

I.R. No. 2021-24

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY  
(MONTCLAIR STATE UNIVERSITY),

Respondent,

-and-

Docket No. CO-2021-214

COUNCIL OF NEW JERSEY STATE  
COLLEGE LOCALS, AFL-CIO,

Charging Party.

**SYNOPSIS**

A Designee grants an application for interim relief based on an unfair practice charge alleging that the public employer unlawfully reversed positive recommendations for reappointment of three "professional staff" employees in reprisal for their protected conduct, specifically, complaining about a health and safety condition as a consequence of an instruction to them to inspect student residence rooms on November 25, 2020. The employees sought assistance from their majority representative. The employer's conduct allegedly violated section 5.4a(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq.

The Designee found that the union had shown through compelling circumstantial evidence and by the requisite standard anti-union animus, as set forth in Bridgewater Tp. v. Bridgewater Public Works Assn, 95 N.J. 235 (1984). The Designee also determined that the employer's business justification was pretextual, intended to conceal its unlawful motive. The Designee ordered the provisional rescission and redaction of the "not recommended" addendums to the evaluations so that the staff members are reappointed to their positions, inclusive of housing and health benefits, for the 2021-2022 academic year, for the time until the case is processed to resolution.

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Appearances:

For the Respondent,  
Gurbir S. Grewal, Attorney General  
(Elizabeth A. Davies, Deputy Attorney General; Alexis  
Fedorchak, Deputy Attorney General, on the brief)

For the Charging Party,  
Mets Schiro and McGovern, LLP  
(Kevin P. McGovern, Esq.)

**INTERLOCUTORY DECISION**

On April 8, 2021, Council of New Jersey State College Locals, AFL-CIO (Council or Union) filed an unfair practice charge against Montclair State University (University), together with an application for interim relief, exhibits, certifications and a brief. The charge alleges that on December 10, 2020, Dr. Karen Pennington, then-University Vice-President of Student Development and Campus Life (Pennington), changed her positive recommendations for reappointment of unit employees Nicole Fiore, Jahkahli Johnson and Garry Jones to negative recommendations in

reprisal for their exercise of protected activity in the latter part of November, 2020. The charge alleges that on December 10, 2020, the University Office of Human Resources issued notices of non-reappointment to all three "Professional Service Specialist IV" employees, then-serving in one-year employment contracts, terminating their respective employment(s), inclusive of health benefits and housing, on June 30, 2021.

The charge alleges that in mid-October, 2020, Fiore, Johnson and Jones commenced the reappointment process that mandates three levels of review; 1) immediate supervisor, 2) unit head (Dean of Students) and 3) Vice-President of Student Development. The review process allegedly takes place on a Human Resources platform, "Workday," that notifies employees when a level of review is completed.

The charge alleges that on November 18, 2020, during a staff meeting that included all three employees, Associate Director of Residence Life Tara Mellor directed all staff to conduct student room inspections by November 25, 2020. Fiore and Jones, concerned with health and safety matters related to COVID-19 because students were living in some of the rooms, asked supervisors for more time so that the students will have vacated before they inspect. The meeting allegedly became "tense" and ended without resolution. Although Johnson did not personally share the concerns of his named colleagues, he allegedly

"supported" them in the meeting, offering to conduct more inspections, ". . . to help out Fiore and Jones."

The next day, November 19<sup>th</sup>, the staff allegedly received an email from Associate Director Mellor, advising that their concerns were reviewed by Dean Coleman-Carter, a campus doctor and VP Pennington, who claimed that, ". . . there were more than adequate safety protocols in place and the inspections were to take place as directed." The response didn't satisfy employees' safety concerns and they allegedly sought the Council's assistance.

Also on November 19<sup>th</sup>, unit employee Johnson allegedly received notice of a positive reappointment recommendation from VP Pennington. Johnson's "Workday" notice was issued earlier than Fiore's and Jones's because he was being evaluated for his first multi-year contract (three years), having served five full (separate) fiscal years. Fiore and Jones are seeking annual reappointments.

On November 20, 2020, a group of professional staff, including Fiore, Johnson and Jones allegedly met with Union representative Dr. Sullivan. The charge alleges that Article XXX of the parties' collective negotiations agreement (CNA) provides that no employee shall be required to work in an unsafe environment and Sullivan is the Union's designated representative to the University's "Safety Committee" under Article XXX. On the

same date, Sullivan allegedly emailed Dean Coleman-Carter, Dean/Unit Head of Residence Life, explaining that employees weren't refusing to work but were seeking an extension of time to perform the student room inspections. Sullivan allegedly attached applicable CDC guidelines. He also "inadvertently revealed" Fiore's, Johnson's and Jones's names in his email. Dean Coleman-Carter allegedly replied to Sullivan, advising that she and VP Pennington were aware of the staff's concerns and were surprised because she thought they had "worked through their concerns."

On or around November 23, 2020, Fiore and Jones allegedly received notice on "Workday" that their reviews had been submitted to Human Resources, the final step in the evaluation process.

On November 24, 2020, Union Grievance Officer, Dr. Maign Gregory, allegedly wrote to University Vice President of Human Resources David Vernon, requesting an accommodation of more time for employees before they had to enter student dorm rooms. Vernon allegedly replied the same day, denying the request. Fiore, Johnson and Jones allegedly performed the inspections by the November 25<sup>th</sup> deadline, as directed.

On December 10, 2020, Fiore, Johnson and Jones, all on mandated unpaid furloughs, allegedly learned that VP Pennington changed her positive recommendations because of "additional

concerns" about their performance. The changed recommendations allegedly criticize all three employees, ". . . for being reluctant to perform normal closing tasks and for failing to elevate their concerns to management within Residence Life." The charge alleges that Pennington's changed performance reviews include concerns that weren't substantial enough for a negative reappointment recommendation in her initial review.

On the same date, the University Office of Human Resources issued notices of non-reappointment to Fiore, Johnson and Jones, terminating their employment, including health benefits and housing, on June 30, 2021.

The University's conduct allegedly violates section 5.4a(1), (3) and (5)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

On April 12, 2021, I issued an Order to Show Cause, specifying a return date of May 6, 2021 for argument in a conference call on the application. I also directed deadlines

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<sup>1/</sup> These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (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."

for the filing of the University's opposing brief and attachments and for the Union's response. The return date was subsequently changed to May 7<sup>th</sup> and then to May 11, 2021, upon the consent of all. On the return date, the parties argued their respective cases.

The University asserts that the Council cannot show that, ". . . the employee's union activity was a substantial [or] motivating factor in the decisions [of non-reappointment]", as set forth in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) (Bridgewater). It contends that VP Pennington had an "independent and legitimate business reason" for the non-appointment as set forth in the revised evaluations. Pennington opined that Fiore had previously declined opportunities for advancement, failed to take "proactive initiative" and engaged in "ongoing complaining;" that Johnson had required "additional follow-up to meet deadlines," failed to share "project-related updates" with his supervisors" and doesn't seek assistance until deadlines passed; and that Jones revealed, "either an unwillingness or inability to manage administrative parts of the job," "lacks proficiency at developing successful strategies to manage opening and closing process," failed to inventory keys at the end of a semester in 2020, failed to organize the Bohn Hall front desk and failed to complete a spreadsheet following the Thanksgiving closing.

The University also contends that the Council hasn't demonstrated irreparable harm because in employments based on annual reappointments, ". . . there is never any guarantee that an employee will be reappointed for a new fiscal year" (brief at 10). Also and inasmuch as they received notice on non-reappointment in December, 2020, Fiore, Johnson and Jones ". . . have ample time to secure housing, health benefits and employment before their current contracts end." The University also asserts that the Council hasn't shown that the probability of harm to others will not be greater than the harm it will suffer in the absence of interim relief. It also contends that the public interest will be harmed by a grant of interim relief.

The following facts appear.

The Council represents faculty, professional staff and librarians at nine State Colleges in New Jersey, including Montclair University. Under Article XIIIIG of the most recent CNA, professional staff receive individual letters of appointment or reappointment for one year periods; after five one-year contracts, a professional staff employee is eligible for reappointment to a three-year contract (Council Exhibits A and B; Davis cert., para 3). Appendix 1, Section C of the CNA sets forth the evaluation process by which decisions to reappoint professional staff are made. At the time of evaluation for appointment or reappointment, "the entire professional



performance record" of the employee is considered. Personnel files are available to the employee's supervisor for that purpose.

Debra Davis is a Council Senior Staff Representative who, for more than 20 years, has enforced the parties' CNAs in partnership with its local union, specifically, AFT Local 194, which represents faculty, professional staff and librarians at the University. She certifies:

At Monclair University, the evaluation process consists of three levels; first an evaluation and recommendation by the employee's immediate supervisor; second, as evaluation and recommendation by the employee's Unit Head, and finally, a review and recommendation by the Vice President of the employee's department. It has been my experience that if a positive recommendation for reappointment is provided at all three levels, reappointment is virtually guaranteed. The remaining steps (forwarding to Human Resources for processing and subsequent approval by the Board of Trustees) are merely a formality. [Davis cert., para 5]

Dr. Karen Pennington, former Vice President for Student Development and Campus Life at the University during the relevant period and until her retirement on March 31, 2021, certifies the same procedure, except for the evaluation's submission to the University President for a recommendation immediately before its submission to the Board of Trustees (Pennington cert. para. 1, 2, 6). Her duties encompassed oversight of 29 departments, including residence life, budget responsibilities for each department, direct supervision of nine staff members and indirect

supervision of about three hundred staff members, establishing new programs and managing existing ones and ensuring compliance with State and federal laws (Pennington cert., para. 3).

The University maintained three "evaluation and reappointment calendars" in Fall, 2020, as set forth in a "locally agreed [-upon]" schedule, entitled, "AFT Professional Staff - Evaluation and Reappointment"; one for professional staff with one or two years of service; one for professional staff with more than two years of service; and one for professional staff being considered for a multi-year contract (Davis Exhibit C). For professional staff who have completed more than two years of service, an employee's immediate supervisor was to have forwarded "recommendation and reappointment materials" to the "Unit Head" by November 5, 2020; the Unit Head's recommendation was to have been forwarded to the "division Vice President by November 16, 2020; and the recommendation from the division Vice President to "Human Resources" was to have been forwarded by November 24, 2020.

The schedule also provides for these professional staff (i.e. those who have completed more than two years of service) a deadline of December 10, 2020 for "recommendations from President to Board of Trustees and NON-reappointment (only) notification to candidate" (Davis Exhibit C).

For professional staff seeking reappointment to an initial multi-year contract (those having completed five years of service), the recommendation from the employee's immediate supervisor to the Unit Head was to have been forwarded by October 30, 2020; the recommendation from the Unit Head to the candidate was to have been provided by November 3, 2020; the Unit Head's recommendation to the division Vice President was to have been forwarded by November 10, 2020; the recommendation from the division Vice President to the candidate by November 19, 2020; and the recommendation from the division Vice President to Human Resources by November 25, 2020. The schedule also provides for these professional staff employees a deadline of December 10, 2020 for notifications of NON-reappointment to a candidate. (Davis Exhibit C).

The University maintains a software program, "Workday," that enables employees seeking reappointment to monitor the progression of their respective evaluations. A notice is issued each time an evaluation is moved to the next step (Fiore cert., para.3; Exhibit A; Johnson cert., Exhibit A; Jones cert., Exhibit A).

Nicole Fiore has been employed by the University since July, 2017 as the "Community Director" of Sinatra (on-campus residence) Hall, housing 270 students. Her job includes, ". . . oversight responsibility over the facility and its residents, as well as

direct supervision of six resident assistants and one assistant community director." In fall, 2020, she was eligible for her fifth, one-year contract, covering fiscal year 2021-2022 (Fiore cert. para. 1, 2).

On October 27, 2020, Fiore reviewed and agreed with the assessment of her immediate supervisor, Tory Elisca. Elisca wrote that Fiore, ". . . consistently thinks of new ways to increase student satisfaction and development . . . and seeks ways to remove [facilities-related] issues to improve the student experience." Elisca wrote that Fiore is "administratively strong"; in 2019-2020, worked with colleagues to "develop a professional staff recruitment website" and ". . . can create a vision and push it through to completion." Elisca also wrote of her continuing support of Fiore as a Community Director and of her suggestion that Fiore should re-visit some "goals that we unaccomplished [sic] in 2019-2020." Elisca wrote several goals for Fiore in the 2021-2022 term. Elisca's rating of Fiore was "recommended." (Fiore Exhibit A).

On an unspecified date, Unit Head Margaree Coleman-Carter "recommended" Fiore for reappointment. She wrote that Fiore had "initiated several projects in her building to improve safety for the residents;" that she is a "good communicator and seeks opportunities to take the lead on tasks;" that her "organization skills and ability to meet deadlines resulted in the development

of a professional staff recruitment website." Coleman-Carter further commended Fiore's performance ". . . for her work and assistance to the department and University during the pandemic." She "full supported" Fiore's reappointment (Fiore Exhibit A).

Garry Jones was employed by the University since February, 2018 as a "Community Director" of student residential facility, Bohn Hall. In July, 2020, he was informed that Bohn Hall would be closing because of the pandemic and he was reassigned as Community Director to two other residential facilities, Freeman and Russ Halls. In that capacity, he was responsible for implementing a residential curriculum and he directly supervised a graduate assistant community director, eight resident assistants and indirectly supervised nineteen service assistants. In Fall, 2020, Jones was seeking his third one-year contract for 2021-2022 (Jones cert., para. 1, 2).

On November 10, 2020, Jones discussed his evaluation with his immediate supervisor, Genicka Voltaire, which he acknowledged in the "Workday" program on November 13, 2020 (Jones Exhibit A). Voltaire "recommended" his reappointment for 2021-2022, commending his "passion for relationship building and connecting with students on a personal level"; his willingness to step up and fill a need on campus"; his ". . . cultivation of a staff environment that is fun, welcoming, safe and supportive." Voltaire praised his performance as a "University Housing

Officer." He was however, ". . . struggling to meet deadlines and complete administrative tasks effectively" for an unspecified period before August 24, 2020. Voltaire wrote that since then, Jones, ". . . improved in this area by creating an organizational system that assists him in responding to tasks effectively" and ". . . has taken the initiative to clarify instructions to meet expectations." He was praised as "an effective community builder and met his goal for establishing a monthly program in his community." (Jones Exhibit A).

On an unspecified date after November 13, 2020, Dean Coleman-Carter, Jones's Unit Head, "fully supported" and recommended his reappointment. Coleman-Carter praised Jones as trustworthy, a "team player," someone who "leads by example" as a supervisor, "takes time to have meaningful conversations with students," supports "the mission and goals in the Office of Residence Life," and "collaborates with office and campus partners on projects and programs." Dean Coleman-Carter also praised his performance as a Hearing Officer, commended his work for and assistance to the department and University during the pandemic, extolled him as an "Enrollment Coach," making calls to students, "not yet-registered for fall 2020 classes" (Jones Exhibit 1).

Jahkahli Johnson has been employed by the University as a Community Director with Residence Life since Fall, 2016. He has

been Community Director of Blanton Hall since May, 2019. In that capacity, he implements residential curriculum in partnership with the Associate Director of Residence Education and directly supervises fifteen undergraduate resident assistants, one assistant community director and twenty undergraduate service assistants. Johnson is eligible for appointment to an initial multi-year contract (3 years) beginning in July 2021, completing his fifth one-year contract in the 2020-2021 fiscal year (Johnson cert., para. 1, 2).

On or about November 19, 2020, Johnson formally acknowledged the written assessment of his performance by his immediate supervisor, Tory Elisca, who "recommended" him. Elisca wrote that Johnson, ". . . excels at community building with his students" and as a hearing officer, ". . . reviews each case thoroughly and without bias, taking all information into account before deciding an outcome." Elisca recommended that Johnson, ". . . put focus on managing his time effectively and working efficiently" and should, ". . . prioritize tasks in ways that result in effective follow through and timely follow-up."

Johnson,

makes calculated decisions on whether to follow through on tasks or not. As a professional, I challenge him to remove justification from responses and take ownership of his decision-making and professional behaviors.

[Johnson Exhibit A].

Acknowledging that the pandemic impacted Johnson's progress on some of his 2019-2020 goals, Elisca, ". . . encouraged him to revisit some goals that were not accomplished to round out his professional experiences." As one of the "most senior" Community Directors, Johnson was advised to "evaluate the impact of his communication on the team and to step up as a source of support to his peers and colleagues in ways that best serve the residential and campus community (August 2021)." Finally, Elisca recommended that beginning in July, 2021 and later, as appropriate, Johnson should "provide training and professional development opportunities" to his assistant community director; publish an article in a professional magazine and attend "a professional development opportunity" (Johnson Exhibit A). At least some of the recommendations were included in Johnson's own "self-evaluation," written in the column alongside Elisca's evaluation.

On an unspecified date before November 19, 2020, Unit Head Dean Coleman-Carter "recommended" Johnson, specifically "supporting his reappointment for the multi-year contract 2021-2024." Coleman-Carter acknowledged Johnson as a University alumnus who, ". . . has done a yeoman's job building community." He is "respected by colleagues," regarded as "fair and genuinely concerned about the well-being of his students" and has "demonstrated his dedication to the social and personal



development of residents and students," as evidenced by his self-evaluation. He is described as a "team player" who is supportive of his coworkers and supervisors in any way he can." Noting that Johnson reported to three supervisors in this evaluation period, she wrote that each ". . . provided him with constructive feedback on his supervisory style" and he has "enhanced his skills" and ". . . shown growth in his supervisory relationships with graduate interns." He has been "open" to feedback from supervisors and other managers." Coleman-Carter foresaw his "progress" in the Community Director role, while noting the imperative that he has "a command of the areas outlined by his supervisor to move to the next level." Coleman-Carter commended Johnson for his work and assistance during the pandemic, reporting that he is "a valued member of the Office of Residence Life and of the Dean of Students Department." (Johnson Exhibit A).

On November 18, 2020, Fiore, Jones, Johnson and their colleagues met with Associate Director of Residence Life, Tara Mellor. In the meeting, the employees were directed to inspect student rooms in their assigned residence halls on Wednesday, November 25, 2020, immediately before the Thanksgiving holiday. Students were permitted to be in the buildings at that time. Employees were to enter ("key into") ". . . rooms to confirm people are gone, windows are closed, and doors are locked." They

were informed that there was, “. . . no need to enter any space that is occupied” (University Exhibit 5). Fiore and Jones, among others, expressed health and safety concerns about entering the residence halls, risking COVID-19 exposure, while students continued to live in them. Johnson did not share such concerns but volunteered, “. . . to take on more of the inspections in order to relieve some colleagues of that responsibility” (Fiore cert., para. 5; Jones cert, para. 6; Johnson cert., para. 6). Unit employees expressed willingness to perform the inspections but wanted more time to complete the task. The meeting “. . . became tense” [for reasons that were not specified] and ended without resolution (Fiore and Jones cert., para. 6).

The next day, Thursday, November 19, 2020, Mellor emailed about one dozen unit employees, including Fiore, Jones and Johnson, advising that several people were consulted, including, “a representative from the Presidential Advisory Committee on COVID-19, Dr. Patricia Ruiz,” as well as Dr. Pennington and Dean Carter, a representative from the “Restart Health and Safety Committee” and all approved “the safety of our closing plan.” Mellor wrote that Ruiz stated that, “. . . our safety protocols went above and beyond the standard required.” Mellor directed the employees to “. . . move forward with the procedures presented on Wednesday.” She wrote of the availability of cleaning supplies and an option to “spray door knobs 10 - 15

minutes before entering rooms" and of a likely availability of "additional masks or gloves." (Johnson Exhibit B).

Also on November 19, 2020, Johnson, reviewing entries on the "Workday" software, read VP Pennington's initial recommendation for his reappointment to a multi-year contract. (Johnson cert., para. 5). Pennington wrote:

I concur with the comments made by Mr. Johnson's supervisor and the unit head and I support his reappointment. He has been very effective in working with his residents to ensure their residential experience is positive. . . He can serve as a resource to his peers and the department. He has worked effectively with students. . . . The change in supervisors that Mr. Johnson has experienced over the past few years is a learning opportunity he should explore further . . . Mr. Johnson has been a great support to many students and he is congratulated for his willingness to work with students . . . He has been supportive of his colleagues and programs of the department. He is committed to the University and his loyalty is appreciated. During the next 12 to 18 months, Mr. Johnson is encouraged to think about what the next steps will be for his professional growth. This should include interviews with those in higher positions, exploration of responsibilities of professionals in other departments, [etc.] [Johnson Exhibit A]

Reading Mellor's November 19<sup>th</sup> reply, Fiore and Jones didn't find their health and safety concerns "assuaged" or "taken seriously" and a group of employees sought a meeting with the "local union" for guidance and support. On November 20, 2020, Fiore, Jones and others, including Johnson (who attended to "show

support”), met with Union representatives about the matter (Fiore cert., para. 6; Jones cert. Para. 6; Johnson cert; para 7).

Article XXX, Safe Conditions, of the CNA provides in a pertinent part:

Whenever an employee observes a condition which he or she feels represents a violation of safety or health rules and regulations or which is an unreasonable hazard to persons or property, the employee shall report such observation, which will be promptly investigated.

Where a hazard exists which endangers the employee, he or she shall not be required to work where that condition exists.

Later on November 20, 2020, Local Union representative Bill Sullivan wrote an email to Dean Coleman-Carter, among others, advising of his receipt of “a complaint” from “professional staff in Residence Life” that they were assigned to inspect each student’s room on Wednesday, November 25<sup>th</sup> between 1 p.m. and 6 p.m. to confirm that students vacated the premises for the Thanksgiving weekend. He wrote that “the staff is concerned that they could be exposed to the coronavirus during their inspections” because some students will remain in their rooms at the designated time of the inspections. He wrote that the staff wants enough time to pass between the students’ departure and the inspections, “. . . to have the air cleared of any viral particles.” He wrote that the staff “. . . are willing to do [the inspections] but would like to carry out that assignment at

a later date." Sullivan attached a link to the CDC website, commenting that its recommendation, ". . . suggests to me that one should wait at least 24 hours to carry out such a task" (Johnson Exhibit B).

Sullivan also attached an email he had received, i.e., "the original complaint" contesting the assurances Mellor had provided the previous day. That email, written by a Union representative identified as "Alex," opines that the virus will likely be airborne at the designated time of inspections; that those who "vetted" the plan personally, ". . . have nothing to worry about;" that some people will be staying in the residence halls during the "break;" etc. It also opines that the "resident Life Staff assume the real reason [for the assignment] is so that rooms can start to be cleaned." Finally, the attached email includes the email sent from Mellor to all named professional staff, (including Fiore, Jones and Johnson). (Johnson Exhibit B).

A few minutes after sending his email and attachments, Sullivan emailed Coleman-Carter again, writing that he "inadvertently included the correspondence from the complaint forwarded to me. Anything below my name should not have been included."

Several minutes later, Dean Coleman-Carter emailed a reply to Sullivan:

This matter had been presented to Dr. Pennington and I by the managers in Residence Life. We were working with the staff on this matter. I supervise Residence Life.  
[Johnson Exhibit B]

Sullivan soon emailed Coleman-Carter, explaining his "role" to present to the "committee" health and safety issues union members present to him, reiterating that not everyone assigned to the "inspection team" agrees with the timeline mandated by Residence Life. He also acknowledged having "screwed up" by including the original complaint.

Coleman-Carter replied to Sullivan, writing in a pertinent part of her email: "It [the complaint] was a bit shocking! I was so surprised to see that come to our group. Especially when I knew we had worked through their concerns." (Johnson Exhibit B). Sullivan replied about an hour later, "explaining the union process" on the evolution of the dispute (Johnson Exhibit B).

By November 23, 2020, VP Pennington "recommended" Fiore's and Jones's reappointments for fiscal year 2021-22. Both had received notices that date on their respective "Workday" programs that their evaluations had been referred from Pennington to Human Resources (Fiore cert., para. 4; Jones cert., para. 5). Council Senior Staff Representative Davis certifies that such referrals to Human Resources, "... [are] indicative of a positive recommendation at all levels, since the process after HR gets the file is mostly a formality." (Davis cert., para 13). The

University has proffered no facts about positive reappointment referrals to Human Resources and beyond. In her recommendation of Fiore, Pennington wrote:

I support the comments and goals established by Ms. Fiore and her supervisors.

In addition to the goals established, during the next 12 to 18 months, Ms. Fiore is encouraged to think about what her next steps will be for her professional growth and future positions. This should include interviews with those in higher positions, exploration of responsibilities of professionals in other departments in Student Affairs and reviews of different types of institutions.

[Fiore Exhibit A]

In her recommendation of Jones, Pennington wrote:

I support the comments and goals established by Mr. Jones and his supervisors. Since several of the goal dates are in advance of this appointment recommendation, I update them as follows:

1. Attend a professional development opportunity that focus on passion areas and/or mid-level professional position . . .

-Research opportunities or conferences by June 2022

-Review and update resume by June 2022

-Approach possible recommenders and request letters of recommendation by June 2022

[Jones Exhibit A]

Pennington certified:

Initially, I recommended each candidate for reappointment. I based my evaluations and recommendations for reappointment on a review of the evaluations drafted by their immediate supervisors and Unit Heads, as well as

conversations that I had with supervisors and my own observations.

[Pennington cert., para. 10]

On Monday, November 23, 2020, Sullivan emailed Coleman-Carter, purportedly attaching a document directing the staff to inspect the students' rooms by 5 p.m., Wednesday. He wrote:

If students do not have to leave until Wednesday, the staff want to wait until more time goes by to make sure any coronavirus traces are cleared out of the ventilation system. That is their concern. If that inspection could be postponed to the timeline recommended by the CDC, we could resolve this.

[Johnson Exhibit B]

A few hours later on November 23, 2020, Coleman-Carter emailed a reply to Sullivan:

I appreciate the follow-up. However, the staff was provided updates on their responsibilities on Wednesday, November 18<sup>th</sup> at a staff meeting. Since this seems to be becoming a union matter, I think it is best to refer this to David Vernon for input. [Johnson Exhibit B]

On November 24, 2020, another AFT Local 194 representative, Maughn Gregory, emailed University Vice President for Human Resources, David Vernon, explaining the inspection tasks assigned to professional staff, the likely continuing presence of students in the residence rooms during the designated inspection period, the health concern, together with cited portion of Article XXX of the CNA and a link to the CDC website. Gregory requested that the staff, ". . . not be required to perform the room check until after the 12/14 closing date" or failing that, not earlier than



November 30, 2020 and thanked Vernon, “. . . for attending to this emergency situation.” (Fiore Exhibit D).

Later that day, Vernon emailed a letter to Gregory, advising of his disagreement that the inspections contemplated are a “hazard,” pursuant to Article XXX of the CNA. He wrote that the “RAs are only inspecting the rooms of students that have left campus for the balance of the fall semester.” He wrote of Gregory’s “misapplication” of CDC recommendations and directed the inspection of all rooms of students, “. . . that are not registered for housing between 11/15 - 12/14 by 5 p.m. on Wednesday, November 25, 2020.” (Johnson Exhibit D).

Fiore, Jones and Johnson completed their assigned student housing room inspections by the designated deadline on November 25, 2020 (Fiore cert., para. 11; Jones cert., para 11; Johnson cert., para. 11). On the same date, Johnson learned from “Workday” that the unanimous recommendations he received for reappointment in a multi-year contract were referred to Human Resources (Johnson cert., para 5).

Fiore certifies that her immediate supervisor, Tory Elisca, informed her at about 5:00 p.m. or 6:00 p.m. on December 10, 2020, (when Fiore phoned her after learning of her “not recommended” evaluation) that she (Elisca) had been called to a meeting with Executive Director, Jeannie Stroh and Associate Director of Residence Life, Tara Mellor on December 8, 2020. In

the meeting, Elisca was informed of a directive from VP Pennington to Mellor to provide "additional information" about Fiore's performance as soon as possible. Elisca told Fiore that she and Mellor provided the information, as requested, to Stroh and Pennington (Fiore supplemental cert., para 6, 7, 8).

Pennington certifies that after she submitted her evaluations to Human Resources, she, ". . . engaged in conversations with residence life supervisors regarding all residence life staff" and "learned information about Fiore, Johnson and Jones that was not known to me at the time I drafted their initial evaluations and recommended them for reappointment" (Pennington cert., para 11).

On December 10, 2020, Fiore received a "Workday" notification (during a period of mandatory furlough) that her review had been returned to VP Pennington from Human Resources. Later in the day, Fiore learned that Pennington had reversed her evaluation to "not recommended" in an "addendum" (Fiore cert., para. 12; Exhibit F, A).

Pennington wrote in pertinent parts:

Although a performance document was previously submitted, as a result of a routine review of performance for the current year, I determined there is significant cause for concern. It is my fiduciary duty to include this addendum to supplement and inform the reappointment recommendation process.

Ms. Fiore does not show initiative to go beyond the basic expectations of her position. She is currently in the fourth year of supervising the smallest community on campus. . . she has repeatedly presented resistance to opportunities for growth and is resistant to change.

. . . she fails to take pro-active initiative and is only willing to take on duties if they are both delegated and desirable to her. When assigned projects that will enhance her portfolio but are not as desirable to her, she requires more direction and supervision.

Ms. Fiore took on and oversaw a large-scale ongoing student staff hiring process. This substantive and challenging collateral assignment allows her to grow in her role, offers a breadth of experiences and will help her as she furthers her career. While she is consistently doing the work and following through on responsibilities, she regularly expresses dissatisfaction with the assignment. The ongoing complaining. . . is not reflective of a professional of her level. She has not shown the maturity expected of an experienced Residence Life professional.

*Ms. Fiore recently expressed some concerns with parts of her role as a Community Director, specifically concerns performing some of the closing tasks that were expected of her as outlined in her job description. Nicole did not express these concerns to her executive director within Residence Life or to the unit head, Dean Carter. Either supervisor could have provided context and additional information, if needed. Nicole has been reminded that the role of Community Director has not changed since she was hired. . . . Closing and check out procedures are a uniform and extremely necessary part of the job and something she has done many times in the past. Therefore, it is essential that she must complete all assigned job-related tasks in order to be successful as a*

*Community Director in Residence Life.*  
*(Emphasis added).*

As someone who has managed residence halls in a variety of roles over the course of eight years at three different institutions, culminating in three years at Montclair, Ms. Fiore is not performing at the level we would expect, given her training and experience.

As a result, I must express deep concern regarding Ms. Fiore's performance and her failure to carry out her responsibilities in this probationary period, in the mature and professional manner expected . . . In my academic judgment, I am no longer confident that Ms. Fiore can adjust her performance level to be successful. Therefore, I do not recommend reappointment. [Fiore Exhibit A; University Exhibit 2]

Also on December 10, 2020, Jones received notice (while on furlough) on "Workday" that his evaluation, ". . . had gone back to [VP Pennington] and would be available to review in 24 hours" (Jones cert., para. 12). Jones read VP Pennington's recommendation against re-appointment of him on December 14, 2020.

The first paragraph of Pennington's "addendum" about Jones is identical to that written about Fiore. Pennington continued in pertinent parts:

Mr. Jones continues to show either an unwillingness or inability to manage administrative parts of the job related to building and occupancy management are significant and important. This inadequate performance has been noted in previous appraisals. . . and was noted in the recent appraisal. A serious performance deficiency was displayed during calendar year 2020. Mr.

Jones lacks proficiency at developing successful strategies to manage opening and closing processes in his area and struggles to complete these tasks according to department standards. After Bohn Hall closed in March, Mr. Jones failed to meet mandatory due dates for building inspections, key reports and work orders. This required extensive follow-up from his supervisor and other managers. . . .

When Mr. Jones was reassigned to the Freeman/Russ complex for fall 2020, it was discovered that keys still remained in the Bohn Hall office in piles or in checkout envelopes rather than inventoried and stored. . . . Throughout the summer, repeated requests [of Mr. Jones] to organize the front desk of Bohn Hall . . . were ignored. Now in Freeman/Russ, following Thanksgiving closing, Mr. Jones didn't complete the spreadsheet to report closing - related concerns according to established timelines and procedures.

*Mr. Jones recently was reluctant to perform the normal closing tasks that were expected of him as outlined in his job description and have been part of his responsibilities, as noted above. Mr. Jones failed to discuss these concerns with his supervisors within Residence Life, who could have provided context and additional information, if needed. Mr. Jones is reminded that the role of a Community Director has not changed since he was hired and there are standard responsibilities for staff at colleges and universities across the nation. Closing and checkout procedures are a uniform and extremely necessary part of the job. . . . Deciding not to carry out these responsibilities in a satisfactory manner is simply not acceptable (Emphasis added).*

The final paragraph of Pennington's addendum about Jones is substantially similar to the final paragraph in her addendum about Fiore (Jones Exhibit A; University Exhibit 4). Pennington

certifies that in March, 2020, “. . . Students were monetarily charged for keys that they properly returned because Jones failed to follow proper checkout procedures and file the keys away correctly” (Pennington cert., para. 12).

Also on December 10, 2020, Johnson received notice on “Workday” (while on unpaid furlough) that his evaluation form was returned to Pennington from Human Resources. He soon accessed her “addendum” that reversed her rating of him from “recommended” to “not recommended” (Johnson cert., para. 12, 13; Johnson Exhibit A; University Exhibit 3). Pennington wrote in pertinent parts:

While some deadlines were met, oftentimes, additional follow-up was needed to get assigned tasks completed and done so properly. This spring there were multiple occurrences:

\* [A] task list was due by Thursday, April 9, 2020. After follow-up from his supervisor, the list was sent on Tuesday, April 14, 2020

\* Mr. Johnson was expected to submit a RA Orientation video. . . on April 24, 2020. On April 24, Mr. Johnson asked questions about the task. It wasn't uploaded until Wednesday, April 29, 2020.

\* With the closing of his assigned residence hall on March 31, 2020, he was expected to complete walkthrough and report all facilities issues. . . [by] Tuesday, April 28, 2020. By the end of business on Thursday April 30, 2020, the list for Blanton remained incomplete. . . .

In managing assignments, Mr. Johnson often fails to share important project-related

updates with his supervisor and doesn't ask for help until after deadlines have passed...[S]upervisors are often met with excuses for incomplete work, rather than solutions. . . He consistently is not proactive in his communication. . . He has attended meetings without the required updates and materials. He seemingly does not understand how this negatively affects the flow of the project he is assigned. . . Issues of deadlines and completing administrative tasks accurately and on-time have been noted in previous appraisals.

*Mr. Johnson recently was reluctant to perform the normal closing tasks that were expected of him . . . Mr. Johnson failed to discuss these concerns with his supervisors within Residence Life who could have provided context and additional information, if needed . . . [substantially similar to criticism set forth in Fiore's and Jones's addendums]*

*Mr. Johnson knows that these responsibilities are part of the position. . . and most especially from his years as an undergraduate RA on the campus. There should have been no confusion about the tasks required and no confusion about where he could turn if he had questions or to address his concerns. He has had a relations with his Executive Director and with Dean Coleman-Carter, and has never had a problem before contacting me. I must conclude that this situation was one of unwillingness-not confusion (Emphasis added).*

As a result, at the end of this probationary period, I must express deep concern regarding Mr. Johnson's performance and his ability to carry out his responsibilities in the mature and professional manner expected for someone in his position. In my academic judgment, he has not met the standards required for a multi-year appointment.

As these matters have been addressed before and did not improve, I am no longer confident that Mr. Johnson can adjust his performance

level to be successful and I do not recommend reappointment [Johnson Exhibit A; University Exhibit 3]

VP Pennington certifies:

Among a multitude of other concerns my addendums referenced a series of events surrounding routine closing inspections of the residence halls to be conducted by residence life staff on November 25, 2020. Fiore and Jones informed Tara Mellor, Associate Director of Residence Life, that they had concerns related to the COVID-19 pandemic as there was a possibility that students would be present in the building[s] during these inspections. Johnson supported his co-workers but did not share the same concerns.

The closing inspections to be conducted on November 25, 2020 were already substantially abbreviated due to the COVID-19 pandemic. For example, instead of entering each room to ensure that all electronics were unplugged, refrigerators were emptied, and no animals were present, staff was instructed to simply open each door to ensure that the lights were turned off and no one was inside. After consulting with management representatives, Mellor informed the residence life staff that the inspections were to proceed as scheduled.

Rather than seek additional clarification from Mellor as to their expectations, Fiore, Johnson and Jones sought assistance from their union. The union, on behalf of the employees, sought additional time for the inspections to be conducted despite some already being addressed by Montclair. In turn Montclair denied the union's request. My concerns related to the performance and abilities of Fiore, Johnson and Jones reached far beyond the incident involving inspections of the residence halls on November 25, 2020, as outlined in the addendums to my evaluations.



[Pennington cert., para. 13-16]

Council Senior Staff Representative Davis certifies:

In over two decades of experience administering the collective negotiations agreements at Montclair and elsewhere, I am hard pressed to think of any other time when an employee was recommended for reappointment, only to have that recommendation rescinded and reversed by the same person who had recommended them. More common is the situation where a supervisor recommends someone for reappointment but is overruled by upper-level management. However, until the recent situation at Montclair, I can think of only two other occasions over the past 20 years when a management representative recommended that a professional staff member be reappointed, only to reverse themselves and rescind that recommendation just days later. . . .  
[Davis cert., para. 8]

#### **ANAYLSIS**

A charging party may obtain interim relief in certain cases. To obtain relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. De Giora, 90 N.J. 126, 132-134 (1982); 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).

N.J.S.A. 34:13A-5.3 guarantees public employees the right to engage in union activities, including making their concerns known to their employer and negotiating collectively. It also guarantees that a majority representative of public employees shall be entitled to act for and represent the interests of public employees. Section 5.4a(3) of the Act prohibits an employer from retaliating against employee(s) for exercising his/her/their rights guaranteed by section 5.3.

Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) established the test for determining if an employer's conduct is discriminatory and violates 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the charging party has proved by a preponderance of the evidence that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of that activity and the employer was hostile toward the exercise of protected rights. Id. at 246. If the employee(s) has/have established a prima facie case, the burden shifts to the employer to demonstrate by preponderance of the evidence that the adverse action occurred for a legitimate business reason and not in retaliation for protected activity.

Id. This affirmative defense need not be considered unless the charging party has established that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs will be resolved by the fact finder. Id. at 244.

Claimed retaliation(s) for protected conduct violating section 5.4a(3) do not normally lend themselves to interim relief because only rarely is there direct and uncontroverted evidence of a public employer's motives. State of New Jersey (Dept. of Human Svcs.) I.R. No. 2018-13, 44 NJPER 434 (¶122 2018); City of Passaic, I.R. No. 2004-7, 30 NJPER 5 (¶2 2004), recon. den., P.E.R.C. No. 2004-50, 30 NJPER 67 (¶21 2004); Newark Housing Auth., I.R. No. 2008-2, 33 NJPER 223 (¶84 2007); City of Long Branch, I.R. No. 2003-9, 29 NJPER 39 (¶14 2003); Compare Chester Borough, I.R. No. 2002-8, 28 NJPER 162 (¶33058 2002), recon. den., P.E.R.C. No. 2002-59, 28 NJPER 220 (¶33076 2002) (employer's retaliatory motive for making a schedule change demonstrated in interim relief proceeding by direct evidence of police chief's state of mind and intent revealed in a memorandum placed in evidence stating that union's grievance was to blame for scheduled change and that the change would be rescinded only if union withdraws its grievance). Also in rare instances, uncontested or compelling circumstantial evidence, such as the timing of certain events, can be decisive in assessing employer

motivation, enabling an inference of hostility or anti-union animus to the exercise of protected rights. Township of Little Falls, I.R. No. 2006-9, 31 NJPER 333 (¶134 2005), recon. den., P.E.R.C. No. 2006-41, 31 NJPER 394 (¶155 2005) (interim relief granted when a mayoral-ordered police schedule change was "suspicious and lends itself to an inference of hostility," given the timing soon after two grievances were filed and despite police chief's strenuous objections to the change).

It appears that the Council has provided compelling circumstantial evidence demonstrating a substantial likelihood of success on its section 5.4a(1) and (3) allegations in a final Commission decision. The evidence pertains to a coincidence in time between the "not recommended" for reappointment decisions and Fiore's, Jones's and Johnson's protected activity and that of the Council on their behalf; their positive evaluations compared to shifted reasons for reversing them, suggesting post hoc rationalization to clothe discriminatory "not recommended" evaluations in legitimacy; and a departure from established practice in administering recommendations indicating a cover for bad motive.

I note preliminarily that the Commission has long-recognized that health and safety issues intimately and directly affect working conditions of public employees. Hillside Tp., P.E.R.C. No. 78-59, 4 NJPER 159 (¶4076 1978); Byram Tp. Bd of Ed. P.E.R.C.

No. 76-27, 2 NJPER 143 (1976), aff'd 142 N.J. Super. 12 (1977); Maurice River Bd of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987); Monmouth Cty., I.R. No. 2021-4, 47 NJPER 116 (¶29 2020), reg. for rev. den., P.E.R.C. No. 2021-15, 47 NJPER 224 (¶50 2020).

The facts indicate that on November 18, 2020, Fiore and Jones, with Johnson's expressed support, complained to Associate Director Mellor in a meeting about having to perform student room inspections on November 25<sup>th</sup>, when students may not yet have vacated or if they had recently, lingering aerosols could pose an avoidable COVID-19 infection risk. The next day, Mellor replied by email advising that a medical doctor, together with Dean Coleman-Carter and VP Pennington, approved the stated plan, reiterating November 25<sup>th</sup> as the inspection date. On November 20<sup>th</sup>, the employees, unassuaged, sought Council assistance with their concern. Council representative Sullivan commenced email exchanges with Dean Coleman-Carter, initially and mistakenly attaching emails he'd received setting forth the complaints that also identified by name Fiore, Jones and Johnson, among others. Coleman-Carter later that day emailed Sullivan, admitting her "shock" to learn of the complaint because she believed that (on November 19<sup>th</sup>), ". . . we had worked through their concerns." On November 23, 2020, Sullivan emailed Coleman-Carter, again requesting a postponement of the scheduled room inspections.

Coleman-Carter later replied, reiterating that the staff had been told of their responsibilities on November 18<sup>th</sup> and advising that, “. . . [it] seems to be becoming a union matter,” and referring it to University Vice President of Human Resources, David Vernon, “. . . for input.” On November 24<sup>th</sup>, another union representative emailed Vernon, identifying Article XXX of the CNA, and seeking a postponement of the room inspections to November 30<sup>th</sup>, at the earliest. Later the same day, Vernon denied the request and directed the inspections to be completed the next day, as they were.

By November 23, 2020, VP Pennington had recommended Fiore and Jones for reappointment (though Johnson read Pennington's positive recommendation of him on November 19<sup>th</sup>). On November 25, 2020, Pennington's recommendation of Johnson for reappointment was sent to Human Resources. I take administrative notice that the University's academic calendar provides that from November 26-29, 2020, there were “no classes, offices closed” for the Thanksgiving holiday ([montclair.edu/academics/academics-calendar/](http://montclair.edu/academics/academics-calendar/)). On an undisclosed date, Pennington admittedly “engaged in conversations” with supervisors regarding “all residence life staff” and “learned information about Fiore, Jones and Johnson” she hadn't known when she recommended their reappointment.

On December 10, 2020, the last day for non-reappointment notifications, when Fiore, Jones, and Johnson were out on a mandatory furlough, they learned from their "Workday" programs that their evaluations were returned to Pennington from Human Resources [because she admittedly decided to rescind them]. Later that day, they each received Pennington's reversals of her earlier "recommended" for reappointment evaluations to "not recommended."

The close timing of these events (within a three-week period), from a group complaint; to a management representative's consternation that it hadn't been resolved; to its escalation as a "union matter", highlighted by Pennington's writing of three positive recommendations for reappointment, only to be retrieved and reversed by her is, standing alone, suspicious. See, e.g., City of Margate, P.E.R.C. No. 87-45, 13 NJPER 498 (¶18183 1987); Downe Tp. Bd of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985).

Included in each of Pennington's decisions to "not recommend" for reappointment Fiore, Jones and Johnson is almost-verbatim repeated (and factually false) criticism of their refusal to perform inspections ("a uniform and extremely necessary part of the job"); failure to discuss concerns with supervisors; and inability to perform, ". . . in the mature and professional manner expected."

The facts appear to show that the three employees performed the room inspections by the University-designated deadline on November 25<sup>th</sup>; they informed Associate Director Mellor - a "supervisor" who instructed them to inspect the rooms - of their COVID-19 health concerns (though Johnson, not personally concerned, expressed support for his co-workers) and their concerns were soon passed to other management personnel, including Pennington; and they lawfully sought their majority representative's assistance in addressing those concerns, notwithstanding Pennington's characterization of their conduct as essentially "immature" and "unprofessional."

The University hasn't specifically defended Pennington's criticisms of the employees' actual or perceived conduct pertaining to the room inspections. Pennington, for her part, appears to imply further criticism in her certification filed in this case:

Rather than seek additional clarification from Mellor as to their expectations, Fiore, Johnson and Jones sought assistance from their union. The union, on behalf of the employees, sought additional time for the inspections to be conducted despite same already being addressed by Montclair. In turn, Montclair denied the unions request. [Pennington cert., para 15]

It appears that these specific written criticisms of Fiore, Johnson and Jones for seeking Council assistance, rather than directly appealing to management, tends to interfere with their



statutory rights set forth in section 5.4a(1) of the Act. New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); Fairview Free Public Library, P.E.R.C. No. 99-47, 25 NJPER 20 (¶30007 1998).

It also appears that these criticisms, embedded in Pennington's decision to not recommend Fiore, Jones and Johnson for reappointment, indicate a violation of section 5.4a(3).

On the record before me, it appears (from Council representative Davis's certification) that on two previous, unspecified occasions in the past twenty years at the University, a management representative who recommended a professional staff member for reappointment rescinded and reversed the recommendation just days later. Omitted from Pennington's certification and from the University's brief is any statement or explanation for her reason or motivation to again discuss with supervisors<sup>2/</sup> professional staff performances for the evaluation period after submitting her positive recommendations of Fiore, Jones and Johnson to Human Resources. (Her positive recommendation of Johnson - - who is positioned for his first multi-year contract - - is lengthy and effusive in praise). Nor has Pennington or the University averred that she previously reversed a positive recommendation for any professional staff

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<sup>2/</sup> The earlier recommendations, Pennington admits, were based in part ". . . on conversations [she] had with supervisors and [her] own observations."

member, let alone, three members at one time. Nor has Pennington or the University averred that she had been negligently misinformed about Fiore's , Jones's and Johnson's performances during the evaluation period. For all of these reasons, it appears to me that the adverse commentary in all three "not recommended" addendums is pretextual, that is, all of it was sourced for the purpose of reaching an adverse employment action intended to conceal Pennington's real motive. It appears that motive was her offense (also implied in her certification) that Fiore, Jones and Johnson complained and elected to seek redress through Council's assistance, rather than through management, exclusively. See Passaic Cty Superintendent of Elections, P.E.R.C. No. 2014-1, 40 NJPER 136 (¶51 2013). As the Supreme Court has stated:

Permitting a public employer to require individual action at the critical moment when vindication of employee rights is at stake would surely 'short circuit' the system of collectivity the Legislature sought to promote in the Act and weaken its benefits. An employee who views the potential consequences of presenting a grievance in his own name with great trepidation would be forced to endure a possible violation of his rights without redress if he is unable to have that grievance presented through his majority representative. Requiring an individual to put himself on the line as the sole means of initiating a grievance is inherently contrary to the very concept of collectivity and would if sanctioned, bring about a 'prejudicial dilution' of the basic right to organize secured by the Constitution. [Red Bank Reg. Ed. Assn' v. Red

Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 138  
(1978)]

It appears that the Council has demonstrated by the required likelihood of success that the University violated 5.4a(1) and (3) by issuing "not recommended" evaluations of unit employees Fiore, Jones and Johnson.

I Also find that irreparable harm will ensue if relief is not granted. Fiore, Jones and Johnson will lose health benefits and housing on June 30, 2021 if they are required to await a determination in a final Commission decision. Either loss isn't curable by money damages. See Franklin Tp., P.E.R.C. No. 2006-13, 32 NJPER 246 (¶102 2006); Butler Bd of Ed., I.R. No. 2011-24 36 NJPER 464 (¶181 2010). I also find that the timing of the University's decision not to reappoint the three employees will have a chilling effect on employees' statutory right to initiate and pursue grievances, causing hesitation among them to enforce contractual rights for fear of retaliation, thereby harming the collective negotiations process. See Township of Little Falls. Although the University asserts that reappointments aren't finalized when they reach the Office of Human Resources, revealing the three employees' "misplaced assumptions," it hasn't provided any example(s) of reversals of such reappointment recommendations at any stage of the process at or above "HR."

I also find that the public interest and a balancing of equities favors a grant of interim relief. This order will

return the parties to the status quo ante, that is, a reversion to the positive recommendations for reappointment, provisionally, while the parties litigate or resolve the unfair practice charge. The Commission has frequently noted that adherence to the tenets of the Act, in this case, the collective right to complain about or grieve working conditions, further the public interest. The harm to the Council and Fiore, Jones and Johnson as previously described, outweighs the harm to the University, which if successful in a final Commission decision, may need to replace the professional staff employees mid-semester.

#### **CONCLUSION**

Under all of these circumstances, I find that the Council has sustained its heavy burden required for interim relief under the Crowe factors and grant the application, pursuant to N.J.A.C. 19:14-9.5(a). This case shall be assigned for further processing.

#### **ORDER**

Montclair University is ordered to provisionally rescind and redact the "not recommended" recommendation and addendums included in the reappointment evaluations of Fiore, Jones and Johnson for the upcoming 2021-2022 academic term; and to continue whatever processing of those amended evaluations that may be necessary to ensure their continued employment, salaries, housing

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44.

and receipt of health benefits while this case is processed until resolution.

/s/ Jonathan Roth  
Jonathan Roth  
Commission Designee

DATED: May 21, 2021  
Trenton, New Jersey