I.R. NO. 2022-5

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SAYREVILLE BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2022-028

SAYREVILLE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee denies 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), (3), and (5), by refusing to allow Association representatives to conduct a health/safety walk-through with the assistance/presence of a third-party. The Designee finds that the Association has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. The Designee also finds that the Association has failed to establish irreparable harm, relative hardship, and that the public interest will not be injured by an interim relief order. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

I.R. NO. 2022-5

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SAYREVILLE BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2022-028

SAYREVILLE EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent,
Busch Law Group, attorneys
(Ari D. Schneider, of counsel)

For the Charging Party,
Oxfeld Cohen, attorney
(Randi Doner April, of counsel
Sanford R. Oxfeld, of counsel)

INTERLOCUTORY DECISION

On August 13, 2021, Sayreville Education Association (Association or SEA) filed an unfair practice charge, together with an application for interim relief, against Sayreville Board of Education (Board). The charge alleges that on or about August 11, 2021, the Board violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1), (3), and (5),[1/2/] by refusing to allow

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"; "(3) Discriminating (continued...)

Association representatives to conduct a health/safety walk-through with the assistance/presence of a third-party.[3/] The Association's application for interim relief requested the following relief pending disposition of the underlying unfair practice charge:

> -an Order mandating that Association representatives and designees be permitted to conduct safety and COVID compliance walk-throughs immediately; and
>
> -an Order that the Board be enjoined from re-opening schools for staff and students until such walk-throughs occur and any required corrective action taken.

PROCEDURAL HISTORY

On August 17, 2021, I signed an Order to Show Cause directing the Board to file any opposition by August 24; the

---

1/ (...continued)
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"; and "(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ I do not consider the 5.4a(3) claim inasmuch as the Association does not develop it in its application for interim relief or unfair practice charge. The Association does not set forth facts that would suggest the Board discriminated 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.

3/ The Board has agreed to allow Association representatives to conduct a health/safety walk-through without the assistance/presence of a third-party. See Hayden Certification, ¶9, Exh. D; accord Labbe Certification, ¶7.

Association to file any reply by August 31; and set September 10 as the return date for oral argument. On August 31, 2021, upon receipt of the Association's reply, I offered the parties three dates/times to hold oral argument before the previously-scheduled September 10th return date; however, none of those was mutually convenient.

On September 9, 2021 at 3:11 p.m., the Association's counsel sent an email, attaching six private sector cases,[4/] to the Board's counsel and me specifying that he "[would] be relying [upon same] tomorrow during our telephonic oral argument." In response, I sent an email to both parties noting that it appeared the Association was requesting an extension to file a reply brief and that I was granting same. Accordingly, I directed the Association to file any reply brief by September 15; the Board to file any sur-reply brief by September 22; and reset September 24 as the return date for oral argument. On September 24, 2021, 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 New Jersey Education Association (NJEA) Field Representative Thomas Hayden (Hayden). In opposition, the Board submitted a

---

4/ Notably, the Association's counsel cited five of the six cases for the first time.

brief and the certification of its Superintendent of Schools (Superintendent), Dr. Richard Labbe (Labbe). In reply, the Association initially only filed the supplemental certification of NJEA Field Representative Hayden. After being granted an extension, the Association also filed a reply brief and the "resume"[5/] of New Jersey Work Environment Council (WEC) representative Allen Barkkume (Barkkume). The Board also filed a sur-reply brief.

FINDINGS OF FACT

The Association represents certificated and non-certificated staff employed by the Board as specified in the recognition clause of the parties' collective negotiations agreement (CNA). See 2020-2021 CNA, Art. 1. The Board and the Association were parties to a CNA in effect from July 1, 2020 through June 30, 2021 and are in negotiations for a successor agreement. The grievance procedure ends in binding arbitration.

Article 5 of the parties' expired 2020-2021 CNA, entitled "Association Rights, Privileges and Responsibilities," provides in pertinent part (emphasis supplied):

> B. Representatives of the Association, the

5/ Barkkume's "resume" consists of three narrative paragraphs – the first paragraph describes Barkkume's education and credentials, the second paragraph describes the New Jersey Work Environment Council (WEC), and the third paragraph notes what WEC representatives "do not take air or surface samples" and do not "conduct invasive inspections that might disturb building materials or dismantle equipment."

Middlesex County Education Association, the New Jersey Education Association, and the National Education Association shall be permitted to transact official Association business on school property at all reasonable times. The Association and its representatives shall be permitted to use school buildings at all reasonable hours for meetings. Any such use of school buildings shall be without interference with or interruption in normal school operations and with advance approval by the Superintendent. The Association shall reimburse the Board any extra custodial labor cost required for such use.

* * *

L. The Board agrees to furnish to the Association one (1) copy of the names and addresses of all Board employees.

1. The Board shall provide to the SEA access to members of the negotiations units.

2. Access includes, but is not limited to, the following:

a. The right to meet with individual employees on the premises of the Board during the work day to investigate and discuss grievances, workplace-related complaints, and other workplace issues;
b. The right to conduct worksite meetings during lunch and other non-work breaks, and before and after the workday, on the Board'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 SEA...
> * * *
> 6. The SEA shall have the right to use government buildings and other facilities that are owned or leased by the Board 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. Meetings conducted in Board buildings pursuant to this section shall not be for the purpose of supporting or opposing any candidate for partisan political office, or for the purpose of distributing literature or information regarding partisan elections. An exclusive representative employee organization conducting a meeting in a government building or other government facility pursuant to this section may be charged for maintenance, security and other costs related to the use of the government building or facility that would not otherwise be incurred by the government entity.

Article 33 of the parties' expired 2020-2021 CNA, entitled "Board Rights," provides in pertinent part:

> A. Except as otherwise specifically provided in this Agreement or otherwise specifically agreed to in writing between the parties to this Agreement, the determination of

> education policy, the operation and management of the schools, and the supervision and direction of all certificated and non-certificated staff are vested exclusively with the Sayreville Board of Education to the extent that such determination, operation, management, supervision and direction is in accordance with all applicable laws.

On July 27, 2021, Association President Kenneth Veres (Veres) sent an email to Superintendent Labbe and Board members that provides in pertinent part:

> The SEA is requesting the work that has been completed on the ventilation system(s) this summer. As you know, we did not meet the requirements last year to open. However, the district reopened last year against the wishes of the SEA. We were also denied an opportunity to inspect the school with [NJ WEC].[6/] We are requesting a walkthrough with NJ WEC before school opens. Please give us a few dates so we can set that up.
>
> [Hayden Certification, ¶5, Exh. A; accord Labbe Certification, ¶3].

On July 30, 2021, Superintendent Labbe sent an email to Association President Veres that provides in pertinent part:

> Attached please find the information that you requested. In addition, this year we have allocated funding to make more improvements, particularly replacing the windows at Truman and replacing all HV and HVAC units in the large spaces in all schools with high efficiency HVAC units. Your request for a

---

6/ WEC "is a membership alliance of labor, environmental, and community organizations working for safe, secure jobs and a healthy, sustainable environment" and "has consulted with numerous [school] districts in New Jersey." See Hayden Certification, ¶10.

> walkthrough with NJ WEC is denied.
>
> [Hayden Certification, Exh. A; accord Labbe Certification, ¶¶4-5].

On July 31, 2021, NJEA Field Representative Hayden sent a letter to Superintendent Labbe, copying Association President Veres, that provides in pertinent part:

> This letter shall serve to advise that the Sayreville Education Association believes you are violating the collective bargaining agreement and the laws of the State of New Jersey with two recent requests made to you. Accordingly, we demand that you cease and desist from infringing upon our rights and obligations as a majority employee representative and fulfill the requests outlined below.
>
> * * *
>
> On Tuesday, July 27, 2021, Sayreville EA President Ken Veres requested information from you regarding ventilation issues and on-site inspections of District facilities to ensure the health and safety of SEA members prior to school reopening in September 2021. Three days later, you responded with what appears to be truncated information and a denial of SEA's walkthrough request.
>
> With respect to the information provided, we will respond at a later date after we have had a chance to review in detail. The denial of the SEA's walkthrough request is cause for immediate concern and response. A walkthrough of a safe and healthy workplace is nothing for a reasonable person to deny and your continued evasion furthers our assertion that the school buildings are potentially unsafe.
>
> Article 5 of the CBA allows for Association Representatives "to transact official Association business on school property at all reasonable times" and "the right to meet . . . on the premises of the Board . . . to

> investigate . . . workplace-related complaints and other workplace issues". These rights are further supported by the Workplace Democracy Enhancement Act (P.L.2018, c.15) and the New Jersey Employer-Employee Relations Act. PERC has held repeatedly throughout this pandemic that the majority representative has the right to conduct health and safety inspections of facilities on behalf of its members.
>
> The SEA renews its request to conduct walkthroughs of all facilities that are or will be occupied by its members prior to the opening of school in September. We expect to conduct our on-site inspections on or prior to August 20, 2021 so as to provide the parties time to explore corrective action, should any concerns arise.
>
> [Hayden Certification, ¶6, Exhs. B-C; accord Labbe Certification, ¶6].

On August 10, 2021, NJEA Field Representative Hayden sent an email, attaching his July 31, 2021 letter, to Superintendent Labbe and the Board's attorney, copying Association President Veres, that provides in pertinent part:

> The attached correspondence was sent over a week ago and no response has been received to-date. With respect to building walkthroughs, time is growing short for the Association to act. We intend to file a ULP tomorrow absent an agreement. PERC has been asked and has answered the question on an Association's right to conduct these walkthroughs several times now. The necessity for both parties to expend legal fees on this is preposterous. [Hayden Certification, ¶6, Exh. C].

On August 11, 2021, the Board's attorney sent an email to NJEA Field Representative Hayden, copying Superintendent Labbe,

that provides in pertinent part:

> On July 27, 2021, Mr. Veres requested that he be permitted to conduct a walkthrough with NJ WEC (a third party). Your recent correspondence neglects to reference NJ WEC and seems to suggest that the SEA would like to conduct a walkthrough with its own membership. In the event Mr. Veres, or other SEA representatives, are seeking to conduct a walkthrough of the buildings without the presence and assistance of a third party, they would certainly be permitted to do so. In fact, Dr. Labbe has never denied such a request. However, in the event your letter is requesting a walkthrough with a third party, please allow this correspondence to reiterate Dr. Labbe's initial denial of same.
>
> [Hayden Certification, ¶9, Exh. D; accord Labbe Certification, ¶7].

On August 13, 2021, the Association filed the underlying unfair practice charge accompanied by the instant application for interim relief.

NJEA Field Representative Hayden certifies that "[t]eachers are reporting back to the buildings for professional development on September 1, 2021 with students to return on September 8, 2021"; that the Association "believes that the educational process is best served by in-person learning . . . provided it can be accomplished safely . . . in the current pandemic environment"; and that "[t]ime is of the essence" to complete health/safety walk-throughs. See Hayden Certification, ¶¶11-12. Hayden certifies that "[i]n anticipation [of] school opening, the [Association] has conducted a training of all its building

delegates to educate them to be able to identify and record potential hazards regarding whether the physical plant of each worksite ha[s] been properly maintained and [is] functioning properly as it pertain[s] to COVID-related concerns"; that "[i]n particular, delegates were trained to note that windows opened properly to ensure adequate ventilation, filters in HVAC and Univent systems were of sufficient MERV levels, had accurate filters and worked properly"; and "[t]he [Association] developed a checklist so that each delegate would be able to record his/her observations." See Hayden Certification, ¶¶13-14. Hayden certifies that "[t]he [Association] anticipated that it would share the results of the walk-through with the Board immediately . . . [b]ecause it should be [the parties'] mutual goal to ensure a safe reentry." See Hayden Certification, ¶15.

Hayden certifies that "[t]he Board . . . has stonewalled the [Association] at every opportunity" given that "it refused to allow inspections during the last school year . . . [and has] prevented [the Association]" from "get[ting] ahead of the curve this year" as "[i]t took until mid-August for any meaningful response to the request . . . ." See Hayden Certification, ¶16. Hayden certifies that "the [D]istrict is impeding the [Association's] rights by refusing [to] allow WEC in [its] buildings" and "has no right to decide who accompanies [Association] members." See Hayden Certification, ¶16. Hayden

certifies that "[n]ot only is the safety of the [Association] membership a concern, but the safety of students and others who are not represented by the [Association], such as building administrators, is also of tremendous concern to . . . the [Association]"; that "[i]t is both totally unreasonable and an unfair labor practice for the Board to delay and then unilaterally impose conditions on walkthroughs"; and that "[b]oth the members of the [Association], as well as the public, require that schools reopen after meaningful walkthroughs with ample opportunity for the Board to remedy any problems that may be discovered." See Hayden Certification, ¶17.

Superintendent Labbe certifies that he "denied [the Association's] request to conduct a walk-through with a WEC representative . . . [because Association President Veres] provided no reason why an expert third-party would be needed to conduct a visual inspection of the equipment"; that "[t]o date, no satisfactory reason has been provided that would justify the need for a third-party expert to assist with a simple walk-through in order to obtain information that is readily observable upon visual inspection with minimal or no tampering with the equipment"; and that Labbe "did not then, nor ever, seek to prevent [the Association] from conducting a building walk-through with [Association] membership." See Labbe Certification, ¶¶4-5, 11. Labbe certifies that "[t]o date, [he is] unaware of the

[Association] attempting to and/or conducting a walkthrough [on] their own, or attempting to schedule one through Administration"; that "[a]ny delay in this process has been brought about by the Association which should not now be permitted through its present application to interfere with the re-opening of school . . . [because same] would adversely affect hundreds of students and parents." See Labbe Certification, ¶¶9-10.

Labbe certifies that "a week after filing its application with PERC for interim relief, the Association's attorney . . . provided . . . the Board's attorney . . . with an outdated list of purported safety concerns apparently in a last minute effort to try to supply some sort of rationale to justify the need for outside expertise"; that the Association's "list of concerns . . . was . . . in fact . . . taken from the Board's website and had been developed in conjunction [with] a facilities development referendum in 2019"; that "[t]he subject referendum has already been ratified and the items of concern currently are being addressed . . . [such that] nothing new is contained in the list that relates to anything that is not already known to [the Board] and currently being addressed"; and that "through an energy saving improvement project, grant funding, and local funds [the Board has] and/or will be spending approximately $15,000,000 this and last year to make major renovations to [its] schools, including about $10,000,000 to update boilers and HV system units

with highly efficient HVAC system units . . . [and] this work is already underway." See Labbe Certification, ¶¶12-17.

Labbe certifies that "[t]here is no indication in the information provided by [the Association] . . . that any specialized expertise is needed to ensure that the project is underway" but "[i]f that is what the Association is seeking to ascertain, then the training already provided to its delegates . . . should suffice"; and "[o]nce the Association has conducted a good faith walk-through, if it can provide specific, convincing information to justify the need for WEC's expertise, or the expertise of another party, [the Board] certainly would be willing to consider that request further." See Labbe Certification, ¶¶18-19. Labbe certifies that "[i]n accordance with the directives of the Governor and the New Jersey Department of Education (NJDOE), [the Board has] been fully engaged in the preparation needed to ensure a complete resumption of in-person instruction in the schools for the first time since the pandemic began" which "has entailed countless hours of administrative planning and oversight . . . ." See Labbe Certification, ¶¶20-22.

In response to Superintendent Labbe's certification, NJEA Field Representative Hayden certifies the following:

> -that "[Labbe] specifically denied [the Association's] original request . . . [to inspect the building] in October 2020" when "there was no request for [a] WEC representative to attend" and that "[i]t was not until

the attorneys became involved that for the first time it was acknowledged that the Association had the right to conduct walk-throughs" (Hayden Supplemental Certification, ¶2);

-although the Association "[has] never been asked . . . [for] WEC's qualifications[,] . . . [the Association would be] happy to do so if that would ease the minds of [Board] administrators" despite the Association's claim that "[the Board] has no authority to control [the Association's] safety team" (Hayden Supplemental Certification, ¶¶4a, 5c);

-the Association concedes that "why special expertise is needed . . . is a valid question" and asserts that although it "attempted to train members . . . to educate them in how to identify and record potential hazards . . . it has become quite clear . . . that our training was not enough", "has been extremely difficult and time consuming and requires more than our Association has been trained to do" and that "the [Board] should be happy to have WEC professionals accompany [the Association] . . . [based upon the Association's] inability to now adequately train [its] staff . . . coupled with . . . [Labbe's] threats of prosecution . . . for even touching equipment" (Hayden Supplemental Certification, ¶4b);

-the Association "[was] not obligated to provide a reason . . . why an expert third party would be needed" and "[the Board] never asked for one" (Hayden Supplemental Certification, ¶5a);

-the Association "[is] entitled to walk through the building[s] and inspect anything and everything to ensure the safety of [its] members" and "[t]here is no such thing as a non-invasive walkthrough" as suggested by the Board (Hayden Supplemental Certification, ¶¶4c-d);

-the Association "is more than willing and in fact is delighted to have approved maintenance personnel accompany them on walkthroughs" and "[g]iven the fact that the [Board] has admitted that its systems are out of date, an expert and perhaps maintenance personnel could corroborate and offer safety suggestions during said walkthrough" (Hayden Supplemental Certification, ¶¶4e, 5d); and

> -the Association "no longer trust[s] [the] process or [Labbe's] word" that "he would be willing to consider [the Association's] request [to have] (WEC) [perform an inspection] . . . after a walkthrough" although it asserts that "[p]erhaps that may have been possible had [Labbe] [not] acted in bad faith since last year when he denied the original walkthroughs and threatened [Association] delegates with criminal complaints" (Hayden Supplemental Certification, ¶5f).

The Association represents the following regarding its requested health/safety walk-through with the assistance/presence of a third-party:

> (1) WHO – it anticipates that Allen Barkkume (Barkkume), a WEC industrial hygiene consultant, will perform the inspection;
>
> (2) WHAT – it anticipates that Barkkume will conduct a professional evaluation of the status and functionality of the unit ventilators/HVAC in each classroom/room/rooftop to ensure that they are compliant with required safety standards and that the highest/needed MERV filters are operating at the maximum capacity each system can handle, to determine if each system is being properly maintained and has a schedule which is current, accurate and meets accepted standards, and to confirm what the Board has posted is indeed accurate;
>
> (3) WHY – when it comes to health/safety issues, unit members have a right to have their union verify same and not simply rely upon what might be self-serving statements issued by the Board's representatives;
>
> (4) WHEN/WHERE/DURATION – it is anticipated that with Board cooperation, the health/safety walk-throughs will not take more than one day given that there are only eight buildings in the school district;
>
> (5) HOW – at a minimum, Barkkume will need access to all of the filters in every unit

> and to have every unit capable of being run to evaluate its efficacy.
>
> [Ass'n Reply Br. at 5-6, Barkkume "Resume"].

The Board represents the following regarding the Association's specifications for a health/safety walk-through with the assistance/presence of a third-party:

> (1) WHO – the Board notes that "[within] the document provided by the Association that it describes as Barkkume's 'resume,' which is really a narrative biographical statement, he is described as an 'industrial hygiene consultant'" but "[there is no] indicat[ion] that he is a certified industrial hygienist . . . although it states that he did complete a graduate program which is described as 'Master of Public Health Industrial Hygiene Program, CUNY SPH'"; the Board asserts that WEC "is part of a union-affiliated advocacy group that is funded, in part, by the NJEA" and that the Association "wants to bring in a 'hired gun'";
>
> (2) WHAT – the Board notes that the Association's "proposed plan . . . appears . . . [to be] to inspect the unit ventilators in each room and on the roof of each of the eight buildings . . . [and] access the filters in each unit and run them to evaluate their efficacy", however "[n]o specific information is provided about exactly what is meant by 'evaluate their efficacy' and how that would be accomplished"; the Board asserts that the Association "fails to explain . . . which required safety standards it intends to use and why this information cannot be provided apart from visual inspection by Association members who have received training . . . [as well as] analysis of the air quality and maintenance records available to the Association"; that the Association "does not provide . . . the slightest legal justification for the premise underlying the implied need to verify that

> the 'highest/needed' MERV filters are operating at the maximum capacity each system can handle"; that the Association can "determine whether each system is being properly maintained and there is a schedule which is current, accurate and meets accepted standards" based upon "reviewing available maintenance logs and reports" and asks whether the possibility that "any equipment anywhere may not be operating properly" – "in the absence of any underlying complaint or reason" – means that school district property "should be subjected to an extensive analysis by an outside expert retained by the party that wishes to locate every type of inefficiency it can";
>
> (3) WHY – the Board asserts that the Association hasn't "explain[ed] the need for WEC's participation" or why "the official maintenance logs and air quality reports to the State concerning the ventilation systems are not self-serving reports";
>
> (4) WHEN/WHERE/DURATION – the Board asserts that "[t]he Association's answer regarding the duration of its proposed inspection is purely speculative and . . . worrisome" because "it is conceivable that the inspection could linger on for some unknown number of days";
>
> (5) HOW – the Board notes that the Association "doesn't really know what needs to be done by its expert" and suggests that "this is going to be a situation where one thing leads to another" because that is "exactly what one would expect when the nature of the exercise is not to address a specifically identified problem, but rather to embark upon an expedition to find one . . . ."
>
> [Board Sur-Reply Br. at 6-12].

If the Association's request to conduct a health/safety walk-through with the assistance/presence of WEC is granted, the Board

seeks/insists on the following:

> -limitation on any inspection(s) to a time when students are not present and the buildings are not being used for some specific community event;
>
> -a detailed list of exactly what Barkkume intends to do beyond checking filters, running units, and accessing the roof and main units in each building (e.g., does he intend to take air quality samples, how is he going to determine operational efficiency, what does he consider to be the "highest/needed" MERV filters, etc.);
>
> -that the Board's qualified supervisory personnel be present at all times during inspection(s) and, if their presence requires extra compensation for work outside normal hours, the Association provide the additional compensation.

See Board Sur-Reply Br. at 14-15.

LEGAL ARGUMENTS

The Association argues that it has satisfied the standard for interim relief. Specifically, the Association maintains that it has a substantial likelihood of prevailing in a final Commission decision given that "[t]he issue of the illegality of a public employer's refusal and failure to provide a union access to the worksite is a matter of settled law" and "a failure to permit access for health and safety walk-throughs during the current pandemic violates the Act and the WDEA." The Association contends that "the health and safety of employees is a mandatorily negotiable term and condition of employment"; that "a public employer has a duty to provide a majority representative with information relevant to contract administration"; that "[a]n employer's refusal to provide a majority representative with

information that the union needs to represent its members constitutes a refusal to negotiate in good faith in violation of subsections 5.4a(1) and 5.4a(5) of the Act"; that "[a]n employer must supply information if there is a probability that the information is potentially relevant and that it will be of use to the representative in carrying out its statutory duties" where "[r]elevance is determined through a discovery-type standard" such that "[t]he employer is required to produce information unless it is clearly irrelevant, confidential, or not in its control or possession." The Association asserts that "absent a legitimate, substantial business justification, a public employer cannot bar a union access to the worksite and to do so would violate the union's right under subsection 5.4a(1) of the Act to represent and advocate for its members." The Association claims that "a union's right to access the workplace was recently codified in the WDEA . . . [specifically] section 5.13(f)"; that it "has a settled legal right to have persons of its own choosing, whether it be a member of WEC or the NJEA UniServ field representative, attend the walkthroughs"; and that "[t]he Board's abject refusal to allow a member of WEC to accompany the delegates was simply an arbitrary decision to stymie the Association's only goal of ensuring safe conditions." The Association notes that it "is not requesting that the Commission declare any particular condition existing on the Board's premises

to be unsafe or not compliant with any existing health and safety legal standard, and . . . is not requesting the Commission order that the Board implement any health and safety measure or to otherwise remedy any unsafe condition"; "[r]ather, the Association is simply requesting that the Commission order the Board to grant it access to school district buildings to conduct health and safety walk-throughs to survey health and safety conditions" and "that the re-opening be delayed until . . . any health and safety concerns . . . identified whenever walk-throughs are held . . . are addressed."[7/] The Association also argues that its members will suffer irreparable harm if interim relief is not granted because there are "serious concerns that the Board cannot adequately protect its employees from the ongoing pandemic"; that "[n]o amount of monetary damages would redress the potential impact of COVID-19 infection and complications within the Association's membership if the

---

7/ In support of its position, the Association cites In re Hunterdon Cty. Freeholder Bd., 116 N.J. 322, 332 (1989), UMDNJ and CIR, P.E.R.C. No. 93-114, 19 NJPER 342 (¶24155 1993), recon. granted P.E.R.C. No. 94-60, 20 NJPER 45 (¶25014 1994), aff'd 21 NJPER 319 (¶26203 App. Div. 1995), aff'd 144 N.J. 511 (1996), State of N.J. (OER) and CWA, P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987), recon. den. P.E.R.C. No. 88-45, 13 NJPER 841 (¶18323 1987), aff'd NJPER Supp.2d 198 (¶177 App. Div. 1988), Perth Amboy Bd. of Ed., H.E. No. 2016-13, 42 NJPER 410 (¶113 2015), N.J.S.A. 34:13A-5.13(f), Passaic Valley Reg'l High School Bd. of Ed., I.R. No. 2021-10, 47 NJPER 235 (¶54 2021), Holyoke Water Power Co., 273 N.L.R.B. 1369 (1985), and Paterson State Operated School District, I.R. No. 2021-25, 47 NJPER 510 (¶120 2021), among other legal authority.

Association is denied the access it needs to obtain the information necessary to advocate on behalf of its members regarding COVID-19 health and safety concerns."[8/] The Association also argues that "consideration of the relative hardship to the parties weighs heavily in favor of the Association" because "[t]here is no hardship to the Board if ordered to allow health and safety walk-throughs . . . when students are not in the buildings"; and that "[i]n contrast, there would be great hardship to the Association caused by continuing to deny it access to health and safety walk-throughs during a pandemic in a timely manner."

In opposition, the Board concedes that the Association has "[a] right to conduct a walk-through"; however, the Board "does not agree that the alleged right of the [Association] to be accompanied by WEC personnel is settled" and argues that the Association has not satisfied the standard for interim relief in this regard. Specifically, the Board asserts that "[t]he right of the union to obtain relevant safety information must be balanced against the right of the employer to control its property and ensure that its operations are not interfered with"; that "the right of the union must prevail only where it is found

---

8/ In support of its position, the Association cites Passaic Valley Reg'l High School Bd. of Ed., I.R. No. 2021-10, 47 NJPER 235 (¶54 2021) and Paterson State Operated School District, I.R. No. 2021-25, 47 NJPER 510 (¶120 2021), among other legal authority.

that responsible representation of employees can be achieved only by the union's having access to the employer's premises"; and that "where it is found that the union can effectively represent employees through some alternate means other than by entering on the premises, the employer's property rights will predominate and the union may properly be denied access." The Board maintains that it "does not seek to deny access to the Association, but rather to its third-party consultant as no viable justification for its presence and the level of intrusiveness implicated thereby has been provided"; that "[n]egotiations . . . [are] a two-way street which require[] the Association, as well as the Board, to provide relevant information and engage in meaningful discussion" and that same "does not . . . empower [the Association to] simply . . . deliver an ultimatum to the Board"; and that "upon completion of its unassisted walk-throughs, if the Association is able to produce specific, convincing information to justify the need for WEC's expertise . . . or the expertise of some other third-party, [the Board] would be willing to further consider the Association's request." The Board claims that it "has been provided with absolutely no information about the background of any of the WEC staff [that] the Association wants to use, their credentials, experience, criminal history and background or reason why they are needed"; that the Association "bears the burden of demonstrating that the right of the Board to

deny access is outweighed by the Association's need for specific, outside assistance"; that the Association's "need is belied by its own admission that its delegates have undergone training and developed walk-through checklists"; and that "[f]ollowing the Association's logic to its conclusion, it could insist on bringing anyone it wants into the school buildings . . . regardless of their background or interests, simply because [the Association] has selected them, with no further justification to warrant the presence of an unvetted third-party." The Board contends that "[a]lthough the Association has not provided the qualifications and credentials for the WEC staff it wishe[s] to utilize, logic dictates that one of two alternatives must be true: (1) WEC staff are experts trained in a field related to workplace ventilation, or (2) they are not experts in a field related to workplace ventilation"; that "[i]f the former is true, then why is special expertise needed to conduct a simple walk-through" and "[i]f the latter is true, then what is it that [WEC] intend[s] to do to the Board's equipment that requires specialized expertise."[9/] The Board also argues that the

---

9/ In support of its position, the Board cites Passaic Valley Reg'l High School Bd. of Ed., I.R. No. 2021-10, 47 NJPER 235 (¶54 2021), Paterson State Operated School District, I.R. No. 2021-25, 47 NJPER 510 (¶120 2021), Holyoke Water Power Co., 273 N.L.R.B. 1369 (1985), the New Jersey Public Employees' Occupational Safety and Health Act set forth at N.J.S.A. 34:6A-25 et seq., the Indoor Air Quality Standard regulations set forth at N.J.A.C. 12:100-13.1 et seq., and (continued...)

Association cannot establish irreparable harm given that the Board "does not deny the Association's right to conduct a non-invasive, audio-visual walk-through in order to obtain information regarding the maintenance and upkeep of HVAC equipment" because "[t]his can readily be achieved by [the Association's] trained delegates . . . using the checklists . . . they have developed . . . and . . . by requesting and reviewing all required maintenance logs"; and that "[a]nything beyond that is not the Association's responsibility . . . but rather a matter for the [New Jersey] Department of Health (NJDOH) pursuant to the Public Employees' Occupational Safety and Health Act (PEOSHA), N.J.S.A. 34:6A-25 et seq., and the Indoor Air Quality Standard regulations, N.J.A.C. 12:100-13.1 et seq." The Board maintains that the Association "has not presented a scintilla of evidence that would suggest any type of non-compliance with State law or regulations that poses any particular safety risk to employees"; and that the Association's argument "really is that since it is possible that a safety risk exists, the Association is therefore entitled to insist on an inspection by its consultant/expert . . . notwithstanding that the [State Department of Health via PEOSHA] is . . . entrusted with that responsibility." The Board contends that "two things have dramatically changed since [the]

9/ (...continued)
N.J.S.A. 18A:18-1 et seq., among other legal authority.

Commission's earlier irreparable harm findings in Passaic Valley and Paterson" - i.e., "every employee who wishes to obtain the COVID-19 vaccination is now free to do so" and "the Governor has issued Executive Order 251 . . . requiring that masks be worn by everyone on school premises" – and that same "provide demonstrably efficacious safety measures that significantly diminish the threat of infection to the point where the irreparable harm criterion cannot be met."[10/] The Board also argues that the relative hardship to the parties weighs in its favor because if "the interim relief sought herein is granted, the Board would be required to grant unfettered access to an unknown third-party in the absence of any evidence whatsoever of any compelling need, its qualifications and licensing, specific information regarding what . . . its inspection would entail . . . and then to ensure the equipment is not . . . tampered with in any way." The Board also argues that "[u]ntil and unless the Association can provide specific information justifying the need for WEC assistance, the identity and qualifications of WEC personnel and clearly delineated inspection parameters, the risk

10/ In support of its position, the Association cites Passaic Valley Reg'l High School Bd. of Ed., I.R. No. 2021-10, 47 NJPER 235 (¶54 2021), Paterson State Operated School District, I.R. No. 2021-25, 47 NJPER 510 (¶120 2021), the New Jersey Public Employees' Occupational Safety and Health Act set forth at N.J.S.A. 34:6A-25 et seq., and the Indoor Air Quality Standard regulations set forth at N.J.A.C. 12:100-13.1 et seq., among other legal authority. .

of harm to the public interest outweighs the Association's demand for interim relief"; that "[no] reasonable person [would] suggest that the Association ought to be permitted to bring into the schools anyone whom it chooses to tamper with . . . equipment which, if it were to malfunction as a result thereof, could result in significant health and safety risks for all building occupants." The Board claims that "anything more than [a] simple walk-through poses the risk . . . that . . . sensitive (and very expensive) equipment should not be tampered with in any way except by Board-authorized, duly licensed personnel"; and that "[p]ermitting unqualified third parties to have access to such equipment is as illogical as asking an unlicensed electrician to tamper with electrical boxes to ensure wiring safety."[11/] Separately, the Board argues that the Association "is not entitled to the extraordinary remedy of interim relief regarding its requested delay of school re-opening" based upon the following:

> -the Association cannot demonstrate a substantial likelihood of success because "State law requires that school must be in session for 180 days"; "any school closure necessarily would require the provision of some type of virtual instruction unless the entire year's school calendar were to be completely revised"; and "the Governor has directed the resumption of in-person instruction in all of the State's schools";
>
> -the Association cannot demonstrate irreparable harm

11/ In support of its position, the Board cites N.J.S.A. 12:90-6.1 et seq.

> given that it "has absolutely no evidence to support its fear . . . that some type of safety hazard might exist that only can be detected with the assistance of WEC and could not be otherwise observed if [the Association] proceeds with its walk-through [by unit members]"; and given "that significant progress has been made . . . in preventing transmission of COVID-19 . . . that substantially mitigates the risk of irreparable harm";
>
> -the Association "completely ignores the deleterious effects of any further remote instruction on students and their parents" and, "[a]lthough one might reasonably argue that the interests of the Association could possibly be served by granting a delay in the re-opening of school, . . . no reasonable person could conclude that the public interest would be served" because "the research demonstrates that the risks to children . . . of denying in-person instruction outweighs the risks of opening the buildings"; and
>
> -"[a]ny delay in the re-opening of the schools would impose a severe hardship on the Board" given that "the Administration has been earnestly preparing for the first full-time resumption of in-person instruction since the pandemic began" as set forth "in the NJDOE's most recently published requirements."
> See Board Br. at 14-17.

In reply, the Association concedes "that there is no prior PERC decision . . . directly on point" while contending that "private sector/NLRB precedent is extremely significant"; and maintains that the "balancing test" established in Holyoke should be employed in this instance where "there exists . . . no alternate means of performing the needed health and safety inspections" given that "no one [in the unit] has the required knowledge and expertise to perform a satisfactory inspection or walk-through . . . ." The Association argues that "there is no adequate alternative to having an air quality/ventilation expert

of the union's choosing to investigate all of the [school district's] ventilation units . . . and a walk-through by Association members and/or the NJEA's UniServ Representative . . . would be futile and fruitless as it would not yield the necessary data and information . . . because none of them are air quality experts."[12/]

In sur-reply, the Board argues that "[a]ll [of] the private sector cases cited by the Association . . . are distinguishable from the matter at hand in important ways" as follows:

> -in Holyoke, "the union's request was triggered by an undisputed noise problem that the NLRB found justified the need for an industrial hygienist's evaluation of that specific problem";
>
> -in Hercules, there was "an accidental explosion which resulted in the death of an employee and injury to four others";
>
> -in Caterpillar, "the need for . . . expert involvement . . . was triggered by a precipitating fatal accident . . . in which a union crane operator was killed when a 36-ton crawler crushed him after being rotated by the crane";
>
> -in Exxon, "the company had denied access to the union's expert who was seeking data relevant to the processing of the union's contractual grievance having to do with allegations about differences between . . . 'multi-skilled craftsmen' job classification and the tasks assigned to employees working in that classification, where the union sought access for its expert's actual on-the-job observation of the work

---

12/ In support of its position, the Association cites Holyoke Water Power Co., 273 N.L.R.B. 1369 (1985), Exxon Chemical Co., 307 N.L.R.B. 1254 (1991), Caterpillar Inc. v. NLRB, 803 F.3d 360 (7th Cir. 2015), Hercules Inc., 281 N.L.R.B. 961 (1986), New Surfside Nursing Home, 322 N.L.R.B. 531 (1996), and Nestle Purina Petcare Co., 347 N.L.R.B. 91 (2006).

> being performed to ascertain what skills were actually being utilized, notwithstanding that the company claimed that the daily logs that employees kept recording the work done could have provided that information had the union requested them";
>
> -in Nestle, the case "involved a time and motion study related to a work overload grievance in which union members had complained of a work overload[,] . . . the union sought to perform a study of the work being performed[,] . . . [and] the NLRB held . . . that the company failed to show that there were alternate means by which the union could effectively represent the employees on the issue"; and
>
> -in New Surfside Nursing Home, "numerous employee complaints had been raised regarding back injuries, infectious diseases, blood-borne pathogens, and issues concerning AIDS, HIV, hepatitis and tuberculosis, emanating from confusion as to whether certain protocols were being followed and workers claiming that they had not received adequate training" and "the union asserted that there exist[ed] a potential of exposure to infectious disease for all health care employees in support of its demand for a walk-through" while specifying that it "did not request an inspection by a third-party expert, but rather . . . by the assistant director for health and safety from its parent organization . . . SEIU."

See Board Sur-Reply Br. at 1-5. The Board maintains that unlike the private sector cases cited by the Association, "there have been no fatalities, injuries or illnesses linked to [its] ventilation systems, nor any complaints filed with oversight authorities, such as PEOSH, the State Departments of Education or Health"; "no grievance is pending . . . [and] there is no allegation of any contractual or other infringement or violation, the veracity of which needs to be determined by [an] arbiter, agency or court" and "there is no need for any type of direct

observational study to assist in providing probative evidence which would form the evidential basis of any such determination . . . were one required"; and "the Board is perfectly willing to provide the Association with access to all maintenance and inspection logs and materials." The Board also contends that unlike New Jersey public schools, private sector companies "[are] not under the jurisdiction of a designated State agency which set[s] and monitor[s] specific operational requirements in the absence of a formal complaint . . . such as . . . OSHA" whereas "the Board is under the direct oversight of the NJDOE which, in coordination with the NJDOH, has issued operational specifications to which all school districts must adhere, based [up]on the Governor's . . . executive orders" including "specific guidance to school districts concerning ventilation systems . . . ." The Board argues that "the use of WEC . . . in the manner described by the Association, to ensure maximum operation of equipment and the subsequent public dissemination of its report is likely to intrude upon the budgeting process by placing unnecessary pressure on the Board to expend funds in a manner that truly may not be needed and will impede other necessary expenditures" and that the Association "is likely to further pursue [its] agenda" of "delay[ing] the re-opening of schools . . . in the event of any adverse findings by [WEC]." The Board maintains that "[a]ny effort by the Association to continue to

impede the Board's efforts to keep its schools open would seriously interfere with . . . managerial obligations" and "even in the absence of any critical safety hazard determinations by WEC, publicizing . . . the slightest adverse finding is likely to be misunderstood, exaggerated, and exploited by those who already are fearful of in-person schooling operations"; and that "[t]his should not be permitted to happen in the absence of a compelling, underlying justification."

STANDARD OF REVIEW

To obtain interim relief, the moving party must demonstrate that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted; in certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. See Crowe v. DeGioia, 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 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.

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982), articulated the standards for determining whether a subject is mandatorily negotiable:

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

The Commission has "recogni[zed] . . . the difficulty of squaring proper recognition of the exercise of managerial

prerogatives by public employers with the duty of public employers under [the] Act to negotiate safety issues." City of East Orange, P.E.R.C. No. 81-11, 6 NJPER 378 (¶11194 1980), aff'd NJPER Supp.2d 100 (¶82 App. Div. 1981), certif. den. 88 N.J. 476 (1981); accord City of Elizabeth, P.E.R.C. No. 92-106, 18 NJPER 262 (¶23109 1992) (the Commission "[is] charged with balancing the employer and employees' respective interests . . . considering the facts of each case"). The Commission has held that "employees covered by collective negotiations agreements [have] the ability to address safety concerns to their employer, as such issues [are] mandatory subjects of negotiations." West Deptford Tp. Bd. of Ed., P.E.R.C. No. 99-68, 25 NJPER 99 (¶30043 1999); accord State of New Jersey (Dep't of Corrections), P.E.R.C. No. 2020-37, 46 NJPER 324 (¶79 2020) ("disputes under contractual safety clauses are legally arbitrable, but . . . an award could not order an increase in staffing or a reversal of . . . policy . . . [that] would substantially interfere with [an employer's] managerial prerogative"); State of New Jersey (Greystone), P.E.R.C. No. 89-85, 15 NJPER 153 (¶20062 1989) (denying a restraint of binding arbitration of a grievance "assert[ing] that ending security guard services made . . . [an] [o]ffice unsafe"). However, "grievance[s] [that] seek[] to prevent [an] employer from implementing a decision to increase employee safety" are not mandatorily negotiable. City of

Elizabeth; accord City of Newark, P.E.R.C. No. 97-153, 23 NJPER 400 (¶28184 1997) ("employer had prerogative to take action to improve employee safety").

Public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). "It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification." State of New Jersey (Corrections), H.E. 2014-9, 40 NJPER 534 (¶173 2014) (citing New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978)). The Commission has held that a violation of another unfair practice provision derivatively violates subsection 5.4a(1). Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Public employers are also prohibited from "[r]efusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. . . ." N.J.S.A. 34:13A-5.4a(5). A determination that a party has refused to negotiate in good faith will depend upon an analysis of the

overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010). The Commission has held that "a breach of contract may also rise to the level of a refusal to negotiate in good faith" and that it "ha[s] the authority to remedy that violation under subsection a(5)." State of New Jersey (Dep't of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

ANALYSIS

Given that the Board has agreed to allow Association representatives to conduct a health/safety walk-through, all that remains at issue in this interim relief application are the following:

> -whether, based upon any general/unspecified health/safety concern raised by a union or for no reason at all, a union's right of access to a public employer's property/facilities extends to include the assistance/presence of – and inspection by - a third-party[13/]; and
>
> -whether there is pre-emptive legal authority and/or a managerial prerogative for public schools to re-open and continue in-person student instruction during the COVID-19 pandemic and, if so, whether same may be vitiated by any general/unspecified health/safety concern raised by a union.

I. Third-Party Assistance/Presence during Walk-Throughs

13/ During oral argument, upon direct inquiry by the Commission Designee, the Association's counsel represented that the Association's position was that for any reason or for no reason at all, a union's right of access to a public employer's property/facilities extends to include the assistance/presence of – and inspection by - a third-party.

The most recent interim relief decisions regarding union access to the worksite for purposes of a healthy/safety walk-through are Passaic Valley Reg'l High School Bd. of Ed., I.R. No. 2021-10, 47 NJPER 235 (¶54 2021) and Paterson State Operated School District, I.R. No. 2021-25, 47 NJPER 510 (¶120 2021).

In Passaic Valley, the local board of education denied the union's request to conduct a health/safety walk-through despite a pending grievance alleging "that the school environment [was] unsafe and hazardous during the COVID-19 pandemic" for a variety of specific reasons including inadequate ventilation, screening, distancing, protective barriers, and HVAC systems. In analyzing the union's application for interim relief, the Commission Designee noted the following:

> Furthermore, it is well-settled that the health and safety of employees is a mandatorily negotiable term and condition of employment. See In re Hunterdon Cty. Bd. of Chosen Freeholders, 116 N.J. 322, 332 (1989) (employee safety is mandatorily negotiable in the absence of issues demonstrably affecting governmental policy); Maurice River Bd. of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987) (negotiation proposal that would allow employees to refuse to work under conditions that would endanger their health, safety or well-being is mandatorily negotiable); Franklin Tp., P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985); Union Cty., P.E.R.C. No. 84-23, 9 NJPER 588 (¶14248 1983). See also N.J.S.A. 34:6A-26 ("the safety and health of public employees in the workplace is of primary public concern" and employers and employees should cooperate to enforce health and safety standards).

It is also well-settled that a public employer has a duty to provide a majority representative with information relevant to contract administration. UMDNJ, P.E.R.C. No. 93-114, 19 NJPER 342 (¶24155 1993), recon. granted, P.E.R.C. No. 94-60, 20 NJPER 45 (¶25014 1994), aff'd 21 NJPER 319 (¶26203 App. Div. 1995), aff'd 144 N.J. 511 (1996). An employer's refusal to provide a majority representative with information that the union needs to represent its members constitutes a refusal to negotiate in good faith in violation of subsections 5.4a(1) and 5.4a(5) of the Act. UMDNJ; see also Morris Cty., P.E.R.C. No. 2003-22, 28 NJPER 421 (¶33154 2002), aff'd 371 N.J. Super. 246 (App. Div. 2004), certif. den., 182 N.J. 427 (2005); Mt. Holly Bd. of Ed., P.E.R.C. No. 2019-6, 45 NJPER 103, 104 (¶27 2018); City of Newark, P.E.R.C. No. 2015-64, 41 NJPER 447 (¶138 2015).

An employer must supply information if there is a probability that the information is potentially relevant and that it will be of use to the representative in carrying out its statutory duties. UMDNJ; see also State of N.J. (OER), P.E.R.C. No. 88-27, 13 NJPER 752 (¶18284 1987), recon. den., P.E.R.C. No. 88-45, 13 NJPER 841 (¶18323 1987), aff'd NJPER Supp.2d 198 (¶177 App. Div. 1988). Relevance is determined through a discovery-type standard; therefore, unions are entitled to a broad range of potentially useful information. UMDNJ; see also NLRB v. Acme Industrial Co., 385 U.S. 432, 437 (1967); Proctor & Gamble Manufacturing Co. v. NLRB, 603 F.2d 1310, 1315 (8th Cir. 1979). The employer is required to produce information unless it is clearly irrelevant, confidential, or not in its control or possession. UMDNJ; State of N.J. (OER).

The Commission has also long held that absent a legitimate, substantial business justification, a public employer cannot bar a union access to the worksite, and to do so would violate the union's right under section

> 5.4a (1) of the Act to represent and advocate for its members. See Perth Amboy Bd. of Ed., H.E. No. 2016-13, 42 NJPER 410 (¶113 2015) (access to employer's premises to represent employees is protected conduct and cannot be unreasonably restricted); Atlantic Cty., H.E. No. 97-22, 23 NJPER 206, 208 (¶28100 1997), adopted P.E.R.C. No. 98-8, 23 NJPER 466 (¶28217 1997) (employer may not impose total ban on access to its premises without a substantial, legitimate business reason); Bergen Cty., P.E.R.C. No. 84-2, 9 NJPER 451, 457 (¶14196 1983).[14/]

Ultimately, the Designee granted the union's application for interim relief, specifying that the board "must allow the Association access to the school premises to conduct a health/safety walkthrough by not more than three representatives of the Association's choice . . . for a reasonable period sufficient to allow the Association's representatives to fully

---

14/ The right of union access to the workplace was recently codified in the Workplace Democracy Enhancement Act (WDEA), N.J.S.A. 34:13A-5.11 et seq. In particular, N.J.S.A. 34:13A-5.13(f), entitled "Access to members of negotiations units," provides in pertinent part (emphasis supplied):

> 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 government or business of the union, provided such use does not interfere with governmental operations.

observe and survey health/safety conditions on the premises, at a time when any employees are working on site and students are not on the premises."[15/] Id.

In Paterson, the local board of education granted the union's request to conduct health/safety walk-throughs despite the fact that there was no related pending grievance. During the walk-throughs, the board prohibited the union representatives from accessing/inspecting ventilation systems and HVAC/Univent systems in most buildings. In analyzing the union's application for interim relief, the Commission Designee cited Passaic Valley and found that despite the board's "significant production of pertinent documentation to the [union] related to its HVAC units and/or ventilation systems, . . . the various burdens cited by the [board] . . . [were] a result of its failure to provide access to HVAC units and/or ventilation systems during the . . . walk-throughs as requested by the union or its determination to proceed with the walk-throughs . . . without first negotiating or litigating the issue given [that the union requested access to HVAC units and/or ventilation systems in advance of the walk-throughs]." Id. Ultimately, the Commission Designee specifically granted **ONLY** Association representatives (i.e., unit members and the NJEA UniServ Representative) the right to conduct

---

15/ N.B., there was no request or suggestion by the union, and no discussion by the Designee, regarding any third-party assistance/presence.

a non-invasive, "audio-visual walk-through of those areas housing HVAC units and/or ventilation systems and to determine whether that equipment has been serviced consistent with the preventative maintenance as required by Regulation and Board policy." Id.

Given the dearth of Commission precedent, a review of pertinent National Labor Relations Board (NLRB) and federal judicial precedent is also instructive.[16/] See, e.g., Holyoke Water Power Co., 273 N.L.R.B. 1369, 118 L.R.R.M. 1179 (1985); Asarco Inc. v. NLRB, 805 F.2d 194 (6th Cir. 1986); Hercules, Inc. v. NLRB, 833 F.2d 426 (2d Cir. 1987); Exxon Chemical Co., 307 N.L.R.B. 1254, 140 L.R.R.M. 1227 (1991); Brown Shoe Co. v. NLRB, 33 F.3d 1019 (8th Cir. 1994); New Surfside Nursing Home, 322 N.L.R.B. 531, 153 L.R.R.M. 1266 (1996); Nestle Purina Petcare Co., 347 N.L.R.B. 891, 180 L.R.R.M. 1137 (2006); Caterpillar Inc. v. NLRB, 803 F.3d 360 (7th Cir. 2015). These cases make clear that the right to access and/or inspect employer property – particularly by a third-party – is not absolute. Rather, it is instead conditioned on the careful balancing of competing,

---

16/ The "experience and adjudications" under the National Labor Relations Act (NLRA) are an appropriate guide for interpreting our Act. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n of Educational Secretaries, 78 N.J. 1, 9 (1978). This is particularly true with respect to the Act's unfair practice provisions, since these provisions ". . . parallel the unfair labor practice provisions of the [NLRA] in many respects." Id.; In re Bridgewater Tp., 95 N.J. 235, 240 (1984) (explaining that the ". . . language and intent of the Act and the [NLRA] are substantially the same").

legitimate interests that are sometimes in conflict – i.e., employees' interest to be responsibly/adequately represented by a majority representative on matters impacting terms and conditions of employment; and employers' interest to control its property and ensure that operations are not interfered with (or, when analogized to public employment, ensure that any disruption to a public employer's operations does not significantly interfere with the determination and implementation of governmental policy).[17/]

17/ While the balancing test in the private sector refers to an employer's "property rights" as an interest that must be balanced against the union's representational rights, the appropriate analogue in the public sector is not a public employer's "property rights", so much as it is a public employer's prerogative to determine and implement governmental policy without significant interference or disruption of governmental operations. See IFPTE Local 195 v. State of New Jersey, 88 N.J. 393, 404-405 (1982); Jersey City v. Jersey City POBA, 154 N.J. 555, 568 (1998). This is consonant with longstanding Commission and judicial precedent on the negotiability of health and safety issues. Willingboro Tp. Bd. of Ed., P.E.R.C. No. 90-27, 15 NJPER 604, (¶20249 1989) ("[h]ealth and safety issues which do not significantly interfere with governmental policy are mandatorily negotiable"); Hunterdon Cty. and CWA, 116 N.J. 322 (1989); State of New Jersey, P.E.R.C. No. 86-11, 11 NJPER 457 (¶16162 1985). While health and safety issues in general are negotiable, negotiations cannot significantly interfere with governmental policy determinations (e.g., staffing, capital expenditures or improvements to employer facilities, methods of training public employees and delivering public services) and other governmental decisions predominantly pertaining to matters of governmental policy. See City of Atlantic City, P.E.R.C. No. 2015-63, 41 NJPER 439 (¶137 2015), aff'd in pt., rev'd in pt., 44 NJPER 115 (¶136 App. Div. 2017); City of Englewood, P.E.R.C. No. 2016-41, 42 NJPER 300 (¶86 2015).

As with all negotiability issues, whether to grant a union's request for access and/or inspection of employer property – particularly by a third-party – ". . .is a fact intensive determination which must be fine tuned to the details of each case." In re Mount Laurel Tp., 215 N.J.Super. 108, 114 (App. Div. 1987); see also Local 195, 88 N.J. at 404-405; Jersey City, 154 N.J. at 574-575. Accordingly, NLRB and federal judicial precedent vary in their interpretation and application of the standard set forth above based upon the unique circumstances arising in a particular context. In fact, federal courts have acknowledged that although ". . . the standard of relevancy is a liberal one . . . similar to that used for discovery purposes[,] . . . when a request for access to information impinges upon an employer's property rights, closer scrutiny may be justified." Brown Shoe, 33 F.3d at 1022.

For example, in Crozer-Chester Med. Ctr. v. NLRB, 976 F.3d 276, 296 (3d Cir. 2020), the U.S. Court of Appeals for the Third Circuit specified that it "[was] unaware of any precedent for ordering an employer to furnish information to a union that has not been established as relevant" in finding that a union had failed to establish the relevance of an entire document that it was seeking. In Brown Shoe, the U.S. Court of Appeals for the Eight Circuit clarified the intersection between the parties' competing interests and the relevance of information sought as

follows (emphasis supplied):

> The [NLRB] improperly required that the Union have "alternate means for gathering the time-study information." "Where it is found that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access." Holyoke, 273 N.L.R.B. at 1370. Holyoke does not require that a union have alternate means of performing a time study or collecting time study data, but rather that a union have alternate means of effectively representing the employees on the particular bargaining issue.
>
> The [NLRB] erred when it found that Brown violated the Act because substantial evidence does not support a finding that the Union could not responsibly represent the employees' piece-rate grievances without access to the plant for purposes of performing a time study. The record indicates that the Union has resolved sixty-eight piece-rate grievances in the last three years without time studies. J.A. at 611. The president of the Union local testified that over the last six years piece-rate grievances have been resolved either with arbitration or with wage increases. Id. at 112. The record indicates that Brown provided the Union with access to information regarding the exact earnings of the employees, as well as the number of items they produced and the wage rate attributable to that production. Id. at 180. Brown also suggested at the hearing that the Union could have sought production rate data from the machine manufacturer. Id. at 183-84. Furthermore, the affidavit of a Union representative, which was offered into evidence, suggested that time studies performed in other Brown plants might be available for the relevant machines. Id. at 384.

> Despite the fact that the parties had agreed in their CBA that a joint investigation should be undertaken when wages decrease in a situation such as this, the Union representative testified that the contractual joint investigation was never requested. Id. at 209. In a conclusory fashion, the Union representative merely testified that the only method for determining a piece rate was a time study. Id. at 182. This evidence examined as a whole is wholly inadequate to conclude that without access to perform a time study, the Union could not responsibly represent the employees.
>
> We are disturbed by the Union's refusal to offer Brown assurances that the presence of the Union time study engineer would not disturb or disrupt its operations. See id. at 173, 174, 176, 180, 200, 201; see also supra note 3. Had the Union attempted to allay Brown's fears of disruption on its property, such assurances would have factored favorably into the Holyoke balancing test. See ASARCO, Inc., Tennessee Mines Div., 805 F.2d at 198. Assuming, without deciding, that Brown denied the Union access to perform the time studies, the Board properly should have weighed the effect such studies would have upon Brown's operations against the availability of alternate means of effectively representing the employees. Because substantial evidence on this record does not support the Board's conclusions, we reverse.
> [Brown Shoe, 33 F.3d at 1023-1024].

(A) Likelihood of Success

Given these legal precepts, I find that the Association has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.

The Association itself has submitted evidence demonstrating

that there are material facts in dispute (or, at best, that changed from August 13-30, 2021) regarding the training and capability of its unit members. Specifically, Hayden alternately certified that the Association has "conducted a training of all its building delegates to educate them to be able to identify and record potential hazards" particularly regarding "COVID-related concerns" and ventilation/HVAC issues and "developed a checklist so that each delegate would be able to record his/her observations" (Hayden Certification, ¶¶13-14); and subsequently certified that the Association's "training was not enough . . . [and] has been extremely difficult and time consuming and requires more than [the] Association has been trained to do" (Hayden Certification, ¶¶13-14). Further, in the absence of any grievance pertaining to specific health/safety concerns or a precipitating incident, Hayden's certifications also illustrate the Association's failure to sufficiently establish a material fact – i.e., the specific articulation of a particularized health/safety concern necessitating the assistance/presence of a third-party. See Hayden Certification, ¶¶5-17; Hayden Supplemental Certification, ¶¶4-5. In sum, "substantial evidence does not support a finding that the [Association] could not responsibly represent . . . [unit members] without . . . [the assistance/presence of – and inspection by – a third-party]." Brown Shoe, 33 F.3d at 1023-1024

As a result of this insufficient evidence – and in the absence of any related grievance or precipitating incident - the following questions remain unanswered:

> -are unit members competently trained and therefore capable of conducting a health/safety walk-through, or not; and
>
> -what particularized health/safety concern(s) necessitates the assistance/presence of a third-party and, once stated, what exactly will the third-party's assistance/presence/inspection entail (e.g., who, what, when, where, why, and how).

Unequivocal, sufficient answers to these questions are a necessary predicate to accurately and adequately assess the parties' competing interests and relevance of the information sought (Brown Shoe; Crozer-Chester Med. Ctr.) – i.e., can the Association effectively/responsibly represent unit members through some alternate means (e.g., the Board's production of documents/data or Association representatives conducting a health/safety walk-through without the assistance/presence of – and inspection by - a third-party); can the Association offer the Board assurances that the presence of a third-party will not disturb/disrupt the Board's operations or significantly interfere with the determination and implementation of governmental policy (e.g., modify or damage the Board's facilities or equipment[18/]).

18/ N.B., the Association has actually taken pains to amplify – rather than allay – the Board's concerns, certifying that "[t]here is no such thing as a non-invasive walkthrough." See Hayden Supplemental Certification, ¶4c. As specified in (continued...)

I find that these material factual issues preclude a finding that the Association has a substantial likelihood of prevailing in a final Commission decision. See, e.g., City of Newark, I.R. No. 2021-7, 47 NJPER 164 (¶38 2020) (denying application for interim relief where there were "material factual disputes"); Town of Boonton, I.R. No. 2020-1, 46 NJPER 30 (¶9 2019) (denying application for interim relief where there were "material factual disputes"); Kean University, I.R. No. 2009-5, 34 NJPER 232 (¶80 2008) (denying application for interim relief where there were "several disputes of material fact[]"); Closter Bor., I.R. No. 2007-10, 33 NJPER 101 (¶35 2007) (denying application for interim relief where "the record show[ed] a dispute on a material fact").

It is also uncertain as to whether the Association has a substantial likelihood of prevailing on its legal allegations. The Association has conceded that ". . . there is no prior PERC decision . . . directly on point." See Association Reply Br. at 1. Although NLRB and federal court precedent may be persuasive

---

18/ (...continued)
Paterson, a non-invasive walk-through means that the union does not seek – or the relief ordered does not grant – any right beyond observations via an audio-visual inspection. Unless agreed to by the parties, any invasive inspection (e.g., destructive or air quality testing; opening/examining/taking apart/testing technical or physical plant equipment; etc.) would need to be specifically requested by the union and ordered by the Commission Designee. See https://www.osha.gov/sites/default/files/training-library_industrial_hygiene.pdf

authority, the Supreme Court of New Jersey has specified ". . . that federal precedents concerning the scope of collective bargaining in the private sector are of little value in determining the permissible scope of collective bargaining in public employment labor relations in New Jersey." In re Bridgewater Tp., 95 N.J. 235, 240, n.2 (1984); accord Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 158-159 (1978) (noting that "[NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958)] dealt with the private sphere, and is therefore inapposite [with respect to public employment labor relations in New Jersey]"); Lullo v. Int'l Ass'n of Fire Fighters, 55 N.J. 409, 439-440 (1970) (noting that "the authorization for 'collective negotiations' in the 1968 Act was designed to make known that there are salient differences between public and private employment relations which necessarily affect the characteristics of collective bargaining in the public sector . . . [and] an effort to make public employers and employees realize that the process of collective bargaining as understood in the private employment sector cannot be transplanted into the public service").

Even assuming, arguendo, that NLRB and federal court precedent are persuasive authority with respect to the instant dispute, I find that the cases cited by the Association are distinguishable given the circumstances present in this matter.

Specifically,

-unlike Holyoke Water Power Co., where there was an undisputed noise problem in the employer's fan room which necessitated the assistance/presence of the union's industrial hygienist (i.e., specific health/safety concern or precipitating incident), here the Association has failed to specifically articulate a particularized health/safety concern and there has been no precipitating incident necessitating the assistance/presence of a third-party;

-unlike Exxon Chemical Co., where there was a pending grievance alleging that the employer had changed the skill requirements for a job classification and cited actual experience in the position as the basis for mis-grading job classifications which necessitated the assistance/presence of the union's time-study expert (i.e., grievance pertaining to specific health/safety concerns), here the Association has not filed any grievance necessitating the assistance/presence of a third-party;

-unlike Caterpillar Inc. v. NLRB, where a crane operator who was a member of the bargaining unit was killed when a 36-ton crawler crushed him after shifting unexpectedly while being rotated by the crane which necessitated the assistance/presence of the union's health/safety specialist who was an investigator of fatal accidents (i.e., specific health/safety concern or precipitating incident), here the Association has failed to specifically articulate a particularized health/safety concern and there has been no precipitating incident necessitating the assistance/presence of a third-party;

-unlike Hercules, Inc. v. NLRB, where an explosion occurred in the nitrocellulose production area of the employer's plant, killing one worker and injuring four others, which necessitated the assistance/presence of the union's industrial hygienist to conduct a healthy/safety inspection (i.e., specific health/safety concern or precipitating incident), here the Association has failed to specifically articulate a particularized health/safety concern and there has been no precipitating incident necessitating the assistance/presence of a third-party;

-unlike Nestle Purina Petcare Co., where there was a pending grievance alleging that forklift drivers were laboring under a "work overload" that might pose a safety concern or require adjustments to paygrade/duties and the union requested a time-study to validate its claim which necessitated the assistance/presence of the union's industrial engineer (i.e., grievance pertaining to specific health/safety concerns), here the Association has not filed any grievance necessitating the assistance/presence of a third-party; and

-unlike New Surfside Nursing Home, where the union/unit members raised a number of concerns regarding back injuries, infectious diseases, blood-borne pathogens, and issues concerning AIDS, HIV, hepatitis, and tuberculosis based upon whether certain protocols were being followed and whether adequate training was being provided which necessitated the assistance/presence of the union's health/safety expert to conduct a health/safety walk-through inspection (i.e., specific health/safety concern or precipitating incident), here the Association has failed to specifically articulate a particularized health/safety concern and there has been no precipitating incident necessitating the assistance/presence of a third-party.[19/]

Thus, the Association's allegations raise a novel legal question that is more appropriate for a plenary hearing and Commission review than to be initially decided via an application for interim relief -- i.e., whether the Commission finds NLRB and federal court precedent persuasive authority regarding third-party access to public employer property/facilities and, if so,

---

19/ Notably, New Surfside Nursing Home did not involve a third-party – i.e., the local union's (SEIU Local 144) health/safety expert was in fact an employee of the national union (SEIU). Accordingly, New Surfside Nursing Home is also distinguishable from this matter given that here, the Board has **AGREED** to allow Association representatives to conduct a health/safety walk-through.

to what extent (if any) that precedent applies to the circumstances present in this matter. See, e.g., Ocean Cty., I.R. No. 2020-24, 47 NJPER 1 (¶1 2020) (denying an application for interim relief based, in part, upon "legal allegations [that] raise several questions that are more appropriate for a plenary hearing and Commission review than to be initially decided via an application for interim relief"); Town of Boonton, I.R. No. 2020-1, 46 NJPER 30 (¶9 2019) (denying an application for interim relief based, in part, upon the unclear legal effect -- if any - of allegedly ratifying a memorandum of agreement during closed session); City of Orange, I.R. No. 2005-10, 31 NJPER 130 (¶56 2005) (denying, in part, an application for interim relief where there was "a novel issue of law that [was] more appropriate for a plenary hearing and Commission review than to be initially decided in interim relief"); Middlesex Cty., I.R. No. 88-10, 14 NJPER 153 (¶19062 1988) (denying an application for interim relief where "complex and novel legal issues [had] been presented . . . [that] can only be resolved at a plenary hearing").

Accordingly, I find that the Association has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.

(B) Irreparable Harm

I also find that the Association has failed to establish irreparable harm. "Irreparable harm will be found in an unfair

practice case where the Commission is unable to fashion an adequate, effective remedy at the conclusion of the plenary proceeding in that case." Brick Tp. Bd. of Ed., I.R. No. 2011-31, 37 NJPER 39 (¶13 2011).

Here, the Board has agreed to allow Association representatives to conduct a health/safety walk-through without the assistance/presence of a third-party (Hayden Certification, ¶9, Exh. D; accord Labbe Certification, ¶7); and the Board has not foreclosed the possibility of agreeing to allow a third-party access to its property/facilities when/if the Association specifically articulates a particularized health/safety concern necessitating the assistance/presence of a third-party (Labbe Certification, ¶¶18-19). Accordingly, other than the Association electing to forego the opportunity to conduct a health/safety walk-through while the instant application for interim relief has been pending (this despite the fact that unit members have continued providing in-person instruction to students within Board buildings throughout most of that period), all avenues of redress will remain open throughout the processing of – and at the conclusion of – the underlying unfair practice charge. Contrast Passaic Valley Reg'l High School Bd. of Ed., I.R. No. 2021-10, 47 NJPER 235 (¶54 2021) ("[an employer's] refusal to accommodate [a union's] request for a health and safety walk-through when students are not in the building, but willingness to

allow custodians and secretaries to continue to work in the building, is unjustified and harmful to the labor relations process"); accord Paterson State Operated School District, I.R. No. 2021-25, 47 NJPER 510 (¶120 2021).

Moreover, although the pandemic continues unabated, the current circumstances are distinguishable from those present when Passaic Valley and Paterson were decided given the decreasing societal impact of COVID-19. Specifically, improving scientific knowledge and the existence/availability of vaccines and rigorous testing regimes have led to the termination of the Public Health Emergency; the resumption of full-day, in-person instruction during the 2021-2022 school year; and the requirement that all New Jersey school personnel accede to mandatory vaccination or COVID-19 testing. See infra §II - Cessation of In-Person Student Instruction. As such, the Association can no longer rely on "the [general] threat posed to employees by potential health and safety issues in a workplace that may increase their exposure to COVID-19 during a pandemic" (Passaic Valley Reg'l High School Bd. of Ed.) in order to establish irreparable harm. Rather, in the absence of any grievance pertaining to specific health/safety concerns or a precipitating incident, the Association must specifically articulate a particularized health/safety concern necessitating the assistance/presence of a third-party in order to establish irreparable harm (see infra §II - Cessation of In-

Person Student Instruction).

Accordingly, I find that the Association has failed to establish irreparable harm.

(C) Relative Hardship and Public Interest

I also find that the Association has failed to demonstrate relative hardship and that the public interest will not be injured by an interim relief order.

Unequivocal, sufficient answers to the questions set forth above (see supra, §I - Third-Party Assistance/Presence during Walk-Throughs, (A) Likelihood of Success) are a necessary predicate to accurately and adequately assess the parties' competing interests and the relevance of information sought (Brown Shoe; Crozer-Chester Med. Ctr.) and, in turn, to determine the relative hardship and whether the public interest will be injured by an interim relief order. Moreover, the Association itself has contributed to the relative hardship that it complains of (i.e., "[being] den[ied] access to health and safety walkthroughs during a pandemic in a timely manner") by electing to forego the opportunity to conduct a health/safety walk-through without the assistance/presence of a third-party while the instant application for interim relief has been pending. See Association Br. at 16 (emphasis supplied). Although conducting a health/safety walk-through without the assistance/presence of a third-party may be less efficient/effective and may require

additional time and manpower, it is conceivable that same could provide assurance to unit members and/or the public (e.g., students, families) that the Board's buildings and equipment are adequately maintained to ensure the health/safety of all occupants. Further, such walk-throughs are consistent with the access provisions of the parties' collective agreement. See 2020-2021 CNA, Art. 5. In Edison Tp., I.R. No. 2010-3, 35 NJPER 241 (¶86 2009), the Commission Designee noted the following:

> . . .[T]he public interest is furthered by requiring adherence to the tenets expressed in the Act which require parties to negotiate prior to implementing changes in terms and conditions of employment. Maintaining the collective negotiations process results in labor stability and thus promotes the public interest.
>
> [35 NJPER at 243.]

Accordingly, I find that the Association has failed to demonstrate relative hardship and that the public interest will not be injured by an interim relief order.

II. Cessation of In-Person Student Instruction

The New Jersey Attorney General has determined that "public schools in [the State of New Jersey] are mandated by law to remain open for instruction for a period of not less than 180 days in the school year." See Formal Opinion No. 19-1975, N.J. Attorney General, August 14, 1975; see also N.J.S.A. 18A:7F-9

(requiring school districts to be open for at least 180 days each school year in order to receive State aid).

On March 9, 2020, in order to protect the health, safety, and welfare of the people of the State of New Jersey, Governor Philip D. Murphy issued Executive Order (EO) No. 103 declaring a Public Health Emergency and State of Emergency in the State of New Jersey related to Coronavirus disease 2019 (COVID-19), a contagious, and at times fatal, respiratory disease caused by SARS-CoV-2 virus; and subsequently issued a series of Executive Orders that included mitigation strategies (e.g., closure of non-essential retail businesses to the public; closure of public, private and parochial preschool program premises as well as elementary and secondary schools; work-from-home arrangements; cessation of non-essential construction projects; permission for residents to leave their residences in order to report to or perform their job; social distancing; etc.) and extensions of the Public Health Emergency. See EO Nos. 103 (emphasis added); see also EO Nos. 104, 107, 119, 122, 125, 138, 151, 162, 171, 180, 186, 191, 200, 210, 215, 222, 231, 235, 240.

On June 4, 2021, Governor Murphy issued EO No. 244 and signed A5820/S3866 (codified at N.J.S.A. 26:13-32 thru -35), both terminating the Public Health Emergency related to COVID-19.

> Specifically with respect to the education setting, -on August 13, 2020, Governor Murphy issued EO No. 175 which superseded EO Nos. 104 and 107 to the extent they required closure of public, private and parochial

preschool program premises as well as elementary and secondary schools; established certain health and safety standards for all school district that re-opened for full or part-time in-person instruction; directed that schools develop a re-opening plan consistent with "The Road Back" and resume partial or full-time in-person instruction during the fall of the 2020-2021 school year; and permitted certain exceptions to allow for remote instruction;

-on May 17, 2021, Governor Murphy announced that portions of EO No. 175 (emphasis supplied) allowing remote learning would be rescinded (or allowed to expire at the conclusion of the 2020-2021 school year) such that schools were/are required to provide full-day, in-person instruction during the 2021-2022 school year as they were prior to the COVID-19 Public Health Emergency [20/];

-on August 23, 2021, Governor Murphy issued EO No. 253 (emphasis supplied) requiring all preschool through Grade 12 school personnel to either provide adequate proof that they are fully vaccinated or submit to COVID-19 testing at a minimum one to two times weekly, effective October 18, 2021.

The New Jersey Supreme Court has held that the assignment or reassignment of personnel, particularly from one job assignment to another, is a managerial prerogative. Local 195, IFPTE v. State, 88 N.J. 393, 415-417 (1982); Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. Ed., 78 N.J. 144, 156 (1978). Moreover, the Commission has specifically held that the right to assign teachers to non-teaching duties, and the question of which personnel to assign, are managerial prerogatives. Mahwah Bd. Ed., P.E.R.C. No. 83-96, 9 NJPER 94 (¶14051 1983); Monroe Tp. Bd.

20/ See https://www.nj.gov/governor/news/news/562021/20210517a.shtml

Ed., P.E.R.C. No. 80-146, 6 NJPER 301 (¶11143 1980); see also Trenton Bd. of Ed., D.U.P. No. 2018-1, 44 NJPER 93 (¶30 2017).

(A) Likelihood of Success

Given these legal precepts, I find that the Association has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.

Presently, a generous reading/interpretation of the Association's charge yields what appears to be a general and unspecified health/safety concern related to the airborne nature of COVID-19 vis-a-vis the condition/effectiveness of the Board's HVAC units and/or ventilation systems. Under the first prong of Local 195, employee health/safety concerns are a term and condition of employment that intimately and directly affect the work and welfare of employees by virtue of the parties' CNA. See West Deptford Tp. Bd. of Ed.; State of New Jersey (Dep't of Corrections); State of New Jersey (Greystone). The second prong of Local 195 is implicated under the N.J. Attorney General's Formal Opinion No. 19-1975, N.J.S.A. 18A:7F-9, Governor Murphy's EO Nos. 175, 244, and 253, and A5820/S3866 (codified at N.J.S.A. 26:13-32 thru -35). Taken together, these legal authorities appear to preempt negotiations regarding the following: the minimum number of instructional days in the school year; termination of the Public Health Emergency; resumption of full-day, in-person instruction during the 2021-2022 school year; and

mandatory vaccination or COVID-19 testing for all New Jersey school personnel. Even assuming, arguendo, that these legal authorities are not preemptive, under the third prong of Local 195, given the decreasing societal impact of COVID-19 based upon improving scientific knowledge and the existence/availability of vaccines and rigorous testing regimes, it appears that the Board's interest in determining governmental policy (i.e., the minimum number of instructional days in the school year; when/how to re-open schools; continuing in-person instruction v. virtual appearance/attendance; etc.) outweighs the Association's general and unspecified health/safety concern related to the airborne nature of COVID-19 vis-a-vis the condition/effectiveness of Board's HVAC units and/or ventilation systems. However, I make no determination regarding whether a more specific health/safety concern could tip the balance.

Accordingly, I find that the Association has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, a requisite element under the Crowe factors,[21/] and deny this aspect

---

21/ As a result, I do not need to conduct an analysis of the other elements of the interim relief standard. See, e.g., Paterson State Operated School District, I.R. No. 2021-25, 47 NJPER 510 (¶120 2021), Harvey Cedars Bor., I.R. No. 2020-4, 46 NJPER 261 (¶64 2019), Irvington Tp., I.R. No. 2019-7, 45 NJPER 129 (¶34 2018), Rutgers, I.R. No. 2018-1, 44 NJPER 131 (¶38 2017), and New Jersey Transit Bus Operations, I.R. No. 2012-17, 39 NJPER 328 (¶113 2012).

of the application for interim relief.

CONCLUSION

Under these circumstances, I find that the Association has not sustained the heavy burden required for interim relief under the Crowe factors and deny the application pursuant to N.J.A.C. 19:14-9.5(b) (3). This case will be transferred to the Director of Unfair Practices for further processing.

ORDER

The Sayreville Education Association's application for interim relief is denied without prejudice.

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

DATED: October 1, 2021
Trenton, New Jersey