JERSEY CITY EDUCATION ASSOCIATION,	:	SUPREME COURT OF NEW JERSEY
	:	DOCKET NO. 083434
Petitioner/Cross-Respondent,	:	CIVIL ACTION
v.	:	ON APPEAL FROM
	:	SUPERIOR COURT OF NEW JERSEY,
MOSHE ROZENBLIT and QWON KYU RIM,	:	APPELLATE DIVISION
	:	DOCKET NO. A-1611-17T1
Respondents/Cross-Petitioners	:	
	:	SAT BELOW:
	:	Hon. Jose L. Fuentes, P.J.A.D.
	:	Hon. Francis J. Vernoia,
	:	J.A.D.
	:	Hon. Scott J. Moynihan, J.A.D.

BRIEF ON BEHALF OF AMICUS CURIAE NEW JERSEY EDUCATION ASSOCIATION

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PRELIMINARY STATEMENT

Amicus curiae New Jersey Education Association (NJEA) is a statewide organization whose mission is to advance and protect the rights, benefits, and interests of its members and to promote a quality system of public education for all students. The Appellate Division's decision in this matter has created uncertainty and unrest for those members and has further threatened the ability of certain members to devote the necessary time to advocacy on behalf of not merely fellow members but public education, equal opportunity, and the rights of those students.

In its decision below, the Appellate Division reversed more than forty years of well-recognized precedent under the New Jersey Education Laws when it erroneously determined that an employee release time policy violated N.J.S.A. 18A:30-7, when in fact the Education Laws recognize the broad authority of boards of education to establish and negotiate the terms and conditions of school employees' leaves of absence. In doing so, the Appellate Division effectively nullified two mutually-negotiated contractual provisions upon which the two contracting parties before that court, the Jersey City Board of Education (Board) and the Jersey City Education Association (Association), had relied for fifty years, thus raising the same concern for other contracting parties across the state who had mutually agreed to the same or similar provisions during their respective negotiations. The Appellate Division further ignored the explicit public policy goals of the New Jersey Employer-Employee Relations Act (EERA or Act), N.J.S.A. 34:13A-1 to -39, in favor of "the prevention or prompt settlement of labor disputes," instead inexplicably claiming that employee release time was unenforceable ***as against*** public policy.

The Appellate Division chose not to decide the constitutional question raised by Plaintiffs Moshe Rozenblit and Won Kyu Kim (collectively, Plaintiffs), who had claimed that employee release time violated the "Gift Clause" of the New Jersey Constitution, Art. VIII, §3, ¶2, as an impermissible use of public funds for purportedly private purposes. Instead, the Appellate Division ruled *sua sponte* that the Board was not authorized to pay released association officials under N.J.S.A. 18A:30-7, determining incorrectly that release time does not fall under the statutory category of "cases of absence not constituting sick leave" because the Court misinterpreted "absence" as referring to absence from ***work*** rather than absence from ***duty*** while ignoring the broader authority granted to boards of education under N.J.S.A. 18A:11-1(c) and 27-4.

The Appellate Division further held that release time conferred benefits on only the Association but not the Board, and that public policy would not allow such disbursement of public funds. Notwithstanding that the Association focused on both the EERA and the State of New Jersey Public Employment Relations Commission (PERC or Commission), the state agency tasked with implementing the Act, in briefing this matter and that the Chancery Division had expressly referenced PERC decisions upholding the validity of release time in its decision below, the Appellate Division never mentioned either PERC or the Act. The Appellate Division was wrong on all counts, but it was especially wrong with respect to its narrow understanding of the nature of the collective negotiations process, the public policy in support of collective negotiations, and the critical role of PERC for the past fifty

years in defining the scope of those negotiations.

Because of the Appellate Division's error, collectively negotiated agreements (CNA or contract) statewide no longer mean what the parties intended them to mean. The EERA's and this Court's well-settled precedent in support of the collective negotiations process and its importance to the public policy goal of employer-employee peace has been upended. Moreover, the constitutionality of employee release time under the Gift Clause has yet to be conclusively affirmed. On this basis, amicus curiae NJEA asks that the Court grant the Association's petition for certification, reverse the decision of the Appellate Division, and reinstate and affirm the decision of the Chancery Division holding that employee release time is authorized by the Education Laws and does not violate the Gift Clause.

PROCEDURAL HISTORY

Amicus NJEA relies upon and incorporates by reference the Procedural History set forth in the Brief filed with the Superior Court, Appellate Division by Petitioner/Cross-Respondent Jersey City Education Association in this matter and which is on file with this Court.

STATEMENT OF FACTS

Amicus NJEA relies upon and incorporates by reference the Statement of Facts set forth in the Brief filed with the Superior Court, Appellate Division by Petitioner/Cross-Respondent Jersey City Education Association in this matter and which is on file with this Court.

LEGAL ARGUMENT

I. THE APPELLATE DIVISION ERRED BY NARROWLY FOCUSING ON AND MISCONSTRUING N.J.S.A. 18A:30-7 WHILE IGNORING PERC CASE LAW ACCORDING TO

WHICH EMPLOYEE RELEASE TIME IS MANDATORILY NEGOTIABLE.

A. Under a Plain Reading of the Education Laws, Boards of Education Have the Power to Negotiate and Authorize Employee Release Time.

The Education Laws broadly empower boards of education 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 "***[m]ake rules . . . governing the employment, terms and tenure of employment,*** promotion and dismissal, and ***salaries and time*** and mode of payment ***thereof of teaching staff members for the district***[.]" N.J.S.A. 18A:27-4. (Emphases added.) These provisions, independently or taken together and particularly when coupled with the EERA, expansively define the scope of a board's right to pay salaries.

This latter right is recognized by N.J.S.A. 18A:30-7, pursuant to which

> [n]othing in [N.J.S.A. 18A:30, Leaves of Absence] 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 18A:30-2 [Sick leave allowable], except that no person shall be allowed to increase his[/her] total accumulation by more than 15 days in any one year.
>
> [Id.] [Emphasis added.]

When it declined to address Plaintiffs' Gift Clause violation claim on grounds of constitutional avoidance, the Appellate Division instead focused not on a board of education's broad powers under the Education Laws but narrowly on N.J.S.A. 18A:30-7.

The Appellate Division claimed that this provision could not be read to authorize employee release time because "[t]he

employees who fall within this class must be absent from work for reasons unrelated to sick leave," but the two released association officials in this case "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 [Association]." Pa12. (Emphasis in original.) But this chapter's definition section, N.J.S.A. 18A:30-1, expressly defines "absence" in the context of sick leave as absence of any person "***from his or her post of duty.***" (Emphasis added.) That person's physical location and the legal ownership of that physical location are irrelevant. Because a teaching staff member devoting all of his or her time to Association business and affairs pursuant to Section 7-2.3 of the CNA is not engaged in teaching, that teaching staff member is thus "absent . . . from his or her post of duty." N.J.S.A. 18A:30-7 applies.[1]

B. PERC Decisions According to Which Employee Release Time Is Mandatorily Negotiable Are Entitled to Deference by a Reviewing Court but Were Ignored by the Appellate Division.

Where the Appellate Division thus erred as a matter of statutory interpretation, the Honorable Barry P. Sarkisian,

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[1]Plaintiffs claim in their opposition to the Association's petition for certification that "it cannot be seriously suggested that the release[d association officials] are 'absent' from work," citing bereavement, sabbatical, and other types of leave as "instances [where] ***a teacher is genuinely absent from his or her teaching duties*** – i.e. not actually working." Rb18. (Emphasis added.) But Plaintiffs' argument ultimately relies on the conclusion that "[t]he release[d association officials] are not performing teaching duties ***at all.***" Rb12. (Emphasis in original.) If Plaintiffs correctly recognize that "absence" refers to absence from teaching duties and not absence from work, and if Plaintiffs further recognize that released association officials are absent from all teaching duties, Plaintiffs' claim that N.J.S.A. 18A:30-7 does not extend to released association officials is illogical.

Presiding Judge of the Chancery Division, correctly recognized that "N.J.S.A. 18A:30-7, while not explicitly authorizing release time leave, establishes the grounds for it 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 . . .'" Pa24. Critically, Judge Sarkisian further noted that

> N.J.S.A. [ ]18A:30-7 has been law for fifty (50) years. . . Release time provisions have been included in [Association] CNAs since at least 1969. . . Moreover, although not binding on this Court, ***the validity of release time provisions ha[s] been consistently upheld in numerous decisions of [PERC]. See, e.g., Brick Tp. Bd. of Educ., I.R. No. 2011-31, 37 NJPER 39 (¶13 2011); City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 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, 240 Ariz. 314, 379 P.3d 211 (2016); Idaho Freedom Found. v. Ind. Sch. Dist. of Boise City, No. CV-OC-2015-15153 (Id. 4th Dist. Ct., Oct. 25, 2016).
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> [Pa24-25.] [Emphasis added.]

In focusing narrowly on N.J.S.A. 18A:30-7, the Appellate Division erroneously claimed that that single statutory provision was "the only authority the Board and [Association] cite in support of their position[.]" Pa14. But the Board's agreement to include union officer release time in its CNA with the Association ***is*** the exercise of its authority under N.J.S.A. 18A:30-7 and the Education Laws more broadly. The Appellate Division ignored not only the fifty-year history of mutually-bargained-for contracts between the Board and the Association that included an employee release time provision but also decades' worth of decisions from PERC that have repeatedly found employee release time to be mandatorily negotiable.

Under N.J.S.A. 34:13A-5.4(d), PERC has primary

jurisdiction to determine whether a subject matter in dispute is a mandatorily negotiable term or condition of employment that falls within the scope of collective negotiations or, alternately, whether it is a non-negotiable managerial prerogative and is thus preempted from the scope of negotiations. A court has no jurisdiction to make an initial determination as to statutory negotiability. See, e.g., State v. State Supervisory Emp. Ass'n, 78 N.J. 54, 83 (1978) ("PERC is the forum for the initial determination of whether a matter in dispute is within the scope of collective negotiations. . . ***No court of this State is empowered to make this initial determination***") (emphasis added); Bd. of Educ. of City of Plainfield v. Plainfield Educ. Ass'n, 144 N.J. Super. 521, 525 (App. Div. 1976) ("PERC has been granted ***primary jurisdiction to determine scope questions*** . . . [and] ***such procedure should be exhausted*** before recourse is had to the courts"). (Emphasis added.)

Although PERC decisions are not binding on a reviewing court, PERC's interpretation of the EERA, including scope of negotiability determinations pursuant to N.J.S.A. 34:13A-5.4(d), is "***entitled to substantial deference . . . unless its interpretations are plainly unreasonable, . . . contrary to the language of the Act, or subversive to the Legislature's intent.***" New Jersey Tpk. Auth. v. Am. Fed'n of State, Cty. & Mun. Employees, Council 73, 150 N.J. 331, 352 (1997). (Emphasis added.) See also State, Div. of State Police v. New Jersey State Trooper Captains Ass'n, 441 N.J. Super. 55. 67 (App. Div. 2015) ("We accord the agency's exercise of its statutorily delegated responsibilities a strong presumption of reasonableness and defer to its findings of fact") (internal quotations and citations omitted).

As Judge Sarkisian acknowledged, PERC has consistently and unequivocally found employee release time to be mandatorily negotiable. See City of Newark, 16 NJPER at 396 ("***Release time for union officials can vitally affect the employees they represent.*** We recognize that these provisions cost money and may reduce the number of employees available to deliver services; but these are issues of wisdom and reasonableness which must be resolved through the negotiations process. . . [T]he general negotiability of time off and ***the specific employee and public interest in release time for representational purposes outweigh any policy concerns which might be affected by agreeing to grant a handful of employees release time from non-emergency duties***") (emphases added); Brick Tp. Bd. of Educ., 37 NJPER 39, 40 (contractual provision stating that "[union] president or his/her designee shall be released from all teaching and non-teaching duties for the full year with NJEA paying one-half year's salary and the Board paying one-half year's salary and continuing all benefits" is negotiable, as "***[t]he Commission has long held that employee release time for representational purposes is mandatorily negotiable***") (emphasis added); Town of Kearny, P.E.R.C. No. SN-81-30, 7 NJPER 456, 458 (¶12202 1981) (contractual provision providing for paid time off for fire fighters union president to conduct union business and attend funerals of employees who die in active service and to the negotiation committee members for collective negotiations is negotiable, as "***[p]aid leave [is a] . . . mandatorily negotiable term[ ] and condition[ ] of employment***") (emphasis added); Maurice River Tp. Bd. of Educ., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987); City of Orange Tp., P.E.R.C. No. 86-23, 11 NJPER 522 (¶16184

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jurisdiction to determine whether a subject matter in dispute is a mandatorily negotiable term or condition of employment that falls within the scope of collective negotiations or, alternately, whether it is a non-negotiable managerial prerogative and is thus preempted from the scope of negotiations. A court has no jurisdiction to make an initial determination as to statutory negotiability. See, e.g., State v. State Supervisory Emp. Ass'n, 78 N.J. 54, 83 (1978) ("PERC is the forum for the initial determination of whether a matter in dispute is within the scope of collective negotiations. . . ***No court of this State is empowered to make this initial determination***") (emphasis added); Bd. of Educ. of City of Plainfield v. Plainfield Educ. Ass'n, 144 N.J. Super. 521, 525 (App. Div. 1976) ("PERC has been granted ***primary jurisdiction to determine scope questions*** . . . [and] ***such procedure should be exhausted*** before recourse is had to the courts"). (Emphasis added.)

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As Judge Sarkisian acknowledged, PERC has consistently and unequivocally found employee release time to be mandatorily negotiable. See City of Newark, 16 NJPER at 396 ("***Release time for union officials can vitally affect the employees they represent.*** We recognize that these provisions cost money and may reduce the number of employees available to deliver services; but these are issues of wisdom and reasonableness which must be resolved through the negotiations process. . . [T]he general negotiability of time off and ***the specific employee and public interest in release time for representational purposes outweigh any policy concerns which might be affected by agreeing to grant a handful of employees release time from non-emergency duties***") (emphases added); Brick Tp. Bd. of Educ., 37 NJPER 39, 40 (contractual provision stating that "[union] president or his/her designee shall be released from all teaching and non-teaching duties for the full year with NJEA paying one-half year's salary and the Board paying one-half year's salary and continuing all benefits" is negotiable, as "***[t]he Commission has long held that employee release time for representational purposes is mandatorily negotiable***") (emphasis added); Town of Kearny, P.E.R.C. No. SN-81-30, 7 NJPER 456, 458 (¶12202 1981) (contractual provision providing for paid time off for fire fighters union president to conduct union business and attend funerals of employees who die in active service and to the negotiation committee members for collective negotiations is negotiable, as "***[p]aid leave [is a] . . . mandatorily negotiable term[ ] and condition[ ] of employment***") (emphasis added); Maurice River Tp. Bd. of Educ., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987); City of Orange Tp., P.E.R.C. No. 86-23, 11 NJPER 522 (¶16184

1985); Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14 (¶12006 1980); Cty. of Essex, I.R. No. 2011-42, 37 NJPER 162 (¶51 2011). See also Lumberton Tp. Bd. of Educ., P.E.R.C. No. 2002-13, 27 NJPER 372, 373 (¶32136 2001), aff'd, 28 NJPER 427 (¶33156 App. Div. 2002) ("In general, ***paid and unpaid leaves of absence intimately and directly affect employee work and welfare*** and ***do not significantly interfere with the determination of governmental policy***"). (Emphasis added.)

Importantly, in Brick Tp. Bd. of Educ., the Commission found that the local board's unilaterally requiring the local president to return mid-contract from his release from all teaching duties constituted a breach of that contract provision, a repudiation of the parties' contract, and an unfair practice under N.J.S.A. 34:13A-5.4(a)(5) and irreparably harmed the local president. PERC granted interim relief accordingly. In issuing its determination, PERC further noted that

> "[P]aid release time agreements can improve representation and promote the Act's public purposes. Such agreements are authorized by the Act and are not unconstitutional." [City of Newark, 16 NJPER at 397. Citations deleted.]
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> Accordingly, the Board's contention that the expenditure of the Board's funds in favor of an employee on full-time release is contrary to public policy appears to be without merit. Should the Board wish to modify its arrangement with the Association regarding release time for Association officials, it may address such change at the appropriate time in collective negotiations.
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> Brick Tp. Bd. of Educ., 37 NJPER at 42.

The Association raised the EERA in briefing the present case at each level and Judge Sarkisian further referenced Brick Tp. Bd. of Educ. and City of Newark in his decision upholding the validity of the contractual release time provision. Nonetheless,

the Appellate Division never acknowledged the Act or any of more than a half dozen PERC decisions recognizing employee release time as a mandatory subject of negotiations under the Act. PERC's consistent and categorical interpretation of the EERA as authorizing the negotiability of employee release time is entitled to substantial deference. The Appellate Division erred by instead failing to consider PERC precedent at all.

II. THE APPELLATE DIVISION INCORRECTLY DETERMINED THAT EMPLOYEE RELEASE TIME BENEFITS ONLY THE UNION WHEN IT ALSO BENEFITS THE EMPLOYER AND FURTHERS THE EXPLICIT PUBLIC POLICY GOALS OF THE EERA.

The Appellate Division further erred in its conclusion that, unlike leaves of absence for study, rest, or recuperation, which are covered by a separate provision in the same CNA, the two employee release time provisions "confer[ ] no reciprocal benefit to the school district" but merely "assure and promote the interests of the [Association]." Pa16-17. As a result, the Appellate Division found the relevant provisions to be "against public policy and unenforceable." Pa19. Such conclusion misconstrues both the nature of the collective bargaining process and the duties and responsibilities of released association officials. It further undermines the express policy of the EERA itself.

The declared policy of the EERA is to "promote permanent, public and private ***employer-employee peace*** and the health, welfare, comfort and safety of the people of the State." N.J.S.A. 34:13A-2. (Emphasis added.) The Act recognizes that "the best interests of the people of the State are served by ***the prevention or prompt settlement of labor disputes***" and that "***strikes, lockouts, work***

stoppages and other forms of employer and employee strife . . . are forces productive ultimately of economic and public waste[.]" Id. (Emphases added.)

Upholding the constitutionality of the EERA's exclusivity provision almost fifty years ago, this Court acknowledged the public policy interest represented by the collective negotiations process with respect to both employer-employee peace and the prevention and settlement of labor disputes:

> The legislative aim in writing [N.J.S.A. 34:13A-5.3, which provides for exclusive representation] was ***to aid. . . public employees in their relationship with their employers***. The purpose was to discourage rivalries among individual employees and employee groups and to avoid the diffusion of negotiating strength which results from multiple representation. . . [T]he Legislature was seeking through the medium of the collective agreement to supersede separate agreements with employees and to substitute a single compact with ***terms which reflect the strength, negotiating power and welfare of the group***. The benefits and advantages of the collective agreement are then open to every employee in the unit whether or not [s/]he is a member of the representative organization chosen by the ***majority of his fellow workers. [S/h]e can be certain also that in negotiating with the employer the representative is obliged to be conscious of the statutory obligation to serve and protect the interests of all the employees, majority and minority, equally and without hostility or discrimination. And [s]he can rest secure in the knowledge that so long as the union or other organization assumes to act as the statutory representative, it cannot lawfully refuse to perform or neglect to perform fully and in complete good faith the duty, which is inseparable from the power of exclusive representation, to represent the entire membership of the employees in the unit.***
>
> [Lullo v. Int'l Ass'n of Fire Fighters, Local 1066, 55 N.J. 409, 429 (1970)] [Emphases added.]

Cf. Troy v. Rutgers, 168 N.J. 354, 372 (2001) ("[Public employees'] collective negotiations representative protects and advances their interests").

Importantly, the negotiations process by its nature involves give-and-take, with parties often making significant concessions with respect to certain issues in order to receive equal concessions in return with respect to other issues. See, e.g., Matter of Hunterdon Cty. Bd. of Chosen Freeholders v.Commc'ns Workers of Am., 116 N.J. 332, 338 (1989)("Th[e] process [of negotiation] should ideally lead to communication and understanding between the parties rather than itself becoming the subject of dispute. . . [but t]he right to negotiate does not create an obligation to agree to a particular proposal or give one party any veto power over proposals of the other. An employer may adhere firmly to a good-faith negotiations position").

Thus, even if the employee release time policy in the present case ***did*** in fact "confer[ ] no reciprocal benefit to the school district," it would be permissible as long as the policy were mutually bargained for by the parties as part of their negotiations process.[2] But the facts in the record clearly indicate that ***the Board benefitted from the employee release time policy***, and that because both parties to the contract benefitted, ***the public interest*** benefitted as well.

Specifically, Judge Sarkisian found that the two released association officials

> conduct contract negotiations, representing the [Association], when the CNA is negotiated, which negotiations occur approximately every four (4)

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[2]Or, taking a broader view, the employee release time policy in this hypothetical case ***would*** confer a reciprocal benefit to the school district when understood in the context of the parties' CNA as a whole, as the Board would have received other mutually-bargained-for benefits in return for its having agreed to this provision.

> years. When the CNA is not being negotiated, the majority of the release[d association officials'] time is spent addressing and attempting to resolve conflicts that arise between the District staff and 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. [President] Greco . . . also serves on various . . . committees or bodies and periodically meets with the District Superintendent[.] [Pa22]

As the Association outlined in its Statement of Facts filed with the Appellate Division and incorporated herein, the Association represents approximately 3,000 certificated teachers, attendance counselors, and teacher assistants. Pb5. The Association is also responsible for providing contract administration services for approximately 800 other employees in three other bargaining units. Id. The total salary earned by these approximately 3,800 employees in fiscal year 2017 was approximately $261 million. Id. As the Association observed, the released association officials' ability to perform the duties and responsibilities referenced by Judge Sarkisian substantially benefits the Board, avoiding the time and expense of formal dispute resolution, arbitration, and litigation as well as the involvement of additional administrators and/or teaching staff members who share other responsibilities and cannot focus exclusively on employer-employee relations as a result.[3]

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[3]The fact that Association members went on strike in March 2018, raised by Plaintiffs' amicus curiae below and referenced in the Appellate Division's decision, see Pa7, says nothing about the released association officials' effectiveness in ***settling*** labor disputes. Plaintiffs offer no context with respect to the reason(s) for the strike; the specific role of the released association officials in the escalation and de-escalation of the strike; how long this particular strike lasted compared with other, similar

In summary, rather than narrowly promote the Association's own self-interest, released association officials do exactly that which the express public policy of the EERA dictates: "promote permanent . . . employer-employee peace." N.J.S.A. 34:13A-2.

III. THIS COURT'S DECISION IN FAIR LAWN, WHICH REINFORCED THE PREEMPTIVE EFFECT OF THE PENSION STATUTES, IS NOT RELEVANT TO EMPLOYEE RELEASE TIME, WHICH IS AUTHORIZED BY THE EDUCATION LAWS AND THE EERA.

In erroneously concluding that N.J.S.A. 18A:30-7 could not authorize employee release time because the New Jersey Legislature did not intend it to do so, the Appellate Division cited this Court's decision in Fair Lawn Educ. Ass'n v. Fair Lawn Bd. of Educ., 79 N.J. 574 (1979) for the premise that a local board of education "may exercise only those powers granted to them by the Legislature – either expressly or by necessary or fair implication." Id. at 579. Plaintiffs further rely on Fair Lawn for their claim that the EERA "does not confer upon local boards an unlimited power to negotiate all types of financial benefits for their teaching employees" and "***does not*** enlarge the areas in which the Board has been delegated the responsibility to act." Id. at 580-81. See Rrb10. (Emphasis added by Plaintiffs.) But both the Appellate Division and Plaintiffs misinterpret Fair Lawn by removing its specific context: the preemptive effect of the pension

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strikes, whether in the same district or statewide; and any other relevant factors. In fact, the strike lasted one day and was the first teachers' strike since 1998. See Terrence T. McDonald, Deal reached to end Jersey City teacher strike, The Jersey Journal (Mar. 19, 2018; updated Jan. 30, 2019), available at https://www.nj.com/hudson/2018/03/deal_reached_to_end_jersey_city_teacher_strike.html.

laws and the Court's concerns that a local board's early retirement plan would undermine the actuarial assumptions upon which the Teachers' Pension and Annuity Fund's (TPAF) pension scheme was based.

In contrast to employee release time, which is authorized by a board of education's broad grant of authority under a plain reading of the Education Laws, the early retirement plan proposed by the local board in Fair Lawn could not be authorized, whether expressly or implicitly; because employee pensions would be affected by an early retirement plan, the pension laws preempt the plan. See State v. State Supervisory Emp. Ass'n, 78 N.J. at 83 ("Public employees and employee representatives may neither negotiate nor agree upon any proposal which would affect the sacrosanct subject of employee pensions").

Moreover, unlike employee release time, which PERC has repeatedly found to be mandatorily negotiable, PERC has never considered employee pensions to be "matters which, in the absence of negotiation, could have been set unilaterally by the Board," and thus to be mandatorily negotiable terms and conditions of employment. Fair Lawn, 79 N.J. at 582. Indeed, not only has the EERA never authorized negotiations over employee pensions, the Act expressly provides that "***[no] provision hereof [shall] annul or modify any pension statute or statutes of this State.***" N.J.S.A. 34:13A-8.1. (Emphasis added.)

Fair Lawn is clear as to the preemptive effect of the pension laws on a local board's powers to make rules governing employee payments that contravene or potentially undermine these laws. It does not and cannot preempt the Association and the Board

in the present case from mutually agreeing to an employee release time provision that is authorized by the Education Laws and that PERC has consistently upheld as a mandatorily negotiable term and condition of employment. In the absence of a statute or regulation that "leaves no room for debate on the matter of discretion and fixes a term and condition of employment expressly, specifically, and comprehensively," negotiation as to a term or condition of employment is not preempted. Matter of Robbinsville Twp. Bd. of Educ. v. Washington Twp. Educ. Ass'n, 227 N.J. 192, 201 (2016) (citing Local 195, IFPTE, AFL-CIO v. State, 88 N.J. 393, 403 (1982)).

IV. BECAUSE RELEASED ASSOCIATION OFFICIALS ARE EMPLOYEES FROM WHOM AN EMPLOYER RECEIVES SUBSTANTIAL CONSIDERATION, A RELEASE TIME POLICY DOES NOT VIOLATE THE GIFT CLAUSE.

This Court should additionally address Plaintiffs' constitutional claim and specifically should affirm the Chancery Division's decision that the employee release time policy at issue does not violate the Gift Clause. Judge Sarkisian correctly determined that the two employee release provisions serve a valid public purpose – namely, furthering the collective negotiations process and conciliating and resolving grievances and/or disciplinary claims – and that the means to accomplish it are consonant with that purpose. Roe v. Kervick, 42 N.J. 191, 212 (1964). Pa26-29.

With respect to these means, Judge Sarkisian properly found that the Board retained sufficient control over its released association officials:

> It is undisputed that [President] Greco and [Designee/Grievance Chair] 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 release[d association officials] meet with teachers or administration in school buildings, ***release[d association officials] are to report their presence in the school building to the principal or sign in at the central office.*** Whether the release[d association officials] 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 release[d association officials] are monitored by the principal and/or vice principal.*** The building and central administration are kept apprised of the release[d association officials'] 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 release[d association officials'] collective bargaining duties.*** The release[d association officials] 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 release[d association officials] for employment-related misconduct.***
>
> [Pa28] [Emphases added.]

In short, ***the released association officials are employees.*** Notwithstanding their role as released association officials as defined by the CNA with respect to "Association business and affairs," they remain employed by the Board and subject to the same employee leave, reporting, and disciplinary procedures as any other Board employees.

Accordingly, Judge Sarkisian determined that the Board's expenditure of funds for its released association officials was supported by substantial consideration, as "***compensation paid to public employees . . . 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

Educ., 131 N.J. Super. 551 (Ch. Div. 1974). (Emphasis added.) Pa29. President Greco and his designee, Grievance Chair Thorp, are ***salaried employees***. In exchange for paying their salaries, the Board "receives a substantial benefit . . . in the form of [their] facilitating labor peace and cost-effective conciliation of grievances and disciplinary issues." Pa29.

Judge Sarkisian dismissed Plaintiffs' constitutional claim, ruling that the employee release time provisions did not violate the Gift Clause. The Appellate Division declined to address the issue on the basis of constitutional avoidance, narrowly focusing on and misinterpreting N.J.S.A. 18A:30-7 instead.

Plaintiffs claim that the release time provisions cannot meet the Roe v. Kervick factors, but merely repeat the errors of the Appellate Division in misconstruing both the nature of the collective negotiations process and the role of the released association officials in facilitating that process. Plaintiffs' claims are further undermined by the fact that their co-counsel elsewhere has acknowledged that a basis for their cross-petition for certification with this Court and the original basis for their complaint is not the law in New Jersey. A June 10, 2014 Goldwater Institute policy report authored by co-counsel Jonathan Riches on the subject of employee release time policies across the US recognizes and concedes that New Jersey's "***Gift Clause [is] satisfied by public purpose and consideration in some form.***"[4]

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[4]Jonathan Riches, Public Money for Private Gain: Legal Strategies to End Taxpayer-Funded Union Activism and Pension Spiking, Goldwater Institute Policy Report No. 268 (June 10, 2014), available at https://goldwaterinstitute.org/wp-content/uploads/cms_page_media/2015/1/28/Release%20Time.pdf, p. 27.

(Emphasis added.)

The bottom line is that the Appellate Division's failure to rule on the constitutional issue along with its misreading of N.J.S.A. 18A:30-7 and its refusal to acknowledge PERC precedent or the EERA has disrupted not only fifty years of contractual history between the Association and the Board in this case but other previously settled labor agreements between similarly-situated parties across the state. NJEA respectfully requests that the Court take judicial notice as to the specific facts thereof. The East Orange Education Association (EOEA) president has been forced by her local board to return to her full-time teaching duties notwithstanding a mutually-bargained-for express contract provision authorizing her full-time release status.

Other local associations have dealt with similar turmoil. The full-time release president of the Wayne Education Association (WEA) has likewise been forced by her local board to return to full-time teaching duties notwithstanding a decade's worth of contractual history between the parties authorizing employee release time. Both the Brick Township Education Association (BTEA) and Toms River Education Association (TREA) have had their mutually-negotiated contracts repudiated for the same reasons, as have the Jackson Education Association (JEA) and Lacey Township Education Association (LTEA). Each of the above matters is currently the subject of an unfair practice charge and request for interim relief filed by the local association with PERC. See PERC Docket Nos. CO-2020-067 (EOEA), CO-2020-066 (WEA), CO-2020-104 (BTEA), CO-2020-111 (TREA), CO-2020-102 (JEA), CO-2020-103 (LTEA).

Enforcement of the plain terms of a fully-executed,

mutually-negotiated CNA promotes labor peace. Refusal to enforce these terms has the opposite effect. See, e.g. Garfield Bd. of Educ., I.R. No. 90-10, 16 NJPER 120, 121 (¶21045 1989) ("To refuse to honor a ratified contract, chills the entire labor relations process"). If the Appellate Division's objective was to encourage "forces productive ultimately of economic and public waste," this objective has now been achieved. N.J.S.A. 34:13A-2.

The Appellate Division erred when it determined that employee release time was not authorized under the Education Laws but was against public policy and unenforceable. Because employee release time promotes public policy, is authorized under the Education Laws, and does not violate the Gift Clause, the Appellate Division's decision must be reversed and the decision of the Chancery Division must be reinstated and affirmed.

CONCLUSION

For all of the foregoing reasons, amicus curiae New Jersey Education Association respectfully requests that the decision of the Appellate Division be reversed and that the decision of the Chancery Division be reinstated and affirmed.

Respectfully submitted,

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DATED: November 15, 2019

JERSEY CITY EDUCATION ASSOCIATION, Petitioner/Cross-Respondent, v. MOSHE ROZENBLIT and QWON KYU RIM, Respondents/Cross-Petitioners	:	SUPREME COURT OF NEW JERSEY DOCKET NO. 083434 CIVIL ACTION ON APPEAL FROM SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DOCKET NO. A-1611-17T1 SAT BELOW: Hon. Jose L. Fuentes, P.J.A.D. Hon. Francis J. Vernoia, J.A.D. Hon. Scott J. Moynihan, J.A.D. **CERTIFICATION OF SERVICE**

I, MEREDITH L. JOYCE, hereby certify as follows:

1. I am a legal assistant employed by the law firm of Selikoff & Cohen, P.A.

2. On November 15, 2019, I served one (1) copy of Amicus Curiae New Jersey Education Association's Notice of Motion for Leave to Appear as Amicus Curiae and to Participate in Oral Argument on behalf of the New Jersey Education Association, Certification of Counsel, Memorandum of Law in Support of Motion for Leave to Appear as Amicus Curiae, Brief of Amicus Curiae New Jersey Education Association, and this Proof of Service via UPS Overnight (Monday) Delivery on the following at the last known addresses being:

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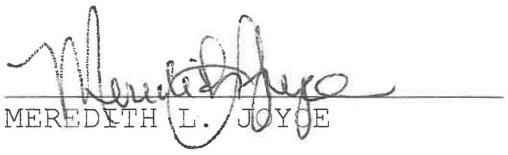
I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are wilfully false, I am subject to punishment.



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VIA UPS OVERNIGHT (MONDAY) DELIVERY
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Re: *Jersey City Education Association v. Moshe Rozenblit and Qwon Kyu Rim*
Supreme Court Docket No. 083434
Appellate Division Docket No. A-1611-17T1
Our File No. 7136 NJEA No. 20019400

Dear Ms. Baker:

Enclosed for filing please find an original and nine copies of the following:

1. Notice of Motion for Leave to Appear as Amicus Curiae and to Participate in Oral Argument on behalf of the New Jersey Education Association;
2. Certification of Steven R. Cohen, Esquire, in Support of Motion to Appear as Amicus Curiae Pursuant to R. 1:13-9;
3. Memorandum of Law in Support of Motion for Leave to Appear as Amicus Curiae;
4. Brief of Amicus Curiae New Jersey Education Association; and
5. Proof of Service.

Thank you for your consideration in this matter.

Respectfully,
SELIKOFF & COHEN, P.A.

BY: Steven R. Cohen

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