

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 violations 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

⁴ N.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.