

SUPERIOR COURT OF NEW JERSEY
APPELLANTE DIVISION

MOSHE ROZENBLIT, and	: DOCKET NO. A-1611-17T1
WON KYU RIM,	
	:
Plaintiffs-Appellants/	
Cross-Respondents,	:
	:
v.	:
	:
MARCIA V. LYLES, in her	:
Official capacity as Superintendent	:
of the Jersey City Board of	:
Education; VIDYA GANGADIN, in her	:
official capacity as President of	:
the Jersey City Board of Education;	:
and JERSEY CITY PUBLIC SCHOOLS	:
OF THE CITY OF JERSEY CITY,	:
	:
Defendants,	:
	:
and	:
	:
JERSEY CITY BOARD OF EDUCATION,	:
and JERSEY CITY EDUCATION	:
ASSOCIATION, INC.,	:
	:
Defendants-Respondents/	:
Cross-Appellants.	:

MEMORANDUM IN SUPPORT OF JCEA'S MOTION FOR STAY PENDING APPEAL

ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN
Raymond M. Baldino, Esq.
Attorney I.D.#: 073952013
570 Broad Street, Suite 1402
Newark, NJ 07102
Attorneys for JCEA
Tel. (973) 623-1822
Fax (973) 623-2209
rbaldino@zazzali-law.com

On the Brief:
Kenneth I. Nowak, Esq.
Raymond M. Baldino, Esq.

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY AND STATEMENT OF FACTS	4
a. Concise Procedural History	4
b. Statement of Facts	5
1. Evidence Before the Trial Court in Certifications of JCEA President Ron Greco and Designee Tina Thorp	5
2. Findings and Decision of the Trial Court ...	8
3. The Decision of the Appellate Division	10
LEGAL ARGUMENT	13
a. Standard of Review.....	13
b. Pursuant to the <i>Crowe v. De Gioia</i> Standard, a Stay Pending Review Before the Supreme Court Must be Granted.....	15
1. Likelihood of Success on the Merits	15
i. The Court's Decision will be Reversed that Failed to Recognize the Broad Authority of a Board to Fix Compensation	15
ii. There is no "Public Policy" against Paid Release Time, but instead Policy in Support Thereof	21
iii. Cannons of Construction Support Only One Conclusion: <u>N.J.S.A.</u> 18A:30-7 Authorizes Paid Release Time	23

iv.	Whether There is a Settled Right and Whether the Facts are in Dispute	25
2.	Balancing of the Equities	26
3.	Irreparable Harm	27
4.	Public Interest	28
CONCLUSION		28

TABLE OF AUTHORITIES

Page (s)

Cases

<u>BOE of Pisc. Twp v. Pisc. Main. & Cust. Assoc.,</u> 152 N.J. Super. 235 (App. Div. 1977)	10, 20
<u>In re Boonton Bd. of Educ.,</u> 99 N.J. 523 (1985)	26, 28
<u>I/M/O Brick Twp. Bd. of Ed. v. Brick Twp. Educ. Assn.,</u> Docket No. CO-2011-210 (Jan. 28, 2011)	21, 27
<u>Camden v. Dicks,</u> 135 N.J. Super. 559 (Law Div. 1975)	17, 18, 24, 25
<u>Cheatham v. DiCiccio,</u> 379 P.3d 211 (Ariz. 2016)	23
<u>City of Newark,</u> PERC No. 90-122	21
<u>Crowe v. De Gioia. Garden State Equality v. Dow,</u> 216 N.J. 314 (2013)	13, 14, 15
<u>DiProspero v. Penn,</u> 183 N.J. 477 (2005)	23
<u>Edmondson v. Bd. of Educ. of Elmer,</u> 424 N.J. Super. 256 (App. Div. 2012)	19, 20
<u>Fair Lawn Educ. Ass'n v. Fair Lawn Bd. of Educ.,</u> 79 N.J. 574 (1979)	18, 19
<u>Loigman v. Twp. Comm. Of the Tp. of Middletown,</u> 297 N.J. Super. 287 (App. Div. 1997)	26
<u>Maywood Educ. Assoc. v. Maywood BOE,</u> 131 N.J. Super. 551 (Ch. Div. 1974)	17, 18, 24, 25
<u>Porcelli v. Titus,</u> 108 N.J. Super. 301 (App. Div. 1969)	16
<u>Pursuant to the Crowe v. De Gioia Standard, a Stay</u> <u>Pending Review Before the Supreme Court Must</u> <u>be Granted</u>	15

<u>Reilly v. Ozzard,</u> 33 N.J. 529 (1960)	24
<u>Robbinsville Twp. BOE v. Wash. Twp. Educ. Ass'n,</u> 227 N.J. 192 (2016)	22
<u>Roe v. Kervick,</u> 42 N.J. 191 (1964)	8, 9, 10
<u>Waste Management of New Jersey, Inc. v. Morris County</u> <u>Mun. Utilities Auth.,</u> 433 N.J. Super. 445 (App. Div. 2013)	14, 25
 Statutes	
<u>N.J.S.A. 18A:6-98</u>	24
<u>N.J.S.A. 18A:11-1</u>	19
<u>N.J.S.A. 18A:11-1(d)</u>	16
<u>N.J.S.A. 18A:27-4</u>	17
<u>N.J.S.A. 18A:30-1</u>	10, 24
<u>N.J.S.A. 18A:30-6</u>	20
<u>N.J.S.A. 18A:30-7</u>	<i>passim</i>
<u>N.J.S.A. 18A:30-8</u>	10, 24
<u>N.J.S.A. 18A:30-9 and 9.1</u>	11
<u>N.J.S.A. 18A:30-11 and 12</u>	11
<u>N.J.S.A. 18A:38-8</u>	20
Public Employment Relations Act	2
 Other Authorities	
New Jersey Constitution Gift Clause	4, 5, 8, 10

PRELIMINARY STATEMENT

Petitioner-Respondent Jersey City Education Association brings this Motion seeking a Stay of the Court's August 21, 2019 decision, pending review of that decision in the Supreme Court of New Jersey. The entrance of a stay is necessary, where this Court's Order invalidates a practice followed for more than 50 years in New Jersey between school districts and teachers' unions: Collective Negotiations Agreements that provide for paid, full-time "release time" for union leaders. Large, populous and administratively complex school districts such as in Jersey City have long recognized the indispensable need for a full-time representative to mediate time-consuming labor issues and grievances that arise in daily business. Logic and experience have selected this method to effect harmonious employer-employee relations. Indeed, New Jersey's Public Employment Relations Commission has repeatedly affirmed that paid release time furthers the labor policy goals of our State.

This Court's decision erased the long-established law and practice in this State with the stroke of a pen. Such dramatic renunciation, issued as schools commence operations for the 2019-20 school year, poses a classic threat of irreparable harm that requires a stay pending appeal. Moreover, as will be set forth more fully below, this Court's ratio decidendi inverts the legal framework established by our courts, including the Supreme

Court, by predicating its entire decision on the proposition that parties operating under the auspices of the Public Employment Relations Act are not permitted to negotiate or agree to any term and condition of employment unless specifically authorized by statute. To be sure, a school district must act within its authority, but in connection with the negotiation of terms and conditions of employment, the scope of that authority is not confined to express statutory grants of authority. Rather, the law is quite clear that negotiation over a term and condition of employment is permitted absent a statutory scheme or statute which would bar such a term.

Were this Court's iteration upheld, parties to public sector negotiations of collective negotiation agreements would be narrowly confined only to express grants of authority. This is exactly opposite the law in this State for over 40 years. Simply stated, this Court's strained reading of the meaning of "absence" in a statute that does not purport to limit forms of leave, is inconsistent with judicial principles of public sector labor relations, which have historically treated negotiations of terms and conditions of employment as authorized, unless barred or preempted by other laws. Here, the Court did not point to any authority which would bar or preempt release time. Rather, the Court adopted the mistaken view that its definition of absence, which is patently debatable in itself, bars release

time because it is not a clearly authorized topic of negotiation.

Simply put, School Districts do not require specific statutory authorization to determine what services to compensate, and how to compensate those services. Instead, Districts enjoy wide, implicit discretion to do so, except where the legislature has banned it.

The true intent of the Court is ultimately reflected in its last sentences. Though the Court based its decision on the erroneous doctrine that release time was not authorized, it concludes by stating that release time is illegal because it is "against public policy." But the Court's decision is not based upon "public policy," and nowhere does the Court even attempt to define what public policy it violates, much less discuss the doctrine of voiding a term of a CNA based upon some undefined public policy that was never the subject of briefing below, the Court has substituted its value judgments over a School District's own wisdom in determining what services may be retained, which is not permissible. This result is made more shocking by the Court's decision to render its decision on grounds not raised by the Plaintiff, and not directly briefed herein. The Court's legal determinations are not supported by, and are inconsistent with, the established law, and as Petitioner respectfully requests, must be stayed pending review.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

a. Concise Procedural History

Plaintiffs Moshe Rozenblitt and Qwon Kyu Rim initiated this matter in the Chancery Division, by way of Complaint that named the Jersey City Education Association ("JCEA") and Jersey City Board of Education ("JCBOE") on January 4, 2017. (Pa24a - 31a). The Complaint sought injunctive relief invalidating a Collective Negotiations Agreement ("CNA") between the JCEA and the JCBOE that provides for release time, asserting that it violated the Gift Clause of the New Jersey Constitution, or Article 8, § 2, ¶ 1 and Article 8, § 3, ¶ 2. Ibid. The Plaintiffs did not cite, or rely upon, N.J.S.A.18A:30-7 as a basis to strike down the release time provision. Rather, and contrary to the statements of the Court, the Plaintiffs' briefs clearly stated their view that Section 7 is not relevant to this case and they will not address it. (Appellant's Brief, at P. 24)

Under the release time provision "the union president and his/her designee [] have the right to carry out union business and affairs full-time, while the District pays them a class-room teacher's salary." (Pa12a). In Jersey City, JCEA President Ron Greco and his designee Tina Thorp are the release time employees who handle such work on a full-time basis. Ibid. The JCBOE filed its Answer on February 22, 2017, denying that the release

time provision violated the Gift Clause. (Pa74a-79a). The JCEA moved to dismiss on March 9, 2017, and was denied on May 30, 2017. (Pa12a, and Pa83a).

Following discovery, the parties cross-moved for summary judgment. (Pa380a and Pa385a). The Trial Court entered summary judgment for Defendant JCEA on October 31, 2017 and denied Plaintiffs' motion. (Pa21a-23a). Plaintiffs filed a notice of appeal of the decision of the Trial Court on December 4, 2017. (Pa387a), and Defendant JCEA filed notice of cross-appeal "insofar as [the Court] denied JCEA's motion to dismiss." (Pa391a). The Appellate Division's August 21, 2019 decision reversed the decision of the Trial Court, finding that the JCBOE lacked authority to enter into a release time agreement with its employees. (Appellate Opinion, at P. 6).

On August 30, 2019, the JCEA filed a Notice of Petition to the Supreme Court of New Jersey. (Certification of Raymond Baldino, Exh. A).

b. Statement of Facts

1. Evidence Before the Trial Court in Certifications of JCEA President Ron Greco and Designee Tina Thorp

In the Trial Court, Defendant JCEA submitted Certifications of each release employee that showed they administer services for some 3,800 employees are covered by the CNA. (Pa327a, Greco Cert. at ¶ 5). The Jersey City School District is

administratively complex, with some 41 school buildings and a wide range of job titles within the District. (Pa329a, Greco Cert. at ¶ 13). Release time has been practiced in the Jersey City School District since at least 1969, or more than 50 years. (Pa328a, Greco Cert. at ¶ 7). In the past, releasees have been assigned to handle grievances on a less than full-time basis, and it has resulted in the employees experiencing constant interruption in the classroom, and the less effective resolution of grievances, whereas full-time releasees resolve grievances earlier in the grievance process. (Pa329a, Greco Cert. at ¶ 11).

JCEA certified that release time employees provide substantial services in facilitating communications between management and employees. (Pa330a-331a, Greco Cert. at ¶16-18). Such work includes "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." (Pa330a, Greco Cert. at ¶ 16). Frequently, requests for assistance to the union representative come from principals and assistant principals, or other administration. (Pa330a, Greco Cert. at ¶ 17). In fact, the releasee frequently reports on the progress to both the District and the employee in the course of handling a grievance.

(Pa335a, Greco Cert. at ¶ 36). Release time employees informally resolve many disputes between employees who are potential grievants, by meeting with the employees first. (Pa331a, Greco Cert. at ¶18). The releasees also handle disciplinary matters and works to resolve them without costly disciplinary proceedings, if possible. (Pa331a-332a, Greco Cert. at ¶ 21). JCEA President Greco and Thorp certified that they spend some 70% of his time conciliating grievances or other disputes, 10-15% of their time attending hearings on grievances, discipline or accommodation requests, and 10-15% of their time in general administrative tasks, such as meetings concerning school policy. (Pa332a, Greco Cert. at ¶ 23); (Pa343a, Thorp Cert. at ¶ 2).

Greco and Thorp certified they are accountable to the District, in that they are subject to discipline and misconduct charges like any employee, and also that their performance of duties is verified by his regular face-to-face contact with District administration as well as recordkeeping of their activities. (Pa335a-336a, Greco Cert. at ¶ 39 - 41); (Pa344a-345a, Thorp. Cert., at ¶ 5-8). Thorp certified that she reports her presence to administrators and signs in when she reports to work. (Pa344a, Thorp Cert. at ¶ 5). Greco Certified that he reports his activities and presence in school buildings to administrators. (Pa334a-335a, Greco Cert. at ¶ 34-36). In

addition, Greco's Certification also detailed that JCEA's political advocacy does not take place during the school day during release time obligations. (Pa332a - 333a, Greco Cert. at ¶ 25 - 30).

2. Findings and Decision of the Trial Court

In reaching a decision that release time is permitted and does not violate the Gift Clause of the New Jersey Constitution, the Court noted that the education law statute N.J.S.A. 18A:30-7 permitted the use of release time for this purpose. (Pa17a). The provision states that "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." N.J.S.A. 18A:30-7. As a result, the Court applied the "beyond a reasonable doubt" standard required to invalidate a statute on Constitutional grounds. (Pa15a-16a). Only evidence sufficient to show that the practice was unconstitutional beyond a reasonable doubt would permit overturning the release time provision and N.J.S.A. 18A:30-7, the Court reasoned.

The Trial Court reviewed the Gift Clause question under the established two prong test: "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." Roe v. Kervick, 42 N.J. 191, 212 (1964). Regarding the role served by

release time, the Trial Court found that "the release time provisions facilitate important functions that serve the District in their constitutional obligation to provide education to the children of Jersey City." (Pa17a -18a). It found that the release employees served a public function in facilitating the collective negotiations process. (Pa18a). However, it noted that the majority of the release employees' time was spent in handling the disciplinary/grievance process, which it found allowed them to "function as a peace-keeping force in the labor-management relationship [and] ensuring that its employees and administration can cooperate in order to serve the District." (Pa18a).

Regarding the second prong of the Roe test, the Trial Court found that there were adequate controls over the release time employees' activities, because through their reporting to administration of their presence and activities, "the releasees are monitored by the principal and/or vice principal" and "the building and central administration are kept apprised of the releasees' activities." (Pa19a). The Court also found that "the District maintains authority to discipline the releasee employees for employment related misconduct." (Pa19a).

The Court specifically found that "the expenditure of funds for the release employees salaries is supported by substantial

consideration." (Pa20a). The Court concluded that the release time provisions did not violate the Gift Clause. Ibid.

3. The Decision of the Appellate Division

In contrast to the Trial Court, this Court determined it should not review the Gift Clause issue under the doctrine of Constitutional avoidance. (Appellate Opinion, at P. 5). Instead, the Court stated that it would decide the case purely on statutory grounds, even though the parties had not briefed that concept or doctrine. The Court found that the JCBOE was not authorized to enter into the release time provision because the power to do so was not expressly or implicitly granted to a Board of Education by statute. (Appellate Opinion at P. 6). This Court rejected that N.J.S.A. 18A:30-7 granted authority a Board authority to provide release time.

First, the Court analyzed the types of leave available under N.J.S.A. 18A:30-1, et seq. It observed that the only published case to review N.J.S.A. 18A:30-7, BOE of Pisc. Twp v. Pisc. Main. & Cust. Assoc., 152 N.J. Super. 235, 238 (App. Div. 1977), invalidated a provision that agreed to pay extended disability benefits in contravention of the school's statutory obligations. (Opinion at P. 7). It noted that N.J.S.A. 18A:30-8 permitted leave for up to 90 days in a calendar year for an employee to compete in an athletic event on the world, Pan American or Olympic level. (Appellate Opinion at P. 8). It

also noted that N.J.S.A. 18A:30-9 and 9.1 limit unused vacation time, Ibid., and that N.J.S.A. 18A:30-11 and 12 permit the creation of "sick leave banks" for a district's employees. (Appellate Opinion at P. 8-9). Thus, this Court indicated that the enumeration of these forms of leave, and the absence of an enumerated right to release time, indicated the Legislature had not sanctioned the practice. Yet the Court did not refer to any statutory provision, or scheme, that would bar release time. Its conclusion was that since release time is not a declared form of leave, it is not authorized and hence *ultra vires*.

In addition to reversing the test, and incorrectly ruling that a term and condition of employment is invalid unless authorized by law or statutory scheme, such as the pension laws, the Court engaged in a parsing of the words in Section 7 in order to find that it did not authorize release time. Because Section 7 does not refer to or bar release time, the Court resorted to a parsimonious and legally unsupported interpretation of the word "absence" to declare that release time is not an absence so therefore it is illegal. But the point is not whether the word "absence" includes release time, but whether it bars it. There is no discussion of this.

The danger in this Court's approach to negotiable terms is patently displayed here. A dubious definition of the word "absence" is the foundation for the conclusion that a law

permitting leaves for absences somehow bars release time. It bears noting that nothing in N.J.S.A. 18A:30-7, or any other leave law cited by the Court, in any manners bars paid release time, whether explicitly, implicitly, or by preemption.

Moreover, even were the courts to now invert the law of negotiability, and even were we to require that release time be authorized by statute, to strike release time down not because the law bans it, but based on the meaning of the word "absence" leads to legally and factually dubious results: that two union officers who did not perform teaching duties were not absent because they were present every day, even though they were in fact absent from their positions as teachers. The Court not only confined permissible terms of negotiation to those within statutory authorization, it proceeded to define the statutory words, indeed one word, in a manner that is contrary to common sense and common usage. If a person is absent from performing their duties as a teacher, is that person not "absent"? Thus, this Court read the term "absent" in the statute narrowly to mean "not physically present" at all rather than "absent from official duties."

Third, this Court also overruled the key factual findings of the Trial Court. Without explanation, it found that the release employees "do not report to any school administrator or school district official, and are not subject to any

administrative oversight." (Appellate Opinion at P. 11). This Court also rejected the finding that the release time serves a public function, finding that the provision "permits the two teachers to devote their entire professional time to exclusive service of the interests of the JCEA [and] confers no reciprocal benefit to the school district." (Appellate Opinion at P. 14). The Court indicated that the release time did not serve public policy, whereas other unidentified forms of leave would serve public policy, if the leave exhibited "reasonableness of the underlying bases for the requests and in the reciprocal benefits they confer." Ibid. Such leave would permit the teacher time off and relief from pressures and emotional exhaustion without risk of unemployment, while a District would receive a refreshed teacher in return. Ibid.

Based on its analysis, the Appellate Division found that the release provision was ultra vires and void. (Appellate Opinion at P. 17).

LEGAL ARGUMENT

a. Standard of Review

On this Motion for a Stay Pending Appeal pursuant to R. 2:9-5(b), the Court's determination is governed by the familiar standard governing emergent relief from Crowe v. De Gioia. Garden State Equality v. Dow, 216 N.J. 314, 320 (2013). The

party seeking relief must demonstrate "(1) relief is needed to prevent irreparable harm; (2) the applicant's claim rests on settled law and has a reasonable probability of succeeding on the merits; and (3) balancing the 'relative hardships to the parties reveals that greater harm would occur if a stay is not granted than if it were.'" Ibid. In addition, a fourth factor applies to a case of "significant public importance," which is that "a court must consider the public interest in addition to the traditional Crowe factors." Id. at 321.

Also, in determining the question of probability of success on the merits, Courts reviewing a request for a stay pending appeal look at "whether the legal or equitable principles upon which the claim is based are doubtful or unsettled" and "whether the material facts are in dispute." Waste Management of New Jersey, Inc. v. Morris County Mun. Utilities Auth., 433 N.J. Super. 445, 451 (App. Div. 2013).

One factor that militates in favor of obtaining a stay pending appeal is whether "the subject matter of the litigation would be destroyed or substantially impaired if a[n] [] injunction did not issue." Id. at 453. The public interests involved also play a vital role, because "courts...may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." Id. at 454.

Based on these factors, a stay is necessary to prevent irreparable harm that would issue from the Court's novel and unprecedented ruling. The undisputed record below indicates that release time work is performed in the public interest, in furtherance of labor peace and the educational mission of school districts. Once that time, and the benefit of those services are lost, they cannot be restored after the fact. As a result, there are substantial public interests at stake and a significant threat that the subject matter of this litigation will be destroyed unless this Court issues a stay.

b. Pursuant to the Crowe v. De Gioia Standard, a Stay Pending Review Before the Supreme Court Must be Granted

Under each of the governing Crowe factors, this Court must enter a stay pending review of this matter on Petition to the New Jersey Supreme Court. The factors are addressed in the following order: (1) likelihood of success on the merits; (2) balancing of the equities; (3) irreparable harm; and (4) public interest. Garden State Equality, supra, 216 N.J., at 320.

1. Likelihood of Success on the Merits

- i. The Court's Decision will be Reversed that Failed to Recognize the Broad Authority of a Board to Fix Compensation.**

The Court's decision will likely be reversed (or at the very least, stands on shaky ground), and the Crowe factor that examines the likelihood of success on the merits favors the

issuance of a stay. This Court's decision inverted the established principles governing a public employer's authority to fix compensation, where it found that "the Legislature did not expressly or implicitly intend to authorize the Board to enter into [the release time arrangement." (Appellate Opinion, at P. 6). To reach that conclusion, this Court wrongly conceived it was necessary to find explicit statutory authorization for the release provision for it to survive scrutiny. However, "there is no need for specific statutory authorization for every possible item to which the public employer and the bargaining unit may agree." State of Int'l Fed'n of Prof'l & Tech. Eng'rs, Local 195, 169 N.J. 505, 526 (2001). A Board of Education, like all other public employers, is granted wide discretion to fix the terms of employee compensation, unless those terms are prohibited by law.

There are "broad discretionary powers vested in [] boards [of education] with respect to the day to day functioning of the schools within their jurisdiction." Porcelli v. Titus, 108 N.J. Super. 301, 308 (App. Div. 1969). That delegation of broad discretion is reflected in N.J.S.A. 18A:11-1(d), that authorizes boards to "perform all acts and do all things, consistent with law and the rules of the state board, necessary for the lawful and proper conduct, equipment and maintenance of the public schools of the district." (emphasis added). Broad authority to

fix compensation is granted under N.J.S.A. 18A:27-4, which provides that a board may "make rules, not inconsistent with the provisions of this title, governing the employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district." (emphasis added). The sweep of these mandates grants broad authority to Districts to fix compensation, unless otherwise prohibited by law. Thus, New Jersey Courts have held

the entire issue of employee compensation, whether by way of salary, customary fringe benefits, or other reasonable modes of payment related to the rendition of employee services or the administration of labor contracts, is generally within the power of the public employer to effect; and the legislature has chosen to commit such issues to the process of collective negotiations unless specifically precluded by statute. BOE of Tp. of Neptune, 293 N.J. Super. 1, 10 (App. Div. 1996). (emphasis added).

That same authority permitted school districts the authority to provide compensation for accumulated unused sick leave, even when no statute addressed the issue. Maywood Educ. Assoc. v. Maywood BOE, 131 N.J. Super. 551, 554 (Ch. Div. 1974); accord Camden v. Dicks, 135 N.J. Super. 559, 563 (Law Div. 1975). In Maywood, the Court rejected the argument that the Legislature's failure to provide for sick leave compensation by statute precluded the authority to do so: "a more reasonable interpretation...[is that] such payments were and continue to be

committed to the discretion of the public employers within their existing statutory authority to compensate employees." Maywood, supra, 131 N.J. Super., at 554-55. The Court held that such statutory authority was broad enough to encompass unused sick leave. Id. at 555. The Dicks court reviewed this same reasoning and stated it "fully agree[d]." Dicks, supra, 135 N.J. Super., at 564.

Cases cited for this Court for the proposition that statutory authorization is required to compensate release time do not support that claim, and have, respectfully, been cited out of context. For example, Fair Lawn Educ. Ass'n v. Fair Lawn Bd. of Educ., 79 N.J. 574, 579 (1979) presents a special scenario easily distinguished from this case. In that case, the board of education had created a form of compensation rendered "for the sole purpose of inducing early retirement." Id. at 580. The payments under the district's plan were "geared toward age, not service." Ibid. Effectively, the district in Fair Lawn enacted a policy that sought to shift higher salaried, more senior employees from its payrolls, and into retirement, where their source of income would be the state pension system. Bonus payments and incentives were offered to retire as early as 55. Id. at 577. The pension system studied such programs and concluded that, if they were widely implemented, they would

increase pension costs by tens of millions of dollars. Id. at 578-79.

Fair Lawn is plainly distinguishable. In fact, Fair Lawn stands for a legal principle directly opposite to this Court. In Fair Lawn, the pension provision was struck down precisely because the Court concluded that the comprehensive legislative scheme establishing and governing pension rights preempts any local authority's right to adopt a policy that contravenes those pension laws. The decision was not based upon the question whether the legislature authorized payment for early release time but, rather, on the fact that the statutory scheme bars it. But here the Court did not even make an attempt to show what law or laws bar release time. Again, the Court's theory is directly opposite to that in Fair Lawn.

The case Edmondson v. Bd. of Educ. of Elmer, 424 N.J. Super. 256 (App. Div. 2012) is not to the contrary. In fact, that case did not involve collective bargaining at all but, rather, an agreement between two school districts regarding transfers of students. But even if one considers the case somehow relevant and controlling, that Court recognized that "the Legislature has delegated broad general authority to the boards of local school districts" under N.J.S.A. 18A:11-1. Id. at 262. The Court affirmed the authority of a school district to effectively consolidate two districts pursuant to a send-receive

relationship under N.J.S.A. 18A:38-8, even though a narrow, and technical reading of that statute appeared to prohibit such acts, because the receiving district did not yet have the required "sufficient accommodations" to receive the new students. Id. at 263-64. The actions were permitted based on the District's plan to create future accommodations, and critically, that the Legislature had never acted to prohibit the use of the provision to create a non-operating school district, i.e., an effective consolidation. Id. at 265. Again, the Court chose to interpret a board's authority expansively, focusing on what *had not been prohibited*, rather than focus on what had not been explicitly authorized.

Finally, BOE v. Pisc. Maint. & Custd. Asso., 152 N.J. Super. 235, 246-47 (App. Div. 1977) does not undermine the practice of paid release time. The case once again clarified that a board's attempt to fix compensation in a manner that violates a statutory mandate is ultra vires. The Court ruled that the board's determination to create a blanket right under a CNA for extended disability compensation violated its statutory mandate under N.J.S.A. 18A:30-6 to consider such additional benefits on an individual basis. Id. at 246-47.

These authorities demonstrate that, absent a statutory prohibition against fixing a particular form of compensation, a board of education's authority is broad and ordinarily not

limited. Accordingly, even without N.J.S.A. 18A:30-7 that appears to authorize paid release time, a district would be permitted to compensate such services. The existence of the statute only makes it clearer that such compensation was sanctioned by the Legislature. For that reason, Petitioner's appeal of this Court's decision is likely to succeed on the merits.

ii. There is no "Public Policy" against Paid Release Time, but instead Policy in Support Thereof

This Court held that public policy supports only supposedly more "reasonable" forms of leave, but not paid release time. (Appellate Opinion, at P. 14). However, the Court did not cite any authority for that proposition, nor is the Court's decision consistent with long standing precedent, which compels the opposite conclusion: paid release time is well-supported by public policy. To begin, New Jersey's Public Employment Relations Commission ("PERC"), the administrative agency tasked with implementing labor policy, has long upheld the right to paid release time. City of Newark, PERC No. 90-122, 16 NJPER 21, 164 (PERC Jun. 26, 1990); I/M/O Brick Twp. Bd. of Ed. v. Brick Twp. Educ. Assn., Docket No. CO-2011-210 (Jan. 28, 2011). In Brick, PERC specifically rejected the argument that paid release time was contrary to public policy, finding that such agreements "can improve representation and promote the [PERC] Act's public purposes." Brick, supra, CO-2011-210 at *12.

In fact, enhanced protection for union officials has been found to be favored by policy even to the extent of permitting minor impingement on managerial prerogative by the Supreme Court. The protection of union leaders from transfer was found to trump the normal managerial prerogative to transfer employees in one case. Local 195 IFPTE, 88 N.J. 393, 418-19 (1982).

This State's public policy regarding labor is best embodied in the scope of negotiations test, which defines what subjects may be appropriately fixed by CNA as the terms of conditions of employment. It holds that a court must look to whether "(1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of government policy." Robbinsville Twp. BOE v. Wash. Twp. Educ. Ass'n, 227 N.J. 192, 199 (2016). Under this test, release time is permitted, because it affects the work and welfare of public employees, and has not been preempted by statute, nor would it interfere with government policy.

That release time is not contrary to a "public Policy" the Court failed to define, is reflected in decisions of other states that have upheld paid release time. For example, the Supreme Court of Arizona has determined that paid release time

for public employees is Constitutional under its State Constitution and serves a public purpose. Cheatham v. DiCiccio, 379 P.3d 211, 217 (Ariz. 2016).

Therefore, the Court's one sentence reference to public policy was erroneous: public policy only favors, rather than disfavors, the availability of paid release time. The JCEA's Petition for review is likely to succeed on the merits in overturning this Court's unsupported pronouncement of public policy.

**iii. Canons of Construction Support Only One Conclusion:
N.J.S.A. 18A:30-7 Authorizes Paid Release Time**

Though the Court reversed the heuristic principles for determining whether a contractual provision is permitted or not, even if one accepted the Court's newly minted approach, its interpretation of the law is unsupported. As this court correctly recited, in interpreting a statute, "each part or section (of the statute) should be construed in connection with every other part or section so as to produce a harmonious whole." DiProspero v. Penn, 183 N.J. 477, 496 (2005). Somehow, in reaching the concept of a harmonious whole, the Court could point to no statute or scheme of statutes that would prohibit release time. Rather than determine whether the law precludes or bars release time, the Court decided that release time would only be permitted if covered by the term "absence" in Section 7.

The Court construed the term "absence" in that statute to mean a "physical absence" from a school building, rather than an absence from one's duties such as occurs on paid release time. It is clear that "absence" means an "absence from duty." For example, under N.J.S.A. 18A:30-1, the term "sick leave" is defined to mean a teacher's "absence from his or her post of duty." Further, the statute that provides for a "leave of absence without loss of pay to attend meetings of the board" refers to a teacher's "time off from his or her duties." N.J.S.A. 18A:6-98. A leave of absence under Title 18A refers to being released from official duties, not physical absence.

In addition, the Court's review of related provisions such as, e.g., N.J.S.A. 18A:30-8 (providing for leave to participate in athletic competitions) to conclude that leave for release time was not permitted because it had not been similarly enumerated was a misguided application of the doctrine of "expressio unius est exclusio alterius." That doctrine is applied where "the sense of the situation suggests that an affirmative specification was meant to be exclusive, as for example, a statement of the qualifications for office." Reilly v. Ozzard, 33 N.J. 529, 539 (1960). Both the Maywood and Dicks Court rejected the application of the doctrine to invalidate payment for unused sick time, noting that the doctrine is rooted

in the "common sense of the situation." Maywood, supra, 131 N.J. Super., at 554, and Dicks, supra, 135 N.J. Super., at 563.

Simply stated, there was no justification to conclude that the providing for certain specific kinds of leave was intended to exclude release time, and that result is contrary to common sense. The Legislature clarified that Boards retained authority to compensate an "absence not constituting sick leave," N.J.S.A. 18A:30-7, a broad phrase that common sense indicates should not be limited by physical presence in a District.

The Court's construction of the statute was not reasonable, and a stay should be granted.

iv. Whether There is a Settled Right and Whether the Facts are in Dispute

As noted supra, a Court should also examine "whether the legal or equitable principles upon which the claim is based are doubtful or unsettled" and "whether the material facts are in dispute." Waste Management of New Jersey, Inc. v. Morris County Mun. Utilities Auth., 433 N.J. Super. 445, 451 (App. Div. 2013). Both of these factors favor granting a stay. As discussed supra, the Court has overturned a settled right, long recognized by PERC and more than 50 years of practice, militating in favor of a stay.

Further, the material facts are in dispute, which also supports Petitioner's request for a stay. The Court's decision to overturn the Trial Court's factual findings as to whether

consideration existed in the contract was not permissible, since Courts do not interfere with the terms of a contract absent illegality or fraud. Loigman v. Twp. Comm. Of the Tp. of Middletown, 297 N.J. Super. 287, 301 (App. Div. 1997). Nor did this Court have support for determining the release time employees lacked administrative oversight or supervision. In general, it was improper for this Court to overturn the factual findings of the Trial Court, since "the appellate court should exercise its original fact finding jurisdiction sparingly and in none but a clear case where there is no doubt about the matter." Rova Farms Resort, Inc., 65 N.J. 474, 484 (1974). These factors militate in favor of a stay.

2. Balancing of the Equities

The equities favor Petitioner, not Plaintiffs. Plaintiffs are taxpayers who assert standing based on their interest in the expenditure of public funds, but the JCEA represents the teachers and employees of the JCBOE who will be negatively impacted by this ruling that deprives the district of valuable services. In addition, both the goals of labor peace and the educational mission of the District itself will be impaired by this ruling, as the Trial Court found. See In re Boonton Bd. of Educ., 99 N.J. 523, 546 (1985). These interests favor the issuance of a stay, since there is slight or no harm to

Plaintiffs posed by a temporary stay, but grave harm will result from enforcing the Court's decision.

3. Irreparable Harm

If the Court's opinion is enforced, irreparable harm will result. As the record below established, the release time employees serve more than 3,800 employees in a complex school district with some 41 buildings. Managing grievances, disciplinary actions, and educational policy questions is a full-time job that consumes the time of two full-time release employees. If the release employees are sent back to perform their teaching duties for the District, their role as release presidents will not be replaced. Even if in the future this Court's decision is reversed, there will be no way to restore the lost release time and its concomitant benefit to the District and its educational mission, as well as the benefit of labor peace provided. For this exact reason, the PERC has already concluded in prior cases that the effect of removing a release employee causes irreparable harm. Brick, supra, Docket No. CO-2011-210, *13-14.

In addition, irreparable harm is caused where enforcing an Order will destroy the subject matter of an appeal. Here, if the release employees are removed from their positions as releasees, Districts will create new plans during the pendency of this District's review that preclude this arrangement. The

plans may become permanent even if this decision is reversed, notwithstanding the harm to labor relations that such changes would represent.

4. Public Interest

Finally, the public interest favors the issuance of a stay. Release time is supported by the goal not only of establishing labor peace, but also furthering the educational mission of a school district. Boonton, supra. These interests favor awarding a stay.

CONCLUSION

For all of the reasons set forth herein, Petitioner-Respondent JCEA's request for a stay pending review of this matter in the Supreme Court of New Jersey should be granted.

Respectfully submitted,

Kenneth I. Nowak
Kenneth I. Nowak, Esq.
Raymond M. Baldino Esq.