

I.R. NO. 2022-2

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

COUNTY OF MERCER,

Respondent,

-and-

Docket No. CO-2021-263

PBA LOCAL 167,

Charging Party.

**SYNOPSIS**

A Commission Designee grants an application for interim relief filed by PBA Local 167 (PBA), alleging that the County of Mercer (County) violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a (1), (2), (5) and (7) when the County on June 1, 2021, issued a memorandum that prohibited custody staff from exiting the correctional facility during the employees' work shifts for breaks except for certain exceptions. The PBA asserts that the memorandum was unilaterally issued by the County without negotiating with the PBA while the parties are in negotiations for a successor collective negotiation agreement (CNA) and changed the *status quo* primarily relying on Cumberland Cty., P.E.R.C. No. 2021-1, 47 NJPER 100 (¶24 2020). The County disputes that the *status quo* was changed by the memorandum as it was based on an existing written procedure, was a managerial prerogative based on CNA language, and was implemented for safety reasons following a series of incidents involving inmates, increases of contraband/drugs entering the facility, and officers on breaks outside failing to respond to codes in a timely fashion. As part of the Order to Show Cause, the Designee issued temporary restraints.

The Designee determined that the PBA had established a substantial likelihood of prevailing in a final Commission decision and that irreparable harm would occur because the *status quo* had changed while the parties were in negotiations for a successor CNA, the missed outdoor break time would be lost forever and there was a chilling effect on the negotiations between the parties. The Designee Ordered that the temporary restraints remain in effect pending the disposition of the matter. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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Appearances:

For the Respondent,  
Genova Burns, LLC, attorneys  
(Joseph M. Hannon, of counsel)

For the Charging Party,  
Beckett and Paris, LLC, attorneys  
(David B. Beckett, of counsel)

**INTERLOCUTORY DECISION**

PBA Local 167 (PBA or Charging Party) filed an unfair practice charge (UPC) accompanied by a request for interim relief with temporary restraints on June 22, 2021. The UPC alleges that the County of Mercer (County or MCCC) violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a (1), (2), (5) and (7),<sup>1/</sup> when the County on June 1,

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<sup>1/</sup> 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."; "(5) Refusing to negotiate (continued...)

2021 (the June 1st Memorandum), issued a memorandum that prohibited custody staff from exiting the correctional facility during the employees' work shifts for breaks except for certain exceptions.

The PBA seeks the following relief:

A. That the County be enjoined and restrained from continuing to implement the restrictions on break periods and alterations set forth in Exhibit 1 to the Charge, the June 1, 2021, Memorandum;

B. That the County be ordered to rescind the June 1, 2021, Memorandum, to reinstate the existing terms and conditions for breaks during shifts whereby, custody staff are allowed to be outside within the secured perimeter during breaks without any required authorization;

C. That the County post a notification to all officers and superiors that limits on break periods set forth in the June 1, 2021, Memorandum be rescinded;

D. That the County be enjoined from any further change in break periods that are not negotiated and agreed to by the respective unions;

E. That the County be ordered to post this decision prominently; and

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1/ (...continued)  
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."

F. That any other relief that is just and necessary be ordered.

The PBA submitted a brief, exhibits and a Verified Narrative from Donald J. Ryland, PBA Local 167 President (Ryland cert.).

On June 23, 2021, I issued an Order to Show Cause with Temporary Restraints with an initial return date via telephone conference call for July 12th.<sup>2/3/</sup> The County filed a response brief, exhibits and a certification from Charles Ellis, Warden of the Mercer County Correctional Facility (Ellis cert.), and the PBA filed a reply brief, exhibits and a reply certification from Ryland (Ryland reply cert.). On July 12th, during the call, it appeared that the parties had the ability to potentially settle this matter and the return date was ultimately rescheduled for July 21st; however, the parties were not able to resolve this matter. After the parties concluded their oral arguments, I again encouraged them to continue their settlement discussions.

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2/ The temporary restraints provided for the following:

"ORDERED that pending the return date herein, the Respondent, County of Mercer, is temporarily enjoined and restrained from:

1. Unilaterally changing and/or altering existing terms and conditions for custody staff by continuing to implement and enforce the June 1, 2021, Memorandum prohibiting, among other things, custody staff from leaving the jail building and going outside the jail building but within the secured perimeter during any break periods."

3/ The County did not move for dissolution or modification of the restraints pursuant to N.J.A.C. 19:14-9.2 (g).

**FINDINGS OF FACT**

The PBA is the majority representative of the rank-and-file custody staff officers employed by the County. The parties' most recent collective negotiations agreement (CNA) expired on December 31, 2017 and the parties are currently in negotiations for a successor CNA. (PBA Exhibit 1; Ryland cert., para. 2; Ellis cert., para. 2).

The June 1 Memorandum regarding breaks that was directed to all custody staff states the following:

1. All custody staff reporting for duty will arrive at the Correction Center with ample time to park in authorized parking area **in accordance with (IAW)** [SOP] 106, submit to search process IAW SOP 107, scan-in IAW SOP 137 and enter facility for line-up IAW SOP 138.
2. Once entering the facility Custody Staff is **NOT** permitted to exit facility. The **ONLY** exceptions authorized are outlined in SOP 007 B. 6-7.
3. Shift Commanders must submit an incident report detailing any permission granted under SOP 007 outside the scope of normal performance of duties. Authorized break areas, as detailed in SOP 007 B.5, will strictly be adhered to!
4. Custody Staff is NOT permitted to utilize ANY OTHER AREA(s) and utilization of the alternate break room will subject staff to search procedure to reenter secured building.
5. Additionally, the complete search process will be conducted on all staff who require reentry to the secured building for any reason i.e. officer's assigned to Transportation, Construction, Outside

Security, Maintenance Security, Laundry, Records Storage and like-post.

**6. Returning to personal vehicle for any reason is not authorized. Failure to adhere to this directive shall be considered abandonment of post and will result disciplinary action.**

[PBA Exhibit 2; County Exhibit C].

The County's SOP 007 entitled "Custody Break Periods" with an effective date of February 21, 2018<sup>4/</sup>, provides the following:

Policy:

A. It is the policy of the Mercer County Correction Center to ensure that the highest standards of security and safety exist at all times. It is required that all custody personnel be available 24 hours a day, 7 days a week in the event of an emergency. It is further required that custody personnel remain within the institution during their schedule[d] Tour of Duty for all break periods.

B. Standards:

1. All Custody Staff on a break period shall respond to any Code situation announced.

2. All Custody Staff will adhere to established break schedules.

3. Custody Staff will return from assigned break periods at the proper time.

4. Custody Staff will log their break periods accurately in the appropriate area of Living Unit Log Books.

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<sup>4/</sup> The SOP has been in effect since September 12, 2016 and appears to have been re-issued or revised on February 21, 2018.

5. Break Periods are confined to the Officers Dining Room, the alternate break room (near maintenance), the Resource Room and the Locker Room. Note\* Living Units and Control Rooms are **NOT** break areas.

6. Under no circumstances may Custody Staff leave secure perimeter of the building without the expressed permission of the Shift Commander or within the scope of the normal performance of their duties.

7. Under no circumstances are Custody Staff permitted to leave institution grounds without the expressed permission of the Warden or his designee, (i.e. Deputy Warden or Shift Commander) or within the scope of the normal performances of their duties.

8. Failure to adhere to any portion of these standards shall be considered Abandonment of Post and will result in severe disciplinary actions.

[PBA Exhibit 3; County Exhibit B].

A second memorandum was also issued on June 1, 2021 (with an effective date of August 1, 2021) entitled "SMOKE-FREE PROPERTY/WORKPLACE" that prohibited smoking for all staff and visitors and provides in pertinent part:

Effective August 1, 2021 at 0000 hours, the Mercer County Correction Center will enact their Tobacco/ Marijuana-Free, Chew/Dip-Free, Smoke-Free and Vapor-Free environment policy. This includes banning the use and/or possession of any product containing, made, or derived from tobacco, nicotine, and/or marijuana that is intended for human consumption whether smoked, heated, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to cigarettes, cigars, little cigars, Electronic Nicotine Delivery Systems (ENDS), chewing tobacco,

pipe tobacco, snuff, including any component, part, or accessory of a tobacco product.

1. Any employee (custody and/or non-custody) found in possession of ANY tobacco products, e-cigarettes, ENDS and/or related paraphernalia or utilizing any tobacco products in violation of this policy WILL be subject to disciplinary action, up to and including removal.

[PBA Exhibit 2].

Ryland certifies the following regarding the June 1st Memorandum that restricted outside break time for custody staff asserting that the memorandum was a unilateral change to the *status quo* and that the County failed to negotiate over the change:

5. The PBA seeks interim injunctive relief to immediately restore the status quo by enjoining and restraining the Respondent County from continuing to implement unilateral changes to rest breaks for custody staff wherein custody staff are prohibited from leaving the jail building during breaks and are effectively imprisoned inside the jail building for their 8 hour shift or for 16 hours if they are held over and required to work a second shift.

8. The Memorandum denying custody staff any outside break time bars them from going outside for a smoke or to get medication or anything else from their car; nor can custody staff get their cell phones to check in with their families on breaks effective June 1, 2021 because cell phones and medication cannot be brought inside the jail.

10. In the Memorandum, the MCCC Management makes it clear with exclamation points and bold printing that the status quo that has existed under which custody staff were able



to go outside the jail building during breaks while staying within the secured perimeter to smoke, get medication or cell phones they must leave in their cars per the SOP (Exhibit 3) has been unilaterally changed, emphasizing this point in the concluding paragraph, which states: "Returning to personal vehicle for any reason is not authorized. Failure to adhere to this directive shall be considered **abandonment of post** and will result disciplinary action (sic)." (Emphasis added).

11. The established status quo for break times before June 1st for custody staff allowed custody staff to leave the jail building if they stayed inside the secured perimeter and the designated smoke area was outside in that same area; moreover, officers were all available for emergencies as the announcements of any codes were made outside the building.

12. The custody staff member's vehicle parked inside the secured perimeter was the safe and secure places to store medicine and attend to family matters and personal medical issues like medication for health issues none of which can be dealt with inside the jail building.

13. Being able to go outside of the jail building for the allocated and established breaks during the 8 hour shift is, and has always been, essential to custody staff well-being and health because, among other things, custody staff cannot bring cell phones, medications, or other items inside the jail as they are considered contraband and there is no way to deal with personal or health matters privately in a break area inside the jail.

15. The Memorandum of June 1, 2021, unilaterally rescinded these established practices, rules, and terms governing breaks and working conditions in multiple ways denying custody staff the full use of essential break times.

16. In its first paragraph of the June 1st Memorandum in announces new rules for each shift that will unilaterally increase time for work on duty by requiring custody staff to report for duty in advance of their scheduled start time and submit to certain processing prior to being at lineup for the start of each shift and this additional work time is in addition to the changes denying use of breaks described in the following paragraphs. See, ¶1 of [the June 1st Memorandum] [above].

17. In ¶2 of [the June 1st Memorandum], the MCCC Management makes it clear that once custody staff enter the facility, meaning the four corners of the jail building itself, they are "NOT permitted to exit facility"; and, the exceptions noted at the end are illusory as shown by the required documentation for any exception in ¶3. [see the June 1st Memorandum].

18. The Memorandum then requires that a Shift Commander justify each time a custody staff is allowed outside for a break by citing to an SOP, and then cite to specific reasons, which in the referenced SOP are of no help because B 6-7 of that SOP authorizes custody staff to be outside of the building with permission of the Shift Commander and outside institution grounds with the Warden's permission, these SOP's have never been interpreted before June 1st to deny custody staff the right to go outside during break so long as they stay within the secured perimeter.

19. Not only does the Memorandum require individual written permission by a Shift Commander but the Shift Commander must prepare an Incident Report for each time the Shift Commander approves an individual custody staff member to go outside within the secured perimeter on break. [The June 1st Memorandum], ¶3.

20. This procedure strongly discourages any officer or superior officer from seeking, granting and or obtaining approval for an outside break, and I have not heard of any Shift Commander providing such authorization and filing such an Incident Report to justify "allowing" the officer to leave the jail building.

21. The SOP's governing breaks/rest periods that are referenced in Exhibit 1 have never been interpreted to deny officers the ability to leave the jail building itself to check a phone in their car, to take a smoke break, to take medication, to check on a child or parent, spouse/partner, or simply be outside in the secured perimeter during their short break periods and so provided no basis to cite for any exceptions.

22. Additionally, insisting in ¶3 [of the June 1st Memorandum] that custody staff can only use the designated break areas inside the jail further confirms this change to the status quo.

23. These designated break areas cannot be used by custody staff for medication nor do they allow custody staff to check-in with children or an ailing parent or spouse, or deal with personal matters, and so custody staff have uniformly been able to go outside to smoke, check phones as noted, or get medication that cannot be inside the jail prior to the issuance of the June 1st Memorandum.

24. Denying custody staff the right to exit the building and go outside even within the secured perimeter during breaks is a unilateral change being imposed that imperils the health and safety of custody staff who have to supervise and monitor prisoners in a high stress working environment that has been made even more stressful due to COVID-19 and staff shortages.

29. Since this policy was implemented, the PBA has written to MCCC Management and County administration identifying the severe and irreparable harm being caused by these new restrictions, the need for the County to negotiate before making any such change and has provided the County with a copy of the violations of the Employer Employee Relations Act ("EERA") even copying the recent Commission decision, P.E.R.C. 2020-1 (attached) where Cumberland County Corrections was enjoined from similar unilateral restrictions on breaks. A copy of the email communications from the PBA are attached as Exhibit 5 and they show the repeated efforts the PBA made to challenge this change to rules.

32. Notwithstanding these notifications and demand that the County rescind the new rules and the offer to meet and negotiate, the County has continued to unilaterally implement these changes to terms and conditions of employment without any negotiations.

[Ryland cert., para 5, 8, 10-13, 15-24, 29, 32].

On behalf of the County, Ellis asserts that the June 1st Memorandum regarding breaks was not a change to the *status quo* as it was based on the existing SOP 007, it was within his managerial rights to issue the memorandum, it was based on CNA language, and was implemented for safety reasons following a series of incidents involving inmates, increases of contraband/drugs entering the facility, and officers on breaks outside failing to respond to codes in a timely fashion:

2. The PBA and County are parties to a collective negotiations agreement ("CNA") for the term 2015-2017 and remain in negotiations

for a successor agreement. Importantly, the CNA contains a Management Rights Clause, 2.1, conferring to the County the "responsibility to promulgate and enforce reasonable rules and regulations governing the conduct and the activities of the employees are exclusively retained by the employer." The employer also has the authority to establish work shift, job duties and qualifications. See 4.1. It also establishes that the "Employer may establish reasonable and necessary rule of work and conduct for employees. Such rules shall be equally applied and enforced." See 6.1. Additionally, in order to ensure officers stay within the secured perimeter, the County implemented a food service on the premises for employees. See 34.1.

3. In my capacity as Warden, I am responsible for promulgating and enforcing rules and regulations to ensure the safety and security of inmates, custodial staff, and all other persons entering the outer and secured perimeter of the facility. To that end, I have exercised my discretion to relax these rules based on the safety needs of the institution from time to time.

4. The outer perimeter of the facility includes the Administrative, Custody and Civilian parking areas where employees park their vehicles. The secured perimeter begins at the F-105 B and F-105 A double doors to enter the correctional building. This area is called the secured perimeter because it is the first check point where anyone entering the correctional facility, including custodial staff, are searched for contraband prior to entering the secured perimeter. As set forth in SOPs 107, and 255 "[i]t is the policy of the Mercer County Correction center to prevent any object(s), which would pose a threat to the security, safety or orderly running of the institution to enter the secure perimeter of the

Correction Center" (emphasis added).  
(Exhibit A, SOP 107).<sup>5/</sup>

5. Intermittently I have given custodial staff the courtesy to leave the secured perimeter for breaks from time to time. This courtesy is not the status quo as alleged by the Union. Instead, the status quo regarding breaks is clearly outlined in SOP 007 "Custody Break Periods." This SOP has been in place since September 12, 2016. (Exhibit B, SOP 007, Custody Break Periods).

6. As Warden, it is my job to assess the safety concerns of the institution on a daily basis. Following a series of safety incidents involving inmates, increases of drugs entering the facility, and officers failing to respond to codes in a timely fashion, I issued a memorandum on June 1, 2021, enforcing existing policies and procedures as set forth in various SOP's. (Exhibit C, June 1, 2021, Memorandum). The issue of contraband entering the correctional facility is of utmost importance in keeping the correctional facility safe and safeguards to limit the amount of exposure to outside the secured perimeter during the work shift is of vital importance to the safety of the facility.

7. I categorically reject any and all claims made by the Union that enforcing these SOP's, specifically, SOP 007, is a unilateral change in any term or condition of employment or constitutes a failure to negotiate. Moreover, any claims that enforcing this SOP, impacts the ability of custodial staff to obtain medical care, or attend to family matters is inaccurate.

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<sup>5/</sup> SOP 107 "Entering Institution - Contraband" - with an effective date of 8/14/18 (appearing to have been enacted on 5/5/09) - describes the procedures for entering the facility and what items are prohibited. (County Exhibit E).

8. SOP 102 B-8&9 directs staff on addressing medication needs. In the event that custodial staff have a family emergency, or need to contact family members for whatever reason, there are procedures in place. Custodial staff are permitted to use telephones in the secured perimeter to contact their family. Likewise, if there is a family emergency, family members can contact the correctional facility and the applicable Shift Commander will redirect the call to the appropriate employee. (Exhibit D, SOP 102).

9. The June 1, 2021, memorandum, is consistent with applicable SOP's as outlined in the memorandum. The first paragraph sets forth the requirements that all custody staff parked in the authorized parking areas should arrive before the beginning of their shift with enough time to undergo the search and scan processes. This is in accordance with long standing SOP's as set forth in SOP 107, 136, 137 and 138. These procedures take time, and the memorandum does no more than advise custodial staff that they should come to work at an appropriate time before the start of their shift to undergo these procedures. For instance, SOP107 requires custodial staff to pass through a metal detector. This includes searches of all bags for contraband. SOP 138 requires all custody staff to perform a line up at the beginning of each Tour of Duty. The SOP requires shift commanders to examine all officers in line up, and observe each officer, including examining uniforms. (Exhibit E, SOP 107, 137, 138).

10. For example, if an employee enters the parking lot five minutes before the beginning of shift, the employee still has to walk close to 300 yards to enter the first barrier leading up to the secured perimeter. After that, the employee must undergo the search procedures, scan in, then go to line up. Clearly, if an employee arrives five minutes before the beginning of their shift, the

employee will not be able to complete these processes and start their shift on time. Per SOP 136, employees are responsible to come to work on time and must adjust their schedule accordingly to ensure they arrive to the parking lot with enough time to go through these processes. Likewise, if an employee is on break outside of the secured perimeter, they are unable to respond immediately to any code because of the time it takes to get to the secured perimeter and undergo the required search procedures before entering the building. (Exhibit F, SOP 106).

14. Paragraph 6, of the memorandum specifies "returning to personal vehicle for any reason is not authorized. Failure to adhere to this directive shall be considered abandonment of the post and will result disciplinary action." This language was not inserted to emphasize the "status quo" has changed, as outlined in paragraph 10 of the union's certification. This is direct quote from the SOP as outlined in SOP 007 B8.

15. The Union officers have been provided the SOPs that are applicable in this matter for several years. In fact, search of records demonstrates Union members and officials signing off on receipt of the various SOPs dating back to 2006. The records are voluminous but may be provided if disputed by the Union.

16. The safety and security of custodial staff, visitors, and all other persons entering the Mercer County Correctional Center is paramount and necessitates prompt and immediate attention from custodial staff at all times. I exercised my discretion as Warden based on my assessment of the security needs of the facility to relax SOP 007 governing custodial breaks as a courtesy to custodial staff. As the safety concerns have increased, there has been a corresponding decrease in response to safety codes as officers on break are unable to respond promptly due to both the distance it takes to



get back to the secured perimeter, and the length of time to undergo the search procedures to reenter the building. As a consequence, the safety and security of all persons within the secured perimeter has been jeopardized. Accordingly, and within my managerial rights, as Administrator of the institution, I withdrew the courtesy to meet the safety needs of the institution.

[Ellis cert., para 2-10, 14-16].

In the PBA's reply certification, Ryland disputes that there were any safety concerns that prompted the June 1st Memorandum, the definition of the "secured perimeter," the size of the fenced in parking area and the time it would take custody staff to return to the correctional facility building:

6. The claimed emergencies, codes that were allegedly not responded to, inmate issues and contraband claims are supported by zero evidence; in fact, there are no incident reports, discipline charges, or even citations to any specific incident or event . . . .

8. These claims of an emergency are made up out of whole cloth as I know that a failure to respond to a code, which is a very serious breach, would result in disciplinary charges or investigations and there have been none in the last two years and the last incident relating to a failure to respond to a code when on break is a charge that goes back to 2017.

28. The nurses, in particular, have regular contact with inmates and they need to be present for emergencies; yet they are allowed to take their breaks outside of the building which shows that this is not designed for security or safety . . . and that it is not about "contraband."

15. The argument in ¶4[of the Ellis cert.] that the "secured perimeter" is understood to start at the double doors that enter the correctional building is not credible or correct and is why the June 1st memo so strongly announced the change.

16. The Ellis Certification's argument ignores the fact that the outside security post officer orders show that the officer is responsible for ensuring security within the perimeter that is within the gated area and outside the building, i.e., the secured perimeter. See, a copy of post orders attached hereto as Exhibit 2.<sup>6/</sup>

40. The attached five photographs [PBA Reply Exhibit 3A-E] demonstrate the parking areas are approximately 100 feet away, next to the outside gate and are not three football fields away so that officers have a one-minute walk, or less, to enter the building, there are no issues with custody staff responding to codes or going to their car on break.

41. In ¶10 the Ellis Certification also argues that employees on break "outside of the secured perimeter" cannot respond to codes when in fact the loudspeaker broadcasting codes is audible within the fenced in area and officers have radios that are assigned to them and work on the grounds inside the fenced in area, which is how officers routinely respond to codes when they are out on break.

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<sup>6/</sup> SOP 267 - "Post Orders - Outside Security Booth" - with an effective date of 10/15/08 - describes the procedures for entering the fenced in parking area and grants the Outside Security Booth Officer the authority to request to search the interior and trunks of vehicles if suspicion exists regarding contraband. (PBA Reply Exhibit 2). Additionally, posted to the fence outside of the security booth is a sign indicating that "ALL VEHICLES AND PERSON'S SUBJECT TO SEARCH." (PBA Reply Exhibit 3E (photograph)).

[Ryland reply cert., para 6, 8, 28, 15-16, 40-41].

### ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations<sup>7/</sup> and that irreparable harm will occur if the requested relief is not granted. 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. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009), (citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe)); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975). In Little Egg Harbor Tp., the 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

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<sup>7/</sup> All material facts must not be controverted in order for the moving party to have a substantial likelihood of success before the Commission. Crowe at 133.

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-5.4a(1) and 5.4a(2)

The standards governing violations of these unfair practice sections of the Act are recited in City of Hoboken, P.E.R.C. No. 2016-79 at pp 3-4, 42 NJPER 559 (¶154 2016):

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 to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. See Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 58 LRRM 2657, 2659 (1965).

5.4a(2)

N.J.S.A. 34:13A-5.4a(2) prohibits "pervasive employer control or manipulation of the employee organization itself . . ."

[North Brunswick Twp. Bd. of Ed., P.E.R.C. No 80-122, 6 NJPER 193, 194 (¶11095 1980).]

N.J.S.A. 34:13A-5.3 sets forth a public employer's obligation to negotiate with a majority representative before changing working conditions:

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

Consistent with the Act, the Commission and courts have held that changes in negotiable terms and conditions of employment must be addressed through the collective negotiations process. See, e.g., Atlantic Cty., 230 N.J. 237, 252 (2017); Middletown Tp. I, P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1997), aff'd, 334 N.J. Super. 512 (App. Div. 1999), aff'd, 166 N.J. 112 (2000); Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 337-338 (1989); and Galloway Twp. Bd. of Educ., 78 N.J. 25, 52 (1978).

A public employer may violate subsection 5.4a(5) of the Act if it modifies terms and conditions of employment without first negotiating in good faith to impasse or having a managerial prerogative or contractual right to make the change. State of New Jersey (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985). For the Commission to find a 5.4a(5) violation, the charging party must prove: (1) a change; (2) in a term or condition of employment; (3) without negotiations. Willingboro Bd. of Ed., P.E.R.C. No. 86-76, 12 NJPER 32 (¶17012 1985). The remedy for a failure to negotiate prior to instituting a mid-contract change to a non-contractual employment condition is to restore and maintain the *status quo* until negotiations have been held and an agreement reached. Galloway, 78 N.J. at 48-49; Middletown Tp. II, 34 NJPER 228, 231 (¶79 App. Div. 2008), aff'g P.E.R.C. No. 2007-18, 32 NJPER 325 (¶135 2006).

An employer independently violates 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (P69 2004), aff'd, 31 NJPER 290 (¶113 App. Div. 2005).

The scope of negotiations for police, correctional custody staff officers and fire employees 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. Compare Paterson Police PBA Local No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), with Local 195, IFPTE v. State, 88 N.J. 393, 403-404 (1982). However, where, as here, a public employer is charged with refusing to negotiate over terms and conditions of employment in violation of N.J.S.A. 34:13A-5.4a(5), the Charging Party must show that the dispute involves a change in a mandatorily negotiable, as opposed to a permissive, subject. City of Newark, P.E.R.C. No. 2019-21, 45 NJPER 211 (¶55 2018). Accordingly, the following standard for mandatorily negotiable items outlined in Paterson, which is consistent with the standard for non-police and fire employees set forth in Local 195, applies:

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.

[Paterson, 87 N.J. at 92.]

In this case the PBA relies mainly on Cumberland Cty., P.E.R.C. No. 2021-1, 47 NJPER 100 (¶24 2020), where the Commission granted both the charging party's motion for reconsideration and its application for interim relief. Cumberland Cty. is case with similar facts to the instant matter although it was based in part on the impact of COVID-19 on correctional custody officers when the County no longer permitted those officers to leave the correctional facility during their breaks. However, Cumberland Cty. also addressed unilateral changes in the *status quo* while the parties were in negotiations. Changing the *status quo* during negotiations for a successor agreement, has a chilling effect on negotiations and meets the irreparable harm portion of the interim relief standards. See Galloway Tp. Bd. of Ed., supra., 78 N.J. at 48.

Cumberland Cty. also addressed other Commission cases where employees were not authorized to leave the work premises while on breaks:

In Freehold Regional H.S. Bd. of Ed., P.E.R.C. No. 81-58, 6 NJPER 548 (¶11278 1980), aff'd, NJPER Supp.2d 113 (¶93 App. Div. 1982), the Commission held that a clause

permitting a teacher to leave the building during the lunch period upon notifying the principal was mandatorily negotiable. The Commission also noted that an employer's ability to act to meet emergencies is implicitly reserved in all situations, so the clause did not need to explicitly include language cancelling the right to leave the building during emergencies. Id.

In contrast, the Commission has found that a school district's ability to provide for the quickest possible professional assistance in the event of a medical emergency outweighed school nurses' interest in leaving their respective buildings during their lunch periods, as the safety and well-being of students is a fundamental policy concern. Salem City Bd. of Ed., P.E.R.C. No. 82-115, 8 NJPER 355 (¶13163 1982), aff'd, NJPER Supp.2d 133 (¶114 App. Div. 1983). Noting that medical emergencies can occur at any time and nurses are the most qualified personnel in the school to administer urgent care, the Commission held that the employer had a non-negotiable managerial prerogative to require nurses to remain in the building.

More recently, in City of Hoboken, P.E.R.C. No. 2014-43, 40 NJPER 425 (¶144 2013), the Commission held that police dispatchers' interest in negotiating prior to changing past practice and losing their ability to leave headquarters during meal breaks outweighed the City's interest in unilaterally eliminating the practice because it was not shown to significantly interfere with any governmental policy determination. The City argued that its concern for maintaining order and efficiency by having both dispatchers available at all times to respond to emergency situations is a non-negotiable managerial prerogative. Id. The Commission noted that all police officers can perform dispatch duties in an emergency and the employer has the prerogative to require the dispatcher to remain during an emergency. Id. Moreover, the Commission distinguished



the situation from that of school nurses in Salem City Bd. of Ed., in which each school building only had one nurse, stating:

"The unique fact in the school nursing context is that the school nurse is the only qualified employee to perform essential first aid during a medical emergency." [Hoboken, 40 NJPER at 427.]

[Cumberland Cty.].

The County argues in its response brief that the Cumberland Cty. decision is inapplicable to this matter for the following reasons, aside from the absence of the COVID-19<sup>8/</sup> issue:

Specifically, there never has been a directive issued endorsing officers to leave the secured perimeter like Cumberland. Instead, as Warden of the Mercer County Correctional Facility, Warden Ellis exercised his discretion based on the existing safety needs of the institution to permit a courtesy to custodial staff to exit the secured perimeter for breaks.

[County response brief at page 2].

However, based on the record as set forth above, there is no documentation that indicates that the custody staff was required in the past to remain inside the correctional facility during breaks and was not authorized (without being required to go through the procedures set forth in the June 1st Memorandum) to go to their vehicles in the secured parking area during their breaks. Although the County has produced SOP 007, "Custody Break

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<sup>8/</sup> COVID-19 is referenced once by the PBA (Ryland cert., para 24).

Periods," it does not appear from the record that the SOP was ever enforced to restrict custody staff from leaving the building to go outside during breaks prior to the June 1st Memorandum.

Additionally, with respect to the safety issue regarding contraband entering the facility, only the custody staff was impacted and other facility employees were not similarly restricted; and the vehicles that park in the secured perimeter fenced in parking area are subject to search by the Outside Security Booth Officer. Finally, there is no specific documentation in the record that demonstrates that any custody officers were not able to respond to safety codes when on breaks outside.

Harm becomes irreparable in circumstances where the Commission cannot fashion an adequate remedy which would return the parties to the conditions that existed before the commission of any unfair practice at the conclusion of the processing of the unfair practice charge. City of Newark, I.R. 2006-3, 31 NJPER 250 (¶97 2005); Atlantic City Bd. of Ed., I.R. No. 2003-14, 29 NJPER 305 (¶94 2003); and Sussex Cty., I.R. No. 2003-13, 29 NJPER 274 (¶81 2003).

I find that the *status quo* between the parties was for the custody staff to have the ability to return to their vehicles in the secured perimeter parking area during breaks and the unilateral change by the County occurred without negotiations

changing the *status quo* during negotiations for a successor agreement; this has a chilling effect on negotiations and meets the irreparable harm portion of the interim relief standards. See Galloway Tp. Bd. of Ed., supra.

The denied outside break time in this matter also establishes irreparable harm since it represents break opportunities that are lost forever. The Commission in Cumberland Cty. addressed this issue:

We find the PBA has established irreparable harm if the status quo ante is not restored pending the resolution of the unfair practice charge. Here, the PBA officers' ability to enjoy their contractual paid breaks by getting some relief from the correctional facility work environment has been denied by the County's unilateral decision to restrict them not just to the premises, but the facility. They cannot get those unilaterally restricted break periods back. This is analogous to leave time denied, which Commission Designees have regularly found constitutes irreparable harm because it represents leave opportunities which are lost forever and are not capable of an effective remedy at the conclusion of the case. Lodi Bor., I.R. No. 2006-14, 32 NJPER 65 (¶33 2006); Mantua Tp., I.R. No. 2019-17, 45 NJPER 298 (¶77 2019); Mercer Cty., I.R. No. 2019-15, 45 NJPER 273 (¶71 2019); and City of Trenton, I.R. No. 2003-4, 28 NJPER 368 (¶33134 2002).

[Cumberland Cty.].

Based on the above, I find that the Charging Party has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and

will suffer irreparable harm if the temporary restraints are dissolved. Crowe. I also find that the relative hardship to the parties weighs in favor of the Charging Party in order to ensure that outdoor break time for the custody officers is not lost forever and there is no chilling effect on the negotiations between the parties. Finally, the public interest is advanced by requiring the County to adhere to the tenets of the Act so that the parties agree on the terms and conditions for the successor CNA in the most efficient manner possible.

**ORDER**

IT IS HEREBY ORDERED, that the Charging Party's application for interim relief is granted and the temporary restraints issued on June 23, 2021 shall remain in effect, pending the disposition of this matter. This case shall be processed in the normal course and this matter will be returned to the Director of Unfair Practices for further processing.

/s/ David N. Gambert  
David N. Gambert  
Commission Designee

DATED: August 13, 2021  
Trenton, New Jersey

