

I.R. NO. 2021-10

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC VALLEY REGIONAL HIGH SCHOOL  
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2021-061

PASSAIC VALLEY EDUCATION ASSOCIATION,

Charging Party.

**SYNOPSIS**

A Commission Designee grants an application for interim relief based on an unfair practice charge alleging that the Passaic Valley Regional High School Board of Education (Board) denied the request of the Passaic Valley Education Association (Association) to conduct a walkthrough of the school premises to address health and safety concerns during the COVID-19 pandemic, in violation of sections 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq., and section 5.13(f) of the Workplace Democracy Enhancement Act, N.J.S.A. 34:13A-5.13.

The Designee determined that the Board must allow the Association access to the school premises to conduct a health and 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 observe and survey health and safety conditions on the premises, at a time when any employees are working on site and students are not on the premises.

I.R. NO. 2021-10

STATE OF NEW JERSEY  
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PASSAIC VALLEY REGIONAL HIGH SCHOOL  
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2021-061

PASSAIC VALLEY EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent,  
Reddin Masri, LLC attorneys  
(Raymond Reddin, of counsel)

For the Charging Party,  
(Sasha A. Wolf, NJEA Uniserv Field Representative)

**INTERLOCUTORY DECISION**

On September 28, 2020, the Passaic Valley Education Association (Association) filed an unfair practice charge against the Passaic Valley Regional High School Board of Education (Board), together with an application for interim relief, a supporting brief, exhibits and a certification. The charge alleges that in response to the COVID-19 pandemic for the 2020-2021 school year, the Board opted for a hybrid model of instruction where different cohorts of students are physically present on different school days, but employees are required to be physically present every school day to perform instructional duties.

The charge further alleges that during September 2020, the Association raised a number of health and safety concerns to the Board relating to the Board's COVID-19 preparations. These included the alleged lack of appropriate HVAC filters, insufficient classroom ventilation, an insufficient number of air scrubbers for the auditorium and gym, and a lack of adequate COVID-19 screening procedures.

The charge further alleges that on September 25, 2020, the Board suspended in-person instruction for two weeks because a student tested positive for COVID-19, announced that it would conduct all-virtual instruction for the next two weeks, and staff would be required to physically report back to work on October 5, 2020. Upon hearing this news, the Association became gravely concerned that not only was the Board failing to address the existing health and safety issues, but that it was not prepared to adequately safeguard the workplace from the spread of COVID-19 when employees returned on October 5, 2020.

Further, the charge alleges that based on these concerns, on September 24, 2020, the Association made a request to Superintendent Joann Cardillo to conduct a walkthrough of the school on September 28, 2020, at 4:00 p.m. Cardillo denied the Association's request without explanation. The Association then made a second request on September 25, 2020, to Cardillo, clarifying that the walkthrough was necessary to address health

and safety concerns prior to the school's projected reopening of October 5, 2020. Later that same day, Cardillo again denied the Association's request and denied the Association access to the school building.

The charge alleges that the Board's failure to allow the Association access to the school building to conduct a health and safety walkthrough violates sections 5.4a(1) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act),<sup>1/</sup> as well as section 5.13(f) of the Workplace Democracy Enhancement Act, N.J.S.A. 34:13A-5.13 (WDEA).

On October 5, 2020, I conducted a telephone conference call with the parties to select dates for briefing and a hearing on the Association's application for interim relief. On October 6, 2020, I issued an Order to Show Cause, which included the schedule agreed upon by the parties during the October 5, 2020 conference call, i.e., the Board's answering brief was due October 14, 2020; the Association's reply brief was due October 19, 2020; and a hearing via telephone conference call would be conducted on October 23, 2020.

---

<sup>1/</sup> 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. (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.

As noted above, on September 28, 2020, the Association filed an application for interim relief, a supporting brief, exhibits and a certification of Association President Marc Salvatore. The Association contends that it is entitled to interim relief granting it a health and safety walkthrough of the building due to its right to represent and advocate for its members on workplace health and safety issues under the Act, and its right of access to the workplace under the WDEA. The Association contends that COVID-19 constitutes an imminent threat to its members, and therefore it should not have to wait for the resolution of the unfair practice charge before it is granted a walkthrough.

On October 14, 2020, the Board filed an answering brief with exhibits, and the certification of Superintendent Cardillo. The Board contends that the Association has no legal right to a walkthrough pursuant to the Act, the WDEA, Governor Murphy's Executive Order 175, or any other authority, and that this issue should be resolved through the parties' contractual grievance procedure, as the Association has also filed a related grievance which is currently pending.

On October 19, 2020, the Association filed a reply brief, and an additional certification of Marc Salvatore. In its reply brief, the Association contends that Executive Order 175 does not

bar the Association from conducting a walkthrough, and that the Commission has jurisdiction over this matter.

On October 23, 2020, the parties argued their respective cases on the application for interim relief in a hearing via telephone conference call.

The following facts appear.

The Association is the majority representative for non-supervisory certificated staff including, but not limited to, teachers, child study team members and guidance counselors employed by the Board. The Association and the Board are parties to a collective negotiations agreement (CNA) effective July 1, 2018 through June 30, 2021.

In response to the COVID-19 pandemic for the 2020-2021 school year, the Board adopted a hybrid model of instruction where different cohorts of students are physically present on different days, but employees are required to be physically present every school day to perform instructional duties (Salvatore cert., ¶4). During September 2020, the Association became concerned about health and safety protections for employees, and members communicated those concerns to Salvatore. (Id., ¶5). Salvatore communicated those concerns to Cardillo and other administrators. (Id.)

The Association's numerous health and safety concerns included: 1) whether HVAC units were fitted with filters that

complied with CDC guidelines of MERV 13 or higher; 2) whether classroom windows opened, and how much they opened to ensure adequate classroom ventilation; 3) whether there were sufficient air scrubbers for the square footage of the auditorium and gym; and 4) why the Board was requiring all students and staff to “self-report” any COVID-like symptoms before entering the building rather than conducting active screenings or temperature checks as recommended by the CDC. (Id., ¶6). Salvatore certifies that to date, the Board has taken little to no action on these concerns. (Id., ¶7).

On September 25, 2020, the Board announced that a student had tested positive for COVID-19 and that it would conduct all-virtual instruction for the following two weeks. (Id., ¶8). Staff would be required to physically report back to work on October 5, 2020. (Id.). The Association became concerned that the Board was failing to address existing health and safety concerns, and was not prepared to adequately safeguard the workplace from the spread of COVID-19 when employees returned on October 5. (Id., ¶9). Thus, on September 24, 2020, Salvatore made a request to Cardillo to conduct a walkthrough of the school on September 28, 2020 at 4:00 p.m., because 4:00 p.m. was at the end of the normal work day, and because no students would be in the building and no student activities were going to be held on

September 28. (Id., ¶10). Cardillo denied the request without explanation. (Id.).

On September 25, 2020, Salvatore made a second request to Cardillo, clarifying that the walkthrough was necessary to address health and safety concerns prior to the school's projected reopening on October 5, 2020. (Id., ¶11). Later that same day, Cardillo denied the second request stating that, "[t]he district has followed the guidance of" the New Jersey Department of Education (NJDOE), and worked in "collaboration with our local and county health Department on this matter." (Id., ¶12).

Cardillo certifies that in response to COVID-19, the Board adopted a Restart and Recovery Plan (Plan), which was approved by NJDOE. (Cardillo cert., ¶3). The Plan outlines protocols and provides a comprehensive list of practices that the Board was mandated to implement in order to reopen the school safely in response to Governor Murphy's Executive Order 175. (Id., ¶¶4-5). Pursuant to Executive Order 175, the Board's Plan must include provisions for meeting numerous health and safety standards, including but not limited to student and staff health screenings, a plan detailing the response when students and/or staff test positive for COVID-19, and a plan to ensure that indoor facilities have adequate ventilation. (Id., ¶¶10-11). Cardillo certifies that all of the mandated protocols and practices in the Plan have been in place since the initial reopening of school on



September 1, 2020, and remained in place when the school reopened on October 5, 2020. (Id., ¶11). Cardillo further certifies that as part of the reopening process, she met with stakeholders including Salvatore and other Association members, and developed the Plan in accordance with state mandated procedures and protocol. (Id., ¶¶15, 29).

With regard to the Association's health and safety concerns regarding air ventilation and airflow in the workplace, Cardillo certifies that "NJDOE did not mandate the MERV-13 HVAC filter to be used nor do the guidelines require a certain MERV air filter grade." (Id., ¶19). Cardillo further certifies that the Association, "informally expressed its opinion that higher standards than required for reopening should be used," the Association "has named specific items and areas in the building where it wanted higher standards applied," and the Association has shared these concerns with the Board. (Id.). Cardillo certified that the Association's "demands were responded to by the Administration assuring it that it has met reopening NJDOE guidelines." (Id., ¶20).

Cardillo further certifies that the Association seeks "for the Administration to allow the unqualified [Association] to conduct a walk-through of the school premises upon demand while there has been no change to the terms and conditions of employment implemented under the approved reopening protocol and

District school buildings were closed due to a temporary 14-day isolation protocol under the NJDOE guidelines.” (Id., ¶21).

Cardillo further certifies that the Association “admitted there is no contractual right to a walk through on demand and the concerns previously brought by members were discussed with the [Association] prior to the temporary closure,” and the Association “made no demand to bargain for higher safety and health measures than required” pursuant to Executive Order 175. (Id., ¶22).

With regard to the Association’s concerns regarding air quality and ventilation, Cardillo certifies that NJDOE’s Checklist for the Reopening of School 2020-21 “does not refer to any specific grade of HVAC air filter.” (Id., ¶23).

Furthermore, Cardillo certifies that the district has passed the NJDOE’s checklist requirements that ensure that indoor facilities have “[a]dequate ventilation by maintaining operational heating and ventilation systems where appropriate,” “[r]ecirculated air with a fresh air component,” “[w]indows that can be opened,” and “[f]ilters that are maintained according to the manufacturers’ recommendations. (Id., ¶24).

Cardillo also certifies that the district “has been in the process of addressing classrooms that currently have windows in need of repair,” but “there is no protocol that requires all rooms to have windows or defines the extent to which a window

must open," and there are also "safety concerns involved with students' ability to fall out of windows that open too much."

(Id., ¶25). Cardillo further certifies that the Association "did not request to review information from the District demonstrating its compliance with ventilation standards." (Id., ¶26).

With regard to a walkthrough, Cardillo certifies that the "Administration, in consultation with the school nurse, and local and county health officials, completed a thorough walk-through in early August 2020 to view classrooms, health offices, and [the] isolation room." (Id., ¶30). Cardillo also certifies that Salvatore "participated in additional walk-throughs throughout the course of August 2020 to view our model classroom." (Id., ¶31). Cardillo certifies that the Association did not request a walkthrough "prior to the reopening of school on September 1 2020." (Id., ¶33).

Cardillo certifies that the Association filed a grievance on September 14, 2020 regarding an alleged violation of district policy 8420, regarding the Board's responsibility to provide for safety and security in each school building. (Id., ¶34 and Ex. F). In this grievance, the Association alleges that the school environment is unsafe and hazardous during the COVID-19 pandemic because the Board's Plan has numerous issues, including that it does not provide for sufficient ventilation for rooms that rely solely on open windows for fresh air, does not include sufficient

screening for students and staff upon entry, does not require sufficient physical distancing and protective barriers, and does not require adequate HVAC systems. (Id. at Ex. F). Through its grievance, the Association sought a remedy of continuing “100% remote learning” until the Board could ensure a safe and healthy work environment. (Id.). The Association’s grievance was denied at Level II on September 30, 2020, and is currently pending at Level III as an appeal to the Board. (Id., ¶34).

Cardillo certifies that the Board had to shutdown and revert to full virtual learning for two weeks from September 25, 2020 through October 5, 2020 due to a student testing positive for COVID-19. (Id., ¶35). Cardillo certifies that the positive test “was not through the fault of the District; conversely, was due to a community outbreak.” (Id., ¶36). Cardillo certifies that there has been no change to safety protocols “since the last walk throughs that were conducted when school was open,” and that no safeguards have changed due to the fourteen day shutdown. (Id., ¶¶37-38). Cardillo then certifies that “[d]uring the school closure period, the Association then demanded to inspect the building.” (Id., ¶39).

Cardillo certifies that the Board denied the Association’s “demands to walkthrough the school buildings while closed” for numerous reasons, including that “[t]he Association’s demand was not a request to bargain but to open buildings contrary to

District's NJDOE protocol and consultation with local health officials," that the Association's "list of higher standards than required by the NJDOE for the safe opening and operation of schools aligns to criteria [that] cannot be accomplished," and that are "unrelated to a demand for a walk through while the District was temporarily closed in compliance with state safeguards." (Id., ¶40). Cardillo further certifies that the Association's air ventilation and HVAC filter requests "are not requirements that need to be met according to the NJDOE checklist to open schools and CDC guidelines," and that "no request to bargain for higher safety and health standards has been made." (Id.).

Cardillo also certifies that if the Association were to make a "request to bargain for higher health and safety measures," "the appropriate time to change a term and condition of employment is during a negotiation year." (Id., ¶41). Cardillo further certifies that due to COVID-19, "the status quo for safety standards are those imposed by Executive Order 175 and NJDOE guidelines," and the Board has not made any unilateral change to those standards. (Id., ¶42).

Cardillo certifies that the Association "has made it known" that "its members do not want to return to in-person learning and prefer to work from home in the virtual classroom." (Id., ¶43). Cardillo further certifies that "[i]t is [her] belief that this

sudden demand for an additional walk through” during the district’s closure “is meant to provide the impetus and platform for those Association members to continue to quibble about the already identified conditions of the building” and as an “opportunity for the [Association] to try a different attempt to derail the state reopening plan to revert back to in-person learning.” (Id., ¶44). Cardillo then certifies that the Association’s “unilateral demand to have access to a building when it is closed for a COVID-19 reason would be a change and condition of employment as no Association members have ever demanded access to school buildings during a school emergency closure.” (Id., ¶45).

In his reply certification, Salvatore certifies that in August 2020, Tim Platt, the Board’s Supervisor of Building and Grounds, allowed Salvatore to inspect a single classroom, but Salvatore was not permitted to inspect any other rooms in the building, and at no point during the 2019-2020 school year was either Salvatore or any other Association representative allowed to conduct a health and safety walkthrough of the entire building. (Salvatore reply cert., ¶3). Salvatore further certifies that during the two week closure between September 25, 2020 and October 5, 2020, although teaching staff and students were engaged in virtual instruction, “[o]ther employees, such as custodians and secretaries continued to physically report to the

school during this time and perform their job duties.” (Id., ¶4). However, Salvatore certifies that the Association does not represent either custodians or secretaries, and those titles are each represented by separate bargaining units. (Id., ¶2).

### **ANALYSIS**

A charging party may obtain interim relief in certain cases. To obtain relief, the moving party must demonstrate both that it has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations and that irreparable harm will occur if the requested relief is not granted. Further, the public interest must not be injured by an interim relief order and the relative hardship to the parties in granting or denying relief must be considered. Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982); Whitmeyer Bros., Inc. v. Doyle, 58 N.J. 25, 35 (1971); State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); Little Egg Harbor Tp., P.E.R.C. No. 94, 1 NJPER 37 (1975).

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

[A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental

policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

[88 N.J. at 404-405]

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); Tp. of Franklin, 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; 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. et al., P.E.R.C. No. 2019-6, 45 NJPER 103, 104 (¶27 2018); and 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; 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) (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).

This well established right of union access to the workplace was recently codified in the WDEA. The Association contends that the Board's failure to allow it access to the school building to conduct a health and safety walkthrough violates section 5.13(f) of the WDEA, which provides that

[e]xclusive 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.

N.J.S.A. 34:13A-5.13(f) (emphasis added).

The Association notes although that there have been no Commission decisions directly on point regarding whether a union has a right to access the workplace to conduct a health and safety inspection, the National Labor Relations Board (NLRB) has held in Holyoke Water Power Co., 273 NLRB 1369 (1985), for its holding that a union has a right to inspect health and safety issues in the workplace so long as the inspection does not unduly interfere with the employer's operations. The Association argues that between the Commission's long history of decisions upholding union access to the employer's premises, the codification of that right of access in the WDEA, and the NLRB's decision in Holyoke Water Power Co., the Commission must similarly find that the Association has a right to conduct workplace health and safety inspections.

In Holyoke Water Power Co., 273 NLRB at 1369, the employer operated a power plant that included a forced draft fan room, which contained two fans that forced air into the plant's burners as part of the combustion process. The fan room was very noisy, and the employer required that all employees who entered the fan room must wear earmuffs provided by the employer for hearing protection. Id.

The union requested that the employer permit the union's industrial hygienist to have access to the fan room to survey potential health and safety hazards. Id. The employer denied the request but gave the union a summary of an overall noise survey, and then a noise level reading from the fan room, that the employer had performed. Id.

An administrative law judge found that the employer was obligated to grant access to the fan room to the union's industrial hygienist. Id. The NLRB adopted the administrative law judge's recommended order with the modification that access must be for a "reasonable period sufficient to allow the union hygienist to fully observe and survey noise level hazards." Id.

In so ordering, the NLRB noted that it disagreed with the administrative law judge's analysis

insofar as it finds that a request for access is tantamount to a request for information; that is, the union is entitled to access if it is shown that the information sought is relevant to the union's proper performance of its representation duties.

Id. (emphasis added). The NLRB further reasoned that, "[w]hile the presence of a union representative on the employer's premises may be relevant to the union's performance of its representative duties," the NLRB "disagree[d] that that alone, ipso facto, obligates an employer to open its doors." Id.

Instead of treating the request for access as "tantamount to a request for information," the NLRB found that the appropriate

analysis was the accommodation of two conflicting rights: "the right of employees to be responsibly represented by the labor organization of their choice," and "the right of the employer to control its property and ensure that its operations are not interfered with." Id. (citing Fafnir Bearing Co. v. NLRB, 362 F.2d 716 (2d Cir. 1966)). In balancing these two conflicting rights, the NLRB found that

[w]here it is found that responsible representation of employees can be achieved only by the union's having access to the employer's premises, the employer's property rights must yield to the extent necessary to achieve this end.

Id. (emphasis added). With regard to access, the NLRB opined that

the access ordered must be limited to reasonable periods so that the union can fulfill its representational duties without unwarranted interruption of the employer's operations . . . [but] where it is found that the 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.

Id. (emphasis added).

The NLRB then reiterated that "health and safety conditions are a term and condition of employment about which an employer is obligated to bargain on request," and "health and safety data is relevant to the Union's representation obligation." Id. (citing Minnesota Mining Co., 261 NLRB 27 (1982)). The NLRB then noted that it was "a matter of common knowledge that exposure to

excessive noise presents potential health hazards," and "no one disputes that the . . . fan room is very noisy." Id.

Thus, the NLRB held that in these circumstances,

the employees' right to responsible representation entails the Union's obtaining accurate noise level readings for the fan room to ascertain the extent of the hazard and to suggest means of ensuring that employees are properly protected.

Id. In balancing the rights of the union and the employer, the NLRB further held that "the property rights must yield to the extent necessary to enable the union hygienist to independently conduct his noise level tests." Id.

With regard to the sufficiency of the noise level data supplied by the employer to the union in lieu of an inspection, the NLRB found that those test results were "insufficient to meet the Union's purposes." Id. Also, the NLRB found that the employer's willingness to permit the union's business agent, but not the union's hygienist, who was the union's choice of representative, to enter the fan room was also insufficient. Id.

I now examine the first Crowe factor, whether the Association has a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations. Again, the Association seeks a health and safety walkthrough of the building, contending that COVID-19 constitutes an imminent threat to its members, and therefore it should not have to wait for the resolution of the charge before it is granted a walkthrough.

Notably, neither the Association's charge nor its application for interim relief seeks a determination by the Commission that the Board must implement any particular remedy to address the Association's health and safety concerns relating to the Board's COVID-19 preparations. The Association does not seek a determination that the Board must install any particular grade of HVAC filter, make any particular improvements to classroom ventilation systems, add additional air scrubbers to the auditorium and gym, or implement any additional COVID-19 screening procedures. Nor does the Association seek an order that the Board revert to all virtual instruction due to any particular health or safety concern, as it does in its pending grievance. Here, the Association simply seeks an order from the Commission requiring the Board to allow it to conduct a walkthrough of the building so that it can collect information to assist it in representing and advocating for its members on workplace health and safety issues.

Notably, the relevant facts in this matter are undisputed. It is undisputed that Governor Murphy's Executive Order 175 necessitated a school reopening plan in response to COVID-19, and it is undisputed that the Board developed its plan in accordance with, and then met all state mandated procedures and protocol. It is also undisputed that Salvatore, on behalf of the Association, participated in a walkthrough in August 2020 to view

a model classroom, but not the entire building. It is undisputed that the Association made two requests for walkthroughs in September, 2020, but the Board denied those requests. It also undisputed that the Association has been advocating, both in its communications to the Board and through its grievance, for higher quality air ventilation equipment that may exceed the standards mandated by NJDOE's reopening guidelines, such as the installation of MERV-13 HVAC filters.

The Association's request for a health and safety walkthrough is strongly supported by numerous well settled labor principles. As reviewed in detail above, the health and safety of employees is a mandatorily negotiable term and condition of employment. See In re Hunterdon Cty., Maurice River Bd. of Ed., supra. The Board has a duty to provide the Association with a broad range of potentially useful information that the Association needs to represent its members. See UMDNJ, Morris Cty., supra. The Association has a right to access the workplace absent a legitimate, substantial business justification, see Perth Amboy Bd. of Ed., supra, a right that was codified in the WDEA. The NLRB has upheld a union's right to inspect health and safety issues in the workplace so long as the inspection does not unduly interfere with the employer's operations. See Holyoke Water Power Co., supra.



The Board's arguments in opposition to the Association's request for a health and safety walkthrough are based upon mischaracterizations of the Association's relatively straightforward request. First, the Board relies upon meeting NJDOE guidelines, and NJDOE's approval of its Plan, as its basis for rejecting the Association's request for a walkthrough. This argument would be relevant as a defense if the Association was seeking an order from the Commission declaring that the Board had violated certain health and safety standards, or requiring that the Board implement a particular health and safety improvement. But that is not the remedy sought here by the Association, which seeks only an opportunity to access the workplace to collect a broad range of potentially useful information that it needs to represent its members during a pandemic.

Next, the Board argues that the Association's request for a walkthrough "upon demand" is inappropriate because there is no contractual right to a walkthrough on demand, and the Association had "made no demand to bargain for higher safety and health measures than required" pursuant to Executive Order 175.

(Cardillo cert., ¶22). But again, this argument mischaracterizes the nature of this action. The Association has filed a separate grievance alleging a potential violation of the parties' CNA. This is an unfair practice charge alleging a violation of the Act and the WDEA, and therefore the Association need not cite a

contractual right. Furthermore, the Board's argument again ignores the Association's representational duties to its members to collect potentially relevant health and safety information during the COVID-19 pandemic. Cardillo mischaracterizes the Association's "demand" for a walkthrough as a "platform for those Association members to continue to quibble about the already identified conditions of the building," and as an "attempt to derail the state reopening plan to revert back to in-person learning," (Cardillo cert., ¶44), but the Association is simply exercising its well supported rights under the Act and the WDEA.

Finally, the Board argues that it cannot allow the Association a health and safety walkthrough because the school building was closed, and the Board could not open "contrary to . . . NJDOE protocol and consultation with local health officials," and the building "was temporarily closed in compliance with state safeguards." (Cardillo cert., ¶40). The argument is flawed for numerous reasons. First, although teaching staff and students were engaged in virtual instruction between September 25, 2020 and October 5, 2020, "custodians and secretaries continued to physically report to school during this time and perform their job duties." (Salvatore reply cert., ¶4). Second, Cardillo did not offer this reason on September 24 or 25, 2020, in response to either of the Association's requests. And third, the school reopened on October 5, 2020. If the Board was

concerned about allowing the Association to conduct a walkthrough during the closure, the Board could have responded that the Association could conduct its walkthrough on or after October 5, 2020, but it did make any attempt to accommodate the Association's request.

Under these unique circumstances, I find that the Association has established a substantial likelihood of prevailing in a final Commission decision on its legal and factual allegations.

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

Here, the Association is requesting a health and safety walkthrough during the COVID-19 pandemic, which the Association reasonably contends constitutes an imminent threat to its members. 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.

Thus, I find that the Board's refusal to accommodate the Association's request for a health and safety walkthrough 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. Accordingly, we find that the Association has demonstrated irreparable harm if the Board does not allow it to conduct a health and safety walkthrough of the workplace.

Finally, to grant interim relief, the public interest must not be injured and the relative hardship to the parties in granting or denying relief must be considered. We find that there is little to no hardship to the Board if ordered to allow a health and safety walkthrough to the Association when students are not in the building, as the Board already allows custodians and secretaries to work in the building at this time. In contrast, there would be comparably great hardship to the Association caused by continuing to deny it access to a health and safety walkthrough during a pandemic in a timely manner. Thus, I find that the relative hardship to the parties weighs in favor of granting the Association's request for a health and safety walkthrough.

**ORDER**

The application of the Association for interim relief is granted. The Board must allow the Association access to the school premises to conduct a health and 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 observe and survey health and safety conditions on the premises, at a time when any employees are working on site and students are not on the premises.

/s/Lisa Ruch  
Lisa Ruch  
Commission Designee

DATED: November 19, 2020  
Trenton, New Jersey