I.R. No. 2009-26

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MAPLEWOOD,

Respondent,

-and- Docket No. CO-2009-376

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

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In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and- Docket No. CO-2009-377

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

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In the Matter of

BOROUGH OF WASHINGTON,

Respondent,

-and- Docket No. CO-2009-378

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

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In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and- Docket No. CO-2009-384

NEW JERSEY STATE POLICEMEN'S
BENEVOLENT ASSOCIATION,

Charging Party.

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In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and- Docket No. CO-2009-390

AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES,
COUNCIL 1

Charging Party.

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In the Matter of

STATE OF NEW JERSEY JUDICIARY,

Respondent,

-and- Docket No. CO-2009-392

PROBATION ASSOCIATION OF
NEW JERSEY, JUDICIARY COUNCIL
OF AFFILIATED UNIONS, COMMUNICATIONS
WORKERS OF AMERICA, AFL-CIO,
OFFICE PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 32.

Charging Parties.

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In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and- Docket No. CO-2009-395

POLICEMEN'S BENEVOLENT
ASSOCIATION LOCAL NO. 105,

Charging Party.

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In the Matter of

Township of Marlboro,

Respondent,

-and- Docket No. CO-2009-398

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

SYNOPSIS

Charging Parties filed unfair practice charges accompanied by applications for interim relief. The charges alleged that Respondents violated the New Jersey Employer-Employee Relations Act by implementing a temporary layoff (furlough) of negotiations unit employees. The Superior Court, Appellate Division, affirmed the emergency regulation promulgated by the Civil Service Commission which authorized the temporary layoff of employees (subject to exempted employees) provided the entire layoff unit was closed. The Court found the decision to temporarily layoff all employees in a layoff unit to constitute an exercise of managerial prerogative. Since those Civil Service employers which implemented a total shutdown of a layoff unit in accordance with the emergency Civil Service Regulation were not required to engage in collective negotiation, the Commission Designee denied those Charging Parties' application for interim relief. As to the employer not subject to Civil Service jurisdiction, the Commission Designee found that temporary layoffs of an entire department were not specifically authorized by statute or regulation and the employer's decision to temporarily layoff employees or reduce employees from full-time to part-time

constituted a reduction in work hours and compensation levels - issues long held by the Public Employment Relations Commission to be mandatorily negotiable terms and conditions of employment. Consequently, as to the non-Civil Service employer at issue here, the Commission Designee restrained the employer from implementing temporary layoffs or any other change in work hours or compensation levels without engaging in prior negotiations with the majority representative.

I.R. No. 2009-26

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF MAPLEWOOD,

Respondent,

-and- Docket No. CO-2009-376

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

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In the Matter of

STATE OF NEW JERSEY,

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-and- Docket No. CO-2009-377

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

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In the Matter of

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STATE OF NEW JERSEY,

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Charging Party.

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In the Matter of

STATE OF NEW JERSEY JUDICIARY,

Respondent,

-and- Docket No. CO-2009-392

PROBATION ASSOCIATION OF NEW JERSEY, JUDICIARY COUNCIL OF AFFILIATED UNIONS, COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO, OFFICE PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL 32.

Charging Parties.

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In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and- Docket No. CO-2009-395

POLICEMEN'S BENEVOLENT
ASSOCIATION LOCAL NO. 105,

Charging Party.

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In the Matter of

Township of Marlboro,

Respondent,

-and- Docket No. CO-2009-398

COMMUNICATIONS WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

Appearances:

For the Respondent - Township of Maplewood, Genova, Burns & Vernoia, attorneys (Brian W. Kronick, of counsel and at oral argument)

For the Charging Parties - Communications Workers of America, AFL-CIO, Weissman & Mintz, LLC (Steven P. Weissman, of counsel and at oral argument)

For the Respondent - State of New Jersey, Anne Milgram, Attorney General (Sally Ann Fields, Senior Deputy Attorney General, of counsel and at oral argument)

For the Respondent - Borough of Washington, Richard D. Phelan, Borough Manager

For the Charging Party - New Jersey State Policemen's Benevolent Association, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Robert A. Fagella, of counsel, Paul L. Kleinbaum at oral argument)

For the Charging - Party American Federation of State, County and Municipal Employees, Council 1, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Sidney H. Lehmann, of counsel and at oral argument)

For the Charging Party - Probation Association of New Jersey, Fox & Fox, LLP (David I. Fox, of counsel)

For the Charging Party - Judiciary Counsel of Affiliated Unions, Cohen, Leder, Montalbano & Grossman, LLC (David Grossman, of counsel and at oral argument)

For the Charging Party - Office Professional Employees International Union, Local 32, Cohen, Leder, Montalbano & Grossman, LLC (David Grossman, of counsel and at oral argument)

For the Charging Party - Policemen's Benevolent Association, Local 105, Fox and Fox, LLP (Lynsey A. Johnson, of counsel and at oral argument)

For the Respondent - Township of Marlboro, DeCotiis, Fitzpatrick, Cole & Wisler, LLP (Louis N. Rainone, of counsel and at oral argument)

For Amicus Curiae - Office Professional Employees International Union, Local 32, Mets, Schiro & McGovern, LLP (James M. Mets, of counsel, Kevin P. McGovern at oral argument)

For Amicus Curiae - International Brotherhood of Teamsters Local 97, Mets, Schiro & McGovern, LLP (Kevin P. McGovern, of counsel and at oral argument)

For Amicus Curiae - New Jersey Education Association, Selikoff & Cohen (Steven R. Cohen, of counsel and at oral argument)

For Amici Curiae - American Federation of Labor and Congress of Industrial Organizations; the American Federation of State, County and Municipal Employees, AFL-CIO; the Council of New Jersey State Colleges, AFT, AFL-CIO; the New Jersey State Federation of Teachers, AFT, AFL-CIO; and Health Professionals and Allied Employees, AFT, AFL-CIO, Spear, Wilderman, PC, attorneys (James Katz, of counsel and at oral argument)

For Amici Curiae - Firemens Mutual Benevolent Association and Newark Council 21, New Jersey Civil Service Association, Fox & Fox, LLP (David I. Fox, of counsel)

INTERLOCUTORY DECISION

On April 14, 2009, the Communications Workers Of America, AFL-CIO (CWA), filed an unfair practice charge and a request for interim relief against the State of New Jersey. CWA alleges that the State has committed unfair practices proscribed by the New Jersey Employer-Employee Relations Act by: (1) unilaterally imposing a reduction in the work year and compensation of employees represented by CWA by requiring them to take unpaid leave days; (2) failing to negotiate over the effects of the decision to impose involuntary unpaid leave days; and (3) conspiring with the Civil Service Commission (CSC) to enact temporary layoff rules for the purpose of circumventing the State's obligation to negotiate over staggered unpaid leave days. The charge alleges that, through these actions, the State repudiated various sections of the collective negotiations agreements it has entered into with CWA and has breached its duty to negotiate over terms and conditions of employment in violation of N.J.S.A. 34:13A-5.4a(1) and (5), of the New Jersey Employer-Employee Relations Act.[1/] To remedy these violations CWA seeks

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1/ These provisions bar 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" and "(5) Refusing to negotiate in good

(continued...)

an order containing this affirmative relief: enjoining the State from unilaterally reducing annual compensation and hours by requiring employees to take unpaid leave days; enjoining the State from announcing the imposition of unpaid leave days until the State negotiates in good faith with CWA over the effects of the decision to impose unpaid days off; and directing the State to negotiate in good faith with CWA over the effects of the decision to impose unpaid days off. The caption reflects that additional charges and requests for interim relief were filed between April 14 and April 29 by other employee organizations representing units of various State and municipal employees.

An order to show cause was executed on April 16, 2009 scheduling a return date for May 5. A modified order was executed on April 28, rescheduling the return date to May 12. By agreement of all parties, the return date was rescheduled to May 14. I was assigned to hear the applications. The respondent public employers and the charging parties submitted briefs, certifications and exhibits in accordance with Commission rules. Additional briefs were filed by various labor organizations appearing as amici curiae, some of whom requested and were granted the opportunity to present oral argument.

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1/ (...continued)
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."

On May 14, 2009, all parties appeared on the return date. Oral argument was presented.[2/] At the end of the Order to Show Cause Hearing, I reserved decision. I now issue my findings of fact, conclusions of law and legal analysis.

CO-2009-377 State and CWA

CWA is the certified majority representative of State employees[3/] in four collective negotiations units: Administrative and Clerical; Professional; Primary Level Supervisory; and Higher Level Supervisory. The State and CWA are parties to four collective negotiations agreements - one covering each of CWA's units. The agreements are effective from July 1, 2007 through June 30, 2011.

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2/ The hearing included oral argument on interim relief applications involving unfair practice charges filed by employee organizations representing employees of:

| | | |
|---|---|---|
| Maplewood Tp. | CO-2009-376 | (Blue & White Collar Unit) |
| Washington Bor. | CO-2009-378 | (Non-supervisory Blue/White collar) |
| State of N.J. | CO-2009-384 | (State Law Enforcement Unit) |
| State of N.J. | CO-2009-390 | (Health Care & Rehab Services) |
| State Judiciary units) | CO-2009-392 | (Four separate negotiations |
| State of N.J. | CO-2009-395 | (Parole Officers) |
| Marlboro Tp. | CO-2009-398 | (Non-supervisory Blue Collar Unit) |

3/ Employees in both the classified and unclassified service of Civil Service are included in the various units. As a practical matter, given the number of employees involved in this case and the employees' working relationships to each other, I make no distinction in this decision between these classes of employees.

Each agreement provides for annual across-the-board increases to the base salaries of employees. The agreements also contain salary schedules in effect for each fiscal year. These schedules identify the "base" or annual salary for each step of each range.

CWA asserts that during negotiations leading to the current agreements the State made no proposal that would allow it to mandate that employees take unpaid leave days. The State made other proposals with respect to leave time, including reducing the number of holidays and administrative leave days.

In or about January 2009, the Director of the Governor's Office of Employee Relations (OER), notified CWA that due to decreases in projected revenues for fiscal year (FY) 2009, resulting in a shortfall of $2.1 billion, the State intended to initiate certain cost-savings measures.

In or about February 2009, OER notified CWA that the State intended to temporarily layoff or "furlough" State employees for one day in May and one day in June to address the FY 2009 revenue shortfall.

The adoption of and court challenge to N.J.A.C. 4A:8-1.1A

On March 25, 2009, the Civil Service Commission adopted as an emergency rule, and concurrently proposed as a new, permanent rule, N.J.A.C. 4A:8-1.1A. That rule provides:

§ 4A:8-1.1A Temporary Layoffs

(a) An appointing authority in State or local service may institute a temporary layoff for economy, efficiency or other related reasons. A temporary layoff shall be defined as the closure of an entire layoff unit for one or more work days over a defined period or a staggered layoff of each employee in a layoff unit for one or more work days over a defined period. A temporary layoff shall be considered a single layoff action even though the layoff of individual employees takes place on different days during the defined period. The defined period shall be set forth by the appointing authority in its temporary layoff plan; however, in a staggered layoff, the maximum period to stagger one day off shall not exceed 45 days.

(b) A temporary layoff pursuant to (a) above may, with the approval of the Chairperson or a designee, be subject to limited exceptions when necessary to ensure continued public health and safety including, but not limited to, child welfare, law enforcement and care for prisoners, patients and other residents in the care or custody of the State.

(c) In a temporary layoff, no employee in the layoff unit, whether career, senior executive or unclassified, shall be paid for any work day that is designated as a temporary layoff day. Any employee who is designated as exempt from a temporary layoff day pursuant to (b) above shall be paid his or her regular wages for working on that day.

(d) A temporary layoff plan shall be submitted to the Chairperson of the Civil Service Commission or a designee in accordance with N.J.A.C. 4A:8-1.4 at least 15 days prior to the issuance of temporary layoff notices or such other period as permitted by the Chairperson or a designee. The temporary layoff plan shall describe the implementation of the temporary layoff, including the specific day(s) on which the layoff unit will be closed, any exceptions pursuant to (b) above and, if staggered, the reasons for not closing the entire layoff

> unit on a specific day and the staffing plan for implementing a staggered temporary layoff. Part-time employees shall be designated for a proportional amount of temporary layoff time, consistent with the ratio of hours worked to full-time employment. In a staggered temporary layoff, the appointing authority shall be permitted, in its sole discretion, to designate as unpaid temporary layoff time any planned or unplanned leave time taken by an employee during the defined layoff period, up to the maximum temporary layoff time for that defined layoff period. Employees shall not be permitted to substitute any paid leave for an unpaid temporary layoff day.
>
> (e) For purposes of accrual of leave time, anniversary dates, paid holidays and seniority, temporary layoff time shall be treated as if the employee is in pay status. An employee serving a working test period shall have the working test period extended for the time equal to the temporary layoff time. A Federal Family and Medical Leave Act leave or other leave for medical or family reasons shall not be affected by a temporary layoff. An alternate work week program may be suspended for pay periods in which a temporary layoff is implemented.
>
> (f) This temporary layoff rule, N.J.A.C. 4A:8-1.1A, shall expire on June 30, 2010.

Between March 26 and April 2, 2009, the CSC approved involuntary furlough plans filed by Executive Branch departments and autonomous agencies. The plans included both complete department or agency shutdowns on specific dates and "staggered" furloughs where a department or agency would remain open while their employees would be on unpaid leave on various dates.

CWA and other employee organizations appealed to the Superior Court, Appellate Division, from the CSC's temporary

adoption of N.J.A.C. 4A:8-1.1A, asserting that the promulgation was procedurally and substantively defective. On April 16, 2009, the Court heard argument and the following day issued an opinion that separately addresses plans for one-day shutdowns and programs calling for staggered unpaid days off. In The Matter Of Emergency Temporary Layoff Rule, App. Div. Dkt. Nos. A-3626-08T2, A-3627-08T2 and A-3628-08T2.

As to what it termed "staggered layoffs," the Court wrote:

> [W]e conclude that enough has been demonstrated to suggest that the procedure embodied in N.J.A.C. 4A:8-1.1A(a), to the extent it permits 'a staggered layoff of each employee in a layoff unit for one or more work days over a defined period,' may be inconsistent with the statutory requirements including N.J.S.A. 11A:8-1 and N.J.S.A. 34:13A-5.3 and -4, providing rights to employees and requiring mandatory negotiations relating to conditions of work. There has been a substantial showing before us that the emergent regulation may not adequately address layoff rights under statutes and regulations which have not been amended. See N.J.S.A. 11A:8-1; N.J.A.C. 4A:8-2.1 et seq. Accordingly, we believe that the issues concerning "staggered layoffs" warrant stay of enforcement pending plenary consideration. We therefore stay the emergency regulation to the extent it relates to "staggered layoffs" pending consideration of the issues as to scope of negotiations before the Public Employment Relations Commission, which has initial jurisdiction to consider the question, and before which related proceedings have otherwise been commenced. See N.J.S.A. 34:13A-5.4(d); Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 154 (1978); State v. State Supervisory Employees Ass'n, 78 N.J. 54, 83 (1978); City of Newark v.

Newark Council 21, 320 N.J. Super. 8, 16-17 (App. Div. 1999).

Addressing the rule as it applies to a complete temporary shut-down of a department or agency (a layoff unit) for non-exempt employees for one or more days, the Court held:

> On the other hand, a decision to lay off all employees in a layoff unit, even on a temporary basis, must be considered a managerial prerogative, and lawfully embodied in the emergent regulation. N.J.S.A. 11A:8-1; State v. Supervisory Employees Ass'n, supra, 78 N.J. at 88; State of New Jersey v. CWA, 285 N.J. Super. 541, 551-52 (App. Div. 1995), certif. denied, 143 N.J. 519 (1996). Such layoffs do not impact rights such as those involving displacement and seniority. We find no basis to disturb the emergency regulation providing for temporary layoffs of 'an entire layoff unit for one or more work days over a defined period,' subject to the provisions of N.J.A.C. 4A:8-1.1A(b) permitting exemption of units because of their relationship to the needs of public safety, law enforcement, child welfare and care for institutionalized persons.

The Court ruled:

> The promulgation of the emergency regulation is affirmed except for the portions of N.J.A.C. 4A:8-1.1A(a) and (d) relating to 'a staggered layoff.' As to the issues concerning 'staggered layoffs', the matter is transferred to PERC pursuant to R. 1:13-4.[4/]

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4/ The Court's opinion recognizes that there may be Constitutional and Contract Clause claims that may remain after the Commission has ruled on the issues transferred to it by the Appellate Division.

Positions of the Parties - Mootness

The State represents that after the Court's ruling, State agencies were requested to revise their temporary layoff plans to eliminate staggered layoffs. Currently, there will be no staggered layoffs in May 2009. Instead, temporary layoffs in the form of entire department closures are planned for May 2009 subject to exemptions for the needs of public health and safety, law enforcement, child welfare, and care for institutionalized persons. The first date on which a temporary layoff is scheduled to occur is May 18, 2009, for employees of the Motor Vehicle Commission.

The State maintains that because the emergency regulation expires on May 24, 2009, it governs only the May 2009 temporary layoffs. It asserts that there is no present issue as to whether the decision to impose staggered layoffs pursuant to the temporary layoff rule violates the Act. It represents that June 2009 layoff dates are under review and could be governed by any regular rule that may be adopted by the CSC.[5/]

The CWA notes that the CSC has approved plans submitted by the State and the Judiciary calling for staggered furloughs to

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5/ The CSC concurrently adopted N.J.A.C. 4A:8-1.1A as an emergency rule, proposed it as a new rule and invited public comments through May 6. See 41 N.J.R. 1535(a).

occur during June 2009. Accordingly, it maintains that a dispute exists that must be resolved by the Commission.[6/]

The temporary shutdowns

The State asserts that, as the Court held that temporary shutdowns of an entire department is on exercise of managerial prerogative and, therefore, not subject to mandatory negotiations, the CWA's allegations pertaining to such closures would not, if true, establish a violation of the State's negotiations obligation.

CWA disputes that the Court has foreclosed the Commission from considering whether furloughs occasioned by complete department or agency shutdowns are mandatorily negotiable. It asserts that the Appellate Division lacked jurisdiction to render a scope of negotiations determination in the first instance. CWA views the Court's statement that the plans for a complete, short-term shutdown of a department or agency concerned a "managerial prerogative" as dictum having no binding effect on the present dispute. CWA relies on state and federal cases holding that dictum neither affects the law of the case nor has any precedential effect.

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6/ I note that the Commission, an agency that is "in, but not of" the Department of Labor and Workforce Development, has submitted a plan calling for its offices to close on May 22 and June 19, 2009. All Commission staff are scheduled to have an unpaid day off.

The staggered furloughs

The State argues that the decision to impose a staggered layoff, like all layoff decisions, is a non-negotiable managerial prerogative. It reasons that there is no merit to the unions' claims and that none of the required elements for the grant of injunctive relief has been proven by the unions in these matters. But, it notes that after the Court's opinion, State agencies were requested to revise their temporary layoff plans and, as a result, there will be no staggered layoffs in May 2009.

CWA urges that the label placed on a personnel action does not control its negotiability. It asserts that, in applying the balancing test, the Commission must take into account the amount of savings the State will realize and also consider that employees who are to be furloughed, include workers whose positions are paid from fee generated and federal, not State, funds. CWA asserts that the decisions to close or partially close departments are not identical and must be scrutinized on the facts applicable to each to determine if requiring negotiations would significantly interfere with the determination of governmental policy.

CWA also observes that an employer's decision to determine hours of operation and staffing levels does not abrogate its obligation, set forth in numerous Commission and Court cases, to

negotiate before changing the work year, work days and work hours, as well as employee compensation and benefits.[7/]

Alleged collaboration between the CSC and the OER

Citing State of N.J. (OER), (Dept. of Personnel) and CWA, P.E.R.C. No. 89-67, 15 NJPER 76, 79 (¶20031 1988), aff'd NJPER Supp.2d 244 (¶202 App. Div. 1990), certif. den. 122 N.J. 395 (1990), the State asserts that the portion of CWA's charge asserting that the OER and the CSC collaborated in adopting the regulation is an issue the Commission has previously declined to consider in an unfair practice case involving essentially these same parties.

CWA asserts that the departments and agencies that submitted furlough plans to the CSC did not act independently. It asserts that the Governor has orchestrated the personnel actions and notes that all entities submitting furlough plans to the CSC used the same form.

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7/ CWA distinguishes State of New Jersey (Department of Environmental Protection) v. CWA, AFL-CIO, 285 N.J. Super. 541 (App. Div. 1995), cert. den., 143 N.J. 519 (1996) from other precedent holding that reductions in weekly work hours are mandatorily negotiable. It asserts that the decision is not controlling because (1) the Commission's acknowledged deviation [21 NJPER 267, 269 (¶26172 1995)] from the Supreme Court's preemption case law must be confined to the specific and unique circumstance of that case, and (2) by virtue of a 2001 amendment to Title 11A, the Civil Service Commission is barred by statute from unilaterally amending, modifying or changing the State compensation plan.

Irreparable Harm

The State asserts that interim relief is not warranted because monetary loss alone does not constitute irreparable injury and the only real injury to the unions or their members from a temporary layoff requiring union members to take two unpaid leave days would be lost wages. The State further asserts that the claims of harm to the collective negotiations interests of the unions do not satisfy the irreparable harm test. It claims there is no harm to the continuing negotiating relationship between the State and the unions when the unions themselves have expressly acknowledged and agreed in the Savings Clause in the collective negotiations agreements that if any provision of the contract conflicts with any law the contract provision shall be deemed amended or nullified to conform to such law.

CWA asserts that a unilateral change in the terms and conditions of employment during the negotiations process chills employee rights guaranteed by the Act, undermines labor stability, and constitutes irreparable harm. Similarly, it argues that a mid-contract repudiation undermines a collective negotiations agreement and irreparably harms the parties' bargaining relationship. It cites Union County, I.R. No. 92-4, 17 NJPER 448, 452 (¶22214 1991) for the proposition that "permitting [mid-term] unilateral changes of this magnitude in these fundamental terms and conditions of employment during this

litigation could irreparably harm the continuing relationship between the employer and the majority representative and cause hardship for individual employees." Union County involved involuntary unpaid furloughs for five consecutive days.

The Interim Relief Standard

The test for reviewing an application for injunctive relief is well-established. 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 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); 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).

Scope of the dispute

A. Temporary shutdown of "an entire layoff unit for one or more work days over a defined period"

CWA asserts that the negotiability of the short term shut downs of complete departments (layoff unit) is also before the Commission because (1) the Court, as it acknowledged with respect to the staggered furloughs, lacks jurisdiction to make an initial

determination concerning negotiability; and (2) its comments concerning "managerial prerogative" are non-binding dicta.

The State argues that the Court expressly held that the decision to layoff all employees in a layoff unit on a temporary basis is a managerial prerogative and is lawfully embodied in the regulation under which the temporary layoffs are being imposed in the present action. It asserts that determination is binding in this proceeding.

The difference between a court's holding and dicta has been explained as follows:

> Dicta [are] statements that are unnecessary to support a court's opinion, while a holding is the rule plus the rationale used to decide a case. Dorf, "Dicta and Article III," 142 U. Pa. L. Rev. 1997, 2000 (1994).

In addition even if a statement can be considered dicta, a lower tribunal may not be free to completely disregard it. 43 Hous. L. Rev. 1143, 1187 (2006).

The Commission is required to apply and follow rulings of the Appellate Division on scope of negotiations disputes. See In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 22 (App. Div. 1977). While a pronouncement that an issue in dispute between a public employer and a majority representative is a "managerial prerogative" appears to be at least an opinion on the negotiability of that subject, the Appellate Division has not transferred the dispute over the short-term, complete shutdowns to the Commission, despite our primary jurisdiction to determine

the scope of negotiations, N.J.S.A. 34:13A-5.4(d). Given the context of the dispute, it appears that the Court held (rather than opined) that the CSC could adopt a rule allowing the State to impose short-term, complete shutdowns of departments and agencies. It denied the appellants' request to enjoin the adoption and application of that portion of N.J.A.C. 4A:8 1.1A(a), reasoning that the rule addressed a managerial prerogative. That disposition of the issue bears the hallmarks of a holding, rather than dictum. Irrespective of whether the Court issued a ruling or dicta, this agency does not have the authority to rule that the Appellate Division went beyond its jurisdictional bounds. Consequently, I am bound to follow the Court's ruling and proceed on the basis that the State's decision, as is the decision of any other employer subject to the jurisdiction of Civil Service, to effectuate a temporary layoff of all employees in a layoff unit is an exercise of managerial prerogative and not subject to negotiations.

B. A staggered layoff of each employee in a layoff unit for one or more work days over a defined period"

The Court ruled that the Commission, at least initially, should determine whether N.J.A.C. 4A:8-1.1A, specifically subparagraphs (a) and (d), to the extent it permits "a staggered layoff of each employee in a layoff unit for one or more work days over a defined period, "may be inconsistent with the statutory requirements including N.J.S.A. 11A:8-1 and N.J.S.A.

34:13A-5.3 and -4, providing rights to employees and requiring mandatory negotiations relating to conditions of work.

The State has represented that no staggered layoffs of the type addressed in the rule will occur in May 2009 as the State will instead use temporary shutdowns of entire layoff units for one or more work days over a defined period.

I note that, in addition to the absence of any staggered furlough plans by State employers to take effect in May 2009, the portion of N.J.A.C. 4A:8-1.1A allowing civil service employers to implement staggered furloughs has been stayed by the Court pending a decision by the Commission.

Given these circumstances, I find that there is no need, at this stage of the proceedings, for a Commission designee to issue a ruling concerning staggered furloughs because no State employer will be implementing such plans during May 2009. Thus, even assuming that the staggered furloughs described by N.J.A.C. 4A:8-1.1A are mandatorily negotiable and are not preempted by that rule, there is no meaningful relief to provide as there are no staggered furloughs to enjoin.

As a Commission designee, I must be guided by the agency's precedents and, absent extraordinary circumstances, should not venture into unchartered interpretations of the Act. The full Commission has not yet addressed the negotiability of the "staggered furloughs," or whether and to what extent N.J.A.C. 4A:8-1.1A might limit or preempt negotiations. The Court

transferred those issues to the full Commission and there appears to be adequate time for the Commission to consider that issue.

Likelihood of success on the Merits

As discussed earlier, I am bound by the Court's holding that "a decision to lay off all employees in a layoff unit, even on a temporary basis, must be considered a managerial prerogative." Therefore CWA does not appear to have established the likelihood of success element of the test required to obtain a grant of interim relief on the portion of its unfair practice charge claiming that the State had an obligation to negotiate over department and agency wide shutdowns.

As stated above, I find that as there will be no staggered layoffs during May 2009, any ruling on the negotiability of such actions should be made in the first instance by the Commission exercising its jurisdiction to determine the scope of negotiations. In addition, the absence of impending staggered layoffs means that no meaningful relief could be provided at this time.

Irreparable harm

Even if a ruling on the negotiability of staggered layoffs was appropriate at this time and assuming I were to find that the charging party had shown a substantial likelihood that the State was required to negotiate before imposing staggered layoffs, the charging party would have to establish that it would suffer irreparable harm if relief were not granted.

The staggered layoffs that were originally planned for May 2009 by the State involved an unpaid leave day for all employees in a given department or layoff unit. While employees would not be paid for that day, the unpaid leave would not affect health insurance coverage or seniority rights. Nor would it diminish leave allowances or pensions. Under those circumstances, the nature of the loss suffered by employees would be limited to monetary.

Where a monetary remedy could normally be issued by the Commission at the end of a case, an injunction is not appropriate as monetary loss alone does not constitute irreparable harm. Morton v. Beyer, 822 F.2d 364, 372 (3rd Cir. 1987). While the CWA correctly points out that an employer must refrain from unilateral changes in working conditions at all times, its assertion that mid-term contract breaches or repudiations always constitute irreparable harm would mean that interim relief should always be available in any case alleging and demonstrating a likelihood that an employer violated N.J.S.A. 34:13A-5.4a(5). That position is not supported by case law. Although the then Commission Chairman granted interim relief in Union County, I find the circumstances were different as the Union County employees would have been subject to a furlough consisting of five consecutive unpaid days off, amounting to a full week's salary. In Union County, affidavits concerning financial hardships had been submitted and it was not clear that seniority

and other associated benefits would be unaffected by those furloughs. I conclude that CWA is not entitled to interim relief in CO-2009-377.

CO-2009-384 State and New Jersey State PBA

On April 20, 2009, the New Jersey State Policeman's Benevolent Association (State PBA) representing titles in various State departments and agencies in the State Law Enforcement Unit which includes such titles as state campus police officer, aeronautical operations specialist, conservation officer, human services police officer, park police officer, weights and measures inspector, and special agents employed by the Division of Criminal Investigations, filed an unfair practice charge against the State of New Jersey alleging that the State has unilaterally altered mandatorily negotiable terms and conditions of employment, including wages, hours, and workweek, by imposing mandatory temporary layoffs which require employees to take off designated work days without pay during the months of May and June 2009.

The State PBA claims that the State has not negotiated over implementation procedures relating to the temporary layoffs/furloughs including, but not limited to, furlough dates, voluntary alternatives to unpaid furloughs and/or the use of paid vacation time or personal days in lieu of furloughs, among other mandatory negotiable subjects. The State PBA's unfair practice charge was accompanied by an application for interim relief which

was handled jointly with the other similar unfair practice charges. The State PBA requests that the State be enjoined from unilaterally reducing unit employees' compensation and work hours by requiring unit employees to take involuntary unpaid furloughs. The primary legal arguments asserted by the State PBA are substantially the same as those expressed by the CWA in its unfair practice charge against the State and which has already been fully set forth above.

The State PBA's application for interim relief is denied for the same reasons set forth in my discussion of CO-2009-377 involving the unfair practice charges filed against the State by CWA.

CO-2009-390 State & AFSCME (Health Care/Rehabilitation Services)

On April 23, 2009, the American Federation of State, County and Municipal Employees (AFSCME), filed an unfair practice charge against the State. On April 24, AFSCME filed an application for interim relief in support of its charge. AFSCME alleges that the State has committed unfair practices proscribed by the Act by: (1) unilaterally imposing a reduction in the work year, work week and compensation of employees represented by AFSCME by requiring them to take unpaid days off in May and June 2009. The charge alleges that, through these actions, the State repudiated various sections of the collective negotiations agreements it has entered into with AFSCME and has breached its duty to negotiate over terms and conditions of employment in violation of 5.4a(1) and

(5) of the Act. To remedy these violations, AFSCME seeks an order enjoining the State from unilaterally reducing the annual compensation of unit employees and from unilaterally altering the hours, work week, and other terms and conditions of employment. AFSCME also requests that the State be directed to obey and abide by the Appellate Division decision by immediately rescinding all aspects of the temporary layoff plans relating to "staggered layoffs." AFSCME's request for interim relief was handled jointly with other similar unfair practice charges.

AFSCME, Council 1, AFL-CIO, its affiliated Councils, Council 52, Council 71, and Council 73, and its affiliated locals are the exclusive representative of the employees in the State's Health, Care, and Rehabilitation Services Unit. The majority of state employees represented by AFSCME are employed in the New Jersey Department of Children and Families (DCF) and the New Jersey Department of Human Services (DHS). AFSCME and the State are parties to a collective negotiations agreement covering the terms and conditions of employment of the unit employees covering July 1, 2007 through June 30, 2011. The collective negotiations agreement between AFSCME and the State sets the wages of employees represented by AFSCME, hours of work, including work week and shifts, and contains provisions addressing layoff and recall.

On or about March 26, 2009, the Departments of Children and Families and Human Services as well as other State departments

with unit employees, submitted temporary layoff plans to the CSC. The plans were approved. AFSCME alleges that unit employees were advised they were exempted from the layoff plan. Other unit employees were advised they would be furloughed, but the furloughs could occur on days on which the divisions within their departments would be entirely closed for a single day in May and June 2009. Other employees were scheduled to be furloughed for one day in May and one day in June 2009, but the furlough days will be "staggered," and those employees will be ordered to take off days specified by their departments. AFSCME alleges that the employees who are exempt from the furloughs may have their hours and/or shifts unilaterally altered by their departments. AFSCME relies upon the arguments submitted by the CWA, the State PBA and the arguments of all other employee organizations that are involved in these interim relief proceedings. On the return date, AFSCME further argued that pursuant to Civil Service Statutes, N.J.S.A. 11A:8-1 and 2, as incorporated in Article 29 of the parties' agreement, all temporary employees must be laid off prior to permanent employees and that I have the authority as Commission designee to apply these statutes to this negotiability dispute. The State responded that any violation of these statutes is an issue to be resolved by the CSC and not this Commission.

AFSCME's application for interim relief is denied for the reasons set forth in my discussion of CO-2009-377 involving the unfair practice charges filed against the State by CWA.[8/]

CO-2009-395 Parole Board & Juvenile Justice Commission

On April 24, 2009, PBA Local 105 (PBA) filed an unfair practice charge alleging that the State of New Jersey violated the Act by announcing its intention to temporarily layoff parole officers employed by the State Parole Board (SPB) and the Juvenile Justice Commission (JJC), by unilaterally reducing their annual compensation and hours of work without negotiations and by failing to negotiate over the effects of the decision to impose temporary layoffs. The charge also asserts that the State failed to provide an exemption from the temporary layoff rules for parole officers in violation of the Act.

The unfair practice charge was accompanied by an application for interim relief seeking to restrain the State from

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8/ AFSCME's argument that civil service law, as incorporated in Article 29 of its collective agreement with the State, requires that any temporary or provisional employee must be furloughed prior to any permanent employee in the same position raises an issue which appears to be mandatorily negotiable and legally arbitrable. See State of New Jersey v. State Supervisory Ass'n., 78 N.J. 54, 80 (1978). However, it also appears that the resolution of disputes pertaining to the proper application of Civil Service law resides primarily with Civil Service. In any event, even assuming that the State's action amounts to a repudiation of that portion of the agreement, the resulting harm would not be irreparable. See discussion above. Cf. State v. Int'l Fedn. of Prof'l & Tech. Eng'rs, Local 195, 169 N.J. 505 (2001) (employees improperly denied overtime work entitled to receive back pay as a remedy).

implementing the temporary layoff action for SPB or JJC parole officers and parole officer recruits; to require the State to exempt all SPB and JJC parole officers and recruits from any layoff action; to restrain the State from unilaterally reducing annual compensation and hours through unpaid leave days; and directing the State to negotiate in good faith.

PBA Local 105 is the exclusive negotiations representative for all correction and parole officers, and other titles, employed by the State. All parole officers belong to PBA Local 326 which represents those employees under the auspices of PBA Local 105. Parole officers are sworn law enforcement officers and are designated as essential employees. Parole officers are responsible for conducting investigations related to parole planning, and supervise individuals paroled from State correctional facilities, including a large number of violent offenders who require supervision to ensure the public safety.

Parole officers work a specific 40-hour work week but 20% of those hours are non-traditional, meaning early in the morning or late at night to accommodate parolee work schedules. Thus, their work week is staggered. The Response Unit, however, works 24/7.

As a result of the March 2009 promulgation by the CSC of rules permitting temporary layoffs, the SPB sought an exemption for SPB parole officers from temporary layoffs in light of public safety concerns or, in the alternative, sought staggered layoffs. The exemption request was denied. On April 14, 2009, SPB parole

officers were notified of temporary layoffs to occur in May and June of 2009.

JJC parole officers were notified that they will be temporarily laid off on May 22 and June 29, 2009. JJC will be shut down on those days. Correction officers, who are part of the same negotiations unit as parole officers, are exempt from the temporary layoff plans.

PBA Local 326 argues that it and the State have been in negotiations (interest arbitration) until recently, and at no time during the process had the State raised the issue of temporary layoffs or staggered temporary layoffs or any other issue relating to the impact of temporary layoffs. Further, it asserts that in the recently issued interest arbitration award for this unit, the arbitrator considered the State's budgetary situation through February 2009 and provided for a lesser salary benefit in fiscal year 2010. PBA Local 326 contends that the State should not now be able to again, unilaterally decrease the salary benefit parole officers have been awarded by the interest arbitrator based on the same economic exigency that led to the promulgation of the temporary layoff rules. Additionally, PBA Local 326 argues that parole officers should be treated like most other law enforcement officers and like correction officers, who are in the same collective negotiations unit, be granted an exemption from the temporary layoff. Finally, Local 326 agrees with the other charging parties in this matter contending that

the furloughs are unilateral changes in compensation, work hours and other mandatorily negotiable terms and conditions of employment. Accordingly, it seeks that the State be restrained from implementing a temporary layoff for any parole officer.

A public employer's determination of the titles that are deemed essential and will be exempted from department shutdowns or temporary layoffs appears to be a management prerogative. Accordingly I find that PBA Local 105 is not likely to prevail on its claim that the State violated the Act by failing to exempt parole officers from temporary layoffs. With respect to the other issues raised by this charge, PBA Local 105's application for interim relief is denied for the reasons set forth in my discussion of CO-2009-377 involving the unfair practice charges filed against the State by CWA.

CO-2009-392 State of New Jersey Judiciary

On April 23, 2009, the majority representatives of four separate collective negotiations units filed unfair practice charges and requests for interim relief against the State of New Jersey Judiciary.

The Probation Officers Association of New Jersey (PANJ) is the certified representative of judicial employees in the case-related professional unit and the professional supervisors unit. The Judiciary Council of Affiliated Unions (JCAU) is the certified representative of judicial employees in the support staff unit and the support staff supervisors unit. The Office

Professional Employees International Union, Local 32 (OPEIU) is the certified representative of judicial employees in the official court reporters unit. The CWA is the certified representative of judicial employees in the non-case related professional unit. For purposes of considering their interim relief applications, PANJ, the JCAU, OPEIU and CWA will be referred to collectively as "the Judiciary Unions."

The Judiciary and each of the Judiciary Unions are parties to separate collective negotiations agreements covering each unit. Each agreement has a term of July 1, 2008 through June 30, 2012 and provides for across-the-board annual salary increases.

On March 31, 2009, the CSC approved the temporary layoff plan submitted by the Judiciary. The Judiciary plan calls for the furlough of all but 27 employees on May 22, 2009 and June 29, 2009. The Judiciary Unions claim that those 27 employees, who work in the Information Technology Office and the Camden PREP program, will be furloughed on a staggered basis. The Judiciary asserts that there are no staggered layoffs.

A notice issued by the Honorable Glenn A. Grant, J.A.D., Acting Administrative Director of the Courts, notified the employees represented by the Judiciary Unions that employees would be furloughed on May 22 and June 29, 2009.

The charges filed by the Judiciary Unions allege that: the imposition of involuntary unpaid leave days constitutes a unilateral reduction in compensation and the work year; the

imposition of involuntary unpaid leave days repudiates various provisions of the collective negotiations agreements, including compensation, hours of work, leave and emergency closing provisions as well as the provisions that require the State to act jointly with Judiciary Unions to enact or modify legislation or regulations to enforce the provisions of the agreements. These actions are alleged to violate N.J.S.A. 34:13A-5.4a(1) and (5). The Judiciary Unions' requests for interim relief were handled jointly with other similar unfair practice charges.

The Judiciary Unions' application for interim relief are denied for the reasons set forth in my discussion of CO-2009-377 involving the unfair practice charges filed against the State by CWA as the representative of State employees.[9/]

CO-2009-398 Marlboro Township and CWA

On April 29, 2009, CWA filed an unfair practice charge alleging that the Township of Marlboro (Marlboro) violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1) and (5) by unilaterally implementing a temporary layoff (furlough) of one unpaid leave day per week for the remainder of calendar year 2009 for employees in the blue-collar

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9/ Although the Judiciary is a separate branch of government, it has, a matter of comity, allowed the Commission to exercise jurisdiction over labor relations disputes involving its employees, while retaining the reserved right to take action it deems necessary to preserve its authority as an independent branch of government. See Passaic County Probation Officers' Ass'n v. County of Passaic, 73 N.J. 247 (1977).

unit represented by CWA. CWA asserts that this action constitutes a unilateral reduction in the compensation and work year of its unit members as well as a repudiation of various provisions of the parties' collective negotiations agreement, specifically the provisions concerning compensation, hours of work and leave time. CWA also contends that the imposition of unpaid leave days changes the status quo while the parties are in negotiations for a successor collective negotiations agreement and constitutes a per se violation of Marlboro's statutory duty to negotiate over terms and conditions of employment.

The unfair practice charge was accompanied by an application for interim relief seeking to restrain Marlboro from unilaterally reducing the compensation and hours of work of employees in the blue-collar unit represented by CWA by imposing one furlough day per week at least through December 31, 2009. This application was also argued on May 14, 2009.

CWA is the majority representative of a unit of approximately 40 or 50[10/] non-supervisory blue-collar employees. All but one employee is assigned to the Department of Public Works (DPW). CWA also represents two units of non-supervisory white-collar employees employed by Marlboro, a civil service jurisdiction.

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10/ The unfair practice charge lists the approximate number of unit members as 50, while the certification of Marlboro business Administrator Alayne Shepler lists the number as 39. This fact is immaterial.

CWA and Marlboro are parties to three collective negotiations agreements effective from January 1, 2004 to December 31, 2007. Article II of all three agreements, entitled "Management Rights", states in paragraph A(6) that management retains the right "[t]o layoff employees in the event of lack of work or funds, or efficiency of operations, so long as said reason for the lay-off is bonafide." Negotiations for successor agreements were conducted in 2008 and continued into 2009.

On January 16, 2009, citing N.J.A.C. 4A:8-1.4, Marlboro's Business Administrator Alayne Shepler notified the Civil Service Commission, of the possible layoff of nine permanent employees in six different departments to address what she described as a severe budget shortfall of over 2.5 million dollars. On February 17, the layoff plan was approved. These layoffs took effect on April 16, but only seven permanent employees, not nine, were laid off due to attrition.

On February 26, 2009, Shepler together with Marlboro's Chief Financial Officer and Labor Counsel met with CWA Staff Representatives to discuss Marlboro's financial situation, specifically what would be needed to close the projected budget gap. At the meeting, Shepler presented a plan. The parties continued to meet but reached no agreement on the various options.

On March 25, 2009, the CSC adopted the emergency rule, N.J.A.C. 4A:8-1.1A. Shepler claims she told CWA representatives

that Marlboro would be forced to use the option of temporary layoffs if agreements with the unions could not be reached.

On April 16, 2009, Shepler filed a temporary layoff plan with the CSC to address the $2.5 million budget shortfall. The only employees exempted from the temporary layoff plan were sworn police officers and police dispatchers. Shepler wrote that the temporary layoff plan, which would take effect July 1, was necessary to achieve $1.2 million in salary savings and an alternative to the permanent layoff of approximately 25 employees.[11/]

On or about April 20, 2009, CWA conducted a membership meeting among employees in the blue-collar unit to consider Marlboro's proposals for a successor collective negotiations agreement, including a 2009 wage freeze and a requirement that unit members take 16 staggered furlough days for 2009 as well as for the foreseeable future until Marlboro determined that

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11/ On or about April 20, 2009, employees in the two white-collar units voted to accept Marlboro's collective negotiations proposals, including a 4.5 percent wage increase in 2008, a freeze in 2009 and a reductions in hours of work of either 2.5 or 2.0 hours depending on the employee's normal work week. And, the employees' hours would be worked over a four day period resulting from the shut down of Town Hall for one day per week. The reduction in hours of work represents approximately a 7 percent reduction in the employees' annual compensation. The successor agreement is effective from January 1, 2008 through December 31, 2009, although the parties agreed that the scheduling changes will remain in effect after the expiration of the successor agreement. The four-day work week began on Friday, May 1, 2009, the first scheduled day that Township offices were closed.

improvement in economic conditions warranted a return to normal work schedules and compensation levels. The 16 furlough days in 2009 would be approximately a seven percent reduction in annual compensation. The blue collar unit voted not to accept these proposals unless Marlboro agreed to forego any additional layoffs while the furlough program was in effect.

On or about April 20, 2009, CWA learned that Marlboro submitted a temporary layoff plan to the CSC requiring employees in the blue-collar unit to take one involuntary unpaid furlough day per week for the remainder of 2009, thus resulting in a four-day work week and an approximate 20 percent compensation reduction for 2009. According to CWA, Marlboro directly communicated to employees in the blue collar unit the details of the plan it submitted to the CSC without notification or seeking negotiations with CWA. This is the first time Marlboro has required employees represented by CWA to take unpaid leave days.

According to Shepler's certification, on April 21, 2009, she and Marlboro's Labor Counsel met with the blue-collar unit's negotiating team. The parties' reached an agreement on a MOA that provided for a seven percent reduction in pay and 15 unpaid days per annum pro-rated for 2009. The agreement contained the same health insurance contributions as the white-collar agreements. The MOA was rejected. The parties have not reached agreement for a successor collective agreement in mediation and the blue collar unit has requested to go to fact-finding.

On April 27, 2009, as a result of the settlements with the white collar units, Shepler informed CSC that Marlboro was amending its temporary layoff plan. The revised plan applied only to employees in the blue collar unit, specifically the Department of Public Works. As the Appellate Division stayed N.J.A.C. 4A:8-1.1A regarding the implementation of staggered furloughs, the revised plan provided for a temporary layoff of all DPW employees each Friday from July 10, 2009 through June 25, 2010.

The Parties legal arguments in Marlboro CO-2009-398

CWA relies on the legal arguments set forth in its charge against the State in CO-2009-377. Marlboro argues that there is no substantial likelihood of success because the Civil Service rule allowing for temporary layoffs of an entire unit for one or more work days over a definite period was upheld by the Appellate Division as a managerial prerogative. It contends that the Commission has no jurisdiction over N.J.A.C. 4A:8-1.1A.

Marlboro acknowledges that the Commission has jurisdiction to consider the negotiability of staggered layoffs, but asserts that it is not implementing a staggered layoff. It maintains that it is completely shutting down its DPW and furloughing DPW employees on Fridays. Marlboro argues that its temporary layoff plan is an exercise of its managerial prerogative to institute a department-wide shut down of its DPW and is, therefore, outside the scope of negotiations. It cites State of New Jersey (DEP) v.

CWA, AFL-CIO. Marlboro also contends that paragraph A(6) of the parties' collective negotiations agreement gives it the right to layoff employees in the event of lack of work or funds as long as the reason is bonafide.

Marlboro points out that it participated in numerous negotiation sessions in hopes of reaching an amicable settlement concerning a layoff plan. Only when no agreement was reached did Marlboro submit a temporary layoff plan to the CSC on April 16, 2009. Marlboro says that by closing an entire department it is not singling out any employee for disparate treatment.

As set forth in my discussion of CO-2009-377, the Appellate Division held that a temporary shutdown of an entire layoff unit for one or more days was a non-negotiable managerial prerogative and upheld the portion of N.J.A.C. 4A:8-1.1A permitting appointing authorities to submit such layoff plans to the CSC. Although Marlboro's plan appears to put an onerous burden on its blue collar employees by cutting their salaries by 20 per cent over a one year period, I have no authority to say that the Court would have decided the issue differently if Marlboro's plan had been before it. I am not free to disregard the Court's ruling.

Accordingly, I find that in light of the Civil Service rule, CWA has not established the requisite likelihood of success

element for a grant of interim relief. CWA's application is denied.[12/]

CO-2009-376 Maplewood Township

CWA's unfair practice charges against Maplewood Township, filed on April 14, 2009, allege that Maplewood, a non-civil service jurisdiction, has violated N.J.S.A. 34:13A-5.4a(1) and (5) by: (1) unilaterally imposing a reduction in the work year and compensation of employees represented by CWA by requiring them to take unpaid days off and (2)engaging in direct dealing with CWA members by contacting them about whether they wanted to spread out their reduced compensation over several pay periods. The charge alleges that, through these actions, Maplewood repudiated various sections of the collective negotiations agreements it has entered into with CWA and has breached its duty to negotiate over terms and conditions of employment. CWA seeks an order enjoining Maplewood from unilaterally imposing unpaid days off and from unilaterally reducing the hours and compensation of employees. CWA asks that employees who have received unilateral reductions in their work hours and wages be compensated by the Township; and that the Township be directed to cease and desist from engaging in direct dealing with CWA unit members.

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12/ Given this conclusion I need not address the issue of irreparable harm.

CWA is the certified representative of a negotiations unit of blue and white collar workers employed by the Township of Maplewood. There are approximately 22 full-time employees in the unit.

The Township and CWA are parties to a collective negotiations agreement with a duration of January 1, 2005 through December 31, 2007. The salary schedule section of the contract lists the titles in the unit; indicates whether those titles are full-time or part-time and lists the starting salaries for all full-time titles. For part-time titles, the salary schedule lists minimum hourly rates.

Article 11 provides for annual across-the-board increases to the base salaries. Article 6 lists the weekly work hours for full-time employees.

The parties reached a Memorandum of Agreement (MOA) on a successor contract in or about December 2008. CWA members ratified the MOA on or about December 18, 2008. The parties had a meeting scheduled for April 14, 2009 to finalize the language of their successor agreement. The parties' successor agreement has a duration of January 1, 2008 to December 31, 2010. The MOA provides for annual across-the-board increases to the base salaries of full-time employees.

On or about February 6, 2009, the CWA Local 1031 Executive Vice President, attended a meeting with Maplewood Mayor Victor DeLuca, the Township Administrator, Maplewood Township Committee

member Lester Lewis-Powder, and the Union Representative for the United Construction Trades & Industrial Employees International Union (UCTIE) that represents employees in the Maplewood Department of Public Works. Members of CWA's bargaining committee also attended, as did members of UCTIE.

During that meeting, representatives from Maplewood notified the Unions that the Township would be laying off 17 employees. On or about February 6, 2009, Maplewood issued layoff notices to the affected employees advising that the layoffs would take effect on March 6. During the meeting, Maplewood representatives also notified the Unions that the Township would be unilaterally reducing the work hours of five full-time employees to part-time, which would result in a corresponding reduction in each employee's compensation.

Four of the five employees whose work hours and compensation were unilaterally reduced by Maplewood are represented by CWA. The CWA members whose work hours were unilaterally reduced from full-time to part-time hold the titles of cashier, tax assessor, and construction official (2 employees). Maplewood also issued layoff notices to these employees on or about February 6, 2009 informing them of the reduction in their work hours from full-time to part-time, and the resulting reduction in their compensation effective March 6.

The CWA alleges that Maplewood did not negotiate prior to its decision to unilaterally reduce the work hours of the four

unit members and it did not negotiate with CWA prior to the issuance of the February 6 layoff notices to the members who had their hours of work and compensation reduced. CWA claims that by decreasing employees' hours of work from full-time to part-time, and reducing their compensation as a result of the decrease in their work hours, without negotiating with CWA, Maplewood has engaged in bad faith bargaining in violation subsections 5.4a(1) and (5) of the Act.

During the February 6 meeting, representatives from Maplewood also notified the Union that the Township would be furloughing employees one day per week for 12 consecutive weeks during the months of June, July and August. Maplewood intends to unilaterally implement these 12 unpaid leave days. The CWA alleges that the 12 days were unilaterally implemented to reduce the compensation to which employees represented by CWA are entitled to under the parties' collective agreement, as well as to reduce the work year.

Employees who work in Town Hall will take unpaid leave days on the 12 consecutive Fridays during June, July, and August. Town Hall will be closed on those dates. The Department of Recreation, Parks, and Cultural Affairs will remain open on Fridays during the months of June, July, and August. Employees who work in the Department of Recreation, Parks, and Cultural Affairs, are to be furloughed on a staggered basis with some employees taking an unpaid leave day on 12 consecutive Mondays,

and others taking an unpaid leave day on 12 consecutive Fridays. The Department of Recreation, Parks, and Cultural Affairs will remain open on all days that employees will be required to take unpaid leave days.

The Township has not announced plans to furlough crossing guards and jitney drivers, who are also represented by CWA. Police and fire employees in the Township will also not be furloughed.

On or about February 20, 2009, Maplewood distributed a memorandum to CWA unit members formally notifying them about the furloughs. The memorandum also solicited the unit members' interest in spreading out the reduction in salary resulting from the imposition of the 12 unpaid leave days. Maplewood offered CWA unit members the option of spreading out their salary reductions over 21 pay dates in 2009, beginning with the first pay date in March. Maplewood asked that each CWA unit member complete a section of the memorandum indicating whether or not the employee wanted his or her salary reductions spread out over 21 pay periods. Maplewood also asked each employee to return the completed memorandum to the Finance Department by February 26.

CWA alleges that Maplewood did not negotiate with them prior to directly contacting unit employees with the February 26 memorandum asking them to decide whether they wanted to spread out their reductions in compensation over 21 pay periods.

CWA argues that the imposition of involuntary unpaid leave days constitutes a unilateral reduction in the compensation and work year of employees; the imposition of involuntary unpaid leave days is a repudiation of various provisions of the collective negotiations agreement between Maplewood and CWA, including the contractual provisions concerning compensation, hours of work, and leave time; the unpaid leave days are being imposed in lieu of a reduction-in-force; Maplewood did not negotiate with CWA prior to the Township's decision to unilaterally impose 12 unpaid furlough days on CWA's members; Maplewood's unilateral imposition of 12 unpaid leave days constitutes bad faith bargaining and violates 5.4a(1) and (5) of the Act. CWA asserts that by failing to negotiate with CWA prior to distributing the February 26 memorandum to unit members, Maplewood's direct dealing with unit members has undermined and circumvented CWA as the exclusive negotiations representative of these employees; Maplewood's direct dealing with unit members undercut CWA's role as the majority representative, as well as damaged the CWA's ability and credibility to perform that function. Maplewood's conduct is a direct violation of 5.4a(1) and (5) of the Act.

The Township responds that the CWA can't meet the interim relief standard since it cannot demonstrate a substantial likelihood of success on the merits because the Township has a non-negotiable managerial prerogative to effectuate layoffs and

alter schedules through departmental shut downs; the Management Rights clause of the parties' agreement clearly and unequivocally grants the Township broad powers to decide the staff, schedules of work assignments, institute temporary layoffs and relieve employees from duty for legitimate reasons; the case concerns a question of contract interpretation that should be deferred to binding arbitration under the parties' grievance procedure; the decision to institute temporary layoffs does not violate the parties' agreement because the salary schedules are only a guide; and the CWA waived its right to argue that the Township violated the Act when it directly contacted its employees about the temporary layoff and the option to spread out the salary adjustment because when confronted by the CWA, the Township attempted to remedy this situation by offering to rescind the letter and the CWA rejected the offer.

The Township further argues that the CWA cannot establish irreparable harm because the relief sought can be remedied by monetary damages; the public interest favors a denial of the interim relief application; and the balance of the harms weighs in favor of a denial of interim relief.

The CWA replies that a balancing of the parties' interests weighs in favor of the employees' interest in negotiating furloughs; a managerial prerogative to determine staffing and hours of operation does not permit the Township to circumvent its obligation to negotiate compensation and hours of work; the fact

that the furloughs may not violate the parties' contract does not control whether negotiations are required; and the grievances filed by the CWA are legally arbitrable.

The Appellate Division decision, In the Matter of Emergency Temporary Layoff Rule, (quoted and discussed above) upheld a portion of an emergency rule, N.J.A.C. 4A:8-1.1A, adopted by the CSC allowing appointing authorities in State and local civil service jurisdictions to impose temporary layoffs by closing "an entire layoff unit for one or more work days over a defined period." This rule does not apply to Maplewood or other jurisdictions not subject to Civil Service law. I find a different result obtains in non-civil service jurisdictions. In non-civil service jurisdictions, no statutory or regulatory scheme exists which would preempt negotiations over temporary layoffs. Consequently, I am compelled to rely upon the Local 195 balancing test and Commission and Court precedents regarding the negotiability of an employer's decision to effect a temporary layoff based primarily on fiscal constraints.

In Union County, the then Commission Chairman granted interim relief where an employer unilaterally sought to impose mid-contract temporary layoffs in the absence of any statutory or regulatory scheme permitting temporary layoffs. Despite the label used by the employer, the Chairman found that the dispute concerned the mandatorily negotiable subjects of work year, compensation and unpaid leaves of absence. Id. at 451.

In Woodstown-Pilesgrove Reg. Sch. Dist. v. Woodstown-Pilesgrove Education Ass'n., 81 N.J. 582 (1980), a dispute arose regarding whether teachers were entitled to compensation for two additional hours worked on the day before Thanksgiving. The Court found that:

> No statute or regulations dealing with teachers' working hours or compensation would have been violated if the additional two hours had not been scheduled or if the teachers had been compensated for having worked those extra hours. There being no demonstration of a particularly significant [managerial] purpose, and the budgetary considerations being the dominant element, it cannot be said that negotiation . . . of that matter significantly or substantially trenched upon the managerial prerogative of the [employer]. [Id. at 594.]

The Commission and the courts have previously addressed the issue of temporary layoffs or furloughs. The Commission has consistently found actions termed "temporary layoff" or "furlough" as changes to the length of an employee's hours of work, level of compensation, and unpaid leave time, all matters considered to be mandatorily negotiable. See Bd. of Ed. of Englewood v. Englewood Teachers Assn., 64 N.J. 1 (1973) (where the Court observed ". . . working hours and compensation are terms and conditions of employment within the contemplation of the Employer-Employee Relations Act.") See also State of New Jersey v. State Supervisory Ass'n., 78 N.J. 54 (1978); Galloway Tp. Bd. of Ed. V. Galloway Tp. Ass'n of Ed. Secy's, 78 N.J. 1 (1978); City of Newark, P.E.R.C. No. 94-118, 20 NJPER 276 (¶25140

1994) (reducing work week of recreation employees from 40 to 20 hours); Gloucester Cty., P.E.R.C. No. 93-96, 19 NJPER 244 (¶24120 1993) (reducing nurses' work week from 40 to part-time); Stratford Bd. of Ed., P.E.R.C. No. 90-120, 16 NJPER 429 (¶21182 1990) (reducing bus drivers' work week from 36 to 21); Bayshore Reg. Sewerage Auth., P.E.R.C. No. 88-104, 14 NJPER 332 (¶19124 1988) (reducing laboratory technicians' work week from 40 hours to 20); State of N.J. (Ramapo State College), P.E.R.C. No. 86-28, 11 NJPER 580 (¶16202 1985) (reducing administrators' work year from twelve months to ten); Sayreville Bd. of Ed., P.E.R.C. No. 83-105, 9 NJPER 138 (¶14066 1983) (creating ten-month secretarial position and hiring employee into that position instead of twelve month position); East Brunswick Bd. of Ed., P.E.R.C. No. 82-111, 8 NJPER 320 (¶13145 1982) (abolishing guidance counselors' twelve month position and substituting ten month position). In Deptford Bd. of Ed., P.E.R.C. No. 81-78, 7 NJPER 35 (¶12015 1980), the Board hired a teacher on a part-time basis to perform duties that were previously performed by full-time teachers. The Commission held that the employer's conduct was ". . . nothing more than a unilateral reduction in the salary and benefits of the position." The Commission held that the ". . . conversion of the position from full-time to part-time was a change in name only to camouflage its attempt to get the work performance for less money." [Id. at 36.]

Maplewood argues that it has a non-negotiable right to effectuate layoffs. However, the Township is not laying off employees in the context of permanently removing employees from position. The predominant issue here is that Maplewood is changing employees' work hours and compensation levels. It has done this by requiring employees to work four days per week in June, July and August and by reducing four unit employees from full-time to part-time. These changes are mandatorily negotiable. See Piscataway Tp. Bd. of Ed. and Piscataway Tp. Principals Ass'n., 164 N.J. Super. 98 (App Div. 1978); City of Newark; Gloucester Cty., P.E.R.C. No. 93-96 (¶24120 1993); Bayshore Reg. Sewage Auth., P.E.R.C. No. 88-104, 14 NJPER 332 (¶19124 1988). Maplewood is not prevented from closing its Town Hall one day per week, but it is required to engage in negotiations with the majority representative prior to changing mandatorily negotiable terms and conditions of employment such as employee work hours and compensation.

Maplewood contends that the Management Rights article in the agreement gives it authority to institute temporary layoffs. The Management Rights article does not specifically address or authorize temporary layoffs. A waiver of the right to negotiate a change in a term and condition of employment will not be found unless the collective agreement clearly and unequivocally authorize such unilateral change. Elmwood Park Bd. of Ed., P.E.R.C. No. 85-115, 11 NJPER 366 (¶16129 1985). See also Red

Bank Reg. Ed. Ass'n. v. Red Bank Bd. of Ed., 78 N.J. 122, 140 (1978); South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp 2d 170 (¶147 App Div. 1987). I find no waiver here.

Collective negotiations for a successor collective agreement has not yet concluded. A unilateral change in terms and conditions of employment during any stage of the negotiations process has a chilling effect on employee rights guaranteed by the Act, undermines labor stability and constitutes irreparable harm. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n., 78 N.J. 25 (1978).

Considering the public interest and the relative hardship to the parties, I find that the public interest is furthered by adhering to the tenants expressed in the Act which require the parties to negotiate prior to implementing changes in terms and condition of employment. Maintaining the collective negotiations process results in labor stability and promotes the public interest.

In assessing the relative hardship to the parties, I find that the scale tips in favor of the Charging Party. Maplewood will not be prevented in any way from taking reasonable and responsible actions reflective of the current financial circumstances. The order today requires that the Township engage in the ameliorative process of collective negotiations before it changes terms and conditions of employment and unilaterally

effect temporary layoffs and reductions of positions from full-time to part-time.

Maplewood Township is restrained from unilaterally implementing temporary layoffs and reducing the positions of cashier, tax assessor and construction official from full-time to part-time.

CO-2009-378 Washington Borough and CWA

On April 14, 2009, the CWA filed an unfair practice charge and a request for interim relief against the Borough of Washington (Warren County). CWA alleges that Washington has committed unfair practices proscribed by the N.J.S.A. 34:13A-5.4a(1) and (5) of the Act by: (1) unilaterally imposing a reduction in the work year and compensation of unit employees' represented by CWA by requiring them to take 26 unpaid leave days; (2) reducing unit employees' work hours from full-time to part-time; and (3) failing to negotiate over the effects of the decision to impose involuntary unpaid leave days. To remedy these violations CWA seeks an order enjoining Washington from unilaterally imposing unpaid days off and reducing the hours and compensation of employees.

On May 14, 2009, CWA appeared and presented its oral argument. Washington relied on its written submission.

CWA is the certified representative of a negotiations unit of non-supervisory blue and white collar employees employed by the Borough of Washington. There are approximately 20 employees

in CWA's negotiations unit. Washington is a Civil Service jurisdiction. Washington and CWA are parties to a collective negotiations agreement with a duration of January 1, 2009 to December 31, 2012. The agreement addresses hours of work, compensation and provides for annual wage increases.

On or about April 6, 2009, the Borough Manager, met with representatives of the CWA and informed them that the Borough intended to unilaterally implement furloughs for unit members, and from July 1, 2009 to December 31, 2009, each CWA unit member would be required to take one unpaid leave day per week for a total of 26 days. The furloughs would be staggered with half the unit taking leave on Mondays and the other half taking leave on Fridays. The Borough would remain open on all days that CWA members will be required to take unpaid leave days. The Borough advised that it intended to submit its furlough plan to the CSC for approval. Police employees are not being furloughed. On the same date, the tax collector, the deputy court administrator, and the code enforcement official were also advised that they would be reduced from full-time to part-time.

The CWA argues that: the purpose of the 26 unpaid leave days and reduction of three employees from full-time to part-time are to reduce the compensation that the employees are entitled to under the parties' agreement and the 26 unpaid leave days will result in a reduction of CWA members' 2009 compensation by approximately 20%; the purpose of the 26 unpaid leave days is to

reduce the work year of employees represented by CWA and constitutes a unilateral reduction in the employees' compensation and work year; the actions of Washington are a repudiation of various provisions of the parties' agreement; the unpaid leave days are being imposed in lieu of a reduction-in-force; and Washington did not negotiate with CWA prior to deciding to reduce hours and furlough employees.

The Borough responds that it has withdrawn its involuntary furlough plan and is in the process of negotiating voluntary furloughs with the CWA[13/]. The CWA does not refute this fact. However, there is no evidence in the record that Washington has rescinded its plan to reduce the positions of the three CWA members from full-time to part-time. In its brief, Washington argues that the Managements Rights clause contained in the parties' agreement permits it to reduce the hours for unit employees and that it has no other alterative since it is in a financial crisis which it explains in detail.

I find that Washington Borough has abandoned its plan to proceed with involuntary temporary layoffs of unit employees. Consequently, as to the issue of furloughs, I issue no order. However, it appears that Washington intends to change the tax collector, deputy court administrator and the code enforcement official from full-time to part-time positions. A change from

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13/ The Borough alleges that prior to imposing involuntary furloughs, it proposed voluntary furloughs to the CWA.

full-time to part-time is considered a change in hours of work, not a temporary layoff under the Civil Service rule. I have already addressed the issue of work hour changes and changes from full-time to part-time elsewhere in this decision regarding Maplewood Township. In the Maplewood section, I fully analyzed the case law holding that a reduction from full-time to part-time is mandatorily negotiable. The case law being clear, I found that the majority representative had established a likelihood of success on the merits, one of the requisite elements for interim relief. The fact that Maplewood is not subject to Civil Service jurisdiction and that Washington is, makes no difference under these facts. However, Maplewood reduced work hours while the parties had not yet completed negotiations and I found that the timing of the change had a chilling effect on those continuing negotiations and constituted irreparable harm. Washington made its change mid-contract. Consequently, I find no irreparable harm exists as to Washington. The Commission is able to order a complete remedy at the conclusion of the unfair practice litigation.[14/] Accordingly, CWA's application for interim relief as against Washington Borough will be denied and the unfair practice will proceed through the normal Commission process.

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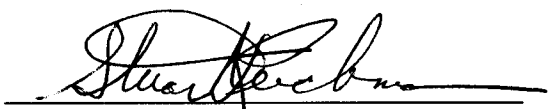
14/ I have no indication that the reduction from full-time to part-time would affect the eligibility of the affected employees for health care coverage or other similar benefits. If health care coverage is affected by the change in hours than I would reconsider whether interim relief is warranted.

ORDER

A. Based upon the reasons set forth in this decision the applications for interim relief in the following cases are denied:

| | | |
|---|---|---|
| State of N.J. | CO-2009-377 | (Four units represented by CWA) |
| Washington Bor. | CO-2009-378 | (Non-supervisory Blue/White collar) |
| State of N.J. | CO-2009-384 | (State Law Enforcement Unit) |
| State of N.J. | CO-2009-390 | (Health Care & Rehab Services) |
| State Judiciary | CO-2009-392 | (Four separate negotiations units) |
| State of N.J. | CO-2009-395 | (Parole Officers) |
| Marlboro Tp. | CO-2009-398 | (Non-supervisory Blue Collar Unit) |

B. Based upon the reasons set forth in this decision, Maplewood Township is restrained from unilaterally implementing temporary layoffs and reducing the positions of cashier, tax assessor and construction official from full-time to part-time.



Stuart Reichman
Commission Designee

DATED: May 16, 2009
Trenton, New Jersey