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MOSHE ROZENBLIT and QWON KYU RIM, SUPREME COURT OF NEW JERSEY CIVIL ACTION

Plaintiffs/Appellants/
Cross-Respondents

DOCKET NO.: 083434

v.

On Cross-Petition for
Certification of the Final Order
of the Superior Court, Appellate
Division

MARCIA V. LYLES, in her
official capacity as
Superintendent of the Jersey
City Board of Education, et
al.,

Appellate Division Docket No.
A-1611-17T1

Defendants/Respondents,

Sat below:
Hon. Jose L. Fuentes, P.J.A.D.,
Hon. Francis J. Vernioia, J.A.D.,
Hon. Scott J. Moynihan, J.A.D.

And

JERSEY CITY EDUCATION
ASSOCIATION,

Defendant/Respondent/
Cross-Appellant.

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SUPREME COURT
OF NEW JERSEY

FILED

NOV 06 2019

Heather J. Baten
CLERK

CORRECTED CROSS-PETITION FOR CERTIFICATION OF THE FINAL
ORDER OF THE SUPERIOR COURT, APPELLATE DIVISION

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QUESTION PRESENTED

The New Jersey Constitution's Gift Clause prohibits the government from making public expenditures to advance private interests. Yet, the Jersey City School Board entered into a contract whereby it pays full government salaries to two employees who devote their full time not to any teaching duties but rather to working exclusively for a private labor union. Does that arrangement violate the Gift Clause?

PRELIMINARY STATEMENT

This case challenges the legality of a government practice called "release time" whereby the government spends taxpayer dollars to employ two full-time public school teachers *not* to educate Jersey City's youth, but instead to work under the exclusive direction and control of the Jersey City Education Association ("JCEA"), a private labor organization, for its own private benefit. No controls, limits, or other rules of accountability are imposed on the JCEA's use of these taxpayer resources. And the purpose of the release time provisions at issue, as the decision below makes plain, is to advance JCEA's private interests, not those of the Jersey City School Board of Education ("Board") or city and state taxpayers.

The two taxpayer Plaintiffs contend that release time violates the New Jersey Constitution's anti-subsidy provisions, collectively known as the "Gift Clause," which forbid the use of

public funds for private activities that are not controlled by the state. The language of the Constitution is plain and unambiguous: "No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation" N.J. Const., art. VIII, § 3, ¶ 2; see also art. VIII, § 3, ¶ 3 ("No ... appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association, or corporation whatsoever").

The framers of these provisions understood basic principles that are axiomatic in our republic: that "public money should be ... used only for public purposes," *Roe v. Kervick*, 42 N.J. 191, 207 (1964) and that when public money is spent, the government should maintain control over those expenditures and receive adequate consideration for them. Absent these constitutional requirements, public expenditures could result in the allocation of taxpayer funds to private interests. Release time" is precisely what the Gift Clause was intended to prevent: public aid to private, special interests.

The Appellate Division correctly held that the Board lacks legal authority to sanction release time, but based its decision on state statute and declined to reach Plaintiffs' constitutional claim. Specifically, the Appellate Division held that Title 18A does not empower the Board to authorize release time, because

school boards are creatures of the State and can only exercise those powers granted to them by the legislature. Appendix ("App") at 008a. The Appellate Division's holding is correct and its statutory analysis is based on settled law. Thus it would be appropriate for this Court to deny Defendant JCEA's petition for certification on the statutory issue, or if granted, to affirm the Appellate Division's decision.

Additionally, should this Court grant Defendant JCEA's petition, it should also grant this cross-petition to consider the Gift Clause question. It should do so for two reasons. First, although the Gift Clause was adopted specifically to prohibit these types of special interest gratuities, there has not been a major Gift Clause case decided by this Court since 1964,¹ and this case presents a good opportunity to clarify Gift Clause jurisprudence. Second, release time is an issue of statewide importance that applies beyond school boards to other public employers throughout the state. A decision based on the New Jersey Constitution would clarify the legal requirements necessary when public agencies spend taxpayer resources to advance the interests of private parties, including public-sector labor unions.

¹ *Kervick, supra.*

For these reasons, certification should either be denied for all parties, or, if the Court grants certification on the statutory question, it should also do so on the constitutional claim.

STATEMENT OF FACTS & PROCEDURAL BACKGROUND

Plaintiffs Moshe Rozenblit and Won Kyu Rim ("Taxpayers") are citizens and taxpayers of the United States and of the State of New Jersey. Mr. Rozenblit pays property taxes and sales taxes in Jersey City, and Mr. Rim pays income tax to the State of New Jersey. The release time benefits challenged here are financed by the Board, which receives State income tax revenue and local tax revenue. Thus, Taxpayers finance the practice of "release time."

Defendant Jersey City Board of Education ("Board") is a local school board that is responsible for providing educational services to students in Jersey City, as authorized by statute.

Defendant JCEA is a labor organization representing teachers, attendance counselors, and teachers' assistants in the Board's school districts. JCEA is a private entity that exists to advocate for the interests of its members.

In 2015, the Board and JCEA entered a Collective Bargaining Agreement ("CBA"). The release time provisions challenged in this case are in Section 7-2.3 of the CBA. Among other things, these provisions specify that JCEA's President and his designee "shall be permitted to devote all of his/her time to the Association business and affairs." Pa017 (Emphasis added). Thus, two full-

time Board teachers are permitted (in fact, required) to devote all their working hours to JCEA "business and affairs."

While on full-time release, these employees receive their salaries, benefits, and pensions from the Board, just as if they were teachers who were performing instructional duties. But they are not. Instead, release time is used for activities that advance JCEA's private interests, including political activities, contract negotiations between the JCEA and the Board, filing grievances against the Board, and representing JCEA members in disciplinary proceedings. Neither the JCEA nor the release time employees themselves, are *obligated* to perform any function for, or provide any service to, the Board under either the CBA or any other policy or procedure. Release time employees spend all their time working solely for JCEA. They are not accountable to the Board, and although they are paid by the Board and Jersey City taxpayers, they do not work *for* the Board. They work *for* the JCEA. Over the term of the CBA, release time costs taxpayers roughly \$1.1 million.

On January 4, 2017, Taxpayers filed a Complaint challenging the release time provisions of the CBA under both the New Jersey Constitution's Gift Clause, N.J. Const., art. VIII, § 3, ¶¶ 2-3— which prohibits public aid to private organizations, associations, and individuals—and the New Jersey Civil Rights Act ("CRA"), N.J.S.A. § 10:6-2(c) and (d). Taxpayers sought declaratory and injunctive relief against the release time provisions.

Upon completion of discovery, Taxpayers and JCEA filed cross motions for summary judgment. The Board joined the JCEA's brief, but did not file its own. By a letter opinion dated October 31, 2017, the Chancery Division denied Taxpayers' motion for summary judgment and granted the JCEA's and the Board's motion for summary judgment. Taxpayers timely appealed.

On August 21, 2019, the Appellate Division reversed and entered an opinion in favor of Taxpayers finding that the Board has no statutory authority "to disburse public funds in this fashion," Pa014, and consequently that Section 7-2.3 of the CBA "is against public policy and unenforceable." Pa019.

Following the Appellate Division's decision, the JCEA filed a notice to petition this Court for certification, and Taxpayers filed a notice of cross-petition for certification.²

COMMENTS WITH RESPECT TO APPELLATE DIVISION OPINION

The Appellate Division based its decision on a proper statutory analysis, but declined to reach the constitutional claim. Specifically, the Appellate Division correctly found that the Board lacked statutory authority to authorize taxpayer-funded release time. Pa018 ("We find ... no legal authority in Title 18A for the Board to sanction this disbursement of public funds.").

² The JCEA also filed a motion to stay the Appellate Division's decision pending the outcome of a petition for certification to this Court. The Appellate Division denied that motion on September 26, 2019.

As a matter of black-letter law, the Appellate Division's analysis was correct. A school board's powers are limited to those granted by the legislature. *N.J. Dep't of Labor v. Pepsi-Cola Co.*, 170 N.J. 59, 61 (2001); see also *Edmondson v. Bd. of Educ. of Borough of Elmer*, 424 N.J. Super. 256, 261 (App. Div. 2012) (a local school board "is a creature of the state and may exercise only those powers granted to it by the Legislature either expressly or by necessity or fair implication") (internal citation omitted). School boards lack power to make payments, or otherwise expend public funds, that are not authorized by statute. *Fair Lawn Educ. Ass'n v. Fair Lawn Bd. of Educ.*, 79 N.J. 574, 581 (1979) (the legislature must grant school boards spending powers and the school district lacked statutory authority to make supplemental retirement payments).

Consequently, the Board may only exercise power it has been granted by the legislature, and may not expend public funds unless it does so pursuant to statutory authorization. Pa019. In other words, as a creature of state statute, the Board does not have plenary authority to act or to spend public resources as it pleases. No state statute grants the Board power to authorize or fund the release time provisions at issue. Pa014. In so finding, the Appellate Division was correct as a matter of statutory law.

Because the Appellate Division based its holding on state statute, it declined to reach the question of whether such expenditures violate the New Jersey Constitution's Gift Clause. See Pa008 ("Here, we are satisfied there are sufficient statutory grounds to definitively decide this appeal. We thus decline to reach the constitutional arguments"). That question, however, was fully briefed and argued below, and if this Court were to grant the JCEA's petition on the statutory question, this constitutional question would also be fairly presented. Because "this Court remains the final arbiter of the meaning of the state constitution," *Right to Choose v. Byrne*, 91 N.J. 287, 333 (1982), this cross-petition for certification presents an opportunity to clarify the contours of the New Jersey Constitution's Gift Clause and to determine whether the Board's expenditure of public funds to benefit a private entity violated not only state statute, but also the state's fundamental law.

REASONS WHY CERTIFICATION SHOULD BE ALLOWED

- I. **The New Jersey Constitution's Gift Clause was adopted to prevent special interest gratuities such as release time, but there has not been a major Gift Clause decision from this Court since 1964. (Pa007-008)**

The New Jersey Constitution prohibits the expenditure of public funds for private activities over which the government lacks sufficient control and for which the government receives inadequate consideration. N.J. Const., art. VIII, § 3, ¶¶ 2-3.

The purpose of this constitutional prohibition is to prevent aid to private corporations not constituting public agencies controlled by the state. *City of Camden v. S. Jersey Port Comm'n*, 2 N.J. Super. 278, 295 (Ch. Div. 1948), *aff'd in part, modified in part*, 4 N.J. 357 (1950); *see also Riddlestorffer v. City of Rahway*, 82 N.J. Super. 36, 45 (Law. Div. 1963) ("The historical purpose of Art. VIII, Sec. III, par. 2, was to prevent aid to private corporations not constituting public agencies controlled by the State.").

This Court decided the "seminal" Gift Clause case, *Kervick*, *supra*, 55 years ago. There, the Court set forth a two-part test for determining whether an expenditure violates the Constitution. First, courts will examine whether the expenditure is for a "public purpose," 42 N.J. at 207, and second, courts will review whether the means of achieving that public purpose are "consonant with the accomplishment of that public purpose." *Id.* at 212.

Under prong one of this test, a public purpose is that which "[1] serves as a benefit to the community as a whole," and which [2] at the same time is directly related to the functions of government." *Id.* at 207; *see also Davidson Bros., Inc. v. D. Katz & Sons, Inc.*, 121 N.J. 196, 217 (1990) (reiterating the *Kervick* Gift Clause test and public purpose prong). Under prong two, courts examine whether the government (1) retains sufficient control over the public expenditure, *Kervick*, 42 N.J. at 219, and

(2) whether the expenditure is "based upon a substantial consideration." *Id.* at 218.

Despite articulating a rigorous test to examine the legality of public expenditures made to advance private interests, the analysis described in *Kervick* has not been significantly developed or clarified since that case was decided. Since 1964, this Court has cited the Gift Clause on few occasions. Indeed, the Court has not issued a Gift Clause decision since 1990, nearly three decades ago. See *Davidson Bros.*, *supra*. And in none of those cases did the Court examine in depth the contours of the anti-subsidy provisions or the test the Court articulated in *Kervick*.

Likewise, lower courts have been reluctant to reach Gift Clause claims. See, e.g., *New Jersey Builders Ass'n v. Fenske*, 249 N.J. Super. 60, 72 (App. Div. 1991) ("By reason of this holding, it is not necessary for us to reach the serious question raised on appeal whether such endorsement or co-permittee participation, if otherwise valid, would violate the anti-donative and anti-credit loan provisions of the New Jersey Constitution.").

This case presents an ideal opportunity for the Court to clarify its Gift Clause jurisprudence and enforce the New Jersey Constitution's strong textual prohibitions on public aid to private parties, because the release time provisions at issue so plainly run afoul of the Constitution. What's more, the record establishes that each of the relevant Gift Clause factors

articulated in *Kervick* is involved in this case. Specifically, (1) the release time expenditures are earmarked to advance the private interests of the JCEA, not those of the Board or broader public; (2) the Board lacks control over release time to ensure that any public purpose will be accomplished; and (3) the Board receives constitutionally inadequate consideration for release time, the purported benefits of which are speculative, indirect, and inure to the JCEA, not the public.

Indeed, although the Appellate Division decided this case on statutory grounds, its decision included an examination of each factor relevant to a Gift Clause inquiry. First, it found that the release time employees "devote their entire work-time to the business and affairs of the union," Pa012, thus serving the private interests of the JCEA, not the public. Second, it found that although "their salaries and benefits are commensurate to the teachers who serve the day-to-day educational needs of the students of the district," the release-time employees "act exclusively as labor leaders." Pa014. Consequently, the Board is unable to ascertain the release time teachers' activities, let alone to control them, as the Gift Clause requires. Finally, the Appellate Division found that the MOU allows the release-time employees "to devote their entire professional time to exclusive service of the interests of the JCEA," which "confers no reciprocal benefit to the school district." Pa016. In other words, the Board does

not receive sufficient consideration in exchange for its expenditures of public money.

Because the release time arrangement in this case raises each of the Gift Clause factors identified in *Kervick*—public purpose, control, and consideration—if certification is granted, this case presents a unique opportunity to review and apply the Gift Clause’s restraints on public subsidies to release time state-wide.

II. Release time exists throughout New Jersey and is an issue of statewide public importance. (Pls.’ Corrected Appendix Vol. 1, page 103a filed with the Super. Ct. of N.J. App. Div.)

The practice of release time is not limited to the Jersey City School Board, but exists in varying forms throughout New Jersey among multiple public employee groups. According to a 2012 report by the State of New Jersey Commission of Investigation (“Commission”), release time in New Jersey is a pervasive practice, one which burdens public resources, and in many cases, drastically reduces the efficiency of government operations. State of New Jersey Commission of Investigation, *Union Work, Public Pay: The Taxpayer Cost of Compensation and Benefits for Public-Employee Union Leave* 12 (2012).³ The report estimated that release time “cost taxpayers more than \$30 million in salaries and medical benefits” across New Jersey. *Id.* at 3. It also found that release time exists inconsistently among multiple classes of government

³ <https://www.state.nj.us/sci/pdf/SCIUnionReport.pdf>.

employees—including public school teachers, some public safety employee groups, and employees represented by the Communications Workers of America and the American Federation of State, County and Municipal Employees, “blue collar” workers such as mechanics, electricians, and others—and that “[t]he practice of providing government-paid leave for union work ... persists amid a thicket of confusing and inconsistent statutory language covering different classes of public employees.” *Id.* at 10. Given the pervasiveness, inconsistency, and dubious statutory grounds on which release time rests in this State, a decision from this Court on constitutional grounds would help definitively resolve a question of continuing statewide importance.

This is particularly true because release time persists despite this Court’s admonition in *Kervick* that public resources may only be used to advance public purposes, not the private interests of any private organization. As the Court observed in *Kervick*, “when the State once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger.” 42 N.J. at 207 (internal citation omitted).

Here, politically influential public labor union members are given the opportunity to engage in electioneering and lobbying activities that often advance the interests of the same

policymakers and entities with whom those union members later negotiate—and to do it all on the taxpayer's dime. These direct subsidies to labor unions have been included in collective bargaining agreements throughout the State to advance their private interests at the public's expense. That sort of special interest influence to extract public subsidies is exactly what animated the adoption of the Gift Clause in New Jersey's Constitution, and is precisely what the Court warned against in *Kervick*. See 42 N.J. at 207. As a result, because this Court is "charged with the solemn responsibility of construing the meaning of the New Jersey Constitution," *DePascale v. State*, 211 N.J. 40, 45 (2012), should the Court grant certification on the statutory question, it should also do so on the constitutional question to clarify that public resources cannot be used to advance the private interests of the JCEA in this case, or in the other cases of release time that exist throughout New Jersey.

CONCLUSION

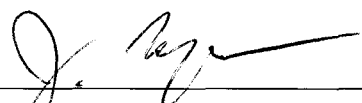
Although Defendant JCEA's Petition for Certification should be denied, if this Court grants certification on that petition, it should also grant certification on Plaintiffs' Cross-Petition for Certification, and enter an Order (1) affirming the judgment of the Appellate Division that Title 18A of New Jersey statute does not authorize the challenged release time provisions, and further

holding that (2) the New Jersey Constitution's Gift Clause prohibits the disbursement of public funds in this case.

CERTIFICATION

I certify, pursuant to R. 2:12-7(a), that this Cross-Petition for Certification presents a substantial question and is filed in good faith and not for purposes of delay.

Dated: November 4, 2019

By: 
JUSTIN A. MEYERS, ESQ.
LAW OFFICES OF G.
MARTIN MEYERS, P.C.

By: 
JONATHAN RICHES, ESQ.
GOLDWATER INSTITUTE

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MOSHE ROZENBLIT and QWON KYU
RIM,

Plaintiffs/Appellants/
Cross-Respondents

v.

MARCIA V. LYLES, in her
official capacity as
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al.,

Defendants/Respondents,

And

JERSEY CITY EDUCATION
ASSOCIATION,

Defendant/Respondent/
Cross-Appellant.

SUPREME COURT OF NEW JERSEY

CIVIL ACTION

DOCKET NO.: 083434

On Cross-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. Vernioia, J.A.D.,
Hon. Scott J. Moynihan, J.A.D.

AMENDED NOTICE OF CROSS-PETITION FOR CERTIFICATION

TO: Mark Neary
Clerk of the Supreme Court of New Jersey
Hughes Justice Complex
25 West Market Street
Trenton, New Jersey 08625-0970


Joseph H. Orlando
Clerk of the Appellate Division
Superior Court of New Jersey
Hughes Justice Complex
25 West Market Street
Trenton, New Jersey 08625-0006

Richard A. Friedman, Esq.
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PLEASE TAKE NOTICE that Plaintiffs-Appellees Moshe Rozenblit and Qwon Kyu Rim, through their attorneys, Scharf-Norton Center for Constitutional Litigation at the GOLDWATER INSTITUTE and Law Offices of G. Martin Meyers, PC, shall petition the Supreme Court for an Order seeking certification to the portion of the judgment pertaining to the Gift Clause claim (Article 8, § 3, ¶¶ 2-3) entered by the Appellate Division in the above matter on August 21, 2019. The filing fee of \$250.00 is enclosed herewith.

Dated: September 16, 2019

By: 
JONATHAN RICHES, ESQ.
GOLDWATER INSTITUTE

By: 
JUSTIN A. MEYERS, ESQ.
LAW OFFICES OF G. MARTIN MEYERS

Attorneys for Plaintiffs-Appellees

NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1611-17T1

MOSHE ROZENBLIT, and
WON KYU RIM,

Plaintiffs-Appellants/
Cross-Respondents,

v.

MARCIA V. LYLES, in her
official capacity as Superintendent
of the Jersey City Board of Education;
VIDYA GANGADIN, in her official
capacity as President of the
Jersey City Board of Education; and
JERSEY CITY PUBLIC SCHOOLS
OF THE CITY OF JERSEY CITY,

Defendants,

and

JERSEY CITY BOARD OF
EDUCATION, and JERSEY CITY
EDUCATION ASSOCIATION, INC.,

Defendants-Respondents/
Cross-Appellants.

APPROVED FOR PUBLICATION

August 21, 2019

APPELLATE DIVISION

Argued March 27, 2019 – Decided August 21, 2019

Before Judges Fuentes, Vernoia, and Moynihan.

On appeal from the Superior Court of New Jersey, Chancery Division, Hudson County, Docket No. C-000002-17.

Jonathan Riches (Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute) of the Arizona bar, admitted pro hac vice, argued the cause for appellants/cross-respondents (Law Offices of G. Martin Meyers, PC, and Jonathan Riches, attorneys; Justin A. Meyers, Aditya Dynar (Scharf-Norton Center for Constitutional Litigation at the Goldwater Institute) of the Arizona bar, admitted pro hac vice, and Jonathan Riches, on the briefs).

Kenneth I. Nowak argued the cause for respondent/cross-appellant Jersey City Education Association, Inc. (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys; Richard A. Friedman and Flavio L. Komuves, on the briefs).

David I. Solomon argued the cause for respondent/cross-appellant Jersey City Board of Education (Florio Perrucci Steinhardt & Capelli, LLC, attorneys, join in the brief of respondent/cross-appellant Jersey City Education Association, Inc.).

Mark Miller argued the cause for amicus curiae Pacific Legal Foundation (Mark Miller and Deborah J. LaFetra (Pacific Legal Foundation) of the California bar, admitted pro hac vice, attorneys; Mark Miller and Deborah J. LaFetra, on the brief).

The opinion of the court was delivered by

FUENTES, P.J.A.D.

This appeal challenges the legality of a section in the collective bargaining agreement (CBA) entered into between the Jersey City Board of Education (Board) and the Jersey City Education Association, Inc., (JCEA) for the period covering September 1, 2013 to August 31, 2017. Specifically, as construed by the JCEA and the Board, Article 7, Section 7-2.3 of the CBA denoted "Association Rights," requires the Board to pay the salaries and benefits of two teachers selected by the members of the JCEA to serve as "president . . . and his /her designee," and to allow them to devote all of their work-time to the business and affairs of the JCEA. The Board must also continue to grant the president of the JCEA "adequate office and parking facilities."

Section 7-2.3 does not on its face address whether the president of the JCEA and his or her designee are entitled to receive their full salaries and benefits as teachers during the time they exclusively serve the needs of the JCEA. It is undisputed, however, that the two teachers selected by the members of the JCEA to serve in this capacity received their full salaries and benefits from the Board during the three-year term of this CBA. Moreover, the Board conceded during oral argument before this court that this practice predates the term of this particular CBA.

We now hold this practice is not sanctioned by Title 18A and declare this Section of the CBA unenforceable as against public policy.

I

Plaintiff Moshe Rozenblit is a resident of Jersey City who pays real estate taxes to the City. Plaintiff Won Kyu Rim¹ is a resident of this State who pays New Jersey income tax. Plaintiffs argue this contractual arrangement by the Board violates Article VIII, § 3, ¶ 3 of the New Jersey Constitution, which provides: "No donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever." They also argue that N.J.S.A. 18A:30-7, which permits the Board to pay the salary of an employee in cases of absence not constituting sick leave, does not authorize the Board to reassign two teachers to devote their entire professional time as the "exclusive and sole bargaining representative[s] for all certificated personnel, attendance counselors, and teacher assistants" employed in this school district.

Amicus Curiae Pacific Legal Foundation's legal argument echoes plaintiffs' constitutional argument. Amicus also argues that the General Equity

¹ Plaintiffs' standing to bring this action is unchallenged. See Stubaus v. Whitman, 339 N.J. Super. 38, 48-51 (App. Div. 2001).

Judge's finding that the Board "receives a substantial benefit from employing the [release] employees in the form of facilitating labor peace" is not supported by the record. Amicus notes that on March 16, 2018, JCEA members went on strike as a negotiating tactic, in defiance of our State's long-established common law principle denying all public employees, including school district employees, the right to strike. See In re Block, 50 N.J. 494, 499-500 (1967).

Relying on Roe v. Kervick, 42 N.J. 191 (1964), the JCEA argues plaintiffs have not presented sufficient grounds to impugn the constitutionality of this contractual arrangement on its face. The Board did not submit its own independent brief in this appeal, opting instead to adopt the JCEA's position. The Chancery Division, General Equity Part rejected plaintiffs' argument. The judge applied the Court's holding in Roe and found "that these release time provisions serve the dual public purposes of facilitating the collective negotiations process and keeping labor peace in the Jersey City Public Schools."

II

We start our analysis guided by the long-settled jurisprudential principle that admonishes judges to "strive to avoid reaching constitutional questions unless required to do so." In re Plan for the Abolition of the Council on Affordable Hous., 214 N.J. 444, 461 (2013) (quoting Comm. to Recall

Menendez from the Office of U.S. Senator v. Wells, 204 N.J. 79, 95 (2010)).

Here, we are satisfied there are sufficient statutory grounds to definitively decide this appeal. We thus decline to reach the constitutional arguments advanced by plaintiffs and amicus.

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.

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 cases of absence not constituting sick leave, or to grant sick leave over and above the minimum sick leave as defined in this chapter or allowing days to accumulate over and above those provided for in section [N.J.S.A.] 18A:30-2, except that no person shall be allowed to increase his total accumulation by more than 15 days in any one year.

[(Emphasis added).]

The Legislature adopted this statute effective January 11, 1968. Fifty-one years later, our research has revealed only one reported opinion from this court that tangentially addressed the issues raised in this appeal. In Board of Education of Piscataway Township v. Piscataway Maintenance & Custodial Association, this court addressed the legality of a provision for extended total disability benefits contained in a contract between the Board of Education of the Township of Piscataway and the Piscataway Maintenance & Custodial Association and whether it exceeded the board of education's authority under Title 18A. 152 N.J. Super. 235, 238 (App. Div. 1977). The legal question in Piscataway concerned whether an agreement to pay the salary of an employee, in whole or in part, for prolonged absence beyond the allowable annual and accumulated sick leave in N.J.S.A. 18A:30-6 violated the school board's managerial prerogative. Id. at 246. We held that "[b]y granting its employees extended total disability leave benefits as a matter of right, the board in this case surrendered its statutory obligation to deal with each case on an individual basis." Ibid.

N.J.S.A. 18A: 30-7 to -13 addresses additional sick leave and other forms of leaves of absence such as "accrued vacation and sick leave bank." For example, N.J.S.A. 18A:30-8 provides:

Any school district employee who qualifies as a member of the United States team for athletic competition on the world, Pan American or Olympic level, in a sport contested in either Pan American or Olympic competitions, shall be granted a leave of absence with pay and without loss of rights, privileges and benefits and without interruption of membership in any retirement system for the purpose of preparing for and engaging in the competition. The paid leave granted pursuant to this act shall be no more than 90 calendar days in 1 year or the combined days of the official training camp and competition, whichever is less.

Any school district which grants employees leaves of absence pursuant to the provisions of this act shall be reimbursed by the State, for the full amount of the actual cost of employing substitutes for said employees.

[(Emphasis added).]

N.J.S.A. 18A:30-9 and N.J.S.A. 18A:30-9.1 limit the accumulation of unused vacation time. N.J.S.A. 18A:30-10 sanctions the establishment of a "sick leave bank" to permit employees to voluntarily donate "sick leave days or any other leave time" to a colleague in need. The establishment of a sick leave bank must be "agreed upon by the board and the majority representative." Sick leave banks are administered by a six-member committee comprised of three representatives from the board of education and three representatives "selected by the majority representative or majority representatives of those employees of the board who are eligible to participate in the sick leave bank." N.J.S.A.

18A:30-11. The Legislature also made clear that the benefits provided through and by the sick leave bank did not authorize boards of education to reduce or negatively affect more favorable sick leave, disability pay or other benefits obtained through collective bargaining agreements, or prohibit future negotiations to enhance these benefits. N.J.S.A. 18A:30-12. Finally, the Legislature directed how these statutory provisions should be construed:

No provision of this act [N.J.S.A. 18A:30-10 et seq.] shall be construed as limiting the authority of a board of education to provide an employee with additional days of salary pursuant to [N.J.S.A.] 18A:30-6 after all sick leave available to the employee, including days provided under this act, has been used.

[N.J.S.A. 18A:30-13.]

"The Legislature's intent is the paramount goal when interpreting a statute and, generally, the best indicator of that intent is the statutory language." DiProspero v. Penn, 183 N.J. 477, 492 (2005). Furthermore, "words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language." N.J.S.A. 1:1-1. Courts must also construe the words in a statute "in context with related provisions so as to give sense to the legislation as a whole." Garden State Check Cashing Serv. v. State Dep't of

Banking & Ins., 237 N.J. 482, 489 (2019) (quoting Spade v. Select Comfort Corp., 232 N.J. 504, 515 (2018)).

Mindful of the principles of statutory construction, we conclude that N.J.S.A. 18A:30-7 does not empower the Board in this case to continue to pay the salaries and benefits of the president of the JCEA and his or her designee, while they devote their entire work-time to the business and affairs of the union. A plain reading of the operative language in N.J.S.A. 18A:30-7 shows the Legislature authorized the Board:

to fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave, or to grant sick leave over and above the minimum sick leave as defined in this chapter or allowing days to accumulate over and above those provided for in section [N.J.S.A.] 18A:30-2

The employees who fall within this class must be absent from work for reasons unrelated to sick leave. Here, the two teachers who serve the JCEA as president and designee were not absent. They reported to work every day to an office located on property provided by the school district to attend to the affairs of the JCEA. Jersey City is our State's second largest city. Its school district operates a vast, educationally diverse school system. As of May 2019, the district employed 2,993 instructional staff, 1,317 non-instructional personnel,

and 151 administrators, and enrolled 26,993 students.² Its brick and mortar educational infrastructure consists of fourteen elementary schools accommodating children from pre-kindergarten to the fifth grade; thirteen grammar schools accommodating children from pre-kindergarten to eighth grade; four middle schools accommodating children from sixth to eighth grade; six high schools; one secondary school accommodating children from sixth to twelfth grade; one Alternative Program, accommodating children from sixth to twelfth grade; and three Early Childhood Centers.³

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

² See Quick Links, Vital Facts, JCBOE.ORG, www.jcboe.org/boe2015/index.php?option=com_content&view=article&id=166&Itemid=650 (last visited Aug. 13, 2019).

³ See Schools, JCBOE.ORG, www.jcboe.org/boe2015/index.php?option=com_content&view=article&id=449&Itemid=1090 (last visited Aug. 13, 2019).

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.

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. However, the CBA at issue here contains several sections that exemplify the proper exercise of the Board's statutory authority to grant leaves of absence for various reasons unrelated to sick leave. Under Article 31, denoted "Other Absences" when there is a death in the teacher's family, "the teacher shall be excused without loss of pay or accumulated leave for death related absences taken within seven (7) calendar days of the date of death." This Section also allows the faculty of an entire school, or if not practical a representative number of the faculty, a paid half-day off to attend the funeral services of an active colleague. The Board may also authorize paid absence to an employee who is quarantined as ordered by an official action. Article 31 also provides for paid absence in response to a court order.

Article 33, denoted "Sabbatical Leave for Study or for Rest and Recuperation," authorizes the Board to grant a leave of absence for rest and recuperation. However, a teacher on leave of absence for rest and recuperation

receives only one-half of his or her "monthly salary for each month during the continuance of such leave." A leave of absence for study or for rest and recuperation must begin on September 1st and is limited to twelve months. Teachers seeking a leave of absence for rest and recuperation must submit their application to the Superintendent "at least three (3) months before the beginning of the desired leave."

Article 33 also allows a teacher to apply for a leave of absence to study. This application should be presented to the Superintendent four months in advance. A teacher granted this academic leave of absence must also "sign a contract to serve in the public schools of the District for at least two (2) years after the expiration of a leave." If the teacher is unable to honor this contractual obligation, "the teacher shall reimburse the School District in direct proportion to the unfilled time except in case of death or permanent disability." (Emphasis added).

Finally, teachers who are granted a leave of absence for rest and recuperation or for study, must refrain from engaging in any remunerative occupation during the continuance of the leave of absence. Teachers on leave to study must present to the Superintendent documentation attesting to their attendance and successful completion of the course of study offered by these

academic institutions. Violations of these requirements will be considered by the Board to constitute evidence of conduct unbecoming a teacher. A maximum of fifteen "teaching staff members" are permitted to take a sabbatical or leave for rest and recuperation.

The public policy underpinning these leaves of absence is reflected in the reasonableness of the underlying bases for the requests and in the reciprocal benefits they confer. Both the Board and the teacher benefit from these hiatuses of limited-duration. They serve to relieve the teacher from the pressures and emotional exhaustion experienced throughout a lengthy career. The teacher is given the opportunity to separate from his or her day-to-day activities without risk of being unemployed; the Board gives a valuable and experienced teacher the opportunity to "refresh" and return to the profession with a renewed sense of commitment. 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 policies 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.

Article 7, denoted "Association Rights" aptly and candidly describes its only purpose – to assure and promote the interests of the JCEA. Article 7 contains a total of eleven sections. We limit our recitation to the four sections most germane to the issue raised here:

Section 7-1: The [JCEA] shall have the right to distribute, through the use of the teachers' mailboxes, material dealing with the proper and legitimate business of the [JCEA].

Section 7-2: The principal and/or his/her designee shall be notified prior to the distribution of such materials.

Section 7-2.1: Representatives of JCEA, NJEA, and NEA shall have the right to enter the schools to meet with teachers during their preparation periods or lunch periods or after school to carry our appropriate [JCEA] business.

Section 7-2.2: The president or his [or her] designee shall have the right to enter the school and meet with teachers at any time. This right shall not be abused.

Section 7-2.3: The president of the JCEA and his/her designee, shall be permitted to devote all of his/her time to the [JCEA] business and affairs. The President shall continue to be granted adequate office and parking facilities.

Section 7-2.4: The president's designee shall carry out appropriate [JCEA] business, provided that the aforesaid business shall not disrupt the educational process. The designee shall notify the Superintendent or his/her designee as to where and when he/she is carrying out such [JCEA] business during school time.

[(Emphasis added).]

We emphasize Section 7-2.3 to show the absence of any language obligating the Board to pay the salaries and benefits of the two teachers serving in this capacity for the JCEA. Inexplicably, the Board does not dispute that the language in Section 7-2.3 implicitly requires the Board to pay these two teachers their full salaries and benefits. We find no textual support in the CBA for this conclusion and no legal authority in Title 18A for the Board to sanction this disbursement of public funds.

In N.J.S.A. 18A:30-8, the Legislature clearly stated that a school district employee who qualifies as a member of the United States team for athletic competition on the world level "shall be granted a leave of absence with pay and without loss of rights, privileges and benefits and without interruption of membership in any retirement system for the purpose of preparing for and engaging in the competition." The Legislature made equally clear the limitations of this public generosity: "paid leave granted pursuant to this act

shall be no more than 90 calendar days in 1 year or the combined days of the official training camp and competition, whichever is less." Ibid.

The intent of the Legislature in N.J.S.A. 18A:30-7 was also made clear by the conspicuous omission of language similar to N.J.S.A. 18A:30-8. 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.

Reversed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY

HUDSON VICINAGE

CHAMBERS OF
BARRY P. SARKISIAN
PRESIDING JUDGE
CHANCERY-GENERAL EQUITY



Brennan Courthouse
583 Newark Avenue
Jersey City, New Jersey 07306

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THE WRITTEN APPROVAL OF THE COMMITTEE ON OPINIONS

LETTER OPINION

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Re: Moshe Rozenblit et al v. Marcia V. Lyles, et al
Docket No. HUD-C-2-17
Date of Hearing: October 27, 2017
Date of Decision: October 31, 2017

Dear Counsel:

Introduction

Presently before the Court are cross-motions for summary judgment submitted by Plaintiffs, Moshe Rozenblit and Qwon Kyu Rim ("Plaintiffs") and Defendant, Jersey City Education Association ("JCEA"). Plaintiffs filed their complaint in this matter on January 04, 2017 under which they sought to have certain provisions of the collectively bargained for agreement ("CNA") entered into between the Jersey City School District, and the teacher's union, JCEA, declared unconstitutional as violations of the "Gift Clause" of the New Jersey

Constitution.¹ More specifically, Plaintiffs object to the “release time” provisions in Sections 7-2.3 and 7-2.4 of the CNA, under which the union president and his/her designee (“releasee employees”) have the right to carry out union business and affairs full-time, while the District pays them a class-room teacher’s salary. This matter last appeared before this Court as Defendant, JCEA’s motion to dismiss pursuant to R. 4:6-2(e), which was denied by this Court on May 30, 2017.

Pursuant to the Court’s amended case management Order of July 14, 2017 discovery took place.² After reviewing all the evidence and statements of material facts presented by both parties, the Court determines that there are no material facts which warrant a trial in this matter. For the reasons in this opinion, the Court denies Plaintiffs’ motion for summary judgment seeking injunctive relief and grants Defendant JCEA’s motion for summary judgment seeking dismissal of this action.

Facts

Plaintiff Rozenblit is a resident of the City of Jersey City, and pays property and sales tax in Jersey City. Plaintiff Rim is a resident of the State of New Jersey and pays income tax thereto. JCEA is a labor union that is the sole and exclusive bargaining representative for all teachers, attendance counselors, and teacher assistants employed in the School District of Jersey City.

In June 2015, negotiators from the School District of Jersey City (“District”) and the JCEA reached accord on and ratified a collective negotiations agreement (“CNA”) covering the period of September 1, 2013 to August 31, 2017 for certain certificated teachers, attendance counselors, and teacher assistants. The CNA includes certain “release time” provisions as set forth in Sections 7-2.3 and 7-2.4 of that agreement, titled “Association Rights.” Section 7-2.3 provides that the JCEA President and his/her designee “shall be permitted to devote all of his/her time to the Association business and affairs.” Section 7-2.4 provides that the releasee employees shall “notify the Superintendent of his/her designee as to where and when he/she is carrying out such Association business during school time.”

Similar release time provisions allowing for two (2) full-time releasee employees have been negotiated in prior JCEA CNAs since at least 1969, under which only the JCEA president was given full-time release status. In 1998 it was decided that two (2) full-time release employees would be provided for.

Mr. Greco, the JCEA President and Ms. Thorp, his designee, are the District employees currently designated to receive release time on a full-time basis by the JCEA. By the terms of the JCEA constitution, these releasee employees are required to be members of the JCEA as well as employees of the Jersey City Public School system. The releasees are paid according to the same rates and receive the same benefits as all other classroom teachers. The District does not determine who will be appointed JCEA

¹ As set forth in Article 8, § 2, ¶ 1, Article 8, § 3, ¶ 2, and Article 8, § 3, ¶ 3.

² Subject to a Stipulated Protective Order, dated August 15, 2017.

President or who will be appointed his/her designee, and does not have authority to remove individuals from those positions. The CNA does not require that the releasee employees keep track of, or report, their daily time records to any supervisor. The releasee employees also do not receive performance reviews from any supervisor or supervisory body.

The releasee employees, of course, conduct contract negotiations, representing the JCEA, when the CNA is negotiated, which negotiations occur approximately every four (4) years. When the CNA is not being negotiated, the majority of the releasee employee's time is spent addressing and attempting to resolve conflicts that arise between the District staff and the administration. This process often involves informal meetings to address grievances and disciplinary hearings. If the grievance or disciplinary issue is not resolved informally, the District schedules time to conduct formal hearings on teacher grievances or administration disciplinary concerns. Mr. Greco, as permitted by Article 36 of the CNA, also serves on various Jersey City School committees or bodies and periodically meets with the District Superintendent, pursuant to Article 9 of the CNA. The releasee employees also engage in some advocacy and political activities on behalf of the JCEA, although such activities are typically scheduled after the school day is concluded.

While the District does not supervise the releasee employees in the same way it might supervise a teacher or administrator, the District does retain some formal and informal controls over the releasee employees. The CNA contains a section titled "Meetings of Superintendent and JCEA President" under which the Superintendent and the JCEA President "may meet at least once a month during the academic year . . . to discuss and attempt to resolve problems affecting the schools, teacher morale, working conditions, and other issues pertinent to the implementation of this contract." In practice, the District administrators are in charge of scheduling administrator meetings, committee meetings, disciplinary hearings and labor negotiations to which the releasee employees are obligated to report to and participate in. Mr. Greco and Ms. Thorp, as employees of the District, report to the District Administration when they take sick leave, personal leave, or other absence from duty authorized by the CNA. Pursuant to the CNA, when meeting with teachers or administrators in school buildings, the releasees report their presence to the building principal or sign in at the school office. These releasee employees may also be subject to discipline by the District for conduct related to their employment. The District administrators have regular face-to-face and other contact with the releasee employees and have various opportunities to supervise their work.

Discussion

Summary Judgment Standard

Pursuant to R. 4:46-2(c), summary judgment is appropriate

[I]f the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order

as a matter of law. An issue of fact is genuine only if, considering the burden of persuasion at trial, the evidence submitted by the parties on the motion, together with all legitimate inferences there from favoring the non-moving party, would require submission of the issue to the trier of fact.

When deciding whether a genuine issue of material fact exists that would preclude summary judgment, the judge must "consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Brill v. Guardian Life Ins. Co., 142 N.J. 520, 540 (1995); see also Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 74-75 (1954). All favorable inference must be drawn in favor of the party opposing the motion. Brill, supra, 142 N.J. at 536. The judge's function is not to weigh the evidence and determine the truth of the matter; rather, it is to determine whether there is a genuine issue for trial. Id. at 540. Summary judgment is to be granted where there is no issue to be decided by the trier of fact based on the evidence. Id. at 536-37. However, it is not so that every issue of fact is material, "[i]n order to determine materiality, it is necessary first to set forth the contours of the legal issue presented." Rowe v. Mazel Thirty, LLC, 209 N.J. 35, 41 (2012).

Plaintiffs, by filing their motion for summary judgment argue that there have been sufficient facts presented to find that the "release provisions" of the CNA violate the New Jersey Constitution's "gift clause" provisions. Defendants argue that the facts, as they stand before the Court, warrant a dismissal of Plaintiffs' action pursuant to R. 4:46-1 et. seq.

This matter requires an interpretation and application of the relevant "gift clause" portions of the New Jersey Constitution with regard to the "release provisions" of the CNA as entered into between JCEA and the District. However, before that determination can take place, the Court must determine the Plaintiffs' burden of proof.

Burden of Proof

When challenging a legislative act as being unconstitutional under the New Jersey Constitution, our Courts have held that the moving party carries a steep burden of proof. Defendant, JCEA argues that Plaintiffs are required to prove their allegations "beyond a reasonable doubt" pursuant to Gangemi v. Berry, 25 N.J. 1, 10 (1957). Defendant asserts that the Court has held that actions challenging the implementations of a legislative act as unconstitutional are held to the same standard. Franklin v. New Jersey Dep't of Human Services, 111 N.J. 1, 16, 17 (1988).

Plaintiffs assert that the Gangemi test is in applicable as a conjunctive two-factor test that only applies the "beyond a reasonable doubt" standard if (1) there is a legislative act, and (2) that the act is challenged under a constitutional provision that is silent, unclear or ambiguous. In re P.L. 2001, Chpt. 362, 186 N.J. 368 (2006).

[I]t is the settled rule of judicial policy in this State that a legislative act will not be declared void unless its repugnancy to the constitution is clear beyond a reasonable

doubt. 'The constitutional limitation upon the exercise of legislative power must be clear and imperative'; there is to be 'no forced or unnatural construction'; the limitation upon the general legislative power is to be 'established and defined by words that are found written in that instrument,'

Gangemi v. Berry, 25 N.J. 1, 10 (1957) (citations omitted).

Plaintiffs contend that the challenged release time provisions of the CNA are (1) not a legislative act or an implementation of such, and (2) even if they were construed as a legislative act or implementation of such, the gift clause provision of the constitution clearly prohibits the kind of monetary allocation permitted under the release time provisions.

Here, N.J.S.A. 18A:30-7, while not explicitly authorizing release time leave, establishes the grounds for it³ by permitting boards of education "to fix either by rule or by individual consideration, the payment of salary in cases of absence not constituting sick leave. . . ." It is true that Plaintiff is not directly challenging the validity of that statute. Plaintiff is instead challenging the validity of the release time provisions of the CAN and its nexus to that statute which triggers a significant burden of proof.

On the other hand, the Jersey City Board of Education, through its District representatives argues that it acted, in negotiating the terms of the CNA, to implement N.J.S.A. 18A:30-7 by fixing the payment of teachers' salary in cases of absence for union business under the collectively negotiated terms of that contract.

It is not clear to the Court that the "gift clause" provisions of the New Jersey Constitution prohibits the implementation of N.J.S.A. 18A:30-7 through the inclusion of "release time" provisions in the CNA. Plaintiff's contention that the release time provisions of the CNA are plain violations of the "gift clause" is not "established and defined by words that are found written in that instrument" (i.e., the New Jersey Constitution). The authors of the New Jersey Constitution obviously did not mean to prohibit all monetary allocation from government entities to private parties. Gangemi v. Berry, 25 N.J. 1, 10 (1957) (citations omitted).

Plaintiffs' steep burden of proof is justified by the deference the Court gives to the constitutional validity of a legislative act that has been in existence without challenge for an extended period of time. N.J.S.A. § 18A:30-7 has been law for fifty (50) years. P.L. 1967, c. 271. Release time provisions have been included in JCEA CNAs since at least 1969. As evidenced by the long life of this statute without the Court's invalidation and without legislative amendment, a presumption exists that this implementation of the statutory right set forth in N.J.S.A. 18A:30-7 is constitutional. See State v. Trump Hotels & Casino Resorts, 160 N.J. 505, 527 (1999) ("[t]he presumption that a statute is constitutional is enhanced when that statute has been in effect and implemented without challenge over an

³ The State of New Jersey Commission on Investigation issued a report on release time provisions cited in Plaintiff's brief in opposition on page 15. That report, while not taking a favorable view of release time, recognizes that N.J.S.A. 18A: 30-7 "establishes the grounds" for paid release time by "giving boards of education the power to grant virtually any type of paid time-off through contract negotiations or other means." (SCI Report, pg. 6).

extended period"). Moreover, although not binding on this Court, the validity of release time provisions have been consistently upheld in numerous decisions of the New Jersey Public Employment Relations Commission. See e.g. I/M/O Brick Twp. Bd. Of Ed. v. Brick Twp. Educ. Assn. Docket No. CO-2011-210 (Jan 28, 2011), City of Newark, PERC No. 90-122, 16 NJPER ¶21, 164 (PERC Jun. 26, 1990). Similar release time provisions have also been held to withstand constitutional challenge under other state's constitutional gift clause provisions. See Cheatham v. DiCiccio, 379 P.3d 211 (Ariz. Supreme Ct. 2016) and Idaho Freedom Foundation v. Ind. Sch. Dist. Of Boise City, No. CV-OC-2015-15153 (Idaho 4th Dist. Ct. Oct. 25, 2016).

Thus in order for Plaintiff to succeed in having the Court determine that Sections 7-2.3 and 7-2.4 (the "release-time provisions") of the June 2015 Collective Bargaining Agreement between the New Jersey Education Association and the Jersey City School District violates the New Jersey Constitution, Art. VIII, § 3, ¶¶ 1-3, Plaintiffs must show that the release-time provisions in the aforementioned contract are repugnant to the constitution beyond a reasonable doubt.

Gift Clause Challenge

Plaintiffs challenge the release time provisions of the collective bargaining agreement as being in violation of the "Gift Clause" of the New Jersey Constitution, Article 8, § 2, ¶ 1, Article 8, § 3, ¶ 2, and Article 8, § 3, ¶ 3.

Article 8, § 2, ¶ 1 provides, in full, that: "The credit of the State shall not be directly or indirectly loaned in any case."

Article 8, § 3, ¶ 2 provides, in full that:

No county, city, borough, town, township or village shall hereafter give any money or property, or loan its money or credit, to or in aid of any individual, association or corporation, or become security for, or be directly or indirectly the owner of, any stock or bonds of any association or corporation.

Article 8, § 3, ¶ 3 provides, in full, that: "No donation of land or appropriation of money shall be made by the State or any county or municipal corporation to or for the use of any society, association or corporation whatever."

New Jersey Supreme Court's decision in Roe v. Kervick, 42 N.J. 191 (1964), is the seminal case discussing the "gift clause" of the New Jersey Constitution. Historically, the constitutional prohibitions of Article VIII were motivated by the myriad of abuses that followed efforts by the State to encourage the development of railroads through grants of financial aid. Roe v. Kervick, 42 N.J. 191, 206 (1964). "The strictures of Article VIII, which were adopted in 1875 were simply a retreat to a fundamental doctrine of government, i.e., that public money should be raised and used only for public purpose." Id. In Roe, the New Jersey State Treasurer sought a judgment that the New Jersey State Area

Redevelopment Assistance Act ("ARAA"),⁴ as overseen by the commissioners of an independent state agency, violated the "gift clause" provisions of the New Jersey Constitution by allowing public credit to be lent to private entities. In upholding ARAA's constitutionality, Roe set forth a two-part test for the Court to use when determining whether a government provision of financial aid is unconstitutional: First [the Court must determine], whether the provision of financial aid is for a public purpose, and second, whether the means to accomplish it are consonant with that purpose. Id. at 212; see also Bryant v. City of Atlantic City, 309 N.J. Super. 596, 612 (App. Div. 1998).

I. Public Purpose

The determination of whether the provision of some financial aid by the government body exists for a public purpose or whether that provision is instead for a private purpose is one that "is incapable of exact or perduring definition." Roe v. Kervick, 42 N.J. 191, 207 (1964). "In each instance where the test is to be applied, the decision must be reached with reference to the object sought to be accomplished." Id. Where a government allocation of financial aid provides an "incidental private benefit" as part of an overall contract that meets the other factors of the Roe test, that incidental benefit will not make the contract unconstitutional as long as the overall public purpose is being adequately served. Id. at 231. A public purpose is generally described as one that "serves to benefit the community as a whole." Id. at 207. A governmental determination of what constitutes a public purpose "is entitled to great weight in the courts. It should not be set aside as violative of the [Constitution] unless there is no reasonable basis for sustaining it." Id. at 229-30. "If there be reasonable difference of opinion as to validity of a plan devised to effectuate a public purpose, the judiciary should defer to the legislative judgment." Id. at 230. Moreover, "[i]t is fair to say that our courts have adopted the view that compensation paid to public employees, whatever the label, is not a gift so long as it is included within the conditions of employment either by statutory direction or contract negotiation." Maywood Ed. Assn. Inc. v. Maywood Bd. of Ed., 131 N.J. Super. 551, 557 (Ch. Div. 1974) (retirement payments by district board for unused sick leave did not violate gift provisions of the Constitution).

Here, the Court finds that the release time provisions of the CNA serve valid public purposes. The release time provisions in the CNA are implementations of a statutory right. As set forth above, the Court understands the release time provisions of the CNA to be the District's implementation of the right to grant teachers non-sick day leave pursuant to N.J.S.A. 18A:30-7. Therefore, the Court will give deference to the legislative determination that there are public purpose reasons for granting the District authority to grant such non-sick-day leave.

However, even if we were not to defer to the legislative's decision to authorize release time, the Court finds that the release time provisions facilitate important functions that serve the District in their constitutional obligation to provide education to the children of

⁴N.J.S.A. §§ 13:1B-15.13 et seq.

Jersey City. These functions include, but are not limited to, engaging in the collective negotiations process; facilitating an effective disciplinary hearing process for employees of the District; facilitating an effective grievance process for employees of the District; limiting the expense to the public of prolonged arbitration and facilitating labor-management communication to ensure labor peace.

Our courts have long recognized that the collective bargaining process, in and of itself, serves an important public purpose. Robbinsville Twp. Bd. Of Ed. V. Washington Twp. Educ. Ass'n., 227 N.J. 192, 204 (2016); I/M/O Hunterdon Bd. Of Freeholders, 116 N.J. 332, 338 (1989). Granting certain District employees release time to engage in that process in negotiating contracts for the JCEA serves the public by facilitating a collectively negotiated agreement between the JCEA and the District.

The Court also recognizes that the majority of the releasee employees time is not spent negotiating contracts, rather, the majority of their time is spent engaging in the disciplinary/grievance hearing process outlined in the CNA. In addition to the conciliation and resolve of grievance and/or disciplinary claims, the releasee employees also attend various meetings with District Administrators to ensure that labor-management relations run smoothly. The release employee's function as a peace-keeping force in the labor-management relationship in the District serves the purpose of ensuring that its employees and administration can cooperate in order to serve the District in implementing its constitutional obligation to educate the children of Jersey City.⁵ Moreover, the full-time availability of the releasee employees for their attendance to labor and management conflicts benefits the District financially by resolving matters that might otherwise evolve into costly and time-consuming arbitration through informal and cost-effective conciliatory meetings. The Court is satisfied that Defendants have demonstrated that these release time provisions serve the dual public purposes of facilitating the collective negotiations process and keeping labor peace in the Jersey City Public Schools.

II. Means to Accomplish Public Purpose

Under the second prong of the test set forth in Roe v. Kervick, 42 N.J. 191 (1964), the Court must examine a variety of factors to determine whether the means fit the purpose, such as whether the government: (1) retains sufficient control over the expenditure, see New Jersey Citizen Action, Inc. v. County of Bergen, 391 N.J. Super. 596, 604 (App. Div. 2007); and (2) if the transaction is contractual in nature, whether the expenditure is "based upon a substantial consideration." New Jersey State Bar Ass'n v. State, 387 N.J. Super. 24, 53 (App. Div. 2006).

⁵ In the Arizona Supreme Court case of Cheatham v. DiCiccio, 379 P.3d 211, 217, 218 (Ariz. Supreme Ct. 2016) the court recognized that when determining the public purpose of release time provisions in response to a gift clause challenge under the Arizona State Constitution, the public purpose of the collectively negotiated contract should be viewed as a whole. The Court here adopts this view in that the release time provisions cannot be viewed in isolation from the public purpose behind the CNA.

Plaintiff asserts that the controls in place by the District are not adequate for the District to determine whether the funds expended in paying these releasee employee's salaries are primarily being used for a public or private purpose. The Court disagrees.

It is undisputed that Mr. Greco and Ms. Thorp report to the District administration when they take sick leave, personal leave or other absence from duty authorized by the CNA. The CNA also provides that when the releasee employees meet with teachers or administration in school buildings, releasees are to report their presence in the school building to the principal or sign in at the central office. Whether the releasees are present in a school at the principal or administrator's request, or are present at a school as a result of a request they initiated on their own, the releasees are monitored by the principal and/or vice principal. The building and central administration are kept apprised of the releasees' activities when they go to schools to help conciliate disputes that may arise between teachers and administrators. In fact, the District sets the schedule for all formal negotiations related to grievance and disciplinary hearings as well as negotiations related to the releasee's collective bargaining duties. The releasee employees have regular face-to-face, telephonic and other contact with members of the District administration as well as record keeping of their attendance as described above. Lastly, the District maintains authority to discipline the releasee employees for employment-related misconduct.

Here, the Court finds that Defendant, JCEA has demonstrated that the District retains sufficient control over the use of release time by those releasee employees. The Court, having reviewed the evidence submitted by both parties on this issue, finds that the District retains sufficient control over the release time expenditure to ensure that the public purpose of those release time provisions is carried out by the releasee employees for the benefit of the District.

The Court notes that language in the cases cited by the plaintiffs discussing the terms of control as necessarily being "strict" and set forth in applicable statutes or contracts primarily deal with direct government loans to private entities, which this case is not. It would make sense that when a government loans money to a private entity that a high amount of control over how that asset is used is necessary to ensure that the government's public purpose of lending the money is accomplished. However, here, where the challenged government financial aid is the allocation of two salaries to individuals authorized to engage in union business and activities full-time, the government body, here the District, must maintain control over how those funds are allocated. However, the control necessary to achieve that purpose is obviously different from the control necessary to ensure proper use of loaned funds to private entities. Moreover, the legislature has statutorily limited the amount of control the District might have over the JCEA and its releasee employees. N.J.S.A. 34:13A-5.4(a)(2) (providing that the public employers cannot "dominat[e]" or "interfere[e] with" a Union's administration).

As set forth above, the District maintains a significant amount of supervisory authority and is directly involved with the work the releasee employees perform on a daily basis. The terms of that supervisory authority are negotiated in good faith and set forth in the provisions of the CNA. Thus, although the District does not maintain the same type of

controls a government agency might maintain over a private entity it is lending money to, the Court finds that, given the nature of releasee employee's role in the District, the District exercises a "reasonable measure of control" over the release employees. New Jersey Citizen Action, Inc. v. County of Bergen, 391 N.J. Super. 596, 604 (App. Div. 2007).

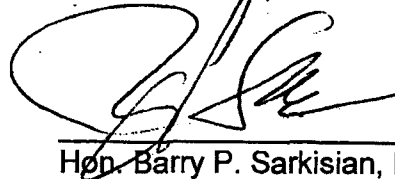
Lastly, the Court finds that the expenditure of funds for the releasee employees salaries is supported by substantial consideration. When an agreement "involves the transfer of public funds to a private entity, but is unsupported by consideration flowing to the government entity" that agreement may violate the gift clause provisions of the New Jersey Constitution. New Jersey Citizen Action, Inc. v. County of Bergen, 391 N.J. Super. 596, 605 (App. Div. 2007) (citing City of Bayonne v. Palmer, 47 N.J. 520 (1966)). Even if there is some benefit received by the government body, the sufficiency of that benefit compared to the size of the monetary allocation will be analyzed in determining whether that allocation is an unconstitutional gift. City of East Orange v. Board of Water Commissioners, 79 N.J. Super. 363, 371 (App. Div.), aff'd on other grounds 41 N.J. (1963). However, our Courts have also recognized that "compensation paid to public employees, whatever the label, is not a gift so long as it is included within the conditions of employment, either by statutory direction or contract negotiation." Maywood Educ. Ass'n v. Maywood Bd. Of Ed. 131 N.J. Super. 551 (Ch. Div. 1974).

Here, the release provisions of the CNA are contractually negotiated provisions of compensation for employees of the District. Moreover, the District is authorized by N.J.S.A. 18A:30-7 to provide this sort of compensation when teachers are absent from their ordinary teaching duties. As set forth above, the District receives a substantial benefit from employing the releasee employees in the form of facilitating labor peace and cost-effective conciliation of grievances and disciplinary issues. In addition to the monetary benefit of stemming these disputes before they turn into costly arbitration proceedings, the District also receives value in the form of non-monetary compensation through the facilitation of communication between the staff and administrators of the District. For the reasons set forth herein, the Court finds that it has enough factual information to determine that there is adequate consideration flowing to the District in exchange for its allocation of public funds to cover the releasee employee's salaries.

Conclusion

Given Plaintiff's steep burden of proof and this Court's determination that the release time provisions in the CNA are not unconstitutional gifts, the Court denies Plaintiff's motion for summary judgment. For the same reason, the Court hereby grants Defendant, JCEA's motion for summary judgment and dismisses this case.

SO ORDERED,



Hon. Barry P. Sarkisian, P.J.Ch.

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION - GENERAL
EQUITY PART
HUDSON COUNTY, NEW JERSEY
DOCKET NO. HUD-C-2-17
APPEAL NO. A-001611-17(T1)

MOSHE ROZENBLIT, et al.,)
)
 Plaintiffs,) TRANSCRIPT
) OF
 -v-) MOTION FOR
) SUMMARY JUDGMENT
 MARCIA V. LYLES, et al.,)
)
 Defendants.)

Place: Hudson County Courthouse
595 Newark Avenue
Jersey City, NJ 07306

Date: October 27, 2017

BEFORE:

HON. BARRY P. SARKISIAN, J.S.C.

TRANSCRIPT ORDERED BY:

JONATHAN RICHES, ESQ. (Goldwater Institute)
Attorney for the Plaintiffs

APPEARANCES:

JONATHAN RICHES, ESQ. (Goldwater Institute)
Attorney for the Plaintiffs

Appearances Continued.

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A P P E A R A N C E S, CONTINUED:

JUSTIN A. MEYERS, ESQ. (Law Offices of G. Martin Meyers, P.C.)
Attorney for the Plaintiffs

FLAVIO L. KOMUVES, ESQ. (Zazzali, Fagella, Nowak, Kleinbaum & Friedman, P.C.)
Attorney for the Defendant, Jersey City Education Association

SHONTAE D. GRAY, ESQ. (Florio, Perrucci, Steinhart & Fader, LLC)
Attorney for the Defendant, Jersey City Board of Education

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I N D E X

TRANSCRIPT OF PROCEEDINGS

PAGE 4

<u>WITNESSES</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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NONE

I N D E X T O E X H I B I T S

<u>NUMBER</u>	<u>DESCRIPTION</u>	<u>ID</u>	<u>EVD</u>
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NONE

ARGUMENT BY:

Mr. Riches	Page 7
Mr. Komuves	Page 16

1 (Proceeding commenced at 11:39 a.m.)

2 THE CLERK: Rozenblit v. Lyles, docket number
3 C-2-17.

4 THE COURT: Please, be seated.

5 (Indiscernible whispering.)

6 Got you.

7 All right. Appearances, please.

8 MR. RICHES: Good morning, Your Honor. John
9 Riches on behalf of plaintiffs, Moshe Rozenblit and Quon
10 Kyu Rim. I'm joined at counsel table by Justin Meyers.

11 MR. MEYERS: Of the Law Office of G. Martin
12 Meyers.

13 THE COURT: Who's going to be speaking to the
14 motion then?

15 MR. RICHES: I will be, Your Honor.

16 THE COURT: And how do you spell your last
17 name, Mr. Meyers?

18 MR. MEYERS: M-E-Y-E-R-S.

19 THE COURT: All right. Thank you, very much.

20 MR. RICHES: Thank you.

21 MR. KOMUVES: Good morning, Your Honor.

22 Flavio Komuves, K-O-M-U-V-E-S. I'm with Zazzali,
23 Fagella, Nowak, Kleinbaum & Friedman. I'm here for the
24 Jersey City Education Association.

25 THE COURT: All right.

1 MS. GRAY: Good morning, Your Honor. Shontae
2 Gray, G-R-A-Y, with the law firm of Florio, Perrucci,
3 Steinhart & Fader, and I'm here on behalf of the Jersey
4 City Board of Education.

5 THE COURT: All right. Thank you. All right.
6 By the way of background, this is -- before the Court
7 today are cross-motions for summary judgment submitted
8 by the plaintiffs and defendant Jersey City Education
9 Association. I'm assuming, Ms. -- is it Getty or -- how
10 do you pronounce your last name?

11 MS. GRAY: Gray.

12 THE COURT: Gray. I'm sorry. That you join
13 in that motion as well; is that correct?

14 MS. GRAY: Yes, Your Honor. I sent a letter
15 to the Court on October 18th joining.

16 THE COURT: October 18th. All right. Very
17 good. But you're going to rely on the argument of
18 Mr. Komuves I assume; right?

19 MS. GRAY: Yes, Your Honor.

20 THE COURT: All right. So the complaint was
21 filed on January 4, 2017, which, based on their status
22 as taxpayers, contend that the certain provisions of the
23 collective bargaining agreement, referred to as CNA I
24 think in the briefs submitted, entered into between the
25 defendant Jersey City Teachers Union, JCEA, and the

1 Jersey City Board of Education are violative of the
2 New Jersey Constitution, more specifically the Gift
3 Clause of the New Jersey Constitution, and keyed into
4 that provision of the collective bargaining agreement
5 which provides for release time provisions in certain
6 sections of the CNA -- I think it's Section 7.2.3 and
7 2.4 -- under which the union president and his or her
8 designee have a right to carry out union business and
9 affairs full-time while the district pays them the
10 classroom teacher's salary.

11 We denied the motion that had been filed by
12 the JCEA on May 13th -- May 30, 2017, for failure to
13 state a claim upon which relief can be granted.
14 Pursuant to the amended case management order of
15 July 14th discovery took place -- (sirens). I always
16 have this competition. They always win.

17 So, um, discovery has taken place. My file is
18 a lot fatter than it was when I saw you last. I
19 reviewed all of the submissions with respect to the
20 discovery that was obtained and I often -- obviously if
21 I'm going to issue a decision in this case I'm -- it
22 will be in writing but with all -- I always try to sort
23 of give a warning to the person who is in the vernacular
24 swimming upstream so they can really focus what they
25 want to focus on but the -- I've read the standard in

1 the cases such as they exist in the State of New Jersey.
2 I've reviewed some out of state cases which have
3 addressed more specifically this argument as it, as it
4 addresses the release time issue, um, and I'm inclined,
5 Mr. Riches, to agree with the defendants' position.

6 So you are the salmon, Mr. Riches. I'll hear
7 you, but please do not repeat everything you said in
8 your brief because you'll be here for five hours.

9 MR. RICHES: Thank you, Your Honor. I
10 appreciate that, that discussion as well.

11 Um, public funds can't be loaned to a private
12 agency for that agency to use as it sees fit. Clearly,
13 if that were to occur the Constitution would stand in
14 the way. That's not in our papers as argument, Your
15 Honor. That is the seminal Gift Clause case in New
16 Jersey, Roe, and that quote appears at 42 N.J. 222. It
17 describes precisely what is happening --

18 THE COURT: I'm sorry. The case name again?

19 MR. RICHES: Oh, Roe, Your Honor.

20 THE COURT: Oh, Roe. Yes, yes, of, course.

21 That's the seminal Gift Clause case in New Jersey but of
22 course it doesn't deal with release time.

23 MR. RICHES: It does not, Your Honor. No.
24 But it spells out the contours for what must occur when
25 the government is going to expend public money.

1 I think it's very valuable to focus on the
2 control element of the Gift Clause test. As the Court's
3 aware, whenever the government's going to spend money it
4 has to exercise continuing control over that expenditure
5 so that the government can insure that a public purpose
6 is actually accomplished and that is unique in, in -- I
7 shouldn't say it's unique. It is rare for that
8 requirement to exist in Gift Clause juris prudence.
9 New Jersey is one of just a handful of states that has a
10 control requirement.

11 And the case law is pretty strong on this
12 point. Um, if you look at New Jersey Citizen Action,
13 Inc., 391 N.J. Super. 596, it says that the control must
14 be so strictly pointed in the direction of the public
15 purpose that the entity that receives the government
16 expenditure becomes the controlled means of the
17 government.

18 Your Honor, that's just, that's simply not --
19 the evidence establishes that is not what is happening
20 here. You have two district employees that the district
21 admits they can't direct their activities. They can't
22 even prohibit them from engaging in certain activities.
23 The JCEA employees don't need permission before they
24 engage in certain activities. The JCEA doesn't even
25 provide an accounting of their activities.

1 Every other public employee in the school
2 district has a supervisor and receives periodic
3 evaluations. These two employees don't have a
4 supervisor. They don't receive any evaluation or
5 assessment from the district of any kind. The district
6 has no say in who becomes these employees. They can't
7 be removed from their position as the release time
8 employees.

9 In any other employment context, Your Honor --
10 and the case law is very clear on this, too -- the
11 employer has to be able to direct the manner in which
12 the business is done as well as the results
13 accomplished.

14 THE COURT: All right. Let me ask you this.

15 MR. RICHES: Yes.

16 THE COURT: You're not contending that there
17 is a complete absence of any controls of the activities
18 of these release employees, do you? Is that your
19 position?

20 MR. RICHES: We're contending that there's an
21 absence of any meaningful control.

22 THE COURT: Okay.

23 MR. RICHES: I mean of any actual control that
24 would exist in any other type of employee --
25 employer/employee context, and, frankly, Your Honor, in

1 any other context that would involve a contract or a
2 vendor for the district. I mean if, if, if the district
3 was going to go out and hire, um, a part-time teacher or
4 even hire somebody to do the maintenance or something
5 like that, it would have to enter into a contract that
6 had really specific duties that were outlined and if the
7 contractor violated the duties then there would have to
8 be some relief that was available.

9 None of that exists here, Your Honor. This is
10 unlike any other situation where the government is
11 expending money and certainly unlike any other situation
12 where the government is an employer, is acting as a
13 public employer.

14 THE COURT: Go ahead.

15 MR. RICHES: To the consideration
16 requirement -- and this is phenomenally important in
17 Gift Clause juris prudence as well -- Roe tells us what
18 we need, and Roe says that in order for there to be
19 adequate consideration the public end must be restricted
20 by contractual obligation. There must be plain and
21 specific obligations in the contract.

22 Here the district has expressly admitted that
23 they're not obligated to provide any specific service to
24 the district in exchange for release time. That's
25 request for admission 10.

1 The contract itself there's no obligation.
2 The plain language of the contract says that these
3 release time employees -- in fact, must, must do only
4 association business and affair. And we asked the
5 district, well, what does that mean. What does
6 association business and affairs actually mean? And the
7 chief of talent, who's the primary HR officer for the
8 entire district, said that that's anything that would
9 assist the members of this particular association. Not
10 even being able to assist the district. It's being able
11 to assist this private organization which gets us back
12 to Roe that the government can't just give a private
13 agency money to use it as it, as it sees fit.

14 Interestingly, the JCEA contends that, well,
15 they do owe these things and arguably some of them have
16 a public purpose. Um, they're not obligated to do that
17 and, frankly, Your Honor, that's an illusory promise.
18 Um, just because they might do it -- and I think that's
19 a disputed question, I think that's a disputed question
20 -- they're not obligated to do any of that. So that's a
21 problem.

22 And even more problematic, the district, um,
23 hasn't ever valued the value of release time and doesn't
24 know what it's worth. This would be tantamount to the
25 district having a very valuable piece of land and

1 selling it to a private entity for \$10 and then saying
2 no one else can appraise the value of the land and we
3 didn't do an appraisal. They haven't even -- I mean
4 they haven't even required any kind of accounting in
5 that regard and that is on its face a failure under the
6 Gift Clause. If the government is going to spend money
7 the government has to know what they're getting in
8 return.

9 Your Honor, I'd, I'd like to just briefly --
10 oh, and to this issue that the district raised, well, we
11 have to look at the entire contract, the contract itself
12 speaks to that. There's a severability provision at
13 Article 40 of the contract and it contemplates that each
14 and every provision of the contract will be evaluated
15 for legal sufficiency should two particular provisions
16 in this case be deemed unlawful or unconstitutional, the
17 remaining contract remains in place; and then the
18 district goes back to the table with the JCEA and maybe
19 negotiates a deal where they actually put in place
20 meaningful controls, where they actually put actual
21 obligations on this private organization, and maybe they
22 value it and say, oh, well, we've actually valued this
23 and we've determined it's not worth \$1.1 million. We've
24 determined it's worth something far less than that. As
25 a result we're going to change the nature of this

1 agreement.

2 And with respect to the deference issue, this
3 is -- no deference is appropriate in this case. This is
4 not an act of -- the legislature is not a co-equal
5 branch of government. In fact, it's situations like
6 this where, um, deference to what the JCEA characterizes
7 the political process is particularly inappropriate.
8 The founders put the Gift Clause in place -- and I'll
9 give you a quote again from, from Roe -- because when
10 the State enters upon the business of subsidies, we
11 shall not fail to discover that the strong and powerful
12 interests are those most likely to control legislation,
13 and that the weaker will be taxed to enhance the profits
14 of the stronger.

15 Um, this is a case where it requires citizen
16 action. It requires a taxpayer action because, frankly,
17 the political process has failed, and we know from the
18 record as well that the JCEA is a politically active
19 organization. It directly advocates for the election or
20 defeat of school board members. It goes door to door
21 and advocates for the election or defeat of school board
22 members, provides financial support to school board
23 members. So this is not a case where we can just say,
24 ah, we're going to defer to that judgment because it's
25 not appropriate here.

1 Your Honor, I'll conclude, um, with this. As
2 far back as our founding -- as far back as the
3 Federalist papers, Federalist 51, we've recognized that
4 there must be control over government activity. That's
5 not only -- it's not only desirable. It's not just
6 something that's nice. It's not just a matter of good
7 government. It's essential to our Constitutional
8 Republic.

9 Um, the government must exercise in this case
10 continuing control over the public's resources and it's
11 failed to do that, and the only way to avoid what Roe
12 characterized as special interest abuse is to faithfully
13 enforce this Constitutional requirement. That's the
14 only way, um, and in this case the government, um, must
15 -- has an obligation to control its expenditures.

16 Um, if there is a public value to release time
17 -- and granted, Your Honor, I think that there's
18 arguments on both sides of this. I'd be happy to
19 address why we don't think that there is a primarily
20 public purpose for these expenditures, but even assuming
21 that there is, that still must be controlled. The
22 district still must receive Constitutionally sufficient
23 consideration that the JCEA is obligated to provide and,
24 frankly, the JCEA can't be the primary beneficiary of
25 those expenditures. It can be an incidental beneficiary

1 but it can't be the primary beneficiary. To establish a
2 Gift Clause violation we only need to establish one of
3 those. Um, Your Honor, the record supports that it,
4 frankly, violates all three.

5 And with that, I'm happy to answer any
6 questions.

7 THE COURT: All three what?

8 MR. RICHES: All three of the requirements of
9 the Gift Clause, lack of control --

10 THE COURT: To the specific language of the
11 Gift Clause?

12 MR. RICHES: That's correct, Your Honor.

13 THE COURT: Yeah. Okay. All right.

14 Mr. Komuves, how about let's go in, let's go in reverse
15 order to what I noted to be key elements of the very
16 succinct argument by plaintiffs' counsel. I appreciate
17 your succinctness.

18 MR. KOMUVES: Yes, sir.

19 THE COURT: Very good synopsis of your
20 position and that is that this is not a scenario where
21 we're dealing with a specific statute which delegates
22 authority to a municipality to do A, B or C and,
23 therefore, cite that as a deference. When we're talking
24 -- I mean I know the recognition to the language that
25 deals with sick leave or any other payments; but, you

1 know, the type of connection for deference that may have
2 been I think mentioned in the Roe case and some of the
3 other cases and that gives rise to this other standard
4 of proof that has to be sustained by somewhat attacking,
5 as I understand it, you know, the Roe case and before
6 that the, um, it's the Meyers case. One second. The
7 Meyers case. This is when I was a young boy. The
8 Gangemi case. You know, where they have to prove that
9 beyond a reasonable doubt. It's almost like a criminal
10 statute, you know, that there's been a clear violation.
11 There's a, there's a beyond a reasonable doubt that
12 there's a violation.

13 Are we really talking about a deference case
14 here under the facts of this case?

15 MR. KOMUVES: I think we are, Your Honor,
16 for a few reasons.

17 THE COURT: Tell me, tell me why, why you
18 think so. I'm not so sure.

19 MR. KOMUVES: 18:30-7 is the statute that
20 authorizes release time and it's the statute that the
21 SCI identified as authorizing release time. It's the
22 statute that PERC over the decades has said the statute
23 authorizes release time.

24 THE COURT: Yeah but --

25 MR. KOMUVES: And it's been an uninterrupted

1 interpretation of that statute that the legislature has
2 acquiesced --

3 THE COURT: And the statute again, the
4 citation is what?

5 MR. KOMUVES: 18A:30-7.

6 THE COURT: All right. So that reads, um --
7 I'm putting aside for a second the PERC decisions, okay,
8 which are not binding on this Court.

9 MR. KOMUVES: Of course.

10 THE COURT: It says -- correct me if I'm
11 wrong -- "Nothing in this chapter" -- this is, "Power of
12 boards of education to pay salaries." It says, "Nothing
13 in this chapter shall affect the right of the Board of
14 Education to fix either by rule or by the individual
15 consideration, the payment of salary in cases of absence
16 not constituting sick leave, or to grant sick leave over
17 and above the minimum sick leave as defined in this
18 chapter or allowing days to accumulate over and above
19 those provided for in Section 18A:30-2, except that no
20 person shall be allowed to increase his total
21 accumulation by more than 15 days in any one year."

22 So I mean that statute, um, is -- you want me
23 to take the first provision which says the payment of
24 salary in cases of absence not constituting sick leave,
25 to draw from that language, that's what you want me to

1 focus in on; correct?

2 MR. KOMUVES: Your Honor, yes, as --

3 THE COURT: Okay. From there draw a
4 conclusion that gives you the authority to do what you
5 do by virtue of its inclusion in a collective bargaining
6 agreement which provides for release time. But that's
7 not the type of nexus which existed on the deferential
8 cases, Gangemi and Roe included, where you had this more
9 stringent standard that someone contesting a provision
10 has to meet. Wouldn't you find it's a bit more tenuous?

11 MR. KOMUVES: Well, Your Honor, in the State
12 versus Trump Hotels case, which is one of the cases we
13 cited about deference and --

14 THE COURT: Hold on a second.

15 MR. KOMUVES: Sure.

16 THE COURT: Is that in your brief in
17 opposition or your brief in support?

18 MR. KOMUVES: Most likely our reply brief
19 actually.

20 THE COURT: Reply brief. Okay.

21 MS. GRAY: Is Your Honor looking for the cite?

22 THE COURT: Yes.

23 MS. GRAY: It is 160 N.J. 505.

24 THE COURT: And the name of the case?

25 MS. GRAY: State v. Trump Hotels & Casino

1 Resorts.

2 THE COURT: Yeah. I remember scanning that.
3 Okay. Go ahead.

4 MR. KOMUVES: So one of the things that the
5 Court discussed in that case is here you have a
6 legislative act that has been implemented over an
7 extended period for decades that has been viewed by
8 different agencies of the executive branch, of the
9 legislative branch, PERC, OAL as authority for release
10 time. So in a sense this case attacks that statute as
11 saying you cannot under that statute Constitutionally
12 provide for release time.

13 Nevertheless, there's wide recognition that
14 that is the statute that is relied upon to give release
15 time. So you have this unbroken interpretation that
16 that's what the statute allows.

17 Then you get into the second question. Is it
18 Constitutional? And I would argue that under State
19 versus Trump Hotels the standard of proof is, is beyond
20 a reasonable doubt.

21 But, but there's another reason for deference
22 that's endemic specifically to Gift Clause cases and
23 this is the language in Roe that counsels judicial
24 deference to government determinations of what
25 constitutes a public purpose. I think any time action,

1 municipal action, comes before this Court, whether it be
2 a prerogative writ or something else, there is, there's
3 some modicum of deference that is paid to the
4 legislative judgments or the findings by the municipal
5 agency. Is it conclusive? No, of course not. But some
6 deference is due to the school board's finding here that
7 for some 50 years in times when the State was under
8 direct State control that release time was an
9 appropriate item to include in the contract because it
10 provides benefits. It provides real public benefits.

11 At best what could be said is that there is a,
12 there's a concurrent private and public purpose, but it
13 absolutely provides public benefits and these include
14 the resolution of disputes, facilitation of
15 communication, smoother operations, and the results of
16 these, improved education quality, enhanced personnel
17 skill, recruitment of high quality personnel, and it
18 includes monetary benefits, preventing disputes from
19 devolving into formal grievance and discipline hearings.
20 Can these be quantified to the penny? I don't know if
21 they can. I'll say they're not in this case, but are we
22 saying that any taxpayer has a right to come into court
23 and demand that everything that the school board does be
24 studied and quantified to the penny? I don't think
25 that's, that's what -- that's something a taxpayer is

1 permitted to do, and these are all -- I don't think
2 there's any dispute that what I've articulated are all
3 public purposes.

4 In addition, the Supreme Court has said the
5 participation in grievance hearings to insure fair
6 outcome, that's a public purpose. Collective bargaining
7 where both sides sit across the table from one another
8 and hash out their difference, that's a public purpose.
9 And when you look at the CNA, the Collective
10 Negotiations Agreement that's been entered into, there
11 are obligations that are owed by the JCEA.

12 What it comes down to then I think is
13 plaintiffs' complaint -- I think Mr. Riches keyed in on
14 this. He said, he said it's about the element of
15 control. So what we're down to then is a taxpayer is
16 dissatisfied that management hasn't negotiated more
17 specific controls in, in the contract.

18 In response to that I would refer the Court
19 back to the Paterson PERC case, and the issue here was
20 that the city, the city had given the police union
21 officials there the use of a phone. The city's
22 basically, well, how do we know they're using it for
23 union, for union matters? And PERC said the city's
24 concern that there's no contractual mechanism for
25 insuring that the calls are limited to union business

1 can be addressed through negotiation. It goes to the
2 wisdom of the proposal.

3 So the taxpayers are certainly allowed to
4 advocate for management. Look, maybe you ought to ask
5 for more controls over this but they're not -- there's,
6 there's such a history of release time and recognition
7 of the benefits that it has from in-state cases, from
8 out-of-state cases.

9 I, I referred to a case that was actually
10 decided while the motion to, while the motion to dismiss
11 in this case was being briefed with the Appellate
12 Division in County of Hudson versus PBA 109, and there
13 was a challenge to release time that this is an
14 excessive or improper expenditure of public funds. It
15 wasn't a Gift Clause case as such but it went to the
16 public policy wisdom of release time, and the Appellate
17 Division said it is legitimate in this particular case
18 where roughly half time -- one half time person being a
19 representative for 450 people. And I went in, I went
20 through my cases in terms of some of the ratios that
21 PERC has upheld, that the Cheatham Court upheld in
22 Arizona, that it was upheld in Boise case and that PERC
23 has upheld.

24 The kind of ratios we're talking about here
25 are, are not substantial ones, and the money that is

1 spent on these qualified labor negotiators, qualified
2 conciliators is -- it really does provide -- and I think
3 this is not really refuted -- it really does provide a
4 benefit to the school district in, in terms of, in terms
5 of creating its, its smoother operations.

6 So in answer to the question of is release
7 time standing alone, it's, it's not a gift at all. It's
8 not a gift because there is something that is being
9 returned to the public for that, and when you look at it
10 in the context of a contract as a whole which I read Roe
11 to require, which I read to Cheatham to require, you
12 have a contract where there's \$261 million being paid to
13 teachers each year for millions of hours of labor and
14 there's a carve-out that says we're going to reserve two
15 people to smooth and facilitate labor relations and
16 we're going to pay them just over 200,000 a year,
17 0.07 percent. So Roe talks about something may not be a
18 gift at all or if it is a gift it is so subordinate and
19 so incidental to the contract as a whole that it must,
20 nevertheless, be validated.

21 I would also add another thing, Your Honor,
22 which is that under the employee -- Employer-Employee
23 Relations Act in Title 34 which we've cited there is a
24 limit to how much an employer can dominate or control
25 the activities of a union as a matter of State labor

1 law. So when you look -- when you compare that to the
2 Roe test that says is there sufficient control, is there
3 reasonable control over the activities, along with the
4 requirements of the Employer-Employee Relations Act,
5 what Jersey City here has done, and perhaps even more
6 importantly in what the parties do, there is that
7 accountability. They report their time. They respond
8 to inquiries. They, they at the request of
9 administrators go out and affirmatively cut off disputes
10 and grievances before they start. They, they, they sign
11 in and they account for their presence to school
12 administrators. They attend committee meetings. Um,
13 Mr. Greco talked about his practice of how he picked up
14 the phone and keep administrators in the loop.

15 And we talked about discipline for a second
16 and, you know, Mr. Riches I think was making a little
17 fun of our point theoretically folks could be subject to
18 discipline. Let me, let me clarify that because this is
19 Mr. Greco's own testimony. He said if I commit an
20 employment related act of misconduct I could be subject
21 to discipline, suspension, tenure charges, things like
22 that. I have not been and Ms. Thorp has not been and my
23 predecessors have not been but that right of control to
24 discipline employees does exist.

25 So when you look at how the public entity has

1 chosen to exercise control, when you look at the
2 requirements of the EERA, when you look at the real
3 world conduct of the parties, the statements made by the
4 people that are in the schools and know what's going on,
5 our folks, the Jersey City Board, there is no violation
6 of the Gift Clause by including release time. It's a
7 common practice. It's a longstanding practice. It is
8 not invalid under the Gift Clause or any other provision
9 of the Constitution.

10 THE COURT: One second.

11 (Indiscernible whispering.)

12 Continue.

13 MR. KOMUVES: Um, Your Honor, I think the, the
14 only other thing I wanted to add was just Mr. Riches
15 referred to the severability clause in the contract and
16 that's a rule of construction for the contract, but I
17 think when you look at Roe and you look at Cheatham,
18 Cheatham has this wonderful, wonderful, wonderful word
19 in it saying look at the contract panoptically. Look at
20 it from all sides and from all perspectives, and when
21 that examination taken as a whole does that reveal a
22 gift or does that reveal a public purpose of preserving
23 labor peace at minimal cost? And that's what we would
24 ask you to do and dismiss the complaint.

25 THE COURT: All right. Thank you.

1 Any further comments, Mr. Riches?

2 MR. RICHES: Yes, Your Honor. Um, to the
3 point that this is a practice that's been going on for a
4 long time, in a prior life I was on active duty and used
5 to have to advise commanding officers on their ethics
6 and every time we got the response, well, we've always
7 done it this way, those were the most dangerous words in
8 the English language from our perspective.

9 Um, in the fact that Mr. -- or the JCEA
10 contends that, well, you know, a taxpayer just can't
11 come in any time they don't like some particular
12 provision and challenge it, a taxpayer has a right in
13 this state to challenge unlawful government
14 expenditures, and I think it's pretty clear from the
15 case law that that is not something that's abused and it
16 is certainly not something that's abused in this case
17 where as you have a very large contract, taxpayers are
18 challenging a very narrow portion of it which is itself
19 unlawful.

20 The level of control that taxpayers like,
21 that's not, it's not our choice. This isn't a policy
22 determination for taxpayers. It's a Constitutional
23 requirement. The Constitution requires the district to
24 control these resources and taxpayers are alleging
25 that's what they haven't done.

1 I think an order from this Court that says
2 that's correct, there is an absence of control entirely,
3 would force the parties to do what they should have done
4 in the first instance which would be to go back and lay
5 out parameters of what this arrangement actually is,
6 impose actual obligations on the JCEA and direct the
7 district to actually control these resources.

8 THE COURT: In what form?

9 MR. RICHES: An injunction, Your Honor, and a
10 declaratory judgment.

11 THE COURT: No, no, no. I know what you're
12 asking me to do, but what would the injunction require
13 them to do more than they've done now? They say there
14 are controls. They do say there are protocols regarding
15 accountability, time. There are three or four points
16 they made, but how would that meet in your view the
17 controllability to sustain Constitution viability?

18 MR. RICHES: This has happened in other, um,
19 cases. In fact, in Arizona, Cheatham when the Trial
20 Court enjoined release time twice, the Trial Court wrote
21 an injunction that said, look, there has to be an actual
22 obligation of what the employees are going to do when
23 they're on this time and that has to be spelled out in
24 the contract. They're going to do grievances.

25 THE COURT: So you asked the question. Your

1 view is that unless the element of controls are spelled
2 out in the collective bargaining agreement, the CNA, if
3 you will, it's insufficient?

4 MR. RICHES: I do believe that's, that's
5 correct, but at the very least -- and I'll say why in
6 one second -- the very least the contract must obligate
7 them to do something. The contract doesn't obligate
8 them to perform any function at all. So at the very
9 least there must be -- because right now there's an
10 arrangement -- fortunately, I think there's some good
11 release time employees in place that I think mean very
12 well but they don't -- they're not obligated to do
13 anything and that's illusory. So there must at the very
14 least be put in place a requirement that they, that they
15 perform some function for the public which doesn't exist
16 at all.

17 And to the, to the control, um, situation,
18 yes, I think it can be -- you know, there's sufficient
19 controls insofar as the district has the authority to
20 direct the work of these employees. The district has
21 the authority to recall them to the classroom if they
22 need them. The district has the authority to require an
23 accounting of how they're using their time. That's not
24 even in there.

25 I'm not alleging this is the case, but these

1 two employees could never do anything at all for the
2 district and it would still be in perfect compliance
3 with the terms of the agreement. And, again, that's not
4 a policy decision for us. It's not even, it's not even
5 a policy decision for the party. It's a Constitutional
6 requirement.

7 THE COURT: I see.

8 MR. RICHES: The control mechanisms that they
9 identified, Your Honor -- and I don't want to, I don't
10 want to give them short-strip, but they say that while
11 there's adequate control because the district maintains
12 time and attendance records. Of course they do. I mean
13 that's the way they cut the public paycheck which is the
14 entire problem.

15 What they don't do is they don't say give us
16 an accounting of how you use their time. They just say,
17 Okay, I worked 40 hours this week and here's the
18 paycheck. That's not control.

19 The employees must report their physical
20 presence when they come on to a school. I would hope
21 so. I would hope when an adult who's not usually on
22 school grounds must tell the principal I'm here and I'm
23 here for a proper purpose. And, in any event,
24 notification is not control. That's just saying I'm
25 here. It's not directing any -- in any meaningful way

1 their activities.

2 The fact that they attend hearings and
3 meetings, again, that's not control. That's just
4 physical presence. Um, and the fact that -- the
5 question as to whether they can be disciplined is
6 theoretical, it shouldn't at all. I mean if the
7 employer-employee relationship means anything it's
8 ability to monitor and supervise activities.

9 THE COURT: Okay.

10 MR. RICHES: One final point, Your Honor, and
11 I think this is very telling and I believe it's,
12 frankly, the primary reason why this Court -- why the
13 only remedy here is an order from this Court. They
14 say, well, there's this State statute that says an
15 employer can't dominate or interfere with union
16 activities, and I think that's a wonderful policy from
17 the State of New Jersey. I think that that is
18 Constitutionally required in many ways, but the JCEA
19 can't have it both ways. They can't say public employer
20 pay me with taxpayer funds but you can't control me.

21 If the JCEA wants to engage in private
22 activities by all means they can and they should. They
23 have a Constitutional right to associate. What they
24 don't have is a right to have taxpayers fund that and
25 then say, well, the government can no longer control us

1 because there's State statute that prevents it, and I
2 think that's what we would see if the district on its
3 own, which is maybe perhaps why the district has been
4 silent during this case apart from joining the briefs of
5 the JCEA, if the district were to say, okay, we're going
6 to, we're going to instill some Constitutionally
7 required controls, then you're going to get a complaint
8 with PERC that says, well, they're violating the statute
9 which is why when the founders of the Gift Clause framed
10 this provision they gave the judiciary the branch with
11 the burden or with the obligation to say what the law is
12 the ability to --

13 THE COURT: That's, that, that argument is
14 rather -- it's almost like it's an advisory opinion,
15 isn't it, about this would happen if they tried to
16 exercise more controls? We don't know. All you're
17 saying is there has to be Constitutionally more controls
18 and that would bring on what it would bring on. But I
19 mean you're just creating a scenario of what would
20 happen if that was attempted and that underscores your
21 argument that there are no controls which adequately
22 meet the Constitutional requirement.

23 MR. RICHES: That's correct, Your Honor.

24 THE COURT: Yeah. Okay.

25 MR. KOMUVES: Briefly, Your Honor, in our --

1 and this is basically a statement of undisputed facts,
2 43,50, as we outlined the levels of control.

3 THE COURT: No. I --

4 MR. KOMUVES: Mr. Greco's testified to that
5 effect.

6 THE COURT: I saw it.

7 MR. KOMUVES: I don't think the Court's role
8 is to --

9 THE COURT: Ponder it and weigh it.

10 MR. KOMUVES: That, that certainly is, but I
11 would urge that the Court's role shouldn't be to tell
12 management what to seek at the bargaining table as part
13 of this broader \$261 million agreement. That's, that's
14 not the Court's role when there are sufficient controls
15 in place to make sure that the individuals are doing
16 their job, are keeping labor peace and other things
17 they've done. Thank you.

18 THE COURT: All right. I don't know if I
19 would put Mr. Riches in that box of the argument but I
20 understand your point. Thank you.

21 MR. KOMUVES: Thank you, Your Honor.

22 THE COURT: All right. Reserve decision.

23 MR. RICHES: Thank you, Your Honor.

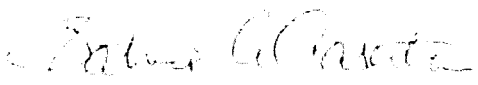
24 MS. GRAY: Thank you.

25 (Proceedings ended at 12:18:59 p.m.)

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CERTIFICATION

I, PATRICE A. CASERTA, the assigned transcriber, do hereby certify the foregoing transcript of proceedings on CD, Index No. 1 from 11:39:00 to 12:18:59 is prepared to the best of my ability and in full compliance with the current Transcript Format for Judicial Proceedings and is a true and accurate compressed transcript of the proceedings as recorded.



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