SUPREME COURT OF NEW JERSEY
DOCKET NO. 083434

JERSEY CITY EDUCATION ASSOCIATION, Petitioner/Cross-Respondent v. MOSHE ROZENBLIT and QWON KYU RIM, Respondents/Cross-Petitioners	CIVIL ACTION Sat Below: Hon. Jose L. Fuentes, J.A.D. Hon. Francis J. Vernoia, J.A.D. Hon. Scott J. Moynihan, J.A.D.

BRIEF AND APPENDIX OF PETITIONER/CROSS-RESPONDENT JERSEY CITY EDUCATION ASSOCIATION IN RESPONSE TO BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND AMERICANS FOR PROSPERITY

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PRELIMINARY STATEMENT

The brief amicus curiae of Pacific Legal Foundation and Americans for Prosperity ("PLF brief") nominally addresses the "Gift Clause" issue before the Court, but, in so doing, it fails even to acknowledge, let alone rebut, the central points made by Petitioner/Cross-Respondent Jersey City Education Association ("JCEA") in its briefs to this Court on that issue.[1] Instead, the PLF brief presents arguments about legal propositions that are of no relevance to deciding the contested issues here and levels unsupported and overheated charges about the nature of the release-time positions at issue, see, e.g., Br. Amicus Curiae of Pacific Legal Foundation & Americans for Prosperity 3, 12-13 (calling the challenged positions "no show jobs") – charges that are so insupportable that amici themselves walk them back as soon as they are done leveling them, see id. at 3 ("[N]obody alleges that the union president and vice-president are 'corrupt[.]'"). As we now show, the PLF brief does not advance the cause of the Taxpayer-Plaintiffs ("Taxpayers") who initiated this lawsuit.

[1] See Br.& App. of Cross-Resp't Jersey City Education Ass'n in Resp. to Cross-Pet. for Certification("JCEA Br.") 1-20; see also Pet. for Certification & App. on Behalf of Pet'r Jersey City Education Ass'n 16-20.

ARGUMENT

1. To fully appreciate the disjuncture between the PLF brief and the Gift Clause issues actually before the Court, a summary of the central points of JCEA's previous submissions is in order.

First. For decades, in both the private and public sectors, employers and unions representing their employees have negotiated release-time provisions.[2] These are provisions under which a small number of employees, elected from among their fellows and thus familiar with the experience of working for their common employer, either take part of the day off from their regular job duties without loss of pay — or, as here, receive a paid leave of full-time absence from those duties — to serve as ombudspersons, perform contract-administration responsibilities, act as intermediaries between employees with grievances and their supervisors, and carry out other representational functions. See Pa39-41, Pa148-49, Pa154-56, Pa347-48, Pa352, Pa377.

[2] See, e.g., Caterpillar, Inc. v. UAW, 107 F.3d 1052, 1053 (3d Cir. 1997) (en banc)(describing private-sector collective bargaining agreement providing for paid full-time release provisions going back to 1973 and part-time release provisions going back to 1954); N.J. Comm'n of Investigation, Union Work Public Pay 3-4 (2012), https://www.state.nj.us/sci/pdf/SCIUnionReport.pdf [hereinafter Report] (describing the long history of release-time provisions in New Jersey public sector collective negotiations agreements).

Release-time provisions have a long pedigree in the annals of collective bargaining precisely because they serve the interest, not only of the employees and the union, but of the employer as well, in fostering harmonious labor relations. See, e.g., Int'l Ass'n of Machinists, Local Lodge 964 v. BF Goodrich Aerospace Aerostructures Grp. (BF Goodrich), 387 F.3d 1046, 1058 (9th Cir. 2004) ("There is, in short, a reason why virtually every single collective bargaining agreement in this country contains a grievance mechanism and why nearly all of them provide for union representation in the course of that process: Services rendered by union stewards benefit union and corporation alike."); see also id. at 1057 (release time provisions play "an integral role in enforcing the terms of the collective bargaining agreement and in peacefully resolving disputes"). As the Sixth Circuit put it in Douglas v. Argo-Tech Corp., 113 F.3d 67 (6th Cir. 1997), "[a] labor force secure in the belief that [the employer] is treating its members fairly and in accordance with the bargaining agreement *is likely to be more productive*. This is an obvious benefit to [the employer]," id. at 72 (emphasis added).

The same logic holds in the public sector. Thus, where the employer is a public employer, contract provisions advancing the employer's and employees' interests necessarily advance public interests as well – namely, the public interests in a more

productive public work force. Indeed, because "a governmental entity . . . has interests broader than a private employer," Cheatham v. DiCiccio, 379 P.3d 211, 218 (Ariz. 2016) – including the sovereign interests in fair treatment of public servants and accountable government as ends in themselves, and not just as means of achieving greater productivity, see JCEA Br. 14 – the fact that courts have recognized an employer interest in release time in the private sector compels the conclusion that release time advances public interests in the public sector.

Second. The release-time provisions in the collective negotiations agreement ("CNA") challenged here do not bear any resemblance to a "gift" in ordinary discourse because the employer here, the Jersey City Board of Education ("District"), did not give the provisions away *gratis*, but instead bargained over them as part of a comprehensive contract in which both sides exchanged multiple forms of consideration. See, e.g., Pa345-46. Indeed, after many years of experience with one full-time releasee, the District itself, in the 1998 round of negotiations, initiated a proposal to amend the CNA to provide for the addition of a second full-time releasee, because the demand had been high for release-time services and the alternative of requiring several teachers to leave their classrooms for parts of days had proven disruptive as compared

to having an additional teacher take full-time leave to perform those services. Id.

Reflecting that release time is bargained over and not given away, the New Jersey Public Employment Relations Commission ("PERC") has interpreted the statute governing New Jersey public-sector labor relations, the Employer-Employee Relations Act ("EERA"), N.J.S.A. 34A:13A-1 to -21, as making release time a *mandatory* subject of bargaining. See, e.g., In re City of Newark, P.E.R.C. No. 90-122, 16 N.J.P.E.R. ¶ 21164, 1990 N.J. PERC LEXIS 228 at 13 ("[T]he 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.").

Third. Labor unions in New Jersey operate under an important duty, imposed by EERA, that makes them fundamentally different from private business organizations and even from other private non-profit associations: the duty to fairly represent *nonmembers* of the organization. See D'Arrigo v. N.J. State Bd. of Mediation, 119 N.J. 74, 79 (1990). This duty of fair representation ("DFR") imposes on unions a series of distinct prohibitions. Prime among these is a prohibition against favoring members over nonmembers in administering and bargaining contracts, id. — a prohibition to which no other

membership associations are subject, see Lehnert v. Ferris Faculty Ass'n, 500 U.S. 507, 556 (1991) (Scalia, J., concurring in part and dissenting in part) (noting that, under the duty of fair representation, "a union *must* seek to further the interests of its nonmembers" and must in fact "*go out of its way* to benefit [nonmembers], even at the expense of its other interests").

The DFR also prohibits unions from acting arbitrarily or in bad faith with respect to any aspect of their role as representative, even when acting in a nondiscriminatory manner toward nonmembers. D'Arrigo, 119 N.J. at 79. The duty thus would preclude a union from misappropriating bargained-for employer funds that the parties intended to be spent on representing the employees in a given unit and diverting them to line the pockets of union officials or to finance any other nonrepresentational activity. See, e.g., United States v. Local 6A, Cement & Concrete Workers, 832 F. Supp. 674, 685 (S.D.N.Y. 1993) (observing that diversion to union official's relative of employer-provided funds earmarked for employee benefits was inconsistent with the DFR). The duty is enforceable by the PERC at the behest of any person, including a public employer, who files a charge with the agency, and it is enforceable as well through a private right of action in court. See JCEA Br. 17 (collecting cases).

Fourth. While the duty of fair representation itself imposes meaningful controls that inhibit release-time employees from abandoning their public mission, the labor contract here imposes additional controls, as does the fact that release-time employees interact so frequently with District managers that the very nature of their relationship provides an important control against the prospect that they might abandon their public mission and use their release time for personal or other unauthorized ends. See JCEA Br. 17-19.

2. The PLF brief does not even acknowledge, let alone grapple with, any of these arguments advanced in support of the constitutionality of release-time provisions. Indeed, the brief disregards entirely the series of duties encompassed within the DFR and the concomitant controls that those duties exert over union activities. The brief instead proceeds from the assumption that unions are just like unregulated business corporations with no duties other than maximizing the wealth of private stakeholders.

Worse, the PLF brief not only disregards the fact that the DFR imposed by EERA regulates unions so as to control against the prospect that they might shirk their release-time obligations, it goes so far as to argue that EERA actually *shields* unions and their officials from any type of control by protecting them from charges of misconduct in connection with

their use of release-time funds. PLF Br. 6. Specifically, PLF quotes the provision of EERA that prohibits public employers from "interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act," N.J.S.A. 34:13A-5.4(a)(1), and makes the argument that this provision would disable an employer from ever discharging or disciplining releasees – presumably, even if the releasees misappropriated their salaries by, for example, using the hours during which they were supposed to be acting as ombudspersons on personal frolics or other unauthorized non-representational functions.

Neither the text of the provision nor the authorities PLF cites in support of that argument in fact support it. The text prohibits discipline by an employer only when imposed to retaliate against employees for "exercis[ing] [] their *rights under EERA*." Id. (emphasis added). JCEA has never contended that any employee it represents has some sort of *statutory* right to take a paid leave of absence to work on release-time functions; JCEA has contended only that it may bargain with the District to secure a *contract* right pursuant to which an eligible District employee may take release time. Moreover, even when actual statutory rights are at issue, and not mere contract rights, it is plain from the text of the EERA provision invoked by PLF that the statute would not protect an employee who was disciplined for *abuse* of a statutory right by, for example, submitting

falsified documents to support a grievance. See, e.g., Ryan v. Twp. of Boonton, No. A-0432-18T1 (App. Div. Mar. 5, 2020) (slip op. at 8-9).[3]

Unsurprisingly, given the text, the cases that PLF cites do not remotely stand for the proposition that EERA categorically shields from discipline all employees of a public employer who happen also to have union responsibilities. The cases only stand for the unremarkable proposition that when employees exercise *statutory* rights and do not *abuse* them, they are shielded from discipline for their exercise of those rights. See In re Twp. of Bridgewater, 95 N.J. 235, 237 (1984) (township violated EERA when it demoted an employee in retaliation for complaining that a department head bypassed the union and attempted to make a unilateral change to wages); In re Bd. of Fire Comm'rs, 443 N.J. Super. 158, 173 (App. Div. 2015) (fire department violated EERA when it terminated two firefighters in retaliation for their complaint that the department was using a temporary freelancer rather than hiring an additional full-time firefighter).

The reality, then, is that if a JCEA releasee neglected his or her release-time responsibilities and yet still accepted a salary from the District, that releasee would plainly be subject

[3] Pursuant to Rule 1:36-3, this unpublished opinion is attached as an appendix. We are not aware of any contrary unpublished opinions.

to discipline by the District. And, equally to the point, EERA not only wouldn't *shield* the union from liability, as PLF suggests, the statute would *impose* DFR liability on the union for its official's bad faith and arbitrary actions in squandering moneys intended to benefit all employees in the unit, regardless of union affiliation, for personal benefit.

For these reasons, EERA's provisions serve to ensure that the release-time salaries paid to the two releasees at issue here will advance the public purposes supporting the release-time clauses at issue here, and, in so serving, provide a reasonable measure of control against the prospect that the salaries might be squandered on activities that are not consonant with those purposes. Those provisions therefore – both on their own and together with the contractual and other measures in place to guard against that prospect discussed in our principal response to Taxpayers' Cross-Petition for Certification, see JCEA Br. 17-19 – bring this case easily within the holding of this Court's seminal decision in Roe v. Kervick, 42 N.J. 191, 222 (1964). There, the Court upheld the validity of governmental payments to private businesses that were expended to generate new development in poor areas of the state where, as here, there was a public purpose for the disbursements to the private recipients of the funds and where, also as here, there were "reasonable measure[s]" in place, both

legislative and contractual, to guard against the prospect that the private recipients of the funds might divert them for other purposes. Id.

The fact that the District does not control releasees' day-to-day activities in the way it controls its employees when performing their regular classroom teaching responsibilities in no way transforms the salary payments to releasees into unconstitutional "gifts." Were it otherwise, all payments by governmental bodies to independent contractors – entities that by definition are not under the "control" of the government in the way that a traditional employee is – would constitute gifts.

That notion is contrary to the case law, which establishes that control need not involve day-to-day supervision but can be at a very high level. The Appellate Division's decision in In re Grant of Charter School Application, 320 N.J. Super. 174 (App. Div. 1999), aff'd as modified, 164 N.J. 316 (2000), illustrates this point well. There the court held that the fact that charter schools, by design, operate without public superintendence on a day-to-day basis does not render payments of public funds to them violative of the Gift Clause. The court explained that, although there remained a "possibility that some of the charter school funds might be spent illegally," the governing statute provided a sufficient control against that prospect by "creat[ing] a remedy for such a violation: the Commissioner may

non-renew or revoke the charter, or may place a school on probationary status." 320 N.J. Super. at 229. Here, as we have explained, there are multiple remedies to redress the prospect that releasees might divert their release-time salaries to unauthorized purposes: the District can terminate a teacher who accepts release-time payments but shirks his or her release-time duties; the District can bring a breach-of-contract action against the union; and the District – or indeed any employee – can bring a DFR charge against the union.

3. Apart from making the single EERA argument that we have just rebutted, the PLF brief devotes the remainder of its energy to (i) quoting extensively from a 2012 report by the State Commission of Investigation about the provision of release time pursuant to public-sector collective negotiations agreements in New Jersey (the "Report"[4]), PLF Br. 10-12; and (ii) labeling release-time positions as "no show jobs," id. at 12-13.

As to the Report, all that needs be said is that it does not address any Gift Clause issues and indeed treats the question of release time as a policy matter to be resolved by the Legislature. See Report, supra, at 25-26. The Report also highlights the wide variety of release-time provisions that have been negotiated in New Jersey public-sector labor agreements,

[4] The full citation to the Report and its internet URL address are set out supra note 2.

id. at 9-20, thereby illustrating one of JCEA's central points in this case, which is that release-time provisions are not gifts but are commonly negotiated contract clauses that vary from workplace to workplace and classification to classification based on the needs and priorities of both management and employees in the various bargaining units. Indeed, part of the genius of collective bargaining is that it has the capacity to tailor workplace arrangements to workplace needs and to avoid one-size-fits-all straitjackets imposed across the board by a single bureaucracy. See Michael H. Gottesman, Wither Goest Labor Law: Law and Economics in the Workplace, 100 Yale L.J. 2767, 2795 (1991).

As to the "no show jobs" epithet, we already have noted that the PLF brief itself concedes that the JCEA releasees – who devote their days to serving as ombudspersons, contract administrators, intermediaries between supervisors and employees, and negotiators on behalf of all public employees (union member and nonmember alike) – are not "corrupt." See supra p. 2. Given that concession, the use of the label is gratuitous at best.

We would stress only that release-time positions, far from being treated by the courts as "no show" jobs, have been repeatedly described by the courts as involving important and meaningful work that benefits not just the employees but also

the employer. See, e.g., BF Goodrich, 387 F.3d at 1057 ("[T]he Chief Shop Steward [covered by the release-time provision] plays an integral role in enforcing the terms of the collective bargaining agreement and in peacefully resolving disputes between labor and management — helping both parties avoid expensive and time-consuming litigation and the constant threat of work stoppages."). The release-time positions at issue in this case are no exception, as even the Taxpayers have been forced to recognize. See Pls.'-Appellants' Corrected Opening Br. in App. Div. 35 ("No one is saying that the releasees are not hard-working employees pursuing what they believe are their professional duties.").

That release-time work is valuable and important in the public sector is reflected as well in the Federal Service Labor-Management Relations Statute ("FSLMRS"), 5 U.S.C. §§ 7101-35, which Congress enacted in 1978 to establish a system of collective bargaining applicable to workers in federal departments and agencies. In the FSLMRS, Congress expressly *required* the provision of paid release time (called "official time" in the parlance of that statute) for certain representational functions, see 5 U.S.C. § 7131(a), and authorized bargaining over release time for certain other such functions, id. § 7131(d). Congress would hardly have adopted

that legal regime had it seen no public, but only private, benefit to the provision of release time.

CONCLUSION

For the foregoing reasons and those stated in JCEA's previous briefs, the decision of the Appellate Division below should be reversed and the order of the Chancery Division upholding the constitutionality of the release-time provisions at issue here should be affirmed.

Respectfully submitted,

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Dated: June 22, 2020

CERTIFICATION

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 willfully false, I am subject to punishment.

Richard Friedman (cds)

Richard A. Friedman
ZAZZALI, FAGELLA, NOWAK,
KLEINBAUM & FRIEDMAN

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0432-18T1

PAUL RYAN,

Plaintiff-Appellant/
Cross-Respondent,

v.

TOWNSHIP OF BOONTON
and BOONTON TOWNSHIP
POLICE DEPARTMENT,

Defendants-Respondents/
Cross-Appellants.

Argued February 5, 2020 – Decided March 5, 2020

Before Judges Koblitz, Gooden Brown and Mawla.

On appeal from the Superior Court of New Jersey, Law Division, Morris County, Docket No. L-1794-16.

Ashley Vallie Whitney argued the cause for appellant/ cross-respondent (Law Offices of Gina Mendola Longarzo, LLC, attorneys; Ashley Vallie Whitney, on the briefs).

Stephen E. Trimboli argued the cause for respondents/ cross-appellants (Trimboli & Prusinowski, attorneys;

Stephen E. Trimboli, of counsel and on the briefs; John P. Harrington, on the briefs).

PER CURIAM

Plaintiff Paul Ryan, an eighteen-year veteran of the Boonton Township Police Department (Department), appeals from an August 15, 2018 order upholding discipline for submitting a false overtime certification, but reducing the penalty to a fifteen-working-day suspension. Defendants the Department and the Township of Boonton (Township) cross-appeal, arguing the court should not have reduced the penalty from a thirty-working-day suspension. We reject all arguments and affirm.

On July 2, 2015, Detective Peter Ricciardi arrived at the Department to retrieve evidence from a rape kit plaintiff logged in the night before. Only evidence custodians are authorized to access and release evidence, but plaintiff, the primary evidence custodian, had left after his shift and the alternate evidence custodian was assigned to an "outside detail" post. Rather than call plaintiff to return to the Department to give Detective Ricciardi the evidence, Police Chief Paul Fortunato ordered the alternate evidence custodian to leave his post to do so.

Plaintiff believed that as the more senior officer, he was entitled to receive the assignment with overtime pay. He consulted the collective bargaining

agreement and his local PBA President, Officer Christopher Chicoris, about possible remedies. Plaintiff asked Chicoris to speak to the PBA attorney about whether he could file a grievance. Upon learning from Chicoris that the lawyer said plaintiff had to have his overtime request denied before grieving the issue, plaintiff submitted an overtime voucher falsely asserting he had reported to work between 10:35 a.m. and 11:18 a.m. on July 2, 2015. Plaintiff wrote in his email to the Chief forwarding the voucher, "Attached is my overtime sheet for the call[-]out that I was never called for . . . ." His signed voucher included the certification:

> I do [s]olemnly declare and certify under the penalties of law that the above is a true and correct statement of the hours worked, or services rendered by me for the time specified, and the payment due to same, as stated, is justly due and owing.

Chief Fortunato reported plaintiff's false certification to the Morris County Prosecutor's Office (MCPO).[1] The Chief also sent internal affairs officer Lieutenant Michael Danyo a letter reporting plaintiff's inaccurate voucher. Lieutenant Danyo opened an investigation.

[1] See fourth-degree false swearing, N.J.S.A. 2C:28-2, and second-degree official misconduct, N.J.S.A. 2C:30-2.

The next day, July 16, 2015, Chief Fortunato and Lieutenant Danyo briefly met with plaintiff to discuss his overtime voucher. After they told him "there was not a call[-]out on this day," plaintiff asked whether his voucher was denied. Chief Fortunato repeated no call-out had occurred on July 2, 2015, and plaintiff ended the meeting.

A few days later, the MCPO informed Chief Fortunato that it found "insufficient evidence to warrant a criminal prosecution for official misconduct" and referred the matter "for the commencement of an administrative investigation." Plaintiff was notified by Lieutenant Danyo that he was the subject of an internal investigation. The same day, Danyo formally interviewed defendant in the presence of defendant's counsel, who signed a "Weingarten Representative Acknowledgement" form. Within two weeks, plaintiff was served with a notice of disciplinary action recommending a ninety-working-day suspension for three violations of the Department's Rules and Regulations: neglect of duty, general responsibilities, and misconduct and incapacity.

A four-day testimonial hearing was conducted before the Township Hearing Officer (THO), who found plaintiff guilty of the misconduct violation only and recommended a thirty-working-day suspension, which the Township Committee approved on August 3, 2016.

A trial de novo before the court was held on June 28, 2018, pursuant to N.J.S.A. 40A:14-150, which is applicable to non-civil service municipal employees. Assignment Judge Stuart A. Minkowitz again found defendant guilty but reduced the penalty to fifteen working-days. The judge detailed his reasons in a thoughtful, comprehensive twenty-five-page written opinion.

I. Our Standard of Review.

We play "a limited role in reviewing . . . de novo proceeding[s]." In re Disciplinary Procedures of Phillips, 117 N.J. 567, 579 (1990). "[T]he court's 'function on appeal is not to make new factual findings but simply to decide whether there was adequate evidence before the [trial court] to justify its finding of guilt.'" Ibid. (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). The trial court conducting a de novo proceeding "makes its own findings of fact." Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 357 (2013) (quoting In re Phillips, 117 N.J. at 578).

We should not disturb the de novo findings of the trial court unless "the decision below was 'arbitrary, capricious or unreasonable' or '[un]supported by substantial credible evidence in the record as a whole.'" In re Phillips, 117 N.J. at 579 (alteration in original) (quoting Henry v. Rahway State Prison, 81 N.J. 571, 580 (1980)).

II. Evidentiary Rulings.

When a disciplinary matter is reviewed de novo by a court, "[e]ither party may supplement the record with additional testimony subject to the rules of evidence." N.J.S.A. 40A:14-150. Plaintiff argues the trial court erred by denying his pre-trial motion and renewed argument at trial to compel discovery and expand the record to include evidence of inaccurate certifications submitted by other officers as well as the PBA attorney's advice. Plaintiff never alleged that the PBA attorney advised signing a false certification, merely that an overtime request must be denied before it can be grieved.

Plaintiff argues the trial judge abused his discretion in finding plaintiff's request to supplement the record with testimony and documents related to other officers' overtime requests was irrelevant. Plaintiff claims "the Department had an accepted, routine practice whereby officers regularly submitted overtime vouchers and payment requests containing untrue and inaccurate information, without consequence." For example, plaintiff notes that Lieutenant Danyo and Chief Fortunato testified at deposition that officers whose outside detail assignments are cancelled without proper notice, are allowed to submit overtime vouchers certifying that they completed the work when in fact they did not.

We review a trial court's evidentiary rulings under a deferential standard and will "uphold [the trial court's] determinations 'absent a showing of an abuse of discretion.'" State v. Scott, 229 N.J. 469, 479 (2017) (quoting State v. Perry, 225 N.J. 222, 233 (2016)). Under this standard, "[a] reviewing court must not 'substitute its own judgment for that of the trial court' unless there was a 'clear error in judgment'—a ruling 'so wide of the mark that a manifest denial of justice resulted.'" Ibid. (quoting Perry, 225 N.J. at 233).

"Evidence must be relevant for it to be admissible" and, unless excluded by the Rules of Evidence, "all relevant evidence is admissible." State v. Schraf, 225 N.J. 547, 568-69 (2016); N.J.R.E. 401-402. "Relevancy consists of probative value and materiality." State v. Buckley, 216 N.J. 249, 261 (2013). When determining whether evidence is relevant, "[t]he inquiry is 'whether the thing sought to be established is more logical with the evidence than without it.'" Ibid. (quoting State v. Coruzzi, 189 N.J. Super. 273, 302 (App. Div. 1983)); N.J.R.E. 401.

When denying the admission of deposition transcripts, Judge Minkowitz stated:

> Plaintiff seeks to establish a practice by the Department of paying other officers for outside details when they are cancelled by a vendor; however this is not the set of circumstances under which [p]laintiff was denied overtime. Plaintiff was not requesting overtime pay due to an outside detail, but rather based on his

> understanding that he was not called in for overtime when he alleges he was required to be called in. Therefore, the payment of overtime vouchers in other specific circumstances is not relevant.

The trial judge did not abuse his discretion in denying both of plaintiff's requests to expand the record.

III. Protected Union Activity.

Plaintiff argues that in submitting his overtime voucher, he was exercising his First Amendment right to redress grievances and participate in protected union activity. As he explained during his interview with Lieutenant Danyo, plaintiff reiterates in his brief that "he submitted the overtime voucher for the sole purpose of initiating the grievance process." By informing Chief Fortunato via email that his "overtime sheet [was] for the call[-]out that [he] was never called for," he claims he made his intention clear that he was initiating a grievance. Plaintiff argues that the trial judge's refusal to dismiss the discipline charges against him violates his First Amendment rights.

The collective bargaining agreement provides a three-step procedure for filing a grievance. A grievant must first inform the Chief of Police, either orally or in writing, of his or her issue within ten days of the event and the Chief must respond within three days. The grievant need not inform the Chief in any particular manner. If unsatisfied with the outcome, the grievant may then make a written request to meet

with the Township Committee or its designee to discuss the issue, requiring a response within twenty days. The last step allows the grievant to request binding arbitration.

"The New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 to -21, makes unlawful a discharge or otherwise adverse public employer action against a worker because of his or her union activity." In re Bridgewater Twp., 95 N.J. 235, 237 (1984). Union activity may include the "fil[ing] [of] an affidavit, petition, or complaint." N.J.S.A. 34:13A-5.4(a)(4). Plaintiff asserts that because he acted pursuant to what Officer Chicoris advised was a grievable action, he was engaged in union activity. The judge correctly determined: "[Plaintiff] was not disciplined for filing a grievance. Instead, [p]laintiff's disciplinary action arose from the circumstances surrounding his filing of a false certification . . . ."

Plaintiff submitted a false certification as part of an overtime voucher and was disciplined for doing so.

IV. Unfair Labor Practice.

Plaintiff alleges his Weingarten[2] rights were violated because he did not have a representative at his July 16, 2015 meeting with Chief Fortunato and Lieutenant

[2] N.L.R.B. v. J. Weingarten, Inc., 420 U.S. 251, 260 (1975).

Danyo. He argues that pursuant to the Attorney General's guidelines governing internal affairs investigations, he should have been told about the context of the meeting, so he could have exercised his right to representation. New Jersey Attorney General, Internal Affairs Policy & Procedures 49-50, (Dec. 2019), https://nj.gov/oag/dcj/agguide/directives/2019- Internal_Affairs_Policy_and_Procedures.pdf [hereinafter AG Guidelines].

In Weingarten, the Supreme Court of the United States held that a union member is entitled to representation at an interview by management, where the employee reasonably believes that it will lead to disciplinary action. 420 U.S. at 256-57. N.J.S.A. 34:13A-5.4(a)(1) has been interpreted to provide public employees the same right, which if violated will constitute an unfair labor practice. Hernandez v. Overlook Hosp., 149 N.J. 68, 75 (1997). An officer must be advised prior to the start of questioning when he is the subject of a civil investigation. The right to representation attaches when he "requests representation and reasonably believes the interview may result in disciplinary action." AG Guidelines at 50-51; Weingarten, 420 U.S. at 257; In re Univ. of Med. & Dentistry, 144 N.J. 511, 530 (1996).

When scheduling the July 16, 2015 meeting, Chief Fortunato emailed plaintiff, "[S]ee me regarding this overtime sheet." Chief Fortunato had already reported plaintiff's false certification to the MCPO and the department's internal

affairs unit. During the meeting, however, plaintiff was not asked any questions, but was informed that the Chief knew that no call-out was made that day.

Plaintiff was disciplined after his attendance with counsel at the August 14, 2015 interview with Lieutenant Danyo. Plaintiff had been informed about the nature of the August 14 meeting and his attorney signed the "Weingarten Representative Acknowledgement." Even if the first brief July 16 meeting amounted to a Weingarten violation, the Public Employment Relations Commission has the "exclusive power" to resolve an unfair labor practice. N.J.S.A. 34:13A-5.4(c).

V. Failure of Proof.

Because this case arises from a departmental disciplinary hearing, guilt must be assessed by a preponderance of the evidence based on Department policy. Pursuant to the Department's Internal Affairs Policy: "Administrative [m]isconduct is defined as a reportable incident where there is a serious violation of department rules and regulations, policy, procedure, written directive; or, conduct which adversely reflects upon the employee or the department." Pursuant to its Rules and Regulations, even in the "absence of a specific rule addressing the act or omission," the Department may find misconduct and incapacity.

Our Supreme Court recognizes "honesty, integrity, and truthfulness [as] essential traits for a law enforcement officer." Ruroede, 214 N.J. at 362. The AG Guidelines also note:

> Honesty is an essential job function for every New Jersey law enforcement officer. Officers who are not committed to the truth, who cannot convey facts and observations in an accurate and impartial manner and whose credibility can be impeached in court cannot advance the State's interests . . . .
>
> [AG Guidelines at 62.]

An officer's dishonest behavior, "even if motivated by good intentions," is improper, and dishonest officers are disciplined accordingly. See Henry, 81 N.J. at 580 (holding that because the officer's false report, even if well-intentioned, could have "disrupt[ed] and destroy[ed] order and discipline in a prison," a ninety-day suspension was unreasonably lenient and removal was required).

Plaintiff argues that the judge erred in finding that defendants proved by a preponderance of the evidence that he was guilty of misconduct and incapacity because he lacked any wrongful intent and was forthright in his email that he did not work the hours in his overtime request. He argues that the judge's findings that he "knowingly filed a false certification," "lack[ed] candor during the administrative hearing," and "undermine[d] the public's respect for, and trust and confidence in, the Department" lacked support. Plaintiff's sworn submission of an overtime voucher

for hours he did not work is undisputed. The Department's definition of misconduct does not include the requirement of malicious intent.

Regarding plaintiff's argument that the judge should not have relied on the THO's findings, a trial court "must give due deference to the conclusions drawn by the original tribunal regarding credibility." Ruroede, 214 N.J. at 357 (quoting In re Phillips, 117 N.J. at 579). Judge Minkowitz recognized that these credibility determinations were not controlling. He considered the materials reviewed at the disciplinary hearing anew and agreed with the THO's findings.

VI. Penalty.

Plaintiff argues that the fifteen-working-day suspension ordered by the trial court "should be vacated as arbitrary, capricious and unreasonable." Citing to agency decisions where officers were found guilty of intentionally making false statements, plaintiff asserts he should have received a lesser penalty, especially since he does not have a history of discipline.

Defendants argue that the original thirty-working-day suspension should be reinstated because a fifteen-working-day suspension is disproportionate to the severity of the disciplinary charge. They note that because plaintiff "submitted his statement under oath, which constitutes false swearing" and was found not entirely candid at the hearing, a more severe penalty is appropriate.

Judge Minkowitz found "[p]laintiff's misconduct in this matter undoubtedly qualifies as 'serious' . . . as [it] arguably could have constituted a crime." Recognizing that the THO appeared to have "simply divided the proposed suspension [of ninety-working-days] by three and imposed the [thirty] working-day penalty as a result," the judge considered the following before imposing a fifteen-working-day suspension: (1) plaintiff's lack of any disciplinary record; (2) his admission from the beginning that he did not work the hours; (3) his lack of candor "as to the motives of employees of the Department"; and (4) that a ninety-working-day suspension would reduce his salary by roughly one-third. The modified sanction was not an abuse of discretion.

Judge Minkowitz's well-reasoned findings were based on substantial, credible evidence in the record.

Affirmed.

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JERSEY CITY EDUCATION ASSOCIATION, Petitioner, v. MOSHE ROZENBLIT and QWON KYU RIM, Respondents.	SUPREME COURT OF NEW JERSEY DOCKET NO. 083434 APP. DIV. DOCKET NO.: A-1611-17-T01 **CERTIFICATION OF SERVICE**

Phyllis Thompson, of full age, hereby certifies as follows:

1. I am employed as a paralegal by the firm of Bredhoff & Kaiser P.L.L.C., attorneys for the Petitioner/Cross-Respondent Jersey City Education Association.

2. An original and four (4) copies of the following documents: Brief and Appendix of Petitioner/Cross-Respondent Jersey City Education Association in Response to Brief Amicus Curiae of Pacific Legal Foundation and Americans for Prosperity and a Certification of Service were served via FedEx and by E-mail on June 22, 2020 on the Clerk, Supreme Court of New Jersey, R.J. Hughes Justice Complex, Supreme Court Clerk's Office, P.O. Box 970 Trenton, NJ 08625-0970 and SupremeCTBrief.mbx@njcourts.gov.

3. Two (2) copies of the Brief and Appendix of Petitioner/Cross-Respondent Jersey City Education Association in Response to Brief Amicus Curiae of Pacific Legal Foundation and Americans for Prosperity and a Certification of Service were served via E-mail and regular mail on June 22, 2020, on each of the following:

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I hereby certify that the foregoing statements made by me are true to the best of my knowledge, information and belief. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Respectfully submitted,

Dated: June 22, 2020

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