I.R. NO. 2021-21

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF HAMILTON,

RESPONDENT,

-and- Docket No. CO-2021-126

PBA LOCAL 66 AND
PBA LOCAL 66A (SUPERIORS),

CHARGING PARTY.

Appearances:

For the Respondent,
(Elissa Grodd Schragger, Director of Law, Hamilton Township)

For the Charging Party,
Beckett and Paris, LLC, attorneys
(David B. Beckett, of counsel)

INTERLOCUTORY DECISION

On December 16, 2020, Hamilton Township PBA Local 66 (PBA) and Hamilton Township PBA Local 66A, Superior Officers Association (SOA), filed an unfair practice charge against the Township of Hamilton (Hamilton), together with a verified narrative attachment to the charge, an application for interim relief and temporary restraints, a supporting brief, and exhibits.

The charge alleges that Hamilton's unilateral changes to PBA and SOA members' terms and conditions of employment during the parties' negotiations for successor agreements, including

unilateral changes to PBA and SOA's pay issuance date in December 2020 and January 2021, unilateral changes to PBA and SOA's bi-weekly base pay paycheck amounts in 2021, and termination of sick leave buyback for 2020, violate sections 5.4a(1), (2), (3), (5) and (7) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).[1/]

Specifically, in its verified narrative attachment to the charge,[2/] the PBA and SOA allege that PBA is the majority representative for police officers employed by Hamilton, and is a party to a collective negotiations agreement (PBA CNA) with Hamilton, which took effect on January 1, 2017, and expired on

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the 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. (7) Violating any of the rules and regulations established by the commission."

2/ PBA and SOA's verified narrative attachment to the charge includes a verification by Chris DiMeo, PBA President, that "the facts set forth in the Verified Unfair Practice Charge that apply to the PBA and its members are true based on personal knowledge," and a verification by Kyle Thornton, SOA President, that "the facts set forth in the foregoing Unfair Practice Charge that apply to the SOA and its members are true based on personal knowledge."

December 31, 2019. (Verified Narrative, ¶1.) PBA and SOA allege that SOA is the majority representative for all superior officers in the rank of sergeant, lieutenant and captain employed by Hamilton, and is a party to a collective negotiations agreement (SOA CNA) with Hamilton which also took effect on January 1, 2017, and expired on December 31, 2019. (Id., ¶2.) As both CNAs expired on December 31, 2019, both PBA and SOA are currently in negotiations for successor agreements. (Id., ¶3.)

Section 1 of the article entitled "Term of Agreement" (Article 27 in PBA CNA and Article 26 in SOA CNA) that appears in both contracts provides that the existing contract terms continue in force following expiration of the contract term:

> This Agreement shall have a term from January 1, 2017 through December 31, 2019. If the parties have not executed a successor Agreement by December 31, 2019, then this Agreement shall continue in full force and effect until a successor agreement is executed, except as superceded by state or federal law. Negotiations for a successor agreement shall be in accordance with the rules of the Public Employment Relations Commission.

(Id., ¶¶4-5.)

Section 2 of the same "Term of Agreement" article in both contracts expressly incorporates all terms, benefits, and conditions of employment that exist and operate even if those terms, benefits and conditions are not explicitly stated in other articles of the respective contracts:

> All benefits, terms and conditions of employment presently enjoyed by Employees hereunder that have not been included in this Agreement shall be continued in full force and effect.

(Id., ¶6.) PBA and SOA allege that this provision ensures that all practices, and terms and conditions governing pay to employees, including those governing the specific pay days for employees each bi-weekly pay period, as well as the amount and calculation of bi-weekly base pay for employees, are part of the contract terms and must be followed by the parties while they negotiate a new successor contract. (Id., ¶7.)

Section 11 of Article X (Incidental Economic Benefit) in the PBA CNA and Section 3 of Article XI (Leave Time) in the SOA CNA both set forth a sick leave buyback benefit under which eligible employees receive payment in January of the following year for the value of sick leave time that is sold back to Hamilton in November and December, and this benefit has been in both contracts for many years. (Id., ¶8.)

PBA and SOA allege that notwithstanding the law and the undisputed fact that these contract provisions have not been waived or negotiated out of the contracts, and that PBA and SOA do not agree to any changes to these provisions, Hamilton representatives, including Hamilton's mayor and business administrator, have explicitly stated that Hamilton will not honor existing contract obligations governing pay and benefits.

(Id., ¶9.) PBA and SOA allege that Hamilton is brazenly stating that it is doing so because it believes that the existing contract provisions are not binding until there are successor agreements, despite clear opposition to these changes by PBA and SOA. (Id., ¶10.)

On November 12, 2020, after the PBA President emailed Hamilton's business administrator, Kathryn Monzo, requesting that sick leave buyback paperwork be issued, Monzo responded as follows:

> As you may remember, the Mayor and Administrator made the decision earlier this year to suspend sick time buyback for 2020. Your membership is not currently under contract so the Township will not be sending out any paperwork that may have been sent in the past. I would be happy to discuss during upcoming negotiations.

(Id., ¶11 and Exhibit 3.)

With regard to sick leave buyback, PBA and SOA allege that although Hamilton proposed waiving sick leave buyback for calendar year 2020 earlier in 2020, PBA and SOA never agreed to any such waiver, and Hamilton cannot implement this change unilaterally. (Id., ¶12.) By letter dated June 3, 2020, PBA and SOA confirmed that they would not agree to a one-year contract with a wage freeze and waiver of sick leave buyback in 2020, but would engage in negotiations for a longer term agreement when Hamilton was ready for those negotiations. (Id., ¶13; Exhibit 4.) However, PBA and SOA allege that there was no further

engagement from Hamilton on sick leave buyback until the November 12, 2020 email from Monzo. (Id.) PBA and SOA further contend that Monzo's statement that sick leave buyback would be dealt with in negotiations demonstrates that Hamilton is "refusing to follow this contract term during successor negotiations to pressure and undermine" PBA and SOA. (Id., ¶14.)

PBA and SOA further allege that Hamilton is also unilaterally violating the contracts and changing the status quo terms and conditions of employment during negotiations for new contracts with regard to the payroll calendar for PBA and SOA members. (Id., ¶¶15-16.) PBA and SOA allege that they first learned of this unilateral change in an October 15, 2020 general announcement to all employees by Monzo, who advised that Hamilton was changing the payroll calendar for 2020, which had been issued in October 2019 and was consistent with the contract and terms governing pay that had been in place for decades. (Id., ¶16; Exhibits 5-6.) PBA and SOA allege that in the October 15, 2020 memo, Monzo stated that the December 31, 2020 pay date included on the 2020 payroll calendar as the 27th pay issuance date in 2020 had been set in error. (Id., ¶17.) Instead, Monzo stated that it should instead have been designated as the first pay issuance date of 2021 and issued on Saturday, January 2, 2021. (Id.) Monzo explained that the unprecedented Saturday pay day

was required because Friday, January 1, 2021 was a holiday and "[w]e cannot have a pay date on a national holiday." (Id.)

Monzo stated in the same October 15, 2020 memo that the new 2021 payroll schedule that Hamilton was unilaterally creating would now have 27 pay issuance days and so "bi[-]weekly salaries will be adjusted to accommodate this schedule." (Id., ¶18.) PBA and SOA allege that this "curious phrasing" did not provide any direct notice of any specific unilateral reductions to bi-weekly base pay in 2021, but this memo created questions for PBA and SOA because of the change to the pay issuance date for the December 14 to 27, 2020 pay period from December 31, 2020 to January 2, 2021, which PBA and SOA contend were contrary to long-standing practice and established contractual terms. (Id., ¶19.) PBA and SOA allege that by email dated December 11, 2020, Hamilton's representatives again stated that they would not pay members on December 31, 2020, for the last and 27th pay period in 2020, but would now make the pay issuance date January 1, 2021, instead of January 2, 2020 as previously advised. (Id., ¶20; Exhibit 6.)

PBA and SOA allege that the issuance of pay for the December 14-27, 2020 pay period on December 31, 2020 was required because each pay day covers a two week pay period that ends on midnight of the Sunday before the pay issuance date, and the pay issuance date is always the following Friday, or the following Thursday if Friday is a holiday, but the pay issuance date is never moved

back after the following Friday. (Id., ¶21.) PBA and SOA allege that Hamilton has followed this practice, i.e., bi-weekly Friday pay days for the preceding two week pay period ending on the previous Sunday, for decades, including paying members on Thursday if the Friday pay day is a holiday. (Id., ¶22.)

PBA and SOA also contend that the situation faced by Hamilton in 2020/2021 involving 27 pay periods, was also the situation faced by Hamilton in both 1998/1999 and 2009/2010. (Id., ¶¶22-23; Exhibit 8.) In both 1998/1999 and 2009/2010, the "normal" Friday pay day for the last pay period in December was the New Year's Day holiday of January 1, 1999 and January 1, 2010. (Id.) But because Friday, January 1 was a holiday, members were paid a day early in both cases, on Thursday, December 31, 1998 and Thursday, December 31, 2009. (Id.) In both of these previous cases of 1998/1999 ad 2009/2010, that last pay on Thursday, December 31 was the 27th pay issuance date for members in both 1998 and 2009. (Id., ¶23.)

Furthermore, not only were members paid 27 times in both 1998 and 2009, but Hamilton paid the same bi-weekly base pay amount with no reduction in salary in both those December 31 pays, even though there were 27 pays in both 1998 and 2009 instead of the usual 26. (Id., ¶24.) And there was no issue with moving the pay day from the later year (1999 and 2010) up to the earlier year (1998 and 2009). (Id.) PBA and SOA allege that

the payroll calendar issued by Hamilton in October 2019 followed the contract terms and designated 27 pays in 2020 with no reduction in bi-weekly base pay as a result. (Id., ¶25.) Thus, PBA and SOA allege that Hamilton belatedly and unilaterally changed the 2020 pay calendar by changing the pay day for the 27th pay from December 31, 2020 to January 2, 2021, and then January 1, 2021, and violated the terms and conditions governing pay days. (Id., ¶26.)

PBA and SOA also allege that Hamilton's change to the 2020 pay calendar "is linked directly to [Hamilton's] illegal plan to unilaterally reduce bi-weekly pay in 2021 under the false pretense that there are 27 pays in 2021 and so bi-weekly base pay must be reduced." (Id., ¶26.) PBA and SOA allege that there are not 27 pays in 2021, because there are 27 pays in 2020, and December 31, 2020 is the 27th and final pay day in 2020 pursuant to the 2020 payroll calendar, the contracts and past practice. (Id., ¶27; Exhibits 5 and 8.) PBA and SOA allege that "[e]very past administration has known that employees are paid the same bi-weekly amount every year regardless of whether there are 26 or 27 pays in the calendar year." (Id., ¶28; Exhibits 5 and 8.) PBA and SOA also allege that Hamilton "had been following these terms and paying the correct bi-weekly pay to employees in each of the first 25 pay days in 2020 and is set to pay the correct bi-weekly amount on Friday, December 18, 2020," which is the 26th

pay in 2020. (Id., ¶29.) And, "[i]nstead of following the contract and issuing the same bi-weekly pay on December 31, 2020 for the pay period of December 14-27, 2020 as the 27th pay in Calendar Year 2020 as was shown throughout much of 2020 in the Pay Calendar," Hamilton "has unilaterally decided to violate the contract terms without any agreement and in doing so is finally being explicit in its legal position." (Id., ¶30; Exhibit 5.)

PBA and SOA allege that Hamilton's December 11, 2020 email to "explain" pay shows Hamilton moving the pay day from December 31, 2020 and "threatening to unilaterally reduce bi-weekly pay to 1/27th of what it labels as annual base salary starting on the January 15, 2021 pay day and ending on the January 14, 2022 pay day," unless PBA and SOA reach an agreement, stating:

> The 2021 annual base salary for everyone beginning with the January 15, 2021 payroll will be equally split between the next twenty-seven (27) biweekly paydays, with the final pay date on January 14, 2022 unless:
> - the parties have agreed to a new contract with terms; or
> - the base pay for an employee has been altered (increased or decreased) by virtue of a step increase, promotion, other individual increase or reduction in base pay, or termination during this first pay period in 2021 or any biweekly pay period thereafter.

(Id., ¶31; Exhibit 6.)

PBA and SOA allege that "[t]his scheme is as illogical as it is illegal," as Hamilton "has never reduced regular bi-weekly paychecks to employees in any year with 27 paydays (or failed to

move a pay day up one day from a holiday)" because Hamilton "knew it was not permitted by the contract to either move pay days unilaterally or reduce bi-weekly pay in any year with 27 pays," such as in 1998 and 2009. (Id., ¶32; Exhibit 8.) PBA and SOA reiterate that the paystubs that it provided from 1998 and 2009 demonstrate that "the 27th pay day was also the last day of the year, was on Thursday, December 31st substituting for Friday, January 1st," and that "like it was already doing in 2020 until [Hamilton] announced this unilateral change," Hamilton "did not reduce the bi-weekly amount in each of the 27 paychecks." (Id., ¶33; Exhibit 8.)

PBA and SOA further allege that Hamilton "cannot unilaterally create 27 pay days in 2021 by illegally moving the pay day" to January 1, 2021, "nor can it unilaterally reduce bi-weekly paychecks for 2021" in light of the existing contract terms. (Id., ¶34.) And similarly, Hamilton "cannot legally 'suspend' and not honor the sick leave buyback for 2020." (Id., ¶35.)

PBA and SOA allege that they do not have to "guess [Hamilton's] motivation" because "common to these illegal and anti-union actions" is Hamilton's "meritless insistence that it does not have to follow the existing terms and conditions of employment when they are in negotiations for a successor agreement" with PBA and SOA, and Hamilton "is seeking to

undermine" PBA and SOA, and "gain advantage illegally in successor negotiations by ignoring contract terms that are binding and stating they will continue to ignore . . . such terms unless PBA and SOA negotiate a new agreement." (Id., ¶¶36-37.)

PBA and SOA allege that Hamilton's actions "will irreparably harm negotiations and undermine [PBA and SOA] in bargaining," which is contrary to any "false claim that [Hamilton] is negotiating in good faith or interested in good labor relations," and shows that "the equities and status quo strongly support interim relief." (Id., ¶38.) PBA and SOA allege that they "have been acting in good faith and have made it clear each was willing to enter into negotiations," but Hamilton "presented no proposal and has not engaged in good faith negotiations" with PBA and SOA, and thus "the balance of equities strongly favors" PBA and SOA. (Id., ¶39.)

PBA and SOA further allege that Hamilton's position "is the exact opposite of the law whereby the party seeking to change existing terms . . . must negotiate those changes into a successor agreement," and until they do so, "must honor the existing terms." (Id., ¶40.) Thus, PBA and SOA allege that Hamilton's actions "demonstrate a flagrant disregard of established labor relations law and the contract, undermine negotiations and [PBA and SOA's] standing, and must be

immediately enjoined to preserve the status quo during negotiations for a successor agreement." (Id., ¶41.)

As noted above, on December 16, 2020, PBA and SOA filed an application for interim relief and temporary restraints, a supporting brief, and exhibits. PBA and SOA contend that they are entitled to interim relief and temporary restraints that enjoins and restrains Hamilton from: 1) unilaterally changing the pay issuance date for the pay period of December 14 to 27, 2020, from December 31, 2020 to a pay date of January 1, 2021; 2) unilaterally changing bi-weekly base pay paycheck amounts in 2021 to "annual salary" divided by 27, instead of 26; 3) refusing to reinstate sick leave buyback processing for 2020 for all eligible PBA and SOA members; and 4) refusing to rescind any notice to employees that Hamilton would delay or reduce pay in 2020 and 2021, or refusing to process and pay 2020 sick leave buybacks pursuant to the PBA CNA and SOA CNA. PBA and SOA contend that they have demonstrated a likelihood of success on the merits, and that Hamilton's actions will result in immediate and irreparable harm to its members, and therefore PBA and SOA should not have to wait for the resolution of the unfair practice charge before they are granted the requested relief.

On December 18, 2020, I conducted a telephone conference call with the parties to select dates for briefing and a hearing on PBA and SOA's application for interim relief. On December 21,

2020, I issued an Order to Show Cause with Temporary Restraints Pursuant to N.J.A.C. 19:14-9.2, which included the schedule agreed upon by the parties during the December 18, 2020 conference call, i.e., Hamilton's answering brief was due December 28, 2020; PBA and SOA's reply brief was due December 30, 2020; and a hearing via telephone conference call would be conducted on December 31, 2020.[3/] I also ordered that pending the return date, Hamilton was temporarily enjoined and restrained from unilaterally changing and/or altering the pay issuance date for the pay period of December 14 to 27, 2020, from December 31, 2020, the last and 27th pay in calendar year 2020, to a pay date of January 1, 2021 or any date in calendar year 2021, and from unilaterally changing the pay date for that pay period to the first pay in calendar year 2021.

On December 28, 2020, Hamilton filed an answering brief and the Certification of Kathryn Monzo, Hamilton's Business Administrator. In its answering brief, Hamilton opposes PBA and SOA's application for interim relief and "cross-moves" for PBA, SOA and their membership "to immediately make full restitution with interest for the improperly demanded and received extra paycheck paid to the membership in 1998 and 2009 constituting taxpayer moneys" and "additional pay in excess of their

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3/ The parties later requested that the hearing be conducted virtually via Zoom instead of a telephone conference call, and this request was granted.

negotiated annual salary." Hamilton contends that PBA and SOA cannot rely upon the "bonus paycheck" paid in 1998 and 2009 because "this is not the private sector," the contract determines "annual salary," and by "demanding an extra payday," PBA and SOA are demanding a "bonus" of "$755,000 in taxpayer funds," "over what was budgeted and negotiated for." Hamilton argues that PBA and SOA cannot rely upon past practice when the contracts are "unambiguous," and PBA and SOA "cannot obtain from PERC a better contract than the one they negotiated."

Hamilton further argues that it has attempted to negotiate successor contracts with PBA and SOA, but the unions have "stonewalled" and they are not entitled to the "benefit of the expired contract." Hamilton also argues that this is a "contract issue" in "an improper forum," the additional pays of 1/26th of "annual salary" for a 27th pay period in 1998 and 2009 were mistakes, and "there should be a full accounting made of pension payments by current and retired members of the PBA/SOA, as matched by the State, so that the pension calculation is corrected to reflect the salary and pension payments without the wrongful additional paychecks of 1998 and 2009."

Also on December 28, 2020, PBA and SOA submitted a letter in this matter in response to statements made by Hamilton's counsel on a conference call earlier that day in a separate matter also involving an application for interim relief filed by CWA Local

1042 against Hamilton, bearing Docket No. CO-2021-129.[4/] During that conference call, Hamilton's counsel stated that, despite the temporary restraints entered on December 21, 2020, restraining Hamilton from unilaterally changing the pay issuance date for the pay period of December 14 to 27, 2020, from December 31, 2020, the last and 27th pay in calendar year 2020, to a pay date of January 1, 2021, Hamilton had changed the pay date to January 1, 2021. PBA and SOA's counsel wrote on December 28, 2020 that although "an application for enforcement of the Commission's orders is typically made by way of motion," because "the declaration of non-compliance with the temporary restraints was made directly on the call," PBA and SOA requested that the Commission "act sua sponte" to "take action against [Hamilton] for this clear and intentional violation of its Order granting temporary restraints."

Hamilton then submitted a letter later the same day on December 28, 2020 in response to PBA and SOA's December 28, 2020 letter. In this letter, Hamilton argued that this PBA and SOA matter is mandatorily negotiable and should be grieved instead of "litigated as an unfair practice," PBA and SOA members "are not entitled to a bonus above and beyond their contractual annual

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4/ In the Hamilton and CWA Local 1042 matter, CWA Local 1042 is represented by the same counsel as PBA and SOA in this matter, and Hamilton is also represented by the same counsel as in this matter.

salary," PBA and SOA were notified about this issue in October 2020, and therefore had adequate time to file a grievance but chose not to, and Hamilton should not be "forced into paying an unearned and unwarranted bonus from taxpayers moneys which is not contracted for and is a violation of salary ordinances."

On December 30, 2020, PBA and SOA filed a reply brief, an additional Certification of Kyle Thornton, SOA President, and exhibits. In their reply brief, PBA and SOA argue that although Hamilton's response was replete with false factual allegations that PBA and SOA rebutted in the reply Certification of Kyle Thornton, Hamilton did not dispute the material facts that it had unilaterally changed the pay date from December 31, 2020 to January 1, 2021; that in 1998 and 2009, Hamilton had not changed the pay date to January 1, and paid the same bi-weekly pay in a 27th pay on December 31; that Hamilton did not offer any defense for denying sick leave buyback benefits; and that Hamilton altered the December 31 pay date in violation of temporary restraints. PBA and SOA argue that Hamilton's unilateral change of economic terms during negotiations requires interim relief, Hamilton's claim of fiduciary obligations and public interest lack merit, and that contractual terms cannot be unilaterally voided during negotiations. PBA and SOA also argue that Hamilton's "demand" for restitution from 1998 and 2009 "is so absurd that it is difficult to take seriously," but "it lacks

merit, is time barred, is premised upon false assertions that are irrelevant and that impeach the integrity and competence of multiple [Hamilton] administrations which complied with the contract terms."

On December 31, 2020, the parties argued their respective cases on the application for interim relief in a virtual hearing conducted via Zoom.

In addition to the facts described above in PBA and SOA's verified narrative attachment to the charge, the following facts appear.

Kathryn Monzo, Hamilton's Business Administrator, certifies that she was confirmed as business administrator in May 2020, and upon starting her position, she reached out to PBA and SOA to begin negotiations on their successor contracts. (Monzo cert., ¶¶2-3.) Monzo certifies that during that time, Hamilton was working to "ameliorate the financial effects of the pandemic upon our tax base" and therefore Hamilton "passed a very lean budget." (Id., ¶4.) Monzo certifies that due to the "financial fallouts" of the pandemic, Hamilton "proposed a one-year contract" to PBA and SOA, but PBA and SOA "declined and refused to negotiate." (Id., ¶¶5-6.) Monzo further certifies that PBA and SOA "sent a letter to the Mayor but only emailed it to our Personnel Director," and no one from PBA or SOA "followed up with

[Hamilton] regarding our response to the misaddressed letter." (Id., ¶7.)

Monzo then certifies that on October 17, 2020, Hamilton reached out to PBA and SOA regarding negotiations again, but Hamilton only heard back from PBA and SOA "for a date to meet once [Hamilton] sent out communications to its employees about the pay dates." (Id., ¶8.) Monzo certifies that Hamilton "in good faith attempted" to negotiate with PBA and SOA, "but it was apparent the PBA/SOA was waiting to see what the fire unions negotiated." (Id.) Monzo certifies that Hamilton "was willing to negotiate all terms of employment in 2020 and beyond, including sick-time buyback, but was stonewalled by the PBA/SOA for months." (Id.)

Monzo further certifies that "[a]t some point, while I was the Acting CFO as our CFO did not start until the end of July," she realized "that the previous administration made a mistake with the payroll calendar by moving a scheduled 2021 pay date into the calendar year 2020 thereby creating a 27th pay for 2020," and that this occurred "[a]lthough they had divided annual salaries into 1/26 but had designated 27 pay dates for 2020." (Id., ¶9.) Monzo certifies that this occurred despite the fact that Hamilton's "budget only contemplated 26 equal paychecks for salary." (Id., ¶10.)

Monzo certifies that if Hamilton "paid an extra paycheck in 2020, that would equate into an additional $2.15 million of taxpayer moneys, for the entire workforce, before any salary adjustments for 2021," and of the "$2.15 million overpayment, police salaries would be overpaid by more than $755,000." (Id., ¶11.) Monzo certifies that "[u]ltimately, we determined that the extra pay date was wrongly placed on Thursday, December 31, 2020." (Id., ¶12.)

Monzo then certifies that pursuant to Hamilton's Personnel Manual, "pay days are on a Friday and represent the 14 work day pay period ending the previous Sunday." (Id., ¶13.) Monzo certifies that, "for example, the Friday, December 18, 2020 pay day reflects the pay period from Monday, November 30, 2020 through Sunday, December 13, 2020." (Id.)

Monzo certifies that the relevant portion of the Personnel Manual, "Payment of Wages," states

> The Township's regular pay cycle is Monday through Sunday. State law requires records of time worked and of vacation, sick and personal days taken. If you are a non-exempt employee, you must submit signed time sheets to your supervisor. If you are an exempt employee, you must identify sick time, personal time, and vacation time taken in a record submitted to your supervisor on a weekly basis. Although payday is every other Friday, as a courtesy to employees, paychecks are usually distributed bi-weekly on Thursday afternoon. However, there may be circumstances whereby paychecks cannot be distributed on Thursday. Efforts will be

> made to have checks ready by 3:00 p.m. on Thursdays.

(Id.)

Monzo certifies that "this upcoming pay date should fall on January 1, 2021," because "it reflects work done during the 2020 year, the rate of pay would stay the same as any 2020 pay check." (Id., ¶14.) Monzo certifies that, "[a]s normal, checks will be distributed by December 31, 2020 for those that receive live checks," but for those that receive direct deposit, "the funds will be available in their accounts on December 31, 2020." (Id., ¶15.) However, Monzo certifies that for both "live or direct deposit," the checks "will be dated January 1, 2021." (Id.) Monzo certifies that "the next bi[-]weekly pay, in calendar year 2021, shall be paid on January 15, 2021," and beginning with this January 15, 2021 check, the "2021 annual base salary for everyone . . . will be equally split between the next twenty-seven (27) bi[-]weekly pay periods, with the final pay date for 2021 pay period occurring on January 14, 2022." (Id.)

Monzo certifies that "[p]ay dates are scheduled with our Payroll vendor in advance, and the timing of payroll data input, and processing checks and/or direct deposits is challenging particularly in a week that coincides with a holiday." (Id., ¶16.) Monzo certifies that "[w]e spoke to each of the unions about this via Zoom conference calls," but PBA and SOA "refused to agree to this plan," and "told me that the pattern and

practice in the past was to overpay annual salaries in a 27-pay year." (Id., ¶¶17-18.) Monzo then certifies that "[o]ne of [PBA and SOA's] representatives admitted they knew it was an extra paycheck above and beyond their annual salary and several felt it was something [Hamilton] should do." (Id., ¶18.) Monzo finally certifies that "[a]nnual salaries . . . are approved by Council and signed in a collective bargaining agreement," and "[a]ny overpayment of salary would not only be a violation of the collective bargaining agreement, but also a violation of the Salary Ordinances." (Id., ¶19.) Monzo does not provide any additional detail regarding salary ordinances.

In his reply Certification, SOA President Kyle Thornton certifies that Monzo "makes inaccurate claims that do not dispute the fundamental facts stated in the Verified Charge," namely "that [Hamilton] has unilaterally changed existing terms and conditions of employment governing pay and benefits for members of the PBA/SOA when we are in the middle of successor negotiations and [Hamilton] is forcing us to negotiate an agreement to get these unilateral changes reversed." (Thornton reply cert.,¶3.) Thornton certifies that Monzo does not dispute "proofs showing [Hamilton's] unilateral refusal to honor the sick leave buyback benefit in the contract," nor does Monzo dispute "[Hamilton's] assertions that our members will not receive this negotiated benefit because the contract 'expired' on December 31,

2019." (Id., ¶4.) Thornton certifies that Monzo's certification tells a "false and irrelevant story about how the PBA and SOA have failed to negotiate" and that Hamilton "must be allowed to make unilateral changes to negotiable terms because its position is 'just'," and in doing so, "they concede the accuracy of the Verified Charge." (Id., ¶5.) Thornton certifies that Monzo correctly asserted that Hamilton "proposed a one year contract to the PBA and SOA with a wage freeze and no sick leave buyback benefit in or about May 2020 and that it was refused, but what follows is fiction." (Id., ¶7.)

Thornton further certifies that Monzo "falsely claims that the PBA/SOA refused to negotiate when the undisputed documents show the June 3, 2020 letter sent to the Mayor care of [Hamilton's] Personnel Director, Louis Guarino" because Hamilton "had designated [Guarino] as a point person," and in the letter, PBA and SOA "confirmed what [PBA and SOA] had made clear in person, namely that we would negotiate a longer term agreement and would talk when the Township was ready." (Id., ¶8; Exhibit 4 to Verified Charge.) Thornton certifies that "[t]he delayed response from [Hamilton] did not surprise [PBA and SOA] because early in 2020 [Hamilton] was first focusing upon the fire consolidation and contract" and would not "address [PBA and SOA's] issues until [fire consolidation] was done, which we all knew would take much of the year." (Id., ¶9.) Thornton further

certifies that PBA and SOA "knew [Hamilton] was inclined to a very favorable deal for the fire fighter unions" and PBA and SOA "wanted to see the full contours of the deal because patterns and comparables are essential factors in any negotiations, and police and fire are always linked." (Id., ¶10.)

Thornton certifies that PBA and SOA "did not receive any request or demand to negotiate" from Hamilton and "so [the parties] did not start talking again until late in October [2020]." (Id., ¶11.) Thornton certifies that in her certification, Monzo "proudly states that what brought us to negotiate was [Hamilton's] announcement that [it was] changing pay dates and bi-weekly pay," and thus Hamilton was "admitting it was using the announced unilateral changes to pay and benefits to try to force" PBA and SOA "to agree to [Hamilton's] terms." (Id., ¶12.)

Thornton then certifies that in her certification, Monzo "concedes . . . that [Hamilton] decided to change the pay date from December 31, 2020 and to impose this without negotiations claiming it had to do so because it had only budgeted for 26 paychecks" in the 2020 budget, and that the "Payroll Calendar issued for 2020 showing 27 bi-weekly pays in 2020 (Exhibit 5 to the Verified Charge) was in error and again had to be unilaterally changed." (Id., ¶13.) Thornton certifies that Monzo thereby "conced[ed] [Hamilton] committed an unfair

practice," and that these claims are false because "not only did the past administration properly issue the Payroll Calendar for 2020 in conformity with existing terms and conditions requiring 27 bi-weekly pays with no reduction," but it also "ensured that it was budgeted for by paying the first of the 27 pays [in 2020] from the 2019 budget," and so the "26 pays budgeted for 2020 by this administration are more than adequate." (Id., ¶14.)

Thornton certifies that PBA and SOA know that the first of the 27 pays in 2020 was paid from the 2019 budget "because the official Audit Trail for the 2019 Hamilton Township budget obtained by the PBA/SOA shows the first pay in 2020, issued on January 3, 2020, was paid from the 2019 budget." (Id., ¶15; Exhibit 1 to Thornton reply cert.) Thornton then certifies that these 2019 Hamilton budget official audit records "show that because the first pay date in Calendar Year 2020 on January 3, 2020 was paid from the 2019 budget there would be only 26 pay days in the 2020 budget including the December 31, 2020 pay day," and Monzo's certification to the contrary is "demonstrably false." (Id., ¶¶16-17.)

Thornton then certifies that Monzo's claims that the parties did not engage in negotiations on the pay date or the 27th pay issues, and that PBA and SOA "took an unreasonable position in which it [sought] 'unfairly' to be overpaid," and thus "'forc[ed]' [Hamilton] to act unilaterally," are "demonstrably

false" and "an admission of an unfair practice." (Id., ¶¶18-19.) Thornton certifies that PBA and SOA made "multiple efforts" to address the payroll history and 27th pay issue with Hamilton, as demonstrated by a November 12, 2020 email to the Hamilton Mayor from PBA and SOA negotiating team representative, Steven Gould. (Id., ¶21; Exhibit 2.)

Thornton certifies that in that November 12, 2020 email, Gould "painstakingly explains why the unilateral changes being planned by [Hamilton] were illegal and needed to be rescinded," while "providing citations to the State Wage and Hour law and federal guidance from the Office of Personnel Management (OPM) on the 27th pay issue." (Id., ¶22; Exhibit 2.) Thornton certifies that Gould explains in the email that "absent a collectively negotiated agreement[,] the status quo prevails and the current practice of [Hamilton] which is consistent with that of the federal government in which there are 27 pay years with no reduction in bi-weekly pay must be continued and is fully supported by the guidance of the OPM." (Id., ¶23; Exhibit 2.) Thornton certifies that the Gould email includes the following OPM guidance on 27 pay years:

> There are usually 26 pay dates each year. Over a period of several years, employees can expect to experience 27 pay days in a calendar year. Therefore, employees can actually receive more or less than their annual rate of basic pay in a given calendar year.

(Id., ¶23; Exhibit 2.)

Thornton certifies that this analysis by OPM "demonstrates also how the claim that paying the same bi-weekly pay creates some unjust enrichment is false" because when, as in Hamilton, "bi-weekly pay is derived by dividing salary by 2080 hours[,] there will always be unpaid hours each 26 pay year" as "each 26 pay year is based upon 364 days," not 365 days. (Id., ¶24.) Thornton further certifies that other examples of unpaid hours in 26 pay years include if he "worked a schedule of 2100 hours in 2017 and was paid for 2080 [hours]," or member who worked "8.5 hour shifts in 2016, 2018, 2019" who "worked 2088 hours," but were paid for 2080. (Id., ¶24.) Thus, Thornton certifies that due to unpaid hours in 26 pay years, "[t]he parties have always understood and agreed that in the ten years where there are 26 pays," PBA and SOA members "who are paid these 26 bi-weekly pays are essentially working one day or more on average for free each year and it is in the 27th pay year that this [underpayment] is addressed." (Id., ¶25.)

Thornton then certifies that the parties "could negotiate a pay date schedule such as two pays per month to avoid this but the parties have not done this," and instead "have established and agreed to the practice whereby bi-weekly pay does not change regardless of whether there are 27 pays in a year or 26, just as the federal government and most employers do." (Id., ¶26;

Exhibit 2.) Thornton certifies that no PBA or SOA representative "ever 'admitted' that a 27th pay was an extra paycheck[,] or not pay for work performed because we know this is payment of salary that we are owed and this is a contractual requirement and agreement, spanning decades." (Id., ¶27.) Thornton certifies that he has "seen contracts back to 1993" and "the language and terms governing wages are the same over the years that include 2020, 2009 and 1998," and "bi[-]weekly pay does not change regardless of whether it is a 26 or 27 pay year . . . unless new terms are negotiated to agreement." (Id., ¶¶28-29.)

Thornton certifies that Monzo's "parade of allegations about budget harms, and unfairness of paying employees for their work is not only insulting and wrong," but it is "a false claim that attempts to obscure a lack of negotiations and engagement by [Hamilton] which seeks to only act unilaterally and not negotiate." (Id., ¶30.)

Thornton also certifies that Monzo's reliance on the Hamilton Personnel Manual is misplaced, as there is clear language in the Personnel Manual "which states that it is subordinate to any collective bargaining agreement" as follows:

> In the event there is a conflict between these rules and any collective bargaining agreement, personnel services contract, or federal or state law including the Attorney General's Guidelines with respect to police department personnel matters and the New Jersey Civil Service Act, the terms and

> conditions of that contract or law shall prevail.

(Id., ¶31; Exhibit 4 (emphasis added).)

Finally, Thornton certifies that PBA and SOA have had a "long and well established relationship with multiple [Hamilton] administrations," which have "understood that the [CNA] continues to govern even when we are negotiating a new agreement" and have "paid the 27 pays in exactly the way we have asserted." (Id., ¶¶32-33.) Thornton certifies that past administrations have paid the 27 pays at the same bi-weekly salary "not because they were unaware dupes or wanted to pay us some 'extra'. . . but because both sides understood the agreed upon terms governing bi-weekly pay and pay dates had to be followed." (Id., ¶33.)

ANALYSIS

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. DeGioia, 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).

Local 195, IFPTE v. State, 88 N.J. 393 (1982), articulated the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
>
> [88 N.J. at 404-405.]

Applying the negotiability test required by Local 195, IFPTE v. State, 88 N.J. 393 (1982), the Commission has consistently held that the timing of paychecks is mandatorily negotiable and that changing the timing without first negotiating with the affected employees' majority representative violates subsection 5.4a(5) and, derivatively, 5.4a(1) of the Act. See, e.g., Twp. of West Orange, PERC No. 2018-26, 44 NJPER 291 (¶81 2018); Brick Bd. of Ed., P.E.R.C. No. 2003-25, 28 NJPER 436 (¶33160 2002) (July payday delayed two days for 12-month employees and number of

September paydays reduced for 10-month employees from three to two); Borough of Fairview, P.E.R.C. No. 97-152, 23 NJPER 398 (¶28183 1997) (pay period changed from weekly to bi-weekly); and Township of Fairfield, P.E.R.C. No. 97-60, 23 NJPER 13 (¶28013 1996) (pay period changed from weekly to bi-weekly).

Employment conditions may arise not only from the parties' collective negotiations agreement, but also through an established practice not enunciated in the parties' agreement. An established practice arises "from the mutual consent of the parties, implied from their conduct." Twp. of West Orange, PERC No. 2018-26, 44 NJPER 291 (¶81 2018); Caldwell-West Caldwell Bd. of Ed., P.E.R.C. No. 80-64, 5 NJPER 536, 537 (¶10276 1979), aff'd in part, rev'd in part, 180 N.J. Super. 440 (App. Div. 1981).

N.J.S.A. 34:13A-5.3 sets forth a public employer's obligation to negotiate with a majority representative before changing working conditions:

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

Consistent with the Act, the Commission and courts have held that changes in negotiable terms and conditions of employment must be addressed through the collective negotiations process because unilateral action is destabilizing to the employment relationship and contrary to the principles of our Act. See, e.g., Atlantic County., 230 N.J. 237, 252 (2017); State of NJ and CWA, P.E.R.C.

No. 2018-35, 44 NJPER 328 (¶193 2018); Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1997), aff'd, 334 N.J. Super. 512 (App. Div. 1999), aff'd, 166 N.J. 112 (2000); Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 337-338 (1989); Galloway Twp. Bd. of Educ., 78 N.J. 25, 52 (1978).

In Galloway, supra, the New Jersey Supreme Court explained that the proscription of any unilateral implementation of changes in terms and conditions of employment incorporated by the Legislature in N.J.S.A. 34:13A-5.3 is similar to, and more expansive than, the private sector labor law principle set forth in the United States Supreme Court decision NLRB v. Katz, 369 U.S. 736 (1962). Galloway, 78 N.J. at 48. The New Jersey Supreme Court described the Katz principle as:

> The basis of the rule prohibiting unilateral changes by an employer during negotiations is the recognition of the importance of maintaining the then-prevailing terms and conditions of employment during this delicate period until new terms and conditions are arrived at by agreement. Unilateral changes disruptive of this status quo are unlawful because they frustrate the "statutory objective of establishing working conditions through bargaining." NLRB v. Katz, supra, 369 U.S. at 744, 82 S. Ct. At 1112.
>
> [Galloway, 78 N.J. at 48.]

More recently, in Atlantic County, supra, the New Jersey Supreme Court reiterated this statutory duty to negotiate:

> Thus, employers are barred from "unilaterally altering . . . mandatory bargaining topics, whether established by expired contract or by

> past practice, without first bargaining to impasse." Bd. of Educ. v. Neptune Twp. Educ. Ass'n, 144 N.J. 16, 22, 675 A.2d 611 (1996) (citation omitted); accord Galloway Twp. Bd. of Educ. v. Galloway Twp. Educ. Ass'n, 78 N.J. 25, 48, 393 A.2d 218 (1978) (finding Legislature, through enactment of EERA, "recognized that the unilateral imposition of working conditions is the antithesis of its goal that the terms and conditions of public employment be established through bilateral negotiation").
>
> [230 N.J. at 252.]

In Atlantic County, the Supreme Court determined that the parties' expired contracts provided for the continuation of salary guide increments post-contract expiration, so the freeze of those increments during collective negotiations violated the Act. The Court held:

> We find that salary step increments is a mandatorily negotiable term and condition of employment because it is part and parcel to an employee's compensation for any particular year. . . . Accordingly we must determine whether the salary increment systems provided for in the expired CNAs still governed working conditions during the hiatus period between agreements. See N.J.S.A. 34:13A-5.3 - 5.4(a)(1), and -5.4(a)(5). Here, we need not look beyond the contracts themselves to conclude that the step increases continued beyond the expiration of the contracts. . . . Because the salary increment system was a term and condition of employment that governed beyond the CNA's expiration date, County and Bridgewater Township committed an unfair labor practice when they altered that condition without first attempting to negotiate in good faith, in violation of N.J.S.A. 34:13A-5.3, -5.4(a)(1), and -5.4(a)(5).

[230 N.J. at 253-254, 256 (emphasis added).]

The Court stated that if the parties had intended to cease increment payments, they could have negotiated "clear contractual language [that] leaves no room for confusion" such as "increments shall not be paid unless and until the parties agree to a successor contract." Id. at 256. The Court also explained that "[h]ad the . . . agreements been silent about whether the terms of the salary increment system were to continue, the issue in this appeal . . . might well have required careful consideration of past practices, custom and viability of the dynamic status quo doctrine." Id.

Similarly, in Galloway, the Supreme Court found that if continuation of a scheduled salary increment is determined to be an existing working condition that constitutes an element of the status quo, then "the unilateral denial of that increment would constitute a modification thereof without the negotiation mandated by N.J.S.A. 34:13A-5.3 and would thus violate N.J.S.A. 34:13A-5.4(a)(5)." 78 N.J. at 49-50; see also Howell Tp. Bd. of Ed., P.E.R.C. No. 86-44, 11 NJPER 634 (¶16223 1985); State of New Jersey, P.E.R.C. No. 87-21, 12 NJPER 744 (¶17279 1986); Camden Housing Authority, P.E.R.C. No. 88-5, 13 NJPER 639 (¶18239 1987); Scotch Plains-Fanwood Bd. of Ed., P.E.R.C. No. 91-114, 17 NJPER 336 (¶22149 1991); CWA and State, I.R. No. 82-2, 7 NJPER 532, 536-537 (¶12235 1981).

Consistent with the Supreme Court's Atlantic County 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. See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn., 78 N.J. 25, 49 (1978). It is also well settled that a public employer's unilateral change to terms and conditions of employment during negotiations for a successor contract has a chilling effect, undermines labor stability, and constitutes a refusal to negotiate. See Academy Urban Leadership, IR No. 2020-9, 46 NJPER 353 (¶86 2020); State of NJ and CWA, P.E.R.C. No. 2018-35, 44 NJPER 328 (¶193 2018); Nutley Tp., IR No. 99-19, 22 NJPER 262 (¶303109 1999). Furthermore, a public employer's repudiation of a CNA through the unilateral change of terms and conditions of employment constitutes irreparable harm warranting interim relief. Academy Urban Leadership, supra; Twp. of Union, 28 NJPER 198 (¶33070 2002); Willingboro Bd. of Ed., 11 NJPER 675 (¶16231 1985); Jersey City Bd. of Ed., 9 NJPER 525 (¶14213 1983).

I now examine the first Crowe factor, whether PBA and SOA have a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. Notably, the relevant facts in this matter are undisputed. It is undisputed that the PBA and SOA CNAs both expired on December 31, 2019, and

that the parties are currently negotiating successor contracts. It is undisputed that in October 2020, Hamilton unilaterally changed the PBA and SOA pay issuance date for the December 14 to 27, 2020 pay period from December 31, 2020 to January 2, 2021, and then to January 1, 2021. It is undisputed that after I granted PBA and SOA temporary restraints on December 21, 2020 ordering Hamilton to pay their members on December 31, 2020, Hamilton did not comply with those restraints, and instead continued to pay on January 1, 2021. It is undisputed that Hamilton unilaterally suspended the PBA and SOA's contractual sick leave buyback policy for eligible PBA and SOA members in 2020. It is undisputed that Hamilton unilaterally changed the status quo bi-weekly base pay for PBA and SOA members in 2021 to 1/27th, instead of 1/26th, of "annual salary".

It is also undisputed that there is a past practice between the parties regarding 27 pay period years, and that the situation faced by Hamilton in 2020/2021 involving 27 pay periods was also the situation faced by Hamilton in both 1998/1999 and 2009/2010. Again, in both 1998/1999 and 2009/2010, the Friday pay day for the last pay period in December was the New Year's Day holiday of January 1, 1999 and January 1, 2010, but because of the holiday, members were paid a day early on Thursday, December 31, 1998 and Thursday, December 31, 2009. In both 1998/1999 ad 2009/2010, that last pay on Thursday, December 31 was the 27th pay for those

years. Not only were members paid 27 times in both of those years, but Hamilton paid the same status quo 1/26th bi-weekly base pay amount with no reduction in salary in both of those December 31 pays, and with no issue about moving the pay day from the later year to the current year. Furthermore, Hamilton followed the past practice and issued a payroll calendar in October 2019 that designated 27 pays in 2020 with no reduction in bi-weekly pay. Then in October 2020, Hamilton unilaterally changed the pay day for the 27th pay from December 31, 2020 to January 2, 2021, and then to January 1, 2021, in violation of a past practice of paying on December 31.

Hamilton does not dispute that it made those 27th pays of 1/26th of "annual salary" in 1998 and 2009, but argues that those 27th pays were mistakes, and "cross-moves" that "there should be a full accounting made of pension payments by current and retired members of the PBA/SOA, as matched by the State, so that the pension calculation is corrected to reflect the salary and pension payments without the wrongful additional paychecks of 1998 and 2009."[5/] However, the Commission has held that if a public employer repeats an allegedly "mistaken" practice twice, that allegedly "mistaken" practice establishes a term and

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5/ As PERC has no jurisdiction over PBA and SOA member pension calculations, nor does PERC have jurisdiction over alleged "wrongful additional paychecks" issued to PBA and SOA members in 1998 and 2009, Hamilton's "cross-motion" on those issues will not be addressed here.

condition of employment. See Barnegat Tp. Bd. of Ed., P.E.R.C. No. 91028, 16 NJPER 484 (¶21210 1990), aff'd NJPER Supp. 2d 268 (¶221 App. Div. 1992)(Commission held that majority representative demonstrated substantial likelihood of success because public employer's allegedly "mistaken" provision, in effect for two years, established a term and condition of employment); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 2016-3, 42 NJPER 95 (¶26 2015).

Thus, continuation of the status quo during collective negotiations pursuant to Atlantic County means that Hamilton must continue the prevailing terms and conditions of employment established through the expired CNAs and past practice.[6/] As the past practice has been that Hamilton has paid a 27th pay on December 31 in both 1998 and 2009, the undisputed facts demonstrate that PBA and SOA have a substantial likelihood of prevailing in a final Commission decision on its legal and

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6/ As described earlier, both the PBA and SOA CNAs explicitly address the issue of continuation of benefits after the expiration of the contracts in the "Term of Agreement" article, which states that if the parties have not executed a successor CNA before the current CNA expires on December 31, 2019, then the current CNA "shall continue in full force and effect until a successor agreement is executed, except as superceded by state or federal law." (Verified Narrative, ¶¶4-5 (Art. 27 in PBA CNA, Art. 26 in SOA CNA).) And both the PBA and SOA CNAs contain the same "Term of Agreement" article that expressly incorporates all terms, benefits, and conditions of employment that exist and operate even if they are not explicitly stated in other articles of their contracts. (Id., ¶6.)

factual allegations that Hamilton violated the Act when it unilaterally changed PBA and SOA's December 31, 2020 pay issuance date to January 1, 2021. Hamilton's argument that a 27th pay on December 31 is an inappropriate "bonus" is baseless, as it is simply a continuation of the status quo during collective negotiations pursuant to Atlantic County.

Furthermore, a determination that Hamilton should have issued a 27th pay in 2020 on December 31, 2020, instead of delaying that pay to January 1, 2021, eliminates Hamilton's unilaterally created 27, instead of 26, pay periods in 2021. Again, Hamilton's unilateral change to a January 1, 2021 pay date created 27 pay periods in 2021, instead of the status quo of 26. However, Hamilton must maintain both the status quo pay issuance date of December 31, 2020, as well as the status quo bi-weekly base pay of 1/26th of "annual salary" in 2021. Hamilton cannot unilaterally change status quo bi-weekly base pay in 2021 during negotiations.

With regard to sick leave buyback, PBA and SOA allege that Hamilton proposed waiving sick leave buyback for 2020 earlier in 2020, PBA and SOA never agreed to any such waiver, and then Hamilton unilaterally terminated the program. Hamilton does not address its termination of the sick leave buyback policy in 2020 in its answering brief, and thus, PBA and SOA's allegations are undisputed. Based upon these undisputed facts, PBA and SOA have

demonstrated that they have a substantial likelihood of prevailing in a final Commission decision that Hamilton's unilateral termination of sick leave buyback for eligible PBA and SOA members in 2020 violates Atlantic County and the continuation of status quo terms and conditions of employment as established through the expired CNAs.

Next, Hamilton argues that PBA and SOA's unfair practice charge is actually a "contract issue" filed in "an improper forum." However, PBA and SOA are simply exercising their well-supported rights under Atlantic County to the continuation of status quo terms and conditions of employment as established through the expired CNAs and past practice during their contract negotiations. PBA and SOA are correct that they should not have to negotiate with Hamilton simply to retain their status quo payroll calendar, bi-weekly base pay, and sick leave buyback benefits.

In Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000), the Commission distinguished between "a claim that a past practice was contractually binding for the life of a contract, a claim that must be submitted to a grievance arbitrator," see also State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984)("deferral to a negotiated grievance procedure culminating

in binding arbitration is generally appropriate when a charge essentially alleges a violation of subsection 5.4a(5) interrelated with a breach of contract claim"), and "a claim that an existing employment condition could not be changed without prior negotiations, a claim that may be raised in an unfair practice charge." Middletown Tp., 24 NJPER at 28. With regard to the second option, the Commission can enforce an employer's obligation to negotiate before modifying existing employment conditions, and has the remedial authority to restore the status quo before negotiations through an unfair practice charge. Middletown Tp., supra, 24 NJPER at 28. Thus, as PBA and SOA are not seeking a determination that they have a contractual right to have these benefits maintained, but are simply seeking to retain the status quo before negotiations with Hamilton, this matter is appropriately filed as an unfair practice charge with the Commission.

Finally, with regard to Hamilton's argument that its budgetary problems provided a substantial and legitimate business justification to make the payroll change unilaterally, a public employer's economic crisis does not in and of itself permit the employer to forego negotiations on an issue that is otherwise mandatorily negotiable. North Hudson Reg'l Fire and Rescue, supra, 41 NJPER 353 (¶112 App. Div. 2015) (public employer's ability to pay is not material to whether it engaged in an unfair

practice by failing to negotiate in good faith and unilaterally changing terms and conditions of employment).

Accordingly, under these unique circumstances, I find that PBA and SOA have established a substantial likelihood of prevailing in a final Commission decision on their legal and factual allegations.

I next consider irreparable harm. Harm becomes irreparable in circumstances where the Commission cannot fashion an adequate remedy which would return the parties to the conditions that existed before the Commission of any unfair practice at the conclusion of the processing of the unfair practice charge. City of Newark, I.R. No. 2006-3, 31 NJPER 250 (¶97 2005); City Bd. of Ed., I.R. No. 2003-14, 29 NJPER 305 (¶94 2003); Sussex Cty., I.R. No. 2003-13, 29 NJPER 274 (¶81 2003). "Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe, 90 N.J. at 132-33.

Here, PBA and SOA claim that they are suffering irreparable harm during their contract negotiations due to Hamilton's unilateral changes to the payroll calendar and 2021 bi-weekly base pay, as well as Hamilton's termination of sick leave buyback. Again, it is well settled that a public employer's unilateral change to terms and conditions of employment during negotiations for a successor contract has a chilling effect, undermines labor stability, and constitutes irreparable harm

warranting interim relief. See Academy Urban Leadership, IR No. 2020-9, 46 NJPER 353 (¶86 2020); Twp. of Union, 28 NJPER 198 (¶33070 2002); Willingboro Bd. of Ed., 11 NJPER 675 (¶16231 1985); Jersey City Bd. of Ed., 9 NJPER 525 (¶14213 1983). That is certainly the case here, where Hamilton has expressly stated that PBA and SOA must negotiate to gain back status quo terms and conditions of employment established in their expired CNAs, because their CNAs have expired. Accordingly, I find that PBA and SOA have demonstrated irreparable harm.

Finally, to grant interim relief, the public interest must not be injured and the relative hardship to the parties in granting or denying relief must be considered. I find that the public interest would not be injured by requiring Hamilton to maintain the status quo during collective negotiations with PBA and SOA by continuing the prevailing terms and conditions established through the expired contracts and past practice in accordance with Atlantic County and Galloway. Similarly, I find that there is little hardship to Hamilton if ordered to maintain the status quo during negotiations, and comparably greater hardship to PBA and SOA caused by continuing to allow Hamilton to chill negotiations by unilaterally changing expired contract terms and past practice without negotiating to impasse as required by Atlantic County. In addition to chilled negotiations, PBA and SOA members have experienced the economic

hardship of delayed bi-weekly pay in 2020, decreased bi-weekly pay in 2021, and the termination of sick leave buyback for 2020. Thus, I find that the relative hardship to the parties weighs in favor of granting PBA and SOA's request for interim relief.

In sum, as PBA and SOA have demonstrated that they have a substantial likelihood of prevailing in a final Commission decision on their legal and factual allegations, that irreparable harm will occur if the requested relief is not granted, that the public interest would not be injured by an interim relief order, and that the relative hardship to the parties weighs in favor of granting relief, PBA and SOA's request for interim relief is granted.

Accordingly, PBA and SOA's application for interim relief is granted, and Hamilton is enjoined and restrained from: 1) unilaterally changing the pay issuance date for the pay period of December 14 to 27, 2020, from December 31, 2020 to a pay date of January 1, 2021; 2) unilaterally changing bi-weekly base pay amounts in 2021 to "annual salary" divided by 27, instead of 26; 3) refusing to reinstate sick leave buyback processing for 2020 for all eligible PBA and SOA members; and 4) refusing to rescind any notice to employees that Hamilton would delay or reduce pay in 2020 and 2021, or refusing to process and pay 2020 sick leave buybacks pursuant to the PBA and SOA CNAs.

ORDER

PBA and SOA's application for interim relief is granted. Hamilton is enjoined and restrained from: 1) unilaterally changing the pay issuance date for the pay period of December 14 to 27, 2020, from December 31, 2020 to a pay date of January 1, 2021; 2) unilaterally changing bi-weekly base pay amounts in 2021 to "annual salary" divided by 27, instead of 26; 3) refusing to reinstate sick leave buyback processing for 2020 for all eligible PBA and SOA members; and 4) refusing to rescind any notice to employees that Hamilton would delay or reduce pay in 2020 and 2021, or refusing to process and pay 2020 sick leave buybacks pursuant to the PBA and SOA CNAs.

/s/Lisa Ruch
Lisa Ruch
Commission Designee

DATED: February 1, 2021
Trenton, New Jersey