SUPREME COURT OF NEW JERSEY
DOCKET NO. 083434
APP. DIV. DOCKET NO. A-1611-17T1

JERSEY CITY EDUCATION ASSOCIATION, Petitioner v. MOSHE ROZENBLIT and QWON KYU RIM, Respondents	CIVIL ACTION On Petition for Certification to the Supreme Court of New Jersey Sat Below: Hon. Jose L. Fuentes, J.A.D. Hon. Francis J. Vernoia, J.A.D. Hon. Scott J. Moynihan, J.A.D.

PETITION FOR CERTIFICATION AND APPENDIX ON BEHALF OF PETITIONER JERSEY CITY EDUCATION ASSOCIATION

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PRELIMINARY STATEMENT

A practice of long standing in the field of labor-management relations, both nationally and in New Jersey, is the provision of "release time" – a form of paid leave granted to certain employees designated by the union to work full time on administering the labor contract and on related representational functions. Important public interests justify this form of leave because, as courts have recognized, an employee on release time "plays an integral role in enforcing the terms of the collective bargaining agreement and in peacefully resolving disputes between labor and management." Int'l Ass'n of Machinists, Local Lodge 964 v. BF Goodrich, 387 F.3d 1046, 1057 (9th Cir. 2004).

The Appellate Division, reversing the Chancery Division on a ground not contested, briefed, or argued at any stage of this case, found that a fifty-year-old statutory provision which on its face does not prohibit any employment practices – and which indeed only saves certain practices from prohibition – nonetheless has been silently prohibiting negotiated release-time clauses in New Jersey public-sector labor agreements for decades. The court took this surprising step without even mentioning New Jersey's Employer-Employee Relations Act, the foundational statute under which such labor agreements are governed and pursuant to which release-time clauses repeatedly have been found to be enforceable.

For the reasons stated herein, this Court should grant certification of the statutory issue decided by the Appellate Division to give that important issue the deliberation it deserves. In so doing, the Court also should address the issue that was raised and briefed in the courts below – namely, the constitutionality of contractual release-time arrangements under the "Gift Clause" of the New Jersey Constitution. The Chancery Division correctly rejected that constitutional challenge, and its judgment on that question should be affirmed.

STATEMENT OF THE MATTER INVOLVED

A. The Employer-Employee Relations Act ("EERA"), N.J.S.A. 34:13A-1 to -21, obligates public employers to negotiate collectively and in good faith "the terms and conditions of employment" with a union selected by a majority of their employees to be their representative, N.J.S.A. 34:13A-3, -5.3. As a rule, any term or condition that a school district or other political subdivision has the power to set unilaterally in the absence of union representation is a term or condition it may, and indeed must, negotiate with the union. Fair Lawn Educ. Ass'n v. Fair Lawn Bd. of Educ., 79 N.J. 574, 580-81 (1979). Because the New Jersey Education Code empowers school boards to "[m]ake, amend and repeal rules . . . for the employment, regulation of conduct and discharge of its employees," N.J.S.A. 18A:11-1(c), and to "make rules" governing the "terms . . . of employment" of

teachers, N.J.S.A. 18A:27-4, the Code generally confers on school districts the full power to set, and concomitantly the full responsibility to bargain over, all EERA "terms and conditions of employment," N.J.S.A. 34:13A-5.3.

Since 1969, the Jersey City School District ("District") and Petitioner Jersey City Education Association ("JCEA"), the representative of some 3,000 District employees, Pa368,[1] have bargained for collective negotiations agreements ("CNAs") that include a "release time" clause, Pa12, which allows two union-selected District employees to take paid leaves of absence from their teaching duties in order to assist in administering the CNA and in otherwise representing their fellow teachers and other District employees, Pa44. Their duties include acting as ombudspersons, mediators, and professional educators on behalf of JCEA and the District employees it represents in the ongoing process of implementing and administering the CNA. See Pa39-41, Pa148-49, Pa154-56, Pa347-48, Pa352, Pa377. The District receives substantial benefits from their work as releasees, both financial, as successful resolution of disputes at an early stage avoids costly arbitration proceedings, Pa17-18, and educational, as they help to maintain a peaceful and orderly learning environment, Pa369, and enhance personnel skill, Pa352.

[1] "Pa" and "Db" refer to Plaintiffs' Appendix and Defendant's Brief, respectively, filed in the Appellate Division.

B. On January 4, 2017, two individuals, suing only in their capacity as taxpayers, initiated this litigation in the Chancery Division. Their sole contention was that the CNA's release-time provision violated the Gift Clause of the New Jersey Constitution, N.J. Const. art. VIII, § 2, ¶ 1; § 3, ¶¶ 2, 3. Pa24-33. The Chancery Division rejected this contention and granted summary judgment to Defendants. 29a. The court reasoned that the "valid public purposes" served by release time, 26a-27a; the "sufficient control" the District exerted over releasees, 28a; and the "substantial consideration" supplied by releasees' services, 29a, all made clear that the release-time provision was "not [an] unconstitutional gift[]" to JCEA, ibid.

The Appellate Division reversed. 19a. The court did not address the Gift Clause issue that made up the only claim in Plaintiffs' complaint, the only claim decided by the Chancery Division, and the sole focus of the parties' briefing on appeal. Instead, the court held that the challenged release-time arrangement was invalid because, the court believed, it was inconsistent with a statutory provision, N.J.S.A. 18A:30-7 ("Section 7"), that is part of — and on its face is structured as a savings clause to — a broader 1967 statute, N.J.S.A. 18A:30-1 to -7, L. 1967, c. 271 (the "Sick Leave Statute").

The Sick Leave Statute begins in Section 1 by defining "[s]ick leave." N.J.S.A. 18A:30-1. The statute then continues in

Sections 2 through 6 by setting various rules for the provision and compensation of sick leave. Id. 30-2 to -6. It ends with Section 7, the provision invoked by the Appellate Division to strike down release-time provisions as prohibited by statute.

Section 7, as noted, is structured as a savings clause. It provides in pertinent part: "Nothing in this chapter [the Sick Leave Statute] 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." Although this language contains no words of abrogation or prohibition, the Appellate Division read into the provision an implication that school districts lack authority to pay salary in cases of absences due to release time. 12a.

QUESTIONS PRESENTED

1. Did the Appellate Division err in determining that school districts lack statutory authorization to negotiate release-time arrangements in their contracts with unions?

2. Was the Chancery Division correct in holding that the New Jersey Constitution's Gift Clause does not prohibit the negotiation of release-time arrangements?

ERROR COMPLAINED OF

JCEA respectfully submits that the Appellate Division erred in determining that school districts lack statutory authority to negotiate release-time arrangements in their union contracts.

REASONS WHY CERTIFICATION SHOULD BE ALLOWED

This litigation "presents a question of general public importance," R. 2:12-4, namely, whether New Jersey school districts may continue to honor contractually negotiated release-time arrangements, a common feature of collective bargaining agreements across the American labor-relations landscape. In the private sector, release time is a mandatory subject of bargaining under the National Labor Relations Act, meaning that it is treated as a subject involving "wages . . . or other conditions of employment." 29 U.S.C. § 158(d); NLRB v. BASF Wyandotte Corp., 798 F.2d 849, 852-53 (5th Cir. 1986). In the public sector, Title VII of the Civil Service Reform Act of 1978 authorizes paid release time (called "official time") for federal employees, 5 U.S.C. § 7131, and many public employers at the state and local levels have also adopted the practice, see, e.g., Cheatham v. DiCiccio, 379 P.2d 211 (Ariz. 2016).

Like their counterparts across the nation, scores of New Jersey's public-sector employers routinely negotiate release-time arrangements,[2] consistent with their broad authority under the Education Code and EERA to bargain "the terms and conditions of employment." N.J.S.A. 34:13A-5.3. The state's school districts are no exception. For decades, they have included

[2] See N.J. Comm'n of Investigation, Union Work, Public Pay 3-4 (2012), https://www.state.nj.us/sci/pdf/SCIUnionReport.pdf.

release-time provisions in CNAs in reliance on a long, unbroken line of judicial and administrative decisions treating compensated-leave arrangements generally – and compensated release time specifically – as not merely tolerated by the law, but in fact as a mandatory subject of bargaining under EERA. See, e.g., Burlington Cty. Coll. Faculty Ass'n v. Bd. of Trs., 64 N.J. 10, 13-14 (1973) (enunciating general principles); Haddonfield Bd. of Educ., P.E.R.C. No. 80-9, 5 N.J.P.E.R. ¶ 10250, 1979 N.J. PERC LEXIS 148 (1979) (applying Burlington's principles to hold compensated release time to be a mandatory bargaining subject); see also infra pp. 12-13 (citing more authorities).

The Appellate Division's sua sponte ruling that the Legislature intended to ban release time thus upends years of practice and precedent. If allowed to stand, it will invalidate an untold number of decades-old, contractually negotiated release-time arrangements in the state. It will force employers and employee representatives to depart from a time-honored, widespread, and mutually beneficial practice. And it will disserve public-sector labor relations across the state.

Furthermore, the "interest of justice requires" review here, R. 2:12-4, given that the Appellate Division decided the question on a ground neither briefed nor argued, even though that question is no minor technical question, but one of great

consequence to school districts and unions across the state.

Finally, if this Court grants certification and reverses the Appellate Division's statutory holding, it should also address and resolve the Gift Clause question correctly decided by the Chancery Division. Under the circumstances here, a remand would serve no useful purpose, as that court's decision on the issue would be appealable as of right to this Court for de novo review. See R. 2:2-1(a); State v. Hemenway, No. 81206, __ N.J. __ (slip op. at 14) (July 24, 2019). Because of the public importance of this issue, the fact that the constitutional issue has already been fully briefed, and the disruption already occasioned by the Appellate Division's ruling, a remand would result only in continued and unnecessary uncertainty among public-sector employers and unions.

COMMENTS WITH RESPECT TO THE APPELLATE DIVISION OPINION

I. THE APPELLATE DIVISION ERRED IN HOLDING THAT SCHOOL DISTRICTS LACK STATUTORY AUTHORITY TO NEGOTIATE RELEASE-TIME CLAUSES.

A. The Appellate Division Read 18A:30-7 in Isolation from EERA and Education Code Chapters 11 and 27.

In interpreting Section 7 of Chapter 30 of the Education Code (Title 18A) to invalidate release-time arrangements, the Appellate Division examined that statute in isolation. It thus took no account of the full context of the Education Code, which in Chapters 11 and 27 grants to school districts the general power to "make rules" governing teachers' employment, including

"the terms" thereof, such as salary and compensation. See supra pp. 2-3 (discussing 18A:11-1(c) and 18A:27-4). And because the court below failed to take account of these provisions conferring broad power on school boards to set the terms and conditions of teachers' employment, it likewise failed to appreciate that school boards have broad responsibilities, commensurate with their broad powers, to bargain over those terms and conditions under EERA, New Jersey's foundational labor-relations statute. See Dunellen Bd. of Educ. v. Dunellen Educ. Ass'n, 64 N.J. 17, 31-32 (1973).

The court below may have missed these basic points because the parties in the proceedings below took it as a given that there was statutory authorization for the District to grant and bargain over the subject of release time, the only issue in controversy being whether the Gift Clause barred paid release time notwithstanding the general power-conferring provisions of the Education Code and EERA. But whatever may have led the court to error, the important point for present purposes is that public employers bargaining pursuant to EERA's general authorization to negotiate "the terms and conditions of employment," N.J.S.A. 34:13A-5.3, do not require further authorization to negotiate the working conditions that would otherwise be within their unilateral control. To the contrary, EERA establishes a strong presumption that a working condition

not tied to the "determination of governmental policy" is mandatorily negotiable unless the Legislature expressly intended to remove it from bargaining through a separate statute specifying the particulars of a given working condition. See Local 195, IFPTE v. State, 88 N.J. 393, 404-05 (1982).

Compensation provided during absences of any type has long been presumptively negotiable between school districts and unions. See, e.g., Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 445 (2012); Burlington, 64 N.J. at 13-14. The negotiability of release-time arrangements therefore turns not on whether they are specifically authorized by name in Section 7, but on whether a clear statutory directive removes them from the scope of negotiations under EERA.

Thus, when the Appellate Division considered the pertinence of Section 7 to the question whether the Legislature prohibited school districts from negotiating paid release-time clauses, it should have asked not whether there was any language in Section 7 that expressly authorized collective negotiations over release time, but whether there was any language in Section 7 that expressly removed that topic from the scope of such negotiations. A proper examination of the pertinent question yields the conclusion that Section 7 does not remove that topic from the scope of negotiations.

The standard for statutory removal of bargaining authority

is rigorous: a statute renders a particular working condition non-negotiable only if it "speak[s] in the imperative and leave[s] nothing to the discretion of the public employer." State v. State Supervisory Emps. Ass'n, 78 N.J. 54, 80 (1978); see also Bethlehem Twp. Educ. Ass'n v. Bethlehem Twp. Bd. of Educ., 91 N.J. 38, 44 (1982).

The clause from Section 7 relied upon by the Appellate Division does not come close to clearing this high bar. That clause – which provides 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" – is, on its face, a savings clause that does not prohibit anything. Far from speaking in the imperative, the text of the clause stresses the District's discretion, as it preserves the "right" to "fix either by rule or by individual consideration the payment of salary in cases of absence not constituting sick leave."[3]

Given all this, it should be unsurprising that New Jersey

[3] Indeed, the clause not only fails to preclude compensation for leaves of absence attributable to causes other than sickness, it appears to include an express recognition of a right of school districts to provide such compensation, including for release time. Section 7 was cited below for that point, but given the statutory authority conferred on districts by Chapters 11 and 27 of the Education Code and EERA, see supra pp. 2-3, it is not even necessary for Section 7 to provide such authority in order for compensated release time to be negotiable.

courts and PERC, the administrative body charged with enforcing and interpreting EERA, have repeatedly affirmed that EERA and Section 7 read together make a wide array of paid absences mandatorily negotiable. In numerous decisions predating this litigation, the Appellate Division has interpreted Section 7 to mean that "a contractual provision relating to . . . absences [other than sick leave] e.g. compensation, ordinarily may be negotiated." Demarest Bd. of Educ. v. Demarest Educ. Ass'n, 177 N.J. Super. 211, 216 (App. Div. 1980) (citing Hunterdon Cent. High Sch. v. Hunterdon Cent. High Sch. Teachers' Ass'n, 174 N.J. Super. 468, 473 (App. Div. 1980); Bd. of Educ. v. Piscataway Maint. & Custodial Ass'n ("Piscataway"), 152 N.J. Super. 235, 243-44 (App. Div. 1977)[4]; see also In re Hackensack Bd. of Educ., 184 N.J. Super. 311, 318 (App. Div. 1982) ("N.J.S.A. 18A:30-7 clearly permits a board to provide for payment of salary for absences not for sick leave."). PERC, too, has found that Section 7 does not "preempt negotiations" over compensation linked to leaves of absence other than sick leave. W. Orange Bd. of Educ., P.E.R.C. No. 92-114, 18 N.J.P.E.R. ¶ 23117, 1992 N.J.

[4] In Piscataway, the Appellate Division held that Section 6 of the Sick Leave Statute, N.J.S.A. 18A:30-6, contained language evincing the Legislature's intent to make a particular type of long-term disability payment a matter of individual-by-individual treatment within the employer's sole discretion and thus to preclude collective negotiation over it. 152 N.J. Super. at 246. Section 7 has no such language, a fact that the court below overlooked in relying on Piscataway. See 9a.

PERC LEXIS 198 (1992), aff'd, N.J.P.E.R. Supp. 2d 291 (App. Div. 1993); see also Hopewell Valley Reg'l Bd. of Educ., P.E.R.C. No. 97-91, 23 N.J.P.E.R. ¶ 28065, 1997 N.J. PERC LEXIS 212 (1997).

Of crucial importance here, PERC has applied its interpretation of Section 7 to the specific issue of compensated release time, holding consistently over a period spanning decades that "employee release time for representational purposes is mandatorily negotiable." Brick Twp. Bd. of Educ., P.E.R.C. No. 2011-210, 37 N.J.P.E.R. ¶ 13, 2011 N.J. PERC LEXIS 159, at *5 (2011); see Maurice River Twp. Bd. of Educ., P.E.R.C. No. 87-91, 13 N.J.P.E.R. ¶ 18054, 1987 N.J. PERC LEXIS 220 (1987); Haddonfield Bd. of Educ., 1979 N.J. PERC LEXIS 148.[5]

In short, both precedent and the text of the statute itself make clear that Section 7 has no constraining effect on a school district's authority under EERA to negotiate release-time agreements as part of a CNA. That should end the inquiry. But there are additional reasons why the Appellate Division erred.

B. The Appellate Division Misread 18A:30-7 Even on its Own Terms.

Compounding the error caused by its mistaken assumption that Section 7 stands independently of EERA and Chapters 11 and

[5] See also Trenton Bd. of Educ., P.E.R.C. No. 2009-12, 34 N.J.P.E.R. ¶ 129, 2008 N.J. PERC LEXIS 230, at *5 (2008) (PERC "has often held that paid release time . . . is mandatorily negotiable."); cf. also City of Newark, P.E.R.C. No. 90-122, 16 N.J.P.E.R. ¶ 21164, 1990 N.J. PERC LEXIS 228 (1990).

27 of the Education Code, the Appellate Division misread the text of Section 7 itself. In addition to the fundamental interpretive error already noted, which was to read language in Section 7 that on its face is a savings clause as if it were an implied-prohibitions clause, the court made a second significant error. In particular, the court opined that "absence" denotes that the employee is not physically present on district property, such that an employee present on district property but absent from her post of duty as a classroom teacher does not count as "absen[t]." See 12a. Because, the court believed, the releasees "report[] to work every day to an office located on property provided by the school district," the court concluded that they are not "absent" for Section 7 purposes. Ibid.

Although the Appellate Division claimed it was adopting the "plain reading" of the term, there is nothing "plain" about that reading. The term "absence" is a relational word that gains meaning only from context; to understand what the term means, one must ask, "absence from what?" In the context of a paid-leave statute, the only commonsense answer to that question is absence from duty, not absence from employer-owned property.

A peculiar aspect of this case brings that point home. The court, operating under the assumption that releasees report to work at offices located on district property, 12a, found that they are not "absent" under Section 7 when in those offices or

otherwise on district property. But because the record here shows that JCEA releasees in fact report to work at offices on union-owned property, Pa164-65, the releasees would be "absent" for Section 7 purposes under the court's (erroneous) interpretation — at least on days when they stayed in their union-owned offices. But it would make no sense for school districts' employee-compensation authority to turn on a complete fortuity, which would seem to be the consequence of accepting the Appellate Division's interpretation of Section 7. A different interpretation, which would define "absence" as absence from duty, not only would give effect to the natural reading of the word "absence" in this context, it would avoid such anomalous results. Under this natural reading, because releasees are, by definition, absent from their teaching duties, they are absent for Section 7 purposes regardless of where their physical office is located or whose property they happen to be on when performing their release-time functions.

C. The Appellate Division Failed to Apply the Principle of Legislative Acquiescence.

The Appellate Division also ruled in a manner contrary to the principle of acquiescence. The court erred in the first instance by failing to consider the forty years of undisturbed PERC decisions, discussed above, which have addressed Section 7 and interpreted it to recognize the right of school boards to

provide, and negotiate over, compensated release time. See supra pp. 12-13. During that period, the Legislature chose to leave Section 7 unamended, even as it made multiple amendments to the statute of which Section 7 is a part. See, e.g., L. 1997, c. 112, § 1 (amending Section 2); L. 2007, c. 92, § 44 (amending Section 3). That choice to leave the long-established administrative interpretation of Section 7 undisturbed supplies "'great weight as evidence of [the interpretation's] conformity with the legislative intent.'" Klumb v. Bd. of Educ., 199 N.J. 14, 25-26 (2009) (quoting Malone v. Fender, 80 N.J. 129, 137 (1979)). Yet the Appellate Division, by failing to realize that a longstanding administrative interpretation of Section 7 even existed (a failure attributable to ruling without the benefit of briefing), never considered this established principle of statutory construction in arriving at its statutory holding. To ensure the Legislature's intent is honored, review should be granted for this reason as well.

II. THIS COURT SHOULD ALSO RESOLVE THE CONSTITUTIONAL ISSUE RAISED BY PLAINTIFFS' COMPLAINT.

In their complaint, Plaintiffs asked the Chancery Division to hold that the release-time provision violated the Gift Clause of the New Jersey Constitution, N.J. Const. art. VIII, § 2, ¶ 1; § 3, ¶¶ 2, 3, which bars government entities from making "direct loans or gifts of public money or property" to private parties,

Roe v. Kervick, 42 N.J. 191, 206 (1964). The Chancery Division correctly rejected that contention, which was the only issue briefed in either of the courts below. Instead of ruling on that question, the Appellate Division struck down the release-time provision on the statutory ground just discussed.

If the Court grants review to hear the constitutional issue, the appropriate resolution is to affirm the Chancery Division's holding that the Gift Clause does not prohibit release-time provisions – as indeed the courts of multiple other jurisdictions have recently held in rejecting similar challenges. See, e.g., Cheatham, 379 P.2d at 221. As is developed more fully in JCEA's brief in the Appellate Division, Db23-50, no giveaway to private interests, such as the Gift Clause prohibits, is at issue here – and that is true whether the release-time provision is considered in isolation or as one provision of a much larger CNA. A transaction between a government body and a private entity does not violate the Gift Clause if financial aid is provided for a "public purpose" and the means to achieve the purpose are "consonant" with it. Kervick, 42 N.J. at 212. In the context of a contractual relationship, "substantial consideration," N.J. State Bar Ass'n v. State, 387 N.J. Super. 24, 53 (App. Div. 2006), and sufficient government control over the expenditure, see N.J. Citizen Action, Inc. v. County of Bergen, 391 N.J. Super. 596,

604 (App. Div. 2007), demonstrate a means-end fit. Under this standard, the challenged release-time provision is not an unconstitutional gift, but part of an arrangement to compensate public employees in consideration of their services to the District. See Maywood Educ. Ass'n v. Maywood Bd. of Educ., 131 N.J. Super. 551, 557 (Ch. Div. 1974).

The CNA in its entirety furthers the constitutional mandate to provide a "thorough and efficient" education to all Jersey City students because it sets the terms under which 3,000 employees educate Jersey City's children, a preeminently public purpose. N.J. Const. art. VIII, § 4, ¶ 1; N.J. Sports & Exposition Auth. v. McCrane, 61 N.J. 1, 16 (1972) ("[A]nything calculated to promote the education . . . of the people is a proper public purpose."). Its overall public purpose also extends to the challenged release-time provision. As the Chancery Division acknowledged, see 26a-27a, the collective negotiating process and releasees' efforts to facilitate it themselves serve an important public function, see, e.g., Robbinsville Twp. Bd. of Educ. v. Washington Twp. Educ. Ass'n, 227 N.J. 192, 204 (2016). Further, release time maximizes the benefits to the District of the labor-relations system premised on collective negotiations that EERA created.

Read as a whole, as the law requires, see Manahawkin Convalescent v. O'Neill, 217 N.J. 99, 118 (2014), the CNA also

shows that the release-time arrangement is backed by substantial consideration in the form of cooperative labor relations and JCEA members' work for the District, see, e.g., Restatement (Second) of Contracts § 71(4) & cmt. (e); Caterpillar, Inc. v. UAW, 107 F.3d 1052, 1057 (3d Cir. 1997) (holding that employees exchange their labor for the terms of a collective bargaining agreement, including terms providing paid leave to those in release time-eligible union positions).

Even looking at the release-time provision in isolation, it clearly passes muster. As the Chancery Division found, 20a, it is specifically backed by the substantial consideration of releasees' involvement in the grievance and disciplinary processes, which permits resolution of disputes short of the expensive and time-consuming process of formal arbitration, Pa17-18, Pa352-53. District administrators testified that the releasees' efforts help "to maintain a peaceful, orderly, and efficient delivery of educational services," an outcome with "nonmonetary value" to the District. Pa336.

Finally, as part of this bargained-for arrangement, JCEA and the District agreed to several mechanisms by which the District exercises constitutionally sufficient control over releasees' activities, N.J. Citizen Action, 391 N.J. Super. at 604, including the District's retention of authority over them as employees, subject to discipline or termination by the

District, Pa322-23, Pa352, Pa398, and the requirement that they report on their activities and whereabouts to District administrators, Pa165, Pa168, Pa350-52. District administrators routinely request that JCEA's releasees, as the trusted representatives of District employees, undertake "peacekeeping" activities in their schools, Pa352, and the releasees report the outcome of their efforts to administrators, Pa164-65, Pa179, Pa352, Pa347-48. As the Chancery Division rightly concluded, these measures show that the District maintains a legally sufficient and "significant amount of supervisory authority." Pa19. These considerations are more than enough to uphold the release-time provision under the Gift Clause.

CONCLUSION

For the foregoing reasons, the Petition should be granted, the Appellate Division's judgment should be reversed, and the Chancery Division's judgment should be affirmed.

Respectfully submitted,

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Dated: October 21, 2019

CERTIFICATION

I hereby certify that this Petition for Certification presents a substantial question and is filed in good faith and not for purposes of delay.

Richard A. Friedman
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Dated: October 21, 2019

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PLEASE TAKE NOTICE that Defendant-Appellant, The New Jersey Education Association, through their attorneys, Zazzali, Fagella, Nowak, Kleinbaum, and Friedman, Esqs., shall petition the Supreme Court for an Order seeking certification of the entire judgment entered by the Appellate Division in the above matter on August 21, 2019.

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By: Richard A. Friedman
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Dated: September 19, 2019

243723

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1611-17T1

MOSHE ROZENBLIT, and
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.

APPROVED FOR PUBLICATION

August 21, 2019

APPELLATE DIVISION

Argued March 27, 2019 – Decided August 21, 2019

Before Judges Fuentes, Vernoia, and Moynihan.

On appeal from the Superior Court of New Jersey, Chancery Division, Hudson County, Docket No. C-000002-17.

Jonathan Riches (Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute) of the Arizona bar, admitted pro hac vice, argued the cause for appellants/cross-respondents (Law Offices of G. Martin Meyers, PC, and Jonathan Riches, attorneys; Justin A. Meyers, Aditya Dynar (Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute) of the Arizona bar, admitted pro hac vice, and Jonathan Riches, on the briefs).

Kenneth I. Nowak argued the cause for respondent/ cross-appellant Jersey City Education Association, Inc. (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys; Richard A. Friedman and Flavio L. Komuves, on the briefs).

David I. Solomon argued the cause for respondent/ cross-appellant Jersey City Board of Education (Florio Perrucci Steinhardt & Capelli, LLC, attorneys, join in the brief of respondent/cross-appellant Jersey City Education Association, Inc.).

Mark Miller argued the cause for amicus curiae Pacific Legal Foundation (Mark Miller and Deborah J. LaFetra (Pacific Legal Foundation) of the California bar, admitted pro hac vice, attorneys; Mark Miller and Deborah J. LaFetra, on the brief).

The opinion of the court was delivered by

FUENTES, P.J.A.D.

This appeal challenges the legality of a section in the collective bargaining agreement (CBA) entered into between the Jersey City Board of Education (Board) and the Jersey City Education Association, Inc., (JCEA) for the period covering September 1, 2013 to August 31, 2017. Specifically, as construed by the JCEA and the Board, Article 7, Section 7-2.3 of the CBA denoted "Association Rights," requires the Board to pay the salaries and benefits of two teachers selected by the members of the JCEA to serve as "president . . . and his /her designee," and to allow them to devote all of their work-time to the business and affairs of the JCEA. The Board must also continue to grant the president of the JCEA "adequate office and parking facilities."

Section 7-2.3 does not on its face address whether the president of the JCEA and his or her designee are entitled to receive their full salaries and benefits as teachers during the time they exclusively serve the needs of the JCEA. It is undisputed, however, that the two teachers selected by the members of the JCEA to serve in this capacity received their full salaries and benefits from the Board during the three-year term of this CBA. Moreover, the Board conceded during oral argument before this court that this practice predates the term of this particular CBA.

We now hold this practice is not sanctioned by Title 18A and declare this Section of the CBA unenforceable as against public policy.

I

Plaintiff Moshe Rozenblit is a resident of Jersey City who pays real estate taxes to the City. Plaintiff Won Kyu Rim[1] is a resident of this State who pays New Jersey income tax. Plaintiffs argue this contractual arrangement by the Board violates Article VIII, § 3, ¶ 3 of the New Jersey Constitution, which provides: "No donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever." They also argue that N.J.S.A. 18A:30-7, which permits the Board to pay the salary of an employee in cases of absence not constituting sick leave, does not authorize the Board to reassign two teachers to devote their entire professional time as the "exclusive and sole bargaining representative[s] for all certificated personnel, attendance counselors, and teacher assistants" employed in this school district.

Amicus Curiae Pacific Legal Foundation's legal argument echoes plaintiffs' constitutional argument. Amicus also argues that the General Equity

[1] Plaintiffs' standing to bring this action is unchallenged. See Stubaus v. Whitman, 339 N.J. Super. 38, 48-51 (App. Div. 2001).

Judge's finding that the Board "receives a substantial benefit from employing the [release] employees in the form of facilitating labor peace" is not supported by the record. Amicus notes that on March 16, 2018, JCEA members went on strike as a negotiating tactic, in defiance of our State's long-established common law principle denying all public employees, including school district employees, the right to strike. See In re Block, 50 N.J. 494, 499-500 (1967).

Relying on Roe v. Kervick, 42 N.J. 191 (1964), the JCEA argues plaintiffs have not presented sufficient grounds to impugn the constitutionality of this contractual arrangement on its face. The Board did not submit its own independent brief in this appeal, opting instead to adopt the JCEA's position. The Chancery Division, General Equity Part rejected plaintiffs' argument. The judge applied the Court's holding in Roe and found "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."

II

We start our analysis guided by the long-settled jurisprudential principle that admonishes judges to "strive to avoid reaching constitutional questions unless required to do so." In re Plan for the Abolition of the Council on Affordable Hous., 214 N.J. 444, 461 (2013) (quoting Comm. to Recall

Menendez from the Office of U.S. Senator v. Wells, 204 N.J. 79, 95 (2010)). Here, we are satisfied there are sufficient statutory grounds to definitively decide this appeal. We thus decline to reach the constitutional arguments advanced by plaintiffs and amicus.

As a creature of the State, a local board of education "may exercise only those powers granted to them by the Legislature -- either expressly or by necessary or fair implication." Fair Lawn Educ. Ass'n v. Fair Lawn Bd. of Educ., 79 N.J. 574, 579 (1979); see also Edmondson v. Bd. of Educ. of Elmer, 424 N.J. Super. 256, 261 (App. Div. 2012). We are satisfied that in adopting N.J.S.A. 18A:30-7, the Legislature did not expressly or implicitly intend to authorize the Board to enter into the contractual arrangement reflected in Article 7, Section 7-2.3 of the CBA.

N.J.S.A. 18A:30-7 provides:

> 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, or to grant sick leave over and above the minimum sick leave as defined in this chapter or allowing days to accumulate over and above those provided for in section [N.J.S.A.] 18A:30-2, except that no person shall be allowed to increase his total accumulation by more than 15 days in any one year.
>
> [(Emphasis added).]

The Legislature adopted this statute effective January 11, 1968. Fifty-one years later, our research has revealed only one reported opinion from this court that tangentially addressed the issues raised in this appeal. In Board of Education of Piscataway Township v. Piscataway Maintenance & Custodial Association, this court addressed the legality of a provision for extended total disability benefits contained in a contract between the Board of Education of the Township of Piscataway and the Piscataway Maintenance & Custodial Association and whether it exceeded the board of education's authority under Title 18A. 152 N.J. Super. 235, 238 (App. Div. 1977). The legal question in Piscataway concerned whether an agreement to pay the salary of an employee, in whole or in part, for prolonged absence beyond the allowable annual and accumulated sick leave in N.J.S.A. 18A:30-6 violated the school board's managerial prerogative. Id. at 246. We held that "[b]y granting its employees extended total disability leave benefits as a matter of right, the board in this case surrendered its statutory obligation to deal with each case on an individual basis." Ibid.

N.J.S.A. 18A: 30-7 to -13 addresses additional sick leave and other forms of leaves of absence such as "accrued vacation and sick leave bank." For example, N.J.S.A. 18A:30-8 provides:

> Any school district employee who qualifies as a member of the United States team for athletic competition on the world, Pan American or Olympic level, in a sport contested in either Pan American or Olympic competitions, shall be granted a leave of absence with pay and without loss of rights, privileges and benefits and without interruption of membership in any retirement system for the purpose of preparing for and engaging in the competition. The paid leave granted pursuant to this act shall be no more than 90 calendar days in 1 year or the combined days of the official training camp and competition, whichever is less.
>
> Any school district which grants employees leaves of absence pursuant to the provisions of this act shall be reimbursed by the State, for the full amount of the actual cost of employing substitutes for said employees.
>
> [(Emphasis added).]

N.J.S.A. 18A:30-9 and N.J.S.A. 18A:30-9.1 limit the accumulation of unused vacation time. N.J.S.A. 18A:30-10 sanctions the establishment of a "sick leave bank" to permit employees to voluntarily donate "sick leave days or any other leave time" to a colleague in need. The establishment of a sick leave bank must be "agreed upon by the board and the majority representative." Sick leave banks are administered by a six-member committee comprised of three representatives from the board of education and three representatives "selected by the majority representative or majority representatives of those employees of the board who are eligible to participate in the sick leave bank." N.J.S.A.

18A:30-11. The Legislature also made clear that the benefits provided through and by the sick leave bank did not authorize boards of education to reduce or negatively affect more favorable sick leave, disability pay or other benefits obtained through collective bargaining agreements, or prohibit future negotiations to enhance these benefits. N.J.S.A. 18A:30-12. Finally, the Legislature directed how these statutory provisions should be construed:

> No provision of this act [N.J.S.A. 18A:30-10 et seq.] shall be construed as limiting the authority of a board of education to provide an employee with additional days of salary pursuant to [N.J.S.A] 18A:30-6 after all sick leave available to the employee, including days provided under this act, has been used.
>
> [N.J.S.A. 18A:30-13.]

"The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005). Furthermore, "words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language." N.J.S.A. 1:1-1. Courts must also construe the words in a statute "in context with related provisions so as to give sense to the legislation as a whole." Garden State Check Cashing Serv. v. State Dep't of

Banking & Ins., 237 N.J. 482, 489 (2019) (quoting Spade v. Select Comfort Corp., 232 N.J. 504, 515 (2018)).

Mindful of the principles of statutory construction, we conclude that N.J.S.A. 18A:30-7 does not empower the Board in this case to continue to pay the salaries and benefits of the president of the JCEA and his or her designee, while they devote their entire work-time to the business and affairs of the union. A plain reading of the operative language in N.J.S.A. 18A:30-7 shows the Legislature authorized the Board:

> to fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave, or to grant sick leave over and above the minimum sick leave as defined in this chapter or allowing days to accumulate over and above those provided for in section [N.J.S.A.] 18A:30-2 . . . .

The employees who fall within this class must be absent from work for reasons unrelated to sick leave. Here, the two teachers who serve the JCEA as president and designee were not absent. They reported to work every day to an office located on property provided by the school district to attend to the affairs of the JCEA. Jersey City is our State's second largest city. Its school district operates a vast, educationally diverse school system. As of May 2019, the district employed 2,993 instructional staff, 1,317 non-instructional personnel,

and 151 administrators, and enrolled 26,993 students.[2] Its brick and mortar educational infrastructure consists of fourteen elementary schools accommodating children from pre-kindergarten to the fifth grade; thirteen grammar schools accommodating children from pre-kindergarten to eighth grade; four middle schools accommodating children from sixth to eighth grade; six high schools; one secondary school accommodating children from sixth to twelfth grade; one Alternative Program, accommodating children from sixth to twelfth grade; and three Early Childhood Centers.[3]

The two teachers selected by the members of the JCEA to serve as president and designee, are required to travel throughout the school district to attend meetings, participate in disciplinary matters to advocate the interests of JCEA members, attend to the affairs of the union, and negotiate the terms of the next CBA. These two teachers, who are paid their fulltime salaries, do not report to any school administrator or school district official, and are not subject to any administrative oversight. In short, while serving as president and designee of

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[2] See Quick Links, Vital Facts, JCBOE.ORG, www.jcboe.org/boe2015/index.php?option=com_content&view=article&id=166&Itemid=650 (last visited Aug. 13, 2019).

[3] See Schools, JCBOE.ORG, www.jcboe.org/boe2015/index.php?option=com_content&view=article&id=449&Itemid=1090 (last visited Aug. 13, 2019).

the JCEA, these two teachers act exclusively as labor leaders. Despite this, their salaries and benefits are commensurate to the teachers who serve the day-to-day educational needs of the students of the district.

N.J.S.A. 18A:30-7, which is the only authority the Board and the JCEA cite in support of their position, does not authorize the Board to disburse public funds in this fashion. However, the CBA at issue here contains several sections that exemplify the proper exercise of the Board's statutory authority to grant leaves of absence for various reasons unrelated to sick leave. Under Article 31, denoted "Other Absences" when there is a death in the teacher's family, "the teacher shall be excused without loss of pay or accumulated leave for death related absences taken within seven (7) calendar days of the date of death." This Section also allows the faculty of an entire school, or if not practical a representative number of the faculty, a paid half-day off to attend the funeral services of an active colleague. The Board may also authorize paid absence to an employee who is quarantined as ordered by an official action. Article 31 also provides for paid absence in response to a court order.

Article 33, denoted "Sabbatical Leave for Study or for Rest and Recuperation," authorizes the Board to grant a leave of absence for rest and recuperation. However, a teacher on leave of absence for rest and recuperation

receives only one-half of his or her "monthly salary for each month during the continuance of such leave." A leave of absence for study or for rest and recuperation must begin on September 1st and is limited to twelve months. Teachers seeking a leave of absence for rest and recuperation must submit their application to the Superintendent "at least three (3) months before the beginning of the desired leave."

Article 33 also allows a teacher to apply for a leave of absence to study. This application should be presented to the Superintendent four months in advance. A teacher granted this academic leave of absence must also "sign a contract to serve in the public schools of the District for at least two (2) years after the expiration of a leave." If the teacher is unable to honor this contractual obligation, "the teacher shall reimburse the School District in direct proportion to the unfilled time except in case of death or permanent disability." (Emphasis added).

Finally, teachers who are granted a leave of absence for rest and recuperation or for study, must refrain from engaging in any remunerative occupation during the continuance of the leave of absence. Teachers on leave to study must present to the Superintendent documentation attesting to their attendance and successful completion of the course of study offered by these

academic institutions. Violations of these requirements will be considered by the Board to constitute evidence of conduct unbecoming a teacher. A maximum of fifteen "teaching staff members" are permitted to take a sabbatical or leave for rest and recuperation.

The public policy underpinning these leaves of absence is reflected in the reasonableness of the underlying bases for the requests and in the reciprocal benefits they confer. Both the Board and the teacher benefit from these hiatuses of limited-duration. They serve to relieve the teacher from the pressures and emotional exhaustion experienced throughout a lengthy career. The teacher is given the opportunity to separate from his or her day-to-day activities without risk of being unemployed; the Board gives a valuable and experienced teacher the opportunity to "refresh" and return to the profession with a renewed sense of commitment. By contrast, the contractual arrangement which permits the two teachers to devote their entire professional time to exclusive service of the interests of the JCEA confers no reciprocal benefit to the school district. In fulfilling their duties to the JCEA, the teachers' role is to advocate the interests of the JCEA, even when such interests may conflict with the educational and administrative polices of the Board. The JCEA does not cite to any statutory authority permitting the Board to pay the salaries of teachers whose job duties

are exclusively devoted to the service of another organization, in this case the JCEA.

Article 7, denoted "Association Rights" aptly and candidly describes its only purpose – to assure and promote the interests of the JCEA. Article 7 contains a total of eleven sections. We limit our recitation to the four sections most germane to the issue raised here:

> Section 7-1: The [JCEA] shall have the right to distribute, through the use of the teachers' mailboxes, material dealing with the proper and legitimate business of the [JCEA].
>
> Section 7-2: The principal and/or his/her designee shall be notified prior to the distribution of such materials.
>
> Section 7-2.1: Representatives of JCEA, NJEA, and NEA shall have the right to enter the schools to meet with teachers during their preparation periods or lunch periods or after school to carry our appropriate [JCEA] business.
>
> Section 7-2.2: The president or his [or her] designee shall have the right to enter the school and meet with teachers at any time. This right shall not be abused.
>
> Section 7-2.3: <u>The president of the JCEA and his/her designee, shall be permitted to devote all of his/her time to the [JCEA] business and affairs. The President shall continue to be granted adequate office and parking facilities</u>.

> Section 7-2.4: The president's designee shall carry out appropriate [JCEA] business, provided that the aforesaid business shall not disrupt the educational process. The designee shall notify the Superintendent or his/her designee as to where and when he/she is carrying out such [JCEA] business during school time.
>
> [(Emphasis added).]

We emphasize Section 7-2.3 to show the absence of any language obligating the Board to pay the salaries and benefits of the two teachers serving in this capacity for the JCEA. Inexplicably, the Board does not dispute that the language in Section 7-2.3 implicitly requires the Board to pay these two teachers their full salaries and benefits. We find no textual support in the CBA for this conclusion and no legal authority in Title 18A for the Board to sanction this disbursement of public funds.

In N.J.S.A. 18A:30-8, the Legislature clearly stated that a school district employee who qualifies as a member of the United States team for athletic competition on the world level "shall be granted a leave of absence with pay and without loss of rights, privileges and benefits and without interruption of membership in any retirement system for the purpose of preparing for and engaging in the competition." The Legislature made equally clear the limitations of this public generosity: "paid leave granted pursuant to this act

shall be no more than 90 calendar days in 1 year or the combined days of the official training camp and competition, whichever is less." Ibid.

The intent of the Legislature in N.J.S.A. 18A:30-7 was also made clear by the conspicuous omission of language similar to N.J.S.A. 18A:30-8. We thus hold Section 7-2.3 of the CBA covering the period from September 1, 2013 to August 31, 2017, is against public policy and unenforceable. The actions taken by the Board that caused the disbursement of public funds pursuant to Section 7-2.3 were ultra vires.

Reversed.

SUPERIOR COURT OF NEW JERSEY

HUDSON VICINAGE

CHAMBERS OF
BARRY P. SARKISIAN
PRESIDING JUDGE
CHANCERY-GENERAL EQUITY

Brennan Courthouse
583 Newark Avenue
Jersey City, New Jersey 07306

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THE WRITTEN APPROVAL OF THE COMMITTEE ON OPINIONS

LETTER OPINION

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Re: Moshe Rozenblit et al v. Marcia V. Lyles, et al
Docket No. HUD-C-2-17
Date of Hearing: October 27, 2017
Date of Decision: October 31, 2017

Dear Counsel:

Introduction

Presently before the Court are cross-motions for summary judgment submitted by Plaintiffs, Moshe Rozenblit and Qwon Kyu Rim ("Plaintiffs") and Defendant, Jersey City Education Association ("JCEA"). Plaintiffs filed their complaint in this matter on January 04, 2017 under which they sought to have certain provisions of the collectively bargained for agreement ("CNA") entered into between the Jersey City School District, and the teacher's union, JCEA, declared unconstitutional as violations of the "Gift Clause" of the New Jersey

Constitution.[1] More specifically, Plaintiffs object to the "release time" provisions in Sections 7-2.3 and 7-2.4 of the CNA, under which the union president and his/her designee ("releasee employees") have the right to carry out union business and affairs full-time, while the District pays them a class-room teacher's salary. This matter last appeared before this Court as Defendant, JCEA's motion to dismiss pursuant to R. 4:6-2(e), which was denied by this Court on May 30, 2017.

Pursuant to the Court's amended case management Order of July 14, 2017 discovery took place.[2] After reviewing all the evidence and statements of material facts presented by both parties, the Court determines that there are no material facts which warrant a trial in this matter. For the reasons in this opinion, the Court denies Plaintiffs' motion for summary judgment seeking injunctive relief and grants Defendant JCEA's motion for summary judgment seeking dismissal of this action.

Facts

Plaintiff Rozenblit is a resident of the City of Jersey City, and pays property and sales tax in Jersey City. Plaintiff Rim is a resident of the State of New Jersey and pays income tax thereto. JCEA is a labor union that is the sole and exclusive bargaining representative for all teachers, attendance counselors, and teacher assistants employed in the School District of Jersey City.

In June 2015, negotiators from the School District of Jersey City ("District") and the JCEA reached accord on and ratified a collective negotiations agreement ("CNA") covering the period of September 1, 2013 to August 31, 2017 for certain certificated teachers, attendance counselors, and teacher assistants. The CNA includes certain "release time" provisions as set forth in Sections 7-2.3 and 7-2.4 of that agreement, titled "Association Rights." Section 7-2.3 provides that the JCEA President and his/her designee "shall be permitted to devote all of his/her time to the Association business and affairs." Section 7-2.4 provides that the releasee employees shall "notify the Superintendent of his/her designee as to where and when he/she is carrying out such Association business during school time."

Similar release time provisions allowing for two (2) full-time releasee employees have been negotiated in prior JCEA CNAs since at least 1969, under which only the JCEA president was given full-time release status. In 1998 it was decided that two (2) full-time release employees would be provided for.

Mr. Greco, the JCEA President and Ms. Thorp, his designee, are the District employees currently designated to receive release time on a full-time basis by the JCEA. By the terms of the JCEA constitution, these releasee employees are required to be members of the JCEA as well as employees of the Jersey City Public School system. The releasees are paid according to the same rates and receive the same benefits as all other classroom teachers. The District does not determine who will be appointed JCEA

[1] As set forth in Article 8, § 2, ¶ 1, Article 8, § 3, ¶ 2, and Article 8, § 3, ¶ 3.
[2] Subject to a Stipulated Protective Order, dated August 15, 2017.

President or who will be appointed his/her designee, and does not have authority to remove individuals from those positions. The CNA does not require that the releasee employees keep track of, or report, their daily time records to any supervisor. The releasee employees also do not receive performance reviews from any supervisor or supervisory body.

The releasee employees, of course, conduct contract negotiations, representing the JCEA, when the CNA is negotiated, which negotiations occur approximately every four (4) years. When the CNA is not being negotiated, the majority of the releasee employee's time is spent addressing and attempting to resolve conflicts that arise between the District staff and the administration. This process often involves informal meetings to address grievances and disciplinary hearings. If the grievance or disciplinary issue is not resolved informally, the District schedules time to conduct formal hearings on teacher grievances or administration disciplinary concerns. Mr. Greco, as permitted by Article 36 of the CNA, also serves on various Jersey City School committees or bodies and periodically meets with the District Superintendent, pursuant to Article 9 of the CNA. The releasee employees also engage in some advocacy and political activities on behalf of the JCEA, although such activities are typically scheduled after the school day is concluded.

While the District does not supervise the releasee employees in the same way it might supervise a teacher or administrator, the District does retain some formal and informal controls over the releasee employees. The CNA contains a section titled "Meetings of Superintendent and JCEA President" under which the Superintendent and the JCEA President "may meet at least once a month during the academic year . . . to discuss and attempt to resolve problems affecting the schools, teacher morale, working conditions, and other issues pertinent to the implementation of this contract." In practice, the District administrators are in charge of scheduling administrator meetings, committee meetings, disciplinary hearings and labor negotiations to which the releasee employees are obligated to report to and participate in. Mr. Greco and Ms. Thorp, as employees of the District, report to the District Administration when they take sick leave, personal leave, or other absence from duty authorized by the CNA. Pursuant to the CNA, when meeting with teachers or administrators in school buildings, the releasees report their presence to the building principal or sign in at the school office. These releasee employees may also be subject to discipline by the District for conduct related to their employment. The District administrators have regular face-to-face and other contact with the releasee employees and have various opportunities to supervise their work.

Discussion

Summary Judgment Standard

Pursuant to R. 4:46-2(c), summary judgment is appropriate

> [I]f the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order

> as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences there from favoring the non-moving party, would require submission of the issue to the trier of fact.

When deciding whether a genuine issue of material fact exists that would preclude summary judgment, the judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995); see also Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74-75 (1954). All favorable inference must be drawn in favor of the party opposing the motion. Brill, supra, 142 N.J. at 536. The judge's function is not to weigh the evidence and determine the truth of the matter; rather, it is to determine whether there is a genuine issue for trial. Id. at 540. Summary judgment is to be granted where there is no issue to be decided by the trier of fact based on the evidence. Id. at 536-37. However, it is not so that every issue of fact is material, "[i]n order to determine materiality, it is necessary first to set forth the contours of the legal issue presented." Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 41 (2012).

Plaintiffs, by filing their motion for summary judgment argue that there have been sufficient facts presented to find that the "release provisions" of the CNA violate the New Jersey Constitution's "gift clause" provisions. Defendants argue that the facts, as they stand before the Court, warrant a dismissal of Plaintiffs' action pursuant to R. 4:46-1 et. seq.

This matter requires an interpretation and application of the relevant "gift clause" portions of the New Jersey Constitution with regard to the "release provisions" of the CNA as entered into between JCEA and the District. However, before that determination can take place, the Court must determine the Plaintiffs' burden of proof.

Burden of Proof

When challenging a legislative act as being unconstitutional under the New Jersey Constitution, our Courts have held that the moving party carries a steep burden of proof. Defendant, JCEA argues that Plaintiffs are required to prove their allegations "beyond a reasonable doubt" pursuant to Gangemi v. Berry, 25 N.J. 1, 10 (1957). Defendant asserts that the Court has held that actions challenging the implementations of a legislative act as unconstitutional are held to the same standard. Franklin v. New Jersey Dep't of Human Services, 111 N.J. 1, 16, 17 (1988).

Plaintiffs assert that the Gangemi test is in applicable as a conjunctive two-factor test that only applies the "beyond a reasonable doubt" standard if (1) there is a legislative act, and (2) that the act is challenged under a constitutional provision that is silent, unclear or ambiguous. In re P.L. 2001, Chpt. 362, 186 N.J. 368 (2006).

> [I]t is the settled rule of judicial policy in this State that a legislative act will not be declared void unless its repugnancy to the constitution is clear beyond a reasonable

> doubt. 'The constitutional limitation upon the exercise of legislative power must be clear and imperative'; there is to be 'no forced or unnatural construction'; the limitation upon the general legislative power is to be 'established and defined by words that are found written in that instrument,'

Gangemi v. Berry, 25 N.J. 1, 10 (1957) (citations omitted).

Plaintiffs contend that the challenged release time provisions of the CNA are (1) not a legislative act or an implementation of such, and (2) even if they were construed as a legislative act or implementation of such, the gift clause provision of the constitution clearly prohibits the kind of monetary allocation permitted under the release time provisions.

Here, N.J.S.A. 18A:30-7, while not explicitly authorizing release time leave, establishes the grounds for it[3] by permitting boards of education "to fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave. . . ." It is true that Plaintiff is not directly challenging the validity of that statute. Plaintiff is instead challenging the validity of the release time provisions of the CAN and its nexus to that statute which triggers a significant burden of proof.

On the other hand, the Jersey City Board of Education, through its District representatives argues that it acted, in negotiating the terms of the CNA, to implement N.J.S.A. 18A:30-7 by fixing the payment of teachers' salary in cases of absence for union business under the collectively negotiated terms of that contract.

It is not clear to the Court that the "gift clause" provisions of the New Jersey Constitution prohibits the implementation of N.J.S.A. 18A:30-7 through the inclusion of "release time" provisions in the CNA. Plaintiff's contention that the release time provisions of the CNA are plain violations of the "gift clause" is not "established and defined by words that are found written in that instrument" (i.e., the New Jersey Constitution). The authors of the New Jersey Constitution obviously did not mean to prohibit all monetary allocation from government entities to private parties. Gangemi v. Berry, 25 N.J. 1, 10 (1957) (citations omitted).

Plaintiffs' steep burden of proof is justified by the deference the Court gives to the constitutional validity of a legislative act that has been in existence without challenge for an extended period of time. N.J.S.A. § 18A:30-7 has been law for fifty (50) years. P.L. 1967, c. 271. Release time provisions have been included in JCEA CNAs since at least 1969. As evidenced by the long life of this statute without the Court's invalidation and without legislative amendment, a presumption exists that this implementation of the statutory right set forth in N.J.S.A. 18A:30-7 is constitutional. See State v. Trump Hotels & Casino Resorts, 160 N.J. 505, 527 (1999) ("[t]he presumption that a statute is constitutional is enhanced when that statute has been in effect and implemented without challenge over an

[3] The State of New Jersey Commission on Investigation issued a report on release time provisions cited in Plaintiff's brief in opposition on page 15. That report, while not taking a favorable view of release time, recognizes that N.J.S.A. 18A: 30-7 "establishes the grounds" for paid release time by "giving boards of education the power to grant virtually any type of paid time-off through contract negotiations or other means." (SCI Report, pg. 6).

extended period"). Moreover, although not binding on this Court, the validity of release time provisions have been consistently upheld in numerous decisions of the New Jersey Public Employment Relations Commission. See e.g. I/M/O Brick Twp. Bd. Of Ed. v. Brick Twp. Educ. Assn. Docket No. CO-2011-210 (Jan 28, 2011), City of Newark, PERC No. 90-122, 16 NJPER ¶21, 164 (PERC Jun. 26, 1990). Similar release time provisions have also been held to withstand constitutional challenge under other state's constitutional gift clause provisions. See Cheatham v. DiCiccio, 379 P.3d 211 (Ariz. Supreme Ct. 2016) and Idaho Freedom Foundation v. Ind. Sch. Dist. Of Boise City, No. CV-OC-2015-15153 (Idaho 4th Dist. Ct. Oct. 25, 2016).

Thus in order for Plaintiff to succeed in having the Court determine that Sections 7-2.3 and 7-2.4 (the "release-time provisions")of the June 2015 Collective Bargaining Agreement between the New Jersey Education Association and the Jersey City School District violates the New Jersey Constitution, Art. VIII, § 3, ¶¶ 1-3, Plaintiffs must show that the release-time provisions in the aforementioned contract are repugnant to the constitution beyond a reasonable doubt.

Gift Clause Challenge

Plaintiffs challenge the release time provisions of the collective bargaining agreement as being in violations of the "Gift Clause" of the New Jersey Constitution, Article 8, § 2, ¶ 1, Article 8, § 3, ¶ 2, and Article 8, § 3, ¶ 3.

Article 8, § 2, ¶ 1 provides, in full, that: "The credit of the State shall not be directly or indirectly loaned in any case."

Article 8, § 3, ¶ 2 provides, in full that:

> No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become security for, or be directly or indirectly the owner of, any stock or bonds of any association or corporation.

Article 8, § 3, ¶ 3 provides, in full, that: "No donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever."

New Jersey Supreme Court's decision in Roe v. Kervick, 42 N.J. 191 (1964), is the seminal case discussing the "gift clause" of the New Jersey Constitution. Historically, the constitutional prohibitions of Article VIII were motivated by the myriad of abuses that followed efforts by the State to encourage the development of railroads through grants of financial aid. Roe v. Kervick, 42 N.J. 191,206 (1964). "The strictures of Article VIII, which were adopted in 1875 were simply a retreat to a fundamental doctrine of government, i.e., that public money should be raised and used only for public purpose." Id. In Roe, the New Jersey State Treasurer sought a judgment that the New Jersey State Area

Redevelopment Assistance Act ("ARAA"),[4] as overseen by the commissioners of an independent state agency, violated the "gift clause" provisions of the New Jersey Constitution by allowing public credit to be lent to private entities. In upholding ARAA's constitutionality, Roe set forth a two-part test for the Court to use when determining whether a government provision of financial aid is unconstitutional: First [the Court must determine], whether the provision of financial aid is for a public purpose, and second, whether the means to accomplish it are consonant with that purpose. Id. at 212; see also Bryant v. City of Atlantic City, 309 N.J. Super.596, 612 (App. Div. 1998).

I. Public Purpose

The determination of whether the provision of some financial aid by the government body exists for a public purpose or whether that provision is instead for a private purpose is one that "is incapable of exact or perduring definition." Roe v. Kervick, 42 N.J. 191, 207 (1964). "In each instance where the test is to be applied, the decision must be reached with reference to the object sought to be accomplished." Id. Where a government allocation of financial aid provides an "incidental private benefit" as part of an overall contract that meets the other factors of the Roe test, that incidential benefit will not make the contract unconstitutional as long as the overall public purpose is being adequately served. Id. at 231. A public purpose is generally described as one that "serves to benefit the community as a whole." Id. at 207. A governmental determination of what constitutes a public purpose "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." Id. at 229-30. "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. Moreover, "[i]t 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." Maywood Ed. Assn. Inc. v. Maywood Bd. of Ed., 131 N.J. Super. 551, 557 (Ch. Div. 1974) (retirement payments by district board for unused sick leave did not violate gift provisions of the Constitution).

Here, the Court finds that the release time provisions of the CNA serve valid public purposes. The release time provisions in the CNA are implementations of a statutory right. As set forth above, the Court understands the release time provisions of the CNA to be the District's implementation of the right to grant teachers non-sick day leave pursuant to N.J.S.A. 18A:30-7. Therefore, the Court will give deference to the legislative determination that there are public purpose reasons for granting the District authority to grant such non-sick-day leave.

However, even if we were not to defer to the legislative's decision to authorize release time, the Court finds that the release time provisions facilitate important functions that serve the District in their constitutional obligation to provide education to the children of

[4] N.J.S.A. §§ 13:1B-15.13 et seq.

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.

Our courts have long recognized that the collective bargaining process, in and of itself, serves an important public purpose. Robbinsville Twp. Bd. Of Ed. V. Washington Twp. Educ. Ass'n., 227 N.J. 192, 204 (2016); I/M/O Hunterdon Bd. Of Freeholders, 116 N.J. 332, 338 (1989). Granting certain District employees release time to engage in that process in negotiating contracts for the JCEA serves the public by facilitating a collectively negotiated agreement between the JCEA and the District.

The Court also recognizes that the majority of the releasee employees time is not spent negotiating contracts, rather, the majority of their time is spent engaging in the disciplinary/grievance hearing process outlined in the CNA. In addition to the conciliation and resolve of grievance and/or disciplinary claims, the releasee employees also attend various meetings with District Administrators to ensure that labor-management relations run smoothly. The release employeee'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.[5] 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. 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.

II. Means to Accomplish Public Purpose

Under the second prong of the test set forth in Roe v. Kervick, 42 N.J. 191 (1964), 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) if the transaction is contractual in nature, 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).

[5] In the Arizona Supreme Court case of Cheatham v. DiCiccio, 379 P.3d 211, 217, 218 (Ariz. Supreme Ct. 2016) the court recognized that when determining the public purpose of release time provisions in response to a gift clause challenge under the Arizona State Constitution, the public purpose of the collectively negotiated contract should be viewed as a whole. The Court here adopts this view in that the release time provisions cannot be viewed in isolation from the public purpose behind the CNA.

Plaintiff asserts that the controls in place by the District are not adequate for the District to determine whether the funds expended in paying these releasee employee's salaries are primarily being used for a public or private purpose. The Court disagrees.

It is undisputed that Mr. Greco and Ms. Thorp report to the District administration when they take sick leave, personal leave or other absence from duty authorized by the CNA. The CNA also provides that when the releasee employees meet with teachers or administration in school buildings, releasees are to report their presence in the school building to the principal or sign in at the central office. Whether the releasees are present in a school at the principal or administrator's request, or are present at a school as a result of a request they initiated on their own, the releasees are monitored by the principal and/or vice principal. The building and central administration are kept apprised of the releasees' activities when they go to schools to help conciliate disputes that may arise between teachers and administrators. In fact, the District sets the schedule for all formal negotiations related to grievance and disciplinary hearings as well as negotiations related to the releasee's collective bargaining duties. The releasee employees have regular face-to-face, telephonic and other contact with members of the District administration as well as record keeping of their attendance as described above. Lastly, the District maintains authority to discipline the releasee employees for employment-related misconduct.

Here, the Court finds that Defendant, JCEA has demonstrated that the District retains sufficient control over the use of release time by those releasee employees. The Court, having reviewed the evidence submitted by both parties on this issue, finds that the District retains sufficient control over the release time expenditure to ensure that the public purpose of those release time provisions is carried out by the releasee employees for the benefit of the District.

The Court notes that language in the cases cited by the plaintiffs discussing the terms of control as necessarily being "strict" and set forth in applicable statutes or contracts primarily deal with direct government loans to private entities, which this case is not. It would make sense that when a government loans money to a private entity that a high amount of control over how that asset is used is necessary to ensure that the government's public purpose of lending the money is accomplished. However, here, where the challenged government financial aid is the allocation of two salaries to individuals authorized to engage in union business and activities full-time, the government body, here the District, must maintain control over how those funds are allocated. However, the control necessary to achieve that purpose is obviously different from the control necessary to ensure proper use of loaned funds to private entities. Moreover, the legislature has statutorily limited the amount of control the District might have over the JCEA and its releasee employees. N.J.S.A. 34:13A-5.4(a)(2) (providing that the public employers cannot "dominat[e]" or "interfere[e] with" a Union's administration).

As set forth above, the District maintains a significant amount of supervisory authority and is directly involved with the work the releasee employees perform on a daily basis. The terms of that supervisory authority are negotiated in good faith and set forth in the provisions of the CNA. Thus, although the District does not maintain the same type of

controls a government agency might maintain over a private entity it is lending money to, the Court finds that, given the nature of releasee employee's role in the District, the District exercises a "reasonable measure of control" over the release employees. New Jersey Citizen Action, Inc. v. County of Bergen, 391 N.J. Super. 596, 604 (App. Div. 2007).

Lastly, the Court finds that the expenditure of funds for the releasee employees salaries is supported by substantial consideration. When an agreement "involves the transfer of public funds to a private entity, but is unsupported by consideration flowing to the government entity" that agreement may violate the gift clause provisions of the New Jersey Constitution. New Jersey Citizen Action, Inc. v. County of Bergen, 391 N.J. Super. 596, 605 (App. Div. 2007) (citing City of Bayonne v. Palmer, 47 N.J. 520 (1966)). Even if there is some benefit received by the government body, the sufficiency of that benefit compared to the size of the monetary allocation will be analyzed in determining whether that allocation is an unconstitutional gift. City of East Orange v. Board of Water Commissioners, 79 N.J. Super. 363, 371 (App. Div), aff'd on other grounds 41 N.J. (1963). However, our Courts have also recognized 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." Maywood Educ. Ass'n v. Maywood Bd. Of Ed. 131 N.J. Super. 551 (Ch. Div. 1974).

Here, the release provisions of the CNA are contractually negotiated provisions of compensation for employees of the District. Moreover, the District is authorized by N.J.S.A. 18A:30-7 to provide this sort of compensation when teachers are absent from their ordinary teaching duties. As set forth above, the District receives a substantial benefit from employing the releasee employees in the form of facilitating labor peace and cost-effective conciliation of grievances and disciplinary issues. In addition to the monetary benefit of stemming these disputes before they turn into costly arbitration proceedings, the District also receives value in the form of non-monetary compensation through the facilitation of communication between the staff and administrators of the District. For the reasons set forth herein, the Court finds that it has enough factual information to determine that there is adequate consideration flowing to the District in exchange for its allocation of public funds to cover the releasee employee's salaries.

Conclusion

Given Plaintiff's steep burden of proof and this Court's determination that the release time provisions in the CNA are not unconstitutional gifts, the Court denies Plaintiff's motion for summary judgment. For the same reason, the Court hereby grants Defendant, JCEA's motion for summary judgment and dismisses this case.

SO ORDERED,

Hon. Barry P. Sarkisian, P.J.Ch.