

I.R. NO. 2020-23

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC COUNTY SHERIFF'S OFFICE,
COUNTY OF PASSAIC,

Respondents,

-and-

Docket Nos. CO-2020-263
CO-2020-264

POLICEMEN'S BENEVOLENT ASSOCIATION
LOCAL NO. 197,
POLICEMEN'S BENEVOLENT ASSOCIATION
LOCAL NO. 286,

Charging Parties.

SYNOPSIS

A Commission Designee grants applications for interim relief filed by PBA Local 197 and PBA Local 286 against the County alleging that the County 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 eliminating and/or rescinding full-time union release for the Presidents of Local 197 and Local 286. The Designee finds that the PBA has demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. The Designee also finds that the PBA has established irreparable harm, relative hardship, and that the public interest will not be injured by an interim relief order. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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LOCAL NO. 286,

Charging Parties.

Appearances:

For the Respondent, Florio, Perrucci, Steinhardt,
Cappelli, Tipton & Taylor, LLC, attorneys (Lester E.
Taylor, of counsel)

For Charging Party, Crivelli & Barbati, L.L.C.,
attorneys (Frank M. Crivelli, of counsel; Donald C.
Barbati, of counsel; Michael P. DeRose, of counsel)

INTERLOCUTORY DECISION

On March 30, 2020, Policemen's Benevolent Association Local No. 197 (Local 197) and Policemen's Benevolent Association Local No. 286 (Local 286) (collectively, PBA) filed unfair practice charges, together with applications for interim relief, against the Passaic County Sheriff's Office and the County of Passaic (collectively, County). The charges allege that on or about March 24, 2020, the County 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 eliminating and/or rescinding full-time union release for Local 197 President John Welsh (Welsh) (CO-2020-263) and Local 286 President James Weston (Weston) (CO-2020-264).

The PBA's applications for interim relief request the following relief pending disposition of the underlying unfair practice charges, including temporary restraints:

-the County be enjoined from unilaterally eliminating and/or rescinding the full-time off and/or full-duty release expressly afforded, allotted, and/or granted to PBA Local 197 President Welsh and PBA Local 286 President Weston.

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- 1/ These provisions prohibit public employers, their representatives or agents from "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act"; "(2) Dominating or interfering with the formation, existence or administration 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(2), (3), (4), and (7) claims inasmuch as they are unnecessary for my determination of the PBA's applications for interim relief.

PROCEDURAL HISTORY

On April 2, 2020, I signed an Order consolidating CO-2020-263 and CO-2020-264. Also on April 2, I signed an Order to Show Cause directing the County to file any opposition by April 6; the PBA to file any reply by April 8; and set April 9 as the return date for oral argument. On April 9, counsel engaged in oral argument during a telephone conference call.^{3/} At the conclusion of oral argument, based upon the parties' representations, I asked whether the County was willing to engage in good faith negotiations with the PBA in an effort to resolve the instant disputes before I proceeded to issue a final decision. At that time, the County's attorney indicated that the County was willing to engage in good faith negotiations with the PBA. Accordingly, on April 9, I signed an Order imposing temporary restraints; directed the parties to immediately engage in negotiations and inform me of any progress; and indicated that a subsequent determination regarding the efficacy of continued negotiations, additional briefing related to the applications for interim relief, and/or a written decision disposing of the applications for interim relief would be made upon receipt of the parties' status update.

3/ The parties agree that Rozenblit v. Lyles, 2017 N.J. Super. Unpub. LEXIS 3202 (Ch. Div. 2017), rev'd 461 N.J. Super. 20 (App. Div. 2019), certif. granted (Dkt No. A-41/42-19), is inapplicable to the instant applications for interim relief/underlying unfair practice charges.

On May 13, 2020, the County advised that negotiations were languishing. Accordingly, on May 14, I convened a telephone conference call to discuss how this matter would proceed and the parties agreed that a written decision should be issued without any further briefing.

In support of the applications for interim relief, the PBA submitted a brief, exhibits, the certification of its attorney, Frank M. Crivelli (Crivelli); the certification of Local 197 President John Welsh (Welsh); the supplemental certification of Local 197 President Welsh; and the certification of Local 286 President James Weston (Weston). In opposition, the County submitted a brief, exhibits, the certification of its attorney, Lester E. Taylor (Taylor); the certification of County Administrator, Anthony J. DeNova (DeNova); the certification of the Warden of the County Jail, Michael Tolerico (Tolerico); and the certification of the Undersheriff of the County Sheriff's Office, Joseph Dennis (Dennis). The PBA also filed a reply brief, exhibits, the supplemental certification of its attorney, Crivelli; the second supplemental certification of Local 197 President Welsh; and the supplemental certification of Local 286 President Weston.

FINDINGS OF FACT**Local 197**

Local 197 represents correctional officers whose duties are non-supervisory, excluding the Warden and Deputy Warden, employed by the County. See 2015-2018 MOA, Recognition provision (Crivelli Certification, Ex. A); 2007-2014 CNA, Art. 1 (Crivelli Certification, Ex. B). The County and Local 197 are parties to an expired collective negotiations agreement (CNA) in effect from January 1, 2007 through December 31, 2014; an expired memorandum of agreement (MOA) in effect from January 1, 2015 through December 31, 2018; and are currently in negotiations for a successor agreement. The grievance procedure ends in binding arbitration.

Article 4 of the parties' expired CNA, entitled "Management Rights," provides:

The public employer retains the rights, in accordance with applicable laws and procedures, to: (a) direct employees; (b) hire, promote, transfer, assign and retain employees in positions within the agency, as well as to suspend, demote, discharge, or take reasonable disciplinary action against employees; (c) relieve employees from duties because of lack of work or other legitimate reasons; (d) maintain the efficiency of the government operations entrusted to the employer; (e) determine the methods, means and personnel by which such operations are to be conducted; (f) take whatever action may be necessary to carry out the mission of the agency in situations of emergency; and (g) take disciplinary action when an employee

fails to comply with reasonable management requests.

Article 5 of the parties' expired CNA, entitled "Work Week - Hours of Work," provides in pertinent part:

C. As a condition of employment, employees must be available to work any and all shifts as needed to maintain the efficient operation of the Passaic County Sheriff's Office. When necessary, employees may be placed on a staggering starts and finishes.

* * *

F. Except in emergent situations, one week advanced notice shall be given to an officer prior to any non-emergent shift change.

Article 15 of the parties' expired CNA, entitled "Miscellaneous," provides in pertinent part:

M. The PBA President shall have full time off from regular duty assignment without loss of regular compensation.

The "Acknowledgment of Ratification and Incorporation" in the parties' expired MOA provide in pertinent part:

All issues agreed to shall be incorporated into the new Agreement. All issues not previously agreed to and not mentioned herein are withdrawn. All other language in the expired Agreement shall continue in the new contract and will remain status quo.

Local 286

Local 286 represents sheriff's officers whose duties are non-supervisory, excluding the Chief Sheriff's Officer, Chief, Chief ID Officer, and Chief Warrant Officer, employed by the County. See 2015-2018 MOA, Recognition (Crivelli Certification, Ex. C); 2007-2014 CNA, Art. 1 (Crivelli Certification, Ex. D).

The County and Local 286 are parties to an expired collective negotiations agreement (CNA) in effect from January 1, 2007 through December 31, 2014; an expired memorandum of agreement (MOA) in effect from January 1, 2015 through December 31, 2018; and are currently in negotiations for a successor agreement. The grievance procedure ends in binding arbitration.

Article 4 of the parties' expired CNA, entitled "Management Rights," provides:

The public employer retains the rights, in accordance with applicable laws and procedures, to: (a) direct employees; (b) hire, promote, transfer, assign and retain employees in positions within the agency, as well as to suspend, demote, discharge, or take reasonable disciplinary action against employees; (c) relieve employees from duties because of lack of work or other legitimate reasons; (d) maintain the efficiency of the government operations entrusted to the employer; (e) determine the methods, means and personnel by which such operations are to be conducted; (f) take whatever action may be necessary to carry out the mission of the agency in situations of emergency; and (g) take disciplinary action when an employee fails to comply with reasonable management requests.

Article 5 of the parties' expired CNA, entitled "Work Week - Hours of Work," provides in pertinent part:

C. As a condition of employment, employees must be available to work any and all shifts as needed to maintain the efficient operation of the Passaic County Sheriff's Office. When necessary, employees may be placed on a staggering starts and finishes.

* * *

F. Except in emergent situations, one week advanced notice shall be given to an officer prior to any non-emergent shift change.

Article 16 of the parties' expired CNA, entitled "Miscellaneous," provides in pertinent part:

M. The PBA President shall have full time off from regular duty assignment without loss of regular compensation.

The "Acknowledgment of Ratification and Incorporation" in the parties' expired MOA provide in pertinent part:

All issues agreed to shall be incorporated into the new Agreement. All issues not previously agreed to and not mentioned herein are withdrawn. All other language in the expired Agreement shall continue in the new contract and will remain status quo.

Elimination/Revocation of Full-Time Union Release

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; and subsequently issued a series of Executive Orders regarding 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). See State EO Nos. 103, 104, 107, 119, 122, 125.

On March 16, 2020, County Administrator Anthony J. DeNova, III, issued Administrative Order (AO) No. 20-01 designating certain employees, departments, and/or divisions as essential and requiring them to report to work throughout the Public Health Emergency and specified the following:

3. All statutory, constitutional, and gubernatorial officers, including the Board of Elections, Superintendent of Elections, Sheriff's Department, County Clerk, County Prosecutor, Superintendent of Schools, County Tax Board, Rutgers Co-op Extension, and Surrogate shall maintain operations as deemed necessary by the director of same.^{4/}

[County AO No. 20-01.]

On March 24, 2020, Undersheriff Joseph Dennis (Dennis) issued a memorandum (March 24, 2020 Memorandum) to Local 197 President John Welsh (Welsh) and Local 286 President James Weston (Weston) that provides in pertinent part:

In light of the COVID-19 outbreak being declared a national emergency on March 13,

^{4/} DeNova certifies that "as of March 24, 2020, there were 2,844 presumptive positive tests in New Jersey, 141 presumptive positives in Passaic County, and hundreds of persons under investigation for COVID-19." DeNova certifies that "as of March 30, 2020, there were 16,636 known cases in New Jersey and 1,091 positive cases in Passaic County, and thousands of persons under investigation for exposure to COVID-19." DeNova certifies that "as of April 6, 2020, there were 41,090 known cases in New Jersey and 3,756 positive cases in Passaic County, and thousands of persons under investigation for exposure to COVID-19."

2020, and as a measure to maximize staffing of all essential posts in all Divisions of the Sheriff's Office, all staff on leave for union business are now being recalled to assist with daily operations.

On March 30, 2020, the PBA filed the underlying unfair practice charges accompanied by the instant applications for interim relief.

Local 197 President Welsh

Local 197 President Welsh and Warden Michael Tolerico (Tolerico) certify that effective March 30, 2020, Welsh was reassigned to the second shift (3:00 p.m. to 11:00 p.m.) at the County Jail. Tolerico certifies that "Welsh was specifically assigned to this shift as it grants him access to a majority of the members in the Union, i.e., those departing from first shift upon Welsh starting his shift, those present during second shift, and those arriving for third shift while Welsh ends his shift." Tolerico certifies that "Welsh was additionally reassigned as the result of a[] mounting concern and need to ensure manpower in the Jail", a "concern [that] was realized on April 4, 2020 when six inmates in the maximum security unit . . . began to riot." Tolerico certifies that "[w]hile there were not serious injuries and only minor damage, the Jail is in need of all available officers to assist in the efficient function of the Jail." Tolerico certifies that "[Welsh] is receiving night differential

pay pursuant to Article 9 of the CNA . . . [a]s [a] result of [his] temporary reassignment."

Warden Tolerico certifies that "[t]emporary reassignments for other officers started approximately one week before [Welsh's] reassignment" Tolerico certifies that "[a]ll officers are currently in the process of performing duties, both within and outside of their job titles, to best support the functions of the Sheriff's Department during the ongoing coronavirus pandemic." Tolerico certifies that "all officers currently assigned to outside agencies have been notified in writing that they may be recalled at any time." Tolerico certifies that "as of April 3, 2020, the Sheriff's Department had approximately 29 officers . . . out of duty due to illness or self-quarantine"; "[a]s of April 6, 2020, the Department ha[d] approximately 35 officers and civilians . . . out of duty due to self-quarantine and a total of 18 officers and civilians who had tested positive for COVID-19." Tolerico certifies that "approximately 13 Jail staff had already self-quarantined or became ill within 9 days of the first person to self-quarantine on March 15, 2020" and "[t]his number, [which] included at least 3 officers that were presumptive positive, was expected to rapidly increase." Tolerico certifies that "[t]o date, no grievances have been filed relating to any other issues regarding

shift assignments or reassignments due to the ongoing coronavirus pandemic.”

Local 197 President Welsh certifies that “[p]rior to the [March 24, 2020 Memorandum] being issued neither the County Administration, the Sheriff, nor any member of the Sheriff’s Administrative Staff attempted to discuss [it] with [him].” Welsh certifies that “the [March 24, 2020 Memorandum] was issued after [he], through counsel, raised certain issues and/or concerns with the County regarding the County’s handling of the COVID-19 outbreak as it pertained to certain Local 197 members” – specifically, Welsh “objected to the County forcing and/or requiring a Local 197 member who was directed and/or required to self-quarantine for 14 days to use his own personal leave time”; “raised concern as to the lack of Personal Protection Equipment possessed and/or provided by the County to Local 197 members to ensure the safety of correctional staff as well as the inmates under [his] charge during the COVID-19 outbreak”; “raised an objection to the County’s abject failure to advise Local 197 that a Sheriff’s Officer had . . . tested positive for COVID-19” and the fact that Local 197 “only discovered the possible exposure . . . when the positive test result was reported . . . by a local news media outlet.”

Local 197 President Welsh certifies that “[his] duties and responsibilities have vastly changed” as a result of his

reassignment and that these changes "prohibit[] [him] from conducting vital Local 197 business and/or adequately addressing the many concerns of Local 197 members" because he is "working primarily outside of normal business hours." Welsh certifies that "[i]n essence, [he] is virtually working a 'double shift' in that [he] is tending to and dealing with union business during normal business hours and then working [his] required shift until much later in the evening"; and he is "not being compensated for the same despite this 'double duty.'" Welsh certifies that he is "[left] with very little time, if any, to attend to [his] family and their needs during this very difficult time."

Local 197 President Welsh certifies that "the Sheriff's Department has many officers, to include Correction Officers, on loan to other Departments and/or agencies" and "[i]f there truly was a need to maximize staffing and assist with daily operations, those officers would have been recalled by the County." Welsh certifies that "this has not occurred"; instead, "the County has only taken the action of eliminating the full-release previously afforded to [him] and [Local 286 President] Weston . . . to 'address its staffing needs.'" Welsh also certifies that "there are several officers that were not working their normal assignments because they were either at the range or at classes for training" and "[t]hese officers could . . . serve to complement staff at the [County] Jail if the County was truly

concerned about overtime." Welsh certifies that despite guidance from the Attorney General's Office "relaxing a series of general reporting, training, and certification deadlines," "the County is still currently sending officers assigned to the Jail for training."

Local 197 President Welsh certifies that "[t]here are currently 335 sworn Correctional Police Officers assigned to the Passaic County Jail." Welsh certifies that "inmate intake has significantly decreased at the Jail due to bail reform, the current COVID-19 crisis that mandated the release of numerous inmates, and the fact that municipal police forces in the County are not making arrests as often as they were prior to the crisis [due to] Governor Murphy['s] stay-at-home order." Welsh certifies that "prior to the crisis [the County] processed up to 15 inmates on an average day under normal circumstances"; however "[c]urrently, [the County] [is] now admitting less than 5 inmates per day on average" which "has significantly decreased the workload in the booking section of the Jail" yet "the Booking section of the Jail [remains] fully staffed." Welsh certifies that "[s]ince the COVID-19 crisis[,], there has been a state-wide suspension imposed in regard to the transfer of inmates between [correctional institutions]" and "personal criminal court appearances in Superior Court have been suspended along with all non-emergent medical appointments." Welsh certifies that "[a]s a

result of these suspensions, the Transportation section of the Jail has had a significant decrease in its workload" yet "the Transportation section of the Jail [remains] fully staffed." Welsh certifies that before the COVID-19 crisis, "in-person [inmate] visitation occurred three times [per] week and required a significant number of Correctional Police Officers to staff and run"; however, "[s]ince the end of March 2020, all in-person inmate visitation periods have been suspended" such that "there has been a significant decrease in the need for manpower to run visitation." Welsh certifies that "[s]ince the end of March 2020, all in-person attorney visitation appointments have been suspended" causing "a significant decrease in the need for manpower to run and supervise in-person attorney visitation appointments." Welsh certifies that "[v]irtually every inmate movement in the Jail has been suspended since the end of March 2020" and "[a]s a result of these programs being suspended, many officers have seen their daily duties and responsibilities reduced."

Local 197 President Welsh certifies that "[p]rior to the COVID-19 outbreak, [the County] hired 25 Correctional Police Officer Recruits" that were "scheduled to begin the County Correctional Training Academy in the beginning of April 2020"; however, "every law enforcement academy in the State of New Jersey suspended operations and indefinitely delayed starting any

incoming training classes." Welsh certifies that "[a]s a result, . . . these recruits have instead received immediate in-service training within the Jail and are now working posts on various shifts throughout the institution" causing "each shift to be overstaffed . . . [with] a minimum of five 'extra' officers."

Local 197 President Welsh certifies that "[s]ince being reassigned to the Jail, no officer has had scheduled vacation time, personal time or the utilization of compensatory time off cancelled because of any alleged 'manpower' shortage" nor has Welsh "seen a single officer ordered to work mandatory overtime" Welsh certifies that "several Correctional Police Officers are currently assigned to locations other than the Jail performing work outside the scope of their Civil Service Job Description" and, "[t]o date, the County has not recalled any of these particular officers to the Jail despite the purported staffing shortage."

Local 197 President Welsh certifies that "it is unreasonable to expect that [he] can adequately conduct Union business before the start of [his] 3:00 p.m. - 11:00 p.m. shift . . . and then at the end of [his] shift" because "after [unit] members have spent a shift locked in a facility which tends to breed COVID-19, they head for [the] closest exist door in order to decontaminate." Welsh certifies that "[the Jail's] security policies dictate that [he] [is] isolated without any access to [his] cell phone during

[his] shift" which "deprives [Welsh] of the ability to communicate and coordinate with other officers, union members, counsel, and other County personnel"; similarly, "Internal Affairs is not able to contact [Welsh], nor [is] [Welsh] able to assist with [related disciplinary] matters as [he] do[es] on a regular basis." Welsh certifies that "the County [did not] attempt to discuss this matter with [him] or the Union before unilaterally abdicating Article 15(M) of the 2007-2014 CNA" and "there [has] been no discussion of working together in any way since [Welsh] declined a verbal offer regarding [the parties'] contract"; however, "[t]he Union would certainly prefer more open discussions with administration in furtherance of working together to better the Department."

Local 286 President Weston

On March 25, 2020, Undersheriff Dennis - by/through Undersheriff Daryl Walton (Walton) - issued a memorandum to all personnel temporarily transferring Local 286 President Weston to be a temporary liaison to the mobile COVID-19 testing site established at William Paterson University, effective March 30, 2020. Dennis certifies that on or about March 24, 2020, "it was reported to [him] by Chief George Rosenthal (Rosenthal) that the [Sheriff's] Department projected the site would be experiencing approximately 500 cars in line which could reach upwards of two miles in length." Dennis certifies that "[t]he site opened on

March 25, 2020, at which point it was reported to [him] by Chief Rosenthal that the site received approximately 150 cars"; "as of April 3, 2020, it was reported to [him] by Chief Rosenthal that the site was receiving approximately 300 cars"; "[a]s of April 6, 2020, it was further reported to [him] by Chief Rosenthal that the site was receiving approximately 365 cars and the line of cars reached an approximate length of 1.8 miles."

Undersheriff Dennis certifies that "additional memoranda have been circulated throughout the Department temporarily reassigning numerous other officers." Dennis certifies that "[a]ll officers are currently in the process of performing duties, both within and outside of their job titles, to best support the functions of the [Sheriff's] Department during the ongoing coronavirus pandemic." Dennis certifies that "all officers currently assigned to outside agencies have been notified in writing that they may be recalled at any time." Dennis certifies that "as of April 3, 2020, the [Sheriff's] Department had approximately 29 officers . . . out of duty due to illness or self-quarantine"; "[a]s of April 6, 2020, the Department ha[d] approximately 35 officers and civilians . . . out of duty due to self-quarantine and a total of 18 officers and civilians who had tested positive for COVID-19." Dennis certifies that "[o]n March 15, 2020, the New Jersey Courts cancelled all in-person appearances and closed New Jersey Courts

to the public." Dennis certifies that "[a]ccordingly, approximately 50% of all Court officers have been reassigned to the William Paterson University mobile testing site"; "the other approximately 50% of Court officers remain in the County Courthouse as approximately 24 employees remain in the building" Dennis certifies "it was discovered that certain areas of the Courthouse required painting"; "[t]ypically such maintenance would not be possible due to certain employees' presence in the Courthouse" but "through conversations with Undersheriff Hapatsha, [Undersheriff Dennis] [has] been informed that a number of Court officers have volunteered their time to capitalize on this opportunity . . . by painting the Courthouse while on duty." Dennis certifies that "officers have also volunteered their time to extensively clean[] or perform[] other duties outside of their job titles." Dennis certifies that "[t]o date, no grievances have been filed relating to these or any other issues regarding shift assignments or reassignments due to the ongoing coronavirus pandemic."

Local 286 President Weston certifies that "the [March 24, 2020 Memorandum] was issued after certain concerns, issues and/or objections were raised with the County regarding the County's handling of the COVID-19 outbreak as it pertained to certain Local 197 members" - specifically, Local 197 "objected to the County forcing and/or requiring a Local 197 member who was

directed and/or required to self-quarantine for 14 days to use his own personal leave time"; "raised concern as to the lack of Personal Protection Equipment possessed and/or provided by the County to Local 197 members to ensure the safety of correctional staff as well as the inmates under their charge during the COVID-19 outbreak." Weston certifies that he "raised an objection to the County's abject failure to advise Local 286 that a Sheriff's Officer had . . . tested positive for COVID-19" despite the fact that "prior thereto, the subject officer had come into contact with various inmates and other Local 197 and Local 286 members."

Local 286 President Weston certifies that he has "[been] transferred to an active duty post" and that this change "significantly interferes with and/or impedes [his] ability to conduct vital Local 286 business and/or adequately address the many concerns of Local 286 members." Weston certifies that "the Sheriff's Department has many officers on loan to other Departments and/or agencies" and "[i]f there truly was a need to maximize staffing and assist with daily operations, those officers can be recalled by the County." Weston certifies that "this has not occurred"; instead, "the County has only taken the action of eliminating the full-release previously afforded to [him] and [Local 197 President] Welsh . . . to 'address its staffing needs.'" Weston certifies that "the County's Court Services Division is currently staffed to capacity" and "[due to]

court operations having effectively ceased with the exception of emergent matters, many Local 286 members assigned to the Court Services Division are reporting to work only to sit in conference rooms for the entirety of the day." Weston certifies that "recently, Local 286 members assigned to the Court Services Division were asked to assist with the painting of various court facilities by the Sheriff and/or his designee, . . . further undermining the County's contention that it needs to maximize staffing."

Local 286 President Weston certifies that "[t]here are approximately 225 Sheriff's Officers employed by [the County]"; and "the Department employs many civilian employees that serve in support of the Department's mission." Weston certifies that "[b]ecause Governor Murphy has suspended evictions, foreclosures and the levying of writs of execution, [related] paperwork no longer needs to be prepared by the civilian employees nor served by the Sheriff's Officers"; accordingly, "the Civil Processing Unit, the Detective Bureau, and Warrants Squad are without their normal duties and responsibilities and all of these officers have been assigned to the COVID-19 testing site." Weston certifies that "[although] [t]he Courthouse is typically staffed with approximately 100 Sheriff's Officers", "approximately 70 of these officers have found their normal duties and responsibilities to be temporarily eliminated" due to "all personal appearances in

the Superior Courts of New Jersey hav[ing] been indefinitely suspended." Weston certifies that "each of these Officers have been assigned to the COVID-19 testing site" and "[t]he remaining officers . . . are on patrol."

Local 286 President Weston certifies that "the notion that there is a staffing shortage belies the indisputable facts that presently exist" and does not "warrant[] the County's abdication of its obligation under its agreement with the Union, particularly when there are less offensive means of achieving their purported objective." Weston certifies that "[t]he County's actions of unilaterally repudiating Article 16(M) of the 2007-2014 CNA have significantly hindered [his] ability to adequately address the concerns of fellow officers" and "[his] current assignment precludes [Weston] from fulfilling [his] duties [as Local 286 President] and obstructs [his] ability to address . . . important employment-related issues." Weston certifies that "[h]ad [this] issue been brought to [his] attention for discussion, [Weston] would have been more than willing to . . . engage[] [in negotiations.]"

LEGAL ARGUMENTS

The PBA argues that it has satisfied the standard for interim relief. Specifically, the PBA maintains that it has a substantial likelihood of prevailing in a final Commission decision given that the Commission has held that "employee

release time for representational purposes is mandatorily negotiable" and "that an established practice and/or provision in a collective negotiations agreement which allows a union officer to be granted full-release from his or her duties constitutes a term and condition of employment which may only be modified through the conduct of bilateral collective negotiations between the employer and the employee representative." The PBA contends that "the County's action of unilaterally removing the respective [local] Presidents from full-duty release constitutes an unfair labor practice by violating subsections 1 and 5 of N.J.S.A. 34:13A-5.4(a)"; and "because the action was taken immediately after the [locals] put the County on notice of several examples of how it was mishandling the current health crisis . . . [it] constitutes an effort to silence the [locals] or otherwise interfere with the respective Presidents' ability to represent their members . . . in violation of subsections (2), (3) and (4) of N.J.S.A. 34:13A-5.4(a)." The PBA claims that "[t]he current COVID-19 crisis has caused law enforcement agencies across the State and County to enact measures and respond in ways that have a direct impact on terms and conditions of employment" and "it is during these turbulent times that union leaders are needed most . . . to ensure that . . . [unit members] are adequately protected and are not having their rights ignored or disregarded by administration." The PBA asserts that the County's claim

"regarding adequate staffing . . . is without merit based on the current circumstances" given that the County "has not fully exercised its prerogative to recall officers on loan to outside agencies" and has "asked [unit members] to undertake duties completely unrelated to the current COVID-19 crisis . . . such as painting County facilities."^{5/} The PBA also argues that its members will suffer irreparable harm if interim relief is not granted because "union leave time, once denied, can never be restored at the conclusion of a case and is lost forever"; and that "irreparable harm is found in an unfair practice case where the Commission is unable to fashion an adequate, effective remedy at the conclusion of the plenary proceeding in that case." The PBA notes that the Commission has held that reducing the number of union officials to be released for union business "potentially impairs the [union's] right to represents its members, resulting in irreparable harm." The PBA maintains that in this case, "[t]he County's removal of the [local] Presidents from full-duty release to active duty will cripple their ability to adequately

^{5/} In support of its position, the cites N.J.S.A. 34:13A-5.3, Association of New Jersey State College Faculties, Inc. v. New Jersey Board of Higher Education, 66 N.J. 72, 75 (1974), Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Ass'n, 78 N.J. 25, 48 (1978), City of Paterson, P.E.R.C. No. 2005-32, 30 NJPER 463 (¶153 2004), City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990), and Essex Cty., I.R. No. 2011-42, 37 NJPER 162 (¶51 2011).

represent membership at a time when it is most crucial" and "compromises the integrity of the collective bargaining process . . . [by] undermin[ing] future negotiations between the parties" ^{6/} The PBA also argues that the relative hardship weighs in its favor and that the public interest will not be harmed by a grant of interim relief. The PBA asserts that "there is currently no staffing shortage affecting the County and its Court/Corrections Services Divisions" and "the County has less obstructive actions it can take in regard to any claimed staffing shortage . . . without violating the collective bargaining rights of the [locals]." The PBA maintains that "[unit members] will suffer substantial hardship in the absence of interim relief"; that "by assigning [the local Presidents] to duties other than what the contract provides for, the County is virtually guaranteeing that the Presidents will have substantially less time to address the concerns of its members and represent them accordingly" given that being a union president "is a full-time job . . . [that] is not mitigated in any way if they are returned to duty at a post."

^{6/} In support of its position, the PBA cites Union Tp., I.R. No. 2002-7, 28 NJPER 86 (¶33031 2001), recon. den. P.E.R.C. No. 2002-55, 28 NJPER 198 (¶33070 2002), City of Plainfield, I.R. No. 2004-14, 30 NJPER 193 (¶72 2004), Chester Bor., I.R. No. 2002-8, 28 NJPER 162 (¶33058 2002), and Bogota Bor., I.R. No. 98-23, 24 NJPER 237 (¶29112 1999).

In response, the County argues that the PBA has not satisfied the standard for interim relief.^{7/} Specifically, the County maintains that the PBA has not demonstrated a substantial likelihood of prevailing in a final Commission decision because it “[has] failed to show that the temporary recall and reassignment of County employees, including Union Presidents on release time, during a National and State of Emergency is a mandatorily negotiable subject.” The County asserts that “the temporary recall and reassignment of County employees, including Union Presidents, during emergencies is controlled by . . . [Articles 4 and 5 of the parties’ expired CNA] [and] N.J.A.C. 10A:31-7.1^{8/}” which provides “the County [with] authority to

^{7/} The County notes the following: “the County did not issue the temporary reassignment directive until March 24, 2020 . . . [because] [it was] assessing the impact of the pandemic on the County’s workforce . . . to determine the appropriate and necessary police power required in response to the circumstances”; “the Union Presidents were given several days’ written notice of the reassignments before they went into effect . . . despite the fact that the CNA[s] waive[] any notice requirement under emergency conditions”; “numerous other County employees and Sheriff’s Office employees were temporarily reassigned during this State of Emergency”; and “no formal grievance was formally submitted to the County.”

^{8/} N.J.A.C. 10A:31-7.1, entitled “Meeting emergencies,” provides:

- (a) Emergencies shall be met in a way which will safeguard the welfare of the inmate population, facility staff, and the public at large.
- (b) All measures shall be taken to maintain

(continued...)

respond to an emergency, such as COVID-19, in the best way it deems fit"; and that "[u]nder the current circumstances, . . . the County is adequately justified in implementing County directives temporarily recalling and reassigning County employees, including the Union Presidents on release time, because such directives reasonably safeguard the welfare of the inmate population, facility staff and the public at large by efficiently deploying the police force within the County during this State of Emergency." The County contends that "the recall and reassignment of County employees temporarily and during a State of Emergency does not constitute a term or condition of employment" and is "therefore . . . not mandatorily negotiable"; and that "[t]he temporary and emergent elimination of release time and reassignment of the Union Presidents does not intimately and directly affect the work and welfare of the Union Presidents" even if "it may present a temporary inconvenience" The County asserts that the evidence submitted by the PBA fails to demonstrate that the "temporary elimination of release time and

8/ (...continued)

effective security and restore normal conditions as expeditiously as possible.

(c) Each facility shall develop written plans for emergencies such as, but not limited to, passive resistance, work stoppage, escapes, riots and natural disasters.

(d) All emergency plans shall be implemented with appropriate consideration and care for both inmate and staff safety.

reassignment of the Union Presidents directly and [in]controvertibly had a negative impact on the Union Presidents and/or unit members.” The County claims that “negotiations over staffing and reassignments, particularly temporary staffing and reassignment decisions during emergencies, would significantly interfere with the exercise of inherent managerial prerogatives pertaining to the determination of governmental policy” given that “[p]ublic employers have a non-negotiable managerial prerogative to determine which employees are deemed ‘essential’ [,] . . . to allocate overtime . . . [,] . . . [and] to determine its staffing levels” during a state of emergency; and that “[a]rguably and alternatively, since the Union Presidents are not performing public safety duties, . . . a question arises as to whether they are ‘essential’ and . . . required to report to work during the State of Emergency.” The County argues that “[it] acted reasonably and prudently within its inherent managerial prerogative” and “[w]ithout the power to act and make policy determinations in situations of emergency, . . . State, County and Municipal governments would be incapable of effectuating governmental policy critical for the maintenance of public health, safety, and welfare.” The County, noting that the parties’ CNAs contain grievance procedures and that the PBA failed to follow the grievance procedure, contends that “[t]he question of whether the County committed an unfair labor practice

by temporarily recalling Union Presidents' release time and reassigning them is a determination of whether the County has violated the CNA terms" that should be "defer[r]ed . . . to the grievance procedure expressly provided under the parties' CNAs."^{9/} The County also argues that the PBA "[has] failed to allege any facts or circumstances demonstrating that [a] preliminary injunction is necessary to prevent irreparable harm" because "[t]here is nothing irreparable about the temporary elimination of release time and reassignment of Union Presidents from one shift to another"; and that "[c]onversely, restraining or inhibiting the County's determination of staffing and scheduling arrangements to ensure the inherent governmental function of providing law enforcement during a National and State of Emergency would undoubtedly cause irreparable harm." The County maintains that "[its] police are necessary for responding to emergencies" and "[d]ictating how [the County] deploys its police force would irreparably intrude upon its inherent

^{9/} In support of its position, the County cites Paterson Police PBA No. 1 v. City of Paterson, 87 N.J. 78, 92-93 (1981), Somerset Cty., P.E.R.C. No. 2014-76, 40 NJPER 520 (¶169 2014), Ocean Tp., P.E.R.C. No. 2011-90, 38 NJPER 72 (¶15 2011), City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982), Morris Cty. Sheriff's Office v. Morris Cty. PBA Local 298, 418 N.J. Super. 64, 78 (App. Div. 2011), City of Linden, P.E.R.C. No. 95-18, 20 NJPER 380 (¶25192 1994), West Paterson Bor., P.E.R.C. No. 2000-62, 26 NJPER 101 (¶31041 2000), Hawthorne Bor., P.E.R.C. No. 2011-61, 37 NJPER 54 (¶20 2011), and Collyer Insulated Wire, 192 N.L.R.B. 837 (1971).

governmental right and prerogative to determine the methods, means and personnel by which that governmental responsibility is to be conducted, especially in emergency conditions." The County contends that the "Union Presidents are not necessary for resolving the day-to-day concerns and grievances of [unit members]" and that "staggering the Union Presidents' shifts grants all Union Members direct access to the Union President to discuss any concerns/grievances." The County maintains that the "Union Presidents have not suffered any change in their compensation and benefits as a result of the temporary reassignment directive" and "continue to receive their full compensation and benefits . . . even during the State of Emergency." The County maintains that neither "the Union Presidents [nor] any other Union employees" have been singled out; that certain "policeman [were deemed] 'essential' for daily function and reassigned . . . as [the County] deemed necessary to carry out its core governmental function of law enforcement"; that "[t]he current State of Emergency requires an 'all hands on deck' approach, as evidenced by the recall of the Union Presidents to active duty during this National and State of Emergency." The County asserts that "there is no showing that the County's temporary reassignment directive irreparably harmed the Union Presidents or any [unit members]"; that the PBA "has [not] submitted a single certification by any [unit member]

certifying to how the temporary reassignment directive has specifically led to a significant interference with the ordinary grievance procedure and/or presented a significant impediment in the representation of [unit member] concerns." The County claims that "if the [PBA] [is] entitled to any of the[] demanded relief, same must be established by an adequate record" which "warrants further discovery and a testimonial hearing outside the purview of an Order to Show Cause" The County also argues that "the balance of relative hardships and the public interest significantly favor denying the . . . requested injunctive relief" because "[t]he Union Presidents' preference for a certain shift does not take precedence over the safety and welfare of all County residents in the midst of a National and State of Emergency"; and "[a]ny alleged [unit member's] concern/grievance can be adequately addressed by shift supervisors." The County maintains that "[its] interests in effectively performing the core governmental function of law enforcement during a national emergency far outweigh the Union Presidents' interests in any temporary elimination of release time and shift preference." The County contends that "[c]ompelling [it] to 'maintain the status quo' during an unprecedented State and National Public Health Emergency would severely injure the public interest currently at risk and would significantly undermine governmental policy"; and "[m]aintaining the health and safety of hundreds of County

residents and correctional facility inmates under emergency conditions is significantly more important than blindly maintaining the Union Presidents' release time and/or shift preferences otherwise afforded to them under ordinary circumstances."

In reply, the PBA reiterates its argument that "employee release time for representational purposes is mandatorily negotiable" and "may only be modified through the conduct of bilateral collective negotiations between the employer and the employee representative"; and that "it is undisputed no such negotiations were initiated by or engaged in by the County prior to its unilateral alteration and/or revocation of the full-duty release clauses." The PBA maintains that "the County's reliance on Article 4 in both CNAs [is] misplaced" given that "Article [4] is prefaced by stating that all actions taken . . . have to be in accordance with 'applicable laws and procedures'"; and that "if the Commission were to accept the County's argument that Article 4 provides unfettered discretion to unilaterally alter the contract during . . . an emergency, theoretically the County would be empowered to institute any change to the agreement that it desires during an emergency" including "wages, healthcare benefits, time off from work and every other term and condition of employment" The PBA argues that the law does not provide "that anytime a public employer can claim a crisis,

managerial prerogative allows the public employer to throw a collectively-negotiated agreement out the window" because that "would eviscerate the durability of collective negotiations agreements." The PBA contends that in this case, "the County's self-proclaimed staffing emergency does not allow it to throw the CNAs . . . out of the window" particularly "given that the County has not produced any evidence to justify that a staffing emergency exists." The PBA concedes that "the County has the prerogative to determine minimum staffing levels," but claims that the County "did not produce one scintilla of evidence to show staffing levels will be compromised if Welsh and Weston are permitted to remain on full-duty release in accordance with the provisions contained in their respective CNAs"; and the County "failed to produce the Table of Organization and/or staffing plan for the Sheriff's Department" and "did [not] . . . provide a breakdown of the number of assignments and/or posts that must be filled in the Court Services Division and/or the Corrections Division on any given shift, tour, or week."^{10/}

^{10/} In support of its position, the PBA cites Robbinsville Twp. Bd. of Ed. v. Washington Twp. Ed. Ass'n, 227 N.J. 192, 203-204 (2016), City of Trenton, I.R. No. 2003-4, 28 NJPER 368 (¶33134 2002), Rutherford Bor., P.E.R.C. No. 97-12, 22 NJPER 322 (¶27103 1996), and Town of West New York, I.R. No. 99-24, 29 NJPER 335 (¶104 1999), recon. den. P.E.R.C. No. 2000-13, 25 NJPER 404 (¶30175 1999).

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 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.

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

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

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.

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 “[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 whether, absent demonstrating a particularized need to unilaterally change a mandatorily negotiable term and condition of employment established in a collective negotiations agreement (e.g., that

minimum staffing requirements have been established and that same would be jeopardized by maintaining existing terms and conditions of employment), the County has a managerial prerogative to unilaterally eliminate/revoke (albeit temporarily) a pre-existing full-time union release provision during a Public Health Emergency and/or State of Emergency.

The Commission has consistently held that a public employer has a managerial prerogative to determine its staffing levels. 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).

The Commission has also consistently held that "paid leaves of absence and release time and use of office space and equipment for union business are mandatorily negotiable." City of Paterson, P.E.R.C. No. 2005-32, 30 NJPER 463 (¶153 2004); accord City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990) ("leaves of absence and release time for representational purposes are mandatorily negotiable"). However, "[an] employer retains the power to use all its employees to respond to a specific law enforcement or firefighting emergency" and "[i]f a

dispute arises about a specific assignment, a scope petition could be filed and [the Commission] would decide that question in a specific factual setting.” City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990).

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).]

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

It is undisputed that the parties' expired 2007-2014 CNAs include a negotiated full-time union release provision for the Presidents of Local 197 and Local 286; and that the parties' expired 2015-2018 MOAs incorporate and continue this provision. See 2007-2014 Local 197 CNA, Art. 15(M); 2014-2018 Local 197 MOA, Acknowledgment of Ratification and Incorporation; 2007-2014 Local 286 CNA, Art. 16(M); 2014-2018 Local 286 MOA, Acknowledgment of Ratification and Incorporation. It is also undisputed that on March 24, 2020, while the parties were in negotiations for successor agreements, the County unilaterally eliminated/revoked full-time union release for Local 197 President Welsh and Local 286 President Weston. See Crivelli Certification, Ex. E.

However, the County points to the following additional undisputed facts to substantiate the legal basis for its unilateral action. Specifically, the parties' expired 2007-2014 CNAs include a negotiated management rights provision that grants the County enhanced authority "to take whatever action may be necessary to carry out the mission of the agency in situations of

emergency” and a negotiated hours of work provision that requires employees to “be available to work any and all shifts”, permits the County to place employees “on a staggering starts and finishes”, and eliminates the requirement that the County provide “one week advance notice . . . prior to any . . . shift change” in emergent situations; and that the parties’ expired 2015-2018 MOAs incorporate and continue these provisions. See 2007-2014 Local 197 CNA, Art. 4(f), Art. 5(C, F); 2014-2018 Local 197 MOA, Acknowledgment of Ratification and Incorporation; 2007-2014 Local 286 CNA, Art. 4(f), Art. 5(C, F); 2014-2018 Local 286 MOA, Acknowledgment of Ratification and Incorporation. In addition, on March 9, 2020, Governor Murphy declared a Public Health Emergency and State of Emergency in the State of New Jersey related to COVID-19; and on March 16, 2020, County Administrator DeNova designated certain employees, departments, and/or divisions as essential and required them to report to work throughout the Public Health Emergency and specified that the Sheriff’s Department would maintain operations as deemed necessary. See State EO Nos. 103, 104, 107, 119, 122, 125; County AO No. 20-01.

As the New Jersey Supreme Court instructed in Robbinsville, I must employ the Paterson three-prong balancing test to the facts of this case in order to reach a legal conclusion regarding

the PBA's likelihood of prevailing in a final Commission decision.

Under the first prong of Paterson, I find that the parties have not cited any preemptive statute or regulation pertaining to this matter. "[T]he mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations" and "[n]egotiation is preempted only if the [statute or] regulation fixes a term and condition of employment 'expressly, specifically, and comprehensively.'" Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982) (citations omitted). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." State v. State Supervisory Employees Ass'n, 78 N.J. 54, 80-82 (1978). Contrary to the County's assertion, I find that N.J.A.C. 10A:31-7.1 is not preemptive; rather, it specifies that adult county correctional facilities have general discretionary power to take action to meet emergencies "in a way which will safeguard the welfare of the inmate population, facility staff, and the public at large" but does not place any limitation(s) on the negotiability of full-time union release. Similarly, I find that State EO No. 103 and County AO No. 20-01 are not preemptive; they declare a Public Health Emergency and State of Emergency in the State of New Jersey related to COVID-19 and designate certain employees,

departments, and/or divisions as essential but do not place any limitation(s) on the negotiability of full-time union release. See, e.g., State of New Jersey (Dep't of Corrections), P.E.R.C. No. 2019-9, 45 NJPER 114 (¶30 2018) (denying the State's request for a restraint of arbitration; holding that although N.J.S.A. App. A:9-40 authorizes the Governor "to make, amend and rescind orders, rules and regulations as in this act provided" during a state of emergency, it "does not address" certain terms and conditions of employment such as "the treatment of leave time during a state of emergency").

Under the second prong of Paterson, I find that union release time is a term and condition of employment that intimately and directly affects the work and welfare of police units like Local 197 and Local 286. See City of Paterson; City of Newark. In accord with Commission precedent, Commission Designees have consistently granted interim relief when public employers have unilaterally changed terms and conditions of employment related to union release time. See, e.g., Essex Cty., I.R. No. 2011-42, 37 NJPER 162 (¶51 2011) (restraining an employer from "unilaterally altering the established practice which allows the [union president] to be granted full release time from his duties as a sheriff's officer in order to engage in representational activity . . . without being required to physically report to the sheriff's office at the beginning of

each work day"); Brick Tp. Bd. of Ed., I.R. No. 2011-31, 37 NJPER 39 (¶13 2011) (restraining an employer from "denying full-time release to the [union president] during the term of the collective agreement").

Under the third prong of Paterson, and even in the face of a Public Health Emergency and/or State of Emergency requiring heightened scrutiny of the parties' interests, I find that at this time the County has failed to sufficiently demonstrate that maintaining the negotiated full-time release provisions in the parties' respective CNAs would significantly interfere with the exercise of its inherent or express management prerogatives or place substantial limitations on its policymaking powers. While conceding that the instant circumstances are not identical given that Robbinsville centered on a public employer's actions in the face of an economic crisis, I find that the holding in Robbinsville can be analogized to this situation - i.e., "Keyport does not stand for the proposition that anytime a municipal public employer can claim a[] [public health crisis or state of emergency], managerial prerogative allows the public employer to throw a collectively negotiated agreement out the window"; and "[a]llowing a claimed need for management prerogative to prevail in [a difficult public health crisis] in order for municipal governmental policy to be properly determined would eviscerate the durability of collective negotiated agreements . . . [as]

promises on wages, rates of pay, and hours, and other traditional terms and conditions of employment . . . would mean nothing in the wake of any [public health crisis or state of emergency] faced by a local governmental entity.” 227 N.J. at 203-205.

With respect to the County’s assertion that its minimum staffing requirements will be jeopardized absent unilaterally eliminating/revoking (albeit temporarily) full-time union release for Local 197 President Welsh and Local 286 President Weston, the County has failed to provide sufficient evidence demonstrating that minimum staffing requirements have been established for its Corrections Division and/or its Court Services Division or that existing available manpower is insufficient for the County to meet its staffing requirements during the current Public Health Emergency and State of Emergency related to COVID-19. I find that the certifications of DeNova, Tolerico, and Dennis “fall short of showing that . . . [the] staffing requirements . . . [of the County’s Corrections Division and/or Court Services Division] cannot be met without the . . . categorical limitations on . . . [Local 197 President Welsh and Local 286 President Weston] or the blanket . . . [rescission of full-time union release during the Public Health Emergency and State of Emergency related to COVID-19].” Watchung Bor., P.E.R.C. No. 2016-49, 42 NJPER 351 (¶99 2016). Even in the face of an emergency, the Commission has found that a public employer failed to demonstrate a sufficient

basis for the blanket rescission of a negotiated term and condition of employment absent a particularized showing. See City of Newark, P.E.R.C. No. 90-122, 16 NJPER 394 (¶21164 1990) (the Commission specifically stated that “[even when] a state of emergency has been declared in [a] police department because of staffing shortages, . . . [if] the record is silent on what this means . . . [it] does not support a blanket rescission of a negotiated term and condition of employment”); accord City of Elizabeth, P.E.R.C. No. 82-100, 8 NJPER 303 (¶13134 1982), aff’d NJPER Supp.2d 141 (¶125 App. Div. 1984) (holding that “unilaterally impos[ing] an open-ended, blanket denial of all accrued time off and holidays . . . [was] overly intrusive on the employees’ negotiated rights, even if they had their genesis in a real manpower shortage”; finding that “the [employer’s] action . . . exceeded the needs of the emergency situation and unreasonably abrogated the terms and conditions of employment negotiated in the contract”; that “[e]ven assuming that the City had to suspend time off and holidays during the emergency, it was . . . at least . . . obligated to offer to negotiate with the [union] on how these accrued contractual rights might be protected and/or reinstated when the emergency ended”); Watchung Bor. (finding that the employer’s certifications “[did] not describe the structure of the department, including the number of officers by rank or special designation overall and per squad and

platoon, or the number of shifts or squads and platoons, or the staffing levels of shift and platoon"; holding that "[o]n this record, [the Commission] cannot conclude that the Department's minimum staffing requirements will not be met" and that "without specific information as to how many officers have taken time off . . . [or are unavailable due to COVID-19], and how many officers are needed to report to duty those days, [the Commission is] unable to conclude that the Department cannot meet its manpower levels unless it bars the use of [full-time union release] [during] the [Public Health Emergency and/or State of Emergency related to COVID-19]").

Accordingly, I find that the PBA has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.^{11/}

^{11/} I acknowledge the County's assertion that Articles 4 and 5 of the parties' expired 2007-2014 CNAs provide it with authority to "take whatever action may be necessary to carry out the mission of the agency in situations of emergency" and the County's assertion that it has managerial prerogative to designate essential employees (see, e.g., Somerset Cty., P.E.R.C. No. 2014-76, 40 NJPER 520 (¶169 2014)). However, I find these defenses insufficient to outweigh the PBA's predominant interest as set forth above in the Paterson analysis. While it is unclear whether the Director of Unfair Practices will retain jurisdiction over this matter or defer to the parties' negotiated grievance procedures, Commission Designees have granted interim relief when a public employer has unilaterally changed contractually-based union release time provisions. See, e.g., Brick Tp. Bd. of Ed., I.R. No. 2011-31, 37 NJPER 39 (¶13 2011) (holding that "[the union release time provision] in the collective agreement appears to clearly require the (continued...)

I also find that the PBA has established irreparable harm. New Jersey courts and the Commission have held that "employers are barred from 'unilaterally altering mandatory bargaining topics, whether established by expired contract or by past practice, without first bargaining to impasse.'" In re Atlantic Cty., 230 N.J. 237, 252 (2017) (citing Bd. of Educ. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16, 22 (1996)); accord Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n, 78 N.J. 25, 48 (1978) (finding that the Legislature, through enactment of the Act, "recognized that the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be established through bilateral negotiation"; finding that unilaterally changing terms and conditions of employment by a public employer "ha[s] the effect of coercing its employees in their exercise of the organizational rights guaranteed them by the Act because of its inherent repudiation of and chilling effect on the exercise of their statutory right to have such issues negotiated on their behalf by their majority representative"); Closter Bor., P.E.R.C. No. 2001-75, 27 NJPER 289 (¶32104 2001) (holding that "[u]nilateral

11/ (...continued)

[employer] to release the [union] president from all . . . duties . . . and provide a certain level of compensation" and "[t]he [employer's] refusal to allow such release appears to repudiate the agreement and such repudiation rises to the level of a violation of 5.4a(5)").

changes in [mandatorily negotiable terms and conditions of employment] violate the obligation to negotiate in good faith” and “can shift the balance of power in the collective negotiations process”; holding that “[i]f a change occurs during contract negotiations, the harm is exacerbated”). In Galloway, a decision recently cited with approval by the Appellate Division for the same proposition set forth below, the New Jersey Supreme Court noted that unilateral employer action with respect to mandatorily negotiable subjects has a “coerc[ive]” and “chilling effect”:

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

[Galloway, 78 N.J. at 49.]

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

“Irreparable harm will be found in an unfair practice case where the Commission is unable to fashion an adequate, effective remedy at the conclusion of the plenary proceeding in that case.” Brick Tp. Bd. of Ed., I.R. No. 2011-31, 37 NJPER 39 (¶13 2011). Commission Designees have consistently held that “denying [a] [union] president the release time required pursuant to . . . [a] collective agreement would constitute irreparable harm, since at the end of [the] case, the Commission could not formulate an adequate remedy that would allow the [union] president to get the release time back.” Id.; accord Essex Cty.; City of Plainfield, I.R. No. 2004-14, 30 NJPER 193 (¶72 2004) (finding that “the reduction in the number of [union] officers - from two to one - permitted to be released for union business potentially impairs the [union’s] right to represent its members, resulting in irreparable harm”). Here, union release time that is eliminated/revoked (albeit temporarily) for any period - including during the Public Health Emergency and State of Emergency related to COVID-19 - cannot be restored upon disposition of the underlying unfair practice charge.

Accordingly, I find that the PBA has established irreparable harm.

I also find that the PBA has demonstrated relative hardship and that the public interest will not be injured by an interim relief order. In weighing the relative hardships to the parties

resulting from granting interim relief, I find that the scale favors the PBA. This Order maintains the temporary restraints imposed on April 9, 2020 that returned the parties to the status quo ante, enabling the County to maintain minimum staffing requirements while prospectively permitting Local 197 President Welsh and Local 286 President Weston full-time union release as they had before the March 24, 2020 Memorandum was issued. See, e.g., Brick Tp. Bd. of Ed.; Essex Cty.; City of Plainfield.

Moreover, the County has not demonstrated that it will endure any harm if the status quo ante is maintained. See Closter Bor., I.R. No. 2001-11, 27 NJPER 225 (¶32077 2001), recon. granted P.E.R.C. No. 2001-75, 27 NJPER 289 (¶32104 2001) (noting that “[t]he employer has not identified any specific harm to it from restoring the status quo”). Finally, the public interest is not injured by an interim relief order in this case. The County shall maintain minimum staffing levels in its Corrections Division and/or Court Services Division, thereby assuring the public of the necessary level of service including during the Public Health Emergency and State of Emergency related to COVID-19. In Edison Tp., I.R. No. 2010-3, 35 NJPER 241 (¶86 2009), the Commission Designee noted the following:

. . . [T]he public interest is furthered by requiring adherence to the tenets expressed in the Act which require parties to negotiate prior to implementing changes in terms and conditions of employment. Maintaining the collective negotiations process results in

labor stability and thus promotes the public interest.

[35 NJPER at 243.]

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

CONCLUSION

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

ORDER

The applications for interim relief filed by Policemen's Benevolent Association Local No. 197 (Local 197) and Policemen's Benevolent Association Local No. 286 (Local 286) (collectively, PBA) are granted. The Passaic County Sheriff's Office and County of Passaic (County):

-are restrained from unilaterally eliminating and/or rescinding full-time union release for Local 197 President John Welsh (Welsh) as specified in Article 15(M) of the parties' expired 2007-2014 CNA (CO-2020-263);

-are restrained from unilaterally eliminating and/or rescinding full-time union release for Local 286 President James Weston (Weston) as specified in Article 16(M) of the parties' expired 2007-2014 CNA (CO-2020-264);

-will maintain the status quo ante with respect to full-time union release for Local 197 President Welsh and Local 286 President Weston, so long as minimum staffing levels are not jeopardized; and

-this Order will remain in effect pending a final agency decision or until the parties negotiate a resolution.

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

DATED: May 26, 2020
Trenton, New Jersey