

I.R. NO. 2021-022

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF MILLTOWN,

Respondent,

-and-

Docket No. CO-2021-158

PBA LOCAL 338,

Charging Party.

SYNOPSIS

A Commission Designee denies an application for interim relief filed by PBA Local 338 (Charging Party), alleging that the Borough of Milltown (Borough) violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a (1) and (5), when the Borough distributed a memorandum dated January 7, 2021, while the parties were in negotiations for a successor collective negotiations agreement (CNA), stating that sick, vacation, personal, holiday and bereavement time will be accrued at a rate of eight (8) hours per day as opposed to twelve (12) hours per day for the police officers that work the twelve (12) hour schedule.

The Designee determined that the Charging Party had not established a substantial likelihood of prevailing in a final Commission decision or that irreparable harm would occur because material facts were in dispute regarding the interpretation of the expired CNA between the parties and whether a "controlling past practice" had been established; the relative hardship weighed in favor of the Borough and the Charging Party had not demonstrated that the public interest would not be injured by the granting of interim relief. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

I.R. NO. 2021-022

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOROUGH OF MILLTOWN,

Respondent,

-and-

Docket No. CO-2021-158

PBA LOCAL 338,

Charging Party.

Appearances:

For the Respondent,
Law Offices of Michael A. D'Aquanni, LLC, attorneys
(Heather J. Fay, of counsel)

For the Charging Party,
Mets Schiro and McGovern, LLP, attorneys
(Nicholas P. Milewski, of counsel)

INTERLOCUTORY DECISION

PBA Local 338 (PBA or Charging Party) filed an unfair practice charge accompanied by a request for interim relief seeking temporary restraints on January 25, 2021. The charge alleges that the Borough of Milltown (Borough) violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a (1) and (5),^{1/} when the Borough distributed

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"; and "(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
(continued...)

a memorandum dated January 7, 2021, while the parties were in negotiations for a successor collective negotiations agreement (CNA), stating that sick, vacation, personal, holiday and bereavement time will be accrued at a rate of eight (8) hours per day as opposed to twelve (12) hours per day for the police officers that work that shift. The PBA represents all Milltown Patrolmen, Corporals and Sergeants, excluding Lieutenants and the Chief of Police. The most recent CNA between the parties expired on December 31, 2019 (expired or last CNA).

The PBA seeks a declaration of an unfair labor practice on the part of the Borough, and the PBA seeks an order enjoining the Borough from: maintaining a change in the rate of accrual of sick, vacation, personal, holiday and bereavement time while in contract negotiations from twelve (12) hours per day to eight (8) hours per day.

The PBA submitted a brief, exhibits and a certification from Michael Dinis (Dinis cert.), police officer for the Borough and the President of the PBA.

On January 27, 2021, I issued an Order to Show Cause without Temporary Restraints with an initial return date via telephone conference call for February 9th, however that date was changed based on the request from the Borough, with the consent of the

1/ (...continued)
refusing to process grievances presented by the majority representative."

PBA, and the return date was set for February 24th. On that date, I conducted a telephone status conference with counsel and was informed that on February 25th, the PBA was scheduled to make a presentation to the Borough Council regarding their CNA proposal that was provided to the Borough before the January 7th memo that is the subject of the instant application. As a result, the return date was rescheduled for March 4th (in the event that the instant issue was discussed between the parties at that meeting) and oral argument occurred on that date.

In response to the PBA's application, the Borough filed a brief, exhibits and a certification from Jeanette Larrison (Larrison cert.), the Business Administrator and Chief Financial Officer for the Borough.

The PBA filed a reply brief along with a reply certification from Dinis (Dinis reply cert).

FINDINGS OF FACT

The Parties are currently in contract negotiations for a successor CNA. (Dinis cert., para. 10; Larrison cert., para. 3).

The PBA members currently work two (2) schedules: a twelve (12) hour schedule and an eight (8) hour schedule. (Dinis cert., para. 4; Larrison cert., para. 5,6; Dinis reply cert., para.4).^{2/}

^{2/} The Borough and PBA disagree on the number of PBA members assigned to the eight (8) hour schedule: the Borough claims that three (3) are assigned to that schedule and the PBA claims that only one (1) is assigned. (See Larrison cert.,
(continued...)

This schedule was first implemented in 1997. (Borough Exh. 3 (January 1, 1997 - December 31, 1999 CNA)).^{3/}

Regardless of the assigned schedule, all PBA members work 2,080 hours per year. Larrison certifies:

7. All members in the PBA covered by this agreement work 2,080 hours a year, regardless of what shift they are scheduled to work.

8. Members who are scheduled to work the forty (40) hour work schedule, work 260 shifts a year, 10 shifts a pay period.

9. Members who work the twelve (12) hour shift schedule, work 182 shifts a year, 7 shifts a pay period.

10. Each officer's bi-weekly pay, regardless of what shift they work, is calculated by dividing the officer's annual base pay, inclusive of longevity, holiday pay, and any additional incentive payments or stipends, by the twenty-six (26) pay periods per year. The officer's hourly rate of pay is calculated by taking their bi-weekly pay, dividing the resulting number by ten, and then dividing the resulting number by eight (8) hours.

[Larrison cert., para. 7-10].

2/ (...continued) para 6; Dinis reply cert., para 4). Additionally, at oral argument, counsel for the PBA claimed that there are nine (9) total PBA members and counsel for the Borough claimed that there are fifteen (15).

3/ Article IX. HOURS OF WORK

1. The Chief or his designee will maintain the new twelve (12) hour shift work schedule substantially in the form that was agreed on. (2-days on 2-days off/ 3-days on 2-days off/ 2-days on 3-days off schedule and 2,080 hours in a year, including training times).

The last CNA that expired on December 31, 2019 sets forth hours of work at Article IX:

IX. HOURS OF WORK

The Chief or his designee will maintain the twelve (12) hour shift work schedule substantially in the form that was agreed on. (2 days on, 2 days off/3 days on 2 days off 2 days on 3 days off schedule and 2,080 hours in a year, including training times).

The day shifts will begin at 6:00 am and end at 6:00 pm, and the evening shift will begin at 6:00 pm and end at 6:00 am.

The Borough owes officers working twelve (12) hour days 104 hours of "time due" per calendar year as a result of all workdays being initially designated as 12 hours. For the purpose of repaying the aforementioned 104 hours and insuring that officers do not work more than 2080 hours per year of straight time for pay purposes, each officer working the twelve (12) hour schedule will be entitled to designate, with the approval of the Chief or his designee (which approval shall not be unreasonably withheld) the following:

a. Forty-eight (48) hours in a minimum of four (4) hour blocks, said designation to be made as follows: Twenty-four (24) hours for the first half of each year and twenty-four (24) hours for the second half of each year.

b. Fifty-six (56) hours in fourteen (14) four (4) hour blocks (eight (8) hour days to be worked) to be selected as follows: one (1) additional four (4) hour block for the months of January through December, and one (1) additional four (4) hour block for the months of January through May and one (1) additional four (4) hour block for the months of September through December.

In the event that an officer works other than a twelve (12) hour schedule during a portion of the year, the above "time due" will be prorated to represent the time the officer actually worked a twelve (12) hour schedule.

The Administrative Lieutenant, Operations Lieutenant and Detective Bureau will work a forty (40) hour a week schedule. The schedule shall be approved by the Chief of Police.^{4/}

[Borough Exh. 1].

Larrison certifies, "In or around October 2020, the Borough implemented a new time and attendance system called PrimePoint. The program's parameters were set up according to each union contract with the Borough. PrimePoint is now responsible for keeping track of all Borough employees' hours, time off and accrued time bank." (Larrison cert., para. 11-13).

Larrison further certifies regarding the PrimePoint system and what occurred after its implementation:

14. Prior to the implementation of this program, there was an "honor system" whereby each PBA member was responsible for keeping records of their own usage of their paid time off. The member was responsible for submitting a record of same to their supervisor. The supervisor would then provide the documentation to the administration at the end of each year with an accounting for each officer, including the number of used of how many "days" of paid time off (for vacation, sick, bereavement and personal days). The Borough would then keep

^{4/} The parties Recognition clause at Article I excludes lieutenants.

a record of the used days and calculate how many days the officer was entitled to carry over into the new year.

15. When inputting the member's current time bank into PrimePoint in October 2020, the Lieutenant advised the administration how many days each officer had remaining in 2020.

16. At the end of December 2020, I discovered that the members who worked a twelve (12) hour shift were incorrectly reporting (12) hours off as one (1) day of paid time off. The administrative error was discovered when PrimePoint rolled over the member's 2020 accrued time to their 2021 bank.

17. This revealed that the members who were working the twelve (12) hour shifts were using and reporting each day of leave as twelve (12) hours off and not eight (8). All members who worked the eight (8) shifts, were using and reporting each day off as eight (8) hours. Prior to this discovery of the administrative error, the Borough was not previously aware that the members who worked the twelve (12) hours shift were taking twelve (12) hours off for each day of leave.

18. Upon discovery of this error, I issued a memorandum on January 7, 2021, stating that "All paid time off (i.e., vacation, personal, sick, bereavement and holidays) earned is calculated at eight (8) hours per day. Rate, usage and annual amounts that each Officer is eligible to accrue is subject to the provisions of the collective bargaining agreement." A true and accurate copy of the January 7, 2021 memorandum is attached hereto as Exhibit 2.

19. The Borough did not seek any reimbursement for the incorrect reporting of time nor did the Borough pro rate any of the affected member's time banks.

[Larrison cert., para. 14-19].

The PBA asserts for the members assigned to the twelve (12) hour schedule, "Pursuant to the Borough's proposed change in accrual rate, it will take 1.5 times longer to accrue at sick, vacation, personal, holiday and bereavement leave time than it did prior to January 7, 2021." (Dinis cert., para. 9).

Additionally, in response to Larrison's certification at paragraph 14 above, Dinis certifies, "Prior to the institution of the PrimePoint system, officers did not keep track of their paid time off by themselves. Rather, the Administration and Records Divisions maintained records of all officers' paid time off, and had to approve all time off. (Dinis reply cert., para. 5).

The provisions of the last CNA provide the following regarding the rate of accrual of holiday, personal, bereavement, vacation, and sick leave:

XII. HOLIDAYS

1. The Borough shall include payment for fourteen (14) holidays as part of an Employee's bi-weekly base salary. Holiday pay shall be calculated by multiplying the daily rate of pay by fourteen (14) days. The daily rate of pay shall be calculated by dividing the officers annual base pay, inclusive of longevity, by the twenty-six (26) pay periods per year and then dividing the resulting number by ten (10) to establish a daily rate of pay.

2. If an officer is scheduled to work on the Fourth of July, Thanksgiving, Christmas and/or New Year's Day, he shall be paid at the rate of time and one half his hourly rate of pay for all hours worked.

XIII. PERSONAL DAY

1. All full time Employees shall have four (4) personal days. Personal days may be taken on separate days; however, a personal day application shall, except in cases of emergency, be made at least five (5) working days prior to the personal day to be taken. The third and fourth personal day will be granted as long as the request for the personal day does not result in an overtime situation for the Borough.

2. Personal days may not be accumulated, from year to year, unless refused for operational needs of the Police Department. Then they will be carried to the next year and used as soon as possible.

XV. BEREAVEMENT

All Employees shall receive three (3) days leave in the event of the death of a spouse, child, son-in-law, daughter-in-law, parent, father-in-law, mother-in-law, brother, brother-in-law, sister, sister-in-law, grandparent, grandchild, aunts and uncles.

It is understood and agreed that this bereavement leave will be communicated to the department head by the Employee and said Employee shall be granted three (3) days leave of absence consisting of three (3) working days next following the day of death until the date of burial. The Employee will be compensated for the time lost during said period from his regularly scheduled work, not to exceed three (3) days.

XVI. VACATION LEAVE

1. A new Employee shall be granted vacation leave only at a rate of one (1) day per month on a month to month basis until the completion of one (1) full year of employment. Upon completion of said year, a pro-rata number of vacation days shall be credited to the Employee for the balance of

the calendar year ending December 31, the full allotment of vacation days shall be credited to the Employee at the beginning of each successive calendar year.

2. If separation occurs before the end of the year and more vacation days have been taken than is appropriate, the per diem rate of pay for the excess days shall be deducted from the final pay.

3. All Employees shall be granted vacation leave based upon the following schedule. (It is understood that when reference is made to six to twelve years, etc., six means the start of the sixth year, etc.)

1 - 5 years	13 days per year
6 - 12 years	16 days per year
13 - 20 years	21 days per year
21- 30 years	26 days per year
31 years and over	31 days per year

4. Vacations may be taken during any part of the year, provided they do not interfere with the normal operations of the department and in serving the best interests of the public at large. However, it is agreed to and understood that exceptions to the prescribed rule will be reviewed with scheduling and/or openings for vacations as permissible.

5. It is understood and agreed that yearly vacations will be chosen by seniority. It is also further agreed to and understood that when a Police Officer is scheduled off on the weekend, he will be permitted to take his vacation in conjunction with said weekend.

6. All officers must submit their requests for vacations by 12:01 a.m. on March 16 of each year. If requests are not submitted, the Officer(s) will lose their place in seniority and vacations will be scheduled at the discretion of the Chief of Police. All officers are to be notified of approval by April 30.

7. If due to operational needs vacations are refused said vacations may be carried over to the following year or, at the discretion of the individual officer, they may be paid at the current rate of that year (i.e., 8 hours = 1 vacation day). Either option must be taken by July 1 of the following year.^{5/}

8. By February 15 of each year, the Employer shall furnish to each Employee a written record of the Employee's vacation days available for the upcoming year. Employees shall return a signed off copy of this record to the Employer by April 1 of each year.

XVII. SICK LEAVE

1. A new Employee shall earn sick leave at a rate of one and one-quarter (1-1/4) days per month on a month to month basis until completion of one (1) full year of employment. Upon completion of said year, a pro rata number of sick days shall be credited to the Employee for the balance of the calendar year ending December 31st.

2. If termination occurs before the end of the year and more sick leave has been taken than earned, the per diem rate of pay for the excess days shall be deducted from the final pay.

3. Sick leave shall accumulate year to year with an additional fifteen (15) days credited to the Employee at the beginning of each successive calendar year.

4. All other proper and authorized leaves as provided in the rules of the Department of Personnel constitute a part of this agreement. An Employee is entitled to use sick leave when he is incapable of working for medical reasons.

^{5/} This provision equating eight (8) hours to one vacation day "(8 hours = 1 vacation day)" has not changed since the January 1, 1994 - December 31, 1996 CNA (Borough Exh. 1, 3).

5. Paid holidays occurring during a period of sick leave shall not be chargeable to sick leave.

6. By February 15 of year, the Employer shall furnish to each Employee a written record of the Employee's sick days available for the upcoming year. Employees shall return a signed off copy of this record to the Employer by April 1 of each year.

XVIII. ACCUMULATED SICK TIME PAYOFF UPON RETIREMENT

1. Employees who retire will receive all lump sum payment for unused sick leave in an amount of one-half (1/2) payment for every full day earned in unused sick leave, with a total amount not to exceed \$15,000, credited to him/her on the employment records and certified by the Borough on the effective date of his/her retirement, at the prevailing rate of pay at the time of retirement.

2. Each retiring Employee shall have the sole discretion to receive such entitlement as may be provided by this Article paid in up to three (3) payments over a period of up to eighteen (18) calendar months. While the public employer is retaining said unpaid monies, no interest will be due.

[Borough Exh. 1].

Larrison certifies the following regarding the Borough's interpretation of how leave time is calculated for the PBA members:

20. Pursuant to the current CBA, the accrual rate for vacation, personal, sick and bereavement days is equivalent to eight (8) hours of time. There has been no change in the accrual rate of vacation, personal, sick and bereavement days since at least the 1994-1996 contract between the Borough and the PBA.

21. Holiday pay for each member is calculated pursuant to Article XII of the CBA. This calculation of pay entitles all members, whether they work the eight (8) hour shift or the twelve (12) hour shift to receive eight (8) hours of pay for each holiday. At the beginning of each year, the officer's annual holiday pay for all fourteen (14) holidays is then added to their base salary. This has been the practice predating my employment with the Borough. I have never received a grievance or dispute from the PBA regarding their Holiday pay calculation. See Exhibit 1.

[Larrison cert., para. 20-21].

Dinis certifies the following regarding the vacation accrual rate:

6. Where the contract speaks to vacation time being paid out at a rate of 8 hours to 1 day (at Article XVI, Section 7), this section of the contract has not been utilized within the time that I have been on the force. Such language would only be applicable where the Administration was forced to refuse an officer vacation time, the officer had vacation time left over at the end of the year as a result of said refusal, and the officer opted to receive a payout of time rather than carry over the time to the next year. I am not aware of any occasion when this has happened.

[Dinis reply cert., para. 6].

The PBA asserts the following regarding the effect of the Borough's January 7th memorandum:^{6/}

13. The proposed change in sick, vacation, personal, holiday and bereavement time

^{6/} See Larrison cert., para. 18 above.

accrual would benefit the Borough by causing Officers' accrued time to be dramatically reduced. It would decrease the Borough's liability toward Officers based upon accrued time going forward. The proposed change in sick, vacation, personal, holiday and bereavement time accrual has a direct and substantial impact upon contract negotiations between the Borough and the PBA.

14. The PBA objects to and opposes the change in sick, vacation, personal, holiday and bereavement time accrual proposed by the Borough, and the Borough must be restrained from unilaterally implementing this change during ongoing negotiations.

[Dinis cert., para. 13-14].

Prior to the implementation of the twelve (12) hour shift in the January 1, 1997 - December 31, 1999 CNA (and also included in that CNA), the Article XII Holidays provision provided the following:

The present holiday schedule in effect of fourteen (14) holidays is to be adhered to. Employees will receive a lump sum payment at the end of November of each year at his regular rate of pay for ten (10) of those holidays. Four (4) holidays, designated by the Borough, being the Fourth of July, Thanksgiving, Christmas and New Year's Day shall be payable at the time-and-one-half rate if they are worked and at the regular rate if not worked upon the submission of vouchers.

[Borough Exh. 3; January 1, 1994 - December 31, 1996 CNA and January 1, 1997 - December 31, 1999 CNA].

In the CNA following the implementation of the twelve (12) hour shift, the January 1, 2000 - December 31, 2002 CNA Article

XII Holidays provision provided the following, which in paragraph 2, equates to holidays being calculated at the eight (8) hour daily rate:

1. The present holiday schedule in effect of fourteen (14) holidays is to be adhered to. For year 2000 employees will receive a lump sum payment at the end of November at this regular rate of pay for ten (10) of those holidays. Four (4) holidays designated by the Borough, being the Fourth of July, Thanksgiving, Christmas and New Year's Day shall be payable at the time-and-one-half rate if they are worked and at the regular rate if not worked upon the submission of vouchers.

2. Effective January 1, 2001, the Borough shall include payment for fourteen (14) holidays as part of an employees biweekly base salary. Holiday pay shall be calculated by multiplying the daily rate of pay by fourteen (14) days. The daily rate of pay shall be calculate[d] by dividing the officers annual base pay, inclusive of longevity, by the twenty-six (26) pay periods per year then dividing the resulting number by ten (10) to establish a daily rate of pay.

3. If an officer is scheduled to work on the Fourth of July, Thanksgiving, Christmas and/or New Year's Day, he shall be paid at the rate of time and one half his hourly rate of pay for all hours worked.

[Borough Exh. 3; January 1, 2000 - December 31, 2002 CNA].

ANALYSIS

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a

final Commission decision on its legal and factual allegations^{7/} and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Gioia, 90 N.J. 126, 132-134 (1982); Whitmyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); Burlington Cty., P.E.R.C. No. 2010-33, 35 NJPER 428 (¶139 2009), (citing Ispahani v. Allied Domecq Retailing United States, 320 N.J. Super. 494 (App. Div. 1999) (federal court requirement of showing a substantial likelihood of success on the merits is similar to Crowe)); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975). In Little Egg Harbor Tp., the designee stated:

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

The amount of paid leave, absent a preemptive statute or regulation, is a mandatorily negotiable term and condition of

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

employment. See Headen v. Jersey City Bd. of Educ., 212 N.J. 437, 445 (2012); Hoboken Bd. of Ed. and Hoboken Teachers Ass'n, P.E.R.C. No. 81-97, 7 NJPER 135 (¶12058 1981), aff'd NJPER Supp.2d 113 (¶95 App. Div. 1982), app. disp. 93 N.J. 263 (1983); Ocean Cty. Util. Auth., P.E.R.C. No. 2020-27, 46 NJPER 242 (¶57 2019).

Based on the certifications and exhibits from the parties, as set forth in the Findings of Fact above, this application clearly concerns an issue of contractual interpretation and material facts are in dispute. The PBA argues that the expired CNA defines a "day" as a twelve (12) hour period of time for the accrual of vacation, sick, personal, holiday and bereavement time and there is a past practice between the parties regarding the issue of the accrual of that time and that the Borough should be required to maintain the staus quo since the parties are in negotiations.

The Borough asserts that the expired CNA sets eight (8) hours as the appropriate period of time for vacation, sick, personal, holiday and bereavement time and that no past practice was established because the administrative error, regarding excess accrual of that time, was not discovered until the PrimePoint program was implemented (and was never accepted/approved by the Borough) and that the PBA members that

work the eight (8) hour schedule would receive less accrued time than those that are assigned to the twelve (12) hour schedule.

The New Jersey Supreme Court in Matter of Atlantic County, 230 N.J. 237 (2017) (a case involving the unilateral withholding of scheduled salary increases during negotiations), set forth the standards for contract interpretation in the courts:

It is well-settled that “[c]ourts enforce contracts ‘based on the intent of the parties, the express terms of the contract, surrounding circumstances and the underlying purpose of the contract.’” Manahawkin Convalescent v. O’Neill, 217 N.J. 99, 118, (2014) (quoting Caruso v. Ravenswood Developers, Inc., 337 N.J. Super. 499, 506 (App. Div. 2001)). A reviewing court must consider contractual language “‘in the context of the circumstances’ at the time of drafting and . . . apply ‘a rational meaning in keeping with the expressed general purpose.’” Sachau v. Sachau, 206 N.J. 1, 5-6 (2011) (quoting Atl. N. Airlines, Inc. v. Schwimmer, 12 N.J. 293, 302 (1953)). “[I]f the contract into which the parties have entered is clear, then it must be enforced” as written. Maglies v. Estate of Guy, 193 N.J. 108, 143 (2007); accord Kampf v. Franklin Life Ins. Co., 33 N.J. 36, 43 (1960) (“Courts cannot make contracts for parties. They can only enforce the contracts which the parties themselves have made.” (quoting Sellars v. Cont’l Life Ins. Co., 30 F.2d 42, 45 (4th Cir. 1929))). Where an agreement is ambiguous, “courts will consider the parties’ practical construction of the contract as evidence of their intention and as controlling weight in determining a contract’s interpretation.” County of Morris v. Fauver, 153 N.J. 80, 103 (1998).

[Atlantic Cty. at 254, 255].

The Commission recently held in State of New Jersey (Corrections) P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020) regarding the status quo during collective negotiations (a similar case involving the employer unilaterally discontinuing the payment of salary guide step increments): "Consistent with the Supreme Court's recent Atlantic Cty. decision, the Commission interprets the status quo during collective negotiations as a continuation of the prevailing terms and conditions of employment established through the expired CNA, past practice, or otherwise."^{8/}

Also, an employer does not violate the Act by ending a practice granting more generous benefits than those provided by the parties' contract. New Brunswick Bd. of Ed. v. New Brunswick Ed. Ass'n, Inc., P.E.R.C. No. 78-47, 4 NJPER 84 (¶4040 1978), recon. den. P.E.R.C. No. 78-56, 4 NJPER 156 (¶4073 1978), aff'd NJPER Supp.2d 60 (¶42 App. Div. 1979); Kittatinny Reg. Bd. of Ed., P.E.R.C. No. 92-37, 17 NJPER 475 (¶22230 1991) (no violation where Board required secretaries to work the hours provided for in the contract, despite practice of reducing hours during

^{8/} Following the quoted language, footnote 6 was inserted, "Prior to the Supreme Court's 1996 decision in Neptune Bd. of Educ. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16 (1996), neither the Commission, nor the courts in Galloway, Hudson Cty., or Rutgers, used the term 'dynamic status quo' or characterized the status quo required to be maintained per the Act as either 'dynamic' or 'static.'"

holidays and recess periods); Burlington Cty. Bridge Comm., P.E.R.C. No. 92-47, 17 NJPER 496 (¶22242 1991) (no violation where the employer's decision not to consider sick or vacation time in computing overtime was authorized by the contract); Passaic Co. Reg. Bd. of Ed., P.E.R.C. No. 91-11, 16 NJPER 446 (¶21192 1990) (no violation where the Board imposed extra work days which did not exceed the limits set forth in the contract); New Jersey Sports and Exposition Authority, P.E.R.C. No. 88-14, 13 NJPER 710 (¶18264 1987) (no violation where the employer changed the workweek when the contract did not guarantee any particular day or consecutive days off).

In the instant application, there is no article in any of the CNAs that were provided in the exhibits that indicates the PBA members assigned to the twelve (12) hour schedule are entitled to the accrual of more vacation, sick, personal, holiday and bereavement time than those assigned to the eight (8) hour shift. Additionally, all PBA members work the same 2080 hours per year and those assigned to the twelve (12) hour schedule receive 104 hours of "time due" to put them on par with those assigned to the eight (8) hour shift. Further, the vacation leave CNA article specifically refers to eight (8) hours equaling one (1) vacation day and the holiday CNA article - which was revised in the 2000 - 2002 CNA (the CNA following the implementation of the twelve (12) hour schedule) equates to eight

(8) hours of pay for each holiday. I find that there is a material factual dispute between the parties regarding the interpretation of the expired CNA in this matter.

Regarding the issue of the establishment of a past practice, both parties cite Somerville Bor., P.E.R.C. No. 84-90, 10 NJPER 125 (¶15064 1984) regarding the definition of a past practice. The Commission held that a controlling past practice is one "[W]hich is repeated, unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." (quoting Elkouri and Elkouri, How Arbitration Works, p. 391 (BNA 1973)). I find that there is a material factual dispute between the parties regarding whether the issue of the twelve (12) hour schedule accrual time meets the above definition of a "controlling past practice" since the Borough's certification states that the issue was an administrative error and only came to light when the PrimePoint system was recently installed.

The Commission has held that "[b]inding arbitration is the preferred mechanism for resolving a dispute when an unfair practice charge essentially alleges a violation of subsection 5.4a(5) interrelated with a breach of contract." Hillsborough Tp. Bd. of Ed., P.E.R.C. No. 2005-1, 30 NJPER 293 (¶101 2004).

Additionally, the Commission stated in Camden County and Camden County Prosecutor, P.E.R.C. No. 2012-42, 38 NJPER 289

(¶102 2012), "In State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984), we held that allegations setting forth 'at most a mere breach of contract do not warrant the exercise of the Commission's unfair practice jurisdiction.' Contract disputes must be resolved through negotiated grievance procedures."

Although the PBA argues that the change in the leave time accrual rate based on the January 7th memorandum will have a direct and substantial impact upon contract negotiations between the Borough and the PBA, the instant decision only concerns the issue of interim relief and does not dismiss the underlying unfair practice charge which the parties will have to address before the Commission (and presumably will be discussed during negotiations).

Based on the above - the material factual disputes regarding the interpretation of the expired CNA and the existence of a controlling past practice between the parties, and given the heavy burden required for interim relief, I find that the PBA has not established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element to obtain interim relief, and that irreparable harm will occur if the requested relief is not granted. Crowe.

I also find that the relative hardship to the parties weighs in favor of the Borough since the use of additional leave time by

the PBA members assigned to the twelve (12) hour schedule may not be able to be recouped by the Borough if necessary.

Additionally, if the PBA is ultimately successful in a final Commission decision in this matter, any owed leave time, or monetary relief if necessary, can be provided to the affected members who work(ed) the twelve (12) hour schedule to make them whole.

Under these circumstances, as set forth in the record above and given that a final Commission decision may defer this matter to arbitration, I find that the PBA has failed to demonstrate that the public interest will not be injured by granting interim relief.

ORDER

IT IS HEREBY ORDERED, that the Charging Party's application for interim relief is denied and this matter will be returned to the Director of Unfair Practices for further processing.

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

DATED: March 26, 2021
Trenton, New Jersey