I.R. NO. 2020-1

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWN OF BOONTON,

Respondent,

-and- Docket No. CO-2019-262

PBA LOCAL 212,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by the PBA against the Town alleging that the Town violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1), (2), (3), (4), (5), and (6), when it repudiated a memorandum of agreement for a successor collective negotiations agreement that was signed by the Town Administrator and the PBA President on March 14, 2019 and ratified during closed session of a regular meeting of the Mayor and Board of Aldermen on March 18, 2019.

The Designee finds that the PBA has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. The Designee also finds that the PBA failed to demonstrate irreparable harm, relative hardship or that the public interest will not be injured by an interim relief order. Given that an exploratory conference has already occurred and the statutorily-mandated timeline for interest arbitration proceedings, the Designee recommends that the Director of Unfair Practices issue a complaint forthwith.

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PBA LOCAL 212,

Charging Party.

Appearances:

For the Respondent, Cleary, Giacobbe, Alfieri & Jacobs, LLC, attorneys (Matthew J. Giacobbe, of counsel; Adam S. Abramson-Schneider, on the brief)

For the Charging Party, Alterman & Associates, LLC, attorneys (Stuart J. Alterman, of counsel and on the brief; Timothy J. Prol, of counsel)

INTERLOCUTORY DECISION

On April 16 and May 29, 2019, PBA Local 212 (PBA) filed an unfair practice charge and amended charge against the Town of Boonton (Town). The charge alleges that on or about April 1, 2019, the Town violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1), (2), (3), (4), (5) and (6),[1/] when it

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of (continued...)

repudiated a memorandum of agreement (MOA) for a successor collective negotiations agreement (CNA) that was signed by the Town Administrator and PBA President on March 14, 2019 and ratified during closed session of a regular meeting of the Mayor and Board of Aldermen on March 18, 2019.

On June 10, 2019, the PBA filed an application for interim relief seeking the following:

> -a suspension of interest arbitration while the underlying unfair practice charge is being processed;
>
> -a requirement that the Town implement the terms of the parties' March 14, 2019 MOA.

PROCEDURAL HISTORY

On June 10, 2019, I signed an Order to Show Cause directing the Town to file any opposition by June 17; the PBA to file any reply by June 21; and set June 26 as the return date for oral argument. On June 26, counsel engaged in oral argument during a telephone conference call. During the call, pursuant to N.J.A.C.

1/ (...continued)
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."

19:14-9.3(c),[2/] I granted the PBA's request to submit two additional certifications and provided the Town with an opportunity to respond.

In support of the application for interim relief, the PBA submitted a brief, exhibits, and the following certifications: PBA President Karl Mangino (Mangino); PBA member Captain Stephen Jones (Jones); PBA delegate Anthony Cosentino (Cosentino); PBA Treasurer/Acting Vice President Leo Colombo (Colombo); PBA member Anthony Limandri (Limandri). In opposition, the Town submitted a brief, exhibits, and the certification of its Administrator, Neil Henry (Henry). The PBA also filed a reply brief and the certifications of Raphael J. Caprio (Caprio), Ph.D. and Kim Cuspilich (Cuspilich). The Town also filed the second certification of Henry and the certification of Jon Rheinhardt (Rheinhardt), Managing Partner of the Phoenix Consulting Group, LLC.

FINDINGS OF FACT

The PBA represents police officers employed by the Town. The Town and the PBA are parties to an expired CNA in effect from January 1, 2016 through December 31, 2018.[3/] The parties began

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2/ N.J.A.C. 19:14-9.3(c) grants the Commission Chair or Designee with the authority to permit additional briefing in an interim relief proceeding.

3/ Henry certifies that "[s]ince its expiration on December 31, 2018, the prior Agreement, effective January 1, 2016 through (continued...)

negotiations for a successor agreement in July 2018.

Neil Henry (Henry), the Town's Administrator, certifies that "[he] was present at every negotiation session on behalf of the Town and Mangino . . . was present at every negotiation session on behalf of the PBA." According to Henry, additional Town representatives began attending negotiation sessions after December 31, 2018 including "Mayor Matthew DiLauri (DiLauri), Alderman Ward 4 Mike Cardillo (Cardillo), Alderman Ward 2 Bobby Tullock (Tullock) and Alderman Ward 1 Michael Eoga (Eoga)." However, Henry certifies that "Town CFO, Yolanda Dykes (Dykes), was not present at and did not assist with negotiations sessions, nor did she help with 'data crunching' between meetings." Similarly, Henry certifies that "the Assistant to the Administrator and Assistant to the Tax Assessor, Kimberly Cuspilich (Cuspilich), was not present at and did not assist with negotiation sessions, nor did she help with 'number crunching' between meetings"; "Cuspilich's sole role in connection with negotiations was to input data into the county comparative chart, which was previously created and provided to her." According to Henry, neither Dykes nor Cuspilich "assisted with creating the

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3/ (...continued)
December 31, 2018, has continued to remain in full force and effect in accordance with law." According to Henry, "PBA members have been afforded step movement on the salary guide and continue to receive all benefits pursuant to the expired Agreement."

PBA negotiation proposals."[4/5/] Henry certifies that "[t]he Town

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4/ Cuspilich certifies that "a spreadsheet was created which analyzed the compensation rates for the Town['s] Police Officers and compared those rates with other Departments throughout Morris County, New Jersey." According to Cuspilich, "[i]nitially [she] was tasked with compiling the spreadsheet, however, compilation of the initial spreadsheet was outsourced." Subsequently, Cuspilich certifies that "[she] was tasked with making notations and updating inputs into the spreadsheet, often receiving communication from Aldermen." According to Cuspilich, "[she] provided extensive data analysis and compiled amendments, additions, and updates to the [spread]sheet, sending snapshots of the results of the changes to those involved in negotiating and drafting the MOA" and this involvement "lasted for more than three (3) weeks during which time the negotiations were ongoing." Cuspilich certifies that "the data and numbers contained in the spreadsheet which [she] compiled and analyzed were used and incorporated into the MOA which was mutually signed by the Town and PBA Local 212."

5/ In Henry's second certification, he specifically responds to Cuspilich's certification. Henry certifies that "Cuspilich's sole role in this process was data crunching, as in inputting additional data into an already created chart" and that "[she] did not, and is not qualified to, number crunch in any way." Henry certifies that "to the best of [his] knowledge, Cuspilich did not often receive communication from the Aldermen, and did not make notations on the comparative chart" and "any input the Aldermen had was communicated directly to [Henry] and [he] would, in turn, forward the necessary information to Cuspilich." Henry certifies that Cuspilich "did not perform any, let alone 'extensive,' data analysis" and "did not send information regarding the comparative chart directly to the Aldermen." Henry certifies "although Cuspilich input new and updated data into the comparative chart, subsequently the chart required significant overhaul, as the majority of the information contained therein was inaccurate." Henry certifies that "none of the information contained in the comparative chart was turned into language reflected in [the March 14, 2019 MOA]" and "nothing contained in the comparative chart ever went into any of the Memorand[a] of Agreement." Henry certifies that "shortly before the Board rejected [the March 14, 2019 MOA], the Town stopped using

(continued...)

retained Jon Rheinhardt (Rheinhardt) and Matthew Laracy to generate and evaluate data, including cost-out figures, in connection with the PBA negotiations."

Karl Mangino (Mangino), the PBA's President, certifies that "[he] [has] participated in all negotiations leading up to the signing of the MOA signed on March 14, 2019." According to Mangino, "[p]resent and/or assisting with the negotiation sessions which led to the MOA which was ultimately signed were . . . DiLauri, Cardillo, Tullock, Eoga, Henry, Dykes, [and] Cuspilich." However, Mangino certifies that "Dykes and Cuspilich were not in the negotiations but helped with data crunching between meetings"; "[they] assisted with creating the final negotiation and compiled a budget which passed to meet the financial needs under the MOA which was ultimately signed."

On March 14, 2019, Henry and Mangino executed a memorandum of agreement (MOA) that provides in pertinent part:

> The following are the employer's proposals for modifications, deletions and/or additions to the collective negotiations agreement between the parties. These items represent the Town's MOA 3 with PBA Local 212. The Town reserves the right to submit additional proposals, counter-proposals and/or modifications of its proposals during negotiations. The representatives of the employer are empowered to make proposals, accept and reject the employee

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5/ (...continued)
the comparative chart [because] it could be manipulated to display specific results and was largely inaccurate."

> representative's proposals, make counter-proposals, and to reach a tentative settlement with the employee representative, pending final acceptance and approval by the governing body. The representatives of the employer expressly have no power to bind the governing body without its express acceptance and approval. All items tentatively agreed upon are subject to final agreement on the entire contract. In some cases, the employer's proposal is merely a clarification of an existing right or practice, and this proposal should not be considered an admission that the employer does not already possess such a right or that the practice does not exist. Unless expressly proposed by the employer, any item of the current agreement between the parties shall remain as in the prior agreement. The employer also reserves the right to participate in the construction of salary guides and to approve the salary guides prior to final ratification.
>
> [emphasis added.]

Henry certifies that "[he] signed [the March 14, 2019 MOA] without the authority to bind the Town" because "any signed Memorandum of Agreement still needed to be presented, approved and ratified by the Mayor and the Board of Aldermen." According to Henry, "[i]t was always [his] understanding . . . that final approval of the Memorandum of Agreement would be based on the completion of a full cost out, a final review by the Town's Labor Counsel and finally by ratification of the Mayor and Board." Henry also certifies that "Mangino drafted a proposed collective negotiations agreement reflecting the terms of [the March 14, 2019 MOA] and provided same to [him] for his review" but "[t]he

proposed Agreement remained on [Henry's] desk and was never presented to the Mayor or the Board."

In the PBA's verified complaint, which was certified by Mangino, the PBA certifies that "[the March 14, 2019 MOA] was arrived at after significant and substantial negotiations and represented the PBA's acceptance of the Town's terms of the contract" given that "the PBA conceded on several points in order to arrive at an agreement with the Town and meet the Town's demands, all demonstrated and mutually accepted by both parties."

On March 18, 2019, a regular meeting of the Town's Mayor and Board of Aldermen (collectively, Governing Body) was held. No action was taken during open session with respect to the parties' March 14, 2019 MOA. However, as reflected in the meeting minutes and audio recording, the Governing Body moved into closed session to discuss "litigation" and "contract negotiations."[6/]

Mangino certifies that "[he] was present at the Town Meeting of the Mayor and Board of Aldermen on March 18, 2019." According to Mangino, "[a]t the . . . [m]eeting . . . the Mayor and Board of Aldermen discussed the MOA which had been signed." Mangino certifies that "[a]fter emerging from a session which was televised on a monitor, thereby enabling the public to view the

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6/ See Town's March 18, 2019 Regular Meeting Minutes at https://www.boonton.org/AgendaCenter and https://www.boonton.org/AgendaCenter/ViewFile/Minutes/_03182019-215

activities taking place in the meeting, the Mayor and Board indicated to [Mangino] and other members of PBA Local 212 that the Mayor and Board had reviewed, voted on, and approved the MOA signed on March 14, 2019" and that "the CBA would be signed accordingly." In the PBA's verified complaint, which was certified by Mangino, the PBA certifies that "[the March 14, 2019 MOA] was . . . ratified in closed session on live video feed . . . during a session on March 18, 2019" and "[t]he Mayor and some Aldermen congratulated PBA members on a job well done."

Henry certifies that "the Mayor and the Board discussed [the March 14, 2019 MOA] in closed executive session" on March 18, 2019 and asserts that "the Board is unable to ratify any agreement . . . in closed session pursuant to the Open Public Meetings Act." According to Henry, "[the March 14, 2019 MOA] was not agreed to, nor ratified, by the Mayor and the Board on March 18, 2019 and [was] still required to be costed out by Rheinhardt and reviewed by Labor Counsel." Henry certifies that "[t]he Board and Mayor directed [him] to share [the March 14, 2019 MOA] with Rheinhardt for a full cost-out analysis and with Labor Counsel for review." According to Henry, "[f]ollowing the March 18, 2019 meeting, the Town did not tell the PBA that they ratified and/or approved [the March 14, 2019 MOA], nor did the Town assure the PBA that [the March 14, 2019 MOA] had been approved and the Agreement would be signed accordingly." Rather,

Henry certifies that "[the March 14, 2019 MOA] still needed to be costed out by Rheinhardt and reviewed by Labor Counsel."

Henry also certifies that "PBA members were in attendance at the public part of the Town meeting, including PBA President Mangino[,] . . . [and] [w]hen the Board and Mayor passed a Resolution to go into closed executive session, the members of the PBA left the meeting room and closed executive session commenced." According to Henry, "Town Board meetings are never broadcast to the public, nor does anyone film the meeting to facilitate same" and "[t]he closed session portion of the Board meeting on March 18, 2018 was not broadcast []or filmed for the public's viewing." Henry certifies that "[t]here are no video cameras that broadcast the meetings to the public during open or closed executive session" and "[t]he only camera in [the] room is a security camera that does not have audio and is not accessible to the public."

Henry certifies that "[i]n the days following the March 18, 2019 meeting, [he] requested to speak with Mangino regarding [the March 14, 2019 MOA] . . . [and] inquired as to whether the PBA would consider reducing the percentage of holiday pay contained in [the March 14, 2019 MOA]." According to Henry, "Mangino rejected this inquiry, claiming that the Town would be 'pivoting' off the [the March 14, 2019 MOA]" and "[u]pon review with the Board, [Henry] inquired as to the PBA's flexibility in connection

with the holiday pay provision . . . so that a possible reduction could be worked into a final cost-out." Henry certifies that he "was surprised to learn that Mangino believed [the March 14, 2019 MOA] was ratified, as [Henry] assumed that Mangino shared [his] understanding that final approval of [the March 14, 2019 MOA] would be based on the completion of a full cost out, a final review by the Town's Labor Counsel and ratification by the Mayor and Board." According to Henry, "[t]he cost-out figures in connection with [the March 14, 2019 MOA] were generated by Rheinhardt and the Town realized there was no way to budget for same and ultimately would have a crippling effect on the Town's budget and taxpayers."

On April 1, 2019, a regular meeting of the Governing Body was held. As reflected in the meeting minutes and audio recording, the Governing Body moved into closed session to discuss "contract negotiations."[7/] Thereafter, the Governing Body returned to open session and voted to approve "A Resolution . . . Rejecting the Memorandum of Agreement With Boonton PBA Local No. 212" (Resolution 19-121), which provides in pertinent part:

> WHEREAS, the collective negotiations agreement between the Town of Boonton

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7/ See Town's April 1, 2019 Regular Meeting Minutes at https://www.boonton.org/AgendaCenter and https://www.boonton.org/AgendaCenter/ViewFile/Minutes/_04012019-216

> (hereinafter referred to as "Town") and Boonton PBA Local No. 212 (hereinafter referred to as "PBA") expired on December 31, 2018; and
>
> WHEREAS, the Town Administrator and the PBA executed a tentative agreement dated March 14, 2019 which is subject to the ratification by both the Town of Boonton and the PBA; and
>
> WHEREAS, the Mayor and Board of Aldermen have reviewed the tentative agreement; and
>
> NOW THEREFORE, BE IT RESOLVED by the Mayor and Board of Aldermen of the Town of Boonton, County of Morris and State of New Jersey hereby reject the tentative agreement; and
>
> BE IT FURTHER RESOLVED the Mayor and Board of Aldermen hereby direct the Town Administrator and Labor Counsel to recommence negotiations with the PBA for terms to a successor collective negotiations agreement.

As indicated within Resolution 19-121, the vote tally was 7-0 (with one absence) in favor of rejecting the March 14, 2019 MOA.

Mangino certifies that "[a]t the April 1, 2019 meeting of the Mayor and Board of Aldermen, the Town repudiated their representations that they were going to sign, and that they had voted on March 18, 2019 to execute the CBA memorializing the MOA signed on March 14, 2019." According to Mangino, "[he] and [his] family are experiencing a tremendous hardship, both in terms of working without a contract, as well as the emotional and

psychological fallout which the stresses of this situation are causing."[8/]

Henry certifies that "[u]pon review of [the March 14, 2019 MOA] by Labor Counsel and Rheinhardt's cost-out analysis, the Board voted in public session on April 1, 2019 to reject [the March 14, 2019 MOA]" and "[a] Resolution was adopted by the Mayor and Board on April 1, 2019 rejecting same." According to Henry, "[r]atification of any agreement between the Town and the PBA has consistently been done via Resolution of the Board adopted at a public meeting in compliance with the Open Public Meetings Act."[9/] Henry certifies that "[t]he Board never ratified [the March 14, 2019 MOA] and therefore could not have 'repudiated a ratified' Memorandum of Agreement." Rather, Henry certifies that "the Board expressly rejected same on April 1, 2019 and directed Labor Counsel to continue negotiations."

On April 3, 2019, PBA's counsel wrote a letter to the Town Administrator that provides in pertinent part:

> Please be advised that this Firm represents the Boonton Chapter #212 New Jersey State

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8/ PBA members Captain Stephen Jones, Anthony Cosentino, Leo Colombo, and Anthony LiMandri all certify that they "have participated in negotiations leading up to the signing of the Memorandum of Agreement (MOA) signed on March 14, 2019 and [are] familiar with the facts of this matter"; they also certify that they "have read the certification of PBA President Mangino and concur and agree with same."

9/ Henry attached Town Resolutions 11-92, 12-238, and 16-114 in support of his statement.

> Policemen's Benevolent Association in reference to their contract with the Town of Boonton which expired December 31, 2018.
>
> As such, I would like to coordinate dates with the Town to meet to negotiate a successor collective bargaining agreement between the parties. I understand that you were attempting to meet with the Local today. Unfortunately I am not available so this meeting will need to be rescheduled.
>
> * * *
>
> I look forward to working with you in securing a successor collective bargaining agreement amicable to both parties.

Henry certifies that "[t]he Town and the PBA met and engaged in negotiations for a successor agreement on April 11, 2019."

On April 16, 2019, the PBA filed the underlying unfair practice charge.

On May 8, 2019, the Town filed a petition to initiate compulsory interest arbitration (IA-2019-021). The interest arbitrator scheduled a hearing for July 16, 17, and 22. An award is due by August 19.

On May 29, 2019, the PBA amended the underlying unfair practice charge.

On June 6, 2019, a Commission staff agent held an exploratory conference.

On June 7, 2019, the PBA filed the instant application for interim relief.

Henry certifies that "[t]he Town CFO and Tax Assessor did not compile a budget to meet the financial needs under [the March

14, 2019 MOA]." Rather, Henry certifies that "[the March 14, 2019 MOA] was rejected and the budget was never created in response to the negotiation of [the March 14, 2019 MOA]"; "[i]n fact, the Town budget for Fiscal Year 2019 was not introduced until April 15, 2016, two (2) weeks after the Board voted to reject [the March 14, 2019 MOA]." According to Henry, "[t]he Town budget for Fiscal Year 2019 was subsequently passed on May 20, 2019."

Raphael J. Caprio (Caprio), Ph.D. certifies that "[he] [has] reviewed the Town's most current and historical financial documents, budgets, and reports regarding the Town's ability to pay the provisions incorporated into the budget as a result of the negotiated agreement between PBA Local 212 and the Town." Caprio goes on to certify the following:

> 3. The Town is able to fund a competitive Collective Negotiated Agreement as financials are solid and predictable.
>
> 4. The cost in the first year of the previously agreed upon MOA #3 is approximately $37,000 between the Town's position and that of the PBA. There is no challenge whatsoever in funding the PBA Local #212 proposal.
>
> 5. The Town has budgeted $2,695,600 for police salaries in 2019. On the other hand, Boonton's public statement on its website describing contract negotiations lists 2019 salaries at $2,707,566. However $352,826 of this amount is the officer share of outside duty.

6. In addition to the amount paid to officers, the Town retains Miscellaneous Revenue of a comparable amount. Thus net appropriation of Boonton resources are $2,354,741, including estimate[d] overtime, leaving more than $340,000 to fund incremental costs of the requested PBA contract.

7. The Town has under-budgeted PILOT payments in 2019 (see 2019 Budget, Sheet 10, PILOT revenue of $61,000). The Avalon development (350 units) had its formal ribbon cutting last week. With an average rental of between $2,000 and $2,300, the amount budgeted covers PILOTS for approximately 50 units for 6 months ($2,000 x 12 months [)] of which 10% would be a PILOT payment, an amount sufficient for about 50 units. While not all units will likely be occupied through December 2019, PILOT payments are likely to exceed the amount budgeted by 200 percent, generating yet an additional $120,000 of revenue.

8. In addition to clear and more than sufficient resources to fund the PBA proposal, we are able to note that the Town is in excellent financial condition.

9. The Fund Balance has increased from $2.575 million in 2015 to just under $3 million in 2019 while increasing the amount used as current revenue from the Fund Balance increased from $2.2 million to more than $2.5 million. This represents an increase in resources of more than $7 million.

10. The average annual Property Tax increase for municipal purposes has been low, averaging only 1.05% - from a low of minus 1.06% (2014 to 2015) to 1.61% (2018 to 2019).

11. Boonton has decreased its debt level by more than 5.5% and is not constrained by excessive debt payments.

> 12. The Budget which was adopted by the Town on April 15, 2019 met the financial needs of the MOA memorializing the agreement between PBA Local 212 and the Town of Boonton.

Jon Rheinhardt (Rheinhardt), Managing Partner of the Phoenix Consulting Group, LLC, certifies that "[he] was retained by the Town to act as the Town's Budget and Financial Consultant" and "[has] reviewed the Certification . . . of Caprio." Rheinhardt goes on to certify the following:

> -Caprio does not have any knowledge nor is he able to ascertain information to make a statement that the Town took concrete actions to fund MOA #3.
>
> -Caprio's assertion in paragraph 3 of his certification is unclear and overly broad. It is impossible to determine what Caprio considers a "competitive Collective Negotiated Agreement" and what makes financials "solid and predictable."
>
> -It is unclear what Caprio is referring to as the "Town's position and that of the PBA" in paragraph 4 [of his certification]. Notwithstanding, Caprio's assertion that the cost of the first year of MOA #3 is $37,000 is completely erroneous as it does not account for the non-salary related increased, which will cost the Town a significant amount of money. Additionally, Caprio's statement that "there is no challenge whatsoever in funding the PBA Local #212 proposal" should be disregarded. It remains unclear what [Caprio] is referring to as "the PBA Local #212 proposal" and provides no supporting documentation to show that the Town would have no challenge funding same.
>
> -Paragraph 6 of Caprio's certification is unclear, overly broad and not supported by any formulation of costs. First it is unclear what the alleged "Miscellaneous

Revenue" is a "comparable amount" to. Notwithstanding, the numbers referenced therein do not match the revenue provided for in the Town's budget. Further, it is unclear how Caprio calculated the "net appropriation of Boonton resources" or how he concluded that $340,000 would be left to fund incremental costs of the PBA contract. Due to the declaratory nature of his erroneous statements, and the failure to provide documentation in support of same, such should be disregarded in its entirety.

-Even after the opening of Avalon, as displayed by Caprio's certification, it is impossible to predict how many units, if any, are occupied or will be occupied, the amount of time they will be occupied in 2019 and how much those occupied units are renting for.

-[I]n paragraph 7 of his certification, Caprio alleges that the Town is to receive 10% Annual Service Charge under the PILOT agreement. However, the PILOT agreement expressly sets the Annual Service Charge at 9%. Additionally, various RAB bonds associated with the Avalon project are to be paid from the Town's Annual Service Charge, which will further deteriorate the funds to be received by the Town. Further, the money received under the PILOT agreement has been dedicated to the Town's Debt and Capital Management Plan. The money received under the PILOT agreement was intended to serve the whole community, not a select group thereof. Adversely, Caprio is essentially requesting that the Town take unguaranteed revenue, which was intended to benefit and serve the whole community, and instead allocate it to funding the exorbitant cost of MOA #3.

-Paragraph 8 of Caprio's certification is simply a declaratory statement with no analysis, backup or information in support thereof. Further, it is unclear where and what "sufficient resources" Caprio is referring to that can fund "the PBA proposal."

-In paragraph 9 of his certification, Caprio evaluates a period of time that conveniently portrays the Town to be in a better position with regard to its Fund Balance. However, in actuality, the Town's Fund Balance approximately fifteen (15) years ago, in 2004, stood at $2.99 million dollars, whereas in 2018 the Town's Fund Balance was $2.89 million dollars, constituting a slight decrease over the past fifteen (15) years. To further illustrate the Town's position, the Fund Balance decreased from $3.27 million dollars in 2017 to $2.89 million dollars in 2018, a decrease in the Town's Fund Balance in excess of ten percent (10%). Further, the numbers and calculations contained in Paragraph 9 of Caprio's certification do not make sense, as he compares two different time frames of no relevance or comparability.

-[I]n paragraph 10 of his certification, Caprio again selects and evaluates a period of time that conveniently supports his position. However, if you compare the Town's current position to that from approximately fifteen (15) years ago, in 2004, the Town's municipal tax component increased on average 7.83% over those fifteen (15) years and the Town's total tax burden increased on average 6.18% over the same time frame.

-Caprio's assertion in paragraph 11 of his certification is unclear, overly broad and misleading. Caprio fails to support his claim that the Town decreased its debt level by more than 5.5% with any documentation, calculations or analysis. Further, the Town is unable to determine over what period of time this decrease allegedly occurred as Caprio fails to specify same.

-[I]n paragraph 12 of his certification, Caprio makes an erroneous declaratory statement supported by absolutely no documentation, evidence or personal knowledge of same. Thus, this allegation should be disregarded in its entirety.

LEGAL ARGUMENTS

The PBA argues that it has satisfied the standard for interim relief. Specifically, the PBA maintains that it has a substantial likelihood of prevailing in a final Commission decision because "PERC is empowered to order that arbitration proceedings be suspended" and "PERC's enabling legislation imposes upon the Commission full responsibility for forestalling, resolving and supervising both potential and actual labor disputes involving public employees . . . ." The PBA "seeks only to suspend the timeline of [interest] arbitration to allow the [unfair practice charge] . . . to be addressed and adjudicated prior to determining the results of [interest arbitration]" and asserts that same "is preferable from a legislative policy perspective as well as a judicial efficiency perspective . . . ." The PBA contends that "interest arbitration is [only] applicable where there is an impasse to a negotiated contract" and "[t]hat is not the case here . . . [where] the dispute involves whether the signed MOA . . . represents an enforceable agreement." The PBA also maintains that "the Town['s] actions in this matter exhibit a blatant and unequivocal violation of . . . N.J.S.A. 34:13A-5.4a(1), (5), and (6)[10/] . . . [and] [t]herefore the

10/ Although the charge alleges that the Town violated subsections 5.4a(1), (2), (3), (4), (5) and (6), the PBA's application for interim relief focuses solely on 5.4a(1), (5), and (6). Accordingly, this interlocutory decision (continued...)

[PBA's] ultimate success on the merits is significant." Specifically, the PBA argues that "[b]y failing to sign the CBA memorializing the bargained-for and mutually-agreed-to terms of the MOA, the Town has . . . acted in bad faith . . . and in violation of the principles of fair dealing."[11/] The PBA also argues that its members will suffer irreparable harm if interim relief is not granted because "Members of PBA 212 and their families are experiencing substantial harm in the form of the stress, anxiety, and uncertainty they face each and every moment the [Town] insists on perpetrating this injustice." The PBA maintains that "[w]ithout a signed contract, the futures, lives, and well-being of all of the Police Officer families effected hang in the balance" and "[s]uch psychological and emotional trauma may not be redressed simply by pecuniary means." The PBA asserts that "[t]he taxpayers of the Town are also facing harm that the bad faith actions of the Mayor and Aldermen are causing"

10/ (...continued)
addresses only those aspects of the charge.

11/ In support of its position, the PBA cites Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 155 (1978), Bd. of Ed. of City of Englewood v. Englewood Teachers' Ass'n, 135 N.J. Super. 120, 124 (App. Div. 1975), Irvington Tp., P.E.R.C. No. 2010-44, 35 NJPER 458 (¶151 2009), Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 87-117, 13 NJPER 282 (¶18118 1987), Jersey City Bd. of Ed., P.E.R.C. No. 84-64, 10 NJPER 19 (¶15011 1983), City of Newark, P.E.R.C. No. 2016-56, 42 NJPER 441 (¶119 2016), and Red Bank Reg. Ed. Ass'n v. Red Bank Reg. High School Bd. of Ed., 78 N.J. 122 (1978).

and "[s]uch a single, bad faith and deceptive breach . . . must not be permitted." The PBA contends that the Town's "continued unwillingness to act in good faith further undermines the process and rights at stake in this matter" and the Town's "callous disregard of the . . . [Act] and the protections provided thereby constitutes harm, not only to the PBA, [its members], the families of those [members] . . . , and the taxpayers of the Town, but it represents an affront to the Statutes of the State of New Jersey, the public policy underpinning those laws, and a disregard of the authority of the Public Employ[ment] Relations Commission." The PBA also argues that the relative hardship weighs in its favor and that the public interest is not harmed by a grant of interim relief because "[t]he new budget [for] the Town . . . funds the CBA . . . [and] [t]he intent existed to implement same" while "Members of [the] PBA . . . and their families are experiencing, not only the uncertainty of working without the contract which was negotiated and agreed to by PBA 212 and the Town, along with the stress, anxiety, and concern that that brings, but the crushing blow to morale which comes from painstakingly negotiating in good faith . . . only to have the Town pull the rug out under your feet for no legitimate or lawful reason."

In response, the Town argues that the PBA has not satisfied the standard for interim relief. Specifically, the Town

maintains that the PBA has not demonstrated a substantial likelihood of prevailing in a final Commission decision based upon the following arguments:

> -The PBA cannot prove the Town violated N.J.S.A. 34:13A-5.4a(1), (5) or (6) because Governing Body ratification was required, the Governing Body did not ratify the Memorandum of Agreement, and the parties' actions confirm that no agreement was ratified;
>
> -The PBA has failed to adequately allege violation of N.J.S.A. 34:13A-5.4a(2), (3) or (4) and fails to even mention these aspects of the charge in its application for interim relief; and
>
> -The PBA cannot prove a likelihood of success on the merits because there is a dispute over material facts, namely whether the Town ratified the Memorandum of Agreement and whether the Town is capable of ratifying an agreement in closed session; whether the Town repudiated a ratified agreement, refused to sign an agreement or reneged on same; whether the Town's budget was created to meet the financial needs of the Memorandum of Agreement and/or what effect the Memorandum of Agreement would have on the Town's budget.[12/]

12/ In support of its position, the Town cites Washington Tp. Bd. of Ed., P.E.R.C. No. 2011-32, 36 NJPER 401 (¶155 2010), Palmyra Bor., P.E.R.C. No. 2008-5, 33 NJPER 207 (¶75 2007), Maltese v. Twp. of North Brunswick, 353 N.J. Super. 226, 246 (App. Div. 2002), Bergen Cty., P.E.R.C. No. 2013-8, 39 NJPER 147 (¶45 2012), Cancro v. Twp. of Edison, 2012 WL 3030187, at *4 (App. Div. 2012), N.J.S.A. 10:4-12b(4), Burnett v. Gloucester Cty. Bd. of Chosen Freeholders, 409 N.J. Super. 219, 238 (App. Div. 2009), Houman v. Mayor and Council of Borough of Pompton Lakes, 155 N.J. Super. 129 (Law Div. 1977), Bd. of Ed. of City of Trenton, OAL Dkt. No. EDU 16465-15 (August 5, 2016), aff'd Commissioner Decision No. 334-16 (September 20, 2016), and North Hudson Reg. Fire and Rescue, P.E.R.C. No. 2008-61, 34 NJPER 113 (¶48 2008).

The Town also asserts that "[t]he Commission is the incorrect forum to enforce an alleged agreement and cannot suspend the statutory interest arbitration requirements" because "[t]he Superior Court has jurisdiction over actions to enforce agreements" and "[t]he Commission does not have the authority to suspend the statutory interest arbitration timeline."[13/] The Town also argues that "[t]he PBA will not suffer irreparable harm if interim relief is not granted" given that it "is seeking pecuniary damages in the form of enforcement of [a] non-ratified Memorandum of Agreement" that "has an adequate remedy at law [which] is not irreparable." The Town notes that "the PBA fails to acknowledge that the prior Agreement continues in the absence of a successor agreement" such that "PBA members are not only receiving the same benefits they have since 2016, but they have also received step movement on the salary guide." The Town maintains that "even if the Commission were to find that the PBA adequately alleged harm in the form of stress, anxiety and uncertainty, pecuniary damages can be assessed to redress same." The Town contends that "if the . . . rejection of [the]

13/ In support of its position, the Town cites Bergen Cty. PBA Local 134 v. Donovan, 436 N.J. Super. 187 (App. Div. 2014), Middletown Twp. v. Middletown PBA Local 124, 334 N.J. Super. 512, 515 (App. Div. 1999), aff'd, 166 N.J. 112 (2000), State of New Jersey (Dep't of Human Services), P.E.R.C. 84-148, 10 NJPER 419 (¶15191 1984), In re United Telephone Co. of the West, 112 N.L.R.B. No. 103, 36 LRRM 1097 (1955), and N.J.S.A. 34:13A-16.

Memorandum of Agreement subjected the PBA to imminent irreparable injury, it would not have waited such a significant amount of time to file the instant application [for interim relief]."[14/] The Town also argues that a "balancing of equities favors denial of interim relief" and that "the public interest will not be harmed by denying relief." The Town maintains that "[t]he PBA will suffer no hardship if the instant application is denied [because] the prior agreement will continue in full force and effect" and asserts that "the PBA would actually suffer inconvenience if the Commission enjoins the interest arbitration from proceeding prior to the unfair practice charge being adjudicated . . . [because] [t]o do so would delay the interest arbitration process . . . which is being employed to facilitate a successor agreement between the parties." The Town asserts that it "will . . . be subject to significant hardship" and the public interest will not be served "if the instant application is granted . . . [because it] is fiscally unable to fund the Memorandum of Agreement, which would result in crippling fiscal

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14/ In support of its position, the Town cites Driscoll Potatoes, Inc. v. N.A. Produce Co. Inc., 765 F. Supp. 174 (3d Cir. 1991), Rankin v. Homestead Golf & Country Club, Inc., 135 N.J. Eq. 160, 167 (Ch. Div. 1944), Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 801 (3d Cir. 1989), Peterson v. HVM, LLC, Civ. No. 14-1137, 2015 U.S. Dist. LEXIS 75424, at *7 (D.N.J. June 11, 2015), and Jackus v. City of Elizabeth Bd. of Educ., Dkt. No. A-0993-10T1, 2011 N.J. Super. Unpub. LEXIS 619, at *9 (App. Div. March 9, 2011).

harm to the Town . . . [,] negatively impact the Town's budget and adversely impact the taxpayers of the Town."[15/]

In reply, the PBA makes the following factual assertions absent any corresponding evidence:

> -during the Governing Body's March 18, 2019 meeting, "the Mayor and Aldermen voted by a show of hands, with the vote being six (6) to three (3) in favor of approval" and "[u]pon completion of the meeting . . . the Mayor and Aldermen shook hands with the President and Members of PBA 212, relayed the results of the vote ratifying the contract to PBA 212, and shaking hands and congratulating those present"; and
>
> -"negotiations for the Senior Officers Association do not commence until the PBA has finalized an agreed upon contract" and "SOA Negotiations commenced in March, 2019, almost immediately after the Town voted to accept the MOA on March 18, 2019 and made assurances to PBA 212 that the CBA would be signed as agreed."

The PBA reiterates its argument that "PERC [has] the authority to suspend arbitration procedures whenever PERC deems it reasonable to do so . . . [and] therefore PERC has the authority to rule on [the PBA's] application." The PBA maintains that "[i]nterest arbitration under N.J.S.A. 34:13A-16 is inapplicable to this matter because no impasse in negotiation has occurred [and], therefore, a determination by PERC that there exists a valid

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15/ In support of its position, the Town cites Sherman v. Sherman, 330 N.J. Super. 638, 653-654 (Ch. Div. 1999) and Zoning Bd. of Adjustment of Sparta Twp., 198 N.J. Super. 370, 379 (App. Div. 1985).

contract is necessary before interest arbitration may proceed and [the PBA's] request for relief should be granted." The PBA also reiterates that it is entitled to interim relief under the Crowe factors.

STANDARD OF REVIEW

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

> [T]he undersigned is most cognizant of and sensitive to the extraordinary nature of the remedy sought to be invoked and the limited circumstances under which its invocation is necessary and appropriate. The Commission's exclusive remedial powers, normally intended to be exercised subsequent to a plenary hearing, will not be called into play for interim relief in advance of such hearing except in the most clear and compelling circumstances.

Public employers are prohibiting from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). "It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification." State of New Jersey (Dep't of Corrections), H.E. No. 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-5.4a(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. 84-148, 10 NJPER 419 (¶15191 1984).

Public employers are also prohibited from "[r]efusing to reduce a negotiated agreement to writing and to sign such agreement." N.J.S.A. 34:13A-5.4a(6). "Such a refusal also violates N.J.S.A. 34:13A-5.4a(5) . . . and N.J.S.A. 34:13A-5.4a(1) . . . ." City of Plainfield, P.E.R.C. No. 2017-73, 44 NJPER 30 (¶9 2017). The Commission has held that its jurisdiction in 5.4a(6) matters "is limited to determining whether an agreement has been reached, and whether a party refused to sign that agreement." Fair Lawn Bor., H.E. No. 91-33, 17 NJPER 201 (¶22085 1989), adopted P.E.R.C. No. 91-102, 17 NJPER 262 (¶22122 1991).

ANALYSIS

As a threshold question, at issue in this interim relief application is whether a Commission Designee retains jurisdiction

to stay interest arbitration proceedings pending resolution of an unfair practice charge. If so, the underlying substantive issue is whether, upon execution of an MOA for a successor CNA that specifies "[t]he representatives of the employer expressly have no power to bind the governing body without its express acceptance and approval," a public employer is bound to implement the terms of the MOA absent ratification by the governing body in open session.

Jurisdiction

Initially, I find that my jurisdiction to stay interest arbitration proceedings pending resolution of an unfair practice charge is uncertain. The parties have not cited, and my research has not yielded, any legal authority that conclusively answers this threshold question.

The Act's interest arbitration provisions address unfair practices that occur prior to the expiration of a CNA and specify that "[t]he filing and resolution of the unfair practice charge shall not delay or impair the impasse resolution process." N.J.S.A. 34:13A-16a(1). However, these provisions are silent with respect to unfair practices that occur after the expiration of a CNA and they do not specify whether or in what circumstances the impasse resolution process – including interest arbitration

and its statutorily-mandated timeline - may be stayed. See N.J.S.A. 34:13A-16b(2), -16f(5).[16/]

16/ N.J.S.A. 34:13A-16, entitled "Negotiations between public fire, police department and exclusive representative; unfair practice charge; negotiation; factfinding; arbitration," provides in pertinent part (emphasis added):

> a. (1) Negotiations between a public fire or police department and an exclusive representative concerning the terms and conditions of employment shall begin at least 120 days prior to the day on which their collective negotiation agreement is to expire. The parties shall meet at least three times during that 120-day period. The first of those three meetings shall take place no later than the 90th day prior to the day on which their collective negotiation agreement is to expire. By mutual consent, the parties may agree to extend the period during which the second and third meetings are required to take place beyond the day on which their collective negotiation agreement is to expire. A violation of this paragraph shall constitute an unfair practice and the violator shall be subject to the penalties prescribed by the commission pursuant to rule and regulation. Prior to the expiration of their collective negotiation agreement, either party may file an unfair practice charge with the commission alleging that the other party is refusing to negotiate in good faith. The charge shall be filed in the manner, form and time specified by the commission in rule and regulation. If the charge is sustained, the commission shall order that the respondent be assessed for all legal and administrative costs associated with the filing and resolution of the charge; if the charge is dismissed, the commission shall order that the charging party be assessed for all legal and administrative costs associated with the filing and resolution of the charge. The

(continued...)

16/ (...continued)

filing and resolution of the unfair practice charge shall not delay or impair the impasse resolution process.

* * *

b. (2) Notwithstanding the provisions of paragraph (2) of subsection a. of this section or paragraph (1) of this subsection, either party may petition the commission for arbitration on or after the date on which their collective negotiation agreement expires. The petition shall be filed in a manner and form prescribed by the commission. The party filing the petition shall notify the other party of its action. The notice shall be given in a manner and form prescribed by the commission. Any mediation or factfinding invoked pursuant to paragraph (2) of subsection a. of this section or paragraph (1) of subsection b. of this section shall terminate immediately upon the filing of a petition for arbitration.

* * *

f. (5) The decision of an arbitrator or panel of arbitrators shall include an opinion and an award, and shall be rendered within 90 calendar days of the commission's assignment of that arbitrator. Each arbitrator's decision shall be accompanied by a written report explaining how each of the statutory criteria played into the arbitrator's determination of the final award. The report shall certify that the arbitrator took the statutory limitations imposed on the local levy cap into account in making the award. Any arbitrator violating the provisions of this paragraph may be subject to the commission's powers under paragraph (3) of subsection e. of this section. The decision shall be final and binding upon the parties and shall be irreversible, except:

(a) Within 14 calendar days of receiving an award, an aggrieved party may file notice of an appeal of an award to the commission on

(continued...)

New Jersey courts have held that the Commission "[has] the power to grant interim relief during the pendency of a scope of negotiation proceeding." Bd. of Ed. of the City of Englewood v. Englewood Teachers' Ass'n, 135 N.J. Super. 120, 124 (App. Div.

16/ (...continued)

> the grounds that the arbitrator failed to apply the criteria specified in subsection g. of this section or violated the standards set forth in N.J.S.2A:24-8 or N.J.S.2A:24-9. The appeal shall be filed in a form and manner prescribed by the commission. In deciding an appeal, the commission, pursuant to rule and regulation and upon petition, may afford the parties the opportunity to present oral arguments. The commission may affirm, modify, correct or vacate the award or may, at its discretion, remand the award to the same arbitrator or to another arbitrator, selected by lot, for reconsideration. The commission's decision shall be rendered no later than 60 calendar days after the filing of the appeal with the commission.
>
> Arbitration appeal decisions shall be accompanied by a written report explaining how each of the statutory criteria played into their determination of the final award. The report shall certify that in deciding the appeal, the commission took the local levy cap into account in making the award. An aggrieved party may appeal a decision of the commission to the Appellate Division of the Superior Court.
>
> (b) An arbitrator's award shall be implemented immediately.

1975); accord Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154-155 (1978) ("PERC is empowered to order that arbitration proceedings be suspended during the pendency of a scope-of-negotiations proceeding"). In its analysis of the Commission's statutory responsibilities and related authority, the Appellate Division stated:

> The legislative scheme embodied in N.J.S.A. 34:13A-1 et seq. (L. 1974, c. 123) imposes on PERC full responsibility for forestalling, resolving and supervising both potential and actual labor disputes involving public employees. Under the statute PERC regulates elections of negotiation representatives, negotiations and impasse proceedings, it determines the scope of negotiability, issues cease and desist orders to those who engage in unfair labor practices, and also issues any other orders reasonably necessary to effectuate the purposes of the act. N.J.S.A. 34:13A-5.4 and 6 (L. 1974, c. 123, §§ 1, 5). Considering these broad powers granted to it by the Legislature, we can conceive of no reason why PERC should not have the power to grant interim relief during the pendency of a scope of negotiation proceeding. Certainly, PERC has the power to terminate any arbitration proceedings by issuing its final order in a scope proceeding. Implicitly, it should have the power to suspend arbitration whenever it determines it reasonable to do so. Obviously, if the result of a given scope proceeding would negate arbitration, the prosecution of arbitration proceedings in the interim would constitute a monumental waste of time and energy.
>
> Again, we cannot conclude that it was the intent of the Legislature to compound scope procedures by requiring resort to another tribunal during their pendency. It seems more probable that it was the legislative intent that all issues relevant to scope of

> negotiations be determined in one forum. Cf. Dist. 65, R.W.D.S.U. v. Paramount Surg. Sup. Co., 117 N.J. Super. 125, 128 (App. Div. 1971). We find that in vesting PERC jurisdiction over questions of scope of negotiability the Legislature intended to include the jurisdiction and power to grant interim relief in such proceedings.
>
> [Englewood, 135 N.J. Super. at 124-125.]

Although I do not concede the point, arguendo, I find that staying interest arbitration proceedings pending resolution of an unfair practice charge may be analogized to temporarily restraining grievance arbitration proceedings pending resolution of a scope of negotiations petition. Therefore, for purposes of resolving this interim relief application, I will assume that I have jurisdiction to grant the relief sought by the PBA. However, as set forth below, I need not determine whether a Commission Designee does in fact retain jurisdiction to stay interest arbitration proceedings pending resolution of an unfair practice charge in order to render a decision in this matter and decline to do so.

Ratification

Although the Commission's policy regarding ratification has changed over the course of time, it articulated the following guidelines in 2007 that presently remain intact/applicable:

> [R]atification by the governing body has become the norm based on oral or written reservation, or based on the mutual understanding of the parties. Our cases reflect that many parties have a long history

> of negotiations, agreement and ratification. Accordingly, we believe it no longer appropriate to disregard the parties' history of ratification in determining whether a negotiations team has final negotiations authority. Thus, we will not apply Black Horse Pike so broadly as to amount to a bright line rule that present silence on ratification means ratification is never required despite a past history of ratification. Where the issue of ratification is addressed during negotiations, past history is irrelevant. Where the issue is not addressed, past history may be relevant to discerning the parties' expectations and the negotiators' apparent authority. Compare Borough of Little Ferry, P.E.R.C. No. 86-151, 12 NJPER 543 (¶17203 1986), adopting H.E. No. 86-53, 12 NJPER 463 (¶17175 1986) (although borough administrator did not expressly reserve council's right to ratify, parties knew from experience that mayor and council had to approve and ratify contracts).
>
> These parties have a history of reaching oral agreements. The Borough Council has passed resolutions authorizing the execution of contracts based on those agreements since at least 1994. The prior round of negotiations was conducted by attorneys and a written memorandum of understanding was signed by the same Mayor and the same Association President, among others. That memorandum specified that the negotiators would recommend ratification to their respective parties. Considering the additional factor of past history, we conclude that the Borough's negotiations team did not have authority to approve a contract without ratification by the Borough Council. That the Borough Council had never before rejected a contract does not mean that it did not have a right to do so.
>
> Having reached this conclusion, we wish to add a note of caution and emphasize a point we made earlier. Ratification by a governing body is the norm and reserving a right of ratification as part of the ground rules for

> negotiations or as part of a memorandum of understanding remains the best practice. Reliance on past history alone to protect a right to ratify leaves that right subject to challenge.
>
> After considering all the evidence, including the parties' past history, we conclude that the Borough's negotiators did not have the apparent authority to enter into a successor contract without Borough Council ratification. Accordingly, we dismiss the Complaint.
>
> [Palmyra Bor., H.E. No. 2007-7, 33 NJPER 86 (¶31 2007), rev'd P.E.R.C. No. 2008-5, 33 NJPER 207 (¶75 2007).]

In response to a motion for reconsideration, the Commission affirmed P.E.R.C. No. 2008-5 and went on to state the following:

> The Association's theory is that since it accepted the salary and overtime proposals presented by the Borough's own negotiators, the Borough Council was bound to ratify a contract containing those proposals. While we are troubled by a governing body's not accepting terms initially proposed by its own representatives, there is no per se rule that a governing body loses a right to ratify when its initial proposals are accepted and there is no evidence that a majority of the Council knew of or had approved the proposals its negotiations team would make. The Council members who were on the negotiations team acted in good faith and properly supported ratification, as they were legally bound to do, but the other Council members were free to judge the acceptability of the terms being submitted to them in light of the economic circumstances then existing. Those circumstances included a fiscal crisis that led to decisions to close the welfare office, lay off a tax clerk and part-time maintenance employee, and raise taxes 14 percent. Under the totality of the circumstances, we do not find that the Borough acted in bad faith in not ratifying the draft contract.

> [Palmyra Bor., P.E.R.C. No. 2008-16, 33 NJPER 232 (¶89 2007).]

Accord Washington Tp. Bd. of Ed., P.E.R.C. No. 2011-32, 36 NJPER 401 (¶155 2010) (holding that "[a]lthough the Act authorizes public employers and public employee organizations to negotiate through designated representatives, limits on the authority of those representatives are often established by the ground rules for negotiations").

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

Although it is undisputed that the Town Administrator and PBA President executed the March 14, 2019 MOA, the evidence submitted by the parties demonstrates that there are material facts in dispute regarding whether the MOA was ratified by the Governing Body. See City of Orange Tp., I.R. No. 2010-15, 36 NJPER 72 (¶34 2010) (denying application for interim relief where there were "disputes over several material facts" regarding "whether the parties had a meeting of the minds . . . and whether the City's negotiations team had the authority to enter into a binding agreement"). The PBA claims that the March 14, 2019 MOA was ratified by the Governing Body during closed session of a regular meeting on March 18, 2019. See Verified Complaint at ¶¶9, 11, 13; Mangino's Certification at ¶¶10-13. The PBA also

claims that the Town's budget comports with the financial needs of the March 14, 2019 MOA. See Caprio Certification at ¶¶1-12. Oppositely, the Town claims that the Governing Body discussed the March 14, 2019 MOA during closed session of a regular meeting on March 18, 2019, but did not ratify same; and that the Governing Body rejected the March 14, 2019 MOA during open session of a regular meeting on April 1, 2019. See Henry's Certification at ¶¶14-25, Exh. B. The Town also claims that its budget was not developed to meet the financial needs of the March 14, 2019 MOA; and that the PBA's analysis of the Town's budget is inaccurate. See Henry's Certification at ¶¶31-32; Rheinhardt's Certification at ¶¶1-16. These material factual disputes regarding whether the March 14, 2019 MOA was ratified by the Governing Body preclude a finding that the PBA has a substantial likelihood of prevailing in a final Commission. See, e.g., Kean University, I.R. No. 2009-5, 34 NJPER 232 (¶80 2008) (denying application for interim relief where there were "several disputes of material fact[]"); Closter Bor., I.R. No. 2007-10, 33 NJPER 101 (¶35 2007) (denying application for interim relief where "the record show[ed] a dispute on a material fact").

It is also uncertain as to whether the PBA has a substantial likelihood of prevailing on its legal allegations. The Town has demonstrated that in the past, the Governing Body has authorized the execution of CNAs between the parties via resolution adopted

during open session. See Henry's Certification at ¶28, Exh. C; Denville Tp., I.R. No. 2011-11, 36 NJPER 295 (¶109 2010) (denying application for interim relief to the extent that the PBA failed to demonstrate "whether there was any intent to change the [parties'] ratification practice"; granting application for interim relief to the extent that "the [existing] ratification procedure required the Council to vote upon the agreement and ordinance" such that an order requiring the Council to vote and the Mayor to support the agreement in its presentation to the Council was issued). Even assuming, arguendo, that the PBA can establish that the March 14, 2019 MOA was ratified by the Governing Body during closed session, the legal effect – if any – of same is unclear.

The Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 et seq., requires that "all meetings of public bodies shall be open to the public at all times." N.J.S.A. 10:4-12a. However, "a public body may exclude the public only from that portion of a meeting at which the public body discusses any: . . . collective bargaining agreement, or the terms and conditions which are proposed for inclusion in any collective bargaining agreement, including the negotiation of the terms and conditions thereof with employees or representatives of employees of the public body . . . ." N.J.S.A. 10:4-12b(4). The Appellate Division has held that although "the intent of the statute is to allow officials to

meet privately with counselors and advisors in order to discuss policy, formulate plans of action and generally to have an exchange of ideas", "[t]he OPMA is violated when formal action is taken in the closed session and never ratified or even discussed in a public session." Burnett v. Gloucester Cty. Bd. of Chosen Freeholders, 409 N.J. Super. 219, (App. Div. 2009); see also N.J.S.A. 40A:9-165.[17/]

Oppositely, New Jersey courts have held that "the doctrine of equitable estoppel is applied against a municipality only in very compelling circumstances, where the interests of justice, morality and common fairness dictate that course." Maltese v. Twp. of North Brunswick, 353 N.J. Super. 226, 244-245 (App. Div. 2002). "However, the doctrine is rarely invoked against a governmental entity when the estoppel would interfere with essential governmental functions." Id. at 245. In its analysis of what may constitute ratification by a municipality, the

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17/ N.J.S.A. 40A:9-165, entitled "Salaries, wages or compensation of mayor or other chief executive; officers and employees; exceptions; referendum," provides in pertinent part:

> The governing body of a municipality, by ordinance, unless otherwise provided by law, shall fix and determine the salaries, wages or compensation to be paid to the officers and employees of the municipality, including the members of the governing body and the mayor or other chief executive, who by law are entitled to salaries, wages, or compensation.

Appellate Division stated:

> Where there is sufficient evidence that the municipality has affirmed the unauthorized act of an employee or officer, the doctrine of implied ratification can be invoked to enforce the agreement. . . . Ratification by a municipality, express or implied, must be demonstrated by actions that fully comply with all the statutory precedents. If the difficulty is an irregularity in the exercise of a power the municipality does have and the Legislature had not decreed the consequences of the irregularity, our cases seek a just result. Additionally, although ratification may be implied by conduct, before ratification may estop a claim it must be shown that the officials acted with full knowledge of the material facts, either actually or as a matter of law. The proper inquiry here is whether any conduct by the council, the entity that had the authority to act and provide plaintiff the benefits as promised by the mayor, manifested an intention to ratify or affirm the unauthorized actions of the mayor. Any conduct on the part of the municipality reasonably evidencing approval of the unauthorized transaction will suffice. The form of that action must be by resolution or ordinance and with full knowledge of all the facts and with the intent to grant plaintiff the benefits promised.
>
> [Maltese, 353 N.J. Super. at 245-247 (citations omitted).]

Thus, the PBA's legal allegations raise two questions that are more appropriate for a plenary hearing and Commission review than to be initially decided via an application for interim relief - i.e., whether any formal action taken by the Governing Body in closed session is void ab initio under the OPMA; and whether the doctrine of implied ratification can be invoked

regardless of the OPMA. See, e.g., City of Orange, I.R. No. 2005-10, 31 NJPER 130 (¶56 2005) (denying, in part, an application for interim relief where there was "a novel issue of law that [was] more appropriate for a plenary hearing and Commission review than to be initially decided in interim relief"); Middlesex Cty., I.R. No. 88-10, 14 NJPER 153 (¶19062 1988) (denying an application for interim relief where "complex and novel legal issues [had] been presented . . . [that] can only be resolved at a plenary hearing").

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

I also find that the PBA has failed to demonstrate irreparable harm, relative hardship or that the public interest will not be injured by an interim relief order. "Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages" which "may be inadequate because of the nature of the injury or of the right affected." Crowe, 90 N.J. at 132-133. Here, it is undisputed that since the parties' 2016-2018 CNA expired, the Town has continued PBA members' existing terms and conditions of employment including step movement on the salary guide. See Henry's Certification at ¶¶33-34. While I acknowledge that the instant dispute has caused stress for the PBA and its members,

the PBA has failed to demonstrate that it does not have an adequate remedy at law (i.e., it appears that if successful, a pecuniary remedy would make the PBA and its members whole). See Camden Cty. Bd. of Chosen Freeholders, I.R. No. 2011-38, 37 NJPER 119 (¶34 2011) (denying an application for interim relief based upon a finding that there was no irreparable harm given that a monetary remedy would make the employees whole if successful). Moreover, although completing interest arbitration while litigating the underlying unfair practice charge may not be the most efficient/economical use of time and/or resources, the parties' "competing interests are at best in equipoise and, thus, this balancing does not favor the relief sought." Sherman v. Sherman, 330 N.J. Super. 638, 653-654 (Ch. Div. 1999).

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

Under these circumstances, I find that the PBA has failed to sustain the heavy burden required for interim relief under the Crowe factors and deny the application pursuant to N.J.A.C. 19:14-9.5(b)(3). Given that an exploratory conference has already occurred and the statutorily-mandated timeline for interest arbitration proceedings, I am recommending that the Director of Unfair Practices issue a complaint forthwith.

ORDER

PBA Local 212's application for interim relief is denied.

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

DATED: July 1, 2019

Trenton, New Jersey