

MOSHE ROZENBLIT and QWON KYU
RIM,

Plaintiffs/Appellants/
Cross-Respondents

v.

MARCIA V. LYLES, in her
official capacity as
Superintendent of the Jersey
City Board of Education, et
al.,

Defendants/Respondents,

And

JERSEY CITY EDUCATION
ASSOCIATION,

Defendant/Respondent/
Cross-Appellant.

SUPREME COURT OF NEW JERSEY

CIVIL ACTION

DOCKET NO.: 083434

On Certification of the Final
Order of the Superior Court,
Appellate Division

Appellate Division Docket No.
A-1611-17T1

Sat below:

Hon. Jose L. Fuentes, P.J.A.D.,
Hon. Francis J. Vernoia, J.A.D.,
Hon. Scott J. Moynihan, J.A.D.

**RESPONSE TO PETITIONER *AMICUS CURIAE* BRIEF BY
NEW JERSEY PUBLIC EMPLOYMENT RELATIONS COMMISSION**

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PRELIMINARY STATEMENT

In its *amicus curiae* brief, the New Jersey Public Employment Relations Commission ("PERC") contends that the release time payments at issue in this case are a mandatory subject of collective bargaining, and therefore, PERC, rather than the Appellate Division (or any other New Jersey court), has initial jurisdiction over whether such payments are statutorily authorized. PERC's argument is badly misplaced, and if accepted, would contravene basic principles of separation of powers and democratic accountability. PERC's interpretation of the educational statutes, moreover, are outside the agency's charge and should be rejected.

As an initial matter, contrary to PERC's contention, the Appellate Division did not make a "scope of negotiations" determination. The scope of negotiations between the Jersey City Board of Education ("Board") and the Jersey City Education Association ("JCEA") is not, and has never been, at issue in this case. In order for a subject to be negotiable, it must first be lawful. In the context of education, that means that the Legislature must *first* authorize the Board to expend public funds *before* the Board can negotiate over those expenditures. *Fair Lawn Educ. Ass'n v. Fair Lawn Bd. of Educ.*, 79 N.J. 574, 581 (1979).

The Appellate Division arrived at its conclusion by interpreting Title 18A, the educational statutes of this state,

not by interpreting the Employer-Employee Relations Act ("EERA"), which gives PERC limited powers to adjudicate certain disputes between public employers and public employees. The Appellate Division held that release time expenditures are "not sanctioned by Title 18A," and are otherwise "unenforceable as against public policy." Op. at 4. Of course, if something is unlawful as against public policy, and not permitted by Title 18A, then that thing cannot be a proper subject of negotiation at all.

In effect, PERC's contention that the Appellate Division's decision was a scope of negotiations determination, is an argument expanding PERC's authority beyond what it has been delegated by the Legislature in the EERA. If PERC's interpretation of Title 18A were correct, it would mean that PERC could decide what public funds school boards are or are not statutorily authorized to expend. That would mean second-guessing New Jersey courts on issues of statutory interpretation. But that is beyond PERC's authority, and contrary to New Jersey law.

PERC also commits the same error that the JCEA made in its Petition for Certification - namely, it argues that a school board's powers are unlimited unless they are specifically *preempted* by state statute. Br. at 5. But as the Appellate Division ruled, and as this Court has routinely held, the Board's powers to expend public funds are limited to those that are *authorized* by state statute. See *Fair Lawn Educ. Ass'n*, 79 N.J.

at 581; *Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ.*, 78 N.J. 144, 161 (1978). In other words, school boards in this state do not have whatever powers are not specifically prohibited; on the contrary, they have only those powers that are expressly permitted. Because release time expenditures are not authorized by statute, the Board's actions in allowing those expenditures were ultra vires. That renders PERC's "scope of negotiations" argument moot.

Even if we analyzed the release time expenditures at issue in this case as a scope of negotiations question, however, those expenditures are non-negotiable matters of governmental policy. This Court has held that important matters of educational policy should be left to the political process, not negotiated behind closed doors through the collective bargaining process. *Ridgefield Park Ed. Ass'n*, 78 N.J. at 161-62. Release time is an important policy issue that is properly reserved to the politically accountable branches of government, not to an administrative agency.

Finally, N.J.S.A. 18A:30-7 does not authorize the release time expenditures in this case because release time is not compensation offered to all teachers; it is instead a gratuity provided to one special interest group without sanction in state law and unlawful under the New Jersey Constitution. Neither 18A:30-7, nor any other statute, authorizes that expenditure of

public funds on release time, as the Appellate Division correctly found.

ARGUMENT

I. PERC'S PREFERRED INTERPRETATION OF N.J.S.A. 18A:30-7 AS REQUIRING NEGOTIATIONS OVER RELEASE TIME EXCEEDS THE SCOPE OF THE AGENCY'S DELEGATED AUTHORITY.

In contending that the Appellate Division's interpretation of 18A:30-7 was a scope of negotiations determination, PERC is exceeding its delegated authority. As a threshold matter, the Appellate Division's decision is based entirely on the statutory limitation of the Board's power to expend public funds under this state's *education* statutes, not on whether the Board may or may not negotiate with a labor union under the EERA *public employment* statute. This is important because the question of the Board's authority must be answered before any question about the scope of negotiation. *Serv. Armament Co. v. Hyland*, 70 N.J. 550, 563 (1976). And the question of whether state statute authorizes the Board to fund or not fund release time is thus outside of PERC's scope. By claiming that the Appellate Division's decision was a scope of negotiations determination, PERC is attempting to expand its authority beyond what has been delegated to it.

PERC is an administrative agency with limited delegated authority concerning employer-employee relations in public employment. This includes adjudicating disputes between public employers and employees, administering grievances, and enforcing

certain specific statutory provisions regarding employee representative elections. N.J.S.A. 34:13A-5.2. Like any other administrative body, PERC may only exercise powers that have been expressly delegated to it. See *Gen. Assembly of N. J. v. Byrne*, 90 N.J. 376, 393 (1982) ("Administrative agency power derives solely from a grant of authority by the Legislature."). PERC has not been delegated authority to determine whether or how a school board may expend public funds under this state's education statutes.

In this case, the Appellate Division held that "N.J.S.A. 18A:30-7, which is the only authority the Board and the JCEA cite in support of their position, does not authorize the Board to disburse public funds ... [on release time]." Op. at 12. In its brief, PERC contends that this decision was effectively a "scope of negotiations determination," Br. at 5, and thus within the initial jurisdiction of PERC. But PERC cannot unilaterally increase its delegated authority by declaring that something is within a scope of negotiations.

As this Court held in *Hyland*, "an administrative interpretation which attempts to add to a statute something which is not there can furnish no sustenance to the enactment." 70 N.J. at 563. The Appellate Division found in this case that Title 18A does not authorize the expenditure of public funds on release time *at all*, which necessarily means it does not authorize PERC to

adjudicate disputes regarding negotiations over release time. See *id.* ("An administrative agency may not under the guise of interpretation extend a statute to include persons not intended, nor may it give the statute any greater effect than its language allows.") PERC's contention that 18A:30-7 grants the Board "discretion on the subject of non-sick leave" and therefore that that subject is within PERC's authority as a scope of negotiations determination, is an effort to expand the statute to *require* parties to negotiate over "release time" – a power the Legislature never gave to PERC. Br. at 9.

Nor does the EERA expand PERC's authority over release time. This Court has specifically held that the EERA "does not enlarge the areas in which the Board has been delegated the responsibility to act," but merely recognizes the right of public employees to negotiate with school boards over areas where the boards have statutory authority. *Fair Lawn Ed. Ass'n*, 79 N.J. at 580-81. The Board has no statutory power to grant release time to begin with, and therefore the EERA cannot give the Board authority to make release time payments. Nor does the EERA increase PERC's jurisdiction over release time matters.

What's more, it is axiomatic that courts, not administrative agencies, interpret statutes. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); see also

Hyland, 70 N.J. at 561 ("The construction of statutes is a judicial, not an executive function."). The central issue in the Appellate Division's decision—whether release time is statutorily authorized—depends solely upon the interpretation of 18A:30-7. Such interpretation is a matter "for which the courts are uniquely suited." *Matawan v. Monmouth Cnty. Tax Bd.*, 51 N.J. 291, 297 (1968).

In other words, while courts may defer to an agency on *factual* questions that are *within* its expertise, courts are not bound by agency *legal* conclusions, let alone an agency's interpretation of a statute that is *outside* its focus. *Cianciulli v. Bd. of Tr., Pub. Emps.' Ret. Sys.*, 244 N.J. Super. 399, 402 (App. Div. 1990) ("Deference to the expertise of the agency does not require deference to the agency's interpretation of case law or legal conclusions.") PERC is not empowered to second-guess appellate courts on an issue of statutory interpretation of a law outside its charge. See *Mayflower Sec. Co. v. Bureau of Sec.*, 64 N.J. 85, 93 (1973) ("An appellate tribunal is, however, in no way bound by (an) agency's interpretation of a statute.").

PERC, moreover, cannot definitively opine about what funds school Boards are or are not statutorily authorized to expend. Yet, in arguing that the Appellate Division's interpretation of 18A:30-7 amounted to a scope of negotiations determination, that

is precisely what PERC has done. This flawed interpretation of the law, and PERC's claimed power under it, should be rejected.

II. RELEASE TIME IS NOT A SUBJECT OF MANDATORY COLLECTIVE BARGAINING.

Even examined under PERC's "scope of negotiations" framework, release time is not a mandatory subject of collective bargaining because it is not statutorily authorized and because collective negotiations over the subject would interfere with a significant area of public policy.

PERC contends that the Appellate Division erred because it purportedly did not examine whether N.J.S.A. 18A:30-7 "preempted the issue of union release time." Br. at 5. But this Court has specifically rejected the argument that matters of education policy must be preempted in order to be non-negotiable.

In *Ridgefield Park Educ. Ass'n*, PERC made a nearly identical argument, contending that grievances involving transfers and reassignments of teachers were mandatorily negotiable because these subjects were not specifically preempted by statute. 78 N.J. at 152-53 ("So long as no specific statutes are violated and no overriding public policy contravened, PERC was of the opinion that ... negotiation ... of permissive matters are acceptable.") But this Court rejected the argument that "everything which in any way affects the terms and conditions of public employment is

negotiable" as long as it is not "precluded by a specific statute." *Id.* at 161.

A year later, in *Fair Lawn Educ. Ass'n*, the Court reiterated that holding. In that case, a public labor union sought to compel a school board to pay supplemental retirement benefits to teachers as part of a collective bargaining agreement, even though those payments were not authorized by statute. "Local boards of education," this Court said, "are creations of the State and, as such, may exercise only those powers granted to them by the Legislature." 79 N.J. at 579. It then expressly rejected the argument that the EERA "enlarge[s] the areas in which the Board has been delegated the responsibility to act." *Id.* at 580-81. The EERA "does not confer upon local boards an unlimited power to negotiate all types of financial benefits for their teaching employees," and "does not enlarge the areas in which the Board has been delegated the responsibility to act." *Id.* (emphasis added).

In other words, rather than finding that all payments by a school board are permissible unless they are specifically prohibited, this Court held that public payments made by school boards must fall within a Board's statutorily-granted authority *before* they are permissible.

Part of the reason for this, as this Court has found, is that decisions about public education involve significant areas of public policy and should be subject to the democratic process

rather than collective negotiations, done in secret. The question of whether a subject is mandatorily negotiable "focuses on the extent to which collective negotiations will interfere with the establishment and effectuation of governmental policy." *Borough of Keyport v. Int'l Union of Operating Eng'rs*, 222 N.J. 314, 335 (2015). And this Court has held that "community involvement in educational decisions, insuring some democratic control over such matters, is a significant part of a thorough and efficient system of education in this state." *Ridgefield Park Educ. Ass'n*, 78 N.J. at 161-62.

PERC's view that everything is negotiable unless preempted would leave "little room for community involvement," and would allow "agreements concerning educational policy matters" to be "negotiated behind closed doors," a proposition that would "endanger[]" the "very foundation of representative democracy." *Id.* at 78 N.J. at 162-63.

Thus, as this Court has found, educational policy in this state, such as whether the public should fund union representatives to perform union work, should not be left to the collective negotiations process, unless the Legislature has specifically directed that outcome.

In *Ridgefield Park Educ. Ass'n*, this Court cited another reason that sets educational policy apart from other areas of public employment negotiations:

Since teachers possess substantial expertise in the education area, negotiations between teachers' associations and boards of education present a situation where an agreement which effectively determines governmental policy on various issues is especially likely. The impropriety of permitting such educational policy matters to be determined in the forum of collective negotiation just as if they pertained to the terms and conditions of employment is every bit as strong as it is in other areas of public employment. The interests of teachers do not always coincide with the interests of the students on many important matters of educational policy. Teachers' associations, like any employee organizations, have as their primary responsibility the advancement of the interests of their members.

Id. at 165.

In short, matters of public policy, particularly in the field of education, are properly decided not through private negotiations between public employers and labor unions, but by the public political process. That is why this Court, contrary to PERC's contention, has held that school boards must *first* have statutory authorization to spend public funds on things like release time, and that they do not have blanket authority to negotiate over whatever they want, absent express preemption. For reasons given in Respondents' other briefs and Section III below, the Appellate Division's holding that the release time expenditures at issue are contrary to public policy and *ultra vires* is correct as a matter of law and should be affirmed. PERC's argument that that issue takes a back seat to its own determination of its own authority is contrary to law.

III. N.J.S.A. 18A:30-7 DOES NOT AUTHORIZE PUBLIC PAYMENTS FOR RELEASE TIME.

PERC's argument that the "express, specific and comprehensive language of N.J.S.A. 18A:30-7," Br. at 10, mandates collective bargaining over release time does not comport with the plain language of that statute. N.J.S.A. 18A:30-7 does not authorize release time, nor does it require release time as a subject of mandatory negotiation. Indeed, the statute is silent on the subject. The law's plain language suggests that release time was simply not contemplated at all under the statute.

As a threshold matter, PERC's interpretation of N.J.S.A. 18A:30-7, an educational statute outside the agency's charge, is not entitled to deference or any special weight. See *Commc'n Workers of Am., Local 1034 v. N.J. Policemen's Benevolent Ass'n*, 412 N.J. Super. 286, 291 (App. Div. 2010); *In re Cnty. of Atl.*, 445 N.J. Super. 1, 15 (App. Div. 2016), *aff'd on other grounds sub nom. Matter of Cnty. of Atl.*, 230 N.J. 237 (2017) ("PERC's interpretation of the law outside of its charge is entitled to no special deference") (internal citations omitted).

PERC first contends that N.J.S.A. 18A:30-7 requires the Board to negotiate over release time by focusing on the phrase, "Nothing in this chapter shall affect the right of the board of education to fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave ..." Br.

at 10 (emphasis in original). But that language suggests that the Legislature *did not* make release time a mandatory subject of bargaining.

First, the Board wrongly assumes that the phrase fixed "by rule" means "collective negotiations." Br. at 11. But collective negotiations are not "rules" within the meaning of the education code. Contrary to PERC's assertion, "rules" under Title 18A mean those adopted pursuant to the Administrative Procedures Act. See, e.g., N.J.S.A. § 18A:29A-7 ("The State Board of Education shall, pursuant to the 'Administrative Procedure Act,' P.L.1968, c. 410 (C. 52:14B-1 et seq.), adopt *rules* and regulations which are necessary to effectuate the purposes of this act") (emphasis added). "Collective negotiations," by contrast, refers to the process by which employers and labor unions arrive at collective bargaining agreements. See COLLECTIVE BARGAINING, Black's Law Dictionary (11th ed. 2019). "Collective negotiations" means "Negotiations between an employer and the representatives of organized employees to determine the conditions of employment, such as wages, hours, discipline, and fringe benefits." They are two totally different things.

Second, the release time provisions at issue in this case are also not fixed "by individual consideration." Release time is not granted to each individual employee for services rendered. Individual employees cannot even decide whether to fund release

time or not. Instead, release time is granted directly to the JCEA for the JCEA President and his designee "to devote *all* of his/her time to the Association business and affairs." CBA § 7-2.3 (emphasis added). That is not the "payment of salary" fixed by "individual consideration." It is instead a gratuity offered to one private organization.

That is why PERC's examples of other forms of compensated leave, such as sick leave for child rearing, Br. at 14-16, are unavailing. *Actual* nonmonetary compensation — such as child-rearing leave, pensions, or other fringe benefits — go directly to the *employee*, in exchange for services rendered by the employee. In fact, the Appellate Division cited six separate instances in which the CBA contemplates actual absences from work, and, unlike release time, these are all within Board's statutory authority. Op. at 12-13. These include authorized absences for bereavement, sabbatical, or legal obligations. But unlike these leaves of absence, release time does *not* go to employees for services rendered. Instead, they go directly to *the JCEA* — and do so with *no* accountability or control, and for no consideration.

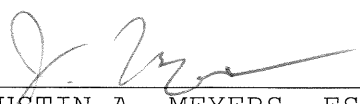
As this Court held in *Fair Lawn Educ. Ass'n*, absent statutory authorization in Title 18A, the EERA, from which PERC derives its delegated authority, does *not* "confer authority upon the Board [of Education] to agree to compensation schemes which bear no relation to the amount and quality of the services which its teaching

employees have rendered." 79 N.J. at 581. But in this case, the Board has entered into a compensation scheme for two employees that bears no relation to teaching services.

The only party that has ever found release time to be a subject of mandatory negotiations is PERC. No court has ever done so. PERC has done that despite the fact that there is no legal authority in Title 18A, or anywhere else, for school boards to disburse public funds in this fashion. The Appellate Division correctly held that N.J.S.A. 18A:30-7 – which does not mention release time or anything even remotely resembling release time – does not authorize the expenditures at issue in this case.

The Appellate Division's holding is correct and its statutory analysis is based on the plain and settled law of this Court. Its decision should be affirmed.

Dated: May 29, 2020

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2. On May 29, 2020, I caused to be sent an Original and three copies of Cross-Respondents' Response to *Amicus Curiae* Brief of the New Jersey Public Employment Relations Commission via Federal Express for delivery on Monday, June 1, 2020 to:

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4. I hereby certify that the foregoing statements are true and correct. I understand that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Dated: May 29, 2020

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