I.R. NO. 2018-7

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ALLIANCE OF ATLANTIC CITY
SUPERVISORY EMPLOYEES,

Respondent,

-and- Docket No. CI-2017-034

ANTHONY R. COX, SR.,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by Cox against the Alliance alleging that the Alliance violated subsection 5.4b(1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it (1) failed to issue a timely explanation of representation fees to nonmembers, (2) failed to establish a demand and return system in a timely manner, and (3) established a statutorily defective demand and return system.

The Designee found that Cox had not established irreparable harm. The Designee also found that, based upon disputed material facts and lack of a fully-developed record, Cox had not demonstrated a substantial likelihood of prevailing in a final Commission decision and had not established the other requirements for interim relief. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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Appearances:

For the Respondent, O'Brien, Belland & Bushinsky, LLC, attorneys (Robert F. O'Brien of counsel and on the brief)

For the Charging Party, Anthony R. Cox, Sr., pro se

INTERLOCUTORY DECISION

On May 30, 2017, Anthony R. Cox, Sr. (Cox) filed an unfair practice charge, together with an application for interim relief, against the Alliance of Atlantic City Supervisory Employees (Alliance) and the City of Atlantic City (City) alleging that the City violated subsections 5.4a(1), (3) and (7),[1/] and that the

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; (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 this act;(7) Violating any of the rules and regulations established by the commission."

Alliance violated subsections 5.4b(1) and (5),[2/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), by:

> -failing to file copies of their current memorandum of agreement (MOA) with the Commission;
>
> -failing to include an agency shop clause for fee collection and payment in their MOA;
>
> -failing to modify the agency shop provisions of the expired collective negotiations agreement (CNA) by leaving the previous majority representative, the United Workers Union, Local 910, as payee;
>
> -failing to conduct demand and return proceedings as required by the Act and referenced in the expired CNA; and
>
> -failing to issue an explanation for 2017 representation fees as required by the Act and referenced in the expired CNA.

On May 31, 2017, the Commission notified Cox that certain deficiencies had to be corrected in order for his interim relief application to be processed.

On June 2, 2017, the Director of the Division of Local Governmental Services (DLGC) informed the Commission that in accordance with the Municipal Stabilization Recovery Act, N.J.S.A. 52:27BBBB-1 et seq. (MSRA), the City "shall not be

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2/ These provisions prohibit employee organizations, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (5) Violating any of the rules and regulations established by the commission."

subject to the Commission's authority to prevent an unfair practice . . . ." N.J.S.A. 34:13A-5.4(g). On June 6, the Commission acknowledged the Director's notice, confirming that no complaint would be issued with regard to Cox's allegations against the City and informing the parties of same.

On June 16, 2017, Commission Designee David N. Gambert notified Cox that his application for interim relief would not be processed because he had not corrected certain deficiencies as requested and that his underlying unfair practice charge would be transferred to the Director of Unfair Practices for processing. On June 27, the Director of Unfair Practices scheduled an exploratory conference for August 30. On August 11, the exploratory conference was rescheduled to October 5.

On October 4, 2017, Cox re-submitted the same unfair practice charge and application for interim relief. On October 6, the Commission notified Cox that he "need[ed] to file an amended application removing the claim and allegations against the City, leaving only the claims against the Alliance," if he wanted the agency "to process [his] interim relief application." On October 25, the Director of the DGLC reiterated in a letter to Cox that in accordance with the MSRA, the Commission would take no action on his unfair practice charge as it related to the City but "maintain[ed] jurisdiction to make all factual and legal determinations relative to [his] [c]harge against the [Alliance]."

On October 27, 2017, Cox filed an amended unfair practice charge together with the instant application for interim relief alleging that the Alliance violated subsection 5.4b(1) of the Act by:

> -failing to issue a timely explanation of representation fees to its nonmembers as required by N.J.S.A. 34:13A-5.5, -5.6;
>
> -failing to establish a demand and return system in a timely manner; and
>
> -establishing a demand and return system that is statutorily defective.

Cox's application for interim relief requests that "the Commission order the [Alliance] to cease and desist the collection and receipt of representation fees (via payroll deduction) until the Commission has determined [whether] the [Alliance] [is] in full compliance with all statutory and regulatory requirements to collect such fees."

PROCEDURAL HISTORY

On October 30, 2017, I signed an Order to Show Cause directing the Alliance to file any opposition by November 2 and setting November 6 as the return date for oral argument. On November 1, I granted the Alliance's request for an extension and set November 10 as the deadline for any opposition and November 15 as the return date for oral argument.

On November 7, 2017, the Alliance filed opposition to the application for interim relief. On November 15, Cox and counsel

for the Alliance engaged in oral argument during a telephone conference call.

In support of the application for interim relief, Cox submitted a brief and exhibits. In opposition, the Alliance submitted a brief and exhibits.

FINDINGS OF FACT

The Alliance represents all supervisory employees in classified titles, including craft and professional supervisors, employed by the City. Cox is member of the unit, but is not a member of the Alliance.

The City and the United Workers Union, Local 910 (UWU), were parties to a collective negotiations agreement (CNA) in effect from January 1, 2008 through December 31, 2011. Article VI of the expired CNA, entitled "Agency Shop," provides:

> A. The City agrees to deduct the fair share fee from the earnings of those employees who elect not to become members of the Union and transmit the fee to the majority representative.
>
> B. The deduction shall commence for each employee who elects not to become a member of the Union during the month following written notice from the Union of the amount of the fair share assessment. A copy of the written notice of the amount of the fair share assessment must be furnished to the New Jersey Public Employment Relations Commission, (hereinafter P.E.R.C.).
>
> C. The fair share for services rendered by the Union shall be in an amount equal to the regular membership dues, initiation fees and assessments of the Union; but in no event

> shall the fee exceed eighty-five (85%) of the regular membership dues, fees and assessments. Such monies to be paid to the United Workers Union.
>
> D. The sum representing the fair share fee shall not reflect the costs of financial support of political causes of candidates, except as permitted by law.
>
> E. The Union shall establish and maintain a procedure whereby any employee can challenge the assessment as computed by the Union. This appeal procedure shall in no way involve the City or require the City to take any action other than to hold the fee in escrow pending resolution of the appeal.
>
> F. The Union shall indemnify, defend and save the City harmless against any and all claims, demands, suits, or other forms of liability that shall arise out of or by reason of action taken by the City in reliance upon salary deduction authorization cards or in the fair share assessment information furnished by the Union to the City, or in reliance upon the official notification on the letterhead of the Union and signed by the President of the Union, advising of such changed deduction.

On February 15, 2012, the Alliance replaced the UWU as majority representative. In March 2013, the City and the Alliance executed a memorandum of agreement (MOA) in effect from January 1, 2012 through December 31, 2014. The MOA only modifies certain provisions in the expired CNA; however, it "represents the full and final understanding between the Parties regarding the successor collective bargaining agreement to the current collective bargaining agreement which expired December 31, 2011." Article 11 of the MOA, entitled "General Provisions," provides in pertinent part:

> All other contractual provisions not modified herein shall remain unchanged.

On or about April 11, 2014, the Alliance "began deducting an agency shop fee from Cox's paycheck."

CI-2015-037[3/]

On February 23, 2015, Cox filed an unfair practice charge (CI-2015-037) alleging that union dues were improperly being deducted from his paycheck rather than representation fees and that the Alliance was not in compliance with N.J.S.A. 34:13A-5.5, -5.6. On April 17, Cox withdrew the charge.

AB-2015-001

On June 15, 2015, Cox filed a petition of appeal with the Public Employment Relations Commission Appeal Board (Appeal Board) (AB-2015-001) seeking a refund of union dues deducted from his paycheck in 2014. On July 10, the Alliance filed an answer.

On May 23, 2016, Cox filed an amended petition seeking a refund of union dues deducted from his paycheck in 2015 and 2016. On June 21, the Alliance filed an answer to the amended petition. On August 25, the Appeal Board transferred Cox's petition to the Office of Administrative Law (OAL) for a hearing.

On May 30, 2017, Cox attempted to file with the Appeal Board an amended petition seeking a refund of union dues deducted from

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3/ On January 7, 2015, Cox filed a discrete unfair practice charge (CI-2015-032) alleging that the Alliance violated the Act by distributing gift cards to union members only. On January 16, Cox withdrew the charge.

his paycheck in 2017. On June 19, the Appeal Board advised Cox that his amendment must be addressed to the OAL. Thereafter, Cox filed a motion with the OAL seeking to amend his petition. On October 31, Administrative Law Judge (ALJ) John S. Kennedy issued a letter order denying the motion. On November 2, Cox filed with the Appeal Board a request for interlocutory review of the ALJ's decision. To date, the Board has not issued a decision.

CI-2017-012

On November 7, 2016, Cox filed an unfair practice charge (CI-2017-012) alleging that the Alliance had failed to obtain a written agreement that the City would collect representation fees in lieu of union dues from nonmembers and had failed to establish and provide a copy of its written demand and return system. On May 30, 2017, Cox withdrew the charge.

CI-2017-034

Cox certifies that on January 13, 2017, the Alliance "began collecting and receiving 2017 representation fees via payroll deduction." Cox certifies that on January 27, he "filed (via email) a fee challenge notice with the [Alliance] and the City asserting . . . that there [was] no agreement in place for the [Alliance] to collect a representation fee." Cox certifies that on February 10, "the City began to escrow the representation fee pending the outcome of [his] appeal." On May 30, as set forth more fully above, Cox originally filed the underlying unfair

practice charge (CI-2017-034) together with an application for interim relief. Cox certifies that on September 29, the Alliance issued a letter to nonmembers with the subject line "Re: Annual Hudson Notice and Certified Financial Statement" that enclosed a copy of the Alliance's "Demand and Return Policy" and "Statement of Expenses and Allocation of Expenses" for the "Year Ended December 31, 2016."[4/]

LEGAL ARGUMENTS

Cox argues that he has satisfied the standard for interim relief. Specifically, Cox argues that he has a substantial likelihood of prevailing in a final Commission decision because "[t]he City and the [Alliance] [have] an MOA that does not include provisions to collect and receive representation fees as required by [N.J.S.A. 34:13A-5.5]" given that "[u]nion security clauses in a collective bargaining agreement with a former majority representative become null & void and cannot be expressly implied or adopted by a current majority representative." Further, Cox maintains that prior to September 29, 2017, "the [Alliance] admits it [did] not conduct[] demand

4/ Pursuant to N.J.A.C. 19:17-3.3, -3.4, a majority representative is required to provide an annual notice to nonmembers that contains certain information regarding the basis for - and calculation of - representation fees in lieu of union dues as well as a copy of the demand and return system. Commission and court cases refer to this as a "Hudson" notice because the obligation to provide it stems from Chicago Teacher's Union v. Hudson, 475 U.S. 292 (1986).

and return proceedings and [did] not provide[] copies of [its] . . . written demand and return system as required by [N.J.S.A. 34:13A-5.5] . . . yet continued to collect representation fees." Cox claims that the demand and return system established by the Alliance on September 29, 2017 is "structurally defective" because it does not comply with N.J.S.A. 34:13A-5.5 and N.J.A.C. 19:17-3.3, -3.4. Cox also contends that the Alliance "failed to issue a timely annual notice in violation of the Act." Cox asserts that he will suffer irreparable harm if interim relief is not granted because the Alliance:

> -is interfering with rights guaranteed to Cox under the Act and same constitutes bad faith, has a chilling effect, and undermines labor stability;
>
> -is discriminating against Cox, a nonmember; and
>
> -is arbitrarily enforcing and/or repudiating terms and conditions of Cox's employment.

Finally, Cox argues that the public interest "would be furthered by requiring adherence to the tenets expressed in the Act . . . which (in part) requires the City and the [Alliance] to reach an agreement in writing to collect a representation fee, establish a written demand and return system, and issue an explanation of the fee prior to collecting the same."

In opposition, the Alliance initially asserts that the instant application for interim relief and underlying unfair practice charge and/or petition of appeal are untimely with

respect to payroll deductions that began in January 2017. The Alliance also claims that Cox cannot rely on an untimely charge to revisit the ALJ's decision denying his motion to amend. Moreover, the Alliance argues that Cox has not satisfied the standard for interim relief. Specifically, the Alliance argues that Cox has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision because "it is sufficient that the [MOA] incorporated the previous agency shop clause by reference" and "the MOA was signed in March of 2013 prior to the date of any of . . . Cox's claims." Further, the Alliance maintains that its demand and return system "is not structurally deficient because it: (1) provides for pro rata returns; and (2) includes a provision by which persons who pay a representation fee in lieu of dues may obtain review of the amount returned through full and fair proceedings" in accordance with N.J.S.A. 34:13A-5.5, -5.6. The Alliance also contends that the information provided to Cox on September 29, 2017 "substantially complied with . . . notice requirements" because it included: "a statement, verified by an independent auditor, of the expenditures of the majority representative for its fiscal year ending within 12 months prior to the date the notice required[;] . . . instructions as to how to request review of the amount assessed as a representation fee in lieu of dues[;] . . . [and] an explanation of the formula by which the representation

fee is set and the schedule by which the fee will be deducted from pay" in accordance with N.J.A.C. 19:17-3.3. The Alliance asserts that Cox has failed to demonstrate irreparable harm given that "he can be made whole entirely with a payment of monetary damages" if he prevails. Finally, the Alliance argues that the relative hardship weighs in its favor given that the Alliance "is entitled to at least a portion of the fees being deducted" and Cox "would not even be paying the [Alliance] for its chargeable expenses" if interim relief is granted.

STANDARD OF REVIEW

To obtain interim 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[5/] 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. De Gioia, 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

5/ Material facts must not be in dispute in order for the moving party to have a substantial likelihood of success before the Commission.

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 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). 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-5.5, entitled "Representation fee in lieu of dues," provides:

> a. Notwithstanding any other provisions of law to the contrary, the majority representative and the public employer of public employees in an appropriate unit shall, where requested by the majority representative, negotiate concerning the subject of requiring the payment by all nonmember employees in the unit to the majority representative of a representation fee in lieu of dues for services rendered by the majority representative. Where agreement is reached it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative. If no agreement is reached, the majority representative may petition the commission to conduct an investigation. If the commission determines during the

investigation that a majority of the employees in the negotiations unit are voluntary dues paying members of the majority representative and that the majority representative maintains a demand and return system as required by subsection c. of this section and section 3 of P.L. 1979, c. 477 (C. 34:13A-5.6), the commission shall order the public employer to institute a payroll deduction of the representation fee in lieu of dues from the wages or salaries of the employees in the negotiations unit who are not members of the majority representative.

b. The representation fee in lieu of dues shall be in an amount equivalent to the regular membership dues, initiation fees and assessments charged by the majority representative to its own members less the cost of benefits financed through the dues, fees and assessments and available to or benefitting only its members, but in no event shall such fee exceed 85% of the regular membership dues, fees and assessments.

c. Any public employee who pays a representation fee in lieu of dues shall have the right to demand and receive from the majority representative, under proceedings established and maintained in accordance with section 3 of P.L. 1979, c. 477 (C. 34:13A-5.6), a return of any part of that fee paid by him which represents the employee's additional pro rata share of expenditures by the majority representative that is either in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment or applied toward the cost of any other benefits available only to members of the majority representative. The pro rata share subject to refund shall not reflect, however, the costs of support of lobbying activities designed to foster policy goals in collective negotiations and contract administration or to secure for the employees represented advantages in wages, hours, and other conditions of employment in addition to

> those secured through collective negotiations with the public employer.

N.J.S.A. 34:13A-5.6, entitled "Representation fee in lieu of dues," provides:

> Where a negotiated agreement is reached, pursuant to section 2 of P.L. 1979, c. 477 (C. 34:13A-5.5), or where the public employer has been ordered by the commission to institute a payroll deduction of the representation fee in lieu of dues, a majority representative of public employees in an appropriate unit shall be entitled to a representation fee in lieu of dues by payroll deduction from the wages or salaries of the employees in such unit who are not members of a majority representative; provided, however, that membership in the majority representative is available to all employees in the unit on an equal basis and that the representation fee in lieu of dues shall be available only to a majority representative that has established and maintained a demand and return system which provides pro rata returns as described in subsection c. of section 2 of P.L. 1979, c. 477 (C. 34:13A-5.5). The demand and return system shall include a provision by which persons who pay a representation fee in lieu of dues may obtain review of the amount returned through full and fair proceedings placing the burden of proof on the majority representative. Such proceedings shall provide for an appeal to a board consisting of three members to be appointed by the Governor, by and with the advice and consent of the Senate, who shall serve without compensation but shall be reimbursed for actual expenses reasonably incurred in the performance of their official duties. Of such members, one shall be representative of public employers, one shall be representative of public employee organizations and one, as chairman, who shall represent the interest of the public as a strictly impartial member not having had more than a casual association or

> relationship with any public employers, public employer organizations or public employee organizations in the 10 years prior to appointment. Of the first appointees, one shall be appointed for one year, one for a term of two years and the chairman, for a term of three years. Their successors shall be appointed for terms of two years each and until their successors are appointed and qualified, except that any person chosen to fill a vacancy shall be appointed only for the unexpired term of the member whose office has become vacant. Nothing herein shall be deemed to require any employee to become a member of the majority representative.

N.J.A.C. 19:17-3.3, entitled "Annual notice to nonmembers; copy of demand and return system to public employer," provides:

> (a) Prior to the commencement of payroll deductions of the representation fee in lieu of dues for any dues year, the majority representative shall provide all persons subject to the fee with a notice adequately explaining the basis of the fee, which shall include:
>
> > 1. A statement, verified by an independent auditor or by some other suitable method, of the expenditures of the majority representative for its fiscal year ending within 12 months prior to the date the notice required by this section is served on all persons subject to the fee. The statement shall set forth the major categories of expenditures and shall also identify expenditures of the majority representative and its affiliates which are in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment or applied toward the cost of benefits only available to members of the majority representative.

> 2. A copy of the demand and return system established by the majority representative pursuant to N.J.S.A. 34:13A-5.6, including instructions to persons paying the representation fee in lieu of dues as to how to request review of the amount assessed as a representation fee in lieu of dues.
>
> 3. The name and address of the financial institution where the majority representative maintains an account in which to escrow portions of representation fees in lieu of dues which are reasonably in dispute. The interest rate of the account in effect on the date the notice required by (a) above is issued shall also be disclosed.
>
> 4. The amount of the annual representation fee in lieu of dues, or an explanation of the formula by which the representation fee is set, and the schedule by which the fee will be deducted from pay.
>
> (b) The majority representative shall provide a copy of the demand and return system referred to in (a)2 above to the public employer.

N.J.A.C. 19:17-3.4, entitled "Amount of representation fee in lieu of dues; annual adjustment," provides:

> (a) The maximum representation fee in lieu of dues assessed nonmembers in any dues year shall be the lower of:
>
> 1. Eighty-five percent of the regular membership dues, fees and assessments charged by the majority representative to its own members.

> 2. Regular membership dues, fees and assessments, charged by the majority representative to its own members, reduced by the percentage amount spent during the most recently completed fiscal year by the majority representative and any affiliate of the majority representative which receives any portion of the representation fees in lieu of dues paid or payable to the majority representative on benefits available to or benefitting only its members and in aid of activities or causes of a partisan political or ideological nature only incidentally related to the terms and conditions of employment. The amount shall be based upon the figures contained in the statement provided nonmembers prior to the start of the dues year in accordance with N.J.A.C. 19:17-3.3(a)1.
>
> (b) Every majority representative shall annually recalculate its representation fee in lieu of dues in accordance with (a) above.

The Commission has "unfair practice jurisdiction under N.J.S.A. 34:13A-5.4(a)(1) and (b)(1) to determine whether the statutory and structural conditions for deduction of representation fees are in place." Boonton Bd. of Ed. and Boonton Ed. Ass'n and NJEA, P.E.R.C. No. 84-3, 9 NJPER 47 (¶14199 1983), aff'd as mod. sub. nom. Boonton Bd. of Ed. v. Kramer, 99 N.J. 523 (1985), cert. den. 475 U.S. 1072 (1986). The Commission has also held that a majority representative's failure to comply with related regulatory requirements is an unfair practice. See Camden Lodge No. 35, Policemen's Benevolent Ass'n, P.E.R.C. No.

95-42, 21 NJPER 40 (¶26025 1994); State of New Jersey and New Jersey State Corrections Officers Ass'n/FOP Lodge 200, P.E.R.C. No. 2006-2, 31 NJPER 236 (¶90 2005).

ANALYSIS

As specified in Cox's brief, at issue in this interim relief application are the following:

> -whether the Alliance has a valid agency shop agreement with the City;
>
> -whether the Alliance conducted demand and return proceedings and provided copies of its demand and return system prior to September 2017;
>
> -whether the Alliance's demand and return system promulgated in September 2017 is deficient; and
>
> -whether the Alliance's Hudson notice promulgated in September 2017 was timely.

The Supreme Court of New Jersey has held that "a preliminary injunction should not issue except when necessary to prevent irreparable harm" and "[h]arm is considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe v. De Gioia, 90 N.J. 126, 132 (1982). A Commission Designee has held that "[i]n order to satisfy the irreparable harm standard, [a charging party] must demonstrate that the harm which the affected employees will suffer could not be rectified at the conclusion of a final Commission determination." Union Cty., I.R. No. 99-15, 25 NJPER 192 (¶30088 1999).

Given these legal precepts, I find that Cox has failed to demonstrate irreparable harm. "The Commission [only] has jurisdiction over the adequacy of the respondent's fee collection procedures" and "[t]he Appeal Board has mandatory jurisdiction over the amount of the representation fee." Anderson, Robinson and Olsen, P.E.R.C. No. 90-52, 16 NJPER 13 (¶21008 1989). To the extent Cox seeks to challenge the amount of the representation fees deducted from his paycheck, the Commission lacks jurisdiction. Moreover, Cox's assertion that representation fees collected from him are being spent by the Alliance in furtherance of its political concerns is belied by Cox's concession that "the City began to escrow [his] representation fees" on February 10, 2017. See Cox's Br. at 5; see also, Cox's Exhibit C5.

To the extent Cox is challenging the validity of the Alliance's agreement with the City and/or the adequacy of the Alliance's fee collection procedures, Cox has failed to demonstrate – and has not cited any interim relief authority showing – why any resulting harm to him cannot be rectified in a final Commission decision. Cf. State of New Jersey and New Jersey State Corrections Officers Ass'n/FOP Lodge 200, P.E.R.C. No. 2006-2, 31 NJPER 236 (¶90 2005) (final Commission decision ordering a majority representative to cease and desist collecting and distributing representation fees in lieu of dues without first complying with all statutory and regulatory requirements

and to refund fees collected during a certain period based upon a finding that the majority representative did not have a demand and return system or written agreement in place); Bacon and District 65, UAW, P.E.R.C. No. 87-72, 13 NJPER 57 (¶18025 1986), aff'd NJPER Supp.2d 196 (¶173 App. Div. 1988), certif. den. 114 N.J. 308 (1988) (final Commission decision ordering a majority representative to cease and desist receiving representation fees in lieu of dues without a valid demand and return system in place, to adopt a new demand and return system in compliance with certain legal requirements, and to inform all nonmembers of the new demand and return system and their right to demand appropriate refunds through that system and the Appeal Board based upon a finding that the majority representative had a defective demand and return system in place); State of New Jersey and New Jersey State Corrections Officers Ass'n/FOP Lodge 200, P.E.R.C. No. 2006-49, 32 NJPER 10 (¶4 2006), recon. den. P.E.R.C. No. 2006-56, 32 NJPER 37 (¶18 2006) (final Commission decision ordering a majority representative to cease and desist collecting and distributing representation fees in lieu of dues without first distributing the required annual notice to nonmembers and to refund fees collected during a certain period based upon a finding that the majority representative failed to issue a timely Hudson notice; noting that a related application for interim relief was resolved when the majority representative agreed to

discontinue fee collections pending issuance of the Hudson notice).

I also find that Cox has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on his legal and factual allegations.

With respect to the validity of the Alliance's agreement with the City, the cases cited by Cox are distinguishable from the instant matter. In State of New Jersey and New Jersey State Corrections Officers Ass'n/FOP Lodge 200, P.E.R.C. No. 2006-2, 31 NJPER 236 (¶90 2005) (emphasis added), the Commission determined that the respondents violated the Act when, after the FOP replaced the PBA as majority representative on June 4, 2004, they began "collecting and distributing a representation fee in lieu of dues . . . before the FOP and the employer had a written agreement providing for the collection of representation fees . . . ." In FOP Lodge No. 59 (Baran), A.B.D. No. 91-2, 16 NJPER 502 (¶21221 1990) (emphasis added), the Appeal Board determined that the petitioners were entitled to a refund of all representation fees paid by them to the FOP from the date the FOP replaced the PBA as majority representative until the FOP executed an agreement with the public employer because "[the FOP's] adoption of the [PBA's] expired agreement and the employer's apparent acquiescence in that action (by deducting representation fees) did not meet the Act's requirement of a written agreement."

Unlike those cases, in this instance it appears that the Alliance began collecting representation fees in lieu of dues from Cox on or about April 11, 2014 – approximately one year after executing a memorandum of agreement with the City in March 2013 that appears to incorporate by reference, among other provisions, agency shop provisions (Article VI) from the expired CNA into a successor agreement. See Alpert, Golberg, Butler, Norton & Weiss, P.C. v. Quinn, 410 N.J. Super. 510, 533-534 (App. Div. 2009) (specifying that "[i]n order for there to be a proper and enforceable incorporation by reference of a separate document, the document to be incorporated must be described in such terms that its identity may be ascertained beyond doubt and the party to be bound by the terms must have had 'knowledge of and assented to the incorporated terms'").

With respect to whether the Alliance had a nonexistent or deficient demand and return system, failed to provide copies of its demand and return system, and/or issued an untimely Hudson notice, there are disputed material facts and legal conclusions regarding whether the Alliance was/is in compliance with relevant statutory and regulatory requirements. See N.J.S.A. 34:13A-5.5, -5.6 (requiring a majority representative to establish a demand and return system with certain elements); N.J.A.C. 19:17-3.3, -3.4 (requiring a majority representative to provide an annual Hudson notice to nonmembers that includes certain information

including a copy of the demand and return system). Absent an administrative investigation and/or plenary hearing, "I cannot weigh the conflicting evidence and determine which party's characterization [is] more accurate[] . . . ." Newark Bd. of Ed., I.R. No. 92-11, 17 NJPER 532 (¶22261 1991).

Specifically, the Alliance has asserted that a letter sent to Cox dated May 6, 2015 "contained sufficient information to meet the requirements for notice under Hudson and would be sufficient to allow collection of fees in dues year 2016." See Alliance's Answer to Cox's Amended Petition (AB-2015-001), Cox's Exhibit C6 at 7. It is undisputed that the Alliance issued a Hudson Notice to nonmembers – including Cox – on September 29, 2017 that included a copy of its demand and return system. See Cox's Exhibit C7. Further, the Alliance has asserted an affirmative defense (i.e., that Cox failed to file a timely unfair practice charge and/or petition of appeal regarding any 2017 infractions) that must be assessed and resolved. See Alliance's Br. at 6-7; see also, Alliance's Answer to Cox's Amended Petition (AB-2015-001), Cox's Exhibit C6 at 7-8. See generally, N.J.S.A. 34:13A-5.4(c) (establishing a six-month limitations period for unfair practice charges; N.J.A.C. 19:17-4.5 (establishing a six-month limitations period for petitions of appeal).

I also find that Cox has failed to demonstrate relative hardship or that the public interest will not be injured by granting interim relief. Regardless of the forum (i.e., the Appeal Board or the Commission), Cox has an avenue of redress with respect to any claim that has been timely filed.

Accordingly, I find that Cox has failed to sustain the heavy burden required for interim relief under the Crowe factors and deny the application for interim relief 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

The application for interim relief filed by Anthony R. Cox, Sr. is denied.

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Joseph P. Blaney
Commission Designee

DATED: November 17, 2017

Trenton, New Jersey