I.R. NO. 2019-14

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF HILLSIDE,

Respondent,

-and- Docket No. CO-2019-158

HILLSIDE PUBLIC WORKS ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee grants an application for interim relief filed by HPWA against the Township alleging that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(2) and (5), when it revoked its recognition of HPWA as the exclusive majority representative of a unit of non-supervisory employees in the Township's Department of Public Works and ceased withholding dues approximately six months after the Township engaged in a course of conduct with HPWA that included collective negotiations for a successor agreement, accepting/processing grievances filed on behalf of unit members, and withholding dues from unit members. The Designee finds that HPWA has demonstrated a substantial likelihood of prevailing in a final Commission decision, irreparable harm, relative hardship, and that the public interest will not be injured by an interim relief order and directs the Township to reinstate the status quo ante. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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HILLSIDE PUBLIC WORKS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Weber Dowd Law, LLC, attorneys (Kraig M. Dowd, of counsel and on the brief; Christina M. Nguyen, of counsel)

For the Charging Party, Mets, Schiro & McGovern, LLP, attorneys (Leonard C. Schiro, of counsel and on the brief; Nicholas P. Milewski, of counsel and on the brief)

INTERLOCUTORY DECISION

On December 20, 2018, Hillside Public Works Association (HPWA) filed an unfair practice charge against the Township of Hillside (Township) alleging that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically subsections 5.4a(2) and (5),[1/] when it

1/ These provisions prohibit public employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization"; and "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and (continued...)

revoked its recognition of HPWA as the exclusive majority representative of a unit of non-supervisory employees in the Township's Department of Public Works and ceased withholding dues approximately six months after the Township engaged in a course of conduct with HPWA that included collective negotiations for a successor agreement, accepting/processing grievances filed on behalf of unit members, and withholding dues from unit members. The Association's unfair practice charge was accompanied by an application for interim relief requesting that the Township be directed to:

> -recognize HPWA as the collective bargaining unit for non-supervisory employees of the Township's Department of Public Works;
>
> -withhold dues for HPWA from employees' paychecks;
>
> -adhere to the terms and conditions of the collective negotiations agreement in place between the Township and Local 255, United Service Workers Union, IUJAT (USWU or Local 255) until a successor agreement is accepted by the parties; and
>
> -continue to negotiate a successor agreement between the Township and HPWA in good faith.

PROCEDURAL HISTORY

On December 20, 2018, I signed an Order to Show Cause directing the Township to file any opposition by December 28;

1/ (...continued)
conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

HPWA to file any reply by January 2; and set January 4 as the return date for oral argument. On December 28, with the consent of HPWA, I granted the Township's request for an extension to file opposition until January 4; HPWA to file any reply by January 9; and rescheduled the return date for oral argument to January 11.

On January 3-4, 2019, HPWA filed a request for temporary restraints together with a proposed Amended Order to Show Cause requesting that, in addition to the original relief sought, the Township be directed to:

> -compensate HPWA for any and all union dues that were not withheld by the Township from appropriate employees' paychecks; and
>
> -compensate appropriate employees of the Department of Public Works who were called in to perform emergency work at the rate specified in Article XI of the existing contract and pursuant to past practice, and who were assigned to the Shade Tree Division pursuant to Article VI, Section 5.B of the existing contract, pursuant to Section 3(c) of the Memorandum of Agreement executed August 15, 2008 and pursuant to past practice.

On January 4, I signed an Amended Order to Show Cause imposing temporary restraints[2/] and granted the Township's

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2/ Pending disposition of the application for interim relief, I temporarily restrained the Township from:

> -refusing to recognize HPWA as the collective bargaining unit for non-supervisory employees of the Township's Department of Public Works;

(continued...)

request for a further extension to file opposition until January 9; HPWA to file any reply by January 11; and rescheduled the return date for oral argument to January 14. On January 14, counsel engaged in oral argument during a telephone conference call.

In support of the application for interim relief, HPWA submitted a brief, letter, exhibits, and the first and second certifications of its President, Michael Lindia (Lindia). In opposition, the Township submitted a brief, exhibits, and the certification of its Business Administrator, Hope Smith (Smith). HPWA also filed a reply brief, exhibits, and the third certification of Lindia.

2/ (...continued)

-refusing to withhold dues for HPWA from employees' paychecks;

-refusing to adhere to the terms and conditions of the collective negotiations agreement in place between the Township and USWU until a successor agreement is accepted by the parties; and

-refusing to compensate appropriate employees of the Department of Public Works who were called in to perform emergency work at the rate specified in Article XI of the existing contract and pursuant to past practice, and who were assigned to the Shade Tree Division pursuant to Article VI, Section 5.B of the existing contract, pursuant to Section 3(c) of the Memorandum of Agreement executed August 15, 2008 and pursuant to past practice.

FINDINGS OF FACT

The Township and Local 255, United Service Workers Union, IUJAT (USWU) were parties to collective negotiations agreement (CNA) in effect from July 1, 2007 through June 30, 2012. As specified in the recognition clause (Article I) of the expired 2007-2012 CNA, USWU represented all non-supervisory personnel in the Township's Public Works Department including, but not limited to, equipment operators, laborers, garage mechanics, pumping station operators, and road repairers but excluding the general supervisor and superintendent. The grievance procedure ends in binding arbitration.

Article VI of the expired 2007-2012 CNA, entitled "Salary Schedule," provides in pertinent part:

> Section 5
>
> A. Employees covered by this Agreement who perform shade tree work, which involves the removal, feeding, spraying, trimming and otherwise caring for shade trees and similar growth, and the repair thereof, by use of needed equipment, materials and supplies be required to complete the appropriate training and/or educational course designated by the Township at the expense of the Township, hard work and log splitting are specifically excluded from shade tree work.
>
> B. Employees assigned to the Shade Tree Division of the Department of Public Works shall receive a one dollar and twenty-five cents ($1.25) differential when performing shade tree duties as set forth in Paragraph A of this Section.

Article XI of the expired 2007-2012 CNA, entitled "Emergency

Work," provides in pertinent part:

> When an employee is summoned for emergency overtime duty, the Township guarantees a minimum call-in rate of:
>
> Effective July 1, 2007: $168.36
> Effective July 1, 2008: $174.67
> Effective July 1, 2009: $181.66
> Effective July 1, 2010: $188.93
> Effective July 1, 2011: $197.43
>
> for the first three (3) hours worked. Additional time worked over three (3) hours is to be compensated at the overtime rate, namely time and one-half. The emergency "recall pay" shall reflect the annual salary increases in this contract for each employee's hourly rate.

Article XX of the expired 2007-2012 CNA, entitled "Agency Shop and Dues Deduction," provides:

> Section 1
>
> Whenever any bargaining unit member shall indicate in writing to the Township Treasurer his desire to have deductions made from his compensation for the purpose of paying the employee's dues to the Union, the Township Treasurer shall make such deduction from the compensation of such employee and the Treasurer shall transmit the sum so deducted to the Union.
>
> Any such written authorization may be withdrawn by the employee at any time by filing of notice of such withdrawal with [t]he Township Treasurer. The filing of notice of withdrawal shall be effective to halt deductions as of January 1st or July 1st next succeeding the date on which notice of withdrawal is filed.
>
> Section 2
>
> Any employee in the bargaining unit who does not join the Union within 30 days from the date of execution of this Agreement, or any new employee who does not join the Union

> within 30 days of initial employment with the bargaining unit, and any employee previously employed within the unit who returns and who does not join the Union within 10 days of re-entry into employment within the unit shall pay a representation fee in lieu of dues to the Union by payroll deduction. The representation fee shall be in the amount equal to no more than 85% of the regular union membership dues, fees, and assessments as certified to the Township by the Union. The Union may revise its certification of the amount of the representation fee upon 60 days written notice to the Township to reflect changes in the regular Union membership dues, fees and assessments.
>
> In order for this section to become effective, the Union must provide to the Township and to employees referred to above, sufficient evidence that it has complied with the statutory requirement of establishing an internal procedure for non-members who seek to challenge the appropriateness of the representation fee. The Union shall comply with Chapter 477 of the Public Laws of 1979 in all respects.
>
> Section 3
>
> The Union will provide the necessary "check-off Authorization" form and deliver the signed forms to the appropriate officers. With respect to both dues deductions, representation fee deductions, and the "demand and return" procedure described in Section 2, the Union shall indemnify, defend, and hold the Township 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 Township pursuant to the above provisions concerning dues deductions, representation fee deductions, and "demand and return" procedures.

Article XXVI of the expired 2007-2012 CNA, entitled "Term and Renewal," provides in pertinent part:

> The term of this agreement shall be from July 1, 2007, through June 30, 2012, and from year to year thereafter, subject to a written notice from either party to the other of the desire to change or amend this Agreement.

Hope Smith (Smith), the Township's Administrator, certifies that on May 17, 2018, the Township and USWU representatives had a meeting "at which both parties agreed to the form of a successor collective negotiations agreement for the bargaining unit covering the July 1, 2013 through June 30, 2017 time period."

On May 18, 2018, Jason Insalaco (Insalaco), HPWA's Vice President, sent an email to Kraig Dowd (Dowd), an attorney for the Township, that provides in pertinent part:

> As of today, Friday the 18th of May, we had a union meeting with our members to talk about this proposed contract and wish not to move forward with the contract. As per our members, it was a unanimous decision not to sign this contract.

On May 22, 2018, Insalaco sent an email to Dowd that provides in pertinent part:

> This letter stands as an explanation as to why Local 255 does not want to sign this proposed contract. The union members as a whole are not happy with it. We feel we are not getting a fair contract. When Michael and I became union representatives we inherited this contract proposal. We have been without a raise in six years, paying more and more for health care and we are losing money in our paychecks. Our crew is getting smaller and smaller, without any promotions and still getting the work done. We were told that we would get our promotions if we signed this contract proposal and if we didn't that would not happen. We believe

> this to be unfair labor practices. We feel that the word "Mayor and Council", should stay the same. We also feel that we are giving up more than we are gaining in this contract proposal. We are not even getting the cost of living increase yearly. We also are asked to give up longevity for new hires which is a big gain for the Township and a big loss for the Department. As for our last meeting on May 17th, we believe it went too quick with many wording changes. We are looking for a better contract and rightful promotions since almost every member is working out of title. We are also looking at our representation with our BA and other representatives with USWU which may result in changes too.

On May 24, 2018, Edward T. Kahn (Kahn), USWU's business agent, sent a letter to Smith and Dowd that provides in pertinent part:

> Please be advised that effective immediately, Local 255, United Service Workers Union disclaims interest in representing the Township of Hillside Public Works Department, specifically all "Non-supervisory employees including but not limited to equipment operators, laborers, garage mechanics, pumping station operators, and road repairers." At this time the agreement between the Township and Local 255 is terminated.

On June 13, 2018, Kahn sent an identical email to Smith and Dowd.

On July 18, 2018, Leonard C. Schiro (Schiro), an attorney for HPWA, sent a letter to Smith that provides in pertinent part:

> This office represents the Hillside Public Works Association. Please consider this letter a request to commence negotiations for a successor contract. We are available on the following dates, July 23rd, July 24th (after 1:00 p.m.), July 26th (9:30 a.m.) or

> July 27th. Please contact this office with the Township's preference of dates.

On July 27, 2018, Schiro sent a letter to Smith that provides in pertinent part:

> As you know, this firm represents the Hillside Public Works Association. It has come to my attention that Ken Finzi (Finzi), a member of the bargaining unit, had his health insurance wrongfully terminated for the period of October 1, 2017 until October 25, 2017. Mr. Finzi was not alerted to this cancellation and despite coverage being reinstated he unfortunately incurred $2,759.35 worth of medical expenses. It is my understanding that the Township had agreed to reimburse Mr. Finzi for these bills. To date, that has not occurred. In the event it is the position of the Township to not reimburse Mr. Finzi, consider this a Step 1 grievance and provide a written response to both this office and the grievant within five (5) working days of your receipt of this letter.

On August 24, 2018, Schiro sent a letter to the New Jersey State Board of Mediation with copies to Dahlia Vertreese, the Township's Mayor, Lorraine Messiah, the Township's Clerk, and Rhea Moore (Moore), the Township's attorney, that provides in pertinent part:

> This firm represents the Hillside Public Works Association. The Association and the Township of Hillside are parties to a Collective Negotiations Agreement that has a grievance procedure in which Step 3 calls for mediation through your office. The dispute between the Association and the Township concern[s] reimbursement of medical expenses to member Ken Finzi and the Association requests mediation. A copy of the Grievance Procedure clause of the Collective

> Negotiations Agreement is attached. ...Please process this matter pursuant to the Board's Rules and Regulations.

On December 12, 2018, Smith sent a memorandum to Michael Lindia (Lindia), HPWA's President, and Insalaco that provides in pertinent part:

> I am in receipt of the attached correspondence that was provided to Director Johnson on December 12, 2018 alleging that the Township is in violation of Article XVIII. Your requested relief is hereby denied based on the fact there is no recognition clause for the Hillside Public Works Association. The Township does not recognize the entity as a bargaining unit. There is no Collective Bargaining Agreement (CBA) or negotiated agreement. Also, there is no record of an election or dues notification to legitimize such a request.
>
> Please be further advised that Ed Kahn, Business Agent for the United Service Workers Union communicated to the Township on June 13, 2018 that the Union disclaimed interest in representing the Township of Hillside Public Works Department, specifically all "non-supervisory employees including but not limited to equipment operators, laborers, garage mechanics, pumping station operators and road repairers." The disclaiming of interest terminated the agreement between the Township and Local 255 and there is no successor agreement in place.[3/]

On December 15, 2018, Dowd sent an email to Schiro that

3/ Lindia certifies that HPWA has never been provided a copy of USWU's letter to the Township disclaiming interest "nor any communication between HPWA members and the Township . . . [or] HPWA members and USWU . . . indicating that USWU or HPWA at any time expressed a desire to change or amend the existing agreement or in any manner invoked Article XXVI of the contract."

provides in pertinent part:

> Please be advised that my client is not inclined to accept the proposal made on behalf of the Township's DPW workers at our last meeting. Further, my client has indicated that, in light of the disclaimer of interest issued by United Service Workers, IUJAT, to the bargaining unit earlier this year, and the fact that your client unit is not operating under an existing agreement, a new contract should be proposed in its entirety. Please let me know when you wish to schedule an additional negotiation session.

Between December 13, 2018 and January 10, 2019, Moore, Schiro, and Nicholas P. Milewski (Milewski), an attorney for HPWA, exchanged email correspondence indicating that on or about December 13, 2018, the Township forwarded a release to HPWA regarding Finzi's grievance; on or about December 20, 2018, HPWA returned an executed release to the Township regarding Finzi's grievance and the Township indicated that it would advise as to when Finzi should expect to receive reimbursement after consultation with the Township's "CFO"; on or about January 9-10, 2019, HPWA requested an update from the Township regarding the status of Finzi's settlement proceeds and the Township indicated that the "CFO" had advised that same "[would] be on the bill list for Council approval on January 22, 2019" and that Finzi's payment would be made shortly thereafter.

On December 20, 2018, the underlying unfair practice charge was filed together with the instant application for interim

relief.

Lindia certifies that HPWA was "formerly a part of the United Service Workers Union, Local 255 (USWU) and the two entities separated in or about June 2018 when the USWU disclaimed interest in representing the members of the HPWA."[4/] According to Lindia, the Township "was notified of this separation on or around the time it occurred" and he is "not aware of any communication in which HPWA, USWU or the Township has expressed a desire to change or amend the contract."

Lindia certifies that "[d]uring the period from USWU's disclaimer in May 2018 until on or about December 10, 2018, the Township had adhered to the terms and conditions of the contract between USWU and the Township, and past practice with respect to withholding union dues and compensating employees." More specifically, Lindia certifies that since June 2018, "the Township [has] collected dues on behalf of the HPWA without interruption." According to Lindia, "[b]oth prior and subsequent to the separation of the two (2) entities, all bank drafts that the HPWA received from the Township paying members' dues were made out to the 'Hillside DPW Independent Employee Union.'" Lindia also certifies that "the Township engaged in extensive

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4/ On August 8, 1969, the Director of Representation issued a Certification of Representative identifying Hillside Public Works Independent Union as the exclusive representative of a collective negotiations unit comprised of employees within the Hillside Public Works Department (Dkt. No. R-66).

contract negotiations with the Association over the course of approximately the past six (6) months, and Township representatives attended three (3) different negotiation sessions with Association representatives, the latest of which was conducted on November 1, 2018." Lindia also certifies that the HPWA "has filed grievances on behalf of members since the separation from USWU, which grievances have been accepted and addressed by the Township."

Lindia certifies that "[a]t the latest negotiation session, the Township's Business Administrator . . . advised HPWA representatives that HPWA needed to change its dues authorization cards." According to Lindia, "HPWA submitted new authorization cards; however, after the new dues cards were submitted, as of November 15, 2018, the Township ceased withholding union dues on behalf of HPWA" and "[a]s of [December 20, 2018], the Township has withheld dues collection for three (3) continuous pay periods."

Lindia certifies that "[t]he Township now claims that the HPWA is not recognized as a bargaining unit in the current contract and there is no record of an election or dues notification on the part of HPWA . . . ." According to Lindia, "the Township has stated that it will not recognize the HPWA as a bargaining unit for its members" and "[s]ince the USWU has disclaimed an interest in representing members of the HPWA and

since the Township does not have a contract with the HPWA, . . . the former contract has been terminated and . . . no successor agreement exists."

Smith certifies that the Township and HPWA "met to discuss the Hillside Public Works Department employees' desire to negotiate a contract on August 24, September 20, and November 5, 2018." According to Smith, neither HPWA nor any of the Department of Public Works non-supervisory employees "filed a grievance subsequent to USWU's disclaimer of interest" and "[t]he Township has never had a contract with HPWA."

Lindia certifies that "[o]n or about January 1, 2019, the employees of the Department of Public Works . . . who were assigned to the Shade Tree Division in 2018 should have been compensated pursuant to Article VI, Section 5.B of the existing contract . . . ." According to Lindia, six employees "have been improperly denied Shade Tree Division differential pay . . . ." In addition, Lindia certifies that "[t]he Township has refused to pay employees who are called in to perform emergency work at the rate specified in Article XI of the [existing] contract . . . ." According to Lindia, "[t]he Township now claims that the employees who performed emergency work or who were assigned to the Shade Tree Division are not entitled to call-in pay or differential pay." Lindia certifies that "[o]n payday on January 10, 2019 . . . , the Township completely failed to withhold union

dues from paychecks, and failed to compensate employees with any Shade Tree Division differential pay and emergency work pay, all of which are governed by the contract."

LEGAL ARGUMENTS

HPWA argues that it has satisfied the standard for interim relief. Specifically, HPWA maintains that it has a substantial likelihood of prevailing in a final Commission decision because "a bargaining relationship established by voluntary recognition is irrebuttably presumed to continue for a reasonable period of time"; "the effect of voluntary recognition of majority status is no different from that achieved as a result of a certified election"; and New Jersey courts and the Commission have "sanctioned the concept of de facto recognition despite the wording of the Commission's recognition rules." HPWA maintains that the Township "undeniably voluntarily recognized the existence of HPWA as the bargaining unit for the Township's non-supervisory DPW employees and cannot now unilaterally withdraw such recognition." HPWA asserts that the Township's actions constitute "bad faith", "a violation of subsection 5.4a(1) and (5) of the Act", and "cannot . . . be permitted."[5/] HPWA also

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5/ In support of its position, HPWA cites Waste Mgmt. of New Jersey, Inc. v. Union Cty. Utilities Auth., 399 N.J. Super. 508 (App. Div. 2008), NLRB v. Frick Co., 423 F.2d 1327 (3d Cir. 1970), NLRB v. Broad St. Hosp. & Med. Ctr., 452 F.2d 302 (3d Cir. 1971), Toltec Metals, Inc. v. NLRB, 490 F.2d 1122 (3d Cir. 1974), Nantucket Fish Co., 309 NLRB 794 (continued...)

argues that the employee organization "and its members will be irreparably harmed if interim relief is not granted" because "the unilateral action of the [Township] while the parties are engaged in collective negotiations irreparably harms the negotiations process and undermines HPWA's ability to represent its members." HPWA maintains that "an employer's refusal to properly tender dues withheld from an employee's paycheck under a valid dues-checkoff authorization constitutes a unilateral change in the terms and conditions of employment" as does "failing to withhold union dues from the unit employees." HPWA asserts that "[t]he Township's refusal to collect and remit union dues to HPWA . . . will have a dramatic impact upon the ability of HPWA to survive and function as the bargaining unit for its members" as HPWA "will not be able to hire attorneys to assist in contract negotiations or to remedy legal mistreatment."[6/] HPWA also

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5/ (...continued)
(1992), PBA Local 53 v. Town of Montclair, 131 N.J. Super. 505 (App. Div. 1974), Collingswood Bd. of Ed., P.E.R.C. No. 86-50, 11 NJPER 694 (¶16240 1985), State of New Jersey (Dep't of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), Fair Lawn Bor., I.R. No. 98-1, 23 NJPER 444 (¶28204 1997), Middlesex Bd. of Ed., H.E. No. 93-26, 19 NJPER 279 (¶24143 1993), Piscataway Tp., P.E.R.C. No. 87-47, 12 NJPER 833 (¶17320 1986), Burlington Cty., I.R. No. 2004-8, 30 NJPER 56 (¶16 2004), recon. den. P.E.R.C. No. 2004-59, 30 NJPER 102 (¶39 2004), and Hunterdon Cty. Bd. of Social Services, I.R. No. 87-17, 13 NJPER 215 (¶18091 1987).

6/ In support of its position, HPWA cites Galloway Tp. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25, 49 (1978), Parkview Furniture Mfg. Co., 284 NLRB 947, 972-973 (1987), Space
(continued...)

argues that "[t]he public interest is not harmed by requiring the Township to comply with the existing terms and conditions of the agreement." HPWA maintains that "the public interest is furthered by requiring the Township to recognize HPWA as the bargaining unit for non-supervisory DPW employees, to continue to negotiate a successor agreement, and to withhold dues on behalf of HPWA" because "[t]his will maintain the collective bargaining process and . . . labor stability."[7/] HPWA also argues that "[t]he relative hardship to the parties favors granting HPWA's request for interim relief." HPWA maintains that "members will suffer great hardship" if the Township's actions are permitted to stand. HPWA asserts that the Township's "refusal to collect and remit union dues . . . will have a dramatic impact upon the ability of HPWA to survive and function as the bargaining unit

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6/ (...continued)
Needle, LLC & Unite Here! Local 8 & Julia Dube, 362 NLRB No. 11 (Jan. 30, 2015), W. Coast Cintas Corp., 291 NLRB 152, 156 (1988), Edison Tp., I.R. No. 2010-3, 35 NJPER 241 (¶86 2009), Gloucester Cty., I.R. No. 2004-11, 30 NJPER 62 (¶19 2004), Ocean Cty. Sheriff's Office, I.R. No. 2010-23, 36 NJPER 191 (¶72 2010), Nutley Tp., I.R. No. 99-19, 25 NJPER 262 (¶30109 1999), Cherry Hill Tp., I.R. No. 96-30, 25 NJPER 212 (¶30096 1996), recon. den. P.E.R.C. No. 97-36, 22 NJPER 378 (¶27199 1996), and Harrison Tp., I.R. No. 83-3, 8 NJPER 462 (¶13217 1982).

7/ In support of its position, HPWA cites Edison Tp., I.R. No. 2010-3, 35 NJPER 241 (¶86 2009), Winslow Tp., I.R. No. 2007-7, 33 NJPER 39 (¶16 2007), and the Workplace Democracy Enhancement Act (WDEA), P.L.2018, c.15, which was enacted May 18, 2018 and supplemented the Act at N.J.S.A. 34:13A-5.11 thru -5.15 and amended N.J.S.A. 52:14-15.9e.

for its members" and "it is anticipated that the Township will further change the terms and conditions of employment for members of HPWA insofar as the Township has denied the existence of the CNA which is presently in effect." HPWA contends that "[c]onversely, the [Township] will not suffer any hardship if interim relief is granted"; HPWA "simply seeks to return to the status quo ante . . . prior to the Township's unilateral repudiation and withdrawal of recognition of HPWA as a valid bargaining unit" and "does not seek to disturb the managerial prerogative of the Township in any manner."

In response, the Township acknowledges that "by virtue of its conduct, it can be inferred that [the Township] informally recognized [HPWA] as a bargaining unit" given that "an employee organization may become an exclusive majority representative through informal recognition which may be inferred from conduct and circumstances" (i.e., "[a]fter USWU disclaimed its interest", the Township "responded to HPWA's request to meet and discuss the possible terms of a new contract" and "continued to engage in negotiation sessions with [HPWA] over a period of four months"). However, the Township maintains that "[t]he very conduct from which such an inference can be drawn precludes the Commission from concluding that the Township committed an unfair labor practice . . . for failure to negotiate" and that HPWA has not satisfied the standard for interim relief. Specifically, the

Township argues that HPWA has not demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. The Township maintains that there is "no prior agreement . . . between the Township and [HPWA] for the Township to repudiate" (i.e., the "agreement at issue was a contract between the Township and USWU dated August 15, 2008", HPWA "was not a party to the agreement nor was it the bargaining unit named in the agreement", and "the agreement was explicitly terminated by USWU . . . on May 24 and June 13, 2018"). The Township asserts that "[t]here was no post expiration requirement that the terms and conditions of the agreement stay in full force and effect" and "[t]herefore, there are no terms and conditions in effect between the Township and [HPWA] that were or can be unilaterally altered." The Township contends that it "has attempted to continue negotiations with [HPWA] provided that a new contract be proposed, [but HPWA] has apparently now refused to do [so]."[8/] The Township also argues that HPWA will not suffer irreparable harm if interim relief is not granted because HPWA "was not a party to the prior agreement . . . [with] USWU", "no agreement exists between the Township and [HPWA]", and therefore "there are no terms or conditions specific to the

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8/ In support of its position, the Township cites State of New Jersey, H.E. No. 90-30, 16 NJPER 72 (¶21031 1989), Collingswood Bd. of Ed., P.E.R.C. No. 86-50, 11 NJPER 694 (¶16240 1985), and In re Atlantic Cty., 230 N.J. 237, 248-249 (2017).

deduction of dues or emergency work pay to which the Township must adhere." The Township maintains that even if "the prior agreement is still in effect, [HPWA] failed to adhere to the grievance procedure in the agreement" and HPWA "has erroneously filed a de facto grievance within its amended pleadings in addition to the unfair practice charges instead of addressing the emergency work pay grievance as provided by Article XIII of the prior agreement." The Township asserts that HPWA's "conduct subsequent to the USWU's disclaimer . . . is consistent with the Township's position that the subject agreement was terminated, and such conduct is inconsistent with [HPWA's] very own position that the agreement must be honored by the parties thereto." The Township contends that even if HPWA "is entitled to assume and enforce the provisions of the prior contract, [the] dues deduction clause does not give [HPWA] the exclusive right to collect its employees' dues." The Township claims that it "mistakenly continued to collect union dues from [HPWA] from May or June 2018 when the USWU disclaimed its interest" such that HPWA "had funds and months to obtain a new representative and/or attorney to assist in further negotiations . . . [and] did just that." The Township maintains that "[HPWA] cannot claim now that only three pay periods worth of union dues irreparably harms its stance in the negotiation and current legal complaint." The Township asserts that HPWA's "latest grievance that its employees

who conducted emergency work are entitled to pay does not meet the standard of irreparable harm . . . [because same] can be redressed adequately monetarily."[9/] The Township also argues that the "[p]ublic interest is furthered by adhering to the tenants expressed in the Act which require the parties to engage in collective negotiations to achieve a mutually acceptable agreement" and that same "will be furthered when [HPWA] continues to negotiate with the Township by proposing a new contract, which would maintain the negotiation process" given that "[t]here is no existing agreement between [HPWA] and the Township." The Township contends that HPWA "did not maintain the integrity of negotiations" by "rescind[ing] from the final agreed upon agreement at the last moment and ignor[ing] requests to resume bargaining" and that HPWA "did not engage in good faith bilateral negotiations."[10/] The Township also argues that HPWA "has not suffered any hardship because it was able to continue negotiations over a period of four months and hire an attorney to represent it during these legal proceedings" and "any terms and conditions previously afforded to [HPWA] can be negotiated for if [HPWA] opts to resume negotiations with the Township." The

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9/ In support of its position, the Township cites City of Atlantic City, I.R. No. 2004-3, 29 NJPER 376 (¶118 2003).

10/ In support of its position, the Township cites Caldwell Tp., I.R. No. 2000-12, 26 NJPER 193 (¶31078 2000), Hirsch v. Konig, 895 F. Supp. 688, 694 (D.N.J. 1995), and Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010).

Township asserts that HPWA "has been able to function since the disclaimed interest as there have been no grievances filed by its members." The Township maintains that it "will suffer if the Commission allows [HPWA] to negotiate for a successor agreement" because the Township "negotiated in good faith with USWU and reached a meeting of the minds as to all terms of the successor agreement, only to have the bargaining unit representatives refuse to sign the memorialized terms." The Township contends that it "relied in good faith upon USWU's later termination of the agreement long before [HPWA] sought to schedule negotiations for a contract" and "[s]anctioning the behavior of [HPWA], whom the Township acknowledges as a valid bargaining unit, will only serve to punish the Township for relying upon the conduct of the USWU (in terminating the subject agreement) and the conduct of [HPWA] (in eschewing the terms of the agreement) subsequent to the bargaining unit representatives' refusal to execute the agreed-upon successor agreement."

In reply, HPWA asserts that the essential facts are undisputed, that the Township has now "admit[ted] that its conduct . . . constitutes a voluntary recognition of HPWA as the majority bargaining unit", and that "the Township's conduct from November 5, 2018 to the present . . . constitutes an unfair labor practice." HPWA argues that Article XXVI of the expired 2007-2012 CNA "does not state that either party may terminate the

contract upon notice" but rather "merely provides that either party may put the other on notice that the former seeks to negotiate new terms." HPWA maintains that "[t]he contract between the Township and USWU . . . was not terminated merely because the [USWU] representative so stated" and that regardless, "for many months following USWU's expression of 'termination' to the Township, the Township continued to treat the members of HPWA as if they were still governed by the terms and conditions of the contract and as if HPWA was the bargaining unit for its members." HPWA contends that "legally the members of HPWA were still governed by the terms of the contract subsequent to USWU's disclaimer of interest insofar as HPWA members were in privity to the USWU and HPWA members were beneficiaries to the contract" and that as a result, "the Township is barred and estopped from repudiating the contract at this late date, and by its past conduct has waived any right to do so."[11/]

STANDARD OF REVIEW

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a

11/ In support of its position, HPWA cites Hitchens v. Cty. of Montgomery, 98 Fed. Appx. 106, 114 (3d Cir. 2004), Griswold v. Coventry First LLC, 762 F.3d 264, 272 (3d Cir. 2014), and Hirsch v. Amper Fin. Servs. LLC, 215 N.J. 174, 179-180, 189 (2013).

final Commission decision on its legal and factual allegations[12/] 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 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

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

> except in the most clear and compelling circumstances.

Article I of the New Jersey Constitution, entitled "Rights and Privileges," provides in pertinent part

> 19. Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

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

> Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity . . .
>
> * * *
>
> Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes, by the majority of the employees voting in an election conducted by the commission as authorized by this act or, at the option of the representative in a case in which the commission finds that only one representative is seeking to be the majority representative, by a majority of the employees in the unit signing authorization cards indicating their preference for that representative, shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit.
>
> * * *
>
> A majority representative of public employees

> in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.

N.J.A.C. 19:11-3.1, entitled "Recognition as exclusive representative," provides:

> (a) Whenever a public employer has been requested to recognize an employee organization as the exclusive representative of a majority of the employees in an appropriate collective negotiations unit, the public employer and the employee organization may resolve such matters without the intervention of the Commission.
>
> (b) The Commission will accord certain privileges to such recognition as set forth in N.J.A.C. 19:11-2.7, Intervention and N.J.A.C. 19:11-2.8, Timeliness of petitions, provided the following criteria have been satisfied before the written grant of such recognition by a public employer:
>
> > 1. The public employer has satisfied itself in good faith, after a suitable check of the showing of interest, that the employee representative is the freely chosen representative of a majority of the employees in an appropriate collective negotiations unit;

> 2. The public employer conspicuously posted a notice, where notices to employees are normally posted, for a period of at least 10 consecutive days advising all persons that it intends to grant such exclusive recognition without an election to a named employee organization for a specified negotiations unit;
>
> 3. The public employer served written notification on any employee organizations that have claimed, by a written communication within the year preceding the request for recognition, to represent any of the employees in the unit involved, or any organization with which it has dealt within the year preceding the date of the request for recognition. Such notification was made at least 10 days before the grant of recognition and contained the information set forth in (b)2 above;
>
> 4. Another employee organization has not within the 10-day period notified the public employer, in writing, of a claim to represent any of the employees in the collective negotiations unit or has not within such period filed a valid petition for certification of public employee representative with the Director of Representation;
>
> 5. Such recognition shall be in writing and shall set forth specifically the collective negotiations unit involved.

The Commission has held that N.J.A.C. 19:11-3.1(b) "only defines under what circumstance . . . a voluntary recognition

[will] be treated as a certification after an election"; failure to comply with N.J.A.C. 19:11-3.1(b) "does not totally eliminate the obligation to negotiate arising in a voluntary recognition" and "only means the full protection of [N.J.A.C.] 19:11-2.8 will not be granted." Atlantic Cty. Sewerage Auth., H.E. No. 81-15, 6 NJPER 566 (¶11287 1980), adopted P.E.R.C. No. 81-91, 7 NJPER 99 (¶12041 1981), recon. den. P.E.R.C. No. 81-111, 7 NJPER 162 (¶12072 1980), aff'd NJPER Supp.2d 128 (¶108 App. Div. 1983). "A negotiations relationship protected under our Act may arise even in the absence of a certification of election results or a formal recognition" and "[a]lthough certification or full compliance with N.J.A.C. 19:11-3.1 provides a majority representative certain benefits, the absence of that entitlement does not expose an organization to unfair practices if a negotiations relationship otherwise exists." Monmouth Cty., D.R. No. 2011-4, 36 NJPER 390 (¶152 2010) (citing Salem City Bd. of Ed., H.E. No. 80-42, 6 NJPER 264 (¶11125 1980), rev'd and rem'd P.E.R.C. No. 81-6, 6 NJPER 371 (¶11190 1980)).

N.J.S.A. 52:14-15.9e, entitled "Deduction from compensation to pay dues to certain employee organizations," provides:

> Whenever any person holding employment, whose compensation is paid by this State or by any county, municipality, board of education or authority in this State, or by any board, body, agency or commission thereof shall indicate in writing, including by electronic communications, and which writing or communication may be evidenced by the

electronic signature of the employee, as the term electronic signature is defined in section 2 of P.L.2001, c.116 (C.12A:12-2), to the proper disbursing officer his desire to have any deductions made from his compensation, for the purpose of paying the employee's dues to a bona fide employee organization, designated by the employee in such request, and of which said employee is a member, such disbursing officer shall make such deduction from the compensation of such person and such disbursing officer shall transmit the sum so deducted to the employee organization designated by the employee in such request.

Employees who have authorized the payroll deduction of fees to employee organizations may revoke such authorization by providing written notice to their public employer during the 10 days following each anniversary date of their employment. Within five days of receipt of notice from an employee of revocation of authorization for the payroll deduction of fees, the public employer shall provide notice to the employee organization of an employee's revocation of such authorization. An employee's notice of revocation of authorization for the payroll deduction of employee organization fees shall be effective on the 30th day after the anniversary date of employment.

Nothing herein shall preclude a public employer and a duly certified majority representative from entering into a collectively negotiated written agreement which provides that employees included in the negotiating unit may only request deduction for the payment of dues to the duly certified majority representative. Such collectively negotiated agreement may include a provision that existing written authorizations for payment of dues to an employee organization other than the duly certified majority representative be terminated. Such collectively negotiated agreement may also include a provision specifying the effective

> date of a termination in deductions as of the July 1 next succeeding the date on which notice of withdrawal is filed by an employee with the public employer's disbursing officer.
>
> This authorization for negotiation of exclusive dues deduction provisions shall not apply to any negotiating unit which includes employees of any local school district or county college.
>
> As used in this section, dues shall mean all moneys required to be paid by the employee as a condition of membership in an employee organization and any voluntary employee contribution to a committee or fund established by such organization, including but not limited to welfare funds, political action committees, charity funds, legal defense funds, educational funds, and funds for donations to schools, colleges, and universities.

In City of Atlantic City, I.R. No. 2004-3, 29 NJPER 376 (¶118 2003), the Commission Designee found the following:

> [N.J.S.A. 52:14-15.9(e)] requires a public employer to deduct union dues from the wages of a public employee when the employee individually so authorizes the deduction. It further provides that the dues shall continue until the employee revokes the authorization. Thus, union dues run to the union the employee so authorizes, not necessarily to the majority representative. The exception is when the majority representative succeeds in negotiating a dues exclusivity clause, which provides that dues may only be deducted to the majority representative. Here, Article V of the expired contract does not contain such an exclusivity clause. Rather, there is nothing in that clause that prevents an employee from paying dues to any organization. Thus, even assuming, as the Association argues, that it is entitled to assume and enforce the provisions of the old

> Local 331 contract, this clause does not give the majority representative the exclusive right to collect employees' dues. Accordingly, absent a dues exclusivity agreement, the employees have a right to continue to pay dues to a minority organization.
>
> [29 NJPER at 378 (citing State of New Jersey, P.E.R.C. No. 85-72, 11 NJPER 53 (¶16028 1984).]

Public employers are prohibiting 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 also prohibited from dominating or interfering with the formation, existence, or administration of an employee organization. N.J.S.A. 34:13A-5.4a(2); see also

Trenton Bd. of Ed., D.U.P. No. 2010-1, 35 NJPER 467 (¶154 2009); City of Hoboken, P.E.R.C. No. 2016-79, 42 NJPER 559 (¶154 2016). "Domination exists when the organization is directed by the employer, rather than the employees." Atlantic Comm. Coll., P.E.R.C. No. 87-33, 12 NJPER 764 (¶17291 1986), aff'd NJPER Supp.2d 182 (¶159 App. Div. 1987). "Interference involves less severe misconduct than domination, so that the employee organization is deemed capable of functioning independently once the interference is removed"; "[i]t goes beyond merely interfering with an employee's section 5.3 rights" and "must be aimed instead at the employee organization as an entity." Id.; accord North Brunswick Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980).

Public employers are also 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).

ANALYSIS

At issue in this interim relief application is whether, upon an incumbent exclusive majority representative's disclaimer of interest, a public employer may unilaterally change terms and conditions of employment after a new employee organization has gained de facto status as the majority representative or has been informally recognized.

New Jersey courts and the Commission have held that "an employee group [can] gain de facto status as a majority representative" and "that recognition need not be formal and may be inferred from conduct and circumstances." Collingswood Bd. of Ed., P.E.R.C. No. 86-50, 11 NJPER 694 (¶16240 1985) (citing the Labor Management Relations Act (LMRA), 29 U.S.C. §141 et seq.[13/]); accord PBA Local 53 v. Town of Montclair, 131 N.J. Super. 505 (App. Div. 1974), vacated on other grounds and remanded 70 N.J. 130 (1976) (holding that "by its actions . . . [the town] has recognized [Local 53] as a designated and selected representative

13/ New Jersey courts and the Commission have held that "the experiences and adjudications under the LMRA are appropriate guides in determining unfair practice cases because the language, content and purposes of the Act and the LMRA are the same." Irvington Bd. of Ed., H.E. No. 2016-16, 42 NJPER 427 (¶116 2016), adopted P.E.R.C. No. 2016-62, 42 NJPER 472 (¶128 2016); accord In re Bridgewater Tp., 95 N.J. 235, 240-241 (1984).

. . . and by so doing has conferred at least de facto status on [Local 53]"; finding that "[b]asic principles of fairness dictate that if [the town] was going to question the right of [Local 53] to act as the majority representative . . . , it should have done so promptly and not acted so as to lull [Local 53] over a period of months into a false sense of security and into thinking it had recognition"); Fair Lawn Bor., D.R. No. 2013-4, 39 NJPER 235 (¶81 2012), adopted P.E.R.C. No. 2013-50, 39 NJPER 300 (¶100 2013) (finding that a "de facto collective negotiations relationship [existed], evidenced by a mutually signed-written agreement covering . . . employees for a finite term, setting forth terms and conditions of employment, . . . , and a four step grievance procedure"; holding that the Act "covers 'homegrown' employee organizations whose procedures may not seem as established or formalized as other organizations, so long as a negotiations relationship in fact exists"); New Jersey Transit Bus Operations, Inc., H.E. No. 85-46, 11 NJPER 406 (¶16142 1985), adopted P.E.R.C. No. 86-21, 11 NJPER 520 (¶16182 1985) (finding that New Jersey Transit "violated N.J.S.A. 34:13A-5.4a(1), (2) and (5) when it unilaterally and without notification . . . withdrew its de facto recognition of ATU . . . , shifted recognition to TWU and thereafter negotiated an amendment to TWU's collective negotiations agreement").

In Collingswood Bd. of Ed., the Commission held the

following:

> [A] negotiations relationship protected under [the] Act may arise even in the absence of a certification of election results or a formal recognition pursuant to N.J.A.C. 19:11-3.1. Certification or full compliance with N.J.A.C. 19:11-3.1 provides a majority representative with certain benefits, including insulation for 12 months from another group's representation petition or an employer's revocation of recognition. N.J.A.C. 19:11-2.8(b). But the absence of entitlement to such benefits does not expose an organization to unfair practices if a negotiations relationship otherwise exists. . . .The[] . . . preconditions [in N.J.A.C. 19:11-3.1] do not necessarily have to be met before a negotiations obligation arises between a public employer and an employee organization which does represent a majority of the employees in an appropriate unit. Such an organization may have the right to negotiate but only so long as it can satisfy the employer that it represents a majority of the employees in the unit.
>
> [11 NJPER 696.]

In order to determine whether a de facto negotiations relationship exists, the Commission has focused on "[whether there was] an organization regularly speaking on behalf of a reasonably well defined group of employees seeking improvement of employee conditions and resolution of differences through dialogue (now called negotiations) with an employer who engaged in the process with an intent to reach agreement." West Paterson Bd. of Ed., P.E.R.C. No. 77, NJPER Supp. 333 (¶77 1973), modified P.E.R.C. No. 79, NJPER Supp. 352 (¶79 1973). "[T]he essential elements for negotiations [include]: the give and take of a

bilateral relationship, through proposal and counterproposal, directed towards consummation of a mutually acceptable agreement." Henry Hudson Reg. Bd. of Ed., E.D. No. 12, NJPER Supp. 425 (¶103 1970). "This bilateral relationship is in distinction to a situation in which there is a unilateral establishment of terms and conditions of employment" and "does not mean the solicited or unsolicited submission by the employee representative of wage and fringe benefit demands without more" (Teaneck Tp., E.D. No. 23, NJPER Supp. 465 (¶114 1971)); "nor does it mean a limited 'history' of an employee organization's relationship with the public employer" (Middlesex Cty. Coll. Bd. of Trustees, P.E.R.C. No. 29, NJPER Supp. 110 (¶29 1969)).

The U.S. Court of Appeals for the Third Circuit Court has held the following:

> Where a bargaining relationship has been properly established either by Board certification or, as here, by voluntary recognition, the representative status of the Union is presumed to continue for a reasonable period and the presumption is irrebuttable. In the case of a certified union, the reasonable time during which its majority status may not be challenged is ordinarily one year. And although a presumption of majority status continues after one year, it then becomes rebuttable. In such circumstances an employer may refuse to bargain without violating the Act if but only if, he in good faith has a reasonable doubt of the Union's continuing majority. An employer must, however, come forward with evidence casting serious doubt on the union's majority status. . . .More than an employer's mere mention of its good faith

> doubt and more than proof of the employer's subjective frame of mind is necessary. What is required is a rational basis in fact.
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> * * *
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> [W]e are of the view that the Board may, within its authority, properly apply the rebuttable presumption of continued majority status to unions which have been recognized voluntarily. We do not believe that by naming the one year irrebuttable presumption of majority status as an advantage of a certified union the Supreme Court meant that the Board was necessarily precluded from extending the same benefit to voluntarily recognized unions. As we have noted above, the Board, with court approval, has in fact applied the irrebuttable presumption of representative status for a reasonable time, to unions having received voluntary recognition, without specific adoption of the one year period.
>
> In like manner, we think the Board is free to determine that the rebuttable presumption of continued majority status evolved for certified unions should also apply in the case of unions voluntarily recognized. This is an area which involves the weighing of two conflicting goals of national labor policy: preserving employees' free choice of bargaining representatives, and providing stability for established bargaining relationships. In this situation we believe that the Board should be left free to utilize its administrative expertise in striking the proper balance.
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> [NLRB v. Frick Co., 423 F.2d 1327, 1330-1332 (3d Cir. 1970) (citations omitted).]

See also NLRB v. Broad St. Hosp. & Med. Ctr., 452 F.2d 302, 305 (3d Cir. 1971) (holding that "[t]here are no substantive policy considerations which justify a distinction between written or oral recognition"; "whether the employer's bona fide recognition

of a union's majority status be oral or written, it must be binding for the same reasons we enunciated in Frick: the inability of all parties to the collective bargaining process to rely on such recognition would produce an uncertainty potentially generative of strife and discord in industrial relations" and "the unlawful refusal of an employer to bargain collectively with its employees' chosen representatives disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions"); accord Toltec Metals, Inc. v. NLRB, 490 F.2d 1122 (3d Cir. 1974).

After de facto status as a majority representative or voluntary recognition has been established, the NLRB has held that "further evidence of recognition" is unnecessary:

> Rather, the key is the original commitment of the employer to bargain upon some demonstrable showing of majority. That showing was made here by the Union and that commitment was made by Respondent when it agreed to begin bargaining. Once that commitment was made, Respondent could not unilaterally withdraw its recognition, and to do so was a violation of the Act.
>
> * * *
>
> Once voluntary recognition has been granted to a majority union, the union becomes the exclusive collective-bargaining representative of the employees, and withdrawal or reneging from the commitment to recognize before a reasonable time for bargaining has elapsed violates the employer's bargaining obligation. Evidence that an employer has commenced bargaining or has taken other affirmative action consistent with its recognition of the union aids in resolving the evidentiary question as to

> whether recognition was granted. However, once the fact of recognition is established, such additional evidence is not required for the bargaining obligation arises upon voluntary recognition and continues until there has been a reasonable opportunity for bargaining to succeed.
>
> [Jerr-Dan Corp. v. NLRB, 237 N.L.R.B. 302, 303 (1978), enforced 601 F.2d 575 (3d Cir. 1979).]

See also Nantucket Fish Co., 309 N.L.R.B. 794, 795 (1992) (holding that "[a] commitment to enter into negotiations with the union is also an implicit recognition of the union" and "[o]nce the original commitment to bargain is made, the employer cannot unilaterally withdraw its recognition and to do so is a violation of the Act"); accord Int'l Union of Operating Eng'rs, Local 150 v. NLRB, 361 F.3d 395 (7th Cir. 2004) ("[i]mplicit voluntary recognition occurs when an employer's statement or conduct clearly and unequivocally demonstrate that it has made a commitment to enter into negotiations with a union").

Given these legal precepts, I find that HPWA has demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. The evidence submitted indicates that HPWA gained de facto status as the majority representative after USWU's disclaimer of interest in May/June 2018 based upon the following course of conduct:

> -HPWA sought to engage in collective negotiations with the Township for a successor agreement in July 2018 and the Township acceded, scheduling/holding negotiations sessions with HPWA in August, September, and November,

2018;

-HPWA filed at least one grievance on behalf of a unit member (Finzi) in July 2018 and moved it through the steps of the grievance procedure set forth in the expired 2007-2012 CNA, and the Township accepted/processed the grievance;

-HPWA submitted new dues authorization cards in November 2018 at the Township's request;

-the Township continued withholding dues from unit members and transmitted same to HPWA via bank drafts made out to "Hillside DPW Independent Employee Union," both before and after the disclaimer, until November 2018; and

-the Township maintained the terms and conditions of employment set forth in the expired 2007-2012 CNA until November 2018.

Moreover, the Township has acknowledged that it informally recognized HPWA by virtue of its conduct.

The Commission has held that "an employer may not revoke its recognition of a majority representative for a reasonable period and may not revoke recognition thereafter unless it proves a good faith doubt of the union's continuing majority status." Essex Cty. Educational Services Comm'n, H.E. No. 85-31, 11 NJPER 170 (¶16075 1985), adopted P.E.R.C. No. 86-68, 12 NJPER 13 (¶17004 1985). In addition, the Commission has "rejected the rule of the NLRB . . . which requires that an employer stop negotiating with the incumbent if a good faith doubt of its majority status is raised through objective considerations." Old Bridge Bd. of Ed., D.U.P. No. 94-39, 20 NJPER 213 (¶25104 1994); accord Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983) (holding that in the

absence of a pending representation petition, a public employer has an obligation to continue to negotiate with an incumbent).

Even assuming, arguendo, that the Township had authority to unilaterally change unit members' terms and conditions of employment immediately after USWU's disclaimer of interest (i.e., at that moment, unit members were unrepresented employees governed by an expired CNA), the Township obligated itself to continue the terms and conditions of employment upon entering into the course of conduct set forth above (i.e., the Township was required to maintain the status quo that existed when HPWA gained de facto status as the majority representative or was informally recognized). See, e.g., Fairview Free Public Library, H.E. No. 99-3, 24 NJPER 435 (¶29201 1998), adopted P.E.R.C. No. 99-47, 25 NJPER 20 (¶30007 1998) (after a disclaimer of interest was filed by the incumbent in the face of a decertification petition, the employer's consideration of withdrawing holiday pay benefits in January 1997 did not constitute a violation of subsections 5.4a(2), (3) or (4) of the Act given that unit members were unrepresented employees governed by an expired CNA; however, the employer's decision to withdraw holiday pay benefits in June 1997 did constitute a violation of subsection 5.4a(1) of the Act given that it occurred after a new employee organization sought voluntary recognition and filed a representation petition in May 1997; the hearing examiner specifically found that

"[e]liminating the benefit anytime before the request for recognition was received would have been lawful").

If the Township had a good faith doubt concerning HPWA's continuing majority status, it was incumbent upon the Township to affirmatively file a petition for certification of public employee representative (RE) or, in response to a legal challenge, to demonstrate the basis for its doubt through objective considerations. See N.J.A.C. 19:11-1.1(a)2[14/]; N.J.A.C. 19:11-1.4(a).[15/] Here, in the absence of an RE petition and/or

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14/ N.J.A.C. 19:11-1.1, entitled "Petitions," provides in pertinent part:

> (a). . .2. A petition for certification of public employee representative (RE) may be filed by a public employer alleging that one or more public employees, group of public employees, individuals or employee organizations have presented to such employer a claim to be recognized or continue to be recognized as the exclusive representative and the public employer has a good faith doubt concerning the majority status of the representative of its employees.

15/ N.J.A.C. 19:11-1.4, entitled "Petition for certification filed by a public employer," provides in pertinent part:

> (a) A petition for certification of public employee representative filed by a public employer shall state that a claim for representation or continued representation has been made by one or more public employees, groups of public employees, individuals or employee organizations and that the public employer has a good faith doubt concerning the majority status of the representative of its employees.

any demonstration of a good faith doubt concerning HPWA's continuing majority status in response to the underlying unfair practice charge, the Township was obligated to continue negotiations for a reasonable period and to maintain the status quo with respect to unit members' terms and conditions of employment. See N.J.S.A. 34:13A-5.3 ("[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established"); Essex Cty., D.U.P. No. 2003-7, 29 NJPER 77 (¶21 2003) (holding that "terms and conditions of employment of the employees remain in effect until the new [majority] representative negotiates a successor contract . . . or obtains one through interest arbitration, if applicable"); Camden Housing Auth., H.E. No. 87-68, 13 NJPER 510 (¶18191 1987), adopted P.E.R.C. No. 88-5, 13 NJPER 639 (¶18239 1987) (holding that an employer's unilateral decision to withhold automatic increments violated subsections 5.4a(1) and (5) of the Act given that it occurred after a representation petition was filed, an election was held, the parties had become aware that employees voted unanimously for union representation, and the employer failed to file any election objections; the hearing examiner found that the employer "act[ed] at its [own] peril in making unilateral changes in terms and conditions of employment" given that it "passed its resolution withholding the increments one day before the

Commission certified [the employee organization] as the majority representative" despite having "effective notice of its imminent duty to collectively negotiate terms and conditions of employment").

Contrary to its assertions, the Township has not submitted any evidence demonstrating that HPWA refused to negotiate nor has it filed a related unfair practice charge. Likewise, the Township's claim that HPWA "failed to adhere to the grievance procedure" with respect to its allegations regarding shade tree differential pay, emergency overtime pay, and dues deductions is inconsistent with undisputed evidence demonstrating that since November 2018, the Township has taken the position that the terms and conditions of employment set forth in the expired 2007-2012 CNA are no longer applicable to unit members' (i.e, after HPWA gained de facto status as the majority representative or was informally recognized, the Township ceased withholding dues despite receiving new dues authorization cards; indicated that it "[did] not recognize [HPWA] as a bargaining unit" and that there "[was] no collective bargaining agreement or negotiated agreement [in place]"; and unilaterally changed terms and conditions of employment pertaining to compensation).

Similarly, although the Township maintains that it "mistakenly continued to collect union dues from [HPWA] from May or June 2018 when USWU disclaimed its interest" and that "[the]

dues deduction clause does not give [HPWA] the exclusive right to collect its employees' dues," same is inconsistent with the Township's acknowledgment that it informally recognized HPWA. Contrary to its assertions, undisputed evidence demonstrates that the Township's bank drafts transmitting union dues were made out to "Hillside DPW Independent Employee Union" both before and after USWU's disclaimer of interest and that HPWA submitted new dues authorization cards in November 2018. Moreover, whether the Township's actions were "mistaken[]" may be of no moment. See, e.g., Barnegat Tp. Bd. of Ed., H.E. No. 90-41, 16 NJPER 223 (¶21094 1990), adopted P.E.R.C. No. 91-18, 16 NJPER 484 (¶21210 1990), aff'd NJPER Supp.2d 268 (¶221 App. Div. 1992) (finding that a payroll clerk's mistaken two-year practice of converting unused personal days into sick days created an employment condition that the board could not change unilaterally).

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

I also find that HPWA has established that it will suffer irreparable harm as a result of the Township's actions. 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. of Neptune Twp. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16, 22 (1996)); accord 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"); 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").

In Galloway, a decision recently cited with approval by the Appellate Division for the same proposition set forth below, the Supreme Court of New Jersey stated:

> Indisputably, the amount of an employee's compensation is an important condition of his employment. If a scheduled annual step increment in an employee's salary is an "existing rule governing working conditions," the unilateral denial of that increment would constitute a modification thereof without the negotiation mandated by N.J.S.A. 34:13A-5.3 and would thus violate N.J.S.A. 34:13A-5.4a(5). Such conduct by a public employer would also have 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.
>
> [Galloway, 78 N.J. at 49.]

Accord In re Atlantic Cty., 445 N.J. Super. 1, 17-18 (App. Div. 2016) (noting that "even if the Court's analysis in Galloway was no more than dictum unnecessary to the ultimate ruling applying N.J.S.A. 18A:29-4.1, we must follow it").

In Palisades Park Bor., I.R. No. 87-21, 13 NJPER 260 (¶18107 1987), the union filed an unfair practice charge alleging that the employer violated the Act when it "unilaterally altered terms and conditions of employment . . . by increasing [unit members'] hours of work" and sought interim relief. Finding that there was "no ratified, executed agreement between the parties covering [the] unit and that the parties [were] in negotiations" at the time the employer changed unit members' work hours, the Commission Designee ordered the employer to "cease and desist from" making unilateral changes "during the course of negotiations for an agreement covering [unit members]" and a return to the "status quo ante." The Commission Designee noted the following:

> The Commission and the Courts have held that when an employer unilaterally alters terms and conditions of employment during the course of contract negotiations and before the exhaustion of the dispute resolution mechanisms of the Commission, the employer's action is violative of the Act and the harm done to the negotiations process is irreparable.

[13 NJPER at 263.]

See also City of Jersey City, I.R. No. 97-20, 23 NJPER 354 (¶28167 1997) (finding that the employer's refusal to deduct dues from previous paychecks during negotiations for a successor agreement "create[d] a unique harm which [was] irreparable" and warranted interim relief; ordering the employer to make appropriate deductions from future paychecks in order to recoup the missing dues).

Accordingly, I find that HPWA has demonstrated irreparable harm.

I also find that HPWA has demonstrated relative hardship and that the public interest will not be injured by an interim relief order. In Edison Tp., I.R. No. 2010-3, 35 NJPER 241 (¶86 2009), the union filed an unfair practice charge alleging that the employer violated the Act when it "unilaterally altered unit employees' vacation schedule selection policy" and sought interim relief. Finding that the parties' most recent CNA had "expired" and that the parties were "in the midst of collective negotiations for a successor agreement" at the time the employer changed the policy, the Commission Designee ordered the employer to "maintain the vacation leave policy that was in effect at the expiration of the collective negotiations agreement provided minimum staffing levels [were] maintained." 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.
>
> [35 NJPER at 243.]

Accord Winslow Tp., I.R. No. 2007-7, 33 NJPER 39 (¶16 2007).

Given the course of conduct set forth above, requiring the Township to return to the status quo ante pending final disposition of the underlying unfair practice charge will facilitate the purposes of the Act. See N.J.S.A. 34:13A-2 (declaring that the public policy of the State of New Jersey is "the prevention or prompt settlement of labor disputes" and "to promote permanent, public and private employer-employee peace and the health, welfare, comfort and safety of the people of the State"). Moreover, the Township has not sufficiently demonstrated that it will endure any harm if the status quo ante is reinstated nor has it filed any legal challenge regarding the status of, or actions taken by, HPWA.

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

Under these circumstances, I find that HPWA 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

The Hillside Public Works Association's (HPWA) application for interim relief is granted. The Township of Hillside (Township) is ordered to:

> -reinstate any terms and conditions of employment that were abrogated during/after November 2018 including, but not limited to, compensating unit members with shade tree differential pay in accordance with Article VI, Section 5, and emergency overtime pay in accordance with Article XI; and
>
> -negotiate with HPWA regarding a plan to withhold and transmit dues that were not withheld from appropriate unit members' paychecks or transmitted to HPWA during/after November 2018.

Pending final disposition of the underlying unfair practice charge or a change in circumstances, the Township is restrained from:

> -refusing to recognize HPWA as the exclusive majority representative for non-supervisory employees within the Township's Department of Public Works;
>
> -refusing to engage in good faith negotiations for a successor agreement with HPWA;
>
> -refusing to withhold dues from appropriate unit members' paychecks and transmit same to HPWA; and
>
> -refusing to maintain the terms and conditions of employment set forth in the expired 2007-2012 CNA.

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

DATED: January 18, 2019
Trenton, New Jersey