FILED, Clerk of the Appellate Division, March 04, 2024, **A-001151-23**, **AMENDED**

IN THE MATTERS OF WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, BOARD OF EDUCATION Charging Party/Cross-Respondent, v. WATCHUNG HILLS REGIONAL EDUCATION ASSOCIATION, Respondent/Cross-Charging Party.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001151-23T4 Civil Action ON APPEAL FROM THE FINAL DECISION OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION DATED OCTOBER 26, 2023 (AGENCY DOCKET NOS. CE-2022-005 and CO-2022-168 (CONSOLIDATED)

BRIEF OF APPELLANT WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION IN SUPPORT OF APPEAL

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PRELIMINARY STATEMENT

This matter involves a straight-forward question of statutory interpretation. The Watchung Hills Regional High School District Board of Education ("Board" or "Appellant") and the Watchung Hills Regional Education Association ("Association") have been involved in negotiations for a successor collective negotiations agreement for more than two (2) years. When the most recent round of bargaining began, the Association demanded that its so-called "Bargaining Council," which was comprised of, and open to, all 200-plus members of the Association, be permitted to attend each negotiations session. Although the parties attempted to negotiate a ground rule to limit the number of attendees at each session, they were ultimately unsuccessful, and the Association thereafter refused to negotiate with the Board without its membership present.

The parties filed cross-unfair practice charges against each other with the Public Employment Relations Commission ("PERC"), each alleging bad faith bargaining by the other party and the interference of rights granted to them by the Employer-Employee Relations Act ("Act"), specifically, the right to negotiate pursuant to the Act's requirements. PERC ruled that the Board's refusal to consent to negotiations with, potentially, the entire Association violated the Act, and simultaneously found that the Association did not commit

an unfair practice by demanding to hold open negotiations and refusing to negotiate with the Board absent the presence of its entire membership.

However, the Act states that "**[r]epresentatives** designated or selected by public employees for the purposes of collective negotiation…shall be **the exclusive representatives for collective negotiation** [emphasis added]…" Notwithstanding this requirement, the Association seeks to avoid the Act's "exclusive representation" provision by simply labeling all of its rank-and-file members, collectively, as its "Bargaining Council." To accept such a disingenuous representation would effectively make the Act's "exclusive representation" provision meaningless. Put simply, any union could simply label their collective membership as some type of "committee" or "council" (such as here, the "Bargaining Council") in order to usurp the Act's requirements.

PERC's acceptance of the Association's argument that employee organizations can simply identify *every single member* in the organization as a "representative" contradicts the clear statutory requirement that a party must choose a representative of its membership to act on its behalf for negotiation purposes.

PERC's holding not only violates the legislative requirements set forth in the Act, but, if permitted to stand, would lead to the absurd result that government agencies throughout the State could be required to negotiate with

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an association's entire membership (some of which consist of tens of thousands of members) at the employee organization's sole demand.

PROCEDURAL HISTORY

On January 14, 2022, the Board filed an unfair practice charge against the Association, alleging that the Association violated 5.4b(1), (3), and (5) of the Act, which was docketed by PERC as CE-2022-005 (Pa001). On February 9, 2022, the Association filed a cross-unfair practice charge against the Board, alleging that the Board violated 5.4a(1) and (5) of the Act, which PERC docketed as CO-2022-168 (Pa003). PERC's Deputy Director of Unfair Practices issued a Consolidated Complaint and Notice of Pre-Hearing on February 28, 2023 (Pa049). On June 15, 2023, the parties filed a joint stipulation of facts "and agreed to submit the matter to the full Commission for a final agency decision, waiving a hearing examiner's report and recommended decision" (Pa066).

On October 26, 2023, PERC issued a decision and order, finding that "the Board violated N.J.S.A. 34:13A-5.4a(5), and, derivatively, 5.4a(1)," and dismissing the Board's charge against the Association (Pa215).

STATEMENT OF FACTS

The parties jointly stipulated to the following facts (Pa066), which were

accepted by PERC (Pa219). The Board is a public employer within the meaning of the New Jersey Employer-Employee Relations Act (Joint Stipulation of Facts, Pa66, ¶ 1). The Board operates the Watchung Hills Regional High School District ("WHRHS"), which serves as the public high school for residents of Green Brook, Long Hill, Warren, and Watchung (Ibid.). The Association represents, *inter alia*, the professional staff members employed by the Board (Id., ¶ 2). During all times relevant hereto, the Association has represented approximately 225 Board employees, including, but not limited to teachers, secretaries, paraprofessionals, bus drivers, nurses, security personnel, child study team members, counselors, and buildings, grounds, and maintenance staff (Ibid.).

At all times relevant to the within matter, the Board and the Association were parties to a collective negotiations agreement ("CNA") for the period July 1, 2019 through June 30, 2022 (Id., ¶ 3). During negotiations for a successor agreement, the expired CNA remains in effect during the negotiations process (Ibid.).

During the negotiations for the 2019-2022 CNA, the Association first started utilizing a "Bargaining Council" (Id., ¶ 4). The Bargaining Council was comprised of, and open to, all Association members (Pa220, ¶ 5). Non-Association members are not able to join the group (Ibid.).

During the negotiations for the 2019-2022 CNA, the Association sought to have its Bargaining Council members attend negotiation sessions with the Board (Id., ¶ 8). On at least one occasion during the negotiations for the 2019-2022 CNA, the Bargaining Council attended the bargaining session (Id., ¶ 9). Subsequent to the meeting between the Board and the Association which was attended by the Bargaining Council, representatives from the Board and the Association agreed to meet in a smaller setting in an effort to expeditiously reach a successor Agreement (Id., ¶ 10). Prior to this smaller-scale meeting, the Board and the Association agreed to pull back all proposals aside from salary and health benefits, and that the smaller setting would also exclude the Parties' legal representation (Id., ¶ 11).

The Association and the Board executed the 2019-2022 CNA in or around the Fall of 2019 (Id., ¶ 12). Neither of the Parties filed any unfair practice charges during the negotiations for the 2019-2022 CNA (Ibid.). In or about October of 2021, the parties first reached out to each other to discuss beginning the negotiations process towards a successor agreement to the 2019-2022 CNA (Pa221, ¶ 13). In the intervening two (2)-year period after the 2019-2022 CNA was ratified, neither the Association nor Board had any discussions as to the scope of the Bargaining Council's involvement in the negotiations for the successor CNA (Id., ¶ 14).

The first negotiations session for a successor agreement between the parties was tentatively scheduled for November 10, 2021 (Id., ¶ 15). On or around October 28, 2021, the Association's negotiations chair [M.G.] informed then-Board negotiations chair (and then-Board member) [P.F.] that the Association again sought to have the Bargaining Council be present at all negotiations sessions (Id., ¶ 16). [P.F.] objected to the presence of the Bargaining Council at the negotiations sessions (Ibid.). On November 9, 2021, [P.F.] informed the Association that the Board would be proposing a ground rule prohibiting the Bargaining Council from being present at and participating in the negotiations sessions for the successor agreement (Id., ¶ 16). Because the parties could not agree on whether to allow Bargaining Council members attend the meeting, the November 10, 2021 negotiation session was postponed to allow the parties to engage in further discussion regarding the Bargaining Council (Id., ¶ 18).

Designated representatives of the Association and the Board subsequently agreed to meet on December 8, 2021 to discuss ground rules, including the role of the Bargaining Council during negotiations sessions (Id., ¶ 19). For this meeting only, the Association agreed to not have its Bargaining Council members present at the meeting (Ibid.). At the December 8, 2021 meeting, the Board maintained its position that the Association's Bargaining Council should

not be allowed to attend the negotiation sessions (Id., ¶ 20). The Association countered that it had the right to include its Bargaining Council members at negotiations sessions (Ibid.). The parties exchanged numerous proposals regarding the Bargaining Council or alternatives, but were unable to agree to any solution at this meeting (Ibid.). No agreement was reached on the presence of the Bargaining Council at future sessions (Id., ¶ 21). At the end of the meeting, the Parties agreed to exchange proposals for a successor contract by the end of January, 2022 (Ibid.).

On or about January 14, 2022, the Board filed the underlying Unfair Practice Charge against the Association, which was docketed by the Commission as CE-2022-005 (Pa222, ¶ 22). On February 9, 2022, the Association filed the underlying Cross-Unfair Practice Charge against the Board, which was docketed as CE-2022-174 (Ibid.).

Proposals were exchanged by the Parties in or around January 26, 2022 (Id., ¶ 23). The parties did not meet again to continue negotiations from the filing of unfair practice charges docketed as CE-2022-005 and CO-2022-174 until on or around March 1, 2023 (Id., ¶ 24). The purpose of that meeting was to address the role of the Bargaining Council (Ibid.). However, the parties did not come to a resolution on that issue (Ibid.).

On or about January 31, 2024, the parties again met to continue negotiations pursuant to PERC's Order and Decision. However, the parties never reached a formal agreement regarding the specific role of the Bargaining Council, although the Board has complied with PERC's directives and negotiated with the Association, including its Bargaining Council, while this appeal is pending. Accordingly, the issue of the Bargaining Council remains (Ibid.).

STANDARD OF REVIEW

PERC's "interpretation of the Act is entitled to substantial deference" and "[a]ppellate courts 'will not upset a State agency's determination in the absence of a showing that it was arbitrary, capricious, or unreasonable, or that it lacked fair support in the evidence, or that it violated a legislative policy expressed express or implicit in the governing statute.'" In re: City of Atl., 445 N.J. Super. 1, 11 (App. Div. 2016) (citing Communications Workers of America, Local 1034 v. New Jersey State Policemen's Benev. Ass'n., 412 N.J. Super. 286, 291 (App. Div. 2010)). However, while PERC's interpretation of the Act "is entitled to great weight…[appellate courts] will not yield to PERC if its interpretation is 'plainly unreasonable, contrary to the language of the Act, or subversive of the Legislature's intent.'" Ibid. "Moreover, deference is not afforded when PERC's interpretation gives a provision of the Act greater reach than the Legislature

intended, and PERC must follow judicial precedents interpreting the Act." Ibid.

Importantly, "when an agency's decision is based on 'the agency's interpretation of a statute or its determination of a strictly legal issue, [appellate courts] are not bound by the agency's interpretation." Matter of Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020) (internal citations omitted). "Instead, [the appellate court] review[s] that determination *de novo*." Ibid. Indeed, the New Jersey Supreme Court and the Appellate Division have conducted *de novo* reviews of PERC determinations in several instances. See, *i.e.*, Matter of Ridgefield Park Bd. of Educ., *supra*, at 5 ("a dispute between [the Board] and the [local education association] concerning employees' obligations to contribute to the cost of their health care benefits under [Chapter 78]"); Matter of City of Newark, 469 N.J. Super. 366, 377 (App. Div. 2021)("[t]he question of whether the City has a managerial prerogative"); In re: Cty. Of Atl., *supra*, at 12 ("whether PERC can summarily reverse the dynamic status quo doctrine in order to advance the legislative goal embodied in the two percent tax levy cap").

In addition, "appellate review is less deferential" where "there was no evidentiary hearing and the parties are not disputing material facts." Matter of City of Newark, *supra*, at 378 ("Moreover, because there was no evidentiary hearing and the parties are not disputing material facts, we are applying the law to undisputed facts. In essence, the PERC Director accepted the facts in the

record and then, applied the law to those facts. In such situations, appellate review is less deferential (internal citations omitted).").

In this matter, Appellant asks the Court to review PERC's "interpretation of a statute," N.J.S.A. 34:13A-5.3, and the legislature's meaning of the phrase "designate representatives" as set forth therein. As in Matter of City of Newark, *supra*, "there was no evidentiary hearing and the parties are not disputing material facts," which they have stipulated to, and which "the PERC Director accepted…and then, applied the law to those facts" (Pa219). Matter of City of Newark, *supra*. Accordingly, the Appellate Division is asked to "apply the law to those facts," and PERC's determination is not entitled to any deference. Therefore, the Appellate Division respectfully should review this matter *de novo*.

POINT I

PERC ERRED IN DETERMINING THAT THE ASSOCIATION DID NOT VIOLATE THE ACT BY REFUSING TO IDENTIFY REPRESENTATIVES FOR BARGAINING IN VIOLATION OF N.J.S.A. 34:13A-5.3 (Pa215).

A. The Association's entire membership does not constitute its "designated representatives" within the meaning of the Act.

The Association has refused to negotiate without the potential presence of its entire membership (which the Association self-identifies as a "Bargaining

Council") at negotiations sessions (Pa220, ¶ 5-6). By the Act's plain language, however, negotiations must be conducted between designated representatives of each party, and not between the entire Association and the entire Board. N.J.S.A. 34:13A-5.3. In other words, it is self-evident that the entire Association cannot be a representative of itself. Yet, that is exactly what the Association seeks in this case and what PERC's holding permits.

In its decision, PERC cites to several of its decisions which stand for the proposition that "[n]either the employer nor the majority representative may dictate the other's choice of representatives for collective negotiations [emphasis added]" (Pa233). However, PERC conflates this analysis with the actual issue presented in this matter – whether the majority representative may designate its entire membership as "representatives" for collective bargaining within the intent of the Act. The Board does not seek to have any control whatsoever over the actual identity of any of the Association's "designated representatives," nor does it take issue with any specific Association member being on the negotiations team. Rather, the Association must actually select representatives from among its members to act on its behalf during negotiations.

N.J.S.A. 34:13A-5.3 states, in relevant part:

> **Representatives designated or selected by public employees for the purposes of collective negotiation** by the majority of the employees in a unit appropriate for such purposes…**shall be the exclusive representatives for collective negotiation concerning**

> **the terms and conditions of employment of the employees in such unit**.
> […]
> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership. Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, **the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment**. Nothing herein shall be construed as permitting negotiation of the standards or criteria for employee performance.[Emphasis added].

Accordingly, adjudication of this matter requires a statutory interpretation of N.J.S.A. 34:13A-5.3 – particularly, the meaning of the term "[r]epresentatives designated or selected by public employees for the purpose of collective negotiation." Pursuant to N.J.S.A. 1:1-1, "words and phrases shall be read and constructed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language."

Additionally, it is well-settled that "[w]hen construing a statute, 'legislative language must not, if reasonably avoidable, be found to be inoperative, superfluous, or meaningless.'" State v. Regis, 208 N.J. 439, 449

(2011) (internal citations omitted). See also State v. Rangel, 213 N.J. 500, 513 (2013) (citing to Regis for the proposition that "every word is presumed to have import and none to be mere surplusage"). Indeed, it must be presumed that the Legislature's usage of the words "exclusive, "representatives," and "designate" were intentional and that it can only mean that a designee less than the entire Association must be selected to negotiate on the Association's behalf.

Importantly, the New Jersey Supreme Court ("Supreme Court") provided a thorough analysis of the statutory meaning of the word "designate" when analyzing a teacher tenure statute in Bridgewater-Raritan Educ. Ass'n. v. Bd. of Educ. Of Bridgewater-Raritan Sch. Dist., Somerset Cty., 221 N.J. 349 (2015). The Supreme Court stated, in relevant part:

> N.J.S.A. 18A:16-1.1 repeatedly states that a teacher serving in place of another should be "designated" as such. **To "designate" in common parlance means "[t]o indicate or specify," "[t]o give a name or title to," or "[t]o select for a duty, office, or purpose." Webster's II New Riverside University Dictionary 367 (1994). Thus, the natural reading of "designate" contemplates that a person, who is "designated" as having some conferred status, is informed that he or she has been so designated or is made aware of that conferred status.** It is a basic rule of statutory construction to ascribe to plain language its ordinary meaning. See D'Annunzio v. Prudential Ins. Co. of Am., 192 N.J. 110, 119-20, 927 A.2d 113 (2007) ("[W]e look first to the plain language of the statute, and we ascribe to the statutory language its ordinary meaning." (citations omitted)); N.J.S.A. 1:1-1 (providing that words in statutes shall be given their "generally

> accepted meaning, according to the approved usage of the language" unless that reading is inconsistent with "the manifest intent of the legislature" or "different meaning is expressly indicated"). Bridgewater-Raritan at 360. [Emphasis added].

Additionally, the dictionary definition of "exclusive" means, in relevant part: "limiting or limited to possession, control, or use by a single individual or group" and "excluding others from participation[1]."[2] N.J.S.A. 34:13A-5.3 requires the Association to "select" and "inform" specific individuals that they have been "designated" as having the "conferred status" of "exclusive representatives" for collective negotiations with the Board. The Association, however, has refused to identify any specific individuals as exclusive representatives for negotiations. Rather, the Association maintains that its entire 225-employee membership has the right to attend and/or participate in all negotiations sessions, presumably whenever each such member decides to do so (*i.e.*, on a "come-and-go" basis). See, *i.e.*, Pa073 (Association's Negotiations Chair stating in a letter to the Board's Director of Human Resources and Professional Development that "[a]ll [Association] members have a right to

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[1] *Exclusive*, Merriam-Webster, merriam-webster.com/dictionary/exclusive (last visited February 26, 2024).

[2] New Jersey appellate courts regularly rely on the definitions set forth in Merriam-Webster Dictionary when interpreting statutory language. See, *i.e.*, State v. Smith, 251 N.J. 244, 265, n.3 (2022); JWC Fitness, LLC v. Murphy, 469 N.J. Super. 414, 426 (App. Div. 2021); Angus v. Bd. of Educ. Of Borough of Metuchen, Middlesex Cty., 475 N.J. Super. 362, 371 (App. Div. 2023).

attend the meetings as part of this [Bargaining Council]").

Indeed, the Association maintains that "any member of the Bargaining Council[3] has the same rights as any other negotiations team member, including lead negotiators, [including] the right to vote on any matters before the Associations negotiation team, to address offers from the Board, and to propose contractual language, (Pa220, ¶ 6)" which is plainly violative of the Act's requirement that majority representatives **"designate representatives"** for collective bargaining. N.J.S.A. 34:13A-5.3. Therefore, the Association has violated N.J.S.A. 34:13A-5.3 by refusing to designate representatives for bargaining. In essence, no Association member has been designated as a representative for negotiations purposes, because all of the members have been.

B. Acceptance of the Association's Position would lead to an absurd result and render the Act's language meaningless.

Moreover, acceptance of the Association's position that its entire membership constitute "representatives" (Pa220, ¶ 5-6) would lead to an absurd result. It is a common principle of statutory interpretation in New Jersey that "[a]n absurd result must be avoided in interpreting a statute." Gallagher v. Irvington, 190 N.J. Super. 394, 397 (App. Div. 1983) (citing Marranca v. Harbo, 41 N.J. 569, 574 (1964)). Similarly, PERC recognized in I/M/O Local 195, IFPTE and Local 518, SEIU that "[t]he courts have held that when the literal

[3] "The Bargaining Council," which is "compromised of, and open to, all Association members," is the Association's way of saying "the entire Association" (Pa220, ¶ 5).

reading of a statute...leads to an absurd result, that a reasonable construction consistent with its underlying purpose is presumed." 3 NJPER ¶ 252 (1977) (citing Schierstead v. Brigantine, 29 N.J. 220 (1959); In re: Petition of Gardener, 67 N.J. Super. 435 (1961) (Pa255)). Additionally, "when a literal interpretation of individual statutory terms or provisions would lead to results inconsistent with the overall purpose of the statute, that interpretation should be rejected." Bermudez v. Kessler Inst. for Rehab., 439 N.J. Super. 45, 51 (App. Div. 2015) (internal citations omitted).

The Association's proposed interpretation of the statute, and by extension, PERC's acceptance of this interpretation, would most definitely lead to an absurd result. As discussed, *supra*, N.J.S.A. 34:13A-5.3 states, in relevant part: "**Representatives designated or selected by public employees for the purposes of collective negotiation** by the majority of the employees in a unit appropriate for such purposes...**shall be the exclusive representatives for collective negotiation** concerning the terms and conditions of employment of the employees in such unit" and "the majority representative and designated representatives of the public employer shall meet at reasonable time and negotiate in good faith with respect to grievance, disciplinary disputes, and other terms and conditions of employment" [emphasis added].

Initially, acceptance of the Association's position would render the language of the statute, requiring "representatives" to be "designated" as the "exclusive representatives for collective negotiations," completely meaningless. Moreover, the logistics of the Association's position defy logic. In its decision,

which is which is fully precedential as it applies to government agencies and employee organizations throughout the State, PERC stated "that neither party may dictate or challenge the other's choice of its negotiations representatives (including as to a specific number or identity of such representatives), absent evidence of conflict of interest or ill-will, or evidence that a party's choice of representatives jeopardizes safety or security" (Pa236).

Notably, there are some public unions in New Jersey that have thousands of members – for example, CWA D1 has as many as 70,000 members[4]. Thus, if permitted to stand, PERC's holding would enable such unions to also designate their entire membership as members of their bargaining team by self-identifying them as a "Bargaining Council" or something similar, and to require that all members attend all negotiations sessions as a precondition to negotiations, unless the government agency can identify specific members as having "ill-will" or posing safety concerns (Pa236).

Taken to its extreme, allowing a public employee representative of such a large size to make such demands before agreeing to negotiate, as PERC's precedential decision would allow them to do, might require the parties to rent out stadiums such as MetLife Stadium or the Prudential Center to conduct

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[4] CWA D1 NEW JERSEY, https://cwanj.org/about-cwa-d1-new-jersey (last visited February 26, 2024).

negotiations. This further exemplifies the absurdity of PERC's holding, which defies the Act's requirement.

The Legislature could have stated that public employees have the absolute right take part in collective negotiations, but it chose not to. Instead, the Legislature requires associations in New Jersey to "designate" or "select" "exclusive representatives" to bargain on their behalf. N.J.S.A. 34:13A-5.3. These terms must be given meaning. Regis, *supra*. That the Legislature specifically included that requirement is illustrative – allowing an entire union to dictate the terms of the negotiation process, attend all of the meetings, and essentially act as its own negotiations committee, does not lead to good-faith or efficient negotiations.

C. The Association's demand to conduct "open negotiations" is an unlawful pre-condition to negotiation.

The Association's demand to conduct negotiations with its entire membership is essentially a requirement that the parties engage in "open negotiations," which PERC has held is an unlawful pre-condition to negotiations.

In I/M/O Brielle Board of Education and Brielle Education Association, 3 NJPER ¶ 323 (1977) (Pa265), the board refused to negotiate with the union unless the negotiations were conducted in open public session, but the union refused to participate in open negotiations. The union filed an unfair practice charge, "alleging that the board's insistence upon public negotiation

constitute[d] an illegal pre-condition to negotiations..." PERC determined that "the board's refusal to negotiate unless such negotiations sessions are conducted in open public session establishe[d] an illegal condition precedent to negotiations, inconsistent with its duty to negotiate in good faith..." Moreover, the Commission emphasized the importance of upholding the Act's provision regarding "exclusive representation":

> The Act's concept of exclusivity of representation has been held by the Supreme Court of this State to be analogous to the similar provisions of the National Labor Relations Act. Commenting upon this concept, the Court found it to be at the very core of our national labor relations policy and ruled that its inclusion in the Act was a valid legislative vehicle to discourage rivalries among individual employees and employee groups and to avoid the diffusion of negotiating strength which results from multiple representation.

PERC found "that <u>the right of negotiations attaches only to the majority representative</u> and that public employers are prohibited from negotiating terms and conditions of employment or processing grievances presented by a minority employee organization, when there is a majority representative (<u>N.J.S.A.</u> 34:13A-5.3)" [emphasis added].

PERC further contemplated the danger of there being "rank-and-file unit members" present for the negotiations: "Certainly [the] public could also include rank and file unit members and the leaders of minority organizations. Therefore, the concept of exclusivity of representation and the right of public employers and public employees to negotiate through representatives of their own choosing, and the Constitutional right to organize as stated by the New Jersey Supreme Court...could be compromised." Furthermore, "this is a

permissive subject of negotiations" and "[e]ither party may propose it and the parties would be free to agree to it, but neither party can insist upon open public negotiations as a precondition to negotiations." Id. The Association's condition precedent to beginning negotiations in the instant matter is to have every rank-and-file member present during negotiations, a position it may not take pursuant to the Act. See also Lullo v. International Asso. of Fire Fighters, 55 N.J. 409, 421 (1970) (in which the Court noted the importance of the Act's exclusive representation rule).

"Open bargaining," by the Association's own admission, is exactly what it seeks, notwithstanding its already unlawful attempt to pivot its argument and simply designate its entire membership as its Bargaining Council. See, *i.e.*, Pa037, for a copy of an article published by the New Jersey Education Association, entitled "Open Bargaining: a new way to engage and empower your local at the table and beyond," which was co-authored by the Association's initial lead negotiator. The article details the open bargaining "playbook" which the Association attempts to effectuate here and, indeed, specifically references the Board and prior negotiations as supposed evidence that "open bargaining" leads to intimidation and so-called "winning" at the bargaining table – all of which is a violation of the Act by interfering with the Board's rights to negotiate, N.J.S.A. 34:13A-5.4(b)(1), refusing to negotiate with the Board in good faith, N.J.S.A. 34:13A-5.4(b)(3), and refusing to follow the Act and designate a representative, N.J.S.A. 23:13A-5.4(b)(5).

In addition, numerous courts and public employment relations boards throughout the country have considered similar issues as those raised by the Association and, instructively, have also held that employers are not required to negotiate in the presence of employee-observers – the minimum level of involvement by the Bargaining Council members if permitted to attend each negotiations session at the Associations' demand.

For example, in Petaluma Federation of Teachers, Local 1881, P.E.R.B. Decision No. 2485 (2016) (Pa273), the Petaluma Federation of Teachers, Local 1881 ("Federation") filed an unfair practice charge with California's Public Employment Relations Board ("PERB"). Therein, the Federation alleged that the school district committed an unfair practice by, in relevant part, "conditioning negotiations on the Federation's agreement to prohibit bargaining unit employees from observing negotiations."

The school district argued that negotiations were to be treated as "non-public," and as a result, "neither party can insist on negotiations that are open beyond attendance by the specified negotiation teams," while the Federation countered that the employees were "not simply part of the 'public.'" PERB rejected the Federation's argument, holding, in relevant part:

> [T]he statute also provides that "once the employees in an appropriate unit have selected an exclusive representative" and it has been "recognized or certified. .*only* that employee organization may represent [employees of] that unit in their employment relations with the public school employer." Moreover, "an employee in that unit shall not meet and negotiate with the public school employer." As we recently observed. .employees necessarily surrender some of their statutory rights when they accept the

> benefits of exclusive representation, which is "the cornerstone of the Act." The statute's declared purpose recognizes that some employee rights may not be exercised in a manner that undermines the authority of the bargaining agent or abridges the principle of exclusivity. In particular, employee rights to self-representation and to select representatives other than those designated by the majority organization may be curtailed to the extent necessary to accommodate the statutory scheme for collective bargaining *through exclusive representation*.[...]
>
> In the present case, the employee-observers are not designated or even prospective representatives or officers of the Federation and, consequently, the Federation exercises no authority over them. If employees could assert an independent statutory right to attend negotiations, even against the wishes of their bargaining representative, then, much of the decisional law prohibiting direct dealing and bad-faith bargaining would need to be re-written. [Emphasis in original]. [Citations omitted].

In Aircraft Mechs. Fraternal Ass'n. v. Nw. Airlines Corp., 394 F. Supp. 2d 1082 (D. Minn. 2005), a Minnesota union refused to participate in negotiations unless the employer permitted its members to attend negotiations sessions. The union stated that it had "historically used rank-and-file members to observe negotiations and consult with observers in private caucuses while negotiations are ongoing." The employer had agreed to permit union members to attend the previous round of collective negotiations, but refused to allow them to observe during the next round of negotiations.

The union insisted on having its members attend negotiations, and the employer applied to the National Mediation Board for mediation. The National Mediation Board established a ground rule which prohibited the member-observers from attending the sessions, which the union also objected to. The union thus refused to either negotiate or attend mediation without their members present, and initiated an action in federal court, which the employer filed a counter-claim on. The union "ask[ed] the Court to enjoin [the employer] from conditioning bargaining on the exclusion of observers and to order [the employer] to engage in bargaining with observers present." The union argued that the "observers" were actually "representatives" because they were "an integral part of [the union's] bargaining committee, valuable for their input and assistance during bargaining, and critical to ensure the confidence of rank-and-file in assessing any tentative agreement that might be reached."

The employer requested "a preliminary injunction requiring [the union] to participate in the mediation without observers." The Court stated that resolution of the matter required "the Court to distinguish between observers and representatives, which goes to the heart of this case." The Court determined that the observers did not constitute representatives which were able to attend negotiations, noting, in relevant part, that "the observers do not 'act for' the employees. Rather, they simply silently spectate the negotiating process...'" The Court concluded:

> Simply put, the observers are not "representatives" as defined by the Act. Thus, [the employer] is not infringing on [the union's] members' rights to choose their representatives by insisting that

> observers be excluded from negotiations. It is merely insisting that only those representatives – and not mere observers – come to the bargaining table.
> [...]
> [T]he Court finds that [the union] has failed to show that its members will be deprived of a fundamental right to representation of their choice. Rather, all that they have been deprived of is the opportunity to view those representatives in action. The Railway Labor Act does not create a substantive right to observation of negotiations.

The National Labor Relations Board declared in Brooke Glen Behavioral Hosp., 365 NLRB No. 79 (2017) (Pa327) that "[a]lthough...parties are generally permitted to select their own bargaining team, that does not necessarily include the selection of 'observers' who are not members of the bargaining team and have nothing to add to the bargaining. Extending bargaining to such observers – by either side, over the objection of the other – would raise the potential for mischief and serious interference with good-faith bargaining."

See also Talbot v. Concord Union Sch. Dist., 114 N.H. 532, 535 (N.H. 1974) ("[T]he presence of the public and the press at negotiating sessions would inhibit the free exchange of views and freeze negotiators into fixed positions from which they could not recede without loss of fact."); Appeal of Exeter, 126 N.H. 685 (1985) (New Hampshire Supreme Court affirming public employee labor relations board determination that "[n]either party may insist on open or public negotiations or statements thereon as a precondition for substantive negotiations if the other party does not consent" and that "[a]bsent such an agreement, negotiation sessions shall be held in private"); Bd. of Selectmen v.

Labor Relations Com., 7 Mass App. Ct. 360, 362 (Mapp. App. Ct. 1979) (citing to Talbot, *supra*, for the propositions that "the delicate mechanisms of collective bargaining would be thrown awry if viewed prematurely by the public" and that "the position of several State labor boards [is] that bargaining in public would tend to prolong negotiations and damage the procedure of compromise inherent in collective bargaining"); Gerawan Farming, Inc. v. Agric. Labor Relations Bd., 40 Cal. App. 5th 241, 265 ("Collective bargaining negotiations historically have been considered private and closed to the public, even in the public sector.")

The Association in this matter seeks the very same thing that the public unions sought in the above-referenced cases – open bargaining in the presence of all of their members – i.e., "employee observers." This Court respectfully should adopt the same position taken by these courts and labor relations boards throughout the country. A contrary opinion would lead to an absurd result and render the Legislature's requirement that the Association, and all public sector unions in New Jersey, designate "representatives" for negotiations, completely meaningless. N.J.S.A. 34:13A-5.3. Unions could completely evade this requirement and force "open bargaining" by simply identifying its entire membership as its "representatives," as the Association attempts to do here.

In sum, the Association has violated N.J.S.A. 34:13A-5.3 by refusing to negotiate if its demands were not met.

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POINT II

PERC EXCEEDED ITS AUTHORITY BY UNILATERALLY BINDING THE PARTIES TO A GROUND RULE REQUIRING THE BOARD TO NEGOTIATE WITH THE ASSOCIATION'S ENTIRE MEMBERSHIP AS A PRECONDITION TO NEGOTIATIONS (Pa245).

PERC essentially created a ground rule for negotiations by requiring the Board to negotiate with the Association's entire membership as a precondition to negotiations (Ibid.). PERC has held that "nothing in [the Act]…or any other statute that [PERC is] aware of would preclude…parties from agreeing to conduct their negotiations in open public session," and that "[t]herefore, this is a permissive subject of negotiations. Either party may propose it and the parties would be free to agree to it, but neither party can insist upon public negotiations as a precondition to negotiations." I/M/O Brielle Board of Education, *supra* (Pa271).

PERC, through its Order, has done exactly that, by requiring the parties to engage in what the Association itself defines as "open collective negotiations (Pa232)," without the parties agreeing to same and as a precondition to negotiations.[5] However, if the parties could not agree on a ground rule regarding

---

[5] See Pa245 (ordering the Board to "[n]egotiate in good faith with the [Association] over mandatorily negotiable subjects, including over negotiations ground rules respecting the presence of the Association's Bargaining Council during negotiations sessions").

open public negotiations, either party, or potentially PERC itself, could have instituted the impasse procedures pursuant to the framework set forth in the Act and accompanying Administrative Code, rather than for PERC to unilaterally enact a ground rule that was never agreed upon by the parties.

N.J.A.C. 19:12-3.1(a) states, in relevant part: "In the event that a public employer and a certified or recognized employee representative have failed to achieve an agreement through direct negotiation, either the public employer, the employee representative, or the parties jointly, may notify the Director of Conciliation, in writing, of the existence of an impasse and request the appointment of a mediator." The Director of Conciliation then utilizes the mediator's confidential report to "consider whether or not fact-finding with recommendations for settlement should be invoked." N.J.A.C. 19:12-3.5(b). "If the impasse is not resolved [through fact-finding], the fact-finder shall make findings of fact and recommend the terms of settlement as soon after the conclusion of the hearing [before the fact-finder] as possible." N.J.A.C. 19:12-4.3(d). If the parties still cannot reach an agreement to resolve the impasse, "[PERC] or the Director of Conciliation may take whatever steps are deemed expedient to effect a voluntary settlement of the impasse, including the appointment of a super conciliator, where appropriate." N.J.A.C. 19:12-4.3(g).

PERC exceeded its authority by unilaterally declaring a ground rule as a

precondition to negotiations, even though it has previously found that ground rules are permissive subjects of negotiations and may not be imposed upon either party without agreement. Rather, PERC should have either ordered the parties to either negotiate over the ground rule or to declare an impasse. PERC's determination respectfully must be reversed on this ground as well.

POINT III

PERC ERRED IN FINDING THAT THE ASSOCIATION DID NOT VIOLATE N.J.S.A. 5.4(B)(1); (3); AND (5) (Pa231).

The Association has also acted in violation of Sections (1), (3), and (5) of the Act. These sections provide, in pertinent part, that:

> Employee organizations, their representatives, or agents are prohibited from:
> (1) Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by this act.
>
> (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit.
>
> (5) Violating any of the rules and regulations established by the commission.
> N.J.S.A. 34:13A-5.4(b)(1); (3); (5).

A. The Association's Actions Violate N.J.S.A. 34:13A-5.4(b)(1).

The Association has violated this section of the Act by "[i]nterfering with, restraining, or coercing employees" from engaging in negotiations for a new

collective negotiations agreement. In refusing to negotiate without the Bargaining Council, the Association has essentially eliminated members' abilities to negotiate and obtain a new contract through its refusal to name bargaining representatives. For the same reasons, the Association has also frustrated the Board's right to exercise its own rights under the Act and engage in negotiations with the Association for a successor collective negotiations agreement, itself a violation of Section b(1) of the Act or at the least, its spirit and intent.

B. The Association's Actions Violate Subsection (b)(3) of the Act.

The Commission stated in I/M/O Morris County College Faculty Association, 48 NJPER ¶ 16 (Pa335):

> Section 5.4b(3) of the Act requires a majority representative to negotiate in good faith with a public employer concerning terms and conditions of employment. N.J.S.A. 34:13A-5.4b(3); Glen Rock Bd. of Ed., P.E.R.C. No. 82-11 7 NJPER 454 (P12201 1981) . To prove a violation of this section, an employer must establish that the majority representative, by its conduct, adversely impacted negotiations or was an impediment to reaching an agreement. Rutgers University, P.E.R.C. No. 2017-4, 43 NJPER 17 (P18 2016).

The Association has, at all times since the inception of the negotiations process for the current round of bargaining, failed to negotiate in good faith. The Association refused to appear at the bargaining table or to negotiate a ground rule regarding the presence of its members at negotiations sessions, thus

depriving the parties from negotiating for nearly two (2) years. The Association has thus violated the Act by demanding open bargaining with member-observers present, rather than to negotiate through a designated representative as the Act requires. Accordingly, the Association has, by its conduct, adversely impacted negotiations and has been an impediment to reaching an agreement.

C. The Association's Actions Violate Subsection (b)(5) of the Act.

As set forth at length *supra*, the Association has repeatedly and steadfastly refused to designate a representative committee for bargaining, a requirement pursuant to N.J.S.A. 34:13A5.3. Its position is therefore in violation of N.J.S.A. 34:14A-5.4(b)(5).

POINT IV

PERC ERRED IN FINDING THAT THE BOARD VIOLATED THE ACT (Pa244).

PERC determined that "the Board violated N.J.S.A. 34:13A-5.4a(5), and, derivatively, 5.4a(1), when it refused to meet and negotiate with the Associate in the presence of Bargaining Council members" (Ibid.). These sections of the Act provide, in pertinent part, that:

> Public Employers, their representatives, or agents are prohibited from:
> (1) Interfering with, restraining, or coercing 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.

However, the record is clear that the Board's actions were proper in all respects and were not based on anti-union animus or any ill-will towards the Association or any of its members.

A. The Board's Actions Did Not Violate N.J.S.A. 34:13A-5.4(a)(1).

Subsection (a)(1) of the Act may be violated independently or derivatively through a violation of other subsections of Section 5.4(a). PERC established the standard for finding an independent violation of subsection (a)(1) in New Jersey College of Medicine and Dentistry, 4 NJPER ¶ 563 (1978) (Pa341), which states that:

> 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 employees in the exercise of rights guaranteed by the Act, providing the actions lack a legitimate and substantial "business" justification.

In determining whether the particular action interferes with, restrains, or coerces an employee in the exercise of rights protected under the Act, PERC considers the totality of the evidence proffered, and the competing interests of the public employer and the employee organization and/or the affected individuals. East Orange Public Library v. Taliaferro, 180 N.J. Super. 155, 160 (App. Div. 1981). Thus, the facts must show an interference, coercion, or restraint with regard to the exercise of protected rights. If the facts show that the exercise of protected rights has been infringed upon, the alleged violation must

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be dismissed if the respondent proffers evidence of a business justification for the action. Id.

The Association has not proffered any evidence whatsoever that the Board interfered with, restrained, or coerced any employees in the exercise of their rights under the Act. As discussed *supra*, only the Association's legal representatives have an entitlement to attend negotiations sessions, not the rank-and-file members. The Board's insistence that the Association adhere to the Act is not an unfair practice or an interference with any employee right.

The Association does not, and cannot, proffer evidence that the District prevented Association members from engaging in any protected activity because rank-and-file members did not have a legal entitlement to attend negotiations sessions. In fact, it is the Board, through its properly designated negotiations committee, who have consistently reached out to the Association in an attempt to move the negotiations process forward and make progress on a successor Agreement (See, *i.e.*, 042). The Association refused to meaningfully engage with the Board on this issue unless the Board agrees that its so-called "Bargaining Council" attend each negotiations session.[6] It is the Association, rather than the Board, that interfered with and frustrated the rights of its own members when it demanded the Bargaining Council attend each negotiations session.

[6] The parties have since met to continue negotiations in the presence of the Bargaining Council, in accordance with PERC's directives.

B. The Board's Alleged Actions Did Not Violate Subsection (a)(5) of the Act.

The Association additionally alleges that the Board's actions violated N.J.S.A. 34:13A-5.4(a)(5). Subsection (a)(5) of the Act prohibits an employer from "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." Subsection (a)(5) may be violated when an employer unilaterally changes terms and conditions of employment without negotiation. Lumberton Education Association v. Lumberton Board of Education, 28 NJPER 427, *aff'd.* App. Div. No. A-1328-01T5 (Oct. 8, 2002) (Pa345).

The Board has not refused to negotiate in good faith; quite the opposite, the Board had requested to meet with the Association's bargaining representatives for nearly two (2) years to engage in negotiations for a successor Agreement, but the Association had simply refused to do so. The Board did not take any unilateral action concerning unit members' terms and conditions of employment and has not even contemplated doing so, without negotiation. The Association has not even alleged this to be the case, and there is no evidence of any such violation by the Board. Rather, the Board has and continues to seek negotiations with the Association's exclusive representative (its Negotiations

Council), rather than with its "Bargaining Council" that is comprised of every single Association member (Pa024). Although the parties have since met for negotiations in the presence of the "Bargaining Council," as directed by PERC, the Board's position remains that it should not be forced to do so without simply meeting with a representative of the Association for bargaining purposes. This position does not alter terms and conditions of employment. In the absence of any alterations to the terms and conditions of employment, the Association cannot support its claim that the Board violated N.J.S.A. 34:13A-5.4(a)(5).

CONCLUSION

Based upon the foregoing arguments, the Watchung Hills Regional High School District Board of Education hereby respectfully requests that PERC's decision be reversed, that the Association is determined to have violated N.J.S.A. 34:13A-5.3 and N.J.S.A. 34:13A-5.4(b)(1), (3), and (5) of the Act, and that that Board is determined not to have violated the Act.

Respectfully submitted,
SCHENCK, PRICE, SMITH & KING, LLP

By: /s/ Joseph L. Roselle
Joseph L. Roselle

Dated: March 4, 2024

FILED, Clerk of the Appellate Division, April 02, 2024, **A-001151-23**

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Re: Watchung Hills Regional High School District Board of Education, Appellant
-and-
Watchung Hills Regional Education Association, Respondent; App. Div. Dkt. No. A-001151-23T4; Agcy Dkt. Nos. CE-2022-005; CO-2022-168

Dear Mr. Orlando:

The New Jersey Public Employment Relations Commission (Commission or PERC) files this letter brief in opposition to the appeal of the Watchung Hills Regional High School District Board of Education (Board or Appellant) from PERC's final agency decision issued on October 26, 2023, P.E.R.C. No. 2024-12,

50 NJPER 226 (¶50 2023) (Pa215[1/]).

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1/ All citations to these record herein with the designation "Pa__" refer to the Appendix filed by the Board on February 26, 2024. See, R. 2:6-8.

PRELIMINARY STATEMENT

Pursuant to a legislative policy that seeks the prevention or prompt settlement of public-sector labor disputes, the Commission is charged with enforcing and implementing all the provisions of of New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq. In this matter, the Commission considered the meaning of the phrase, "[r]epresentatives designated or selected by public employees for the purposes of collective negotiation," in Section 5.3 of the Act. Broadly speaking, the Commission had to decide whether that phrase places any sort of upper limit on the size of the team that a duly-elected majority representative of public employees in an appropriate unit may bring to meetings wherein the majority representative and the public employer conduct negotiations over the terms and conditions of employment of unit members.

For the parties here, the Commission's final agency decision considered whether Section 5.3 bars the Association from engaging in a practice it defines as "open bargaining" through the use of "expanded teams" during contract negotiations. More particularly, the Commission considered whether the Act precludes from negotiation sessions the presence of the Association's "Bargaining Council." As it is open to all Association members, the Bargaining Council's presence during negotiations could result in very large groups in attendance.

In its comprehensive decision, the Commission acknowledged that the Association's use of its Bargaining Council in negotiations may be unusual, but found that neither the State Constitution nor the Act placed express limitations on the size of its negotiations team, which included only Association members, not members of the public, other unions, or non-participant employee groups.

The Commission fully considered the totality of the circumstances as reflected in the jointly-stipulated record presented (including evidence that the parties successfully settled their prior contract despite the Association's use of its Bargaining Council in those negotiations). The Commission's final decision neither endorses nor discourages "open" collective negotiations as defined by the Association, and is fully cognizant and mindful of the Board's legitimate concerns that large numbers in a negotiation session could become problematic. But the Commission found the Board's concerns had not yet materialized in a manner that would support a good faith refusal by the Board to negotiate in the Bargaining Council's presence.

The Commission applied its agency expertise in resolving this dispute (including through a detailed analysis of the relevant authorities), and reasonably found that the circumstances presented, although unusual, remain subject to well-established principles: that neither party may dictate or challenge the other's

choice of its negotiations representatives (including as to a specific number or identity of such representatives), absent evidence (not present here) of conflict of interest or ill-will, or evidence that a party's choice of representatives jeopardizes safety or security.

The Commission sensibly urged both parties to exercise discretion and good faith in implementing large team meetings, and pointedly cautioned the Association to remain open to reasonable restrictions on the deployment of its Bargaining Council in negotiations, as well as to ground rules that will reasonably maintain effective negotiations when large teams are present. The Commission further stressed that its decision would not prevent or preclude the Board from seeking recourse before PERC if the Association's continued use of its Bargaining Council in fact proves obstructive of good-faith negotiations. To date, no such issues have been presented, while the Board states that during the parties' current round of negotiations it has been complying with the Commission's Order.

In short (as more fully detailed, infra), the Commission's decision was a proper application of its agency expertise, is entitled to deference, and should be affirmed on appeal.

PROCEDURAL HISTORY

On January 14, 2022, the Board filed an unfair practice charge (PERC Dkt. No. CE-2022-005) against the Association. On February 9, 2022, the Association filed a cross-unfair practice charge (PERC Dkt. No. CO-2022-168) against the Board. Each party alleged the other's actions in connection with negotiations for a successor to their 2019-2022 collective negotiations agreement (CNA) violated the Act. The Board alleged the Association violated the Act by refusing to negotiate without the presence, as part of its negotiations team, of a "Bargaining Council" that was open to all Association members. The Association alleged the Board violated the Act by refusing to negotiate in the presence of the Bargaining Council.

The parties filed position statements and, on February 28, 2023, PERC's Deputy Director of Unfair Practices issued a Consolidated Complaint, finding that the allegations in the consolidated charges, if true, may constitute unfair practices. The parties then filed answers, affirmative defenses and exhibits. On June 15, 2023, the parties filed with PERC a Joint Stipulation of Facts (JSF) together with Joint Exhibits, and agreed to submit the matter to the full Commission for a final agency decision, waiving a hearing examiner's report and recommended decision.

After briefing by the parties, the Commission issued its final agency

decision on October 26, 2023, finding the Board violated sections 5.4a(5) and, derivatively, 5.4a(1) of the Act,[2/] when it refused to meet and negotiate with the Association in the presence of Bargaining Council members. The Commission ordered the Board to, among other things, negotiate in good faith with the Association over mandatorily negotiable subjects, including over negotiations ground rules respecting the presence of the Bargaining Council during negotiations sessions. The Commission dismissed the Board's charge against the Association. This appeal ensued.

STATEMENT OF MATERIAL FACTS

During the pendency of its appeal, the Board is complying with PERC's Order. (Board's Br. at 8, and 32, n.6.) Since the Commission issued its Order and to date, it has received no filings from the Board asserting any challenges in connection with the Association's use of its Bargaining Council during the parties' current negotiations, pertaining to good-faith allegations of conflict of interest or ill-will, breach of confidentiality, or concerns over safety and security.

2/ 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 . . . [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."

The following facts are derived from the stipulated record before the Commission, as thoroughly detailed in its final agency decision on appeal. The Board is a public employer within the meaning of the Act. (Pa219.) The Association, a local unit of the statewide New Jersey Education Association (NJEA), is the majority representative of the professional staff members employed by the Board. (Id.) The Association is composed of approximately 225 Board employees. (Id.)

Bargaining Council membership is open to all Association members.[3/] (Pa220.) Non-Association members are not able to join the group. (Id.) In negotiation sessions going forward, the Association does not seek to include on its Bargaining Council members of the public, other unions, or groups of employees who are not part of its designated negotiations team. (Pa240.)

The Bargaining Council was present at a negotiations session on at least one occasion during the parties' previous round of negotiations, for their 2019-2022 CNA. (Pa220, 237.) The number of individuals on the Bargaining Council during

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3/ The Association modeled its Bargaining Council on the NJEA's advocacy of the concept of "open bargaining" by "bringing the [local unit's] membership into the bargaining process" through the use of "expanded teams" during contract negotiations. (Pa223.) In the stipulated record, the Association is described as taking that concept to the "next level" through "full-on open bargaining: the entire membership is invited to attend bargaining sessions with the board and participate in the process." (Pa224.)

those negotiations ranged from "over 50" to "about 100." (Pa223.) Bargaining Council members were active participants in those negotiations, and were not just passive observers of that process. (Pa225.) Members of the public were not present during the parties' 2019-2022 negotiations. (Pa225-226, Pa240.) The Association agreed (in the 2019-2022 negotiations) to conduct a negotiations session without the presence of its Bargaining Council. (Pa220.) Neither party filed unfair practice charges during those negotiations, and the parties reached an agreed-upon settlement of their 2019-2022 contract under those conditions. (Id.)

Prior to the commencement of negotiations for a successor agreement to the 2019-2022 CNA, the Association notified the Board that it again sought to have the Bargaining Council present at negotiation sessions. (Pa221.) The Board again objected. (Id.) The Association certified it is willing to set ground rules pertaining to the maximum size of the Bargaining Council and the number of sessions it may attend in current negotiations. (Pa227.)

The Board refused to commence negotiations for the parties' successor agreement after receiving advance notice of the Association's intention to use its Bargaining Council in negotiations. (Pa221.)

The stipulated record contained no facts indicating the Board was (or is) unable to accommodate the presence of the Bargaining Council in a negotiation

session due to room size limitations or concerns regarding safety and security, or that Bargaining Council members demonstrated ill will or otherwise behaved disruptively during prior negotiations or will do so in current negotiations. (Pa238.) The stipulated record contained no evidence that confidentiality ground rules were broken during the 2019-2022 negotiations. (Id.)

LEGAL ARGUMENT

THE STANDARD OF REVIEW

The Commission has "broad authority and wide discretion in a highly specialized area of public life" and is entrusted with deciding cases based upon its "expertise and knowledge of circumstances and dynamics that are typical or unique to the realm of employer-employee relations in the public sector." Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 328 (1989). Judicial review in this context is narrow:

> The role of judicial review [concerning the reasonableness of a quasi-Legislative policy decision pursuant to duly-delegated authority] is thoroughly settled. The administrative determination will stand unless it is clearly demonstrated to be arbitrary or capricious. . . . Moreover, where, as here, a substantial element of agency expertise is implicated, due weight should be accorded thereto on judicial review. State v. Professional Ass'n of N.J. Dep't of Education, 64 N.J. 231, 258-59 (1974).
>
> [Hunterdon Cty., 116 N.J. at 329 (emphasis added).]

In other words, a party appealing a final decision of a state agency such as PERC must show that the decision is "arbitrary, capricious, or unreasonable, lacking fair support in the evidence, or violative of a legislative policy expressed or implicit in the governing statute." In re County of Atlantic, 445 N.J. Super. 1, 20-21 (App. Div. 2016), aff'd on other grounds, 230 N.J. 237 (2017). "'[T]he test is not whether [the reviewing court] would come to the same conclusion if the original determination was [its] to make, but rather whether the factfinder could reasonably so conclude upon the proofs.'" Brady v. Bd. of Review, 152 N.J. 197, 210 (1997) (quoting Charatan v. Bd. of Review, 200 N.J. Super. 74, 79 (App. Div. 1985)). "The burden of proving that an agency action is arbitrary, capricious, or unreasonable is on the challenger." Parsells v. Bd. of Educ. of Somerville, 472 N.J. Super. 369 (App Div. 2021), aff'd as modified, 254 N.J. 152 (2023).

Here, the Board bears the responsibility of demonstrating that the decision at issue was an arbitrary application of the agency's expertise, is not entitled to deference and should not be affirmed on appeal. It has not met that burden.

I. PERC's FINAL DECISION SHOULD BE AFFIRMED

As is self-evident, the final agency decision was well-reasoned, comprehensive and stands on its own. The Commission fully considered each party's arguments. 50 NJPER 226, 229-230 (¶50 2023)(Pa227-231). Using its

agency expertise, it then specifically acknowledged the "circumstances and dynamics" underlying the dispute at issue, and placed them in the proper context. In doing so, it also clearly defined the parameters of its decision, as well as its reasonable expectations regarding the parties' compliance with it, as follows:

> At the outset, we acknowledge that historically there has been a practical basis for parties not using larger negotiation teams for collective negotiations. The use of smaller teams may be more conducive to a process that often involves "numerous, informal exchanges of ideas and written data . . . during a series of negotiations sessions" in which "proposals and counter-proposals may be exchanged between the parties." Brielle Bd. of Ed., P.E.R.C. No. 77-72, 3 NJPER 310 (1977). We further acknowledge that in the conduct of public sector collective negotiations it is essential to strike a balance between transparency and effective negotiations.
>
> With that said, we also stress that our decision today is not intended to endorse or discourage "open" collective negotiations, as defined by the Association. But, as further discussed infra, we find that its practice, when carried out in accordance with good faith and within the boundaries of the Act, is not inherently an unfair practice. However, the parties are cautioned to exercise discretion and good faith in implementing large team meetings, ensuring it does not compromise the effectiveness of the process, and does not otherwise obstruct the process or infringe upon the parties' rights under the Act.
>
> [50 NJPER 226, 230 (¶50 2023)(Pa231-231).]

On appeal, the Board does not show that PERC's decision is arbitrary, capricious,

or unreasonable, lacking fair support in the evidence, or violative of a legislative policy expressed or implicit in the governing statute. The Board largely repeats the same substantive arguments made to and addressed by the Commission in its final agency decision. As such, the Board has not met its burden on appeal, and its appeal must be dismissed.

a. THE COMMISSION PROPERLY REJECTED THE BOARD'S "PLAIN LANGUAGE" INTERPRETATION OF THE ACT

On appeal, the Board repeats its argument that the Act's "plain language" requires that the "entire Association cannot be a representative of itself." (Board's Br., Point I(A).) The Commission comprehensively addressed that argument. First, it recognized the applicable constitutional and statutory framework governing the parties' dispute:

> The New Jersey Constitution at Article 1, Para. 19 guarantees public employees the right to present proposals to their employers and make known their grievances "through representatives of their own choosing." Section 5.3 of the Act implemented this constitutional provision "through the use of majority representatives selected by the employees in an appropriate unit."
>
> [50 NJPER 226, 230 (¶50 2023) (Pa232).]

In extensive further discussion, the Commission next detailed the following well-established principles derived from the above-quoted constitutional and statutory

rights, as developed in controlling court and Commission precedent:

> [N]either party may dictate or challenge the other's choice of its negotiations representatives (including as to a specific number or identity of such representatives), absent evidence of conflict of interest or ill-will, or evidence that a party's choice of representatives jeopardizes safety or security.
>
> [50 NJPER 226, 231 (¶50 2023) (Pa236).]

The Commission then applied those principles to the stipulated record presented, reasoning as follows:

> The Association's use of its Bargaining Council in negotiations may be unusual or atypical. But neither our Constitution nor our Act place express limitations on the size of a party's collective negotiations team.
>
> . . .
>
> We . . . reject the Board's argument that the exclusivity principle set forth in section 5.3 of the Act somehow prohibits the Association's use of the Bargaining Council. Section 5.3 provides, "Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit . . . shall be the exclusive representatives for collective negotiation," and "shall be entitled to act for and to negotiate agreements covering all employees in the unit." N.J.S.A. 34:13A-5.3.
>
> There is no indication here that the designation of the Bargaining Council as part of the Association's team was or is unsupported by a majority of employees in that unit. Nor do any facts suggest that the size of the Association's negotiations team (or its potential size), standing alone, renders it unable "to act for and to negotiate agreements covering all employees in the unit."

> Id.
>
> [50 NJPER 226, 232 (¶50 2023)(footnote omitted) (Pa237, 240-231).]

On appeal, the Board does not address or show that the reasoning and conclusions of the Commission were arbitrary, capricious or unreasonable. Instead, the Board largely repeats the same arguments it made below, and otherwise cites additional authority that is inapposite or not controlling.

Contrary to the Board, the New Jersey Supreme Court's interpretation of the word "designate" as used in N.J.S.A. 18A:16-1.1 (in a dispute over that education statute's notice provisions as applied to a teacher's tenure eligibility[4/]), does not control the interpretation of the word "designated" in Section 5.3 of the Act, as applied to representatives chosen by public employees for the purposes of collective negotiation by a majority of employees in a unit. This is made plain by the Supreme Court's decision directly construing Section 5.3 in a case cited by the Commission in its final agency decision, Lullo v. International Ass'n. of Fire Fighters, 55 N.J. 409 (1970). There, the Court stated:

> [Section 5.3] of the Act provides that the representative duly elected by a majority of the public employees in an appropriate unit shall be the exclusive representative of

---

4/ Bridgewater-Raritan Educ. Ass'n v. Board of Educ. of Bridgewater-Raritan School Dist., 221 N.J. 349 (2015) (Board's Br. at 13).

> all employees in the unit . . . [and] authorizes such representative and the employer in the appropriate unit involved to engage in collective negotiations concerning the terms and conditions of their employment.
>
> [55 N.J. at 412 (emphases added).]

It is clear from the above that with regard to "[r]epresentatives designated or selected by public employees for the purposes of collective negotiation" as stated in Section 5.3, the "plain meaning" of that phrase is representatives who are "duly elected" by a majority of the employees in a unit. The Commission's analysis in this case, quoted supra, is fully consistent with the Lullo court's controlling interpretation, in that the Association is such a "duly elected" representative authorized "to act for and to negotiate agreements covering all employees in the unit," including through the use of large teams in negotiations sessions. Further, it is hard to see how the Association's designation of its Bargaining Council as part of its negotiations team is even in conflict with the Board's proffered definition of "designate," that is, "to indicate or specify." Again, the Board has not met its burden on appeal, and its appeal must be dismissed.

b. THE BOARD'S SPECULATION ABOUT "ABSURD RESULTS" DOES NOT STATE GROUNDS TO DISTURB PERC's DECISION

The Board does not satisfy its burden on appeal by repeating its speculative argument about "absurd results" that have not yet materialized. (Board's Br.,

Point I(B).) The Commission fully acknowledged and comprehensively addressed such concerns in its final agency decision, as follows:

> The facts in the instant matter involve a significantly larger number of employee representatives than was the case in the Belmont decisions. The joint documentary record indicates that during the parties' 2019-2022 negotiations, the number of individuals on the Bargaining Council ranged from "over 50" to "about 100." (Joint Exhibit I, NJEA article; Joint Exhibit H, B.R. Cert.) The potential also exists for a negotiation session to include up to several hundred individuals on the Bargaining Council, as participation is open to all Association members.
>
> We do not underestimate the possibility that such large numbers of people in a negotiation session could become problematic, both as a practical matter (in terms of accommodations as well as safety and security), and in the event the group becomes disruptive, otherwise demonstrates ill will or fails to observe confidentiality ground rules. But we find that those issues have not yet materialized in a manner that would support a good faith refusal to negotiate on the part of the Board, based on the stipulated record before us. Our decision today is limited to that record.
>
> Significantly, we note the Association's demonstrated willingness (in the last round of negotiations) to negotiate without the presence of its Bargaining Council if necessary, and its certified willingness to set ground rules pertaining to the maximum size of the Bargaining Council and the number of sessions it may attend in current negotiations. We caution that the Association should continue to remain open to reasonable restrictions on the deployment of its Bargaining Council in negotiations, as well as to ground rules that will

> reasonably maintain effective negotiations when large negotiations teams are present.
>
> Our decision also does not preclude the Board, going forward, from asserting any good faith challenges during the parties' negotiations if actual evidence arises of conflict of interest or ill-will, breach of confidentiality, or concerns over safety and security in connection with the Association's use of its Bargaining Council.
>
> [50 NJPER 226, 232 (¶50 2023) (Pa242-244).]

As noted supra, during the pendency of this appeal the Board has represented that it is complying with PERC's Order in current negotiations, and to date PERC has received no challenges from the Board arising from same. The decision on appeal, as noted therein, would not prevent or preclude the Board from seeking recourse before PERC should any such issues arise in fact.

c. THE BARGAINING COUNCIL ARE NOT PASSIVE OBSERVERS; THE NEGOTIATIONS AT ISSUE ARE NOT CONDUCTED IN OPEN PUBLIC SESSION

In Point I(C) of its brief, the Board again regurgitates arguments that were throughly addressed and properly dismissed by the Commission in its final agency decision. Once again, the Board does not explain how or why the following detailed findings and analysis of the Commission were arbitrary, capricious or unreasonable:

> There is . . . no evidence suggesting Bargaining Council members are mere passive observers of the negotiations

process, as opposed to active participants in it. The parties' joint exhibits include Association certifications as to the Bargaining Councils' role in the process, including that it was "able to research and analyze any Board offers or arguments presented during the face-to-face sessions and provide written responses for the Negotiators to consider while still at the table," and the Association's full team was able to complete its caucusing faster because Bargaining Council members "were already fully informed . . . at the bargaining table." (Joint Exhibit H, M.G. Cert., ¶¶ 12-13.) The record contains no certified facts submitted by the Board refuting these assertions.

Thus, we are unpersuaded by the Board's reliance on decisions wherein the presence of union members in negotiation sessions was challenged based upon their status as passive observers who, unlike the Association's Bargaining Council, were not designated by the union as part of its negotiations team and took no part in negotiations.

Likewise, while we find the cases involving the exclusion of members of the public from negotiation sessions, including Brielle, supra, to be instructive, they are not wholly applicable to the instant facts. In Brielle, the Commission found that a school board's refusal to collectively negotiate except during open public session was inconsistent with its duty to negotiate in good faith. The Commission expressed a concern that the concept of "exclusivity of representation" could be compromised by open public negotiations because the public could include rank and file unit members and leaders of minority organizations. Here the Association has expressly designated its Bargaining Council as part of its negotiations team, and limited access to Association members. The only evidence in the record that members of the public were present during the parties' 2019-2022

> negotiations indicates it was at the Board's invitation, and was short-lived as the Association objected to it. (Joint Exhibit H, M.G. Cert., ¶¶ 8-10; Joint Exhibit I, NJEA article.) It is also clear from the record that in negotiation sessions, going forward, the Association does not seek to include members of the public, other unions or groups of employees who are not part of its designated negotiations team.
>
> [50 NJPER 226, 232 (¶50 2023) (Pa238-240).]

The Commission stands by its above analysis and conclusions while, again, the Board has not stated grounds to disturb them.

II. PERC DID NOT EXCEED ITS AUTHORITY IN ORDERING NEGOTIATIONS OVER GROUND RULES

The Board's arguments in Point II of its brief lack merit. It is true that in Brielle, supra, the Commission held that the issue of whether to conduct negotiations in open public session is a permissive subject of negotiations, and that neither party can insist upon same as a precondition to negotiations. However, the Commission found the instant dispute does not implicate collective negotiations that take place in open public session. (See Point IV of this Brief, supra.) Thus, the Board's argument in Point II of its brief is based in part on a false premise: that PERC's Order (directing the Board to negotiate in good faith with the Association over mandatorily negotiable subjects, including over negotiations ground rules respecting the presence of the Bargaining Council

during negotiations sessions) compels it to negotiate over a permissive, as opposed to a mandatory, subject of negotiations. This is simply not the case.

The Commission has held that parties have "a mutual obligation to seek agreement on [negotiations] ground rules." Phillipsburg Bd. of Ed., P.E.R.C. No. 83-34, 8 NJPER 569 (¶13262 1982), recon. den. P.E.R.C. No. 83-67, 9 NJPER 23 (¶14011 1982). PERC's Order specifically directs the Board to negotiate over ground rules pertaining to the Bargaining Council, in light of the Association's certified willingness to discuss "a ground rule to limit how many members of the Bargaining Council could attend a negotiations session or limit how many sessions the Bargaining Council could attend." 50 NJPER 226, 229 (¶50 2023) (Pa227). PERC's Order does not dictate the terms or outcome of those negotiations.

The Board next argues that PERC could or should have ordered the parties to declare an impasse and request the appointment of a PERC mediator if they could not agree on a ground rule. The Commission notes that the Board did not raise this issue below. Issues not raised below will ordinarily not be considered on appeal unless they are jurisdictional in nature or substantially implicate public interest, and neither exception applies here. See, e.g., State v. Vincenty, 237 N.J. 122, 135 (2019); County of Essex v. First Union, 186 N.J. 46, 51 (2006); Brock v. Public Service Electric & Gas Co., 149 N.J. 378, 391 (1997).

Regardless, even if the Board had properly raised this issue to the Commission, it would not change the result. First, the Commission cannot compel parties to declare an impasse. That must be done by the parties, either individually or jointly. N.J.A.C. 19:12-3.1(a). Second, in Phillipsburg Bd. of Ed., supra, the Commission held that "a party may not insist until impasse on a particular ground rule for substantive contract negotiations." In denying reconsideration of that decision, the Commission further held that a party's "insistence until impasse on . . . a [ground rule] proposal would warrant finding a per se violation" of the Act's requirement that parties negotiate in good faith. Id. In other words, doing so is an unfair labor practice unsuitable for resolution through impasse proceedings.

Here, the Board's argument presupposes that, prior to substantive negotiations over a successor to the parties' 2019-2022 CNA, each party's insistence on conflicting ground rules (pertaining to the Bargaining Council) resulted in impasse. But if, under Phillipsburg, parties may not do that without violating the Act, it is questionable whether PERC could have reasonably ordered (or condoned) such a result. In any case, the proper forum for deciding alleged violations of a party's duty to negotiate in good faith is an unfair practice proceeding, as occurred here. As such, the Board's newly-raised contention is devoid of merit.

III. PERC PROPERLY DISMISSED THE BOARD's CHARGE AGAINST THE ASSOCIATION, AND SUSTAINED THE ASSOCIATION's CHARGE AGAINST THE BOARD

In Points III and IV of the Board's brief, it again repeats the same arguments it made to the Commission as to which party violated the Act. The Board's contention that the Association did so is again premised on its legal arguments, properly rejected by the Commission, that: section 5.3 of the Act somehow prohibits the Association's designation of the Bargaining Council as part of its negotiations team. It does not. (See Point II of this Brief, supra.); and that the Association "demanded open bargaining with member-observers present." It did not. (See Point IV of this Brief, supra.)

The Board's argument that it did not violate the Act is also premised on its belief, properly rejected by the Commission, that "rank-and-file [Association] members did not have a legal entitlement to attend negotiations sessions." (Board's Br. at 32.) That belief might be justified if Bargaining Council members were not expressly designated in advance by the Association as part of its negotiating team, or if they did not actively participate in the negotiations process. Again, based on its detailed review of the stipulated record, and its application of controlling law to that record, the Commission found to the contrary. On appeal,

the Board has not demonstrated that the Commission's decision was arbitrary, capricious, unreasonable, or contrary to law.

CONCLUSION

For the foregoing reasons, the Commission's decision should be affirmed.

Respectfully submitted,

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BRIEF ON BEHALF OF APPELLANT WATCHUNG HILLS REGIONAL BOARD OF EDUCATION

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PRELIMINARY STATEMENT

Respondent Watchung Hills Regional Education Association ("WHREA" or "Association") submits this brief in opposition to Appellant Watchung Hills Board of Education's ("Board") appeal, and in support of the New Jersey Public Employment Relations Commission's ("PERC") October 26, 2023 Decision in the consolidated docket matters of CE-2022-005 and CO-2022-168. The instant appeal arises from PERC's holding that the Board's refusal to meet with the WHREA's choice of negotiation representatives violated the New Jersey Employer-Employee Relations Act ("NJEERA"). The Board refused to negotiate with the WHREA on a successor collectively negotiated agreement ("CNA") unless the WHREA first agreed to a ground rule to bar the WHREA's Bargaining Council members from attending and participating in negotiations sessions. The Board insisted on this position despite the WHREA repeatedly informing the Board in writing that the Bargaining Council was part of the WHREA's negotiations team.

In reaching its determination, PERC, as the expert authority on the NJEERA, carefully studied the Act to strike a balance between a majority representative's right to determine the composition of its negotiations team and the NJEERA's aim to promote good faith negotiations between the parties. PERC accomplished this goal by reasonably concluding that an employer can contest in good faith the size of a labor organization's negotiations team, but only when the

employer can show evidence that the size of the team actually undermines of good faith negotiations due to a conflict of interest or ill-will, breach of confidentiality, or by causing a safety and security risk. Because the Board here did not present any evidence that the Bargaining Council's presence had previously or would in the future interfere in the collective negotiations between the Board and WHREA, PERC correctly held that the Board's refusal to negotiate with the WHREA's choice of negotiations representatives violated the NJEERA.

In reviewing this appeal, the Appellate Division must consider certain incontrovertible facts. One is that the WHREA identified its Bargaining Council as part of its negotiations team. Another is that the WHREA never sought to open the negotiations sessions to the general public or to anyone outside of the interested parties. Third, the Board could not point to any evidence during the prior round of negotiations or for the upcoming negotiations to suggest that the Bargaining Council would actually interfere with the bargaining process. Instead, the Board's submission relies upon inaccurate narratives and conjecture which PERC had already considered and rejected. Accordingly, the Appellate Division must conclude that the Board is unable to meet its significant burden to support reversing PERC's decision below.

PROCEDURAL HISTORY

On January 14, 2022, the Board filed unfair practice charges against the WHREA, claiming that the WHREA violated the NJEERA by insisting on having the Bargaining Council members of its negotiations team attend and participate in the negotiation sessions for the successor to the 2019-2022 CNA. Despite the fact that the WHREA had already repeatedly stated to the Board that the Bargaining Council was part of its negotiations team, the Board in the unfair practice charges inaccurately referred to the WHREA's Bargaining Council as "separate and apart from the Association's Negotiations Committee". (Pa001-Pa002). On February 9, 2022, the WHREA filed cross-unfair practice charges against the Board. The charges explained how the Board was refusing to meet with the WHREA's preferred composition for its negotiations team, instead insisting on ground rules to limit the size of the WHREA's negotiations team before it would move forward with any substantive negotiations. (Pa003-Pa009).

Both parties submitted position statements to PERC in support of their filings and in opposition to the other party's unfair practice charges. (Pa017-Pa035); (Pa092-Pa196, Pa199-Pa213). PERC proceeded to issue a Complaint and Notice of Pre-Hearing for both sets of charges, consolidating them into a single action. (Pa049-Pa065). After issuance of the complaints, the Board and WHREA each submitted its "Answer and Affirmative Defenses" on March 13, 2023.

(Pa010-Pa015); (Pa044-Pa048). On June 15, 2023, the Parties presented a "Joint Stipulation of Facts" with exhibits attached for PERC to rely upon for the subsequent motions for summary decision. (Pa001-Pa009; Pa017-Pa035; Pa049-Pa213). As the Parties agreed to forgo an evidentiary hearing, on July 21, 2023, the Parties each submitted briefs in support of their unfair practice charges.

On October 26, 2023, PERC issued the Decision and Order. PERC held that the Board violated N.J.S.A. 34:13A-5.4(a)(1) and –(a)(5) by its refusal to meet with the WHREA in the presence of the WHREA's Bargaining Council members. PERC also dismissed the Board's unfair practice charges against the WHREA. Accordingly, PERC ordered the Board to cease and desist from refusing to negotiate in good faith with the WHREA. (Pa215-Pa246).

On December 21, 2023, the Board filed an Amended Notice of Appeal with the Appellate Division to contest PERC's Decision and Order. (Pa247-Pa250). Notwithstanding the Board's appeal of PERC's determination, the Parties have been negotiating on a successor CNA. The WHREA's Bargaining Council has participated as part of the WHREA's negotiations team during the negotiated sessions without reported issues.

STATEMENT OF MATERIAL FACTS

Background on collective negotiations and the bargaining council.

The WHREA represents *inter alia* the Board's professional staff members, which has been approximately 225 employees over the past several years. (Pa066). Job titles covered by the WHREA include teachers, secretaries, paraprofessionals, bus drivers, nurses, security personnel, child study team members, counselors, and buildings, ground and maintenance staff. (Pa066). The most recently expired CNA between the Board and Association was in effect from July 1, 2019 through June 30, 2022 (hereinafter "2019-2022 CNA"). (Pa066).

The WHREA began utilizing a "Bargaining Council" during the negotiations for the 2019-2022 CNA. Any WHREA member is eligible to join the Bargaining Council. However, non-WHREA members are ineligible to join the Bargaining Council. (Pa066). The WHREA's Bargaining Council participated in at least one of the bargaining sessions resulting in the 2019-2022 CNA. Subsequently, representatives from the Board and WHREA agreed to meet in a smaller setting. (Pa067). Before the smaller-scale meeting, the Board and WHREA agreed to pull back all proposals aside from salary and health benefits. The Parties also agreed to exclude legal representatives from this particular meeting. (Pa067). Ultimately, the WHREA and Board executed the 2019-2022 CNA in or around Fall 2019. (Pa067).

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The WHREA has consistently stated that, consistent with its bylaws, its Bargaining Council is part of the WHREA's negotiations team. There are two parts to the WHREA's negotiations team: those individuals who are directly across from the Board at bargaining sessions ("Negotiators") and the Bargaining Council. (Pa153-Pa154, Pa169-Pa170). Any member of the Bargaining Council has the same rights as any other member of the WHREA's negotiations team, including the WHREA's lead negotiators. These rights include the right to vote on any matter before the WHREA's negotiations team, the ability to address offers from the Board and to propose contractual language. (Pa066). Although Bargaining Council members do not talk directly with the Board at the bargaining sessions, these members are still actively involved during these sessions. For example, they research and analyze Board offers and arguments presented during face-to-face sessions and provide written responses for the Negotiators to state to the Board. (Pa155).

Initial Association attempts to schedule bargaining sessions on successor CNA.

In or about October 2021, the Parties first contacted each other to discuss scheduling negotiations sessions for a successor to the 2019-2022 CNA. In the two years after the ratification of the 2019-2022 CNA, the Parties had not discussed the scope of the WHREA Bargaining Council's involvement in future CNA

negotiations. (Pa067). The Parties tentatively scheduled the first negotiations session for November 10, 2021. (Pa067).

On or around October 28, 2021, WHREA negotiations chair Michael Gangluff informed then-Board negotiations chair Peter Fallon that the WHREA again sought the Bargaining Council's involvement at the negotiations sessions. (Pa067). As documented in an October 28, 2021 Board email, the Association suggested reserving a room which could hold the Bargaining Council members. (Pa074-Pa075). Fallon, though, objected to the Bargaining Council's presence at the negotiations sessions. (Pa067). Upon receipt of this objection, Gangluff explained in an October 29, 2021 email:

> Regarding the Bargaining Council, they are a part of our Negotiations Committee. All WHREA members have a right to attend the meetings as part of this council.

(Pa074). In response to Fallon's reply that the Board felt that the Bargaining Council's presence was meant to intimidate the Board members, Gangluff emailed back that the Bargaining Council's purpose was not meant to intimidate the Board. Rather, Gangluff pointed to the WHREA's successful use of the Bargaining Council during the negotiations for the 2019-2022 CNA. (Pa073-Pa074).

On November 9, 2021, Fallon presented a proposed ground rule on behalf of the Board in which the Board proposed prohibiting the Bargaining Council from participating in the upcoming negotiation sessions. (Pa067); (Pa079). In response,

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Gangluff reiterated the WHREA's position that its Bargaining Council was part of the WHREA's negotiation team. Gangluff added that the WHREA had reserved the South Auditorium for the scheduled negotiation session, a room which could hold the Bargaining Council. (Pa079). Fallon replied that the Board believed that the Bargaining Council's presence would frustrate the bargaining process. Gangluff then retorted that the WHREA disagreed since the Parties had been able to negotiate the 2019-2022 CNA with the Bargaining Council's involvement. (Pa078). Because the Parties could not agree on whether to allow the Association's Bargaining Council members to attend the scheduled meeting, the Parties postponed the scheduled November 10, 2021 negotiations session to allow them to further discuss the Bargaining Council. (Pa068).

<u>December 9, 2021 negotiations session and filing of unfair practice charges.</u>

In late-November 2021, the Parties resumed efforts to schedule negotiations sessions. Fallon emailed Gangluff that he had presented the WHREA's position regarding the Bargaining Council to the rest of the Board, but that the Board was still requesting the ground rule to exclude the WHREA's Bargaining Council members from negotiations sessions. When he proposed a negotiations session for December 8, 2021, Fallon demanded that the WHREA agree to exclude its Bargaining Council from this meeting. (Pa084-Pa085). The WHREA replied that it

was not going to agree to a ground rule before the first negotiations session. Fallon answered that the Board attorney would be filing unfair practice charges. (Pa083-Pa084). In response to the threat, the WHREA agreed, for this meeting only, to move forward with a meeting on December 8, 2021, without the presence of its Bargaining Council. The purpose of the meeting was to discuss ground rules, including the role of the Bargaining Council. (Pa068); (Pa082-Pa083).

At the December 8, 2021 meeting, the Board maintained its stance that it would not allow the WHREA's Bargaining Council to participate in negotiation sessions. The WHREA countered that it had the right to include its Bargaining Council members during the negotiation sessions. The Parties exchanged proposals about the Bargaining Council's role during negotiations but were unable to reach an agreement on the issue. (Pa068). The Parties, though, did agree at the time to exchange proposals for a successor contract by the end of January 2022. (Pa068).

On or around January 14, 2022, the Board filed its Unfair Practice Charges against the WHREA. (Pa068). The Board notified the WHREA of these charges via the Board attorney contacting the NJEA UniServ Field Representative for the WHREA at the time, Brian Rock, and Fallon emailing the WHREA on January 15, 2022. (Ra002-Ra003). The WHREA responded to the news by reiterating that it was still interested in reaching a compromise with the Board regarding the

Bargaining Council. (Ra001-Ra002). The Board filed these charges about two weeks before the Parties exchanged their initial contract proposals. (Pa068).

PERC Decision – legal analysis

PERC began its decision with a procedural summary and review of the Parties' joint stipulations and joint exhibits. (Pa216-Pa227). In reviewing the joint exhibits, PERC addressed an NJEA article describing the value of its bargaining units engaging on what it referred to as "open bargaining".[1] (Pa223-Pa225). PERC also quoted from a certification from WHREA negotiations chair Michael Gangluff concerning the WHREA's use of the Bargaining Council. (Pa225-Pa227). PERC then summarized the Parties' legal arguments. (Pa227-Pa231).

PERC then acknowledged that negotiating parties have historically avoided larger negotiations team. PERC continued by clarifying that this decision was neither an endorsement nor discouragement of "open" collective negotiations. Rather, PERC explained that the issue before it was whether this concept was

[1] The NJEA article's use of the term "open bargaining" differs from how Respondent currently uses the term. The article's use of the term concerns the practice of opening up negotiations to the full bargaining unit. Another way to describe this practice is "team bargaining". The term "open bargaining" as Respondent uses it in the instant submission and as we understand PERC using it in the decision concerns the concept of allowing the public to attend bargaining sessions. As we will address in greater detail *infra*, this appeal does not touch upon whether either side can insist on allowing the public into bargaining sessions.

consistent with the requirement for the sides to negotiate in good faith within the boundaries of the NJEERA. (Pa231-232).

PERC continued by highlighting that Section 5.3 of the NJEERA details the right for public employees to negotiate with employers "though representatives of their choosing", through the use of majority representatives. (Pa232). PERC elaborated on this right under Section 5.3:

> "Application of the majority rule concept," our Supreme Court has held, "brings the collective strength of all the employees in the unit to the negotiating table and thus enhances the chances of effectuating their community purposes and serving the welfare of the Group." Lullo v. International Ass'n of Fire Fighters, 55 N.J. 409, 426-427 (1970).

(Pa233). PERC explained that with few exceptions, an employer cannot lawfully attempt to dictate the composition of a union's negotiations team. (Pa234). PERC elaborated that these limited instances first require an employer to demonstrate that the opposing union's negotiation team is causing a conflict of interest, "persuasive evidence" of ill will from the designated negotiators, or concerns about safety or security. (Pa235).

PERC Decision – Application of analysis

PERC application of the law to the instant matter began with an acknowledgement that whereas the WHREA's use of the Bargaining Council may be unusual, neither the State Constitution nor the NJEERA restricted the

WHREA's ability to determine the size of its negotiations team. (Pa237). PERC then recognized that the Board did not present any evidence that the Bargaining Council's involvement at negotiations had caused or would cause any conflict of interest, ill-will, safety or security concerns. (Pa238). PERC continued, noting that the WHREA's Bargaining Council members were not mere passive observers to the negotiations process. Rather, their research and analysis of Board proposals during face-to-face negotiations and the ability to provide written responses to the WHREA's lead negotiators showed that the Bargaining Council members were active participants of the negotiation sessions. (Pa238-Pa239).

In finding that the WHREA's inclusion of the Bargaining Council as part of its negotiations team was N.J.S.A. 34:13A-5.3, PERC adopted the Massachusetts Commonwealth Employment Relations Board's ("CERB") analysis from I/M/O Belmont School Committee, 2019 WL 3072695 (MA LRC) (hereinafter "Belmont I") and I/M/O Belmont School Committee, 2021 WL 6883936 (MA LRC) (hereinafter "Belmont II"). PERC explained that this situation was similar to Belmont II in that the union in both situations had given the board of education notice before the scheduled meetings that its negotiations team would have both "speaking representatives" and "silent representatives" who would though still be actively involved in the negotiations. Accordingly, PERC here, much like CERB in

Belmont II, concluded that the Board's refusal to negotiate before the WHREA's Bargaining Council was inappropriate. (Pa241-Pa242).

In rejecting the Board's "exclusivity" interpretation of Section 5.3 of the NJEERA, PERC reasoned that the Board had not presented any evidence that the Bargaining Council's involvement at negotiations sessions was unsupported by a majority of the WHREA members. Additionally, PERC did not have any facts to suggest that the WHREA maintaining a large negotiations team would interfere with its ability "to act for and to negotiate agreement covering all employees in the unit." (Pa240-Pa241)(citing N.J.S.A. 34:13A:5-3).

PERC completed its analysis of this case by addressing the Board's stated concerns about how it could interfere with the bargaining process. PERC noted that the WHREA including potentially hundreds of people on its team could become disruptive. However, PERC explained that these issues had not actually happened during the prior round of bargaining, and that the WHREA had shown a willingness to use discretion on the Bargaining Council's involvement at negotiations sessions. PERC also kept the door open for future actions by the Board against the WHREA by explaining that if the Board believed that the Bargaining Council was interfering with the negotiations process, the Board could make good faith demands to limit the use or exclude the Bargaining Council. But absent any evidence here of a conflict of interest, ill will, breach of confidentiality,

or concerns about safety and security stemming from the Bargaining Council's presence, PERC held that the Board's refusal to meet with the WHREA in the presence of the WHREA's Bargaining Council violated N.J.S.A. 34:13A-5.4(a)(1) and (a)(5). (Pa244-Pa245).

LEGAL ARGUMENT:

THE APPELLATE DIVISION MUST UPHOLD PERC'S DECISION IN FULL (Pa215-Pa247)

A. STANDARD OF REVIEW OF FINAL ADMINISTRATIVE AGENCY DECISION

The New Jersey Appellate Division's standard of review for an administrative agency's final decision is limited. In re Carter, 191 N.J. 474, 482 (2007). In conducting the limited review, appellate courts consider:

> (1) Whether the agency's action violates express or implied legislative policies, that is did the agency follow the law;
>
> (2) Whether the record contains substantial evidence to support the findings of which the agency based its action; and
>
> (3) Whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995).

When reviewing administrative agency decisions, there is a strong presumption of reasonableness to the agency's exercise of its statutorily delegated duties. City of Newark v. Natural Resource Council in Dept. of Environmental Protection, 82 N.J. 530, 539 (1980). The grounds for reversing an administrative agency decision are limited:

> A court may reverse only if it "conclude[s] that the decision of the administrative agency is arbitrary, capricious, or unreasonable, or is

> not supported by substantial credible evidence in the record as a whole."

In re Adoption of Amendments to Water Quality Management Plans, 435 N.J. Super. 571, 582 (App. Div. 2014), cert. denied, 219 N.J. 627 (2014) (quoting J.D. v. N.J. Div. of Developmental Disabilities, 329 N.J. Super. 516, 521 (App. Div. 2000)). A court cannot vacate an agency determination if it merely doubts the agency's decision or because the record may support more than one result. Id. at 583. This deferential standard has been applied to PERC decisions. See e.g. Township of Franklin v. Franklin Tp. PBA Local 154, 424 N.J. Super. 369, 377-378 (App. Div. 2012). Further, in reviewing the instant decision, the appellate courts must recognize PERC's expertise in the area of employer-employee relations in the public sector. Hunterdon Cty. Freeholder Bd. and CWA, 116 N.J. 322, 328 (1989). When the subject matter of the appeal implicates PERC's expertise, the appellate courts on judicial review must give due weight to the administrative agency's determination. Id. at 329

Here, the Board merely showing the possibility that this Appellate Division could have reached a different result is insufficient grounds for reversal of PERC's decision. Rather, the Board must demonstrate that PERC's decision was arbitrary, capricious, or unreasonable, or that it was not supported by substantial credible evidence in the record as a whole. The Board here has not and cannot reach this stringent threshold. Accordingly, this Court must deny the Board's appeal.

B. PERC CORRECTLY REJECTED THE BOARD'S CLAIM THAT THE WHREA FAILED TO IDENTIFY "DESIGNATED REPRESENTATIVES" AS DEFINED UNDER THE NJEERA. (Pa227-Pa228; Pa240-Pa243).

Both before PERC and in the instant appeal, the Board has tried to assert a new definition of "designated representatives" under the NJEERA. The Board's argument is based upon its interpretation of N.J.S.A. 34:13A-5.3, which reads in relevant part:

> Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit...shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit...
>
> A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership...In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.

The plain language of the statute reads that public employees have the right to select a majority representative to negotiate with a public employer over the terms and conditions of employment. PERC has in fact long interpreted the NJEERA to permit the parties to a negotiation to choose their own negotiations representatives without interference from the other side. (Pa233-Pa235). The

Board, however, has twisted this plain language to instead claim that this language limits which members of a majority representative can participate in collective bargaining.

PERC's decision below expertly explained why the Board's interpretation of "designated representatives" is incorrect. (Pa232-Pa233). In the instant appeal, PERC again explained how the WHREA's actions were consistent with the NJEERA. (Rb8-Rb11).[2] The WHREA supports and adopts PERC's arguments and wishes to further explain why PERC's decision was not arbitrary, capricious or unreasonable.

Even though the Board tries to portray the case differently, I/M/O Brielle Board of Education and Brielle Education Association, 3 NJPER ¶ 323 (1977) considers the significance of "designated representatives" under N.J.S.A. 34:13A-5.3 which is consistent with PERC's decision. In that case, PERC confirmed the union's right to choose its bargaining representatives but rejected the employer's attempt to open up the bargaining sessions to the general public. PERC explained why that board of education's attempt to open up the sessions to third parties, including potentially minority organizations or other groups attempting to speak on behalf the union's members violated the NJEERA:

> The Act's declaration of policy declares that the public policy of this State is to promote the prompt settlement of public sector labor

[2] "Rb" refers to PERC's Appellate Division brief, dated April 2, 2024.

> disputes in the interests of the people of this State through the provisions of the Act. However, the declaration of policy specifically recognizes that the people of this State are not direct parties to such disputes (*N.J.S.A.* 34:13A-2). In companion provisions the Act imposes a reciprocal duty on public employees in appropriate units to meet at reasonable times and to negotiate with respect to grievances and terms and conditions of employment (*N.J.S.A.* 34:13A-5.3). It should be noted that the right of negotiations attaches only to the majority representative and that public employers are prohibited from negotiating terms and conditions of employment or processing grievances presented by a minority employee organization, when there is a majority representative. (*N.J.S.A.* 34:13A-5.3).
>
> The Act's concept of exclusivity of representation has been held by the Supreme Court of this State to be analogous to the similar provisions of the National Labor Relations Act. Commenting upon this concept, the Court found it to be at the very core of our national labor relations policy and ruled that its inclusion in the Act was a valid legislative vehicle to discourage rivalries among individual employees and employee groups and to avoid the diffusion of negotiating strength which results from multiple representation.

Id. at 311. PERC found in Brielle Bd. of Ed. that it was the majority organization who enjoyed the exclusivity of representation, and that N.J.S.A. 34:13A-5.3 was meant to block outside groups from trying to speak on behalf the majority organization's members.

Applying Brielle Bd. of Ed. to the instant situation, because all Bargaining Council members were also members of the WHREA, the WHREA remains the sole representative of the Board's professional staff members. There is no danger of opening the bargaining sessions to the public or to minority representatives, as was the concern in Brielle.

In the instant case, PERC rejected the Board's interpretation of Brielle Bd. of Ed., 3 NJPER ¶ 310 (1977). Instead, PERC pointed here to the WHREA's requirement for Bargaining Council members to also be members of the WHREA. In comparison, PERC noted how the board of education in Brielle Bd. of Ed. had insisted to negotiate only in open public sessions. PERC explained how that demand in Brielle Bd. of Ed. would have interfered with the union's exclusivity rights under the NJEERA because it could have allowed outside groups, including minority organizations, to interfere in the bargaining process. In comparison, because the negotiations here would still be closed to the public even with the Bargaining Council members' participation, there was no risk to the WHREA "exclusivity of representation" of its membership. Also significantly, PERC noted that the only instance on record of either of the Parties trying to negotiate before the public was actually attempted by the Board during the negotiations for the 2019-2022 CNA. (Pa239-Pa240).

The Board's arguments on this issue otherwise rely on fictions. It claims that the WHREA did not select or inform individuals that they would be representing the WHREA in negotiations. (Pb14). Yet, the Board in the very next sentence acknowledges that the Bargaining Council is comprised of the WHREA's entire membership. (Pb14-15, citing to Pa73). Considering that all WHREA members are Board employees, the Board knew from the start all of the

potential participants of the WHREA's negotiations team. PERC, though, wisely saw through and rejected the Board's claims. As the Board has not provided any basis to suggest that the designated experts on N.J.S.A. 34:13A-5.3 was arbitrary, capricious, or unreasonable in interpreting the statute, this Court conclude that PERC correctly rejected the Board's "designated representative" argument.

C. PERC CORRECTLY HELD THAT THE WHREA WAS ALLOWED UNDER THE NJEERA TO INSIST ON ITS BARGAINING COUNCIL MEMBERS BEING ABLE TO PARTICIPATE AT NEGOTIATIONS SESSIONS. (Pa229-Pa233; Pa237-Pa243).

The Board incorrectly argues that PERC's decision below made "open negotiations" an unlawful pre-condition to negotiation. (Pb18-Pb25). As with the Board's other arguments, the WHREA supports PERC's rebuttal of the Board's claims. (Rb15-Rb16). In addition, the WHREA maintains the Board's claim is defective in multiple respects.

To start, the Board's argument relies upon a definition of "open bargaining" which differs from the use of the term in the matter before this Court. Throughout the proceedings before PERC, the WHREA was consistent that its Bargaining Council was open to any member of the WHREA, but that the negotiations sessions would be closed to the public. The Board, however, continues to define "open bargaining" as discussed in Brielle Bd. of Ed. and to assert that the facts here are substantially similar to Brielle Bd. of Ed.. In doing so, the Board continues

to ignore that PERC correctly distinguished Brielle Bd. of Ed.'s concerns about the public attending negotiations as observers from the instant situation in which the negotiation session would be closed to everyone except the Board and the WHREA's negotiations team. (Pa239-Pa240). In fact, PERC recognized that it was the Board who previously tried to invite the general public into the negotiations sessions, to only be rebuffed by the WHREA.

The Board's reference to the NJEA's article is unpersuasive here, as it previously was before PERC. PERC's decision acknowledged the article, recognizing that the reference to "open bargaining" was in the context of opening up the bargaining process to all of a bargaining unit's members. (Pa223-Pa225). The Board here editorialized the article to suggest that the NJEA is trying to intimidate the board of education with the Bargaining Council. Interestingly, though, the Board does not provide any citations or evidence in support of these claims. Indeed, if the Board here could have demonstrated any actual intimidation which put the Board at fear for their safety or security, PERC's decision provides it with grounds for contesting the Bargaining Council's presence. But there was no credible evidence presented of such a situation in the last round of bargaining or now.

Within this argument, we see the real reason why the Board has spent over two years fighting the Bargaining Council's presence. It is the Board's belief that

the Bargaining Council could make the WHREA stronger and help it "win" negotiations, which irks the Board. The Board seeks to improperly hamstring the WHREA from implementing a legitimate strategy which helps its members at negotiations. Thus, it is in the Board's interest to limit this source of strength. However, as PERC correctly noted, a disagreement or displeasure with an opposing party's strategy is not by itself grounds for limiting its rights under the N.J.S.A. 34:13A-5.3.

The Board's reliance on out-of-state cases amounts to little more than a rehashing of authorities already considered and distinguished by PERC in its decision below. PERC distinguished the Board's cases from these charges by pointing at that the at-issue groups in the Board's citations were all passive observers. For example, Petaluma Federation of Teachers, Local 1881, California P.E.R.B. Decision No. 2,485 (2016), Aircraft Mech. Fraternal Ass'n v. Northwest Airlines Corp., 394 F.Supp.2d 1082 (2005) and Brooke Glen Behavioral Hosp., 365 NLRB No. 79 (2017) all concerned one of the negotiating parties trying to open up the bargaining sessions to the general public. In those cases, the administrative agencies had legitimate concerns about third parties or other observers potentially interfering with good faith negotiations (Pa239, Pa273-Pa334). We do not have the same concerns here because the Bargaining Council

members are all part of the WHREA, and they are active participants in the bargaining sessions.

One pair of out-of-state cases, however, which is conspicuously absent from the Board's appeal is Belmont I and Belmont II. PERC's decision below substantially approved CERB's analysis of these cases, including CERB's consideration of the announced status of "silent bargaining representatives." Pa241-Pa242). PERC explained that in Belmont II, as is also the case here, the union had given the board of education notice before the scheduled meetings that its negotiations team would have both "speaking representatives" and "silent representatives" who would though still be actively involved in the negotiations. Accordingly, PERC concluded that the Board's refusal here to negotiate before the WHREA's Bargaining Council to have been inappropriate as consistent with Belmont II. (Pa241-Pa242).

Despite the Board's protests, there is no basis to conclude that the NJEERA places broad limitations on a labor organization's right to determine the composition of its negotiations team, including the size of its team. Accordingly, PERC correctly held that the NJEERA does not prevent the WHREA from including its Bargaining Council, open to its full membership, to participate in bargaining sessions as part of the WHREA's negotiations team. Thus, the Appellate Division must find that PERC acted reasonably in concluding that the

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WHREA did not violate the NJEERA in attempting to include its Bargaining Council as part of its negotiations team.

D. IT WAS WITHIN PERC'S AUTHORITY TO ORDER THE BOARD TO NEGOTIATE WITH THE WHREA'S FULL NEGOTIATIONS TEAM. (Pa233-Pa237; Pa243-Pa245).

In addition to PERC's position regarding its authority, (Rb15-Rb17), which the WHREA joins in, the WHREA will provide this Court with further reasons why PERC has the authority to Order the Board to negotiate with the WHREA's full negotiations team, including the WHREA's Bargaining Council. Much like with its other arguments, the Board's position here relies upon a false impression of the "open bargaining", to portray this situation as akin to Brielle. However, the evidence is uncontroverted that not only have the negotiations been closed off to the general public, but that it has been the WHREA which has stopped the Board's efforts to open up the negotiations to mere observers. (Pa240). There is no 'open public session' concern here which could limit PERC's authority.

As PERC recognized, it is well established that a labor organization's right to freely choose its negotiation representatives includes the right to freely choose the number of negotiation representatives. (Pa233-Pa235). It is a long recognized bedrock of the NJEERA that neither side of collective bargaining may dictate the other's choice of representatives for collective negotiations. Yet, that is exactly

what the Board tried to do here by insisting to exclude the Bargaining Council members of the WHREA's negotiations team. Reframing the Board's argument reveals how out of step it is with the law. If instead of trying to exclude the Bargaining Council, what if the Board attempted to limit the WHREA's negotiations team from 10 to only 5 participants at bargaining sessions? Or, what if the Board was instead insisting on excluding particular individuals, for example, the WHREA's bargaining chair or vice president from the negotiations sessions? Absent a compelling reason for these requests, PERC would undoubtedly issue an unfair practice complaint.

The only difference between the current situation and the above hypothetical, which is clearly an unfair practice, is that the WHREA's right to determine the size of its negotiations team is newly recognized. The law grants PERC, pursuant to its responsibility to safeguard and administer the NJEERA, the authority to direct a bargaining party to meet and negotiate with the opposing party's choice of negotiation representatives. Since the Board here did not provide any compelling reason in trying to dictate the size of the WHREA's negotiations team, PERC not only had the right but in fact the need to order the Board to negotiate with the WHREA's full negotiations team, including its Bargaining Council members.

E. THE BOARD'S ARGUMENT THAT PERC'S DECISION COULD LEAD TO ABSURD RESULTS IS NOT LEGALLY SIGNIFICANT. (Pa227-Pa228; Pa242-Pa244).

Since the established precedent, plain reading of the NJEERA and pertinent authorities in other jurisdictions did not support the Board's argument, it had to resort to the Domino Theory. Since it could not point to any facts here for why PERC needed to restrict the WHREA's ability to determine the size of its negotiations team, the Board instead relied upon future hypothetical to claim that PERC's analysis of N.J.S.A. 34:13A-5.3 would lead to "an absurd result." (Pb15-Pb18). PERC's brief has already explained why this is not the case, which the WHREA supports and adopts herein. (Rb11-Rb13). The WHREA, though, presents additional reasons for dismissing the Board's claims here.

The WHREA has already explained *supra* why the Board's proposed interpretation of 'exclusive representatives' under N.J.S.A. 34:13A-5.3 conflicts with the purpose of the statute. However, even if the Appellate Division was concerned about the possibility of "an absurd result", PERC's decision includes the method to avoid such an outcome. If the Board or any employer can show that a labor organization's use of a larger negotiations team creates a conflict of interest or ill-will, or that it jeopardizes safety or security, PERC recognizes the employer's legal basis to contest the size of the negotiations team. (Pb17). But, by requiring the employer to first demonstrate actual bad faith before curtailing a

labor organization's right to determine the size of its negotiations team, PERC has presented a balance between protecting a labor organization and members' rights under N.J.S.A. 34:13A-5.3 and the interests in promoting productive negotiations. As the agency entrusted with the administration of NJEERA, this court should, respectfully, defer to PERC's expertise on how to best promote peaceful and productive labor negotiations. The labor organization's rights should not and cannot be curtailed merely by an employer's concern of how things could, but did not, go astray. To find otherwise for the Board here would be throwing out the baby with the bathwater. Simply because team bargaining is a more recent concept in New Jersey does not mean that we should be scared of it or try to prevent labor organizations from considering this option.

Adopting the Board's argument requires believing the fiction that PERC is unable to manage the collective bargaining process. We know, though, that if there comes a situation in which the WHREA or any other bargaining unit presents a negotiations team which the employer can show is actually interfering with the collective negotiations process, PERC is more than capable of assessing the situation. The Board has not and cannot provide a persuasive reasoning for why the tools already in the toolbelt of the State agency best equipped to address this situation would be unable to promote good faith bargaining. Accordingly, this Court must reject the Board's argument.

F. PERC CORRECTLY HELD THAT THE BOARD VIOLATED THE NJEERA. (Pa244-Pa245).

As PERC reasonably concluded that the WHREA had the right to determine the size of its negotiations team, PERC correctly then shifted the burden to the Board to provide a compelling reason why it refused to negotiate with the WHREA's full negotiation team, including the Bargaining Council. The Board has acknowledged that during the last round of CNA negotiations both that the WHREA included its Bargaining Council in at least one session and that the WHREA had demonstrated a flexibility back then as to the Bargaining Council's presence during certain negotiations. PERC also recognized that the Board did not present any evidence that the Bargaining Council interfered with the collective negotiations this time around. Thus, it was proper for PERC to conclude that the Board lacked any good faith reason to refuse to negotiate with the WHREA in the presence of the Bargaining Council members of the WHREA's negotiations committee.

The Board fails to present any reason for the Appellate Division to reverse PERC's finding of the Board's violation of the NJEERA. The Board did not address its burden to present compelling evidence to justify refusing to meet with the WHREA's choice of negotiators. Instead, the Board continued to claim that the WHREA's members were not allowed to participate in the negotiations sessions

without any valid basis. In addition to all the reasons *infra*, in PERC's brief and our prior submissions why this argument is unpersuasive, let's consider this argument by taking it at face value. For the Board to persuasively assert that it could require the WHREA to exclude its own membership from its negotiations, this would require this court to construe the NJEERA, the law meant to enforce public employees' collective negotiations rights, to restrict or even outlaw the presence at negotiations sessions of those very public employees it is meant to protect. Now that would be an absurd outcome.

The Appellate Division must also reject the Board's myth that it supposedly tried to meet with the WHREA's bargaining representatives. Notwithstanding whatever the Board initially believed as to the Bargaining Council's role within the WHREA's Negotiations Committee, the WHREA put the Board on notice by fall 2021 that the WHREA considered the Bargaining Council to be part of its negotiations team. Consequently, this argument acknowledges that the Board tried to reject the WHREA's definition of the union's own negotiations team. Thus, the Board's argument here is that the Board had the right to define the scope of the WHREA's negotiations team, a demand clearly prohibited under the NJEERA.

The WHREA is unclear what the Board meant by "unilateral action" with the negotiations. However, what is clear is that the Board refused to move forward with any negotiation sessions with the WHREA which involved the WHREA's

Bargaining Council as participants from 2021 until PERC's decision. Rather, for nearly two years the Board insisted on ground rules to exclude the Bargaining Council portion of the WHREA's negotiations team. Accordingly, as the act of negotiations requires two participating parties, the Board's refusal to appear was the "unilateral action" here.

In sum, because PERC correctly concluded that the Bargaining Council was part of the WHREA's negotiations team, the Board is bereft of any basis to treat these participants as anything other than as part of the WHREA's negotiations team. As the Board had no justification for its refusal to negotiate before the WHREA's clearly identified negotiations team, PERC was not only reasonable but in fact required to find that the Board acted in bad faith in refusing to negotiate with the WHREA, in violation of the NJEERA.

CONCLUSION

It is respectfully submitted for the reasons set forth herein, that the Appellate Division should affirm PERC's October 26, 2023 Order that the Watchung Hills Regional Board of Education violated the New Jersey Employer-Employee Relations Act by insisting on refusing to negotiate with the Watchung Hills Regional Education Association except on the pre-condition that the Watchung Hills Regional Education exclude a portion of its negotiations team from the bargaining sessions.

Respectfully submitted,
OXFELD COHEN, P.C.

/s/ Samuel Wenocur

Samuel Wenocur, Esq.

FILED, Clerk of the Appellate Division, May 17, 2024, **A-001151-23**

IN THE MATTERS OF WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT, BOARD OF EDUCATION, Charging Party/Cross-Respondent, v. WATCHUNG HILLS REGIONAL EDUCATION ASSOCIATION, Respondent/Cross-Charging Party.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-001151-23T4 Civil Action ON APPEAL FROM THE FINAL DECISION OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION DATED OCTOBER 26, 2023 (AGENCY DOCKET NOS. CE-2022-005 and CO-2022-168 (CONSOLIDATED)

REPLY-BRIEF OF APPELLANT WATCHUNG HILLS REGIONAL HIGH SCHOOL DISTRICT BOARD OF EDUCATION IN SUPPORT OF APPEAL

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PROCEDURAL HISTORY

The Appellant, Watchung Hills Regional High School District Board of Education ("the Board"), hereby relies upon the Procedural History in its initial brief as if fully set forth herein (Pb3[1]).

RESPONSE TO APPELLEE'S STATEMENT OF FACTS

The Board hereby relies upon the Statement of Facts in its initial brief as if fully set forth herein (Ibid.).

LEGAL ARGUMENT

POINT I

THE APPELLATE DIVISION SHOULD CONDUCT A *DE NOVO* REVIEW OF PERC'S DECISION BECAUSE IT PERTAINS TO THE INTERPRETATION OF A STATUTE AND A STRICTY LEGAL ISSUE (Db15[2]; Rb5[3]).

Both Respondent Watchung Hills Regional Education Association ("the Association") and the Public Employment Relations Commission ("PERC") assert that the Appellate Division should consider this matter under an "arbitrary, capricious, or unreasonable" standard of review (Ibid.). In doing so, both parties willfully fail to address well-settled New Jersey precedent that appellate courts review PERC decisions on a *de novo* basis when the case rests on the agency's

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[1] "Pb" refers to the Board's opening brief, filed on March 4, 2024.
[2] "Db" refers to the Association's opposition brief, filed on May 3, 2024.
[3] "Rb" refers to PERC's opposition brief, filed on April 2, 2024.

interpretation of a statute or determination of a strictly legal issue (Pb9[4]). Additionally, the Association incorrectly identifies the Board's "grounds for reversal of PERC's decision" as "merely showing the possibility that this Appellate Division could have reached a different result" (Db16).

However, even a cursory review of the Board's initial brief makes clear its position that the Association's demand to negotiate in the presence of its entire union membership, and PERC's acceptance of that position, misapplies and misconstrues the law as written and intended by the State legislature. See, *e.g.*, Pb10, stating that PERC misinterpreted the statutory language contained in N.J.S.A. 34:13A-5.3. Here, the Board asks the Appellate Division to interpret N.J.S.A. 34:13A-5.3, specifically, the Legislature's intent in including the term "designated representatives" within the statute and then, determine whether PERC correctly applied that interpretation to its decision (Pb10). If PERC misapplied the clear statutory language when issuing its decision, it must be reversed.

New Jersey appellate courts conduct a *de novo* review of agency or trial court decisions in such circumstances. See, *e.g.*, Pb9. See also Matter of Commitment of W.W., 245 N.J. 438, 448 (2021):

> Our Court reviews issues of statutory interpretation *de novo*. Thus, this Court owes no special deference to the trial court's interpretation of the State's burden under the [legislative act at issue].
>
> "[I]n the interpretation of a statute our overriding goal has consistently been to determine the Legislature's intent." "'To determine the

> Legislature's intent, [courts] look to the statute's language and give those terms their plain and ordinary meaning,' because 'the best indicator of that intent is the plain language chosen by the Legislature.'" [Internal citations omitted].

Accordingly, the Appellate Division should utilize a *de novo* standard of review when adjudicating this strictly legal matter involving statutory interpretation.

POINT II

THE APPELLATE DIVISION SHOULD GIVE NO WEIGHT TO PERC'S ADVERSARIAL OPPOSITION BRIEF (Rb).

The Appellate Division respectfully should disregard PERC's opposition brief on appeal (Ibid.). PERC was asked to review the matter between the Board and the Association, and issue a decision in its capacity as a quasi-judicial body pursuant to the Employee-Employer Relations Act, N.J.S.A. 34:13A-1, *et seq*. ("Act"), in much the same manner as would be expected from a Superior Court judge or agency head when deciding a matter between two parties. However, although it is a non-party to the underlying case, PERC's position before the Court argues the underlying merits, facts, and findings of the dispute.

In fact, PERC's opposition brief is in clear contravention of the Appellate Division's prior guidance in similar circumstances that PERC should not "take a position on the merits when the matter is on appeal." See Jackson Tp. Bd. of Educ. v. Jackson Educ. Ass'n. ex rel. Scelba, 334 N.J. Super. 162, 176 (App. Div. 2000):

> Where a State agency's role in an administrative matter is solely that of a forum for the resolution of a dispute committed to its quasi-judicial authority, as distinguished from also being an actual party to the

> controversy or possessing fiduciary responsibilities or functioning in some other capacity bearing upon the merits, it seems inappropriate that the agency should take a position on the merits when the matter is on appeal. The merits views of a court whose decision is being reviewed are seen to be properly expressed only in the formal decision rendered. We see no good reason why an administrative agency, in its role as decision maker in a quasi-judicial matter, should not be expected to maintain the same level of nominal detachment that is considered to be the norm for other tribunals. Such policy interests as the agency may have in the outcome ought to be apparent from the decision itself or from the legislation or administrative rules and regulations pertaining to the subject matter at issue. [Internal citations omitted].

PERC's role in this matter was to act "solely [as a] forum for the resolution of [the] dispute [between the Board and the Association], as distinguished from being an actual party to the controversy." Ibid. PERC is not, and should not, be considered a "party" in this case, as the initial dispute was and remains between the Board and the Association.

Nevertheless, PERC has taken an adversarial position against the Board, rather than simply filing the standard statement-in-lieu-of-brief, which is expressly permitted pursuant to R. 2:6-4(c) and (d) where "the general public does not require its adversarial participation in the appeal and…the parties directly affected by its decision have adequately presented, or may be expected to so present, the issues." See, *e.g.*, Chesterbrooke Ltd. Partnership v. Planning Bd. of Tp. of Chester, 237 N.J. Super. 118, n.1 (App. Div. 1989) ("The Planning Board has not filed a brief. In a statement in lieu of brief, it states: '[T]he general public interest does not require the

Board's adversarial participation in the appeal. Plaintiff and Appellate-Objectors may reasonably be expected to present all relevant issues to the Court . . .'").

PERC's filing of a nineteen (19)-page opposition brief "seems inappropriate…[while] the matter is on appeal." See Jackson Tp. Bd. of Educ., *supra*, at 176. PERC concedes that it has already issued a "comprehensive" and "thoroughly detailed" decision (Rbiv.; Rb3). The Association, in its own opposition brief, "relies on and adopts" several legal arguments made by PERC. See, *e.g.*, Db18 ("The [Association] supports and adopts PERC's arguments…"); Db21 ("As with the Board's other arguments, the [Association] supports PERC's rebuttal of the Board's claims."); Db27 ("PERC's brief has already explained why this is not the case, which the [Association] supports and adopts herein"); Db30 ("In addition to all the reasons…in PERC's brief…").

In this case, PERC is not a party and should not argue the merits of its own decision when deciding a matter submitted to it in its quasi-judicial capacity.

POINT III

PERC INCORRECTLY INTERPRETATED THE STATUTORY LANGUAGE SET FORTH IN N.J.S.A. 34:13A-5.3 (Db17; Rb8)

Rather than address the Board's substantive legal arguments and caselaw on the issue of statutory interpretation (Pb10), the Association "supports and adopts PERC's arguments [referring to PERC's opposition brief against the Board]," accuses the Board of "twist[ing] this plain language [of N.J.S.A. 34:13A-5.3] to

instead claim that this language limits which members of a majority representative can participate in collective bargaining," and alleges that "the Board trie[d] to portray" a PERC holding "differently," which the Board relied on for an entirely different legal argument (Db17) (See Pb18, where the Board cites to I/M/O Brielle Board of Education and Brielle Education, 3 NJPER ¶ 3 (1977) for its legal argument that "[t]he Association's demand to conduct 'open negotiations' is an unlawful pre-condition to negotiation.").

In doing so, the Association attempts to reframe the issue as being whether the Act allows parties "to choose their own negotiations representatives without interference from the other side" (Db17). This has never been the issue before PERC or the basis of the Board's initial filing against the Association. It is undisputed that the parties are permitted to choose their own representatives for negotiations, within certain limits that are not at issue here, which the Board does not challenge. The question, however, is whether a party is permitted to identify its entire membership as "representatives" within the intent of N.J.S.A. 34:13A-5.3 and what the meaning of the term "representative" of a public employment association is. The Association and PERC both ask the Court to accept the Association's argument that it can simply identify every single union member as a "representative" of its negotiations team, which it refers to as its "Bargaining Council," to "come-and-go" to whichever negotiations meetings that they decide to attend. See, *e.g.*, Db24 (the Association supporting PERC's holding that the Act "does not prevent the [Association] from

including its Bargaining Council, **open to its full membership**, to participate in bargaining sessions as part of the [Association's] negotiations team [emphasis added]").

PERC's acceptance of such argument respectfully must be reversed because it frustrates the intent of the statute's requirement that parties "designate representatives" for negotiations. (Pb10). See Williams v. N.J. Dep't. of Corr., 423 N.J. Super. 176, 183 (App. Div. 2011) ("an agency's interpretations, whether through regulations or administrative actions, 'cannot alter the terms of a legislative enactment, nor can they frustrate the policy embodied in [a] statute'" [internal citations omitted]). Similarly, such an interpretation of the statute would render the Legislature's usage of the language "designated representatives" completely meaningless, despite the well-settled holding that "[e]ach word in the statute must be given its plain meaning; no word should be rendered inoperative or superfluous." Macysyn v. Hensler, 329 N.J. Super. 476, 484 (App. Div. 2000) (internal citation omitted).

Elsewhere in its brief, the Association asserts that PERC's underlying determination should be upheld pursuant to the Massachusetts Commonwealth Employment Relations Board's ("CERB") holdings in I/M/O Belmont School Committee, 45 MLC 185 (2019) ("Belmont I") and I/M/O Belmont School Committee, 48 MLC 107 ("Belmont II" (Db24). However, to the extent that these decisions are applicable in this case, the reliance on them only further exemplifies

the manner in which the Association and PERC attempt to conflate the issue in this matter with disputes where government agencies try to have certain individuals excluded from negotiations.

For example, in Belmont I, the government agency refused to bargain in the presence of seven (7) specific individuals for the union. In Belmont II, the government agency also refused to bargain in the presence of specific individuals. Moreover, the record reflected that the union had "conducted an internal Union vote to include silent representatives, and solicited and obtained volunteers to serve in this role." Belmont I, *supra*. This is vastly different from the instant matter, where the Association seeks to generically label all of its members, collectively, as negotiations team members.

Moreover, there is absolutely nothing in the record to suggest that the Association took any internal measures or votes to even identify specific members to attend negotiations. On the contrary, the Association has made it clear that its intent is for members to be able to "come-and-go" to negotiations sessions whenever they feel like it. This is essentially what the union attempted to do in Belmont I, where the CERB determined that the government agency was not required to bargain. See Belmont II ("In [Belmont I], the Union only sent one e-mail indicating that it 'may' bring other representatives to a bargaining session. The CERB found that this was insufficient to clarify the status and role of the unannounced individuals in the back of the room during the 2017 bargaining session. The CERB determined

that an employer could unlawfully refuse to bargain until the union removed any ambiguity as to the identity of the purported bargaining representatives.") This is exactly what the Association is attempting to do in the instant matter, by notifying the Board that any number of employees "may" show up to each bargaining session, depending on if they want to attend or not.

PERC raises mostly the same arguments (which the Association "adopt[ed]" (Db18) in its opposition brief), wherein it cites to its underlying decision, which stated, in relevant part, that "neither our Constitution, nor our Act, places express limitations on the size of a party's collective negotiations team (Rb9)." This also misconstrues the dispute before the Court – the issue does not pertain to how many individuals a party can have on its negotiations team, nor is the Appellate Division being asked to render an opinion regarding same. Rather, the issue is whether a party can self-identify its entire membership, as a whole, for negotiations on a "come-and-go basis" in order to frustrate the Act's statutory intent. The Board submits that the answer is "no," for the reasons set forth herein and in the Board's initial brief.

POINT IV

PERC INCORRECTLY HELD THAT THE BOARD VIOLATED THE ACT (Db29).

The Association states that "PERC correctly…shifted the burden to the Board to provide a compelling reason why it refused to negotiate with the [Association's]

full negotiation team, including the Bargaining Council" (Db29). The Association's reference to its "full negotiations team, including the Bargaining Council" is, in reality, its entire membership, depending on which members decide to attend each negotiations session. The Association also does not cite to any caselaw regarding the Board's purported "burden to present compelling evidence to meet with the [Association's] choice of negotiators (Db29)." It is entirely unclear where the Association is deriving this so-called "burden to present compelling evidence" from.

Nonetheless, the Association reverts back to its same argument repeated throughout, which the Board has addressed, *infra* – conflating the issue of whether a government agency can restrict certain members from being on a union's negotiations team, from the true issue, which is whether the union must select actual "representatives" for the purpose of negotiations. See, *e.g.*, Db30, asserting, incorrectly, that the Board is seeking "to restrict or even outlaw the presence [of certain members] at negotiations sessions."

The Board did not, and has not, attempted to select any specific Association member to negotiate the successor Agreement, nor did it refuse to negotiate unless the Association included or did not include certain individuals on the Association's negotiations team. The Board simply sought to negotiate with the Association's "representatives," which is plainly required by the Act. It is not an unfair practice to seek negotiations which comply with the Act's requirements, and PERC erred by ruling to the contrary.

Even under an arbitrary, capricious, or unreasonable standard of review, which PERC and the Association assume is the correct standard throughout each of their responses, PERC's decision must not stand. PERC found that the Board committed an unfair practice under the Act when it refused to negotiate with the Association's entire membership present. Such a determination is patently arbitrary and unreasonable.

The Act's purpose is to encourage negotiations between public employers and employee organizations. The Board attempted to do exactly this when it attempted to negotiate with the Association for a successor contract. The Board repeatedly informed the Association that it would meet whenever and wherever a mutual time and place could be determined, provided that only the representatives of each party do so. The Board should not be forced to negotiate with the entire Association membership, and, at the very least, should not be reprimanded for attempting to adhere to the Act itself.

Rather, it is the Association who violated the Act and committed an unfair employment practice when it refused to meet at all without each of its members permitted to attend, even if not all of them chose to, thus frustrating the Act's intent, since the Association's abject refusal to negotiate led to what was, at the time, a two-year moratorium on negotiations. PERC should have so found.

CONCLUSION

Based upon the foregoing, as well as the arguments set forth in the Board's

opening brief, the Board hereby respectfully requests that: (i) the Public Employment Relations Commission's decision be reversed; (ii) a determination be made that the Board did not violate the Act, (iii) the Court find that the plain language of the Act requires an employee organization to designate a reasonable representative for negotiations purposes; and, finally, (iv) the Association be found to have violated the Act.

Very truly yours,
SCHENCK, PRICE, SMITH & KING, LLP

By:*/s/ Joseph L. Roselle*
Joseph L. Roselle, Esq.

Dated: May 17, 2024