FILED, Clerk of the Appellate Division, September 13, 2023, **A-002935-22**, **AMENDED**

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COUNTY OF WARREN, Plaintiff-Appellant, NICHUA LIACI, Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002935-22 CIVIL ACTION ON APPEAL FROM: Superior Court-Chancery Division, Warren County WRN-C-016006-23 Sat Below: Hon. Kevin M Shanahan, A.J.S.C.

BRIEF ON BEHALF OF PLAINTIFF-APPELLANT COUNTY OF WARREN

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Date of Submission: September 6, 2023

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PRELIMINARY STATEMENT

The central issue on this appeal is whether a settlement between Plaintiff, County of Warren, and Defendant, Nichua Liaci, a former corrections officer employed by Plaintiff, memorialized on the record at an administrative hearing before a hearing officer, during which the undisputed record reflects that:

- both parties were represented by counsel;
- defense counsel indicated a settlement was reached;
- defense counsel confirmed and clarified the material terms on the record;
- Defendant confirmed her understanding of the settlement on the record;
- Defendant confirmed voluntariness, absence of impairment, and full understanding of the settlement as described on the record by Plaintiff's counsel and clarified and confirmed by her counsel; and
- Defendant assented to the settlement before the hearing officer

is valid and binding on the parties. Plaintiff argues that the answer to this straightforward inquiry is yes, and respectfully requests that Your Honors reverse the trial court's denial of its Order to Show Cause ("OTSC") and remand the matter to the trial court to permit the enforcement of the agreed upon and memorialized settlement.

Simply put, the trial court erred in validating Defendant's "buyer's remorse" which came three weeks after the agreed-upon settlement was reached and memorialized, which was three weeks too late. Additionally, despite Defendant's belated "change of heart" and efforts to repudiate the agreed-upon

and memorialized settlement, at no point after the hearing did defense counsel ever claim there was no settlement reached. Instead, after receiving the proposed form of written Voluntary Retirement and Release Agreement (the "Agreement") for comment and execution, defense counsel confirmed receipt and represented that he would be providing redlined edits shortly prior to Defendant's execution.

Nonetheless, the trial court denied Plaintiff's OTSC on rather confounding grounds relying exclusively upon the Age Discrimination in Employment Act ("ADEA") waiver provisions of the Older Workers Benefit Protection Act ("OWBPA") to give credence to Defendant's late interposed change of heart. Because the OWBPA only impacts whether an ADEA waiver is valid, the trial court misinterpreted this provision and erred in finding it permitted Defendant to unilaterally repudiate the entirety of the agreed-upon and memorialized settlement.

Consequently, based on the trial court's mistaken reasoning, it found that, despite the fact that a settlement was reached, agreed to, and memorialized on the record, Defendant nevertheless had the right to repudiate the settlement three weeks later, based upon the OWBPA, an issue not addressed on the record memorializing the settlement, not argued or briefed below, and not consistent with applicable law. Such a determination and refusal to uphold an agreed upon

and memorialized settlement is entirely inconsistent with the law and public policy of this State, which favors the entry and enforcement of settlements.

Therefore, Plaintiff respectfully recommends that Your Honors reverse the trial court's denial of its OTSC and enforce the agreed upon and memorialized settlement. Defendant's "buyer's remorse" cannot and should not serve as a basis for invalidating an agreed upon and memorialized settlement contract. A contrary result would have far-reaching consequences for settlements and concomitant public policy in this State.

PROCEDURAL HISTORY

On March 28, 2023, Plaintiff filed a three-count Verified Complaint in Superior Court–Chancery Division, Warren County, alleging that it was entitled to a declaratory judgment ruling that the settlement reached during an administrative hearing was an enforceable contract, and Defendant breached said contract as well as the covenant of good faith and fair dealing attendant thereto. (Pa1-Pa68). Additionally, Plaintiff filed an OTSC requesting that the terms of the settlement reached between Defendant and Plaintiff be enforced, and the awarding of counsel fees and costs. (Pa69-Pa93). The Court issued a scheduling order on March 30. (Pa94-Pa97). Subsequently, Plaintiff served an Attorney Certification and Proof of Service of the OTSC and Verified Complaint on Defendant on April 3. (Pa98-Pa107).

Also on April 3, Defendant submitted a letter brief and Attorney Certification in opposition to Plaintiff's OTSC. (Pa108-Pa130). Plaintiff filed its reply brief in response to Defendant's opposition on April 4. (Pa131-Pa134).

Oral argument was held on April 6 before The Hon. Kevin M. Shanahan, A.J.S.C. (1T). On April 12, Judge Shanahan rendered his decision from the bench, denied Plaintiff's OTSC, and remanded the matter to the hearing officer. (2T). Judge Shanahan entered a conforming order on April 17. (Pa135-Pa136).

On May 31, Plaintiff filed a Notice of Appeal. (Pa137-Pa141). This appeal follows.

STATEMENT OF FACTS

Plaintiff, the County of Warren, *inter alia*, operates the Warren County Correctional Facility. (Pa1, Verified Complaint ("VC") at ¶ 1). Defendant is a former employee of the Warren County Correctional Facility, where she was most recently employed as a Sergeant. (Id. at ¶ 2).

THE DECEMBER 2021 ALTERCATION, ENSUING INVESTIGATION, AND DISCIPLINARY CHARGES

On December 18, 2021, Defendant had an altercation with another corrections officer at a charity event at Phillipsburg Middle School. (Id. at ¶ 3).[1] Subsequently, the other corrections officer filed a complaint with Internal Affairs ("IA") relative to Defendant's conduct and alleging that Defendant engaged in harassment, threats of violence, unprofessionalism, and hostility. (Id. at ¶ 4). Shortly thereafter, on or about December 23, 2021, Defendant was suspended with pay. (Pa2, Id. at ¶ 6). On or about January 3, 2022, the County Administrator issued a Preliminary Notice of Disciplinary Action ("PNDA") to Defendant memorializing her suspension without pay pending the IA investigation. (Id. at ¶ 8; Pa14-Pa16, PDNA).

[1] Defendant, after the conclusion of her bout at a charity boxing event, "shouted expletives from inside the ring and in full view of witnesses from both the public and members of the law enforcement community at large, [and] made several obscene hand gestures . . . toward the gym bleachers that were full of event spectators." (Pa20). The target of these gestures and language was a fellow officer. (Ibid.). Defendant continued this shortly thereafter, and returned to the gym floor, directing "lewd, inappropriate" language at the other officer and the other officer's family; event security and off duty members of law enforcement had to escort Defendant and her family from the gym. (Ibid.). Nonetheless, Defendant repeatedly continued to engage with the other officer and members of her family while in the gymnasium lobby, walked behind them to their vehicles in the parking lot, and used "lewd, inappropriate language while on public school grounds in full view of the public." (Pa21).

The IA investigation was completed on or about April 27, 2022, and the results were communicated to the County Administrator. (Pa2, VC at ¶ 9). As a result of the investigatory findings, on or about May 18, 2022, the County Administrator issued an Amended Preliminary Notice of Disciplinary Action ("APNDA") which sought Defendant's removal, effective May 24, 2022. (Id. at ¶ 10; Pa17-Pa23, APNDA). In response to the APNDA, Defendant notified the County that she was appealing the APNDA and sought an administrative departmental hearing. (Pa2, VC at ¶ 12).

On August 7, 2022, through counsel, Defendant filed a Notice of Claim against Plaintiff asserting tortious interference, breach of implied covenant of good faith, breach of contract, misrepresentation, slander, libel, fraud, wrongful termination, and violations of the New Jersey Law Against Discrimination, the Conscientious Employee Protection Act, Title VII, and various state and federal civil rights violations. (Pa3, VC at ¶ 16). She also filed an EEOC charge against Plaintiff which was dismissed via Dismissal and Notice of Rights on December 16, 2022. (Id. at ¶ 17).

In response to Defendant's appeal of the APNDA charges which sought her removal, the matter was initially scheduled, with the consent of both parties, for an administrative departmental hearing on the merits of the charges in September 2022. (Id. at ¶ 18). The Honorable Gerard F. Smith was assigned to

the matter as the hearing officer. (Id. at ¶ 19). Thereafter, Defendant retained new counsel and the initial hearing dates were adjourned at defense counsel's request. (Id. at ¶ 20). The hearing was scheduled to proceed in December 2022. (Id. at ¶ 21).

During the hearing, Plaintiff presented multiple witnesses, statements, an exhaustive IA investigatory report, and cellphone and school surveillance videos in support of the disciplinary charges. (Pa4, VC at ¶¶ 22-23). County Counsel, J. Andrew Kinsey, prosecuted the charges and was present, along with the County Administrator, on each of the hearing dates. (Id. at ¶ 24). Defendant and both of her counsel were present during the entirety of the hearing. (Id. at ¶¶ 28-30).

DECEMBER 20, 2022 SETTLEMENT NEGOTIATIONS

On December 20, the third day of the hearing, defense counsel approached the County Counsel and County Administrator relative to the possibility of a settlement. (Id. at ¶ 25). Settlement discussions ensued between the parties, during which Defendant was represented by two attorneys, and also had family members present and available for consultation during the course of the negotiations. (Id. at ¶¶ 26-30). Following negotiations, counsel went on the record to memorialize a settlement reached by the parties. (Id. at ¶ 31; Pa31-Pa38, Transcript of Dec. 20, 2022 Memorialization of Settlement on Record).

THE DECEMBER 20, 2022 MEMORIALIZATION OF THE SETTLEMENT ON RECORD

After entering their appearances, the hearing officer stated, "And it's my understanding we've reached an agreement in this matter?" to which defense counsel replied, "That's correct, Your Honor." (Pa33, 3:19-22 (emphasis added)). Subsequently, Plaintiff's counsel stated he would review the terms of the settlement, and the following colloquy ensued:

> [PLAINTIFF'S COUNSEL]: I'll go over the terms of the agreement. My understanding is that [Defendant] will retire now through PFRS as of the date of the signed agreement which will be prepared this evening and forwarded to counsel tomorrow. In exchange for her retirement[, Plaintiff] dismisses the charges, and also [Defendant] is to sign a release of her right to sue and dismiss any lawsuits and the covenant not to sue [Plaintiff].
>
> She will be entitled to a payout of any unused accrued sick and vacation time per her labor contract. There will be a mutual non-disparagement clause, a neutral letter of reference which will be prepared and attached to the settlement agreement which sets forth her dates of employment and positions held. And she will waive any claim to backpay, but she will be paid an equivalent of 35 days pay, which will be issued to her in a check. It will not count toward any additional pension time or service credits, but whatever 35 days comes out to, it will be issued in a check and there will be tax withholdings.
>
> I believe that's the extent of the agreement.
>
> [DEFENSE COUNSEL]: Let me just make sure. It sounds like it is complete. Health insurance?

[PLAINTIFF'S COUNSEL]: Oh, health insurance, yes. She will, subject to Chapter 78 Contributions, . . . receive health benefits upon her retirement. And in the next three years the health insurance payments will be based on her current salary. And then when she hits 25 years, which will be on March 28th, 2025, she makes retiree health contributions pursuant to that plan until she reaches age 65, at which time she's Medicare eligible.

[DEFENSE COUNSEL]: I just want to clarify that it's health insurance for the family, the family plan.

[PLAINTIFF'S COUNSEL]: Yes, if she elects family.

[DEFENSE COUNSEL]: Okay.

[PLAINTIFF'S COUNSEL]: If she just wants to cover herself or cover herself and her husband, she can do that too. Under Chapter 78[,] you share in the premium contribution. So the more coverage you choose the more your share, the employee, share, the retiree share will be.

[DEFENSE COUNSEL]: But for the outstanding two plus years, no matter which premium she elects, [Plaintiff] will pay it.

[DEFENSE COUNSEL]: The employer's –

[PLAINTIFF'S COUNSEL]: Yes, the employer's share, yes, Chapter 78 employer's portion will pick up.

HEARING OFFICER: Counsel, is that your understanding?

[DEFENSE COUNSEL]: That is, Your Honor, we are just making sure.

HEARING OFFICER: Make sure your client has the same understanding.

> [DEFENSE COUNSEL]: That would be the entirety of the agreement as our understanding goes.
>
> [Defendant], are the terms that have been described by [Plaintiff's counsel] an accurate reflection of your understanding of the agreement resolving the matter you are attending today?
>
> [DEFENDANT]: Yes.
>
> [DEFENSE COUNSEL]: And you're not under the influence of any drugs, narcotics or otherwise medication to impair your judgment or thinking ability?
>
> [DEFENDANT]: No.
>
> [DEFENSE COUNSEL]: And . . . you've come to the agreement with this agreement voluntarily and without –
>
> [DEFENDANT]: Yes.
>
> [DEFENSE COUNSEL]: I just wanted to make sure.
>
> HEARING OFFICER: It's been fully explained to you, [Defendant]?
>
> [DEFENDANT]: Yes, Your Honor.
>
> HEARING OFFICER: And so as long as you understand it, and we are going to conclude this hearing here tonight, I want to thank both counsel for working very hard in coming to this agreement. . . .
>
> [(Pa33-Pa34, 3:23-7:11).]

As the dialogue demonstrates, both defense counsel and Judge Smith specifically questioned Defendant relative to her understanding and acceptance of the settlement. (Ibid.) Additionally, Defendant expressly acknowledged her

understanding and acceptance on the record. (Ibid.). Each defense counsel also independently verified that settlement had been reached, the terms, going so far as to clarify them adding to Plaintiff's counsel's recitation of the settlement reached and agreed upon. (Ibid.).

COUNSEL'S POST-SETTLEMENT COMMUNICATIONS

Consistent with the terms of the settlement memorialized on the record on December 20, 2022, the following day, County Counsel prepared and sent a Voluntary Retirement and Settlement Agreement (the "Agreement") reflecting the terms of the settlement to defense counsel via email. (Pa6, VC at ¶ 36; Pa39-Pa40, Email to Plaintiff's Counsel; Pa41-Pa44, Agreement). Having received no response, County Counsel sent a follow-up email to defense counsel on December 27 to confirm receipt of the draft written Agreement. (Pa6, VC at ¶ 38; Pa45-Pa48, Emails). Later that day, defense counsel responded to the December 27 email, confirmed receipt, and indicated that they were redlining the draft written Agreement "with some issues [they] saw" and "should be getting back to [Plaintiff's counsel] shortly." (Pa7, VC at ¶ 39; Pa46, Emails).

Defense counsel sent an additional email to Plaintiff's counsel on December 29, stating they would have "a copy of the redlined agreement shortly" and requested, "in the meantime," the balance of Defendant's hours in her timebank, as well as Plaintiff's policy stating the maximum number of hours

Plaintiff is permitted to pay out. (Pa7, VC ¶ 39; Pa46, Email). Notably, there was no suggestion from defense counsel that no settlement had been reached, and, in fact, he requested PTO balances necessary to finalize the settlement Agreement. (Pa7, VC ¶ 42; Pa46, Email). Thereafter, County Counsel forwarded additional corrected PTO information on December 30 to defense counsel to finalize the settlement Agreement. (Pa7, VC ¶ 46; Pa55, Email).

On or about January 6, 2023, after not hearing from defense counsel, County Counsel reached out to defense counsel via telephone to inquire as to the status of the redlined Agreement so that it could be finalized. (Pa7-Pa8, VC ¶ 48). During the call, defense counsel advised County Counsel that Defendant changed her mind and did not want to proceed with the settlement. (Pa8, VC ¶ 49). Significantly, however, defense counsel never asserted that no settlement had been reached. (Ibid.).

In response to Defendant's reported change of heart, County Counsel advised defense counsel that if Defendant refused to proceed with the memorialized settlement which was agreed to by the parties on the record on December 20, 2022, Plaintiff would move to enforce the settlement. (Pa8, VC ¶ 50). However, instead of finalizing the agreed-upon memorialized settlement, defense counsel made a new demand by way of correspondence dated January 12, 2023. (Id. at ¶ 51; Pa115-Pa116, Correspondence). In response, County

Counsel reiterated in correspondence dated January 19, 2023, that a settlement had already been reached and memorialized, and Plaintiff expected Defendant to abide by it, and put Defendant on notice that if she refused to finalize the settlement, it would seek to enforce the settlement and seek any other appropriate relief, including attorneys' fees and costs. (Id. at ¶ 52; Pa61-Pa62, Correspondence).

Consequently, Plaintiff filed an OTSC to enforce the settlement which was heard by the trial court on April 6, 2023. (1T).

THE APRIL 6, 2023 OTSC HEARING

On April 6, 2023, counsel appeared before Judge Shanahan for argument on Plaintiff's OTSC. (1T). As an initial matter, Plaintiff's counsel submitted that Plaintiff was "prepared to move forward with the terms as they were put on the record, which include[d] a full release." (1T4:14-16). Subsequently, Judge Shanahan asked defense counsel why he should not enforce the terms of the agreement placed on record on December 20, 2022. (1T4:19-20). Defense counsel responded that there were "additional terms" set forth in the written Agreement and averred that the memorialization of said agreement on the record was merely a "vague blurb of our, I guess tentative discussions on what . . . the settlement agreement w[as] to be." (1T4:21-5:1). As defense counsel began to describe the written four-page written Agreement, the judge echoed Plaintiff's

position and emphasized that Plaintiff was "walking away from the separation agreement" and seeking only enforcement of the settlement terms as memorialized on the record, which was confirmed by Plaintiff's counsel. (1T5:2-11).

Addressing the contents of the memorialized settlement placed on the record, the judge asked defense counsel what, if any, terms counsel or Defendant disagreed with in terms of the material terms as reflected in the transcript. (1T5:19-22). In response, defense counsel referenced various terms contained in the written Agreement, i.e., specific claims released, the relinquishment of rights to sue, and monetary value of Defendant's accrued time, to which Judge Shanahan again responded that Plaintiff was willing to walk away from anything not contained in the memorialized terms of the settlement placed on the record. (1T5:25-6:12).

Nonetheless, defense counsel claimed that the memorialized settlement could not be effectuated because they believed Defendant would have a "chance to review it" based on a revocation period. (1T6:17-20). He referenced various provisions of the written Agreement, such as the voluntary retirement provision (Pa41, ¶ 9), statutory review/revocation period provision (Pa43, ¶ 11), and the employee's release provision (Pa42, ¶ 9), to support his contention that

Defendant had a right to repudiate the settlement and that the written Agreement included additional terms not agreed to by the parties. (1T8:2-10:10).

Plaintiff's counsel countered that the release provision constituted a general release, thus making the precise language used in that provision irrelevant, and that Defendant agreed to release all claims against Plaintiff in exchange for her retirement on the record at the December 20, 2022 hearing. (1T10:15-23). As for the statutory review/revocation provision, Plaintiff's counsel reiterated that Plaintiff had no problem taking that provision out and that there was no memorialized discussion on the record about a rescission period or the OWBPA language in that provision, and instead, it is boilerplate generally included in agreements. (1T10:24-11:3).

Furthermore, Plaintiff's counsel repeated that the issue was that Defendant agreed to the memorialized terms of the settlement, counsel for both parties verified on the record that those terms constituted the full scope of the settlement, Defendant was not impaired, and Defendant affirmed on the record that she was aware of the terms of the settlement and agreed to them. (1T14:11-23). She further noted that the usual course of things consisted of either placing

a settlement on the record, which the parties did, or drafting a Willingboro[2] written document if you are in mediation. (1T15:3-7).

THE TRIAL COURT'S APRIL 12, 2023 ORAL DECISION

On April 12, 2023, following argument, Judge Shanahan rendered his decision from the bench and denied Plaintiff's OTSC. (2T). After summarizing the facts of the matter, reading the December 20, 2022 memorialization of the settlement into the record, and summarizing the parties' positions, he made the following determinations.

First, Judge Shanahan noted that a motion to enforce a settlement uses the same standard of review as a summary judgment motion, i.e., requiring that the court draw legitimate inferences in favor of the nonmoving party. (2T10:16-11:1). Additionally, he found that the key question was "whether or not the post-settlement communications between counsel negated the 'settlement' of contract breach as delineated in the transcript." (2T13:13-16). To that end, Judge Shanahan averred that the issue was whether or not there were facts which supported Defendant's position on this issue and she had a right to repudiate the settlement. (2T14:10-12). Regarding the back and forth between counsel and whether it constituted reopening negotiations, a counteroffer, etc., Judge

[2] Willingboro Mall Ltd. v. 240/242 Franklin Ave., LLC, 421 N.J. Super. 445, 453 (App. Div. 1011), aff'd, 215 N.J. 242 (2013).

Shanahan found these issues frivolous and meritless. (2T14:12-17). In other words, he viewed the issue as "whether or not the material terms placed on the record in of themselves without being memorialized in a written agreement are enforceable." (2T14:21-24).

On this point, Judge Shanahan referenced the introductory provisions of the written Agreement, highlighting that it "clearly . . . flushe[d] out the tentative agreement placed on the record." (2T14:25-16-8). However, he found the statutory review revocation period, paragraph 11 of the written Agreement, controlling. (2T17:21-18:15). Judge Shanahan found this provision to be particularly important because it "explain[ed Plaintiff]'s position that they're walking away from any material term of the settlement, not contained solely in the . . . transcript . . . ." (2T18:16-21).

To that end, although not briefed by the parties or explicitly argued by defense counsel at oral argument,[3] Judge Shanahan stated that he reviewed the OWBPA and found that it did not permit an individual to waive "any right or claim under [it], unless it's knowing or voluntarily." (2T18:22-19:11). He continued that the Act gives an individual

> a period of at least 21 days in which to consider the agreement, and the agreement provides for a period of at least seven days following the execution of the

---

[3] At argument, defense counsel merely asserted that paragraph 11 gave Defendant "a right to review [and] rescind." (1T9:17-18).

> agreement, to give the individual the right to revoke the agreement, and that the agreement shall not become effective or enforceable until the revocation period has expired.
>
> [(2T19:20-20:2).]

In reference to the statutory review and revocation period provision of the written Agreement contained in paragraph 11, Judge Shanahan concluded that the language within this provision "codif[ied] the requirements of the [OWBPA]." (2T20:3-7). Consequently, he held that it was "clear that the [D]efendant has the right to revoke" and that because Defendant revoked the settlement within the timeframe pursuant to the OWBPA, "there was no settlement." (2T20:7-13).

On April 17, Judge Shanahan entered a conforming order denying Plaintiff's OTSC, declining to enforce the settlement, and remanding the matter back to the hearing officer. (Pa135-Pa136).

STANDARD OF REVIEW

Because settlements are subject to contract law principles, appellate courts review a trial judge's interpretation and construction de novo. In re Estate of Balk, 445 N.J. Super. 395, 400 (App. Div. 2016) (citing Kieffer v. Best Buy, 205 N.J. 213, 223 (2011)); see Kaur v. Assured Lending Corp., 405 N.J. Super. 468, 474 (App. Div. 2009). Moreover, a trial court's interpretation of the law

and legal conclusions that flow therefrom are not entitled to particular deference. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

As will be demonstrated below, the trial court erred in denying Plaintiff's OTSC and declining to enforce the agreed-upon and memorialized settlement.

LEGAL ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S OTSC AND DECLINING TO ENFORCE THE AGREED-UPON AND MEMORIALIZED SETTLEMENT (Pa135-Pa136; 2T20:3-14)

A. The Agreed-Upon and Memorialized Settlement is Valid and Binding on the Parties.

As an initial matter, Plaintiff argues that the settlement, agreed upon and memorialized on the record at the December 20, 2022 hearing, is valid and binding on the parties based on traditional contract principles and this State's public policy favoring the entry and subsequent enforcement of settlements. Thus, Plaintiff contends that the trial court erred in denying its OTSC and declining to enforce the settlement.

"[T]he standard for vacating a settlement is not easily met." Kaur, 405 N.J. Super. at 474. Indeed, it is well-settled that "[a]n agreement to settle a lawsuit is a contract which, like all contracts, may be freely entered into and which a [c]ourt, absent a demonstration of 'fraud or other compelling

circumstances,' should honor and enforce as it does other contracts." Pascarella v. Bruck, 190 N.J. Super. 118, 124-25 (App. Div.) (emphasis added), certif. denied, 94 N.J. 600 (1983) (quoting Honeywell v. Bubb, 130 N.J. Super. 130, 136 (App. Div. 1974)); see also Nolan v. Lee Ho, 120 N.J. 465, 472 (1990) (noting that "[s]ettlement of litigation ranks high in our public policy"); Brundage v. Estate of Carambio, 195 N.J. 575, 601 (2008) (stating that "[f]undamental to our jurisprudence relating to settlements is the principle that '[t]he settlement of litigation ranks high in our public policy'").

To this end, the New Jersey Supreme Court has recognized that:

> Public policy favors the settlement of disputes. Settlement spares the parties the risk of an adverse outcome and the time and expense – both monetary and emotional – of protracted litigation. Settlement also preserves precious and overstretched judicial resources.
>
> [Willingboro, 215 N.J. at 253-54 (citations omitted).]

The seminal case addressing the enforceability of settlements is Willingboro, which involved settlement reached at a court-directed non-binding mediation conducted by a retired Superior Court judge. Id. at 246. Following negotiations, the parties reached an agreement to settle the matter. Ibid. However, some weeks later, Willingboro had a change of heart and rejected the terms of the settlement. Id. at 247. Despite the lack of a signed written agreement, the New Jersey Supreme Court upheld both the trial court and

Appellate Division in finding there was a binding and enforceable settlement.[4] Id. at 245.

As the enforceability of settlements is governed by contract law, like a contract, it requires an offer and acceptance by the parties, and "must be sufficiently definite 'that the performance to be rendered by each party can be ascertained with reasonable certainty.'" Weichert Co. Realtors v. Ryan, 128 N.J. 427, 435 (1992) (quoting Borough of W. Caldwell v. Caldwell, 26 N.J. 9, 24-25 (1958)). Likewise, a legally enforceable contract "requires mutual assent, [and] a meeting of the minds based on a common understanding of the contract terms." Morgan v. Sanford Brown Inst., 225 N.J. 289, 308 (2016).

Generally, because this State highly values settlements, courts "strain to give effect to the terms of a settlement wherever possible." Brundage, 195 N.J. at 601 (quoting Div. of Rate Couns. V. N.J. Bd. of Pub. Utils., 206 N.J. Super. 523 (App Div. 1985)). Thus, a court will enforce a settlement, if it "addresses the principal terms required to resolve the dispute." Willingboro 421 N.J. Super.

[4] The Willingboro Court also held that "going forward, parties that intend to enforce a settlement reached at mediation must execute a signed written agreement." Willingboro, 215 N.J. at 245. Although the instant matter was not resolved via mediation such that this requirement would be apposite, it was still more than met to the extent the settlement reached during the administrative department hearing was memorialized on the record by a certified court reporter, with Defendant's acknowledgement and acceptance. (Pa33-Pa34); see Willingboro, 215 N.J. at 263 (recognizing that recording would meet memorialization requirement).

at 453. If "the parties do not agree to one or more essential terms . . . courts generally hold that the agreement is unenforceable." Weichert Co. Realtors, 128 N.J. at 435. Nonetheless, "[w]here the parties agree upon the essential terms of a settlement, so that the mechanics can be 'fleshed out' in a writing to be thereafter executed, the settlement will be enforced notwithstanding the fact the writing does not materialize because a party later reneges." Lahue v. Pio Costa, 263 N.J. Super. 575, 596 (App. Div. 1993) (emphasis added).

Here, Plaintiff maintains that the agreed-upon and memorialized settlement constitutes an enforceable contract because the parties agreed on essential terms and manifested an intention to be bound by those terms. These key facts are supported by the record of the December 20, 2022 hearing. (Pa31-Pa38).

Significantly, it is first important to emphasize that at the hearing, Defendant: (1) was represented by two attorneys, (2) accompanied by various family members at the time of the negotiations and the memorialization of the settlement on the record, (3) verbalized that she understood the material terms of the settlement as placed on the record, and (4) assented to them before the hearing officer, Judge Smith. (See Pa4, VC ¶¶27-30; Pa32-Pa34).

Moreover, it cannot be disputed that the material terms of the settlement were reached and agreed to by the parties, and memorialized on the record, as follows:

- Defendant would retire through the PFRS system as of the date of the signed agreement.
- The Settlement Agreement reflecting the settlement reached and memorialized on the record would be prepared by County Counsel and sent to Defendant's counsel on December 21, 2022.
- In exchange for her retirement, the County would dismiss all charges against Defendant.
- Defendant would sign a release of her right to sue the County and dismiss any pending lawsuits.
- Defendant would not initiate any new lawsuits or otherwise seek to sue the County relative to events which had occurred up to that point in time.
- Defendant would receive a payout of any unused accrued sick and vacation time consistent with the terms of the labor contract.
- Defendant and the County agreed to mutual non-disparagement clauses.
- County would provide a neutral letter of reference, which would be attached to the formal Settlement Agreement and would set forth her dates of employment and positions held.
- Defendant waived any claim to back pay.
- County would pay Defendant the equivalent of 35 days of pay, which would be issued to her in a check, which payment would not reflect pensionable time and would be subject to applicable tax withholdings.
- Subject to Chapter 78 Contributions, Defendant would receive health benefits upon her retirement, family plan if she so elected, which for the next 3 years would be based upon her current salary. After March 28, 2025, Defendant would make retiree health contributions until she reached age 65, at which point she would become Medicare eligible.

[(See Pa33-Pa34).]

Additionally, it is undisputed that the hearing officer, Judge Smith, confirmed Defendant's understanding of the settlement, that she was not under the influence of any drugs, narcotics, or medication to impair her judgment or thinking, and that she came to the settlement voluntarily. (Pa34). Defendant also admitted that the settlement was "fully explained" to her, and the matter consequently concluded. (Ibid.). Moreover, her own counsel confirmed her understanding and agreement to the settlement on the record. (Ibid.).

Thereafter, it is also undisputed that County Counsel sent the Agreement to defense counsel on December 21, 2022, consistent with the terms of the December 20th memorialized settlement. (Pa40-Pa44). Subsequently, there were multiple communications between County Counsel and defense counsel regarding the Agreement, wherein defense counsel never suggested that a settlement had not been reached. (Pa46-Pa59). In fact, defense counsel repeatedly promised to redline the Agreement and discussed Defendant's PTO bank and other information necessary to finalize the settlement. (See ibid.). However, no such redlined Agreement was ever provided to County Counsel.

Notably, it is also undisputed that defense counsel, only approximately three weeks after the memorialization of the December 20th settlement on the record and after a proposed form of written Agreement was circulated, advised County Counsel that Defendant changed her mind about the settlement. (See

Pa7-Pa8, VC ¶¶ 48-49). This occurred only after County Counsel contacted defense counsel via telephone on January 6, 2023, after still not having received a redlined version of the written Agreement as promised. (Id. at ¶ 48). It was during this phone call that defense counsel revealed that Defendant had changed her mind and sought to repudiate the settlement; he did not, however, ever suggest that a settlement had never been reached and agreed upon. (Id. at ¶ 49).[5]

Based on the foregoing, Plaintiff avers that the agreed upon and memorialized settlement constitutes a valid and binding agreement. Therefore, Plaintiff respectfully recommends that Your Honors reverse the trial court's denial of its OTSC because it is entitled to enforcement of the settlement reached between the parties and memorialized on the record on December 20, 2022.

B. Defendant's "Change of Heart" is Insufficient to Repudiate the Memorialized Settlement

Plaintiff further argues that Defendant's belated "change of heart" is insufficient to repudiate the agreed-upon and memorialized December 20, 2022 settlement.

When a party has changed their mind about a settlement and attempts to repudiate it, our Supreme Court has conclusively stated that "[c]ourts routinely

[5] Even in opposition to the OTSC, defense counsel did not assert that no settlement had been reached. Instead, his certification indicates on that on January 6, 2023, he advised County Counsel "of Defendant's intent to exercise her right to repudiate the settlement . . . ." (Pa 109, Certification of Jared M. Wichnovitz, ¶ 4).

enforce those settlements even in the face of changed minds. . . . Absent a demonstration that a settlement was procured by fraud or some similarly compelling reason, we have long been reluctant to set it aside." Brundage, 195 N.J. at 613.

Indeed, the classic case of "buyer's remorse" simply does not and cannot serve as a legal basis to repudiate a settlement. Willingboro, 215 N.J. at 251; see Bistricer v. Bistricer, 231 N.J. Super. 143, 151 (Ch. Div. 1987) (enforcing settlement and noting that where "parties agreed to the essential terms of a settlement" and that "[p]laintiff's objections [were] basically either 'afterthoughts' or pertain to the implementation of settlement" that "[s]etting aside the settlement under these circumstances would allow plaintiff to avoid a fair agreement duly entered into to resolve pending and burdensome litigation" and would be "unfair to defendants"); see also Dep't of Pub. Advoc. v. Bd. of Pub. Utils., 206 N.J. Super. 523, 530 (App. Div. 1985) (finding that "second thoughts are entitled to absolutely no weight as against our policy in favor of settlement").

Significantly, the Appellate Division upheld an agreed-upon oral settlement agreement under even less compelling circumstances than the instant matter in Pascarella. 190 N.J. Super. at 118. In Pascarella, the parties entered into a settlement on the day of trial and advised the judge that the case was

settled. Id. at 120. While the case was marked settled by the clerk, the settlement was not placed on the record. Id. at 120-21. When defense counsel prepared settlement papers, plaintiff expressed that she had second thoughts the following day. Id. at 121.

Nonetheless, the Court made it clear that even when a settlement is not placed on the record, parties cannot change their minds once they enter into a binding settlement agreement. Id. at 124-25. Specifically, the Court stated:

> This was a settlement agreement made between competent adults. There is no legal requirement that there be court approval in such a case . . . and the practice of spreading the terms of the agreement upon the record, although a familiar practice, is not a procedure requisite to enforcement. That the agreement to settlement was orally made is of no consequence, and the failure to do no more than as here, inform the court of settlement and have the clerk mark the case as settled has no effect on the validity of a compromised disposition.

[Id. at 124.]

Here, not only was the settlement reached between competent parties, but unlike the Pascarella agreement, it was even memorialized and placed on the record. (Pa33-Pa34). Furthermore, unlike the plaintiff in Pascarella having second thoughts the very next day after she agreed to the settlement, Defendant had second thoughts approximately three weeks later. Also distinguishable from Pascarella is the fact that County Counsel and defense counsel were actively communicating during the weeks subsequent to the December 20, 2022

memorialization of the settlement, during which time defense counsel confirmed receipt of the written Agreement, and agreed to provide a redlined version. (Pa46-Pa59). Also, there has been no showing or even a suggestion of fraud or other "compelling circumstances" which would justify vacating the memorialized settlement.

Under these facts, the trial court's decisions to deny Plaintiff's OTSC and decline to enforce the settlement were erroneous, and Plaintiff respectfully recommends that Your Honors reverse the trial court's findings.

POINT II

THE TRIAL COURT ERRED FINDING THE OLDER WORKERS BENEFIT PROTECTION ACT PERMITTED DEFENDANT TO REPUDIATE THE AGREED-UPON AND MEMORIALIZED SETTLEMENT.
(2T18:22-20:14)

Plaintiff also argues that the trial court erred in holding that the OWBPA precluded enforcement of the settlement reached and memorialized on the record because it permitted Defendant to repudiate the entirety of the agreed-upon and memorialized settlement. Moreover, to this end, Plaintiff contends that the judge improperly denied its OTSC on analysis which was neither briefed nor argued by the parties at oral argument.[6] Nonetheless, Plaintiff will address this

[6] Unless issues relate to a court's jurisdiction or matters of substantial public interests, Your Honors generally will not consider issues that were not raised or addressed below. See Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)

contention and maintains that the OWBPA does not invalidate the settlement reached or permit Defendant to unilaterally repudiate the entire settlement, and so, as argued below, the Court should have enforced the settlement reached pursuant to the terms memorialized on the record.

In 1990, Congress amended the ADEA by way of the OWBPA. Oubre v. Entergy Operations, Inc., 522 U.S. 422, 426 (1998). The OWBPA "imposes specific requirements for releases covering ADEA claims." Id. at 424. Essentially, the OWBPA imposes, among other mandates, requirements for valid waivers of ADEA rights and claims to ensure that "older workers are not coerced or manipulated into waiving their rights to seek legal relief under the ADEA." Long v. Sears Roebuck & Co., 105 F.3d 1529, 1534 (3d Cir. 1997) (citation omitted). Accordingly, the Supreme Court has recognized that "[a]n employee 'may not waive' an ADEA claim unless the waiver or release satisfies the OWBPA's requirements." Oubre, 522 U.S. a 426-27.

As the Supreme Court also made clear, however, the OWBPA

> sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law. The statute creates a series of prerequisites for knowing and voluntary waivers and imposes affirmative duties of disclosure and waiting periods. The OWBPA governs the effect under federal law of waivers or releases on

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(stating that appellate court generally need not address issues not properly presented to the trial court).

> ADEA claims and incorporates no exceptions or qualifications. The text of the OWBPA forecloses the employer's defense, notwithstanding how general contract principles would apply to non-ADEA claims.
>
> [Oubre, 522 U.S. at 427 (emphasis added).]

In Oubre, because the Court found a contractual release of ADEA claims failed to comply with the waiver requirements of the OWBPA, the release was "unenforceable against [the employee] insofar as it purports to waive or release her ADEA claim" and could not "bar [the employee's] ADEA suit, irrespective of the validity of the contract as to other claims." Id. at 427-28.

Similarly, as Your Honors noted, "[t]he waiver provision of the [OWBPA] clearly indicates its limited applicability to claims arising only under the ADEA" and "29 C.F.R. §1625.22 . . . specifically appl[ies] only to the waiver of claims under the ADEA." Blum v. Lucent Techs., Inc., 2005 WL 4044579, at *5 (N.J. Super. Ct. App. Div. May 30, 2006) (emphasis added) (confirming OWBPA's limited applicability and holding that its regulatory provisions only apply to ADEA claims and not state law claims); see also Nakamoto v. Lockheed Martin Corp., 2010 WL 2348634, at *8 (N.D. Cal. June 8, 2010) (finding that "even if the [c]ourt were to accept [p]laintiff's argument that the Agreement does not comply with the [OWBPA] requirements[,] . . . it remains enforceable as to all of [p]laintiff's non-ADEA claims for relief based on events occurring prior to the execution of the agreement").

Simply put, the ADEA waiver provisions of the OWBPA do not entitle a party to a blanket revocation of any settlement reached under any circumstances, but rather, it is expressly limited to mandating such a period for a valid ADEA waiver. See Oubre, 522 U.S. at 427 (stating that "[a]n employee 'may not waive' an ADEA claim unless the employer complies with the statute"); Burlison v. McDonald's Corp., 455 F.3d 1242, 12449 (11th Cir. 2006) (finding that because the release agreements satisfied the OWBPA waiver requirements, the releases from ADEA liability contained therein were knowing and voluntary, and therefore valid).

The Court's reliance on the OWBPA to deny enforcement of the settlement as memorialized on the record was, accordingly, a reversible error of law. Moreover, the Court's reliance on paragraph 11 of the Agreement, which Agreement was not signed by the parties, and which provision was not reflected in the material settlement terms memorialized on the record, was wholly misplaced. In fact, in the decision, the Court extensively criticizes the terms of the proposed written Agreement, but never found that a settlement was not reached. (2T14:21-17:20).[7] Instead, the Court ruled in misplaced reliance on

[7] The Court also erroneously concluded that the waiver provisions of the OWBPA extend beyond waiver of an ADEA claim, suggesting that "it gives protections to older individuals with respect to employee benefit plan and other purposes." (2T19:2-4). However, this is a misstatement of the law. To this end, the United States Supreme Court has made clear that the waiver provisions of

the OWBPA that Defendant had a unilateral right to repudiate the entire settlement. This is, however, not consistent with the law as described above. Moreover, in doing so the Court relied upon the insertion into the unsigned written Agreement, boilerplate ADEA language into paragraph 11. This proposed provision, however, not reflected on the record of the memorialized settlement, did not give Defendant a unilateral right to repudiate the entirety of the settlement reached and memorialized on the record. At most, in reliance on the OWBPA, the Court could have found that there was no valid and enforceable ADEA waiver had that issue been before the Court, which it was not. Moreover, even had that issue been before the trial court, such a finding does not affect the validity of the entirety of the agreed-upon memorialized settlement, which is determined by entirely separate concepts of contract law, as expressed by the Supreme Court in Oubre or create a right of repudiation of the entire settlement reached and memorialized on the record. See Oubre, 522 U.S. at 427.[8]

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the OWBPA function only to invalidate waiver of an ADEA claim, nothing more. Oubre, 522 U.S. at 427 (noting that the OWBPA "sets up its own regime for assessing the effect of ADEA waivers, separate and apart from contract law") (emphasis added).

[8] It is also noteworthy that if the trial court's analysis as memorialized in the decision below were to be upheld, the public policy implication would be that any settling party who developed buyer's remorse within 21 days of reaching a settlement and memorializing it on the record, including before a court, could simply change their mind and repudiate the settlement. That is neither the law nor the public policy of this State as argued more fully in Point I, supra.

Furthermore, even assuming *arguendo* that proposed paragraph 11 gave Defendant a unilateral right to rescind the Agreement, Plaintiff's counsel underscored at argument that Plaintiff was willing to "walk away" from any and all provisions contained in the written Agreement which were not included in the December 20th agreed upon and memorialized settlement as reflected and agreed to on the record. (1T5:7-11). In other words, Plaintiff was prepared to proceed "based upon the terms as they were outlined on the [December 20, 2022] transcript[,] and if [the judge was] willing to enforce those terms, [Plaintiff was] satisfied with that." (Ibid.). Indeed, paragraph 11 was even explicitly referenced when Plaintiff's counsel reiterated that Plaintiff "has no problem taking out paragraph 11" and stated that "[t]here was no discussion on the record about a recis[sion] period or the [OWBPA] language[;] that's simply something that is generally put into agreements." (1T10:24-11:3). Yet, the trial court ignored and disregarded this point in rendering its decision.

Simply put, the ADEA/OWBPA do not serve as a legal impediment to enforcement of the settlement reached and memorialized on the record, although this was the only basis upon which the trial court refused to enforce the settlement. Thus, Plaintiff argues that the trial court erroneously denied its OTSC and declined to enforce the agreed-upon and memorialized settlement on

grounds wholly independent of and irrelevant to the contractual validity and enforceability of the settlement memorialized on the record.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully submits that the trial court's denial of its OTSC be reversed, and the settlement reached between the parties and memorialized on the record on December 20, 2022 be enforced.

Respectfully submitted,

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Dated: September 6, 2023

FILED, Clerk of the Appellate Division, February 29, 2024, **A-002935-22**

	:	
COUNTY OF WARREN,	:	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
	:	DOCKET NO. : A-002935-22
Plaintiff-Appellant	:	CIVIL ACTION
	:	
v.	:	APPEAL FROM:
	:	Superior Court – Chancery Division
NICHUA LIACI,	:	Warren County
	:	
Defendant-Respondent.	:	WRN-C-016006-23
	:	
	:	SAT BELOW:
	:	Hon. Kevin M. Shanahan, A.J.S.C.

RESPONDENT NICHUA LIACI'S BRIEF

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FILED, Clerk of the Appellate Division, February 29, 2024, **A-002935-22**

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PRELIMINARY STATEMENT

The issue presented by this appeal is a very simple and straightforward one: whether an enforceable settlement agreement exists between the parties. In a word, no. The Court was correct in denying the requested enforcement below and Appellant County of Warren (hereafter "Appellant") should receive no different a result here. Notwithstanding the fact that Appellant has failed to exhaust its administrative remedies and the matter should be before the Civil Service Commission as opposed to before this Court , the fact remains that while there were terms of a settlement agreement placed upon record at the December 20, 2022 departmental hearing, these terms were intended and required to be reduced to writing and signed by the Parties. However, no such event occurred.

The reality is that there was no meeting of the minds and there was no binding or otherwise legally enforceable contract. When the proposed writing was delivered to Respondent, Nichua Liaci (hereafter "Respondent"), the parties continued to negotiate terms. Moreover, Respondent exercised her right to repudiate the agreement in accordance with paragraph 11 of the proposed writing. In response to same, Appellant then solicited a counteroffer from Respondent. Respondent did then provide a counteroffer which Appellant rejected. Accordingly, there was no enforceable contract to enforce. Therefore, and for the reasons set forth in more detail herein, it is only proper that this Court deny the Appellant's appeal.

STATEMENT OF FACTS

Appellant, the Warren County Correctional Facility (hereafter "Appellant") is a public employer within the meaning of N.J.S.A. 34:13A-1 et. seq, ("Act") and is statutorily empowered to operate in the County of Warren, State of New Jersey. Appellant operates under the Civil Service Jurisdiction. At all relevant times, Respondent Nichua Liaci (hereafter "Respondent") was a public employee for the State of New Jersey.

On or about March 27, 2000, Respondent was hired by the Warren County Correctional Facility as an officer. On or about July 14, 2011, Respondent was promoted to Corrections Sergeant. On or about January 3, 2022, Respondent was served with a Preliminary Notice of Disciplinary Action (hereinafter "PNDA"). **Pa16**[2] On or about May 18, 2022, Respondent was served with an Amended Preliminary Notice of Disciplinary Action (hereinafter "PNDA"). **Pa18** The Departmental Hearing was partially held on December 2, 2022, December 16, 2022, and was scheduled to be held on December 20, 2022, however a settlement agreement was tentatively reached and some of the terms were put on the record. **Pa32-34.** A formal settlement Agreement was never signed. **Pa41-44.**

[2] "Pa" refers to Appellant's Appendix submitted in support of its appeal. For example, Pa1 would refer to page 1 of said appendix.

On or about January 5, 2023, Mr. Andrew J. Kinsey, Esq. (hereinafter "Mr. Kinsey") (counsel for the Appellant below) was notified by Jared M. Wichnovitz, Esq., prior counsel for Respondent, (hereinafter "Mr. Wichnovitz") that he wanted to schedule a teleconference to discuss the matter. **Pa109-111, para(s) 3-4.** The very next day, in a teleconference, Mr. Wichnovitz notified Mr. Kinsey that Respondent sought to exercise her right to repudiate the agreement. **Pa109-111, para(s) 3-4; Pa41-44, paragraph 11.**

On the teleconference, additional terms were also discussed, and Mr. Kinsey requested that the new terms be put forth in a written counter proposal so that he could bring it to his clients to ascertain their position. **Pa109-111, para(s) 5-6.** On or about January 12, 2023, the undersigned submitted the new proposed settlement terms to Mr. Kinsey. **Pa115-116.** By way of letter dated January 19, 2023, Mr. Kinsey sent a response to the January 12, 2023, correspondence. **Pa61-62.** On or about February 11, 2023, Respondent, through counsel, submitted a formal response and opposition to Mr. Kinsey's correspondence dated January 19, 2023, restating Respondent's position and demanding that either settlement negotiations continue or proceedings resume. **Pa126-127.**

On or about March 3, 2023, a formal demand for the continuation of the Departmental Hearing was sent to Mr. Kinsey, to which no formal response was

received to date or prior to Appellant's filing its application for an Order to Show Cause on March 27, 2023. **Pa130.**

PROCEDURAL HISTORY

On March 27, 2023, Appellant filed in the Superior Court of New Jersey – Law Division – Chancery Division an application for an Order to Show Cause (alternatively "OTSC") and accompanying verified complaint, seeking, among other forms of relief, to enforce the alleged "settlement agreement" against Respondent. **Pa1-Pa13** On or about April 3, 2023, Respondent confirmed, through counsel, service of Appellant's attorney certification, proof of service of the OTSC and verified complaint on Defendant. **Pa104.** Notwithstanding the fact that Appellant's application would more properly be heard by the Civil Service Commission, Respondent filed opposition to Appellant's application on or about April 3, 2023. **Pa108-130.** Thereafter, Appellant filed a reply brief in response to Respondent's opposition. **Pa131-134**

Oral argument was held on or about April 6, 2023, before Hon. Kevin M. Shanahan, A.J.S.C. **1T.** On April 12, 2023, Judge Shanahan correctly found in favor of Respondent and rendered a decision from the bench which denied Appellant's OTSC and remanded the matter back to the hearing officer. **2T.** Judge Shanahan would enter a conforming Order on April 17, 2023. **Pa135-136.** On May 31, 2023, Appellant filed its instant appeal. **Pa137-141.** Respondent now files her opposition

and, respectfully submits that for the reasons set forth in Judge Shanahan's Order and for those set forth in more detail herein, Respondent's appeal should be denied.

LEGAL ARGUMENT

STANDARD OF REVIEW

Settlement agreements are subject to the ordinary principles of contract law. In re Estate of Balk, 445 N.J. Super. 395, 400 (App. Div. 2016) citing Thompson v. City of Atlantic City, 190 N.J. 359, 374 (2007). The interpretation and construction of contracts is a mater of law for the Court to review *de novo*. Id. citing Fastenberg v. Prudential Ins. Co. of Am., 309 N.J. Super. 415, 420 (App. Div. 1998). Accordingly, reviewing Courts do not give deference to the lower Court's interpretation and review the contract with "fresh eyes." Id. quoting Kiefer v. Best Buy, 205 N.J. 213, 223 (2011); see also Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)(holding a trial Court's interpretation of law and legal consequences that flow from established facts are not entitled to special deference).

POINT ONE: APPELLANT'S APPEAL SHOULD BE DENIED AS THEY HAVE NOT EXHAUSTED ITS ADMINISTRATIVE REMEDIES

The requirement that a party exhaust administrative remedies before resort to the courts is a firmly embedded judicial principle. Garrow v. Elizabeth General Hospital & Dispensary, 79 N.J. 549, 558-559 (1979), relying on Central R.R. Co. v.

Neeld, 26 N.J. 172, 178, *cert.* den. 357 U.S. 928, 78 S. Ct. 1373, 2 L. Ed. 2d 1371 (1958). This principle requires exhausting available procedures, that is, "pursuing them to their appropriate conclusion and, correlatively awaiting their final outcome before seeking judicial intervention." Id. quoting Aircraft & Diesel Equip. Corp. v. Hirsch, 331 U.S. 752, 767, 67 S. Ct. 1493, 1500, 91 L. Ed. 1796, 1806 (1947). The policy of our Courts has generally been to discourage piecemeal litigation. Id. (citations omitted) (giving the example of the single controversy doctrine as having been designed to prevent harassment and unnecessary clogging of the judicial system, and to avoid wasting time and effort of the parties.) Our Courts have also utilized the doctrine out of a recognition that the expertise of an administrative agency may not be exercised or known until it renders its final decision, and usually upon judicial review due deference is accorded that expertise. Garrow 79 N.J. at 559.

A public employee, such as Respondent, and a public employer, such as Appellant, are subject to the Civil Service Act ("Act") N.J.S.A. 11A:1-1 et seq. and the jurisdiction of the Civil Service Commission. Pursuant to N.J.S.A. 11A:2-6, Administrative agencies have broad discretion to adjudicate disputes. Greenwood v. State Police Training Ctr., 127 N.J. 500, 513 (1992). The Civil Service Commission is empowered, in relevant part, to **provide for interim remedies** or relief in a pending appeal where warranted. N.J.S.A. 11A:2-6 (emphasis added). Such powers to award relief include injunctive relief. See e.g. In the Matter of Jesse O'Brien,

Jersey City, CSC Docket No. 2024-523 (granting officer's petition for enforcement of prior order(s) of the commission to municipality to place officer on paid leave and to schedule departmental hearing).

In the case at bar, Appellant has not pursued the administrative remedies available to them by way of the Civil Service Commission. Instead, Appellant sought enforcement of the purported settlement agreement by way of application for injunctive relief to the Superior Court and now seeks this Court excuse them of their obligation to exhaust administrative remedies by way of the instant Appeal. This is improper as Appellant could have and should have petitioned the Civil Service Commission for relief. In other words, Appellant has not exhausted its administrative remedies, and it is only proper that the requested relief be denied pursuant to the well-established doctrine of administrative remedies. The instant appeal should be denied.

POINT TWO:APPELLANT'S APPEAL SHOULD BE DENIED BECAUSE THERE ARE MATERIAL FACTS IN DISPUTE WHICH ALLOW A FACT FINDER TO FIND NO ENFORCEABLE CONTRACT.

On a disputed motion to enforce a settlement agreement, as on a motion for summary judgment, a hearing is to be held to establish the facts unless the available competent evidence, considered **in a light most favorable to the non-moving party**, is insufficient to permit the judge, as a rational fact finder, to revolve the disputed factual issues in favor of the non-moving party. Amatuzzo v. Kozmiuk, 305

N.J. Super. 469, 474-475 (App. Div. 1997) relying upon Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995). The Court draws all legitimate inferences from the facts in **favor of the non-moving party**. Id. (emphasis added) Credibility determinations are the function of juries, not the Court. Brill, 142 N.J. 520 at 540. If there exists a single, unavoidable resolution of the alleged disputed issue of fact, the issue would be considered insufficient to constitute a "genuine" issue of material fact for purposes of R. 4:46-2. Id. (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986).

For Appellant to prevail on this appeal, it is axiomatic that Appellant be able to prove the existence of a contract. See e.g. EnviroFinance Grp., LLC v. Envtl. Barrier Co., LLC, 440 N.J. Super. 325, 345 (App. Div. 2015)(holding that to prevail on a breach of contract claim, a party must prove a valid contract existed, the opposing party failed to perform an obligation under the contract, and the breach caused the claimant to sustain damages.) An enforceable agreement exists where the following four elements are satisfied:

> (1) a meeting of the minds or better put, the parties agreed to the substance and terms of the contract; (2) Offer and acceptance; (3) consideration or, in other words, each party gave or promised something of value to the other; and (4) the terms are sufficiently definite.
>
> [Model Civil Jury Charges, 4.10C]

Whether there was a meeting of the minds or acceptance are material questions of fact which underpin the legal determination of the existence of a contract.

Here, Appellant's appeal should fail because applying the appropriate standard and reviewing the facts in light most favorable to Respondent, one can conclude that there was never a meeting of the minds or an acceptance by Respondent of the asserted settlement contract. On or about December 21, 2022, defendant received a draft of the proposed settlement agreement setting forth **some** of the terms stated on the record, as well as **additional terms**, which were added by Mr. J. Andrew Kinsey, counsel for Appellant, during the departmental proceedings. Upon review of the draft, it was found the newly added material terms were objectionable. As was stated in the December 27, 2022, email, "I hope you had a great holiday weekend. We received the draft. We are redlining it with **some issues we saw**. We **should be getting** back to you shortly." **Pa151.** (Emphasis Added) Indeed, no reasonable person would find this to constitute acceptance.

There were several serious and material issues that were found within the proposed written agreement, and after addressing those issues with the Respondent, said changes were found unacceptable. The basic essentials were never sufficiently definite as evidenced by Mr. Kinsey's admission in the reply in which he states he was "adding other[s] [terms]". **Pa61 (3rd paragraph down).**

Furthermore, it was stated that it was objected to that Respondent was utilizing her right to revoke/rescind the proposed settlement agreement and it was advised that Appellant would "likely apply to enforce the settlement", however, it was also stated, "but before doing so more details were needed regarding her position". **Id.** However, more accurately, it was stated that Mr. Kinsey would need her counteroffer in writing before bringing it to the necessary parties. **A counteroffer is a repudiation of a contract.** Berbarian v. Lynn, 355 N.J. Super. 210, 217 (App. Div. 2002)(emphasis added)(holding that a "counteroffer operates a rejection because it implies that the offeree will not consent to the terms of the original offer and will only enter into the transaction on the terms stated in the counter offer.") Moreover, it was specifically requested the counteroffer be in writing at least twice on the phone call, clearly showing a lack of a "meeting of the minds." **Pa109-111, para(s) 5-6.**

Additionally, Mr. Kinsey reopened settlement negotiations pursuant to his request for future writing, which was completed. This directly conflicts with the case law cited by Plaintiff now in Ruffin. There is no absence of future writing. In fact, as stated, Mr. Kinsey personally requested the future writing. Second, again by their own admission, the proposed "contract" was never completed in the terms. Details were not just getting "fleshed out". No objection was raised to email correspondence indicating several issues on or about December 27, 2022, or a follow-up email on or

about December 29, where it was stated that the redlined agreement "should" be coming shortly, however, counsel also requested additional information for the material terms of the matter. Some of these material terms were relating to the Sick Time, Vacation Time, and Personal Time that Respondent had accumulated. While those numbers were provided, Mr. Kinsey still did not object to the notion of various issues on the same email chain a mere two (2) days prior. Stating that a policy is only paying out a small fraction of what she accrued is clearly one of the several material terms. Clearly material terms were still in dispute, therefore there was no meeting of the minds.

Notwithstanding the above, Ruffin, states,

> "A settlement agreement obtained through mediation has a separate set of conditions in order to be enforceable. "[I]f the parties to mediation reach an agreement to resolve their dispute, the terms of that settlement **must be reduced to writing and signed by the parties before the mediation comes to a close**. In those cases in which the complexity of the settlement terms cannot be drafted by the time the mediation session was expected to have ended, the mediation session should be continued for a brief but reasonable period of time to allow for the signing of the settlement." Willingboro Mall, Ltd. v. 240/242 Franklin Ave., L.L.C., 215 N.J. 242, 71 A.3d 888, 900 (N.J. 2013)."

[Ruffin v. Allstate Ins. Co., 2016 WL 5745118, at *4 (D.N.J. 2016) (emphasis added)]

The conversations in efforts to resolve the matter took place in a mediation session outside of the departmental hearing. The fully completed settlement agreement must

be reduced in writing and signed by the parties. It never was, because the terms were still being negotiated. Moreover, Mr. Kinsey also mentioned in conversations that should Respondent revoke/rescind, this matter would go straight to the Office of Administrative Law (OAL). This evidences that, not only were settlement negotiations essentially ongoing[3], but that the functional equivalent of a "continuation period" to allow for the signing of the document existed, like Ruffin. Id. Most importantly, Respondent unequivocally repudiated the contract. Simply put, the facts of the record permit a reasonable fact finder to conclude there was never a meeting of the minds, and therefore no contract with which to bind Respondent.

POINT THREE: APPELLANT'S RELIANCE ON WILLINGBORO IS MISPLACED AND THE APPEAL SHOULD BE DENIED.

Appellant relies heavily upon the case of Willingboro Mall, Ltd. v. 249/242 Franklin Ave., LLC, 215 N.J. 242 (2013) in support of its contention that it is entitled to enforcement of the terms set forth on record on December 20, 2022. Appellant's arguments should not be found at all persuasive and should be rejected in their entirety.

[3] It also indicates initial agreement/acknowledgment by Appellant that the proper forum in which to seek relief would be to petition the Civil Service Commission; further indicates the position that the agreement – absent a writing – was incomplete and not binding.

To the extent that Appellant implies that the alleged agreement here should be enforced because the Willingboro Court upheld a settlement agreement which lacked a writing, such should be disregarded. As the Willingboro Court declared, going forward, if parties to mediation reach an agreement to resolve their dispute, the terms of that settlement must be reduced to writing and signed by the parties before the mediation comes to a close. Willingboro, 215 N.J. at 262-263. In those cases in which the complexity of the settlement terms cannot be drafted by the time the mediation session was expected to have ended, the mediation session should be continued for a brief but reasonable period of time to allow for the signing of the settlement. Id. A settlement that is reached at mediation **but not reduced to a signed written agreement will not be enforceable.** Id (emphasis added).

In the instant case, the conversations in efforts to resolve the matter took place in a mediation session outside of the departmental hearing. Therefore, a fully completed settlement agreement would be required to be put in writing and signed by the parties for it to be enforceable. However, no such writing was ever signed by the parties and accordingly, the terms set forth on December 20, 2022 are not properly enforceable. While Appellant asserts at page 21 of its papers that the fact that there is a stenographic record is sufficient, such cannot be the case. As the Willingboro Court held, cases in which the complexity of the settlement terms cannot be drafted by the time the mediation session was expected to have ended, the

mediation session should be continued for a brief but reasonable period of time to allow for the signing of the settlement. Id.

It should go without saying that, in the case at hand, the settlement terms were sufficiently complex to require that there be a reasonable period of time for the signing of the settlement, Specifically, remaining at issue was the complicated details of healthcare plans, backpay, waivers of significant legal claims, and the like. In fact, evidence of this is the fact that Appellant provided a proposed writing intended to be signed by the parties. The stenographic record detailing a rough outline of terms should not be sufficient, the complexity of the terms required a more extensive detailing of them which should have been reduced to writing and signed by the parties. However, no such writing was ever signed by the parties. Therefore, it follows that the terms orally outlined on December 20, 2022 are not enforceable.

Further, even assuming *arguendo* that such were enforceable, there is still no binding settlement agreement. In Larson & Fish, Inc. v. Schultz, the Appellate Division was presented with a similar predicament as one finds here. In Larson, the parties formed a contract under which the plaintiff was authorized to sell defendant's property for seventeen thousand dollars ($17,000.00) and would receive a commission of five percent (5%) of the sale price. The Plaintiff then provided a five hundred dollar ($500) cash deposit and a writing which included the additional language: [purchaser(s)] hereby agrees to purchase the premises as described below,

at price and terms hereinafter stated, and to be bound by this offer immediately upon its acceptance by the owner. The defendant had never made or agreed to make any change in the terms of sale in the original contract and refused to accept the deposit or the writing. On appeal, the plaintiff argued that the tendered agreement constituted an acceptance of the defendant's terms. The Appellate Court disagreed. The Larson Court found that the tendered agreement was a counteroffer, holding that a reply to an offer, although purporting to accept it, which **adds qualifications or requires performance of conditions**, is not an acceptance but is a counteroffer. Larson 5 N.J. Super. 403, 405 (App. Div. 1949) (emphasis added).

Similar to the parties in Larson, the parties placed terms on record which were to be reduced to writing at a later time.[4] Thereafter, just as in Larson, Appellant sent a writing which conditioned the agreement upon Respondent's acceptance of the agreement within twenty-one (21) days. This tendered agreement cannot be seen as anything but the same type of reply in Larson, which purports to accept the agreement, but which adds the performance of conditions, i.e. Respondent's acceptance of the agreement within twenty-one (21) days. In a word, it's a counteroffer. **A counteroffer is a repudiation of a contract.** Berbarian v. Lynn, 355 N.J. Super. 210, 217 (App. Div. 2002)(emphasis added)(holding that a

[4] As evidence of this agreement to reduce the terms to a formal writing is the provision of the formal writing by counsel for Appellant. See Pa41-44.

"counteroffer operates a rejection because it implies that the offeree will not consent to the terms of the original offer and will only enter into the transaction on the terms stated in the counter offer.") Accordingly, there is no settlement agreement to be enforced and Appellant's appeal should be denied.

Moreover, any agreement alleged to exist by Appellant is rendered unenforceable by virtue of Appellant's request for a new offer of settlement from Respondent. Subsequent to the provision of the agreement, a teleconference was scheduled at which time counsel for Respondent informed counsel for Appellant of her intent to repudiate the settlement agreement. **Pa109-Pa111, para(s). 4-6.** During the call, counsel for Appellant then requested that Respondent provide her proposal for settlement on different terms and asked that it would be provided in writing to ensure her position did not change. **Id.** Respondent did so, and the Appellant rejected her proposal for settlement. **Pa115-Pa116; Pa61.**[5]

It is clear from the facts that there is no 'meeting of the minds.' Appellant requested a new offer of settlement on different terms than the original. Not only does this demonstrate that there are ongoing negotiations and therefore no meeting of the minds but, moreover, Respondent provided the requested counteroffer which was rejected. Accordingly, there is no 'meeting of the minds' and no acceptance.

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[5] The January 19, 2023 letter of Appellant's counsel confirms the occurrence of this teleconference and further confirms the request for the provision of a counteroffer which was rejected. See **Pa61.**

The original terms were repudiated and there is no settlement agreement to enforce. Appellant's appeal should be denied.

POINT FOUR: APPELLANT'S ARGUMENTS RELATIVE TO OWBPA ARE UNPERSUASIVE. THE INSTANT APPEAL SHOULD BE DENIED.

Appellant asserts that the Older Worker Benefits Protection Act (hereafter "OWBPA") does not invalidate the settlement agreement nor permit Respondent to repudiate the entire settlement agreement. These arguments should be found to be wholly unconvincing.

In support of its contentions, Appellant relies first upon the case of Oubre v. Entergy Operations, 522 U.S. 422 (1998). Appellant asserts that the import of Oubre's holdings are that a revocation pursuant to OWBPA is limited to Age Discrimination in Employment Act (hereafter "ADEA"). However, even assuming *arguendo* that this principle is the case,[6] it would not render the result below incorrect.

First, the contract terms provided by Appellant provided a right to revoke. Specifically, section 11 of the contract provides, in relevant part:

> "Pursuant to the Older Workers Benefit Protection Act, Employee has twenty-one (21) days from delivery hereof to consider this Agreement. Employee

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[6] See Oubre 522 U.S. at 427-428, where the Court makes clear holding which answers the effect of OWBPA upon waivers of ADEA claims "irrespective of the validity of the contract as to other claims." In other words, the question being answered by the Court appears to be much narrower than what Appellant asserts it to be.

> **may accept this Agreement** before expiration of the twenty-one days, in which case she shall waive the remainder of the consideration period. Employee has a period of seven (7) calendars after delivering the executed Agreement to **revoke acceptance of the Agreement**. To revoke she must deliver timely written notice revoking acceptance **of this Agreement** to the attention of the Employer's attorney…."
>
> [**Pa43**]

The terms are clear. The ability to revoke applies to the Agreement, not to just a waiver of any ADEA claims she may have. Had Appellant sought this ability to revoke to be limited insofar as they contend it is now, the Appellant was free to construct the language in such way. However, the revocation ability provided for in the proposed Settlement Agreement unambiguously applies to the Agreement as a whole. Under New Jersey law, when the terms of a contract are clear and unambiguous, there is no room for interpretation or construction and the Courts must enforce those terms as written. Karl's Sales & Serv. V. Gimbel Bros., 249 N.J. Super. 487, 493 (App. Div. 1991). Accordingly, pursuant to the terms proposed by Appellant, the Agreement provides that Respondent had a right to either revoke the Agreement as a whole within 21 days or within 7 days after delivering an executed agreement. She did so revoke and accordingly, Appellant's appeal should be denied.

Further, Appellant relies upon Blum v. Lucent Techs., Inc., 2006 N.J. Super. Unpub. LEXIS 2734 and Nakamoto v. Lockheed Martin Corp., 2010 U.S. Dist. LEXIS 56500 in support of its OWBPA contentions. As a preliminary matter, Blum

is unpublished and Nakamoto is a case out of the United States District Court for the Northern District of California. As such, neither have binding effect on this Court. Notwithstanding this, the fact is that both cases are easily distinguishable and should not be found to change the fact that Respondent properly repudiated the agreement. In both Blum and Nakamoto, both signed the agreement and then later sought to invalidate the agreement pursuant to OWBPA. In the former case, the plaintiff signed the agreement, received benefits pursuant to the agreement, and then later challenged on the basis it was not made sufficiently knowingly or voluntarily. In the latter, the plaintiff signed the agreement, received benefits pursuant to the agreement, and challenged on the basis of the timeliness of his revocation and on grounds that the agreement was not made knowingly or voluntarily.

The case at bar could not be further apart. At no time did Respondent sign an agreement or receive benefits pursuant to the same. Moreover, Respondent does not put at issue whether her revocation was timely or whether or not her actions were made knowingly or voluntarily. Rather, Respondent contends that she knowingly and voluntarily revoked the Agreement pursuant to section 11 of the same in a timely manner. Accordingly, the issues presented by Blum and Nakamoto are not relevant to the analysis here.

Rather, it is as Judge Shanahan correctly concluded in his opinion on April 21, 2023:

> "Indeed, it is clear that the specific language of Section 11 dealing with statutory review and revocation period of this voluntary retirement and release agreement, codify the requirements of the Older Worker's Benefit Protection Act. It's clear that the [Respondent] has the right to revoke and if the factual circumstance comes under this argument bargained for rights under the two labor contracts, she's entitled to revoke it. It was clearly done under the time period and therefore… **there was no settlement…**"
>
> [**2T, 20:3-14.**]

To the extent that Appellant argues that it would be counter to public policy to uphold Respondent's exercise of her right to revoke, this is absurd. Rather the reverse would be true. The terms offered by Appellant in the writing include a provision that clearly provides Respondent the right to revoke within twenty-one (21) days. Not only would reversing the decision below violate her rights under contract law but would further confound the intentions of the Congress to protect persons such as Respondent from uninformed and unfair losses of important rights. Moreover, to find that Respondent did not properly revoke the agreement in accordance with the clear terms of the agreement would be in complete countenance to well settled law prohibiting Courts from rewriting clear contracts on the basis that it might have been functionally desirable to draft it differently; remaking a better contract for the parties than they themselves decided to enter; or alter contracts for the benefit of one party and to the detriment of another. <u>Karl's Sale & Serv.</u>, <u>supra</u> at 493. It is clearly the case that public policy favors Court action which preserves

rights, upholds the intentions of the legislature, and maintains consistency of interpretation and application of contract law.

In conclusion, it is respectfully submitted that Appellant's arguments with respect to OWBPA do not change the analysis. Appellant's appeal should be denied.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Court find for Respondent and deny Appellant's requested relief.

Respectfully submitted,

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COUNTY OF WARREN, Plaintiff-Appellant, NICHUA LIACI, Defendant-Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO.: A-002935-22 CIVIL ACTION ON APPEAL FROM: Superior Court-Chancery Division, Warren County WRN-C-016006-23 Sat Below: Hon. Kevin M Shanahan, A.J.S.C.

REPLY BRIEF ON BEHALF OF PLAINTIFF-APPELLANT COUNTY OF WARREN

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Date of Submission: March 29, 2024

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PRELIMINARY STATEMENT

Respondent's contention that the issue presented on this appeal is a very simple and straightforward one as to whether an enforceable settlement contract was reached by the parties is correct. Her conclusion that it was not, however, is unsupported by the record before this Court or applicable law, both of which demonstrate that a settlement contract was reached, memorialized on the record by counsel, and by Respondent herself following questioning by her counsel and the hearing officer as to her understanding of, and agreement to, the settlement contract terms. Her subsequent change of heart and buyer's remorse change neither those facts, nor the law, which mandate enforcement of the settlement contract.

Respondent's arguments that: (1) the matter should be before Civil Service, which was rejected below; (2) disputed material facts preclude enforcement of the memorialized settlement contract, which is contradicted by counsel's own arguments below, wherein Respondent's counsel acknowledged at oral argument that a plenary hearing was unnecessary; (3) Willingboro is apposite and/or its writing requirements were not satisfied by the hearing transcript, which interpretation of that case is incorrect; and/or (4) the OWBPA allowed Respondent to repudiate the memorialized settlement contract are all

meritless and must be rejected by this Court based upon the undisputed record and applicable law. Thus, it is urged that the trial court's decision be reversed.

LEGAL ARGUMENT

POINT I

RESPONDENT'S EXHAUSTION OF ADMINISTRATIVE REMEDIES ARGUMENT SHOULD BE REJECTED BECAUSE SHE DID NOT CROSS-APPEAL ON THIS ISSUE AND THE MATTER WAS PROPERLY BEFORE THE TRIAL COURT.

A. Respondent is barred from arguing that Appellant has not exhausted administrative remedies due to her failure to cross-appeal.

Respondent argues in Point I of her brief that this appeal should be denied as Appellant has "not exhausted administrative remedies." (Rb8-Rb10).[1] Specifically, she contends that Appellant "could have and should have petitioned the Civil Service Commission for relief." (Rb10). Appellant urges Your Honors to reject this contention because Respondent failed to file a cross-appeal on this very issue.

While respondents in an appeal are permitted to raise issues without filing cross-appeals, they are limited to "argue any point on the appeal to sustain the trial court's judgment." Chimes v. Oritani Motor Hotel, Inc., 195 N.J. Super. 435, 443 (App. Div. 1984) (emphasis added). In other words, "[w]ithout cross-

[1] The abbreviation "Rb" notates Respondent's brief.

appealing, a party may argue points the trial court either rejected or did not address, so long as those arguments are in support of the trial court's order." State v. Eldakroury, 439 N.J. Super. 304, 307 n.2 (App. Div. 2015) (emphasis added) (declining to address argument made by defendant that was not made in support of the trial court's order). Indeed, "it is the judgment that is the focus of the appeal." Stone v. Old Bridge, 111 N.J. 110, 115 n.2 (1988).

Here, it simply cannot seriously be argued that Respondent's contention that Appellant failed to exhaust administrative remedies, i.e., submitting this matter for consideration before the Civil Service Commission ("CSC"), supports the trial court's order denying Appellant's Order to Show Cause ("OTSC") to enforce the settlement. As the record reflects, Judge Shanahan placed his reasoning for denying Appellant's OTSC on the record. (2T). It is clear that this ruling was limited to a finding "there was no settlement" and entering "an order remanding the disciplinary action back to the hearing officer." (2T20:2-14). Nonetheless, seemingly in opposition to the trial court's ruling, Respondent now argues that the trial court did not even have jurisdiction over this matter in the first instance, an argument raised and rejected by the court below. (Rb9-Rb10). Because Respondent failed to submit this issue by way of cross-appeal, Appellant urges Your Honors to deem this issue waived.

B. Alternatively, Appellant has not failed to exhaust administrative remedies because the trial court had jurisdiction over this matter.

Alternatively, even assuming *arguendo* that Respondent had submitted the exhaustion of administrative remedies issue on cross-appeal, this argument remains incorrect on its merits. Appellant maintains that the CSC has no expertise in making a legal determination as to the existence of a settlement contract, the only issue that was before the trial court.

"The exhaustion of administrative remedies is not an absolute prerequisite to seeking appellate review" and "[e]xceptions are made when the administrative remedies would be futile, when irreparable harm would result, when jurisdiction of the agency is doubtful, or when an overriding public interest calls for a prompt judicial decision." New Jersey Civil Service Ass'n v. State, 88 N.J. 605, 613 (1982) (emphasis added). Indeed, our courts "have frequently held that in a case involving only legal questions, the doctrine of exhaustion of administrative remedies does not apply." Ibid.; see also Zamboni v. Stamler, 194 N.J. Super. 598, 603 (Law Div. 1984) (finding whether a prosecutor has the authority to appoint superior officers to be a legal issue not requiring the parties to exhaust their administrative remedies before the CSC); Thomas v. Bergen Cnty. Welfare Bd., 122 N.J. Super. 371, 376 (App. Div. 1973) (reversing finding that plaintiff was required to exhaust her administrative remedies because the issues before the court were questions of law "not peculiarly within the expertise of the [CSC]").

As the statutory language demonstrates, the CSC has limited jurisdiction which does not include interpretation of settlement contracts. See N.J.S.A. 11A:2-6. Moreover, in the instant matter there are only legal issues related to the validity of the settlement reached between the parties, clearly issues not within the confines of the CSC's limited jurisdiction or its expertise. Moreover, to the extent Respondent's disciplinary charges were never perfected into final disciplinary action, and instead, the matter was resolved by way of a settlement rather than disciplinary action, there is no final disciplinary action which Respondent could have brought before the CSC on appeal. Likewise, there was no appeal mechanism by which the Appellant could have brought this matter to the CSC as there was and is no pending Civil Service matter. Instead, the disciplinary matter was simply one aspect of the dispute between the parties which was resolved by the settlement, which by its terms reached well beyond the discipline which formed the basis for the Amended Notice of Disciplinary Action and the administrative departmental hearing which was ongoing at the time the settlement contract was reached and memorialized on the record.

Accordingly, Appellant submits that Your Honors should reject Respondent's argument that Appellant failed to exhaust administrative remedies, as this argument is belied by the record and the Civil Service statute.

POINT II

RESPONDENT IS PRECLUDED FROM ARGUING THAT THERE ARE GENUINE ISSUES OF MATERIAL FACT AFTER FAILING TO RAISE THIS ISSUE BEFORE THE TRIAL COURT AND AFFIRMATIVELY REPRESENTING IN THE TRIAL COURT THAT NO MATERIAL ISSUES OF FACT REQUIRED A PLENARY HEARING AND THE MATTER WAS APPROPRIATE FOR RESOLUTION BY THE TRIAL COURT ON THE UNDISPUTED FACTS IN THE RECORD AS A MATTER OF LAW.

In Point II of her appellate brief, Respondent belatedly argues that Appellant's request for appellate relief should be denied "because there are material facts in dispute which would allow a fact[]finder to find no enforceable contract." (Rb10-Rb15). However, as the record reflects, not only did Respondent fail to raise this issue before the trial court, despite having the opportunity to do so, but Respondent's counsel expressly acknowledged in the court below that there were no questions of fact which required a plenary hearing and conceded same was not necessary when questioned by the court on this issue during oral argument. (1T23:7-10). Accordingly, Respondent is precluded from raising the issue on appeal.

It is well established that an appellate court does not consider arguments which were "not properly presented to the trial court when an opportunity for such a presentation [wa]s available unless the questions so raised on appeal go

to the jurisdiction of the trial court or concern matters of great public interest."[2] Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (quoting State v. Robinson, 200 N.J. 1, 20 (2009)); Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973); see also Strickland v. Foulke Mgmt. Corp., 475. N.J. Super. 27, 43 n.5 (App. Div. 2023) (declining to address the issues of fraud, laches, estoppel, or waiver, due to plaintiff's failure to raise them before the trial court).

Here, after reviewing the parties' submissions, Judge Shanahan opined that it seemed to him "as if the only way out of this [was] a plenary hearing[,]" and asked counsel for their thoughts. (1T3:12-16). Appellant's counsel maintained that there were "not really any disputed facts which would preclude [the trial court's] ruling,[,]" but Appellant was willing to proceed to a hearing if it was deemed necessary. (1T3:17-21). During oral argument, Respondent's counsel did not disagree with this assessment and did not request a plenary hearing or suggest same was necessary or appropriate. In fact, following argument by both counsel, the court confirmed of counsel, "No need for a

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[2] In this regard, it cannot be argued that the issue as to whether there are genuine issues of material fact in determining whether there is an enforceable contract is a matter "of great public interest." See, e.g., Monek v. Borough of South River, 354 N.J. Super. 442, 456 (App. Div. 2002) (declining to address pre-judgment interest issues because plaintiff failed to present same to the trial judge, and the issues did not involve "sufficient public concern"); but see Berardo v. City of Jersey City, 476 N.J. Super. 341, 354 (App. Div. 2023) (finding whether a historic preservation officer can unilaterally determine the historic nature of a property to be a "matter of public interest").

plenary hearing. You agree?" (1T23:7). Appellant's counsel agreed, and notably, Respondent's counsel responded, "No, Your Honor." (1T23:8-10) (emphasis added). Thus, Respondent had every opportunity during the argument to contend that a plenary hearing was necessary, as initially suggested by the court because there were genuine issues of material fact precluding the judge's ruling as a matter of law, yet Respondent's counsel declined to do so, instead, affirmatively acknowledging on the record that the matter was ready for a ruling by the court based upon the undisputed facts in the record and the applicable law.

Accordingly, Respondent's late interposed objection that material questions of fact preclude enforcement of the settlement contract memorialized on the record is without merit and must be rejected as untimely to the extent it was not raised below, and more importantly, is inconsistent with counsel's own representation to the trial court that no plenary hearing was necessary, and instead, the court could properly rule on the undisputed facts in the record and applicable law.

POINT III

THE MEMORIALIZATION OF THE SETTLEMENT CONTRACT ON THE RECORD BEFORE THE HEARING OFFICER SATISFIES WILLINGBORO TO THE EXTENT SUCH COMPLIANCE IS EVEN REQUIRED IN VIEW OF THE FACT THAT THIS MATTER WAS SETTLED AT HEARING AND NOT AT MEDIATION.

Respondent argues in her brief that the settlement contract reached and memorialized on the record is insufficient to satisfy Willingboro either because a transcript is an insufficient writing, or because, only a formal Settlement Agreement was sufficient in this matter. (Rb15-Rb20). Both arguments must be rejected.

First and foremost, as argued in Appellant's initial brief, this matter was settled during an administrative hearing, not at mediation, and so, the Willingboro writing requirement is arguably inapposite. See Willingboro Mall, Ltd. v. 240/242 Franklin Ave., LLC, 215 N.J. 242 (2013) (upholding oral settlement agreement **reached at mediation** and holding that "going forward parties that intend to enforce a settlement agreement **reached at mediation** must execute a signed written agreement") (emphasis added); see also Pascarella v. Bruck, 190 N.J. Super. 118 (App. Div. 1983) (upholding enforceability of oral settlement agreement reached on eve of trial and not memorialized on the record and rejecting ability of plaintiff to repudiate the following day based upon a change of heart).

Even if the Willingboro writing requirement is applicable despite the fact that the settlement at issue was not reached during a mediation, Respondent's argument that a transcript, wherein the Respondent was questioned by the hearing officer and her own counsel and Respondent and her attorneys assented

on the record to the terms and substance of the settlement is somehow an insufficient writing to satisfy the Willingboro writing requirement is ridiculous and inconsistent with Willingboro itself which recognizes that "[w]e also see no reason why an audio- or video-recorded agreement would not meet the test of 'an agreement evidenced by a recorded signed by all parties to the agreement . . . ." Willingboro, 215 N.J. at 262-63. To suggest that an audio or video recording is sufficient, but a written transcript prepared by a certified Court Reporter is insufficient, is simply preposterous, and must be rejected by this Court.

Further, although Respondent is correct that Willingboro holds that in cases where "the complexity of the settlement terms cannot be drafted by the time the mediation session was expected to have ended, the mediation session should be continued for a brief but reasonable period of time to all for the signing of the settlement," no such necessity was identified in the instant matter by the hearing officer, Respondent, or her counsel. Id. Quite the contrary, Respondent and her counsel both agreed on the record that the material terms of the settlement were accurately and completely reflected by the representations of counsel of the record as confirmed by the questioning of Respondent by the hearing officer and her counsel. (Pa34). To this end, those terms were even clarified by Respondent's counsel. (Id.). Accordingly, Respondent's argument

in this regard is without merit and must be rejected by this Court for what it is, another after the fact effort to justify what in this instance is nothing more than a simple case of buyer's remorse which cannot and should not be endorsed by this Court.[3]

POINT IV

THE TRIAL COURT ERRED IN FINDING THE OLDER WORKERS BENEFIT PROTECTION ACT PERMITTED RESPONDENT TO

[3] Respondent's reliance on the more than seventy-year-old decision in Larsen & Fish, Inc. v. Schultz, 5 N.J. Super. 403, 405 (App. Div. 1949) demonstrates the frivolity of this argument. First, Larsen did not involve a settlement agreement. Also, there was no contract reached, rather, the acceptance contained an additional term which was rejected. Here, that is not the case. Instead, all parties and counsel agreed to the terms of the settlement contract on the record. Moreover, it is that contract, which is sought to be enforced in this matter, not the subsequent unexecuted draft Settlement Agreement which Respondent claims contained additional terms not agreed upon. Finally, it should be noted that a settlement contract cannot be undone simply because a settling party seeks to change a term. Rather, such AMENDMENT to the contract is only incorporated if subsequently agreed to by both the parties. Simply proposing a change to the term of a settlement contract, which has been reached and agreed to does not, as noted by the trial court in rejecting this argument, invalidate the contract. Indeed, contracts are amended all the time, with mutual consent of the parties to the contract. Such subsequent negotiation of new or amended terms does not undermine the original contract and Respondent offers no legal authority to support such proposition. Thus, neither the suggestion of a new term to a settlement contract already reached, or consideration of such proposed new term, serves to negate the underlying contract absent a meeting of the minds and agreement ***on the amendment***. Herein, the parties and counsel agreed to and acknowledged the terms of the settlement contract on the record. Thereafter, neither the introduction of additional terms in an unsigned draft Settlement Agreement or alternative proposals from Respondent, whether or not considered by the other party, constituted anything more than negotiations to amend the settlement contract reached and memorialized on the record. To no measure did such exchanges undermine the settlement contract reached and memorialized on the record. Thus, Respondent's arguments must be rejected as without any basis in law or fact.

REPUDIATE THE SETTLEMENT CONTRACT MEMORIALIZED ON THE HEARING RECORD.

Contrary to the lower court's ruling, the OWBPA does not serve as a legal impediment to enforcement of a settlement reached and memorialized on the record. To this end, in arguing that Judge Shanahan's finding that "there was no settlement" **based exclusively upon the OWBPA language contained in the unexecuted draft Settlement Agreement ("SA") never signed by Respondent** – should be upheld, like the trial court, Respondent misunderstands the relief sought by Appellant below, and now, before this Court. (Rb22-Rb23). As argued below and on appeal, Appellant contends that the settlement contract reached and memorialized on the record before the hearing officer, the affirmance of the terms of which and agreement to the resolution memorialized was agreed to by Respondent upon questioning by her counsel and the hearing officer, was an enforceable settlement contract, containing all material terms, which accordingly should have been enforced by the court below. Nowhere in those terms memorialized on the record was there any discussion of an OWBPA revocation period. (Pa33-Pa34). Moreover, the OWBPA serves as no impediment to the enforcement of the settlement agreement reached and memorialized on the record, the OWBPA statutory requirements, by its terms, are **only** applicable to waiver of ADEA claims. See Oubre v. Entergy Operations, Inc., 522 U.S. 422, 426-27 (1998) (noting limitation of OWBPA to

releases covering ADEA claims); see also Blum v. Lucent Techs, Inc., 2005 WL 4044579, at *5 (N.J. Super. Ct. App. Div. May 30, 2006) (confirming OWBPA's applicability **only to ADEA claims** and not to state law claims).

Moreover, Appellant's counsel at oral argument before Judge Shanahan made clear that they were ***not*** seeking enforcement of the draft SA which Respondent never signed, but instead, simply of the settlement contract terms as memorialized on the record. (1T14:11-23). Nevertheless, Judge Shanahan ruled, not based upon the terms of the settlement contract as memorialized on the record, but instead, based upon paragraph 11 of the unexecuted draft SA and the language of the OWBPA, that Respondent had the right to revoke the settlement contract memorialized on the record and that she timely did so. This, however, was a reversible error of law.

First, both the lower court and Respondent seem to argue that the "contract" at issue is the SA (Rb20; Pa43), not the material terms of the settlement memorialized on the record. This is absurd. Rather, the issue before this Court, and before the lower court, as clearly delineated by counsel on the record below and in Appellant's Notice of Appeal and initial brief on appeal, is whether the settlement contract ***as memorialized on the record was enforceable***. For the reasons set forth in Appellant's initial brief, it is beyond dispute that as a matter of law, the settlement contract memorialized on the record is

enforceable and should be enforced, thereby warranting reversal of the lower court's decision.

The OWBPA issue is nothing more than a red herring. There was no discussion of a revocation period or compliance with the OWBPA in the settlement contract memorialized on the record. Moreover, counsel made clear that Appellant was prepared to proceed based upon the material terms of the settlement contract memorialized on the record, which did not include an OWBPA compliant release of ADEA claims and/or a concomitant revocation period. Accordingly, the lower court's determination that somehow the OWBPA language contained in the unexecuted draft SA undermined the settlement reached and memorialized on the record is without basis in fact or law. That is particularly true since Respondent repudiated the agreement reached and memorialized on the record without ever agreeing to or executing the draft SA and now seeks this Court to uphold that repudiation purportedly based upon a term which was not contemplated or included in the settlement contract memorialized on the record and expressly agreed to by Respondent and her counsel. (Pa33-Pa34, 3:23-7:11). That flawed argument must be rejected.

Finally, with respect to the public policy argument addressed in Appellant's initial brief, if the lower court's ruling is permitted to stand, it will upend the finality and certainty of settlements in this State and the concomitant

public policy favoring resolution of matters to the extent it would mean that any plaintiff in an employment case reaching a resolution at mediation or in a settlement before the court, who developed buyer's remorse within 21 days of reaching a settlement and memorializing it in a Willingboro writing or transcript before a court or hearing officer, could simply change their mind and repudiate the settlement. That is not, and cannot be, the public policy of this State as argued more fully in Appellant's moving brief at Point I and n.8. Accordingly, this Court is respectfully urged to reverse the lower court and remand this matter for enforcement of the settlement contract reached and memorialized on the record before the hearing officer on December 20, 2022.

CONCLUSION

For the foregoing reasons, Appellant respectfully submits that the trial court's denial of its OTSC should be reversed, and the settlement reached between the parties and memorialized on the record on December 20, 2022 be enforced.

Respectfully submitted,

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