I.R. NO. 2020-24

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF OCEAN,

Respondent,

-and- Docket No. CO-2020-281

POLICEMEN'S BENEVOLENT ASSOCIATION
LOCAL NO. 258,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the PBA against the County alleging that the County violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(3), (4), (5), and (7), by unilaterally requiring unit members to report to work in their uniform or work clothing and precluding unit members from utilizing the locker room to change their clothes at the beginning or at the end of their shift. 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 Designee also finds that the PBA has failed to establish irreparable harm, relative hardship, and that the public interest will not be injured by an interim relief order given that these factors are, at best, in equipoise. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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Charging Party.

Appearances:

For the Respondent, Apruzzese, McDermott, Mastro & Murphy, P.C., attorneys (Robert T. Clarke, of counsel; H. Thomas Clarke, of counsel)

For Charging Party, Crivelli & Barbati, L.L.C., attorneys (Frank M. Crivelli, of counsel; Donald C. Barbati, of counsel; Michael P. DeRose, of counsel)

INTERLOCUTORY DECISION

On May 4, 2020, Policemen's Benevolent Association Local No. 258 (PBA or Local 258) filed an unfair practice charge, together with an application for interim relief, against the County of Ocean (County). The charge alleges that on or about April 28, 2020, the County violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(3), (4), (5), and (7),[1/2/] by unilaterally

1/ These provisions prohibit public employers, their representatives or agents from "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the
(continued...)

requiring unit members to report to work in their uniform or work clothing and precluding unit members from utilizing the locker room to change their clothes at the beginning or at the end of their shift.

The PBA's application for interim relief requests the following relief pending disposition of the underlying unfair practice charge, including temporary restraints:

> -the County be enjoined from unilaterally altering, restricting, and/or rescinding the utilization of the locker room within Ocean County Correction Center by unit members;
>
> -the County be enjoined from unilaterally prohibiting unit members from being able to change their clothes in the locker room within Ocean County Correction Center at the beginning and/or end of their respective shifts; and

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1/ (...continued) exercise of the rights guaranteed to them by this act"; "(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act"; "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative"; and "(7) Violating any of the rules and regulations established by the commission."

2/ I do not consider the 5.4a(4) or (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 County discharged or discriminated against any employee because he/she signed or filed an affidavit, petition, or complaint or gave any information or testimony under the Act; the PBA does not identify which Commission rules or regulations the County allegedly violated.

-the County be enjoined from unilaterally requiring unit members to report for their respective work shifts at the Ocean County Correction Center in their full uniform and/or other work-required clothing.

PROCEDURAL HISTORY

On May 8, 2020, in opposition to the PBA's request for temporary restraints, the County submitted a brief, exhibits, and the certification of the Warden of the Ocean County Department of Corrections, Sandra Mueller (Mueller). Also on May 8, I signed an Order to Show Cause denying the PBA's request for temporary restraints and directing the County to file any opposition by May 14; the PBA to file any reply by May 18; and set May 20 as the return date for oral argument. On May 20, counsel engaged in oral argument during a telephone conference call. At the conclusion of oral argument, based upon the parties' representations, I asked the PBA whether it had attempted to negotiate with the County before filing the underlying unfair practice charge and instant application for interim relief; the PBA's attorney indicated that negotiations had not taken place before litigation was initiated. Accordingly, I entered an Order directing the parties to immediately engage in negotiations, without prejudice to their respective positions, in an effort to resolve the instant dispute before I proceeded to issue a decision.

On June 1, 2020, the PBA sent a letter to me, copying the County, indicating that negotiations had been unsuccessful.

Accordingly, I advised the parties that a written decision disposing of the application for interim relief would be forthcoming.

In support of the application for interim relief, the PBA submitted a brief, exhibits, the certification of its attorney, Frank M. Crivelli (Crivelli); and the certification of Local 258 President Lucian Woods (Woods). In opposition, the County re-submitted the brief, exhibits, and certification of Warden Mueller that were previously filed; the County also submitted additional exhibits and the supplemental certification of Warden Mueller. The PBA also filed a reply brief and the supplemental certification of Local 258 President Woods.

FINDINGS OF FACT

The PBA represents all permanent correction officers employed by the County, including correction officer cook and bilingual correction officer but excluding sergeants, lieutenants, and captains. See 2016-2019 CNA, Art. I (Crivelli Certification, Ex. A). The County and PBA are parties to an expired collective negotiations agreement (CNA) in effect from April 1, 2016 through June 30, 2019; and an interest arbitration award in effect from July 1, 2019 through June 30, 2022. The grievance procedure ends in binding arbitration.

Article 3 of the parties' expired CNA, entitled "Management Rights," provides in pertinent part:

> A. The Board reserves to themselves and its agents full jurisdiction and authority over matters of policy, work rules and regulations, and retains the right, subject only to the specific limitations imposed by the language of this Agreement, in accordance with applicable laws and regulations[:]
>
> > (1) To direct the employees of the unit.
> >
> > (2) To hire, promote, transfer, assign and retain employees in positions in the unit and for just cause, to suspend, to demote, to discharge or to take other disciplinary action against employees.
> >
> > (3) To relieve employees from duties because of lack of work or for other legitimate reasons.
> >
> > (4) To maintain the efficiency of the operations of the County.
> >
> > (5) To determine the methods, means and personnel by which such operations are to be conducted.
> >
> > (6) To take whatever actions may be necessary to carry out the mission of the County in situations of emergency.

Article 5 of the parties' expired CNA, entitled "Maintenance of Benefits," provides:

> Except as specifically modified, deleted or changed by this Agreement, all benefits existing at the time of this Agreement shall continue in effect for the duration of this Agreement. Nothing contained herein shall be interpreted or applied so as to eliminate, reduce or detract from any employee benefit existing prior to this date.

Article 23 of the parties' expired CNA, entitled "Unilateral Changes," provides:

> There shall not be any unilateral changes in the terms and conditions of this Agreement. Any changes made in this Agreement shall be done with mutual consent of the parties. However, unless specifically provided in this Agreement, neither party shall be required to re-negotiate any part of this Agreement until the expiration of said Agreement.

On March 9, 2020, in order to protect the health, safety, and welfare of the people of the State of New Jersey, Governor Philip D. Murphy issued Executive Order (EO) No. 103 declaring a Public Health Emergency and State of Emergency in the State of New Jersey related to Coronavirus disease 2019 (COVID-19), a contagious, and at times fatal, respiratory disease caused by SARS-CoV-2 virus; and subsequently issued a series of Executive Orders that included mitigation strategies (e.g., closure of non-essential retail businesses to the public, work-from-home arrangements, cessation of non-essential construction projects, permission for residents to leave their residences in order to report to or perform their job, social distancing) and extensions of the Public Health Emergency. See State EO Nos. 103, 104, 107, 119, 122, 125, 138, 151.

During the COVID-19 Pandemic, the U.S. Centers for Disease Control and Prevention (CDC) has issued and frequently updated guidance related to COVID-19. In a section entitled, "Social Distancing," the CDC recommends the following:

> In addition to everyday steps to prevent COVID-19, keeping space between you and others is one of the best tools we have to avoid being exposed to this virus and slowing its spread locally and across the country and world. Limit close contact with others outside your household in indoor and outdoor spaces. Since people can spread the virus before they know they are sick, it is important to stay away from others when possible, even if you – or they – have no symptoms. Social distancing is especially important for people who are at higher risk for severe illness from COVID-19.[3/]

In a section entitled "Frequently Asked Questions for Law Enforcement Agencies and Personnel," the CDC recommends the following:

> -Should law enforcement personnel and other first responders take additional precautions when coming home, even if they have no symptoms of COVID-19, to avoid potentially exposing household members?
>
> -CDC recommends that law enforcement personnel practice everyday measures to protect their household members from becoming ill. These measures include:
>
> *hand hygiene
> *covering coughs and sneezes
> *disinfecting frequently touched surfaces daily
>
> Many law enforcement personnel routinely change out of their uniforms at the station and wear street clothes and shoes home. Laundry services for uniforms may be provided by law enforcement agencies. Continuing this practice may help minimize the potential of

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3/ See https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html (page last reviewed May 6, 2020).

> transmitting the virus that causes COVID-19 and other potential take-home exposures. Law enforcement personnel should perform hand hygiene after changing out of uniforms. They should also have a plan for household members who are at higher risk for severe illness from COVID-19.[4/]

In a section entitled "Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities," the CDC recommends the following:

> -Prevention Practices for Staff
> * * *
> When feasible and consistent with security priorities, encourage staff to maintain a distance of 6 feet or more from an individual with respiratory symptoms while interviewing, escorting, or interacting in other ways.
>
> -Management Strategies for Incarcerated/Detained Persons without COVID-19 Symptoms
> * * *
> Consider additional options to intensify social distancing within the facility.[5/]

On April 28, 2020, Warden Sandra Mueller (Mueller) - by/through Captain Theresa Wallace - issued a memorandum (April

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4/ See https://www.cdc.gov/coronavirus/2019-ncov/community/law-enforcement-agencies-faq.html (updated April 27, 2020).

5/ See https://www.cdc.gov/coronavirus/2019-ncov/community/correction-detention/guidance-correctional-detention.html (page last reviewed May 7, 2020)

28, 2020 Memorandum) to all County Department of Corrections staff that provides in pertinent part:

> Per Warden Mueller, for the safety of staff and to prevent the spread of COVID-19 throughout the facility the following restrictions/precautions will go into effect on April 30, 2020 at 0700 hours:
>
> -All officers, civilians and contract staff are required to report to work in their uniform or work clothing.
>
> -Locker rooms will not be used to change in or out of work clothing at the beginning or end of shift.
>
> -Staff must swipe-in prior to temperature check and before proceeding to the locker room.
>
> -Staff may enter the locker room to store their personal belongings in their lockers and to retrieve necessary items or use the bathroom during their shift.
>
> -Staff must wear face coverings in the locker room and adhere to social distancing.
>
> -No congregating in the locker rooms.

On May 4, 2020, the PBA filed the underlying unfair practice charge accompanied by the instant application for interim relief.

On May 13, 2020, Warden Mueller – by/through Lieutenant Michael Archibald – issued a memorandum (May 13, 2020 Memorandum) to all County Department of Corrections staff that provides in pertinent part:

> Beginning Thursday, May 14th, 2020 at 0700 hours, an emergency disinfectant misting walkthrough area will be operational in the courtyard of the 2011 Main Jail Ground Floor. The food grade disinfectant that it mists is called Aseptic Plus. You can access the courtyard from the door behind the Ground Floor/Administrative Hallway staircase at the staff entrance. Usage of the emergency disinfectant misting walkthrough for self-decontamination is optional for an emergency decontamination. It may be utilized by custody, civilian and contract staff when reporting for and/or leaving work, if desired. Eye protection and face mask required when passing through the emergency disinfectant misting walkthrough. Usage of the emergency disinfectant misting walkthrough for disinfecting items such as boots, duty belts, etc., is optional and may be utilized by custody, civilian and contract staff as needed. Eye protection and face mask required when passing items through the emergency disinfectant misting walkthrough.

Warden Sandra Mueller (Mueller) certifies that "[t]he decision to require all employees including correction officers to report to work in their uniforms was the culmination of a number of directives and . . . training designed to limit the spread of COVID-19 . . . and [to] protect employees, their families, inmates, and the public in general"; and "[a] key component of [the County's] effort to eliminate or at least minimize the impact of COVID-19 . . . was social distancing." Mueller certifies that the U.S. Centers for Disease Control and Prevention (CDC) has promulgated guidance related to COVID-19, including "recommendations for Correctional and Detention Facilities . . . that [do not include] allowing officers to

change in and out of uniform at the workplace"; rather, the CDC recommends that "when feasible and consistent with security priorities, encourage staff to maintain a distance of 6 feet or more from an individual" and to "consider additional options to intensify social distancing within the facility."

Warden Mueller certifies that "[i]n spite of . . . extensive training that took place at the Correctional Facility, social distancing was not possible in all locations" and "[o]ne such location was the locker rooms"; that "[t]he size and design of the locker rooms along with the number of persons that are allowed to utilize these locker rooms makes it impossible to maintain six foot social distancing" – i.e., "[t]he men's locker room is 1,100 square feet", "[t]he women's locker room is 425 square feet", "[t]he contractor's locker room is 200 square feet", and "[a]pproximately 280 persons are authorized to use the male and female locker rooms." Mueller certifies that "[a]t the outset of the COVID-19 pandemic[,] no officers [or] inmates had the [corona-]virus that [she] was aware of" and "[t]o date, not one inmate has had the [corona-]virus due to the extreme precautionary measures . . . [that] have [been] taken . . . ." Mueller certifies that "[o]n April 15, 2020, [she] learned of the first correction officer that had COVID-19" and "[o]n April 23, 2020, [she] learned of a second officer that tested positive for

COVID-19"[6]; and that the limited number of infections "is because of the extreme measures that [the County] has taken including extensive training, precautionary measures, and appropriate staff deployment."

Warden Mueller certifies that "the [Correctional] [F]acility locker rooms were a concern . . . [f]rom the outset of [the County's] COVID-19 preparation" and "[were] reviewed with County Administration, [her] staff, and [during] numerous conversations with Ocean County Police Chiefs." Mueller certifies that during a "March 19, 2020 COVID-19 Committee meeting", Committee members discussed the fact that "local Police Departments ha[d] closed their locker rooms . . . , requiring [officers] to come to work in their uniforms"; and "[t]he locker room issue was also discussed at COVID-19 Committee meetings on March 30, April 2 and April 27, 2020." Mueller certifies that "[a]t the March 30 meeting, [she] pointed out that the locker room issue may need to be revisited because officers [were] too close to each other in the locker room" and "[i]t was expressed . . . that officers need to keep their distance from each other"; and "[a]t . . . the April 2 meeting, Deputy Warden Valenti advised that he received an email from one correction officer suggesting that the locker room be closed" and "[i]t was also pointed out at that meeting

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6/ During oral argument, the County's attorney represented that a third correction officer had tested positive for COVID-19.

that [Local 258 President Woods] suggested any officer returning from an assignment at the hospital should be decontaminated or else not allowed in the locker room." Mueller certifies that "[i]t was very obvious to [her] that the locker room issue was [more imperative] at this stage of the COVID-19 emergency than . . . had [been] perceived at the outset of the COVID-19 pandemic."

Warden Mueller certifies that "[a]s of the April 27 COVID-19 [Committee] meeting, there were . . . two positive cases" and "[b]oth were correction officers and none involved inmates"; and that "[t]his meant that the [corona-]virus was brought into the facility by an employee(s) who . . . potentially could easily spread the [corona-]virus to other employee(s) since six foot social distancing could not be maintained in the locker rooms." Mueller certifies that "[o]nce [the Correctional Facility] had [its] first case of COVID-19, . . . staff became even more concerned that the chance of contracting the illness was now even greater"; and "[i]n emails referred to at . . . [a] COVID-19 meeting[,] two correction officers emphasized concern about the ability to social distance in the locker room" and one "also recommended that the gym be closed . . . because of the inability to maintain social distancing." Mueller certifies that "[b]ased [up]on the fact that [the Correctional Facility] ultimately had two positive COVID-19 cases and the fact that despite . . .

extensive training, social distancing was not working in the locker rooms, nor in reality due to the number of employees, size, and design of these locker rooms could it work, for the safety of all concerned [the County] made the decision to no longer allow officers to change before and/or after a shift in the locker room"; but "the restrictions regarding the locker room are a temporary directive that will [only] continue as long as the pandemic is an issue in the greater Ocean County area" such that "[o]nce the social distancing mandate is rescinded, the locker rooms will likely be available for changing clothes." Mueller certifies that she "issued the [April 28, 2020 Memorandum] to protect the health and safety of all employees and inmates of [the] facility" and that "not one inmate in the Correctional Facility has been diagnosed with COVID-19 . . . [as] a direct result of the proactive measures [that the County has] taken . . . ." Mueller certifies that "[i]f social distancing could be accomplished and enforced in the Correctional Facility, [her] [April 28, 2020 Memorandum] would not have been issued"; and that "[she] has an obligation to every correctional employee, their families, inmates and the public in general to take every reasonable step to protect them from COVID-19" and "[t]hat is what [she] has done."

Warden Mueller notes that "[correction] officers can change before they enter their home if they so choose"; and the PBA has

conceded that "members are now changing into . . . [and] out of their uniforms in the Correctional Facility parking lot or other locations away from their residence" such that "the health and safety concern alleged by the PBA in this matter seems to have already been eliminated." Mueller certifies that if PBA members are concerned that "traveling to/from work [in uniform] . . . may [result in them] becom[ing] potential targets of persons harboring anti-law enforcement sentiment . . . , correction officers need only wear a sweater or jacket over their uniform and the public would not know they are a correction officer" and this "would also limit the possibility of spreading any germs." Mueller certifies that "[f]or years, a number of correction officers have traveled to/from the [Correction[al] [F]acility in uniform and there has never been an issue"; and that "[t]he State of New Jersey Department of Corrections . . . [and] a number of counties . . . require that . . . correction officers . . . report to work . . . and depart . . . in uniform." Mueller certifies that "[t]he [April 28, 2020 Memorandum] applies to all employees and contractors"; that "[p]hysicians are not exempt from the [April 28, 2020 Memorandum]"; and that "[i]f . . . physicians or any other individuals are changing in the locker room that will certainly stop."

Warden Mueller certifies that "[t]he disinfectant misting walkthrough is yet another effort to limit the spread of COVID-19

. . . and protect . . . employees, their families, . . . inmates and the public in general." Mueller certifies that "[i]f a uniform is potentially contaminated during an officer's shift . . . , the disinfectant misting walkthrough will mitigate the likelihood that the [corona-]virus can spread from an officer's uniform"; that the "disinfectant misting walkthrough is optional, and may be utilized by all personnel, including correction[] officers, civilian and contract staff as needed . . . [and] when reporting and leaving work"; and that "[t]he disinfectant misting walkthrough . . . process from start to finish takes approximately 20 seconds per employee." Mueller certifies that "[u]tilizing disinfectant misting walkthroughs as a precautionary measure in response to COVID-19 is not new" and that it "is also used by [the] Ocean County Sheriff Department, Port Authority, Brooklyn Pier, Meridian Health, Hackensack EMS, Community Medical Center, Monmouth Medical Center, and Jersey City OEM." Mueller certifies that "[t]he option to use the disinfectant misting walkthrough before or after a shift eliminates an officer's concern of wearing a potentially contaminated uniform home to [his/her] famil[y]."

Warden Mueller certifies that "discussions regarding a de-contamination procedure go as far back as March 2020" and that during an April 2, 2020 meeting, Local 258 President Woods "said that if officers decide to not decontaminate they should not be

allowed into the locker room." Mueller certifies that "[e]ven if an officer walks through the disinfectant misting tent, it is impossible to safely change in/out of one's uniform in the locker room without the risk of spreading the [corona-]virus because correction officers, civilians, and contractors cannot adhere to the . . . six foot social distancing protocol"; and that the "disinfectant misting walkthrough only disinfects the germs that may be on a person . . . [and] does not eliminate the spread of COVID-19 from someone who has contracted [it] to someone who has not" such that "even after decontamination, if someone has COVID-19, it will still be spread in the locker room both airborne and through droplets where people would be changing." Mueller certifies that "[s]ince it is not possible to maintain social distancing in the locker room . . . [or] any other location available and suitable to changing uniforms, allowing officers the option of utilizing the disinfectant misting walkthrough before or after their shift serves as a precautionary measure to limit instances of exposure" and "is much more effective than changing in a locker room where the individuals cannot social distance and their street clothes inevitably will be making contact with the surfaces of the lockers, benches and floor of the locker room."

Local 258 President Woods certifies that although Governor Murphy "declared a Public Health Emergency and accompanying

guidelines to address same in early March 2020[,] . . . PBA members were permitted to utilize the locker room to change before and after their shifts up until April 30, 2020." Woods certifies that "it is [his] understanding that other individuals, such as the Correctional Facility physician, are still being permitted to utilize the locker room . . . to dress, undress, and shower"; and that "[i]f this is being afforded to [other] individuals . . . , PBA members should be afforded the same privileges." Woods certifies that he is "of the firm opinion that the [April 28, 2020 Memorandum] and the resulting restrictions on the locker room for PBA members was issued for no other reason than to serve as a retaliatory response [to the] PBA raising various concerns with the County's handling of the COVID-19 outbreak."

Local 258 President Woods certifies that "[p]rior to the restrictions on the locker room . . . [,] [the] PBA raised many concerns with the County . . . regarding several issues associated with the COVID-19 outbreak" in correspondence dated "March 17, March 20, April 27, and April 28, 2020"; and that the issues raised included "the County's failure to extend certain allowances to essential personnel regarding leave time necessary to address the sudden statewide school closures[,] the County's unilateral change to the accrual of compensatory time[,] the County's failure to establish and/or implement an adequate

notification procedure in conjunction with an officer who tested positive for COVID-19[,] the County's failure to provide PBA members with adequate and/or proper PPE[,] and compensation for PBA members for the temperature checks being conducted at the Correctional Facility." Woods certifies that "[c]onspicuously, the [April 28, 2020 Memorandum] was issued in the wake of these issues being raised by [the] PBA."

Local 258 President Woods certifies that it "is [his] understanding that the ban on allowing officers to change inside the locker rooms . . . not only exceeds what the CDC recommends, it contravenes it entirely"; and that he "adamantly dispute[s] the notion that social distancing is an 'impossibility' within the locker rooms at the Correctional Facility" particularly because "[the] PBA has maintained that it does not oppose reasonable restrictions on locker room usage." Woods certifies that based upon the "layout and/or floor plan [in the locker rooms], various social distancing protocols can be utilized therein" - e.g., Correctional Police Officer Seth Knauer has "offer[ed] numerous suggestions as to how social distancing protocols can be utilized and/or instituted within the locker rooms" including "a limit o[n] the number of persons allowed entry into the locker rooms at one time . . . ensuring social distancing protocols can be followed so as to allow officers to have their own respective benches and/or bays" and/or "allow[ing]

[unit members] to report a certain amount of time . . . prior to their respective shifts starting in order [to] limit the number of persons in the locker rooms [changing] into[/out of] their uniforms . . . [and] ensuring that the Correctional Facility is staffed appropriately and 'on schedule.'" Woods certifies that the locker room ban "is further undermined" by the fact that Warden Mueller has "recogniz[ed] that social distancing is able to occur in the locker rooms through the institution of reasonable measures" and permits locker room usage for other purposes as long as "staff . . . [are] wear[ing] face coverings . . . and adhere to social distancing." Woods also certifies that "this seriously calls into question the County's motives [for] instituting the prohibition and/or restriction at issue"; that it "strains credulity that the 'impossibility' of social distancing is the reasoning [for the] imposition of the restriction."

Local 258 President Woods certifies that the PBA "has no objection to various . . . portions of the [April 28, 2020 Memorandum]" and "supports . . . adequate social distancing measures to be utilized in the locker room [,] a reduction of the occupancy volume[,] the use of PPE in the locker room[,] and a prohibition of congregation in the locker room." Woods certifies that the "primary function that the officer locker room presently serves during the current COVID-19 crisis is that it allows

members of [the] PBA the ability to avoid wearing a potentially contaminated uniform in their vehicles when they arrive home to their families after their shift" and "allowing officers to change their uniform before and after work mitigates against the potential spread of COVID-19 from the officer to his or her family" and "decreases the likelihood that the officer will be wearing a contaminated uniform into the jail, thereby protecting other officers, staff, and the inmates housed within the facility." Woods certifies that requiring "all staff members [to] report to work in their uniform or work clothing . . . [and] preclud[ing] [them] from utilizing the locker room to change their clothes at the beginning or at the end of their respective work shift . . . jeopardizes the health and safety of PBA members, members' families and loved ones, inmates, and other staff" and "[t]his, in turn, jeopardizes the public at large." Woods certifies that "[t]he County's prohibition on PBA members utilizing the locker room to change before and after their respective shifts also compromises members' safety in other respects" - e.g., "PBA members are traveling to and from work each day . . . in full uniform . . . without the protection of a service weapon" such that they "[may] become potential targets of those harboring anti-law enforcement sentiment without the ability to protect themselves" and/or "the location of the member's residence may become compromised since the officer will

be in full uniform and . . . in 'plain view' for the public at large." Woods certifies that as result of the locker room ban, "PBA members have taken matters into their own hands in order to safeguard the health, safety, and well-being of not only themselves, but their families and loved ones" – i.e., "PBA members . . . are changing into their uniforms in the Correctional Facility parking lot or other locations away from their residence in order to mitigate the spread of COVID-19 and potential exposure thereto."

Local 258 President Woods certifies that although he is "aware of the County's recent implementation of the emergency disinfectant misting walkthrough [that is] now available to PBA members both before and after their shifts[,] [he] do[es] not know how effective the misting walkthrough is at mitigating the likelihood that the [corona-]virus can spread from an officer's uniform." Woods certifies that he "[is] supportive of the utilization of this measure as another means to prioritize member safety"; however, "there is no reason the misting walkthrough has to serve as a 'substitute' for allowing PBA members to change in and out of their uniforms at the start of and/or conclusion of their shifts" because "the[se] measures can be utilized in conjunction with one another." Woods certifies that "rescinding the [locker room] restriction at issue will alleviate any concerns that might arise pertaining to members who do not wish

to utilize the misting walkthrough for personal reasons, such as exposure to certain chemicals"; PBA members "who do not wish to utilize the misting walkthrough [will] still have the option to change out of their uniforms and ensure their safety."

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 "[t]he Commission has long held that employee safety is a mandatorily negotiable term and condition of employment"; "[p]olicies that affect employee safety and commitments to provide a safe working environment are negotiable and enforceable"; "[e]quipment that affects employee safety is . . . mandatorily negotiable"; "requests by employees for safe conditions to perform their assigned duties is conduct[] protected by the [Act]"; and "the absence of safety protocols posing substantial and potential dangers to employees constitutes irreparable harm under . . . the Commission's standard for issuing interim relief." The PBA contends that "the County's . . . [April 28, 2020 Memorandum] directly impacts the health and safety of . . . PBA [members]" given that "[t]he CDC recommends that during the pendency of the COVID-19 crisis, law enforcement officers that have the ability to change at their workplace/ station should continue to do so before and after their shift

. . . [because] this will help mitigate the spread of COVID-19 . . . by an officer potentially wearing a contaminated uniform." The PBA claims that "[t]his principle applies equally to both PBA members arriving at the facility as well as PBA members departing the facility" and "the locker room serves as a 'buffer' of sorts that the CDC recognizes might mitigate against potential exposure and/or spread" – i.e., "a [PBA] member may have unknowingly contaminated his or her uniform before he or she arrives at the correctional facility to start work, thereby exposing all staff and inmates at the facility to infection"; "a [PBA] member may unknowingly be wearing a contaminated uniform as he or she is leav[ing] work, thereby placing their families at risk of possible infection." The PBA maintains that "the action taken by the County is . . . a mandatorily negotiable term and condition of employment" yet "it is undisputed that the County did not negotiate with the PBA . . . prior to implementing the locker room restriction and/or issuing the [April 28, 2020 Memorandum]." The PBA also maintains that "PBA members have traditionally been afforded the ability to utilize the locker room for the purpose of changing in and out of uniform prior to and after their respective shifts"; that "[this] has been a long-standing past practice at the Correctional Facility"; and accordingly, "the County's actions violate Article 5 of the parties' CNA that calls for the maintenance of such benefits" and "Article 23 of the

parties' CNA that prohibits unilateral changes to the terms and conditions." The PBA contends that "the actions taken by the County constitute retaliation" given that the locker room ban was "instituted . . . following five separate complaints raised by the [PBA] pertaining to the County's handling, or more specifically mishandling, of the COVID-19 crisis with respect to conditions at the Correctional Facility"; however, the PBA "concedes that these underlying issues have been somewhat resolved" although "contemporaneous with the County's pledge to take some limited corrective action in regard to the complaints raised by the [PBA] . . . , the County [also] inexplicably imposed the locker room ban . . . ." The PBA claims that "other individuals, such as the Correctional Facility physician, are still being permitted to utilize the locker room for purposes of dressing, undressing, and showering"; and that "PBA members should be afforded the same privileges." The PBA also claims that "the timing of the [April 28, 2020 Memorandum] and the restrictions are . . . conspicuous" given that the Governor "declared a Public Health Emergency on March 9, 2020" yet "PBA members were permitted to utilize the locker room to change before and after their shifts until April 30, 2020"; and that "the only plausible explanation for the County's action is that

it was taken in reprisal for [protected activity]."[7/] The PBA also argues that its members will suffer irreparable harm if interim relief is not granted because "the County's unilateral restriction on PBA member usage of the . . . locker room threatens the health and safety of the officers, their families, other personnel . . . , and the inmates." The PBA maintains that "[b]y allowing PBA members to change in the locker room, they have the ability to stow their uniform in a secure place until it can be washed"; that "if the uniform is potentially contaminated from working a shift at the facility, it will mitigate the likelihood that the [corona-]virus can spread from the uniform"; and that "[t]his applies equally to PBA members who are traveling to work to begin their shift." The PBA contends that the "County's restriction in this matter provides for the opposite outcome" and "potentially expos[es] people to possible COVID-19

7/ In support of its position, the cites N.J.S.A. 34:13A-5.3, Association of New Jersey State College Faculties, Inc. v. New Jersey Board of Higher Education, 66 N.J. 72, 75 (1974), Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Ass'n, 78 N.J. 25, 48 (1978), State of New Jersey Judiciary, I.R. No. 2007-14, 33 NJPER 138 (¶49 2007), recon. granted P.E.R.C. No. 2008-12, 33 NJPER 225 (¶85 2007), Hunterdon Cty. Bd. of Chosen Freeholders, 116 N.J. 322 (1989), State of New Jersey (Dep't of Corrections), P.E.R.C. No. 99-35, 24 NJPER 512 (¶29238 1998), State of New Jersey (Greystone), P.E.R.C. No. 89-85, 15 NJPER 153 (¶20062 1989), City of Newark, P.E.R.C. No. 97-153, 23 NJPER 400 (¶28184 1997), Teaneck Tp., P.E.R.C. No. 88-107, 14 NJPER 338 (¶19127 1988), South Brunswick Tp., P.E.R.C. No. 86-115, 12 NJPER 363 (¶17138 1986), Union Cty., P.E.R.C. No. 84-23, 9 NJPER 588 (¶14248 1983), and West Deptford Tp. Bd. of Ed., P.E.R.C. No. 99-68, 25 NJPER 99 (¶30043 1999).

infection on two fronts" – i.e., "[f]or PBA members leaving work, wearing a potentially contaminated uniform poses a risk to innocent family members by increasing the likelihood that the [corona-]virus will spread in that officer's vehicle or at his/her home"; and "[f]or PBA members arriving at work fully uniformed, if his or her uniform has been contaminated by an asymptomatic . . . but infected individual they may have come into contact with during their commute, . . . they are taking that infection into the Correctional Facility . . . [and] jeopardizing the health and safety of the staff . . . along with the inmates." The PBA asserts that "[t]he County's prohibition on PBA members utilizing the locker room to change before and after their respective shifts also compromises members' safety in other respects" – e.g., "PBA members are now forced to travel to work in full uniform . . . without the protection of a service weapon" and this may result in them "becom[ing] potential targets of those harboring anti-law enforcement sentiment without the ability to protect themselves" and/or "the location of the [PBA] member's residence . . . [being] compromised since the officer will be in full uniform and . . . in 'plain view' for the public at large."[8/] The PBA also argues that the relative hardship

8/ In support of its position, the PBA cites Union Tp., I.R. No. 2002-7, 28 NJPER 86 (¶33031 2001), recon. den. P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002), Willingboro Bd. of Ed., I.R. No. 86-2, 11 NJPER 675 (¶16231 1985), Jersey City (continued...)

weighs in its favor and "would impose absolutely no hardship on the County." The PBA asserts that "reinstat[ing] the locker room utilization procedures PBA members have grown accustomed to since the COVID-19 outbreak in early March 2020" would be consistent with "[t]he fact that the County has allowed PBA [members] to use the locker room to change their clothes before and after their shifts since the onset of the outbreak and until most recently despite the existence of a Public Health Emergency . . . ." The PBA contends that "[its] members will suffer substantial hardship in the absence of interim relief . . . [because they] will be unreasonably and unnecessarily exposed to a risk of COVID-19 infection through a County prohibition that is directly contrary to CDC guidelines" and "[t]he risk of possible exposure also extends to the members' families and loved ones along with other staff and the inmates at the Correctional Facility"; and "the collective negotiations agreement between the parties will be violated, thereby undermining labor relations between the parties and imposing a 'chilling effect' between them going forward." The PBA claims that its members "are already suffering a hardship due to the unlawful restrictions in the [April 28, 2020 Memorandum]" given that they "are changing into their uniforms in

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8/ (...continued)
Bd. of Ed., I.R. No. 83-18, 9 NJPER 525 (¶14213 1983), and State of New Jersey Judiciary, I.R. No. 2007-14, 33 NJPER 138 (¶49 2007), recon. granted P.E.R.C. No. 2008-12, 33 NJPER 225 (¶85 2007).

the Correctional Facility parking lot or other locations away from their residence in order to mitigate the spread of COVID-19 and potential exposure thereto"; and that "PBA members should not have to take matters into their own hands in order to safeguard their health, safety, and well-being" but instead "this should be a priority of the [County]."

In response, the County argues that the PBA has not satisfied the standard for interim relief. Specifically, the County maintains that the PBA has not demonstrated a substantial likelihood of prevailing in a final Commission decision on its 5.4a(5) claim because "the County was under no obligation to negotiate . . . [given that] Article 3, Section A(6) of the CNA explicitly vests in the County the right 'to take whatever actions may be necessary to carry out the mission of the County in situations of emergency'"; and "the [PBA] has waived any right to negotiate over actions taken in situations of emergency." The County contends that "[e]ven the PBA would have to concede [that the COVID-19] pandemic is an emergency"; that "social distancing is one of the major tools [that the] President and . . . Governor have emphasized"; and that "the County's mission . . . is to prevent the spread of COVID-19 in its Correctional Facility." The County notes that "[c]orrectional facilities throughout the country have been ravaged by COVID-19" and asserts that it "has done an exceptional job" given that, "to date[,] . . . no inmates

have contracted COVID-19 and only two correction officers have contracted COVID-19"; and correspondingly, "the correction officers did not contract COVID-19 from the inmates" such that "[i]t was either contracted from co-workers or from outside of the facility." The County maintains that "even if the CNA did not contain explicit language authorizing the County to act here, [the Commission] has recognized that in times of emergency public employers can 'deviate' from mandatorily negotiable terms and conditions of employment that normally prevail[]"; that "in none of the reported [Commission] decisions involving an employer's right to unilaterally act in an emergency was the emergency anywhere near as dire as the instant pandemic"; and that accordingly, "the County was not required to negotiate under the third prong of Local 195." The County claims that "[n]egotiations over changing in/out of uniforms in the locker room would significantly interfere with the determination of government policy under the current circumstances"; that "[g]iven the size and design of the locker rooms along with the number of persons that are allowed to utilize these locker rooms . . . it [is] impossible to maintain six foot social distancing"; and that "[b]ased on the determination that it is impossible to maintain six foot social distancing in the locker room, the County decided that not permitting employees to change in/out of uniform in the locker room was necessary to mitigate the spread of COVID-19."

The County contends that contrary to the PBA's suggestion, "the CDC is not suggesting that officers should be changing in and out of uniforms in the [locker room] facility that for men is only 1,100 square feet . . . less the square footage taken up by lockers, bathrooms, etc." or that "[for] women . . . is only 425 square feet . . . less the square footage taken up by the lockers, bathrooms, etc." The County also maintains that the PBA has not demonstrated a substantial likelihood of prevailing in a final Commission decision on its 5.4a(3) claim because Warden Mueller "discussed the locker room issue at COVID-19 Committee meetings on March 19, March 30, April 2, and April 7, 2020" and "the decision to not permit employees to change in the locker room was contemplated well before the PBA's objections to workplace issues." The County asserts that "at the March 30, 2020 meeting, Warden Mueller pointed out that the locker room [issue] may need to be revisited because officers [were] too close to each [other]"; that "based on the fact that the County later had two positive COVID-19 cases . . . despite . . . extensive training, [it became clear that] social distancing was not working in the locker rooms given their size, design and number of employees who utilize them"; and that accordingly, "the County made the decision to no longer allow officers to change before and/or after a shift in the locker room . . . to protect the health and safety of all employees and inmates and in no way

to retaliate against the PBA." The County contends that "the PBA completely ignores the fact that all levels of government and healthcare have made adjustments in their COVID-19 strategies as the pandemic intensifies and as more information is learned"; that "[t]he restrictions on the locker rooms were only one of many changes"; and that "[i]f there was any merit to the PBA's retaliation allegations, the Commission's designee would have to find that every change that occurred since the first week of March was retaliatory." The County also contends that "the PBA completely ignore[s] the fact that the [April 28, 2020 Memorandum] applied to all employees and contractors, not just PBA members." The County claims that "there was not only a legitimate business justification for the [April 28, 2020 Memorandum], but actually a compelling reason to issue restrictions on the use of locker rooms for all employees and . . . a contractual right to act."[9/] The County also argues that "there is no irreparable harm to the PBA . . . [given that] the PBA President admits there are alternatives to changing in/out of . . . uniform[] in the Correctional Facility locker room"; and

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9/ In support of its position, the County cites Sussex-Wantage Bd. of Ed., P.E.R.C. No. 86-57, 11 NJPER 711 (¶16247 1985), Somerset Cty., P.E.R.C. No. 2014-76, 40 NJPER 520 (¶169 2014), Colts Neck Tp., P.E.R.C. No. 2014-59, 40 NJPER 423 (¶143 2014), Hunterdon Cty., P.E.R.C. No. 83-86, 9 NJPER 66 (¶14036 1982), Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982), Passaic Cty., I.R. No. 2020-20, __ NJPER __ (¶__ 2020), and Bridgewater Twp. v. Bridgewater Public Works Ass'n, 95 N.J. 235, 241-245 (1984).

that the PBA President has certified that "PBA members are now changing into their uniforms in the Correctional Facility parking lot or other locations away from their residence." The County maintains that in order to avoid becoming "potential targets of persons harboring anti-law enforcement sentiment[s][,] . . . a correction officer need only wear a sweater or jacket over their uniform and the public would not know they are a correction officer" and this "would also limit the possibility of spreading any germs." The County asserts that "requiring correction officers to report to work in uniform and depart the Correctional Facility in uniform is not new" – i.e., "a number of correction officers have traveled to/from the Correctional Facility in uniform . . . [f]or years . . . and there has never been an issue", not to mention the "State of New Jersey Department of Corrections" and "[a] number of counties . . . require officers to report to work in uniform and leave in uniform." The County contends that "the irreprable harm here is to the County if the temporary restraints are granted" because "the County has an obligation to every correctional employee, their families, inmates and the public in general to take every reasonable step to protect them from COVID-19" and the "[April 28, 2020 Memorandum] to not permit employees to change in/out of . . . uniforms in the locker room was issued in order to mitigate the spread of COVID-19 . . . ." The County maintains that "[a]s of

May 7, 2020, not one inmate in the Correctional Facility has been diagnosed with COVID-19" and "th[is] is a direct result of the proactive measures the County has taken, including training, closure of various areas, redesigning assignments, closing the gym[,] and now closing the locker room since [the County] [has] had two correction officers with reported COVID-19." The County asserts that "[t]he only irreparable harm here would be if someone contracts COVID-19 because of their failure to exercise appropriate social distancing rules, which . . . cannot be observed in the County's locker rooms"; on the other hand, "[i]f an officer decides to change clothes or cover his/her clothes before returning home, that is not irreparable harm."[10/] The County argues that "[a] balancing of relative hardship weighs against granting [interim relief]" because "not only will the health and safety of the PBA be jeopardized, but [also] the entire Corrections Department staff and inmate population." The County maintains that "the PBA cannot demonstrate a hardship . . . [given that its members] ha[ve] already remedied the situation by changing in/out of their uniforms before they go home each day . . . ." The County contends that while it would be an irreparable hardship "if COVID-19 spread throughout the

10/ In support of its position, the County cites State of New Jersey Judiciary, I.R. No. 2007-14, 33 NJPER 138 (¶49 2007), recon. granted P.E.R.C. No. 2008-12, 33 NJPER 225 (¶85 2007).

[Correctional Facility] to inmates and . . . employees", it is "merely a possible inconvenience . . . if an officer . . . change[s] out of their uniform before they enter their home." The County also argues that "[t]he public interest will in fact be harmed if the County's [April 28, 2020 Memorandum] is rescinded" given that the County "has taken extraordinary precautions in order to mitigate the spread of COVID-19" because "[i]t has an obligation under the law to make every effort to enforce six foot social distancing under the Governor's Executive Orders." The County maintains that it "cannot risk the potential harm that could occur if it does not take every realistic step to control the spread of COVID-19 [because] it impacts employees and inmates."

In reply, the PBA reiterates its argument that "the locker room restriction imposed [by the County] . . . falls within the scope of permissible negotiations." The PBA maintains that "the interests of both the [PBA] and the County should be aligned in furtherance of mitigating the spread of the [corona-]virus" but "[t]he actions of the County . . . eliminate a viable CDC-endorsed mitigation option and . . . do[] little to actually promote mitigation." The PBA contends that contrary to "the County's interpretation of . . . [Article 3(A)(6)] [that] the [PBA] has effectively waived its right to negotiate over any term and condition of employment 'in situations of emergency,'"

"[a]ccepting that interpretation would . . . violate the well-established principle that contractual language alleged to constitute a waiver not be read expansively"; and that under Article 3, the County only "retains the right to take emergency actions in accordance with applicable laws and regulations" which "further mitigates against the notion that . . . [the CNA] empowers the County to unilaterally alter any and all negotiable terms and conditions of employment under the auspices of an emergency situation." The PBA claims that the County's assertion that "not one inmate in Correctional Facility has been diagnosed with COVID-19 . . . is severely misleading . . . [and] more reflective of the limited testing the County has administered upon the inmates, rather than being based on actual knowledge of which inmates are currently in[fected] with the [corona-]virus"; and that "[there is a] significant chance that inmates may be positive for the [corona-]virus . . . while presenting as entirely asymptomatic." The PBA asserts that "[i]t is entirely disingenuous for the County to claim that COVID-19 was 'obviously' not contracted by officers from an inmate given the possibility that the [corona-]virus may be transmitted by asymptomatic persons"; that "the available scientific research indicates that there is no way for the County to support such an assertion without employing rigorous testing upon each and every inmate"; and that this "also undermines the County's assertion

that the [corona-]virus was brought into the facility by an employee." The PBA maintains that it is "perplex[ed] [by] the County's repeated claim that social distancing is 'absolutely impossible' and that it 'could not be maintained' inside the locker room" given that the [April 28, 2020 Memorandum] "imposing the restriction at issue calls for social distancing to be maintained" and the fact that "PBA members are still able to store their personal belongings in the locker room, retrieve the[ir] belongings as needed during their respective shifts, and utilize the bathroom contained in the locker room" – i.e., "if social distancing protocols are an 'impossibility' and not able to be maintained in the locker room as asserted by the County . . . , it would logically follow that locker room usage . . . in its entirety . . . would be prohibited." The PBA juxtaposes the difficulty of maintaining social distance within the Correctional Facility proper ("there are numerous scenarios wherein a six foot social distance is impossible") with the ease of maintaining social distance within the locker rooms ("one of the scenarios wherein social distancing can be utilized and adhered to . . . more rigorously . . . than . . . within the confines of the jail"). The PBA contends that "the County's assertion that its basis for imposing the ban is to promote social distancing is disingenuous and . . . demonstrates that the ban was imposed to retaliate against [the] PBA for its criticism of the County's

handling of the COVID-19 crisis"; and that "it strains credulity that the 'impossibility' of social distancing is the reasoning [for the] imposition of the restriction."[11/] The PBA claims that "[w]hile . . . [the emergency disinfectant misting walkthrough] may potentially provide an important option for officers to utilize during the pending crisis, it should not serve as the 'be-all and end-all' of COVID-19 mitigation options"; that "all available options that further mitigation should be made available to correctional staff and . . . PBA members . . . during this crisis"; and that "[s]acrificing an effective, CDC-endorsed measure for the sake of an alternative option is entirely unnecessary when both protocols can be safely made available." The PBA "is unaware precisely how effective the misting walkthrough is at mitigating the likelihood that the [corona-]virus can spread from an officer's uniform" and maintains that it "may not be a viable option for all officers . . . [because some] do not desire to use the walkthrough due to concerns about being exposed to chemicals . . . or due to skin

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11/ In support of its position, the PBA cites Robbinsville Twp. Bd. of Ed. v. Washington Twp. Ed. Ass'n, 227 N.J. 192, 199 (2016), Franklin Twp. v. Franklin Twp. PBA Local 154, 424 N.J. Super. 369, 383 (App. Div. 2012), Provena Hospitals, 350 N.L.R.B. 808, 810-812 (2007), City of Margate, P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987), recon. den. P.E.R.C. No. 88-50, 13 NJPER 849 (¶18328 1987), Glassboro Bor., P.E.R.C. No. 86-141, 12 NJPER 517 (¶17193 1986), Dennis Tp. Bd. of Ed., 12 NJPER 16 (¶17005 1985), and Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985).

sensitivity or for other dermatological reasons." The PBA "supports the utilization of [the misting walkthrough] as another means to prioritize member safety" but asserts that "it does not have to serve as a 'substitute' for allowing PBA members to change in and out of their uniform at the start of and/or conclusion of their shifts." The PBA notes that "it does not oppose reasonable restrictions on locker room usage" including "limiting the amount of people permitted to utilize both the male and female locker rooms"; and that in fact "a cap on the amount of officers permitted to enter the locker room goes further than the present restriction imposed by the [April 28, 2020 Memorandum] which merely prohibits congregating in the locker rooms."

STANDARD OF REVIEW

To obtain interim relief, the moving party must demonstrate that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted; in certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. See Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); Whitmyer

Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009) (citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe)); State of New Jersey (Stockton College), P.E.R.C. No. 76-6, 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.

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v.

City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

> First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is, the parties may not include any inconsistent term in their agreement. State v. State Supervisory Employees Ass'n, 78 N.J. 54, 81 (1978). If an item is not mandated by statute or regulation but is within the general discretionary powers of a public employer, the next step is to determine whether it is a term or condition of employment as we have defined that phrase. An item that intimately and directly affects the work and welfare of police and firefighters, like any other public employees, and on which negotiated agreement would not significantly interfere with the exercise of inherent or express management prerogatives is mandatorily negotiable. In a case involving police and firefighters, if an item is not mandatorily negotiable, one last determination must be made. If it places substantial limitations on government's policymaking powers, the item must always remain within managerial prerogatives and cannot be bargained away. However, if these governmental powers remain essentially unfettered by agreement on that item, then it is permissively negotiable.

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

5.4a(3) Claim

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

"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 employer'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 2019). The PBA has not provided any direct, uncontroverted evidence that the County's decision to issue the April 28, 2020 Memorandum was motivated by anti-union animus (i.e., the PBA raising multiple concerns about the County's handling of the COVID-19 crisis with respect to conditions at the Correctional Facility). Compare Mueller Certification at ¶¶32-41, 45-49, Exhs. 14-23 (certifying that the locker rooms were a concern from the outset of the COVID-19 crisis based in part upon CDC guidelines and Governor Murphy's Executive Orders; that there were discussions about closing the locker rooms during COVID-19 Committee meetings as far back as March 19, 2020 based upon other

local police departments closing their locker rooms and again during COVID-19 Committee meetings on March 30, April 2, and April 27, 2020; that correction officers had suggested closing the locker rooms and/or modifying locker room usage in emails dated April 1 and April 2, 2020 to superior officers at the Correctional Facility; that the April 28, 2020 Memorandum applies to all Department of Corrections employees and contractors, including physicians; that not all correction officers change in the locker rooms but all officers continue to be permitted to use the locker rooms to store/retrieve personal belongings; and that the April 28, 2020 Memorandum is temporary such that locker rooms will be available again for changing clothes/uniforms after the social distancing mandate has been rescinded) with Woods Certification at ¶¶26-32, Crivelli Certification at Exhs. C-H (certifying that the PBA sent correspondence to the County raising concerns about how the COVID-19 crisis was being handled at the Correctional Facility on March 17, March 20, April 27, and April 28, 2020; that the April 28, 2020 Memorandum was issued in the wake of these issues being raised; that PBA members were permitted to use the locker rooms, despite the COVID-19 crisis, up until April 30, 2020; and that other employees, including physicians, were being permitted to utilize the locker rooms after the April 28, 2020 Memorandum was issued despite the fact that PBA members were not) and Woods Supplemental Certification

at ¶¶5-21 (asserting that the County's motives for issuing the April 28, 2020 Memorandum have been called into question based upon the fact that despite claiming that social distancing is an impossibility in the locker rooms, the County calls for social distancing to be maintained in the locker rooms and has continued to permit their usage for storage/retrieval of personal belongings and the bathroom). Contrast Chester Bor. (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. (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).

"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., Irvington Tp., I.R. No. 2019-7, 45 NJPER 129 (¶34 2018) (denying interim relief, in part, where the township presented a colorable claim that its reasons for returning to a 10/14 schedule were to address an increase in costs/efficiency/safety; minimum staffing requirements, work schedule, staffing inflexibility, and significant increases in non-productive time; diminished ability to maintain service levels due to the adverse and unfavorable impact of the 24/72 schedule; and harm to the necessary order, control and stability of the fire department); 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).

In this case, although the timing (vis-a-vis the PBA raising multiple concerns about the County's handling of the COVID-19 crisis with respect to conditions at the Correctional Facility) and apparent inconsistency (vis-a-vis despite not permitting unit members to change clothes/uniforms in the locker rooms, the County calls for social distancing to be maintained in the locker rooms and has continued to permit their usage for storage/ retrieval of personal belongings and the bathroom) are suspicious, the County has asserted a colorable claim that its reasons for the April 28, 2020 Memorandum are the following:

> -"for the safety of staff and to prevent the spread of COVID-19 throughout the facility";
>
> -factors influencing the decision include "a number of directives and . . . training designed to limit the spread of COVID-19 [in the] Correctional Facility and protect employees, their families, inmates and the public in general";
>
> -"[a] key component of [the] effort to eliminate or at least minimize the impact of COVID-19 on [the] Correctional Facility was social distancing";
>
> -the "CDC's guidance that [about social distancing]";
>
> -based upon the size, design, and number of people allowed to utilize the locker rooms, "social distancing was not possible in all locations [at the Correctional Facility] . . . [including] the locker rooms";

> -COVID-19 Committee meeting discussions, suggestions from correction officers, and information from local police departments about whether social distancing was possible/effective in the locker rooms as well as two correction officers testing positive for COVID-19 in mid-April 2020; and
>
> -the County's "obligation to every correctional employee, their families, inmates and the public in general to take every reasonable step to protect them from COVID-19."

See Mueller Certification at ¶¶13-51, Exhs. 1-25; see also Mueller Supplemental Certification at ¶¶4-16, Exhs. 26-27 (certifying that the County has set up a disinfectant misting walkthrough that is available to all Correctional Facility staff as needed, including before/after shifts, to mitigate the likelihood that COVID-19 can spread from clothing; and that "[s]ince it is not possible to maintain social distancing in the locker room[s], nor any other location available and suitable to changing uniforms, allowing officers the option of utilizing the disinfectant misting walkthrough before or after their shift serves as a precautionary measure to limit instances of exposure . . . [and] is much more effective than changing in a locker room"). Thus, it appears that material facts are in dispute. Whether the County'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 failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its 5.4a(3) legal and factual allegations.

5.4a(5) Claim

The Commission has "recogni[zed] . . . the difficulty of squaring proper recognition of the exercise of managerial prerogatives by public employers with the duty of public employers under [the] Act to negotiate safety issues." City of East Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11194 1980), aff'd NJPER Supp.2d 100 (¶82 App. Div. 1981), certif. den. 88 N.J. 476 (1981); accord City of Elizabeth, P.E.R.C. No. 92-106, 18 NJPER 262 (¶23109 1992) (the Commission "[is] charged with balancing the employer and employees' respective interests . . . considering the facts of each case"). The Commission has held that "employees covered by collective negotiations agreements [have] the ability to address safety concerns to their employer, as such issues [are] mandatory subjects of negotiations." West Deptford Tp. Bd. of Ed., P.E.R.C. No. 99-68, 25 NJPER 99 (¶30043 1999); accord State of New Jersey (Dep't of Corrections), P.E.R.C. No. 2020-37, 46 NJPER 324 (¶79 2020) ("disputes under contractual safety clauses are legally arbitrable, but . . . an award could not order an increase in staffing or a reversal of . . . policy . . . [that] would substantially interfere with [an employer's] managerial prerogative"); State of New Jersey

(Greystone), P.E.R.C. No. 89-85, 15 NJPER 153 (¶20062 1989) (denying a restraint of binding arbitration of a grievance "assert[ing] that ending security guard services made . . . [an] [o]ffice unsafe"). However, "grievance[s] [that] seek[] to prevent [an] employer from implementing a decision to increase employee safety" are not mandatorily negotiable. City of Elizabeth; accord City of Newark, P.E.R.C. No. 97-153, 23 NJPER 400 (¶28184 1997) ("employer had prerogative to take action to improve employee safety").

In Robbinsville Twp. Bd. of Ed. v. Washington Twp. Ed. Ass'n, P.E.R.C. No. 2014-30, 40 NJPER 253 (¶96 2013), aff'd 42 NJPER 69 (¶17 App. Div. 2015), certif. granted 223 N.J. 557, rev'd and rem'd 227 N.J. 192 (2016), the New Jersey Supreme Court held the following:

> In the matter under review, the Appellate Division also employed the Local 195 three-prong test and concluded that, despite the fact that the terms and conditions at issue were prime examples of negotiable employment terms, negotiation was not necessary because it would "impinge on the determination of public policy."
>
> Although the Appellate Division correctly determined that the first and second prongs of Local 195 are not at issue in this case — because the action here, in impacting work hours and pay, directly affects the employees' work and welfare and because there is no statute or regulation preempting the EERA — the panel misapplied our holding in Keyport when analyzing the third prong of the test. Concerning that third prong, the Appellate Division concluded that the

economic crisis present in the Robbinsville school district permitted the Board to forego negotiations on the furloughs. The panel stated that it reached that determination because the Board was attempting to "achieve a balance between the interests of public employees and the need to maintain and provide reasonable services," and because, pursuant to Keyport, "economic considerations 'are indisputably a legitimate basis for a layoff of any type.'"

The appellate decision undervalued the lack here of an authorizing temporary emergency regulation that permitted temporary furloughs — a factor that had the significant impact of tilting the public policy calculus in Keyport's analysis under the third prong of Local 195. Keyport does not stand for the proposition that anytime a municipal public employer can claim an economic crisis, managerial prerogative allows the public employer to throw a collectively negotiated agreement out the window. To the contrary, Keyport painstakingly emphasized the significance of an agency of State government enacting a temporary emergency regulation to provide local governmental managers with enhanced prerogatives in handling the extraordinary fiscal times faced in the late 2000s. The regulation's existence made all the difference in Keyport. It was mentioned by the Court repeatedly throughout the opinion.

This Court determined that the emergency regulation promulgated by the governmental agency overseeing layoff activity in civil service jurisdictions purposefully added to the managerial discretion reposed in the municipalities and, further, that it added weight to the Court's conclusion that forcing the civil service municipalities involved in Keyport to abide by their respective "negotiated agreement[s] would significantly interfere with the determination of governmental policy." That was underscored by the Court's recognition of the

> regulation's importance to the prong-three analysis under Local 195 regardless of whether the regulation was the express impetus for the municipalities' decisions.
>
> Had the temporary regulation not provided that extra managerial authority, the fact patterns in the three consolidated cases in Keyport would have foundered on the third-prong analysis. Allowing a claimed need for management prerogative to prevail in tight budgetary times in order for municipal governmental policy to be properly determined would eviscerate the durability of collective negotiated agreements. Collective negotiated agreements — promises on wages, rates of pay, and hours, and other traditional terms and conditions of employment — would mean nothing in the wake of any financial setback faced by a local governmental entity. That drastic public-policy course alteration was not explicit or implicit in the opinion setting forth the reasoning to support our holding in Keyport. We do not endorse it now for to do so would undermine Local 195 and decades of public sector labor law on collective negotiations.
>
> To that end, the Legislature and this Court have, time and again, emphasized the value of collective negotiated agreements in our society. The Legislature enacted the EERA to serve the interests of New Jersey citizens by preventing labor disputes through such agreements. N.J.S.A. 34:13A-2; see also N.J.S.A. 34:13A-5.3 (requiring representatives of employers and employees to "meet at reasonable times and negotiate in good faith with respect to . . . terms and conditions of employment," and requiring that such agreements be written and signed). This Court also has recognized the "wisdom of pursuing discussion between public employers and employees," which "promote[s] labor peace and harmony." Local 195, supra, 88 N.J. at 409; see also Teaneck Bd. of Educ. v. Teaneck Teachers Ass'n, 94 N.J. 9, 18-19 (1983). And, the Court has encouraged negotiations,

> stating that "[s]tate officials would be derelict in their public responsibilities" if they failed to negotiate. Local 195, supra, 88 N.J. at 409, 443. Thus, by reading Keyport to authorize the Board's unilateral alteration of a collective negotiated agreement, the Appellate Division erroneously expanded Keyport, rendering it unrecognizable. We reject that mistaken reading and unwarranted extension of Keyport. Keyport does not support the award of summary judgment to the Board.
>
> [Robbinsville, 227 N.J. at 202-205 (citations omitted).]

Given these legal precepts, I find that the PBA has also failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its 5.4a(5) legal and factual allegations.

It is undisputed that although the parties' expired 2016-2019 CNA does not include a provision regarding the locker rooms, it does include a negotiated provision regarding maintenance of benefits that continues all benefits throughout the duration of the parties' agreement; and a negotiated unilateral changes provision that requires any unilateral change to be done with the parties' mutual consent. See 2016-2019 CNA, Arts. 5 & 23. It is also undisputed that on April 28, 2020, the County issued a memorandum unilaterally requiring unit members to report to work in their uniform and prohibiting unit members from using the locker rooms to change in/out of uniform at the beginning/end of their shift. See Crivelli Certification, Ex. I.

However, the County points to the following additional undisputed facts to substantiate the basis for its unilateral action. Specifically, the parties' expired 2016-2019 CNA also includes a management rights provision that grants the County enhanced authority "[t]o take whatever actions may be necessary to carry out the mission of the County in situations of emergency." See 2016-2019 CNA, Art. 3(A)(6). In addition, on March 9, 2020, Governor Murphy declared a Public Health Emergency and State of Emergency in the State of New Jersey related to COVID-19 and issued subsequent Executive Orders that include social distancing as a mitigation strategy. See State EO Nos. 103, 104, 107, 119, 122, 125, 138, 151.

As the New Jersey Supreme Court instructed in Robbinsville, I must employ the Paterson three-prong balancing test to the facts of this case in order to reach a determination regarding the PBA's likelihood of prevailing in a final Commission decision.

Under the first prong of Paterson, the parties have not cited any preemptive statute or regulation pertaining to this matter. "[T]he mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations" and "[n]egotiation is preempted only if the [statute or] regulation fixes a term and condition of employment 'expressly, specifically, and comprehensively.'" Bethlehem Twp.

Bd. of Ed. v. Bethlehem Twp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982) (citations omitted). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). Although both parties claim that certain CDC Guidelines support their respective positions, it does not appear that they are preemptive; rather, they appear to be health/safety recommendations pertaining to COVID-19 that do not place any related limitation(s) on the negotiability of the underlying subject. Similarly, it does not appear that Governor Murphy's Executive Orders are preemptive; they declare a Public Health Emergency and State of Emergency in the State of New Jersey related to COVID-19 and specify certain mitigation strategies including social distancing, but do not appear to place any related limitation(s) on the negotiability of the underlying subject. See, e.g., State of New Jersey (Dep't of Corrections), P.E.R.C. No. 2019-9, 45 NJPER 114 (¶30 2018) (denying the State's request for a restraint of arbitration; holding that although N.J.S.A. App. A:9-40 authorizes the Governor "to make, amend and rescind orders, rules and regulations as in this act provided" during a state of emergency, it "does not address" certain terms and conditions of employment such as "the treatment of leave time during a state of emergency").

Under the second prong of Paterson, the Commission has held that employee health/safety concerns are a term and condition of employment that intimately and directly affect the work and welfare of police units like Local 258. See West Deptford Tp. Bd. of Ed.; State of New Jersey (Dep't of Corrections); State of New Jersey (Greystone). However, the Commission has also recognized the difficulty of balancing the proper exercise of managerial prerogatives by public employers with the duty to negotiate health/safety issues with employees and engages in case-by-case analysis of the parties' interests. City of East Orange; City of Elizabeth; City of Newark.

Under the third prong of Paterson, I must balance the parties' interests. Notably, although Commission Designees have granted interim when public employers have unilaterally changed terms and conditions of employment related to health/safety, the Commission has not always upheld those grants of interim relief. See, e.g., State of New Jersey Judiciary, I.R. No. 2007-14, 33 NJPER 138 (¶49 2007), recon. granted P.E.R.C. No. 2008-12, 33 NJPER 225 (¶85 2007) (the designee ordered the employer to negotiate with the union "over severable and mandatorily negotiable issues associated with the implementation of [a] [d]irective as it affects adult and juvenile probation officers who are required . . . to carry out home inspections" including "the establishment of a system or protocol to establish

parameters under which adult and juvenile probation officers will be provided with the assistance of law enforcement personnel", "providing pepper spray to probation officers", and "providing Kevlar vests and other protective garments"; however, on reconsideration, the Commission vacated the designee's order "requiring the employer to negotiate over the three specified issues" because the union did not demand to negotiate over these issues nor did employer refuse to negotiate in response to such a demand).

I find that there are material facts in dispute regarding both parties' health/safety concerns. The PBA claims that social distancing can be effective in the locker rooms as evidenced, in part, by the County continuing to permit their usage for storage/retrieval of personal belongings and the bathroom while adhering to social distancing protocols. See Woods Certification at ¶¶17-20, 25; Woods Supplemental Certification at ¶¶6-25. The PBA is unaware of the efficacy of the disinfectant misting walkthrough. See Woods Supplemental Certification at ¶¶26-27. Oppositely, the County claims that social distancing is not possible in the locker rooms or in any other location available and suitable to changing uniforms. See Mueller Certification at ¶¶13-51; Mueller Supplemental Certification at ¶¶15. The County also claims that the disinfectant misting walkthrough will mitigate the likelihood that the coronavirus can spread from an

officer's uniform. See Mueller Supplemental Certification at ¶¶4-15. While it is clear that COVID-19 is a respiratory disease that can be transmitted from person-to-person through respiratory droplets produced when an infected person coughs, sneezes, or talks, it is unclear whether (and/or to what degree) COVID-19 can be transmitted from contaminated clothing-to-person, and neither party has provided evidence clarifying this ambiguity.[12/] Thus, the evidence submitted by the parties does not establish an undisputed factual basis upon which to render a determination. See, e.g., Kean University, I.R. No. 2009-5, 34 NJPER 232 (¶80 2008) (denying application for interim relief where there were "several disputes of material fact[]"); Closter Bor., I.R. No. 2007-10, 33 NJPER 101 (¶35 2007) (denying application for interim relief where "the record show[ed] a dispute on a material fact"). "Absent an administrative investigation and/or plenary hearing, 'I cannot weigh conflicting evidence and determine which party's characterization [is] more accurate[] . . . .'" Alliance of Atlantic City Supervisory Employees, I.R. No. 2018-7, 44 NJPER 202 (¶59 2017) (quoting Newark Bd. of Ed., I.R. No. 92-11, 17 NJPER 532 (¶22261 1991)).

12/ See https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html#:~:text=The%20virus%20is%20thought%20to,are%20not%20showing%20symptoms.

It is also uncertain as to whether the PBA has a substantial likelihood of prevailing on its legal allegations. "Public employers have been given some latitude in demonstrable emergencies to 'deviate' from mandatorily negotiable terms and conditions of employment that normally prevailed." Passaic Cty., I.R. No. 2020-20, __ NJPER __ (¶__ 2020) (citing Somerset Cty., P.E.R.C. No. 2014-76, 40 NJPER 520 (¶169 2014); Colts Neck Tp., P.E.R.C. No. 2014-59, 40 NJPER 423 (¶14036 2014); Hunterdon Cty., P.E.R.C. No. 83-86, 9 NJPER 66 (¶14036 1982); Salem City Bd. of Ed., P.E.R.C. No. 82-115, 8 NJPER 163 (¶13 1982)). However, the Commission has also held that "[even when] a state of emergency has been declared in [a] police department because of staffing shortages, . . . [if] the record is silent on what this means . . . [it] does not support a blanket rescission of a negotiated term and condition of employment." City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990); accord City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), aff'd NJPER Supp.2d 141 (¶125 App. Div. 1984) (holding that "unilaterally impos[ing] an open-ended, blanket denial of all accrued time off and holidays . . . [was] overly intrusive on the employees' negotiated rights, even if they had their genesis in a real manpower shortage"; finding that "the [employer's] action . . . exceeded the needs of the emergency situation and unreasonably abrogated the terms and conditions of employment negotiated in

the contract"; that "[e]ven assuming that the City had to suspend time off and holidays during the emergency, it was . . . at least . . . obligated to offer to negotiate with the [union] on how these accrued contractual rights might be protected and/or reinstated when the emergency ended").

Thus, the PBA's legal allegations raise several questions that are more appropriate for a plenary hearing and Commission review than to be initially decided via an application for interim relief – i.e., whether an employer's asserted action to increase/maintain workplace health/safety for employees and inmates is a managerial prerogative or mandatorily negotiable (City of Elizabeth, P.E.R.C. No. 92-106; City of Newark, P.E.R.C. No. 97-153); whether the COVID-19 crisis constitutes a demonstrable emergency and, if so, the degree of latitude that will be afforded to public employers to deviate from mandatorily negotiable terms and conditions of employment including employee health/safety concerns (Passaic Cty.; West Deptford Tp. Bd. of Ed.; State of New Jersey (Dep't of Corrections); State of New Jersey (Greystone)); and whether the record in this matter supports the employer's requirement that unit members report to work in their uniform and prohibition on unit members from using the locker rooms to change in/out of uniform at the beginning/end of their shift and, if so, any related obligation to negotiate the employer's action or its impact if a demand to negotiate was

made by the majority representative (City of Newark, P.E.R.C. No. 90-122; City of Elizabeth, P.E.R.C. No. 82-100). See Town of Boonton, I.R. No. 2020-1, 46 NJPER 30 (¶9 2019) (denying an application for interim relief based, in part, upon the unclear legal effect – if any - of allegedly ratifying a memorandum of agreement during closed session); accord City of Orange, I.R. No. 2005-10, 31 NJPER 130 (¶56 2005) (denying, in part, an application for interim relief where there was "a novel issue of law that [was] more appropriate for a plenary hearing and Commission review than to be initially decided in interim relief"); Middlesex Cty., I.R. No. 88-10, 14 NJPER 153 (¶19062 1988) (denying an application for interim relief where "complex and novel legal issues [had] been presented . . . [that] can only be resolved at a plenary hearing").

Accordingly, I find that the PBA has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its 5.4a(5) legal and factual allegations.

Irreparable Harm, Relative Hardship, and Public Interest

I also find that the PBA has failed to demonstrate irreparable harm, relative hardship or that the public interest will not be injured by an interim relief order.

Initially, I acknowledge the PBA's health/safety concerns regarding having a suitable place to change in/out of uniform at the beginning/end of their shift. The County has also

acknowledged that the health/safety of unit members is of paramount importance (together with that of inmates and other staff at the Correctional Facility as well as the public at-large), and to that end has taken additional measures to ensure unit member health/safety (e.g., the disinfectant misting walkthrough). I also acknowledge the PBA's safety concerns regarding traveling to/from work in uniform, particularly in light of recent demonstrations. The County's suggestion of placing a sweater or other clothing over an officer's uniform appears to be a reasonable solution.

However, I also take administrative notice that since the COVID-19 crisis began, "Garden State prisoners have died at a rate of 21 people for every 10,000 . . . [which is] double the rate of the rest of the state"; and that "at least 595 state corrections employees have contracted the virus . . . [which is] nearly identical to the 598 cases documented at the beginning of the month within every other law enforcement agency in the state combined . . ."[13/] I also take administrative notice that "[a]n 'outbreak' of COVID-19 has infected nearly 30% of the Mercer County Correction Center's 302 inmates . . . [with] [p]ositive cases of the deadly virus jump[ing] from 5 . . . to 88" between May 12-21, 2020, "with results of [at] least another 50 tests

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13/ See https://www.nj.com/coronavirus/2020/05/coronavirus-has-killed-dozens-in-state-prisons-how-nj-failed-to-stop-it.html

pending."[14/] See N.J.A.C. 19:14-6.6(a) ("[n]otice may be taken of administratively noticeable facts").

Consequently, while I acknowledge that the instant dispute has caused stress for the PBA and its members, the parties' "competing interests are at best in equipoise and, thus, this balancing does not favor the relief sought." Sherman v. Sherman, 330 N.J. Super. 638, 653-654 (Ch. Div. 1999). There appears to be a possibility of irreparable harm – COVID-19 infection – that I cannot accurately evaluate without an undisputed factual record. For the same reason, "in this early stage of case processing, I cannot sufficiently gauge whether the public interest is served or harmed by" requiring unit members to report to work in uniform and prohibiting unit members from changing into/out of their uniforms in the locker rooms; I also cannot effectively weigh the relative hardships. See Passaic Cty.

Accordingly, I find that the PBA has failed to demonstrate irreparable harm, relative hardship or that the public interest will not be injured by an interim relief order.

CONCLUSION

Under these circumstances, I find that the PBA has not sustained the heavy burden required for interim relief under the

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14/ See https://www.trentonian.com/news/covid-19-outbreak-declared-after-88-inmates-infected-at-mercer-county-jail/article_540d6056-9e94-11ea-9650-17bb006764d9.html

Crowe factors and deny the applications for interim relief pursuant to N.J.A.C. 19:14-9.5(b)3. This case will be transferred to the Director of Unfair Practices for further processing.

ORDER

The Policemen's Benevolent Association Local No. 258's application for interim relief is denied.

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

DATED: June 8, 2020
Trenton, New Jersey