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

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1611-17

On appeal from an Order of the Superior Court of New Jersey, Chancery Division Hudson County

Sat below:
Hon. Barry P. Sarkisian, P.J. Ch.

Docket No. below: HUD-C-2-17

BRIEF AND APPENDIX OF RESPONDENT/CROSS-APPELLANT JERSEY CITY EDUCATION ASSOCATION, INC.

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PRELIMINARY STATEMENT

This case involves two taxpayers' challenge, under the Gift Clause, to a single provision in a collectively-negotiated labor agreement: a "release time" provision that has been in predecessor agreements in the Jersey City School District ("District") for nearly half a century, including when such contracts were under the direct State supervision. It is a practice expressly countenanced by a valid state law, which has been upheld in multiple PERC decisions for decades. Beyond our borders, challenges to release time for public sector employees have been repeatedly made elsewhere, and all have failed.

Here, Presiding Judge Barry P. Sarkisian, after exploring the particulars of the use of release time in the large and complex Jersey City School District, concluded that release time is not a gift, but instead a lawfully negotiated arrangement that furthers a panoply of public purposes, including promoting labor peace, facilitating communication between labor and management, and improving educational quality.

The evidence of record showed that the school district continuously uses the release time employees to help the smooth operation of a large school system covering over 40 buildings and nearly 3,800 represented employees. This substantially reduces costs to the administration had there been no process and people in place to address and resolve the myriad labor

issues that occur on a daily basis, and which, if not addressed quickly by the release time employees, will develop into far more costly disciplinary and contract hearings and arbitrations.

Even when disputes rise to that level, it is the State's public policy that the resolution of disputes through hearings, where employees are given a full and fair opportunity to be heard, serves the public interest. So, too, with negotiating labor agreements. Work done to further these important state interests cannot be regarded as inconsistent with the public interest. Thus, the best that could be said of Plaintiffs' arguments is that they show release time serves a concurrent public purpose, wherein both the educators in Jersey City and the District as an entity, are benefited. As such, it is not a "gift" at all within the meaning of the Gift Clause.

The amount of "release time" granted by the contract is exceedingly modest: it applies to only two of approximately 3,800 employees served by the Jersey City Education Association ("JCEA"). Even if there were some components of release time that might be said to inure exclusively to the Union's benefit, they are "incidental and subordinate" to the broader negotiated agreement that covers approximately 3,800 workers and $261 million in salaries.

The trial judge, cognizant of these facts, granted summary judgment dismissing the complaint, citing substantial benefits

flow to the public from the practice of release time. Simply stated, release time - the practice of having one or two experienced Union representative available full time to labor and management - directly promotes labor peace in the workplace, the swift and fair resolution of disagreements, facilitating communications between employees and management, smoother operations, improved education quality and enhanced personnel skill. Tangible, monetary benefits also flow from it: disagreements that might devolve into expensive grievance or disciplinary hearings are thereby avoided, preserving precious public dollars for education. The school district and the Union both agree on this point, and there is no competent evidence to the contrary. Further, the District adequately monitors the use of release time by the JCEA. Thus, release time, in its implementation in the Jersey City Schools, demonstrably provides substantial public benefits, and should be upheld.

Whether Plaintiffs' burden was to prove the invalidity of release time beyond a reasonable doubt, or under some lesser burden of proof, Plaintiffs utterly failed in this regard. Not only was the complaint rightly dismissed, it indeed should have been dismissed at the motion-to-dismiss stage of the litigation, in light of the complete absence of any suggestion that release time is an impermissible gift.

PROCEDURAL HISTORY

JCEA accepts the procedural history articulated by Plaintiffs, further pointing out that the discovery authorized by the presiding judge and taken by the parties included written discovery demands, including interrogatories, document requests, and request for admissions. In addition, three depositions were noticed and taken: the President and the Grievance Chair of the JCEA, and the Chief Talent Officer of the District.

STATEMENT OF FACTS

A. As amply shown in the motion record, there is a strong public purpose in release time, as it confers benefits on the public.

At the time of the trial court proceedings, the District and the JCEA's relationship was based on applicable statutory law and the terms of a ratified collective negotiations agreement ("CNA") covering September 1, 2013 to August 31, 2017 (Pa367)[1]. The lengthy and detailed agreement constituted the parties' agreement on a wide range of economic and non-economic issues, including the release time for the two officers that is being questioned in this lawsuit (Pa367-68, ¶ 3).

The CNA mentioned above covers about 3,000 certificated teachers, attendance counselors, and teacher assistants who are

[1] In this brief, "Pa__" refers to the appendix of the Plaintiffs-Appellants and "Pb__" refers to the opening brief of the Plaintiffs-Appellants. "Da" refers to the JCEA's appendix that is bound with this brief.

represented by the JCEA. JCEA is also responsible for providing contract administration services and facilitating labor peace for approximately 800 other employees in three other different bargaining units (Pa368, ¶ 4).[2]

The salary earned by these approximately 3,800 employees is approximately $261 million in Fiscal 2017 (Pa369, ¶ 6). The gross salary of the two released employees is about $208,000 per year. It is the amount they would be earning as classroom teachers (Id., ¶ 7).

Every employee covered by the CNA is provided with at least thirteen paid sick days and three paid personal days per school year (Id., ¶ 8). The CNA also provides for other kinds of paid and unpaid leave for all employees, including for bereavement, maternity, military service, and sabbatical leave. (Id.) When an employee takes paid leave within these categories, he or she is paid, although performing no work for the district. (Id.) And that practice, indistinguishable from release time, is perfectly legal.

The releasees receive the same leave and other benefits as all other classroom teachers (Id.) As with the release time,

[2] Plaintiffs did not dispute the Union's obligations to the 3,000 JCEA employees, nor to the 800 employees of the other bargaining units, but deny the latter is "relevant" or "material." (Da368, ¶ 4).

these paid-leave days were part of the economic negotiations that culminated in the CNA (Id.)

Article 7 of the current CNA, the subject of Plaintiffs' challenge, allows two, and only two, JCEA officers - currently, President Ronald Greco and Grievance Chair Tina Thorp - to work full-time attending to the responsibilities allocated to Union under the CNAs (Pa345, ¶ 10).[3] These include promoting harmonious employer/employee relations; maintaining open lines of communication with administration, and service on joint faculty-administration committees, (See, e.g., Pa344, ¶ 6; Pa347, ¶ 16; Pa352, ¶¶ 36-37).

In particular, the duties that the full-time releasees perform administering the CNA include facilitating labor-

[3] As noted above, there are only two full-time releasees for the 3,800 employees, who furnish millions of hours of professional time every year to provide a Constitutionally-guaranteed public education to the enrolled students, who number approximately 34,000 (Da334, ¶ 15). Moreover, aside from having a large student and faculty census, the District is also complex. The District has a total of about 41 school buildings, spread throughout Jersey City, which is the second largest municipality by population in the State (Da334, ¶ 16).

In addition, the professionals covered by the JCEA CNA alone hold a staggering array of job titles, ranging from generalist elementary teachers to high school teachers assigned to teach a specific and specialized subject matter, including both regular and special education; they also non-certificated professionals, administrators, and secretaries, as well as attendance counselors and teacher aides, who likewise work in all parts of the City at various District locations. Still more job titles for secretaries, paraprofessionals, and noncertified professionals are covered in the three separate CNAs described above (Da334, ¶ 17).

management relations, informally and formally resolving disagreements, promoting effective communications between teachers and administration, helping set and clarify school policies with the administration, and working with the staff to understand and comply with all policies, and improving education quality and personnel skill (Pa347, ¶ 16). The releasees also serve on various school committees (Pa377, ¶ 31).

The releasees' discharge of these duties result in a substantial benefit to the District. They are able to resolve disputes between teachers and administration at all levels, thus avoiding more involved and complex dispute resolution at a later date which would necessitate the involvement of many more administrators, and avoiding the costs of formal dispute resolution, arbitrations, and judicial proceedings before the Office of Administrative Law. In addition, by working with administrators, they resolve policy issues to insure that such disputes are avoided in the future (Pa347, ¶ 16). This involves both explaining to the staff the purpose of policies and to understand why administration might be contemplating or taking certain action, and to likewise explain to administration the position of the staff in an effort to educate them to the experiences and concerns of the staff, all with the goal of promoting labor peace and avoiding conflicts and costs to the public (Id.).

The presence of two experienced JCEA officers conducting full-time release duties has other benefits: it in turn results in better communications between and among teachers, nonteaching staff, and administration. It has further benefits in making easier the retention and recruitment of high-quality personnel easier (Da348, ¶ 17).

The District's chief human resources executive (known as the Chief Talent Officer), who has close to 20 years' experience in education human resource management, concurred in this view, stating:

> [R]elease time assists in facilitating communication between faculty and administration in order to maintain a peaceful, orderly, and efficient delivery of educational services for Jersey City public school students. This has some nonmonetary value for the Board.
>
> [Pa369, Tr. 42:5-10).

Mr. Greco, who was a classroom teacher and who has held progressively higher Union offices, is in agreement, and states that based on his experience:

> a major aspect of the full time releasees' duties is to work with management to avoid labor problems and resolve potentially disruptive disputes. They keep labor peace in the buildings by facilitating the resolution of disputes that may arise between employees and management.
>
> [Da347-48, ¶ 17.]

He explained to the trial court, without contradiction from either Plaintiffs or the District about his frequent work

"addressing issues between staff and management before the issue reaches a more formal and adversarial stage." (Pa352-53, ¶ 40).

Stressing the fact that his and Ms. Thorp's activities add value to the District, he further said that while some disputes are initiated by members as grievances,[4] a great deal of this 'peacemaking' or 'peacekeeping' activity is initiated at the request of principals, assistant principals, or other administration, rather than by employees (Pa347, ¶ 17).

Judge Sarkisian, summarizing the record before him on the cross-motions, put it this way:

> Release time provisions facilitate important functions that serve the District in their constitutional obligations to provide education to the children of Jersey City. These functions include, but are not limited to, engaging in the collective negotiations process, facilitating an effective disciplinary hearing process for employees of the District, facilitating an effective grievance process for employees of the District; limiting the expense to the public of prolonged arbitration and facilitating labor-management communication to ensure labor peace . . .
>
> [T]he majority of the release employees time is . . . spent engaging in the disciplinary/grievance hearing process outlined in the CNA. In addition to the conciliation and resol[ution] of grievance and/or

[4] Mr. Greco stated without contradiction that interviews with grievants and preparation for grievance hearings happens after the school day, not during it (Pa376, ¶ 27). Preparation of the defense of discipline matters also happens after school hours (Id.) Any activity such as this outside of school hours is not relevant to Plaintiffs' Gift Clause claims. In addition, the District chooses to schedule grievance hearings during the school day. The JCEA does not choose when the hearing is held, but they must appear (Pa376, ¶ 28).

> disciplinary claims, the releasee employees also attend various meetings with District Administrators to ensure that labor-management relations run smoothly. The release employee's function as a peace-keeping force in the labor-management relationship in the District serves the purpose of ensuring that its employees and administration can cooperate in order to serve the District in implementing its constitutional obligation to educate the children of Jersey City. Moreover, the full-time availability of the releasee employees for their attendance to labor and management conflicts benefits the District financially by resolving matters that might otherwise evolve into costly and time-consuming arbitration through informal and cost-effective conciliatory meetings.
>
> [Pa17-18].

Based on the foregoing, the trial court concluded that the evidence showed that there was a public purpose undergirding release time, even if that public purpose was concurrent with a purpose that benefited the Union:

> The Court is satisfied that Defendants have demonstrated that these release time provisions serve the dual public purposes of facilitating the collective negotiations process and keeping labor peace in the Jersey City Public Schools.
>
> [Pa18].

It was also clear to the Court that the negotiated contract terms allowing for release time are of long standing. The provision for two persons on full-time paid release have been in the JCEA CNA since about 1998. The provisions providing for the president to be on full-time paid release have been in the CNA since at least 1969 (Pa370, ¶ 11). The release time provisions have always been negotiated, have never been "hidden" as the

amicus baselessly asserts (cf. Amicus Brf. at 8), and have been set forth in the main body of the publicly-available contract documents for half a century, making them readily available to the public and to the state-appointed administration of the District, which oversaw district operations for many years (Pa370, ¶ 9).[5]

Furthermore, in actual practice, the District obtains further benefits: although the contract calls for the District to provide office space, (Pa44, Art. 7-2.3) that provision is not enforced. Other than a parking spot at the central offices of the Jersey City Schools, used when Mr. Greco or Ms. Thorp are detailed there, the administration provides no office and parking to the JCEA (Pa371-72, ¶ 14). On the contrary, the JCEA owns its building at 1600 JFK Boulevard in Jersey City, and the parking areas surrounding it, bears all expenses for operating the facility, and pays property taxes on it (Id.) The District also receives benefits under the CNA that are not contracted for, in the form of off-site meeting space. Specifically, the

[5] It is a judicially noticeable fact that Jersey City's schools were under state oversight or administration for decades, from 1989 to 2017. See https://www.nj.com/education/2017/07/nj ends state takeover of jersey citys public scho.html. Given the uncontested allegation that release time for at least one person existed since 1969 and for 2 persons since 1988, it is therefore uncontestable that release time was expressly and repeatedly authorized by State educational officials with the relevant educational and management duties.

JCEA regularly makes its facilities available to the District, free of charge, for professional development workshops, dozens of days during the school year (Pa385-86, ¶ 11). Each use saves the District at least $500 per day in rental fees they would otherwise have to pay (Id.).

B. The motion record also amply showed that the manner and means to carry out the public purpose were sufficiently monitored by the District.

Aside from finding a clear and sufficient public purpose to release time, Judge Sarkisian also carefully analyzed the issue of whether there was sufficient control over the use of release time, and found that there was (Pa18-20). Ample evidence in the record supports that finding.

The JCEA is a New Jersey nonprofit corporation that is regulated by, among other things, Title 15A, N.J.S.A. and by applicable provisions of Section 501(c) of the Internal Revenue Code; the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.2 et seq.; and its own constitution (Pa367, ¶ 1).

Under the JCEA Constitution, the JCEA President, and its officers, must each be a Jersey City Schools employee and a member of the JCEA, and have been both an employee and JCEA member for a specified number of years prior to their nomination (Pa367, ¶ 2). Thus, one cannot be a JCEA officer eligible for release time without also being an employee (Id.)

Authority over the employment of the releasees remains vested in the school district. The school district hired them, could discipline them for misconduct, and could seek their termination for misconduct or other statutory reasons. (Pa322-323, ¶ 23). Mr. Greco himself said that if he were derelict in his duties and "didn't show up regularly" then the District "could discipline me," "could suspend me," "could withhold my pay" and "could recommend me for tenure charges to the Commissioner." (Pa398). Like every other public and private employer, the District does not intervene in Union elections or otherwise decide who will be elected or re-elected as a JCEA elected official. But it has full authority over their status as employees (Pa352, ¶ 38). Mr. Greco and Ms. Thorp could be subjected to discipline by the school district for conduct related to their employment. They have never been accused of any misconduct of any type, but the school administration retains the ability to do so. (Pa341, ¶ 37; Pa398, Tr. 83:24-84:7.

As employees of the District, Mr. Greco and Ms. Thorp report to the District administration, not to Union personnel, when they take sick leave, personal leave, or other absence from duty authorized by the CNA. The District affirms they comply with this requirement. (Pa380, ¶ 40).

Like a classroom teacher, the releasees are each required to work 184-186 days in every school year for a specified number

of hours during the school day (Pa380, ¶ 41). In fact, however, they generally work longer than the normal school day on contract administration issues or assisting in the resolution of disputes (Id.) For example, they generally begin responding to calls and emails or messages from the Human Resources Department or other administrators before the start of the school day. (Id.) They continue to do so throughout the school day, and respond when they are not in meetings or hearings. Also, during the school day they are involved in meetings with school and central administrators about educational policy, committee meetings, and in dispute conciliation activities as set forth elsewhere (Id.)

Under the CNA, when they meet with teachers or administration in school buildings, the releasees must report their presence in the school building to the building principal (if a school) or to sign in (at the central office). They adhere to these requirements (Pa380, ¶ 42).

When present in a school, school administrative personnel, that is, the principal and/or vice-principal are either in the releasees' presence there or aware of their presence there. This is true whether their presence at the school is at the principal's or administrator's request, or whether they have initiated the request to be present at a school. (Pa381, ¶ 43).

As outlined above, part of their releasees' duties involves conciliating disputes that may arise between teachers and administrators, often at the request of administration. The meetings to conciliate a dispute with an employee and an administrator take place during the school day (Pa381, ¶ 43). In addition, Mr. Greco reports that he is regularly asked by central administrative staff to travel to a school to conciliate a dispute, and to then report back on the results of those efforts (again, during this school day) (Pa381, ¶ 44). In this way, both building and central administration are kept apprised of his activities (Id.)

In the course of attending committee meetings outlined above, members of the school administration are personally present (Pa352, ¶ 37).

Over and above these ways of accounting for his time and whereabouts to District administration, Mr. Greco advises that he make it his practice to keep an appropriate Associate Superintendent apprised of what work he is doing and where he is doing it (Pa352, ¶ 38).

Through all these means, including being in the personal presence of an administrator or principal, communicating with District officials by telephone or email (Pa352-53, ¶¶ 40-41), the fact that releasees are performing their job duties is verified through regular, face-to-face and other contact with

members of the District administration, as well as the recordkeeping described above (Id.) In addition, the District Administration is generally aware of the significant amount of time they spend addressing and attempting to resolve disputes between staff and administration. Because they fully know that Mr. Greco and Ms. Thorp are fulfilling their duties, the District Administration has not asked these professionals to account for their time in a more formal way such as punching a clock or filling out timesheets (Pa383, ¶ 50).

Canvassing this evidence, the trial judge found that the releasees were mandated to fully account for their time, and in fact did so in a variety of ways (Pa19). Through this, and through a myriad of other accountability mechanisms cited by the judge, the "supervisory authority" over the releasees was "significant." (Id.) The judge further found that the district further had the authority to "discipline the release employees for employment-related misconduct" and that in total, these efforts were legally sufficient (Id.)

C. Rebuttal to certain claims made by Plaintiffs.

Plaintiffs, relying largely on their own disputed assertions and a number of out-of-context statements, present a misleading picture of certain JCEA activities. In this section, JCEA will canvass and rebut some of the more glaring ones.

First, Plaintiffs imply that the sole raison-d-être for the JCEA is private objectives (Pb4). In so doing, Plaintiffs completely ignore the advocacy for children and for public education itself, for equal opportunity, and for civil rights, that JCEA and its affiliates openly list as their purposes (Pa392, 394).

Second, for reasons stated above, it is incorrect to say that the releasees devote all their time during school hours to JCEA business, and none to district business (Pb5). Specifically, as recounted above, much of the conciliation work done by the releasees is done at the instance of request of principals and administrators, and they must adhere to schedules set by the district for meetings and hearings (See Pa381, ¶ 44; Pa374, ¶ 22; Pa376, ¶¶ 28, 30).

It is likewise false to claim that "neither Greco nor Thorp are required to report to the District," given that their work is verified through pervasive interactions with District personnel (Pa364, ¶ 7; Pa349, ¶ 23) and which far exceeds the 30 percent figure offered by Plaintiffs (see Pb 32,51).[6] It is

[6] In deposition, Ms. Thorp was asked how much time she spent in the presence of a District employee "such as Celeste Williams," the District's chief human resources executive. Ms. Thorp answered 30 percent. The question and answer, however, did not on their face encompass all time spent with District administration, principals, or staff.

therefore unnecessary, in the view of the District, to require these professionals to punch a clock.

Fourth, as demonstrated above, and as the trial judge found, the releasees can be disciplined as employees for employment-related misconduct. The notion that "they cannot be removed from their positions" by the District (Pb6) is therefore an false; while the District, like any employer, by law cannot interfere with the Union's choice of its leadership, the Union leadership must be employees of the Jersey City Schools. And the District can most certainly affect their status as employees. (Pa398, Tr. 83:24-84:8).

Fifth, as to political activity (Pb6), the record was pellucidly clear that any such activities take place after school or on weekends (Pa324, ¶ 29; Pa349, ¶¶ 25-30; Pa378-79, ¶¶ 34-39). What the JCEA and its leadership and officials do with their time outside of the school day is none of the Plaintiffs' business.

ARGUMENT

The trial court determined that in order to sustain the decades-long practice of release time, authorized by state law, the Plaintiffs had to demonstrate beyond a reasonable doubt that the practice was unconstitutional. Inasmuch as Plaintiffs were attacking a practice that has been authorized by an enabling statute for half a century, the trial court's assessment of the applicable standard of proof was indubitably correct. However, even under a more lenient standard of review, the uncontradicted evidence showed that given the contractual language, the parties' practices, and the applicable law, negotiating paid release time for two employees out of the 3,800 bargaining unit members is not a violation of the Gift Clause, as a public purpose was being served by release time, and that there was sufficient public control over the use of release time. Further supporting this conclusion are the unwavering decisions from the New Jersey Public Employment Relations Commission (PERC) and out-of-state authorities upholding release time, recognizing its importance to labor-management relations in the public sector. In addition, though the trial judge did not reach the issue, the exceedingly modest amount of release time here, in the context of the broader collective negotiations agreement conferred no more than an "incidental" and "subordinate" value on the JCEA.

I. IN CHALLENGING GOVERNMENT EXPENDITURES UNDER THE GIFT CLAUSE, PLAINTIFFS FACE A STEEP BURDEN OF PROOF: DEMONSTRATING THE UNCONSTITUTIONALITY OF THE CHALLENGED ACTION BEYOND A REASONABLE DOUBT (Pa14-15).

When a plaintiff challenges governmental action in New Jersey as violative of the Constitution, and the case does not involve free-speech, due process, or equal protection rights, the standard of review is supplied by Gangemi v. Berry, 25 N.J. 1 (1957). Gangemi states that governmental action "will not be declared void unless its repugnancy to the constitution is clear beyond reasonable doubt." Id. at 10; see also State v. Trump Hotels & Casino Resorts, 160 N.J. 505, 526 (1999) (plaintiff must prove unconstitutionality beyond reasonable doubt); In re P.L. 2001, Chapter 362, 186 N.J. 368, 392 (2006) (same).

This rule applies to both facial challenges to legislation, as well as as-applied challenges to particular governmental acts. See, e.g., Franklin v. New Jersey Dep't of Human Services, 111 N.J. 1 (1988). In rendering its decision, the Court noted that the judiciary has a limited role in reviewing the actions of other branches of government, whether they be statutes themselves, or their implementation. Building on Gangemi's beyond-a-reasonable-doubt standard, id. at 17, the Franklin Court explained that "[t]o declare a statute [or its implementation] unconstitutional is a judicial power to be delicately exercised." Id. (quoting Harvey v. Essex County Bd.

of Freeholders, 30 N.J. 381, 388 (1959) (alterations in original)).

Plaintiffs deny that the beyond-a-reasonable-doubt standard is appropriate here. Yet, as demonstrated infra, tribunals and at least one independent state agency, for decades, have cited one particular statute, N.J.S.A. 18A:30-7, as providing the legal basis for school districts to grant release time. In this case, the Plaintiffs' specific complaint is that one aspect of the 2013-2017 CNA between the District and the JCEA is invalid because it includes provisions awarding release time, allegedly in violation of the Gift Clause. As set forth in more detail infra, release time is specifically authorized by statute, N.J.S.A. 18A:30-7. That statute, aside from authorizing and regulating sick leave, expressly authorizes boards of education to negotiate contracts for "the payment of salary in cases of absence not constituting sick leave." Id. While Plaintiffs disavow that they are asking for a declaration that N.J.S.A. 18A:30-7 is unconstitutional, in sum and substance, that is precisely what they are doing: they are challenging a long-standing practice in which N.J.S.A. 18A:30-7 constitutes the enabling legislation for release time.

As such, Plaintiffs' challenge is an as-applied challenge to the validity of N.J.S.A. 18A:30-7 itself, and its implementation here by the District. For these reasons, whether

the Plaintiffs' Complaint is regarded as a direct attack on N.J.S.A. 18A:30-7, or is regarded as an attack on the District's "implementation" of N.J.S.A. 18A:30-7, Plaintiffs, under Gangemi and Franklin, bear the burden of proving beyond a reasonable doubt the unconstitutionality of the CNA, including its release time provision.[7]

In an argument newly raised on appeal, Plaintiffs also posit that the requirement of Gangemi - that attacks on statutes under the State Constitution be proven beyond a reasonable doubt - is itself unconstitutional. They rely on cases about what procedural due process is due to an individual before government interferes with their interests in life, liberty or process. They cite no authority for the proposition that a State judiciary, as a branch of government in a sovereign in a federal system, is barred from interpreting its own Constitution in a

[7] Although Plaintiffs disclaim that they are making an as-applied challenge to the validity of N.J.S.A. 18A:30-7, they do devote time to arguing that the "Legislature cannot invalidate by statute" the constitutional requirements of the Gift Clause (Pb40-42). In that subpoint, Plaintiffs are effectively positing that the statutory requirement in N.J.S.A. 34A:13A-5.4(a)(2) that public employers not interfere with internal union business is constrained by the Gift Clause. Whatever their exact theory is - whether it be outright invalidation of the Release Time Clause in the CNA, or a requirement that the public employer violate N.J.S.A. 34A:13A-5.4(a)(2) to get more "control" over the JCEA, it is plain that Plaintiffs are attacking the invalidity of statutes on constitutional grounds, thus implicating the enhanced burden of proof required by Gangemi.

manner it sees fit. Aside from the fact that it was not raised below, the argument is absurd.

However, even if the Court finds that some standard other than beyond a reasonable doubt applies, the record is clear: under any standard, Plaintiffs, who do not deny they bear the burden of proof and persuasion, have failed to show that release time transgresses the Gift Clause.

II. NEW JERSEY'S GIFT CLAUSE ALLOWS EXPENDITURES THAT ARE IN FURTHERANCE OF A LEGITIMATE PUBLIC PURPOSE, ARE SUPPORTED BY SUBSTANTIAL CONSIDERATION, AND GIVE GOVERNMENT THE REASONABLE ABILITY TO MONITOR THE EXPENDITURE (Pa17-18).

As the trial twice recognized, in its statement of reasons on the Motion to Dismiss, and in the later summary judgment ruling, any challenge to governmental action in New Jersey under the Gift Clause must necessarily begin with Roe v. Kervick, 42 N.J. 191 (1964) (Pa6-8, 16-17). Roe dealt with a redevelopment assistance statute that authorized grants and loans to private business ventures. The financial assistance under the law was for the specific purpose of alleviating substantial and persistent unemployment. Id. at 212. The Supreme Court explained that the Gift Clause does not prohibit the contractual transfer of public money, by grant or loan, to a private entity, as long as the "paramount factor" in the contract is the furtherance of that public purpose, and any "private benefit radiating therefrom [is] subordinate and incidental." Id. at

218, 219. The trial court emphasized that the transfer of funds had to be "contractual in nature," "based on substantial consideration," meant to accomplish "a public purpose" that was "the paramount factor" of the agreement, with any "private advantage" being "incidental and subordinate." Pa7 (quoting Roe, 42 N.J. at 218). Put differently,

> An analysis of a purported gift clause violation involves a two-part test, established by Roe v. Kervick: "First, whether the provision of financial aid is for a public purpose, and second, whether the means to accomplish it are consonant with that purpose." Bryant v. City of Atlantic City, 309 N.J. Super. 596, 612 (App. Div. 1998). Under the second prong of this test, the Court must examine a variety of factors to determine whether the means fit the purpose, such as whether the government: (1) retains sufficient control over the expenditure, see New Jersey Citizen Action, Inc. v. County of Bergen, 391 N.J. Super. 596, 604 (App. Div. 2007); and (2) whether the expenditure is "based upon a substantial consideration." New Jersey State Bar Ass'n v. State, 387 N.J. Super. 24, 53 (App. Div. 2006).
>
> [Pa8].

It is beyond peradventure that the CNA at issue here is "contractual in nature." Like all labor agreements, the CNA is a document that contractually binds the Union and its members, the thousands of school employees, and the District. But the CNA *in toto*, and its release time provisions in particular, also satisfy the remaining requirements of the Roe test, in that a public purpose is served, the expenditure is based on

substantial consideration, and the government retains substantial control over the expenditure.

A. Release Time Meets The Broad Definition of Public Purpose, As The Trial Court Found.

The Roe Court explained that the definition of "public purpose" for Gift Clause purposes is extraordinarily broad. "Generally speaking," the Court said, a public purpose is an "activity which serves as a benefit to the community as a whole, and which, at the same time is directly related to the functions of government." 42 N.J. at 207. It is also a flexible concept, "incapable of exact or perduring definition" and which "must expand when necessary to encompass changing public needs of a modern dynamic society." Id. The flexibility that applies to both the definition of public purpose and the means chosen to achieve it were summarized in Bd. of Educ. of Neptune Twp. v. Neptune Twp. Educ. Ass'n, 293 N.J. Super. 1, 11 (App. Div. 1996), where the Court explained that "public funds may validly be used to achieve a variety of public purposes by a variety of means." Therefore, the Gift Clause is not violated by using public funds to provide "benefits of public employment, whether direct or indirect, substantial or incidental." Id.

Moreover, a governmental determination of what constitutes a public purpose, and whether a particular governmental action furthers that public purpose, is entitled to substantial

deference from the courts. Such a "decision is entitled to great weight in the courts. It should not be set aside as violative of the [Constitution] unless there is no reasonable basis for sustaining it." Roe, 42 N.J. at 229-30. Any doubts must be resolved in favor of upholding the governmental action. "If there be reasonable difference of opinion as to validity of a plan devised to effectuate a public purpose, the judiciary should defer to the legislative judgment." Id. at 230; accord, New Jersey Ass'n. on Correction v. Lan, 80 N.J. 199, 218 (1979) (noting the "respect for the act of a co-equal branch of government, as well as for the public interest in the effective operations of government" counsel "broad tolerance in considering a charge of constitutional evasion or excess") (internal citations omitted)).

The analytical framework of Roe, including its broad definition of public purpose, has withstood the test of time. In N.J. State Bar Ass'n v. State, 387 N.J. Super. 24, 36-37 (App. Div. 2006), the court upheld a statute that granted a subsidy to private physicians who maintained their medical practices in New Jersey on the grounds that the subsidy, while providing a benefit to individual physicians, nevertheless was a permissible "attempt[] to assure the availability of medical care and treatment" for State residents, which in turn was a legitimate public purpose. Id.

The evidence presented to the trial court clearly demonstrates the existence of a public purpose. The CNA's dominant purpose is to obtain and maintain the labor necessary for the District to discharge its Constitutional duty of educating Jersey City's children. Release time is part of that same CNA. Thus, any suggestion that release time is something other than bargained-for consideration finds no support in the record.

In addition, the release time provision, even it were properly viewed in isolation, is also imbued with many public purposes: the maintenance of labor peace, and the furtherance of a quality education. The Supreme Court has expressly recognized that discussions to promote and preserve labor peace are *per se* in the public interest. Robbinsville Twp. Bd. of Ed. v. Washington Twp. Educ. Ass'n, 227 N.J. 192, 204 (2016) ("This Court has recognized the 'wisdom of pursuing discussions between public employer and employees' which 'promote[s] labor peace and harmony'") (quotation omitted). In numerous ways, the existence of which has been attested to by both the Union and the District, having the service of full-time releasees facilitates communication, helps ensure a peaceful, orderly, and efficient delivery of educational services, and avoids and resolves potentially disruptive disputes. See, e.g., Pa374-75, ¶¶ 20-21, 24. This has both "nonmonetary value," id., ¶ 20, and financial

value in the form of potentially avoiding costly grievance and disciplinary proceedings, id., ¶¶ 25-26. This is part of the reason why, in the releasees' experience, it is often management that initiates the request to them to engage in peacemaking or peacekeeping activities. Id., ¶ 22.

In sum, based on the extraordinarily broad concept of what constitutes a public purpose, and the well-defined contributions to educational quality and labor peace that flow from release time, the contractual provisions amply further a public purpose.[8]

B. The CNA, And Its Release Time Provisions, Are Supported By Substantial Consideration.

The CNA challenged in the trial court was four years in duration. In the most recent year, some $261 million in public money was exchanged for millions of hours of labor, under terms and conditions agreed to at a bargaining table. Pa367-69, ¶¶ 3, 4, 6. There can be no question that the millions of hours in labor furnished by JCEA employees constitutes substantial consideration for the amounts paid to them. The release time

[8] In I/M/O Hunterdon Bd. of Freeholders, 116 N.J. 332, 338 (1989), the Court explained that the collective bargaining process, with each side's vigorous articulation of its own desires and concerns, and then resolving them in negotiations, has itself been declared to be in the public interest. While the releasees advocate for the Union during contract negotiations, based on Hunterdon, that activity is no less in furtherance of the public interest than their activity in promoting labor peace and quality education. Accord, Robbinsville Twp., supra, 227 N.J. at 204 ("the Legislature and this Court have, time and again, emphasized the value of collective negotiated agreements in our society").

provisions, which are part of that overall bargained-for exchange, would also survive scrutiny in their own right. For as Defendants have shown, for the sum of $208,000 annually, the District receives the full-time services of two experienced Union officials, whose time is chiefly spent on peacemaking and peacekeeping activities. Pa377.

The exchange of money for labor, along with terms and conditions regulating that exchange (including bonuses, sick days, personal days etc.), cf. Pa369, ¶ 8, is recognized as a legitimate exchange of consideration. As the trial judge recognized, "it is fair to say that our courts have adopted the view that compensation paid to public employees, whatever the label, is not a gift so long as it is included within the conditions of employment, either by statutory direction or contract negotiation." Pa8 (quoting Maywood Educ. Ass'n v. Maywood Bd. of Ed., 131 N.J. Super. 551 (Ch. Div. 1974)). In Maywood, a board of education had contractually agreed to pay retirees for unused sick leave. When two retirees sought payment of their unused sick leave, the board reneged on its promise, and sought to void the agreement on the grounds that it was contrary to public policy, specifically, the Gift Clause. Id. at 555. The court rejected the argument and ordered the payment made.

In so doing, it recounted numerous instances where public employees received compensation for periods of time where they were performing no work for the employer. For example, it was pointed out that various forms of fringe benefits, pensions, military leave, and compensation for employees wrongly terminated had all been upheld by courts even though in those cases there was a payment to employees for time when no work was done directly for the public employer. Id. at 557 (collecting cases).

Maywood therefore stands for the proposition that where salary, benefits, and compensation, have been arrived at through the collective negotiations process, it comports with the Gift Clause as an exchange of substantial consideration, even if there are instances within the contract of payments that are not directly tied to work performed for the public employer. This is especially so when a statute, here, N.J.S.A. 18A:30-7, expressly authorizes such an arrangement.[9] For this reason, there is no merit to Plaintiffs' arguments about who the beneficiary of release time may be. Pb48-54. For it is clear that the CNA, taken its entirety, is an exchange of various kinds of monetary and monetary compensation as consideration for

[9] The statute states that "[n]othing 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. . ." This provision has been interpreted as authorizing paid release time.

the millions of hours of labor annually devoted to the unquestionably public purpose of educating Jersey City students.

In any event, in this case it is clear that the work in the CNA as whole is being performed for the benefit of the public employer. In addition, though the two releasees are officers of the JCEA, substantial part of their activity is directed to the concurrent interest of labor and management in preserving labor peace and avoiding grievances and other disruptions in the workplace. That is, their activity confers public benefits. It cannot be forgotten that a grievance unresolved ferments into an arbitration, with its attendant costs in lawyers' and arbitrator fees, not to mention the time and energy of witnesses, including administrators.

In its ruling, the Maywood court recognized that provisions like those challenged here are based on substantial consideration, and by definition, are therefore not a gift at all. The case also echoes the Supreme Court's holding in Roe that even if some private benefit were shown, it was merely a "subordinate and incidental" benefit in the broader context of a sizeable collective bargaining agreement serving the school district and therefore not a violation of the Gift Clause. Like the unused sick leave payment at issue in Maywood, the release time at issue here is supported by substantial consideration, and therefore is not a gift at all.

C. Government Retains Sufficient Control Over The Expenditure.

While Plaintiffs' appeal continues to press their argument that the releasees are effectively unaccountable for their time during the school day, discovery in this matter reveals the exact opposite. See generally Pa340-42, ¶¶ 40-50; Pa323-24, ¶ 27. Judge Sarkisian recognized this, writing that "the District retains sufficient control over the use of release time by those release employees." Da19. By way of briefly recapitulating the control exercised by the District, the releasees' time and attendance records are kept by the District, not the Union, and the releasees comply with their obligation to report time and attendance in this manner. Pa340, ¶ 40. When present in school buildings or the central office (often at administrators' directions), they must report their presence and activity to administrators, a requirement they also comply with. Pa340-41, ¶¶ 42, 43. They attend meetings, hearings, and other gatherings where they are in the physical presence of administrators, or in contact with them by phone or email. Pa341-42, ¶¶ 44-45, 49. The releasees have reported that substantial parts of their time during the school day is spent in the physical presence of administrators. Pa341-42, ¶ 48. When they are not, administrators are kept abreast of their activities on a regular basis. Pa341, ¶ 46. Finally, the District could discipline the

releasees for employment-related misconduct, Pa341, ¶ 47, which would in turn impact their eligibility to hold the Union positions that they hold. Pa331, ¶ 2).

To be sure, the District cannot "dominat[e]" or "interfer[e] with" a Union pursuant to N.J.S.A. 34:13A-5.4(a)(2), which prohibits a public employer from such acts. But by keeping their time and attendance, and from the sheer fact that the releasees and the administration are in extremely frequent contact, with administration making frequent requests for the releasees' conciliation efforts. As such, there is "sufficient" control within the meaning of New Jersey Citizen Action, supra, to validate this activity under the Gift Clause. The Court, in sum, will search the record in vain for any allegation that the officials are misusing their time, or devoting anything less than their best efforts to their duties, or that their duties do not contribute to the public interest as the foregoing cases have described.

The Plaintiffs continue to complain on appeal that the District lacks sufficient control over the releasees' time, but their arguments either ignore the actual record, or are merely simplistic views of the situation. The releasees must report their time and attendance to the District (which is in turn determined by the District's establishment of work days and work hours). They show up when told to for hearings and meetings.

They conciliate grievances, often at the express direction of an administrator or principal. They can be disciplined or fired for employment-related misconduct.

Moreover, pursuant to I/M/O City of Paterson, P.E.R.C. No. 2005-32, 30 NJPER P153 (Nov. 24, 2004),[10] the extent of controls over a Union official's time or property is a negotiable item. Id. at *7, *9 (citing Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (P12202 1981); State of New Jersey, P.E.R.C. No. 86-16, 11 NJPER 497 (P16177 1985); and Bergen Cty. Prosecutor, P.E.R.C. No. 96-81, 22 NJPER 237 (P27123 1996)). These negotiated controls are not second-guessed by PERC or the Courts; rather, such controls are to "be addressed through negotiations." In sum, they do not affect the validity of release time clauses. Simply put, the law does not require strict or onerous controls over the use of time or property by a Union releasee, but "sufficient" ones. That standard is amply met here.

[10] The PERC cases cited in this brief, along with the unpublished cases cited in this brief, are attached as an Appendix hereto pursuant to R. 1:36-3. There are no contrary unpublished opinions known to counsel.

III. THE ADMINISTRATIVE AGENCY CHARGED WITH POLICING THE TERMS OF PUBLIC EMPLOYEE CONTRACTS CONSISTENTLY HOLDS THAT PAID RELEASE TIME CLAUSES ARE PERMISSIBLE AND DO NOT VIOLATE THE GIFT CLAUSE (Pa16)

In this case, Plaintiffs have taken on the burden of proving that the release time provisions at issue here violate the Gift Clause. Added to that burden, they must also show a lack of "public purpose," under an extraordinarily broad definition, as well as satisfy the other requirements of a Gift Clause challenge set forth above.

While the issue presented by Plaintiffs might arguably have been a novel one for the Chancery Division and in this Court Court, constitutional challenges to release time under the Gift Clause are not at all novel for the Public Employees Relations Commission (PERC).

As an initial matter, PERC will not hesitate to analyze the constitutionality of a statute in making the rulings it is charged with rendering. Hunterdon Cent. High Sch. Bd. of Educ. v. Hunterdon Cent. High Sch. Teacher's Ass'n, 174 N.J. Super. 468, 475 (App. Div. 1980), aff'd o.b., 86 N.J. 43 (1981). This is a proper exercise of PERC's power, as the Court explained that "PERC's delegated authority is broad enough to enable it to apply laws other than that which it administers. . . . We discern no sound reason to deprive PERC of the power to declare

a proposal nonnegotiable on the ground that its acceptance would be constitutionally objectionable." Id.

Applying the precedents discussed above, numerous PERC tribunals have repeatedly recognized that the subject of paid release time is a valid subject of collective bargaining, not an illegal or impermissible one. See, e.g., I/M/O Brick Twp. Bd. of Ed. v. Brick Twp. Educ. Assn., Docket No. CO-2011-210 (Jan. 28, 2011). In so doing, they have not just ruled that release time is mandatorily negotiable, but have expressly rejected Gift Clause challenges. Consequently, PERC has determined that paid release time accord with the Gift Clause, and is not "contrary to public policy," including the Gift Clause. See Brick Township, supra, at *3, Da10.

In upholding the validity of paid release time for school employees, Brick Township reaffirmed PERC's earlier ruling in City of Newark, PERC No. 90-122, 16 NJPER ¶21,164 (PERC Jun. 26, 1990), which explained that contractual provisions granting paid release time are not just constitutionally permissible under the Gift Clause or otherwise, they further the important public interest in labor peace. Thus, in Brick Township, the Commission Designee rejected contentions that "agreeing to paid release time violates the . . . constitutional ban against using public monies for private purposes." See id. at *12, Da12. That

conclusion in turn was based on City of Newark's determination that:

> N.J.S.A. 34:13A-5.3 authorizes and requires employers and employee representatives to negotiate over terms and conditions of employment. A viable negotiations process serves the public interest in improved morale, greater productivity, and smoother labor relations. N.J.S.A. 34:13A-5.2; Hunterdon [Freeholder Bd. and CWA, 116 N.J. 322], 338 (1999); Woodstown-Pilegrove Rea. H.S. Bd. of Ed. v. Woodstown-Pilegrove Reg. Ed. Ass'n, 81 N.J. 582, 591 (1980). As we have explained, paid release time agreements can improve representation and promote the Act's public purposes. Such agreements are authorized by the Act and are not unconstitutional. See, e.g., Maywood Ed. Ass'n Inc. v. Maywood Bd. of Ed., 131 N.J. Super. 551 (Ch. Div. 1974); River Vale Tp., P.E.R.C. No. 86-82, 12 NJPER 95 (P17036 1985); Lawrence Tp. Bd. of Ed., P.E.R.C. No. 81-69, 7 NJPER 13 (P12005 1980).
>
> [City of Newark, at *17, Da19].

The Brick Township decision, which came 21 years after the City of Newark decision, again ratified PERC's repeated and unswerving holdings that paid release time arrangements, together with other arrangements that make limited and reasonable concessions to labor organizations to further their roles in a collectively-negotiated agreement, do not violate the Gift Clause of the Constitution and serve a valuable public purpose. In City of Newark, PERC had explained:

> We have repeatedly held in turn that leaves of absence and release time for representational purposes are mandatorily negotiable. Maurice River Tp. Bd. of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (P18054 1987); City of Orange Tp., P.E.R.C. No. 86-23, 11 NJPER 522 (P16184 1985); State of New Jersey, P.E.R.C. No. 86-11, 11 NJPER 497 (P16177 1985); Town of Kearny,

> P.E.R.C. No. 82-12, 7 NJPER 456 (P12202 1981); Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14 (P12006 1980); Haddonfield Bd. of Ed., P.E.R.C. No. 80-53, 5 NJPER 488 (P10250 1979).
>
> We reaffirm our caselaw. Release time for union officials can vitally affect the employees they represent. We recognize that these provisions cost money and may reduce the number of employees available to deliver services; but these are issues of wisdom and reasonableness which must be resolved through the negotiations process. On balance, then, we conclude that the contractual provisions are mandatorily negotiable.
>
> [Id. at *11-*12, Da17-18].

As the state agency primarily charged with regulating public employee contracts, PERC's legal rulings are informed by decades of field experience in seeing what paid release time actually accomplishes to further the public interest. Their repeated conclusion that contract provisions allowing for paid full-time release do not conflict with public policy, is entitled to substantial deference. CWA v. Atl. Cty. Ass'n for Retarded Citizens, 250 N.J. Super. 403, 415 (App. Div. 1991) (PERC brings "expertise . . . to this subject and "is normally accorded" "deference" in such matters); I/M/O Hunterdon County Bd. of Chosen Freeholders, 116 N.J. 322, 328 (1989) (courts have "a high degree of confidence in the ability of PERC to use expertise and knowledge of circumstances and dynamics that are typical or unique to the realm of employer-employee relations in the public sector"). The PERC precedents amply support the

validity of release time under the Constitutional framework applicable to Gift Clause challenges. This Court should accordingly affirm the dismissal of Plaintiffs' Complaint.

IV. THERE IS A WIDE CONSENSUS AMONG COURTS THAT A CONTRACT CLAUSE GRANTING A REASONABLE QUANTITY OF PAID RELEASE TIME IS PERMISSIBLE (Pa16).

In County of Hudson v. PBA Local 109, No. A-0328-15T4, 2017 N.J. Super. Unpub. LEXIS 1118 (App. Div. May 8, 2017), this Court upheld an arbitrator's award in favor of a public employee's use of paid release time. In that case, the Union claimed that management was interfering with a contractual clause allowing a corrections officer to take paid release time. Over objections that the arbitral award violated public policy or was an inefficient use of taxpayer resources, the appeals court responded that:

> Here, the award permits one officer, in a collective bargaining unit consisting of approximately 450 officers, release time for part of his work day to attend to PBA activities. Given the limitation of release time to one officer for only a part of the work day, it is inconceivable that the award could involve an issue of safety or security or the inefficient use of taxpayer monies such as to "frustrate and thwart" public policy.
>
> [Id. at *19, Da26].

Although the employer there did not even claim that a release time agreement was void under the Gift Clause, it still raised public policy defenses, and had them rejected.

In a similar vein, in Cheatham v. DiCiccio, 379 P.3d 211 (Ariz. 2016), the Arizona Supreme Court dealt with a public employee release time case under Arizona's Gift Clause, which is similar to New Jersey's. In Cheatham, individual taxpayers brought a suit over provisions of the collective bargaining agreement for the Phoenix police. The agreement at issue provided that six police officers, out of the 2,500 employees in the bargaining unit, were entitled to full-time paid release time to work on Union business. Id. at 214. The contract also had other provisions giving release time, on a part-time basis, to other police officers. Id.

The Supreme Court determined that these arrangements did not violate the Arizona Constitution's Gift Clause. Similar to the test employed by Roe and its progeny under New Jersey law, the Court evaluated whether release time, negotiated in the context of a collective bargaining agreement, "has a public purpose, and . . . the consideration received by the government is not grossly disproportionate to the amounts paid to the private entity." Id. at 215 (citations omitted).

The Court observed that in the context of taxpayer challenge to a labor contract, deference to the governmental body that ratified the agreement was important. Id. at 215. Equally important was that a reviewing court had to take a "panoptic" view of the transaction at issue. Id. at 217, 218.

"[T]he release time provisions must be assessed in light of the entire [contract], including the obligations imposed on" the police union, the employees, and the municipal employer. Id. at 217-18. The Court illustrated the point by explaining that if a public employee contract provided for paid vacation or personal leave, there would be no violation of the Gift Clause where the employees, who otherwise devoted hundreds of hours of their time to their employment, did not perform any services during their paid time off. Id. at 219.

The Court explained that the panoptic view of the transaction was appropriate rather than artificially subdividing the contract and "consider[ing] particular provisions in isolation." Id. at 219. Release time provisions, as such, had to be evaluated in the broader context of a contract that provided for 2,500 employees to provide millions of hours of labor annually. Id. at 219. Under such circumstances, the expenditure of salary for six full-time released officers (plus other personnel having part-time release), was not "grossly disproportionate." Id. at 219. Nor was the Gift Clause violated by the fact that the contract did not spell out "minutely how release time will be used." Id. at 220. It was plain there, as it is here, that release time is contemplated to be used, and is in fact used, "for activities related to [the

Union's] role as the authorized representative" for the bargaining unit members. Id. at 220.

Just last year, a New York trial court likewise decided that in assessing a Gift Clause challenge to release time provisions in a teachers' contract, the agreement had to be considered in its entirety. Hunter v. Syracuse City School District, No. 2017EFC-2020 (N.Y. Sup. Ct. 5th Dist. Oct. 17, 2017). The judge there held that CNAs had to be examined in their entirety. "[T]o take one section out and say that, hey, sorry, it's unconstitutional, it represents a gift, I don't think you can do that.. . . [A]s I just indicated previously, as a fact-finder, whether it be myself or a jury, I don't think they can -- they weren't there they -- to rip apart that entire contract to determine whether it's a gift or not." Id. at pp. 26-27, Da53-54. Significantly, that case was decided on a motion to dismiss for failure to state a claim, rather than after discovery and summary judgment, as the trial court here required of the parties. As detailed infra, that is the procedure that should have been use here to dispose of Plaintiffs' claims.

A month after the Cheatham decision, an Idaho trial court dismissed another challenge to paid release time, this time in the education context, in Idaho Freedom Foundation v. Ind. Sch. Dist. of Boise City, No. CV-OC-2015-15153 (Idaho 4th Dist. Ct.

Oct. 25, 2016). The Boise School District serves about 26,000 students, employs more than 1,700 certificated teachers, and has a total budget of $234 million. Slip op. at 3, Da60_. Under the Boise collective bargaining agreement, the Union's president is granted full-time release, while other Union delegates were given about 200 days of paid leave in the aggregate. Id. at 6, Da63. The Court recounted that the Union president's full-time status "directly benefit[s] the District and the public it serves" and by "facilitating communication between" district administration and teachers and "promoting high-quality educational services." Id. at 7, Da64. More particularly, the experience that a full-time Union president brings to bear on her job facilitates a "cooperative relationship" between the Union and administration, by among other things, "screen[ing] out meritless grievances prior to pursuing arbitration" and "educat[ing] teachers or administrators about new regulatory requirements." Id. at 8-9, Da65-66. These activities, in the aggregate, saved money for the District. Id. at 10, Da67.

Given the impressive array of benefits that arise from having a Union official on full-time release, the Idaho court had little difficulty concluding these provisions did not violate the Idaho Constitution's gift clause. These provisions, worded very similarly to New Jersey's, do not bar arrangements where a public entity receives adequate consideration for funds

that it may pay to a private person or entity. Id. at 25, Da82. Citing Cheatham, the court concluded it is "not unusual for collective bargaining agreements to include provisions to pay certain employees for time spent on union activities," and thus joined Cheatham in finding that "the union leave provisions served a public purpose," making them constitutional. Id. at 26, Da83.

As described above, JCEA contends that Plaintiffs' claims must be measured through the prism mandated by Gangemi: that it is their burden to prove beyond a reasonable doubt that the Jersey City Schools' collective negotiations agreement and/or its provisions about paid release time violate the Gift Clause. But even under a lesser standard of proof, Plaintiffs would still be unable to make that showing.

The applicable precedents under New Jersey's Gift Clause make clear that the court's review of a public contract for compliance must take the entire contract into account, not just isolated provisions. In Roe, our Supreme Court explained that its review of the redevelopment laws turned on whether the "overall contractual undertaking [was] supported by a substantial exchange of consideration[]." 42 N.J. at 231. A finding that there might be some "incidental private benefit" in the contract as a whole was irrelevant where the dominant or "primary" purpose of the contract served the public interest.

Id. Similarly, the court in Cheatham said that its Gift Clause review must proceed by taking a "panoptic" view of the entire labor agreement, rather than individual parts in isolation. 379 P.3d at 217-18.

Applying this framework, there can be no dispute that the agreement, considered in a holistic manner as the precedents require, serves a legitimate public purpose, given its subject matter and its purpose of setting forth the terms and conditions under which education will be provided to Jersey City students. It therefore satisfies the requirements of Roe: a public purpose, adequate consideration, and sufficient governmental control over the expenditure.

The PERC cases cited above, which are entitled to deference since they are rendered by an agency with specialized knowledge of public contracting law, uniformly say that paid release time does not violate the Gift Clause. Even apart from the PERC decisions, release time in this district, which has existed for nearly 50 years, has been scrutinized and approved by the County Executive Superintendent and the Department of Education while the District was under state supervision. Realizing that release time is an eminently proper and constitutional contract term, there is no evidence that any of these officials has ever interposed an objection to the inclusion of a release time clause in the CNA.

The PERC decisions are part of an extensive body of law that recognizes the benefits that inure to the public of having a Union official on full-time release status. Brick Township and City of Newark, for example, recognized successful negotiations outcomes, greater productivity, and smoother labor relations as among the benefits of full-time release provisions. Beyond our borders, Idaho Freedom Foundation recognized several other benefits of full-time release: facilitating communication, promoting high-quality education, fostering a cooperative relationship, and resolving disputes before they rise to the level of a grievance.

These particular outcomes validate what the defense in this litigation has shown, which is that there are ample benefits that flow to the public from having a Union official on a full-time release status. Pa335-37, ¶¶ 18-26. Roe validates payments to individuals that facilitate activities that "benefit the community as a whole" and which are "directly related to the functions of government." 42 N.J. at 207. Surely the promotion of labor peace, saving taxpayer dollars, and supporting high-quality education are all "benefits" that are "related to the functions of government" and therefore permissible under Roe.

In addition, the amount of release time in the contract at issue here is not excessive or disproportionate. In County of Hudson, the Appellate Division found that a roughly half-time

release of one corrections officer, to serve a membership of 450 people (in other words, a 1:900 ratio) was not unreasonable. County of Hudson, supra, at *19. In Cheatham, the court upheld full time release of 6 police officers to serve a 2,500 member bargaining unit (a 1:416 ratio). Cheatham, 379 F.3d at 219. And in Idaho Freedom Foundation, full-time release of a single teacher to serve a membership of 1,700 people was upheld. Idaho Freedom Foundation, slip op. at 3.

PERC has upheld even higher ratios. In City of Newark, PERC upheld release time at personnel ratios that included: 4 police officers for an 850-member bargaining unit (1:213 ratio); 3 firefighters for a bargaining unit of 565 members (1:188 ratio); and two superior firefighter officials for a bargaining unit of 140 members (1:70 ratio). City of Newark, supra, at *2-*3, Da15 (enumerating bargaining unit size and release time provisions).

The contract at issue here gives two teachers full time release status to serve approximately 3,800 people in the teachers' bargaining unit and the other bargaining units served by that organization. That is a ratio of 1:1,900. The ratio of releasees to employees served negotiated here is far below what has been upheld in various tribunals. This Court should therefore conclude, on the record presented, that the value of release time here is not disproportionate, and therefore does

not require further inquiry under the Gift Clause. It should dismiss all of Plaintiffs' claims.

V. ANY PRIVATE BENEFIT IN A PUBLIC CONTRACT THAT IS MERELY INCIDENTAL OR SUBORDINATE TO BROADER PUBLIC PURPOSES WILL NOT BE INVALIDATED UNDER THE GIFT CLAUSE (Pa7).

As discussed above, the Supreme Court in Roe has explained that the Gift Clause does not prohibit the contractual transfer of public money to a private entity, if the contract as a whole serves the public interest, and any "private benefit radiating therefrom [is] subordinate and incidental." 42 N.J. at 218, 219. Here, the record demonstrated that the releasees earned about $208,000 per year, out of a $261 million annual cost for labor alone. That represents about 0.07% of that total. While JCEA has amply shown that release time, standing alone, furthers a public purpose, the Court may also take into account just how small a part of the contract is devoted to release time. While the courts interpreting the Gift Clause have never placed a formal demarcation of what constitutes "subordinate and incidental" benefits, it seems plain that 0.07% of a contract amply meets that test. And as canvassed above, PERC authorities have upheld release time at much higher ratios of releasees to bargaining unit members. These facts, showing the paucity of the value of release time in the overall contract value, constitute an alternate basis for affirming the trial court's

ruling, on the basis that any private benefit is subordinate and incidental to the contract's main purpose.

VI. THE TRIAL COURT SHOULD HAVE DISMISSED PLAINTIFF'S CASE ON JCEA'S MOTION TO DISMISS (Pa3-4).

In lieu of answering the complaint, JCEA filed a motion to dismiss this action for failure to state a claim. Pa86-87. The trial court denied the motion, Pa1-2, and directed the parties to engage in limited discovery, Pa3-4. In their cross appeal, JCEA challenges that decision by the trial judge.

On a motion to dismiss, a plaintiff is certainly entitled to have its pleading viewed liberally. Printing Mart v. Morristown, 116 N.J. 739, 746 (1989). However, in light of the law governing release time that existed (and still exists), Plaintiff failed to allege facts sufficient to withstand a motion to dismiss. It may have offered some conclusory statements complaining about release time, but the Complaint was bereft of sufficient facts.

On the motion to dismiss, Plaintiffs, although having possession of the CNA, having access to relevant economic data, and having access to relevant administrative precedents on release time in New Jersey, said that release time conferred "lopsided benefits" on JCEA. Pa4. But in elaborating on that claim, all Plaintiffs did was to describe how all full-time release operates: a Union officer is relieved of work duty and

does not have to be in her classroom (in the case of teaching, as here), or at her patrol assignment (in the case of the public safety work described in the PERC precedents). In either case, however, the person remains employed by the employer and draws a salary. See id. Furthermore, in complaining about how the releasees accounted for the use of their time, Plaintiffs ignored the applicable precedent discussed above, such as I/M/O City of Paterson, P.E.R.C. No. 2005-32, 30 NJPER P153 (Nov. 24, 2004), which hold that the extent of controls over a Union official's time or property is a negotiable item. These negotiated controls are not second-guessed by PERC or the Courts; rather, such controls are to "be addressed through negotiations."

Finally, Plaintiffs, while they modestly exaggerated the cost of the releasees' salary, they pointed to no evidence that this use of release time was in any way outside the norm. There was no way for them to avoid the fact that the releasees' salary was only 0.09 percent of the contract cost (based on their reckoning of the figures) or 0.07 percent (based on what Defendants' documents accurately showed).

Notwithstanding the foregoing, the trial court allowed the Plaintiffs to proceed with discovery. Effectively, it allowed two disgruntled taxpayers (only one of whom lives in Jersey City), who were complaining about a long-established and legally

upheld practice, the right to compel documents and testimony from Union officials and senior administrators based their claim that release time was in use in Jersey City. Plaintiffs made no allegations of wrongdoing in the use of the release time; they pleaded nothing more than a description of how release time is implemented in this State.

Based on the case law presented that showed the general acceptance of release time, and in the absence of any allegation that the release time was disproportionate or being abused, the Court should have dismissed the claim under R. 4:6-2(e). In affirming the result below, this Court should emphasize that the case should have dismissed at an earlier stage. Taxpayers certainly have the right to raise claims of fraud, waste, and abuse with the Courts. But that it not what these taxpayers did. Dissatisfied with the outcome of collective negotiations, they brought a challenge to a long-established and legal practice, without even pleading that it in any way deviated from normal practices. In the absence of allegations that something is amiss with the use of release time in a particular district, the Courts should not provide taxpayers with permission to fish for records and demand audits based on nothing more than allegations of a normal and accepted practice.

VII. THE AMICUS CURIAE OFFERS NO PERSUASIVE ARGUMENTS FOR A DIFFERENT RESULT.

Amicus curiae, Pacific Legal Foundation, has filed a brief in support of Plaintiffs, but presents no reason for the Court to find any merit in the appeal.

As an initial matter, Plaintiffs devote substantial effort to argue that generally, taxpayers have standing to challenge government expenditures. As support for their argument, amicus cites to the Federalist Papers and the 1859 writings of John Stuart Mill. Amicus Brf. at 4-5. However, as the New Jersey Gift Clause dates from 1875, it is unlikely that either Alexander Hamilton nor John Stuart Mill had the New Jersey Constitution's gift clause, or release time, in mind, when they wrote their quoted exhortations to taxpayers to carefully monitor government spending. In any event, JCEA does not contest the underpinnings of this principle. JCEA argues that on the merits, release time is a valid and lawful practice, but does not question the ability of a taxpayer who is funding an expenditure to challenge it, and has acknowledged that at least one of the plaintiffs pays a modest amount of payments in lieu of property taxes to Jersey City. Pa318, ¶ 2. Standing is not an issue here, but standing alone is insufficient for a plaintiff to win: when a court is satisfied as to an

expenditure's lawfulness, the case must nevertheless be dismissed.

Next, amicus points to the fact that in March 2018, Jersey City's educators, who had been without a contract for nearly ten months, conducted a one day strike. The contract was resolved within a day or two after that. Amicus Brf. at 8-9 & n.2. While it is doubtful that this Court should consider matters that occurred months after it rendered summary judgment dismissing the case, the Union's patience in exhausting negotiating possibilities, ten months after the contract had expired, and the swift resolution of the contract, shows that, as Mr. Greco has declared, trying to amicably resolve labor disputes through discussions with management has always been a paramount goal of his and the JCEA. Pa348, ¶ 18. While that may not always happen, the peaceful resolution of disputes is the most common outcome, see id., and the teachers' patience in reaching a negotiated settlement months after the contract expired, and the prompt resolution of the matter after the job action, supports JCEA here.

Amicus also devotes time to an Oregon case dealing with an overtime claim by a Union releasee. Amicus Brf. 12-13. The case dealt with the narrow question of who could be considered an "employer" under the terms of Section 15(a)(3) of the federal Fair Labor Standards Act. Amicus claims that the case "did not

address the validity of release time directly," but read fairly, the case in fact assumes the validity of release time when negotiated in a collective bargaining agreement with a public employer.

The federal cases amicus points to are likewise irrelevant. Under federal labor law governing private sector unions, it is generally unlawful for employers to make payments to labor unions or their officers. See 29 U.S.C. § 186(a). Thus, release time for private sector unions constrained by the Labor Management Relations Act, operates in a very different legal framework for private sector employees.

In any event, the record in this case amply demonstrates that the releasees provide a wide variety of service to the District, often at the request and instance of administrators. A releasee told to spend time to conciliate a grievance, to show up at specified time for meetings and hearings, is not unmoored from employer control.

Lastly, Pacific States offensively calls the CNA a "sweetheart deal." Every piece of evidence in this motion record shows that the releasees work exceedingly hard at their jobs, including before and after hours, and before and after the school year has ended. See, e.g., Pa351, ¶ 33; Pa348, ¶ 18. Their hard work confers tangible monetary and nonmonetary benefits on the District. This lawful arrangement, reached at a

bargaining table, and published in the final contract for all to see, cannot be voided by the Court. Plaintiffs may dispute its wisdom,[11] but its legality cannot be seriously questioned in the face of the authorities discussed above.

CONCLUSION

For the foregoing reasons, the trial court's rulings on the cross motions for summary judgment, dismissing the complaint, should be affirmed. The denial of JCEA's motion to dismiss should be reversed.

Respectfully submitted,

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN

By: _____
Flavio L. Komuves

Dated: July 16, 2018

[11] Amicus references a 2012 report of the State Commission of Investigation into release time. Amicus Brf. at 16 n.10; see also Pb2 n.1. That report questioned the wisdom of release time, but it was also replete with citations affirming its legality. See SCI Report at pp. 6-9 (canvassing statutes, including N.J.S.A. 18A:30-7, that authorized release time).

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MOSHE ROZENBLIT, et al.,	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION
Plaintiffs/Appellants/ Cross-Respondents	Docket No.: A-001611-17
v.	Civil Action On Appeal from Superior Court, Chancery Division,
MARCIA V. LYLES, et al.	General Equity, Hudson County
Defendants/Respondents/ Cross-Appellants	Sat Below: Hon. Barry P. Sarkisian, J.S.C.

CERTIFICATION OF SERVICE

Meghan Westbrook, of full age, hereby certifies as follows:

1. I am a secretary employed by the Law Firm of Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys for the Defendant/Respondent/Cross-Appellant, Jersey City Education Association, Inc. ("JCEA") in the within matter.

2. On July 16, 2018, I hand delivered an original and five copies of JCEA's Brief and Appendix, and Certification of Service to:

Joseph H. Orlando, Clerk
Superior Court of New Jersey
Appellate Division
Richard J. Hughes Justice Complex
25 W. Market Street, P.O. Box 006
Trenton, New Jersey 08625-0006

3. On July 16, 2018, I forwarded via email and regular mail, two copies of the documents referred to in Paragraph 2 to:

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I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Meghan Westbrook

Dated: July 16, 2018

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Re: Rozenblit, et al. v. Lyles, et al.
Docket No. A-001611-17

Dear Mr. Orlando:

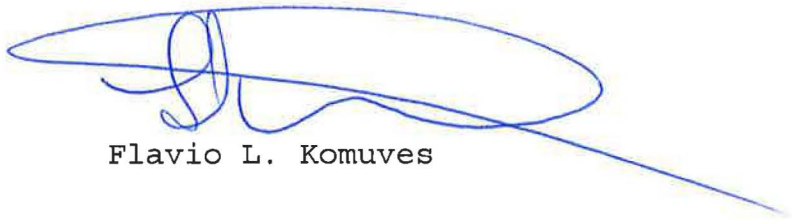
Enclosed please find an original and five (5) copies of Defendant/Respondent/Cross-Appellant Jersey City Education Association's Brief, Appendix, and Certification of Service, in the above matter.

Please charge our firm's account no.: 140110, matter number 21326-2307, the appropriate filing fee, if any.

Kindly file all of the above-referenced documents and return a conformed copy in the stamped self-addressed envelope provided for your convenience.

Thank you for your cooperation.

Respectfully yours,



Flavio L. Komuves

FLK/mw
Enclosures

cc: Jonathan Riches, Esq. (w/encl.)
Justin A. Meyers, Esq. (w/encl.)
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VIA EMAIL & REGULAR MAIL

21326-2307