THE ATLANTIC CITY POLICEMEN'S BENEVOLENT ASSOCIATION LOCAL 24, THE ATLANTIC CITY SUPERIOR OFFICERS' ASSOCIATION, *Appellants/Plaintiffs*, v. **CITY OF ATLANTIC CITY, STATE OF NEW JERSEY, NEW JERSEY DIVISION OF LOCAL GOVERNMENT SERVICES IN THE DEPARTMENT OF COMMUNITY AFFAIRS, JACQUELYN SUAREZ,** Director of the Division of Local Government Services in the Department of Community Affairs in her official capacity**,** *Respondents/Defendants*.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION *Docket No.: A-002478-23T2* Appeal of the March 4, 2024 Orders of the Honorable Michael J. Blee, Superior Court of New Jersey, Atlantic County-Law Division, Trial Docket No. ATL-L-002790-23

APPELLANTS' INITIAL BRIEF IN SUPPORT OF APPEAL

O'BRIEN, BELLAND & BUSHINSKY, LLC
509 S. Lenola Road, Bldg. 6
Moorestown, NJ 08057
T: (856) 795-2181
Attorneys for Appellants/Plaintiffs, The Atlantic City PBA Local 24 & The Atlantic City Superior Officers' Association

On the Brief:
Kevin D. Jarvis, Esquire (022452001)
David F. Watkins Jr., Esquire (030812004)

TABLE OF CONTENTS

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED iii

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 4

STATEMENT OF FACTS 5

I. PROMOTIONS 5

II. THE MSRA 7

III. PBA-1 LAWSUIT AND SETTLEMENT 9

IV. THE MSRA IS RENEWED AND AMENDED 11

STANDARD OF REVIEW 14

LEGAL ARGUMENTS 15

POINT I: THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS THE VERIFIED COMPLAINT BY FINDING THAT THE MSRA PREVENTS THE POLICE UNIONS' CLAIMS TO RECOVER UNPAID WAGES.
(Pa000017-18, 26-29) 15

POINT II: THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS THE VERIFIED COMPLAINT AS PLAINTIFFS HAVE PLED PRIMA FACIE CAUSES OF ACTION.
(Pa000017-18, 26-29) 23

POINT III: THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS THE VERIFIED COMPLAINT AS THE MSRA DOES NOT DEPRIVE PAINTIFFS' MEMBERS OF A VESTED BENEFIT. (Pa000017-18, 26-29)..... 29

CONCLUSION 31

TABLE OF JUDGMENTS, ORDERS, AND RULINGS BEING APPEALED

March 4, 2024 Court's Order and Decision Pa000017

TABLE OF AUTHORITIES

Federal Cases **Page(s)**

Frederico v. Home Depot,
507 F.3d 188 (3d Cir. 2007) 23

Portillo v. Nat'l Freight, Inc.,
2022 U.S. Dist. LEXIS 103186 (D.N.J. June 9, 2022) 27

Somers Constr. Co. v. Board of Educ.,
198 F.Supp. 732 (D.N.J. 1961) 14

Suburban Transfer Serv., Inc. v. Beech Holdings, Inc.,
716 F.2d 220 (3d Cir. 1983) 26

State Cases

Association Group Life, Inc. v. Catholic War Veterans,
61 N.J. 150 (1972) 24

Atl. City Superior Officers' Ass'n v. City of Atl. City, No. A-3117-20,
2022 N.J. Super. Unpub. LEXIS 1194 (App. Div. June 30, 2022) 17-19, 21

Barila v. Bd. of Educ. of Cliffside Park,
241 N.J. 595 (2020) 30

Goldfarb v. Solimine,
245 N.J. 326 (2021) 26

Independent Dairy Workers Union v. Milk Drivers Local 680,
23 N.J. 85 (1956) 15

Matter of Morris School Dist. Bd. of Educ.,
310 N.J. Super. 332 (App. Div. 1998) 30

Nostrame v. Santiago,
213 N.J. 109 (2013) 14

Pa. Greyhound Lines, Inc. v. Rosenthal,
14 N.J. 372 (1954) 30

Phillips v. Curiale,
128 N.J. 608 (1992) 30

Pop's Cones, Inc. v. Resorts Int'l Hotel, Inc.,
307 N.J. Super. 461 (App. Div. 1998) 26

Printing Mart-Morristown v. Sharp Electronics Corp.,
116 N.J. 739 (1989) 14

Sons of Thunder v. Borden, Inc.,
148 N.J. 396 (1997) 24

Toll Bros., Inc. v. Bd. Chosen Freeholders of Burlington,
194 N.J. 223 (2008) 26

Township of Middletown,
334 N.J. Super. 512 (App. Div. 1999) aff'd o.b., 166 N.J. 112 (2000) 13

Wade v. Kessler Inst.,
343 N.J. Super. 338 (N.J. Super. Ct. App. Div. 2001)
aff'd as modified, 172 N.J.327 (2002) 25

Wilson v. Amerada Hess Corp.,
168 N.J. 236, (2001) 24

Wreden v. Township of Lafayette,
436 N.J. Super. 117, (App. Div. 2014) 14

State Statutes

N.J.S.A. 11A:1-1, et seq. 9

N.J.S.A. 34:11 27

N.J.S.A. 34:11-4.1a, et seq. 18

N.J.S.A. 34:11-4.2 27

N.J.S.A. 34:11-4.7 27

N.J.S.A. 34:11-57, et seq. 18

N.J.S.A. 34:12:61-1.3 27

N.J.S.A. 34:13A-5.4 ..... 8-10, 12, 13

N.J.S.A. 34:13A-16 ..... 6, 9, 18, 20

N.J.S.A. 52:27 BBBB-1, et seq. 2, 7

N.J.S.A. 52:27 BBBB-4 ..... 9, 11, 12

N.J.S.A. 52:27 BBBB-5 ..... 7-9, 12, 20, 29

Other

R. 4:6-2 ..... 5, 14

13 *Williston on Contracts* § 38:15 (4th ed. 2000) 24

PRELIMINARY STATEMENT

The police officers represented by Appellants/Plaintiffs, the Atlantic City Policemen's Benevolent Association Local 24 ("ACPBA") and the Atlantic City Superior Officers' Association ("ACSOA" together with the ACPBA "Police Unions"), make tremendous sacrifices and expose themselves daily to unfathomable harm to protect the residents, visitors and businesses of the City of Atlantic City ("City"). In 2016, the City was in one of its darkest hours financially and was unable to fund promotions within the Atlantic City Police Department ("ACPD") which were necessary to maintain public safety. Desperate, the City asked officers to accept promotions without receiving any contractually required pay increase with a promise that they would be properly compensated at a later time. Many officers answered the call by agreeing to take promotions with the added responsibilities that those promotions required without receiving the contractually required pay increase at that time. Respondents/Defendants, State of New Jersey ("State") through the Director of the Division of Local Government Services ("DLGS") in the Department of Community Affairs ("DCA") and the City, never honored their promises of subsequent, retroactive pay increase for those who accepted the promotions resulting in the underlying litigation which was improperly dismissed by the Trial Court.

The Trial Court in this matter found that the Respondents/Defendants can dissolve agreements for earned wages and ignore New Jersy law which unequivocally requires the payment of earned wages pursuant to the New Jersey Municipal Stabilization and Recovery Act ("MSRA"), N.J.S.A. 52:27 BBBB-1, *et seq*., P.L. 2016, c. 4. This holding is patently inconsistent with longstanding judicial precedent, express statutory terms, fundamental concepts of fairness and common sense. In the underlying action, Plaintiffs seek to recover these earned but unpaid wages on behalf of numerous officers who were promoted in 2016 without receiving pay increases as required by the parties' Collective Negotiations Agreements ("CNAs"), Memoranda of Agreement ("MOAs"), and New Jersey wage and hour law.

The Trial Court incorrectly found the following: (1) there is no obligation pursuant to the New Jersey Wage Payment and Collection Law because the MOAs were based on contingencies which never happened and the MSRA eliminates any obligation under New Jersey Wage Payment and Collection law; (2) the MSRA is intended to supersede all prior agreements and contracts, including the MOAs at issue in this matter; and, (3) the June 7, 2017 Notice of Implementation and related Settlement Agreement encompassed the MOAs and the Defendants'/Respondents' failure to pay wages pursuant to the MOAs was a proper exercise of the MSRA.

The June 7, 2017 Notice of Implementation and related Settlement Agreement did not address or include terms impacting promotional pay or back pay for the period alleged in this matter. To be clear, this matter concerns a finite time period from the 2016 promotion dates until the June 7, 2017 implementation of new salaries. It does not seek to add salary increases after the June 7, 2017 implementation date.

Moreover, the MSRA in no way altered the New Jersey Wage Payment laws which require Defendants to pay earned wages. While prior Courts have found that the MSRA permits modification of labor contracts for prospective wages, the issue of whether the MSRA permits Defendants to not pay previously earned wages has not been litigated prior to this matter. The Trial Court's dismissal was both incorrect and premature as: (1) Plaintiffs have met the Motion to Dismiss pleading standard; (2) the MSRA does not permit Defendants to deprive promoted officers of earned wages; and (3) the MSRA did not modify New Jersey's wage and hour statutes.

Plaintiffs have pleaded causes of action more than sufficient to survive Defendants' Motion to Dismiss. Plaintiffs are entitled to discovery and to have this matter litigated on its merits. Plaintiffs urges this Honorable Court to reverse the Trial Court's March 4, 2024 Order and remand to the Trial Court for further proceedings.

PROCEDURAL HISTORY

This matter was initially filed on May 4, 2018 under docket ATL-L-985-18. The Verified Complaint alleges four causes of action: Count I- Breach of Contract; Count II- Breach of Implied Covenant of Good Faith and Fair Dealings; Count III- Promissory Estoppel; and Cout IV- New Jersey Wage Payment and Collection Law. The City filed an Answer with Crossclaims against the State on September 7, 2018. Pa000213-230.[1] The State filed an Answer on November 12, 2018. Pa000231. Plaintiffs served discovery requests on August 29, 2019. Pa000245-284. The matter was transferred to the Honorable Julio Mendez and stayed pursuant to a September 4, 2019 request from counsel. Pa000285. The parties engaged in protracted negotiations regarding multiple matters during the pendency of this matter and companion litigation regarding promotional processes, disciplinary procedures and hiring procedures.

The Court entered a Consent Order on August 7, 2023, whereby case ATL-L-985-18 would be dismissed without prejudice, Plaintiffs were permitted to refile the Complaint, Defendants would be precluded from raising time-based defenses, Defendants' counsel would accept service, and the previously served written discovery would not have to be re-served. Pa000286-88.

[1] "Pa" refers to Plaintiff's appendix.

Plaintiffs timely refiled this action on October 5, 2023 with identical allegations: Count I- Breach of Contract; Count II- Breach of Implied Covenant of Good Faith and Fair Dealings; Count III- Promissory Estoppel; and Cout IV, New Jersey Wage Payment and Collection Law. Pa00030-47. Defendants filed a Motion to Dismiss on November 9, 2023 seeking to dismiss the Complaint for failure to state a claim pursuant to R. 4:6-2(e). The Court held oral argument on February 16, 2024. Pa000001. The Court granted Defendants' motion on March 4, 2024 and dismissed the Verified Complaint in its entirety on the issue of the MSRA but did not reach the issue of res judicata and the entire controversy arguments raised by Defendants. Pa000025-39. Plaintiffs timely filed for appeal on April 17, 2024. Pa000001.

STATEMENT OF FACTS

I. 2016 Promotions

The City was facing bankruptcy in 2016 but also had a police force which was in dire need of promotions. Without having the financial resources and needing promotions to protect public safety, the City and the Police Unions entered into two (2) MOAs whereby certain officers would be promoted but would delay receiving the promotional wage increase required by the CNAs until new wages were set.

In or around May 2016, the parties reached and memorialized two (2) agreements with the following terms:

> 1. Notwithstanding the provisions of the relevant collective negotiations agreements regarding salary adjustments for promotions, the parties agree that the City may effectuate such promotions as it deems necessary from Police Officer to Sergeant with no increase in pay ***until a salary increase***, including rank deferential[sic] and any other increase, ***is ratified between the City, the State Monitor, and the PBA***, or until such salary increases are awarded by an interest arbitrator in accordance with the statutory provisions set forth in N.J.S.A. 34:13A-16, et seq. ***All increases shall be retroactive to the date of promotion.***

Pa000035-37, 49; (emphasis added).

> 1. Notwithstanding the provisions of the relevant collective negotiations agreements regarding salary adjustments for promotions, the parties agree that the City may effectuate such promotions as it deems necessary from Sergeant to Lieutenant, and/or Lieutenant to Captain with no increase in pay ***until a salary increase***, including rank deferential [sic]and any other increase, ***is ratified between the City, the State Monitor and the SOA***, or until such salary increases are awarded by an interest arbitrator in accordance with the statutory provisions set forth in N.J.S.A. 34:13A-16, et seq. ***All increases shall be retroactive to the date of promotion.***

Pa000035-37, 51; (emphasis added).

On June 8, 2016, the Atlantic City City Council voted to approve both MOAs. Pa000037, 195-197. Sixteen (16) officers were promoted to sergeant, six (6) were promoted to lieutenant, and two (2) were promoted to captain during

the time period germane to this litigation.

II. THE MSRA

Shortly before the promotions in this matter, on May 27, 2016, then-Governor Christopher Christie signed into law, S-1711/A-2569 the MSRA, N.J.S.A. 52:27 BBBB-1, *et seq*., P.L. 2016, c. 4. The law took effect immediately. The MSRA provides a mechanism for the State and its designees to take over complete control of the City, including staffing, labor contracts, promotions, and pay. The vast powers relevant to this matter were not triggered until the City was afforded an opportunity to submit a financial recovery plan. See N.J.S.A. 52:27BBBB-5.

On or about November 9, 2016, over four (4) months after the promotions, the New Jersey Department of Community Affairs Local Finance Board voted to vest powers under the MSRA to the then-Director of Local Government Services, Timothy Cunningham. On or about November 14, 2016, Jeffrey Chiesa ("Chiesa") was selected as Designee of the Director of the Division of Local Government Services in the Department of Community Affairs. In that capacity, Chiesa had full control of the City pursuant to the terms of the MSRA. Lieutenant Governor Sheila Oliver replaced Chiesa after Governor Phil Murphy was inaugurated. Defendant Jaquelene Suarez later assumed the role of Director

of the Division of Local Government Services in the Department of Community Affairs.

The broad provisions of the MSRA, N.J.S.A. 52:27BBBB-5 (g)-(i), grant the following powers, *inter alia*, to the Director:

> (g) unilaterally modifying, amending, or terminating any collective negotiations agreements, except those related to school districts, to which the municipality is a party, or unilaterally modifying, amending, or terminating the terms and conditions of employment during the term of any applicable collective negotiations agreement, or both, provided that the director determines that the modifications, amendments, or terminations are reasonable and directly related to stabilizing the finances or assisting with the fiscal rehabilitation and recovery of the municipality in need of stabilization and recovery;
>
> (h) acting as the sole agent in collective negotiations on behalf of the municipality in need of stabilization and recovery;
>
> (i) with respect to any expired collective negotiations agreement to which the municipality in need of stabilization and recovery is a party, unilaterally modifying wages, hours, or any other terms and conditions of employment;
>
> N.J.S.A. 52:27BBBB-5.

The MSRA also amended the Employer-Employee Relations Act ("EERA"), N.J.S.A. 34:13A-5.4. The EERA permits Plaintiffs and Plaintiffs' members to file unfair labor practice charges and facilitates grievance arbitration. The MSRA amended the EERA by adding the following provision which eliminated all of Plaintiffs' and Plaintiffs' members' EERA rights with respect to PERC enforcement of unfair practice violations, which include

unilateral changes to labor contracts:

> g. The Director of the Division of Local Government Services in the Department of Community Affairs may notify the commission that a municipality deemed a "municipality in need of stabilization and recovery" pursuant to section 4 of P.L.2016, c.4 (C.52:27BBBB-4) ***shall not be subject to the commission's authority*** to prevent ***an unfair practice pursuant*** to subsection a. of this section. Upon such notice, neither the commission, nor any designee, shall have the authority to issue or cause to be served upon such municipality in need of stabilization and recovery any complaint alleging an unfair practice under subsection a. of this section or to hold any hearings with respect thereto. Nothing in this subsection shall be construed to limit the scope of any general or specific powers of the Local Finance Board or the Director set forth in P.L.2016, c.4 (C.52:27BBBB-1 et al.).
>
> N.J.S.A. 52:27BBBB-5 (emphasis added).

III. PBA-1 Lawsuit and Settlement

PBA 24 and the SOA filed an action in New Jersey Superior Court, Law Division, on March 17, 2017 challenging, i*nter alia*, the constitutionality of the MSRA. PBA Local 24 and SOA v. Christopher J. Christie et al., ATL-L-554-17 ("Police 1"). Plaintiffs challenged the constitutionality of the MSRA and the legality of Defendants' actions in decimating the terms of the respective CNAs. The gravamen of Police 1 was that the MSRA violated the Police Unions' constitutional rights by eliminating all of the employees' prospective contractual rights, all rights pursuant to the Employer-Employee Relations Act ("EERA"), N.J.S.A. 34:13A-5.4, the Civil Service Act, N.J.S.A. 11A:1-1, *et seq.*, and the Interest Arbitration Act, N.J.S.A. 34:13A-16.

On March 17, 2017, the Court entered a Temporary Restraining Order maintaining the status quo with respect to all terms and conditions of employment, including wages. Pa000289-296. The Court later issued an Order on May 23, 2017 denying an injunction with respect to changes to salary, overtime, health insurance, longevity and education pay, workers' compensation, and terminal leave over $15,000. Pa000305-306. The Court granted an injunction for the reduction of the police force, change in work schedule, and elimination of terminal leave over $15,000. The Court, however, did not permit these changes to become effective until after the "close of business on Tuesday, June 6, 2017." Id.

Defendants drafted an implementation memorandum dated June 7, 2017 ("Implementation Memo") outlining the changes to employment which had been approved by the Court. Pa000208-212.

The Implementation Memo stated the following for new salaries:

> - ***Effective June 7, 2017***, a new salary guide is hereby established for **all** current and future employees (including ***future promotions*** to the rank of Sergeant).[2] Police officers will be placed on the step that is closest to their current base salary. (Step 15 is maximum for Police Officers). Base salary is defined as the employee's total pensionable salary. The below salaries shall be the entire compensation for each employee.

[2] The SOA had a separate Implementation Memo adjusting salaries and other terms and conditions of employment which was also effective June 7, 2024. Defendants did not submit that memorandum in this action with their Trial Court filings.

Pa000209-210 (emphasis added).

The parties agreed to resolve Police 1 and entered into the November 17, 2017 Settlement Agreement, submitted to the Court on or about January 16, 2018, which incorporated all nonconflicting terms of the Implementation Memo. Pa000198-207. Neither the Settlement Agreement nor the related Implementation Memo addresses the 2016 promotional wages owed. Indeed, the Implementation Memo has a term of June 7, 2017 through December 31, 2021. Pa000198-212. The effective date with respect to the entirety of the Implementation Memo, including salary adjustments, is July 7, 2017. Id.

IV. THE MSRA IS RENEWED AND AMENDED

On June 24, 2021, Governor Phil Murphy signed bills A-5590/S-3819 which renewed the MSRA but restored Civil Service, EERA protections, and Interest Arbitration to City employees.[3]

The new MSRA states:

> Notwithstanding the provisions of any other law, rule, regulation, or contract to the contrary, ***except for the provisions of Title 11A, Civil Service*** as may be applicable to actions taken after the effective date [June 24, 2021] of P.L.2021, c.124 (C.52:27BBBB-4 et al.), the director shall have the authority to take any steps to stabilize the finances, restructure the debts, or assist in the financial rehabilitation and recovery of the municipality in need of stabilization and recovery, including, but not limited to:

[3] As the amended MSRA was not in effect during the relevant time period, Plaintiffs references to and interpretation of the MSRA shall not be construed as Plaintiffs' interpretation of the amended MSRA, or any provisions set forth therein, unless Plaintiffs clearly state to the contrary.

> […]
>
> (g) unilaterally modifying, amending, or terminating any collective negotiations agreements, except those related to school districts, to which the municipality is a party, or unilaterally modifying, amending, or terminating the terms and conditions of employment during the term of any applicable collective negotiations agreement, or both, provided that the director determines that the modifications, amendments, or terminations are reasonable and directly related to stabilizing the finances or assisting with the fiscal rehabilitation and recovery of the municipality in need of stabilization and recovery;
>
> (h) acting as the sole agent in collective negotiations on behalf of the municipality in need of stabilization and recovery;
>
> (i) with respect to any expired collective negotiations agreement to which the municipality in need of stabilization and recovery is a party, unilaterally modifying wages, hours, or any other terms and conditions of employment;
>
> N.J.S.A. 52:27BBBB-5 (emphasis added).

The new MSRA also amended the EERA, N.J.S.A. 34:13A-5.4, for a second time which restored EERA and PERC enforcement rights.

> g. […]The provisions of this subsection shall no longer be applicable on and after the first day of the sixth year next following the determination by the Commissioner of Community Affairs that the municipality shall be deemed "a municipality in need of stabilization and recovery" pursuant to section 4 of P.L.2016, c.4 (C.52:27BBBB-4); however, actions taken pursuant to this subsection prior to the effective date [June 24, 2021] of P.L.2021, c.124 (C.52:27BBBB-4 et al.) shall be final and shall not be subject to reconsideration.
>
> N.J.S.A. 34:13A-5.4.

Pursuant to this amendment, the ability of the State to unilaterally make

changes to labor agreements is subject to the terms of the Civil Service Act and the EERA. Unilateral modifications of terms and conditions of employment, such as wages, by a New Jersey public employer violate the duty of good faith negotiations and are a *per se* violation of the EERA, N.J.S.A. 34:13A-5.4(a)(5). See, Township of Middletown, 24 NJPER 28, 30 (¶29016, 1997), aff'd per curiam, 334 N.J. Super. 512 (App. Div. 1999); aff'd o.b., 166 N.J. 112 (2000). The City was designated "a municipality in need of stabilization and recovery" on June 6, 2016 by the Commissioner of Community Affairs. The first day of the sixth year was June 7, 2021 but the amendment did not take effect until June 24, 2021. Ibid.

STANDARD OF REVIEW

Appellate courts in New Jersey "review a grant of a motion to dismiss a complaint for failure to state a cause of action de novo, applying the same standard under R. 4:6-2(e) that governed the motion court." Wreden v. Township of Lafayette, 436 N.J. Super. 117, 124, (App. Div. 2014). The standard that applies to consideration of a motion to dismiss pursuant to R. 4:6-2(e) is well known:

> Such motions are judged by determining whether a cause of action is suggested by the facts. Although the inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint [,] a reviewing court searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary[.]

Nostrame v. Santiago, 213 N.J. 109, 127 (2013) (citations and quotations omitted). When deciding a motion to dismiss, "the Court is not concerned with the ability of plaintiffs to prove the allegation contained in the complaint." Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 746 (1989) (citing Somers Constr. Co. v. Board of Educ., 198 F.Supp. 732, 734 (D.N.J. 1961)).

The test to be applied is "whether a cause of action is 'suggested' by the facts." Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989) (citation omitted). "[A] reviewing court 'searches the complaint in depth

and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" Ibid. (citation omitted). "[P]laintiffs are entitled to every reasonable inference of fact," and our examination of the complaint should be one "that is at once painstaking and undertaken with a generous and hospitable approach." Ibid.

For purposes of analysis, plaintiffs are entitled to every reasonable inference of fact. Independent Dairy Workers Union v. Milk Drivers Local 680, 23 N.J. 85, 89 (1956).

LEGAL ARGUMENTS

POINT I

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS THE VERIFIED COMPLAINT BY FINDING THAT THE MSRA PREVENTS THE POLICE UNIONS' CLAIMS TO RECOVER UNPAID WAGES. (Pa000017-18, 26-29)

The Trial Court incorrectly found that the vast powers of the MSRA allows Defendants to ignore all other laws and not pay promoted officers back wages. Pa000017-18, 26-29. While prior courts held that the MSRA does permit the modification of labor contracts and expired labor contracts, Defendants have never previously relied on this authority, and cannot rely on

this authority, to avoid paying wages which have been earned and owed. The Trial Court incorrectly found that the Implementation Memo and Settlement Agreement modified the MOAs and responsibility to pay accrued earned wages from the respective 2016 promotion dates until the Implementation Memo was in effect. The Trial Court relied on the following term from the Implementation Memo to support this argument: "the below salaries shall be the entire compensation for each employee." Pa000028. The Trial Court then found that "Defendants' decision to modify the 2016 MOAs via the 2017 Notice of Implementation was reasonable and directly related to stabilizing the finances or assisting with the fiscal rehabilitation and recovery of the municipality in need of stabilization and recovery." Id.

The Court's interpretation is contrary to the plain meaning of the Implementation Memo and Settlement Agreement which never discussed back wages owed and by their own terms, were only effective prospectively from June 7, 2017. Pa000198-212. Defendants were also restrained by Court Order from modifying wages until June 7, 2017 which is after the period Plaintiffs are seeking earned and unpaid wages. Id., Pa000289-296, 305-306. Indeed, in reviewing the Implementation Memo and Settlement Agreement, Judge Mendez found that any contractual or other terms of employment not specifically identified were impacted by the Implementation Memo and Settlement

Agreement. Pa0000396397. In addressing issues not specifically identified in those documents, Judge Mendez found the following:

> If the negotiations that led to the PBA Settlement Agreement included an agreement between the parties regarding ACPD's hiring, promotional, and disciplinary actions, and/or the appeals process used, ***then those agreements should have been reflected in the PBA Settlement Agreement***.
>
> Id. (emphasis added).

There was no discussion or agreement for back wages addressed in the Implementation Memo and Settlement Agreement despite the Trial Court's reliance on the vague statement of "entire compensation." Applying the Trial Court's logic, the State could require that employees refund wages previously earned and received because they unilaterally modified the terms of the CNAs after the fact. They could also retroactively recoup wages paid while the March 17, 2017 Temporary Restraining Order was in effect. Such authority is not contemplated or permitted by the MSRA. Perhaps recognizing these constraints, Defendants filed Answers in response to the initial action rather than seeking dismissal on MSRA authority.

The Trial Court incorrectly relied in part on Atl. City Superior Officers' Ass'n v. City of Atl. City, No. A-3117-20, 2022 N.J. Super. Unpub. LEXIS 1194 (App. Div. June 30, 2022), which was decided after the initial Complaint was filed in this matter. Pa000026-28. The Trial Court's reliance on that case is

misguided. In that matter, the Appellate Division found that the State was authorized pursuant to the terms of the MSRA to vacate an arbitration award concerning a sick pay lump sum payout owed to two (2) promoted Captains pursuant to the terms of the SOA CNA on their July 1, 2016 promotions. Id. This matter is significantly different.

As an initial matter, this action involves accrued unpaid wages and not an arbitration award. The Appellate Division found that MSRA, N.J.S.A. 34:13A-16(j), permitted the State to review and approve or reject arbitration awards and such approval or rejection was not subject to the reasonableness requirements found in other areas of the MSRA, such as those to modify labor contracts. Atl. City Superior Officers' Ass'n v. City of Atl. City, No. A-3117-20, 2022 N.J. Super. Unpub. LEXIS 1194 at *15-16 (App. Div. June 30, 2022). The Appellate Division affirmed the State's actions in rejecting the arbitration at issue in that case. Id.

Unlike the statutory changes permitting the State to void arbitration awards, N.J.S.A. 34:13A-16(j), the MSRA did not amend New Jersey Wage Payment and Collection Law, N.J.S.A. 34:11-4.1a, *et seq.*, and N.J.S.A. 34:11-57, *et seq.,* Count IV, to permit Defendants the authority to not pay earned wages. As discussed below, Plaintiffs have sufficiently plead such a cause of action to survive the Motion to Dismiss. The Trial Court avoids any analysis of

the New Jersey Wage Payment and Collection Law by stating that the MSRA's term "to the extent inconsistency exists between the terms of the [MSRA] and other applicable laws, the terms of the [MSRA] shall prevail." Pa000028. There was absolutely no analysis of how the New Jersey Wage Payment and Collection Law or any other statue was in conflict with the MSRA and whether Defendants actually triggered such authority when the Implementation Memo and Settlement Agreement were silent on the MOAs and, indeed, any earned and unpaid wages.

The Trial Court, instead, blindly relied upon MSRA Section 5(a)(3)(f), (g), and (i) which granted authority to modify labor contracts and expired labor contracts and found that the vesting of earned wages was inconsequential. Pa000025-26. The Appellate Division, in dicta, stated that the "vesting" of the lump sum payment was inconsequential to their decision. Atl. City Superior Officers' Ass'n 2022 N.J. Super. Unpub. LEXIS 1194 at *20. The Appellate Division did not reach a decision on the matter stating the following:

> In the end, although no case law directly addresses whether lump sum payments upon promotion for accumulated sick leave constitute a vested right, Judge Mendez's reasoning that the vested right was the sick leave days, not the dollar amount, is also persuasive. The Director disapproved the arbitration award granting Barnhart and Sarkos lump sum payments for accumulated sick leave when they were promoted. But the Director permitted them to use the accumulated leave during their tenure. ***Thus, because plaintiffs retain their sick leave benefit, the arbitration award does not infringe on their vested contractual rights, if any.***

Id. at 24-25 (emphasis added).

In this matter, the promoted officers never received earned wages and have no equal benefit, unlike the officers who were able to maintain their sick time but were prohibited from cashing it out.

The Appellate Division did find that a reasonableness standard applies to State actions involving MSRA Section 5(3)(g) and presumptively (f) and (i) as well. Id. The Appellate Division did not conclude if the actions in that matter were reasonable but did note that in response to the arbitration award, then-DLGS Director Melanie Walter, sent a communication to counsel stating the following:

> For the reasons provided below, I hereby exercise the power vested in me by the Municipal Stabilization and Recovery Act (MSRA), codified at N.J.S.A. [52:27BBBB-1] to deny approval of the arbitration award. In accordance with the MSRA, the arbitration award is not binding upon the parties to the grievance and has no force and effect. Accordingly, Sarkos and Barnhart shall not receive any payment for accumulated sick leave by virtue of their promotion to Captain on July 1, 2016. However, both parties will have the ability to use this accumulated leave.
> Walter explained that N.J.S.A. 52:27BBBB-5(g) and (i) empowered her as Director "to take any steps to stabilize the finances, restructure the debts, or assist in the financial rehabilitation and recovery of the municipality in need of stabilization and recovery, including, but not limited to" unliterally modifying CNAs, except those related to school districts, and "unliterally modifying wages, hours, or any other terms and conditions of employment" with respect to any expired CNA. She also explained that N.J.S.A. 34:13A-16(j) provides that an arbitration award will not be binding without the Director's approval.

Atl. City Superior Officers' Ass'n v. City of Atl. City, No. A-3117-20, 2022 N.J. Super. Unpub. LEXIS 1194 at *9 (App. Div. June 30, 2022). The reasonableness standard, as articulated by Judge Mendez, states that the Designee [State] must take into account the following: (1) that he take action that provides for the public health, safety, and welfare; (2) that public services are provided in an efficient and cost-effective manner; (3) that he ensure the development of a comprehensive plan for financial rehabilitation and recovery; and (4) that he take action that is reasonable and directly related to financial stabilization. Pa000332. A "reasonable proposal implies that it is factually based, uniform, fairly implemented, and objective." Pa000335. "To be reasonable, a proposal must be accompanied by an adequate explanation and foundation for its determination." Id. The Designee or State is also required to engage in discussions and the exchange of ideas with the affected parties. Id.

There is nothing in the record which suggests that the State's actions, or inactions, if permitted by the MSRA were reasonable. There was no communication submitted by Defendants like the above-cited communication to indicate any reason why earned wages were not paid. Indeed, as Defendants are relying upon this defense, discovery is necessary to show the reasonableness of withholding earned wages to the promoted officers. Defendants' refusal to comply with their pre-MSRA contractual obligations is completely

unreasonable and in violation of the MSRA and is sufficiently pled in the Complaint.

The Trial Court erroneously dismissed Plaintiffs' viable causes of action which must be reversed by This Court.

POINT II

THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS THE VERIFIED COMPLAINT AS PLAINTIFFS HAVE PLED PRIMA FACIE CAUSES OF ACTION. (Pa000017-18, 26-29)

The Plaintiffs have alleged the following counts: Count I- Breach of Contract; Count II- Breach of Implied Covenant of Good Faith and Fair Dealings; Count III- Promissory Estoppel; and Cout IV, New Jersey Wage Payment and Collection Law. As previously argued, Defendants fall short in using the MSRA to avoid any of these causes of action. The Trial Court did not directly analyze Plaintiffs' causes of action and instead found that if there was an inconsistency between common law or statutory law, the MSRA prevails. Pa000028. There is no inconsistency between Plaintiffs' claims and the MSRA and no inconsistency identified by the Trial Court who uses this term to give Defendants a free pass under the guise of the MSRA to avoid paying promoted officers their earned wages. Id. All claims were more than sufficiently pled to survive a Motion to Dismiss.

To state a claim for breach of contract in New Jersey, Plaintiff must allege: "(1) a contract between the parties; (2) a breach of that contract; (3) damages flowing therefrom; and (4) that the party stating the claim performed its own contractual obligations." Frederico v. Home Depot, 507 F.3d 188, 203 (3d Cir.

2007). Plaintiffs sufficiently plead that the contracts, the CNAs and MOAs, were in effect, a breach and damages, they were not paid contractual wage increases, and they performed their obligations by working the promoted positions. Complaint ¶¶ 45-50.

Regarding Count II, Breach of Implied Covenant of Good Faith and Fair Dealings, every contract in New Jersey contains an implied covenant of good faith and fair dealing. See Wilson v. Amerada Hess Corp., 168 N.J. 236, 243, (2001); Sons of Thunder v. Borden, Inc., 148 N.J. 396, 420 (1997); Association Group Life, Inc. v. Catholic War Veterans, 61 N.J. 150, 153 (1972). The implied duty of good faith and fair dealing means that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the full fruits of the contract; in other words, in every contract there exists an implied covenant of good faith and fair dealing." Association Group Life, 61 N.J. at 153; see 13 *Williston on Contracts* § 38:15 (4th ed. 2000) (stating that an implied covenant of good faith and fair dealing means that "neither party will do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract").

In order to succeed on a claim for breach of the covenant of good faith and fair dealing, a plaintiff must plead: (1) a contract exists between the plaintiff and the defendant; (2) the plaintiff performed under the terms of the contract,

unless excused; (3) the defendant engaged in conduct, apart from its contractual obligations, without good faith and for the purpose of depriving the plaintiff of the rights and benefits under the contract; and (4) the defendant's conduct caused the plaintiff to suffer injury, damage, loss or harm. Wade v. Kessler Inst., 343 N.J. Super. 338 (N.J. Super. Ct. App. Div. 2001), aff'd as modified, 172 N.J. 327 (2002). Plaintiffs sufficiently plead that a contract existed, the CNAs and MOAs, Plaintiffs performed their obligations by working the promoted positions, Defendant engaged in bad faith for purposes of denying contractual benefits, and Plaintiffs suffered damages from unpaid wages. Pa000041-42.

The language of the promotional MOA is anticipatory. Plaintiff members agreed to step up, receive promotions and perform heightened responsibilities commensurate with their promotions based on promises that they would be paid for the entire time performing those duties once the parties had negotiated a new promotional right for respective rank (". . . with no increase in pay ***until a salary increase . . . is ratified between the City, the State Monitor, and the PBA***, ... ***All increases shall be retroactive to the date of promotion."***) See *supra* (emphasis added). To induce officers to accept a promotion with heightened responsibilities with the promise of future pay retroactive to the date of said promotion only to then yank back the promise after having received the benefit of the officers' labor is the very definition of bad faith and should not be

rewarded by this, or any, Court.

Count III, promissory estoppel, "is made up of four elements: (1) a clear and definite promise; (2) made with the expectation that the promisee will rely on it; (3) reasonable reliance; and (4) definite and substantial detriment." Goldfarb v. Solimine, 245 N.J. 326, 339-40 (2021) (quoting Toll Bros., Inc. v. Bd. of Chosen Freeholders of Burlington, 194 N.J. 223, 253 (2008)) (internal quotation marks omitted). "The essential justification for the promissory estoppel doctrine is to avoid the substantial hardship or injustice which would result if such a promise were not enforced. New Jersey courts engage in an equitable analysis designed to avoid injustice." Pop's Cones, Inc. v. Resorts Int'l Hotel, Inc., 307 N.J. Super. 461 (App. Div. 1998). While liability cannot be based on a quasi-contractual principle if an express contract exists concerning identical matter, Plaintiffs are permitted to plead these principles in the alternative in the Complaint. See Suburban Transfer Serv., Inc. v. Beech Holdings, Inc., 716 F.2d 220, 226-27 (3d Cir. 1983).

Plaintiffs sufficiently plead that a clear promise was made to pay promotional pay rates expecting officers to work promoted titles, the officers reasonably relied upon that promise in working in those promoted titles, and they were deprived of those promises to their detriment by not being adequately compensated. Pa00042-43.

With respect to Count IV, NJ Wage Payment and Collection law "[u]nless an exception applies, the [New Jersey Wage Payment Law] requires 'every employer [to] pay the full amount of wages due to his employees[.] Portillo v. Nat'l Freight, Inc., 2022 U.S. Dist. LEXIS 103186 (D.N.J. June 9, 2022) (quoting N.J.S.A. 34:11-4.2). With limited exceptions, the WPL also prevents employers from contracting around their wage payment obligations. Ibid.; N.J.S.A. 34:11-4.7. The WPL permits employees to sue to recover the full amount of their wages if an employer fails to fulfill its obligations. Ibid. Although the WPL does not include a legislative statement of intent, its enactment leads to the conclusion that the statute was designed to protect employees' wages and to guarantee receipt of the fruits of their labor. Ibid. The WPL is therefore a remedial statute that should be liberally construed to effectuate its remedial purpose. Ibid. The Wage Collection Act permits employees to either file a claim with the Commissioner of Labor or to pursue remedies in the Superior Court. N.J.S.A. 34:11– 34:12:61-1.3. Plaintiffs have adequately pled that their employer owed wages which were earned and that those wages were not paid. Pa000043. As previously discussed, the MSRA does not amend New Jersey wage and hour laws or prevent Plaintiffs from seeking relief pursuant to these laws. Indeed, the WPL finds that any agreement or attempt to avoid paying earned wages shall "be null and void." See N.J.S.A.

34:11-4.7.

Earned wages are protected by New Jersey law and must not be unduly impacted by vague provisions of the MSRA. The MSRA does not permit Defendants to deprive the promoted officers the fruits of their labor. The Trial Court's March 4, 2024 Order must, therefore, be reversed as all causes of action are more than sufficiently plead in the Complaint.

POINT III

THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS THE VERIFIED COMPLAINT AS THE MSRA DOES NOT DEPRIVE PAINTIFFS' MEMBERS OF A VESTED BENEFIT. (Pa000017-18, 26-29)

The State first assumed the powers under N.J.S.A. 52:27BBBB-5 to modify, amend or terminate current CNAs, act as the City's bargaining representative, and change conditions of employment on November 9, 2016 and was prevented by Court Order from making any changes until June 7, 2017.[4] The MSRA is silent on whether this power extends to wages and terms of employment accrued prior to the trigger date. Both the Trial Court and Defendants' position is that the MSRA permits the State to claw back wages and benefits earned prior to the Implementation Memo. Under this logic, the State could modify wages and benefits accrued and paid by the City prior to June 7, 2017 and then pursue these employees for reimbursement.

This is clearly not the intention of the New Jersey Legislature. A more expansive interpretation is that the MSRA permits changes to wages and terms and conditions of employment, whether contractual or not, when the powers pursuant to N.J.S.A. 52:27BBBB-5 are triggered. There are no powers for the

[4] The Trial Court identified Vadel, et al. v. City of Atlantic City, et al. where the Hon. John C. Porto P.J.Cv., determined that the State was permitted to eliminate terminal leave payments accrued prior to the MSRA takeover. PA0000026. Upon information and belief, Plaintiffs in that matter have filed an appeal which is pending. For the reasons discussed herein, the MSRA does not permit the elimination of accrued earned wages.

State to reach back for prior paid or owed wages or benefits. Earned wages cannot be divested absent ***a knowing and intentional waiver by each person adversely affected***. Matter of Morris School Dist. Bd. of Educ., 310 N.J. Super. 332 (App. Div. 1998). None of Plaintiffs' members have executed any such knowing and intentional waiver.

The New Jersey Supreme Court recently discussed accumulated sick leave as a vested right in Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 601 (2020). In that case, the Supreme Court found that a modification to terminal leave was effective because those benefits do not vest until a triggering event, such as retirement or separation from employment. Id. at 601. In this matter, the event triggering the payment of accumulated sick leave was the July 1, 2016 promotion, because the contractual right to wage increases was "a present fixed interest which […] should be protected against arbitrary state action." Phillips v. Curiale, 128 N.J. 608, 620 (1992) (quoting Pa. Greyhound Lines, Inc. v. Rosenthal, 14 N.J. 372, 384 (1954)).

Under no reasonable interpretation of the MSRA is the State permitted to eliminate earned wages that were fully vested ***prior*** to the State acquiring the authority to modify those terms on June 7, 2017. The Trial Court's March 4, 2024 Order must, therefore, be reversed.

CONCLUSION

For the reasons set forth above, Plaintiffs urge this Honorable Court to: (1) reverse the Trial Court's March 4, 2024 Order and Opinion; (2) remand the matter and direct the Trial Court for further proceedings.

Respectfully Submitted**,**

O'BRIEN, BELLAND & BUSHINSKY, LLC

/s/ Kevin D. Jarvis
Kevin D. Jarvis, Esquire
David F. Watkins Jr., Esquire
Attorneys for Appellants/Plaintiffs

Dated: September 5, 2024

---------- X

THE ATLANTIC CITY POLICEMEN'S BENEVOLENT ASSOCIATION LOCAL 24, THE ATLANTIC CITY SUPERIOR OFFICERS' ASSOCIATION,

Appellants/Plaintiffs,

vs.

CITY OF ATLANTIC CITY, STATE OF NEW JERSEY, NEW JEREY DIVISION OF LOCAL GOVERNMENT SERVICES IN THE DEPARTMENT OF COMMUNITY AFFAIRS, JACQUELYN SUAREZ, Director of the Division of Local Government Services in the Department of Community Affairs in her official capacity,

Respondents/Defendants.

---------- X

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
Docket No. A-002478-23T2

Civil Action

ON APPEAL FROM THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, ATLANTIC COUNTY, ORDER ENTERED MARCH 4, 2024

Docket No. in The Court Below:
ATL-L-002790-23

Sat Below:
Hon. Michael J. Blee, A.J.S.C.

RESPONDENTS' BRIEF AND APPENDIX ON APPEAL

CHIESA SHAHINIAN & GIANTOMASI PC
105 Eisenhower Parkway
Roseland, NJ 07068
T: 973.325.1500
Attorneys for Respondents/Defendants CITY OF ATLANTIC CITY, STATE OF NEW JERSEY, NEW JEREY DIVISION OF LOCAL GOVERNMENT SERVICES IN THE DEPARTMENT OF COMMUNITY AFFAIRS, JACQUELYN SUAREZ

On the Brief:
Ronald L. Israel (040231996)
Melissa F. Wernick (033642010)

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

TABLE OF JUDGMENTS AND ORDERS vi

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 4

STATEMENT OF FACTS 5

A. ATLANTIC CITY'S FINANCIAL CRISIS AND DESIGNATION UNDER THE MSRA. 5

B. THE MSRA CONFERRED THE DIRECTOR WITH BROAD POWERS TO STABILIZE ATLANTIC CITY AND FACILITATE ITS RECOVERY. 8

C. COURTS HAVE CONSISTENTLY CONFIRMED THE CONSTITUTIONALITY OF THE MSRA. 10

D. PLAINTIFFS' COMPLAINT. 15

E. THE SUPERIOR COURT'S WELL-REASONED DECISION. 17

STANDARD OF REVIEW 19

LEGAL ARGUMENT 20

POINT I 20

THE MSRA EXPLICITLY AUTHORIZES THE UNILATERAL TERMINATION OF CONTRACTS AND THE SUPERIOR COURT CORRECTLY FOUND THAT PLAINTIFFS FAIL TO ALLEGE ANY ACTIONABLE CONDUCT (PA17-29). 20

POINT II 25

THE SUPERIOR COURT CORRECTLY HELD THAT PLAINTIFFS FAIL TO STATE A CLAIM BASED ON ALLEGEDLY UNPAID WAGES (PA17-29). 25

POINT III 29

THIS MATTER DOES NOT INVOLVE A "VESTED" BENEFIT (PA17-29). 29

CONCLUSION 31

APPENDIX Da00001

CERTIFICATION OF RONALD L. ISRAEL Da00001

NOTICE OF IMPLEMENTATION Da00004

TABLE OF AUTHORITIES

Page

Cases

Atl. City Superior Officers' Ass'n v. City of Atl. City,
No. A-3117-20, 2022 WL 2352376 (N.J. Super. Ct. App. Div. June 30, 2022) .....*passim*

Banco Popular North America v. Gandi,
184 N.J. 161 (2005) 20

Barila v. Bd. of Educ. of Cliffside Park,
241 N.J. 595 (2020) 30

Bridgewater-Raritan Educ. Ass'n v. Bd. of Educ. of Bridgewater-Raritan Sch. Dist., Somerset Cty.,
221 N.J. 349 (2015) 22

Camden County Energy Recovery Assocs., L.P. v. New Jersey Dep't of Envtl. Prot.,
320 N.J. Super. 59 (App. Div. 1999) 19

D'Annunzio v. Prudential Ins. Co. of Am.,
192 N.J. 110 (2007) 22

Donato v. Moldow,
374 N.J. Super. 475 (App. Div. 2005) 20

Edwards v. Prudential Prop. & Cas. Co.,
357 N.J. Super. 196 (App. Div. 2003) 19

Goldfarb v. Solimine,
245 N.J. 326 (2021) 28

Hardwicke v. Am. Boychoir Sch.,
188 N.J. 69 (2006) 23

Matter of Morris School Dist. Bd. of Educ.,
310 N.J. Super. 332 (App. Div. 1998) 29

TABLE OF AUTHORITIES

Page

Portillo v. Nat'l Frieght, Inc.,
2022 U.S. District. LEXIS 103186 (D.N.J. June 9, 2022) 28

Printing Mart-Morristown v. Sharp Electronics Corp.,
116 N.J. 739 (1989) 20

Sauter v. Colts Neck Volunteer Fire Co. No. 2,
451 N.J. Super 581,600 (App. Div. 2017).....23

Sickles v. Cabot Corp.,
379 N.J. Super. 100 (App. Div. 2005), certif. denied, 185 N.J. 297
(2005).....19, 20

Wade v. Kessler Inst.,
343 N.J. Super. 338 (App. Div. 2001).....28

Statutes

Municipal Stabilization and Recovery Act, ("MSRA"), N.J.S.A. 52:27
BBBB-1, *et seq*. .....*passim*

N.J.S.A. 1:1-1.....22

Other Authorities

Rule 4:6-2(e) 19

TABLE OF JUDGMENTS AND ORDERS

Page

March 4, 2024 Order and Decision..... Pa000017

PRELIMINARY STATEMENT

Defendants/Respondents City of Atlantic City (the "City"), State of New Jersey, New Jersey Division of Local Government Services in the Department of Community Affairs, and Jacquelyn Suarez, Commissioner of the Department of Community Affairs (former Director of the Division of Local Government Services) (collectively "Defendants") respectfully submit this brief in response to Plaintiffs/Appellants Atlantic City Policemen's Benevolent Association Local 24's ("PBA") and the Atlantic City Superior Officers' Association's ("SOA" together with the PBA, the "Police Unions" or "Plaintiffs") appeal of the Superior Court's March 4, 2024 Order dismissing the Verified Complaint in this matter, with prejudice.

Plaintiffs' appeal relates to two Memorandums of Agreement entered between Plaintiffs and Defendants in 2016 (the "2016 MOAs"), prior to Atlantic City's designation as a municipality in need of stabilization and recovery under the Municipal Stabilization and Recovery Act, ("MSRA"), N.J.S.A. 52:27 BBBB-1, *et seq*. Pursuant to the 2016 MOAs, the parties agreed to much needed promotions in the Atlantic City Police Department ("ACPD"), but that the promoted officers would serve "with no increase in pay until a salary increase, including rank deferential and any other increase, is ratified between the City, the State Monitor and the [Unions]," but that any increase shall be retroactive to the date of promotion. (Pa000049; 51).

Months after the 2016 MOAs were entered, Atlantic City was designated a municipality in need of stabilization and recovery under the MSRA, and the State was given broad authority to take "steps to stabilize the finances, restructure the debts, or assist in the financial rehabilitation and recovery of the municipality in need of stabilization and recovery," including unilaterally modifying employment agreements. The State took swift action, and pursuant to the authority conferred under the MSRA issued Notices of Implementation on June 7, 2017, setting forth a pay scale for Plaintiffs, which included promotional pay, and explained that it addressed the "entire compensation" for employees. Plaintiffs ratified the Notice of Implementation in a Settlement Agreement with Defendants in January 2018.

Nonetheless, Plaintiffs filed the Complaint in this matter in October 2023, after failing to pursue such claims for years, alleging that Defendants' purported failure to honor the 2016 MOAs gives rise to claims for breach of contract, breach of good faith and fair dealing, promissory estoppel and failure to pay wages. These arguments were considered, and rejected, by the Superior Court because Plaintiffs' claims are both factually and legally flawed and fail to state any actionable claim against Defendants.

Legally, the entirety of Plaintiffs' claims relates to action permitted under the MSRA. As the Superior Court found, the MSRA was intended by the Legislature to be liberally interpreted, and "delineates substantial authority to the State's ability to

terminate and modify existing agreements involving municipalities in need of stabilization and recovery." (Pa000027). Relevant here, the MSRA specifically confers the State with the authority to unilaterally amend or terminate contracts and modify collectively negotiated agreements.

Factually, the entire premise of Plaintiffs' Complaint (and this appeal) is based on the incorrect assumption that Defendants have somehow failed to pay "earned" wages based solely on contingent agreements (the 2016 MOAs), which were subject to termination and modification under the MSRA. Neither the 2016 MOAs, nor the subsequent changes to the payment scale, codified in a settlement agreement the Police Unions entered, resulted in "unpaid wages." Moreover, nowhere in the Complaint do Plaintiffs allege that the conditions precedent required by the 2016 MOAs for promotional pay increases were even satisfied.

As recognized by the Superior Court, this changes the entire context of Plaintiffs' case, and mandates that the Superior Court's decision be affirmed. Not only do the MOAs contain a contingency (which never materialized), Plaintiffs acknowledge that the MOAs are contracts, and therefore subject to modification under the express terms of the MSRA. Under the MSRA, Defendants had the authority to unilaterally terminate or amend the 2016 MOAs, and in any event, the contingencies set forth in the 2016 MOAs never materialized. The Superior Court's decision should be affirmed in its entirety.

PROCEDURAL HISTORY

Plaintiffs originally filed their claims by Complaint dated May 4, 2018 under docket number ATL-L-985-18. (Pa000021).[1] After filing their original Complaint, however, Plaintiffs did not pursue these claims for approximately five years, seemingly acknowledging their lack of merit. On August 28, 2023, the Superior Court dismissed Plaintiffs' original action without prejudice based on an agreement between the parties, granting Plaintiffs leave to refile. (Pa0000286-288).

Plaintiffs refiled this action on October 5, 2023, under docket number ATL-L-2790-23, purporting to assert causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, promissory estoppel and alleged violation of the New Jersey Wage Payment and Collection Law. (Pa00030-47).

Decisions by both the Superior Court and Appellate Division, issued after Plaintiffs' original Complaint in 2018, prompted Defendants to file a motion to dismiss on the pleadings on November 9, 2023. (Pa000019). The Superior Court held oral argument in connection with Defendants' motion to dismiss on February 16, 2024, and thereafter granted Defendants' motion in an Order and Decision dated

[1] "Pa" refers to Plaintiffs' Appendix. "Da" refers to Defendants' Appendix.

March 4, 2024, dismissing Plaintiffs' Complaint in its entirety.[2] (Pa000017-29). This appeal now follows.

STATEMENT OF FACTS

A. Atlantic City's Financial Crisis and Designation Under the MSRA.

In the Complaint, Plaintiffs recognize the extraordinary financial crisis that Atlantic City has faced over the past decade. The City submitted to state monitorship pursuant to N.J.S.A. 52:27BB in February 2011 in response to tax appeals filed by various casinos which, among other economic conditions, triggered an unprecedented financial crisis. (Pa00020); (Pa000034, Compl. ¶ 9). Despite the monitorship, the City continued to struggle financially, and "has experienced a $14,000,000[] reduction in its real property tax base, substantial decline in tax revenue, drastic property tax increases, and suffocating tax appeals. The economic downturn resulted in the closure of 5 casinos, more than 11,000 people have lost their jobs, and Atlantic County has one of the highest foreclosure rates in the nation." (Pa000308).

[2] In the March 4, 2024 Order and Decision, the Superior Court did not reach Defendants' motion to dismiss to the extent it was based on *res judicata* and the entire controversy doctrine. (Pa000028-29). In the event this matter is remanded to the Superior Court, Defendants reserve all rights to renew these issues as grounds for immediate dismissal.

On May 27, 2016, then-Governor Christopher Christie signed S-1711/A-2569 into law, the "Municipal Stabilization and Recovery Act" ("MSRA"), N.J.S.A. 52:27BBBB-1, *et seq.,* with bipartisan support. (Pa000037, Compl. ¶ 24).

In adopting the MSRA, the Legislature found and declared that:

> a. The short and long-term fiscal stability of local government units is essential to the interests of the citizens of this State to assure the efficient and effective provision of necessary governmental services vital to public health, safety, and welfare, including the fiscal health of our State's municipalities.
>
> b. In certain extreme cases, local governments that experience severe fiscal distress become incapable of addressing the circumstances that led to that extraordinary distress or of developing a comprehensive plan for financial rehabilitation and recovery.
>
> c. It is necessary and appropriate for the State to take action to assist local governments experiencing severe budget imbalances and other conditions of severe fiscal distress or emergency by requiring prudent fiscal management and operational efficiencies in the provision of public services.
>
> d. As the State entity primarily responsible for the financial integrity and stability of all local government units, the Local Finance Board should be authorized, under certain limited circumstances, to develop a comprehensive rehabilitation plan for local governments that are experiencing severe fiscal distress, and to act on behalf of local government units to remedy the distress.

N.J.S.A. 52:27BBBB-2.

The MSRA provides that the Director of the Department of Community Affairs, Division of Local Government Services "may ascertain whether a municipality should be deemed a municipality in need of stabilization and recovery." N.J.S.A. 52:27BBBB-4(a). If the Director so ascertains, the MSRA then requires

that the Director recommend to the Commissioner of the Department of Community Affairs that he determine the municipality to be in need of stabilization and recovery ("Final Determination"). (Id.). If the Commissioner makes such a Final Determination, the Director is required to notify the municipality's clerk or other municipal official of the Final Determination in writing. (Id.).

Within 150 days of the Final Determination, the MSRA requires that the municipality prepare and adopt a resolution containing a five-year recovery plan which must be submitted to the Commissioner for review ("Recovery Plan"). N.J.S.A. 52:27BBBB-4(b)-(c). The MSRA provides in detail various items that must be included in the Recovery Plan, including a proposed balanced budget for the upcoming fiscal year. N.J.S.A. 52:27BBBB-4(b). Upon receipt of the Recovery Plan, the Commissioner has five business days to determine in his "sole and exclusive discretion, whether the [R]ecovery [P]lan is likely or is not likely to achieve financial stability for the municipality." N.J.S.A. 52:27BBBB-4(c). If the Commissioner "determines that the [R]ecovery [P]lan is not likely to achieve financial stability," or if the "municipality fails to submit a plan," the Local Finance Board may "assume and reallocate to, and vest exclusively in" the Director "any of the functions, powers, privileges, and immunities of the governing body of that municipality." N.J.S.A. 52:27BBBB-5(a)(1). In those circumstances, the MSRA authorizes the Director "to take any steps to stabilize the finances, restructure the

debts, or assist in the financial rehabilitation and recovery of the municipality in need of stabilization and recovery . . ." N.J.S.A. 52:27BBBB-5(a)(1).

On November 9, 2016, pursuant to the MSRA, the Local Finance Board voted 5-0 to assume, reallocate, and vest the powers of the governing body of Atlantic City exclusively with then-Director of the Division of Local Government Services in the Department of Community Affairs, Timothy Cunningham. (Pa000037, Compl. ¶ 26).[3] On November 14, 2016, former United States Senator and Attorney General of New Jersey, Jeffrey Chiesa, was named the Director's designee and was authorized to exercise any powers granted to the Director under the MSRA, including taking steps to stabilize the finances, restructure the debts and assist in the financial rehabilitation and recovery of the City. (Pa000037, Compl. ¶ 27).

B. The MSRA Conferred The Director With Broad Powers to Stabilize Atlantic City and Facilitate its Recovery.

The MSRA provides the Director with broad powers in taking employment actions in municipalities "in need of stabilization and recovery," and specifically authorizes the Director and/or his Designee to:

> [T]ake any steps to stabilize the finances, restructure the debts, or assist in the financial rehabilitation and recovery of the municipality in need of stabilization and recovery, including, but not limited to:

[3] Defendant Jacquelyn Suarez replaced Director Cunningham as the Director of the Division of Local Government Services in the Department of Community Affairs during the relevant time period. (Pa000033, Compl. ¶ 4).

> ...
>
> (f) amending or terminating any existing contracts or agreements, which shall not include bonds, notes, indentures, or other similar financing instruments and documents to which the municipality is a party, in accordance with the terms thereof; or unilaterally amending or terminating any contracts or agreements which shall not include bonds, notes, indentures, or other similar financing instruments and documents to which the municipality is a party, provided that the director determines that the unilateral termination or amendment is reasonable and directly related to stabilizing the finances or assisting with the fiscal rehabilitation and recovery of the municipality in need of stabilization and recovery;
>
> (g) unilaterally modifying, amending, or terminating any collective negotiations agreements, except those related to school districts, to which the municipality is a party, or unilaterally modifying, amending, or terminating the terms and conditions of employment during the term of any applicable collective negotiations agreement, or both, provided that the director determines that the modifications, amendments, or terminations are reasonable and directly related to stabilizing the finances or assisting with the fiscal rehabilitation and recovery of the municipality in need of stabilization and recovery[.]...
>
> (i) with respect to any expired collective negotiations agreement to which the municipality in need of stabilization and recovery is a party, unilaterally modifying wages, hours, or any other terms and conditions of employment.

N.J.S.A. 52:27BBBB-5(a)(3).

Indeed, in their Complaint, Plaintiffs recognize that the MSRA "provides a mechanism for the State and its designees to takeover complete control of the City, including staffing, labor contracts, promotions, and pay." (Pa000037, Compl. ¶ 25). New Jersey courts, including the Appellate Division, have consistently recognized the broad authority conferred to the Director under the MSRA.

C. Courts Have Consistently Confirmed the Constitutionality of the MSRA.

Almost immediately following the implementation of the MSRA, Plaintiffs sought to challenge the constitutionality of the statute. On March 15, 2017, Plaintiffs commenced an action by way of Order to Show Cause challenging the constitutionality of the MSRA and the reforms implemented by the then-Director and Designee (the "First Police Matter"). (Pa000308). By Order dated May 23, 2017, in a 57-page opinion by the Honorable Julio L. Mendez, A.J.S.C., the Superior Court upheld the constitutionality of the MSRA, as well as the Director's right to implement the majority of the collective bargaining agreement modifications at issue. (Pa000305-363). In doing so, the Superior Court recognized that the MSRA reflected the State Legislature's intent to provide the Director and Designee with broad and extensive powers to execute a comprehensive plan to assist the City in achieving economic stability. (Pa000315). Judge Mendez explained that "Atlantic City's severe fiscal crisis stems from two main reasons. First, the well documented economic downturn and devaluation of real estate that led to the substantial reduction in tax revenue. Second, the inability of the City to reduce spending to reflect the reduction in revenue." (Pa000309). In considering the constitutionality of the MSRA, the Superior Court found:

> Regarding the enactment of the [MSRA], the law is settled. The State has an inherent police power to issue legislation regarding the regulation and administration of municipalities when it is necessary for

the protection of the public welfare, health, and safety. See Rodriguez v. Raymours Furniture Co., 225 N.J. 343, 355 (2016); Hudson Cnty. News Co. v. Sills, 41 N.J. 220, 227 (1963). The power granted to municipalities originates in the State's police power. See Inganamort v. Ft. Lee, 62 N.J. 521, 528 (1973) citing Bergen County v. Port of New York Authority, 32 N.J. 303, 312-314 (1960). Also, "[t]he grant of an express power by the Legislature is always attended by such incidental authority as is fairly and reasonably necessary or appropriate to make it effective, and the authority granted to an administrative agency should be construed so as to permit the fullest accomplishment of the legislative intent." Kaprow v. Bd. of Educ. of Berkeley Twp., 131 N.J. 572, 581, 622 A.2d 237,241 (1993) quoting Mulligan v. Wilson, 110 N.J. Super. 167, 171, 264 A.2d 745 (App.Div.1970). Courts will uphold an exercise of police power when "statutes exercising those police powers serve a legitimate public purpose and the adjustment of the private parties' duties and obligations is on reasonable terms and conditions." Fidelity Union Trust Co. & N.J. Highway Auth., 85 N.J. 277, 287 (1981); see also Schmidt v. Bd. of Adjustment of City of Newark, 9 N.J. 405, 413-16 (1952).

The State of New Jersey duly enacted the [MSRA] to address the extraordinary financial distress of municipalities like Atlantic City. Despite the City's severe economic collapse over the last 8 years, the City has continued to enter into contracts and has agreed to payments and benefits it simply can no longer afford. The court acknowledges that over the last few years the current administration has made efforts to confront these issues. Plaintiffs have also made significant concessions, but it simply is not enough. The State Legislature has determined that Atlantic City requires "prudent fiscal management and operational efficiencies in the provision of public services" in order to recover. N.J.S.A. 52:27BBBBB-2.

Having carefully reviewed the [MSRA], the case law, and arguments submitted by both sides, the court concludes that plaintiffs are unable to establish a reasonable probability of success on the merits on their challenges to the [MSRA]. The enactment of the [MSRA] is a proper exercise of the State's inherent police power to pass legislation when necessary for the public health, safety, and welfare. Courts are reluctant to disturb legislation, such as the [MSRA], enacted to serve a legitimate public purpose.

(Pa000333-335).

The Superior Court also considered Plaintiffs' challenges relating to the abrogation or impairment of contracts. Specifically, Plaintiffs argued that the MSRA "constitutes a substantial impairment of the existing CNAs … Both PBA, SOA, and the City are parties to the CNAs with a term of January 1, 2013 to December 31, 2015. The City, PBA, and SOA negotiated terms for successor agreements which were memorialized and ratified on October 24, 2016. Plaintiffs propose that by allowing the Designee, pursuant to the Recovery Act, to unilaterally make changes to the CNAs, the Recovery Act substantially impairs the contractual relationship between the PBA, SOA, and the City." (Pa000347).

In response, the Superior Court held that: (a) the MSRA "provides the Designee with authority that impairs the contract rights of the plaintiffs;" (b) "Courts have … recognized that at times based on extraordinary circumstances contracts of public employment are subject to modification or early termination;" and (c) "Plaintiffs were well aware of the financial state of Atlantic City when entering into their respective CNAs and MOAs, it was even included in the language of the agreements." (Pa000348-349).

Following the May 23, 2017 decision, the Designee issued a Notice of Implementation dated June 7, 2017, consistent with the decision. (Pa000208-212). Among the changes placed into effect related to pay within the PBA and SOA,

including promotional pay. With respect to the PBA, the Notice of Implementation provided for an updated salary scale, and indicated that the revised compensation scale would be the "entire compensation" for each employee, and further eliminated the "current rank differential upon promotion from Police Officer to Sergeant." (Pa000209-210).

With respect to the SOA, the Notice of Implementation provided:

> Effective June 7, 2017, a new salary guide is hereby established for all employees, including future promotions to the rank of Lieutenant and Captain. The below salaries shall be the entire compensation for each employee. There shall be no supplemental compensation except for overtime where applicable.
>
> | RANK | 2017 Salaries |
> |---|---|
> | CAPTAIN | $125,000 |
> | LIEUTENANT | $115,000 |

(Da00001-14).

Thereafter, on January 18, 2018, the parties to the First Police Matter filed a settlement agreement (the "Settlement Agreement") resolving that matter. (Pa0000199-203). As part of the Settlement Agreement, the parties agreed to a resolution regarding pay. Specifically, the Settlement Agreement provides the "salaries and steps specifically set forth in the June 7, 2017 Implementation Memoranda shall not be altered," but that "all currently employed Sergeants will be increased to a new base salary of $100,000.00 per year effective January 1, 2018 and

all sworn officers hired as, or promoted to the rank of Sergeant will receive a base salary of $100,000.00 per year. All other law enforcement officers hired after the date of this Agreement shall not be entitled to any of these additional monies and shall be hired and thereafter promoted under the salaries and steps specifically set forth in the June 7, 2017 Implementation Memoranda." (Pa000200). The parties further agreed that the "Implementation Memorandum dated June 7, 2017, which modified the collective negotiations agreements with PBA Local 24 and the SOA shall remain in full force and effect except as modified by this Settlement Agreement." (Pa000201).

Following the settlement of the First Police Matter, the Appellate Division had its first opportunity to consider the MSRA, and confirmed that the "Legislature instructed the courts to liberally construe the MSRA 'to give effect to its intent that severe fiscal distress in municipalities in need of stabilization and recovery shall be addressed and corrected.'" Atl. City Superior Officers' Ass'n v. City of Atl. City, No. A-3117-20, 2022 WL 2352376, at *6 (N.J. Super. Ct. App. Div. June 30, 2022); (Pa000297-304). In Superior Officers', the Appellate Division found that "MSRA's findings and declarations undeniably supply the justifications for granting the State the authority to unilaterally modify the expired-but-effective CNA" at issue. Id. at *9.

D. Plaintiffs' Complaint.

Notwithstanding the Settlement Agreement and the Appellate Division's decision in Superior Officers', Plaintiffs filed this action on October 5, 2023, rehashing claims that pre-date the MSRA, and which were previously abandoned by Plaintiffs. (Pa00030-47). Specifically, Plaintiffs' Complaint relates to MOAs entered in connection with the negotiation of CNAs that expired in 2015, prior to the City's designation as a municipality in need of stabilization and recovery under the MSRA. (Pa000034-35, Compl. ¶¶ 13-18). Plaintiffs allege that during "negotiations for successor CNAs, the City disclosed to Plaintiffs that the ACPD needed to promote numerous officers but did not have the financial resources to pay for the promotions." (Pa000035, Compl. ¶ 17).

Plaintiffs further allege that in May 2016, again before the Local Finance Board vested the Director with control over Atlantic City's finances, that the City reached separate agreements with the PBA and SOA regarding promotions. The agreements, however, did not guarantee a pay increase for the promoted officers. Far from it – they recognized, the City's inability to pay promotional increases. *First*, an MOA was entered with the PBA, which provided that "the City may effectuate such promotions as it deems necessary from Police Officer to Sergeant with no increase in pay until a salary increase, including rank deferential and any other increase, is ratified between the City, the State Monitor, and the PBA, or until

such salary increases are awarded by an interest arbitrator in accordance with the statutory provisions set forth in N.J.S.A. 34:13A-16, et seq. All increases shall be retroactive to the date of promotion." (Pa000035-37, Compl. ¶ 19).

The SOA and Defendants entered a similar agreement, which provided that "the City may effectuate such promotions as it deems necessary from Sergeant to Lieutenant, and/or Lieutenant to Captain with no increase in pay until a salary increase, including rank deferential and any other increase, is ratified between the City, the State Monitor and the SOA, or until such salary increases are awarded by an interest arbitrator in accordance with the statutory provisions set forth in N.J.S.A. 34:13A-16, et seq. All increases shall be retroactive to the date of promotion." (Pa000035-37, Compl. ¶ 19).

Plaintiffs allege that the agreements were ratified by the PBA and SOA and were thereafter approved by the Atlantic City Council on June 8, 2016. (Pa000037, Compl. ¶¶ 20-22). Without acknowledging the import of the MSRA, or the terms of the Notice of Implementation or Settlement Agreement, Plaintiffs argue that the "Settlement Agreement set terms of a successor CNA between the PBA and the City and State and a successor CNA between the SOA and the City and State," thereby triggering promotional payments pursuant to the 2016 MOAs. (Pa000039, Compl. ¶ 39). Plaintiffs do not, however, allege that the Settlement Agreement contains a "salary increase." Instead, Plaintiffs baldly claim that pursuant to the MOAs,

following the Settlement Agreement, "Defendants were obligated to pay impacted members retroactive pay and raise pay to the appropriate level for titles to which these members were promoted." (Pa000039, Compl. ¶ 41). Plaintiffs further allege that "Defendants failed to pay impacted members retroactive pay and have failed to raise wages and salary items to the contractual levels." (Pa000039, Compl. ¶ 42).

Thus, Plaintiffs' claim relates solely to the allegation that Defendants have abrogated MOAs entered prior to Atlantic City's designation under the MSRA, despite the fact that the MOAs were subject to a condition precedent, which never materialized, and in any event could be (and were) unilaterally modified pursuant to the MSRA.

E. The Superior Court's Well-Reasoned Decision.

The Superior Court held oral argument in connection with Defendants' motion to dismiss on February 16, 2024. On March 4, 2024, the Superior Court issued a written opinion, dismissing the Complaint with prejudice, in an eleven-page written decision by Hon. Michael J. Blee, A.J.S.C. (Pa000019-29). In reaching its decision, the Superior Court analyzed the parties' respective positions and found that (a) Defendants acted within the authority conferred under the MSRA and (b) the 2016 MOAs were subject to a contingency that never materialized, precluding an actionable claim.

Specifically, the Superior Court recognized the Superior Officers' decision and noted that it addresses the power vested in the State under the MSRA:

> It is undisputed that the MSRA delineates substantial authority to the State's ability to terminate and modify existing agreements involving municipalities in need of stabilization and recovery. Applying this rationale to the case at bar, this Court finds the MSRA is to be interpreted liberally and was intended to supersede all prior agreements or contracts, including the 2016 MOAs.

(Pa000026-27).

The Superior Court further analyzed the MOAs in the context of the MSRA, together with the Settlement Agreement and Implementation Memo, and determined that Plaintiffs had failed to state a cause of action:

> Pursuant to [the MOAs], Plaintiffs agreed to accept promotions without a pay increase and subject to contingencies. These agreements were entered into at Plaintiffs' risk and understanding that the contingencies may never materialize. Such is what happened here. Plaintiffs' argument that the MSRA does not authorize the deprivation of earned wages is a mischaracterization of the monetary sums Plaintiffs assert they are owed. Because the 2016 MOAs were subject to contingencies that never occurred, Defendants did not deprive Plaintiffs of earned wages. Further, the terms of the June 7, 2017 Notice of Implementation are clear and should be interpreted to encompass all prior salary agreements. The Notice of Implementation "provided for an updated salary scale ... indicating that the revised compensation scale would be the 'entire compensation' for each employee." This language demonstrates the intent of the Implementation to supersede all prior agreements relating to compensation and salary, including the 2016 MOAs. This language, coupled with the broad authority under the MSRA to modify and terminate existing agreements, is enough to persuade the Court that the Notice of Implementation was not silent on the issue of Plaintiffs' earned wages. Rather, the Implementation modified the prior MOAs' terms and provided entire compensation pay to Plaintiffs.

> The Court further finds the MSRA specifically vests authority in Defendants to act in this manner. The Defendants' decision to modify the 2016 MOAs via the 2017 Notice of Implementation was "reasonable and directly related to stabilizing the finances or assisting with the fiscal rehabilitation and recovery of the municipality in need of stabilization and recovery." N.J.S.A. § 52:27BBBB. Defendants' actions are also protected under The Municipal Stabilization and Recovery Act "to the extent any inconsistency exists between the terms of P.L.2016,c.4 (C.52.27BBBB-1 et al) and other applicable laws, the terms of P.L.2016,c.4 (C.52.27BBBB-1 et al) shall prevail." N.J.S.A. § 52:27BBBB-14. Thus, the claims by Plaintiffs relating to the New Jersey Wage Payment and Collection Law are futile under the plain language of the MSRA.

(Pa000027-28).

The Superior Court's Order and Decision should be affirmed on appeal.

STANDARD OF REVIEW

Rule 4:6-2(e) provides that a defendant may move to dismiss a complaint for "failure to state a claim upon which relief may be granted." R. 4:6-2(e). On appeal, this Court may conduct a plenary review from the lower court's decision to grant Defendants' motion to dismiss pursuant to Rule 4:6–2(e). Sickles v. Cabot Corp., 379 N.J. Super. 100, 106 (App. Div. 2005), certif. denied, 185 N.J. 297 (2005). However, it is well settled that a motion to dismiss for failure to state a claim under Rule 4:6-2(e) must be granted if a "generous reading of the allegations does not reveal a legal basis for recovery." Edwards v. Prudential Prop. & Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003). A court must dismiss a plaintiff's complaint if it has failed to articulate a legal basis entitling plaintiff to relief. Camden County

Energy Recovery Assocs., L.P. v. New Jersey Dep't of Envtl. Prot., 320 N.J. Super. 59, 64 (App. Div. 1999); see Printing Mart-Morristown v. Sharp Electronics Corp., 116 N.J. 739, 771-72 (1989) (setting forth standard for motions to dismiss); see, e.g., Sickles, 379 N.J. Super. at 105–06 (motion to dismiss "must be evaluated in light of the legal sufficiency of the facts alleged in the complaint"); Donato v. Moldow, 374 N.J. Super. 475, 482 (App. Div. 2005) (same).

"If the complaint states no basis for relief and discovery would not provide [the claimant with a basis for relief], dismissal is the appropriate remedy." Banco Popular North America v. Gandi, 184 N.J. 161, 166 (2005). Because Plaintiffs cannot assert a claim against Defendants as a matter of law, this Court should affirm the Superior Court's dismissal with prejudice.

LEGAL ARGUMENT

POINT I

THE MSRA EXPLICITLY AUTHORIZES THE UNILATERAL TERMINATION OF CONTRACTS AND THE SUPERIOR COURT CORRECTLY FOUND THAT PLAINTIFFS FAIL TO ALLEGE ANY ACTIONABLE CONDUCT (Pa17-29).

In considering Defendants' motion to dismiss, the Superior Court considered the plain language of the MSRA, and properly applied that language to dismiss Plaintiffs' Complaint. Plaintiffs' response on appeal is to ignore the plain language of the MSRA, or alternatively argue that the Superior Court's interpretation was somehow improper. Plaintiffs' position is contrary to basic tenants of statutory

interpretation, and should be rejected by this Court. The Superior Court properly dismissed the Complaint, because it does nothing more than complain of a permissible and authorized action under the MSRA. Relevant here, the MSRA specifically grants Defendants with the authority to:

> [T]ake any steps to stabilize the finances, restructure the debts, or assist in the financial rehabilitation and recovery of the municipality in need of stabilization and recovery, including, but not limited to:
>
> ***
>
> (f) amending or terminating any existing contracts or agreements, which shall not include bonds, notes, indentures, or other similar financing instruments and documents to which the municipality is a party, in accordance with the terms thereof; or unilaterally amending or terminating any contracts or agreements which shall not include bonds, notes, indentures, or other similar financing instruments and documents to which the municipality is a party, provided that the director determines that the unilateral termination or amendment is reasonable and directly related to stabilizing the finances or assisting with the fiscal rehabilitation and recovery of the municipality in need of stabilization and recovery;
>
> (g) unilaterally modifying, amending, or terminating any collective negotiations agreements, except those related to school districts, to which the municipality is a party, or unilaterally modifying, amending, or terminating the terms and conditions of employment during the term of any applicable collective negotiations agreement, or both, provided that the director determines that the modifications, amendments, or terminations are reasonable and directly related to stabilizing the finances or assisting with the fiscal rehabilitation and recovery of the municipality in need of stabilization and recovery;
>
> (i) with respect to any expired collective negotiations agreement to which the municipality in need of stabilization and recovery is a party, unilaterally modifying wages, hours, or any other terms and conditions of employment.

N.J.S.A. 52:27BBBB-5(a)(3).

In dismissing Plaintiffs' Complaint, the Superior Court considered the statutory language and found that:

> It is undisputed that the MSRA delineates substantial authority to the State's ability to terminate and modify existing agreements involving municipalities in need of stabilization and recovery. Applying this rationale to the case at bar, this Court finds the MSRA is to be interpreted liberally and was intended to supersede all prior agreements or contracts, including the 2016 MOAs.

(Pa000026-27). The Superior Court's Order and Decision is consistent with both this Court's prior decisions concerning the MSRA and basic jurisprudence regarding statutory interpretation.

The New Jersey Supreme Court has held that the basic rule of statutory construction is to ascribe to plain language its ordinary meaning. Bridgewater-Raritan Educ. Ass'n v. Bd. of Educ. of Bridgewater-Raritan Sch. Dist., Somerset Cty., 221 N.J. 349, 361 (2015). The Court first looks to the plain language of the statute and then ascribes to the statutory language its ordinary meaning. D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 119-20 (2007). N.J.S.A. 1:1-1 provides that words in statutes shall be given their "generally accepted meaning, according to the approved usage of the language," unless that reading is inconsistent with "the manifest intent of the legislature" or a "different meaning is expressly indicated."

The "overriding goal has consistently been the Legislature's intent." Hardwicke v. Am. Boychoir Sch., 188 N.J. 69, 95 (2006).

In the Superior Officers' matter, this Court had occasion to construe the MSRA and explained:

> The Legislature's enactment of N.J.S.A. 52:27BBBB-5(3)(i) contemplated precisely the circumstance here where the State may unilaterally modify the terms and conditions of employment in connection with an expired CNA.
>
> Applying the principles of statutory interpretation, the Legislature's intent by the plain language of this provision is apparent. The State may 'unilaterally modify' any term or condition of employment where the CNA with a municipality in need of stabilization and recovery is expired. This 'clear and unambiguous result' concludes our interpretative process. Richardson, 192 N.J. at 195. Thus, MSRA permits the Director to unliterally modify the contract term for accumulated sick leave upon from Lieutenant to Captain as that CNA expired.

Id., 2022 WL 2352376, at *8.

While not precedential, the Superior Officers' decision is instructive. See Sauter v. Colts Neck Volunteer Fire Co. No. 2, 451 N.J. Super 581,600 (App. Div. 2017) (explaining that a court may find "the logic of the opinion persuasive and adopt []" the unpublished, nonbinding opinion).

As in the Superior Officers' case, the only alleged improper conduct by Defendants is action that is expressly permitted by the MSRA, which was granted by the Legislature to ensure the economic recovery of the City. Indeed, as Plaintiffs recognize, the City did not have the financial ability to make promotional payments

in 2016, and the MSRA was enacted as a mechanism by which the City could avoid precisely that sort of expense. Plaintiffs' Complaint does nothing more than complain of conduct that is expressly permitted under the MSRA.

Recognizing the fatal flaw in Plaintiffs' Complaint, the Superior Court properly concluded:

> The Court further finds the MSRA specifically vests authority in Defendants to act in this manner. The Defendants' decision to modify the 2016 MOAs via the 2017 Notice of Implementation was "reasonable and directly related to stabilizing the finances or assisting with the fiscal rehabilitation and recovery of the municipality in need of stabilization and recovery." N.J.S.A. § 52:27BBBB. Defendants' actions are also protected under The Municipal Stabilization and Recovery Act "to the extent any inconsistency exists between the terms of P.L.2016,c.4 (C.52.27BBBB-1 et al) and other applicable laws, the terms of P.L.2016,c.4 (C.52.27BBBB-1 et al) shall prevail." N.J.S.A. § 52:27BBBB-14. Thus, the claims by Plaintiffs relating to the New Jersey Wage Payment and Collection Law are futile under the plain language of the MSRA.

(Pa000028).

Here, the complained of conduct was both expressly permitted under the MSRA and ultimately ratified by Plaintiffs, and cannot be the basis of Plaintiffs' claims. See Atl. City Superior Officers' Ass'n, 2022 WL 2352376, at *8 (affirming dismissal). Moreover, Plaintiffs' reference to a "reasonableness" test is misplaced. The Superior Officers' decision provides guidance that a "reasonableness" standard should not be read into the MSRA where it is not specifically included, as is the case for modifications to expired collectively negotiated agreements. See Id. at *7

(noting "N.J.S.A. 34:13A-16(j) plainly contains no reasonableness standard." The same is true with respect to N.J.S.A. 52:27BBBB-5(a)(3)(i)). Moreover, the Notice of Implementation, which was ratified by the Settlement Agreement, found that the modifications to the Union Members' "entire compensation" was "necessary to achieve financial stability" for the City. (Pa000208). Plaintiffs cannot simply second guess Defendants' position.

POINT II

THE SUPERIOR COURT CORRECTLY HELD THAT PLAINTIFFS FAIL TO STATE A CLAIM BASED ON ALLEGEDLY UNPAID WAGES (Pa17-29).

Plaintiffs base their entire Complaint (and appeal) on their position that Plaintiffs' members, who were promoted in 2016, are somehow owed "unpaid wages" for the time period through June 7, 2017, based on the pre-MSRA MOAs.

The Superior Court explicitly rejected this argument:

> Pursuant to these agreements, Plaintiffs agreed to accept promotions without a pay increase and subject to contingencies. These agreements were entered into at Plaintiffs' risk and understanding that the contingencies may never materialize. Such is what happened here. Plaintiffs' argument that the MSRA does not authorize the deprivation of earned wages is a mischaracterization of the monetary sums Plaintiffs assert they are owed. Because the 2016 MOAs were subject to contingencies that never occurred, Defendants did not deprive Plaintiffs of earned wages.

(Pa000027-28).

A plain reading of the MOAs supports the Superior Court's Order and Decision. The two MOAs are nearly identical and provide:

> Notwithstanding the provisions of the relevant collective negotiations agreements regarding salary adjustments for promotions, the parties agree that the City may effectuate such promotions as it deems necessary from Police Officer to Sergeant with no increase in pay until a salary increase, including rank deferential[sic] and any other increase, is ratified between the City, the State Monitor, and the PBA, or until such salary increases are awarded by an interest arbitrator in accordance with the statutory provisions set forth in N.J.S.A. 34:13A-16, et seq. All increases shall be retroactive to the date of promotion.
>
> ***
>
> Notwithstanding the provisions of the relevant collective negotiations agreements regarding salary adjustments for promotions, the parties agree that the City may effectuate such promotions as it deems necessary from Sergeant to Lieutenant, and/or Lieutenant to Captain with no increase in pay until a salary increase, including rank deferential [sic]and any other increase, is ratified between the City, the State Monitor and the SOA, or until such salary increases are awarded by an interest arbitrator in accordance with the statutory provisions set forth in N.J.S.A. 34:13A-16, et seq. All increases shall be retroactive to the date of promotion.

(Pa000049; 51); (Pa000035-37, Compl. ¶ 19).

Plaintiffs do not allege that any police officer was not paid their salary at any point in time. In fact, the precise point of the MOAs was to recognize Atlantic City's dire financial position and defer any increase in salary to a point which might never come. The MOAs acknowledge that the officers agreed to serve in their new positions without salary increase, subject to a contingency that might never occur. Specifically, the agreements recognize that the officers agreed to serve without salary adjustments for promotions "until a salary increase, including rank deferential [sic] and any other increase, is ratified between the City, the State Monitor and the

[Unions], or until such salary increases are awarded by an interest arbitrator." (Pa000049; 51).

Neither event happened because following the entry of the MOAs, the legislature enacted the MSRA, which created an entirely new framework for addressing Union contracts, and issues including salary and compensation. Ultimately, the Unions agreed to the salary modifications implemented under the MSRA, including that the compensation scale implemented by the Director would be the "entire compensation" for each employee, and that there "would be no supplemental compensation." (Pa000209-210).

The contingencies envisioned in the MOAs never arose, and the Unions ultimately agreed to the "entire compensation" for their officers. Accordingly, Plaintiffs' suggestion that "[a]pplying the Trial Court's logic, the State could require that employees refund wages previously earned and received because they unilaterally modified the terms of the CNAs after the fact" (Pb17) is incorrect.

First, Defendants have not failed to pay an officer an agreed upon wage, or sought to claw back wages actually paid. As the Superior Court found, the 2016 MOAs did not result in "unpaid wages," and Plaintiffs fail to offer a single case supporting their wage claim in the context of a contingent agreement (let alone the MSRA). Plaintiffs simply do not have a claim for "unpaid wages," because the contingency envisioned by the MOAs never arose. Accordingly, Plaintiffs'

reference that the MSRA "did not amend New Jersey Wage Payment and Collection Law, N.J.S.A. 34:11-4.1a, et seq., and N.J.S.A. 34:11-57, et seq.," (Pb18), is of no moment as there were no "earned" wages.

On appeal Plaintiffs also criticize the Superior Courts alleged failure to analyze the individual elements of their causes of action. The cases cited by Plaintiffs, however, demonstrate that such analysis is not needed, where each claim is predicated on a purported breach that is not supported factually or legally in the Complaint. (Pb23-27) (citing Frederico v. Home Depot, 507 F.3d 188, 203 (3d Cir. 2007) (claim for breach of contract requires "breach of that contract"); Wade v. Kessler Inst., 343 N.J. Super. 338 (App. Div. 2001)(breach of good faith and fair dealing requires "the defendant engaged in conduct, apart from its contractual obligations, without good faith and for the purpose of depriving the plaintiff of the rights and benefits under the contract"); Goldfarb v. Solimine, 245 N.J. 326, 339-340 (2021) (promissory estoppel requires "a clear and definite promise"); Portillo v. Nat'l Frieght, Inc., 2022 U.S. District. LEXIS 103186 (D.N.J. June 9, 2022) ("[u]nless an exception applies, the [New Jersey Wage Payment Law] requires 'every employer [to] pay the full amount of wages due to his employees."). Plaintiffs citation to blackletter law for the elements of each of their causes of action does nothing to rehabilitate their claims, where each is based on (a) a contingency that

never came to fruition, (b) which was subject to modification under the MSRA, and (c) ultimately ratified by the Unions in the settlement agreement.

POINT III

THIS MATTER DOES NOT INVOLVE A "VESTED" BENEFIT (Pa17-29).

In Point III of their appellate brief, Plaintiffs argue that the MSRA does not permit the State to "eliminate earned wages that were fully vested," and challenges the March 4 Order and Decision based on the purported deprivation of a "vested benefit." (Pb30). This argument is a red herring.

First, as the Superior Court recognized, "Plaintiffs' argument that the MSRA does not authorize the deprivation of earned wages is a mischaracterization of the monetary sums Plaintiffs assert they are owed. Because the 2016 MOAs were subject to contingencies that never occurred, Defendants did not deprive Plaintiffs of earned wages." (Pa000027-28). Outside of this contingency, Plaintiffs do not point to a single benefit that was earned but not received by the Union members, nor do they cite to a single hour of work that was uncompensated. Accordingly, Plaintiffs' citation to Matter of Morris School Dist. Bd. of Educ., 310 N.J. Super. 332 (App. Div. 1998), and the proposition that earned wages cannot be divested absent a knowing and intentional waiver, is simply inapposite. (Pb30).

Indeed, this section appears to be a vestige from Plaintiffs' appellate brief in the Superior Officers' matter, as Plaintiffs reference facts relevant only to the

Superior Officers' case, and wholly outside of this matter. (Pb30) ("In this matter, the event triggering the payment of accumulated sick leave was the July 1, 2016 promotion.") In any event, in the Superior Officers' matter, the Appellate Division found that alleged "vesting" of employee rights under expired CNAs is inconsequential following the enactment of the MSRA. In considering the alleged vesting of accumulated sick leave upon promotion, the Appellate Division made clear that, "the July 1, 2016 'vesting' of Barnhart and Sarkos's accumulated sick leave lump sum payments is inconsequential. **MSRA permits the Director to unilaterally modify this contract term**." Id., 2022 WL 2352376, at *8 (emphasis added).

Plaintiffs' citation to Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 601 (2020), which does not involve an analysis of vested rights in the context of the MSRA, is also misplaced, and appears to be an effort to collaterally attack a separate order of the Superior Court by the Hon. John C. Porto P.J.Cv. in Vadell, et al. v. City of Atlantic City, et al., relating to the elimination of terminal leave payments, which is currently pending appeal under docket A-002112-23.

While Plaintiffs' arguments may be relevant to the Vadell matter, they are not relevant to the Court's considerations here where Plaintiffs have not alleged the deprivation of a vested right.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court affirm the Superior Court's March 4, 2024 Order and Decision dismissing Plaintiffs' Verified Complaint with prejudice in its entirety.

Respectfully submitted,

CHIESA SHAHINIAN & GIANTOMASI PC
Attorneys for Respondents/Defendants CITY OF ATLANTIC CITY, STATE OF NEW JERSEY, NEW JEREY DIVISION OF LOCAL GOVERNMENT SERVICES IN THE DEPARTMENT OF COMMUNITY AFFAIRS, JACQUELYN SUAREZ

By *s/ Ronald L. Israel* _____
RONALD L. ISRAEL

Dated: November 6, 2024

THE ATLANTIC CITY POLICEMEN'S BENEVOLENT ASSOCIATION LOCAL 24, THE ATLANTIC CITY SUPERIOR OFFICERS' ASSOCIATION, *Appellants/Plaintiffs*, v. **CITY OF ATLANTIC CITY, STATE OF NEW JERSEY, NEW JERSEY DIVISION OF LOCAL GOVERNMENT SERVICES IN THE DEPARTMENT OF COMMUNITY AFFAIRS, JACQUELYN SUAREZ,** Director of the Division of Local Government Services in the Department of Community Affairs in her official capacity**,** *Respondents/Defendants*.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION *Docket No.: A-002478-23T2* Appeal of the March 4, 2024 Orders of the Honorable Michael J. Blee, Superior Court of New Jersey, Atlantic County-Law Division, Trial Docket No. ATL-L-002790-23

APPELLANTS' REPLY BRIEF IN SUPPORT OF APPEAL

O'BRIEN, BELLAND & BUSHINSKY, LLC
509 S. Lenola Road, Bldg. 6
Moorestown, NJ 08057
T: (856) 795-2181
Attorneys for Appellants/Plaintiffs, The Atlantic City PBA Local 24 & The Atlantic City Superior Officers' Association

On the Brief:
Kevin D. Jarvis, Esquire (022452001)
David F. Watkins Jr., Esquire (030812004)

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

PROCEDURAL HISTORY 4

STATEMENT OF FACTS 4

LEGAL ARGUMENTS 4

POINT I: THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS THE VERIFIED COMPLAINT BY FINDING THAT THE MSRA PREVENTS THE POLICE UNIONS' CLAIMS TO RECOVER UNPAID WAGES.
(Pa000017-18, 26-29) 4

POINT II: THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS THE VERIFIED COMPLAINT AS PLAINTIFFS HAVE PLED PRIMA FACIE CAUSES OF ACTION.
(Pa000017-18, 26-29) 10

POINT III: THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION TO DISMISS THE VERIFIED COMPLAINT AS THE MSRA DOES NOT DEPRIVE PAINTIFFS' MEMBERS OF A VESTED BENEFIT.
(Pa000017-18, 26-29) 13

CONCLUSION 15

TABLE OF AUTHORITIES

STATE CASES

Page(s)

Atl. City Superior Officers' Ass'n v. City of Atl. City, No. A-3117-20, 2022 N.J. Super. Unpub. LEXIS 1194 (App. Div. June 30, 2022) 5-7, 13-14

Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595 (2020) 14

Matter of Morris School Dist. Bd. of Educ., 310 N.J. Super. 332 (App. Div. 1998) 14

Pa. Greyhound Lines, Inc. v. Rosenthal, 14 N.J. 372 (1954) 14-15

Phillips v. Curiale, 128 N.J. 608 (1992) 14-15

STATE STATUTES

N.J.S.A. 34:11-4.1 11

N.J.S.A. 34:11-57 11

N.J.S.A. 34:13A-16 ..... 5, 10-11

N.J.S.A. 52:27 BBBB-1 1

N.J.S.A. 52:27BBBB-5 5-9

PRELIMINARY STATEMENT

Respondents/Defendants, the City of Atlantic City ("City"), State of New Jersey ("State"), the Director of the Division of Local Government Services ("DLGS") in the Department of Community Affairs ("DCA") and Jacquelyn Suarez, Commissioner of the DCA (collectively "Defendants"), continue to argue that the New Jersey Municipal Stabilization and Recovery Act ("MSRA"), N.J.S.A. 52:27 BBBB-1, *et seq*., P.L. 2016, c. 4. authorizes limitless power to deprive the police officers represented by Appellants/Plaintiffs, the Atlantic City Policemen's Benevolent Association Local 24 ("ACPBA") and the Atlantic City Superior Officers' Association ("ACSOA" together with the ACPBA "Police Unions"), of basic wage and hour rights. Both Defendants and the Trial Court are respectfully incorrect.

Plaintiffs are seeking payment of earned and unpaid wages for a discrete time period, between the promotion dates in 2016 and when the Superior Court permitted Defendants to alter Plaintiffs' Collective Negotiations Agreements ("CNAs") and other terms and conditions of employment on June 7, 2017. These officers agreed to be promoted without the contractually mandated wage increases in an effort to protect the integrity of the Atlantic City Police Department ("ACPD") and public safety. The City promised to retroactively pay these officers once successor CNAs were approved by the parties or terms

were set by an interest arbitrator. (Pa000049; 51). The intent of the parties was for the promoted officers to receive the owed amount under the then-current CNAs and any increase agreed to or awarded retroactive to promotion. In no uncertain terms did the parties intend that these officers were not going to receive any promotional pay if an increase to the then current promotional rates was not effectuated. At minimum, these officers are entitled to the CNA promotional rate.

Respondents/Defendants argument that they can dissolve agreements for earned wages and ignore New Jersy law which unequivocally requires the payment of earned wages pursuant to the MSRA is patently inconsistent with longstanding judicial precedent, express statutory terms, fundamental concepts of fairness and common sense. Despite Defendants' arguments, a reasonableness standard does apply to Defendants' actions and was not considered by the Trial Court. Moreover, the June 7, 2017 Notice of Implementation and related Settlement Agreement did not address or include terms impacting promotional pay or back pay for the period alleged in this matter.

To be clear, this matter concerns a finite time period from the 2016 promotion dates until the June 7, 2017 implementation of new salaries. It does not seek to add salary increases after the June 7, 2017 implementation date.

Moreover, the MSRA in no way altered the New Jersey Wage Payment laws which require Defendants to pay earned wages. While prior Courts have found that the MSRA permits modification of labor contracts for prospective wages, the issue of whether the MSRA permits Defendants to not pay previously earned wages has not been litigated prior to this matter. The Trial Court's dismissal was both incorrect and premature as: (1) Plaintiffs have met the Motion to Dismiss pleading standard; (2) the MSRA does not permit Defendants to deprive promoted officers of earned wages; and (3) the MSRA did not modify New Jersey's wage and hour statutes.

Plaintiffs have pleaded causes of action more than sufficient to survive Defendants' Motion to Dismiss. Plaintiffs are entitled to discovery and to have this matter litigated on its merits. Plaintiffs urges this Honorable Court to reverse the Trial Court's March 4, 2024 Order and remand to the Trial Court for further proceedings.

PROCEDURAL HISTORY

Appellants adopt the procedural history contained in the Appellants' September 5, 2024 Brief and hereby incorporates same by reference.

STATEMENT OF FACTS

Appellants adopt the statement of facts contained in the Appellants' September 5, 2024 Brief and hereby incorporates same by reference.

LEGAL ARGUMENTS

POINT I

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS THE VERIFIED COMPLAINT BY FINDING THAT THE MSRA PREVENTS THE POLICE UNIONS' CLAIMS TO RECOVER UNPAID WAGES. (Pa000017-18, 26-29)

Defendants argue that the MSRA permits them to yield unrestrained power which includes permitting Defendants to ignore all other laws and not pay promoted officers back wages. Db20-25; Pa000017-18, 26-29. Defendants state that the Complaint "does nothing more than complain of a permissible and authorized action under the MSRA." Db21. This argument is deficient as the MSRA is not all encompassing and does not grant unchecked authority contrary to Defendants' argument that "Plaintiffs cannot simply second guess Defendants' position." Db25.

The decision to deprive officers of promised compensation is not

expressly permitted under the MSRA and was not ratified by Plaintiffs. Db24. Both Defendants and the Trial Court incorrectly rely on Atl. City Superior Officers' Ass'n v. City of Atl. City, No. A-3117-20, 2022 N.J. Super. Unpub. LEXIS 1194 (App. Div. June 30, 2022), which was decided after the initial Complaint was filed in this matter. Pa000026-28; Db23-25. As previously stated in the moving papers, the Appellate Division found that the State was authorized pursuant to the terms of the MSRA to vacate an arbitration award concerning a sick pay lump sum payout owed to two (2) promoted Captains pursuant to the terms of the SOA CNA on their July 1, 2016 promotions. Id.

Defendants are correct that the Appellate Division in Superior Officers rejected the union's argument that a "reasonableness" standard should be applied when Defendants unilaterally vacate an arbitration award pursuant to N.J.S.A. 34:13A-16(j). Db24-25. The Appellate Division, however, found that "[t]he reasonableness standard does apply to N.J.S.A. 52:27BBBB-5(3)(g)[.]" Superior Officers at 24.

The broad provisions of the MSRA, N.J.S.A. 52:27BBBB-5 (a)(3)(g)-(i), grant the following powers, *inter alia*, to the Director of the Division of Local Government Services in the Department of Community Affairs:

> (g) unilaterally modifying, amending, or terminating any collective negotiations agreements, except those related to school districts, to which the municipality is a party, or unilaterally modifying, amending, or terminating the terms and conditions of employment during the term of

> any applicable collective negotiations agreement, or both, provided that the director determines that the modifications, amendments, or terminations are reasonable and directly related to stabilizing the finances or assisting with the fiscal rehabilitation and recovery of the municipality in need of stabilization and recovery;
>
> […]
>
> (i) with respect to any expired collective negotiations agreement to which the municipality in need of stabilization and recovery is a party, unilaterally modifying wages, hours, or any other terms and conditions of employment;

Defendants simply state that the reasonableness standard should not apply to N.J.S.A. 52:27BBBB-5(a)(3)(i) without providing any substantive argument to support that contention and completely ignore that the Appellate Division found that the reasonableness standard applies to N.J.S.A. 52:27BBBB-5(a)(3)(g). Db24-25. The reasonableness standard, as articulated by Judge Mendez, states that the Designee [State] must take into account the following: (1) that he take action that provides for the public health, safety, and welfare; (2) that public services are provided in an efficient and cost-effective manner; (3) that he ensure the development of a comprehensive plan for financial rehabilitation and recovery; and (4) that he take action that is reasonable and directly related to financial stabilization. Pa000332. A "reasonable proposal implies that it is factually based, uniform, fairly implemented, and objective." Pa000335. "To be reasonable, a proposal must be accompanied by an adequate explanation and foundation for its determination." Id. The Designee or State is

also required to engage in discussions and the exchange of ideas with the affected parties. Id.

Defendants cannot point to anything in the record which suggests that these actions or inactions, if permitted by the MSRA, were reasonable. There was no communication submitted by Defendants to indicate any reason why earned wages were not paid. Indeed, as Defendants are relying upon this defense, discovery is necessary to show the reasonableness of withholding earned wages to the promoted officers. Defendants' refusal to comply with their pre-MSRA contractual obligations is completely unreasonable and in violation of the MSRA and is sufficiently pled in the Complaint.

Moreover, both Defendants and the Trial Court's reliance on the Implementation Memo and Settlement Agreement with respect to the promotional pay issues in the instant matter is misplaced. Pa000028; Db24-25. The Implementation Memo was a product of a May 23, 2017 Court Order in PBA Local 24 and SOA v. Christopher J. Christie et al., ATL-L-554-17 ("Police 1") which partially lifted a Temporary Restraining Order and stated that changes to wages were permitted after the "close of business on Tuesday, June 6, 2017." Pa000305-306.

The Implementation Memo stated the following for new salaries:

- ***Effective June 7, 2017***, a new salary guide is hereby established for **all** current and future employees (including ***future***

> ***promotions*** to the rank of Sergeant).[1] Police officers will be placed on the step that is closest to their current base salary. (Step 15 is maximum for Police Officers). Base salary is defined as the employee's total pensionable salary. The below salaries shall be the entire compensation for each employee.
>
> Pa000209-210 (emphasis added).

The parties agreed to resolve Police 1 and entered into the November 17, 2017 Settlement Agreement, submitted to the Court on or about January 16, 2018, which incorporated all nonconflicting terms of the Implementation Memo. Pa000198-207. Neither the Settlement Agreement nor the related Implementation Memo addresses the 2016 promotional wages owed. Indeed, the Implementation Memo has a term of June 7, 2017 through December 31, 2021. Pa000198-212. The effective date with respect to the entirety of the Implementation Memo, including salary adjustments, is July 7, 2017. Id.

The Trial Court relied on the following term from the Implementation Memo to support its argument: "the below salaries shall be the entire compensation for each employee." Pa000028. The Trial Court then found that "Defendants' decision to modify the 2016 MOAs via the 2017 Notice of Implementation was reasonable and directly related to stabilizing the finances or assisting with the fiscal rehabilitation and recovery of the municipality in

[1] The SOA had a separate Implementation Memo adjusting salaries and other terms and conditions of employment which was also effective June 7, 2024. Defendants did not submit that memorandum in this action with their Trial Court filings.

need of stabilization and recovery." Id.

The Implementation Memo and Settlement Agreement never discussed back wages owed and by their own terms, were only effective prospectively from June 7, 2017. Pa000198-212. Defendants were also restrained by Court Order from modifying wages until June 7, 2017 which is after the period Plaintiffs are seeking earned and unpaid wages. Id., Pa000289-296, 305-306. There was no discussion or agreement for back wages addressed in the Implementation Memo and Settlement Agreement despite the Trial Court's reliance on the vague statement of "entire compensation."

Dismissal was inappropriate on this basis. At minimum, the parties should be permitted to conduct discovery to determine whether the promotional pay at issue in this matter was encompassed by the Implementation Memo and Settlement Agreement. The Trial Court and Defendants' assertions are contrary to the terms of the Implementation Memo and Settlement Agreement.

The Trial Court erroneously dismissed Plaintiffs' viable causes of action which must be reversed by This Court.

POINT II

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS THE VERIFIED COMPLAINT AS PLAINTIFFS HAVE PLED PRIMA FACIE CAUSES OF ACTION. (Pa000017-18, 26-29)

Both the Defendants and Trial Court incorrectly rely on the supposition that the MOAs at issue required an unrealized contingency necessary for the promoted officers to get paid. Pa000027-28, 49, 51; Db25-28. This argument fundamentally misstates the terms of the MOAs. Those terms state the following:

> 1. Notwithstanding the provisions of the relevant collective negotiations agreements regarding salary adjustments for promotions, the parties agree that the City may effectuate such promotions as it deems necessary from Police Officer to Sergeant with no increase in pay ***until a salary increase***, including rank deferential[sic] and any other increase, ***is ratified between the City, the State Monitor, and the PBA***, or until such salary increases are awarded by an interest arbitrator in accordance with the statutory provisions set forth in N.J.S.A. 34:13A-16, et seq. ***All increases shall be retroactive to the date of promotion.***

Pa000035-37, 49 (emphasis added).

> 1. Notwithstanding the provisions of the relevant collective negotiations agreements regarding salary adjustments for promotions, the parties agree that the City may effectuate such promotions as it deems necessary from Sergeant to Lieutenant, and/or Lieutenant to Captain with no increase in pay ***until a salary increase***, including rank deferential [sic]and any other increase, ***is ratified between the City, the State Monitor and the***

> ***SOA***, or until such salary increases are awarded by an interest arbitrator in accordance with the statutory provisions set forth in N.J.S.A. 34:13A-16, et seq. ***All increases shall be retroactive to the date of promotion.***

Pa000035-37, 51 (emphasis added).

Defendants argue that these are contingent agreements for any and all earned wages. The Wage Payment Law defines "wages" as "the direct monetary compensation for labor or services rendered by an employee, where the amount is determined on a time, task, piece, or commission basis excluding any form of supplementary incentives and bonuses which are calculated independently of regular wages and paid in addition thereto." N.J.S.A. 34:11-4.1(c). Under the Wage Collection Law, "wages" consist of "any moneys due an employee from the employer whether payable by the hour, day, week, semimonthly, monthly or yearly and shall include commissions, bonus, piecework compensation and any other benefits arising out of an employment contract." N.J.S.A. 34:11-57.

The promoted officers earned and are entitled to the base line CNA rates for each police title in effect at the time of the 2016 promotions up until the June 7, 2017 Implementation Memo. These are wages pursuant to N.J.S.A. 34:11-4.1(c) and N.J.S.A. 34:11-57 despite Defendants' assertions to the contrary. Any ***increase*** to the CNA rates in effect at the time of promotion was the contingency that did not happen. The promotional pay owed pursuant to the terms of the CNA was ***never*** contingent. The fact that the MSRA permitted

Defendants to unilaterally alter the terms of the CNA effective June 7, 2017 did not absolve any obligation for pay earned and not paid for work performed during the period of promotion to implementation. The sixteen (16) officers promoted to sergeant, the six (6) officers promoted to lieutenant, and the two (2) officers promoted to captain during the time period germane to this litigation, never waived their respective rights to the wage rates set forth in the CNAs.

Defendants then incorrectly argue that the promoted officers never earned the wages sought in this matter which nullifies all four (4) causes of action alleged in the Complaint. For the reasons discussed in the moving brief, Plaintiffs have adequately alleged the following counts: Count I- Breach of Contract; Count II- Breach of Implied Covenant of Good Faith and Fair Dealings; Count III- Promissory Estoppel; and Cout IV, New Jersey Wage Payment and Collection Law. Pb23-28. Earned wages are protected by New Jersey law and must not be unduly impacted by vague provisions of the MSRA. The MSRA does not permit Defendants to deprive the promoted officers the fruits of their labor.

The Trial Court's March 4, 2024 Order must, therefore, be reversed as all causes of action are more than sufficiently plead in the Complaint.

POINT III

THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION TO DISMISS THE VERIFIED COMPLAINT AS THE MSRA DOES NOT DEPRIVE PAINTIFFS' MEMBERS OF A VESTED BENEFIT. (Pa000017-18, 26-29)

Defendants' characterization of Plaintiffs' "vested right" arguments as a "red herring" is outlandish. Db29-30. The impacted officers worked for the City and earned wages which were never paid. As previously discussed, there was no contingency for promoted rates, only those above the CNA rates in effect. Defendants further argue that "Plaintiffs do not point to a single benefit that was earned but not received." Db29. This is contrary to the fundamental basis of this matter. Promoted officers earned higher rates for every hour they worked at their previous rate.

Defendants cite Superior Officers and state that the "Appellate Division found that alleged 'vesting' of employee rights under expired CNAs is inconsequential following the enactment of the CBA." Db29-30. This is not what the Appellate Division found. The Appellate Division found the following in response to the claim that accumulated sick leave was a vested right:

> In the end, although no case law directly addresses whether lump sum payments upon promotion for accumulated sick leave constitute a vested right, Judge Mendez's reasoning that the vested right was the sick leave days, not the dollar amount, is also persuasive. The Director disapproved the arbitration award granting Barnhart and Sarkos lump sum payments for accumulated sick leave when they were promoted. But the Director permitted them to use

> the accumulated leave during their tenure. Thus, because plaintiffs retain their sick leave benefit, the arbitration award does not infringe on their vested contractual rights, if any.
>
> Superior Officers at 24-25.

The promoted officers have no equivalent benefit unlike the accumulated sick leave in Superior Officers, which those officers were able to use but not cash out. These officers worked at a promoted rank and earned additional wages for every hour worked at their respective promoted rank. Moreover, earned wages cannot be divested absent ***a knowing and intentional waiver by each person adversely affected***. Matter of Morris School Dist. Bd. of Educ., 310 N.J. Super. 332 (App. Div. 1998). None of Plaintiffs' members have executed any such knowing and intentional waiver. Under no reasonable interpretation of the MSRA is the State permitted to eliminate earned wages that were fully vested ***prior*** to the State acquiring the authority to modify those terms on June 7, 2017.

The New Jersey Supreme Court recently discussed accumulated sick leave as a vested right in Barila v. Bd. of Educ. of Cliffside Park, 241 N.J. 595, 601 (2020). In that case, the Supreme Court found that a modification to terminal leave was effective because those benefits do not vest until a triggering event, such as retirement or separation from employment. Id. at 601. In this matter, the event triggering the payment of accumulated sick leave was the July 1, 2016 promotion, because the contractual right to wage increases was "a present fixed

interest which […] should be protected against arbitrary state action." Phillips v. Curiale, 128 N.J. 608, 620 (1992) (quoting Pa. Greyhound Lines, Inc. v. Rosenthal, 14 N.J. 372, 384 (1954)).

Under no reasonable interpretation of the MSRA is the State permitted to eliminate earned wages that were fully vested ***prior*** to the State acquiring the authority to modify those terms on June 7, 2017. The Trial Court's March 4, 2024 Order must, therefore, be reversed.

CONCLUSION

For the reasons set forth above, Plaintiffs urge this Honorable Court to: (1) reverse the Trial Court's March 4, 2024 Order and Opinion; (2) remand the matter and direct the Trial Court for further proceedings.

Respectfully Submitted**,**

O'BRIEN, BELLAND & BUSHINSKY, LLC

/s/ Kevin D. Jarvis
Kevin D. Jarvis, Esquire
David F. Watkins Jr., Esquire
Attorneys for Appellants/Plaintiffs

Dated: November 20, 2024