I.R. NO. 2019-7

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF IRVINGTON,

Respondent,

-and- Docket No. CO-2019-078

IRVINGTON FIREFIGHTERS ASSOCIATION,
I.A.F.F. LOCAL 305,

Charging Party.

## SYNOPSIS

A Commission Designee grants in part, and denies in part, an application for interim relief filed by IAFF against the Township alleging that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1), (2), (3), and (5), by unilaterally refusing and/or failing to implement salary increments; refusing and/or failing to implement a 2% salary increase; refusing and/or failing to implement longevity increments; directing unit members to sign an Employee Medical Records (HIPAA) Release form authorizing the release of the employee's personal medical information to the Township upon returning to full duty from a personal injury or illness; and changing the work schedule from a 24/72 schedule to a 10/14 schedule.

With respect to the economic issues, the Designee finds that IAFF has demonstrated a substantial likelihood of prevailing in a final Commission decision, irreparable harm to the negotiations process, relative hardship, and that the public interest will not be injured by an interim relief order. Accordingly, the Designee grants this aspect of the application and orders the Township to immediately pay salary increments, the 2% salary increase, and longevity increments. With respect to the HIPAA Release, the Designee finds that IAFF has established irreparable harm given that disclosure of personal medical information while the underlying unfair practice charge is pending cannot be remedied by a final Commission decision; the Designee also finds that IAFF has demonstrated a substantial likelihood of prevailing in a final Commission decision, relative hardship, and that the public interest will not be injured by an interim relief order. Accordingly, the Designee grants this aspect of the application and restrains the Township from unilaterally implementing the HIPAA Release form. With respect to the work schedule, the Designee finds that IAFF has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations given that there are material disputed facts. Accordingly, the Designee denies this aspect of the application. 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, Florio, Perrucci, Steinhardt and Cappelli, LLC, attorneys (Lester E. Taylor, III, of counsel)

For the Charging Party, Law Offices of Craig S. Gumpel LLC, attorneys (Craig S. Gumpel, of counsel)

INTERLOCUTORY DECISION

On September 20, 2018, Irvington Firefighters Association, I.A.F.F. Local 305 (IAFF) filed an unfair practice charge against Township of Irvington (Township) alleging that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically subsections 5.4a(1), (2), (3), and (5),[1/] by unilaterally:

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

> -refusing and/or failing to implement salary step raises (increments);
>
> -refusing and/or failing to implement a 2% salary increase and pay each member as well as refusing and/or failing to increase each step of the salary guide by 2%;
>
> -refusing and/or failing to implement a longevity step increase for certain unit members;
>
> -changing the work schedule from a 24/72 schedule to a 10/14 schedule effective October 15, 2018;
>
> -directing unit members to sign an Employee Medical Records (HIPAA) Release form authorizing the release of the employee's personal medical information to the Township upon returning to full duty from a personal injury or illness; and
>
> -refusing and/or failing to provide information regarding the application of SOP 2018-16 to unit members.[2/]

IAFF's unfair practice charge was accompanied by an application for interim relief requesting that the Township be ordered to cease and desist from unilaterally implementing the actions

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1/ (...continued)
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"; and "(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."

2/ During oral argument, IAFF conceded that this aspect of the charge had been resolved by the parties' submissions. Accordingly, I will not address it further.

specified above pending final resolution of the underlying unfair practice charge.

PROCEDURAL HISTORY

On September 24, 2018, I signed an Order to Show Cause directing the Township to file any opposition by October 1; IAFF to file any reply by October 4; and set October 9 as the return date for oral argument. On October 3, the Township requested an extension. Despite IAFF's opposition, I granted an extension and directed the Township to file any opposition by October 5; IAFF to file any reply by October 9; and set October 10 as the new return date for oral argument. On October 5, the Township filed opposition to the application for interim relief. On October 9, IAFF filed a reply. On October 10, counsel engaged in oral argument during a telephone conference call.

After oral argument, I advised counsel that the record was closed for purposes of the interim relief application; directed the parties to meet and confer by/before October 11 in an attempt to resolve this matter; and requested an update by October 12. On October 11, the parties advised that they were unable to resolve this matter. On October 12, I invited the parties to submit supplemental certifications; after receiving same, I issued an interlocutory order consistent with this decision.

In support of the application for interim relief, IAFF submitted a brief, exhibits, and the certification of its

President, Alex Lima (Lima). In opposition, the Township submitted a brief, exhibit, and the certification of its Public Safety Director, Tracy Bowers (Bowers). IAFF also submitted a reply brief, exhibit, and the reply certification of Lima. In response to my request, IAFF submitted the certification of its Vice President, Edwin Velasco (Velasco); the Township submitted the certification of Deputy Public Safety Director, John Brown (Brown).

## FINDINGS OF FACT

IAFF represents all uniformed firefighters permanently employed by the Township excluding the chief, deputy chiefs, captains, lieutenants, and non-uniformed employees as specified in the recognition clause (Article I) of the parties' collective negotiations agreement (CNA). The Township and IAFF are parties to an expired CNA in effect from July 1, 2007 through June 30, 2012 and successor memoranda of agreement (MOA) in effect from July 1, 2012 through June 30, 2016 and July 1, 2016 through June 30, 2020. The grievance procedure ends in binding arbitration.

Article IV of the parties' expired CNA, entitled "Work Week and Overtime," provides in pertinent part:

> 6. Members assigned to the Suppression Division shall report for normal duty no later than 0715 hours (15 minute line up time) on each day of scheduled duty. Tours of duty will begin at 0730 hours and conclude 24 hours later at 0730 hours of the following calendar day. Notwithstanding re-employment, recall, swaps, special assignments and other

applicable duty obligations, a seventy-two (72) hour period of time off from duty shall be provided between each 24 hour work period.

* * *

19. QUESTIONS/DISPUTES: Any questions or disputes which may arise relative to the 24-72 hour work schedule shall be brought before the Chief of the Department for evaluation and resolution of same. No final disposition of any issue shall be made without prior notification and discussion with respective Labor Units.

20. LABOR'S RIGHTS: By majority consensus, labor maintains the right to withdrawal from the 24-72 work schedule and return to the 10-14 work schedule provided that both collective bargaining agents (firefighters' bargaining unit and officers' bargaining unit) demonstrate in writing that the majority consensus in both units have voted in favor of returning to the 10-14. In such case, the work schedule change to the 10-14 will be made by management as soon as reasonably possible. Collective bargaining units agree that once a schedule change is made by this process, subsequent requests by labor to change or alter the prevailing work schedule cannot be made for at least 3 full years (36 consecutive months) from the time a new schedule is implemented.

21. MANAGEMENT'S RIGHTS: Nothing herein restricts or diminishes managerial prerogatives including but not limited to as prescribed in the sections entitled "Managements Rights and Responsibilities" of the respective collective bargaining agreements. Further, management shall maintain the right to reconsider a return to the 10-14 work schedule pursuant to a show of reasonable cause (unsafe, adverse, or otherwise significantly unfavorable impact) demonstrating harm to the necessary order, control and stability of the organization.

> In such case, item #15 "Questions/Disputes" of this agreement may be invoked.[3/]

Article VII of the parties' expired CNA, entitled "Leave of Absence/Sick Leave," provides in pertinent part:

> 3. Sick Leave:
> (a) The Town may grant a leave of absence with pay to any member of the Fire Department who shall become injured, ill or disabled from any cause so as to be physically unfit for duty during the period of such disability and physical unfitness or duty, where such injury, illness or disability shall become evidenced by the Certificate of a physician designated by the Department to examine such Firemen or the Fireman's personal physician in accordance with Departmental General Order No. 87-9 and such Departmental General Orders and Regulations promulgated from time to time by the Chief and Director.

Article VIII of the parties' expired CNA, entitled "Wages," provides in pertinent part:

> 1. The following salary increases (percentage) shall apply to be earned on and after the effective dates listed below, but not to be paid [sic] until no later than February 1, 2008 when all increases will be paid retroactively to their respective effective dates:
> -Effective October 1, 2007 - 4.0% Increase
>
> 2. The following salary increases (percentage) shall apply to be earned and paid on the effective dates listed below:
> -Effective July 1, 2008 - 3.0% across the board increases;
> -Effective January 1, 2009 - 1.0% across the board increases;

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3/ The parties' agree that the reference to "item #15" in Article IV, Section 21 of the CNA is a typo and that the correct reference is "item #19."

> -Effective July 1, 2009 - 3.0% across the board increases;
> -Effective January 1, 2010 - 1.0% across the board increases;
> -Effective July 1, 2010 - 3.0% across the board increases;
> -Effective January 1, 2011 - 1.0% across the board increases;
> -Effective July 1, 2011 -3.5% across the board increases;
>
> * * *
>
> 6. All Firefighters hired after January 1, 2005 shall be subject to a seven (7) step salary guide. One step will be added between step two (2) and three (3) and another step will be added after step five (5). See chart below outlining the salary amounts EFFECTIVE October 1, 2007 for Firefighters hired prior to January 1, 2005 and those hired after.

Article IX of the parties' expired CNA, entitled "Longevity," provides:

> All Firemen shall be paid, in accordance with Municipal Order No. M.C. 2760, or such other ordinance as may be adopted to reflect the salary increase provided by ARTICLE VIII hereof, in addition to base pay scale, as payment for years of faithful service rendered, an amount equal to the following:
> (1) Over five (5) years' service but less than ten (10) years' service, an amount equal to two percent (2%) of the yearly base pay.
> (2) Over ten (10) years' service but less than fifteen (15) years' service, an amount equal to four (4%) percent of the yearly base pay.
> (3) Over fifteen (15) years' service but less than twenty (20) years' service, an amount equal to six (6%) percent of the yearly base pay.
> (4) Over twenty (20) years' service but less than twenty-five (25) years' service, an amount equal to eight (8%) percent of the yearly base pay.

> (5) Over twenty-four (24) years' service an amount equal to ten (10%) percent of the yearly base pay.

Article XXII of the parties' expired CNA, entitled "Physical Examination," provides:

> Physical, mental or other examinations required by the Town shall be complied with by all employees, provided, however, the Town shall bear all charges for such examinations. The FIREFIGHTERS/LOCAL 305 may have the employee examined by a physician of its choice at the employee's expense, if the employee disagrees with the finding of the Town's physician.

The "Salaries" section of the parties' 2012-2016 MOA provides:

> -7/1/12 - increment payments when due; salary guide freeze
> -7/1/13 - increment payments when due; salary guide freeze
> -7/1/14 - increment payments when due; 2.5% increase to top step of the salary guide
> -7/1/15 - increment payments when due; 2.0% increase to top step of the salary guide

The "Longevity" section of the parties' 2012-2016 MOA provides:

> 1. Eliminate longevity benefit for employees hired after 7/1/13.
> 2. Convert longevity benefit from a percentage of base pay to a flat dollar amount to be based [on] the current contractual percentage of the employee's 7/1/12 base pay. Revise Article IX to read as follows:

| Years' Service | Former % | Firefighters |
|---|---|---|
| 5+ | 2% | 1691 |
| 10+ | 4% | 3053 |
| 15+ | 6% | 4579 |
| 20+ | 8% | 6105 |
| 24+ | 10% | 7631 |

> 3. In any event, no employee's current longevity pay shall be reduced as a result of this agreement.

Section 3 of the parties' 2016-2020 MOA, entitled "Wages," provides in pertinent part:

> a. Salary Increase: The following salary increased percentages shall apply to be earned and paid on the effective dates listed below:
> -Effective July 1, 2016 - 2.0% increase to each step of the salary guide
> -Effective July 1, 2017 – 2.0% increase to each step of the salary guide
> -Effective July 1, 2018 – 2.0% increase to each step of the salary guide
> -Effective July 1, 2019 - 2.0% increase to each step of the salary guide
>
> * * *
>
> c. Additional Step to the Salary Guide: All Firefighters hired after July 1, 2016 shall be subject to an eight (8) step salary guide. One (1) step shall be added between steps four (4) and five (5).
> d. Senior Firefighter Step: Effective January 1, 2017, Senior Firefighters shall receive two thousand five hundred ($2,500.00) dollars in base pay in the twenty first (21st) year and each year thereafter.

In or about June 2018, the Township requested that IAFF agree to reopen the parties' CNA with respect to a proposed 14-

step salary schedule for new hires that would reduce starting salary and cap maximum salary. The Township also proposed modifying salary increases for existing unit members during the CNA's final two years. The parties met on June 13, July 17, and July 25, 2018 regarding the proposal. On July 25, IAFF rejected the Township's proposal.

Township firefighters and fire officers have worked a 24/72 schedule since approximately 2001. Bowers certifies that during the same period that the 14-step salary schedule proposal was under consideration, the Township "approached [IAFF] to discuss proposed Special Order 2018-32 which changes the work schedule from 24/72 to 10/14 effective September 15, 2018." According to Bowers, the parties met on July 13, 2018 and "[a] copy of the draft Special Order 2018-32 was personally handed to all attendees and reviewed from beginning to end." IAFF objected to the work schedule change.

On July 31, 2018, the Township issued Special Order 2018-32 – which changed the work schedule from 24/72 to 10/14 - together with Memo 2018-36 - which ordered the demotion of 26 fire officers and the layoff of 10 firefighters effective January 1, 2019. Bowers certifies that Special Order 2018-32 "describes in detail the basis for the change in work schedule." According to Bowers,

> Special Order 2018-32 was issued to address an increase in costs, efficiency and safety.

> The factors influencing the cost for the fire department include: minimum staffing requirements, work schedules, staffing inflexibility and significant increases in non-productive time (i.e. weekend and holiday sick leave, expanded [vacation] use during the weekend and summer months etc.). These factors, among others, have led to an increase in overtime costs, which has inhibited the Fire Department's ability to maintain service levels. . . .[T]he Township satisfied the reasonable cause standard, albeit not defined, set forth in [Article IV,] Section 21 [of the parties' CNA]. The adverse and unfavorable impact of the 24/72 schedule is the Fire Department's diminished ability to maintain service levels. The Fire Department's diminished ability to maintain service levels serves as direct evidence of a harm to the necessary order, control and stability of the Fire Department.

Lima certifies that the Township's claims regarding diminished service levels are "conclusory" and that its claims regarding reduced overtime costs are "speculative." According to Lima,

> [S]ince 2000, the Fire Department has had a 17% reduction in total fire personnel. The Fire Department went from 125 members to 104 members. There has been 67 firefighter personnel since February 2018 following the promotion of 13 firefighters to fire officer. More importantly, there has been a 21% reduction in firefighters. The Union's bargaining unit has been reduced from 85 firefighters in 2011 to 67 firefighters currently. When there is insufficient manpower to provide services to the community, manpower will need to be backfilled through overtime. The decisions regarding the hiring of personnel, and the decision to increase manpower through the use of overtime, are within the Township's authority. The Township cannot claim that

> the 24/72 schedule diminishes its ability to maintain service levels, while at the same time being the cause of the shortage of manpower. At the meetings with the Union in June 2018 to discuss the new hire 14 step salary guide, the [Township] told the Union that it was looking to hire 30 new firefighters. Now, the Township claims that it intends to move forward with the demotion of 26 fire officers and layoff of 10 firefighters effective January 1, 2019. Notwithstanding this statement, in September 2018 [the Township] hired 5 firefighters who are currently in the [F]ire [A]cademy. There is nothing . . . to indicate how these layoffs will impact the 10/14 work schedule.

Bowers certifies that after Special Order 2018-32 was issued, IAFF representatives objected to the work schedule change and sought to discuss a voluntary resolution of the issue. According to Bowers, IAFF did not make a specific proposal but raised "a general concern . . . with respect to the Township's minimum manning requirements, i.e., there was consideration from reducing the requirement from 19-16 persons per shift." Bowers certifies that although the parties failed to resolve the issue, the Township considered the minimum staffing level concerns and ultimately amended Special Order 2018-32 to change the implementation date of the 10/14 schedule to October 15, 2018. Lima certifies that "upon information and belief," fire officers will remain on a 24/72 work schedule.

On or about June 1, 2018, certain IAFF unit members were entitled to salary increments in accordance with the parties' CNA and MOAs. The Township failed to provide same. On June 10, IAFF

filed a grievance related to the Township's failure to provide salary increments. On July 18, IAFF filed a related demand for arbitration (AR-2019-043).

On or about July 1, 2018, IAFF unit members were entitled to a 2% salary increase in accordance with the parties' CNA and MOAs. The Township filed to provide same. On July 24, IAFF filed a grievance related to the Township's failure to provide the 2% salary increase. On September 7, IAFF filed a related demand for arbitration (AR-2019-135). Lima certifies that fire officers were also entitled to a 2% salary increase and, "upon information and belief," received their 2% salary increase on July 1, 2018.

On or about August 1, 2018, certain IAFF unit members were entitled to longevity increments in accordance with the parties' CNA and MOAs. The Township failed to provide same. On August 23, IAFF filed a grievance related to the Township's failure to provide longevity increments. On October 1, IAFF filed a related demand for arbitration (AR-2019-175). Lima certifies that certain fire officers were also entitled to longevity increments and, "upon information and belief," timely received same.

On or about May 31, 2018, the Township began requiring firefighters who were returning to full duty from a personal injury or illness to sign a HIPAA Release form that authorizes the release of the employee's personal information to the

Township in order to allegedly document personal illnesses or injuries for future work-related claims regarding the same illness or injury. Lima certifies that in letters dated June 4 and July 11, 2018, IAFF objected to the Township's unilateral implementation of the HIPAA Release form.

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

LEGAL ARGUMENTS

IAFF argues that it has satisfied the standard for interim relief. Specifically, IAFF maintains that it has a substantial likelihood of prevailing in a final Commission decision based upon the following arguments:

> -the decision to modify the work schedule from a 24/72 hour schedule to a 10/14 schedule constitutes a unilateral change in terms and conditions of employment and a repudiation of the collective negotiations agreement;
>
> -failing and/or refusing to implement salary step increases, longevity increases, and across-the-board salary increases constitutes a unilateral change in the terms and conditions of employment and a repudiation of the collective negotiations agreement;
>
> -implementation of a HIPAA Release form authorizing the release of an employee's personal medical information to the Township constitutes a unilateral change in the terms and conditions of employment; and
>
> -the record is replete with irrefutable evidence of retaliatory action by the

Township related to IAFF's protected activity.

IAFF asserts that unit members will suffer irreparable harm if interim relief is not granted because previously scheduled leave time and family obligations will be disrupted (e.g., vacations, childcare arrangements). IAFF also argues that repudiation of the parties' collective negotiations agreement mid-contract constitutes irreparable harm to the negotiations process by upsetting the balance required for good faith negotiations. Finally, IAFF contends that the relative hardship and public interest weigh in its favor because the Township will suffer no hardship in maintaining the status quo with respect to the 24/72 work schedule and other existing contractual terms and conditions of employment. Conversely, IAFF maintains that unit members' lives will be severely impacted if the 24/72 work schedule and other terms and conditions of employment are changed unilaterally. IAFF also argues that the public interest is furthered by adhering to the tenets expressed in the Act which require parties to negotiate prior to implementing changes to mandatorily negotiable terms and conditions of employment.

In opposition, the Township argues that IAFF has not satisfied the standard for interim relief. Specifically, the Township maintains that IAFF will not suffer irreparable harm as a result of the failure to implement salary step increases, a 2% salary increase, or longevity step increases because monetary

damages are an insufficient basis to establish irreparable harm. Further, the Township asserts that IAFF has failed to demonstrate how/why implementation of the HIPAA Release form will result in immediate or irreparable harm to unit members. The Township asserts that based upon the parties' CNA, it has a managerial prerogative to reconsider changing the 24/72 work schedule to a 10/14 work schedule and has no obligation to reach an agreement with IAFF. The Township contends that it satisfied the reasonable cause standard set forth in Article IV, Section 21 of the parties' CNA based upon Bowers' certification that the 24/72 work schedule has created a diminished ability to maintain service levels, efficiency, and safety which adversely impacts the order, control, and stability of the Fire Department.

In reply, IAFF reiterates that the Township's actions are retaliatory and directly related to IAFF's rejection of the Township's request to reopen the parties' CNA mid-contract. IAFF maintains that the Township's basis for changing the work schedule fails to meet the strict standards established in the parties' CNA. IAFF also asserts that requiring unit members' to sign a HIPAA Release form implicates privacy concerns.

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

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

> except in the most clear and compelling circumstances.

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.

N.J.S.A. 34:13A-33, entitled "Terms, conditions of employment under expired agreements," provides:

> Notwithstanding the expiration of a collective negotiations agreement, an impasse in negotiations, an exhaustion of the commission's impasse procedures, or the utilization or completion of the procedures required by this act, and notwithstanding any law or regulation to the contrary, no public employer, its representatives, or its agents shall unilaterally impose, modify, amend, delete or alter any terms and conditions of employment as set forth in the expired or expiring collective negotiations agreement, or unilaterally impose, modify, amend, delete, or alter any other negotiable terms and conditions of employment, without specific agreement of the majority representative.

Public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). "It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an

employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification." State of New Jersey (Corrections), H.E. 2014-9, 40 NJPER 534 (¶173 2014) (citing New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978)). The Commission has held that a violation of another unfair practice provision derivatively violates subsection 5.4a(1). Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Public employers are prohibited from "[d]ominating or interfering with the formation, existence or administration of any employee organization." N.J.S.A. 34:13-5.4a(2). "[D]omination exists when the organization is directed by the employer, rather than by employees . . . [while] [i]nterference involves less severe conduct than domination but goes beyond merely interfering with an employee's section 5.3 rights; it must be aimed at the employee organization as an entity." Atlantic Comm. Coll., P.E.R.C. No. 87-33, 12 NJPER 764 (¶17291 1986). The Commission has held that the type of activity prohibited by 5.4a(2) must be pervasive employer control or manipulation of the employee organization itself. See North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980).

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).

New Jersey courts and the Commission have held that "employers are barred from 'unilaterally altering mandatory bargaining topics, whether established by expired contract or by past practice, without first bargaining to impasse.'" In re Atlantic Cty., 230 N.J. 237, 252 (2017) (citing Bd. of Educ. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16, 22 (1996)); accord Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n, 78 N.J. 25, 48 (1978) (finding that the Legislature, through enactment of the Act, "recognized that the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be established through bilateral negotiation"; finding that unilaterally changing terms and conditions of employment by a public employer "ha[s] the effect of coercing its employees in their exercise of the organizational rights guaranteed them by the Act because of its inherent repudiation of and chilling effect on the exercise of their statutory right to have such issues negotiated on their behalf by

their majority representative"); Closter Bor., P.E.R.C. No. 2001-75, 27 NJPER 289 (¶32104 2001) (holding that "[u]nilateral changes in [mandatorily negotiable terms and conditions of employment] violate the obligation to negotiate in good faith" and "can shift the balance of power in the collective negotiations process"; holding that "[i]f a change occurs during contract negotiations, the harm is exacerbated").

ANALYSIS

**Economic Issues**

Although the Commission does not typically assert unfair practice jurisdiction over contract disputes under State of New Jersey (Dep't of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), an exception to that policy is where a claim of repudiation is asserted (i.e., the employer has acted in bad faith by repudiating a contract clause that is so clear on its face that an inference of bad faith arises from a refusal to honor it). See, e.g., Middlesex Bd. of Ed., H.E. No. 93-26, 19 NJPER 279 (¶24143 1993), adopted P.E.R.C. No. 94-31, 19 NJPER 544 (¶24257 1993) (holding that the union was not required to reopen negotiations mid-contract regarding mandatorily negotiable subjects that were clearly outlined in the parties' agreement and that the board's unilateral reduction of the work year and salary constituted a mid-contract repudiation); Ocean Cty., I.R. No. 2010-20, 36 NJPER 180 (¶65 2010) and Ocean Cty. Sheriff's Office,

I.R. 2010-23, 36 NJPER 191 (¶72 2010), recon. den. P.E.R.C. No. 2011-6, 36 NJPER 303 (¶115 2010) (granting interim relief based upon a determination that failing to pay contractually-negotiated salary increments based upon an unambiguous provision in the parties' expired CNA would irreparably harm the negotiations process); Egg Harbor Tp., I.R. No. 2011-14, 36 NJPER 336 (¶131 2010) (granting interim relief based upon a determination that a mid-contract repudiation of the parties' contractually-negotiated salary increase would irreparably harm the negotiations process).

I find that IAFF has demonstrated a substantial likelihood of success on its legal and factual allegations. The parties' CNA and MOAs are clear – certain IAFF unit members were entitled to salary increments on or about June 1, 2018 (CNA Article VIII; Salaries Section of 2012-2016 MOA; Section 3 of 2016-2020 MOA); IAFF unit members were entitled to a 2% salary increase on or about July 1, 2018 (CNA Article VIII; Salaries Section of 2012-2016 MOA; Section 3 of 2016-2020 MOA); and certain IAFF unit members were entitled to longevity increments on or about August 1, 2018 (CNA Article IX; Longevity Section of 2012-2016 MOA). The Township's failure to timely provide contractually-negotiated compensation appears to constitute a mid-contract repudiation of the parties' CNA and MOAs. Egg Harbor Tp.; Ocean Cty.; Ocean Cty. Sheriff's Office.

I also find that IAFF has established irreparable harm. "Ordinarily, where the final remedy is primarily money, the Commission is reluctant to grant interim relief." Egg Harbor Tp. (citing Maplewood Tp., I.R. No. 2009-26, 35 NJPER 184 (¶70 2009); Union Cty., I.R. No. 99-15, 25 NJPER 192 (¶30088 1999)). However, there are two types of harm present in this case - harm to IAFF unit members who have not received contractually-negotiated compensation and harm to the negotiations process. Even if IAFF has failed to sufficiently demonstrate harm to unit members that cannot be rectified in a final Commission decision, I find that IAFF has demonstrated irreparable harm to the negotiations process. See Galloway Tp. Bd. of Ed., 78 N.J. at 48. The Township's mid-contract repudiation "has upset the balance required for good faith negotiations and has chilled the negotiations process at a time when cooperation between labor and management is imperative to address [existing] circumstances." Egg Harbor Tp. Moreover, the Township has provided no justification for its action nor has it cited any contractual defense; the Township simply argues that monetary damages are an insufficient basis to establish irreparable harm. Accordingly, and in light of the other issues raised in this interim relief application, I find that allowing the Township to renege on its contractual commitments will have an adverse impact on the negotiations process and irreparably harm the parties' ability to

negotiate in good faith. "Monetary damages will not satisfy the damage to the process." Egg Harbor Tp.; accord Ocean Cty.; Ocean Cty. Sheriff's Office.

I also find that IAFF has demonstrated relative hardship and that the public interest will not be injured by an interim relief order. The public interest will be furthered "by requiring the Township to fulfill its contractual commitment[s] under these circumstances" because "[t]he ability of the Township to negotiate [any] concessions with [IAFF] or any of its other unions is damaged by" repudiating terms and conditions that it has already negotiated. Egg Harbor Tp. Moreover, the Township has failed to specify any hardship related to the payment of contractually-negotiated compensation. Accordingly, enforcing the parties' CNA and MOAs "preserves the Township's ability to approach its unions for . . . concessions" and provides IAFF unit members with negotiated compensation; this outweighs any unspecified cost to the Township.

Under these circumstances, I find that IAFF has sustained the heavy burden required for interim relief under the Crowe factors and grant these aspects of the application for interim relief pursuant to N.J.A.C. 19:14-9.5(a).

**HIPAA Release**

The Commission has consistently held that a public employer has a managerial prerogative to use reasonable means to verify

employee illness or disability. Atlantic Cty. Sheriff's Office, P.E.R.C. No. 2017-26, 43 NJPER 202 (¶60 2016). This includes the right to require that employees taking sick leave produce doctors' notes; it also includes the right to determine the number of absences that will trigger a doctor's note requirement and the time frame in which absences will be counted. Id. However, what the disciplinary penalties will be for abusing sick leave and the cost of obtaining verification are mandatorily negotiable and the application of a sick leave verification policy may be challenged through contractual grievance procedures. Id.

The Commission has held that employees may contest the application of a sick leave policy if it was allegedly conducted for improper reasons or constituted an egregious and unjustifiable violation of an employee's privacy. See Piscataway Tp. Bd. of Ed., P.E.R.C. No. 82-64, 8 NJPER 95 (¶13039 1982); Dumont Bor., P.E.R.C. No. 2003-7, 28 NJPER 337 (¶33118 2002); Belmar Bor., P.E.R.C. No. 2003-63, 29 NJPER 104 (¶32 2003). In this context, "[e]mployees have a strong privacy interest in being protected against inquiries that could lead to the disclosure of illnesses or disabilities unrelated to sick leave abuse." City of Trenton, P.E.R.C. No. 2005-20, 30 NJPER 413 (¶135 2004). "[Q]uestions about an employee's recreational activities and [certain medical] care implicate employee privacy

concerns" and "[m]ere assertions that . . . additional questions are needed are not sufficient to overcome . . . employees' interest in negotiating about their privacy concerns." City of Newark, P.E.R.C. No. 2009-41, 35 NJPER 41 (¶17 2009).

I find that IAFF has demonstrated a substantial likelihood of success on its legal and factual allegations, irreparable harm, relative hardship, and that the public interest will not be injured by an interim relief order. The parties' CNA clearly permits the Township to require that IAFF unit members produce a doctor's note (CNA Article VII) and/or undergo a physical, mental or other examination (CNA Article XXII) related to personal injury or illness. However, it is undisputed that the Township unilaterally imposed a new requirement that firefighters returning from personal injury or illness sign a HIPAA Release form authorizing the release of the employee's personal medical information in order to allegedly document personal injuries or illnesses for future work-related claims regarding the same illness or injury. 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.

This appears to be "an unusual requirement . . . imposed in an unusual manner" rather than "a routine application of a

verification policy." Belmar Bor. The Township has not asserted that existing policies, procedures, or forms are inadequate to document unit members' personal injuries or illnesses nor has it demonstrated any justification for such an intrusive requirement. City of Newark. Moreover, the Township has not provided any assurances that employee privacy concerns will be addressed or that personal medical information will remain confidential. City of Trenton. The disclosure of personal medical information (obtained via required execution of a HIPAA Release form) while the underlying unfair practice charge is pending cannot be remedied by a final Commission decision.

Under these circumstances, I find that IAFF has sustained the heavy burden required for interim relief under the Crowe factors and grant this aspect of the application for interim relief pursuant to N.J.A.C. 19:14-9.5(a).

**Work Schedule**

Police and fire work schedules are generally mandatorily negotiable unless the employer demonstrates a particularized need to preserve or change a work schedule to protect a governmental policy determination. See Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982); Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78 (1981); Township of Mt. Laurel v. Mt. Laurel Police Officers Ass'n, 215 N.J. Super. 108 (App. Div. 1987). However, "even where an employer has a managerial prerogative or

contractual right to take a personnel action without first engaging in negotiations, it still may not do so for illegal reasons." Chester Bor., I.R. No. 2002-8, 28 NJPER 162 (¶33058 2002), recon. den. P.E.R.C. No. 2002-59, 28 NJPER 220 (¶33076 2002).

I find that IAFF has failed to demonstrate a substantial likelihood of success on its legal and factual allegations. The parties' contractually-negotiated work schedule (CNA Article IV, Section 6) gives IAFF the right to withdrawal from the 24/72 work schedule under certain circumstances (CNA Article IV, Section 20); gives the Township the right to reconsider a return to the 10/14 work schedule under certain circumstances (CNA Article IV, Section 21); and establishes a dispute resolution mechanism whereby work schedule issues are raised before the Chief of the Department and resolved after prior notification and discussion with IAFF (CNA Article IV, Section 19). IAFF claims that the Township failed to demonstrate "reasonable cause" and that "[a]bsent meeting this burden, . . . is prohibited under the CNA from modifying the 24/72 work schedule." See Township's Br. at 14. Conversely, the Township asserts that it satisfied its burden under the contract and that "[c]ontinuing with the 24/72 schedule will impair the [Fire Department's] order, control and stability." See Bowers Certification at ¶¶15-26; see also

Special Order 2018-32; Memo 2018-36. Accordingly, it appears that material facts are in dispute.

Moreover, given the parties' existing contractual provisions and countervailing assertions, it is unclear whether this aspect of the underlying unfair practice charge will ultimately be processed, deferred to arbitration, or otherwise. See, e.g., Hillsborough Tp. Bd. of Ed., P.E.R.C. No. 2005-1, 30 NJPER 293 (¶101 2004) ("[b]inding arbitration is the preferred mechanism for resolving a dispute when an unfair practice charge essentially alleges a violation of subsection 5.4a(5) interrelated with a breach of contract"); Camden County and Camden County Prosecutor, P.E.R.C. No. 2012-42, 38 NJPER 289 (¶102 2012) (holding that when the facts of a charge clearly show that the dispute between the parties revolves around the interpretation of a contract clause and whether or not there has been a breach of that clause, the issue "must be resolved through negotiated grievance procedures"); Woodland Park Bd. of Ed., D.U.P. No. 2014-12, 40 NJPER 429 (¶147 2014) (deferring an unfair practice charge to the parties' negotiated grievance procedure where the employee organization had not alleged facts demonstrating a connection between the employer's obligation to negotiate in good faith under the Act and the employer's alleged breach of a contract provision); N.J.S.A. 34:13A-5.3 ("[g]rievance and disciplinary review procedures established by

agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement").

Turning to the retaliation claim, I also find that IAFF has failed to demonstrate a substantial likelihood of success on its 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 employee's motives." Little Falls Tp., I.R. No. 2006-9, 31 NJPER 333 (¶134 2005), recon. den. P.E.R.C. No. 2006-41, 31 NJPER 394 (¶155 2005); accord Bergen Cty. Sheriff's Office, I.R. No. 2019-6, __ NJPER __ (¶__ 2019). IAFF has not provided any direct, uncontroverted evidence that the Township's decision to change the work schedule was motivated by anti-union animus (i.e., IAFF's refusal to reopen the parties' CNA). Compare Lima Reply Certification at ¶18 (asserting that Brown told Velasco that the 24/72 work schedule would not be changed if IAFF agreed to reopen the contract to implement the 14 step salary guide for new hires) with Velasco Certification at ¶¶4-7 (certifying that Brown inquired whether IAFF would support the mayor by attending his fund-raising ball if the Township took the 10/14 work schedule change and demotions off the table; and that Brown told him that the administration was upset about IAFF pursuing a grievance regarding senior firefighter pay) and Brown

Certification at ¶¶3-5 (admitting that he had conversations with Velasco and other IAFF members; denying that he engaged in any unethical behavior; certifying that he spoke with Velasco about IAFF's preference for maintaining the 24/72 work schedule and suggested that IAFF schedule a meeting to work something out with the mayor and administration). 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., 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 IAFF's refusal to reopen the parties' CNA), disparity with the fire officers' schedule (vis-a-vis apparently maintaining a 24/72 work schedule), and totality of the circumstances (vis-a-vis refusing to provide contractually-negotiated compensation, unilaterally requiring HIPAA Release forms) are suspicious, the Township has

asserted a colorable claim that its reasons for returning to the 10/14 work schedule are the following:

> -"to address an increase in costs, efficiency and safety";
>
> -that factors influencing the decision include "minimum staffing requirements, work schedule, staffing inflexibility and significant increases in non-productive time";
>
> -that "[t]he adverse and unfavorable impact of the 24/72 schedule is the Fire Department's diminished ability to maintain service levels"; and
>
> -that "diminished ability to maintain service levels serves as direct evidence of a harm to the necessary order, control, and stability of the Fire Department."

See Bowers Certification at ¶¶15-26; see also Special Order 2018-32; Memo 2018-36. Accordingly, it appears that material facts are in dispute. Whether the Township'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).

Under these circumstances, I find that IAFF has not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element under the Crowe factors,[5/] and deny this aspect of the application for interim relief pursuant to N.J.A.C. 19:14-

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

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

ORDER

The Irvington Firefighters Association, I.A.F.F. Local 305's application for interim relief is denied with respect to the work schedule change; the application is granted as set forth below:

-the Township immediately pay the 2018 salary increments that were due on/about June 1, 2018;

-the Township immediately pay the 2% salary increases that were due on/about July 1, 2018;

-the Township immediately pay the 2018 longevity increments that were due on/about August 1, 2018;

-the Township is restrained from unilaterally implementing an Employee Medical Records (HIPAA) Release form.

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

DATED: October 16, 2018
Trenton, New Jersey