

I.R. No. 2020-4

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF HARVEY CEDARS,

Respondent,

-and-

Docket No. CO-2020-134

PBA LOCAL 175,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the PBA against the Borough alleging that the Borough violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1), (2), (3), (4), (5), and (7), by unilaterally changing the work schedule for unit members from 12-hour to 10-hour shifts pursuant to Special Order No. 19-06, effective January 1, 2020. The Designee finds that the PBA has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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Appearances:

For the Respondent, Armando Riccio, LLC, attorneys
(Armando V. Riccio, of counsel)

For the Charging Party, Detzky, Hunter & DeFillippo,
LLC, attorneys (David J. DeFillippo, of counsel)

INTERLOCUTORY DECISION

On November 12, 2019, PBA Local 175 (PBA) filed an unfair practice charge against the Borough of Harvey Cedars (Borough). The charge alleges that on October 1, 2019, the Borough violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1), (2), (3), (4), (5) and (7),^{1/2/} by unilaterally changing the work schedule

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", "(2) Dominating or interfering with the formation, existence or administration of any employee organization", "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act", "(4)
(continued...)

for unit members from 12-hour to 10-hour shifts pursuant to Special Order No. 19-06, effective January 1, 2020.

On November 12, 2019, the PBA filed an application for interim relief requesting that the Borough be compelled to:

-rescind[] its unilateral intent to change the parties' work schedule from 12-hour tours of duty to 10-hour tours of duty, effective January 1, 2020 and, instead, continue the parties' longstanding 12-hour tour work schedule until such time as the parties negotiate in good faith any change or other revision to said work schedule.

PROCEDURAL HISTORY

On November 12, 2019, I signed an Order to Show Cause directing the Borough to file any opposition by November 19; the PBA to file any reply by November 26; and set December 2 as the return date for oral argument. On November 14, with the PBA's consent, I granted the Borough's request for an extension and

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- 1/ (...continued)
Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act", "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative", and "(7) Violating any of the rules and regulations established by the commission."
- 2/ I do not consider the 5.4a(2) and (7) claims inasmuch as the PBA does not develop them in its interim relief application or its unfair practice charge. The PBA does not set forth facts that would suggest the Borough dominated or interfered with the formation, existence or administration of any employee organization; the PBA does not identify which Commission regulations the Borough allegedly violated.

directed that it file opposition by November 25; the PBA file any reply by December 2; and set December 5 as the return date for oral argument. On December 5, counsel engaged in oral argument during a telephone conference call.

In support of the application for interim relief, the PBA submitted a brief, exhibits, and the certifications of Sergeant Kevin Snow (Snow); Sergeant Steven Frazee (Frazee); Officer Anthony Abbatemarco (Abbatemarco); Officer Benjamin Mrozinski (Mrozinski); Officer Timothy Butler (Butler); and Officer Matthew Chester (Chester). In opposition, the Borough submitted a brief, exhibits, and the certifications of its Chief of Police Robert Burnaford (Burnaford); its Public Safety Director Jerry Falkowski (Falkowski); and Ocean County Prosecutor's Office (OCPO) Captain Vincent Frulio (Frulio). The PBA also filed a reply brief with an exhibit.

FINDINGS OF FACT

The PBA represents all police officers employed by the Borough excluding the Chief of Police. See 2017-2020 CNA, Art. I. The Borough and the PBA are parties to a collective negotiations agreement (CNA) in effect from January 1, 2017 through December 31, 2020. The grievance procedure ends in binding arbitration.

Article V of the parties' CNA, entitled "Work Hours and Work Year," provides:

A. Work Hours

1. In all cases, member's workload shall not exceed forty (40) work hours per week.
2. All overtime shall be paid at the rate of time and one-half (1 ½) for all hours worked over forty (40) hours in any work week.

B. Work Year

The work year for employees shall be from January 1st to December 31st.

Article IX of the parties' CNA, entitled "Bereavement Leave," provides in pertinent part:

Each member shall be entitled, in addition to his sick leave and personal time, bereavement leave for each of the following relatives according to the following schedule: Hours used will be based on a 12 hour work day.

Article X of the parties' CNA, entitled "Holidays," provides in pertinent part:

There shall be twelve (12) paid holidays for each member of this unit. . . .Holiday pay shall be for 12 hours of each holiday stated above. . . .If an employee works on the above holidays, that employee will receive[] twelve (12) hours of holiday compensatory time.

The Borough's Police Department is presently comprised of a chief, two sergeants, one detective, and five police officers. An additional police officer is currently suspended; an additional sergeant was terminated in June 2019. See Certification of Snow at ¶¶5-7.

Since approximately 2009, the parties' past practice has been a work schedule for unit members that includes one of the following 12-hour shifts:

6:00 a.m. - 6:00 p.m.
8:00 a.m. - 8:00 p.m.
2:00 p.m. - 2:00 a.m.
6:00 p.m. - 6:00 a.m.

See Certification of Frazee at ¶4; Certification of Snow at ¶12. The 12-hour work schedule results in an officer working 48 hours in one week and 36 hours in another week. See Certification of Burnaford at ¶3. In order to maintain a standard 2,080 hour work year, the Borough has provided each police officer with paid "Kelly Time" in the annual amount of 104 or 112 hours. See Certification of Snow at ¶9. The 12-hour work schedule is "extremely popular" among members of the PBA because "it permits officers an opportunity to have several weekends off each year." See Certification of Snow at ¶10; see also Certification of Frazee at ¶6; Certification of Abbatemarco at ¶4; Certification of Mrozinski at ¶4; Certification of Butler at ¶7; Certification of Chester at ¶5. Notably, the parties' have never included a contractually-negotiated work schedule in their collective negotiations agreement. See Certification of Burnaford at ¶2; Certification of Falkowski at ¶¶2-5; 2017-2020 CNA; 2013-2016 CNA.

In or around December 2018, the Ocean County Prosecutor's Office (OCPO) initiated an investigation regarding allegations levied against three Borough employees - police officer Christopher Oldham (Oldham); sergeant Sean Marti (Marti); and Chief Burnaford. Oldham is the son of the Borough's current

mayor; Marti is the son of the Borough's previous mayor. Oldham and Marti are personal friends of Chief Burnaford. See Certification of Snow at ¶¶5-7, 13-16; Certification of Frazee at ¶¶9-10; Certification of Frulio at ¶3. During the investigation, "each remaining Borough police officer . . . was interviewed by representatives of the OCPO concerning his knowledge, if any, re[garding] the alleged misconduct of Chief Burnaford, Marti and Oldham." See Certification of Snow at ¶19.

The OCPO investigation, which concluded in August 2019, yielded the following results:

-Chief Burnaford was placed on administrative leave in June 2019 and the OCPO assumed daily supervision of the Borough's Police Department, with OCPO Captain Vincent Frulio (Frulio) assigned daily oversight of operations from June 3, 2019 through October 25, 2019 (Certification of Frulio at ¶3; Certification of Snow at ¶16; Certification of Frazee at ¶11);

-Marti pled guilty to theft of movable property, was sentenced to probation, and his employment with the Borough was terminated in June 2019 (Certification of Snow at ¶¶6, 15);

-Oldham's employment with the Borough is currently suspended due to pending criminal charges that include allegations of theft, tampering with evidence, and filing a false police report (Certification of Snow at ¶¶6, 15); and

-Chief Burnaford received a five-day suspension but no additional information regarding disciplinary action taken against him was provided to the PBA (Certification of Snow at ¶17).

In addition, on July 8, 2019, the Borough appointed Jerry

Falkowski^{3/} (Falkowski) to be its Public Safety Director with general oversight over the Police Department. See Certification of Falkowski at ¶1; Certification of Burnaford at ¶5.

On October 1, 2019, Chief Burnaford issued Special Order No. 19-06, entitled "2020 10 Hour Shifts," that provides^{4/}:

Effective January 1, 2020, all Officers will be assigned to a 10 hour shift. Shift assignments will be based on seniority, unless the Chief of Police deems differently based on an officer's job assignment(s) and/or overall operational efficiency of the department. If assigned to "Shift 2" (1400-0000), AKA the "FLEX Shift," officers will have the flexibility to work anywhere from 1200-2200 to 1600-0200 hours with supervisor's approval. Those officers assigned to the "FLEX Shift" will also have the understanding of working a requested time by the Chief.

Using your badge #, indicate desired shift & steady days off on the sign-up sheet, which has been posted, by no later than October 14th. Failure to complete will result in an assignment by the Chief of Police.

Chief Burnaford certifies that "[d]uring the week of September 23, 2019, [he] spoke with . . . Falkowski and . . . Frulio regarding a return . . . to a 10 hour shift schedule" and

^{3/} Falkowski is a former Borough police officer with 26 years of service as a patrolman, sergeant, and chief. See Certification of Falkowski at ¶¶2-3.

^{4/} At the time he issued Special Order No. 19-06, Chief Burnaford was still "report[ing] to Falkowski and Frulio" and "Frulio was ultimately in charge of day to day operations until October 25, 2019." See Certification of Burnaford at ¶5; see also Certification of Frulio at ¶3.

"expressed [his] belief that [a] return to [a] 10 hour shift schedule would better the Department including its overall operational efficiency" for the following reasons:

-Increased Manpower: When working a 12-hour schedule, there are ordinarily 4 Officers scheduled to work on each work day (1 Sergeant and 3 Patrol Officers) during a 24 hour period. When working a 10-hour schedule, for a month containing 31 days, there are 4 Officers working on 22 out of 31 days, 5 officers working on 4 out of 31 days and 7 officers working on 4 out of 31 days. That means that, 9 out of 31 days, there is an increase in manpower over the course of each work day. That means there are a greater number of days per month when a greater number of officers are working together with command staff. . . .[T]he increase resulting from a 10 hour schedule will provide better police coverage for the community as well as increase Officer safety.

-Command Staff Working Together: When working a 12-hour schedule, 1 Sergeant works with their 3 Officers (squad 1) with no overlap with the other Sergeant and their 3 Officers (squad 2). In turn, that results in the Chief and both Sergeants not working together on any given day. Command staff communication, information sharing and collaboration are essential to any department in operating as efficiently as possible. When working a 10-hour schedule, the Chief and both Sergeants work on the same day approximately 4 times per month which provides the opportunity for communication amongst rank to share ideas and information multiple times per month. Additionally, when the command staff works together, it creates more of a team atmosphere and allows for a more effective information sharing amongst the ranks below. Working together will be extremely beneficial in the overall operational efficiency of the Department.

-Eliminates "2" Squads (e.g., Squad 1 and Squad 2): . . .[W]hen working a 12-hour shift, 1 Sergeant works with their 3 Officers (squad 1) with no overlap with the other Sergeant and their 3 Officers (squad 2). This type of schedule creates a division in a Department as small as Harvey Cedars Police Department and results in poor morale. Returning to a 10-hour shift will provide overlap within the rank and file, and create an overlap with both Sergeants working with all Officers at any given time throughout the month. Also, when working a 12 hour schedule, each Sergeant is assigned 3 officers to their squad and are more aware of their Officers' responsibilities than that of the other Sergeant's Officers. When one Sergeant is off for vacation, sick leave, etc., the other sergeant is needed for coverage. With a 10-hour shift schedule, each Sergeant works with all officers making both Sergeants responsible for all the Patrol Officers which allows for smoother transitions and better operational efficiency of the Department.

-Department Training: Currently with the Department's 12-hour schedule, the Department typically holds full department training days 2 times per year. When full department training days are scheduled, this results in requiring at least 5 Officers to come in when they are not scheduled to work to attend the training as well as paying those 5 Officers overtime, making it a financial burden. When working a 10-hour schedule, approximately 5 days a month, there will be 7 Officers working each work day. When full department training days are scheduled during one of those days, it would require, at most, 3 Officers to come in when off and receive overtime. This would also allow for additional full department training days per year. Training is of the utmost importance for the Department and the profession as a whole. Having additional opportunities to train together as a Department allows for better communication amongst rank and file,

and keep all Officers up to date on current trends, tactics and assists with overcoming natural tendencies that one may have. Additionally, training as a Department ensures everyone is on the same page and remains organized in achieving Community Policing and Departmental goals, such as handling a situation effectively, efficiently and safely.

[Certification of Burnaford at ¶¶6-7.]

Frulio corroborates Chief Burnaford's recollection of their discussion during the week of September 23, 2019 and certifies that he "believe[s] [a] return to a 10 hour shift meets the need for greater overlap, interaction and development of a better working relationship among all Officers and Chief Burnaford while increasing manpower and providing for better community policing." See Certification of Frulio at ¶¶5, 7. Frulio certifies that at the conclusion of his discussion with Chief Burnaford, he "expressed [his] agreement with the return to a 10 hour shift schedule as extremely beneficial to the Department for the reasons expressed by [Chief Burnaford] and stated that [he] had success with implementing [a 10 hour shift schedule] in Pine Beach when [he] was assigned oversight of that Department." See Certification of Frulio at ¶8. Frulio certifies that he "did not form the opinion that Chief Burnaford had any other reason for returning to a 10 hour shift" and that "[h]ad [he] formed the belief or suspicion that Chief Burnaford was acting out of retaliation or other improper motive [he] would not have agreed

with him and . . . would have been obligated to take action.”

See Certification of Frulio at ¶9.

Falkowski also corroborates Chief Burnaford’s recollection of their discussion during the week of September 23, 2019 and certifies that he “believe[s] [a] return to a 10 hour shift meets the need for greater overlap, interaction and development of a better working relationship among all Officers and Chief Burnaford while increasing manpower and providing for better community policing.” See Certification of Falkowski at ¶¶8, 10. Falkowski certifies that at the conclusion of his discussion with Chief Burnaford, he “expressed [his] agreement with the return to a 10 hour shift schedule as extremely beneficial to the Department for the reasons expressed by [Chief Burnaford].” See Certification of Falkowski at ¶12. Falkowski certifies that he “did not form the opinion that Chief Burnaford had any other reason for returning to a 10 hour shift” and that “[h]ad [he] formed the belief or suspicion that Chief Burnaford was acting out of retaliation or other improper motive [he] would not have agreed with him and . . . would have been obligated to take action.” See Certification of Falkowski at ¶13.

Chief Burnaford certifies that on/about October 1, 2019, he and Falkowski “met with Snow and Frazee and explained the reasons for the return to a 10 hour shift schedule” as described above. See Certification of Burnaford at ¶12. Falkowski corroborates

Chief Burnaford's recollection and certifies that on/about October 1, 2019, he and Burnaford "met with Snow and Frazee and explained the reasons for the return to a 10 hour shift schedule" as described above. See Certification of Falkowski at ¶14.

Sergeant Kevin Snow (Snow) certifies that "[t]he only explanation provided by Chief Burnaford for this abrupt decision was that the schedule change would . . . 'improve morale'" which Snow asserts is "patently absurd [and] offered to camouflage the Chief's true intent: to punish the officers for their cooperation with the OCPO." See Certification of Snow at ¶21. Snow certifies that "[n]o effort was made to hide these interviews from Chief Burnaford's attention." See Certification of Snow at ¶21. "The unilateral rescission of the long-standing 12-hour schedule is extremely unpopular among the police officers." See Certification of Frazee at ¶16; accord Certification of Snow at ¶25; Certification of Abbatemarco at ¶15; Certification of Mrozinski at ¶15; Certification of Butler at ¶¶16-18; Certification of Chester at ¶14.

On October 25, 2019,^{5/} the PBA filed a grievance with the Borough that provides:

The PBA is initiating this grievance at Step 3 of the parties' grievance procedure, as per Article III, Paragraph F, of the 2017-2020

^{5/} Snow certifies that although the grievance is dated October 15, 2019, it was not filed with the Borough until October 25, 2019.

CNA, as this affects all our members. You may recall that each police [officer] has worked 12 hour shifts (either 6 am - 6 pm; 2 pm - 2 am; or 8 am - 8 pm) for several years. As such, paid leave time such as bereavement and holidays are provided in 12-hour increments.

On October 1, 2019, Chief Robert Burnaford issued Special Order 19-06 announcing, effective January 1, 2020, that all officers will work 10 hour shifts. This schedule change was not negotiated with the PBA and not only rescinds the parties' long-standing past practice but is also violative of the 2017-2020 CNA. Moreover, the announced schedule change represents a clear expression of retaliation; reprisal; and animus by Chief Burnaford toward our members. You will recall that the Chief was recently suspended for five (5) days as a result of an investigation conducted by the Ocean County Prosecutor's Office wherein each officer was questioned under oath as to their respective knowledge of Chief Burnaford's conduct. Accordingly, the PBA demands that the aforesaid Special Order be immediately rescinded and that our members continue to work the 12-hour schedule unless and until a change is negotiated by and between the parties.

On November 12, 2019, the PBA filed the underlying unfair practice charge accompanied by the instant application for interim relief.

On November 26, 2019, the PBA filed a related demand for binding grievance arbitration (AR-2020-229). On November 27, the Borough filed a related scope of negotiations petition (SN-2020-028).

LEGAL ARGUMENTS

The PBA argues that it has satisfied the standard for interim relief. Specifically, the PBA maintains that it has a substantial likelihood of prevailing in a final Commission decision given that "generally, employers cannot unilaterally effectuate a change in the work schedule . . . [except] where the employer demonstrates that the change is necessary to achieve a tangible - rather than contrived - and particularized governmental need of operational objective." The PBA asserts that "no such compelling need to achieve particularized need or operational objective was cited by the Chief of Police as justification of the announced schedule change"; "the only justification offered by Chief Burnaford was the weak, preposterous and vague claim that the 10-hour schedule will improve the Police Department's morale." The PBA contends that "the new schedule change has had the exact opposite effect" and "prompted the PBA to file not only a grievance but [also] the instant unfair practice charge and request for interim relief." The PBA argues that "the timing of the Chief's determination, announced after serving his 5-day suspension and shortly before resuming full oversight of the Police Department, clearly illustrates his true motivation: to punish and otherwise retaliate against the PBA's membership for their role in leading to his suspension as well as the criminal prosecution of his two

personal friends . . . Sergeant Marti and Officer Oldham.”^{6/} The PBA also argues that its members will suffer irreparable harm if interim relief is not granted because the “schedule change is slated to take effect on January 1, 2020 - the last year of the parties’ current CNA” - and “the harm which will result . . . cannot be effectively remedied at the conclusion of the case.” The PBA notes that “[t]he Commission has regularly and consistently prevented employers from unilaterally changing terms and conditions of employment during contract negotiations” and “[a]lthough the parties’ CNA will have one more year . . . before it expires[,] the same harm will result here.” The PBA maintains that “[t]he purpose of maintaining the status quo . . . is to ensure that the scales of the parties’ respective negotiating balance is not tipped in favor of the employer” and “the harm which will result from the schedule change will include harm to the negotiations process”; “upset the balance required for good faith negotiations”; and “chill the negotiations process at a time when cooperation between labor and management is imperative.” The PBA contends that “the scales of negotiating power will . . . tip decidedly in favor of the Borough as the PBA

^{6/} In support of its position, the PBA cites Franklin v. PBA Local 154, 424 N.J. Super. 369, 382-383 (App. Div. 2012), City of Jersey City, P.E.R.C. No. 94-30, 19 NJPER 542 (¶24256 1993), Princeton Bor., I.R. No. 94-3, 19 NJPER 516 (¶24238 1993), and City of Egg Harbor City, P.E.R.C. No. 98-125, 24 NJPER 223 (¶29105 1998).

will be placed - unfairly - in the unenviable position of attempting to negotiate back the benefit the Borough unilaterally took away." The PBA argues that "[its] membership cannot be adequately compensated for the loss of the Kelly Time as well as the requirement to report for duty significantly more under the 10-hour schedule - where the ability to have weekends off will be severely diminished." The PBA maintains that "any remedy at the conclusion of this case cannot make the employees whole for the months of having to work the unilaterally imposed new work schedule" and that "[t]he staff officers' lost days off is disruptive to their personal lives and cannot be recouped at a later time." The PBA also maintains that "no remedy will effectively address the effect and impact of the Chief's retribution for the membership's cooperation in the OCPO investigation not only in the present but also the foreseeable future."^{7/} The PBA also argues that the relative hardship weighs in its favor and that the public interest will not be harmed by a grant of interim relief. The PBA "asserts that the public interest will actually be enhanced or otherwise promoted by

7/ In support of its position, the PBA cites North Hudson Reg. Fire and Rescue, I.R. No. 2012-9, 40 NJPER 105 (¶41 2011), City of Plainfield, I.R. No. 2004-14, 30 NJPER 193 (¶72 2004), Closter Bor., I.R. No. 2001-11, 27 NJPER 225 (¶32077 2001), recon. granted P.E.R.C. No. 2001-75, 27 NJPER 289 (¶32104 2001), Irvington Tp., I.R. 2019-7, 45 NJPER 129 (¶34 2018), and City of East Orange, I.R. No. 2007-5, 32 NJPER 354 (¶148 2006).

prohibit[ing] the Borough from unilaterally implementing a change from the parties' long-standing 12-hour work schedule . . . with a 10-hour work schedule." The PBA maintains that "no harm will come to the Borough by being compelled to continue the 12-hour work schedule unless and until the parties negotiate . . . any change to same."

In response, the Borough argues that the PBA has not satisfied the standard for interim relief. Specifically, the Borough maintains that the PBA has not demonstrated a substantial likelihood of prevailing in a final Commission decision based upon the following:

- the PBA's assertions of improper motive are flatly refuted by an independent, non-biased third party (i.e., OCPO Captain Frulio) with no interest in the outcome of the application for interim relief who had a strong interest in making sure there was no act of reprisal or improper conduct by Chief Burnaford and those conclusions are buttressed by a long-term officer and well-respected member of the Police Department (i.e., Chief Falkowski) who assumed the role of the Department's Public Safety Director;

- the peculiar facts of this matter establish that legitimate governmental policy and public interests warrant a return to a 10-hour schedule including, inter alia, the need for greater direct contact among all personnel within the Police Department, interaction and development of a better working relationship among all officers and Chief Burnaford while increasing manpower and providing better community policing; and

- assuming, arguendo, negotiations are nonetheless required, the express provisions of the parties' contract provide for a 40-hour workweek and the irreparable harm would be experienced by the Borough, not the PBA, given that the PBA readily admits that the contract does not provide a specific shift schedule.

The Borough asserts that "it is clear that the facts in this matter . . . rebuke the PBA's bald assumptions of retaliation and improper motive since the schedule change was approved by both Frulio and Falkowski"; "Frulio remained in charge of the [Police] Department at the time Chief Burnaford sought approval to return to a 10-hour work schedule" and "was well aware of the events that led to his oversight of the [Police] Department and the charges against Chief Burnaford"; and "[b]oth Frulio and Falkowski make clear that had either formed the belief or became suspicious of any improper motive by Chief Burnaford, they would have been required to take action." The Borough contends that "[t]here is nothing in the record that establishes . . . that either the OCPO or Falkowski had any motive to commit any violation of the rights of any union member or employee within the [Police] Department covered by the Act." The Borough maintains that in addition to Chief Burnaford, "Frulio and Falkowski . . . viewed the return to a 10-hour schedule as a means to promote greater interaction and overlap with the very limited number of sergeants and available officers employed by a very small [Police] Department and greater efficiency"; and "[t]hat same policy interest also serves the public's interest in establishing more congruent working relationships among all officers and the Police Chief based on frequent, direct interaction of all its members as well as greater police coverage

through scheduling efficiency." The Borough contends that at the very least there are "material facts in dispute . . . [regarding] Chief Burnaford's articulated basis [for changing the work schedule]." The Borough argues that "[t]he public interest will be injured by an interim relief order . . . [because] [t]o prohibit the Borough from [providing greater police coverage given its loss of two regular full-time police officers] will negatively impact the public interest in achieving maximum police coverage, better use of personnel resources, as well as enhance training opportunities and . . . promoting more frequent interaction among all officers and command staff as well as developing a stronger working relationship."^{8/} The Borough also argues that "the contract lacks a provision requiring 12-hour shifts . . . [but includes] actual contract language establishing a 40-hour workweek"; as such, "through its application for interim . . . relief, the PBA asks the Commission to re-write its contract with the Borough." The Borough maintains that it "has met its obligation [to negotiate] and is entitled to return to a

^{8/} In support of its position, the Borough cites Borough of Atlantic Highlands, P.E.R.C. No. 83-75, 9 NJPER 46 (¶14021 1982), recon. den. P.E.R.C. No. 83-104, 9 NJPER 137 (¶14065 1983), rev'd 192 N.J. Super. 71 (App. Div. 1983), certif. den. 82 N.J. 296 (1980), Town of Irvington, P.E.R.C. No. 78-84, 4 NJPER 251 (¶4127 1978), rev'd 170 N.J. Super. 539 (App. Div. 1979), certif. den. 82 N.J. 296 (1980), City of Long Branch, I.R. No. 2003-9, 29 NJPER 39 (¶14 2003), City of New Brunswick, I.R. No. 99-18, 25 NJPER 260 (¶30108 1999), and City of Millville, P.E.R.C. No. 2003-21, 28 NJPER 418 (¶33153 2002).

40-hour workweek specified in the contract" given that "[t]here is no genuine dispute that 12-hour shifts . . . result in working hours well below and well above the contractually-provided 40-hour workweek." The Borough claims that "the PBA's contention that 12-hour schedules have existed since 2009 only establishes that the PBA has . . . had approximately four opportunities to negotiate a change in the agreement from the contractually-established 40-hour work schedule but, to date, no negotiated change has been provided-for within the parties' contract."^{9/}

In reply, the PBA argues that it has not "waived its right to negotiate . . . its members' work schedule" and "it is undisputed that the 12-hour work schedule has been in place for at least a decade." The PBA concedes that "a past practice cannot override the express, unambiguous text of a CNA," but maintains that "the parties' 2017-2020 agreement does not reference - let alone mandate - that the PBA's membership work a

^{9/} In support of its position, the Borough cites West Caldwell Tp., I.R. No. 2002-1, 27 NJPER 338 (¶32120 2001), Somerset Hills Reg. Bd. of Ed., I.R. No. 2001-9, 27 NJPER 208 (¶32071 2001), Sussex-Wantage Reg. Bd. of Ed., P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985), Randolph Tp. Bd. of Ed., P.E.R.C. No. 83-41, 8 NJPER 600 (¶13282 1982), Pascack Valley Bd. of Ed., P.E.R.C. No. 81-61, 6 NJPER 554 (¶11280 1980), Passaic Cty. Reg. H.S. Dist. No. 1, P.E.R.C. No. 91-11, 16 NJPER 446 (¶121192 1990), New Jersey Sports & Exposition Auth., P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987), Roselle Bor., I.R. No. 2009-9, 34 NJPER 317 (¶115 2008), Kittatinny Reg. Bd. of Ed., P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991), Kittatinny Reg. Bd. of Ed., P.E.R.C. No. 93-34, 18 NJPER 501 (¶23231 1992), and Franklin Bor., I.R. No. 2001-1, 26 NJPER 346 (¶31136 2000).

10-hour schedule"; and "the long-standing 12-hour schedule is entirely consistent with the general text of Article V as the officers work, on average, 40 hours a week and 2,080 hours each year."^{10/} The PBA also argues that the Borough "has utterly failed to establish a compelling need to remove the parties' work schedule from the arena of collective negotiations." The PBA maintains that unlike Atlantic Highlands, "no coverage gaps have ever existed under the 12-hour work schedule"; "the desire to reduce overtime costs does not constitute a non-negotiable managerial prerogative"; and Chief Burnaford's asserted reasons for changing the work schedule are "ambiguous . . . [,] dubious . . . [and] similar to . . . conclusory statements [that] the Commission [has] found to be an insufficient basis to permit a unilateral schedule change." Specifically, the PBA asserts the following:

-the "12-hour work schedule is extremely popular among the members of the [Police] Department and the announced change to a 10-hour schedule is equally unpopular";

-the "claim of enhanced manpower coverage . . . is spurious at best" given that "under the proposed 10-hour schedule, the Shift 1 officer will be working alone for 6 [hours] of his 10-hour shift" and "[t]he Shift 3 officer . . . will work alone for 6 to 8 hours of his [10-hour] shift" while "[under] the 12-hour schedule . . . [there is] much more overlap among the officers" (e.g., "the day Shift officer often works not

^{10/} In support of its position, the PBA cites Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000).

only with the 8 a.m. - 8 p.m. officer but also the 2 p.m. - 2 a.m. officer"); and

-the Borough "does not refer to even one instance under the 12-hour work schedule wherein the [Police] Department was unable to man each shift[,] provide training to its officers[,] [or] otherwise protect and serve the community."^{11/}

The PBA also argues that the Borough "has not pointed to any emergent reasons for changing [work schedules] . . . but has instead . . . articulated a mix of economic, efficiency, supervision, and shift coverage reasons for making the change" and "[n]one of those reasons requires that an alleged agreement to maintain steady shifts until December be abrogated." The PBA maintains that "there is a . . . lack of urgency for the switch to the 10-hour work schedule" such that "compelling the Borough to maintain the existing 12-hour schedule through 2020 - the last year of the parties' CNA - is appropriate and just."

STANDARD OF REVIEW

To obtain interim relief, the moving party must demonstrate that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not

^{11/} In support of its position, the PBA cites Little Falls Tp., I.R. No. 2006-9, 31 NJPER 333 (¶134 2005), recon. den. P.E.R.C. No. 2006-41, 31 NJPER 394 (¶155 2005), Franklin Tp., P.E.R.C. No. 2011-48, 36 NJPER 461 (¶179 2010), aff'd 38 NJPER 277 (¶95 2012), Ramsey Bor., I.R. No. 93-8, 19 NJPER 282 (¶24144 1992), Harrison Tp., I.R. No. 83-3, 8 NJPER 462 (¶13217 1982), and Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985).

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 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-5.3, entitled "Employee organizations; right to form or join; collective negotiations; grievance procedures," provides in pertinent part:

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

Public employers are prohibited from “[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.” N.J.S.A. 34:13A-5.4a(1). “It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification.” State of New Jersey (Corrections), H.E. 2014-9, 40 NJPER 534 (¶173 2014) (citing New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978)). The Commission has held that a violation of another unfair practice provision derivatively violates subsection 5.4a(1). Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Allegations of anti-union discrimination under N.J.S.A. 34:13A-5.4a(3) are governed by In re Bridgewater Tp., 95 N.J. 235, 240-245 (1984). “The charging party must prove, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action.” Newark Housing Auth., P.E.R.C. No. 2016-29, 42 NJPER 237, 239 (¶67 2015). This may be done by direct evidence

or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Ibid. If the employer did not present any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Ibid. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. Ibid. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Ibid.

Public employers are prohibited from "[r]efusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. . . ." N.J.S.A. 34:13A-5.4a(5). A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010). The Commission has held that "a breach of contract may also rise to the level of a refusal to negotiate in good faith" and that it "ha[s] the authority to remedy that violation under subsection a(5)." State

of New Jersey (Dep't of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

ANALYSIS

At issue in this interim relief application is:

-whether the Borough's decision to unilaterally change the work schedule for unit members from 12-hour to 10-hour shifts was motivated by anti-union animus; and/or

-whether, when a CNA is silent regarding unit members' work schedule but mandates that "[i]n all cases . . . [unit] members' workload shall not exceed 40 hours per week," the Borough was required to negotiate with the PBA over ending a past practice at variance with the contract (i.e., 12-hour shifts that result in unit members working more than 40 hours per week every other week) and returning to the express terms set forth in the contract (i.e., unit members working no more than 40 hours per week based upon 10-hour shifts).

5.4a(3) Claim

"Claims of retaliation for protected activity in violation of 5.4a(3) do not normally lend themselves to interim relief since there is rarely direct, uncontroverted evidence of the employee's motives." Little Falls Tp., I.R. No. 2006-9, 31 NJPER 333 (¶134 2005), recon. den. P.E.R.C. No. 2006-41, 31 NJPER 394 (¶155 2005); accord Bergen Cty. Sheriff's Office, I.R. No. 2019-6, 45 NJPER 123 (¶33 2018). "This is not to suggest that a 'smoking' gun is always required to find a substantial likelihood of success on the merits of a 5.4a(3) charge at the interim relief stage" because "[c]ircumstantial evidence such as the timing of events is an important factor in assessing motivation and determining whether or not hostility or anti-union animus can

be inferred." State of New Jersey (Dep't of Human Services), I.R. No. 2018-13, 44 NJPER 434 (¶122 2018). However, interim relief has been denied in retaliation cases where the employer has presented a colorable claim that the basis for its action was not motivated by anti-union animus. See, e.g., City of Passaic, I.R. No. 2004-7, 30 NJPER 5 (¶2 2004), recon. den. P.E.R.C. No. 2004-50, 30 NJPER 67 (¶21 2004) (denying interim relief where the city presented a colorable claim that its reason for rejecting bid selection by straight seniority was due to high number of inexperienced officers on the midnight shift); South Orange Village Tp., I.R. No. 90-14, 16 NJPER 164 (¶21067 1990) (denying interim relief where there were material facts in dispute given that the parties submitted conflicting affidavits in support of their respective positions as to the township's motivation for the shift change; noting that a work schedule change "made purely for economic reasons" might be negotiable); see also Parsippany-Troy Hills Tp., I.R. No. 2008-15, 34 NJPER 86 (¶36 2008); Pemberton Tp., I.R. No. 99-14, 25 NJPER 191 (¶30087 1999).

Given these legal precepts, I find that the PBA has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal and factual 5.4a(3) allegations.

The PBA has not provided any direct, uncontroverted evidence that the Borough's decision to unilaterally change the work schedule for unit members from 12-hour to 10-hour shifts was

motivated by anti-union animus (i.e., PBA members were interviewed by representatives of the OCPO concerning their knowledge regarding the alleged misconduct of Chief Burnaford, Marti and Oldham)^{12/}. Compare Snow Certification at ¶21 (certifying that PBA members made no effort to hide their participation in the OCPO investigation; asserting that Chief Burnaford's only explanation for the unilateral change in work schedule was that it would "improve morale"; maintaining that the reason asserted by Chief Burnaford is "patently absurd [and] offered to camouflage the Chief's true intent: to punish the officers for their cooperation with the OCPO") and Certification of Frazee at ¶16, Certification of Snow at ¶25, Certification of Abbatemarco at ¶15, Certification of Mrozinski at ¶15, Certification of Butler at ¶¶16-18, Certification of Chester at ¶14 (asserting that "[t]he unilateral rescission of the long-standing 12-hour schedule is extremely unpopular among the police officers") with Burnaford Certification at ¶¶6-7 (asserting that

^{12/} Although neither party has raised the issue, it is uncertain as to whether being interviewed as part of a criminal investigation constitutes protected activity under the Act or another statute. See, e.g., the Conscientious Employee Protection Act, N.J.S.A. 34:19-1, et seq.; compare N.J.S.A. 34:13A-5.4a(4) ("[p]ublic employers, their representatives or agents are prohibited from . . . discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act"). However, I need not make any determination on this issue because it is unnecessary for purposes of this interlocutory decision.

returning to 10-hour shifts would improve the Police Department's operational efficiency, particularly with respect to increased manpower, command staff working together, eliminating two squads, and training), and Burnaford Certification at ¶¶5-7, 12, Frulio Certification at ¶¶3, 5, 7-9, and Falkowski Certification at ¶¶8, 10-14 (certifying that Chief Burnaford spoke with Frulio and Falkowski during the week of September 23, 2019, before Special Order No. 19-06 was issued, regarding a return to 10-hour shifts; certifying that at the time he issued Special Order No. 19-06 on October 1, 2019, Chief Burnaford was still reporting to Frulio and Falkowski and Frulio was in charge of day-to-day operations; certifying that Frulio and Falkowski agreed with returning to 10-hour shifts for the reasons specified by Chief Burnaford and that they had no reason to believe Chief Burnaford was acting out of retaliation or other improper motive; certifying that Chief Burnaford and Falkowski met with Snow and Frazee on/about October 1, 2019 to explain the reasons, including those specified above, for returning to 10-hour shifts). Contrast Chester Bor., I.R. No. 2002-8, 28 NJPER 162 (¶33058 2002), recon. den. P.E.R.C. No. 2002-59, 28 NJPER 220 (¶33076 2002) (granting interim relief in a retaliation case where there was direct evidence that a grievance was the chief's motivation for changing the work schedule and that the change would be obviated if the grievance was withdrawn); Little Falls Tp., I.R. No. 2006-9, 31 NJPER 333 (¶134

2005), recon. den. P.E.R.C. No. 2006-41, 31 NJPER 394 (¶155 2005) (granting interim relief in a retaliation case where there was direct evidence that the mayor's decision to change the work schedule came shortly after two grievances were filed and over strenuous opposition from the chief, who indicated that the mayor had not spoken to him prior to deciding to change the schedule, specified particular public safety concerns about the proposed change, and requested that the decision be postponed until safety and other concerns could be reviewed).

Although the timing of the Borough's decision is questionable (vis-a-vis, in conjunction with the OCPO investigation: after PBA members were interviewed by representatives of the OCPO concerning their knowledge regarding the alleged misconduct of Chief Burnaford, Marti and Oldham; after Chief Burnaford was placed on administrative leave and the OCPO assumed daily supervision of the Borough's Police Department; after Marti's employment with the Borough was terminated; after Oldham's employment with the Borough was suspended; after Chief Burnaford received a five-day suspension; and after the Borough appointed a Public Safety Director with general oversight over the Police Department), the Borough has asserted a colorable claim that its reasons for unilaterally changing the work schedule and returning to 10-hour shifts were/are the following:

-a 12-hour shift results in an officer working 48 hours in one week and 36 hours in another other week;

-increased manpower (i.e., there are a greater number of days per month when a greater number of officers are working together with command staff which will provide better police coverage for the community as well as increase officer safety);

-command staff working together (i.e., that factors influencing the decision include "minimum staffing requirements, work schedule, staffing inflexibility and significant increases in non-productive time");

-eliminates "2" squads (i.e., "returning to a 10-hour shift will provide overlap within the rank and file, and create an overlap with both sergeants working with all officers at any given time throughout the month"; "[w]ith a 10-hour shift schedule, each sergeant works with all officers making both sergeants responsible for all the patrol officers which allows for smoother transitions and better operational efficiency"); and

-department training (i.e., "working a 10-hour schedule, approximately 5 days a month there will be 7 officers working each day" such that "[w]hen full department training days are scheduled during one of those days, it would require, at most, 3 officers to come in when off and receive overtime" and this would "allow for additional full department training days per year").

See Burnaford Certification at ¶¶3, 6-11. In addition to Chief Burnaford, Frulio and Falkowski also certify that the basis for the Borough's unilateral change in work schedule are the reasons set forth above. See Frulio Certification at ¶¶5-9; Falkowski Certification at ¶¶5-6, 8-13. Moreover, Chief Burnaford and Falkowski certify that the reasons set forth above were communicated to the PBA (i.e., Snow and Frazee) on/about October 1, 2019. See Certification of Burnaford at ¶12; Certification of

Falkowski at ¶14.

Under these circumstances, it appears that material facts are in dispute. Whether the Borough's assertions are in fact sufficient or pretextual will have to be tested in an evidentiary hearing. City of Passaic; South Orange Village Tp.; State of New Jersey (Dep't of Human Services). Accordingly, I find that the PBA has not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual 5.4a(3) allegations, a requisite element under the Crowe factors,^{13/} and deny this aspect of the application.

5.4a(1) and (5) Claims

New Jersey courts and the Commission have held that "employers are barred from 'unilaterally altering mandatory bargaining topics, whether established by expired contract or by past practice, without first bargaining to impasse.'" In re Atlantic Cty., 230 N.J. 237, 252 (2017) (citing Bd. of Educ. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16, 22 (1996)); accord Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n, 78 N.J. 25, 48 (1978) (finding that the Legislature, through enactment of the Act, "recognized that the unilateral imposition of working

^{13/} As a result, I do not need to conduct an analysis of the other elements of the interim relief standard. See, e.g., New Jersey Transit Bus Operations, I.R. No. 2012-17, 39 NJPER 328 (¶113 2012); Rutgers, I.R. No. 2018-1, 44 NJPER 131 (¶38 2017); Irvington Tp., I.R. No. 2019-7, 45 NJPER 129 (¶34 2018).

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

Police and fire work schedules are generally mandatorily negotiable unless the employer demonstrates a particularized need to preserve or change a work schedule to protect a governmental policy determination. See Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982); Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981); Township of Mt. Laurel v. Mt. Laurel Police Officers Ass'n, 215 N.J. Super. 108 (App. Div. 1987). "Work schedules of individual employees are, as a general rule, mandatorily negotiable. However, a past practice does not

establish the condition of employment in the face of contrary express language contained in the parties' collective agreement" and "[a]n employer does not violate its negotiations obligation by ending a practice at variance with the contract and returning to the express terms set forth in the contract." West Caldwell Tp., I.R. No. 2002-1, 27 NJPER 338 (¶32120 2001); accord Franklin Bor., I.R. No. 2001-1, 26 NJPER 346 (¶31136 2000). The Commission has held that "[w]here clear and unambiguous contract language grants a benefit to employees, an employer does not violate the Act by ending a past practice granting more generous benefits and by returning to the benefit level set by the contract." Kittatinny Reg. Bd. of Ed., P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991). However, "even where an employer has a managerial prerogative or contractual right to take a personnel action without first engaging in negotiations, it still may not do so for illegal reasons." Chester Bor., I.R. No. 2002-8, 28 NJPER 162 (¶33058 2002), recon. den. P.E.R.C. No. 2002-59, 28 NJPER 220 (¶33076 2002).

Given these legal precepts, and even assuming, arguendo, that the Borough has failed to demonstrate a particularized need to unilaterally change the work schedule from 12-hour to 10-hour shifts,^{14/} I find that the PBA has failed to demonstrate a

^{14/} In response to the PBA's related demand for binding grievance arbitration (AR-2020-229), the Borough filed a
(continued...)

substantial likelihood of prevailing in a final Commission decision on its legal and factual 5.4a(1) and (5) allegations.

It is undisputed that the parties' have never included a contractually-negotiated work schedule in their collective negotiations agreement. See Certification of Burnaford at ¶2; Certification of Falkowski at ¶¶2-5; 2017-2020 CNA; 2013-2016 CNA. However, since 2009, the parties' past practice has been a work schedule for unit members that includes 12-hour shifts (Certification of Sergeant Frazee at ¶4; Certification of Snow at ¶12) which results in unit members working 48 hours in one week and 36 hours in another week (Certification of Burnaford at ¶3). It is also undisputed that the parties' CNA includes contractually-negotiated leave provisions that are based upon a 12-hour work day (2017-2020 CNA, Art. VII, IX, X, XII) and work hours that "[i]n all cases . . . shall not exceed . . . 40 hours per week" (2017-2020, Art. V).

The Borough asserts that it "is entitled to return to a 40-hour workweek specified in the contract" given that "[t]here is no genuine dispute that 12-hour shifts . . . result in working hours well below and well above the contractually-provided 40-

14/ (...continued)
scope of negotiations petition (SN-2020-028). Accordingly, the Commission will make a determination regarding whether the Borough has in fact demonstrated a particularized need to unilaterally change the work schedule from 12-hour to 10-hour shifts.

hour workweek." See Borough's Br. at 16. Conversely, although the PBA concedes that "a past practice cannot override the express, unambiguous text of a CNA," the PBA asserts that "the parties' 2017-2020 agreement does not reference - let alone mandate - that the PBA's membership work a 10-hour schedule" and "the long-standing 12-hour schedule is entirely consistent with the general text of Article V as the officers work, on average, 40 hours a week and 2,080 hours each year." See PBA's Reply Br. at 2 (emphasis added).

Under these circumstances, and even assuming, arguendo, that the Borough has failed to demonstrate a particularized need to unilaterally change the work schedule from 12-hour to 10-hour shifts, it appears that the PBA's legal right to relief by way of an unfair practice charge is - at best - uncertain. There is a clear conflict between the parties' past practice (i.e., 12-hour shifts that result in unit members working 48 hours in one week and 36 hours in another week) and the parties' contractually-negotiated work hours (i.e., "[i]n all cases . . . shall not exceed 40 hours per week"). The Commission has held that "[when] the wording of . . . [a] collective negotiations agreement permits the [employer] to require [employees] to work seven and one-half hours a day", "[t]his clear wording negates any contrary past practice." Kittatinny Reg. Bd. of Ed., P.E.R.C. No. 93-94, 18 NJPER 501 (¶23231 1992); accord Kittatinny Reg. Bd. of Ed.,

P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991); West Caldwell Tp.; Franklin Bor.; see also Town of Irvington, H.E. No. 82-11, 7 NJPER 618 (¶12277 1981), adopted P.E.R.C. No. 82-63, 8 NJPER 94 (¶13038 1982) (where “[an employer] prove[s] its contract defense and thereby establishe[s] that it ha[s] discharged its negotiations obligation [regarding a change in work schedule] during the term of [an applicable collective negotiations] agreement” - particularly where “the plain meaning of the clause[] in question [gives] the [employer] the right to establish and change work schedules without negotiations so long as the number of working hours [does] not exceed the contractual limitations set forth [in a work hours] provision” - an unfair practice charge must be dismissed).

Moreover, given that the parties’ past practice is both consistent (i.e., leave provisions that are based upon a 12-hour work day - 2017-2020 CNA, Art. VII, IX, X, XII) and inconsistent (i.e., “[i]n all cases, member’s workload shall not exceed forty (40) work hours per week” - 2017-2020, Art. V) with certain contractual provisions, it is unclear whether this aspect of the underlying unfair practice charge will ultimately be processed, deferred to arbitration, or otherwise. See, e.g., Hillsborough Tp. Bd. of Ed., P.E.R.C. No. 2005-1, 30 NJPER 293 (¶101 2004) (“[b]inding arbitration is the preferred mechanism for resolving a dispute when an unfair practice charge essentially alleges a

violation of subsection 5.4a(5) interrelated with a breach of contract"); Camden Cty. and Camden Cty. Prosecutor, P.E.R.C. No. 2012-42, 38 NJPER 289 (¶102 2012) (holding that when the facts of a charge clearly show that the dispute between the parties revolves around the interpretation of a contract clause and whether or not there has been a breach of that clause, the issue "must be resolved through negotiated grievance procedures"); Woodland Park Bd. of Ed., D.U.P. No. 2014-12, 40 NJPER 429 (¶147 2014) (deferring an unfair practice charge to the parties' negotiated grievance procedure where the employee organization had not alleged facts demonstrating a connection between the employer's obligation to negotiate in good faith under the Act and the employer's alleged breach of a contract provision); N.J.S.A. 34:13A-5.3 ("[g]rievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement").

Accordingly, I find that the PBA has not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual 5.4a(1) and (5) allegations, a requisite element under the Crowe factors,^{15/} and deny this aspect

^{15/} As a result, I do not need to conduct an analysis of the other elements of the interim relief standard. See, e.g., New Jersey Transit Bus Operations, I.R. No. 2012-17, 39 NJPER 328 (¶113 2012); Rutgers, I.R. No. 2018-1, 44 NJPER (continued...)

of the application.

CONCLUSION

Under these circumstances, I find that the PBA has failed to sustain the heavy burden required for interim relief under the Crowe factors and deny the application pursuant to N.J.A.C.

19:14-9.5(b)3. This case will be transferred to the Director of Unfair Practices for further processing.

ORDER

PBA Local 175's application for interim relief is denied.

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

DATED: December 13, 2019
Trenton, New Jersey

15/ (...continued)
131 (¶38 2017); Irvington Tp., I.R. No. 2019-7, 45 NJPER 129
(¶34 2018).