before her scheduled follow-up appointment in February. Regarding the second note, Dr. Johnson testified that it was "not issued through clinical evaluation" but rather through an "outside communication" based on a "subjective patient request." (Pa33) In other words, Dr. Johnson neither had evaluated Sims during the period between the first doctor's note and the second doctor's note, nor approved the contents of the second doctor's note. Again, Arbitrator Pierson recounted Dr. Johnson's testimony without discrediting it.

Umara Suri, Dr. Johnson's physician assistant, recalled seeing Sims in December 2019 and discussing a plan with Dr. Johnson regarding Sim's recovery. (Pa33-34) She did not, however, recall authorizing the second doctor's

note issued in January 2020. (Pa34) As with Dr. Johnson's testimony, Arbitrator Pierson recounted Suri's testimony without discrediting it.

After recounting the evidence and testimony in his written interim award, Arbitrator Pierson issued a decision that relied neither on the evidence in the record, nor on his determination of the witnesses' credibility, nor on his interpretation of the CBA. Instead, he reasoned -- "**in his opinion**," as he put it -- that NHA could not terminate an employee for just cause based on the employee's temporary disability. (Emphasis added). His interim award states:

> In the opinion of this Arbitrator, an employer may be justified in terminating an employee permanently unfit to perform the duties of their position but not justified in terminating an employee capable of returning to full duties once the temporary injury or medical condition is resolved. Herein, while temporarily unable to return to work without limitations, there was a reasonable expectation that Ms. Sims would return to her duties once the interim work limitations were removed. . . .
>
> In the opinion of this Arbitrator, while an employer is empowered to terminate an employee with a permanent inability to perform or a long-term medical condition preventing a return to work, consideration must be afforded an employee with a temporary medical condition which can be corrected and able to return to work. Time limitations must also be considered.
>
> (Pa35)

Arbitrator Pierson further faulted NHA for not pursuing alternative measures to terminating Sims, such as placing her on a temporary suspension. He explained: "At the very least, when medical information was provided [*i.e.*, the second doctor's note], even if non-determinable or questionable, NHA could have placed Ms. Sims on temporary suspension, pursued definitive medical information (from a neutral source[3]) and considered her continued employment on medical finality." (Pa36)

Finally, Arbitrator Pierson determined that NHA was without just cause to terminate Sims because it "jumped too quickly from recognizing the Grievant's injury restrictions to deciding to terminate her." (*Id.*) He explained:

> The generally accepted and often referenced test for just cause includes the question of whether the Company gave the employee forewarning or foreknowledge of the possible disciplinary consequences of the employee's absence. Here, while it was clear that the Grievant was out of work due to an injury not of her own fault nor the result of her conduct, the NHA issued an immediate discharge once Ms. Sims submitted the return to work note with "restrictions." The record was absent any communication to the Grievant expressing a forewarning of the consequences of Ms. Sims returning to work with "limitations."
>
> (*Id.*)

[3] It must be noted that Dr. Johnson, as well as Umara Suri, were part of Sims' treating medical team, and as such, they were not engaged, nor did they have any association with NHA.

The interim award required NHA to reinstate Sims to employment immediately and make her whole for lost wages and benefits retroactive to August 19, 2022. (Pa37) The interim award also directed the Union -- without contractual authorization or cited precedent -- to pay the entire arbitration fee to the Arbitrator, and further required NHA in turn to reimburse the Union for NHA's portion of the Arbitrator's fee by check payable to the Union. (Pa38) In doing so, Arbitrator Pierson ignored the plain language of the CBA stating that "the cost of the arbitrator shall be borne equally by the Union and the Authority and all other expenses incurred by either side, including the presentation and witness, will be borne by the party incurring same." (Pa49) Thus, in addition to a decision that, once again, created a new and unprecedented work rule divorced from the CBA's plain language, the Arbitrator fashioned an unusual and unauthorized payment procedure without any basis in, and in fact directly contradicting, the CBA.

C. NHA's Superior Court Action To Set Aside The Arbitration Award.

On December 2, 2022, NHA filed a verified complaint seeking vacatur of the interim award. (Pa4) NHA subsequently informed the Arbitrator that it had filed an action to appeal the interim award. (Pa50) One day after receiving notice of the vacatur action, and without response or warning, the Arbitrator closed the record and issued a related remedial award and final order, arbitrarily denying

to NHA the opportunity to dispute the Union's claim to economic remedial relief. (Pa50) The final award continued NHA's obligation to comply with the interim award. (Pa60-61) In response, NHA filed a two-count verified complaint on March 10, 2023, seeking a judgment vacating the awards under the New Jersey Arbitration Act. (Pa41)

After filing an answer, the Union moved in July 2023 to confirm and enforce the Awards. (Pa62-120) NHA cross-moved to vacate the awards, arguing that the Arbitrator exceeded his authority and that the awards were procured through undue means. (Pa121-127) Both parties submitted briefs to the trial court and the matter proceeded to oral argument.

Both in its briefing to the trial court and during oral argument, NHA stressed that Arbitrator Pierson's decision was fatally flawed for two principal reasons: (1) he created a new work rule subverting and contradicting the NHA's managerial prerogative set forth in the CBA, providing that NHA cannot discharge an employee who is on temporary disability; and (2) he faulted NHA for the actions it took ***subsequent*** to Sims' termination, despite the absence of any language in the CBA requiring that NHA reconsider a termination decision. Both flaws flow irreversibly from the Arbitrator's ultra vires creation of a new work rule based not on his reading of the CBA, but on his own sense of fairness. Indeed, the Arbitrator's decision was based not on the testimony in the record,

or credibility determinations, or weighing of the evidence, or on his reading of the plain language of the CBA, but on the Arbitrator's ***opinion*** that NHA is not permitted to terminate an employee who cannot perform the essential functions of her job because of a temporary disability. The Arbitrator's decision and findings thus rest entirely on his mistaken conclusion of law that NHA could not set the standard of performance for an employee who cannot work.

NHA's counsel explained the fatal flaw in the Arbitrator's decision during oral argument, distinguishing the difference between an arbitrator's interpretation of a just cause standard on the one hand, and the creation of a new work rule which violates the employer's prerogatives under a collective bargaining agreement, on the other. Counsel stated on the record:

> The Authority has no qualms about acknowledging arbitrator's have the right, and always have, [to] interpret[] just cause where the term was ambiguous, was not defined.
>
> However, in -- in this particular case and in all cases, arbitrator's in interpreting just cause cannot violate specific terms of the contract.
>
> . . . .
>
> In this case, the arbitrator didn't merely interpret just cause. He introduced a brand new standard of performance based upon his own personal opinion, not based upon anything within the four corners of the contract.

(1T 9:6-11; 10:3-7.)[4]

NHA's counsel then referenced the provisions of the CBA providing that NHA maintains the right to "determine [employees'] qualification and conditions of continued employment." Counsel then explained that the Arbitrator's decision rested entirely on a new work rule that contradicts the express authority the CBA granted the NHA:

> The -- the Authority determined based upon the note that was submitted that the grievant, Ms. Simms [sic], could not perform her job.
>
> . . . .
>
> There was no dispute, and that's clear from the record, that she was unable to perform the essential functions of the job. There was no provision in the contract that gave the arbitrator the right to ignore those standards.
>
> . . . .
>
> Your Honor, his decision flows from his statement that in his opinion an employer cannot terminate an employee who is temporarily disabled. He . . . makes that up out of [nothing]. That is the fixing of the standards of performance.
>
> . . . .
>
> There's nothing that we can see that justifies the arbitrator making the decision that the employer could

[4] "1T" refers to the transcript of oral argument on the parties' competing motions before the trial court, dated October 6, 2023.

> not perform -- could not terminate an employee for a temporary disability.
>
> . . . .
>
> And, again, everything flows from the arbitrator's decision that an employer cannot terminate an employee on a temporary disability. That is a standard of performance and everything flows from that. Once -- if he determined that she did not meet the standard of performance, the case is over. How could it be reasonably debatable if she can't perform the job that the -- that the Authority's subsequent actions maybe didn't pass muster?
>
> . . . .
>
> There was actually virtually no cross-examination of the medical witnesses additionally and [the Arbitrator] doesn't note that there was any reason to not credit the medical professionals. So, the Authority, based upon the note that was provided, determined that the grievant could not perform the essential functions of the job.
>
> The arbitrator doesn't base his decision upon a note. He bases it upon his statement, his opinion, that an employer cannot terminate an employee who's temporarily disabled. Where did he get that from? He's not allowed to do that.
>
> (1T 11:1-25:3.)

On the issue of NHA's actions regarding the second doctor's note, NHA's counsel explained that the Arbitrator did not make any finding regarding the second note's veracity, and that, regardless of the note's veracity, NHA had no

duty under the CBA to reconsider its decision to terminate Sims, a decision it made before Sims produced the second note. Counsel explained:

> There were -- and -- and the arbitrator does not say anywhere, does not make any credibility determinations which would have been his -- his area to do. Instead, he makes an ambiguous statement that subsequent medical information shows she was cleared -- cleared to work. He doesn't say that it was -- that he accepts the [second] note.
>
> But, it was clear that she just made the note up. There was nobody who said that the doctor approved the note and after microfracture surgery, in one week, this -- this employee miraculously is able to perform all of those -- those functions. That's on one side.
>
> The other -- other side is, there was nothing in the contract that required the Authority to reconsider its decision.
>
> . . . .
>
> According to -- according to the arbitrator's record, the doctor testified that the average person would be at least six to nine months before they would be able to work. And, frankly, the testimony was more full-throated than that. He was extremely skeptical that somebody could perform this within a year and he actually testified that there were people that would take considerably longer than a year to go back to sufficient function.
>
> But, the note made absolutely no sense whatsoever. And, remember the arbitrator -- the employer had already terminated the employee. And, there's no provision in the contract that says once an employee is terminated there needs to be a procedure

> for reconsideration. Nothing in the contract provides that.
>
> (1T 14:13-22:14.)

After NHA's counsel's argument, the trial court acknowledged that the CBA does not contain any provision that requires NHA to reconsider personnel decisions. The Court asked the Union's counsel:

> [W]hy once a determination was made to terminate her because there was no light duty work, why didn't it end there? Why -- where in the Collective Bargaining Agreement or any practices and procedures written of the -- the Authority, where is it that the Authority was obligated after that point to reconsider or reopen its -- its determination to terminate her based upon the very clear return to work note and the very clear restrictions?
>
> (1T 31:14-23.)

Despite its apparent understanding of the fatal flaws underlying the Arbitrator's decision, the trial court issued an order and statement of reasons on November 2, 2023 finding that the arbitration award met the reasonably debatable standard and therefore should be confirmed. (Pa128-141) In its written decision, the trial court neither analyzed the award nor the CBA. Rather, the trial court merely rejected NHA's arguments that the award established a new work rule precluding NHA from terminating employees on temporary disability, no matter the period of their absence, and usurped the NHA's right

under the law and the CBA to establish the qualifications for continued employment.

Moreover, the trial court's decision did not analyze whether the Arbitrator's decision adhered to the CBA's terms and conditions. Rather, the trial court merely stated its "opinion" that "the Arbitrator did not . . . create[] a new work rule regarding termination of employees unable to perform their essential functions[,]" (Pa140), ignoring the award's plain language clearly establishing an unwarranted limitation on NHA's ability to set standards of performance for its employees, as well as language in the CBA permitting NHA to set standards of performance in its sole discretion. The trial court further held that the Arbitrator merely "found that there was no reason for removal of the employee aside from her temporary recovery from a medical procedure and incidental limitation to perform." (Pa134) In essence, the trial court's decision was little more than a rubber stump, devoid of the necessary analysis concerning whether the Arbitrator exceeded his authority or infringed upon NHA's managerial prerogative as set by decades of case law and memorialized in the CBA.

The present appeal followed.

LEGAL ARGUMENT

STANDARD OF REVIEW

An appellate court's review of rulings of law and issues regarding the applicability, validity, or interpretation of laws, statutes, or rules is *de novo*. *See Kocanowski v. Twp. of Bridgewater*, 237 N.J. 3, 9 (2019). Accordingly, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." *Rowe v. Bell & Gossett Co.*, 239 N.J. 531, 552 (2019) (quoting *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 N.J. 366, 378 (1995)). Furthermore, an appellate court's *de novo* review of questions of law applies to a trial court's review and interpretation of a contract, including an arbitration agreement. *Serico v. Rothberg*, 234 N.J. 168, 178 (2018) (noting *de novo* appellate review of contracts); *Kieffer v. Best Buy*, 205 N.J. 213, 222 (2011) (noting same); *Goffe v. Foulke Mgmt. Corp.*, 238 N.J. 191, 207 (2019) (noting *de novo* appellate review of arbitration agreements). The Court's review of the trial court's decision here therefore is plenary, and the trial court's decision is not entitled to deference.

As to arbitration awards, the Court's review of an arbitrator's decision "is very limited." *Bound Brook Bd. of Educ. v. Ciripompa*, 228 N.J. 4, 11 (2017) (quoting *Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko*, 202 N.J. 268, 276 (2010)). New Jersey's Courts are guided by the principles set forth by

the United States Supreme Court in the *Steelworkers* Trilogy[5] when reviewing a challenged arbitration award. *See New Jersey Tpke. Auth. v. Local 196, IFPTE*, 190 N.J. 283 (2007). Thus, judicial involvement in disputes involving arbitration awards is limited to confined parameters of review.

Nonetheless, a reviewing court can accept an arbitrator's award in a public sector arbitration only if the award constitutes a "reasonably debatable" interpretation of the parties' contract. *See, e.g., Bd. of Educ. of Alpha v. Alpha Educ. Ass'n*, 190 N.J. 34, 42 (2006). An award is "reasonably debatable" if it is "justifiable" or "fully supportable in the record." *Policemen's Benevolent Ass'n v. City of Trenton*, 205 N.J. 422, 431 (2011). Similarly, the New Jersey Arbitration Act, *N.J.S.A.* 2A:24–1 to –11, which applies to disputes "arising from a collective bargaining agreement," *N.J.S.A.* 2A:24–1.1, permits courts to vacate an arbitration award, among other situations, where "the award was procured by corruption, fraud or undue means." *N.J.S.A.* 2A:24–8(a); *See Port Auth. Police Sergeants Benevolent Ass'n of N.Y., N.J. v. Port Auth. of N.Y. and N.J.*, 340 N.J. Super. 453, 458-60 (App. Div. 2001) (describing limitation on arbitrator's authority as defined by public sector collective bargaining

[5] *See United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

agreement). "Undue means" in particular includes "an arbitrator's failure to follow the substantive law." *In re City of Camden*, 429 N.J. Super. 309, 332 (App. Div. 2013). The Arbitration Act also permits a reviewing court to set aside an award where an arbitrator "exceeded or so imperfectly executed [his] powers that a mutual, final and definite award upon the subject matter submitted was not made." *N.J.S.A.* 2A:24–8(d).

In sum, an arbitrator's award cannot stand if (1) it does not flow from a reasonably debatable interpretation of the parties' agreement; (2) the arbitrator failed to follow applicable substantive law; or (3) the arbitrator exceeded the authority provided to him by the parties' agreement and applicable law. All three of the above bases for setting aside an arbitration award are present here. Any one of them standing alone is sufficient to set aside the Arbitrator's award. Each will be addressed in turn.

I. THE ARBITRATION AWARD MUST BE SET ASIDE BECAUSE THE ARBITRATOR'S INVENTION OF A NEW WORK RULE DOES NOT CONSTITUTE A REASONABLY DEBATABLE INTERPRETATION OF THE CBA. (PA139-140)

The reasonably debatable" standard requires courts to provide a considerable degree of deference to an arbitrator's award. In other words, even if the reviewing court might have reached a different conclusion, it will uphold

the award so long as it is "justifiable," or otherwise presents a plausible interpretation of the agreement. *See Borough of Carteret v. Firefighters Mut. Benevolent Ass'n, Loc. 67*, 247 N.J. 202, 212 (2021) ("[I]f two or more interpretations of a labor agreement could be plausibly argued, the outcome is at least reasonably debatable."). *See also Borough of E. Rutherford v. E. Rutherford PBA Loc. 275*, 213 N.J. 190, 201 (2013) ("Under the 'reasonably debatable' standard, a court reviewing [a public sector] arbitration award 'may not substitute its own judgment for that of the arbitrator, regardless of the court's view of the correctness of the arbitrator's position.'").

Nonetheless, the deference courts provide to an arbitrator's decision "is not a rubber stamp." *Bound Brook Bd. of Educ. v. Ciripoma*, 228 N.J. 4, 12 (2017). Although arbitrators may "fill in gaps" to provide meaning to certain terms, they "may not look beyond the four corners of a contract to alter unambiguous language." *Policemen's Benevolent Ass'n v. City of Trenton,* 205 N.J. 422, 430 (2011). To that end, a court should vacate an arbitration award "as not reasonably debatable when arbitrators have, for example, added new terms to an agreement or ignored its clear language." *Id.* at 429.

For example, in *PBA Local 160 v. Township of North Brunswick*, 272 N.J. Super. 467 (App. Div. 1994), this Court set aside an arbitration award where the arbitrator failed to give appropriate regard to the express terms of the parties'

agreement. The case concerned a police officer's request for overtime pay related to certain doctor visits he had made for a work-related injury. Virtually identical to the CBA at issue here, the *PBA Local 160* arbitration agreement required that the arbitrator "shall be bound by the provisions of this Agreement and . . . shall have no authority to modify or alter in any way the provisions of this Agreement or any amendment or supplement hereto." *Id.* at 472.

This Court overturned the arbitration award in the officer's favor, holding that the arbitrator had ignored the plain language of the parties' agreement requiring that officers be "sent" by the Township to a doctor of the Township's choosing before they could be eligible for overtime pay for time spent traveling to and from medical appointments. *Id.* at 475. Regarding the issue of whether the arbitrator's decision was "reasonably debatable," the Court explained:

> [T]he arbitrator's award should have been consonant with the subject matter submitted, *i.e.*, the arbitrator should have simply decided whether or not North Brunswick had "sent" [the officer] to a township doctor. Instead, he made a determination contrary to the authority vested in him when he awarded overtime compensation for off-duty visits to doctors made by [the officer] on his own volition.
>
> **As the arbitration award failed to draw its essence from the collective negotiations of the parties, and because the arbitrator exceeded the authority granted him in the contract and was not free to disregard the contractual obligation that [the officer] be "sent" to a township doctor, we are constrained to vacate the arbitration award.**

. . . .

> Here, it cannot fairly be stated that the interpretation of the contract between the parties is reasonably debatable. Simply put, no interpretation including the term "sent" took place and, hence, any so-called interpretation flowing from that premise could not be deemed reasonably debatable. **Stated differently, there is nothing to debate, let alone reasonably debate, given that the arbitrator obviously disregarded the term "sent" in paragraph 6 of the agreement as well as the context of that paragraph in Article 27(C)**.
>
> [*Id.* at 476-77 (emphases added).]

See also City Ass'n of Supervisors & Adm'rs v. State Operated Sch. Dist. Of Newark, 311 N.J. Super. 300, 312 (App. Div. 1998) (rejecting arbitration award which relied on past practices and "ignor[ed] the clear language of the agreement"); *Beaird Indus., Inc. v. Local 2297, Int'l Union*, 404 F.3d 942, 946–47 (5th Cir.2005) (overturning arbitration award in which arbitrator balanced parties' interests instead of applying contract language).

The same logic applies here. Arbitrator Pierson's award does not flow from a reasonably debatable interpretation of the parties' CBA because ***he did not interpret the parties' CBA.*** Indeed, he completely ignored the provisions of the CBA granting NHA the sole discretion to set standards of performance for its employees. Just as the arbitrator in *PBA Local 160* was not free to disregard the plain language of the parties' agreement, so too here, the Arbitrator is

mandated to abide by the terms of the parties' CBA vesting NHA with a managerial prerogative to determine the standards of performance for its employees. As stated expressly in Article III of the CBA, NHA retains the right to "determine [employees'] qualifications and conditions of continued employment, or assignment," as the case may be. Inherent in NHA's right to determine conditions for continued employment is its right to determine that an employee who no longer can perform her job duties no longer is qualified for duty. Arbitrator Pierson ignored that plain language by inserting a new and unprecedented requirement into the agreement prohibiting NHA from discharging employees on temporary disability. By doing so, he failed to interpret the CBA's language in any meaningful way, and instead planted an impermissible caveat and limitation into the sole and unfettered discretion NHA maintains regarding determinations of an employee's fitness for duty.

To be clear, the Arbitrator was free to "fill in the gaps" by interpreting the meaning of "just cause" as set forth in the CBA, but he cannot bind the parties to an interpretation that contravenes the CBA's express language. Arbitrator Pierson did so here: he imposed his own opinion -- to use his words -- based not on an interpretation of the CBA, but on his own personal sense of justice, that NHA could not terminate an employee on temporary disability.

No such language appears in the CBA. Indeed, as described above, the CBA provides exactly the opposite, granting NHA the right to set the standards of performance in its sole discretion. NHA determined on January 6, 2020, based on her own doctor's note which Sims herself had provided, that she no longer could perform her essential job duties. Arbitrator Pierson did not find otherwise in his arbitration award. On the contrary, he implicitly agreed that the restrictions set forth in the initial doctor's note -- the only note NHA had when it decided to terminate Sims on January 6, 2020 -- would not allow Sims to perform her essential job duties. No such facts regarding either the initial doctor's note nor the underlying medical testimony are in dispute, and Arbitrator Pierson did not rely on any such factual findings to reach his decision.

Instead, his arbitration award is based solely on a new and arbitrary work rule the Arbitrator invented out of whole cloth and that outright thwarts NHA's right to set the standards of performance as set forth both in the CBA and as recognized by decades of case law. By failing to interpret the CBA, and by relying instead on his own sense of justice, the Arbitrator loses the benefit of the Court's deference. As this Court explained in *PBA Local 160*, if an arbitrator does not undertake an interpretation of the parties' agreement, then there is "nothing to debate," and no basis on which a court can determine that the arbitrator's award is "reasonably debatable." Such is the case here; Arbitrator

Pierson did not undertake an effort to interpret NHA's managerial prerogative under the CBA, but rather fashioned a new work rule based upon nothing beyond his own personal sense of fairness.

Accordingly, the Arbitrator's decision here, to replace the rights granted to NHA under the CBA with his own sense of justice, constitutes reversible error. The Court therefore should reverse the trial court's order confirming the arbitration award.

II. THE ARBITRATION AWARD MUST BE SET ASIDE BECAUSE THE ARBITRATOR EXCEEDED THE SCOPE OF HIS POWERS UNDER THE CBA BY FASHIONING A NEW WORK RULE BASED SOLELY ON HIS SUBJECTIVE SENSE OF INDUSTRIAL JUSTICE. (PA139-140)

Similar to the requirement that an arbitrator's award rest on a reasonably debatable interpretation of the parties' agreement, *N.J.S.A.* 2A:24-8(d) provides that an arbitration award must be vacated when an arbitrator "exceeded or so imperfectly executed [his] powers that a mutual, final and definite award upon the subject matter submitted was not made." An arbitrator exceeds his or her authority by ignoring "the clear and unambiguous language of the agreement." *City Ass'n of Supervisors and Admin'rs*, 311 N.J. Super. at 312. *See also Commc'ns Workers of Am., Local 1087 v. Monmouth Cty. Bd. of Soc. Servs.*, 96 N.J. 442, 452-53 (1984) (holding that an arbitrator may not exceed the power authorized under the parties' collectively negotiated agreement). Indeed, it is a

fundamental labor law principle that "an arbitrator may not disregard the terms of the parties' agreement, nor may he [or she] rewrite the contract for the parties." *Cty. Coll. of Morris Staff Ass'n v. Cty. Coll. of Morris*, 100 N.J. 383, 391 (1985) (citation omitted). *See also Linden Bd. of Educ.*, 202 N.J. at 276 ("[T]he arbitrator may not contradict the express language of the contract.").

In addition to the well-established principles developed through decades of case law, the CBA similarly prohibits an arbitrator from adding to, deleting, or modifying any of the CBA's provisions. (Pa45) The CBA further provides that the "arbitrator shall be without power or authority to make any decision contrary to or inconsistent with or modifying or varying in any way the terms of [the CBA]." (*Id.*) Further still, the CBA requires that the "arbitrator's decision shall not usurp the functions or power of the Authority." (*Id.*)

New Jersey's own Supreme Court has spoken forcefully on the subject of an arbitrator overstepping his statutory and contractual authority, holding that an arbitrator cannot "read into" the agreement language for which the parties did not bargain. In *County College of Morris*, *supra*, the New Jersey Supreme Court held that an arbitrator who issued an award imposing a system of progressive discipline that was not provided in the parties' collective bargaining agreement had exceeded his authority under *N.J.S.A.* 2A:24-8(d).

The grievant in *County College of Morris* argued that he was improperly discharged for cause under the parties' collective bargaining agreement. The agreement there provided that an employee could be discharged for just cause. 100 N.J. at 387. Though the arbitrator expressly found that the grievant had been discharged for just cause, he went on to find that the penalty was not warranted because of the college's failure to criticize, warn, or discipline the grievant before terminating him. *Id.* The arbitrator thus issued an award reducing the grievant's penalty to an eight-month suspension without pay. *Id.* at 389.

The Supreme Court overturned the award, holding that the parties' agreement did not empower the arbitrator to reduce the grievant's penalty or otherwise to alter the agreement's terms. Indeed, and just as in the CBA here, the parties' agreement prohibited the arbitrator from altering, adding to, amending, or otherwise modifying the parties' agreement. *Id.* at 388-89. Thus, the Court determined that "[o]nce the arbitrator had applied his special expertise and found the plaintiff guilty of misconduct sufficient to warrant discharge, then the limits on his power required that the employee be dismissed." *Id.* at 392. The Court further explained that the arbitrator could not "read in" language to the agreement to make a better deal for the grievant than he had made for himself through his union:

> But to avoid that result [of immediate discharge], the arbitrator admittedly read into the agreement a

> condition not required by the contract: the necessity for incremental or progressive discipline. That this is so is plain from the arbitrator's insistence that the "normal context of [grievant's] responsibilities . . . must include . . . a measure of progressive discipline." Without imposing that requirement the arbitrator could not have avoided discharging [the grievant] -- at least could not have avoided that result without sacrificing all consistency in his written opinion.
>
> However, the arbitrator's "reading in" ignored the contractual provision that prohibited him from adding to, altering, or modifying the parties' agreement. It overlooked the fact that the collective bargaining agreement was considered to be the complete understanding of the parties, and it disregarded the directive that any modification in responsibilities be agreed upon in writing. . . . We repeat that the arbitrator's authority is circumscribed by whatever provisions and conditions the parties have mutually agreed upon. Any action taken beyond that authority is impeachable.
>
> [*Id.* at 393 (first alteration in original) (internal quotations omitted).]

Critically, the Court further explained that the arbitrator could not sneak an additional term into the contract through interpretation of a just cause provision:

> We reject plaintiffs' contention that under the circumstances of this case there can be no "just cause" for discharge without some prior warning to the employee. Obviously, there is no explicit provision in the contract between the College and the Association requiring the use of such incremental or progressive discipline, nor did the arbitrator point to any other, related contract terms as furnishing implicit support for

> a progressive-discipline requirement. We are impressed with the fact that it has been the practice in other labor contracts to set forth specifically any requirements of prior warning and progressive discipline. The inclusion of these explicit provisions in other agreements suggests to us that the decision whether to use such a disciplinary scheme is likely to be a subject of collective negotiations, and that the College would legitimately expect the Association to give some quid pro quo to obtain that protection.
>
> [*Id.* at 394-95 (internal citations omitted).]

With regard to the arbitrator's ability to dispense his own brand of industrial justice in the name of balancing the equities, the Court stated cogently:

> **Here we simply recognize that an arbitrator's power to decide what is fair and just is at all times limited by the intent of the parties as manifested by the terms of their contract**. The parties took pains to put explicit restrictions on the arbitrator's authority. The arbitrator measured the employee's conduct against the standard of "just cause" for dismissal and found "just cause" to exist. Despite the fact that the contract provided for no more, the arbitrator went a significant step further by requiring the College to engage in progressive discipline of its employees as a prerequisite to discharge. In so doing, the arbitrator exceeded his authority by adding a new term to the contract.
>
> [*Id.* at 397 (emphasis added).]

Arbitrator Pierson engaged in the same impermissible practice here by including an additional term in the CBA through the Trojan Horse of an undefined just cause provision. By doing so, he clearly "read in" a new rule precluding termination of any employee for incapacity where the employee

asserts that the incapacity is caused by a temporary condition. Moreover, and similar to the arbitrator in *County College of Morris*, he required that NHA provide some form of "warning" to Sims before terminating her; in essence, the same type of "progressive" discipline the arbitrator read into the agreement in *County College of Morris*. Of course, no such "warning" requirement is provided by the CBA. Moreover, any such "warning" here would have been impractical, if not completely nonsensical. There is no way Sims could have responded to a warning by, for example, recovering any faster from surgery than nature would ordinarily provide. She has no control over her physical healing process sufficient to respond meaningfully to a warning from her employer; she either was physically able to work, or she was not. A "warning" would not change the physical realities of her condition and would serve no purpose other than to encourage an unhealthy employee to return to work prematurely, perhaps by fabricating, withholding, or otherwise falsifying medical and other records.[6]

[6] Indeed, the evidence here regarding the second "magic" return-to-work doctor's note, as recounted by the Arbitrator, leads to the inexorable conclusion that the note likely was procured falsely, possibly through undue means. For example, and as made clear by the Arbitrator's findings, the second note was **not** justified by any intervening medical examination, following the first note, that would explain Sims' miraculous recovery, reducing her complete recovery period from major reconstructive knee surgery from six months to a mere two weeks. Neither do the Arbitrator's own findings in his award establish that any member of Sims' medical team approved the second note. (Pa32-34)

Simply put, it is bad policy, and it appears nowhere in the CBA -- for good reason.

Even more troubling, the Arbitrator did not provide any limitations as to the length of time NHA must wait before it is permitted to discharge an injured or otherwise incapacitated employee. Sims' incapacity here was to last for a period of at least six months. Without any additional guidance, the Arbitrator, in essence, has granted Sims and other similarly-situated employees permanent tenured status, a provision that does not appear anywhere in the CBA. By any measure, the Arbitrator's creation of this new work rule provides Union members with the benefit of a bargain which they did not receive through the give and take of labor negotiations that produced the parties' CBA. Rather, the Arbitrator's new work rule is an archetypal example of renegade industrial justice completely divorced from the reality of labor negotiations, and a classic case of overreach requiring reversal.

Finally, the Arbitrator's new work rule is contrary to and inconsistent with the CBA's grant to NHA of the right to make rules deemed appropriate for the purpose of maintaining safety; the right to manage its employees; and the right to determine their qualifications and conditions for continued employment. Thus, the new work rule not only exceeds the four corners of the CBA, it directly

contradicts the CBA's express terms.[7] *See PBA Local 160*, 272 N.J. Super. at 477 (holding that arbitrator exceeded his statutory authority and the authority conferred on him by the parties' agreement because his final award contradicted the express terms of the parties' agreement). The trial court's decision therefore should be overturned, and the Arbitrator's award vacated.

III. THE ARBITRATROR'S AWARD WAS PROCURED THROUGH UNDUE MEANS BECAUSE THE ARBITRATOR'S NEW WORK RULE IS AN ULTRA VIRES IMPOSITION UPON THE PARTIES' CBA THAT VIOLATES BOTH THE CBA'S PLAIN LANGUAGE AND APPLICABLE SUBSTANTIVE LAW. (PA139-140)

N.J.S.A. 2A:24-8(a) provides that an arbitration award may be vacated when it was "procured by corruption, fraud or undue means." In the context of arbitration, "undue means" includes "an arbitrator's failure to follow the substantive law." *In re City of Camden*, 429 N.J. Super. 309, 332 (App. Div. 2013). An arbitrator's authority is, by law, limited by statute and "the questions framed by the parties in a particular dispute." *Ciripompa*, 228 N.J.

[7] Arbitrator Pierson further violated the plain language of the CBA by requiring that NHA reimburse the Union for the arbitration costs. The CBA provides that "the cost of the arbitrator shall be borne equally by the Union and the Authority and all other expenses incurred by either side, including the presentation and witness, will be borne by the party incurring same." (Pa49) Even in this most basic aspect of the CBA, the Arbitrator took it upon himself to invent a new procedure to which the parties never agreed.

at 12 (quoting *Local No. 153, Office & Prof. Emps. Int'l Union v. Tr. Co. of N.J.*, 105 N.J. 442, 449 (1987)). "If an arbitrator exceeds the scope of that authority, then his [or her] decision may be vacated on statutory grounds pursuant to *N.J.S.A.* 2A:24-8." *City Ass'n of Supervisors and Admin'rs*, 311 N.J. Super. at 310.

As explained in detail above, the Arbitrator had no authority here to encroach upon or otherwise limit or qualify NHA's authority, under both applicable case law and the CBA's express terms, to set the standards of performance. Critically, because this matter concerns NHA's managerial prerogative to set the standards of performance and qualifications of its employees, it is distinguishable from cases of employee misconduct in which an arbitrator is called upon properly to determine whether there is "just cause" to warrant the employee's discharge for the conduct in question. In *Linden Board of Education*, *supra*, for example, the Supreme Court explained that parties to a collective bargaining agreement may call upon an arbitrator's expertise to determine whether the "misconduct" in question "rise[s] to a level . . . that constitutes just cause for discharge," particularly where the term "just cause" remains undefined. 202 N.J. at 279. The Court further clarified that an arbitrator's duty to define "just cause" is particularly appropriate in "disciplinary matters" regarding employee misconduct. *Id.* at 277. Nonetheless,

the Court was sure to state that in no instance may the arbitrator "contradict the express language of the contract." *Id.* at 276.

Importantly, this matter does not concern an arbitrator's attempts to define an ambiguous just cause standard as applied to an employee who has been disciplined for repeated misconduct. The facts here do not present an ambiguous set of circumstances in which an arbitrator is called upon to define whether an employer had just cause to terminate an employee for misconduct that may or may not warrant discharge under the terms of a collective bargaining agreement. Instead, this matter concerns a public employer's right to determine, in its sole discretion and as provided both by the applicable agreement and by case law, whether an employee remains qualified to perform her job duties.

NHA terminated Sims because she could not perform the duties of her position. NHA retains the right under the parties' CBA, and applicable case law, to set the standards of performance. Again, Article III of the CBA grants NHA the exclusive right "[t]o hire all employees, and subject to the provisions of law, to determine their qualifications and conditions of continued employment, or assignment, and to promote and transfer employees." (Pa6) Whatever the extent of the Arbitrator's ability to define just cause under the CBA, he cannot violate, infringe, ignore, or qualify the CBA's express terms and the managerial prerogative those terms provide to NHA. *Linden Bd. of Educ.*, 202 N.J. at 279.

Beyond the express terms of the parties' CBA, the NHA's right to control the performance of its employees has been enshrined by the Legislature as a managerial prerogative of public employers for over 50 years. As the New Jersey Supreme Court noted, the Legislature has provided a comprehensive "list of non-negotiable management rights":

> It is the right of any public employer to determine the standards of services to be offered; determine school and college curricula; determine the standards of selection for employment; direct its employees; take disciplinary action; maintain the efficiency of operations; determine the methods, means and personnel by which operations are to be conducted; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of any public employer on the aforesaid matters are not within the scope of collective negotiations; provided, however, that questions concerning the practical impact that decisions on said matters have on employees, such as questions of workload or manning, are within the scope of collective negotiations.
>
> [*State v. State Supervisory Emp. Ass'n*, 78 N.J. 54, 70 (1978).]

Those same rights similarly are enshrined in the parties' CBA here. By ignoring them, Arbitrator Pierson disregarded both the CBA and the substantive law to which he is bound. Simply put, Arbitrator Pierson had no authority to limit or confine NHA's managerial rights, or to carve out a special exception for

employees on a temporary injury leave. NHA maintains the absolute right to set the standards of performance for its employees. It is beyond dispute that Sims could not perform the essential functions of her carpentry position when she was terminated from her employment on January 6, 2020. NHA based its decision on the only information it had before it at the time; a single doctor's note stating that Sims could not perform numerous tasks integral to her position for at least six months. Based on that information, NHA exercised its right to terminate her employment because she could not perform her essential job functions.

The Arbitrator infringed upon the NHA's authority by creating an ultra vires work rule that adds a restriction upon NHA's authority found nowhere in the CBA. In essence, his award rewrites Article III of the CBA to state that NHA has the exclusive right "[t]o hire all employees, and subject to the provisions of law, to determine their qualifications and conditions of continued employment, or assignment," ***except for employees on temporary disability***. The case law on the issue is unequivocal that an arbitrator cannot add any such qualification; as the Supreme Court stated in *County College of Morris*, an arbitrator cannot "read in" an additional term over which the parties did not collectively bargain.

To compound his error, the Arbitrator then faulted NHA both for not warning Sims of the disciplinary action it would take against her, and for failing to inquire into the veracity of the second doctor's note she produced in January

2020. As to the former, and as explained above, NHA had no duty under the CBA or according to the applicable case law to warn Sims of potential disciplinary action. *See Cty. Coll. of Morris*, 100 N.J. at 394-95. Nor does any such duty make practical sense. As to the latter, NHA has no duty under the CBA to reconsider personnel decisions or to take any investigatory action subsequent to discharging an employee. For all intents and purposes, and as far as the CBA was concerned, the matter ended when NHA terminated Sims on January 6, 2020, based on the first doctor's note. NHA's subsequent actions regarding whatever it did or did not do after receiving the second doctor's note were irrelevant, and the Arbitrator should not have considered them. The Arbitrator's inclusion of irrelevant post-termination facts only compounds his other errors, and is a logical consequence of his erroneous creation of a new and ultra vires work rule. Given these grave errors and the Arbitrator's failure to abide by the substantive law regarding NHA's managerial prerogative to set the standards of performance for its employees, his award should be set aside.

Accordingly, the trial court's decision confirming the arbitration award should be reversed, and the arbitrator's decision vacated.

CONCLUSION

For all the foregoing reasons, NHA respectfully requests that the Court reverse the trial court's decision confirming the final arbitration award in favor of the Union and grant NHA's motion to vacate the arbitration award.

Respectfully submitted,

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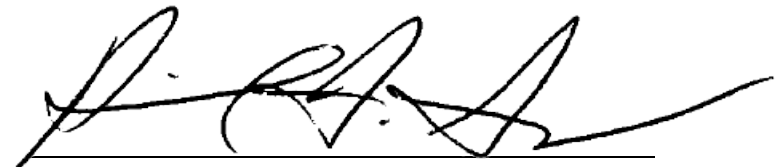
By: 
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NEWARK HOUSING AUTHORITY, Plaintiff-Appellant, v. EASTERN ATLANTIC STATES REGIONAL COUNCIL OF CARPENTERS, LOCAL 253, Defendant-Appellee.	)	SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO: A-001169-23 On Appeal From Docket No. ESX-C-000219-22 Sat Below: Hon. JODI LEE ALPER, J.S.C.

APPELLATE BRIEF ON BEHALF OF DEFENDANT-APPELLEE EASTERN ATLANTIC STATES REGIONAL COUNCIL OF CARPENTERS, LOCAL 253

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PRELIMINARY STATEMENT

The instant case involves the simple enforcement of a labor arbitration award in favor of Defendant-Appellee Eastern Atlantic States Regional Council of Carpenters, Local 253 ("Union"), resolving its dispute with Plaintiff-Appellant Newark Housing Authority ("Authority") concerning the Authority's termination of the Union's member, Cheniqua Sims, in New Jersey Public Employment Relations Commission Docket Number AR-2020-514. Arbitrator J.J. Pierson ruled that the Newark Housing Authority had terminated Ms. Sims without just cause in violation of the parties' Collective Negotiations Agreement ("CNA"). (Appendix page ("Pa.") 19-40; 57-61; CNA at Pa 69-86). Ms. Sims was injured on the job in 2019, and was terminated when she returned from her injury leave with a doctor's note imposing limited work restrictions in January 2020. Ms. Sims provided a revised note rescinding those restrictions, only to be told that she still would not be reinstated, now due to Pandemic-related budget cuts.

The sole issue before the arbitrator, which the parties stipulated and agreed to at the outset of the arbitration hearing, was whether the Authority had just cause to terminate Ms. Sims. As explained in his award, Arbitrator Pierson ruled that the Authority lacked just cause to terminate Ms. Sims' employment and directed the Authority to make Ms. Sims whole for the period of her wrongful termination and

provide make-whole relief in the form of back pay and fringe benefit fund contributions.

The Authority refused to comply with Arbitrator Pierson's Award and filed the underlying Complaint to Vacate Arbitrator Pierson's Awards before the Essex County Chancery Court. The Union, in return, moved before the for an order confirming the Award. The Court dismissed the Authority's Complaint and granted the Union's Motion to Confirm. This appeal followed.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. Ms. Sims' Termination

The Eastern Atlantic States Regional Council of Carpenters is a labor organization, and its Local 253 is affiliated with the Essex County Building and Construction Trades Council. The Authority and the Union are both signatory to the Building Trades Council's applicable Collective Bargaining Agreement, which provides that employees may only be disciplined or discharged for just cause. (Pa 20, 22-24). Cheniqua Sims is a journeyman carpenter and members of the Union. She was first referred to work for the Authority in June of 2018, and she remained

[1] The Statement of Facts and Procedural History have been combined for the Court's convenience, as the two are inextricably linked in this case.

employed by the Authority until it terminated her employment in January 2020. (Pa 20-21).

On March 19, 2019, Ms. Sims was involved in an automobile accident while at work, and was treated for a right knee injury on site and at a nearby hospital. Ms. Sims underwent a surgical procedure to repair a resulting tear in her ACL, for which her recovery time was projected at six months. (Pa 20). Ms. Sims undertook a course of physical therapy to help her regain her functionality and return to work. (Pa 20). In November 2019, Ms. Sims saw a doctor who advised her to remain out of work through the end of the year. On December 30, 2019, Ms. Sims was cleared to return to work subject to some recommended restrictions. (Pa 20).

Ms. Sims presented her December 30, 2019 doctor's note to the Authority, clearing her to return to work on January 7, 2020, but with a six month period without squatting, heavy lifting, climbing, kneeling, or prolonged standing. (Pa 21). On January 6, 2020, the Authority advised Ms. Sims that because she had produced a doctor's note with restrictions and because the Authority did "not have light duty" and "due to business need," it was terminating her employment effective immediately. (Pa 21).

Upon receipt of the Authority's January 6 termination notice, Ms. Sims contacted her doctor's office and obtained a new doctor's note, dated January 22, 2020. Under that note, Ms. Sims was cleared to "return to work on 01/22/20" with no restrictions. (Pa 21). While the Authority asserted that it "did not trust the doctor's note" provided on January 22, 2020, there was no evidence that the Authority ever made any effort to investigate its concerns as to the note's trustworthiness and refused to reconsider Ms. Sims' termination.

B. The Grievance and Arbitration Process

The Union timely filed a grievance contending that Ms. Sims' termination was without just cause, and pursued that grievance to final and binding arbitration. Both the Authority and the Union presented testimony and documentary evidence across three days of hearing. Both parties submitted written closings in the form of post-hearing briefs, whereafter the Arbitrator issued his ruling.

On September 5, 2022, Arbitrator Pierson issued what he labeled as his Interim Award. In that Award, Arbitrator Pierson ruled that Ms. Sims' termination was without just cause. (Pa 35-38). Arbitrator Pierson determined that while "an employer may be justified in terminating an employee permanently unit to perform the duties of their position," this employer was "not justified in terminating an employee capable of returning to full duties once the temporary injury or medical

condition is resolved." (Pa 35). Arbitrator Pierson noted that the Authority had a "reasonable expectation" that Ms. Sims would be able to return to her duties once her condition had improved, and that throughout the grievance process, the Authority shifted its justification for Ms. Sims' termination to the economic strain placed on it by the COVID-19 pandemic and the reduction in work which accompanied it. (Pa 35).

Arbitrator Pierson noted that the "generally accepted and often referenced test for just cause includes the question of whether the Company gave the employee forewarning or foreknowledge of the possible disciplinary consequences of the employee's absence." (Pa 36). He recognized that the record included no such warning by the Authority to Ms. Sims, or that the Authority had ever contacted the Union to request a referral for a replacement worker or otherwise indicated that her absence was causing any particular hardship to the Authority's orderly, efficient, and safe operation. (Pa 36). Based upon the absolute lack of any "offense" justifying discipline or any prior disciplinary record, Arbitrator Pierson concluded that the Authority "jumped too quickly from recognizing the Grievant's injury restrictions to deciding to terminate her." (Pa 36). Arbitrator Pierson further highlighted that, while the Authority had claimed economic hardship as a reason for not recalling Ms. Sims, it had requested and received referrals of new

carpenters in August and November 2020, and that Ms. Sims could have returned in one of their stead. (Pa 37).

C. The Chancery Court's Order Confirming the Arbitrator's Award

Rather than comply with the Arbitrator's Award, the Authority instead filed a Complaint to Vacate the Award on December 2, 2022, which it amended on March 10, 2023. (Pa 4-18, 41-57). Before the Chancery Court, the Authority argued that Arbitrator Pierson's Award should be vacated. The Authority argued before the Honorable Jodi Lee Alpert, J.S.C., that while Arbitrator Pierson was duly authorized and empowered to define and interpret "just cause" under the CNA, he did not consider "intent, custom, or practice" in the parties' negotiations to define the term, and that the arbitrator's definition of the term imposed "new work rules" rather than adhere to the CNA's terms as the parties had agreed. The Authority also argued that the Arbitrator's handling of the remedial phase of the hearing and proposed payment structure were further evidence of his failure to loyally adhere to the terms of the CNA.

Judge Alpert rejected each of the Authority's arguments for why the Award should be vacated. Noting that "[p]ublic policy in this state favors resolutions of disputes through arbitration, especially in matters involving the public sector," Judge Alper found that the Arbitrator "did not, in [the] court's opinion, create a

new work rule regarding termination of employees unable to perform their essential job functions." (Pa 138, 140). Instead, Judge Alper found that Arbitrator Pierson "found that there was no reason for removal of the employee aside from her temporary recovery from a medical procedure," underscoring the "inconsistency in the reasons given by the employer for the termination," and emphasizing that "consideration must be afforded an employee with a temporary medical condition which can be corrected and who becomes able to return to work and tat time limitations are also considered." (Pa 140-141). Judge Alper found that Arbitrator Pierson based his conclusions in the evidentiary record developed in the course of the arbitration hearing, and that "[i]t was the job of the Arbitrator to determine just cause, which he did," and that "even if the court were to come to a different conclusion, his is a reasonably debatable assessment based on the record" and thus deserving of judicial deference. (Pa 140-141). Thus the Chancery Court confirmed Arbitrator Pierson's Award and ordered the Authority to comply with the Award, to reinstate Ms. Sims, and to make her whole.

Rather than comply with the Arbitration Award and the Chancery Court's Order, the Authority filed the instant appeal.

STANDARD OF REVIEW

As the Authority notes in its Appellate Brief, the Appellate Division's review of Judge Alper's ruling in the instant matter is *de novo*. *Serico v. Rothberg*, 234 N.J. 168, 178 (2018); *Kieffer v. Best Buy*, 205 N.J. 213, 222 (2011); *Goffe v. Foulke Mgmt. Corp*., 238 N.J. 191, 207 (2019). That *de novo* review, however, remains constrained to the "very limited" scope of judicial review for arbitration awards. *Bound Brook Bd. Of Educ. v. Ciripompa*, 228 N.J. 4, 11 (2017).

More than a quarter-century ago, the United States Supreme Court enshrined grievance arbitration as the centerpiece of the collective bargaining relationship. *Steelworkers v. American Manufacturing Company*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Company*, 363 U.S. 574 (1960); *Steelworkers v. Enterprise Wheel & Car Company*, 363 U.S. 593 (1960) ("*Steelworkers* Trilogy"). The Court emphasized that a court's role in reviewing an arbitration award is extremely limited. *Steelworkers v. American Manufacturing Company*, supra. at 568**;** *Steelworkers v. Enterprise Wheel & Car Corporation*, supra. at 596. The Court placed special attention on the role of the labor arbitrator. In the view of the Court, a labor arbitrator performs a unique task in the collective bargaining relationship:

> The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and

> their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment.

Id. The court noted that arbitrators settle disputes based upon their knowledge of the customs and practices of particular work sites and the practices in an industry. *Steelworkers v. Enterprise Wheel & Car Company*, supra. at 596. "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." *Id*. at 597. The courts will extend great deference to an arbitrator's authority to fashion appropriate remedies to fit particular situations. *Id.; Local 153 v. Trust Co. of New Jersey*, 105 N.J. 442, 448 (1987). A court may not overrule an arbitrator's award simply because it differs with the arbitrator's interpretation of the contract. *W.R. Grace & Company v. Rubber Workers Local 759*, 461 U.S. 757, 764 (1983). Moreover, the courts will confirm an award even where it has "serious misgivings" about the award or where the award is "dubious". *Kane Gas Light & Heating Co. v. International Brotherhood of Firemen & Oilers*, 687 F.2d 673, 679 (3d Cir. 1982), cert. denied 460 U.S. 1011 (1983); *Teamsters Local No. 115 v. DeSoto, Inc.*, 705 F.2d 931, 935 (3d Cir. 1984). In *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987), the Supreme Court noted that the Courts rely on the factual findings of arbitrators, even where they are viewed as silly or improvident.

The principles of the *Steelworkers* Trilogy have been adopted by the New Jersey Supreme Court. *New Jersey Turnpike Authority v. Local 196, IFPTE*, 190 N.J. 283 (2007); *Local 153 v. Trust Co. of New Jersey*, 105 N.J. 442 (1987). See also *Kearny PBA Local #21 v. Kearny*, 81 N.J. 208, 221 (1979). New Jersey courts favor arbitration awards which "are generally presumed to be confirmed unless one of the statutory bases for vacation is proven pursuant to N.J.S.A. 2A:24-8." *Local 153*, 105 N.J. 442 (1987); *Alpha Board of Education v. Alpha Education Association*, 190 N.J. 34 (2006); *Kearny PBA Local #21*, 81 N.J. at 221; *State v. State Troopers Fraternal Association*, 91 N.J. 464, 469 (1982). In his concurring opinion in *Kearny PBA Local #21*, Justice Pashman noted that "it is the arbitrator's judgment for which the parties contracted." 81 N.J. at 226-227 (internal citations omitted). Justice Pashman emphasized that the court's enforcement of the "reasonably debatable standard"... leaves unchanged the traditional limitations regarding judicial review of public employee grievance arbitration *Id*. at 224 (Pashman, J. concurring).

There are limitations to the deference given an arbitrator's decision. The applicable statute, N.J.S.A. 2A:24-8 provides, inter alia, that:

> The court shall vacate the award [of an arbitrator] in any of the following cases:
>
> a. Where the award was procured by corruption, fraud or undue means; and [….]

> 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.

"Undue means" for purposes of Section 8(a) has been defined to apply to cases "which the arbitrator meant to decide according to law, and clearly had mistaken the legal rule, and this mistake appears on the face of the award or by statement of the arbitrator;" or "where the arbitrator has mistaken a fact, and the mistake is apparent on the face of the award itself, or is admitted by the arbitrator himself." *Anco Products Corporation v. T.V. Products Corporation*, 23 N.J. Super 116 (App. Div. 1952) (quoting from *Held v. Comfort Bus Line, Inc*., 136 N.J.L. 640, 641 (S. Ct. 1948); *William H. Burns International Detective Agency v. New Jersey Guards Union*, 64 N.J. Super. 301 (App. Div. 1961); *Teamsters Local 11 v. Abad*, 135 N.J. Super 552 (Ch. Div. 1975), rev'd on other grounds, 144 N.J. Super 239 (App. Div. 1975); *Teamsters Local 560 v. Eazor Express, Inc.*, 95 N.J. 219 Super (App. Div. 1967).

In reviewing labor arbitration awards, Courts must rely on the factual findings of arbitrators, not on a review of pleadings, hearing transcripts and exhibits. As The Third Circuit recognizes, "a court is precluded from overturning an award for errors in assessing the credibility of witnesses, in the weight accorded their testimony, or in the determination of factual issues". *NF&M v. Steelworkers*, 524 F. 2d 756, 759

(3d Cir. 1975); see also, *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 39 (1987) (holding that "improvident, even silly, factfinding" is "hardly a sufficient basis for disregarding what the agent appointed by the parties determined to be the historical facts"). Accordingly, in reviewing the Arbitration Award at issue in the instant appeal, this Court should rely on the facts as found by the Arbitrator in his Award (Pa 19-40; 57-61), rather than the facts argued by the Authority or any extraneous exhibits presented.

Even if a mistake of law or facts appears in an arbitrator's decision, it will not warrant vacation of the award unless the error "is so gross as to suggest fraud or misconduct." *Anco Products Corp.*, 23 N.J. Super. at 124; see also *San Martine Compania De Nav. v. Saguenay Term. Ltd.*, 293 F.2d 796, 801 (9th Cir. 1961); *Collingswood Hosiery Mills v. American Federation of Hosiery Workers*, 31 N.J. Super 466, 471 (App. Div. 1954). The Appellate Division has also explained that an arbitration award could only be assailed for mistake of law where the arbitrator's award was based on law rather than on his sense of what is right under the contract. *Id*. at 472.

In applying the foregoing precepts, the courts have repeatedly emphasized that every intendment is to be indulged in favor of the award, and the burden is upon the complaining party to establish that the award clearly violates the statute. *Anco Products Corp.*, 23 N.J. Super. at 124-125; *Held v. Comfort Bus Line*, 136 N.J.L. at

641; see also *Shahmoon Industries, Inc. v. United Steelworkers*, 263 F. Supp. 10 (D.N.J. 1966).

The State Supreme Court has recognized that for purposes of vacating an award, "undue means" does not include situations in which an arbitrator bases his decision on one party's version of facts, finding that version to be credible. *Local 153 v. Trust Co. of New Jersey*, 105 N.J. at 450.

The scope of an arbitrator's authority depends on the terms of the contract between the parties. *Barcon Associates v. Tri-County Asphalt Corp.*, 86 N.J. 179 (1981); *William H. Burns Int'l Detective Agency*, 64 N.J. Super. at 301. Thus, the jurisdiction and the authority of the arbitrator are circumscribed by the powers delegated to him by the contract of the parties. In the public sector, the authority of the arbitrator is also limited by the scope of mandatory negotiations. In this regard, governmental policy cannot be bargained away to be determined by an arbitrator. *Kearny PBA Local #21*, 81 N.J. at 208.

Thus, judicial review of an arbitration award, whether in the public or private sector, is strictly limited and an award is not to be cast aside lightly. The grievance arbitration process is intended to provide an expeditious and inexpensive forum in which to settle contractual differences. *Id*. at 225 (Pashman J. concurring). Arbitration is supposed to end litigation, not begin it. *Teamsters Local 560 v. Eazor*

Express, Inc., supra. 227; *Collingswood Hosiery Mills*, 31 N.J. Super. at 473.

The highly deferential standard of review accorded public sector labor arbitration awards has been repeatedly reiterated by the New Jersey Supreme Court. In *New Jersey Transit Bus Operations v. Amalgamated Transit Union*, 187 N.J. 546 (2006), the Court upheld an arbitrator's weaving together of numerous contract provisions bearing on compensation as a reasonably debatable interpretation of the parties' agreement, despite the Appellate Division's contrary conclusion that the arbitrator did not follow the clear language of the parties' agreement. The Supreme Court in *Alpha Board of Education v. Alpha Education Association*, 190 N.J. 34, 918 (2006), determined that an arbitrator's decision that a dispute was procedurally arbitrable, by utilizing the "continuing violation doctrine," was reasonably debatable despite the time limitations of the parties' grievance procedure.

In *New Jersey Turnpike Authority v. Local 196,* 190 N.J. at 45, the Court endorsed a deferential limitation on the public policy exception to arbitral review, in finding "reasonably debatable" an arbitrator's reinstatement of a toll collector working for the Garden State Parkway had fired a paint ball gun at a slower moving vehicle after his shift ended. 190 N.J. at 304. More recently, in *Policemen's Benevolent Association, Local 11 v. City of Trenton*, 205 N.J. 422 (2011), the Supreme Court upheld an Arbitrator's interpretation of the phrase in a collective bargaining agreement, that "no overtime shall be paid for ten minute period prior to

commencement of tour," to permit payment of compensation at straight-time rates for that period on the grounds that it was plausible and, thus, reasonably debatable. In *Trenton*, the Supreme Court held that the arbitrator interpreted the collective negotiations agreement to reach the plausible conclusion that, if parties had intended that officers receive no pay at all for time actually worked, they would have said so, and because they did not, straight-time pay for that period was contemplated. *Id*. at 431. The Supreme Court, in *Trenton*, repeated its admonition that, because it was the arbitrator's construction of collective bargaining agreement that was bargained for, a reviewing court should not disturb that construction merely because it perceived that there was an arguably better view. In all 4 cases the New Jersey Supreme Court reiterated the traditional standard that an arbitrator's judgment should be affirmed as long as it met the minimal standard of being reasonable debatable.

The Appellate Division recently upheld the Chancery Division's deferential standard of review in enforcing a labor arbitration award interpreting the CNA in the Edison Fire Department:

> We engage "in an extremely deferential review when a party to a collective bargaining agreement has sought to vacate an arbitrator's award." *Policemen's Benevolent Ass'n, Local No. 11 v. City of Trenton*, 205 N.J. 422, 428 (2011). "That high level of deference springs from the strong public policy favoring 'the use of arbitration to resolve labor-management disputes.' " *Id.* at 429 (quoting *Linden Bd. of Educ. v.*

> *Linden Educ. Ass'n ex rel. Mizichko*, 202 N.J. 268, 275–76 (2010)); see also *Borough of E. Rutherford*, supra, 213 N.J. at 201. Our role "in reviewing arbitration awards is extremely limited and an arbitrator's award is not ... set aside lightly." *State v. Int'l Fed'n of Prof'l & Tech. Eng'rs, Local 195*, 169 N.J. 505, 513 (2001) (citing *Kearny PBA Local # 21 v. Town of Kearny*, 81 N.J. 208, 221 (1979)).
>
> We will not substitute our judgment for that of a labor arbitrator, and we will uphold an arbitration decision so long as the award is "reasonably debatable." *Borough of E. Rutherford*, supra, 213 N.J. at 201–03. "Reasonably debatable" means fairly arguable in the minds of ordinary laymen. See *Standard Oil Dev. Co. Emps. Union v. Esso Research & Eng'g Co.*, 38 N.J. Super . 106, 119 (App.Div.), sustained on reh'g, 38 N.J.Super. 293 (App.Div.1955).

IAFF Local 1197 v. Township of Edison, A-5128-13, 2015 WL 6121581 (App. Div. 2015).

ARGUMENT

POINT I

THIS COURT SHOULD CONFIRM THE ARBITRATION AWARD BECAUSE IT REPRESENTS A REASONABLY DEBATEABLE INTERPRETATION OF THE PARTIES' AGREEMENT.

In considering the issue before him, Arbitrator Pierson recognized that his role was to apply his expertise as a labor arbitrator to interpret the meaning of the parties' CNA, and to apply that meaning in the dispute before him. That dispute concerned whether the City violated the parties' CNA by terminating Ms. Sims

without just cause. Arbitrator Pierson applied well-established principles of just cause, expressly confining himself to the language of the CNA, and determined that based on the evidence and testimony presented, the Authority had not met its burden of establishing that it had just cause to terminate Ms. Sims.

It bears repeating that the "reasonably debatable" standard strongly favors confirmation of arbitration awards. To that end, even if the Authority presents an interpretation of the CNA which differs from the Arbitrator's and which is "arguably plausible in its own right," courts are instructed not to "improperly substitute[their] own judgment for that of the arbitrator." *Borough of Carteret v. Firefighters Mut. Benevolent Ass'n, Local 67*, 247 N.J. 202, 205 (2021). In *Borough of Carteret*, the Chancery Court vacated an arbitrator's award, but that decision was reversed by the Supreme Court. Emphasizing that "a court may not substitute its own judgment for that of the arbitrator, regardless of the court's view of the correctness of the arbitrator's position," the Supreme Court ruled that even where "[b]oth of [the proposed] interpretations are arguably reasonable, but the arbitrator sided with the" union based upon testimony and evidence in the record, "affirming an arbitrator's award is not a comment on the viability of opposing interpretations of a disputed labor agreement, nor is it a conclusion that the arbitrator's interpretation is the best one. That is not the standard." *Id*. at 213-214 (internal citations omitted). Like the award in *Carteret*, Arbitrator Pierson's award

is reasonably debatable. It mandates that covered employees may only be disciplined or discharged for "just cause," a term which the CNA leaves undefined. The Arbitrator considered that provision in light of the remainder of the CNA and the both parties' submissions and issued his ruling accordingly. This Court does not have to believe that the Arbitrator's ruling is the only reasonably debatable conclusion, or even that the Arbitrator's interpretation is better than the Authority's. Rather, the Court need only conclude that the Arbitrator's interpretation is "reasonably debatable."

As it did before the Chancery Court, in its Appellate Brief, the Authority suggests that the Arbitrator's use of his expertise in defining the concept of "just cause" exceeded his authority to interpret the CNA and, in doing so, "invented a new work rule" for the Authority's employees. Such an argument is entirely unsupported in arbitral case law. It is well recognized that "[j]ust cause is not an easily defined concept," and is often regarded as "shorthand for what an arbitrator thinks is fair." BNA, *Discipline and Discharge in Arbitration (3rd Ed.),* ch. 2 p. 2. "If, after considering the facts, the arbitrator concludes that the employer failed to treat the employee fairly, he or she will find that there was no just cause for the discipline." *Id*. To that end, most collective bargaining agreements do not specifically define just cause, leaving the arbitrator to define the term.

For instance, when the Linden Education Association sued to vacate an arbitrator's award for "reading terms" into its CNA by interpreting the term "just cause," the New Jersey Supreme Court ruled that the arbitrator had acted within his contractual authority. Specifically, the Supreme Court found that

> Just cause was not defined in the Agreement, and therefore it was necessary for the arbitrator to give meaning to the term. The arbitrator did that. In our view, the fair and reasonable interpretation of the arbitrator's decision is that the arbitrator found there was no just cause to terminate the employee. That decision is reasonably debatable, and therefore, the trial court properly confirmed the award.

Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko, 202 N.J. 268, 278 (2010). The Supreme Court specifically found that, where parties ask the arbitrator to rule on whether just cause exists, they grant the arbitrator the authority to define the term. In doing so, the court expressly adopted federal court interpretations finding that an arbitrator does not "impermissibly 'read into' the parties' agreement terms that were not there" by defining "just cause" or "proper cause" when the arbitrator "imply interpreted the ambiguous term "proper cause" in a manner unsatisfactory to management." Instead, where a contract "allows [the employer] to discipline or discharge for 'proper cause' […] but does not define the phrase[,] [w]hen the grievance was submitted to arbitration, the arbitrator was forced to decide what "proper cause" meant[.]" *Id*. at 280-281 (citing *Transportation Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 380-381 (3rd Cir. 1995))

Here, the Union and the Authority did not create the phrase "just cause" through their own negotiations. Rather, they used a well-recognized term of art in collective negotiations, and specifically bargained to submit disputes concerning the interpretation of that phrase to a mutually-selected arbitrator. Arbitrator Pierson was that arbitrator, and interpreted the term accordingly. In the absence of a contractual definition, the Arbitrator reviewed the evidence before him and interpreted the ambiguous term, as was his specific charge when the parties asked him to rule on the question of "did the Authority have just cause to terminate Cheniqua Sims?" (Pa 19). The Authority's disagreement with Arbitrator Pierson's interpretation of the ambiguous phrase does not render his decision invalid, and presents no basis for this Court to vacate his award. The Arbitrator's ruling is thus entitled to this Court's deference, and the Chancery Court's Order confirming the Award should be affirmed.

The Authority's argument that the Arbitrator invented and imposed a new work rule that the employer may never terminate an employee on indefinite non-FMLA medical leave is unsupported by either the record or case law. Significantly, the Arbitrator's Award simply does not state a "new work rule" as the Authority alleges. Rather, the Arbitrator simply ruled on the narrow issue before him: whether the Authority had just cause to terminate Ms. Sims. Under the specific circumstances presented and the Authority's shifting rationale for why it

terminated Ms. Sims, the Arbitrator ruled that there was no just cause for her termination. In doing so, in fact, Arbitrator Pierson specifically noted that "an employer is empowered to terminate an employee with a permanent inability to perform or a long-term medical condition preventing a return to work[.]" (P1 35, emphasis added). He simply also noted that "consideration must be afforded to an employee with a temporary medical condition which can be corrected and able to return to work" as well as "time limitations." (Pa 35). Arbitrator Pierson also noted that the Authority could have "placed Ms. Sims on temporary suspension, pursued definitive medical information (from a neutral source) and considered her continued employment on medical finality." (Pa 36). By failing to properly consider those circumstances and alternatives, which mitigated the Authority's power to terminate Ms. Sims for medical incapacity, Arbitrator Pierson ruled that the Authority acted without just cause. Arbitrator Pierson did not rule that the Authority had violated some bright-line rule against terminating employees on medical leaves of absence, but that the Authority had violated this particular contract by terminating this particular grievant under these particular circumstances. Again, as discussed above, that analysis of these facts under this CNA fell squarely within Arbitrator Pierson's contractual purview, and his conclusion is entitled to deference.

In its Appellate Brief, the Authority relies heavily on one case to argue that Arbitrator Pierson's interpretation and application of just cause should be set aside for failure to adhere to the CNA's terms. There, an employee pursued a grievance to arbitration and was awarded a specific benefit – the right to overtime pay for off-duty visits to doctors for treatment of several injuries – based upon an arbitrator's misinterpretation of the applicable CNA. *PBA Local 160 v. Twp. Of North Brunswick*, 272 N.J. Super. 467, 470-472 (N.J. Super. Ct. App. Div. 1994). There, the applicable contract provided that officers "sent to a Township doctor while off duty" would be paid overtime for time spent at the appointment and in transit there and back. *Id*. at 472. The Arbitrator in that case ruled that, because the grievant's Township-sponsored health benefits paid for the appointments without objection by the Township, the doctor was a "Township doctor," and thus that the grievant was entitled to pay. *Id*. The Court, however, found that the employer did not have the authority to disregard the requirement that the grievant be *sent* by the Township, and that by disregarding that prerequisite, "the arbitrator ignored the contractual provision that prohibited him from modifying or altering in any way the provisions of the agreement." *Id*. at 475. The *Local 160* court also found that the arbitrator erred by conflating status as a "Township doctor" with health insurance coverage. By disregarding the "sending" requirement, the *Local 160* court ruled that the arbitrator imperfectly executed his authority to issue an

award by undue means, in essence rewriting the agreement for the parties by ignoring prerequisites to obtaining those benefits. *Id*. at 475-477.

The instant CNA does not include any similar prerequisite to just cause. In its Appellate Brief, the Authority argues that its contractual right to "determine [employees'] qualifications and conditions of continued employment or assignment" extends to its handling of employee medical evaluations, and that Ms. Sims' condition was subject to the Authority's supposedly unconstrained right to declare her physically unfit for duty, even when presented with an authentic doctor's note which authorized her to return to work without restriction. The Authority essentially argues that its right to determine qualifications and conditions of continued employment places employee discharge beyond the reach of the CNA's requirement that employees may only be disciplined or discharged for just cause. (Pa 20, 22-24), and that Arbitrator Pierson ignored that language. The Arbitrator weighed the provisions and competing positions of the parties, and concluded that Ms. Sims' termination was not for just cause. To be sure, the Authority never argued before the Arbitrator that Ms. Sims' termination was subject to any standard other than just cause; indeed the parties affirmatively agreed that the issue in the arbitration proceedings was whether "the Employer ha[d] just cause to terminate" Ms. Sims, not whether the Authority had the unfettered right to terminate her employment. (Pa 19).

Furthermore, the Authority's Appellate Brief focuses entirely on Ms. Sims' physical abilities. As Arbitrator Pierson ruled, "at the time of termination, the only reason offered to justify" the Authority's termination of Ms. Sims' employment was "the Grievant's inability to physically perform the work required, based upon which the Arbitrator concluded that the "record ultimately revealed" that "Ms. Sims' medical issues were resolved, her temporary medical condition corrected and her fitness to return to work confirmed," thus precluding a finding of just cause based solely upon her supposed physical incapacity. However, as the grievance advanced, the Arbitrator noted that the Authority changed its justification for terminating Ms. Sims from her injury to a lack of funding and budget cuts. (Pa 36-37). The Arbitrator noted that, even if that were true, the Authority requested additional manpower on August 19, 2020, and again in November 2020, conclusively establishing that by August 19, any budgetary constraints on reinstating Ms. Sims had been resolved, and thus set August 19 as the effective date of Ms. Sims' reinstatement. Conspicuously, the Authority's Appellate Brief does not even attempt to explain the Authority's inconsistent rationalizations for its decisions advanced throughout the grievance process.

The Arbitrator reviewed the CNA in its entirety, including both the Authority's right to determine employee qualifications and the requirement that employees may only be disciplined and discharged for just cause. There was no

dispute before the Arbitrator that Ms. Sims' termination was subject to the just cause standard, and the Arbitrator rightly concluded that the Authority lacked just cause, both because of the medical documentation which Ms. Sims presented and because the Authority advanced inconsistent explanations for her termination. These interpretations of just cause are more than reasonably debatable, and Arbitrator Pierson's award deserves to be enforced accordingly.

POINT II

THIS COURT SHOULD CONFIRM THE ARBITRATION AWARD BECAUSE THE ARBITRATOR DID NOT EXCEED THE SCOPE OF HIS AUTHORITY UNDER THE CONTRACT.

In its Appellate Brief, the Authority argues that Arbitrator Pierson exceeded the scope of his by defining the undefined term "just cause" as it appears in the parties' Collective Negotiations Agreement. The Authority argues that the Arbitrator did not consider the specific "intent of the parties" when they bargained to include the just cause standard for discipline and discharge in the CNA. The Authority's argument on this point is unavailing.

It is undisputed that the Authority did not present any evidence concerning the parties' bargaining over the just cause provision, any evidence of a past course of dealing, or any other such evidence before the Arbitrator in the arbitration

hearings. It did not argue the intent of the language to the Arbitrator, and even now is not arguing that Arbitrator Pierson ignored any actual bit of history between the parties in arriving at his definition of just cause. Rather, the Authority simply disapproves of the Arbitrator's definition because it resulted in an award that was unfavorable to the Authority. To the extent that the Authority believes that there is some aspect of the parties' history which may have informed the Arbitrator's definition, it should have presented that evidence and those arguments to the Arbitrator in the first instance, not here. Considering any evidence beyond the arbitral record would impermissibly grant the Authority a second bite at the proverbial apple, and would violate the Supreme Court's guidance in *Misco* that courts should rely on the factual findings of arbitrators, even where they are viewed as silly or improvident. *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. at 29 (1987).

The Authority cites to two cases for the proposition that an arbitrator cannot define "just cause" without considering the parties' bargaining history or prior course of dealing in applying the term. The Authority misapplies the holdings in each case, and neither compels this Court to vacate Arbitrator Pierson's Arbitration Awards.

The Authority's reliance on *Linden v. Board of Educ. v. Linden Educ. Ass'n*, 202 NJ 268 (2010) is misplaced. There, the New Jersey Supreme Court affirmed

the authority of arbitrators to define "just cause" where a Collective Negotiations Agreement does not. There, "Just cause was not defined in the Agreement, and therefore it was necessary for the arbitrator to give meaning to the term." *Id*. at 278. The applicable CNA provided that tenured employees "shall not be disciplined, discharged or not reappointed without just cause," and that "Grievances regarding the above shall be subject to binding arbitration under the terms of this Agreement." *Id*. at 272-273. The Linden Board of Education fired a tenured employee for mistakenly entering and cleaning a classroom while students were changing clothes, but the arbitrator reduced that termination to a ten-day suspension, ruling in part that just cause "requires that the penalty fit the infraction and not be disproportionate given the totality of the circumstances, including mitigating factors." *Id*. at 273. Like the Authority, Linden moved to vacate that arbitration award because the arbitrator had defined "just cause" without reference to the parties' bargaining history.

The New Jersey Supreme Court distinguished cases where the CNA itself specifically defines "just cause," where an arbitrator may not deviate from the specifically defined parameters. *Id*. at 279-280. The Supreme Court specifically distinguished *County College of Morris Staff Ass'n v. County College of Morris*, 100 NJ 383 (1985), which the Authority also cites in its brief, noting that "[i]n that case, the contractual language defined the circumstances constituting just cause for

termination, and the arbitrator expressly found just cause to terminate the employee" and "the arbitrator exceeded his authority in ordering suspension, because he neglected to discharge the employee pursuant to the agreement of the pa'rties." *Linden v. Board of Educ. v. Linden Educ. Ass'n*, 202 NJ at 278-279 (citing *Morris County*, 100 NJ at 392-395).

In *Linden* the Court expressly distinguished *Morris County* from cases like the instant one, where "the Agreement here did not define just cause for discharge" and where "the expertise of the arbitrator was sought, and the arbitrator was free to determine that the misconduct did not rise to a 'level . . . that constitutes just cause for discharge.'" *Id*. at 279 (quoting *Morris County*, 100 NJ at 394). Instead, the Supreme Court held that "the arbitrator did not impermissibly 'read into' the parties' agreement terms that were not there" when the arbitrator "simply interpreted the ambiguous term 'proper cause' in a manner unsatisfactory to management." *Id.* at 179-281 (quoting *United Transportation Union Local 1589 v. Suburban Transit Corp*., 51 F.3d 376, 378 (3d Cir. 1995)).

In *Linden Board of Educ.* as here, "the CBA allow[ed the employer] to discipline or discharge for 'proper cause' . . . but does not define the phrase," and that the arbitrator was thus "forced to decide what 'proper cause' meant[.]" *Id*. Because the *Linden* CNA did not specifically define just cause, "the arbitrator needed to fill in the gap and give meaning to the words "just cause." The arbitrator

did so." *Id*. at 281. Thus the Supreme Court ruled that the *Linden* award should be confirmed. The Union agrees with the Authority that *Linden* compels a clear result in the instant case: that the Arbitrator was not acting with undue means by defining an ambiguous term in the CNA, and that his award is entitled to confirmation.

Similarly, in *Mobil Oil Corp. v. Independent Oil Workers Union*, 679 F.2d 299 (3rd Cir. 1982), deferred to an arbitrator's definition of just cause where the applicable CBA did not provide one. There, Mobil terminated an employee, and the arbitrator there ruled that the termination was without just cause. The Court opined that "where an arbitrator determines what a contractual phrase, such as 'cause' in a submission means, the arbitrator's determination must be informed by what that word was intended to mean[]." *Id*. at 302. The Third Circuit deferred to the arbitrator's framing of the issue before him, as "interpretation of the submission will likely involve consideration of the same issues as a review of the merits." *Id*. at 302. In actually reviewing the arbitrator's award at issue in *Mobil Oil*, however, the Third Circuit ruled that the arbitrator did not dispense with his own brand of industrial justice. *Id*. at 303-304. Mobil argued that allowing the arbitrator to define "cause" would "usurp Mobil's power to discharge and to ignore the parties' express limitations on his authority by merely expressing his own sense of discipline" and "render Mobil's right to discharge for cause meaningless." *Id*. at 303-304. The Third Circuit disagreed, ruling that the "short answer to Mobil's

contentions is that Mobil agreed to leave to an arbitrator the resolution of disputes whether cause existed for the discharge of any employee represented by Local 8-831. The arbitrator has ruled, and Mobil is bound by that award." *Id*. at 304.

The rationale of *Mobile Oil* applies to the instant appeal as well. By declining to define "just cause" specifically in its CNA with Local 253, the Authority agreed to leave that term open to an arbitrator's interpretation. Just like in *Mobil Oil*, Arbitrator Pierson utilized his expertise as a labor arbitrator to review the contract between the Union and the Authority and define just cause, then applied that definition to the Authority's wrongful termination of Cheniqua Sims. Simply put, "the short answer to" the Authority's "contentions is that [it] agreed to leave to an arbitrator the resolution of disputes whether cause existed for the discharge of any employee represented by" the Union; "the arbitrator has ruled, and [the Authority] is bound by that award." *Id*. at 304.

The CNA between the Union and the Authority requires that employees may only be disciplined or discharged for just cause, but does not expressly define what "just cause" means. In other words, when disputes concerning discipline and discharge arise, the term is left to the definition and interpretation of an arbitrator. Here, Arbitrator Pierson did just that: he "simply interpreted the ambiguous term '[just] cause' in a manner unsatisfactory to management," and management seeks vacatur of the award for that reason. *Linden Bd. Of Educ. v. Linden Educ. Ass'n* at

179-281 (quoting *United Transportation Union Local 1589 v. Suburban Transit Corp*., 51 F.3d at 378 (3d Cir. 1995)). In its brief, the Authority did not cite a single case where an arbitration award was vacated for defining "just cause," but did cite to two in which awards were confirmed over objections materially identical to the Authority's own. In both *Linden* and *Mobil Oil*, the New Jersey Supreme Court and the Third Circuit respectively affirmatively ruled that arbitrators faced with an undefined "just cause" standard for discipline are charged with defining the term. This Court should do the same and confirm Arbitrator Pierson's Award.

CONCLUSION

For all of the foregoing reasons, the Eastern Atlantic States Regional Council of Carpenters, Local 253, respectfully requests that the Appellate Division affirm the trial court's Order confirming the Arbitration Award and dismissing the Newark Housing Authority's Complaint to Vacate same.

Respectfully submitted,

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CERTIFICATION OF SERVICE

I, Seth B. Kennedy, Esq., hereby certify that on June 17, 2024, on behalf of Defendant-Appellee Eastern Atlantic States Regional Council of Carpenters, Local 253, I served a copy of Defendant-Appellee's Appellate Brief via email and electronic filing upon counsel for the Respondent at the following address:

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NEWARK HOUSING AUTHORITY, Appellant, v. EASTERN ATLANTIC STATES REGIONAL COUNSEL OF CARPENTERS, LOCAL 253, Appellee.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-001169-23 On Appeal from: CHANCERY DIVISION: ESSEX COUNTY DOCKET NO.: ESX-C-000219-22 Sat Below: JODI LEE ALPER, JSC CIVIL ACTION

APPELLANT, NEWARK HOUSING AUTHORITY'S APPELLATE REPLY BRIEF

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PRELIMINARY STATEMENT

Defendant Eastern Atlantic States Regional Counsel of Carpenters, Local 253's (the "Union's") opposition brief does little more than resort to the truism that an appellate court must review an arbitrator's award under a deferential standard, arguing the Arbitrator's award is insulated from any form of effective appellate review and must be affirmed absent egregious and obvious misconduct. The Union's opposition addresses neither the Arbitrator's critical errors nor the crux of Newark Housing Authority's ("NHA") arguments. The Union's opposition thus fails to grasp the reasons why the Arbitrator's award here is fatally flawed and must be set aside.

But, the well-established deferential arbitral standard of review does not entitle an arbitrator to unfettered power, nor does it insulate an arbitration award from scrupulous appellate review. An arbitrator's interpretation of the parties' collective bargaining agreement must be "reasonably debatable," actually interpreting the applicable contractual language. Moreover, the arbitrator may not ignore the express contractual language to create a "better" agreement for a party by interpreting undefined terms such as "just cause." The Arbitrator's fatal flaw here was his utter failure to interpret the Collective Bargaining Agreement ("CBA"). Indeed, his decision does not reference the relevant contract language at all. By ignoring the CBA's plain terms, the Arbitrator failed to adhere to

express language granting NHA sole and exclusive authority to set the standards of employee performance. And the Arbitrator's threshold error ultimately contaminated his later attempt to define "just cause" rendering the Award not "reasonably debatable."

The Union's opposition fails to address, much less refute NHA's position, instead, merely restating time and again that the Arbitrator merely was inoffensively defining the term "just cause." But, while the Arbitrator could define just cause, his definition had to be based upon, and not contradict, the CBA's express terms. It certainly cannot be suspended on a flimsy platform of personal opinion.

The Union also reinterprets the Arbitrator's findings, arguing that the Arbitrator believed NHA could have pursued alternative measures to Grievant Sims' termination. To begin, the Arbitrator did not base his decision on these "findings," but rather on his personal opinion that NHA could not terminate an employee on a temporary medical leave. The Union's arguments distort the undisputed facts and plain contractual language. NHA terminated Sims based on a doctor's note she produced stating she could not perform the essential duties of her job for a period of at least six months. NHA expressly told Sims she was terminated because she could not perform her job duties. These facts are

undisputed. Any post-termination information NHA provided to Sims, following a second contradictory and suspicious doctor's note, is irrelevant.

Accordingly, the trial court's decision must be reversed and the Arbitration Award vacated.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

NHA relies upon the statement of facts and procedural history set forth in its appellate brief.

LEGAL ARGUMENT

I. CONTRARY TO THE UNION'S ARGUMENTS, THE ARBITRATOR'S DECISION WAS NOT A REASONABLY DEBATABLE INTERPRETATION OF THE PARTIES' CBA BECAUSE IT IGNORED THE CBA'S EXPRESS TERMS.

The Union first argues that the Arbitrator's decision was a "reasonably debatable" interpretation of the parties' CBA because the Arbitrator "applied well-established principles of just cause, expressly confining himself to the language of the C[B]A, and determined that based on the evidence and testimony presented," NHA did not establish that it had just cause to terminate Sims. (Db12)[1] The Union supports its argument by claiming that just cause is little more than a shorthand for "what an arbitrator thinks is fair." (Db12)

[1] "Db" refers to the Union's appellate brief.

In reality, the Arbitrator could not possibly have confined himself to the CBA's express terms because the CBA unequivocally grants NHA the right to set the standards of performance for its employees. The CBA provides:

> A. The Authority hereby retains until itself all powers, rights, authority, duties and responsibilities conferred upon and vested in it prior to the signing of this Agreement by the laws and Constitution of the State of New Jersey and of the United States, including:
>
> . . . .
>
> 4. To hire all employees, and subject to the provisions of law, **to determine their qualifications and conditions of continued employment, or assignment, and to promote and transfer employees**.
>
> 5. To suspend, discharge or take any other appropriate disciplinary action against any employee for just cause according to law.
>
> ***
>
> 7. To make such changes as it deems desirable and necessary for the efficiency and effective operation of the Authority.

(Pa43-44) (emphasis added)

The CBA further provides that an arbitrator is bound by its terms:

> 2. **The arbitrator shall comply with and be bound by the provisions of this Agreement. The arbitrator shall have no power to add to, delete or modify any provisions of this Agreement**.
>
> 3. **The arbitrator shall be without power or authority to make any decision contrary to or**

> **inconsistent with or modifying or varying in any way the terms of this Agreement, or applicable law or rules or regulations having the force or effect of law**.
>
> 4. **The arbitrator's decision shall not usurp the functions of power of the Authority as provided by law**.
>
> (Pa44-45 (emphases added).)

Given these express terms, the Arbitrator would not have reached the just cause issue had he actually interpreted the CBA's plain language because the CBA grants NHA the express and unfettered authority to determine its employees' "qualifications and conditions of continued employment." (Pa43-44) The Arbitrator's subsequent findings, including his interpretation of the term "just cause," all flow from this initial and fatal error. His interpretation therefore cannot be reasonably debatable because it is not a "justifiable" or otherwise plausible interpretation of the parties' agreement. *See Borough of Carteret v. Firefighters Mut. Benevolent Ass'n, Loc. 67*, 247 N.J. 202, 212 (2021); *PBA Local 160 v. Township of North Brunswick*, 272 N.J. Super. 467, 476-77 (App. Div. 1994) (holding that arbitrator's interpretation of a contract cannot, as a matter of law, be "reasonably debatable" if the arbitrator "obviously disregarded" a term of the parties' agreement). *See also City Ass'n of Supervisors & Adm'rs v. State Operated Sch. Dist. Of Newark*, 311 N.J. Super.

300, 312 (App. Div. 1998) (rejecting arbitration award which relied on past practices and "ignor[ed] the clear language of the agreement").

Critically, the Union does not engage at all with the Arbitrator's failure to adhere to the CBA's express terms, or with the actual language of the Arbitrator's decision, which relies not on the actual contract language or on the testimony in the record, but rather on the Arbitrator's personal "opinion" that NHA cannot terminate an employee with a "temporary medical condition." (Pa35) Again, the CBA grants NHA the right to set the standard for continued employment, including for employees with a "temporary medical condition."

Rather than attempt to justify the Arbitrator's failure to interpret the CBA's plain language, the Union instead attempts to frame the Arbitrator's decision as a fair and common sense middle ground that would obviate a harsh result. According to the Union, the Arbitrator did not create a new work rule that does not appear in the CBA, but rather determined, based on the specific facts before him, that NHA should have pursued alternatives such as placing Sims on temporary suspension, obtaining medical information from an alternative source, or pursuing other alternatives short of termination. The Union further notes that the Arbitrator's decision would have allowed NHA to terminate an employee with a permanent disability or long-term medical condition. (Db15)

In truth, the Union's attempt to justify the Arbitrator's decision only further draws attention to its fatal flaws. The CBA does not require NHA to continue to employ a worker on short-term disability. On the contrary, it grants NHA wide discretion to set the standard of employee performance and continued employment. If NHA determines an employee cannot perform, whether physically or otherwise, it can terminate that employee.[2] By holding that NHA can terminate employees on long-term or permanent disability, but not employees on short-term or indeterminate disability, the Arbitrator's ruling creates a new work rule that does not appear in the CBA, that contradicts the CBA's plain language, and that usurps authority granted to NHA through the collective bargaining process. NHA had no obligation to place Sims on temporary suspension or to verify further her medical status. In fact, the doctor's note NHA received from Sims was produced by a medical office that had no

[2] This certainly is not to say that NHA's discretion in determining the standard for continued employment is completely insulated from review. If appropriate facts existed, which they did not here, demonstrating inconsistent and/or arbitrary application of NHA's discretion, the Arbitrator would have been well within in his right to determine that the termination did not meet the "just cause" standard due to an inconsistent application of that performance standard, one of the traditional tests of "just cause." *See* Alyson Raphael, *Arbitrating "Just Cause" for Employee Discipline and Discharge in the Era of Covid-19*, 34 GEORGETOWN J. LEGAL ETHICS 1237, 1243 (2021) (citing Carroll R. Daugherty's "Seven Tests of Just Cause", as described in ADOLPH M. KOVEN & SUSAN L. SMITH, JUST CAUSE: THE SEVEN TESTS (revised by Donald F. Farwell, 3d ed. 2006)).

association with NHA. Simply put, NHA did what the CBA grants it the authority to do: it reviewed Sims' doctor's note prepared by an unaffiliated medical office, determined she no longer could perform her essential job duties -- a fact undisputed in the record -- and terminated her.

The Union next attempts to draw attention away from the merits of the Arbitrator's decision by pointing to alleged inconsistencies in NHA's reasons for terminating Sims. In particular, the Union notes that NHA offered different explanations for Sims' termination, and that its later explanation that it had no work available for her was contradicted by evidence in the record. The Union also draws attention to the second "authentic doctor's note which authorized [Sims] to return to work without restriction," and which it claims NHA ignored in favor of asserting an "unconstrained right to declare [Sims] physically unfit for duty." (Db17)

The Union's arguments are a gross distortion both of the record and of NHA's arguments. First, the Arbitrator did not rely upon NHA's rationale for terminating Sims or the second doctor's note in reaching his decision. Rather, his decision was based exclusively on his personal "opinion" that NHA could not terminate an employee on a temporary medical leave. Second, the Union ignores several critical and undisputed facts. It is undisputed that NHA received a doctor's note from Sims on December 30, 2019 stating that she could not

perform her essential job functions for a period of at least six months. NHA terminated her employment one week later, and expressly informed her that she was terminated because she could not perform her essential job functions. NHA's January 6, 2020 letter to Sims noted the limitations set forth in her doctor's note and informed her that there was no light duty work available to her. (Pa21) NHA's stated reason for terminating Sims could not have been more clear.

The Union's references to NHA's alternative explanations for Sims' termination refer to events occurring after her termination and after she provided a second, highly suspicious doctor's note directly contradicting her first doctor's note which Sims' own treating physician confirmed he had not prepared, authorized, or reviewed. (Pa33) NHA had no duty to reconsider Sims' termination,[3] no duty to re-employ her when requesting referrals for new carpenters, and no duty to maintain any particular number of staff. Thus, the Union's argument that NHA could not consistently explain why Sims was

[3] It must be noted that nowhere in his decision did the Arbitrator cite any contractual or legal basis requiring NHA to reconsider a previously implemented termination. The Arbitrator thus placed an extra-contractual obligation unsupported by even a past practice. An employer can only be charged with acting upon the knowledge it had in its possession at the time of the discharge. *See Tynan v. Vicinage 13 of Superior Ct.*, 351 N.J. Super. 385, 402 (App. Div. 2002) (noting principle that employer cannot be charged with unlawful termination unless plaintiff employee shows that employer actually "knew" of the alleged unlawful motivating factor at the time of termination).

terminated are a red herring. NHA's initial letter to Sims explained her termination; that should be the end of the matter.

Finally, the Union makes several specious attempts to distinguish case law which NHA cited in its appellate brief which requires that the Court overturn the Arbitrator's decision here. In particular, the Union argues that *PBA Local 160*, *supra*, does not control here because that case concerned an employee's failure to meet "prerequisites" in the parties' agreement, and that no such "similar prerequisite to just cause" is present here. The Union's interpretation of *PBA Local 160* clearly, and perhaps purposely, misses the point and distorts that Court's holding. The *PBA Local 160* Court did not focus on the issue of "prerequisites" set forth in the parties' agreement, but rather on the arbitrator's failure to adhere to the express contract terms. The Court explained that it was required to vacate the award because it "failed to draw its essence from the collective negotiations of the parties, and because the arbitrator exceeded the authority granted him in the contract and was not free to disregard the contractual" language. 272 N.J. Super. at 476-77.

The Arbitrator here committed precisely the same error. He was not free to disregard the contractual language to which the Union previously had agreed, providing NHA the right to control the standards of employee performance. By doing so, the Arbitrator created a new work rule based not on the parties'

agreement, but on his own, personal sense of industrial justice. The new work rule usurped NHA's authority and therefore, the Award must be reversed.

II. CONTRARY TO THE UNION'S ARGUMENTS, THE ARBITRATOR EXCEEDED HIS AUTHORITY UNDER THE CBA BECAUSE HE FAILED TO ABIDE BY THE CBA'S EXPRESS TERMS.

In its second point, The Union attempts to reframe NHA's arguments as an attack on the Arbitrator's fact findings and nothing more than disagreement and dissatisfaction with the Arbitrator's interpretation of the term "just cause." On the contrary, NHA readily agreed in its appellate brief that an arbitrator has the authority to fill in gaps in an agreement, including by interpreting undefined terms. The issue here does not concern the Arbitrator's fact findings or his attempt to define the term "just cause."

In fact, the Arbitrator did not make any fact findings that were relevant to his final award. He recounted the testimony in the record without weighing its credibility or otherwise relying upon it. He also noted several post-termination issues regarding the second doctor's note and NHA's later explanations as to why Sims was terminated, but again did not rely upon them in reaching his decision. Rather, his decision was based entirely on his own personal "opinion" that NHA could not terminate an employee with a "temporary medical condition" because there was a "reasonable expectation that Sims would return to her duties" at some point in the future, a statement completely unsupported

by any credible evidence in the record. (Pa35) The Arbitrator's determination that NHA could not terminate an employee on a temporary medical leave was the sole basis underlying his decision, and was not based on the testimony or other facts in the record. By placing a restriction on the NHA's authority to control the performance standards for its personnel, the Arbitrator violated the CBA's express terms. *See PBA Local 160*, 272 N.J. Super. at 477.

The Union then faults NHA for not submitting evidence regarding the parties' past practices to the Arbitrator, arguing that NHA should not be given "a second bite at the proverbial apple" to introduce evidence to this Court beyond the arbitral record. NHA has presented no such argument. The issue does not concern ignoring evidence in the record nor unsubmitted evidence, but the Arbitrator's ignoring the CBA's express terms. NHA does not ask this Court to re-weigh the evidence, to second-guess the Arbitrator's fact findings (to the extent there are any), or to consider new evidence never presented to the Arbitrator. This Court's intervention is required because the Arbitrator made a critical, fatal, and reversible error by ignoring the CBA's plain language and creating a new work rule for which the parties did not bargain. *See PBA Local 160*, 272 N.J. Super. at 477. This Court can and should correct the Arbitrator's mistake.

Finally, the Union cites to two cases as supporting its position that the Arbitrator did not exceed his authority: *Linden Bd. of Educ. v. Linden Educ. Ass'n ex rel. Mizichko*, 202 N.J. 268, 276 (2010); and *Mobil Oil Corp. v. Independent Oil Workers Union*, 679 F.2d 299 (3rd Cir. 1982). As to *Linden*, the Union attempts to distinguish a prior case cited extensively by NHA: *Cty. Coll. of Morris Staff Ass'n v. Cty. Coll. of Morris*, 100 N.J. 383, 391 (1985), arguing that *Linden* holds an arbitrator is free to define "just cause" where the parties previously have not defined that term. NHA does not dispute that well-established principle. Importantly, the *Linden* Court explained that an arbitrator never can "contradict the express language of the contract," even when attempting to define "just cause." 202 N.J. at 276. The Arbitrator here ignored that command. Thus, the *Linden* Court did not distinguish *County College of Morris*, as the Union contends, but rather reaffirmed the holding that an arbitrator may not disregard express contractual language and "read in" language making a better deal for the grievant than the union made through the collective bargaining process. *See Cty. Coll. of Morris*, 100 N.J. at 393.

Moreover, in *Linden,* the Supreme Court explained that an arbitrator's determination of "just cause" is particularly suited to cases of "misconduct" where the arbitrator must determine whether the employee's actions "rise to a level . . . that constitutes just cause for discharge." 202 N.J. at 279. But this

matter does not concern misconduct, but rather NHA's ability to terminate an employee unable to perform. The Union argues that NHA is attempting to insulate all of its personnel decisions from arbitral review by claiming it has "unfettered discretion" to terminate anyone it wants. The Union's argument is disingenuous. In cases of employee discipline, for example, there is no question an arbitrator can apply traditional standards to determine whether NHA has just cause to terminate an employee. This particular matter, however, concerns an employee who could not perform the essential duties of their job, where the CBA grants NHA the exclusive right to set the standards of performance. Accordingly, in this particular case, but certainly not in all cases, NHA had the authority to terminate Sims in its sole discretion. The Arbitrator should have reached that conclusion upon reviewing the CBA's terms, but failed to do so.

Finally, the Union's citation to *Mobil Oil*, *supra*, warrants little discussion. Beyond the fact that the case is not binding precedent, it did not concern an arbitration in which the arbitrator clearly exceeded his authority by violating the express terms of the parties' agreement. Accordingly, it is of little value to this Court and should yield to the extensive and binding case law set forth in NHA's appellate brief. As previously explained, the case law requires that a reviewing court set aside an arbitrator's decision where that decision

contradicts the express terms of the parties' agreement. This Court should reach that conclusion here and set aside the Arbitrator's award.

CONCLUSION

For the foregoing reasons, NHA respectfully requests that the Court reverse the trial court's decision in favor of the Union and direct that the Trial Court enter judgment on behalf of NHA vacating the arbitration award in this matter.

Respectfully submitted,

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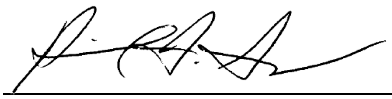
By: 
Richard H. Bauch

DATED: July 17, 2024