I.R. NO. 2020-18

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CAMDEN,

Respondent,

-and- Docket No. CO-2020-251

CWA LOCAL 1014,

Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief filed by CWA against the City alleging that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1) and (5), by unilaterally establishing an absolute restriction on vacation leave during the collection and Tax Sale periods (Feb, May, Aug, and November 1-10, during extended grace periods dates will be adjusted; and May 11-Tax Sale date). The Designee finds that CWA has demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. The Designee also finds that CWA has established irreparable harm, relative hardship, and that the public interest will not be injured by an interim relief order. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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CWA LOCAL 1014,

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Appearances:

For the Respondent, Office of the City Attorney (Edward Trueblood, Assistant City Attorney)

For the Charging Party, Spear Wilderman, P.C., attorneys (James Katz, of counsel)

INTERLOCUTORY DECISION

On March 13, 2020, CWA Local 1014 (CWA or Local 1014) filed an unfair practice charge, together with an application for interim relief, against the City of Camden (City). The charge alleges that on or about March 10, 2020, the City violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1) and (5),[1/] by

1/ These provisions prohibit public employers, their representatives or agents from "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act"; and "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority (continued...)

unilaterally establishing an absolute restriction on vacation leave during the collection and Tax Sale periods (Feb, May, Aug, and November 1-10, during extended grace periods dates will be adjusted; and May 11-Tax Sale Date).

The CWA's application for interim relief requests the following relief pending disposition of the underlying unfair practice charge:

> -the City be enjoined from continuing to enforce its policy imposing vacation black out dates preventing any employee from the Camden Tax Office being on vacation during tax collection dates (February 1-10; May 1-10; August 1-10; November 1-10) and tax sale dates (approximately May 6 through June 17), regardless of staffing levels.

PROCEDURAL HISTORY

On March 13, 2020, I signed an Order to Show Cause directing the City to file any opposition by March 23; CWA to file any reply by March 27; and set April 1 as the return date for oral argument. On March 23, with CWA's consent, I granted the City's request for an extension and directed that it file any opposition by March 30; CWA file any reply by April 3; and set April 8 as the return date for oral argument. On March 30, with CWA's consent, I granted the City's request for another extension and directed that it file any opposition by April 1; CWA file any reply by April 6; and maintained April 8 as the return date for

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1/ (...continued)
representative."

oral argument. On April 8, counsel engaged in oral argument during a telephone conference call. At the conclusion of oral argument, based upon the parties' representations, I asked the City's attorney to inquire as to whether the City was willing to engage in good faith negotiations with CWA in an effort to resolve the instant dispute before I proceeded to issue a decision. On April 9, the City indicated that it was willing to engage in good faith negotiations with CWA. Accordingly, I directed the parties to immediately engage in negotiations.

On April 14, 2020, the parties advised that negotiations had been unsuccessful. Accordingly, I convened a telephone conference call to provide the parties with notice regarding how this matter would proceed. Thereafter, I issued an order imposing temporary restraints, directed the parties to continue their negotiations and inform me of any progress, and indicated that the temporary restraints were subject to modification and/or clarification in a subsequent written decision disposing of the application for interim relief.

In support of the application for interim relief, CWA submitted a brief, exhibits, and the certification of Local 1014 Trustee, Ma'kin El (El). In opposition, the City submitted a brief, exhibits, and the "purported" certification of its Acting Tax Collector, Michelle D. Hill (Hill). CWA also filed a reply brief, exhibits, the certification of its attorney, James Katz

(Katz); the certification of Local 1014 President, Garren Steiner (Steiner); and the supplemental certification of Local 1014 Trustee, Ma'kin El (El).

FINDINGS OF FACT

CWA represents various City employees including, but not limited to, those employed in the City's Tax Office. See 2018-2021 CNA, Art. I, App. 1; El Certification, ¶3. The City and CWA are parties to a collective negotiations agreement (CNA), which was executed on January 13, 2020, in effect from January 1, 2018 through December 31, 2021. The grievance procedure ends in binding arbitration.

Article XI of the parties' CNA, entitled "Vacation," provides in pertinent part:

> A) Full time employees in the City service shall be entitled to vacation with pay:
>
> > 1) New employees shall only receive one working day for the initial month of employment if they begin work on the 1st through the 8th day of the calendar month, and one-half working day if they begin on the 9th through the 23rd day of the month. If an employee commences work after the 23rd day of the month, no vacation accrues to the employee for that month. After the initial month of employment and up [to] the end of the first calendar year, employees shall be credited with one working day for each month of service.
>
> * * *

2) Four (4) vacation days per calendar year may be used as personal emergency vacation days. Employees shall notify their immediate supervisor prior to their regular starting time. Personal emergency vacation days shall not be granted for a day preceding or following a holiday. Personal emergency vacation days are non-accumulative.

3) Vacation days earned in the current year may be carried into the succeeding year without requiring approval. However, carried over days must be scheduled by March 31st of the succeeding year to avoid loss of those days.

4) Vacation requests must be submitted in writing to the employee's Department Head or designee in advance on a day for day sliding scale for a vacation request up to four (4) days as follows: One (1) day's notice for one (1) day vacation; two (2) days' notice for two (2) days' vacation; three (3) days' notice for three (3) days' vacation; four (4) days' notice for four (4) days' vacation. Requests for five (5) or more days' vacation shall be submitted at least five (5) working days in advance. A vacation request may be denied if the employee does not provide the appropriate advance notice. All vacation requests are subject to approval. Employees shall be allowed to take vacation in two (2) weeks or more time frames upon ten (10) days' notice if they have accumulated enough days to accommodate such request, upon the Department Head's (or designee's) approval of an absence of that length. This approval shall not be arbitrarily withheld.

5) Upon separation from employment, an employee shall be entitled to vacation allowance for the current

year prorated on the number of months worked in the calendar year in which the separation becomes effective and any vacation leave which he/she may have carried over from the preceding calendar year.

6) If an employee dies having vacation credits, a sum of money equal to the compensation figured on his salary rate at the time of death shall be circulated and paid to his/her estate.

7) When the vacation allowance for an employee changes, based on his/her years of service, during any calendar year the annual allowance shall be computed at the new rate.

8) Employees covered by this Agreement shall be required to submit only one choice per vacation request when requesting vacation leave.

9) Seniority as outlined in Article III[2/] shall prevail when questions arise concerning vacation scheduling, if requests are made prior to March 31st.

2/ Article III of the parties' CNA, entitled "Seniority," provides in pertinent part:

> A) Except where the New Jersey Civil Service Commission regulations require otherwise, the employee with the greatest amount of seniority shall be given preference, provided the employee has the ability to perform the work, with respect to demotions, layoffs, recalls, vacation schedules and holidays. Seniority shall be a consideration but not the sole factor in filling new or vacant positions, assigning work, and in shift, schedule or sectional assignments.

> 10) Employees shall be allowed to take vacation in two (2) weeks or more time frames if they have accumulated enough days to accommodate such request, upon the Department Head's approval of an absence of that length. This approval shall not be arbitrarily withheld.

Article XXI of the parties' CNA, entitled "Work Rules," provides:

> A) The City may establish reasonable and necessary rules of work and conduct for employees. Notice of the establishment of such rules will be given to Local 1014 and posted on employee bulletin boards no later than ten (10) days prior to their effective date. Such rules shall be equitably applied and enforced. The locations of the employee bulletin boards are to be established by mutual agreement of the parties hereto.

Article XXIV of the parties' CNA, entitled "Management Rights," provides in pertinent part:

> A) It is recognized that the management of the City offices, the control of the properties and the maintenance of order and efficiency, are solely the responsibility of the City. Accordingly, the City retains the following rights, including, but not limited to: selection and direction of the workforce; to hire, suspend, or discharge for just cause; to establish work-related rules and regulations subject to prior notice to the Union of any change; to decide the staff, scheduling work assignments; to take disciplinary action for just cause; to assign, promote, demote or transfer; to determine the amount of overtime to be worked; to relieve employees from duty because of lack of work or for other legitimate reasons; to decide on the number and location of facilities; to determine the

> work to be performed, direct the performance of the work and the amount of supervision necessary; to determine the equipment, methods, schedules, together with the selection, procurement, designing, engineering and the control of equipment and materials; and to purchase service of others, contract or sub-contract.

On March 10, 2020, the City's then-Tax Collector, Nahema Harvey (Harvey), issued a memorandum that provides in pertinent part:

> Effective immediately unless otherwise noted
>
> * * *
>
> -No vacation days will be approved during the collection and Tax Sale periods (Feb, May, Aug, and November 1-10, during extended grace periods dates will be adjusted; and May 11-Tax Sale Date) any sick time used during this period will require a doctor note. Please see your supervisor for any special or emergency circumstances.
>
> * * *
>
> Failure to comply with office policy will result in disciplinary action.

Steiner certifies that "[n]either the memorandum nor the dates were discussed or negotiated with the Union"; that "[d]uring the most recent contract negotiations, the City never discussed with the Union any black out dates for vacation approval for employees in the Tax Office or any other City department"; and "[p]rior to the issuance of this memorandum, the Union never received any documents from the City indicating that it had any black out policy for employees in the Tax Office covering the property tax collection or sales period, nor had the City ever notified the Union of such a policy."

El certifies that "[n]either the memorandum nor the [black out] dates were negotiated with the Union"; that "[t]here is no other office in the City which has ever imposed such a restriction on vacation leave"; and that he is "unaware of any other tax office in the State of New Jersey which imposes such a draconian restriction." El certifies that the "vacation prohibition applies regardless of the number of employees available to work in the [City's] Tax Office" and "even though there has never been any minimum staffing requirements set or imposed by the Tax Office"; and that the "vacation restriction applies even though there are no other restrictions on paid time off . . . including bereavement leave, sick leave, jury duty, or compensatory time applicable to the Tax Office employees." El certifies that "[n]othing in . . . the [parties'] agreement allows the City to black out certain days during the work year when employees are unable to take vacations" and "[o]ther than scheduling vacation in advance, the contract imposes no other requirement for approval of vacation leave." El certifies that "[b]y unilaterally adopting a policy which prohibits employees in the Tax Collector's Office from taking vacation for almost one-third of the work year, regardless of the available staffing in the Tax Office . . . or from other offices in [the City], the City's actions represent a repudiation of the terms and conditions of the parties' negotiated agreement . . . and a

unilateral change of the terms and conditions of employment." El certifies that "[b]argaining unit members will suffer irreparable harm as a result of the City's unilateral change in terms and conditions of employment and refusal to grant vacation leave to any Tax Office employee during approximately 81 days during the work year"; and "[l]eave wrongfully denied is highly disruptive of employees' personal lives and often presents leave opportunities which can never be recovered."

On March 11, 2020, CWA's attorney sent a letter to Harvey, the City's then-Tax Collector, that provides in pertinent part:

> This office is counsel to CWA Local 1014 and I am writing to you in response to a policy which was issued on March 10, 2020 which, in pertinent part, indicated that absolutely no vacation days will be approved during the tax collection period, which runs from February 1 through February 10; May 1 through May 10; August 1 through August 10; and November 1 through November 10, as well as during the tax sale dates from May 11 through the end of the tax sale date. In 2019, tax sale dates ran from May 6 through June 17. As a result of this new policy, the tax office is prohibiting any employee from being on vacation for approximately 81 days during the work year.
>
> The Union and the City are parties to a collective negotiations agreement, which includes vacation provisions. The parties have never negotiated any black out dates when it comes to available vacation dates. The City of Camden may not obtain through unilateral action that which it failed to negotiate with the Union at the bargaining table.

> The Public Employment Relations Commission ("PERC") has long recognized that leave time for employees is a term and condition of employment and the scheduling of time off must be negotiated between the parties.
>
> * * *
>
> In this case, the City has unilaterally decided that for 81 days during the year, or almost one-third of the available work days, employees will be unable to schedule a vacation, and has made this decision without negotiating this issue with the Union. The City's actions [are] a clear violation of the New Jersey Employer-Employee Relations Act and will not be tolerated. No other employee in the City has ever been subject to such a unilaterally imposed vacation restriction, and the Tax Office has never previously applied such a burdensome policy to the employees in this office.
>
> Unless the City immediately rescinds that portion of the March 10, 2020 memo that restricts vacation leave for any employees during both tax collection and tax sale periods, Camden will [give] the Union no choice but to immediately file for interim relief before the New Jersey Employment Relations Commission. Please notify my office by no later than Friday, March 13, 2020 at noon as to how it wishes to proceed in this matter. It is my hope that the City will reconsider its position in this matter and rescind its unjustified and unwarranted vacation leave provisions.

On March 13, 2020, the City's attorney sent correspondence to CWA's attorney indicating that "the 81 vacation black out days encompassing the property tax collection and tax sales period is within Camden's managerial prerogative, and the City is unwilling to rescind the vacation blocking rules which were issued and/or

[to] bargain with Local 1014 over this prohibition." See Katz Certification, ¶4.

Also on March 13, 2020, CWA filed the underlying unfair practice charge accompanied by the instant application for interim relief.

On March 16, 2020, CWA's attorney sent a letter to the City's attorney confirming the City's legal position and requesting the following documents/information:

> 1. Any and all work rules issued prior to March 10, 2020 in which the City indicated that during property tax collection dates (February 1-10; May 1-10; August 1-10; and November 1-10), that no employees in the Tax Collection Office will be eligible to take vacation.
>
> 2. Any and all documents issued prior to March 10, 2020 in which the City indicated that during property tax collection dates (February 1-10; May 1-10; August 1-10; and November 1-10), that no employees in the Tax Collection Office will be eligible to take vacation.
>
> 3. Any and all written documents establishing minimum staffing levels in the Tax Collector's Office.
>
> 4. Any and all documents indicating that the City of Camden during contract negotiations for the most recent collective negotiations agreement, which were signed on January 13, 2020, made any proposals in connection with imposing any type of vacation black out for employees in the City of Camden Tax Collector's Office.

To date, the City has not responded to CWA's request or produced any documents/information. See Katz Certification, ¶5.

On March 26, 2020, Michelle D. Hill (Hill) became the City's Acting Tax Collector; she has not yet been confirmed by the City Council. See El Supp. Certification, ¶3. Prior to March 26, 2020, Hill worked as the Administrative Assistant to the City's Finance Director, Patrick Keating. Id. Harvey now works as the Assistant Tax Collector. Id.

On April 1, 2020, the City's attorney sent a letter to CWA's attorney that provides in pertinent part (citations omitted):

* * *

> In the present complaint you have filed with PERC, case law clearly demonstrates that it is not uncommon for PERC to deny a union's requests for interim relief in matters involving management's blackout dates for vacation. It is long-standing that a union's request for interim relief from an alleged unilateral change in a vacation leave policy must demonstrate a substantial likelihood of success on the merits of the case or on its legal allegations; and more importantly demonstrate that the employer violated contractual rights or managerial prerogatives. When a union fails at this requirement, management's decision to blackout dates for vacation is upheld by PERC. [I]f the Employer's plan constituted an available methodology to address public deficiencies, then that plan would be supported by PERC. The union is required to demonstrate that irreparable harm will occur if the requested relief is not granted. Additionally, PERC denied a union's request for interim relief when the Employer demonstrates that its particular managerial prerogative has been a prior year practice.
>
> PERC requires the union to meet the standard of interim relief. In so doing, the union must demonstrate that the requisite substantial likelihood of success on the

> merits of the case is present in the early stages of the process, which must be based on legal and factual allegations that irreparable harm will occur. Furthermore, the public interest must not be injured by a union's requested interim relief order.
>
> In conclusion, the City, as you know, does not intend to rescind any portion of the March 10, 2020 memo.

Also on April 1, 2020, CWA's attorney sent a letter to the City's attorney that provides in pertinent part:

> * * *
> For now, the Union strenuously disagrees with the City's legal analysis.

Hill's "purported" certification asserts that "[s]ince before [May of 2006] it has always been a practice of the [City's Department of Revenue Collection] to black out vacations during the collection periods" because "[i]t is an extremely busy time"; that "[d]uring those times [the City] service[s] hundreds of customer accounts on a daily basis"; that "[t]here is a constant flow of taxpayers in the office often times extending beyond the office doors into the hall"; and "in order to get this done it requires an all hands on deck approach." Hill's "purported" certification asserts that "[t]here are 4 cashier windows that have to be manned and the head cashier is there to back them up and prepare out daily deposits"; "[t]here are 3 customer service areas that are utilized and the additional 2 members of the customer service team working to keep the phone calls answered in a timely manner and answering the email system all while being

backed up by the Collector"; and that "[d]uring this time the team usually has to stay late and comp or overtime is provided for the period." Hill's "purported" certification asserts that "[u]nder the operation of Revenue Collections is the mailroom"; and that "[w]henever the mail clerk is out of the office, one of the clerical staff members must fill in for the day(s) and during the very busy collections period it could cripple the service[s] [the City] provide[s] to residents." Hill's "purported" certification asserts that "[t]here [have] been moments such as marriages, senior graduations[,] and the death of a loved one where exceptions have been made . . . and [the City] do[es] [its] best to be accommodating."[3/]

El certifies that he has reviewed Hill's "purported" certification. El certifies that "[p]rior to the issuance of the

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3/ In addition to Hill's "purported" certification, the City's brief includes a section entitled "Issues" that sets forth certain factual assertions (e.g., "[b]ased on prior practice the City Tax Collector determined years prior that the manpower needed at the window during certain times of the year must consist of nine persons during working hours"; "[d]uring certain times if one person is missing from the window during tax collection than either the public cannot be professionally and adequately serviced [or] the City risk[s] not collecting revenue" and "[t]herefore, the mail clerk must also be available so that none of the nine workers maintaining collection activity at the nine windows would have to leave their station to collect and distribute incoming daily mail"; "the only complain[t] from the entire department was by one employee, . . . the mail clerk, whose position cannot be substituted by any other employee in the department due to the high seasonal demand at the tax collection windows").

March 10, 2020 . . . work rules for the Tax Office, which included the establishment of vacation black out dates during the property tax collection and sales period, the City had never previously disseminated any written memoranda regarding such black out dates." El certifies that "on October 22, 2019[,] Harvey approved [his] vacation day for November 1, 2019"; and "on December 30, 2019, Harvey approved [his] vacation days for August 3 and 4, 2020." El notes that "all three vacation days [fell] during property tax collection periods."

LEGAL ARGUMENTS

CWA argues that it has satisfied the standard for interim relief. Specifically, CWA maintains that it has a substantial likelihood of prevailing in a final Commission decision given that the Commission has held that "the scheduling of paid time off is generally a mandatorily negotiable term and condition of employment, and a public employer does not have a managerial prerogative to unilaterally limit the number of employees on leave or the amount of leave time absent a showing that minimum staffing requirements or other managerial prerogatives would be jeopardized." CWA asserts that the parties "negotiated a contract which provided for vacation leave for . . . unit members" but "never agreed that there are certain days during the year when employees in the Tax Office, or any other City office, are unable to take vacation . . . or when vacation requests will

never be approved"; and that "if the parties wanted to restrict how vacation leave was to be granted, they knew how to negotiate those restrictions." CWA concedes that "vacation requests require approval" but contends that "such approval is not to be 'arbitrarily withheld'"; and that "[t]he City's rule, which establishes a per se prohibition on vacation leave covering 81 days during the year, regardless of staffing needs or availability, is the 'poster child' for arbitrarily withholding vacation leave." CWA maintains that "[the City's] absolute prohibition on vacation leave in the Tax Office during almost a third of the work year, in the absence of any evidence that the granting of such leave prevents it from meeting minimum staffing requirements, is unreasonable and unlawful." CWA asserts that "[t]he City has offered absolutely no evidence demonstrating that by allowing vacation leave it would be unable to service the public, or unable to meet public need through overtime arrangements" and the fact "[t]hat it has never established a minimum staffing requirement for the Tax Office evidences that [the City] cannot offer any justification in support of its extraordinarily draconinan vacation leave prohibition."[4/] CWA

4/ In support of its position, CWA cites N.J.S.A. 34:13A-5.3, Gloucester Cty. Sheriff's Dep't, P.E.R.C. No. 2019-19, 45 NJPER 205 (¶53 2018), Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Ass'n, 78 N.J. 25, 48 (1978), Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000), (continued...)

also argues that its members will suffer irreparable harm if interim relief is not granted because "leave time that may be wrongfully denied represents leave opportunities which are lost forever and cannot be remedied later in a Commission Order." CWA notes that "[t]he Commission has repeatedly enjoined efforts by employers to restrict employees from taking time off during the year . . . when there has been no evidence that an employer is unable to maintain minimum staffing"; and that "irreparable harm is found in an unfair practice case where the Commission is

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4/ (...continued)
Sussex Cty. Bd. of Chosen Freeholders, I.R. No. 2003-13, 29 NJPER 274 (¶81 2003), State of New Jersey (Dep't of Corrections), P.E.R.C. No. 2004-77, 30 NJPER 208 (¶78 2004), Pennsauken Tp., P.E.R.C. No. 92-39, 17 NJPER 478 (¶22232 1991), City of Trenton, I.R. No. 2003-4, 28 NJPER 368 (¶33134 2002), Town of Kearny, I.R. No. 95-19, 21 NJPER 187 (¶26120 1995), Long Hill Tp., P.E.R.C. No. 2000-40, 26 NJPER 19 (¶31005 1999), Rutherford Bor., P.E.R.C. No. 97-12, 22 NJPER 322 (¶27163 1996), recon. den. P.E.R.C. No. 97-95, 23 NJPER 163 (¶28080 1997), Town of West New York, P.E.R.C. No. 89-131, 15 NJPER 413 (¶20169 1989), Marlboro Tp., P.E.R.C. No. 87-124, 13 NJPER 301 (¶18126 1987), City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1983), Lodi Bor., I.R. No. 2006-14, 32 NJPER 65 (¶33 2006), New Jersey Highway Auth., P.E.R.C. No. 2001-77, 27 NJPER 292 (¶32106 2001), Town of Seacaucus, P.E.R.C. No. 2000-73, 26 NJPER 174 (¶31070 2000), Middle Tp., P.E.R.C. No. 88-22, 13 NJPER 724 (¶18272 1987), Hillsborough Tp., P.E.R.C. No. 2001-53, 27 NJPER 180 (¶32058 2001), South Orange Village Tp., P.E.R.C. No. 90-57, 16 NJPER 37 (¶21017 1989), Garwood Bor., P.E.R.C. No. 90-50, 16 NJPER 11 (¶21006 1989), Old Bridge Tp., P.E.R.C. No. 2007-32, 32 NJPER 368 (¶155 2006), Bradley Beach Bor., P.E.R.C. No. 90-60, 16 NJPER 43 (¶21020 1989), Livingston Tp., P.E.R.C. No. 90-30, 16 NJPER 607 (¶20252 1989), Edison Tp., I.R. No. 2010-3, 35 NJPER 241 (¶86 2009), and Town of Seacaucus, I.R. No. 2000-6, 226 NJPER 83 (¶31032 1999), aff'd P.E.R.C. No. 2000-73, 26 NJPER 174 (¶31070 2000).

unable to fashion an adequate, effective remedy at the conclusion of the plenary proceeding in that case." CWA maintains that "[i]n this case, where the rights of unit members in the Tax Office have been irreparably harmed by the City's unilateral, arbitrary, and unreasonable actions, suffering lost leave opportunities which can never be recovered and/or rectified by a Commission Order at the close of the case, CWA has established irreparable harm."[5/] CWA also argues that the relative hardship weighs in its favor and that the public interest will not be harmed by a grant of interim relief. CWA asserts that "[t]he City has offered no evidence . . . that it will be unable to maintain minimum staffing in the absence of its vacation prohibition, particularly since it has never adopted any minimum staffing requirements for the Tax Office . . . and does not restrict any other types of absences"; however, "[e]mployees denied leaved because of [the City's] unilateral change have suffered irreparable harm which cannot be recovered at the end of

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5/ In support of its position, CWA cites Brick Tp. Bd. of Ed., I.R. No. 2011-31, 37 NJPER 39 (¶13 2011), State of New Jersey, I.R. No. 2011-23, 36 NJPER 446 (¶173 2010), Caldwell Tp., I.R. No. 2000-12, 26 NJPER 193 (¶31078 2000), Mantua Tp., I.R. No. 2019-17, 45 NJPER 298 (¶77 2019), Mercer Cty., I.R. No. 2019-15, 45 NJPER 273 (¶71 2019), Roselle Bor., I.R. No. 2009-9, 34 NJPER 317 (¶115 2008), Lodi Bor., I.R. No. 2006-14, 32 NJPER 65 (¶33 2006), City of Plainfield, I.R. No. 2004-14, 30 NJPER 193 (¶72 2004), City of Trenton, I.R. No. 2003-4, 28 NJPER 368 (¶33134 2002), North Bergen Tp., I.R. No. 97-16, 23 NJPER 249 (¶28110 1997), Essex Cty., I.R. No. 90-2, 15 NJPER 459 (¶20188 1989), and Town of Kearny, I.R. No. 95-19, 21 NJPER 187 (¶26120 1995).

this case." CWA also asserts that "[the City] has never demonstrated any inability to service the public absent this vacation leave prohibition" and that "[t]he public interest is also benefitted when the parties . . . adhere to the tenets of the Act and protect the statutory rights of the Union and its employees." CWA maintains that "[r]especting the statutory rights of the Union and the bargaining unit advances labor stability and the public interest" while "[the City's] unwarranted disregard of its legal obligations and unilateral adoption of an utterly arbitrary vacation leave policy does not."

In response, the City argues that CWA has not satisfied the standard for interim relief. Specifically, the City maintains that CWA has not demonstrated a substantial likelihood of prevailing in a final Commission decision because "New Jersey case law clearly demonstrates that it is not uncommon for PERC to deny a union's requests for interim relief in matters involving management's blackout dates for vacation." The City asserts that "[i]t is long-standing that a union's request for interim relief from an alleged unilateral change in a vacation leave policy must demonstrate a substantial likelihood of success on the merits of the case or on its legal allegations; and more importantly demonstrate that the employer violated contractual rights or managerial prerogatives." The City contends that "[w]hen a union fails at this requirement, management's decision to blackout

dates for vacation is upheld by PERC"; and that "if the Employer's plan constituted an available methodology to address public deficiencies, then that plan would be supported by PERC." The City maintains that "[t]he certification by the Tax Collector establishes that it has always been the Plan of this division to man the windows and telephones during tax season since prior to May 2006."[6/] The City also argues that CWA "is required to demonstrate that irreparable harm will occur if the requested relief is not granted" and that "PERC denied a union's request for interim relief when the Employer demonstrates that its particular managerial prerogative has been a prior year practice." The City maintains that "PERC requires the union to meet the standard of interim relief" and "[i]n so doing, the union must demonstrate that the requisite substantial likelihood of success on the merits of the case is present in the early stages of the process, which must be based on legal and factual allegations that irreparable harm will occur."[7/] The City also argues that "the public interest must not be injured by a union's requested interim relief order" and that "[t]he public interest

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6/ In support of its position, the City cites City of Union City, I.R. No. 2008-3, 33 NJPER 313 (¶117 2007), State-Operated School Dist. of Jersey City, I.R. No. 97-3, 22 NJPER 342 (¶27177 1996), and Hoboken Bd. of Ed., P.E.R.C. No. 93-15, 18 NJPER 446 (¶23200 1992).

7/ In support of its position, the City cites City of Camden, I.R. No. 2009-22, 35 NJPER 100 (¶39 2009).

[is] actually protected . . . because of management's plan to black out vacation days during tax seasons."[8/]

In reply, CWA argues that the City's brief and Hill's "purported" certification do not comport with N.J.A.C. 19:13-3.6(f)1 given that they are unsigned and devoid of pertinent facts and coherent legal argument. CWA maintains that "the bald assertions and bare conclusions in the City's brief regarding factual claims in the absence of a tendered certification [are] [in]sufficient to overcome the Union's meritorious application for interim relief."[9/] CWA also argues that Hill's "purported" certification does not comport with New Jersey Court Rule 1:4-4(b) given that it is unsigned and not based upon penalty of perjury; and that "nothing in the certification evidences that it is based upon personal knowledge and/or establishes the basis for such knowledge regarding Tax Office operations relating to vacation black out days."[10/] CWA maintains that the general

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8/ In support of its position, the City cites Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982).

9/ In support of its position, CWA cites Edison Tp., I.R. No. 2012-14, 39 NJPER 145 (¶44 2012), Ridge at Back Brook LLC v. Klenert, 437 N.J. Super. 90, 97-98 (App. Div. 2014), Brae Asset Fund, L.P. v. Newman, 327 N.J. Super. 129, 134 (App. Div. 1998), Mercer Cty. Sheriff's Office, P.E.R.C. No. 2017-2, 43 NJPER 65 (¶16 2016), and PBA Local 187, P.E.R.C. No. 2005-61, 31 NJPER 60 (¶29 2005).

10/ In support of its position, CWA cites U.S. v. Branella, 972 F. Supp. 294, 300 (D.N.J. 1997), Davis v. Solid Waste Services, 625 Fed. Appx. 104, 105, n.1 (3d Cir. 2015), (continued...)

statements within Hill's "purported" certification are not sufficiently specific to establish a past practice that overcomes CWA's claim. CWA posits that "if there was such an established practice in [the City], why did Tax Collector Harvey suddenly feel compelled on March 10, 2020 to issue an extensive memorandum to all employees in the Tax Office . . . which notes that it is effective immediately . . . and explicitly announces a vacation black out period during all property tax collection and sales tax periods." CWA argues that "[e]ven if the legal and factual failings in [the City's] brief and the accompanying Hill certification are disregarded, and the certification considered for 'what it is worth,' at the end of the day, it is hardly worth anything." CWA maintains that "the City has [not] established a ten-employee minimum or any staffing minimum for the [Tax] Office; and/or that the City could not deliver necessary services if a single employee was granted vacation leave." CWA notes that the City "concedes that there have been numerous occasions in the past where employees were granted time off for a variety of reasons and there is no evidence that the Tax Office was unable to function or operate." CWA contends that "even if . . . [the] vague claim that there has always been a practice [in the Tax

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10/ (...continued)
Tukesbrey v. Midwest Transit, 822 F. Supp. 1192, 1198 (D.N.J. 1993), and Nissho-Iwai American Corp. v. Kline, 845 F.2d 1300, 1305-1306 (5th Cir. 1988).

Office] to black out vacations during the collection periods" is accepted, this "represents an unsubstantiated claim insufficient to demonstrate that the Union waived its right to negotiate over this issue." More specifically, CWA maintains that "[n]othing in the parties' collective negotiations agreement remotely constitutes waiver" and "the City never raised . . . any issue concerning black out dates for vacation approval for employees in the Tax Office" during collective negotiations. "Even if the Hill Certification is sufficient to establish that CWA's conduct amounted to acquiescence to some generic vacation black out policy," CWA contends that the "waiver of its right to negotiate ended when, after the parties executed a new collective negotiations agreement in January of 2020, [CWA] contested the work rule memorandum issued on March 10, 2020 which established in writing for the first time . . . the 81-day black out period for employees in the Tax Office." CWA maintains that "[i]n response to [its] objection, [the City] has refused to rescind its policy or negotiate."[11/] CWA argues that "[t]he cases cited

11/ In support of its position, CWA cites Bridgeton Bd. of Ed., P.E.R.C. No. 2011-64, 37 NJPER 72 (¶27 2011), Red Bank Regional Ed. Ass'n v. Red Bank Regional H.S. Bd. of Ed., 78 N.J. 122, 140 (1978), UMDNJ, P.E.R.C. No. 2010-12, 35 NJPER 330 (¶113 2009), Vernon Tp., P.E.R.C. No. 84-41, 9 NJPER 655 (¶14283 1983), South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987), Somerville Bor., P.E.R.C. No. 84-90, 10 NJPER 125 (¶15064 1984), Mantua Tp., I.R. No. 2019-17, 45 NJPER 298 (¶77 2019), and Rutgers, H.E. No. 2015-5, 41 NJPER (continued...)

by the City are inapposite" and reiterates that "PERC has long recognized that leave time that may be wrongfully denied represents leave opportunities which are lost forever and cannot be remedied later in a Commission Order."[12/]

STANDARD OF REVIEW

To obtain interim relief, the moving party must demonstrate that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted; in certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. See Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009) (citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe)); State of New Jersey (Stockton College), P.E.R.C. No. 76-

11/ (...continued) 235 (¶77 2014).

12/ In support of its position, CWA cites Mantua Tp., I.R. No. 2019-17, 45 NJPER 298 (¶77 2019).

6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975). In Little Egg Harbor Tp., the Commission Designee stated:

> [T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

N.J.S.A. 34:13A-5.3, entitled "Employee organizations; right to form or join; collective negotiations; grievance procedures," provides in pertinent part:

> Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established.

Public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). "It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification." State of New Jersey (Corrections), H.E. 2014-9, 40 NJPER 534 (¶173 2014) (citing New Jersey College of

Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978)). The Commission has held that a violation of another unfair practice provision derivatively violates subsection 5.4a(1). Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Public employers are prohibited from "[r]efusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. . . ." N.J.S.A. 34:13A-5.4a(5). A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010). The Commission has held that "a breach of contract may also rise to the level of a refusal to negotiate in good faith" and that it "ha[s] the authority to remedy that violation under subsection a(5)." State of New Jersey (Dep't of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

New Jersey courts and the Commission have held that "employers are barred from 'unilaterally altering mandatory bargaining topics, whether established by expired contract or by past practice, without first bargaining to impasse.'" In re Atlantic Cty., 230 N.J. 237, 252 (2017) (citing Bd. of Educ. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16, 22 (1996)); accord

Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n, 78 N.J. 25, 48 (1978) (finding that the Legislature, through enactment of the Act, "recognized that the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be established through bilateral negotiation"; finding that unilaterally changing terms and conditions of employment by a public employer "ha[s] the effect of coercing its employees in their exercise of the organizational rights guaranteed them by the Act because of its inherent repudiation of and chilling effect on the exercise of their statutory right to have such issues negotiated on their behalf by their majority representative"); Closter Bor., P.E.R.C. No. 2001-75, 27 NJPER 289 (¶32104 2001) (holding that "[u]nilateral changes in [mandatorily negotiable terms and conditions of employment] violate the obligation to negotiate in good faith" and "can shift the balance of power in the collective negotiations process"; holding that "[i]f a change occurs during contract negotiations, the harm is exacerbated").

ANALYSIS

At issue in this interim relief application is whether, absent demonstrating that minimum staffing requirements have been established and that same would be jeopardized by an existing vacation leave scheduling system, the City has a managerial

prerogative to unilaterally implement a vacation leave black-out policy during certain periods.

The Commission has consistently held that a public employer has a managerial prerogative to determine its staffing levels. City of Vineland, P.E.R.C. No. 2013-43, 39 NJPER 250 (¶86 2012). Minimum staffing levels are not mandatorily or permissively negotiable. West Paterson Bor., P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000). An employer also has a managerial prerogative to determine the number and type of employees who will be on duty to provide services or supervise others. Fairfield Tp., P.E.R.C. No. 2014-73, 40 NJPER 514 (¶166 2014).

The Commission has also consistently held that "(1) scheduling of vacation leave or other time off is mandatorily negotiable, provided the employer can meet its staffing requirements; (2) the employer may deny a requested leave day to ensure that it has enough employees to cover a shift, but it may also legally agree to allow an employee to take leave even though doing so would require it to pay overtime compensation to a replacement employee; and (3) an employer does not have an inherent prerogative to unilaterally limit the number of employees on leave or the amount of leave time absent a showing that minimum staffing requirements would be jeopardized." State of New Jersey (Dep't of Corrections), P.E.R.C. No. 2004-77, 30 NJPER 208 (¶78 2004); see also Pennsauken Tp., P.E.R.C. No.

92-39, 17 NJPER 478 (¶22232 1991); City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982); Watchung Bor., P.E.R.C. No. 2016-49, 42 NJPER 351 (¶99 2016) (noting that an employer "has a reserved prerogative to deny or revoke leave when necessary to ensure that it will have enough employees to meet its staffing needs and to deploy the specific number and type of employees required for a particular shift or respond to emergencies"); Somerset Cty. Sheriff's Office, P.E.R.C. No. 2019-17, 45 NJPER 199 (¶51 2018); Gloucester Cty. Sheriff's Office, P.E.R.C. No. 2019-19, 46 NJPER 205 (¶53 2018). However, if an agreed upon system for scheduling time off prevents an employer from meeting its staffing requirements, the system is no longer mandatorily negotiable. Teaneck Firefighters Mutual Benevolent Ass'n, Local No. 42, P.E.R.C. No. 2013-60, 39 NJPER 423 (¶135 2013), aff'd 41 NJPER 293 (¶97 App. Div. 2015).

Given these legal precepts, I find that CWA has demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.

It is undisputed that the parties' 2018-2021 CNA includes a negotiated vacation leave provision that does not provide for any black-out periods; rather, it specifies that "approval [for vacation leave requests] shall not be arbitrarily withheld." See 2018-2021 CNA, Art. XI(A)(4, 10). It is also undisputed that after the parties reached a successor agreement on January 13,

2020, the City's then-Tax Collector issued a memorandum on March 10, 2020 that unilaterally implemented – for the first time in writing – a vacation leave black-out policy (i.e., "[n]o vacation days will be approved during the collection and Tax Sale periods (Feb, May, Aug, and November 1-10, during extended grace periods dates will be adjusted; and May 11-Tax Sale Date)"). See El Certification, ¶11, Ex. B. Finally, it is undisputed that prior to the City's unilateral implementation of the vacation leave black-out policy on March 10, 2020, at least one unit member requested – and was approved for – vacation days during 2019 and 2020 that fall within the black-out periods. See El Supp. Certification, ¶4, Exhs. A-B.

The City failed to provide any evidence that establishes a factual dispute. Harvey, who previously served as the City's Tax Collector and issued the March 10, 2020 memorandum that unilaterally implemented the vacation leave black-out policy, did not submit a certification despite the fact that she is now the City's Assistant Tax Collector. Hill's "purported" certification does not satisfy the requirements prescribed in N.J.A.C. 19:13-3.6(f)1[13/] or New Jersey Court Rule 1:4-4[14/] – e.g., it is

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13/ N.J.A.C. 19:13-3.6(f)1 requires that "[a]ll briefs filed with the Commission . . . [r]ecite all pertinent facts supported by certifications(s) based upon personal knowledge."

14/ New Jersey Court Rule 1:4-4 provides:

(continued...)

unsigned; it is not made under penalty of perjury/punishment; it does not demonstrate that Hill, who became Acting Tax Collector after the City's March 10, 2020 memorandum was issued and previously served as Administrative Assistant to the City's Finance Director, has personal knowledge regarding the underlying factual issues; and the typed date is crossed out, with a

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14/ (...continued)

> (a) Form. Every affidavit shall run in the first person and be divided into numbered paragraphs as in pleadings. The caption shall include a designation of the particular proceeding the affidavit supports or opposes and the original date, if any, fixed for hearing. Ex parte affidavits may be taken outside the State by a person authorized to take depositions under R. 4:12-2 and R. 4:12-3.
>
> (b) Certification in Lieu of Oath. In lieu of the affidavit, oath or verification required by these rules, the affiant may submit the following certification which shall be dated and immediately precede the affiant's signature: "I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment."
>
> (c) Requirement for Original Signature. Every affidavit or certification shall be filed with an original signature, except that a copy of an affidavit or certification may be filed instead, provided that the affiant signs a document that is sent by facsimile or in Portable Document Format (PDF), or similar format, by the affiant and provided that the attorney or party filing the copy of the affidavit or certification files the original document if requested by the court or a party.

different date written in by hand. Similarly, the City's brief does not satisfy the requirements prescribed in N.J.A.C. 19:13-3.6(f)1 or New Jersey Court Rule 1:4-5[15/] – e.g., it is unsigned and undated; it does not demonstrate that the City's attorney has personal knowledge regarding the underlying factual issues; and the factual assertions therein are not supported by any certification(s) based upon personal knowledge, exhibit(s), or other evidence. Accordingly, I am constrained to give limited – if any – weight to the City's factual claims. See Town of Secaucus, H.E. No. 2003-18, 29 NJPER 229 (¶71 2003), adopted P.E.R.C. No. 2004-3, 29 NJPER 370 (¶115 2003) ("[w]hen a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge"); U.S. v. Branella, 972 F. Supp. 294, 300 (D.N.J. 1997) ("[t]he failure to acknowledge the penalty of perjury prevents the court from considering the affidavits'

15/ New Jersey Court Rule 1:4-5 provides:

> Pleadings (other than indictments), motions and briefs shall be signed by the attorney of record of the attorney's associate or by a pro se party. Signatures of a firm may be typed, followed by the signature of an attorney of the firm. Signatures on any duplicate original or carbon copy required to be filed may be typed. Every paper to be filed shall bear the date on which it was signed.

contents for purposes of summary judgment"); Mercer Cty. Sheriff's Office, P.E.R.C. No. 2017-2, 43 NJPER 65 (¶16 2016) ("[b]ald assertions without support in an affidavit or certification based upon the personal knowledge of the affiant cannot support or defeat summary judgment"; "[b]are conclusions in the pleadings without factual support in tendered affidavits will not defeat a meritorious application for summary judgment" and "by the same token, conclusory assertions in an answering affidavit are insufficient to defeat a meritorious application for summary judgment"); N.J.A.C. 19:13-3.6(g) ("[b]riefs not substantially complying with the requirements of [N.J.A.C. 19:13-3.6](f) . . . may be rejected").

With respect to the City's assertion that its minimum staffing requirements will be jeopardized absent implementation of the vacation leave black-out policy, the City has failed to provide any evidence demonstrating that minimum staffing requirements have been established for its Tax Office or that the existing vacation leave scheduling system has/will prevent the City from meeting its staffing requirements. In the absence of such evidence, Commission Designees have granted applications for interim relief in similar circumstances. See, e.g., Mercer Cty., I.R. No. 2019-15, 45 NJPER 273 (¶71 2019) (granting interim relief and reinstating the status quo ante where "the [City] has not asserted or demonstrated with facts analogous to those in

[Teaneck Firefighters Mutual Benevolent Ass'n, Local No. 42, P.E.R.C. No. 2013-60, 39 NJPER 423 (P135 2013), aff'd 41 NJPER 293 (¶97 App. Div. 2015)] that continued implementation of [its existing vacation leave scheduling system] will cause staffing to fall below levels that are required on each shift or tour"); Lodi Bor., I.R. No. 2006-14, 32 NJPER 65 (¶33 2006) (granting interim relief and reinstating the status quo ante where "the Borough has not demonstrated that it cannot achieve its minimum staffing requirements and still maintain the existing practice of two officers on the same shift simultaneously taking vacation or holiday time off"; and "[a]s to . . . unilaterally imposed black-out days, the Borough does not dispute that that is a new rule not negotiated with the PBA . . . [and] has not set forth any rationale for that policy").

Even assuming, arguendo, that Hill's "purported" certification is considered accurate/reliable factual evidence, I find that it "fall[s] short of showing that the [Tax Office's] staffing requirements cannot be met without the . . . categorical limitations on [all unit members] taking vacation during the specified time periods or the blanket ban on using [vacation] leave on the designated days." Watchung Bor., P.E.R.C. No. 2016-49, 42 NJPER 351 (¶99 2016). The City has only provided me with Hill's statements that "collection periods . . . require[] an all hands on deck approach"; the number of cashier windows, customer

service areas, and customer service team members who answer telephone calls and email inquiries; and that clerical staff filling in for the mail clerk "could cripple the service [the Tax Office] provide[]s to [City] residents." These conclusory statements, alone, are insufficient to demonstrate that the City has established minimum staffing requirements for its Tax Office; that the existing vacation leave scheduling system has/will prevent the City from meeting its staffing requirements; or that the City exercised a managerial prerogative when it unilaterally implemented the vacation leave black-out policy. Moreover, CWA has demonstrated that as recently as October 22, 2019 and December 30, 2019, the City approved at least one unit member for vacation days in 2019 and 2020 that fall within the black-out periods. See El Supp. Certification, ¶4, Exhs. A-B. The City failed to offer any explanation regarding how this correlates with the unilateral implementation of a vacation leave black-out policy. Accordingly, "without specific information as to how many [employees] have taken time off . . . [during the vacation leave black-out periods], and how many [employees] are needed to report to [work] those days, [I] am unable to conclude that the [Tax Office] cannot meet its manpower levels unless it bars the use of [vacation leave] [during] the designated days." Watchung Bor.

With respect to the City's assertion that CWA waived its right to negotiate regarding the vacation leave black-out policy, the Commission has held that a change in terms and conditions of employment imposed without negotiations violates subsection 5.4a(5) unless the employer can prove that the employee representative waived its right to negotiate as follows:

> A waiver can come in a number of different forms, but must be clear and unequivocal. For example, if the contract explicitly allows the employer to make the changes, the employee representative has waived any right to negotiate the changes during the term of the contract. In addition, if the employee organization has been apprised of proposed changes in advance and declines the opportunity to negotiate, or has routinely permitted the employer to make similar changes in the past, it may have waived its right to negotiate those changes.
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> [State of New Jersey (Kean University), H.E. No. 2018-2, 44 NJPER 104 (¶34 2017), adopted P.E.R.C. No. 2018-18, 44 NJPER 221 (¶64 2017) (emphasis added).]

It is undisputed that the parties' 2018-2021 CNA does not explicitly establish a vacation leave black-out policy or certain black-out periods, nor does it implicitly allow the City to impose such a blanket restriction; rather, it specifies that "approval [for vacation leave requests] shall not be arbitrarily withheld." See 2018-2021 CNA, Art. XI(A)(4, 10). See 2018-2021 CNA, Art. XI(A)(4, 10). Moreover, CWA has demonstrated that even if the parties' past practice included an unwritten vacation leave black-out policy, the City applied that policy

inconsistently – e.g., as recently as October 22, 2019 and December 30, 2019, the City approved at least one unit member for vacation days in 2019 and 2020 that fall within the black-out periods. See El Supp. Certification, ¶4, Exhs. A-B.

Even assuming, arguendo, that the parties' past practice included a consistently-applied vacation leave black-out policy, CWA's acquiescence – if any – ended when it received the March 10, 2020 memorandum (which, for the first time, memorialized a vacation leave black-out policy) and demanded to negotiate. See El Certification, ¶¶11, 23, Exhs. B & D. In UMDNJ, H.E. No. 2009-3, 34 NJPER 319 (¶116 2008), rev'd P.E.R.C. No. 2010-12, 35 NJPER 330 (¶113 2009) (emphasis added), the Commission held the following:

> . . .[W]here a majority representative has acquiesced to an employer's unilaterally setting or changing a term and condition of employment, no violation of the obligation to negotiate will be found where the employer simply acted consistent with that practice. However, that waiver of the right to negotiate ends when the union's acquiescence ends. Also, a failure to request negotiations in the past does not amount to a waiver of a present right to be notified of prospective changes and to be given the opportunity to request negotiations about them.

Accord State of New Jersey (Kean University), H.E. No. 2018-2, 44 NJPER 104 (¶34 2017), adopted P.E.R.C. No. 2018-18, 44 NJPER 221 (¶64 2017); Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd

166 N.J. 112 (2000); N.J.S.A. 34:13A-5.3. It is undisputed that the City did not negotiate with CWA before implementing the vacation leave black-out policy. See El Certification, ¶¶11, 14; Steiner Certification, ¶¶3-4. It is also undisputed that in response to CWA's demand to negotiate, the City refused to negotiate and/or rescind the vacation leave black-out policy. See Katz Certification, ¶4; City's Br., Ex. A.1-2. As such, it appears that the City may have violated the Act. See Mantua Tp., I.R. No. 2019-17, 45 NJPER 298 (¶77 2019) (granting interim relief and reinstating the status quo ante "[i]n the absence of apparent facts showing that the Township negotiated with the PBA before implementing the revised [Minimum Staffing Levels Policy]"); accord Lodi Bor.; see also State of New Jersey (Kean University); UMDNJ; Middletown Tp.

Accordingly, I find that CWA has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.

I also find that CWA has established irreparable harm. "Irreparable harm will be found in an unfair practice case where the Commission is unable to fashion an adequate, effective remedy at the conclusion of the plenary proceeding in that case." Brick Tp. Bd. of Ed., I.R. No. 2011-31, 37 NJPER 39 (¶13 2011). Commission Designees have consistently held that "[l]eave time which is denied represents leave opportunities which are lost

forever and are not capable of an effective remedy at the conclusion of the case." Lodi Bor.; accord Mantua Tp.; Mercer Cty.; City of Trenton, I.R. No. 2003-4, 28 NJPER 368 (¶33134 2002). Here, vacation leave that is not taken and/or not approved due to the City's black-out policy cannot be restored upon disposition of the underlying unfair practice charge. Accordingly, I find that CWA has established irreparable harm.

I also find that CWA has demonstrated relative hardship and that the public interest will not be injured by an interim relief order. In weighing the relative hardships to the parties resulting from granting interim relief, I find that the scale favors CWA. This Order will return the parties to the status quo ante, enabling the City to maintain minimum staffing requirements while prospectively permitting unit members to request/obtain vacation leave as they had before the vacation leave black-out policy was unilaterally established on March 10, 2020. See, e.g., Lodi Bor.; Mantua Tp.; Mercer Cty. Moreover, the City has not demonstrated that it will endure any harm if the status quo ante is restored. See Closter Bor., I.R. No. 2001-11, 27 NJPER 225 (¶32077 2001), recon. granted P.E.R.C. No. 2001-75, 27 NJPER 289 (¶32104 2001) (noting that "[t]he employer has not identified any specific harm to it from restoring the status quo"). Finally, the public interest is not injured by an interim relief order in this case. The City shall maintain minimum staffing

levels in the Tax Office, thereby assuring the public of the necessary level of service throughout the year including "during the collection and Tax Sale periods (Feb, May, Aug, and November 1-10, during extended grace periods dates will be adjusted; and May 11-Tax Sale Date)." In Edison Tp., I.R. No. 2010-3, 35 NJPER 241 (¶86 2009), the Commission Designee noted the following:

> . . .[T]he public interest is furthered by requiring adherence to the tenets expressed in the Act which require parties to negotiate prior to implementing changes in terms and conditions of employment. Maintaining the collective negotiations process results in labor stability and thus promotes the public interest.
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> [35 NJPER at 243.]

Accordingly, I find that CWA has demonstrated relative hardship and that the public interest will not be injured by an interim relief order.

CONCLUSION

Under these circumstances, I find that CWA has sustained the heavy burden required for interim relief under the Crowe factors and grant the application for interim relief pursuant to N.J.A.C. 19:14-9.5(a). This case will be transferred to the Director of Unfair Practices for further processing.

ORDER

CWA Local 1014's (CWA) application for interim relief is granted. The City of Camden (City):

-is restrained from implementing the vacation leave black-out policy set forth in the memorandum issued by the City's then-Tax Collector Nahema Harvey on March 10, 2020 (i.e., "[n]o vacation days will be approved during the collection and Tax Sale periods (Feb, May, Aug, and November 1-10, during extended grace periods dates will be adjusted; and May 11-Tax Sale Date)");

-will reinstate the status quo ante with respect to the parties' vacation leave scheduling system (i.e., no black-out dates/periods; "approval shall not be arbitrarily withheld"), so long as minimum staffing levels are not jeopardized; and

-this Order will remain in effect pending a final agency decision or until the parties negotiate a resolution.

/s/ Joseph P. Blaney
Joseph P. Blaney
Commission Designee

DATED: April 20, 2020
Trenton, New Jersey