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

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

AMICUS CURIAE BRIEF ON BEHALF OF IFPTE, LOCAL 195, AFL-CIO, IN SUPPORT OF PETITION FOR CERTIFICATION

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STATEMENT OF INTEREST

IFPTE, Local 195 ("Local 195") is the majority representative of approximately 6,500 employees of the State of New Jersey ("State"). The bargaining unit of public sector employees that it represents includes operations, maintenance, security, inspections and crafts employees throughout the State. Local 195 petitioned to appear as amicus curaie to argue that paid leave for full-time union officers is consistent with public policy and is negotiable.

The representation of the members of Local 195 will be directly impacted by a decision that affects the status of their elected officers, as they are on leaves of absence from various positions with the State. Local 195's collectively negotiated agreement with the State and other collective rights are protected under the New Jersey Employee-Employer Relations Act ("Act"), N.J.S.A. §34:13A-1, *et seq.* Any changes in how the Public Employment Relations Commission ("Commission") or State courts have interpreted the Act on this issue will influence the collectively negotiated agreement between Local 195 and the State.

IFPTE, Local 195 has been involved in the following cases before the Supreme Court: Communication Workers of America v. New Jersey Civil Service Commission, 234 N.J. 483 (2018); In the

Matter of William R. Hendrickson, Jr., Department of Community Affairs, 235 N.J. 145 (2018); Linden Bd. Of Ed. v. Linden Ed. Assoc., 202 N.J. 268 (2010); Local 195, IFPTE v. State, 88 N.J. 393 (1982); State v. IFPTE, Local 195, 169 N.J. 505 (2001); and State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978).

The public has an interest in this case, as it will have far-reaching implications for the leaders of all of the State's public sector unions. The participation of *amici curiae* is particularly appropriate in cases with broad implications or general public interest. See Taxpayers Assoc. of Weymouth Twp. v. Weymouth Twp., 80 N.J. 6, 17 (1976), cert. denied, 430 U.S. 977 (1977). Accordingly, it is respectfully submitted that this Court should grant Local 195's Motion to argue as *amicus curiae.*

PRELIMINARY STATEMENT

The Jersey City School District ("District") and the Petitioner, the Jersey City Education Association ("Association"), have bargained for a paid "release time" clause in numerous collective negotiations agreements ("CNAs"). (Pa12). Under the terms of the CNA, two Association employees take paid leaves of absence from their teaching duties, to assist in administering the CNA and in otherwise representing bargaining unit members. (Pa44). The District receives

substantial benefits from their work. The benefit is both financial, as the successful resolution of disputes at an early stage avoids costly arbitration proceedings, (Pa17-18), and educational, as they help to maintain a peaceful and orderly learning environment, (Pa369), and enhance personal skills (Pa352).

The Appellate Division held that the release time provision at issue is invalid and contrary to public policy, because it is allegedly inconsistent with N.J.S.A. 18A:30-7 ("Section 7"). Section 7 is structured as a savings clause to a broader statute, N.J.S.A. 18A:30-1 to -7, ("Sick Leave Statute").

It is submitted that Section 7 of the Sick Leave Statute does not impose any limitations on the ability of the District to agree in negotiations to a contractual provision on paid release time.

This brief by Local 195 supports the certification petition filed by the Association. It will concentrate on public policy and negotiability, questions raised in the Petition. Local 195 agrees with all the arguments contained in the Petition filed by the Association.

QUESTIONS PRESENTED

Was the Appellate Division mistaken when it determined on public policy grounds that school districts lack

statutory authority to negotiate paid release time provisions into their CNAs with unions?

ERROR COMPLAINED OF

Local 195 respectfully submits that the Appellate Division erred in determining that school districts lack statutory authority to negotiate paid release time arrangements into their union contracts, as being contrary to public policy.

REASONS WHY CERTIFICATION SHOULD BE ALLOWED

This petition "presents a question of general public importance." R. 2:12-4. The Supreme Court is being asked to decide whether school districts can continue to honor contractually negotiated release time arrangements. Scores of New Jersey's public sector employers routinely negotiate release time provisions,[1] consistent with their broad management authority under the Employer Employee Relations Act ("Act"), N.J.S.A. 34:13A-1 et seq to bargain "the terms and conditions of employment." N.J.S.A. 34:13A-5.3.

LEAVES AND COMPENSATION ARE MANDATORILY NEGOTIABLE

For decades CNAs have included paid release time provisions, based on a long line of judicial and administrative

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

decisions treating compensated leave arrangements generally, and compensated release time specifically, as mandatory subjects of bargaining under the Act. See, e.g., Burlington Cty. Coll. Faculty Ass'n v. Bd. of Trs., 64 N.J. 10, 13-14 (1973) (enunciating general principles); Haddonfield Bd. of Educ., P.E.R.C. No. 80-9, 5 N.J.P.E.R. 10250, 1979 N.J. PERC LEXIS 148 (1979) (applying Burlington's principles to hold compensated release time to be a mandatory bargaining subject).

Furthermore, the "interest of justice" requires review here, R. 2:12-4, as the Appellate Division decided a public policy question, which was neither briefed nor argued, even though that question is not a minor technical question, but one of great consequence to school districts and unions across the State.

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

Compensation provided during absences of any type has long

been negotiable between school districts and unions. See, e.g., Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 445 (2012); Burlington, 64 N.J. at 13-14. The negotiability of release time arrangements, therefore, turns on whether a clear statutory directive removes such arrangements from the scope of negotiations under the Act.

In its haste to strike the paid leave provision from the Jersey City Board of Education's CNA, the Appellate Division asked the wrong questions when it determined the impact of Section 7 of the Sick Leave Statute on whether the Legislature prohibited school districts from negotiating paid release time clauses. The Appellate Division should not have asked whether there was language in Section 7 that expressly authorized collective negotiations over release time. Instead, it should have asked whether there was any language in Section 7, or any other statutory provision, which expressly removed that topic from the scope of such negotiations.

Moreover, the Appellate Division did not utilize the proper preemption analysis. A proper review of Section 7 and the Sick Leave Statute, however, leads to the unrefutable conclusion that nothing in the wording of Section 7 can lead to the conclusion that the topic is outside the scope of negotiations.

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

> Nothing in this chapter shall affect the right of the board of education to fix either by rule or by individual consideration, the payment of salary in case of absence not constituting sick leave, or to grant sick leave over and above the minimum sick leave as defined in this chapter or allowing days to accumulate over and above those provided for in section [N.J.S.A.] 18A:30-2, except that no person shall be allowed to increase his total accumulation by more than 15 day in any one year. [Emphasis added]

There is not one scintilla of evidence that N.J.S.A. 18A:30-7 in any way restricts the granting of full-time paid leave to Association representatives. N.J.S.A. 18A:30-1, 2, 6 deal merely with the accumulation of sick leave. In fact, the Sick Leave Statute appear in Article 1, "Sick Leave," of the statute. There is nothing in those sections, however, which indicates that there are any restrictions on bargaining imposed as to any other types of leaves. N.J.S.A. 18A:30-7, on the other hand, appears in Article 2. That article is captioned "Additional Sick Leave or Other Leaves of Absence." Rather than being restrictive, Section 7 is expansive, as it provides that nothing in Chapter 1 shall affect the right of a board of education to grant sick leave over and above the minimum sick leave as defined in the chapter. It goes on to read that "the payment of salary in case of absence not constituting sick

leave" shall not be affected, and a board of education has the authority to grant these types of leaves.

Significantly, included in Article 2 is N.J.S.A. 18A:30-12, "Prohibition Upon Board Action to Reduce Certain Preexisting Employee Benefits." It reads as follows:

> No provision of this act, or regulation promulgated to implement or enforce this act, shall be deemed to justify a board of education in reducing or making less favorable to employees any sick leave, disability pay or other benefits provided by the board or required by a collective bargaining agreement which are more favorable to the employees than those required by this act, nor shall any provision of this act, or any regulation promulgated to implement or enforce this act, be construed to prohibit the negotiation and provision through collective bargaining agreements of sick leave, disability pay or other benefits which are more favorable to the employee than those required by this act, irrespective of the date that a collective bargaining agreement takes effect.

The Legislature made it perfectly clear that if the product of collective bargaining are additional benefits to be provided by a board of education, which are more favorable to the employee than those required by the Act, they must remain in effect.

In this connection, in the United States Supreme Court's decision in Circuit City Stores, Inc. v. Adams, 532 U.S. 105

(2001), the Court utilized the cannon of construction known as *ejusdem generis*. This statutory cannon is that "where general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the specific words." The Supreme Court used this cannon to take an expansive view of when to order arbitration under the Federal Arbitration Act.

In the instant case, the Sick Leave Statute, found in Section 1 of Chapter 30, deals solely with sick leave abuse and credits for unused sick leave. Given the narrow focus of Article 1 to cover only sick leave, it was inappropriate for the Appellate Division under *ejusdem generis* to somehow construe the Sick Leave Statute expansively as restricting other leaves. In fact, N.J.S.A. 18A:30-7 provides that such restrictions are prohibited. This is reinforced by N.J.S.A. 18A:30-12, which prohibits restricting benefits provided in a collective bargaining agreement. In fact, because of N.J.S.A. 18A:30-7 and 18A:30-12, collective bargaining agreements can provide benefits other than sick leave and disability pay that are more favorable than those granted in the Act. That is exactly what occurred here.

Consistent with the foregoing, the courts and the Public Employment Relations Commission ("PERC") have repeatedly

affirmed that the Act and Section 7, when read together, make a wide range of paid absences mandatorily negotiable. In numerous decisions predating this litigation, the Appellate Division has interpreted Section 7 to mean that "a contractual provision relating to . . . absences [other than sick leave] e.g. compensation, ordinarily may be negotiated." Demarest Bd. of Educ. v. Demarest Educ. Ass'n, 177 N.J. Super. 211, 216 (App. Div. 1980) (citing Hunterdon Cent. High Sch. v. Hunterdon Cent. High Sch. Teachers' Ass'n, 174 N.J. Super. 468, 473 (App. Div. 1980); Bd. of Educ. v. Piscataway Maint. & Custodial Ass'n ("Piscataway"), 152 N.J. Super. 235, 243-44 (App. Div. 1977); see also In re Hackensack Bd. Of Educ., 184 N.J. Super. 311, 318 (App. Div. 1982) ("N.J.S.A. 18A:30-7 clearly permits a board to provide for payment of salary for absences not for sick leave."). PERC has concluded that Section 7 does not "preempt negotiations" over compensation linked to leaves of absence other than sick leave. W. Orange Bd. of Educ., P.E.R.C. No. 92-114, 18 N.J.P.E.R. ¶ 23117, 1992 N.J. PERC LEXIS 198 (1992), aff'd, N.J.P.E.R. Supp. 2d 291 (App. Div. 1993); see also Hopewell Valley Reg'l Bd. of Educ., P.E.R.C. No. 97-91, 23 N.J.P.E.R. ¶28065, 1997 N.J. PERC LEXIS 212 (1997).

PERC has applied its interpretation of Section 7 to the specific issue of compensated release time, holding that

"employee release time for representational purposes is mandatorily negotiable." Brick Twp. Bd. of Educ., P.E.R.C. No. 2011-210, 37 N.J.P.E.R. ¶ 13, 2011 N.J. PERC LEXIS 159, at *5 (2011); see Maurice River Twp. Bd. of Educ., P.E.R.C. No. 87-91, 13 N.J.P.E.R. ¶ 18054, 1987 N.J. PERC LEXIS 220 (1987); Haddonfield Bd. of Educ., 1979 N.J. PERC LEXIS 148. See also, Trenton Bd. of Educ., P.E.R.C. No. 2009-12, 34 N.J.P.E.R. ¶129, 2008 N.J. PERC LEXIS 230, at *5 (2008) (PERC "has often held that paid release time . . . is mandatorily negotiable.")

The Appellate Division cavalierly ignored well settled precedent when it failed to consider the longstanding PERC decisions, which have addressed Section 7 and interpreted it to recognize the right of school boards to negotiate over compensated release time. The Legislature chose to leave Section 7 unamended, even though it has made multiple amendments to the statute, of which Section 7 is a part. See, e.g. L.1997, c. 112, § 1 (amending Section 2); L. 2007, c. 92, § 44 (amending Section 3). That choice to leave the long-established administrative interpretation of Section 7 undisturbed supplies "'great weight as evidence of [the interpretation's] conformity with the legislative intent.'" Klumb v. Bd. of Educ., 199 N.J. 14, 25-26 (2009) (quoting Malone v. Fender, 80 N.J. 129, 137 (1979)).

The Appellate Division in the instant case reasoned as follows:

> As a creature of the State, a local board of education "may exercise only those powers granted to them by the Legislature -- either expressly or by necessary or fair implication." Fair Lawn Educ. Ass'n v. Fair Lawn Bd. Of Educ., 79 N.J. 574, 579 (1979); see also Edmondson v. Bd. Of Educ. of Elmer, 424 N.J. Super. 256, 261 (App. Div. 2012). We are satisfied that in adopting N.J.S.A. 18A:30-7, the Legislature did not expressly or implicitly intend to authorize the Board to enter into the contractual arrangement reflected in Article 7, Section 7-2.3 of the CBA. (Pa6).

The Appellate Division furthered its analysis as follows:

> The two teachers selected by the members of the JCEA to serve as president and designee, are required to travel throughout the school district to attend meetings, participate in disciplinary matters to advocate the interests of JCEA members, attend to the affairs of the union, and negotiate the terms of the next CBA. These two teachers, who are paid their fulltime salaries, do not report to any school administrator or school district official, and are not subject to any administrative oversight. In short, while serving as president and designee of the JCEA, these two teachers act exclusively as labor leaders. Despite this, their salaries and benefits are commensurate to the teachers who serve the day-to-day educational needs of the students of the district. (Pa1, Pa12).
>
> N.J.S.A. 18A:30-7, which is the only authority the Board and the JCEA cite in support of their position, does not authorize the Board to disburse public funds in this fashion. (Pa12).

The Appellate Division continued by reasoning as follows:

> By contrast, the contractual arrangement which permits the two teachers to devote their entire professional time to exclusive service of the interests of the JCEA confers no reciprocal benefit to the school district. In fulfilling their duties to the JCEA, the teachers' role is to advocate the interests of the JCEA, even when such interests may conflict with the educational and administrative polices of the Board. The JCEA does not cite to any statutory authority permitting the Board to pay the salaries of teachers whose job duties are exclusively devoted to the service of another organization, in this case the JCEA. (Pa14-15)

The Appellate Division conveniently disregarded the long list of "reciprocal benefits" cited by the Association. This is typical of the sloppy opinion by the Appellate Division.

Compensation provided during absences of any type has long been negotiable between school districts and unions. See, e.g., Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 445 (2012); Burlington, 64 N.J. at 13-14. The negotiability of release time provisions, therefore, turns on whether a clear statutory directive removes them from the scope of negotiations under the Act.

The standard for finding a provision to be outside the scope of negotiations due to statutory preemption is quite

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

Section 7 does not speak in the imperative. Rather, it merely lists items relating to illness where leaves can be granted. There is no reference to union leaves of absence. A plain reading of the statute does not in any way indicate that it constitutes an exhaustive list of permissible leaves. As a result, such leaves are negotiable. To that end, the court must look to the plain language of the statute as the best indicator of the intent of the Legislature. Ibid. "If the plain language leads o a clear and unambiguous result, then our interpretive process is over." Richardson v. Bd. Of Trs., Police & Firemen's Ret. Sys., 192 N.J. 189, 195 (2007); see also N.J.S.A. 1:1-1 (A statute's "words and phrases shall be read and construed with their context, and shall . . . be given their generally accepted meaning, according to the approved usage of the language").

PUBLIC POLICY

The Appellate Division ultimately found that there was a public policy violation in enforcing this contract language. It

ruled as follows:

> We thus hold Section 7-2.3 of the CBA covering the period from September 1, 2013 to August 31, 2017, is against public policy and unenforceable. The actions taken by the Board that caused the disbursement of public funds pursuant to Section 7-2.3 were ultra vires. [Emphasis added] (Pa 19).

The Appellate Division did not explain how it reached its conclusion that there was a public policy violation. Here again, it appears that it utilized the incorrect public policy analysis.

In New Jersey Turnpike Authority v. Local 196, 190 N.J. 283 (2007), the Supreme court reasoned as follows as to the public policy rule:

> For purposes of judicial review of labor arbitration awards, public policy sufficient to vacate an award must be embodied in legislative enactments, administrative regulations, or legal precedents, rather than based on amorphous considerations of the common weal.
>
> * * *
>
> We therefore reject the broad view of the public policy exception and reiterate our pronouncement in Weiss, the corresponding indications of WR. *Grace &Co.* and its Supreme Court progeny, and the conclusions of commentators. We hold that the public policy exception and *Weiss's* heightened judicial scrutiny of awards are triggered when a labor arbitration award-not the grievant's conduct-violates a clear mandate of public policy. If reinstatement

> of an employee does not violate public policy that is embodied in statute, regulation, or legal precedent, then an award requiring reinstatement does not contravene public policy. The approach we adopt today "is the standard which best effectuates labor policy in both the private and public sectors."

There is no statute, regulation or legal precedent prohibiting a board of education from paying salary to an employee on full-time union leave. Rather, the Sick Leave Statute merely lists some types of sick leaves. In short, the basis for the Appellate Division's public policy conclusion rests on amorphous considerations of the common weal.

Additionally, settled PERC law has ruled that the Act supports negotiations over the issue of full-time paid leave. In Brick Township Education Association v. Brick Township Board of Education, 37 NJPER ¶ 13, 37 New Jersey Pub. Employee Rep. ¶ 13, 2011 WL 2227208, PERC ruled as follows:

> The Commission has long held that employees release time for representational purposes is mandatorily negotiable. City of Paterson, P.E.R.C. No. 2005-32, 30 NJPER 463 (¶ 30 2004); City of Newark, P.E.R.C. No 90-122 16 NJPER 394 (¶ 21164 1990); Maurice River Tp. Bd. Of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶ 18054 1987). Accordingly, I find Article IV, F. contained in the collective agreement to be negotiable and enforceable.

In Trenton Paraprofessionals Association/NJEA v. Trenton

Board of Education, 37 NJPER ¶ 129, 34 New Jersey Pub. Employee Rep. ¶ 129, 2008 WL 8569619, PERC ruled as follows:

> The Commission has often held that paid release time for representational purposes is mandatorily negotiable. City of Paterson, P.E.R.C. No. 90-122, 16 NJPER 394 (¶ 21164 1990); State of New Jersey, P.E.R.C. No 86-16 11 NJPER 497 (¶ 16177 1985); Haddonfield Bd. Ed., P.E.R.C. No. 80-53, 5 NJPER 488 (¶ 10250 1979). Thus, the memorandum granting the Association's President release time both confirmed an existing term and condition of employment and continued it as part of the parties collective agreement.

In City of Newark v. Newark Firemen's Mutual Benevolent Association, Local No. 4, 16 NJPER ¶ 21164, 16 New Jersey Pub. Employee Rep. ¶ 21164, 1990 WL 10611487, PERC again ruled as follows:

> Applying these principles, our courts have always held that employee time off is mandatorily negotiable. See, e. g., Burlington Cty. College Faculty Ass'n v. Bd. of Trustees, 64 N.J. 10, 14 (1973); Piscataway Tp. Bd. of Ed. v. Piscataway Maintenance and Custodial Ass'n, 152 N.J. Super. 235, 243-44 (App. Div. 1977); South Orange-Maplewood Ed. Ass'n v. South Orange Bd. of Ed., 146 N.J. Super 457, 462 (App. Div. 1977). See also N.J. S.A. 34:13A-16(g)(3) (interest arbitrator must consider overall compensation, including "excused leaves"). We have repeatedly held in turn that leaves of absence and release time for representational purposes are mandatorily negotiable. Newark; Maurice River Tp. Bd. of Ed., 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); State of New Jersey, P.E.R.C. No. 86-11, 11 NJPER 497 (¶ 16177 1985); Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶ 12202 1981); Town of Kearny, P.E.R.C. No. 81-70, 7 NJPER 14 (¶ 12006 1980); Haddonfield Bd. of Ed., P.E.R.C. No. 80-53, 5 NJPER 488 (¶ 10250 1979).

SUMMARY

In sum, the Appellate Division incorrectly applied the legal test for preemption. It incorrectly reasoned that because there is no language in the Sick Leave Statute permitting paid leave for Association business, it is therefore non-negotiable. To the contrary, the review requires just the opposite analysis. To preempt negotiations, it must be shown that a particular statute or regulation speaks in the imperative, thereby prohibiting negotiations.

Moreover, there was no public policy analysis utilized, just an unsupported conclusion. The Appellate Division did not cite to any statute or regulation which would be violated if the paid leave provision were permitted to remain in the CNA. Moreover, it failed to consider N.J.S.A. 18A:30-12, which clearly mandates negotiations here.

Given the Appellate Division's confusion and failure to address the "speak in the imperative" scope of negotiations analysis, or the actual concept of "public policy," the Supreme

Court needs to intervene to clarify the law. First, the Appellate Division was wrong in its conclusion on public policy. Second, it failed to consider the "in the imperative" analysis. This type of rudderless decision making must be reversed. The Appellate Division clearly needs guidance. As a result, the Petition for Certification must be granted and Local 195 should be permitted to participates an amicus.

CONCLUSION

For the foregoing reasons and authorities cited in support thereof, the Certification Petition should be granted, with the Appellate Division's judgment reversed, the Chancery Division's judgment affirmed, and the amicus application granted.

Respectfully submitted,

ARNOLD SHEP COHEN, ESQ.
OXFELD COHEN, P.C.

DATED: Nov 18 2019

CERTIFICATION

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

ARNOLD SHEP COHEN, ESQ.
OXFELD COHEN, P.C.

DATED: Nov 18, 2019