

I.R. NO. 2022-6

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF JERSEY CITY,

Respondent,

-and-

Docket No. CO-2022-025

JERSEY CITY POLICE OFFICERS  
BENEVOLENT ASSOCIATION,

Charging Party.

**SYNOPSIS**

A Commission Designee denies an application for interim relief filed by Jersey City Police Officers Benevolent Association (POBA) against the City of Jersey City (Jersey City) alleging that Jersey City violated the New Jersey Employer Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically sections 5.4a(1), (2), (3), (4) and (5), by prohibiting POBA officials on special duty from working overtime. The Designee finds that POBA has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations due to material factual issues in the record.

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Charging Party.

Appearances:

For the Respondent,  
Apruzzese McDermott Mastro Murphy, PC, attorneys  
(H. Thomas Clarke, of counsel)

For the Charging Party,  
Beckett and Paris, LLC, attorneys  
(Peter B. Paris, of counsel)

**INTERLOCUTORY DECISION**

On August 12, 2021, Jersey City Police Officers Benevolent Association (POBA) filed an unfair practice charge against the City of Jersey City (Jersey City), together with a verified narrative attachment to the charge, an application for interim relief and temporary restraints, a supporting brief, and exhibits.

The charge alleges that Jersey City's unilateral implementation of a policy prohibiting POBA officials from working overtime violates sections 5.4a(1), (2), (3), (4) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A.

34:13A-1, et seq. (Act).<sup>1/</sup>

### **PROCEDURAL HISTORY**

As noted above, on August 12, 2021, POBA filed an application for interim relief and temporary restraints, a supporting brief, exhibits, and a Verified Narrative from Joe Cossolini, POBA President (Cossolini cert.).

On August 13 and 16, 2021, I conducted two telephone conference calls with the parties to select dates for briefing and a hearing on POBA's application for interim relief. During the August 13, 2021 call, the parties agreed that Jersey City would be permitted to submit a limited response on the issue of temporary restraints by August 17, 2021, which Jersey City timely submitted. On August 20, 2021, I issued an Order to Show Cause pursuant to N.J.A.C. 19:14-9.2, which included the schedule agreed upon by the parties during the August 13 and 16, 2021

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<sup>1/</sup> 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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (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 representative."

conference calls, i.e., Jersey City's answering brief was due August 27, 2021; POBA's reply brief was due September 3, 2021; and a hearing via telephone conference call would be conducted on September 17, 2021. I also denied POBA's request for temporary restraints.

On August 27, 2021, Jersey City filed an answering brief, the Certifications of Tawana Moody and James Shea, a supplemental Certification of James Shea, and exhibits. On September 3, 2021, POBA filed a reply brief, and an exhibit. On September 17, 2021, the parties argued their respective cases on the application for interim relief in a hearing conducted via telephone conference call.

#### **FINDINGS OF FACT**

The following pertinent facts appear.

POBA is the majority representative for all rank and file police officers employed by Jersey City, and is a party to a collective negotiations agreement (CNA) with Jersey City for the term January 1, 2021 through December 31, 2024. (Cossolini cert., ¶¶1-2; Exhibit 1.)

Article 2 of the CNA, entitled "Maintenance and Modification of Work Rules," requires Jersey City to negotiate changes in working conditions prior to implementation. (Id., ¶3; Exhibit 1.) Article 3 of the CNA, entitled "Association Representative and Members," states that the POBA President and two designees

"shall be assigned to special duty . . . in performing their assigned POBA duties and functions, and except in emergencies shall be entitled to administer and enforce the provisions of this Agreement." (Id.) Article 3 of the CNA constitutes a form of "union release time" as discussed in Rozenblit v. Lyles, 245 N.J. 105 (2021). (Id., ¶4.)

POBA's current president Cossolini, first vice president Rashaun Spence, and second vice president James Woods were elected to their POBA positions for three year terms on April 15, 2021, and assumed these positions on or about May 26, 2021. (Id., ¶¶8-9.) Prior to being elected to their POBA positions, Cossolini, Spence and Woods periodically worked "regular overtime" shifts as provided in the CNA, as well as overtime for specialized units. (Id., ¶10.) Cossolini and Woods "are often called out for their specialized assignments with the Hudson County SWAT Team," Cossolini "is also assigned to the JCPD Crime Scene Unit," and Woods "is also assigned to Jersey City's traffic unit." (Id., ¶27.)

In addition to working overtime prior to being elected to POBA leadership, Cossolini "worked several 'regular overtime' shifts without any objection from the City" between May 2021 and July 6, 2021. (Id., ¶12.) Specifically, beginning on May 26, 2021, when Cossolini began his term as POBA President, Cossolini worked and was paid three times for the following overtime: 1)

eight (8) hours of overtime during May 15, 2021 through May 28, 2021, for a total of \$686.20; 2) eight (8) hours of overtime during May 29, 2021 through June 11, 2021, for a total of \$686.20; and 3) twelve (12) hours of overtime during June 12, 2021 through June 25, 2021, for a total of \$1,029.30. (Jersey City Exhibit 1.)<sup>2/</sup> Thus, Cossolini received three overtime payments for a total of twenty-eight (28) hours, or \$2,401.70, of overtime between May 26, 2021 and June 25, 2021. (Id.)

Cossolini, Spence and Woods "began discussions with management on various labor-management issues on behalf of POBA in April 2021, continuing to the present day." (Cossolini cert., ¶15.) James Shea is the Jersey City Director of Public Safety, and Tawana Moody serves as Police Director. (Id., ¶17.) On July 6, 2021, Woods, "in consultation with Cossolini and Spence," submitted a letter on behalf of POBA to Moody "in which the POBA objected to a reduction in minimum manpower limits, which were instituted without notice to the POBA over the Fourth of July Weekend." (Id., ¶23; Exhibit 2.) The letter "challenged the Director's manpower decision and . . . demanded to see the data that supported the Director's unilateral reduction of minimum manpower limits." (Id., ¶25; Exhibit 2.)

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<sup>2/</sup> This information is contained in a document submitted by Jersey City with its opposition labeled as "Exhibit 1" which lists bi-weekly overtime payments to Cossolini from December 26, 2020 through June 25, 2021.

At some point between the end of June and early July, 2021, Moody informed Cossolini that “[Cossolini], Spence and Woods were prohibited from working any overtime, whether ‘regular’ overtime through the overtime list or overtime due to work in specialized units.” (Id., ¶26.) Cossolini and POBA counsel “objected to this prohibition and demanded an explanation.” (Id., ¶28.) The City’s position was that POBA leaders “who are assigned to ‘special duty’ pursuant to Article 3 of the CNA, work for the POBA, not the City,” and therefore they are “not entitled to be called for regular overtime, to work overtime for specialized units, or otherwise to be paid for working any form of overtime.” (Id., ¶29.)

Cossolini and POBA counsel explained to Jersey City that the three POBA leaders on special duty “did not seek to be paid overtime for work done on behalf of the POBA, even though each leader often works in excess of 40 hours per week on POBA-related issues.” (Id., ¶30.) Cossolini and POBA counsel further explained “that they intend only to work ‘regular overtime’ shifts when such shifts are available at night or on weekends, and not during their regular weekday work hours,” and they “intend to be paid overtime when they are called out for duty with their specialized units, just as they had done before they were elected to the POBA leadership.” (Id., ¶¶31-32.) Jersey City “continues to prohibit these POBA leaders from working any

form of overtime.” (Id., ¶33.)

### **LEGAL ARGUMENTS**

POBA contends that it is entitled to interim relief and temporary restraints that enjoins and restrains Jersey City from prohibiting POBA officials assigned to special duty from working and being paid for overtime. POBA contends that it has demonstrated a likelihood of success on the merits, that Jersey City’s actions will result in immediate and irreparable harm to its members, and therefore POBA should not have to wait for the resolution of the unfair practice charge before they are granted the requested relief.

Specifically, POBA alleges that it seeks interim injunctive relief “to immediately restore the status quo ante by enjoining and restraining” Jersey City from “continuing to prohibit” POBA leaders “from working overtime.” (Verified Narrative, ¶34.) POBA alleges that without temporary restraints, POBA leaders will lose overtime opportunities, and “the City’s prohibition on overtime for Cossolini and Woods has resulted in their being removed from the County SWAT Team until this issue is resolved.” (Id., ¶¶35-36.) POBA further alleges that this prohibition constitutes harassment against POBA leadership in retaliation for “advancing POBA concerns,” and is resulting in irreparable harm to POBA and labor relations between the parties. (Id., ¶37.) POBA further alleges that Jersey City has refused to negotiate



with it over these issues. (Id., ¶38.)

In its answering brief, Jersey City opposes POBA's request for interim relief, and argues that it must be denied because Jersey City "has a past practice that the POBA President and his/her designee assigned to special duty under Article 3 of the [CNA] are not permitted to work overtime." Jersey City contends that POBA's claims that prior POBA leadership who were assigned to special duty under Article 3 were permitted to work overtime, and that it implemented a prohibition on overtime immediately after and in retaliation for union activity, are based on hearsay and are not supported by competent evidence. Jersey City argues that it has not interfered with POBA leaders' ability to exercise their rights under the Act, represent their members, or negotiate agreements because POBA admits that its leaders interact with union members, and discuss issues with management daily. Jersey City further argues that it has not restricted or interfered in any way with POBA leaders' union release time, but because it has no way of verifying the hours worked by POBA leaders on release time, it cannot allow them to work overtime.

In its reply brief, POBA argues that it "is not seeking overtime for union business conducted in excess of the 40-hour 'staff schedule' set forth in Article 3," but solely "overtime for regular patrol overtime slots, after-hours call-outs for specialized units, court time, off-duty police actions, or any

other overtime to which officers are contractually entitled that is unrelated to union business.” POBA argues that POBA leaders “would not seek to work any overtime during their regular weekday staff schedule.” POBA argues that “the mutual value of negotiated union release time” was recently re-affirmed by the Supreme Court in Rozenblit v. Lyles, 245 N.J. 105, 129 (2021), and that Jersey City cannot unilaterally eliminate overtime for POBA leaders without negotiations. In response to Jersey City’s argument that it cannot verify the hours worked by POBA leaders on release time, POBA relies upon Article 3(B) of the CNA, which provides that “[a]t the request of the Police Director, the POBA designee shall supply the Police Director with the hours worked over a twenty-one (21) day work cycle.”

#### **ANALYSIS**

A charging party may obtain interim relief in certain cases. To obtain relief, the moving party must demonstrate both 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. 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. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); Whitmeyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College),

P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp.,

P.E.R.C. No. 94, 1 NJPER 37 (1975).

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulated the standards for determining whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[88 N.J. at 404-405.]

Applying the negotiability test required by Local 195, IFPTE v. State, 88 N.J. 393 (1982), the Commission has consistently held that the allocation of overtime earning opportunities among qualified employees is mandatorily negotiable, with exceptions ensuring that governmental policy needs can be met, e.g., that if an urgent situation does not permit enough time to comply with negotiated allocation procedures, the employer may deviate from those procedures. See City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982); see also West Milford Tp., P.E.R.C. No.

2016-45, 42 NJPER 310 (¶90 2015); City of Elizabeth, P.E.R.C. No. 80-80, 6 NJPER 14 (¶11008 1979).

Employment conditions may arise not only from the parties' collective negotiations agreement, but also through an established practice not enunciated in the parties' agreement. An established practice arises "from the mutual consent of the parties, implied from their conduct." Twp. of West Orange, PERC No. 2018-26, 44 NJPER 291 (¶81 2018); Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536, 537 (¶10276 1979), aff'd in part, rev'd in part, 180 N.J. Super. 440 (App. Div. 1981).

N.J.S.A. 34:13A-5.3 sets forth a public employer's obligation to negotiate with a majority representative before changing working conditions:

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

Consistent with the Act, the Commission and courts have held that changes in negotiable terms and conditions of employment must be addressed through the collective negotiations process because unilateral action is destabilizing to the employment relationship and contrary to the principles of our Act. See, e.g., Atlantic County., 230 N.J. 237, 252 (2017); State of NJ and CWA, P.E.R.C. No. 2018-35, 44 NJPER 328 (¶193 2018); Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1997), aff'd, 334 N.J. Super. 512 (App. Div. 1999), aff'd, 166 N.J. 112 (2000);

Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 337-338 (1989); Galloway Twp. Bd. of Educ., 78 N.J. 25, 52 (1978).

I now examine the first Crowe factor, whether POBA has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. First and foremost, there is a significant factual dispute between the parties regarding whether there is a past practice of allowing POBA leaders assigned to special duty pursuant to Article 3 of the CNA from working "regular overtime" shifts, as well as overtime for working in specialized units.

There are material factual disputes between the parties regarding whether POBA leaders on special duty have been permitted to work overtime in the past, and specifically in the Moody and Shea certifications on behalf of Jersey City. Contrary to POBA's assertion that past POBA leaders on special duty have worked overtime, Moody certifies that since 2005, "the City has a past practice that the POBA President and his/her designees who are assigned special duty . . . are not permitted to work overtime," and since 2005, Moody is "not aware of any POBA leaders assigned to special duty . . . that the City has permitted to work overtime." (Moody cert., ¶6.) Shea certifies that Jersey City "has a past practice, which has existed since at least July 2013, that the POBA President and his/her designees who are assigned to special duty . . . are not permitted to work

overtime.” (Shea cert., ¶5.) Shea further certifies that this past practice “applies to all Public Safety Bargaining Units,” including police superior officers, fire superior officers, and rank and file fire fighters. (Id., ¶7.)<sup>3/</sup>

One discrete area of agreement between the parties exists with regard to Cossolini’s overtime from May 26, 2021 through June 25, 2021, at the beginning of his term as POBA President. Specifically, it is undisputed that Cossolini worked and was paid three times for the following overtime: 1) eight (8) hours of overtime during May 15, 2021 through May 28, 2021, for a total of \$686.20; 2) eight (8) hours of overtime during May 29, 2021 through June 11, 2021, for a total of \$686.20; and 3) twelve (12) hours of overtime during June 12, 2021 through June 25, 2021, for a total of \$1,029.30. It is also undisputed that sometime between the last week of June and July 7, 2021, Moody advised Cossolini that he could not work overtime because he was on special duty.

With regard to why Cossolini was permitted to work overtime while he was President on special duty, Jersey City argues that these three payments were mistakes due to Cossolini’s

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<sup>3/</sup> In an attempt to rebut Moody and Shea’s certified statements regarding past practice, POBA submitted a supplemental Cossolini certification consisting of statements made to Cossolini by previous POBA leaders on the issue of past practice. However, as these statements are not based on Cossolini’s personal knowledge, they are not included here.

administrative error of submitting the overtime to the wrong office. Specifically, Moody certifies that "the POBA President and his/her designees who are assigned to special duty . . . are transferred to the Chief's Office, which is currently under my control." (Moody cert., ¶7.) Moody certifies that although POBA alleges that between May 2021 and July 6, 2021, "Cossolini worked several 'regular overtime' shifts without objections from the City," "Cossolini's overtime requests were improperly submitted and approved by the South District." (Moody cert., ¶9.) Moody certifies that those requests "should have been submitted to the Chief's Office," and if they had been, they "would have been properly addressed," as Cossolini "never should have been permitted to work overtime between May 2021 and June 25, 2021." (Id.)

Shea also certifies that Cossolini's "overtime between May 2021 and July 6, 2021 was approved in error." (Id., ¶9.) Shea certifies that prior to being elected as POBA President, "Cossolini was assigned to the South District of the Jersey City Police Department," and when Cossolini "was approved for overtime shifts between May 2021 and July 6, 2021," "Cossolini submitted his overtime requests to the South District, which was then approved by the South District in error." (Id., ¶10.) Shea certifies that "Cossolini's requests for overtime between May 2021 and July 6, 2021 should have been submitted to the Chief's

Office, not the South District,” and if the requests had been “correctly submitted to the Chief’s Office, the requests would have been denied, per the City’s past practice.” (Id., ¶10.) Shea certifies that when “the Chief’s Office discovered that President Cossolini’s overtime had been authorized in error, the Chief’s Office corrected the mistake and no longer permitted President Cossolini to work overtime.” (Id.)

With regard to Jersey City’s argument that these three payments were mistakes due to Cossolini’s submission of the overtime to its South District instead of to the Police Director, the Commission has held that if a public employer repeats an allegedly “mistaken” practice twice, that allegedly “mistaken” practice establishes a term and condition of employment. See Barnegat Tp. Bd. of Ed., P.E.R.C. No. 91028, 16 NJPER 484 (¶21210 1990), aff’d NJPER Supp. 2d 268 (¶221 App. Div. 1992) (Commission held that majority representative demonstrated substantial likelihood of success because public employer’s allegedly “mistaken” provision, in effect for two years, established a term and condition of employment); Hamilton Tp., P.E.R.C. No. 2021-21, 47 NJPER 345 (¶82 2021) (Township’s practice of paying a 27<sup>th</sup> biweekly pay twice over a period of twelve years establishes a term and condition of employment); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 2016-3, 42 NJPER 95 (¶26 2015) (Board’s allegedly mistaken practice of implementing consecutive leaves for more



than six years constituted a term and condition of employment).

However, these Commission decisions are factually distinguishable from this matter because the alleged "mistakes" involved there occurred over a period of years, and not a period of weeks as is the case here. See Academy Urban Leadership Charter High School, I.R. No. 2020-9, 46 NJPER 353 (¶86 2020) (alleged "mistaken" provision in effect for two years established a term and condition of employment, "[u]nlike a 'simple mistake' issued and corrected within a couple of weeks"). Thus, based upon this record, I cannot determine that the three overtime payments to Cossolini established a term and condition of employment.

Beyond the material factual dispute regarding whether POBA leaders on special duty have been permitted to work overtime in the past, Jersey City further argues that it cannot allow POBA leaders on special duty to work overtime because it cannot verify the number of hours that they work while on special duty. Specifically, Moody certifies that when the POBA President and his designees are assigned to special duty, "the City does not track the number of hours per week that the POBA leaders work." (Moody cert., ¶8.) Moody certifies that all other POBA members "have paper roll call during each shift . . . which keeps track of the number of hours per week that each member works," and that Cossolini, Spence and Woods "do not show up on any roll call, nor

do they sign-in at the start of their shift, or sign-out after their shift," and therefore Jersey City "has no way of knowing how many hours per day or week the POBA leaders are working," and "cannot pay them overtime for time worked . . . over forty (40) hours per week." (Id.)

This argument is problematic because it ignores the parties' express hour verification provision for special duty in Article 3(B) of the CNA, which provides that "[a]t the request of the Police Director, the POBA designee shall supply the Police Director with the hours worked over a twenty-one (21) day work cycle." Second, it ignores that POBA leaders are not requesting overtime to perform additional union-related tasks, but are requesting to work the "regular overtime" that is worked by POBA non-leaders, including by Cossolini, Spence and Woods before they were elected to their POBA positions.

Despite these problematic hour verification arguments by Jersey City, I find that these material factual issues preclude a finding that the Association has a substantial likelihood of prevailing in a final Commission decision. See, e.g., City of Newark, I.R. No. 2021-7, 47 NJPER 164 (¶38 2020) (denying application for interim relief where there were "material factual disputes"); Town of Boonton, I.R. No. 2020-1, 46 NJPER 30 (¶9 2019) (denying application for interim relief where there were "material factual disputes"); Kean University, I.R. No. 2009-5,

34 NJPER 232 (¶80 2008) (denying application for interim relief where there were "several disputes of material fact[]"); Closter Bor., I.R. No. 2007-10, 33 NJPER 101 (¶35 2007) (denying application for interim relief where "the record show[ed] a dispute on a material fact").

Accordingly, I find that the Association has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element under the Crowe factors, and deny this aspect of the application for interim relief. As a result, I do not need to conduct an analysis of the other elements of the interim relief standard. See, e.g., Paterson State Operated School District, I.R. No. 2021-25, 47 NJPER 510 (¶120 2021); Harvey Cedars Bor., I.R. No. 2020-4, 46 NJPER 261 (¶64 2019); Irvington Tp., I.R. No. 2019-7, 45 NJPER 129 (¶34 2018); Rutgers, I.R. No. 2018-1, 44 NJPER 131 (¶38 2017); New Jersey Transit Bus Operations, I.R. No. 2012-17, 39 NJPER 328 (¶113 2012).

Under these circumstances, I find that the POBA has not sustained the heavy burden required for interim relief under the Crowe factors and deny the application pursuant to N.J.A.C. 19:14-9.5(b) (3). This case will be transferred to the Director of Unfair Practices for further processing.

**ORDER**

POBA's application for interim relief is denied without prejudice.

/s/Lisa Ruch  
Lisa Ruch  
Commission Designee

DATED: October 22, 2021  
Trenton, New Jersey