I.R. NO. 2019-1

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2019-005

MIDDLESEX EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee grants in part an application for interim relief filed by the Association against the Board alleging that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1) and (5), when the Superintendent imposed certain restrictions on the Association President (i.e., instructed him not to have any contact with parents, students or current/former staff members; directed him not to enter any school building or attend any school-related functions/ activities; discontinued his school district email account) pending the outcome of a New Jersey Department of Child Protection and Permanency (DCP&P) investigation regarding the Association President's alleged inappropriate contact with a current student.

The Designee finds that the Board has articulated a legitimate and substantial business justification for taking precautionary measures, including the imposition of reasonable restrictions on the Association President, pending a change in circumstances or final resolution of the underlying unfair practice charge. The Designee finds that a determination regarding whether the Association has a substantial likelihood of prevailing in a final Commission decision is presently unknown. The Designee also finds that the Association has demonstrated that maintaining the existing restrictions on the Association President absent a change in circumstances constitutes irreparable harm and a relative hardship for the Association; and that the public interest will not be injured by granting partial relief. The Designee finds that the Association has sustained the burden required for interim relief and partially grants the application, but notes that the order is subject to a motion for dissolution or modification based upon a change in circumstances. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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Appearances:

For the Respondent, Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC, attorneys (Dennis McKeever, of counsel)

For the Charging Party, Detzky, Hunter & DeFillippo, LLC, attorneys (David J. DeFillippo, of counsel)

INTERLOCUTORY DECISION

On July 10, 2018, the Middlesex Education Association (Association) filed a three-count unfair practice charge against the Middlesex Board of Education (Board) alleging that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically subsections 5.4a(1), (2), (3), (5) and (7),[1/] when:

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act"; "(2) Dominating or interfering with the formation, existence or administration of any employee organization"; "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act"; "(5) Refusing to negotiate in good faith with a majority (continued...)

-the Superintendent imposed certain restrictions on Association President Robert DeLude (DeLude) (i.e., placed him on paid administrative leave; instructed him not to have any contact with parents, students, or current/former staff members; directed him not to enter any school building or attend any school-related functions/activities; discontinued his school district email account) pending the outcome of a New Jersey Department of Child Protection and Permanency (DCP&P) investigation regarding DeLude's alleged inappropriate communication with a former student[2/];

-the Superintendent issued DeLude a written reprimand on April 20, 2018 based upon an April 19, 2018 school district council meeting during which DeLude questioned the Superintendent about the status of a Board investigation that was mandated under the New Jersey Public Employees Occupational Safety and Health Act (PEOSHA), N.J.S.A. 34:6A-25 et seq.; and

-the Middlesex High School Principal issued DeLude a letter (after the Association filed a grievance related to DeLude's April 20, 2018 written reprimand) advising that he had recently reviewed DeLude's file, became aware of certain restrictions put in place by the Board in August 2013, and reminded DeLude that he needed to continue to comply with same but did not accuse DeLude of failing to comply with any restrictions and did not explain what prompted the review.

1/ (...continued) representative of employees in an appropriate unit concerning terms and conditions of employees in that unit, or refusing to process grievances presented by the majority representative"; and "(7) Violating any of the rules and regulations established by the commission."

2/ In the Board's brief and during oral argument, the Board's attorney clarified that the DCP&P investigation centers on an allegation of "inappropriate contact with a current student."

The Association's unfair practice charge was accompanied by an application for interim relief that only pertains to the 5.4a(1) and (5) allegations regarding the restrictions imposed on DeLude. The Association's proposed order to show cause seeks an interim relief order requiring the Board to take the following action pending final resolution of the underlying unfair practice charge:

> -cease and desist from continuing to interfere, restrain, coerce, dominate or otherwise exhibit anti-union animus towards Robert DeLude, President of the Middlesex Education Association, specifically by prohibiting President DeLude from having any contact with Respondent's current as well as former staff members – unless required by his role as an officer of the Association – as well as prohibiting President DeLude from being on school grounds and/or using school-owned networks to perform his duties as Association President.

PROCEDURAL HISTORY

On July 11, 2018, I signed an Order to Show Cause directing the Board to file any opposition by July 18; the Association to file any reply by July 25; and setting July 31 as the return date for oral argument. On July 17, the Board filed opposition to the application for interim relief. On July 22, the Association filed a reply brief. On July 31, counsel engaged in oral argument during a telephone conference call.

In support of the application for interim relief, the Association submitted a brief, exhibits, and the certification of UniServ Field Representative for the New Jersey Education

Association (NJEA), Brian R. Furry (Furry). In opposition, the Board submitted a letter brief. The Association also submitted a reply brief, exhibits, and the certification of its Vice President, Carolyn Muglia (Muglia).

FINDINGS OF FACT

The Association represents all full-time and part-time certified personnel and all non-certified personnel employed by the Board with certain exclusions as specified in the recognition clause (Article I) of the parties' collective negotiations agreement (CNA). The Board and the Association are parties to a CNA in effect from July 1, 2014 through June 30, 2017. The grievance procedure ends in binding arbitration.

Article 5 of the parties' CNA, entitled "Association Rights," provides in pertinent part:

> 5.2 Representatives of the Association shall be permitted to transact official Association business on school property at reasonable times provided that they shall not interfere with or interrupt normal school operations or employee responsibilities.
>
> 5.3 With permission granted by the appropriate administrator, the Association shall be able to use school facilities and equipment for carrying out Association business provided that such use does not interfere with the operation of the school or the district. . . .
>
> 5.4 The Association shall have the right to use the inter-school mail facilities and school mailboxes to a reasonable extent unless this use interferes in any way with normal school functioning. The building principal and Superintendent shall be given a

> copy of material simultaneously when distributed to members at their schools.
>
> 5.5. The Board shall make available to an Association representative a copy of the agenda and minutes of all regular and special meetings of the Board upon request.
>
> 5.6 The Association will be invited to take part in the planning of the orientation program for potential Association members. Time will be allocated during the orientation period when the Association shall have the responsibility of distributing this Agreement and other pertinent material. All members shall be notified by the Administration of their responsibility to attend the complete orientation program.
>
> 5.7 The Association shall have in each school building a bulletin board in the faculty lounge or employee dining room. Copies of all materials to be posted shall be given to the building principal's and the Superintendent's offices.

Robert DeLude is a certificated Board employee who served as a science teacher at Middlesex High School during the 2017-2018 school year. He became Association President on July 1, 2017. He also served as Association Vice President for the preceding seven years. Carolyn Muglia is a certificated Board employee who served as a 3rd grade teacher at Watchung Elementary School during the 2017-2018 school year. She became Association Vice President on July 1, 2017.

On May 24, 2018, Superintendent Linda Madison (Madison) sent a letter to DeLude that provides:

> Based upon an allegation made to the Department of Child Protection and Permanency (DCP&P) - Institutional Abuse Division - on

> May 22, 2018, you are hereby placed on paid administrative leave pending the outcome of the investigation being conducted by DCP&P.
>
> During your leave you are not to have any contact with Middlesex Borough parents, students, or staff members. You are also directed not to enter any school buildings nor attend any school related functions or activities during the time of your leave.

Between May 24 and July 5, 2018, the Association sent five letters to the Superintendent and/or the Board's attorney seeking the rescission and/or clarification of certain restrictions that were imposed on DeLude. Therein, the Association asserts that the restrictions are interfering with DeLude's ability to conduct union business (e.g., pending grievances, unfair practice charges, an appeal before the Appellative Division, negotiations for a successor CNA and related mediation/fact-finding), communicate with Association members, and collect both personal and Association property from his classroom.

On June 25, 2018, the Board's attorney sent a letter to the Association's attorney that provides:

> In response to your June 22 letter, please be advised that we have no objection to Mr. DeLude attending the June 27 exploratory conferences relative to the above unfair practice charges. Also, Mr. DeLude can make arrangements with the District for a time and location to retrieve his personal belongings. Finally, please be further advised that we have not ignored your previous letter, but have communicated directly with Nicholas Poberezhsky, Esq. from Caruso Smith Picini about these issues.

On July 5, 2018, Superintendent Madison sent a letter to

Muglia that provides:

> Please accept this in response to your correspondence dated July 3, 2018. Please be advised, the Board acknowledges that Mr. DeLude may continue to perform his Association duties while on leave. However, Mr. DeLude is precluded from being on school grounds and/or using school owned networks to perform those duties. Furthermore, Mr. DeLude is to have no contact with employees, or former employees, unless required by his role as an officer of the Association.

On July 5, 2018, Muglia sent a letter to Superintendent Madison that provides in pertinent part:

> We appreciate your clarification that President DeLude “may continue to perform his Association duties” and that he may have contact with current as well as former employees as long as same are “required by his role as an officer of the Association.” However, continuing to prohibit President DeLude from “being on school grounds and/or using school owned networks to perform” his duties as Association President is, respectfully, impermissible under both the Employer-Employee Relations Act as well as the newly-enacted Workplace Democracy Enhancement Act.
>
> The need for President DeLude to enter school property to perform his duties as President are as numerous as they are varied and include the following:
>
> > -We have several grievances which are progressing through the internal steps of the grievance procedure. These matters are addressed on school property and President DeLude needs to be present in order to properly represent the Association;
> >
> > -Our two parties have progressed to fact-finding re: their efforts to

> settle the new C.N.A. Such proceedings will, in all likelihood take place on school property and, again, President DeLude needs to be present;
>
> -The Association will again be conducting a new teacher orientation over a 2-day period in August. President DeLude is slated to run this event and, therefore, obviously needs to be present;
>
> -President DeLude needs to have access to school property to not only continue to attend and observe Board of Education meetings, in his capacity as Association President, but also to meet with individual members to discuss possible grievances; PEOSHA concerns; and other work-related issues.
>
> As for the use of the District's email system, the discontinuance of President DeLude's email has not only prevented him from receiving District announcements to our members but has also prevented members from contacting him regarding various union-related matters. As I am sure you will appreciate, not all of our members have their own personal email address. To reiterate, the Association has no objection to precluding Mr. DeLude from having any contact with present and former staff members regarding the pending DCP&P investigation. However, the on-going restrictions referenced above have had a significant and adverse impact on the Association as a whole and upon President DeLude directly. As such, we are again asking that all said restrictions be rescinded immediately.

On July 10, 2018, the underlying unfair practice charge was filed together with the instant application for interim relief.

Furry certifies that neither the Association nor DeLude have

any desire to compromise the integrity of the DCP&P investigation. However, Furry certifies that the restrictions imposed on DeLude have had a significant adverse impact on DeLude’s ability to represent Association members and perform his duties as President. According to Furry, the restrictions at issue come at a particularly inopportune time because the Association has several pending unfair practice charges; grievances and other union-related matters; and negotiations for a successor CNA are ongoing and have recently progressed from mediation to fact-finding. Furry also certifies that DeLude was unable to attend the Association’s monthly meeting in June 2018; was prohibited from communicating directly with Muglia regarding various pending matters; and no longer receives any announcements issued via email by the District to staff members. According to Furry, Association members are no longer permitted to communicate with DeLude via District email regarding workplace issues and/or other union-related affairs.

Muglia certifies that the following adverse consequences are a result of the restrictions imposed by the Board:

> -DeLude is prohibited from attending Board meetings;
> -DeLude does not receive notice of the Board’s meeting minutes and/or agenda through District email;
> -DeLude does not receive materials distributed to the Association and its members through District email;
> -DeLude cannot access Association files, attend Association meetings, or meet with Association members;

-DeLude cannot post or view any announcements on the Association's bulletin board;
-DeLude cannot participate in the filing of Association grievances or attend related meetings to discuss and resolve disputes;
-DeLude's efforts to participate in negotiations for a successor CNA and related mediation/fact-finding have been frustrated;
-DeLude will be unable to participate in the orientation program for new teachers; and
-DeLude will be unable to attend and address the Association's first general meeting.

LEGAL ARGUMENTS

The Association argues that it has satisfied the standard for interim relief. Specifically, the Association argues that it has a substantial likelihood of prevailing in a final Commission decision because "public employees have the right to present proposals to their employers and make known their grievances through representatives of their own choosing." While conceding that "employees' right to be represented by individuals of its own choosing is not absolute . . . [and] must be balanced with the right of the employer to maintain order in its workplace", the Association maintains that "the Board's actions serve no legitimate and substantial business interest." The Association claims that the restrictions on DeLude "are not designed to preserve the integrity of the pending DCP&P investigation" particularly given that the Association and DeLude "have agreed that he will not have any contact with any current or former staff member regarding [the] investigation." Rather, the Association contends that the restrictions "have severely

interfered with the administ[ration] . . . of the Association" and have "restrained DeLude from exercising the rights guaranteed to him and his members under the Act."[3/] The Association asserts that it will suffer irreparable harm if interim relief is not granted because the restrictions placed on DeLude "[have] significantly compromised his ability to represent his membership as well as administer the various affairs of the Association" and such "interference with the Association's affairs cannot be effectively remedied at the conclusion of the case."[4/] Finally, the Association contends that "the public interest will not be adversely affected in the event interim relief is [granted]" and that in fact "the public interest will actually be enhanced or otherwise promoted by compelling the Board to adhere to the strictures and dictates of the Act . . . ." The Association maintains that "no harm will come to the Board by being compelled to adhere to the clear, concise and unambiguous statutory obligations and otherwise refrain from engaging [in] acts of

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3/ In support of its position, the Association cites the New Jersey Constitution (Art. I, Para. 19), Newark State Operated School District, H.E. No. 2004-18, 30 NJPER 284 (¶99 2004), Dover Tp., P.E.R.C. No. 77-43, 3 NJPER 81 (1977), State of New Jersey (Office of Employee Relations), I.R. No. 2000-14, 26 NJPER 266 (¶31103 2000), Salem Cty., I.R. No. 86-23, 12 NJPER 546 (¶17206 1986), and Atlantic Cty., H.E. No. 97-22, 23 NJPER 206 (¶28100 1997), adopted P.E.R.C. No. 98-8, 23 NJPER 466 (¶28217 1997).

4/ In support of its position, the Association cites North Hudson Regional Fire and Rescue, I.R. No. 2012-9, 40 NJPER 105 (¶41 2011) and City of Plainfield, I.R. No. 2004-14, 30 NJPER 193 (¶72 2004).

interference with the Association's ability to administer its affairs."

In opposition, the Board argues that the Association has not satisfied the standard for interim relief. Specifically, the Board argues that the Association cannot establish that it has a substantial likelihood of success because N.J.S.A. 9:6-3.1 "requires that when an allegation of child abuse is said to have been committed, a teacher shall be temporarily suspended or reassigned to other duties to remove the risk of harm to the child or other children at the institution."[5/][6/] The Board

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5/ N.J.S.A. 9:6-3.1, entitled "Suspension; due process rights; remedial plan," provides:

> a. A teacher, employee, volunteer or staff person of an institution as defined in section 1 of P.L.1974, c.119 (C.9:6-8.21) who is alleged to have committed an act of child abuse or neglect as defined in R.S. 9:6-1, section 2 of P.L.1971, c.437 (C.9:6-8.9) and section 1 of P.L.1974, c.119 (C.9:6-8.21) shall be temporarily suspended by the appointing authority from his position at the institution with pay, or reassigned to other duties which would remove the risk of harm to the child under the person's custody or control, if there is reasonable cause for the appointing authority to believe that the life or health of the alleged victim or other children at the institution is in imminent danger due to continued contact between the alleged perpetrator and a child at the institution.
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> A public employee suspended pursuant to this subsection shall be accorded and may exercise due process rights, including notice of the proposed suspension and a presuspension

(continued...)

5/ (...continued)
opportunity to respond and any other due process rights provided under the laws of this State governing public employment and under any applicable individual or group contractual agreement. A private employee suspended pursuant to this subsection shall be accorded and may exercise due process rights provided for under the laws of this State governing private employment and under any applicable individual or group employee contractual agreement.

b. If the child abuse or neglect is the result of a single act occurring in an institution, within 30 days of receipt of the report of child abuse or neglect, the Department of Children and Families may request that the chief administrator of the institution formulate a plan of remedial action. The plan may include, but shall not be limited to, action to be taken with respect to a teacher, employee, volunteer or staff person of the institution to assure the health and safety of the alleged victim and other children at the institution and to prevent future acts of abuse or neglect. Within 30 days of the date the department requested the remedial plan, the chief administrator shall notify the department in writing of the progress in preparing the plan. The chief administrator shall complete the plan within 90 days of the date the department requested the plan.

c. If the child abuse or neglect is the result of several incidents occurring in an institution, within 30 days of receipt of the report of child abuse or neglect, the department may request that the chief administrator of the institution make administrative, personnel or structural changes at the institution. Within 30 days of the date the department made its request, the chief administrator shall notify the department of the progress in complying with

(continued...)

maintains that "[t]he very fact that DeLude is under active investigation by DCP&P should be sufficient to defeat the Association's argument that [he] be permitted to enter school premises." The Board concedes that "DeLude is free to conduct Association affairs, including contacting and meeting with current and former Board employees" with "[t]he only limitation

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5/ (...continued)

> the terms of the department's request. The department and chief administrator shall determine a time frame for completion of the terms of the request.
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> d. If a chief administrator of an institution does not formulate or implement a remedial plan or make the changes requested by the department, the department may impose appropriate sanctions or actions if the department licenses, oversees, approves or authorizes the operation of the institution. If the department does not license, oversee, approve or authorize the operation of the institution, the department may recommend to the authority which licenses, oversees, approves or authorizes the operation of the institution that appropriate sanctions or actions be imposed against the institution.

6/ N.J.S.A. 9:6-3.1 may be inapplicable in this case given that the school district falls under the definition of a "day school" rather than an "institution." Compare N.J.S.A. 9:6-8.21g (defines "institution" as "a public or private facility in the State which provides children with out of home care, supervision, or maintenance. Institution includes but is not limited to, a correctional facility, detention facility, treatment facility, day care center, residential school, shelter, and hospital") with N.J.S.A. 9:6-8.21h (defines "day school" as "a public or private school which provides general or special educational services to day students in grades kindergarten through 12. Day school does not includes a residential facility whether public or private, which provides care on a 24-hour basis").

on him [being that] his contacts and communications with staff and former staff be germane to Association business and that his meetings with them not occur on school property." The Board claims that "DeLude certainly has access to Association computers and email lists to perform his Association work" and questions how "preventing DeLude from using a school computer or accessing a school email system seriously inhibit[s] him from reaching and communicating with Association members." The Board maintains that "there is nothing preventing other Association officers from using school computers or accessing the school email system in DeLude's absence" and that "the work of the Association will go on undeterred." The Board also asserts that the Association has not demonstrated that it will suffer irreparable harm absent interim relief because "Association business will continue unimpeded." Finally, the Board contends that "the public interest in preventing further potential incidents of child abuse could be imperiled if DeLude were permitted back on school grounds while under a DCP&P investigation."[7/]

In reply, the Association reiterates that the restrictions imposed on DeLude have "significantly and adversely affected the

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7/ The Board did not cite any legal authority in support of its position other than N.J.S.A. 9:6-3.1. The Board did not submit a certification contesting the representations made in the certifications of Furry and Muglia, including the assertion that the restrictions imposed on DeLude have had a "significant and adverse impact" on "the [Association's] affairs."

administration of [union] affairs" and "[t]he resulting harm to the Association is clearly and unmistakably irreparable." The Association argues that the Board's claim that union business will continue unimpeded notwithstanding the restrictions imposed on DeLude is "ridiculous" given the representations set forth in Muglia's certification. Moreover, the Association contends that "the record is completely devoid of any suggestion that permitting DeLude on school grounds in order to conduct [union] business will imperil any student or anyone else." The Association asserts that the Board has several options available during the DCP&P investigation (e.g., reassigning DeLude) and maintains that N.J.S.A. 9:6-3.1 does not prohibit DeLude from being on school district property in order to conduct union business.

STANDARD OF REVIEW

To obtain interim relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations[8/] and that irreparable harm will occur if the requested relief is not granted; in certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Further, the public interest must

8/ Material facts must not be in dispute in order for the moving party to have a substantial likelihood of success before the Commission.

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

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

Article I of the New Jersey Constitution, entitled "Rights and Privileges," provides in pertinent part

> 19. Persons in private employment shall have the right to organize and bargain collectively. Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances and proposals through representatives of their own choosing.

N.J.S.A. 34:13A-5.3, entitled “Employee organizations; right to form or join; collective negotiations; grievance procedures,” provides in pertinent part:

> Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity . . .
>
> *   *   *
>
> Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes, by the majority of the employees voting in an election conducted by the commission as authorized by this act or, at the option of the representative in a case in which the commission finds that only one representative is seeking to be the majority representative, by a majority of the employees in the unit signing authorization cards indicating their preference for that representative, shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit.
>
> *   *   *
>
> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at

> reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.

N.J.S.A. 34:13A-5.13, entitled "Access to members of negotiations units," provides in pertinent part:

> a. Public employers shall provide to exclusive representative employee organizations access to members of the negotiations units.
>
> b. Access includes, but is not limited to, the following:
>
> > (1) the right to meet with individual employees on the premises of the public employer during the work day to investigate and discuss grievances, workplace-related complaints, and other workplace issues;
> > (2) the right to conduct worksite meetings during lunch and other non-work breaks, and before and after the workday, on the employer's premises to discuss workplace issues, collective negotiations, the administration of collective negotiations agreements, other matters related to the duties of an exclusive representative employee organization, and internal union matters involving the governance or business of the exclusive representative employee organization; and
> > (3) the right to meet with newly hired employees, without charge to the pay or leave time of the employees, for a minimum of 30 and a maximum of 120 minutes, within 30 calendar days from the date of hire, during new employee orientations, or if the employer does not conduct new employee orientations, at individual or

group meetings.

* * *

e. Exclusive representative employee organizations shall have the right to use the email systems of public employers to communicate with negotiations unit members regarding collective negotiations, the administration of collective negotiations agreements, the investigation of grievances, other workplace-related complaints and issues, and internal union matters involving the governance or business of the union.

f. Exclusive representative employee organizations shall have the right to use government buildings and other facilities that are owned or leased by government entities to conduct meetings with their unit members regarding collective negotiations, the administration of collective negotiations agreements, the investigation of grievances, other workplace-related complaints and issues, and internal union matters involving the governance or business of the union, provided such use does not interfere with governmental operations.

* * *

g. Upon the request of an exclusive representative employee organization, a public employer shall negotiate in good faith over contractual provisions to memorialize the parties' agreement to implement the provisions of subsections a. through f. of this section. Negotiations shall commence within 10 calendar days from the date of a request by the employee organization, even if a collective negotiations agreement is in effect on the effective date [May 18, 2018] of this act. Agreements between a public employer and an exclusive representative employee organization implementing subsections a. through f. of this section shall be incorporated into the parties' collective negotiations agreement and shall be enforceable through the parties' grievance

> procedure, which shall include binding arbitration. The requirements set forth in subsections a. through f. of this section establish the minimum requirements for access to and communication with negotiations unit employees by an exclusive representative employee organization.

The Commission has held that "[p]ublic employees have a constitutional right to present grievances through their chosen representative." Newark State-Operated School Dist., H.E. No. 2004-18, 30 NJPER 284 (¶99 2004), adopted P.E.R.C. No. 2005-49, 31 NJPER 81 (¶38 2005); accord Dover Tp. Bd. of Ed., P.E.R.C. No. 77-43, 3 NJPER 81 (1977) ("public employees are guaranteed the right to present grievances through representatives of their own choosing and . . . the majority representative, by statute, is entitled to and must represent the interests of all employees in the unit"); Perth Amboy Bd. of Ed., H.E. No. 2016-13, 42 NJPER 410 (¶113 2015) ("[a]ccess to an employer's premises to represent employees is protected conduct and cannot be unreasonably restricted"). In addition, a school board cannot "place restrictions on the composition or parameters of [an] association's negotiations team." Matawan Reg. Bd. of Ed., P.E.R.C. No. 80-153, 6 NJPER 325 (¶11161 1980).

The Commission has also held that employees have "the right . . . to communicate with each other about employment conditions." State of New Jersey (Dep't of Transp.), H.E. No. 90-44, 16 NJPER 282 (¶21117 1990), adopted P.E.R.C. No. 90-114, 16 NJPER 387 (¶21158 1990); accord State Operated School

District, City of Newark, H.E. No. 2016-7, 42 NJPER 274 (¶80 2015), adopted in pt. P.E.R.C. No. 2017-14, 43 NJPER 106 (¶32 2016). "[T]he Act confers a statutory right of communication between majority representatives and unit members" and same is considered a "term and condition of employment." City of Newark, H.E. 2001-3, 26 NJPER 407 (¶31160 2000).

In Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976), the Commission stated:

> School Boards. . .[are] charged. . .with the authority and responsibility for the conduct of schools in their districts . . . [which includes] control over bulletin boards, mail boxes, and all the other facilities included within the various contract provisions under discussion. The School Boards have an interest in conducting the schools, including the efficient use of these school facilities, in as stable a manner as is legally possible. Their authority is effected, however, by the Act's requirement that they negotiate in good faith with the majority representatives of their employees concerning terms and conditions of employment. One such condition of employment is the ability of employees to communicate in furtherance of the rights guaranteed by the Act. The School Boards thus have an obligation to negotiate over access to school facilities by its employees in furtherance of their legal collective activities.

The Commission has held that "[a]n employer action that tends to interfere with these statutory rights without a legitimate and substantial business justification violates [subsection] 5.4a(1)." Newark State-Operated School Dist., 31 NJPER at 82. However, "[these] right[s] . . . [are] not without

restriction" and "[w]hen an employer places limits on the majority representative's access to unit members, the interests of the employee organization in having representatives of its own choosing is balanced with the right of the employer to maintain order in its work place." Newark State-Operated School Dist., 30 NJPER at 288.

ANALYSIS

At issue in this interim relief application is whether the Board has demonstrated a legitimate and substantial business justification for imposing restrictions on DeLude and, if so, what the appropriate balance is between the interests of the Association in having a representative of its own choosing and the right of the Board to maintain order in its workplace pending a change in circumstances or final resolution of the underlying unfair practice charge.

The Appellate Division has held that a local board of education's "concern for the health, safety and welfare of students . . . [is] certainly a managerial prerogative which cannot be bargained away." Warren Hills Reg. H.S. Dist. Bd. of Ed. and Warren Hills Reg. Ed. Ass'n, P.E.R.C. No. 82-8, 7 NJPER 445 (¶12198 1981), aff'd and rem'd to Law Div., NJPER Supp. 2d 126 (¶105 App. Div. 1982), certif. den. 92 N.J. 308 (1983). Related statutory and regulatory requirements reinforce this concept. See, e.g., N.J.S.A. 9:6-3.1 (requiring the temporary suspension or reassignment of a teacher/employee who is alleged

to have committed an act of child abuse or neglect in order to "remove the risk of harm to the child under the person's custody or control . . . if there is reasonable cause . . . to believe that the life or health of the alleged victim or other children at the institution is in imminent danger due to continued contact between the alleged perpetrator and a child at the institution"); N.J.A.C. 6A:16-5.1 (requiring school districts to develop/ implement plans and procedures related to "safety and security in the school district's public elementary and secondary schools . . . which . . . shall provide for, at a minimum . . . the protection of the health, safety, security and welfare of the school population"); N.J.A.C. 6A:16-11.1 (requiring school districts to develop/implement policies and procedures related to "early detection of missing, abused, or neglected children through notification of, reporting to, and cooperation with appropriate law enforcement and child welfare authorities"); cf. New Jersey Div. of Youth & Family Services v. G.M., 198 N.J. 382, 397 (2008) (noting that under N.J.S.A. 30:4C-4, "[t]he Legislature charged the Division with the responsibility of protecting the health and welfare of the children of this state").

Given these legal precepts, despite the Association's right to negotiate and present grievances through a representative of its own choosing (N.J. Const. art. I, ¶9; N.J.S.A. 34:13A-5.3), I find that the Board has articulated a legitimate and substantial

business justification (i.e., an allegation that DeLude had inappropriate contact with a current student) for taking precautionary measures, including the imposition of reasonable restrictions on DeLude, pending a change in circumstances or final resolution of the underlying unfair practice charge. An examination of the appropriate balance between the parties' interests exposes a clear tension with respect to DeLude "wearing two hats," so to speak. Although DeLude's professional responsibilities as a teacher have ceased while he is on paid administrative leave, he remains the Association President.

I find that a determination regarding whether the Association has a substantial likelihood of prevailing in a final Commission decision is presently unknown. If the allegations against DeLude are substantiated by the DCP&P investigation, the Board may have a legitimate and substantial business justification for the restrictions that it imposed on DeLude. Conversely, if the allegations are not substantiated, the Board may not have a legitimate and substantial business justification for those restrictions. See, e.g., Atlantic Cty. (Dep't of Corrections), H.E. No. 97-22, 23 NJPER 206 (¶28100 1997), adopted P.E.R.C. No. 98-8, 23 NJPER 466 (¶28217 1997) (finding that although the county could not institute a total ban on the FOP local president's access to the county justice complex based upon the fact that he was terminated, the issue of "what level of access [was] appropriate" related to contractual provisions and

was therefore "[a] contract interpretation issue[] which [was] more appropriate for an arbitrator to examine"); Newark State-Operated School Dist., H.E. No. 2004-18, 30 NJPER 284 (¶99 2004), adopted P.E.R.C. No. 2005-49, 31 NJPER 81 (¶38 2005) (finding that the district had a substantial and legitimate business justification for denying the SEIU's business agent access to its central office based upon the circumstances surrounding her resignation and noting that the district had made "reasonable accommodations to ensure that employees [were] properly represented in grievance and discipline hearings by other representatives at the central office or by [SEIU's business agent] at an alternate location"); State of New Jersey (Juvenile Justice Comm'n), D.U.P. No. 2015-1, 41 NJPER 142 (¶47 2014), adopted P.E.R.C. No. 2015-31, 41 NJPER 243 (¶79 2014) (noting that "a public employee's status as a union officer or representative does not . . . insulate the union representative from an employer's investigation into workplace harassment or discrimination" and refusing to issue a complaint where the CWA's local shop steward was reassigned to a different unit in order to separate him from an alleged victim during an investigation into whether the shop steward had violated the Federal Prison Rape Elimination Act); Salem Cty., I.R. No. 86-23, 12 NJPER 546 (¶17206 1986) (finding that although the county could not refuse to negotiate with the CWA's local president based upon the fact that he was suspended for striking another employee, the CWA

"[did] not have an absolute unfettered right to have anyone it so chooses represent it in negotiations" because "[o]pprobrious conduct on the part of an employee representative might strip an employee representative of this right"); State of New Jersey (OER), I.R. No. 2000-14, 26 NJPER 266 (¶31103 2000) (noting the "Commission's preference for a result that preserves the rights of both parties" and finding that although the State could not refuse to recognize or grant access to the CWA's local president based upon the fact that she had unacceptable altercations with management representatives and employees, the local president's "right to engage in representational activities . . . may be restricted or even lost" if she continued to engage in similar conduct).

Moreover, given the parties' existing contractual provisions (2014-2017 CNA, Art. 5) as well as the new statutory framework requiring the negotiation of specific contractual provisions regarding union access to unit members, employer buildings/facilities, and employer email systems (N.J.S.A. 34:13A-5.13), it is unclear whether the underlying unfair practice charge will ultimately be processed, deferred to arbitration, or otherwise. See, e.g., Hillsborough Tp. Bd. of Ed., P.E.R.C. No. 2005-1, 30 NJPER 293 (¶101 2004) ("[b]inding arbitration is the preferred mechanism for resolving a dispute when an unfair practice charge essentially alleges a violation of subsection 5.4a(5) interrelated with a breach of contract");

Camden County and Camden County Prosecutor, P.E.R.C. No. 2012-42, 38 NJPER 289 (¶102 2012) (holding that when the facts of a charge clearly show that the dispute between the parties revolves around the interpretation of a contract clause and whether or not there has been a breach of that clause, the issue "must be resolved through negotiated grievance procedures"); Woodland Park Bd. of Ed., D.U.P. No. 2014-12, 40 NJPER 429 (¶147 2014) (deferring an unfair practice charge to the parties' negotiated grievance procedure where the employee organization had not alleged facts demonstrating a connection between the employer's obligation to negotiate in good faith under the Act and the employer's alleged breach of a contract provision); N.J.S.A. 34:13A-5.3 ("[g]rievance and disciplinary review procedures established by agreement between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement").

Accordingly, without more information regarding the basis for the investigation and/or its conclusion, I find that I am unable to make an accurate determination regarding whether there is a substantial likelihood of prevailing in a final Commission decision at this time. Given the Board's responsibility to ensure the health, safety, and welfare of students, an analysis of the remaining Crowe factors is necessary in order to determine the appropriate balance between the parties' interests. See Newark State-Operated School Dist., 30 NJPER at 288; State of New

Jersey (OER).

I find that the Association has demonstrated that maintaining the restrictions on DeLude in their current form,[9] absent a change in circumstances (e.g., conclusion of the pending investigation; additional allegations against DeLude; etc.), constitutes irreparable harm and a relative hardship for the Association. I also find that the public interest will not be injured by granting partial relief.

The Supreme Court of New Jersey has held that "a preliminary injunction should not issue except when necessary to prevent irreparable harm" and "[h]arm is considered irreparable in equity if it cannot be redressed adequately by monetary damages." Crowe v. De Gioia, 90 N.J. 126, 132 (1982). A Commission Designee has held that "[i]n order to satisfy the irreparable harm standard, [a charging party] must demonstrate that the harm which the affected employees will suffer could not be rectified at the

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9/ As clarified by counsel during oral argument, the Association is challenging the following restrictions:

-an absolute prohibition on DeLude entering school district property to perform his duties as Association President;

-an absolute prohibition on DeLude using the District's email system to perform his duties as Association President; and

-an absolute prohibition on DeLude communicating with current and former staff members on any and all matters except for the pending DCP&P investigation.

conclusion of a final Commission determination." Union Cty., I.R. No. 99-15, 25 NJPER 192 (¶30088 1999).

I find that an appropriate balance between the parties' interests that preserves their rights pending a change in circumstances or final resolution of the underlying unfair practice charge requires that the restrictions imposed on DeLude be modified. The Association has cited interim relief authority, as well as the certifications of Furry and Muglia, demonstrating that the harm resulting from the restrictions imposed on DeLude (i.e., excluding/limiting the Association's chosen representative from engaging in union-related matters for an unknown period of time without making reasonable efforts to accommodate his participation) cannot be rectified in a final Commission decision. See Salem Cty.; State of New Jersey (OER). The Board has not provided any evidence or cited any legal authority other than N.J.S.A. 9:6-3.1, which does not apply to a "day school" pursuant to N.J.S.A. 9:6-8.21, contradicting the evidence and/or legal authority submitted by the Association in support of its application.

Moreover, granting partial relief and requiring modifications to the restrictions imposed on DeLude compared to the relative hardship of denying relief and maintaining the restrictions in their current form weighs in favor of the Association. The Board can ensure the health, safety, and welfare of students during the pending investigation - and

thereby protect the public interest – by imposing reasonable restrictions while also making reasonable efforts to accommodate DeLude's participation in union-related matters to the extent possible.

Accordingly, I find that the Association has sustained the burden required for interim relief under the Crowe factors and partially grant the application as set forth in the order below pursuant to N.J.A.C. 19:14-9.5(a). However, the order is subject to a motion for dissolution or modification based upon a change in circumstances as noted above. This case will be transferred to the Director of Unfair Practices for further processing.

ORDER

The Middlesex Education Association's application for interim relief is granted in part. The Middlesex Board of Education is restrained from[10/]:

> -refusing to make reasonable efforts to accommodate DeLude's participation in union-related matters (e.g., finding a mutually agreeable location or providing for appearance by electronic means or establishing safety controls/conditions to permit access to school district property, etc.);
>
> -refusing to ensure that other Association representatives have access to unit members and school district property and are able to participate in union-related matters when

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10/ The examples provided are illustrative in nature; they are meant to facilitate dialogue between the parties in order to achieve the stated modifications rather than to require any specific outcome.

DeLude's access and/or participation cannot be accommodated through reasonable efforts;
-refusing to provide DeLude with materials sent to staff, specifically information related to terms and conditions of employment and union-related matters, via his personal email account in lieu of his District email account (e.g., announcements, the Board's meeting minutes/agenda, etc.);

-directing DeLude not to communicate with current/former staff members regarding union-related matters or matters of a personal-social nature other than the pending DCP&P investigation.

/s/ Joseph P. Blaney
Joseph P. Blaney
Commission Designee

DATED: August 2, 2018
Trenton, New Jersey

I.R. NO. 2019-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2019-005

MIDDLESEX EDUCATION ASSOCIATION,

Charging Party.

AMENDED ORDER

This matter having been re-opened to the Public Employment Relations Commission on a motion for modification of I.R. No. 2019-1 by Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC (Dennis McKeever, Esq., appearing), attorneys for the Respondent, Middlesex Board of Education (Respondent or Board), upon notice to Detzky, Hunter & DeFillippo, LLC (David J. DeFillippo, Esq., appearing), attorney for the Charging Party, Middlesex Education Association (Charging Party or Association); and having reviewed the motion for modification as well as the briefs, certification, and exhibits filed in support of the motion; and the Charging Party having consented to the motion; and for good cause shown:

It is on this **20th** day of **May 2019**,

ORDERED that the Board's motion for modification of I.R. No. 2019-1 is granted; and it is further

ORDERED that the Order in I.R. No. 2019-1 is superseded by this Amended Order; and it is further

ORDERED that the Board is only restrained from:

-refusing to ensure that other Association representatives have access to unit members and school district property and are able to participate in union-related matters;

-refusing to provide Association President Robert DeLude (DeLude) with materials sent to staff, specifically information related to terms and conditions of employment and union-related matters, via his personal email account in lieu of his District email account;

-directing DeLude not to communicate with current/former staff members regarding union-related matters or matters of a personal-social nature other than the pending DCP&P investigation.

/s/ Joseph P. Blaney
Joseph P. Blaney
Commission Designee

DATED: May 20, 2019
Trenton, New Jersey