I.R. NO. 2023-12

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF ROCKAWAY,

Respondent,

-and- Docket No. CO-2023-130

ROCKAWAY TOWNSHIP PBA
LOCAL 287,

Charging Party.

SYNOPSIS

A Commission Designee grants an interim relief application based on an unfair practice charge filed by Rockaway Township PBA Local 287 (PBA) against Rockaway Township (Township), alleging that the Township violated the Act by violating its duty to negotiate in good faith by unilaterally denying salary step increments for certain officers and creating a chilling effect on negotiations for a successor collective negotiations agreement (CNA).

The designee determined that, based on relevant precedent, PBA demonstrated a reasonable likelihood of success on its legal and factual claims and that irreparable harm will result absent the granting of interim relief. The designee determined that consideration of the relative hardships and the public interest supported granting PBA's application. The designee further determined that the Commission has jurisdiction and can grant interim relief because this is not a mere breach of contact case and there is no material dispute regarding contractual interpretation that needs to be resolved to determine whether the mandatorily negotiable employment term of step increases was unilaterally changed without negotiations, even if the matter can be differed to arbitration. The matter was transferred to the Director of Unfair Practices for further processing.

I.R. NO. 2023-12

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF ROCKAWAY,

Respondent,

-and- Docket No. CO-2023-130

ROCKAWAY TOWNSHIP PBA
LOCAL 287,

Charging Party.

Appearances:

For the Respondent,
Laddey Clark Ryan, attorneys
(Thomas H. Ryan, of counsel)

For the Charging Party,
Limsky Mitolo, attorneys
(Merrick H. Limsky, of counsel)

INTERLOCUTORY DECISION

On February 2, 2023, Rockaway Township PBA Local 287 (charging party or PBA) filed an unfair practice charge, together with an application for interim relief, against Rockaway Township (respondent or Township) alleging that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically subsections 5.4(a)(1), (2), (3), (4), (5), (6), and (7),[1/] when it refused/failed to place some

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or
(continued...)

officers on the next step of the salary guide on those officers' anniversary dates. PBA seeks interim relief in the form of an order restraining the Township from continuing to keep unit members from being placed on the appropriate step of the salary guide and compensated accordingly pursuant to the terms and conditions of employment that were in effect prior to December 2022, and to negotiate in good faith.

In support of its application, PBA filed and served a brief and a certification of Officer Michael Hatzimihalis, President of PBA Local 287 (PBA Cert.) with exhibits of the PBA's Certification of Representative; the 2018-2021 collective negotiations agreement (CNA),[2/] a September 24, 2021, request by

---

1/ (...continued)
interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) 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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

2/ The CNA was originally executed by the prior majority representative. I take administrative notice that PBA was certified as the current majority representative on December 14, 2020, pursuant to the results of a Commission election
(continued...)

PBA to meet to negotiate a successor CNA; emails and correspondence showing the parties attempting to schedule negotiations dates and attempting to reach agreement on various terms; an email from the PBA counsel to Township counsel dated January 6, 2023, indicating that PBA could not agree to the terms in the memorandum of agreement (MOA) drafted by the Township, requesting another meeting, providing notice that some officers had not received their scheduled salary step increases, and requesting correction.

On February 3, 2023, I issued an Order to Show Cause. On February 13, 2023, the Township filed and served its brief in opposition to the interim relief request; an answer with affirmative defenses to the unfair practice charge; a certification of Township counsel Thomas N. Ryan (Township Cert.); and exhibits of the 2018-2021 CNA, the MOA sent by the Township to PBA on December 7, 2022, containing proposed terms regarding the salary step guide, and a letter from Officer Hatzimihalis to Township Business Administrator Patricia Seger dated January 17, 2023, notifying her that a grievance regarding the step increase issue had proceeded to Step 3 of the grievance process. On February 16, 2023, the Township also filed and served

---

2/ (...continued)
(Dkt. No. RO-2021-017).

a letter dated February 14, 2023, showing that PBA had advised the Township that it would be filing for grievance arbitration.

On February 17, 2022, PBA filed and served its reply brief in support of its interim relief request and a supplemental certification of Hatzimihalis (PBA Supp. Cert.) with an exhibit of a roster of the Township police department with each members' date of hire.

Both parties appeared and argued their positions at the oral argument held by teleconference on February 22, 2023.

FINDINGS OF FACT

The Township and PBA are currently in their initial negotiations for a first contract between the parties. (PBA Cert. ¶3). On December 14, 2020, PBA was certified by the Commission in Docket No. RO-2021-017, as the majority representative of all regularly employed uniformed and non-uniformed police officers and sergeants employed by the Township. (PBA Cert. ¶3). The parties have been operating under the terms reflected in the expired 2018-2021 CNA between the Township and the previous representative which expired on December 31, 2021. (PBA Cert. ¶4). The CNA contains a six step salary guide in Article VI. (PBA Cert. Ex. B). Officers move up steps on the salary guide on their anniversary date of hire. (PBA Cert. ¶5; Township Cert. ¶5). Up until December of 2022, officers who had anniversary dates continued to be moved up on the salary guide. (PBA Cert. ¶5).

The salary guide in Article VI of the CNA does not explicitly state that officers move up a step on each anniversary date, nor anywhere else in the CNA, although neither is there any explicit clause denying such annual anniversary movements, limiting them to the CNA's duration, nor otherwise stating that such movements are not to continue after the expiration of the CNA. (PBA Cert. Ex. B). Anniversary increments can be inferred from a sentence in Article VI stating that "There will be an Academy rate for the first six (6) months of employment. The incumbent will then advance to Step 1 and will remain there until his first year anniversary." (PBA Cert. Ex. B). PBA and the Township both acknowledge that, at least during the duration of the CNA, officers were moved up a step on each anniversary. (PBA Cert. ¶5; Township Cert. ¶5). Hatzimihalis certifies that members of the police department have always moved up on the salary guide on the anniversary date of hire regardless of the status of the contract, including after the expiration of the 2018-2021 CNA. (PBA Supp. Cert. ¶4).[3/]

In January 2022, after the expiration of the CNA, the following officers moved up a step on the salary guide on the

---

3/ At oral argument, the Township indicated that it was not disputing that step increases occurred after the expiration of the CNA between January 2022 and November 2022. Neither party could say during oral argument whether step increases occurred after expiration of other prior contracts with the prior representative.

anniversary of their dates of hire: Charles Foster, Ryan Jackson, Andrew Perkins, Chad Reilly, Dave McAndrew, Kevin Miller, Brett Mitchell, and Michael Hafley. (PBA Supp. Cert. ¶6). In July 2022, the following officers moved up a step on the salary guide on the anniversary of their dates of hire: Robert Parks, Jeff Atehortua, and Thomas Walsh. (PBA Supp. Cert. ¶7).

On or about September 24, 2021, months before the expiration of the CNA, the PBA had requested to meet with the Township to negotiate a new CNA. (PBA Cert. ¶6, PBA Supp. Cert. ¶3). On November 30, 2021, the PBA sent a second request to begin negotiations. (PBA Cert. ¶7). The Township provided several dates in December and the PBA responded that it would like to meet on December 22, 2021, after its December 21, 2021 PBA meeting, or as soon thereafter as possible. (PBA Cert. ¶7).

The parties met on December 22, 2021 for its first negotiations meeting. (PBA Cert. ¶7). On April 25, 2022, counsel for the PBA sent a letter to the Township's labor attorney, indicating a desire to continue negotiations and reminding the Township that information was supposed to be forthcoming prior to a second meeting. (PBA Cert. ¶8). On May 9, 2022, PBA counsel forwarded the April 25th letter to the Township's labor attorney again seeking dates for negotiations. (PBA Cert. ¶8). An automatic response was received indicating that he was away until May 9th. (PBA Cert. ¶8). On June 6, 2022, PBA counsel sent an

email to the Township's labor attorney again requesting dates for negotiations as no response had been received to the prior inquiries. (PBA Cert. ¶8). On June 7th counsel responded, via email, that his office would be contacting the Township for dates. (PBA Cert. ¶8). A date was finally set for June 30th for a second meeting. (PBA Cert. ¶8). That meeting occurred without a resolution and the parties agreed to set another date. (PBA Cert. ¶8).

For several months the PBA sought to meet with the Township, however the Township was not responsive. (PBA Cert. ¶9). On October 24, 2022, PBA counsel again emailed the Township's labor attorney to set a meeting. (PBA Cert. ¶9). A meeting was confirmed for November 10, 2022, however an agreement was not reached. (PBA Cert. ¶9).

The Township asked whether the PBA would be willing to change the prescription drug plan. (PBA Cert. ¶9). On November 18, 2022, the PBA, via counsel, advised the Township that it would be willing to accept the change to the prescription plan if the parties agreed on the other terms for a new contract. (PBA Cert. ¶9).

The parties had another meeting on November 28th. (PBA Cert. ¶10). At the end of that meeting the PBA told the Township to draft an MOA with the last terms that the Township offered, and the PBA negotiations committee would review it. (PBA Cert. ¶10).

The draft MOA was forwarded on December 7th with additional information forwarded on December 8th. (PBA Cert. ¶10). The draft MOA contained proposed terms to govern the salary step guide. (Township Cert. ¶9, Ex. B).

The Township attempted multiple times to meet with the PBA during December of 2022 and January of 2023, but was unable to do so because PBA counsel was sick and then later on vacation. (Township Cert. ¶11).

On or about December 22, 2022 and January 7, 2023, several officers had their anniversary dates but did not move up on the salary guide. (PBA Cert. ¶11, Township Cert. ¶12). According to the Township, the reason why these officers did not move up on the salary guide was "so that the status quo was preserved pending negotiations of the step guide." (Township Cert. ¶12). On January 6, 2023, PBA counsel informed Township counsel that the terms of the MOA were not acceptable to PBA and that the Township failed to properly advance members on the step guide. (PBA Cert. ¶12). PBA counsel suggested setting up another meeting and informed the Township that he was leaving on vacation and would be back on January 16. (PBA Cert. ¶12, Ex. G). In January 2023, the PBA filed a grievance on behalf of the members who were not moved up a step on the step guide. (PBA Cert. ¶13, Township Cert. ¶14). On January 17, 2023, Officer Hatzimihalis sent a letter to Business Administrator Seger, notifying her that the grievance

had proceeded to Step 3 of the grievance process. (Township Cert. ¶14, Ex. C).

The failure to move officers up a step on the salary guide on the anniversary of their date of hire in December 2022 was the first time officers were not moved up a step on their anniversary date. (PBA Supp. Cert. ¶8). After the PBA informed the Township, that it would not accept the terms in the MOA that was forwarded by the Township, Business Administrator Seger gave the PBA at least two alternative offers to settle the contract, but also informed the PBA that members would not be moved on the salary guide. (PBA Supp. Cert. ¶9). She stated that the grievance for the failure to move members on the salary guide was tied to the PBA settling the contract. (PBA Supp. Cert. ¶9). One of the reasons the PBA did not agree to the MOA sent by the Township was that the attachment which stated the annual salaries for the officers contained, in the PBA's view, inflated individual annual salaries and inflated total salaries for the department, which the PBA maintains were used to represent an inflated budget for police salaries. (PBA Supp. Cert. ¶10; Township Cert. ¶9, Ex. B).

On February 14, 2023, Hatzimihalis sent a letter to Seger advising that PBA would be filing for grievance arbitration. I take administrative notice that a request for submission of a panel of grievance arbitrators was filed by PBA with the Commission on February 22, 2023.

STANDARD OF REVIEW

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations[4/] and that irreparable harm will occur if the requested relief is not granted; in certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. See Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009) (citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe)); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975). In Little Egg Harbor Tp., the Commission Designee stated:

> [T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited

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

> circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

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

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

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

5.4a(1). Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Public employers are also prohibited from "[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-5.4(a)(5). 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 (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

ANALYSIS

In In re Atlantic Cty., the Appellate Division stated: "To the extent the dynamic status quo doctrine must be changed, it is the Legislature's prerogative to do so. Absent such a step, it remains an item open to negotiation between employer and bargaining unit." 445 N.J. Super. 1 (App. Div. 2016), aff'd on other grounds, 230 N.J. 237 (2017). The Supreme Court stated: "salary step increments [are] a mandatorily negotiable term and condition of employment because [they are] part and parcel to an employee's compensation for any particular year." 230 N.J. at 253. The Supreme Court decided not to reach the issue of the dynamic status quo doctrine in that case because it determined that the parties' CNAs had explicit language that terms in the

CNAs would continue until successor CNAs were negotiated, which included the terms of the salary guides.

In State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020), the hearing examiner determined that because the Supreme Court had declined to address the Appellate Division's holding about the viability of the dynamic status quo doctrine and whether increments should be paid in the absence of CNA language requiring the payment of increments after a CNA expires, he was bound by the Appellate Division's holding that the dynamic status quo doctrine still applied. The Commission decided not to reach the issue as to whether the Appellate Division's decision with respect to the dynamic status quo doctrine was still good law, because the Commission itself determined that the dynamic status quo applied. The Commission emphasized that the Supreme Court had determined that salary step increments were a mandatorily negotiable term and condition of employment, and the Commission applied prior precedent in holding that if a scheduled salary increment is an existing rule governing working conditions, then a unilateral change to that status quo is an unfair practice under the Act. The Commission explained that the status quo during collective negotiations is a continuation of the prevailing terms and conditions of employment established through an expired CNA, past practice, or otherwise, and the

terms and conditions of employment dictate whether the parties have established a salary guide increment system through which employees may advance and whether such advancement is to continue post-contract expiration until the parties have agreed on a successor contract. State of New Jersey (Corrections).

Given these legal precepts, I find that the Association has demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. Both parties have certified that salary step increments continued pursuant to the CNA negotiated by the prior representative, even after PBA was certified as the representative.[5/] The facts show that after the December 2021 expiration date of that CNA, salary step increments continued on officers' anniversary dates until December 2022. Thus, even if there had not been a past practice of continued step increases between prior contracts, the practice after the current post-contract period was to provide step

5/ The Township argues in its brief that there is no past practice regarding post-contract step increases between PBA and the Township because the parties have not negotiated a first contract yet. But the Township also acknowledges that it has paid step increases pursuant to the prior representative's CNA even after PBA became the majority representative. To the extent the Township is arguing that the parties never agreed to have PBA assume the prior CNA, not only does that undermine its argument that this matter should be deferred pursuant to the terms of that CNA, but it would establish that PBA and the Township have had a past practice of step increases despite not having a contract. That is, the step increases would be a non-contractual term and condition of employment whose continuation is not dependent on the duration of a contract.

increases. According to the Township, the reason why these officers did not move up on the salary guide starting in December 2021 was "so that the status quo was preserved pending negotiations of the step guide." (Township Cert. ¶12). But the status quo was the continuation of step increases, and the Township unilaterally changed this. There is no provision in the CNA that stated whether step increases would or would not continue after the contract's duration or giving the Township the right to decide. Pursuant to State of New Jersey (Corrections), such contractual silence and the past practice this post-contract period of providing step increases means that the status quo is the continuation of step increases, and the Township's unilateral cessation of advancing officers on their anniversary dates changed the status quo. Accordingly, I find that PBA has demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.

I also find that PBA has established that it will suffer irreparable harm as a result of the Board's failure to pay salary increments. New Jersey courts and the Commission have held that "employers are barred from 'unilaterally altering mandatory bargaining topics, whether established by expired contract or by past practice, without first bargaining to impasse.'" In re Atlantic Cty., 230 N.J. at 252 (citing Neptune, 144 N.J. at 22); accord Closter Bor., P.E.R.C. No. 2001-75, 27 NJPER 289 (¶32104

2001) (holding that "[u]nilateral changes in [mandatorily negotiable terms and conditions of employment] violate the obligation to negotiate in good faith" and "can shift the balance of power in the collective negotiations process"; holding that "[i]f a change occurs during contract negotiations, the harm is exacerbated"); Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n, 78 N.J. 25, 48 (1978) (finding that the Legislature, through enactment of the Act, "recognized that the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be established through bilateral negotiation").

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

> Indisputably, the amount of an employee's compensation is an important condition of his employment. If a scheduled annual step increment in an employee's salary is an "existing rule governing working conditions," the unilateral denial of that increment would constitute a modification thereof without the negotiation mandated by N.J.S.A. 34:13A-5.3 and would thus violate N.J.S.A. 34:13A-5.4a(5). Such conduct by a public employer would also have the effect of coercing its employees in their exercise of the organizational rights guaranteed them by the Act because of its inherent repudiation of and chilling effect on the exercise of their statutory right to have such issues negotiated on their behalf by their majority representative.
>
> [Galloway, 78 N.J. at 49.]

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

Similarly in Waldwick Bd. of Ed., the Commission Designee stated:

> The refusal to pay increments has been found under Galloway to constitute a unilateral alteration of the status quo and a refusal to negotiate in good faith. Historically, it has been found that such conduct so interferes with the negotiations process that a traditional remedy at the conclusion of the hearing process would not effectively remedy the violations of the Act . . . . In accordance with Galloway, the Commission has consistently held that irreparable harm exists when an employer refuses to apply automatic increments because such action changes the established terms and conditions of employment.
>
> [Waldwick Bd. of Ed., 24 NJPER at 499.]

Accord State of New Jersey, I.R. No. 82-2, 7 NJPER 532 (¶12235 1981) (noting that "the unilateral withholding of the increments by the employer introduced illegal economic coercion into the negotiations process" and "[t]he implication of such action [was] that if the employees agree to the employer's position, they get their increments immediately" but "if they continue to negotiate, they must wait for the increments, if they get them at all"); Union Cty. Reg. High School Bd. of Ed., P.E.R.C. No. 78-27, 4 NJPER 11 (¶4007 1978) (noting that "[p]articular types of

unilateral action relating to terms and conditions of employment, such as the non-payment of salary increments, may so undercut the negotiations process and adversely affect the ability of a majority representative to effectively represent its particular constituency that traditional monetary awards that would be ordered at the conclusion of a case would not effectively remedy a violation of the Act"); Ocean Cty., P.E.R.C. No. 2011-6, 36 NJPER 303 (¶115 2010) ("Money damages cannot remedy the chilling effect on the collective negotiations process").

Here, the parties are in the process of negotiating a successor contract. The PBA has specifically rejected the proposed draft MOA presented by the Township, in large part because of the proposed changes to the salary schedule. The Township's decision to withhold increments is likely putting pressure on the PBA to agree to an MOA that it has already rejected.

Accordingly, I find that the PBA has established that irreparable harm will result unless interim relief is granted.

I also find that the PBA has demonstrated relative hardship and that the public interest will not be injured by an interim relief order. "In balancing the parties' relative hardship, . . . the chilling effect that results from the [employer]'s failure to pay the increments and the irreparable harm that is suffered by the [majority representative] as a result of the

[employer]'s unilateral change in conditions of employment during the course of negotiations outweighs any harm suffered by the [employer] as [a] result of [being required to] maintain[] the status quo by granting increments to unit employees." Cliffside Bd. of Ed., I.R. No. 2019-8, 45 NJPER 138 (¶35 2018). The Appellate Division has held that "the fiscal health of municipalities and tax rates are not within PERC's charge." In re Atlantic Cty., 445 N.J. Super. at 22; see also Robbinsville Twp. Bd. of Educ. v. Washington Twp. Educ. Ass'n, 227 N.J. 192, 204 (2016) (rejecting the holding that "the economic crisis present in [a] school district permitted the [b]oard to forego negotiations" because "[a]llowing 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"); Englewood Bd. of Ed., I.R. No. 2019-9, 45 NJPER 161 (¶42 2018) ("the parties are fully capable of accounting for the payment of salary increments due under the expired CNA, modifying their respective proposals where appropriate, and negotiating a successor agreement thereafter.").

At oral argument and in the Township's certification, though not in the argument section of its brief, the Township argued that there was a bad faith attempt by PBA to delay negotiations to bootstrap members up on the step guide and that this has

created a chilling effect on the Township, which thought the CNA would be ratified by the end of 2022. This argument is not sufficiently developed, and the Township provides no facts regarding this motive and cites no cases for the proposition that this would allow the Township to engage in self-help by withholding increments. PBA counsel had explained to the Township that he had been sick since the Township had provided its draft MOA, and he advised the Township then that the PBA rejected the draft and that officers had been denied increments. Although PBA counsel took a vacation, the Township had already withheld increments. The relevant delay period then was only before the vacation, and this period was shorter than other periods earlier in the negotiations cycle where the Township was not responsive to PBA. If the parties had filed for interest arbitration, the process would have taken even longer, but the parties would have been required to maintain the status quo throughout. Even if PBA could be found to have delayed negotiations in bad faith, it is up to the Township to seek relief through its own unfair practice charge, and it is possible that relief would be limited to an order to negotiate in good faith, not an order for PBA to accept the terms of the draft MOA or granting the Township the right to withhold increments.

At oral argument, the Township also argued that it would be difficult to "claw back" salaries and step movement. This

argument is also not sufficiently developed. The Township did not request leave for supplemental briefing. To the extent the argument is that an interim relief order granting step increases would make it harder for the Township to get the PBA to agree to the Township's previous salary schedule proposal in the draft MOA, "the parties are fully capable of accounting for the payment of salary increments due under the expired CNA, modifying their respective proposals where appropriate, and negotiating a successor agreement thereafter." Englewood Bd. of Ed. If the Township would have preferred not having to deal with the dynamic status quo of continuing step increases, the Township could have sought clear language during negotiations for the last CNA or at interest arbitration specifying that step increases would not continue after contract expiration. Atlantic Cty. The Township has also not cited any authority that would prevent it from being able to return the officers back to the steps they are currently frozen on in the event that the Commission or an arbitrator in a final decision determines that the officers were not entitled to step increases.

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

The Township makes an argument, apparently separate from its argument that the Crowe standard has not been met, that because

PBA has filed a grievance over the step increase issue – indeed, merely because the issue is arbitrable – that this matter is not properly before the Commission. I disagree.

In State of New Jersey (Human Services), the Director had dismissed an (a)(5) claim where there was no allegation of a change in past practice or repudiation. The bulk of the Commission's decision addressed the case law up to that point regarding unilateral changes in mandatorily negotiable terms and conditions of employment. The Commission stated that it may find that where a contract has been breached, the breach has also constituted a statutorily prohibited unilateral change in terms and conditions of employment without prior negotiations. The Commission also stated:

> . . . [W]e give the following examples of situations in which we would entertain unfair practice proceedings under section 5.4(a)(5). A specific claim that an employer has repudiated an established term and condition of employment . . . illustrated by an employer's decision to abrogate a contractual clause based on its belief that the clause is outside the scope of negotiations . . . [or] depending upon the circumstances of a particular case, by a contract clause that is so clear that an inference of bad faith arises from a refusal to honor it or by factual allegations indicating that the employer has changed the parties' past and consistent practice in administering a disputed clause. In addition, we will entertain charges in which specific indicia of bad faith over and above a mere breach of contract are alleged. We will also entertain charges which indicate that the policies of our Act, rather than a mere breach of

> contract claim, may be at stake. See Galloway Twp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978).
>
> [State of New Jersey (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984) (some citations omitted)]

The Commission went on to note that the cited Galloway decision established that the unilateral alteration of a prevailing term and condition of employment during the course of collective negotiations constitutes a refusal to negotiate in good faith, and that the statutory policy of upholding the status quo during the delicate period of successor contract negotiations warrants unfair practice proceedings on claims that an employer has unilaterally altered a term and condition of employment set in the expired predecessor contract. State of New Jersey (Human Services) at Footnote 11. Indeed, Galloway was about the employer's unilateral cessation of salary step increments. That is, State of New Jersey (Human Services) specifically acknowledges that such a dispute is within our jurisdiction, even if the step issue also implicates a contractual provision within an arbitrator's jurisdiction as well.

The Commission clarified State of New Jersey (Human Services)'s holding in Willingboro Bd. of Ed. by stating:

> N.J.S.A. 34:13A-5.3 provides, in part:
>
> > Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the

> majority representative before they are established.
>
> . . . A public employer may violate these obligations in two separate fashions: (1) implementing a new rule or changing an old rule concerning a term and condition of employment without first negotiating in good faith to impasse or having a managerial prerogative or contractual defense authorizing the change, and (2) repudiating a term and condition of employment it had agreed would remain in effect throughout a contract's life . . . .
>
> . . . The Complaint in Human Services simply did not allege either a unilateral change in a previously operative term and condition of employment or a bad faith repudiation of a negotiated commitment. Instead, that case involved merely a good faith dispute over ambiguous contractual terms allegedly affording employees a right the employer had not previously recognized or afforded.
>
> [Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985)]

The Commission further noted:

> While Human Services favors recourse to negotiated grievance procedures, recourse would not have resolved this dispute . . . . [T]he Association has alleged a statutory claim -- a unilateral reduction in working hours -- which may be meritorious and vindicated independent of any contractual claim to guaranteed work hours. If the Association does not have a contractual right to insist upon maintaining work hours and if the Board does not have a contractual right to insist upon changing them, then section 5.3 would require negotiations absent a managerial prerogative.
>
> [Willingboro Bd. of Ed. at Footnote 5]

In City of South Amboy, the Commission stated: "[W]e are not divested of our unfair practice jurisdiction simply because the City's defense is based upon an assertion that the contract permits the unilateral action or the unfair practice, if proved, may also constitute a breach of contract." City of South Amboy, P.E.R.C. No. 85-16, 10 NJPER 511 (¶15234 1984). The Commission further explained by providing an analogy: the inclusion of contractual clauses prohibiting anti-union discrimination and recognizing an employee right to have a representative at a disciplinary investigatory interview does not transform similar established statutory rights under (a)(3) and (a)(1) into "mere breach of contract claims," and neither does the inclusion of a right not to have terms unilaterally changed transform (a)(5) rights into mere breach of contract claims. City of South Amboy at Footnote 6.

The Commission has also explained the difference between dismissal and deferral:

> [D]eferral is the preferred mechanism when a charge essentially alleges a violation of subsection 5.4(a)(5) interrelated with a breach of contract . . . . Although deferral is preferred, we have the authority to resolve contract claims to determine whether an unfair practice has occurred . . . . There is a fundamental difference between cases which are dismissed under Human Services and those deferred to arbitration under [Brookdale Comm. College, P.E.R.C. 83-131, 9 NJPER 266 (¶14122 1983)]. The former cases do not involve unfair practices because the breach, even if proved, would not establish a

> unilateral alteration of a term and condition of employment. The latter cases do involve potential unfair practices, but can still be heard by an arbitrator for the reasons set forth by us in Brookdale.
>
> [Pennsauken Tp., P.E.R.C. No. 88-53, 14 NJPER 61 (¶19020 1987)]

Deferral cannot be compelled when an employer will not agree to waive any contractual arbitrability defenses it may have. Pemberton Tp., P.E.R.C. No. 99-90, 25 NJPER 174 (¶30080 1999); Brookdale.

In the instant matter, the facts show that step increases were provided after the expiration of the CNA and only stopped in December 2022 after the Township provided its draft MOA with proposed salary schedule changes. Thus, even to the extent that a contractual clause is implicated, this is not a "mere breach of contract case," but one also involving an alleged unilateral change to the existing mandatorily negotiable term of step increases. The parties do not dispute that step increases on anniversary dates have already occurred. There is no provision in the CNA that limits step increases to the contract's duration. See Perth Amboy Bd. of Ed., P.E.R.C. No. 2021-9, 47 NJPER 193 (¶42 2020) (finding "that the CNA's general duration clause does not establish the parties' intent to freeze the salary guides' usual annual progression during negotiations for a successor CNA", nor did the employer's "interpretation require a factual hearing as the effect of such general duration clauses."). There

is also no provision that gives the Township the contractual right to modify the term of step increases. There is also no material dispute regarding contractual interpretation that needs to be resolved to determine whether the mandatorily negotiable employment term of step increases was unilaterally changed without negotiations. Thus, as stated earlier, I find that PBA has demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.

The CNA does not state that arbitration is the exclusive remedy, though regardless, we are not divested of jurisdiction regarding the alleged failure to negotiate in good faith claim in this matter. It is for the Director of Unfair Practices to determine whether deferral to arbitration is appropriate to resolve all of the issues raised.

I note that because the CNA is silent with respect to post-expiration step increases, an arbitrator might determine that there is no contractual clause that was violated, but this would not resolve whether our Act was violated by a unilateral change to employment terms reflected in the parties' past practice. See Willingboro Bd. of Ed. at Footnote 5. Even if an arbitrator were to find a breach of contract, the arbitrator might not address whether the contract was repudiated, whereas we would. See State of New Jersey (Human Services) (noting that we would entertain unfair practice charges regarding a specific claim that "an

employer has repudiated an established term and condition of employment . . . illustrated by . . . factual allegations indicating that the employer has changed the parties' past and consistent practice in administering a disputed clause.").

The chilling effect created on the present negotiations might also not be addressed by the arbitrator, whereas we might review it as an independent basis for a statutory violation. See Galloway, 78 N.J. at 49 ("If a scheduled annual step increment . . . is an existing rule governing working conditions, the unilateral denial of that increment would . . . violate N.J.S.A. 34:13A-5.4(a)(5). Such conduct by a public employer would also have the effect of coercing its employees in their exercise of the organizational rights guaranteed them by the Act because of its inherent repudiation of and chilling effect on the exercise of their statutory right to have such issues negotiated on their behalf by their majority representative.")(emphasis added).

Even if the Director defers the matter to the arbitrator, interim relief can still be granted for the duration of the arbitration proceedings. Union Tp., P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002) ("Even though we may defer an allegation of a unilateral change to binding arbitration, we may still order interim relief in appropriate cases pending completion of the arbitration process."), denying recon. I.R. No. 2002-7, 28 NJPER 86 (¶33031 2001); Hamilton Tp., I.R. No. 2021-21, 47 NJPER 345

(¶82 2021); Belvidere Bd. of Ed., I.R. No. 2019-19, 45 NJPER 337 (¶90 2019)

Under these circumstances, I find that PBA has sustained the heavy burden required for interim relief under the Crowe factors and grant the application for interim relief pursuant to N.J.A.C. 19:14-9.5(a). This case will be transferred to the Director of Unfair Practices for further processing.[6/]

6/ My grant of interim relief is based on my finding that PBA has a substantial likelihood of prevailing under subsections (a)(5) and derivatively, (a)(1). As such, it is unnecessary for me to determine whether the other subsections of N.J.S.A. 34:13A-5.4 listed in PBA's charge are applicable.

ORDER

The Rockaway Township PBA Local 287's application for interim relief is granted. Rockaway Township shall immediately, retroactive to December 2021, place all eligible unit employees on the appropriate step reflected in the salary schedule in the 2018-2021 CNA based on the passage of their anniversary dates and pay any additional compensation in accordance with the rate of pay they would have received had they been placed on that step on their anniversary dates. Rockaway Township is restrained from denying eligible unit employees step increases on their anniversary dates. Rockaway Township is also ordered to negotiate in good faith toward a successor CNA and on the issue of the salary guide.

/s/ Bryan C. Markward
Bryan C. Markward
Commission Designee

DATED: April 4, 2023
Trenton, New Jersey