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MOSHE ROZENBLIT; and WON KYU RIM, Plaintiffs, vs. 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; JERSEY CITY PUBLIC SCHOOLS OF THE CITY OF JERSEY CITY; JERSEY CITY BOARD OF EDUCATION; and JERSEY CITY EDUCATION ASSOCIATION, INC., Defendants.	**SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION, GENERAL EQUITY – HUDSON COUNTY** **DOCKET No. C-2-17** **PLAINTIFFS' REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

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INTRODUCTION

The Jersey City Education Association ("JCEA") attempts to cast the release time employees' performance of obvious administrative duties as evidence of strict control by the Jersey City Board of Education ("District). It tries to show incidental and speculative benefits from those activities as evidence of substantial consideration to the District. And it claims that the alleged performance of activities that are not addressed in the plain language of the Agreement serve a public purpose. All of these arguments continue to fall short under the Gift Clause.

In its Opposition to Taxpayers' Motion for Summary Judgment, the JCEA reiterates several of the arguments it made in the JCEA's own Summary Judgment Motion. The new assertions are addressed here.

ARGUMENT

The release time provisions violate the Gift Clause because there is no evidence of actual control over release time employees, no obligatory consideration provided by the JCEA to the District in exchange for release time, and the primary benefits flow to the JCEA, not the district.

A. The examples of "control" offered by the JCEA fall woefully short of the Constitution's requirements.

The JCEA points to certain administrative tasks that release time employees engage in: (1) they attend meetings that the District schedules and (2) "respond to telephonic and written inquiries from the District." JCEA Opp. at 4.[1]

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[1] In its brief, JCEA also cited four other examples: (1) The District maintains release time employees' "time" and "attendance" records; (2) the release time employees must report their physical "presence" to school administrators when on campus; (3) they attend meetings, hearings, and other gatherings where they are in the presence of administrators; and (4) the release time employees "could" be disciplined for employment-related misconduct, having now

These examples simply do not prove adequate government control over public expenditures to satisfy the requirements of the Gift Clause. Scheduling a meeting does not mean the District is *controlling or directing the activities* of release time employees either before, during, or after the meeting. Scheduling meetings to which release time employees are invited does not prove that these employees *work for* the District in the sense required by the Gift Clause here. Different parties and business interests *often* schedule meetings for other groups and individuals—who do not work for them. The JCEA's argument here is tantamount to saying that if the District scheduled a meeting with the Parent-Teachers' Association, the District, *ipso facto*, controls the activities of the PTA–obviously, a proposition that does not hold.

Similarly, the fact that the release time employees respond to District telephone calls and e-mails is not evidence of control. By way of comparison, attorneys are expected to respond to calls and e-mails from opposing counsel promptly and professionally. But, of course, that does not mean opposing counsel controls the activities of an attorney on the other side. Likewise here. The fact that release time employees (are invited to) attend meetings scheduled by the District, or that they answer the District's phone calls simply does not show adequate control by the District to prove that the funding of release time employees—whose activities are not supervised by the District, are not reviewed for performance by the District, and cannot be fired by the District—is anything other than a gift of public funds to the JCEA. Pls.' Stmt. of Facts ("SOF") ¶¶ 22–23, 26; JCEA's Resp. to Pls.' Stmt. of Facts ¶¶ 22–23, 26.

The JCEA also continues to contend that there is "no support in the record" for Taxpayers' observation that "the District has no role in when, where, or how, the releasees

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dropped the "theoretically could be disciplined" statement. JCEA Opp. at 3–4; *see also* JCEA MSJ at 15. Plaintiffs explained in their previous brief why these are insufficient.

conduct their activity." JCEA Opp. at 4. On the contrary, there is ample support in the record for this conclusion, as well as *direct admissions* from the District that they have *no* role in directing the daily activities of release time employees. *See* Pls.' MSJ at 8–10; *see also* Pls.' Request for Admission to JCBE ¶ 5 (RFA: "Admit that you do not control or direct the activities of the JCEA President while using release time hours." Response: "Admitted."); *and* Pls.' Request for Admission to JCBE ¶ 6 (RFA: "Admit that you do not control or direct the activities of the JCEA President's designee or other JCEA members using release time hours." Response: "Admitted.").

Similarly, the JCEA argues that there is no evidentiary support for Taxpayers' contention that there are no scheduled interactions between the releasees and District administrators. JCEA Opp. at 4. The record, in fact, establishes this unambiguously: Celeste Williams, the Chief Talent Officer and head of human resources for the entire District, was asked this question: "Q: Are there any required scheduled interactions between Mr. Greco and any District personnel?... A: *No, not to my knowledge but—no. The answer would be no.*" Williams Tr. at 32–33 (emphasis added).

The JCEA also repeats its claim that "the releasees...spend about 90 percent of their time during the school day in the presence of a District administrator." JCEA Opp. at 4, 8. But the evidence on this point is far from "uncontradicted," as the JCEA claims. *Id.* at 8. Indeed, the deposition testimony established the opposite. When asked, "[W]hat percentage of the time would you say are you in the presence of a District employee?", JCEA Chair of Grievances, Tina Thorpe responded, "Maybe 30 percent." Thorp Tr. at 19. When asked the same question, JCEA President Ron Greco responded that Ms. Thorpe would give "more of a definitive answer," but "I don't know at this time." Greco Tr. at 24.

The JCEA next contends that Celeste Williams "and other administrators meet regularly with the releasees." JCEA Opp. at 8. Again, the evidence says the opposite. When asked how often she interacts with Mr. Greco, Ms. Williams responded, "very few times.... Maybe once a month." Williams Tr. at 45. When asked the same question about her interactions with Ms. Thorp, Ms. Williams responded that, "most cases there's at least two or three E-mails a month." Williams Tr. at 46. When asked how many in-person meetings she has with Ms. Thorp, she responded, "[I]t could be two to three times a month. It could be less." *Id.* at 46. These hardly amount to "regular[]" interactions. JCEA Opp. at 8.

Finally, and somewhat ominously, the JCEA hints at what might happen if the District, *sua sponte*, attempted to exercise constitutionally required controls over release time expenditures. It refers to such controls as "dominating or interfering with a Union." JCEA Opp. at 5. While this may make sense with regard to *privately-financed* union activities, it is emphatically *not* the rule when it comes the Constitution's Gift Clause requirements for public control over *public* expenditures. When taxpayer money is spent, the Constitution *mandates* that the government control the use to which that money is put—otherwise, the expenditure is a forbidden gift of public resources. *Roe v. Kervick*, 42 N.J. 191, 219 (1964). Certainly the union has no constitutional right to use the privilege of government financing.

In *Davenport v. Washington Educ. Ass'n,* 551 U.S. 177 (2007), the U.S. Supreme Court rejected a union's argument that it had a First Amendment right to fund its activities with money given to it as a subsidy by the state. It noted that legal restrictions on the union's use of those subsidies were "simply a condition on the union's exercise of this extraordinary power [*i.e.*, the subsidy].... The notion that this modest limitation upon an extraordinary benefit violates the First

Amendment is, to say the least, counterintuitive." *Id.* at 184. Likewise, here: the control over expenditures of public money that the Gift Clause requires do not amount to interference with the union's legal rights.

B. The purported benefits identified by the JCEA that result from release time are both speculative and not contractually obligatory and thus do not amount to substantial consideration under the Gift Clause.

The JCEA identifies "both monetary and nonmonetary benefits" that purportedly flow to the District as a result of release time. JCEA Opp. at 9. These include "avoidance of more formal … grievance hearings" and the "a peaceful, orderly, and efficient delivery of educational services." *Id.* These purported benefits are simply speculative. There is no evidence in the record to conclude that the presence of taxpayer-funded union employees actually *reduces* the cost of the grievance process. In fact, the opposite could be equally true: two full-time union representatives that are "free" to union members may actually *increase* costs when filing grievances against the District. And the same is true for purported "labor peace." Even assuming all of these things were true, these examples are exactly the type of unenforceable, unquantifiable, indirect benefits that do not amount to direct consideration under the Gift Clause.

Release time must be "restricted to the public end by the legislation and contractual *obligation*." *Roe*, 42 N.J. at 217 (1964) (emphasis added). Absent actual, contractual obligation on the part of the private party, there is nothing to ensure that the public's business is being done. A lack of contractual obligation, *as a matter of law*, means insufficient consideration. *See also Turken v. Gordon*, 223 Ariz. 342, 349 ¶ 31 (2010) (only what a party "*obligates* itself to do (or to forebear from doing) in return for the promise of the other contracting party" counts as consideration under the Gift Clause) (emphasis added).

As the evidence makes plain, the release time provisions do not obligate the JCEA to provide *anything* to the District. The plain language of the contract and its interpretation by the District are clear that there are not sufficient contractual obligations under *Roe*. *See* CBA § 7-2.3 ("[T]he JCEA President and his designee "shall be permitted to devote *all* of his/her time to the Association business and affairs") (emphasis added); *see also* Williams Tr. at 18 ("Association business and affairs," in the contract, according to the District means "Anything that would ... assist the members of this particular Association.")

Indeed, *the District has expressly admitted that there are no contractual obligations provided by the JCEA in exchange for release time*. *See* Pls.' Request for Admission to JCBE ¶ 10 ("Admit that the JCEA is *not obligated* to provide *any* specific services to the District in exchange for the release time provisions in the 2013 Agreement." Answer: "Admitted.") Absent contractual obligation, under *Roe*, there simply cannot be substantial consideration for Gift Clause purposes.

The JCEA also attempts an interesting burden shift in its analysis of the consideration prong. JCEA Opp. at 9–10. It contends that Taxpayers have failed to satisfy their burden of proof because they offered as evidence the fact that the District has no mechanism in place to account for or measure the value of release time activities. *Id.*

Of course, Taxpayers have the burden of proving inadequacy of consideration. But the District had the *constitutional obligation* to comply with the Gift Clause. This includes an *obligation* to receive substantial consideration for its release time expenditures. If the District does not know *how* release time is used, and has no mechanism to estimate the value of release time—as the evidence plainly establishes—then it has failed in this obligation. *See* Pls.' MSJ at

13–15. Because the District does not know in any meaningful way *how* release time is used and has never *attempted* to value it, that alone is evidence of inadequate consideration.

It would be as if the District sold a valuable piece of public land for $10 to a private company without ever having it appraised, and then made it impossible to access the land for any outside appraiser to value it. There, as here, no expert in the world could provide additional information on the value of release time because the District has made it impossible to do so when it does not track, or require any accounting of, release time. This failure is fatal on the question of consideration under the Gift Clause.

C. The plain language of the Agreement and the practice of the parties indicates that the primary beneficiary of release time is the JCEA, not the District.

As it did on the consideration prong, the JCEA identified several categories of release time activities that purportedly serve a public purpose under the Gift Clause. JCEA Opp. at 10–11. These include assisting in the disciplinary process, collective negotiations, avoiding the risk of arbitration, and "facilitating labor-management communication." *Id.* at 11.

As stated above, none of these examples are valid consideration under the Gift Clause because there is no contractual *obligation* to perform these activities. But these examples are also inadmissible parol evidence for purposes of evaluating public purpose. As is plain in the common law and this state's precedent, "parole [*sic*] evidence should not be received to alter or vary the terms of that written contract." *Arnoff Shoe Co. v. Chicarelli*, 135 N.J.L. 141, 144, 50 A.2d 834, 836 (1947). A contract that is illegal or ultra vires cannot be rescued from invalidity by admitting parol evidence to try to make the contract say what it does not say. *See, e.g.*, *Berkeley Elec. Co-op., Inc. v. Town of Mount Pleasant*, 308 S.C. 205, 207–09, 417 S.E.2d 579, 581–82 (1992); *American Empire Ins. Co. v. Hanover Natl. Bank of Wilkes-Barre*, 409 F. Supp.

459, 464–65 (M.D. Pa. 1976); *Stewart v. Erie & W. Transp. Co.*, 17 Minn. 372, 388 (1871). This case involves a written agreement between the JCEA and the District that covers each issue of labor management relations between those parties. The agreement consists only of those obligations specified between the four corners of the Agreement. The other activities to which JCEA refers in its brief, that are not mentioned in the agreement, cannot be considered *contractual obligations* for purposes of either contract law or constitutional analysis.

Under the Agreement, release time employees are *required* "to devote *all* of his/her time to the Association business and affairs." CBA § 7-2.3 (emphasis added). If there are some additional obligations imposed on the JCEA's use of release time, they do not appear in the contract. To the extent such activities occur at all, they cannot be considered as part of the public purpose analysis. And even assuming these activities *are* considered, as the evidence amply demonstrates, the JCEA is the *primary* beneficiary of them, not the District. *See* Pls.' MSJ at Pt. III.

The JCEA makes a final perplexing statement that Taxpayers "begrudge the fact that JCEA members also benefit from [release time activities]," and this purported opposition to taxpayer-funded release time is more appropriately resolved "through the political process" than by this Court. JCEA Opp. at 11. Not that it matters for purposes of Gift Clause analysis, but Taxpayers' view is that the JCEA should be able to use its *private* resources whenever and however it likes. Taxpayers' Gift Clause opposition is based on the use of *public* resources for activities that benefit a *private* party.

As to the proposition that the "political process" is the proper vehicle to resolve a Gift Clause abuse, *Roe* simply puts this to bed. As the Supreme Court recognized, "[w]hen the State

once enters upon business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger." 42 N.J. at 207 (citation omitted). That is precisely the case here, as the JCEA regularly engages in political activities, including providing financial support to, and supporting or opposing, candidates for the very same body that ratifies the Agreement containing the release time provisions. Greco Tr. at 40, 46. The only way to avoid such special interest abuse is to faithfully enforce the constitutional requirement that government control the expenditure of public funds, receive adequate consideration for the expenditure, and receive the primary benefit of that expenditure. The Gift Clause wisely requires this Court, rather than the "political process," as the proper body to consider those questions. And the evidence establishes that the release time provisions at issue fail on all three counts.

CONCLUSION

Plaintiff-Taxpayers' motion for summary judgment should be granted.

RESPECTFULLY SUBMITTED this 23rd day of October, 2017, by:

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JUSTIN A. MEYERS, ESQ., certifies and declares as follows:

1. I am an attorney of law of the State of New Jersey. I am counsel for the plaintiffs in the above-captioned matter, and as such I have full knowledge of the facts set forth herein.

2. On October 23, 2017, I served a true and correct copy of Plaintiffs' Reply in Support of Plaintiffs' Motion for Summary Judgment in connection with the above-captioned matter to the following:

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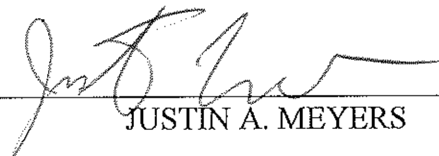
By: 
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