

I.R. NO. 2021-25

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PATERSON STATE OPERATED SCHOOL
DISTRICT,

Respondent,

-and-

Docket No. CO-2021-212

PATERSON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Designee upholds in part and dissolves in part the temporary restraints that were issued and, accordingly, grants in part and denies in part an application for interim relief filed by the Association against the District alleging that the District 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 denying access to HVAC units and/or ventilation systems in District buildings during April 21 and 22, 2021 health/safety walk-throughs. With respect to access to District buildings - particularly HVAC units and/or ventilation systems - in order to conduct health/safety walk-throughs, the Designee finds that the Association has demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations, irreparable harm, relative hardship, and that the public interest will not be injured by an interim relief order. With respect to unilaterally requiring unit members to appear at, and teach virtually from, District buildings when students are attending virtually, the Designee finds that at present the Association has failed to demonstrate a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. The unfair practice charge was transferred to the Director of Unfair Practices for further processing.

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Appearances:

For the Respondent, Souder, Shabazz, &
Woolridge Law Group, attorneys (Khalifah
Shabazz-Charles, of counsel; Bryant L.
Horsley, Jr., of counsel)

For the Charging Party, Oxfeld Cohen, P.C.,
attorneys (Randi Doner April, of counsel;
Sanford R. Oxfeld, of counsel)

INTERLOCUTORY DECISION

On April 5, 2021, Paterson Education Association
(Association) filed an unfair practice charge, together with an
application for interim relief, against Paterson State Operated
School District (District or Board). The charge alleges that on
or about March 26, 2021, the District 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

1/ These provisions prohibit public employers, their
representatives or agents from "(1) Interfering with,
(continued...)

allow Association representatives to conduct health/safety walk-throughs before April 21, 2021. The Association's application for interim relief requested the following relief pending disposition of the underlying unfair practice charge:

-an Order mandating that delegates of the Association be permitted to conduct safety and COVID compliance walk-throughs immediately; and

-an Order that the District be enjoined from re-opening schools for students until such walk-throughs occur and any required corrective action taken.

On April 7, 2021, Commission Designee Jonathan Roth sent a letter to both parties that provides in pertinent part:

An attached certification, essentially comprising the alleged facts, acknowledges a Board-authorized "walk-through" of Board schools on April 21, 2021 but avers an insufficient opportunity for remediation of COVID-19 related health issues because

1/ (...continued)
restraining or coercing employees in the exercise of the rights guaranteed to them by this act"; "(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act"; 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) claims inasmuch as the Association does not develop them in its original or renewed interim relief application or its original or amended unfair practice charge. The Association does not set forth facts that would suggest the District 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.

schools will be open for student attendance on May 3, 2021. The admitted "walk-through" scheduled for April 21, 2021 appears to be consistent with the gist of the Order in Passaic Valley Reg. H.S. Bd. of Ed., I.R. No. 2021-10, 47 NJPER 235 (¶54 2020). Whether remediation is needed, and whether the interim between the walk-through and alleged re-opening suffices for any needed remediation are variables that compel me to deny the application at this time because ". . . there is an insufficient basis in the pleadings to meet the standards for granting interim relief." N.J.A.C. 19:14-9.2(c).

Thereafter, I was assigned Commission Staff Agent for investigation of the underlying unfair practice charge and scheduled an exploratory conference for May 5, 2021.

On April 29, 2021, the Association filed an amended charge specifying that walk-throughs occurred on April 21 and 22, 2021 and that the Association collated and prioritized its results and submitted same to the District on April 26, 2021. However, the amended charge alleges that the District violated the Act as follows:

- failing and continuing to refuse to make available to the Association maintenance logs for each building, which would show when the filters were changed for various ventilation units in each building;

- denying access to the ventilation systems in District buildings during the April 21 and 22, 2021 walk-throughs;

- failing to provide copies of the District's inspection findings; and

- failing to allow the Association President an adequate opportunity to present the Association's findings and

determinations during the Board's April 28, 2021 meeting.

On May 5, 2021, I held an exploratory conference.

Also on May 5, 2021, the Board held a meeting. I take administrative notice^{3/} that the Board's May 5, 2021 Agenda reflects the following:

VIII. RESOLUTION FOR A VOTE:

1. Approve the recommendation of the district administration to reopen schools for staff to report in person starting June 1, 2021, Monday through Thursday, Fridays remote, and self-contained special education students, grades PreK-12, and newcomer students from New Roberto Clemente School and School No. 15 returning to in-person instruction on June 8, 2021, from 8:20 a.m. to 1:30 p.m., adhering to the implementation of COVID-19 prevention strategies.

APPROVED

On May 17, 2021, I held another exploratory conference.

On May 18, 2021, the Association renewed its application for interim relief "due to the ongoing issues between the parties and the impending June 1, 2021 re-opening of the Paterson School District." The Association's renewed application for interim relief requests^{4/} the following relief pending disposition of the underlying amended unfair practice charge:

3/ See N.J.A.C. 19:14-6.6(a) ("[n]otice may be taken of administratively noticeable facts").

4/ The Association requested that I be designated the Commission Designee for purposes of the renewed application for interim relief. Upon inquiry, the District specified that it had no objection to this request.

-an Order requiring the District to promptly allow access to the Association to conduct walk-throughs within a reasonable period and allowing Association representatives to fully observe and survey health/safety conditions in sufficient time in advance of the June 1, 2021 re-opening to permit corrective measures to be taken; or

-in the alternative, should that not occur, restraining the District from re-opening until remediation has occurred.

PROCEDURAL HISTORY

On May 19, 2021, I signed an Order to Show Cause temporarily restraining the District from (1) restricting the Association's access to District buildings - particularly with respect to HVAC and ventilation systems - in order to conduct health/safety walk-throughs as soon as possible, but no later than May 28, 2021; and (2) unilaterally requiring unit members to appear at, and teach virtually from, District buildings when students are attending/learning virtually until the above-referenced walk-throughs are completed. I also specified that the District could move for dissolution or modification of the temporary restraints on two days' notice or on such other notice as may be ordered. I also directed the District to file any opposition by May 26; the Association to file any reply by June 1; and set June 7 as the return date for oral argument.

On May 21, 2021, the District filed a motion to modify/dissolve the temporary restraints, together with its opposition to the renewed application for interim relief, and a

request for a modified/expedited hearing due to the impending June 1, 2021 re-opening date. I granted the District's motion and re-scheduled the return date for oral argument to May 22, 2021.

On May 22, 2021, party representatives engaged in oral argument during a telephone conference call and agreed that a modified/expedited hearing and written decision regarding the renewed application for interim relief was amenable. Accordingly, at the conclusion of oral argument, I advised the parties that a written decision disposing of the renewed application for interim relief would be forthcoming.

In support of the renewed application for interim relief, the Association re-submitted its original brief, exhibits, and the certification of its President, John McEntee (McEntee); the Association also submitted a letter brief, exhibits, the supplemental certification of President McEntee; the certification of New Jersey Education Association (NJEA) Field Representative Sasha Wolf (Wolf); and the certification of District elementary school teacher Joy Spinelli (Spinelli). In opposition, the District submitted a brief, exhibits, and the certification of its School Business Administrator, Richard L. Matthews (Matthews). The Association also filed a reply brief, exhibits, and the supplemental certification of NJEA Field Representative Wolf.

FINDINGS OF FACT

The Association represents all instructional certificated positions, education services certificated positions, and certain support staff positions employed by the District as specified in the recognition clause of the parties' collective negotiations agreement (CNA). See 2017-2022 CNA, Art. 1. The District and the Association are parties to a CNA in effect from July 1, 2017 through June 30, 2022. The grievance procedure ends in binding arbitration.

Article 25 of the parties' CNA, entitled "Protection of Employees, Students and Property," provides in pertinent part (emphasis supplied):

25:1 UNSAFE AND HAZARDOUS CONDITIONS

Employees shall not be required to work under unsafe or hazardous conditions or to perform tasks which endanger their health, safety, or well-being.

25:2 PROCEDURES FOR HAZARDOUS CONDITIONS

In the event of any disorder or disruption in the regular school program, the Association shall have the right to meet with the District immediately to develop mutually acceptable programs to guarantee the safety of students, employees and property.

Article 28 of the parties' CNA, entitled "Miscellaneous Provisions," provides in pertinent part:

28:8 DISTRICT RIGHTS

The management of the school district and the direction of the professional staff including the right to plan, organize and control school operations, the right to hire, promote, suspend, or discharge employees for

cause, or to reduce staff for legitimate reasons, or the right to introduce new and improved methods or facilities, or to change existing education methods or facilities, and to manage the schools in the traditional manner is vested exclusively in the Paterson School District except to the extent that these rights are limited by this Agreement, applicable case law, and the laws of the State of New Jersey.

Article 29 of the parties' CNA, entitled "Working Conditions," provides (emphasis supplied):

29:1 INTERRUPTIONS OF INSTRUCTIONS

The District agrees that there shall be no unnecessary interruptions of instruction.

29:2 WORKSTATION FACILITIES

The District agrees to make every reasonable effort to comply with the following as soon as possible:

- proper furniture in every workstation
- adequate lighting in every workstation
- effective repair and maintenance of school buildings

29:3 COMMITTEE

29:3-1 PURPOSE

Effective July 1, 2005, the parties shall establish a Joint Worksite Safety and Health Committee whose purpose shall be to advise and assist the Superintendent on matters concerning the maintenance of proper standards of worksite health, safety and security. In addition to worksite health and safety, this committee shall pay particular attention to issues arising from school construction, remodeling and modernization. The Committee shall make recommendations to the Superintendent regarding such issues.

29:3-2 COMMITTEE MEMBERSHIP

The committee shall consist of three (3) individuals appointed by the Association

President and three (3) individuals appointed by the Superintendent, as he shall deem necessary. The Chairperson shall be selected by the committee members and shall rotate between the groups on a yearly basis, effective July 1 of each year.

29:3-3 MEETINGS

29:3-3.1 The Committee shall convene during working hours not less than five (5) times during the regular school year, as scheduled by the committee. Additional meetings may be called by mutual consent of the parties. However, not more than one (1) time per year, each side may call one (1) additional meeting, and the other side shall attend such meeting, even if there was not mutual agreement for this one (1) meeting. An agenda of issues to be discussed shall be distributed to the committee members in advance of the meeting.

29:3-3.2 The Superintendent of the District and the President of the Association (or their designees) shall be ex-officio members of the committee. The District shall provide release time from work for committee members to attend the meetings referred to above. The Committee, by majority vote, may request additional release time for Committee members for the purpose of investigating issues within the purview of the Committee. The final decision regarding additional release time shall be at the sole discretion of the Superintendent.

29:3-3.3 In addition to issues identified by the Committee, the District agrees to provide requested information, when available, related to the health, safety and security of Association members including, but not limited to: accident and injury statistics, reports on workplace accidents, environmental test results, reports and citations from PEOSHA or other government agencies, and medical information on individual members who have authorized such release to the Association. The District will not be

required to release information which is determined by the Superintendent to be confidential or a violation of any law.

29:3-3.4 The President of the Association may, at any time, consult with the Superintendent on these topics; the existence of this committee shall not preclude such meetings.

29:3-4 TRAINING

It shall be the right of the Committee to make recommendations to the Superintendent regarding training for the Committee members that they find is necessary to perform its duties. In addition, the Committee may make recommendations for training for presentation to other staff members, including required OSHA/PEOSH training, said approved or mandated training to be paid for by the District and held during the employees' regularly scheduled work hours. The final decision as to whether to provide such training shall reside solely with the Superintendent.

29:3-5 BUILDING RENOVATIONS/CONSTRUCTION

The District shall provide a bulletin board in those buildings or locations where construction or renovations are taking place to permit contractors to place notices regarding the schedule for building renovations. The District retains all of its inherent managerial rights and decision-making authority regarding school construction, remodeling and modernization issues. Like Article 3:3-4.8, such issues are not subject to the grievance and arbitration procedure. Nothing in this language shall waive the Association's right to grieve and arbitrate with respect to unsafe or hazardous conditions under Article 25:1 of this Agreement.

29:4 OVERALL APPROACH

29:4-1 Plant and Equipment Repair
The parties agree that certain minimal levels of quality are essential in the physical

plant and equipment at every school.
Therefore, all instances of substandard physical plant (leaking roof, inadequate heating, ventilation, lighting, etc.) will be corrected at every school.

29:4-2 Maintenance Progress Reports
The District agrees to provide the P.E.A. with a maintenance update by September 1, 1992. A progress report will be provided to the P.E.A. on a regular basis. It will be necessary to distinguish between immediate repairs and capital projects; the parties agree that priority will be given to correcting conditions that cause the greatest barriers to student achievements.

On March 24, 2021, the Association conducted training for all of its building delegates to prepare for health/safety walk-throughs of District buildings prior to the re-opening of schools; among other areas, delegates were trained to ensure that windows opened properly to insure adequate ventilation and filters in HVAC and Univent systems were of sufficient MERV levels. See McEntee Certification, ¶5. The Association developed a checklist so that each delegate would be able to record his/her observations; the Association also provided a copy of the checklist to the District and invited District representatives to the March 24th training session. See McEntee Certification, ¶¶6-7. Prior to March 24th, the District unilaterally decided to limit walk-throughs to one Association delegate during the regular workday and specified that walk-throughs would not be permitted until April 21, 2021. See McEntee Certification, ¶8; Exhibit A.

Also on March 24, 2021, the Association sent an email to the District's Superintendent, Eileen Shafer (Shafer), expressing its concerns about delaying any walk-throughs until April 21, 2021 as it would leave too little time to address any issues discovered; and expressing its concerns about limiting the walk-throughs to one Association delegate as it would make it difficult to complete the walk-throughs in a timely fashion. See McEntee Certification, ¶9; Exhibit B.

On or about March 25, 2021, Association President McEntee instructed Association delegates to begin conducting walk-throughs at each school as soon as possible; McEntee told Association delegates that the walk-throughs must be done after school hours and that they should notify the building administration and chief custodian of the date that the walk-through would be taking place. See McEntee Certification, ¶10.

On March 26, 2021, Superintendent Shafer instructed building administrators that no walk-through would be permitted prior to April 21, 2021. See McEntee Certification, ¶11.

On April 5, 2021, the Association filed the underlying unfair practice charge and original application for relief, which was denied as set forth above. Thereafter, the District agreed to enter into negotiations with the Association as to the conditions to enable the completion of walk-throughs. See McEntee Supplemental Certification, ¶1.

On April 13, 2021, Superintendent Shafer sent a letter to Association President McEntee thanking him for suggesting that the walk-throughs start after 3:30 p.m.; attaching copies of the walk-through schedules for April 21st and 22nd; specifying that the District would be prepared to provide Association delegates with a copy of the District's checklist findings at the conclusion of each walk-through; requesting that the Association, in kind, provide a copy of its completed inspection checklist at the conclusion of each walk-through; and noting that all of this was "an effort to ensure complete transparency." See McEntee Supplemental Certification, ¶2; Exhibit A.

On April 14, 2021, the Association's attorney sent a letter to Superintendent Shafer responding to her correspondence of April 13th. Therein, among other things, the Association notes that there "[is] no indication that each building's Chief Custodian will . . . be available" and that "[t]here are many aspects at each worksite, such as the HVAC system, maintenance records, checking ventilation filters, etc. that only the Chief Custodian knows or has access to." See McEntee Supplemental Certification, ¶¶3-4; Exhibit B.

On April 15, 2021, the Association's attorney sent a letter to the District's attorney demanding to negotiate over the details of health/safety walk-throughs; the amount of time after the last walk-through before the District would consider if/when

school buildings would physically re-open; and when the Association would be allowed to present its walk-through findings and its position on schools re-opening to the Board. See McEntee Supplemental Certification, ¶5; Exhibit C.

Thereafter, the Association was advised that the District had retained new counsel and the parties agreed to a remote conference to address outstanding issues. The Association's attorney created an agenda for the conference, and same was shared with the District's attorney. See McEntee Supplemental Certification, ¶6; Exhibit D.

On April 20, 2021, counsel for both parties participated in a remote conference. Thereafter, counsel for both parties exchanged emails memorializing their discussion and tentative agreement(s), including the Association's agreement to provide the walk-through results by April 26, 2021 so that the District had them prior to the Board's April 28, 2021 meeting; and the District's agreement that although the Association's walk-through findings and position on re-opening schools would not be an agenda item for the Board's April 28, 2021 meeting, the Association would be given sufficient time to address the Board during the public comment portion of the meeting. See McEntee Supplemental Certification, ¶7; Exhibit E.

On April 21 and 22, 2021, health/safety walk-throughs were conducted. However, McEntee certifies that "in the vast majority

of the buildings . . . , [the Association] was not allowed to inspect anything having to do with the ventilation systems" and was "almost uniformly prevented from inspecting the HVAC and Univent systems in each building." McEntee certifies that "the District well knew the importance of these ventilation systems and how important they are under the Road Back"; that "at all times [the Association] made the District aware that [the Association] needed to inspect not only those systems, but also the accompanying records as to when filters were last changed, etc."; and that "it was only when [the Association's] building delegates were attempting to inspect all aspects of each building that they were informed that they were not permitted to inspect the ventilation systems." See McEntee Supplemental Certification, ¶8. McEntee also certifies that he "was not permitted to address the Board as its April 28th meeting." See McEntee Supplemental Certification, ¶8. McEntee certifies that "[i]n many cases, [the Association] felt that if [it] could have inspected the ventilation systems, many of the buildings which fell into [its] Yellow category . . . perhaps could have been reclassified as being Green." See McEntee Supplemental Certification, ¶9.

On April 29, 2021, the Association filed an amended unfair practice charge as set forth above.

On May 5, 2021, I held an exploratory conference. At that time, the District agreed to provide the Association with certain documents referenced in its position statement by May 6, 2021, albeit maintaining that it had previously provided same to the Association.

Also on May 5, 2021, the Board held a meeting and voted to re-open on June 1, 2021 as set forth above. See McEntee Supplemental Certification, ¶¶10-11; Exhibit F.

On May 6, 2021, the District provided the Association with certain documents referenced in its position statement including Indoor Air Quality (IAQ) Logs; the District's inspection report; and a presentation made by the District's Director of Facilities during the Board's April 28, 2021 meeting. See McEntee Supplemental Certification, ¶12; Exhibit G; see District's Br. at Exhibit 4.

On May 10, 2021, after reviewing the documents provided by the District, the Association's attorney sent an email to the District's attorney demanding to "exercis[e] [the Association's] right to inspect those buildings which [the Association] did not find to be Green . . . [a]fter the end of the school day" See McEntee Supplemental Certification, ¶12; Exhibit G; see District's Br. at Exhibit 5.

On May 11, 2021, the District's attorney sent a letter to the Association's attorney disagreeing with, and objecting to,

the Association's request to inspect, but specifying that it was "willing to . . . compromise and reach an agreement on accessing certain ventilation units" under certain conditions including:

- the Association specifically identifying the filtration units it seeks to access and that same be limited to only a modest, reasonable amount of ventilation units;
- limiting the scope of additional walk-throughs to specified ventilation units in Yellow and Red buildings;
- presence of a maintenance technician and inspection of the specified units during normal working hours;
- agreement on an inspection schedule that ensures appropriate classroom coverage during the school day;
- Association members being clothed with proper PPE, approved by the District prior to inspections, at the Association's own expense;
- Association members executing an informed consent/assumption of risk/waiver of liability document before accessing filtration units; and
- Association members executing an informed consent and waiver regarding workers' compensation.

See McEntee Supplemental Certification, ¶13; Exhibit H; see District's Br. at Exhibit 6.

On May 12, 2021, the Association's attorney sent a letter to the District's attorney essentially rejecting the District's conditions for inspection of HVAC units and/or ventilation systems. See McEntee Supplemental Certification, ¶15; Exhibit I.

On May 17, 2021, I held another exploratory conference.

On May 18, 2021, the Association renewed its application for interim relief as set forth above.

On May 19, 2021, I signed an Order to Show Cause with temporary restraints as set forth above.

Association President McEntee certifies that on/about May 18, 2021, it "came to [his] attention that there is no working HVAC system at New Roberto Clemente School" and that "[t]here was a part ordered from Germany that has not been received." See McEntee Supplemental Certification, ¶19.

NJEA Field Representative Wolf certifies that he has "led and participated in countless worksite inspections, many of which were in Paterson during [his] tenure with NJEA" and that he has "requested and been permitted to view the innards of HVAC systems, Univents and other ventilation units"; and that "[a]t no time was either [he] or the local unions [he] represents ever denied access to inspect ventilation units." See Wolf Certification, ¶¶2-3. Wolf also certifies that "neither [he] nor any member of one of [his] local unions [has] ever been requested to sign a waiver or wear PPE in order to inspect such equipment." See Wolf Certification, ¶3. Wolf has developed/provided a checklist for Association delegates to use when inspecting ventilation units and certifies that "the delegates are tasked with verifying whether ventilation units have been serviced and maintained based on preventative maintenance logs that the

District is required to keep.” See Wolf Supplemental Certification, ¶¶1-5; Exhibit A. Wolf certifies that the Association is “not asking its delegates to determine whether any equipment is broken or inoperable, but merely whether the equipment has been serviced consistent with the preventative maintenance schedule as required by Regulation and Board policy.” See Wolf Supplemental Certification, ¶5.

District elementary school teacher Spinelli certifies that as part of the Association’s Worksite Safety and Health Committee, “on several occasions, if there was an issue, we would view HVAC and Univent systems” and “it was no big thing”; “[i]f we mentioned that filters were not changed or if we were told that an HVAC system was not functioning well, we simply viewed the HVAC system”; and that she “can remember being surprised by seeing crayons and other debris in the systems.” See Spinelli Certification, ¶¶1-3. Spinelli certifies that “[t]he Chief Custodian . . . would open the system” and “then we would view the opened system, looking down to see what the problem was”; that “at no time were we required to wear PPE of any sort”; and that “we [were not] required to sign a waiver or admit that workers’ compensation would not cover us if anyone got injured (and no one ever did).” See Spinelli Certification, ¶¶4-5.

The District’s School Business Administrator, Richard L. Matthews (Matthews), certifies that the District “services 29,000

students in Pre-K through 12th Grade”; that “students . . . have been unable to attend school in-person since March 2020”; and that “[i]n preparing the schools for re-opening, more than \$19.6 million was expended to provide several layers of protection that far exceed the CDC and Department of Education guidelines for a safe re-opening” including “universal masking; social distancing; partitions; supplemental ventilation; ActivePure Ionic Air Purifiers in most classrooms, which has been proven to eliminate over 99.9% of many common airborne and surface contaminants including viruses like [COVID-19]; air scrubber devices to improve circulation in rooms without windows; hand sanitizers; CDC-approved disinfectant spray; and vaccinations made available to staff.” See Matthews Certification, ¶¶1-7.

Matthews certifies that Association delegates conducted walk-throughs on April 21 and 22, 2021; that the “walk-throughs were thorough enough to enable the Association to submit a 700+ . . . page report of mostly routine building maintenance issues” and “[i]n response, the District went line-by-line, item-by-item, in remediating most of the deficiencies . . . [and] the few items currently being addressed . . . do not prohibit the re-opening of schools”; that “most of the items represented routine maintenance issues that have nothing to do with COVID-19 [and] are not impediments to re-opening”; and that the District “produced to the Association the IAQ Logs, which demonstrated the satisfactory

status of the indoor air quality and HVAC units and filtration systems." See Matthews Certification, ¶¶8-12, 32-34; see District's Br. at Exhibit 9. Matthew certifies that "[u]pon information and belief, . . . the Association has not requested an HVAC System Commissioning Report for any of its units" and "[n]ot every building walk-through requested IAQ Logs"; however, "[f]or each building in which the IAQ Logs were requested during the April walk-throughs, they were promptly provided to the Association, either in printed hard copy form or e-mailed." See Matthews Certification, ¶¶20-24.

Matthews certifies that "after the [April] walk-throughs, the Association presented its inspection report with a color-coded chart of their assessment of schools" which shows "21 red-coded schools/floors allegedly present[ing] the most deficiencies and were not recommended for re-opening", "26 yellow[-coded] schools allegedly present[ing] some deficiencies and were not recommended for re-opening", and "10 green-coded schools [that] were approved for re-opening." See Matthews Certification, ¶¶35-36. Matthews certifies that "prior to approving the 10 green-coded schools for re-opening, the Association has not inspected so much as one of the HVAC units in any of those 10 green-coded schools"; that "[s]ince September 2020 and to date, the Association has had approximately 340 of its members show up to work in-person on a daily and weekly basis across the 45 schools

. . . [that] comprise the red and yellow-coded schools that the Association alleges require HVAC inspections to determine safety." See Matthews Certification, ¶¶37-41.

Matthews certifies that "[t]hroughout its 4-million square feet of building space and 3,000+ classrooms, the District has over 2,200 HVAC units in various places, including ceilings, rooftops, and other hard to reach places"; that "[t]hese industrial strength units are sealed, and the interior compartments can only be accessed by trained, qualified, and credentialed HVAC technicians wearing appropriate PPE because the filters and other interior compartments trap environmental toxins and other biohazards that can cause harm or injury through exposure"; and that "the District's trained maintenance technicians inspect [the HVAC units], and record data from them, on a rotating, monthly basis." See Matthews Certification, ¶¶13-14, 16. Matthews certifies that "[d]epending on the type of unit and location of the unit, . . . an interior inspection of an HVAC unit takes anywhere from 10-30 minutes" such that "an inspection of HVAC units proposed by the Association could take anywhere from 366 hours [to] 1,100 hours." See Matthews Certification, ¶15.

Matthews certifies that "the Association [has made] a verifiably false statement that there is no working HVAC unit in the New Roberto Clemente building"; that "[t]he two aspects of

the ventilation systems that are mandated, i.e., heat and ventilation, are indeed working and operable in the New Roberto Clemente building's HVAC system" and "[o]nly the chiller (cooling) aspect of the ventilation unit, which is not required by law, is currently under repair"; and that "at least five Association members have been in the New Roberto Clemente [building] for most of the 2020-2021 school year." See Matthews Certification, ¶¶44-47.

Matthews certifies that "[s]ince the Board approved its May 5th resolution for teachers to return to teach in their classrooms, the District's HR staff has been conducting ADA reasonable accommodations meetings for teachers who wish to work from home." See Matthews Certification, ¶48.

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)." The Association notes that it "is not requesting that the Commission declare any particular condition existing on the District'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 any health and safety concerns . . . identified whenever walk-throughs are held and that the re-opening be delayed until such concerns are addressed." The Association concedes that "in-person teaching, if it can be done safely, is far preferable educationally . . . both for the teaching staff and the students"; and that "if it can be done safely, the decision as to whether teaching should be done remotely or in-person is up to a board of education." However, based upon the District's re-opening plan whereby "9% of the District's 24,588 students will be returning to the classroom . . . [and] 91% of the students will still be remote" - yet all unit members will be in-person - the Association claims that "[t]he in-person return of staff is mandatorily negotiable" under the Local 195 balancing test given that it presently only implicates "the location of the staff, not the students."^{5/} The Association also argues that its members will suffer irreparable

^{5/} In support of its position, the Association cites 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), Greater Egg Harbor Reg'l Bd. of Ed., P.E.R.C. No. 2016-43, 42 NJPER 305 (¶88 2015), and Southampton Tp. Bd. of Ed., P.E.R.C. No. 2021-37, ___ NJPER ___ (¶___ 2021), among other legal authority.

harm if interim relief is not granted because there are "serious concerns that the District cannot adequately protect its employees from the ongoing pandemic"; and that "the significance of these concerns" is highlighted by "[t]he fact that the District has had to close schools and implement fully remote instruction due to COVID-19" The Association contends 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 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."^{6/} 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 District 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 response, the District argues that the Association has not satisfied the standard for interim relief. Specifically, the District asserts the following:

^{6/} 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), among other legal authority.

-the Supreme Court confirmed that the decision on the date to open schools falls within the managerial prerogative of the District and PERC lacks the authority and jurisdiction to prohibit the District from re-opening its schools;

-since March 2020, teachers were re-assigned to a remote work location but on June 1, 2021, they are being re-assigned to the classroom and the Supreme Court has ruled that teacher transfers and reassignments are a managerial prerogative not subject to negotiation;

-the New Jersey Dep't of Health through PEOSH retains exclusive authority, jurisdiction, and expertise related to inspections of HVAC units and PERC cannot usurp the authority of PEOSH by mandating HVAC unit inspections by Association members;

-PEOSH mandates and authorizes the production of an HVAC System Commissioning Report from a qualified architect or engineer to verify that the HVAC unit is operating in conformity with the design intent and the Association never requested the HVAC System Commissioning Report during the April walk-throughs, which would have enabled the verification of the functionality of the HVAC units by an expert without the need for their personal inspection such that PERC cannot step in to mandate the Association's inspection of HVAC units when PEOSH authorizes the HVAC System Commissioning Report for that purpose;

-PEOSH mandates and authorizes the creation of IAQ Logs that provide all of the information needed to determine the status of the indoor air quality and filter replacements and all IAQ Logs requested by the Association during the April walk-throughs were promptly delivered yet despite having ample time to review the IAQ Logs, the Association never filed a PEOSH complaint seeking their input on whether the indoor air quality was adequate such that PERC cannot mandate the Association's inspection of the HVAC units when PEOSH authorizes the IAQ Logs for determining the status of the indoor air quality and filter replacements and whether to file a PEOSH complaint;

-the Commissioner of Health and PEOSH is the agency with the exclusive authority, jurisdiction, and

expertise to inspect HVAC units and determine compliance with air quality standards and to initiate HVAC unit inspections and air quality testing, a complaint to PEOSH - not PERC - must be initiated such that PERC lacks the authority, jurisdiction, and expertise to grant the HVAC unit inspections requested;

-the New Jersey Dep't of Health through PEOSH has a well-established procedure for public employees seeking to inspect HVAC units and the procedure for HVAC unit inspections is initiated only through the filing of PEOSH complaints - not through PERC - and the Association did not avail itself of the well-established procedure for HVAC unit inspections such that PERC cannot usurp the authority of PEOSH by enabling the Association to violate PEOSH procedures for HVAC unit inspections;

-the NJEA's own guidance related to indoor air quality and HVAC units does not suggest for untrained teachers to engage in the inspection of the interior compartments of industrial HVAC units but rather, the NJEA suggests non-invasive ways to determine if HVAC and air quality complaints should be made and NJEA guides its members to file PEOSH complaints to initiate HVAC unit inspections or challenge air quality standards such that PERC should reject the Association's attempts to clearly circumvent its own guidance for seeking HVAC unit inspections;

-PERC should dismiss the Association's illegal request for interim relief or, in the alternative, if PERC retains jurisdiction, it should still dismiss the Association's request for interim relief because the District, for purposes of settlement, has been negotiating the issue of HVAC unit inspections in good faith;

-the Association's 150 delegates conducted thorough walk-throughs of the District's 45 buildings and the walk-throughs were sufficient to produce a comprehensive, 700+ page inspection report, that the District addressed line-by-line, item-by-item and the Association received all IAQ Logs requested in the April walk-throughs, and despite having time to review them, never filed a PEOSH complaint seeking HVAC unit inspections; the Association recognized that the PEOSH complaint regulations provide the mechanism for public

employees to inspect HVAC units and indoor air quality, but the Association did not avail itself of this process either; since September 2020, about 340 Association members have been working in and occupying the District's 45 schools on a daily and weekly basis, which proves that the Association does not have a good faith belief that its buildings are unsafe for its employees; and with only one issue remaining regarding HVAC units, it is clear that the Association's request for HVAC unit inspections is nothing more than a pretextual, thinly-veiled attempt to keep teachers from having to return to work such that PERC should dismiss the Association's request for interim relief; and

-all Association members have a legal right to request a reasonable accommodation to work from home and several dozen Association members have exercised that right such that it is unnecessary to seek a blanket prohibition of teachers seeking a work-from-home accommodation.^{7/}

In reply, the Association argues that the District has offered "no authority to actually support [the] claim that PEOSH somehow has exclusive authority, jurisdiction, and expertise related to HVAC units" and no authority to support its suggestion that "only PEOSH can perform HVAC inspections." The Association maintains that contrary to the District's claim "that teachers will be cracking open HVAC units to perform technical inspections of the HVAC units", the Association "merely seeks to check that the units are actually operational, confirm other basic visual

^{7/} In support of its position, the District cites N.J.S.A. 18A:6-9, Bd. of Ed. v. Woodstown-Pilesgrove Reg'l Ed. Ass'n, 81 N.J. 582, 593 (1980), Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 156, 162 (1978), the New Jersey Public Employees' Occupational Safety and Health Act set forth at N.J.S.A. 34:6A-25 et seq., and Indoor Air Quality Standard regulations set forth at N.J.A.C. 12:100-13.1 et seq.

information (how old is the filter; what is the MERV level of the filter; when was the basic upkeep last performed; etc.), and gather relevant documentation on the unit that the District is obligated to maintain and should have on hand." The Association reiterates that "the actual issue here is that the District is denying access to the Association to perform its representational duties on an issue regarding the health and safety of its members"; that it "has become abundantly clear over the past several months that COVID-19 is an airborne virus and that proper ventilation is a critically important part of preventing spread in an indoor setting"; and that "[a]s is made clear by the recent decision granting interim relief in Passaic Valley Reg'l High School Bd. of Ed., I.R. No. 2021-10, 47 NJPER 235 (¶54 2021) and Section 5.13(f) of the WDEA, this matter is exactly within PERC's jurisdiction and authority."

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).

In Passaic Valley Reg’l High School Bd. of Ed., I.R. No. 2021-10, 47 NJPER 235 (¶54 2021), a recent interim relief decision regarding union access to the worksite for purposes of a healthy/safety walk-through, 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).

Moreover, 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.

ANALYSIS

At issue in this interim relief application are the following:

-the extent to which a union's right of access - for purposes of a health/safety walk-through - extends, and whether same is preempted by any pertinent statute or regulation; and

-whether, in the face of general and unspecified health/safety concerns raised by a union related to an employer's failure to allow union access for purposes of certain health/safety walk-throughs, there is a managerial prerogative to assign (or re-assign) teachers to the classroom when students are attending virtually.

I. Health/Safety Walk-Throughs

(A) Likelihood of Success

Given the legal precepts set forth above, particularly as set forth in Passaic Valley Reg'l High School Bd. of Ed., I.R. No. 2021-10, 47 NJPER 235 (¶54 2021),^{8/} I find that the Association has demonstrated a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.

Although the Association was permitted to conduct health/safety walk-throughs on April 21 and 22, 2021, it is undisputed that the Association requested access to HVAC units

^{8/} The District did not challenge, distinguish, or discuss this I.R. decision which I find to be directly on-point.

and/or ventilation in advance of the walk-throughs (see McEntee Supplemental Certification, ¶¶3-4 and Exhibit B; see also McEntee Certification, ¶¶5-8 and Exhibit A) and that Association delegates were not permitted to walk-through or inspect those areas housing HVAC units and/or ventilation systems (see McEntee Supplemental Certification, ¶8). It is also undisputed that in the past, at least one unit member and one NJEA Field Representative have participated in HVAC unit and/or ventilation system inspections within District buildings without issue. See Wolf Certification, ¶¶2-3; Spinelli Certification, ¶¶1-5. Finally, it is undisputed that the Association is not seeking to perform an invasive inspection of any HVAC unit and/or ventilation system; it is simply seeking to perform an 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." See Wolf Supplemental Certification, ¶¶1-5 and Exhibit A; Ass'n Reply Br. at 1-2.

The District itself has acknowledged that 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 2017-2022 CNA, Arts. 25 & 29; see also West Deptford Tp. Bd. of Ed.; State of

New Jersey (Dep't of Corrections); State of New Jersey (Greystone).

Despite repeatedly referencing the New Jersey Public Employees' Occupational Safety and Health Act (PEOSHA), N.J.S.A. 34:6A-25 et seq., and Indoor Air Quality Standard (IAQS) regulations, N.J.A.C. 12:100-13.1 et seq., the District has failed to demonstrate - and I have not found - that either is preemptive in this matter. Rather, PEOSHA and IAQS appear to be health/safety statutory and regulatory provisions that do not place any related limitation(s) on public sector negotiability.^{9/} "[T]he mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations" and "[n]egotiation is preempted only if the [statute or] regulation fixes a term and condition of employment 'expressly, specifically, and comprehensively.'" Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Ed. Ass'n, 91 N.J. 38, 44-45 (1982) (citations omitted). The legislative provision must "speak in the imperative and leave nothing to the discretion of the public

^{9/} "Organized and unorganized workers in the United States have been struggling for well over a century to obtain safe and healthy working conditions" and "[t]he 1970 Occupational Safety and Health Act was an important landmark in the effort of working men and women to enhance the quality of working life by increasing workers' physical, psychological and economic security." Robert Asher, Organized Labor and the Origins of the Occupational Safety and Health Act, NEW SOLUTIONS, Vol. 24(3) 279-301 (Nov. 2014).

employer.” State v. State Supervisory Employees Ass’n, 78 N.J. 54, 80-82 (1978).

Balancing the parties’ interests under the third prong of Local 195, and while acknowledging the District’s significant production of pertinent documentation to the Association related to its HVAC units and/or ventilation systems, I find that the various burdens cited by the District (e.g., length of time, manpower, overtime costs, etc.) are a result of its failure to provide access to HVAC units and/or ventilation systems during the April 21 and 22, 2021 walk-throughs as requested by the Association OR its determination to proceed with the walk-throughs at that time without first negotiating or litigating the issue given the Association’s prior request. See, e.g., NLRB v. Holyoke Water Power Co., 778 F.2d 49, 51 (1st Cir. 1985) (“[w]e agree . . . that the proposition that a union must rely on an employer’s good intentions concerning the vital question of health and safety of represented employees seems patently fallacious”); Hercules, Inc. v. NLRB, 833 F.2d 426, 429 (2d Cir. 1987) (“[r]equiring total reliance on company data would in effect place the union at the mercy of the company”); Asarco, Inc. v. NLRB, 805 F.2d 194, 198 (6th Cir. 1986) (“the availability of the requested information from another source does not alter the employer’s duty to provide readily available relevant information to the bargaining representative”).

Moreover, it appears that providing access to HVAC units and/or ventilation systems - particularly when students and/or teachers are not present in District buildings - would not significantly interfere with any governmental policy. Although I acknowledge the District's concerns about the length of time, manpower, overtime costs, etc. that these audio-visual inspections may take, I note that walk-throughs of all District buildings were "almost" wholly-completed in two days (April 21 and 22, 2021) and that the Association has specified the limited nature of what remains to be done.

Accordingly, I find that the Association has demonstrated 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 established 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). A Commission Designee has held that "[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.” Passaic Valley Reg’l High School Bd. of Ed., I.R. No. 2021-10, 47 NJPER 235 (¶54 2021). Here, during the COVID-19 pandemic, the Association is seeking to perform an 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.” See Wolf Supplemental Certification, ¶¶1-5 and Exhibit A; Ass’n Reply Br. at 1-2. “It is difficult to imagine harm more irreparable than the 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. Moreover, while I acknowledge that the District has engaged in negotiations with the Association regarding the underlying issue, I find that continued negotiations could lead to irreparable harm given the fact that the District plans to re-open on June 1, 2021 with all unit members appearing in-person.

Accordingly, I find that the Association has established irreparable harm.

(C) Relative Hardship and Public Interest

I find that the Association has demonstrated relative hardship and that the public interest will not be injured by an interim relief order. I acknowledge the District’s significant production of pertinent documentation to the Association related

to its HVAC units and/or ventilation systems; however, as set forth above, I find that the various burdens cited by the District are a result of its failure to provide access to HVAC units and/or ventilation systems during the April 21 and 22, 2021 walk-throughs as requested by the Association OR its determination to proceed with the walk-throughs at that time without first negotiating or litigating the issue given the Association's prior request. Although providing the Association with access to HVAC units and/or ventilation systems may require some length of time, manpower, overtime costs, etc., there is less (or no) disruption to District operations and reduced hardship to the District if walk-throughs are ordered when students and/or teachers are not present in District buildings. "In contrast, there would be comparably great[er] hardship to the Association caused by continuing to deny it access . . . [in a timely manner] during a pandemic" given the airborne nature of COVID-19 vis-a-vis the condition/effectiveness of the District's HVAC units and/or ventilation systems and the District's plan for re-opening on June 1, 2021. Passaic Valley Reg'l High School Bd. of Ed.

Finally, the public interest is not injured by an interim relief order in this case. The Association's walk-throughs may provide assurance to unit members and/or the public (e.g., students, families) that the District's buildings are adequately

prepared for a return to in-person education; they are also consistent with the health/safety provisions of the parties' collective agreement. See 2017-2022 CNA, Arts. 25 & 29. 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 demonstrated relative hardship and that the public interest will not be injured by an interim relief order.

II. Teacher Assignment to Classroom with Virtual Students

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. 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, at present 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.

Although it is undisputed that the District plans to re-open on June 1, 2021 with all teachers appearing in-person and most students attending virtually, at present the Association can only point to a general and unspecified health/safety concern related to the airborne nature of COVID-19 vis-a-vis the condition/effectiveness of the District's HVAC units and/or ventilation systems. Further, the Association President has certified that "[i]n many cases, [the Association] felt that if [it] could have inspected the ventilation systems, many of the buildings which fell into [its] Yellow category . . . perhaps could have been reclassified as being Green." See McEntee Supplemental Certification, ¶9.

Under the first prong of Local 195, the District itself has acknowledged that 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 2017-2022 CNA, Arts. 25 & 29; see also West Deptford Tp. Bd. of

Ed.; State of New Jersey (Dep't of Corrections); State of New Jersey (Greystone).

Neither party has pointed to a statute or regulation that would implicate the second prong of Local 195.

Under the third prong of Local 195, given the decreasing societal impact of COVID-19 due to improving scientific knowledge and the existence/availability of vaccines, it appears that the District's interest in determining governmental policy (i.e., when/how to re-open schools; in-person v. virtual appearance/attendance for teachers and students, etc.) outweighs the Association's general and unspecified health/safety concern. However, I make no determination regarding whether a more specific health/safety concern could tip the balance.

Accordingly, at present 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,^{10/} and deny this aspect of the application for interim relief without prejudice.

^{10/} As a result, I do not need to conduct an analysis of the other elements of the interim relief standard. See, e.g., 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).

CONCLUSION

Under these circumstances, I find that the Association has sustained the heavy burden required for interim relief under the Crowe factors with respect to the Association's access to District buildings - particularly with respect to HVAC and ventilation systems - in order to conduct health/safety walk-throughs; and that presently, the Association not sustained the heavy burden required for interim relief under the Crowe factors with respect to unilaterally requiring unit members to appear at, and teach virtually from, District buildings when students are attending/learning virtually. Accordingly, I grant in part and deny in part the application for interim relief pursuant to N.J.A.C. 19:14-9.5(a-b). This case will be transferred to the Director of Unfair Practices for further processing.

ORDER

The Paterson Education Association's (Association) renewed application for interim relief is granted in part, and the temporary restraints issued on May 19, 2021 remain intact, as follows:

-the Paterson State Operated School District (District) is restrained from restricting the Association's access to District buildings - particularly with respect to HVAC unit and/or ventilation systems - in order to conduct health/safety walk-throughs as specified herein (see Wolf Supplemental Certification, ¶¶1-5 and Exhibit A; Ass'n Reply Br. at 1-2) as soon as possible, but no later than May 28, 2021.

The Paterson Education Association's renewed application for interim relief is otherwise denied without prejudice and the balance of temporary restraints issued on May 19, 2021 are hereby dissolved.

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

DATED: May 23, 2021
Trenton, New Jersey