

I.R. NO. 2021-7

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF NEWARK,

Respondent,

-and-

Docket No. CO-2021-021

NEWARK POLICE SUPERIOR
OFFICERS' ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee dissolves the temporary restraints that were issued and denies an application for interim relief filed by the SOA against the City alleging that the City violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1), (2), (3), (4), (5), and (7), by unilaterally transferring unit work traditionally performed by employees represented by the SOA to non-unit employees represented by the FOP Lodge No. 12. The Designee finds that the SOA has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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Appearances:

For the Respondent, Kenyatta Stewart, Corporation
Counsel (Joyce Clayborne, Assistant Corporation
Counsel; France Casseus, Assistant Corporation Counsel)

For the Charging Party, John J. Chrystal, III,
President

INTERLOCUTORY DECISION

On July 30, 2020, Newark Police Superior Officers' Association (SOA) filed an unfair practice charge, together with an application for interim relief, against the City of Newark (City). The charge alleges that on or about August 3, 2020, the City violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1), (2), (3), (4), (5), and (7),^{1/2/} by unilaterally

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...)

transferring unit work traditionally performed by employees represented by the SOA to non-unit employees represented by the Newark Fraternal Order of Police Lodge No. 12 (FOP).

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

-the City be enjoined from assigning police officers to perform sergeant duties without first negotiating with the SOA.

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

2/ I do not consider the 5.4a(3), (4), and (7) claims inasmuch as the SOA does not develop them in its interim relief application or its unfair practice charge. The SOA does not set forth facts that would suggest the City discriminated 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; the SOA does not set forth facts that would suggest the City discharged or discriminated against any employee because he/she signed or filed an affidavit, petition, or complaint or gave any information or testimony under the Act; and the SOA does not identify which Commission rules or regulations the City allegedly violated.

PROCEDURAL HISTORY

On July 31, 2020, I signed an Order to Show Cause temporarily restraining the City - except in case of an emergency - from utilizing non-unit employees as "acting sergeants" to perform SOA unit work, so long as minimum staffing requirements were not jeopardized; and specified that the City could move for dissolution or modification of the temporary restraints on two days' notice or on such other notice as may be ordered. I also directed the City to file any opposition by August 7; the SOA to file any reply by August 10; and set August 12 as the return date for oral argument. On August 12, party representatives engaged in oral argument during a telephone conference call. At the conclusion of oral argument, based upon the parties' representations, I granted the City's request for permission to file a supplemental factual submission by September 4; and the SOA to file any supplemental factual submission by September 18.

On August 26, 2020, I convened a telephone status conference call with the parties. Based upon the parties' representations, I asked the City to schedule a meeting with the SOA to discuss the unit work concerns at issue in this matter. Subsequently, the parties confirmed that a meeting was scheduled for, and took place on, September 15. On September 15, the SOA sent correspondence to me, copying the City, indicating that the parties had reached/remained at impasse despite their meeting.

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

In support of the application for interim relief, the SOA submitted a brief, exhibits, the certification of its President, Captain John J. Chrystal, III (Chrystal); and the certification of its 1st Vice President, Captain Gary D. Vickers (Vickers). In opposition, the City submitted a brief, exhibits, the certification of its Public Safety Director, Anthony F. Ambrose (Ambrose); the certification of its Business Administrator, Eric S. Pennington (Pennington); and the certification of its Assistant Corporation Counsel, Joyce Clayborne (Clayborne). The SOA also filed a reply brief, exhibits, and the supplemental certification of SOA President Chrystal. The City's supplemental factual submission included exhibits and the certification of Special Assistant to the Public Safety Director, John Huegel (Huegel). The SOA's supplemental factual submission included exhibits and the second supplemental certification of SOA President Chrystal.

FINDINGS OF FACT

The City is a Civil Service jurisdiction.^{3/} The SOA represents all superior officers employed by the City in the

^{3/} See <https://www.state.nj.us/csc/about/divisions/slo/jurisdictions.html>

positions of sergeant, lieutenant, and captain but excluding police officers. See 2013-2015 CNA, Art. I (Chrystal Certification, Ex. A). The City and SOA are parties to an expired collective negotiations agreement (CNA) in effect from January 1, 2013 through December 31, 2015; and an expired memorandum of agreement (MOA) in effect from January 1, 2016 through December 31, 2017. The parties are in negotiations for a successor agreement. The grievance procedure ends in binding arbitration.

Article XVIII of the parties' expired CNA, entitled "Maintenance of Standards," provides:

All rights, privileges and benefits existing prior to this Agreement are retained with the following exceptions:

- (a) Those benefits abridged or modified by this Agreement, or
- (b) Those changes in benefits which are not substantial and unreasonable.

Elimination or modification of rights, privileges or benefits which are substantial and unreasonable shall be subject to the Grievance Procedure.

Article XIX of the parties' expired CNA, entitled "Management Rights," provides:

Section 1: The City hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it prior to signing of this Agreement by the laws and Constitution of the State of New

Jersey and of the United States, including but without limiting the generality of the foregoing, following rights:

- (a) To the executive management and administrative control of the City Government and its properties and facilities;
- (b) To hire all employees and subject to the provision of law, to determine their qualifications and conditions for continued employment, assignment, promotion and transfer;
- (c) To suspend, demote, discharge or take other disciplinary action for good and just cause according to law; and
- (d) To the executive management of the Police Department by economical and efficient selection, utilization, deployment and disposition of equipment, notwithstanding any other provisions of this Agreement.

Section 2: The exercise of the foregoing powers, rights, authority, duties or responsibilities of the City, the adoption of policies, rules, regulations and practices in the furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited only by the terms of this Agreement and then only to the extent such terms hereof are in conformance with the Constitution and laws of New Jersey and the United States.

Section 3: Nothing contained in this Article shall be construed to deny or restrict the City of its rights, responsibilities and authority under N.J.S.A. 40, 40A and 11 or any other national, state, county or local laws or ordinances.

Article XXIX of the parties' expired CNA, entitled "Fully Bargained Provisions," provides:

Section 1: This Agreement represents and incorporates the complete and final understanding of the parties. During the term of this Agreement, neither party will be required to negotiate with respect to any such matter, whether or not covered by this Agreement and whether or not within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

Section 2: This Agreement shall not be modified in whole or in part by the parties except in writing, duly executed by both parties.

On March 21, 2016, the City's Public Safety Director, Anthony F. Ambrose (Ambrose), issued Personnel Order No. 2016-104 to Police Division Commands changing the status of nine police officers/detectives to acting sergeant, effective March 22, 2016. See City's Br., Ex. E. On April 6, 2016, SOA President Chrystal sent an email to Public Safety Director Ambrose raising the SOA's "concerns with the [City] [utilizing] police officers in acting sergeants position." See SOA's Reply Br., Ex. F.

On September 16, 2016, Public Safety Director Ambrose issued Personnel Order No. 2016-399 to Police Division Commands changing the status of five sergeants to acting lieutenant; and 11 police officers/detectives to acting sergeant, effective September 19, 2016. See City's Br., Ex. E.

On March 4, 2019, Public Safety Director Ambrose issued Personnel Order No. 2019-105 to Police Division Commands changing

the status of 28 police officers/detectives to acting sergeant, effective January 28, 2019. See City's Br., Ex. E.

Also on March 4, 2019, Public Safety Director Ambrose issued Personnel Order No. 2019-106 to Police Division Commands changing the status of eight police officers/detectives to acting sergeant, effective March 4, 2019. See City's Br., Ex. E.

On June 25-26, 2019, the City's Deputy Administrator, Kecia Daniels (Daniels), had an email exchange with Jennifer Robb (Robb), a New Jersey Civil Service Commission employee, copying the City's Personnel Director, Aondrette O. Williams (Williams), and others, that provides in pertinent part:

Daniels - The Director of Public Safety would like to opt out of the promotional announcement. Director Ambrose met with his staff yesterday to determine his vacancies and decided to promote from the current certification. Please let us know if you require additional information.

Robb - Aside from wanting to promote from the current list is there any other justification you can provide for opting out of the announcement?

Daniels - The reason for opting out is budgetary in nature. During the succession planning meeting on Monday, the department had to account for current vacancies and anticipated vacancies. We don't want to participate in the exam because routinely when a new list is promulgated, the union starts making demands that we appoint from the list and we know through our forecasting that we do not have the funds to make future promotions (outside of the ones planned for next month). When there's an exam announcement, the City looks to the new list

while the union, through their counsel, will file an action against the City to look to the old list and it's costly in terms of defending the City's position of which list to appoint from as well as securing enough vacancies to accommodate a potential negative ruling. The lesson learned is to be as conservative as possible regarding the number of eligibles to promote and that is why we are respectfully requesting to opt out this examination cycle.

See SOA's Supplemental Submission, Ex. P.

On March 5, 2020, Tom Chisholm (Chisholm), a Team Leader in the New Jersey Civil Service Commission's Division of Agency Services, sent a letter to Personnel Director Williams, copying SOA President Chrystal and others, that provides in pertinent part:

The Division of Agency Services (Agency Services) received a request from the Newark Police Superior Officers' Association (SOA) to conduct a classification review of three (3) positions in the Public Safety Department. The SOA alleges that the City of Newark (City) has made two (2) "acting" Police Lieutenant and one (1) "acting" Police Captain appointments, and thus, they believe that the current classification of each position is inappropriate.

The SOA has made numerous claims that the City has made "acting" appointments to the Police Lieutenant and Police Captain titles. The City has been made aware of this complaint via email, telephone conferences, and an in-person meeting held on February 28, 2020. In support of their complaint, the SOA provides Personnel Order 2019-424 that appears to show the appointments of Police Sergeants Neil Laurie and Emanuel Miranda to the position of "Acting Lieutenant". They also provide Personnel Order 2019-562 that

appears to show the reassignment of a different Police Captain. The SOA claims that as a result of that transfer, Police Lieutenant Joao Carvalho has been serving as an "acting" Police Captain.

Please be advised that there is no such designation as an "acting" appointment under Civil Service rules. N.J.S.A. 11A:4-13 and N.J.A.C. 4A:4-1 et seq. provide for regular, conditional, provisional, interim, temporary, and emergency appointments. In the instant matter, the City can make regular appointments to the positions in question if the City is permanently filling each position since there are active promotional lists for each title. Police Lieutenant Symbol PM2013W is scheduled to expire on March 13, 2022 . . . and Police Captain Symbol PM1345U is tentatively scheduled to expire on April 5, 2021. A certification request can be made to permanently fill each position.

In a letter dated February 20, 2020, the SOA requested a classification review of the positions held by Police Sergeants Neil Laurie and Emanuel Miranda, and Police Lieutenant Joao Carvalho. Accordingly, Agency Services requests that each of the aforementioned employees complete and submit a Position Classification Questionnaire, signed by the appointing authority, within 15 calendar days of receipt of this letter.

See SOA's Br., Ex. C.

On March 9, 2020, in order to protect the health, safety, and welfare of the people of the State of New Jersey, Governor Philip D. Murphy issued Executive Order (EO) No. 103 declaring a Public Health Emergency and State of Emergency in the State of New Jersey related to Coronavirus disease 2019 (COVID-19), a contagious, and at times fatal, respiratory disease caused by

SARS-CoV-2 virus^{4/}; and subsequently issued a series of Executive Orders that included mitigation strategies (e.g., closure of non-essential retail businesses to the public, work-from-home arrangements, cessation of non-essential construction projects, permission for residents to leave their residences in order to report to or perform their job, social distancing) and extensions of the Public Health Emergency. See State EO Nos. 103, 104, 107, 119, 122, 125, 138, 151, 162, 171, 180. The New Jersey Civil Service Commission (CSC) issued related guidance specifying that "[t]he Guidelines for State Employee Leave Time and Staffing - COVID-19 and FAQs published by the CSC pursuant to Executive Order 103 apply only to State employees and are not applicable to

4/ State EO No. 103 provides in pertinent part:

I authorize and empower the State Director of Emergency Management, who is the Superintendent of State Police, in conjunction with the Commissioner of DOH, to take any such emergency measures as the State Director may determine necessary, including the implementation of the State Emergency Operations Plan and directing the activation of county and municipal emergency operations plans, in order to fully and adequately protect the health, safety and welfare of the citizens of the State of New Jersey from any actual or potential threat or danger that may exist from the possible exposure to COVID-19. The State Director of Emergency Management, in conjunction with the Commissioner of DOH, is authorized to coordinate the relief effort from this emergency with all governmental agencies, volunteer organizations, and the private sector.

county or local government employees under the jurisdiction of the CSC.”^{5/} The CSC specifies the following:

Should staffing shortages disrupt the usual delivery of government services, it may become necessary for Appointing Authorities to reassign essential work duties to ensure continuity of operations. This potential temporary assignment of out-of-title work is permissible pursuant to N.J.A.C. 4A:3-3.4 so long as:

- (1) the employee is otherwise qualified for the out of title work, (for example, if a temporary assignment requires an employee to be licensed in a particular trade, an Appointing Authority may not assign someone without such a license to perform the work);
- (2) the assignment is temporary in nature, and
- (3) the employee’s normal job duties resume upon return of the absent employee(s).

Consistent with these requirements, unless there is a collective bargaining agreement that otherwise controls, an Appointing Authority has broad discretion to assign out-of-title duties without resulting in the employee’s current position being permanently reclassified to a different title.

On March 27, 2020, Public Safety Director Ambrose issued Personnel Order No. 2020-148 to Police Division Commands changing the status of five detectives to acting sergeant, effective March 30, 2020. See City’s Br., Ex. E.

^{5/} <https://www.state.nj.us/csc/LocalGovernmentGuidance.pdf>

On July 17 and 20, 2020, Public Safety Director Ambrose issued Personnel Order No. 2020-354 and an Addendum to Police Division Commands changing the status of three lieutenants to acting captain; eight sergeants to acting lieutenant; and 22 police officers/detectives to acting sergeant, effective July 20, 2020. See City's Br., Ex. A.

On July 21, 2020, Public Safety Director Ambrose issued Personnel Order No. 2020-355 to Police Division Commands permanently transferring and reassigning one acting deputy chief; one captain; eight acting captains; seven lieutenants; 12 acting lieutenants; and one sergeant, effective July 22, 2020.^{6/} See City's Br., Ex. D.

Also on July 21, 2020, Public Safety Director Ambrose issued Personnel Order No. 2020-358 to Police Division Commands changing the status of one captain to acting deputy chief; five lieutenants to acting captain; and one sergeant to acting lieutenant, effective July 22, 2020. See City's Br., Ex. B.

Also on July 21, 2020, Public Safety Director Ambrose issued Memorandum No. 2020-288 to the Police Division changing the Police Division's Table of Organization, effective July 22, 2020. On July 24, 2020, Public Safety Director Ambrose issued revised General Order 63-15 (entitled "Organization of the Police

^{6/} Certain permanent transfers/reassignments became effective July 27, 2020.

Division") incorporating the changes specified in Memorandum No. 2020-288. See City's Br., Ex. F.

On July 30, 2020, the SOA filed the underlying unfair practice charge accompanied by the instant application for interim relief.

On July 31, 2020, Public Safety Director Ambrose issued Personnel Order No. 2020-378 to Police Division Commands permanently transferring and reassigning six lieutenants; six sergeants; and 27 acting sergeants, effective August 3, 2020. See City's Br., Ex. C.

On August 7, 2020, SOA 1st Vice President Captain Gary D. Vickers sent a letter to Public Safety Director Ambrose demanding to negotiate and requesting information regarding "non-unit members doing overtime for sergeants' positions." See SOA's Supplemental Submission at 2, Ex. L.

On August 12, 2020, Team Leader Chisholm from the New Jersey Civil Service Commission's Division of Agency Services sent an email to Personnel Director Williams and Deputy Administrator Daniels, copying SOA President Chrystal and others, that provides in pertinent part:

Please be advised that we are in receipt of the City's response to PERC as it relates to the Superior Officers Association's request for interim relief due to "acting" positions. The document appears to show that the City acknowledges that "acting" appointments have been made to the Police Sergeant, Police Lieutenant, Police Captain, and Deputy Chief

titles (see page 7). Other supporting documentation has also been received. Please be advised that there is no such designation as an "acting appointment" under Civil Service rules. N.J.S.A. 11A:4-13 and N.J.A.C. 4A:4-1 et seq. provide for regular, conditional, provisional, interim, temporary, and emergency appointments. In light of the evidence that shows that appointments have been made to the aforementioned titles, the Division of Agency Services will be issuing certifications for those titles so that appointments may be recorded in accordance with Civil Service rules.

See SOA's Supplemental Submission at 2, Ex. N.

SOA President Captain John J. Chrystal, III (Chrystal) certifies that "[t]he Newark Police Department is comprised of 1,097 sworn officers including one chief, four deputy chiefs, 23 captains, 79 lieutenants, 124 sergeants, and 866 police officers. See SOA's Br. at 2, 6. Chrystal certifies that "[u]nder the parties' [collective] agreement, . . . the City . . . recognize[s] the SOA as the exclusive representative for sergeants, lieutenants, and captains"; and "[n]othing in the Act bestows upon a majority representative standing to negotiate for, handle, [or] arbitrate grievances on behalf of non-unit members" including police officers who are represented by the FOP. See SOA's Br. at 7. Chrystal certifies that because "[t]he City is a Civil Service jurisdiction[,] [m]embers are promoted to sergeant by successfully passing a promotional exam"; that "the Civil Service Commission authorizes and approves promotions, once the City makes a request to promote an eligible from a certified

promotional list"; and that "[t]he Civil Service Commission does not recognize acting positions, it only recognizes permanently appointed positions." See SOA's Br. at 7.

SOA President Chrystal certifies that on or about March 30 and July 20, 2020, "[t]he City unilaterally assigned 27 police officers (non-unit employees) to work as 'acting sergeants' (unit employees) to supervise police officers without following the promotional procedures from the Civil Service Commission"; and that "[t]hese police officers [are] 'non-unit employees' . . . wearing sergeants' uniforms and doing work traditionally performed by unit employees, sergeants, who are represented by the SOA." See SOA's Br. at 2. Chrystal certifies that "[t]he[se] non-unit employees have the authority to supervise and discipline police officers", and therefore perform the same duties, as SOA unit employees. See SOA's Br. at 3-4. Chrystal certifies that "[t]he City has a current Civil Service list for sergeants (PM2540W)" and "[a] certification request could be made . . . to permanently fill each position"; that "[o]nce a police officer is approved by the Civil Service Commission to be promoted to sergeant, the permanently appointed sergeant becomes a member of the negotiations unit, the SOA." See SOA's Br. at 7. Chrystal certifies that despite the SOA's attempts to raise this issue and its demand to negotiate with the City on July 16, 23, and 24, 2020 and August 7, 2020, the City has "refused to

negotiate and unilaterally transferred SOA duties or 'unit work' to 'non-unit' employees, FOP members who are police officers" See SOA's Br. at 4-6.

The City's Business Administrator, Eric S. Pennington (Pennington), certifies that "[d]ue to the COVID-19 pandemic, the City needs to maintain operations and control to ensure the welfare of its citizenry"; and that "there is a need for supervisory officers in an acting capacity." See Pennington Certification, ¶8. Pennington certifies that "[t]he 'acting sergeants', 'acting lieutenants', and 'acting captains' were appointed temporary employees pursuant to N.J.S.A. 40A:14 et al.; N.J.S.A. 40A:14-134 (Certain Emergencies); Gov. Murphy-New Jersey Executive Orders-COVID-19 Pandemic; and in accordance [with] New Jersey Civil Service Rules & Regulations." See Pennington Certification, ¶5. Pennington certifies that "[t]here are no vacancies for supervising officers for a variety of reasons, but most importantly due to supervising officers being on: indefinite suspension, terminal leave, sick leave, self-quarantining due to potential COVID-19 exposure"; and that "[a]lthough the individual officers are not working, these positions remain filled until the officer returns to work, is successfully removed, or retires." See Pennington Certification, ¶6. Pennington also certifies that "[p]ending retirements on [the] police supervisory level also

preclude vacancies, thereby causing delays." See Pennington Certification, ¶7.

The City's Public Safety Director, Anthony F. Ambrose (Ambrose), certifies that "[o]n or about January 1, 2020, the [Newark Police Department] lost a significant [number] of supervising officers to retirement, which consist of 11 captains, 20 lieutenants, and 15 sergeants"; and that "[l]osing a total of 46 supervising officers leav[es] these much essential positions vacant." See Ambrose Certification, ¶14." Ambrose certifies that "[o]n or about March 2020, the City was impacted by the global pandemic, Covid 19" and "[a]s a result, there were 180 officers infected with the virus and three that . . . died"; and that "[t]he global pandemic has significantly impacted staffing for the City[']s Police Department." See Ambrose Certification, ¶11. Ambrose also certifies that "[o]n or about May 25, 2020[,] there has been a growing level of civil unrest across the City . . . demanding . . . police supervision." See Ambrose Certification, ¶12.

Public Safety Director Ambrose certifies that "[t]he City serves over 200,000 citizens and it is [his] duty to ensure the safety of each individual"; that "[s]upervision is critical in assuring agency goals and that objectives are met, including compliance with Consent Decree mandates"; that "[w]ith current supervisory staffing, the Police Division cannot maintain minimum

staffing or span of control standards”; and that “[t]he Police Division presently has multiple command ranks and first line supervisor positions that are vacant, which are essential positions.” See Ambrose Certification, ¶13. Ambrose certifies that “[a]s the appointing officer of the municipality, [he] [has] the authority to employ such officers and other personnel for [the Newark Police Department] and force as temporary employees in emergencies, or for certain specified parts of the year, as needed in accordance with N.J.S.A. 40A:14-122(4).” See Ambrose Certification, ¶15.

SOA President Chrystal certifies that at the outset of the pandemic, “in the spirit of cooperation and in good faith negotiations”, the SOA agreed to “a new work schedule for the duration of the emergency and allowed . . . five acting sergeants to work temporarily in [the] communications division” with “[an] agreement [that] they would be permanently promoted very soon”; and “[t]he Pitman schedule allowed the City to operate with significant overtime [cost] reductions”^{7/} See SOA’s Reply Br. at 6; SOA’s Supplemental Submission, Ex. J. However,

^{7/} The “Pitman Schedule - Emergency Schedule Agreement” provides in pertinent part:

10. In order to properly staff the precincts and provide calls for service, the City agrees to maintain a reserve of supervisors and police officers to maintain minimum staffing, to take in to account sick or injured leave, or other unforeseen absences.

Chrystal also certifies that “[t]he City has economic issues and is using the pandemic as an excuse to fill vacancies with non-unit employees.” See SOA’s Reply Br. at 6. Chrystal certifies that “[t]he SOA has objected to using acting sergeants in the past” by filing desk audits with the Civil Service Commission, grievances, and unfair practice charges with the Public Employment Relations Commission (PERC). See SOA’s Reply Br. at 2. Chrystal certifies that “there are no SOA members out sick or under quarantine with COVID-19”; “[t]here is only one person indefinitely suspended”; “[s]everal members are on vacation”; and “[t]he City is trying to get members to retire [for] economic reasons” pursuant to its “Voluntary Severance Incentive Program.” See SOA’s Reply Br. at 6. Chrystal certifies that although “the City states [that] [it is making] temporary appointments”, “the City has the acting sergeants in a three-month “Supervisor Preparation Training . . . Mentoring Program.” See SOA’s Reply Br. at 6.

The City’s Special Assistant to the Public Safety Director, John Huegel (Huegel), certifies “[t]here is a police staffing shortage due to retirements, [the] COVID-19 pandemic, terminal leave, indefinite suspension[s][,] and civil unrest.” See Huegel Certification, ¶8. Huegel certifies that “[a]s of 2020, 93 members retired” and that “[o]ut of the retiree[s], 47 were supervisors” with “10 captains, 21 lieutenants, and 16

sergeants.” See Huegel Certification, ¶9. Huegel also certifies that “in 2020, two police officers out of 46 were on disability[;] 12 sworn members resigned or transferred to other departments[;] three died during the COVID-19 pandemic . . . one [of which] was a supervisor[;] [and] one sworn officer was officially terminated”; and that “nine [sworn members] have expressed an intent to separate on or before December 1, 2020, including three lieutenants and one sergeant.” See Huegel Certification, ¶¶10-11.

Special Assistant Huegel certifies that “[i]n 2019, 23 [sworn] members resigned or transferred to other departments, one died[,], and three were officially terminated as officers”; and “40 police officers retired and six were on disability.” See Huegel Certification, ¶¶12-13. Huegel certifies that “[p]romotions were made in 2019” and “[t]here were 48 new officers graduated from the Police Academy.” See Huegel Certification, ¶14. Huegel certifies that “[c]urrently, . . . 77 lieutenants and 103 sergeants . . . are in permanent New Jersey Civil Service [p]ositions related to this action.” See Huegel Certification, ¶15.

Special Assistant Huegel certifies that “[t]here are over 60 dedicated staff [that] provide services on a 24/7 basis to patrol, investigate or support components for the following departments:

- Seven Precincts: provide field response to calls for service or proactive patrol.
- Communications Divisions: handle emergency and non-emergency call-taking and dispatching.
- Juvenile Services Section: handles juvenile arrests/matters separate from adults.
- Special Victims Division: investigates domestic violence, sex offenses/registry, missing persons.
- Robbery Section: investigates all robbery and overdose incidents and property/assault crimes.
- Shooting Response Team: investigates all shooting/shots-fired incidents.
- Homicide Task Force: investigates all homicides or suspicious deaths.
- Emergency Services Division: provides specialized emergency response, i.e. SWAT Team and helicopters.
- Crime Scene Section: collects and processes evidence, photographs crime scenes, accidents, etc.
- Criminal Intelligence Section: monitors, evaluates and relays up-to-date crime information.
- Real Time Crime Center: multi-agency fusion center staffed by state and local agencies.
- Executive Protection: provides security functions for dignitaries.

See Huegel Certification, ¶16; City's Br., Ex. F. Huegel certifies that "[m]ost of the 24/7 components normally operate on a rotating four (4) days on and two (2) days off schedule" and "[e]ach day consists of an eight (8) hour shift." See Huegel Certification, ¶17. Huegel certifies that "[l]arger 24/7 components of the Police Division such as the Seven Precincts, the Communications Division, and the Municipal Holdings Division require two (2) supervisors for each eight (8) hour tour on a daily basis, for a total of fifty-four (54) supervisors daily for just nine (9) components"; that "[t]his supervisory requirement is considered minimal staffing, with no relief factor, and any vacancy will result in overtime"; and that "[e]ach of these

components have a dedicated Captain with an Executive Officer and a Lieutenant." See Huegel Certification, ¶18. Huegel certifies that "[t]he Smaller 24/7 components of the Police Division use a variation of the four (4) and two (2) schedule or a combination of a five (5) and two (2) schedule with on-call or overtime to provide police services around the clock"; and that "[o]ptimally, eliminating the need for on-call or overtime, another twenty-five (25) supervisors are needed daily." See Huegel Certification, ¶19.

Special Assistant Huegel certifies that "[u]nits operating in plain clothes capacity all require a dedicated supervisor when in the field"; that "[e]ach of the Seven Precincts have their own Detective Squad supervisor and their own Crime Prevention Team supervisor"; and that "[t]his requires the dedication of an additional fourteen (14) supervisors for the precincts." See Huegel Certification, ¶20. Huegel certifies that "[t]he remaining components of the Police Division, while not operating on a 24/7 basis also require dedicated supervision"; that "[t]hese components usually operate during regular business hours and provide such services as traffic enforcement, community engagement, fugitive apprehension, training, licensing, property, human resources, finance, taxi regulation, alcoholic beverage control, internal investigations, use of force investigations,

outside employment, consent decree compliance, etc.” See Huegel Certification, ¶21.

Special Assistant Huegel certifies that “[i]n response to the COVID-19 pandemic, the Newark Police Division temporarily switched to an emergency 12-hour shift schedule for patrol known as the Pitman Schedule” in order to “limit contact between officers assigned to platoons/squads” and thereby “the number of police personnel effected with COVID-19”; that “[t]he Pitman schedule was agreed upon by the City, the SOA, and the FOP”; that “[o]n March 20, 2020, [the] Department of Public Safety issued Memorandum No. 2020-158 implementing the Pitman Schedule” effective March 23, 2020; and that “[i]t is anticipated patrol will return back to the four (4) and two (2) schedule unless there is a spike in the number of COVID-19 cases.” See Huegel Certification, ¶¶22-25. Huegel certifies that “[t]he Pitman schedule requires 12-hour shifts but has a built-in overtime component, [such that] ‘acting’ sergeants are necessary to properly staff and provide supervision for the seven police precincts working 24/7 days per week”; and that “[i]n addition, overtime is still available to supervisory police personnel and is submitted via e-mail communication on an almost daily basis” and “[i]f there are no volunteers then overtime is mandated.” See Huegel Certification, ¶¶26-27.

Special Assistant Huegel certifies that “[s]taffing is impacted also by vacations, terminal leave, indefinite suspensions[,] and sick/injured or COVID-19.” See Huegel Certification, ¶28. Huegel certifies that there “are an average of twenty-eight (28) supervisors on vacation per bracket” with “[a] larger number on vacation during summer and holidays”; that “[t]hose on terminal leave . . . include three captains, three lieutenants, and one sergeant”; that “[t]hose on indefinite suspensions . . . include one lieutenant and one sergeant”; that “[t]hose on sick/injured leave . . . include one captain, four lieutenants, and 11 sergeants out on long-term leave” with “51 members on light/restricted duty as a result of sick/injured leave”; that “[o]ver the span of two months, there ha[ve] been about 110 officers calling out due to COVID-19” and “[s]ome have been out longer than [one] month”; and that “[t]here are 15 members who have expressed an intent to separate . . . in 2021” including one captain, four lieutenants, two sergeants, and eight police officers.” See Huegel Certification, ¶¶29-34. Huegel certifies that “[d]ue to the COVID-19 pandemic, the City needs to maintain operations and control to ensure the welfare of its citizenry” and “there is a need for supervisory officers in an acting capacity since [the City] cannot meet the current staffing levels.” See Huegel Certification, ¶35.

LEGAL ARGUMENTS

The SOA argues that it has satisfied the standard for interim relief. Specifically, the SOA maintains that it has a substantial likelihood of prevailing in a final Commission decision given that “[t]he City [has] made police officers ‘acting sergeants’ violating the preservation of unit work rule without first negotiating with the SOA, the exclusive . . . [majority representative]”; and “[t]he unit work rule provides that an employer must negotiate before using non-unit employees to do work traditionally performed by unit employees.” The SOA contends that “[t]he City could have permanently promoted . . . non-unit employees to become unit employees” but “[i]nstead made acting positions”; and that “these non-unit employees are doing [unit work] traditionally [performed] by the SOA” including “supervising, disciplining[,] and taking overtime opportunities away from unit members” while “[t]he SOA is . . . prevented from representing and collecting dues from non-unit members.” The SOA claims that “[t]he City[,] by unilaterally implementing non-unit work employees to do unit work[,] not only abrogated the SOA’s right to negotiate over terms and conditions of employment . . . [but] has [also] violated . . . Commission rules and external law by refusing to negotiate in good faith and changing the status

quo . . . during negotiations for a successor agreement.”^{8/} The SOA also argues that its members will suffer irreparable harm if interim relief is not granted because “the City unilaterally assign[ed] unit-work that [was] traditionally performed by the SOA to non-unit employees without first negotiating with the majority representative . . . during negotiations for a successor collective negotiations agreement.” The SOA maintains that “the Commission [will be unable to] remedy the overtime opportunities lost to unit members, being performed by non-unit members, if an interim order is not granted.” The SOA contends that it “has an interest in maintaining and preserving its unit and contractual rights throughout the period of negotiations for a successor agreement” and that “the City’s unilateral actions constitute irreparable harm.”^{9/} The SOA also argues that “[t]he public interest will not be harmed if the Commission grants the interim relief requested” and that it “would be furthered by requiring

^{8/} In support of its position, the SOA cites N.J.S.A. 34:13A-5.3, Bergen Cty., I.R. No. 2019-6, 45 NJPER 123 (¶33 2018), Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982), City of Jersey City v. Jersey City POBA, 154 N.J. 555, 574-575 (1998), Hudson Cty., P.E.R.C. No. 2008-43, 34 NJPER 13 (¶6 2008), Hunterdon Cty. Bd. of Chosen Freeholders, 116 N.J. 322 (1989), Red Bank Reg. Ed. Ass’n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978), Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Ass’n, 78 N.J. 25, 48 (1978), Bergen Cty., P.E.R.C. No. 97-124, 23 NJPER 297 (¶28136 1997), and Passaic Cty. Tech. & Voc. H.S. Bd. of Ed., P.E.R.C. No. 85-39, 10 NJPER 577 (¶15269 1984).

^{9/} In support of its position, the SOA cites Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Ass’n, 78 N.J. 25, 48 (1978).

adherence to the tenets specifically expressed by the Act, which require parties to negotiate prior to implementing changes in terms and conditions of employment and to respect the negotiations process itself." The SOA maintains that "[a] unilateral change in terms and conditions of employment during the negotiations process has a chilling effect on employee rights guaranteed under the Act, undermines labor stability, and constitutes irreparable harm." The SOA contends that "[m]aintaining the collective negotiations process results in labor stability and thus promotes the public interest."^{10/}

In response, initially the City argues that the SOA lacks standing in this matter given that it does not represent "acting sergeants" and therefore the unfair practice charge and application for interim relief "should be dismissed in [their] entirety"; that "[t]he SOA admits these members are represented by the FOP" and "[t]he FOP has not objected to their 'acting' status." The City also argues that the SOA has not satisfied the standard for interim relief. Specifically, the City maintains that the SOA has not demonstrated a substantial likelihood of prevailing in a final Commission decision "given that the spread

^{10/} In support of its position, the SOA cites Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Ass'n, 78 N.J. 25, 48 (1978), City of Newark, I.R. No. 2015-5, 41 NJPER 435 (¶136 2015), City of East Orange, I.R. No. 2007-5, 32 NJPER 354 (¶148 2006), and Burlington Cty. Freeholder Bd., I.R. No. 2013-121, 39 NJPER 352 (¶120 2012).

of COVID-19 within New Jersey constitutes an imminent public health hazard that threatens and presently endangers the health, safety, and welfare of the residents of one or more municipalities or counties of the State" and "[p]ursuant . . . [to] Executive Order 103, the State Office of Emergency Management directed the local municipal police to ensure the safety and well-being of its citizens." The City asserts that if "the SOA's interim relief application . . . [is granted], it would be in conflict with the provisions of the Governor's Order regarding the corona-virus pandemic and injur[e] the public interest since the Department of Public Safety would fail to maintain minimum staffing requirements to adequately serve the needs of its citizens." The City contends that "[t]here is a shortage of supervisory officers due to the impact of COVID-19" and a variety of other reasons and that "all of these occurrences adversely impact[] the operations of the Department"; that "civil unrest . . . has caused a need for more police presence in order to keep the peace, maintain safety, [and] crowd control"; and that "the public interest will suffer due to a shortage of supervisory 'acting sergeants' helping to protect and serve the citizenry of Newark." The City maintains that if it "must demote the 'acting sergeants', then the 'acting lieutenants', 'acting captains', and 'acting deputy chiefs' must be demoted as well for consistency and fairness." The City asserts that although

"acting sergeants may have the authority to supervise[,] . . . Director Ambrose is the ultimate authority for disciplinary matters." The City also argues that "[t]he SOA has not demonstrated irreparable harm" given that "no proofs or certifications were submitted" demonstrating that SOA members "will lose overtime to 'acting sergeants'"; that "the SOA's loss of overtime is just a theory, mere speculation conjured as an imagined harm"; and that "the SOA needs to be reminded overtime is not automatically afforded police officers" but "is within the discretion of the Department Director." The City asserts that "no proofs have been submitted by the SOA" demonstrating that it is losing dues; and that "[t]he alleged loss of dues from 'acting sergeants' can be attributed to other factors . . . [including] implementation of Janus v. AFSCME, Council 31, 138 S. Ct. 2448 (2018), where members were not obligated to have their paychecks deducted for union dues." The City also argues that "[t]he SOA and the City have established a past practice of utilizing 'acting sergeants.'" The City maintains that "[t]he SOA had no objections to the use of 'acting sergeants' prior to the COVID-19 pandemic or during early on-set of the pandemic in March" - e.g., "on March 27, 2020, Director Ambrose issued Personnel Order No. 2020-148 . . . and the SOA had no objections to the use of 'acting sergeants.'" The City contends that "[o]nly after several personnel orders" "dat[ing] back over 10 years", "the SOA

decided to make issue in the midst of a possible second wave of the COVID-19 pandemic and civic unrest due to racial tensions.”^{11/} The City also argues that it “has managerial rights to appoint ‘acting sergeants’” based upon the parties’ collective negotiations agreement and local ordinances which grant the City, Business Administrator, and Public Safety Director with “the managerial prerogative to conduct the daily operations of the Department of Public Safety.” The City maintains that “[t]he SOA is not an appointing authority and has interjected itself into City operations in an attempt to bypass its managerial rights particularly the right ‘to hire all employees and subject to the provision of law, to determine their qualifications and conditions for continued employment, assignment’” The City contends that “[a]ppointing acting supervisory personnel particularly during a pandemic is the City’s exclusive right, not the SOA’s[,] . . . [and] is necessary to maintain staffing needs.” The City asserts “that the issue involved [in this matter] does not intimately and directly affect the work and welfare of the sergeants serving in [a] permanent position” because they “are not being displaced or replaced”; that “the basis for the use of ‘acting sergeants’ is to ensure the supervisory operational staffing is adequate to maintain the

^{11/} In support of its position, the City cites Hall v. Board of Ed. of Twp. of Jefferson, Morris Cty., 125 N.J. 299 (1991).

safety of the City"; and that "forcing the City to negotiate this issue would significantly interfere with the City's managerial prerogative." The City maintains that "the unit work rule is inapplicable to the facts of the present case" because "[t]his is not a matter where duties are being transferred to another unit"; and that even if the unit work rule is applied, "the City submits it satisfies exceptions to its application" given that "the union has waived its right to negotiate as it is an established past practice between the parties of having police personnel operate in an 'acting' capacity" and the City "is ensuring that the public interest is protected by maintaining supervisory staffing by trained personnel."^{12/} The City also argues that it "has authority to employ and transfer officers for the Newark Police Department as temporary employees due to the current emergency of COVID-19." The City maintains that N.J.S.A. 40A:14-145,^{13/}

^{12/} In support of its position, the City cites City of Atlantic City and Atlantic City Professional Firefighters, IAFF, Local 198, P.E.R.C. No. 2015-63, 41 NJPER 439 (¶137 2015), aff'd in pt., rev'd in pt., 44 NJPER 115 (¶136 App. Div. 2017) and City of Jersey City v. Jersey City POBA, 154 N.J. 555, 568, 572 (1998).

^{13/} N.J.S.A. 40A:14-145, entitled "Appointment of temporary members and officers; general qualifications; termination of employment," provides:

In any municipality wherein Title 11 (Civil Service) of the Revised Statutes is in operation, and a vacancy occurs in the police department or force by reason of the granting of a leave of absence, as provided by law,

(continued...)

N.J.S.A. 40A:14-122,^{14/} N.J.S.A. 40A:14-134,^{15/} and N.J.S.A.

13/ (...continued)

the appointing authority shall certify to the Civil Service Commission the reason for such vacancy, the name of the person and his office or position.

The appointing authority may fill temporarily such office or position by the appointment of any person who:

- (1) is over 21 and under 45 years of age;
- (2) is a citizen of the United States and a resident of New Jersey;
- (3) is able to read, write and speak the English language well and intelligently;
- (4) is of good moral character; and
- (5) has not been convicted of any criminal offense involving moral turpitude.

Such temporary employment shall terminate upon the date the appointee's predecessor returns to his duties, or when it is determined that said predecessor will not return, or sooner, when deemed advisable by said appointing authority.

14/ N.J.S.A. 40A:14-122, entitled "General qualifications of members of police department and force; temporary appointments; absences from duty," provides:

Except as otherwise provided by law, no person shall be appointed as a member of the police department and force, unless he:

- (1) is a citizen of the United States;
- (2) is sound in body and of good health sufficient to satisfy the board of trustees of the police and firemen's retirement system of New Jersey as to his eligibility for membership in the retirement system;
- (3) is able to read, write and speak the English language well and intelligently;
- (4) is of good moral character, and has not been convicted of any criminal offense

(continued...)

14/ (...continued)
involving moral turpitude.

The appointing body, officer or officers of the municipality when authorized so to do, may employ such officers and other personnel for said police department and force as temporary employees in emergencies, or for certain specified parts of the year, as needed.

Except as otherwise provided by law, any permanent member or officer of such police department and force who shall be absent from duty without just cause or leave of absence, for a continuous period of 5 days, shall cease to be a member of such police department and force.

15/ N.J.S.A. 40A:14-134, entitled "Certain emergencies; compensation," provides:

"Emergency" as used herein shall include any unusual conditions caused by any circumstances or situation including shortages in the personnel of the police department or force caused by vacancies, sickness or injury, or by the taking of accrued vacation or sick leave or both, whereby the safety of the public is endangered or imperiled, as shall be determined within the sole discretion of the officer, board or official having charge of the police department or force in any municipality.

In any municipality in which the officer, board or official having charge or control of the police department or force has authority, in times of any such emergency to summon and keep on duty any paid members of the police department or force for a period or periods of time in excess of the hours of ordinary duty, the governing body may provide compensation for some or all of such

(continued...)

40A:14-146.9^{16/} provide statutory authority for the City "to ensure operations during an emergency" and that "COVID-19 and

15/ (...continued)

emergency duty by any such policeman at his prevailing wage, or at a rate not in excess of 1 ½ times his prevailing hourly wage rate, which compensation shall be in lieu of any compensatory time off otherwise due for the emergency duty so compensated.

The governing body of the municipality may, if necessary, make emergency appropriations to provide funds for the payment of such compensation as provided by law.

16/ N.J.S.A. 40A:14-146.9, entitled "Definitions," provides in pertinent part:

b. "Emergency" means any sudden, unexpected or unforeseeable event requiring the immediate use or deployment of law enforcement personnel as shall be determined by the chief of police, or in the absence of the chief, other chief law enforcement officer or the mayor or the mayor's designee or, in the case of a county, the county executive or freeholder director or designee, as appropriate, to whom the authority of designating an "emergency" has been prescribed by local ordinance or resolution, as appropriate. Vacations, shortages in police personnel caused by vacancies unfilled by the appointing authority for more than 60 days, or any other condition which could reasonably have been anticipated or foreseen shall not constitute an "emergency" for the purposes of this act; but an "emergency" may continue for the purposes of this act when a vacancy remains unfilled for more than 60 days and when, on application of the appointing authority, the county prosecutor grants an extension for one or more additional 60-day periods upon a showing by the appointing authority of a diligent, good faith effort to fill the vacancy

civil unrest are two [present] emergencies” justifying the City’s decision “to summon and keep on duty any paid members of the police department.” The City notes that Mayor Ras Baraka “issued several Executive Orders during the COVID-19 crisis . . . to protect the citizens of Newark by implementing measures to safeguard and . . . prevent the spread of the virus” and “closing non-essential retail stores, implementing 8:00 p.m. curfews, wearing masks, [and] maintain[ing] social distancing”; and that the statutory authority cited above provides further support for the City’s actions. The City contends that “[it] has the authority to employ and transfer officers as temporary employees due to the several current emergencies detrimentally impacting the City and its residents”; that “180 officers [have been] infected with [corona-]virus and three [have] died”; that “COVID-19 has impacted the amount of officers taking sick leave” and “[i]ndefinite suspensions and long-term terminal leaves of absences all subject the City to a shortage of supervisory staff”; and that “[a] total of 46 supervisory officers are needed to compensate for the loss of staff . . . particularly in the midst of [a] global pandemic and civil unrest.” The City claims that it “has the authority pursuant to N.J.S.A. 40A:14-146.9 to appoint ‘acting’ sergeants and other acting officers in accordance [with] Civil Service rules and regulations”; that “[o]fficers who are acting are assigned to a new duty station

where there is imminent need"; and that "[t]he City is in imminent need of supervisory officers since the police are involved in COVID-19 testing sites, crowd control[,] and assisting the 283,000 citizens of Newark and over one million traveling through Newark"

In reply, the SOA reiterates its argument that "the City . . . [has] violat[ed] the preservation of unit work rule by transferring work traditionally performed by the SOA to police officers . . . represented by the FOP." The SOA argues that the parties' "contract language is clear and unambiguous" that "[t]he City recognizes the SOA as the sole and exclusive representative for all superior officers employed by the City in the ranks of sergeant, lieutenant, and captain"; and that "[t]he City is relying on parol or extrinsic evidence" to support its claim that "past practice has always been afforded great weight" when the non-unit employees have been utilized as "acting sergeants." The SOA maintains that even if it did acquiesce to the City's utilization of "acting sergeants" in the past, the parties' "clear and unambiguous contract language must prevail"; that the parties' recognition clause "is clear and unambiguous on its face" that the SOA "is the exclusive representative" of sergeants, lieutenants, and captains. The SOA also contends that "[t]he City has economic issues and is using the pandemic as an

excuse to fill vacancies with non-unit employees . . . in a permanent capacity . . . to save money.”^{17/}

STANDARD OF REVIEW

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

^{17/} In support of its position, the SOA cites Hall v. Board of Ed. of Twp. of Jefferson, Morris Cty., 125 N.J. 299 (1991), Mercer Cty. Voc. Tech. Sch. Bd. of Ed., H.E. No. 85-5, 10 NJPER 476 (¶15213 1984), Celanese Ltd. v. Essex Cty. Improvement Auth., 404 N.J. Super. 514, 528 (App. Div. 2009), Kotkin v. Aronson, 175 N.J. 453, 455 (2002), J.L. Davis & Associates v. Heidler, 263 N.J. Super. 264, 271 (App. Div. 1993), Conway v. 287 Corporate Ctr. Associates, 187 N.J. 259, 268 (2006), Chubb Custom Ins. Co. v. Prudential Ins. Co. of America, 195 N.J. 231, 238 (2008), and Nester v. O'Donnell, 301 N.J. Super. 198, 210 (App. Div. 1997).

substantial likelihood of success on the merits is similar to Crowe); State of New Jersey (Stockton College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975). In Little Egg Harbor Tp., the Commission Designee stated:

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

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

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

The scope of negotiations for police officers and firefighters is broader than for other public employees because N.J.S.A. 34:13A-16 provides for a permissive as well as a mandatory category of negotiations. Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), outlines the steps of a scope of negotiations analysis for firefighters and police:

First, it must be determined whether the particular item in dispute is controlled by a specific statute or regulation. If it is,

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

The unit work rule provides that an employer must negotiate before using non-unit employees to do work traditionally performed by negotiations unit employees alone. In City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998), the New Jersey Supreme Court stated that the unit work rule typically applies to require negotiations before workers in a negotiations unit are replaced by workers outside the negotiations unit. The objective of the rule is to provide a majority representative with an opportunity to negotiate over an acceptable alternative that would avoid a loss of jobs or a reduction in union membership. Id. at 576. However, the Court also ruled that the

unit work rule cannot be applied on a per se basis. Instead, the negotiability balancing test set forth in Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982), must be applied to the facts of each particular unit work claim. See Mullica Tp., P.E.R.C. No. 2019-26, 45 NJPER 239 (¶63 2019). Notably, the unit work rule contemplates three exceptions whereby the transfer of unit work is not mandatorily negotiable: "(1) the union has waived its right to negotiate over the transfer of unit work, (2) historically, the job was not within the exclusive province of the unit-personnel, and (3) the municipality is reorganizing the way it delivers government services." Jersey City, 154 N.J. at 577.

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).

Public employers are prohibited from “[r]efusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. . . .” N.J.S.A. 34:13A-5.4a(5). A determination that a party has refused to negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010). The Commission

has held that "a breach of contract may also rise to the level of a refusal to negotiate in good faith" and that it "ha[s] the authority to remedy that violation under subsection a(5)." State of New Jersey (Dep't of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

ANALYSIS

At issue in this interim relief application is the extent to which, if at all, the City's decision to utilize non-unit rank/file police officers as "acting sergeants" is negotiable and, if so, whether the City has demonstrated that its minimum staffing levels would be jeopardized absent utilizing non-unit "acting sergeants" or that it has a managerial prerogative to unilaterally take such action during a Public Health Emergency and/or State of Emergency.

The Commission has "consistently held to be mandatorily negotiable contract provisions requiring that, if an employer chooses to temporarily replace an absent superior officer, it must do so with officers of the same rank at overtime pay rates." City of Newark, P.E.R.C. No. 2006-61, 32 NJPER 43 (¶23 2006); accord Town of Kearny, P.E.R.C. No. 98-22, 23 NJPER 501 (¶28243 1997), aff'd 25 NJPER 400 (¶30173 App. Div. 1999). The Commission has also held that "[t]he decision to use lower-ranked public safety officers in an acting capacity to replace absent higher-ranked officers may be permissively negotiable, but it is

not mandatorily negotiable.” City of East Orange, P.E.R.C. No. 2001-8, 26 NJPER 365 (¶31147 2000). “[T]emporary assignments of public safety officers to replace absent superior officers are permissively negotiable.” City of New Brunswick, P.E.R.C. No. 97-141, 23 NJPER 349 (¶28162 1997). “Where employees in a title seek to protect their interest in having vacancies filled by employees holding the same title, the issue has been found to be at least permissively negotiable” because “the officers are indisputably qualified to fill in for absent officers and the dominant issue has been a reduction in labor costs”; “[t]he employer’s interest in not having to call in a superior officer on overtime does not outweigh the superior officers’ interest in preserving unit work and having employees holding a title perform duties normally assigned to that title.” Id. (citing City of Jersey City, P.E.R.C. No. 93-75, 19 NJPER 157 (¶24080 1993); New Jersey Sports & Exposition Auth., P.E.R.C. No. 87-143, 13 NJPER 492 (¶18181 1987), aff’d NJPER Supp.2d 195 (¶172 App. Div. 1988)).

The Commission has also held that “clauses for the preservation of unit work are mandatorily negotiable.” Ocean Cty. Coll., P.E.R.C. No. 2019-49, 45 NJPER 417 (¶112 2019), recon. den. P.E.R.C. No. 2020-6, 46 NJPER 108 (¶22 2019); accord West Orange Bd. of Ed., H.E. No. 2018-11, 44 NJPER 426 (¶120 2018) adopted P.E.R.C. No. 2019-10, 45 NJPER 144 (¶37 2018);

Gloucester Tp. Fire Dist. No. 2, P.E.R.C. No. 2016-89, 43 NJPER 55 (¶13 2016). The Commission has held that a contract proposal “[that] merely protects [a union’s] legitimate interest that unit employees not be replaced by non-unit employees on a permanent basis” is mandatorily negotiable.” City of Newark, P.E.R.C. No. 85-107, 11 NJPER 300 (1985). The Commission has held that the “right of first refusal” is a mandatorily negotiable “work preservation clause designed to prevent overtime opportunities from being assigned to other non-unit employees of the same public employer.” Paramus Bor., P.E.R.C. No. 86-17, 11 NJPER 502 (¶16178 1985). The Commission has held that “the allocation of overtime and procedures for selecting employees to work overtime are generally mandatorily negotiable and arbitrable.” West Milford Tp., P.E.R.C. No. 2016-45, 42 NJPER 310 (¶90 2015).

The Commission has held that “[a]n employer’s minimum staffing levels are generally not mandatorily negotiable” and “[w]here a grievance has challenged staffing decisions . . . but seeks no safety-related remedy that can be granted without affecting staffing levels, [the Commission] [has] restrained arbitration” given that “an arbitral award [cannot] order an increase in staffing since the determination of staffing levels is a managerial prerogative.” Atlantic Cty. Sheriff’s Office, P.E.R.C. No. 2020-33, 46 NJPER 278 (¶68 2019); see also City of Vineland, P.E.R.C. No. 2013-43, 39 NJPER 250 (¶86 2012). Minimum

staffing levels are not mandatorily or permissively negotiable. West Paterson Bor., P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000). An employer also has a managerial prerogative to determine the number and type of employees who will be on duty to provide services or supervise others. Fairfield Tp., P.E.R.C. No. 2014-73, 40 NJPER 514 (¶166 2014). An employer has a managerial prerogative "to deploy the specific number and type of employees required for a particular shift or respond to emergencies." Watchung Bor., P.E.R.C. No. 2016-49, 42 NJPER 351 (¶99 2016); see also City of Vineland, P.E.R.C. No. 2015-32, 41 NJPER 244 (¶80 2014) ("[i]f an emergency condition exists, a public employer may deploy its workforce to respond, even if doing so may deviate from normal employee assignments and overtime allocation"). The Commission has held that "[p]ublic employers have a managerial prerogative to determine the hours and days that a public service will be provided"; however, "[w]ork schedules of individual employees . . . are generally mandatorily negotiable." Oakland Public Library, P.E.R.C. No. 2010-71, 36 NJPER 115 (¶48 2010). "[T]he number of employees to be employed, or not to be employed, [is] a management prerogative"; "[m]atters such as how many employees are required to perform a particular task are inherent management prerogatives and are non-negotiable and, therefore, non-arbitrable." Kingwood Tp. Bd. of Ed., P.E.R.C. No. 82-31, 7 NJPER 584 (¶12262 1981);

accord North Bergen Bd. of Ed., P.E.R.C. No. 82-109, 8 NJPER 317 (¶13143 1982).

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

In the matter under review, the Appellate Division also employed the Local 195 three-prong test and concluded that, despite the fact that the terms and conditions at issue were prime examples of negotiable employment terms, negotiation was not necessary because it would "impinge on the determination of public policy."

Although the Appellate Division correctly determined that the first and second prongs of Local 195 are not at issue in this case – because the action here, in impacting work hours and pay, directly affects the employees' work and welfare and because there is no statute or regulation preempting the EERA – the panel misapplied our holding in Keyport when analyzing the third prong of the test. Concerning that third prong, the Appellate Division concluded that the economic crisis present in the Robbinsville school district permitted the Board to forego negotiations on the furloughs. The panel stated that it reached that determination because the Board was attempting to "achieve a balance between the interests of public employees and the need to maintain and provide reasonable services," and because, pursuant to Keyport, "economic considerations 'are indisputably a legitimate basis for a layoff of any type.'"

The appellate decision undervalued the lack here of an authorizing temporary emergency

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

This Court determined that the emergency regulation promulgated by the governmental agency overseeing layoff activity in civil service jurisdictions purposefully added to the managerial discretion reposed in the municipalities and, further, that it added weight to the Court's conclusion that forcing the civil service municipalities involved in Keyport to abide by their respective "negotiated agreement[s] would significantly interfere with the determination of governmental policy." That was underscored by the Court's recognition of the regulation's importance to the prong-three analysis under Local 195 regardless of whether the regulation was the express impetus for the municipalities' decisions.

Had the temporary regulation not provided that extra managerial authority, the fact patterns in the three consolidated cases in Keyport would have foundered on the third-prong analysis. Allowing a claimed need for management prerogative to prevail in tight budgetary times in order for municipal governmental policy to be properly determined would eviscerate the durability of collective

negotiated agreements. Collective negotiated agreements – promises on wages, rates of pay, and hours, and other traditional terms and conditions of employment – would mean nothing in the wake of any financial setback faced by a local governmental entity. That drastic public-policy course alteration was not explicit or implicit in the opinion setting forth the reasoning to support our holding in Keyport. We do not endorse it now for to do so would undermine Local 195 and decades of public sector labor law on collective negotiations.

To that end, the Legislature and this Court have, time and again, emphasized the value of collective negotiated agreements in our society. The Legislature enacted the EERA to serve the interests of New Jersey citizens by preventing labor disputes through such agreements. N.J.S.A. 34:13A-2; see also N.J.S.A. 34:13A-5.3 (requiring representatives of employers and employees to “meet at reasonable times and negotiate in good faith with respect to . . . terms and conditions of employment,” and requiring that such agreements be written and signed). This Court also has recognized the “wisdom of pursuing discussion between public employers and employees,” which “promote[s] labor peace and harmony.” Local 195, supra, 88 N.J. at 409; see also Teaneck Bd. of Educ. v. Teaneck Teachers Ass’n, 94 N.J. 9, 18-19 (1983). And, the Court has encouraged negotiations, stating that “[s]tate officials would be derelict in their public responsibilities” if they failed to negotiate. Local 195, supra, 88 N.J. at 409, 443. Thus, by reading Keyport to authorize the Board’s unilateral alteration of a collective negotiated agreement, the Appellate Division erroneously expanded Keyport, rendering it unrecognizable. We reject that mistaken reading and unwarranted extension of Keyport. Keyport does not support the award of summary judgment to the Board.

[Robbinsville, 227 N.J. at 202-205 (citations omitted).]

Likelihood of Success

Given these legal precepts, I find that the SOA 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 City is utilizing "acting sergeants," the evidence submitted by the parties demonstrates that there are material facts in dispute regarding the nature/utilization of the appointments (e.g., temporary or permanent), whether any of the exceptions to the unit work rule are applicable (e.g., waiver and/or exclusivity), and whether minimum staffing levels can be maintained without utilizing non-unit "acting sergeants."

The SOA claims that the City is utilizing non-unit rank/file police officers as "acting sergeants" "in a permanent capacity."^{18/} See SOA's Reply Br. at 6-7, Ex. I. The SOA also asserts that the exceptions to the unit work rule are inapplicable because it "has objected to [the City's use of] acting sergeants in the past"; has not waived its right to negotiate over the transfer of unit work; and maintains that the

^{18/} It appears that this dispute (i.e., whether the City's "acting" designations are in fact temporary or permanent appointments) has been raised before the New Jersey Civil Service Commission and is being litigated by the parties in that forum. See SOA's Br., Ex. C; SOA's Supplemental Submission at 2, Exhs. N, P.

recognition clause in the parties' expired CNA is clear, unambiguous, and controlling. See SOA's Reply Br. at 2-6, Ex. F. The SOA also claims that the City "has economic issues and is using the pandemic as an excuse to fill vacancies with non-unit employees", both explicitly and implicitly claiming that the City is able to meet its minimum staffing levels without utilizing non-unit "acting sergeants" by making permanent sergeant appointments and/or utilizing existing SOA unit members on an overtime basis. See SOA's Reply Br. at 6-7, Exhs. O-P. Oppositely, the City asserts that "the 'acting sergeants', 'acting lieutenants', and 'acting captains' were appointed temporary employees"; and that it has been making "acting" appointments since at least March 21, 2016 in support of its claim that the waiver and/or exclusivity exceptions to the unit work rule are applicable. See Pennington Certification, ¶5; Ambrose Certification, ¶15; City's Br. at Ex. E. The City also claims that "[t]here is a police staffing shortage[] due to retirements, [the] COVID-19 pandemic, terminal leave, indefinite suspension[s][,] and civil unrest" and that "there is a need for supervisory officers in an acting capacity [because the City] cannot meet [its] current staffing levels." See Huegel Certification, ¶¶8-35; Pennington Certification, ¶¶6-8; Ambrose Certification, ¶¶11-15.

These material factual disputes regarding the nature/utilization of the appointments, whether the waiver and/or exclusivity exceptions to the unit work rule are applicable, and whether minimum staffing levels can be maintained without utilizing non-unit "acting sergeants" preclude a finding that the SOA has a substantial likelihood of prevailing in a final Commission decision. See, e.g., Town of Boonton, I.R. No. 2020-1, 46 NJPER 30 (¶9 2019) (denying application for interim relief where there were "material factual disputes"); 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"). Consequently, the SOA's legal allegations are uncertain and raise at least three 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., if the City's appointment of "acting sergeants" is in fact temporary, is the utilization of unit members on an overtime basis in lieu of non-unit members a mandatory, permissive, or non-negotiable subject of negotiations under the circumstances presented (City of Newark; Town of Kearny; City of East Orange; City of New Brunswick; Robbinsville; State EO No. 103 and related Civil Service Commission guidance

re: N.J.A.C. 4A:3-3.4; N.J.S.A. 40A:14-122; N.J.S.A. 40A:14-134; N.J.S.A. 40A:14-145; N.J.S.A. 40A:14-146.9); when the City has made "acting sergeant" appointments in the past, did the SOA effectively assert a unit work claim and thereby maintain exclusivity or did the SOA waive its right to negotiate regarding the preservation of unit work (City of Jersey City); if the City can in fact maintain minimum staffing levels without utilizing non-unit "acting sergeants" by making permanent sergeant appointments and/or utilizing existing SOA unit members on an overtime basis, is the City required to do so under the circumstances presented regardless of whether the City is facing an economic crisis (Atlantic Cty. Sheriff's Office; West Paterson Bor.; Fairfield Tp.; Watchung Bor.; City of Vineland; Kingwood Tp. Bd. of Ed.; Robbinsville). 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 SOA has failed to demonstrate a substantial likelihood of prevailing in a final Commission

decision on its legal and factual allegations, a requisite element under the Crowe factors,^{19/} and deny the application for interim relief.

CONCLUSION

Under these circumstances, I find that the SOA has not sustained the heavy burden required for interim relief under the Crowe factors and deny the applications for interim relief pursuant to N.J.A.C. 19:14-9.5(b)3. This case will be transferred to the Director of Unfair Practices for further processing.

ORDER

The Newark Police Superior Officers' Association application for interim relief is denied and the temporary restraints issued on July 31, 2020 are dissolved.

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

DATED: September 25, 2020
Trenton, New Jersey

^{19/} As a result, I do not need to conduct an analysis of the other elements of the interim relief standard. See, e.g., Harvey Cedars Bor., I.R. No. 2020-4, 46 NJPER 261 (¶64 2019), Irvington Tp., I.R. No. 2019-7, 45 NJPER 129 (¶34 2018), Rutgers, I.R. No. 2018-1, 44 NJPER 131 (¶38 2017), and New Jersey Transit Bus Operations, I.R. No. 2012-17, 39 NJPER 328 (¶113 2012).