

I.R. NO. 2021-4

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MONMOUTH COUNTY,

Respondent,

-and-

Docket No. CO-2020-304

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

A Commission Designee grants in part an application for interim relief filed by the CWA 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) and (5), by unilaterally establishing policies that required unit employees who were potentially exposed to COVID-19 or recently traveled to states with significant community spread of the disease to report to work during their quarantine period. The Designee finds that the CWA has demonstrated a substantial likelihood of prevailing in a final Commission decision, and irreparable harm. The Designee also finds that the relative hardships weigh in favor of granting interim relief, 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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Appearances:

For the Respondent,
Monmouth County
(Steven W. Kleinman, In House Counsel)

For the Charging Party,
Weissman and Mintz, attorneys
(Ira W. Mintz, of counsel)

INTERLOCUTORY DECISION

On June 12, 2020, Communications Workers of America, AFL-CIO, (CWA or Charging Party) filed an unfair practice charge (Dkt. No. CO-2020-304) against Monmouth County (Respondent or County), together with an application for interim relief, a brief, certifications and exhibits that contested two unilaterally imposed policies related to the Coronavirus disease 2019 (COVID-19) pandemic. On July 10, 2020, CWA filed an amended charge challenging a third allegedly unilaterally implemented policy that is also part of the County's COVID-19 response. CWA subsequently filed a request seeking a Temporary Restraints Order

(TRO), along with a supporting certification, to restrict the application of the County's "quarantine-at-work" provisions that are contained in two of the County's policies. As amended, the charge alleges that the County violated subsections 5.4a(1) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act) by failing to negotiate over terms and condition of employment. More specifically, it alleges that on or around April 20, 2020, the County unilaterally adopted the Monmouth County Revised COVID-19 Policy (COVID-19 Policy), which identified all employees in its Division of Social Services as emergency responders and refused to negotiate over its decision to exempt these employees from the expanded leave benefits made available under the federal statute, the Families First Coronavirus Response Act (FFCRA). CWA also alleges that the County unilaterally adopted, on or around June 5, 2020, the Monmouth County Sick Leave Call-Out Policy (COVID-19 Sick Leave Policy), which included a requirement that employees who have been exposed to COVID-19 "quarantine at work" so long as the exposed employees do not experience certain symptoms and follow

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; (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."

particular safety protocols while at work. CWA further alleges that on or around July 9, 2020, the County informed its representatives that it was unilaterally adopting the Monmouth County COVID-19 Travel Quarantine Policy (COVID-19 Travel Quarantine Policy), which requires employees to quarantine at work if they have traveled to certain states with significant community spread of COVID-19, or use accrued leave time to remain at home during the quarantine period.

On June 17, 2020, an Order to Show Cause was issued without temporary restraints since the charge, as originally filed, did not include a request for a TRO. On June 25, 2020, the County filed its brief opposing the application for interim relief together with its supporting certifications. CWA filed its initial reply brief and supporting certification on June 30, 2020.

CWA's June 30 reply brief advised that it was withdrawing its request for interim relief regarding the County's alleged failure to negotiate regarding its decision to exclude unit employees from the expanded federal family and medical leave provisions under the FFCRA because the County permitted the remaining employees with childcare issues to work remotely. Therefore, at that time, the sole issue that remained for purposes of interim relief was the County's requirement that unit employees quarantine at work following exposure to COVID-19

pursuant to its COVID-19 Sick Leave Policy. Oral arguments were held on that issue on July 6, 2020.

On July 10, 2020, CWA amended its charge to contest the unilateral adoption of the County's COVID-19 Travel Quarantine Policy.^{2/} It expanded its application for interim relief to include the County's requirement that unit employees quarantine at work following travel to certain states with significant community spread of COVID-19, or use accrued leave in order to quarantine at home. CWA provided a certification in support. It also advised that it would be relying on its prior submissions to support its amended charge. For purposes of interim relief, CWA sought an order rescinding the County's COVID-19 Sick Leave Policy and its COVID-19 Travel Quarantine Policy, and requiring negotiations over who, if anyone, cannot quarantine-at-home and over who, if anyone is entitled to paid leave if unable to quarantine at home, and any other mandatorily negotiable issue. (CWA July 20 Reply Br.) By email on the same day, I advised that the County had until July 17, 2020 to submit its response regarding the expanded interim relief request.

CWA then filed a request for a TRO regarding the quarantine-at-work provisions in the County's COVID-19 Sick Leave Policy and

^{2/} As a remedy, the amended charge sought an order that Respondent rescind the April 5, June 5 and July 9 policies, make whole any employees who were forced to use accumulated leave time or were placed in unpaid leave status, and negotiate in good faith.

its COVID-19 Travel Quarantine Policy. CWA's order to show cause that accompanied its TRO request sought that Respondent be temporarily restrained from requiring any negotiations unit employees to report to work during their quarantine period pursuant to those two polices.

In a July 12, 2020, email, I advised the parties that I would be holding the request for a TRO in abeyance. I also required the County to notify CWA counsel and me as soon as a unit employee may be impacted by either of the quarantine-at-work provisions. I provided the County with the option to file a response no later than July 14, 2020, on the specific issue of the request for temporary restrains.

After the County requested and was granted an extension on July 17, 2020, the County filed its response on July 20, 2020 regarding CWA's expanded interim relief request. It did not provide any additional certifications. CWA filed another reply brief later the same day. It did not provide any additional certifications.

In a July 29, 2020, email, the County advised CWA counsel and me that two employees would be subject to its COVID-19 Travel Quarantine Policy and reporting to work as early as August 3, 2020.^{3/} On July 30, 2020, I issued the TRO in part, as the

^{3/} According to County's counsel's July 29 email, one employee advised her supervisor on July 24 that she would be
(continued...)

relief provided was more narrow than the relief sought by CWA. Rather than apply to all unit employees as requested, for reasons set forth in detail below, the TRO applied only to those unit employees in positions that were permitted to perform work at home during the declared Public Health Emergency and State of Emergency due to COVID-19. Therefore, unit employees in positions that the County did not previously permit to work from home were not subject to the TRO.

By email on August 4, 2020, County counsel submitted correspondence to me with a copy to CWA counsel advising that the County did not believe the TRO was legally valid because N.J.A.C. 19:14-9.5 "requires the Designee, when issuing any interim relief, to 'include findings of fact and conclusions of law,' setting forth 'the reasons for [the Order's] issuance.'" On August 5, 2020, I sent an email requesting that the County clarify whether it was treating the correspondence as a request to dissolve the TRO. County counsel replied that he was asking for me to take appropriate corrective action regarding the TRO. Also on the same day, I advised in response that I would not be issuing a determination since the applicable regulations

3/ (...continued)
traveling to one of the states subject to the travel advisory on the weekend of July 25 and 26, and this employee opted to use accrued leave to remain at home until her test results came back following her travel. Another employee was traveling to one of the states subject to the travel advisory on the weekend of August 1 and 2.

regarding dissolution apply when an order to show cause that includes temporary restraints is issued without notice. I explained that in the instant matter there had already been ample opportunity to be heard and submit briefs on the interim relief claims and the specific request for temporary restraints. County counsel in response advised that in order to grant the TRO, it needed to be fully justified by factual findings and legal conclusions, which the TRO did not include. Accordingly, the County reiterated its request that the "temporary order should be vacated, as a matter of law (not to mention fundamental due process), unless and until that occurs." In the final email exchange on August 5, I advised the County that Commission regulations expressly require findings of fact and conclusions of law for an interim relief decision, but not for a TRO. I also advised that if the County found caselaw or other legal support for the proposition that the County is entitled to seek dissolution of a temporary restraint where there has already been notice, oral arguments and opportunities to submit briefs, that I would review it.

On August 10, 2020, the County filed an Application for Permission to File Emergent Motion with the Superior Court of New Jersey Appellate Division by email with a copy to CWA counsel, the Commission, and me. The Appellate Division denied the application the same day.

The following facts appear:

The County's Department of Human Services, Division of Social Services (DSS) provides social services and administers financial and medical assistance through various state and federal programs, including Temporary Assistance for Needy Families, the General Assistance program, Supplemental Nutrition Assistance Program (SNAP), and Medicaid . (County Administrator O'Connor Cert. para. 4) CWA's Local 1087 represents two negotiations units at DSS; a combined clerical and professional unit and a supervisory unit. (County Administrator O'Connor Cert. Exhibit C)

On March 9, 2020, the Governor of New Jersey issued Executive Order No. 103, which declared statewide a public health emergency and state of emergency due to COVID-19. In response, the County sought to determine which agencies would need to remain fully operational during the pandemic. (County Administrator O'Connor Cert., para. 7)

On April 1, 2020, the federal statute, the Families First Coronavirus Response Act (FFCRA) became effective, which requires certain employers to provide paid sick leave or expanded family and medical leave under certain circumstances due to the pandemic. (County Administrator O'Connor Cert., para. 8) The County determined that DSS employees qualified as "emergency responders" under the FFCRA because of the critical work they

perform in providing benefits and services to County residents, and therefore, the County had the option to exclude DSS employees from the expanded leave benefits that are available pursuant to the federal statute. (County Administrator O'Connor Cert., paras. 8, 10) The County's decision to exclude DSS employees as emergency responders is set forth in the County's COVID-19 Policy, which became effective April 20, 2020. (CWA June 12 Letter Br. Ex. A, County Administrator O'Connor Cert., paras. 9, 10 and 12)

Although the April 20 COVID-19 Policy is not the subject of the interim relief application, it contains provisions relevant to it. It sets forth leave procedures that were at the time applicable to all employees, regardless of their classification under the FFCRA as identified in that policy. (CWA June 12 Letter Br. Ex. A) In pertinent part, it advises as follows:

In accordance with recommended guidance from federal and state authorities, if an employee is (i) diagnosed with COVID-19, (ii) directed by a medical professional or government agency to self-isolate or quarantine due to suspicion of exposure to or diagnosis with COVID-19, and/or (iii) undergoing a period of self-quarantine or isolation pursuant to public health assessment recommendations, the employee shall immediately notify the County's Human Resources Department - Benefits Division ("HR benefits"), which will in turn notify the County Administrator or Designee. **In such circumstances, the employee will not be required to utilize accumulated leave time if he or she provides documentation verifying the same within three work days of the employee's initial absence. . . .** Any employee who has been diagnosed with or exposed to the COVID-19 virus will not be

permitted to return to the workplace under any circumstances without medical clearance, which shall be provided by the employee's health care professional. (Emphasis in original)

Thus, in accordance with this policy, regardless of their classification as emergency responder, unit employees did not quarantine at work prior to June 5, 2020.^{4/} Under the heading "Staffing (all employees)," it further provides that "[i]n the event of staffing shortages that disrupt the usual delivery of County services due to diagnosis and/or necessity of quarantine, it may become necessary for appropriate County officials to reassign essential work duties to ensure continuity of operations."

On June 24, 2020, the Governor issued a travel advisory (Travel Advisory) that all individuals entering New Jersey from states with significant spread of COVID-19 should quarantine for 14-days after leaving that state. (County July 20 Letter Br.) The State maintains a list of "impacted states" that is frequently updated, and made available on New Jersey's website dedicated as the COVID-19 Information Hub.^{5/} As of the issuance of this decision, there are currently 33 states and U.S.

^{4/} Consistent with this policy, during oral arguments, County counsel confirmed that before the issuance of the COVID-19 Sick Leave Policy, potentially exposed employees did not report to work during their quarantine period.

^{5/} <https://covid19.nj.gov/index.html> (last visited August 13, 2020)

jurisdictions that are subject to the Travel Advisory.^{6/} The particular states subject to the advisory has fluctuated depending on whether they meet the positive COVID-19 test rate or positivity rate that is set forth in the advisory. (Travel Advisory FAQ) As the Travel Advisory FAQs section on the State's COVID-19 Information Hub explains "[t]he self-quarantine is voluntary, but **compliance is expected.**" (Emphasis in original) (County July 20 Letter Br.) It further provides: "Travelers and residents returning from impacted states should self-quarantine at their home, a hotel, or other temporary lodging. Individuals should only leave the place of self-quarantine to seek medical care/treatment or to obtain food and other essential items." The Travel Advisory exempts business travelers, seasonal migrant farm workers, and critical infrastructure workers, as defined by the Cybersecurity and Infrastructure Security Agency, a federal agency.

The quarantine-at-work provisions of the challenged policies are described in detail below. It is undisputed that the County did not negotiate any aspect of them with CWA before their implementation.

^{6/} <https://covid19.nj.gov/faqs/nj-information/travel-information/which-states-are-on-the-travel-advisory-list-are-there-travel-restrictions-to-or-from-new-jersey> (last updated August 11, 2020) (hereinafter Travel Advisory FAQs)

COVID-19 Sick Leave Policy

On or around June 5, 2020, the County issued the "Monmouth County Sick Leave Call-Out Policy" (COVID-19 Sick Leave Policy) (CWA June 12 Letter Br. Ex. B). In a sub-heading, the document notes that the policy is "temporary during coronavirus public health emergency." The COVID-19 Sick Leave Policy advises that its purpose is "to ensure a safe and healthy work environment for all employees. . . . as well as maintain employee privacy and confidentiality as required under HIPAA. . . ." The plain terms of the policy apply to all employees, unless specifically exempted by the County Administrator.^{2/} It defines employees broadly to include any paid employees and unpaid interns. It provides that the COVID-19 Sick Leave Policy supplements the County's existing sick leave policy, that it works in conjunction with the County's April 20 COVID-19 Policy, and that noncompliance with any of its procedures may result in disciplinary action.

The COVID-19 Sick Leave Policy, generally requires employees calling out of work to notify their supervisor at least 30 minutes before their reporting time. Employees who call-out will

^{2/} During oral arguments, County counsel represented that according to his understanding, the policy only applied to employees that the County viewed as essential, such as emergency responders. In any event, there is no dispute that the COVID-19 Sick Leave Policy applies to the unit employees represented by CWA.

receive a call from the County's Health Care Professionals (HCPs) to conduct a health screening to determine potential exposure to COVID-19. These employees are required to speak with the HCP. The policy also identifies various responsibilities supervisors must undertake as part of the call-out process. It also requires employees who call-out sick to provide to the departmental timekeeper medical documentation, such as a note or test results, to enable proper coding.

The pertinent portion for interim relief purposes of the COVID-19 Sick Leave Policy further provides:

If an employee advises that he/she has symptoms of or has tested positive for COVID-19, the HCP will conduct "Contact Tracing" to identify any individuals, including other employees, who may have been potentially exposed.

Employees identified as potentially exposed during contact tracing but who remain asymptomatic must adhere to the following practices prior to and during their work shift:

- The Monmouth County Health Department HCP will notify directly any employees who have potentially been exposed and inform them they will be quarantined at work.
- Arrangements will be made with each employee to pick up from the Health Department the following items to be used throughout quarantine at work:
 - 14 disposable thermometers
 - 14 face masks (should he/she not want to wear their own face covering), and

- A Daily Temperature/Symptom Form.
- Each day, **prior to coming to work**, the employee will take his/her temperature and compare any symptoms he/she may be experiencing to those listed on the symptom form provided. If asymptomatic, **the employee will report to work for his/her usual shift.** The employee will call his/her results in daily to a Health Department On-Call nurse at (XXX) XXX-XXXX.
- While at work, the employee will maintain 6-feet apart from others while practicing social distancing and wear a mask or face covering for 14 days after his/her last exposure.
- If during his/her daily monitoring, **prior to coming to work**, there are any changes in temperature and/or symptoms, **the employee is to remain at home** and contact the Health Department On-Call nurse at (XXX) XXX-XXXX, who will conduct a Health Screening and direct the employee accordingly.

If an employee has tested positive, is a presumptive positive or has been potentially exposed through contact tracing, the HCP will contact the Monmouth County Safety Office, who will notify the Superintendent of Buildings and Grounds (B&G) that there is a need to sanitize a building and worksite after hours. The Superintendent of B&G will only be given the worksite/room number or Department where the employee works. B&G will sanitize the entire area after hours, including any common areas. The employee's name and exact work space will not be identified to ensure the employee's identity remains private.

(Emphasis in original)

COVID-19 Travel Quarantine Policy

On or around July 9, 2020, the County issued a new policy entitled "Monmouth County COVID-19 Travel Quarantine." (COVID-19 Travel Quarantine Policy) (Attachment to CWA Counsel Cert.) The policy itself appears to be undated, but takes effect immediately. Like the COVID-19 Sick Leave Policy, the plain terms of the policy apply to all employees, unless specifically exempted by the County Administrator. It also advises that it works in conjunction with the County's April 20 COVID-19 Policy, and COVID-19 Sick Leave Policy. It also warns that noncompliance with any of its procedures may result in disciplinary action.

The COVID-19 Travel Quarantine Policy explains that on June 24, 2020, the Governor issued a travel advisory that all individuals traveling into New Jersey from states with significant community spread of COVID-19 quarantine for a 14-day period, and that the State will regularly update a list of states to which the travel advisory applies, which is available at www.covid19.nj.gov. It further explains that the County is issuing the policy as part of "its continuing efforts to protect the safety and health of its employees while ensuring the delivery of essential services to the community"

Although the Governor's Travel Advisory is not mandatory, the County policy mandates that employees who traveled to one of the states covered by the Governor's advisory "must quarantine"

for a 14-day period and contact the County's health department before returning to work so a HCP can conduct a health screening. It then outlines the following two options to satisfy the County's requirement that affected employees must quarantine:

Quarantine At-Work

- In accordance with CDC guidelines for essential personnel, if an employee is asymptomatic, he/she will follow the daily process as outlined below.
 - Arrangements will be made with each employee **before entering the workplace** to pick up from the Health Department the following items to be used throughout his/her quarantine at-work:
 - 14 disposable thermometers
 - 14 face masks (should he/she not want to wear their own face covering), and
 - A Daily Temperature/Symptom Form.
- When picking up the quarantine packet at the Health Department, the employee will receive a **free COVID-19 test to take before entering the workplace.**
 - Each day, the employee will take his/her temperature and compare any symptoms he/she may be experiencing to those listed on the symptom form provided. The employee will call or text his/her results in daily to a Health Department On-Call nurse at (XXX) XXX-XXXX **prior to coming to work.** If asymptomatic, **the employee will report to work for his/her usual shift.**
 - While at work, the employee will maintain 6-feet apart from others while practicing social distancing

- and wear a mask or face covering throughout the quarantine at work.
- If during his/her daily monitoring, prior to coming to work, there are any changes in temperature and/or symptoms, **the employee is to remain at home** and call or text the Health Department On-Call nurse at (XXX) XXX-XXXX, who will conduct a Health Screening and direct the employee accordingly.
 - The quarantined employee will receive a **second free COVID-19 test** from the Health Department approximately 7 days after returning to New Jersey. The employee **may not return to the work place if he/she tests positive for COVID-19** (refer to the Sick Call-Out Policy for guidance).
 - At the end of the 14-day quarantine, the employee will receive a clearance letter from the Health Department indicating he/she is no longer required to be quarantined at work.

Quarantine At-Home

- If an essential employee chooses to quarantine at-home, he/she **will be required to utilize accrued leave time.**
- Any employee choosing to quarantine at home **cannot return to workplace at the end of the 14-day quarantine without providing a copy of their medical clearance to return to the workplace.**

(Emphasis in original.)

While the Governor's Travel Advisory exempts critical infrastructure workers as defined by the Cybersecurity and Infrastructure Security Agency (CISA), the County's COVID-19 Travel Quarantine Policy does not expressly classify DSS employees as critical infrastructure workers or as any other applicable exemption.

CWA's Certifications

CWA provided three certifications. The first certification from Jenelle Blackmon accompanied the application for interim relief, as originally filed. In it, Ms. Blackmon certified that she read the factual allegations set forth in the charge, and that the factual allegations contained therein and her foregoing statements are true. The certification and supporting letter brief do not disclose her role with CWA or any position with the County. The certification does not contain any specific factual allegations. The second certification accompanied CWA's initial reply brief, which as noted above, narrowed the issue for interim relief purposes to the County's quarantine-at-work requirement for potentially exposed employees. In it, Kimberly Johnson, President of CWA Local 1087, certified that a DSS employee^{8/} holding the HSS2 title, was working from home via VPN access and processing NJFC Medicaid before the County's COVID-19 Sick Leave Policy. This employee was contacted by the health department and informed that she was exposed to a person who was presumptive positive for COVID-19.^{9/} She was then required to quarantine at

8/ The certification named the particular employee. However to decide this matter, it is not necessary for me to disclose it here. Moreover, I am not relying on this certification in reaching my decision, as the material facts and the application of "quarantine-at-work" provisions are not in dispute.

9/ The certification does not identify the date on which this
(continued...)

work and no longer is permitted to work from home. The third certification is from CWA's counsel and was submitted in support of its request for temporary restraints. In it, counsel advises that on July 9, 2020, County counsel informed him that at the time there were no DSS employees subject to the quarantine-at-work provision of the COVID-19 Sick Leave Policy. CWA counsel further certified that on the same day he also received from County counsel a copy of the COVID-19 Travel Quarantine Policy, which was issued without negotiations.

County's Certifications

The County provided the certification of Jeryl L. Krautle, R.N., who has been the Assistant Director of Nursing for the Monmouth County Health Department (MCHD) since 2016. (Krautle cert., para. 2) She previously was employed as a public health nurse since 1991, and is a registered nurse with the New Jersey State Board of Nursing. (Krautle cert., para.2) As the Assistant Director of Nursing she is involved in creating and effectuating policies, health education and procedures for public health nursing services in the County, including in the areas of communicable diseases. (Krautle cert., para. 1) She certified that she was directly involved in promulgation and approval of policies addressing workplace health concerns related to COVID-

19, including the COVID-19 Sick Leave Policy. (Krautle cert., para. 3) Assistant Director of Nursing Krautle certified that in helping to prepare the COVID-19 Sick Leave Policy, she consulted guidance from the United States Centers for Disease Control and the New Jersey Department of Health. (Krautle cert., para. 4) She quotes in her certification from a portion of the guidance, referenced as Exhibit A, as providing that "a public sector employer that provides essential services 'may allow personnel who are exposed to COVID-19, to work in the workplace setting where needed to maintain essential operation."^{10/} (Krautle cert., para. 4) She further certified that the federal and state guidances outline the following five steps to ensure employees are safely able to continue essential work, if potentially exposed to COVID-19 and are asymptomatic: (1) pre-screening before reporting to work; (2) regular self-monitoring for symptoms; (3) wearing of facemasks in the workplace; (4) social distancing; (5) regular disinfection and cleaning of workspaces. (Krautle cert, para. 5) Assistant Nursing Director Krautle certified that the COVID-19 Sick Leave Policy complies with those

^{10/} Exhibit A from Krautle's certification includes two separate documents. The first one is from the New Jersey Department of Health Communicable Disease Services (NJ CDS). The second one is from the federal agency, the Centers for Disease Control, but also contains the seal for the United States Department of Homeland Security (DHS) and the Cybersecurity and Infrastructure Security Agency (CISA). The language quoted in the certification is from NJ CDS guidance.

five steps and applies in cases where there is not a positive test result. She attached as Exhibit B, a copy of the instructions the County created to explain to employees how to "quarantine at work," a copy of the daily (COVID-19 Quarantine/Monitoring Form), and instructions for properly wearing a face mask. (Krautle cert., para. 6) She certified that there have been employees that have been required to quarantine at work since the COVID-19 Sick Leave Policy was issued.^{11/} (Krautle cert., para. 6) Assistant Nursing Director Krautle further certified that she continuously monitors the latest medical guidance related to COVID-19 mitigation in the workplace, and that the County has adjusted its policies as additional information has been issued by federal and state public health authorities. (Krautle cert., para. 9)

Lastly, in response to safety concerns raised by CWA in this matter, she certified that the County's procedures do not pose any substantial safety risk. (Krautle cert., paras. 7, 8) Regarding eating and drinking, Assistant Nursing Director Krautle certified that quarantined employees may choose to eat and drink in their assigned working spaces or outside of the building, but so long as the six-foot social distancing requirement is met at

^{11/} It is unclear from the record whether any of the employees who were required to quarantine at work due to COVID exposure are in the negotiations unit represented by the Charging Party, and how many employees overall have been impacted.

all times, and there is no sharing of food and drink, in her professional opinion, there is no substantial safety concern for other employees. (Krautle cert., para. 7) Similarly, waiting to sanitize an infected employee's workstation after hours, rather than immediately after the County learns that the employee is infected is a result of its obligation to take steps to protect privacy. (Krautle cert., para. 8) Since the County's social distancing procedures do not permit employees to share workspaces, she certified that in her professional opinion, she does not believe there is any safety risk in waiting until after employees leave the working area to sanitize. (Krautle cert., para. 8).

The first document contained in Exhibit A to Assistant Nursing Director Krautle's certification is from the New Jersey Department of Health Communicable Disease Services (NJ CDS). It is entitled "Protocols for Essential Personnel to Return to Work Following COVID-19 Exposures or Infection" (NJ Return to Work Protocol) and is dated May 15, 2020. It provides in pertinent part:

Public and private sector organizations that provide essential services or functions who have personnel needed to maintain critical functions including infrastructure, public safety, and other essential operations, may allow personnel who are exposed to or recovering from COVID-19, to work in the workplace setting where needed to maintain essential operations. These essential services or functions include public health

personnel, utility and water operators, skilled manufacturers and supporting supply chains, law enforcement, and emergency response personnel.

The New Jersey Return to Work Protocol then sets forth two scenarios for when essential personnel may be permitted to report to the workplace; one where essential personnel has a known exposure to COVID-19 and one where essential personnel has a confirmed or suspected COVID-19 infection. Each scenario has its own conditions. Concerning the former scenario, the NJ Return to Work Protocol provides the following:

Essential personnel who have been exposed to a confirmed case of COVID-19 can be permitted to work in [the] required workplace setting under the following conditions:

1. Working from home would not be feasible for job duties.
2. Personnel are asymptomatic.
3. Personnel quarantine themselves when not at work.
4. Personnel undergo temperature monitoring and symptom checks upon arrival to work and at least every 12 hours while at work, and self-monitor (take temperature, assess for symptoms) twice a day when at home.
5. Personnel whose job duties require interaction within 6 feet of another individual should wear a face mask while working until 14 days after the last exposure.
6. Personnel whose job duties permit a separation of greater than 6 feet should have environmental controls in place to ensure separation is maintained and do not need to wear a facemask.
7. If personnel develop symptoms consistent with COVID-19 (fever, cough, or shortness of breath) while working, they

should immediately stop work and isolate at home. If symptoms worsen over time and they feel that they need a medical evaluation, they should contact their health care provider.

Concerning the latter scenario of a confirmed or suspected infection, essential personnel must have been isolated for at least 10 days after illness, must have had no fever for at least 72 hours, and must have other symptoms substantially improving. If essential personnel meets those benchmarks, then they may be required to wear a facemask until 14 days after illness if they have close contact with vulnerable populations.

The second document contained in Exhibit A to Assistant Nursing Director Krautle's certification is entitled "Interim Guidance for Implementing Safety Practices for Critical Infrastructure Workers Who May Have Had Exposure to a Person with Suspected or Confirmed COVID-19." (CDC Guidance on Critical Infrastructure Employees) The document does not appear to be dated. It advises that its provisions apply to "critical infrastructure workers," which it defines as "including personnel in 16 different sectors of work" such as law enforcement, 911 call center employees, fusion center employees, hazardous material employees, custodial employees, and employees in food and agriculture, critical manufacturing, information technology,

transportation, energy and government facilities.^{12/} According to the CDC Guidance on Critical Infrastructure Employees, "[t]o ensure continuity of operations of essential functions, CDC advises that critical infrastructure workers may be permitted to continue work following potential exposure to COVID-19, provided they remain asymptomatic and additional precautions are implemented to protect them and the community. The precautions involve taking the employee's temperature and assessing symptoms before work, regularly monitoring of symptoms, wearing a face

^{12/} The document advises that additional information regarding the identification of critical infrastructure is available on the DHS CISA website and the CDC's first responder guidance. The State's Travel Advisory FAQs website, which is cited by the County in its submission regarding its COVID-19 Travel Quarantine Policy, exempts critical infrastructure workers and links to the same CISA agency website that further identifies critical infrastructure workers. I take administrative notice that the CISA website linked to by the State identifies "16 critical infrastructure sectors whose assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof." Identifying Critical Infrastructure During COVID-19, <https://www.cisa.gov/identifying-critical-infrastructure-during-covid-19> (last updated April 17, 2020). Those sectors are as follows: chemical sector, commercial facilities sector, communications sector, critical manufacturing sector, dams sector, defense industrial base sector, emergency services sector, energy sector, financial services sector, food and agriculture sector, government facilities sector, health and public health sector, information technology sector, nuclear reactors materials and waste sector, transportation systems sector, water and wastewater systems sector.

mask at all times at work, practicing social distancing and routinely cleaning and disinfecting the workspace.

Exhibit B to Assistant Nursing Director Krautle's certification contains a document outlining the quarantine-at-work directions, a form for the daily monitoring of an exposed employee's symptoms, and directions for properly using a face mask. The quarantine-at-work directions reiterate the requirements set forth in the COVID-19 Sick Leave Policy pertaining to evaluation and reporting of symptoms before reporting to work, the wearing a face covering, and the practicing of social distancing while at work. The County's form for monitoring an exposed employee's symptoms each day over a fourteen day period is entitled COVID-19 Quarantine/Monitoring Form and tracks nine different symptoms. They are sore throat, cough, headache, lack of taste or smell, fever, shortness of breath, chills, muscle pain, and fatigue.^{13/} It also tracks an exposed employee's daily temperature. The COVID-19 Quarantine/Monitoring Form provides that exposed employees experiencing any symptoms should not report to work. The face

^{13/} I take administrative notice that while the interim relief matter was pending, it was reported that the CDC at some point in May or June, added the following new symptoms: congestion or runny nose, nausea or vomiting, and diarrhea. CDC adds 3 new coronavirus symptoms to list <https://nypost.com/2020/06/25/cdc-adds-3-new-coronavirus-symptoms-to-list/> (June 25, 2020).

mask directions instruct an employee regarding how to properly handle the mask so as to avoid risking contamination.

The County also provided the certification of Teri O'Connor, the County Administrator. She certified that she was directly involved in promulgating the COVID-19 Sick Leave Policy.

(O'Connor cert., para. 3) She certified that in an email dated March 17, 2020, from the New Jersey Association of Counties (NJAC)^{14/} that the Governor had determined that DSS employees were essential "first responders." (O'Connor cert., para. 7) She attached a copy of that email as Exhibit A. However, rather than a formal determination, the email instead relays a quote purportedly from the Governor's Deputy Chief of Staff and Commissioner of Human Services, and it is unclear from the record whether the quote is from a text message, another email, or voicemail. (O'Connor cert. Ex. A) The email is from John G. Donnadio, Esq., the Executive Director of NJAC. The subject line reads: "Boards of Social Services/County Welfare Agencies First Responders - Offices to Remain Open." Donnadio writes:

I lied about the emails. Mike Delamater and Commission of Human Services Carole Johnson asked that we share with you the message below concerning County Welfare Agencies and Boards of Social Services, which should remain open as first

^{14/} The County did not identify the organization, or whether it has any role in the government. I take administrative notice that according to its website, the NJAC is a non-partisan advocacy group for county governments. <https://njac.org/> (last accessed August 13, 2020)

responders during the COVID-19 public health crisis.

"We rely on the boards of social services for the enrollment process for many of our critical safety net programs (Medicaid, food assistance, cash assistance, homelessness assistance, etc.) This need is only going to grow in the days ahead. We are aware of at least one board that has closed and its clients are calling us for help - we do not maintain individual case files or have ability to access all of the county systems. In other counties we are quickly seeing declining staff and limits on capacity - and we fear they will follow the example of the one board that closed. This has not been the experience in the past. The boards have generally been essential staff. We've taken a number of steps to lessen the workload for boards by moving as much as we can to the telephone vs in-person, automatically extending people's benefits where we can, waiving program requirements, etc. And we have online enrolment for many things. But there are some things, like helping someone at-risk of homelessness, that are going to involve people coming in to the office in need of critical help. Can you assist us in being clear with the counties that social services are first responders in this crisis and we need them on the job." (Quotation marks in original).

County Administrator O'Connor certified that given the pandemic's economic consequences, DSS has seen a massive increase in requests for assistance and that it is facing a very substantial backlog in processing cases. (O'Connor cert., para. 5) She certified that the failure to process Medicaid cases in a

timely manner may result in the loss of otherwise anticipated revenue pursuant to federal and/or state regulations. (O'Connor cert., para. 5) At the time of her certification, County Administrator O'Connor advised that DSS management informed her that there is a backlog of over 800 Medicaid cases and 750 SNAP cases. (O'Connor cert., para. 5).

County Administrator O'Connor further certified that the County consulted with health and safety experts, including the County's Safety Officer, Kathy West, and Assistant Director of Nursing Krautle, "to ensure the policy complies with current federal and state guidance." (O'Connor cert., para. 22) She certified that she is aware that CWA has areas of concern that are not addressed by the COVID-19 Sick Leave Policy, but claims that she responded in good faith when the Union has reached out to her office about the County's COVID-19 response. (O'Connor cert., para. 23) As an example, she included as Exhibit D to her certification a May 7, 2020 letter to a CWA representative following a request for information pertaining to the County's COVID-19 response.^{15/} Regarding the Union's privacy concerns

^{15/} Since County Administrator O'Connor's May 7, 2020, letter to CWA predates the quarantine-at-work provisions at issue in this matter, I will only provide a cursory overview of its contents. The letter is in response to the Union's April 6, 2020, request for information. (O'Connor cert. Ex. D) The County Administrator advises that the Union is aware of DSS' "continuing efforts to expand work-from home opportunities to the extent possible. . . ." She advises that

(continued...)

under the COVID-19 Sick Leave Policy, O'Connor certified that DSS employees typically submit doctor's notes to the departmental timekeeper, and she attached as Exhibit E, documentation regarding the confidentiality obligations of the timekeeper.^{16/} (O'Connor cert., para. 24) County Administrator O'Connor certified that the County has "whenever feasible, provided a telework option for DSS employees, including many who have claimed that they would have difficulty reporting to the workplace for childcare-related reasons." (O'Connor cert., para. 21) The remaining exhibits included in O'Connor's certification primarily address the FFCRA determinations under the April 20 COVID-19 Policy, which is no longer part of the interim relief application.^{17/}

^{15/} (...continued)

management has not yet issued formal policies regarding every aspect of its COVID-19 response because the "guidance from federal and state authorities is changing on a daily basis, if not more frequently." She then identifies general steps the County has taken, such as providing educational materials, restricting public access to buildings, obtaining additional disinfectant and personal protective equipment supplies.

^{16/} Exhibit E contains a signed acknowledgment form from the DSS timekeeper regarding her responsibility to maintain employee information as confidential, and an excerpt from the County's timekeeper manual which reiterates that same responsibility.

^{17/} Exhibit A is a copy of the County's emailed notification to CWA of its FFCRA Leave Policy. Exhibit C contains the applicable leave of absence contract language covering the negotiations units represented by CWA.

ANALYSIS

A charging party may obtain interim relief in certain cases. To obtain relief, the moving party must demonstrate both that it has a reasonable probability of prevailing on the merits and that irreparable harm will occur if the requested relief is not granted. Crowe v. De Gioia, 90 N.J. 126, 132-34 (1982). 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. Id. See also Whitmeyer 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).

Section 5.3 of the Act provides:

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

To prove a violation of this section, a charging party must show that a working condition has been instituted or changed without negotiations. Hunterdon Cty. Freeholders Bd. and CWA, 116 N.J. 322 (1989); Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 140 (1978).

However, not all working conditions are mandatorily negotiable. In In re Local 195, IFPTE v. State, 88 N.J. 393, 404-

05 (1982) (Local 195), our Supreme Court announced the following test to determine whether a subject is mandatorily negotiable:

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of government policy. To decide whether a negotiated agreement would significantly interfere with the determination of government policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations, even though it may intimately affect employees' working conditions.

CWA's Legal Arguments

CWA contends that the County's quarantine-at-work provisions during a deadly pandemic clearly concern health and safety issues in the workplace, and therefore are mandatorily negotiable.^{18/} By requiring employees who have been potentially exposed to COVID-19 to return to the workplace during their quarantine period, CWA contends that the County is risking exposing other employees to a

^{18/} In support, CWA cites NJ State Judiciary, P.E.R.C. No. 2008-39, 34 NJPER 4 (¶2 2008) (Commission restrains arbitration to the extent grievances challenge the decision to restrict court house access after hours, but permits arbitration of employee health, safety and compensation issues); Maurice River Tp. Bd. of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987) (proposal permitting employees use of reasonable force to protect themselves, or others, or property as permitted by law mandatorily negotiable).

highly contagious virus since transmission may nonetheless occur if an infected employee is asymptomatic or pre-symptomatic.^{19/} It faults the policies for not detailing what happens when quarantining employees need to remove their mask to eat or drink, and for waiting until after hours to sanitize workspaces and common areas if an employee tests positive. CWA notes that it would not need to negotiate over these safety issues if the County permitted employees to remain at home during their quarantine period. It also complains that the COVID-19 Sick Leave Policy provides sensitive medical information such as test results to the departmental timekeeper. CWA contends that it is entitled to negotiate over where COVID-exposed employees can self-isolate, whether it is feasible for an employee to telework, and what procedures should be followed in the workplace when there has been possible exposure. It contends that the County has not identified any government policy interest jeopardized by such negotiations.

It submits that the subject matter is not preempted by any statute or regulation and that the quarantine-at-work provisions

^{19/} In its reply letter brief regarding the COVID-19 Travel Quarantine Policy, CWA quotes from a portion of a State's Travel Advisory FAQs in which it is explained that impacted travelers should still self-quarantine for 14 days regardless of whether they obtain a diagnostic/virus test because "[they] remain in the incubation period." https://nj.gov/health/cd/documents/topics/NCOV/Travel_advisoryFAQs_6-25-2020.pdf

would cause irreparable harm. CWA maintains that if there were no health and safety risks posed by the County's quarantine-at-work provisions, then all of its employees, not only the ones considered to be essential employees, would be permitted to report to the workplace following a potential COVID-19 exposure or travel to a state with high infection rates. CWA asserts that it is not aware of any health care professionals who believe quarantining at work is safer than quarantining at home. It claims that the County would suffer no harm if interim relief were granted because it has a duty to negotiate in good faith and that the public interest is served by allowing it to help protect employees. It further asserts that by denying the opportunity to negotiate over health and safety issues during an unprecedented crisis, the ability of the parties to amicably resolve disputes is undermined.

During oral arguments, CWA explained that the issue is not whether the County's policies are wise, but whether it was required to negotiate before determining that employees must report to work during their quarantine period. It emphasized that the challenged policies were not mandated by any statute or regulations, and were ultimately exercises of discretion. CWA noted that the County is not claiming that it lacks the capacity to permit teleworking for employees during their quarantine period. Moreover, unit employees have been able to telework for

childcare issues and were previously permitted to quarantine at home if exposed before the institution of the COVID-19 Sick Leave Policy.

County's Legal Arguments

The County contends that interim relief should be denied. It maintains that the County, in exercising its managerial expertise and in consultation with health professionals, must implement the COVID-19 Sick Leave Policy and the COVID-19 Travel Quarantine Policy, and the quarantine-at-work provisions contained therein, for DSS to be able to continue to effectively provide essential services.

The County claims that CWA has failed to provide any justification to conclude that the challenged policies contain any mandatorily negotiable subjects, particularly during a public health emergency. It asserts that the County has a managerial right to determine the manner in which it will provided public services. The County asserts that the particular concerns raised by CWA regarding the policies, such as the risk of asymptomatic transmission, how quarantining employees will eat or drink in the workplace, sanitization procedures, and the sharing of medical information to a timekeeper, are not negotiable without trampling on the County's managerial prerogatives. It claims, without elaborating, that the cases cited by CWA are not relevant to the instant dispute. It notes that CWA's argument is inconsistent

because CWA prefers that the workspace of an employee who has COVID-19 to be immediately sanitized, which would effectively identify the employee's medical status, but objects to disclosing medical information to the department timekeeper. The County claims that its policies are consistent with current federal and state guidances. The County emphasizes that the guidances consulted by Assistant Director of Nursing Krautle permit public employers providing essential services to allow employees who are exposed or recovering from COVID-19 to report to the workplace where needed to maintain essential operations.

The County asserts it has no intention of negotiating any deviations from the guidances relied upon by its public health professionals and that the Commission lacks the authority to force the County to do so. It claims that it will not concede on any of the requirements its public health and safety professionals believe are needed to operate safely, and that absent any demonstrable safety concern, it has no obligation to debate CWA about basic working rules and procedures. It submits that the Commission does not enforce workplace safety and that it is not qualified to engage in that analysis. It contends that even if the Commission believed that there were negotiable aspects to its challenged policies, then

the better course of action is to follow precedent stating that employers must have additional discretion in an emergency.^{20/}

The County claims that CWA is trying to force it to allow perfectly healthy employees to stay at home for weeks on full pay merely because they may have been exposed to someone with COVID-19 without providing any evidence in the record that its quarantine-at-work requirements pose any legitimate health and safety threat to its employees or others. The County denies that the challenged policies represent a risk to the health and safety of CWA members, and that even if there were a threat, the Commission is not qualified to address it. It notes that CWA has not identified a single instance that indicates it deviated from established health and safety guidance issued by experts in the field.

The County claims that permitting employees to remain at home during quarantine will likely decimate the workforce. According to the County, since CWA did not provide competent proof that the County's policies present an undue safety hazard, denying interim relief would not place any actual hardship on DSS employees. If interim relief were granted, the County contends that for an uncertain period of time there will be no guidance on

^{20/} In support of this proposition, it cites County of Passaic, I.R. No. 2020-20, 46 NJPER 533 (¶120 2020) (denying interim relief where residential facility temporarily banned outside employment as part of its response to the COVID-19 public health emergency.)

critical health and safety issues while it negotiates with CWA. It claims that the County needs to focus on providing essential government services and any disruption to its ability to effectively do so constitutes an unnecessary and unwarranted hardship.

The County asserts that granting interim relief would severely damage the public interest since it needs to remain capable of effectively delivering critical benefits and services to people in need. The County claims that it is doing everything in its power to provide a safe working environment, but that the County must have "all hands on deck" at DSS in order to deal with the backlog of applications for benefits from citizens who have suffered economic harm from the pandemic. It claims that the services provided by DSS unquestionably help prevent the unchecked spread of the virus in the region. The County also claims that the overwhelming public interest demands that the County be allowed to respond to the pandemic without undue interference from a labor union that is focused on the narrow self-interest of the employees it represents, cynically seeking to have DSS employees remain home while receiving full compensation.

During oral arguments, the County emphasized that federal and state guidances permit public employers to require essential personnel to report to work under certain conditions. The County

concedes that the risk of COVID-19 transmission in the workplace cannot be totally eliminated, but that CWA has not produced any certifications establishing that its quarantine-at-work provisions present a legitimate health and safety issue. It asserts that management determined that it is not nearly as efficient for the unit employees to work from home as it is for them to report to the office. And therefore, given the backlog of applications for assistance, it needs 100% out of DSS employees. It contends that whether it is feasible for these employees to work from home is a determination that is exclusively within the purview of management's discretion, and not reviewable by the Commission. The County also argues that the quarantine-at-work provisions avoid potential abuse by employees.

Regarding the COVID-19 Travel Quarantine Policy in particular, the County also notes that essential employees can quarantine at home, but they cannot do so at the taxpayers' expense and must use accumulated leave. The employees also have the option to quarantine at work so long as they follow the required protocol of testing, daily monitoring, social distancing and wearing of face masks. Therefore, the County argues, there is no irreparable harm because employees have the option to use leave time, and the injury is then solely economic. The County also notes that in contrast to states like New York where there

are associated penalties for noncompliance, the State's travel advisory is voluntary, albeit compliance is expected. It also notes that the State's Travel Advisory treats all the travelers from the affected states the same, whether they practiced social distancing or took other precautions. The County's COVID-19 Travel Quarantine Policy treats impacted employee as if had they had actual exposure to COVID-19.

Likelihood of Success on the Merits

At the outset of this analysis, it is essential to delineate the two constituent parts of the quarantine-at-work provisions that are challenged by CWA's application. First, the County's policies involve the unilateral determination regarding the work location for employees who need to undergo a quarantine period due to potential COVID-19 exposure, whether due to travel or contact. CWA submits that the County's decision regarding where such employees quarantine must be exercised through the collective negotiations process. Second, the County's policies involve the unilateral determination regarding the safety protocols that must be followed in the workplace when there has been potential exposure to a potentially lethal disease during a pandemic. CWA submits that health and safety measures must also be negotiated.

The County's quarantine-at-work provisions intimately and directly affect the work and welfare of public employees because

it involves employee health and safety in the workplace. The Commission has long-recognized that health and safety issues intimately and directly affect the working conditions of public employees. See e.g., Tp. of Hillside, P.E.R.C. NO. 78-59, 4 NJPER 159 (¶4076 1978) (weekly cleaning of police cars and maintenance of locker rooms are mandatory subjects of negotiations); Byram Tp. Bd. of Ed., P.E.R.C. No. 76-27, 2 NJPER 143 (1976), affirmed 152 N.J. Super. 12 (1977) (proposals regarding facilities for teachers, including well-lit and clean restrooms in each school for teachers only and properly maintained off-street parking facilities); Bor. of Paramus, P.E.R.C. No. 86-17, 11 NJPER 502 (¶16178 1985) (proposals regarding the provision of air conditioning, automatic trunk release, interior lighting package, first aid kit, flares and cages in police vehicles were mandatorily negotiable).

There is no preemption argument since there is no statute or regulation mandating the quarantine-at-work provisions set forth in the COVID-19 Sick Leave Policy and the COVID-19 Travel Quarantine Policy. Therefore, the second prong of the Local 195 test is satisfied.

Ultimately, the dispute turns on whether a negotiated agreement would significantly interfere with the determination of government policy. Applying the third prong of the Local 195 test, I must balance the parties' interests. The County asserts

its interests in determining the standards for workplace safety, the manner in which services will be provided, efficiency, and productivity. It also asserts an interest in protecting against employees abusing leave. CWA asserts its interests in strengthening health and safety precautions for its members, and its representational interest in resolving workplace disputes through negotiations.

The County's unilateral determination that DSS employees must quarantine at work implicates its managerial prerogative in determining how services will be provided. In essence, the County's quarantine-at-work is no quarantine^{21/} at all, but a categorical exemption from one. It is a requirement that employees potentially exposed to COVID-19 must report to the office in order to work while following certain safety protocols during the quarantine period and cannot work from home.

^{21/} I take administrative notice that the CDC's website describing when to quarantine provides the following explanation of the term: "Quarantine is used to keep someone *who might have been exposed to COVID-19* away from others. Quarantine helps prevent spread of disease that can occur before a person knows they are sick or if they are infected with the virus without feeling symptoms. People in quarantine should stay home, separate themselves from others, monitor their health and follow directions from their state or local health department." When to Quarantine: Stay home if you might have been exposed to COVID-19, <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/quarantine.html> (last accessed August 13, 2020). This is consistent with the Travel Advisory FAQs website that advises that a quarantine should occur at home and individuals should only leave for essential needs like food or medicine. Supra, n5.

Thus, the degree to which negotiations over where potentially exposed employees spend their quarantine period interferes with a public employer's prerogative to determine how services will be provided, depends on the feasibility of the work being performed from home. Where a public employer has determined^{22/} that it is not feasible for work to be performed remotely, negotiations over where employees work during their quarantine period may not be mandatorily negotiable. Under those circumstances, although employees have a compelling safety interest particularly during a public health emergency to have potentially exposed unit employees remain at home, the employer arguably has an equally strong interest in determining how its services will be provided since negotiations on the subject would require the employer to keep the employee at home while not performing work or to temporarily devise a new workflow in order to make it feasible for the employee to work from home.

Here however, the County already determined that it was feasible for some DSS employees to perform work at home during the public health emergency. (O'Connor cert., para. 21)

^{22/} CWA asserts that through negotiations it can be determined whether who, if anyone, cannot quarantine at home. However, it does not cite any case law in support of its proposition. While it may be true that where a public employer cannot establish a relationship between work location and duties, there is no significant interference with management's prerogative to determine how services will be provided, such determinations raise significant factual questions that are not suitable for interim relief.

Therefore, having made feasibility determinations, the degree to which negotiations over where potentially exposed employees spend their quarantine period is slight, especially when weighed against CWA's asserted safety interest in seeking to minimize COVID-19 transmission in the workplace. While the County has legitimate efficiency and productivity interests, those interests were impacted when the County permitted telework opportunities for other purposes. It is unclear how they should now outweigh CWA's health and safety concerns due to potential COVID-19 exposure raised by its "quarantine-at-work" provisions. While the County undoubtedly has a backlog of applications, it does not claim that the backlog was exacerbated because of its prior decision to let some DSS employees telework. It also does not specifically explain how limited employee teleworking interfered with its ability to provide services. In short, the County does not adequately explain how negotiations over a telework option for unit employees would significantly interfere with its determination of policy during a public health emergency when it previously provided such an option. Bergen Cty. and Bergen Cty. Sheriff's Office, I.R. No. 2019-6, 45 NJPER 123 (¶33 2018) (granting interim relief in pertinent part where generalized concerns about productivity and efficiency were insufficient to establish a managerial prerogative since employer did not explain

specifically how those interests would be achieved by reorganization and transfer of unit work).

Moreover, the Commission has recognized in other contexts that even when a public employer has an undisputed managerial prerogative, such as the decision to make available light duty assignments or overtime, the public employer's exercise of that managerial prerogative triggers a duty to negotiate. Tp. of Parsippany-Troy Hills, P.E.R.C. No. 2010-53, 36 NJPER 25 (¶12 2010) (holding that where the employer permits light duty whether by policy or practice, the assignment of available light duty work to qualified employees is negotiable and legally arbitrable); City of Long Branch, P.E.R.C. No. 83-15, 8 NJPER 448 (¶13211 1982) (distinguishing between the non-negotiable right of management to determine when overtime work must be performed and the generally negotiable subject of how that overtime work will be allocated among qualified employees.) Therefore, even assuming the County has a managerial prerogative here, by providing^{23/} teleworking opportunities a negotiations obligation arose regarding how it is allocated among qualified employees.

23/ While I recognize that but-for the public health emergency, the County may not have made teleworking opportunities available, even unintentional conduct by a public employer can give rise to an obligation to negotiate. See e.g., Piscataway Tp. Bd. of Ed., P.E.R.C. No. 2016-3, 42 NJPER 95 (¶26 2015) (mistaken application of leave policies became a term and condition of employment that required negotiations before modifying).

With respect to the County's unilateral determination regarding the safety protocols to be followed when employees are required to report to work during their quarantine period, the balancing of interests weighs in CWA's favor. Concerns such as the sanitization of common areas and workplace transmission of a contagious disease during a pandemic predominantly relate to employees' health and safety. Employee representatives are entitled under the Act to minimize health and safety risks through negotiations where there is not significant interference with a managerial prerogative.^{24/} Commission cases regarding the negotiability of police health and safety issues - particularly as they pertain to vehicles and related equipment - are instructive, as they distinguish between proposals that are directly related to health, safety and comfort without significantly interfering with a managerial prerogative and those that are not. Bor. of Paramus, P.E.R.C. No. 86-17, 11 NJPER 502 (¶16178 1985) (concluding that other than features that have a direct bearing on employee safety, the determination of the equipment place on a police vehicle, such as electronic siren and lights, oxygen, and twelve gauge shotguns, were not negotiable);

^{24/} This interest is particularly compelling where there are medical conditions that place individuals at an increased risk of severe illness from COVID-19. People with Certain Medical Conditions, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> (updated July 30, 2020).

Middlesex Cty., P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd in pertinent pt., 6 NJPER 338 (¶11169 App. Div. 1980) (proposal requiring police vehicles to be in a good state of repair mandatorily negotiable but other aspects such as engine size and the time at which to purchase new vehicles were not); see also Brookdale Community College, 3 NJPER 156 (1977) (decisions regarding the arming of police officers are matters of government policy). Tellingly, there is no clear explanation in the County's submissions regarding how negotiations over the issues raised by CWA would cause such interference.

While the Commission has previously recognized that public employers have a managerial prerogative to determine certain safety rules during an emergency, those rules did not solely implicate employee safety. More fundamentally, these cases implicated the public employers' ability to determine as a matter of policy what is necessary to safely provide services to those who rely on them. See e.g. Salem City Bd. of Ed., P.E.R.C. No. 82-115, 8 NJPER 355 (¶13163 1982) (upon reconsideration of interim relief decision, Commission grants a permanent injunction against binding arbitration over a directive requiring nurses to stay in school buildings during their lunch break, which coincided with recess when most student injuries arose since student safety was a matter of educational policy); County of Passaic I.R. No. 2020-20, 46 NJPER 533 (¶120 2020) (denying

interim relief challenging temporary ban on outside employment implemented to help protect health and safety of residents at long-term care facility during COVID-19 pandemic). Here, the challenged quarantine-at-work provisions and associated safety protocols do not involve a fundamental judgment about what is necessary to protect the safety of residents applying for assistance or seeking other social services from DSS. Instead, as discussed above, the quarantine-at-work provisions are a requirement that employees do not quarantine but instead report to work. Therefore, it raise health and safety concerns about transmission in the workplace, particularly for unit employees that may be more susceptible to COVID-19. There is no claim here that negotiations on this subject would risk impairing the County's ability to safely provide its services. CWA is entitled to negotiate to the extent it seeks to further minimize risk to its members beyond the health and safety procedures established by the County in its policies, and its proposals do not significantly interfere with other managerial prerogatives.^{25/}

^{25/} The fact that the County's representatives are willing to answer questions about its unilaterally implemented health and safety policies does not alleviate its duty to negotiate under the Act. To be clear, this is not a case where a public employer implemented a set of safety rules during a rapidly escalating public health crisis while it sought, even belatedly, to negotiate with employee representatives regarding additional protections flowing from its staffing decision to have potentially exposed employees report to work during the quarantine period. This is a case where the
(continued...)

Contrary to the County's claim, the challenged policies certainly raise legitimate safety concerns. Although the County correctly notes that CWA did not provide any certifications regarding the safety risks posed by its quarantine-at-work provisions, the state and federal guidance that the County consulted in drafting its policies and produced as part of its submissions, establish that "quarantining at work" is less safe than remaining at home. The very first requirement to be met for essential personnel to return to work under the NJ Return to Work Protocol is not whether employees are asymptomatic but that working from home is not feasible. (Krautle cert. Ex. A) Moreover the guidance limits the discretion of employers to have essential employees return to work during their quarantine period to those situations where it is "needed to maintain essential operations." (Krautle cert. Ex. A) The CDC Guidance on Critical Infrastructure Employees affords employers the discretion of permitting potentially exposed critical infrastructure employees to report to work for the purpose of ensuring continuity of operations. (Krautle cert., Ex. A) These limitations on the employer's discretion clearly evince a determination from the public health experts that the County relied on in drafting its policies that staying at home during the quarantine period is

25/ (...continued)
public employer denies it has any obligation to do so.

safer than not staying at home during the quarantine period.^{26/} And while the County, based on the guidance of its public health professionals, believes the policies are reasonably safe, the health, safety and comfort line of cases that arise under the Act establish that employee representatives have a role in attempting to make the workplace more safe by minimizing risk. For example, clearly the absence of a first aid kit in a police vehicle does

^{26/} A number of State directives issued since the public health emergency was declared establish that remaining at home as much as possible, even when there has been no exposure to COVID-19, promotes the public health and safety. I take administrative notice that the Governor's Executive Order No. 107 acknowledges that "accommodating work-from-home arrangements is an effective means to ensure continuity of operations while also limiting person-to-person contact." It therefore requires that "all businesses or non-profits in the State, whether closed or open to the public, must accommodate their workforce, wherever practicable, for telework or work-from-home arrangements" and that to the extent their employees "cannot perform their functions via telework or work-from-home arrangements, the business or non-profit should make best efforts to reduce staff on site to the minimal number necessary to ensure that essential operations can continue." These requirements remained unchanged when on June 9, 2020, the Governor subsequently signed Executive Order No. 153, which lifted the stay-at-home order that had been in place since March 21, 2020 as part of Executive Order No. 107. Executive Orders available at <https://nj.gov/infobank/eo/056murphy/> I also take administrative notice that following the issuance of Executive Order No. 103, the Civil Service Commission directed that "Appointing Authorities should also be reviewing their current COOPs to determine if requests to work from home can or should be accommodated for both essential and non-essential employees during the period of the outbreak." Guidelines for State Employee Leave Time and Staffing - COVID-19, <https://www.state.nj.us/csc/COVguidelines.FINAL.pdf> (April 28, 2020)

not mean that the police vehicle is not reasonably safe for employees, but its inclusion may make it more safe for employees. Bor. of Paramus, P.E.R.C. No. 86-17, 11 NJPER 502 (¶16178 1985)

Lastly, the County's reliance on Somerset Cty., P.E.R.C. 2014-76, 40 NJPER 520 (¶169 2014) for the proposition that public employers are afforded more leeway during demonstrable emergencies is misplaced. First in Somerset Cty., the Commission restrained arbitration over a grievance that would have challenged the County's substantive determination of which employees are considered essential during a state of emergency, which is not at issue in this matter. Second Somerset Cty. and other emergency cases involve a public employer's deviation from the manner it normally assigns work during an emergency, such as overtime allocation. See also Tp. of Ocean, P.E.R.C. No. 2011-90, 38 NJPER 72 (¶15 2011) (restraining arbitration where employer temporarily assigned non-unit sanitation workers to assist roads, building and grounds employees with their customary duties); Tp. of Colts Neck, P.E.R.C. No. 2014-59, 40 NJPER 423 (¶143 2014) (arbitration restrained when emergency conditions after Hurricane Sandy required the hiring of a temporary yard monitor to keep records of debris weight to ensure federal emergency funds). These cases involve balancing the employers' interest in deploying personnel to respond to an emergency against unions' interest in preserving compensable work for its

members; work that it ordinarily would have been entitled to perform but for the emergency. They do not involve claims that due to the manner in which public employers deployed personnel during an emergency, there were health and safety concerns that may have given rise to an obligation to negotiate.

Irreparable Harm

I find that CWA would suffer irreparable harm. As discussed above, requiring DSS employees who may have been exposed to COVID-19, through contact or travel to states with high community spread, under its COVID-19 Sick Leave Policy and COVID-19 Travel Quarantine Policy, to report to work, poses a legitimate health and safety risk. "Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33. And while under the COVID-19 Travel Quarantine Policy unit employees may opt to remain at home using accrued leave time, the health and safety risks still exist for their co-workers if affected employees decide to return to work during the quarantine period to protect their leave time. Additionally, if it is determined that there was an obligation to negotiate with CWA, by the time a hearing occurs and a final decision is rendered, the public health emergency may have (hopefully) passed, and thus, its interest in protecting unit employees health and safety will not be able to be redressed.

Public Interest

I further find that an interim relief order does not harm the public interest. To the extent that CWA is seeking to improve upon the standards the County put in place in response to the public health emergency and create a safer workplace, the public interest is advanced and not damaged, particularly where members of the public may need to enter those workplaces to access important services. As noted in the NJAC email provided by the County, there are certain situations where members of the public, like those residents at-risk for homelessness, may need to physically come to a social service agency to obtain assistance. (O'Connor cert., Ex. A) Moreover, the County previously required that both essential and non-essential employees remain at home during their quarantine period under its COVID-19 Policy, and it permitted DSS employees to telework. (CWA June 12 Letter Br. Ex. A, O'Connor cert., para. 21) There is no assertion by the County that it injured the public interest by doing so.

Relative Hardship

Weighing the relative hardships of granting or denying interim relief, I conclude that they weigh in favor of granting relief in part. Despite the County's claims to the contrary, if no relief is granted at all, CWA's unit employees will face an increased health and safety risk of COVID-19 transmission if potentially exposed employees report to work during their

quarantine period. This is particularly true where employees may have medical conditions associated with more severe COVID-19 illness.

While the County claims that the granting of interim relief would likely decimate its workforce, this claim is too speculative to be afforded much weight, especially since it is not claiming that its workforce was decimated when under its COVID-19 policy unit employees remained at home during their quarantine period. The County's interests in efficiency, productivity and avoiding abuse of leave can also be protected in other ways, such as exercising managerial prerogatives like discipline. Also, as the County's COVID-19 Policy advises, and consistent with Commission caselaw regarding the allocation of work during demonstrable emergencies, where there are staffing issues "due to diagnosis and/or necessity of quarantine . . ." the County can reassign work duties to ensure continuity of operations. (CWA June 12 Letter Br. Ex. A)

Moreover, as a result of this Order, the County will largely be in the same position as it was under its COVID-19 Policy. "Indeed, the point of temporary relief is to maintain the parties in substantially the same condition 'when the final decree is entered as when the litigation began.'" Crowe, 90 N.J. at 134. This Order will not harm the County's interest in having clear

policies in place during a public health emergency since it will not seek the rescission of those policies.

Instead, this Order prohibits the County from applying its quarantine-at-work provisions to those unit employees in positions that were previously permitted to perform work at home. Before the implementation of the COVID-19 Sick Leave Policy with its "quarantine-at-work" provisions, unit employees did not have to report to work during their quarantine period regardless of title or particular job duties. Therefore, this Order modifies the status quo to recognize the County's feasibility determinations, but ensures that employees holding the same position as other employees who were previously permitted to perform work at home for reasons unrelated to COVID-19 exposure can remain at home during their quarantine period. The Order does not require the County to provide paid leave since given the County's concerns regarding its backlog of applications, it may require employees to work from home during the quarantine period. It also requires the County to negotiate with CWA over health and safety issues raised by its decision to require unit employees to report to work during their quarantine period, since absent a full restoration of the status quo, there will be no meaningful way for CWA to protect that interest before a full hearing is held on the merits.

CONCLUSION

For the foregoing reasons, I grant in part the application 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 Respondent, Monmouth County shall:

- On request, negotiate in good faith with the Charging Party, CWA, regarding health and safety issues related to its requirement that unit employees report to work during their 14-day quarantine period, as set forth in the Monmouth County Sick Leave Call-Out Policy and the Monmouth County COVID-19 Travel Quarantine Policy.
- With respect only to those unit employees in positions that were permitted to perform work at home during the declared Public Health Emergency and State of Emergency due to Coronavirus Disease 19 (COVID-19), and may have been potentially exposed to COVID-19 or traveled to states with significant community spread as identified by the State of New Jersey pursuant to its travel advisory, originally issued on June 24, 2020, be restrained from having those unit employees report to work during their 14-day quarantine period, as set forth in the Monmouth County Sick Leave Call-Out Policy and the Monmouth County COVID-19 Travel Quarantine Policy.

This Order will remain in effect pending a final agency decision, or until the declared Public Health Emergency and State of Emergency due to COVID-19 is rescinded, or until the parties reach a voluntary resolution.

/s/ Christina Gubitosa
Christina Gubitosa
Commission Designee

DATED: August 13, 2020
Trenton, New Jersey

