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MOSHE ROZENBLIT AND QWON RYU RIM, Plaintiffs/Appellants/ Respondents v. MARCIA V. LYLES, in her official capacity as Superintendent of the Jersey City Board of Education, et al. Defendants/Respondents And JERSEY CITY EDUCATION ASSOCIATION, Defendant/Respondent/ Petitioner.	SUPREME COURT OF NEW JERSEY CIVIL ACTION DOCKET NO.: 083434 On Petition for Certification of the Final Order of the Superior Court, Appellate Division 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.

BRIEF OF *AMICI CURIAE* EAST ORANGE EDUCATION ASSOCIATION AND WAYNE EDUCATION ASSOCIATION IN SUPPORT OF THE PETITION FOR CERTIFICATION FILED BY THE JERSEY CITY EDUCATION ASSOCIATION

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STATEMENT OF INTEREST OF AMICI CURIAE

The East Orange Education Association ("EOEA") and Wayne Education Association ("WEA") seek leave to appear as *amici curiae* in support of the Petition for Certification filed by the Jersey City Education Association ("JCEA") in this matter, and to file a brief and participate in oral argument should certification be granted. The EOEA and WEA are the majority representatives for certain groups of employees employed by the East Orange Board of Education ("EOBOE") and Wayne Board of Education ("WBOE"), respectively. Each association has 900 members spread across more than a dozen buildings in their respective school districts.

The collective negotiations agreement ("CNA") between the EOEA and EOBOE contains a provision whereby the EOEA President is allowed full release time to represent EOEA members and attend to union business. The EOEA reimburses the EOBOE for the President's full salary and cost of benefits. The CNA between the WEA and the WBOE contains a provision whereby the WEA President is allowed to be a full-time release president. The WEA pays for 75% of the salary cost of the WEA President, and the WBOE pays for the other 25%. After the Appellate Division issued its decision in this matter, both presidents were ordered to return to classroom teaching on a full-time basis in contravention of the respective CNA release provisions, and in

alleged reliance on the Appellate Division's decision in this matter.

The EOEA and WEA seek leave to participate in this case as *amici curiae* because the decision of the Appellate Division directly affects the CNAs that the associations are parties to as well as the stability of labor relations in their districts. Although the EOEA and WEA CNAs do not contain the same language as that present in the CNA between the JCEA and the Jersey City Board of Education ("JCBOE"), both presidents were ordered back to the classroom on a full-time basis nonetheless, with no release time whatsoever.

The August 21, 2019 decision of the Appellate Division reversing the judgment of the Chancery Division and holding that release provisions were not authorized by Title 18A and were contrary to public policy created a state of chaos in school districts all across the State on the eve of the 2019-20 school year. The decision below, while being incorrect as a matter of law on a number of levels, is also wholly unclear and created more questions than it answered. Does the prohibition apply to part-time release presidents in school districts? Does it apply to union presidents in situations where the union reimburses the cost of salary and benefits to the board of education, either partially or in full? Is the decision limited in scope to CNAs governing the terms and conditions of employment in school

districts or is it applicable to public sector collective negotiations in general? Can a public employee union not use a public employer's telephones or property to speak to or meet with members?

Simply put, the decision of the Appellate Division in this matter has created chaos and instability in labor relations - the exact opposite of what labor relations public policy strives for. Allowing the decision below to remain in place will cause widespread labor instability and interfere with potentially hundreds of collectively negotiated agreements all across the State. The EOEA and WEA seek leave to appear as *amici* in this case and urge this Court to grant certification and to reverse the decision below.

PRELIMINARY STATEMENT

The within matter concerns the Appellate Division's reversal of a well-reasoned and legally supportable decision of the Chancery Division. The Chancery Division held that a decades-old provision in a collectively negotiated agreement between the JCEA and the JCBOE providing for full-time release of the JCEA president and one other JCEA representative was not an unconstitutional gift in violation of the "Gift Clause" of the New Jersey Constitution as Plaintiffs alleged. Despite agreement by the parties on appeal that the legal issue was whether the release time provision violated the Gift Clause of

the State Constitution, the Appellate Division reversed the judgment of the Chancery Division on nonsensical statutory grounds that are in direct contradiction to this Court's prior case law and decades of precedent from the state agency with expertise in public sector labor relations, the Public Employment Relations Commission ("PERC.")

The Appellate Division held that N.J.S.A 18A:30-7 did not grant authority to the JCEA and JCBOE to agree to a release time provision, and that no authority for the provision could be found elsewhere in Title 18A. This analysis, which seemingly would require every term and condition and every expenditure of funds in every public sector CNA to be specifically authorized by statute or regulation, is in direct contradiction to rulings of this Court. Moreover, ignoring the factual record demonstrating that there was substantial consideration and benefit to the JCBOE in the CNA as a whole and for the specific release time provision, the Appellate Division found that there was no reciprocal benefit to the JCBOE and held that the release time provision was contrary to public policy. This opinion ignores the position of the JCBOE itself, ignores the factual record, and is contrary to decades of precedent from PERC, an agency with far more expertise and qualification than the Appellate Division to determine what is and isn't good public policy in public sector labor relations.

The decision of the court below is nothing more than the abrogation and invalidation of a decades-old contractual provision in Jersey City, and a longstanding practice in the field of labor relations across New Jersey and the United States, by ill-advised judicial fiat. Labor relations across the state, including in the East Orange and Wayne School Districts, have been disrupted and thrown into turmoil by the Appellate Division decision. *Amici* EOEA and WEA respectfully submit that certification should be granted in this matter and that the decision of the Appellate Division should be reversed, and the decision of the Chancery Division affirmed.

ARGUMENT

I. THE APPELLATE DIVISION'S ANALYSIS OF TITLE 18A WAS INCORRECT AS A MATTER OF LAW BECAUSE TITLE 18A GRANTS BROAD AUTHORITY TO LOCAL BOARDS OF EDUCATION TO MANAGE SCHOOL DISTRICTS AND SPECIFIC AUTHORITY IS NOT REQUIRED FOR EACH AND EVERY TERM AND CONDITION OF EMPLOYMENT CONTAINED IN A CNA.

a. The Appellate Division's Analysis of Title 18A is Contrary to the Precedent of this Court that Not Every Provision in a CNA Requires Specific Authorization by Statute or Regulation.

In the decision below, the Appellate Division held that the release time provision in the CNA between the JCEA and JCBOE was not valid because there was no specific authorization for such a term in Title 18A. Slip Op. at 14-15. This myopic rationale is directly contrary to this Court's prior decisions concerning public employers agreeing to terms and conditions of employment

in a CNA absent specific statutory authority. In State v. International Federation of Professional and Technical Engineers, Local 195, 169 N.J. 505 (2001), the Court discussed this exact issue at length:

> In the absence of a statute or regulation precluding a public employer from agreeing to a particular type of provision, the employer's general grant of authority, by statute, provides the authority to agree to those provisions. Any other "narrow and inflexible construction would virtually destroy the bargaining powers which public policy has installed in the field of public employment and throttle the ability of a municipality to meet the changing needs of employer-employee relations," as well as "undermine the laudable purposes of New Jersey Employer Employee Relations Act." *Quoting* City of Camden v, Dicks, 135 N.J. Super. 559, 562-63 (Law Div. 1975).
>
> **We cannot expect the legislative and executive branches to specifically authorize every possible provision that the State and a collective representative may consider agreeing to in a collective negotiations agreement. The agreement in this case is fifty-one single-spaced pages, containing dozens of provisions. Requiring the Legislature or Executive to specifically authorize each and every one of those provisions in order for an arbitrator to give force to those provisions would pose a virtually insurmountable burden on those branches of government. We know of no prior decision, and the dissent points to none, in which we have analyzed a collective negotiations agreement to determine whether the provision sought to be enforced was specifically authorized, in particular detail, by the Legislature or Executive.** *Cf.* In re Hunterdon County Bd. of Chosen Freeholders, 116 N.J. 322, 330 (1989) (noting, during preemption analysis, that "[t]he issue, however, is not whether [three statutes] authorize the County to adopt a safety-incentive program, but whether they exempt the County from negotiating with the Union over any of its provisions"). **Therefore, we conclude that there is no need for specific statutory authorization for every possible item to which the public employer and the bargaining unit may agree.** 169 N.J. at 525-26. (Emphasis added).

The Appellate Division's reasoning that the provision in the CNA between the JCEA and the JCBOE providing for release time for two JCEA officers is unlawful is completely contrary to the approach taken by this Court in looking at terms of CNAs without specific statutory authorization. This absurd approach would result in the majority of the terms and conditions contained in all CNAs between public school districts and labor organizations in New Jersey being declared unenforceable. Taken to its logical conclusion, the Appellate Division's approach would also render school boards unable to take any action unless specifically authorized by statute or regulation. For example, could a school district not authorize funds to fix broken sinks or toilets in school buildings because there is no specific statutory authorization for same? Such an approach to analyzing the actions of a school board or the terms and conditions of the agreement it enters into with a labor organization would lead to the absurd result where a school board could do almost nothing, and a school board and labor organization could agree to almost nothing in a duly bargained-for CNA.

This Court has made clear that specific statutory authorization need not exist for every possible term and condition of employment contained in a CNA between a public employer and labor organization. The Appellate Division's

reasoning to the contrary would lead to absurd results and is incorrect as a matter of law.

It is clear that the Appellate Division's analysis was incorrect as a matter of law based on this Court's precedent. That there is no specific statute or regulation authorizing boards to agree to paid release time is irrelevant to this Court's determination. The two significant points concerning N.J.S.A. Title 18A to this case are that (1) there is nothing in Title 18A that prohibits a release time provision in a collectively negotiated agreement, and (2) there are several provisions of Title 18A that give local boards of education broad authority to run school districts and make decisions in furtherance of the obligation to provide a thorough and efficient education to New Jersey students.

b. N.J.S.A. Title 18A Grants Local Boards of Education Broad Authority to Manage School Districts and Over Terms and Conditions of Employment.

The court below found that N.J.S.A. 18A:30-7 did not authorize parties to enter into a release time agreement such as the provision in the JCEA/JCBOE CNA. *Amici* EOEA and WEA agree with the arguments on this issue contained in the JCEA's Appellate Brief and Petition for Certification provided to this Court and will not repeat those points.

Even if the court below was correct on its opinion concerning N.J.S.A. 18A:30-7, its failure to find such authority

elsewhere in Title 18A is striking. If the Appellate Division had examined Title 18A, it would have found that boards of education are granted broad authority to manage the school districts they control and to set terms and conditions of employment, both through negotiations over mandatory subjects of bargaining and managerial prerogative.

N.J.S.A. 18A:2-1, titled "Power to effectuate action," provides:

> Whenever under any provision of this title the validity of the action of any person, official, board or body is made dependent upon the approval or disapproval, consent or refusal to consent or determination of, or is to be exercised pursuant to any rule to be made by, any other person, official, board or body, the latter **shall have power to approve or disapprove, consent or refuse to consent, to make such determination or promulgate any such rule, notwithstanding that such power is not specifically conferred thereby or by any other provision of this title.** (Emphasis added).

Similarly, N.J.S.A. 18A:11-1(c) provides, in relevant part, that a local board of education shall:

> Make, amend and repeal rules, not inconsistent with this title or with the rules of the state board, for its own government and the transaction of its business and for the government and management of the public schools and public school property of the district and for the employment, regulation of conduct and discharge of its employee.

Specifically concerning a board's authority over the terms and conditions of employment for employees, N.J.S.A. 18A:27-4 reads in relevant part:

> Each board of education may make rules, not inconsistent with the provisions of this title, governing the

> employment, terms and tenure of employment, promotion and dismissal, and salaries and time and mode of payment thereof of teaching staff members for the district . . .

These statutory provisions, especially when taken together, clearly provide broad authority for boards of education to manage a district's affairs and to enter into agreements such as the release time provision in the JCEA/JCBOE CNA.

Additionally, pursuant to the Employer Employee Relations Act ("EERA"), boards of education must negotiate with a majority representative over terms and conditions of employment. N.J.S.A. 34:13A-5.3. As discussed *infra*, PERC has long held that union release time is a mandatory subject of negotiations and does not contravene public policy. Accordingly, the court below erred in finding that the JCBOE did not have the authority to enter into the release time provision at issue.

II. THE APPELLATE DIVISION ERRED IN IGNORING THE EXPERTISE AND WELL-ESTABLISHED CASE LAW OF PERC ON RELEASE TIME PROVISIONS IN CNAS AND THAT RELEASE TIME PROVISIONS FURTHER PUBLIC POLICY.

a. PERC has Recognized the Negotiability and Constitutionality of Paid Release Time for Decades.

Amazingly, the opinion issued by the Appellate Division completely ignores the long line of PERC precedent approving duly-negotiated release time provisions in public sector CNAs. The failure of the court below to even consider the considerable expertise and experience of PERC on this exact issue, particularly when it chose to avoid the constitutional issue

argued by both sides, speaks volumes about the deficiencies of the decision below. This court, however, has recognized PERC's unique role in the public labor relations sphere, and has stated the following:

> We deal here with the regulatory determination of an administrative agency that is invested by the Legislature with broad authority and wide discretion in a highly specialized area of public life. PERC is empowered to "make policy and establish rules and regulations concerning employer-employee relations in public employment relating to dispute settlement, grievance procedures and administration including ... to implement fully all the provisions of [the] act." *N.J.S.A.* 34:13A-5.2. These manifestations of legislative intent indicate not only the responsibility and trust accorded to PERC, but also a high degree of confidence in the ability of PERC to use expertise and knowledge of circumstances and dynamics that are typical or unique to the realm of employer-employee relations in the public sector. Matter of Hunterdon Cty. Bd. of Chosen Freeholders, 116 N.J. 322, 328 (1989).

The propriety and negotiability of part or full-time release provisions in public school CNAs is not a novel issue for PERC. PERC has dealt with this issue multiple times over the course of four decades, and has repeatedly held that a release time provision in a CNA is both mandatorily negotiable and in accordance with public policy favoring positive and stable labor relations in the public sector.

In Haddonfield Board of Education, PERC No. 80-53, 5 NJPER ¶ 10250 (1979), PERC for the first time held that a union president's release time and access to the schools during the school day for the purpose of representing employees was

mandatorily negotiable. This matter concerned a past practice whereby a union president who served as a full-time teacher was allowed to leave his school building to transact union business during non-assigned/preparation periods, rather than a negotiated provision providing release time.

Continuing this line of cases, in State of New Jersey, PERC No. 86-16, 11 NJPER ¶ 16177 (1985), PERC found that a proposal by the State Troopers Fraternal Association for paid release time to conduct union business was mandatorily negotiable. PERC also found a proposal to delete a requirement that the union reimburse the State for telephone use by union officials also to be mandatorily negotiable.

In City of Newark, PERC No. 90-122, 16 NJPER ¶ 21164 (1990), PERC held that agreements in public sector CNAs providing for paid release time to conduct union business during work hours are authorized by the EERA and are not unconstitutional. In rejecting the City's argument that paid union leave amounted to an unconstitutional gift of public funds, PERC found that release time promoted public policy:

> N.J.S.A. 34:13A-5.3 authorizes and requires employers and employee representatives to negotiate over terms and conditions of employment. **A viable negotiations process serves the public interest in improved morale, greater productivity, and smoother labor relations. As we have explained, paid release time agreements can improve representation and promote the Act's public purposes. Such agreements are authorized by the Act and are not**

unconstitutional. Id. (Internal citations omitted). (Emphasis added).

In fact, the legal issues concerning the negotiability and constitutionality of paid release time are so well established that PERC has routinely granted interim relief applications where a public employer has violated an agreement providing a union president paid release time. In Trenton Board of Education, I.R. No. 2009-12, 34 NJPER ¶ 129 (2008), the board of education ordered a union president to return to the classroom in contravention of a written sidebar agreement providing that the president would be granted full-time release "to provide service to the membership." Aside from finding that the legal right was so well established as to establish a likelihood of success on the merits because "paid release time for representational purposes is mandatorily negotiable," PERC also found that each day that the president was denied release time would constitute irreparable harm because she could not get those days of release time to represent her members back. Id.

Most recently, in Brick Township Board of Education, I.R. No. 11-31, 37 NJPER ¶ 13 (2010), PERC granted an application for interim relief where a board of education repudiated a provision in the parties' CNA providing that the union president shall be released from all teaching and non-teaching duties for the full year with the union paying half the president's salary, and the

board paying the other half. In reaffirming its long line of precedent on the issue, PERC found:

> The Board claims that compensating the Association President who is on full-time release and performing no work for the Board is against public policy. While in today's fiscal environment Boards are increasingly reluctant to provide compensation to employees who have been granted full-time release, as is the case here, **Commission precedent holds that such arrangements are negotiable, enforceable and not contrary to public policy.** Id. (Emphasis added).

PERC is the state agency that has experience and expertise in administering the EERA and to make policy and establish regulations governing public sector labor relations in New Jersey. The agency is far better equipped than the Appellate Division to decide what is and is not contrary to public policy concerning labor relations, and its interpretations of law within its arena of expertise are owed substantial deference. IMO Hunterdon County Board of Chosen Freeholders, 116 N.J. at 328. For four decades dating back to at least 1979, PERC has held that paid release time is mandatorily negotiable, authorized by the EERA, and is not contrary to public policy. Rather, such a contractual provision has the effect of promoting the public policy of fostering positive and efficient labor relations in the public sector. In the school setting, having such a provision promotes the constitutional mandate to provide a thorough and efficient education for the children of New

Jersey. The Appellate Division erred in ignoring PERC's decisions on this legal issue.

b. This Court has Also Recognized the Value and Importance of Providing Public Employees with Access to their Union Representatives.

Significantly, this Court has also recognized the public policy favoring employee access to their majority representative, even in situations where public employers typically enjoy a managerial prerogative to determine governmental policy. In Local 195, I.F.P.T.E. v. State, 88 N.J. 393 (1982), this Court considered whether several topics were within the scope of negotiations for public employees, including provisions concerning transfer and reassignment of certain employees. The Court found that transfer and reassignment provisions relating to procedure were negotiable, but provisions concerning substantive criteria were non-negotiable managerial prerogatives. However, the Court created an exception to its ruling that the substantive criteria for transfer and reassignment was non-negotiable when the employee at issue was a union officer or shop steward. Id. at 418-19. The Court found that although provisions concerning the substantive transfer/reassignment of union officers and shop stewards "do impinge on the ability of the employer to decide who will be transferred or reassigned . . . the interest of the employees

predominates over the minimal interference with the employer's policy choices." Id.

In response to a dissent by Justice Handler concerning the balance of interests of the employees versus management, Justice Pashman enunciated the majority's view on the importance of public employees' access to their representatives, even at some expense to the employer's ability to determine governmental policy:

> We agree that it would be an unfair labor practice for a public employer to transfer or assign union officials for the purpose of retaliation or coercion of employees' rights. However, protection against improper transfers is not the only employee interest at stake. Even when the government has a legitimate reason for transferring union officials, such as economy or efficiency in the delivery of public services, the employees have a countervailing interest in continuity of the relationship between employees and their bargaining representatives. It is true that allowing negotiation on the issue of the transfer of union officials will interfere somewhat with the determination of governmental policy. However, we do not believe the interference will be significant, since the class of employees involved is relatively small and the restriction on transfers is limited in scope. Because the employee interest is dominant, the issue is negotiable. Id. at 419.

The Appellate Division's opinion that the paid release time provision is against public policy is contrary to established law.

III. THE RELEASE TIME PROVISION IN THE JCEA/JCBOE CNA DOES NOT VIOLATE THE GIFT CLAUSE OF THE NEW JERSEY CONSTITUTION.

Amici EOEA and WEA are in complete agreement with the

arguments advanced by the JCEA that a paid release time provision in a CNA does not violate the Gift Clause, as well as the reasoning expressed by the Chancery Division in its decision, and will not repeat those arguments here. However, it is worth noting that this Court may take some guidance from federal law on the propriety of paid release time.

This court has held that "New Jersey courts have traditionally sought guidance from the substantive and procedural standards established under federal law." Viscik v. Fowler Equip. Co., 173 N.J. 1, 13 (2002); see also Lullo v. Int'l Ass'n of Fire Fighters, Local 1066, 55 N.J. 409 (1970). Although not in the exact same context, the Third Circuit's analysis of whether a provision in a private sector collective bargaining agreement providing for full-time release violated the Labor Management Relations Act ("LMRA") provides useful guidance as to how this issue is handled at the federal level. In Caterpillar, Inc. v. Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., 107 F.3d 1052 (3d Cir. 1997), the employer sought a declaratory judgment that a long-standing provision in the collective bargaining agreement between it and the union providing for full-time release of union officials violated Section 302(a) of the LMRA (29 U.S.C. 186(a)).

Section 302(a) of the LMRA makes it unlawful for any employer "to pay, lend, deliver, or agree to pay, lend, or deliver, any money or other thing of value . . . (1) to any representative to any of his employees . . . or (2)to any labor organization, or officer or employee thereof" which represents the employer's employees. However, Section 302(c) of the LMRA creates an exception to Section 302(a) "in respect to any money or other thing of value payable by an employer . . . to any representative of his employees, . . . who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer." The Third Circuit overruled prior case law in holding that paying a union official to devote their "entire work to union business" did not run afoul of LMRA Section 302(a) because the compensation was "by reason" of the Union official's past service to the employer.

Of significance to this matter is the court's reasoning behind its decision, and its finding that the full-time release provision was not contrary to the LMRA's purpose to "address bribery, extortion and other corrupt practices conducted in secret." Id. At 1057. The court found that the full-time release ". . . payments arose, not out of some 'back-door deal' with the union, but out of the collective bargaining agreement itself. Caterpillar was willing to put that costly benefit on

the table, which strongly implies that the employees had to give up something in the bargaining process that they otherwise could have received. Thus, every employee implicitly gave up a small amount in current wages and benefits in exchange for a promise that, if he or she should someday be elected grievance chairperson, Caterpillar would continue to pay his or her salary." Id. At 1056.

Although the Third Circuit analyzed a different authority in a different factual context, its reasoning lends full support to the notion that an employer paying the partial or full salary of a full-time release union representative is one provision of a complex agreement between employer and labor organization with a multitude of gives and takes on both sides. Further, a full or part-time release provision cannot be viewed in isolation in a CBA because it could not exist without all the other terms and conditions that were dependent on collective bargaining in an agreement that, in many situations, evolves over numerous negotiations over a period of decades.

The LMRA arguably imposes a greater (and certainly more specific) prohibition on an employer giving anything of value to a labor organization than the Gift Clause of our Constitution does. This federal precedent directly contradicts the Appellate Division's opinion that the release provision "confers no reciprocal benefit to the school district." Slip Op. at 14.

Employers, both public and private, receive a reciprocal benefit from negotiated release time provisions. The only way for the Appellate Division to find that the district received no reciprocal benefit was to completely ignore the reality of the factual record developed below. Aside from completely ignoring the factual position expressed by the JCBOE that it receives a substantial benefit from the release time provision, as well as the will of the voters of Jersey City who keep electing board members who continually agree to the full-time release provision in CNA after CNA over the decades, the opinion below is also simply incorrect as a matter of law.

CONCLUSION

For the reasons set forth above, the Petition for Certification filed by the Jersey City Education Association should be granted, the judgment of the Appellate Division should be reversed, and the judgment of the Chancery Division should be affirmed.

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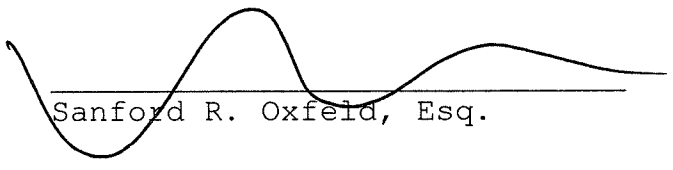

Sanford R. Oxfeld, Esq.

Dated: November 15, 2019