5-PELRB-2021

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

PEÑASCO FEDERATION OF UNITED SCHOOL EMPLOYEES LOCAL 4285, AFT-NM,

Petitioner,

v. **PELRB NO. 108-20**

PEÑASCO INDEPENDENT SCHOOL DISTRICT,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board ("Board") on the District's request for review of the Hearing Officer's Report and Recommended Decision ("Recommended Decision"). After hearing oral argument at its regularly scheduled meeting on January 6, 2021, reviewing the Recommended Decision, request for review and response thereto and being otherwise sufficiently advised, the Board voted 3-0 to adopt the Hearing Officer's Report and Recommended Decision without modification.

THEREFORE, THE BOARD adopts Director Griego's Recommended Decision and the complaint may be closed.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

1/15/2021
DATE

Marianne Bowers
MARIANNE BOWERS, BOARD CHAIR

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

PEÑASCO FEDERATION OF UNITED SCHOOL EMPLOYEES LOCAL 4285, AFT-NM,
and
MIGUELANJEL BURNS, MARISSA SANDOVAL, BRANDON GURULE, and DEBORAH ANGLADA,
Complainants,

v. **PELRB No. 108-20**

PEÑASCO INDEPENDENT SCHOOL DISTRICT,
Respondent

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego, designated as the Hearing Officer in this case, for Hearing on the Merits of the Complaint. Complainants contend that the individual Complainants were vocal and open supporters of the Peñasco Federation of United School Employees, Local 4285 (Union) and worked to assist the Union in carrying out its representation of the Bargaining Unit at Peñasco Independent School District (PISD). Such actions have included, speaking at School Board meetings regarding the Union's concerns with the Superintendent, passing out collective bargaining surveys to the bargaining unit, sending letters of concern to the School Board, assisting the Union in supplying personal protective equipment, and participating in, and submitting on behalf of the union, a licensure complaint to the PED regarding the Superintendent. Respondent is alleged to be aware of this activity and to have demonstrated anti-union animus, motivating the adverse employment actions taken against the individual complainants. For example, Complainants contend that Respondent, through its Superintendent, Lisa Hamilton, gave

four of the individual Complainants, including Miguelanjel Burns, the Union President, and Marissa Sandoval, the Union Treasurer, notices of termination indicating that the District would not reemploy them for the '20-'21 School Year and removed Brandon Gurule from his coaching position, cutting his Athletic Coordinator stipends in half for the upcoming school year. As a result of the foregoing, Complainants contend that Respondent have violated § 5 of the PEBA (giving public employees the right to "form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion and to otherwise engage in concerted activity for mutual aid and protection); § 19(A) (making it a prohibited practice for a "public employer or his representative" to "discriminate against a public employee with regard to terms and conditions of employment because of the employee's membership in a labor organization"); § 19(B) (making it a prohibited practice for a "public employer or his representative" to "interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the [PEBA]"); § 19(D) (making it a prohibited practice for a "public employer or his representative" to "discriminate in regard to hiring, tenure or a term or condition of employment in order to encourage or discourage membership in a labor organization"); and § 19(E) (making it a prohibited practice for a "public employer or his representative" to "discharge or otherwise discriminate against a public employee because he has signed or filed an affidavit, petition, grievance or complaint or given information or testimony pursuant to the provisions of the Public Employee Bargaining Act or because a public employee is forming, joining or choosing to be represented by a labor organization"). Respondent contends its non-renewal decisions were made in accordance with State law and not for any discriminatory or retaliatory reason. Respondents actions were taken under the authority to renew or non-renew employees as well as the right of assignment and contract.

Respondent had no knowledge of a certified exclusive representative for any District employees at the time of the actions taken. Respondent had repeatedly requested such information from AFT-NM as well as Mr. Miguelanjel Burns in order to properly recognize any certified exclusive representative but received no response to the repeated requests. Respondent has had a good working relationship with AFT-NM and extended invitations and use of facilities of the District for AFT-NM to utilize and meet with District employees. Respondent has no anti-union animus. Respondent was unaware of any actions taken by any Complainants on behalf of a certified exclusive representative nor any actions taken against the Superintendent prior to the filing of the instant matter.

Respondent asserts the PELRB lacks subject matter jurisdiction[1] over this dispute and that it did not violate any provisions of PEBA.

A hearing on the merits was held September 21 and 22, 2020. After calling the Hearing to order, Complainant's counsel announced that one of the individual Complainants, Valerie Bemis, decided not to pursue her claims and she was being voluntarily dismissed as a party. The caption herein has been amended to reflect that voluntary dismissal.

At the conclusion of Complainants' case-in-chief Respondent moved for a directed verdict, which motion was denied. All parties hereto were afforded a full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence, and to argue orally. Briefs were submitted by complainant and respondent on October 19, 2020. Both briefs were duly

[1] On July 10, 2020, the Employer filed a Motion to Dismiss on the ground that because "Peñasco Federation of United School Employees" is the certified incumbent exclusive representative the instant claims involve a non-existent labor organization or one not certified as the exclusive representative. The Motion was denied on two grounds: First, to the extent the PPC assert derivative rights of employees in association with a labor organization the recognition status of that organization is immaterial and because individual employees may file PPCs without reference to whether they are represented. Second, under the circumstances of this case including the parties' bargaining history and a filed Notice of Errata, there can be no confusion that the Complainant is the same entity as that certified as an incumbent bargaining representative in PELRB No. 303-07.

considered. On the entire record in this case and from my observation of the witnesses and their demeanor on the witness stand, and upon substantive, reliable evidence considered along with the consistency and inherent probability of testimony, I make the following

FINDINGS OF FACT: In the Pre-Hearing Order herein, the parties stipulate that the following matters are not in dispute:

1. The Public Employee Labor Relations Board has personal jurisdiction over the parties.
2. The Union is a "labor organization" as that term is defined in Section 4(L) of the PEBA (NMSA 1978, § 10-7E-4(L) (2003)).
3. Respondent is a "public employer" as that term is defined in Section 4(S) of the PEBA.
4. Miguelanjel Burns, Marissa Sandoval, Brandon Gurule, Valerie Bemis, and Deborah Anglada are or were at material times employees of Respondent. They are or were at material times "public employees" as that term is defined in Section 4(R) of the PEBA.
5. Respondent, and in particular its Superintendent Lisa Hamilton, issued "notices of termination" to four of the individual Complainants, Miguelanjel Burns, Marissa Sandoval, Valerie Bemis, Deborah Anglada) indicating that the District would not reemploy them for the 2020-2021 School Year.
6. Respondent did not renew Brandon Gurule's coaching contract.

In addition to the foregoing, based on the testimony and documentary submissions, I find as follows:

7. Mr. Burns' employment was terminated by non-renewal of his existing contract on April 30, 2020. (Exhibit J-1.)

8. Miguelanjel Burns' former supervisor from the preceding school year, Ray Maestas, highly rated Mr. Burns' teaching abilities, teaching style and classroom organization. (Testimony of Ray Maestas, Audio Record Day 1, Part 1 at 00:20:04 – 00:23:23.)
9. Immediately preceding his termination Mr. Burns was evaluated by his principal, Mr. Mitchell, on April 29, 2020 and found to do "very well at planning and executing lessons focused on an objective. His respectful attitude toward all students is evidence of the value he places on them and their education. He is consistently modeling a student-centered classroom." (Exhibit A.)
10. Prior to his termination, Mr. Burns was active in the Complainant union serving as its President since February of 2020. He attended public school board meetings wearing union insignia, including one in February of 2020 in which a union representative attempted to present the results of a collective bargaining survey, and meetings in March in which Mr. Burns as Union President, voiced opposition to continuing the Superintendent's contract with the District. Several other members of the Union also were in attendance wearing pro-Union insignia. (Testimony of Miguelanjel Burns, Audio Record Day 1, Part 2 at 00:23:09 – 00:26:12; 01:09:20 – 01:10:40; Exhibit J.)
11. From approximately April 27, 2020 to May 9, 2020, Miguelanjel Burns was actively engaged in a AFT-NM sponsored effort to distribute personal protective equipment (PPE) to PISD employees at the outbreak of COVID-19, about which he communicated via email signed "Miguelangel Burns, 4th Grade Teacher, AFT-PISD President" and which communication was acknowledged by

Superintendent Lisa Hamilton. (Testimony of Miguelanjel Burns, Audio Record Day 1, Part 2 at 00:34:00 – 00:34:23; Exhibit F.)

12. In connection with the union-sponsored distribution of PPE referred to above Superintendent Hamilton wrote an email message to Miguelanjel Burns on May 9, 2020 in which she asked him to obtain advance approval for any communications in which he identifies himself as a teacher for PISD and that he "refrain from identifying [himself] as the Union President for PISD" because she had been "…unable to locate any documentation of a certification of a union here at PISD and, despite repeated requests to AFT, I have not recieved [sic] any documentation either. If you do have a certification of a union, I ask that you provide me a copy so that I may properly recognize the union." (Exhibit L).

13. The stated reasons for the Superintendent's decision not to renew Mr. Burns' contract was:

> "1. Violation of Board Policy G-0850: All personnel employed by the District are expected to relate to students of the District in a manner that maintain social and moral patterns of behavior consistent with comm unit: standards and acceptable professional conduct. Staff-student relationships shall reflect mutual respect between staff members and students and shall support the dignity of the entire profession and educational process: and Board Policy G-0700: an employee shall maintain, at all times, the integrity and ethically high responsibilities of public service and discharge all duties in the same manner. These policies were violated by your inappropriate discussion with fourth grade students regarding your drug use.
>
> 2. Violation of Board Policy G-0650. Principle II: Commitment to the Community: acknowledge the right and responsibility of the public to participate in the formulation of educational policy; and Board Policy G-0650. Principle III: Commitment to the Profession: participate and conduct ourselves in a responsible manner in the development and implementation of policies affecting education. These policies were violated by your insubordinate action of instructing

> employees not to participate in a voluntary survey needed to obtain a grant money for the District.
>
> 3. Violation of Board Policy G-076 I. Staff Conduct: No employee, while on or using school property, otherwise acting as an agent, or working in an official capacity for the District shall engage in a violation of District policies and regulations or any other conduct that may obstruct, disrupt, or interfere with teaching, research, service. administrative or disciplinary function of the District, or any other activity sponsored or approved by the Board. The actions set forth in numbers 1 -3 above constitute violations of these policies."

(Exhibit J-2.)

14. The "inappropriate discussion with fourth grade students regarding [his] drug use" referred to in Exhibit J-2 occurred during "red ribbon week" - a week dedicated to saying "no" to drugs" as part of a lesson plan, (as was done the prior year without objection) in which he described his becoming addicted to prescription drugs following a cancer surgery with the object of showing that it is not always illegal drugs that are an addiction problem. (Testimony of Miguelanjel Burns, Audio Record Day 1, Part 2 at 00:42:10 – 00:45:56.)
15. From October 2019 until April 30, 2020, the date of his termination, Mr. Burns was never notified that this was a problem or was inappropriate. His supervising principal, Aaron Mitchell wanted to meet with him to discuss the context of the presentation. That meeting never took place and Mr. Burns was not given any kind of discipline or letter of caution or concern prior to his termination. (Burns Testimony, Day 1, Pt. 2, at 00:47:54 – 00:48:49).
16. Superintendent Hamilton confirmed that there was no corrective action against Mr. Burns relating to the Red Ribbon Week drug addiction discussion and she never spoke to him about them. (Hamilton Testimony, Day 2 at 04:44:28 – 04:4:45:17; 04:56:18 – 04:56:58).

17. The "insubordinate action of instructing employees not to participate in a voluntary survey needed to obtain a grant money for the District" referred to in in Exhibit J-2, occurred after the District submitted a survey to teachers without first submitting the survey for review to a community grants committee assembled for that purpose and Mr. Burns wrote to teachers telling them that they need not feel compelled to answer the survey. (Testimony of Miguelanjel Burns, Audio Record Day 1, Part 2 at 00:48:06 – 00:50:10; 00:50:21 – 00:51:25; Exhibits M, N and O.)
18. According to information AFT obtained from the Public Education Department, the survey was not mandatory prerequisite for the grant, Burns testified he would not have counselled union members not to participate in the survey had he thought no-participation would jeopardize the grant and the school ultimately received the grant despite Mr. Burns' action. (Id. at 00:51:25 – 00:54:34.)
19. Although the April 8, 2020 email from Mr. Burns to Superintendent Hamilton is not signed in his union capacity and originates from his school email, not a personal or union email address, in the body of the email Mr. Burns writes: "Our state, local and national union take pride in community schools. Our NM AFT union president is part of the PED statewide community schools task force initiative" and Mr. Burns testified that he was acting as union President when he sent the email. (Id. at 00:51:25 - 00:54:37; Exhibit M.)
20. Prior to writing the email discouraging participation in the survey. Mr. Burns discussed his concerns with the survey's lack of anonymity with his immediate supervisor, Principal Aaron Mitchell. (Id. at 01:36:00 - 01:37:40.)

21. The email Exhibit 9 dated April 8, 2020 shows Mr. Burns apparently re-sending a cut and pasted message from AFT attorney Shane Youtz informing AFT-PISD "brothers and sisters" that the survey sent out previously was not appropriate or scientific and their participation in it was voluntary. Exhibit 9 noted that the Burns would forward to the District an email from the Union's counsel stating its position regarding the survey.
22. As anticipated in Exhibit 9, on April 9, 2020 "counsel for AFT New Mexico and its Penasco local" sent an email to Superintendent Hamilton objecting to the survey and requesting its removal. (Exhibit N).
23. The third and final basis for Mr. Burn's termination stated in Exhibit J-2 is an alleged violation of Board Policy by committing the other two alleged violations of District policies and regulations or other conduct that may obstruct, disrupt or interfere with teaching, research, service, administrative, or disciplinary functions of the District, or any other activity sponsored or approved by the Board, while on or using school property, otherwise acting as an agent, or working in an official capacity for the District. (Id. at 00:54:37 – 00:56:51).
24. Mr. Burns' immediate supervisor, Aaron Mitchell, the person who evaluated his performance and observed his classroom demeanor, told him that he recommended to the Superintendent that his contract be renewed. (Id. at 00:56:51 – 00:57:57).
25. Although Mr. Burns purports to be acting in his union capacity when he wrote the email Exhibit G there is no indication in the exhibit that he was acting in that capacity in the communication itself and it is not established that among the

several signature lines on Exhibit F on which Burns signed as "AFT-PISD President", one of those is the signature page for Exhibit G.

26. Because he sent a "letter of concern" to the School Board, Mr. Burns was reprimanded by his Principal, Aaron Mitchell, for violating chain of command as shown in Exhibit H at the direction of Superintendent Hamilton. (Id. at 00:57:57 – 01:02:01; 01:1:30 – 01:1:37).

27. Marcella Cordova also wrote a letter of concern to the Superintendent at the same time as did Mr. Burns in which email she indicates that she is writing as a "concerned member of the staff". (Exhibit I).

28. Although both collaborated on the content of their emails and sent similar email to the same person at the same time expressing the same concern, Ms. Cordova was not disciplined for sending her "letter of concern". (Testimony of Miguelanjel Burns, Audio Record Day 1, Part 2 at 01:02:01 – 01:03:35; Exhibit I.)

29. Peñasco School Board President, Amanda Bissell, testified that after introducing himself as President of the AFT local union at Peñasco Independent Schools, Mr. Burns spoke at the school board meeting March 9, 2020 depicted in Exhibit J and attended by Superintendent Hamilton. (Testimony of Amanda Bissell, Audio Record Day 1, Part 2 at 2:02:13 – 2:02:43.)

30. Complainants Marissa Sandoval, Brandon Gurule and Deborah Anglada were also present during the school board meetings in February and March, wearing union insignia. (Testimony of Miguelanjel Burns, Audio Record Day 1, Part 2 at 00:23:09 – 00:26:12; Exhibit J.)

31. Deborah Anglada's former supervisor from the preceding school year, Ray Maestas, highly rated Ms. Anglada's teaching abilities, teaching style and

classroom organization. (Testimony of Ray Maestas, Audio Record Day 1, Part 1 at 00:23:23 – 00:29:00; Exhibit C.)

32. Ms. Anglada attended the February School Board meeting where Debi Conrad tried to read the results of the collective bargaining survey, where she stood in the doorway wearing the Union sticker. She observed Superintendent Hamilton noticing her during this meeting. (Anglada Testimony, Day 1, Part 2 at 03:22:13 – 03:23:20).
33. In late April, Ms. Anglada received a letter (Exhibit J-3) terminating her employment for substandard performance. (Exhibit J-4).
34. Prior to receiving that notice Exhibit J-3, Ms. Anglada had been given no indication from her supervisor Principal Mitchel or Superintendent Hamilton that her performance was in question; she received no discipline and was not placed on any performance improvement plan. (Anglada Testimony, Day 1, Part 2 at 03:24:50 – 03:26:30).
35. Aaron Mitchel, did not think he could give a recommendation to retain or not retain Ms. Anglada because of the "extremely difficult circumstances" arising from her husband being ill with cancer that year. (Mitchel Testimony, Day 1, Pt. 2 at 03:52:00 - 3:53:08; Anglada Testimony, Day 1, Part 2 at 03:10:35 – 03:11:42).
36. Superintendent Hamilton never spoke to Ms. Anglada about any alleged performance concerns. (Hamilton Testimony, Day 2 at 04:56:18 – 04:56:58).
37. Marissa Sandoval testified she was a member of the Union since February 2020 and its Treasurer, but that she never informed the District of her position as Treasurer. (Testimony of Marissa Sandoval, Hearing Audio Day 1, Part 2 at 04:22:45 -04:23:05; 04:38:20-04:38:30).

38. Ms. Sandoval attended the March 4, 2020 School Board meeting attended by Superintendent Hamilton and testified that this was the first meeting at which renewal of Superintendent Hamilton's contract was discussed by the Board. Because the witness testified that she "spoke up" at the meeting in the same sentence in which she mentioned the Superintendent's contract renewal, I infer that the topic about which Ms. Sandoval spoke was the Superintendent's contract renewal. Likewise, when Ms. Sandoval testified that she "was wearing a sticker", I infer from the testimony of others concerning the wearing of union support stickers at the March meetings, whether the Superintendent could read those stickers and the photographs Exhibit J, where the only stickers in evidence are the referenced stickers showing union support, that she is referring to wearing a union support sticker. (Id. at Hearing Audio Day 1, Part 2 at 04:22:45 -04:23:05.)
39. Ms. Sandoval also spoke at the March 9, 2020 School Board meeting although she could not recall if she was wearing a union sticker during that meeting, and remembered Miguelangel Burns identifying himself as the local union President when he addressed the Board that date concerning non-renewal of the Superintendent's contract. (Id. at 04:25:05 - 04:25:59; 04:27:29.)
40. Brandon Gurule is a physical education teacher and until recently was the Athletic Coordinator and boys' basketball coach at PISD. He testified that he has been a dues-paying union member for three years and attended the School Board meetings on March 4 and March 9 while wearing a sticker showing support of the union. (Testimony of Brandon Gurule, Hearing Audio Day 1, Part 2 at 02:49:50 - 02:50:10; 02:51:16-02:52:14).

41. Mr. Gurule attended the March School Board meetings where Mr. Burns, on behalf of the union, presented a request not to retain Superintendent Hamilton and stood when Mr. Burns asked all that supported the Union's position to so indicate by standing. (Id. at 2:51:13 – 2:53:16; Exhibit J).
42. On May 10, 2020, approximately two months after those meetings, Superintendent Hamilton notified him that he was losing his coaching duties and was having his stipend cut in half because the concessions work he, and the previous Athletic Coordinator, had been doing for at least 8 years was being removed to Food Services. (Gurule Test., Day 1, Pt. 2, at 2:53:16 – 2:57:49).
43. Deborah Anglada has been a union member for two years preceding the hearing in this matter and attended at least one of the school board meetings on March 4 or March 9 while wearing a sticker showing support of the union. (Testimony of Deborah Anglada, Hearing Audio Day 1, Part 2 at 03:10:15 - 03:10:20; 03:22:08-03:23:25).
44. Ms. Anglada does not know if Superintendent Hamilton saw her wearing the sticker. (Hearing Audio Day 1, Part 2 at 03:22:08 - 03:23:25).
45. Superintendent Hamilton testified she was not aware what was on the sticker worn by attendees at the school board meeting. (Hearing Audio Day 2 at 04:09:37 - 04:11:11).
46. Superintendent Hamilton testified that she overheard a student at a basketball game who stated: "Mr. Burns is a drug addict". That student's parents said it was a concern that they would address with their child. (Hearing Day 2 at 3:05:38 - 3:07:45).

47. Ms. Hamilton testified that since then she heard other parents complain about Mr. Burns discussing his past drug problem and that she discussed those complaints with Mr. Burns' supervisor, Aaron Mitchell, who said that he, too, had received complaints from parents regarding this issue. Without an investigation into the context of Mr. Burns' statements during the Red Ribbon drug awareness week or without testimony as to how Mr. Mitchell responded to parent complaints, Ms. Hamilton concluded at that time that Mr. Burns' comments were "inappropriate" for a 4th grade class. (Hearing Day 2 at 3:05:38 - 3:07:45).
48. Complainant Anglada's contract was not renewed for violations of three Board policies, for unsatisfactory performance and failing to improve the learning facilities and educational opportunities for students. (Joint Ex. 4).
49. Superintendent Hamilton observed Ms. Anglada in the classroom and noted her lack of a lesson plan and general lack of instruction. (Hearing Audio Day 2 at 03:39:22 - 03:40:26).
50. Superintendent Hamilton claims to have made the decision not to renew Complainants Burns, Sandoval and Anglada in January 2020, but there are no contemporaneous confirming corroboration for that decision. (Hearing Audio Day 2 at 3:51:13 -3:51:20).
51. Complainant Gurule was told his coaching duties were not renewed because of the "lack of success" of the team and he admitted he did not have a winning record. (Hearing Audio Day 1, Part 1 at 02:52:46 - 02:53:06).
52. Superintendent Hamilton testified as to Gurule's poor win/loss record, that she felt pressured by parents and community members to not renew him as the

coach and her observation of his anger directed at his players. (Hearing Audio Day 2 at 03:59:20 - 04:01:15).

53. Superintendent Hamilton testified she made the decision not to offer him the coaching position prior to the end of the basketball season at the end of January to beginning of February 2020, but did not offer any contemporaneous corroborating evidence. (Hearing Audio Day 2 at 04:01:15 - 04:01:50).

54. Gurule's Athletic Coordinator stipend was reduced by $7500.00 because he was relieved of concession duties reassigned to Food Services as an operational decision. (Hearing Audio Day 1, Part 1 at 02:56:21 - 02:56:47). (Hearing Audio Day 2 at 00:32:45 -00:33:02; 00:39:46 – 00:40:20; 02:04:00 - 02:05:45; 02:17:55 - 02:19:23).

55. Reassigning concessions to Food Services was prudent for several reasons: 1) having Food Services purchase the food items would resolve problems with lack of inventory and spoilage of food; 2) Food Services would be able to cook the food in the kitchen at the District rather than at people's homes; 3) purchasing the food through Food Services would reduce costs; 4) the District would be in compliance with its concessions inasmuch as Food Services holds the food handler's licenses; and 5) reassigning concessions to Food Services would reduce costs to the District in hiring a substitute for Complainant Gurule when he was absent from the District to purchase food and reduce the costs through wear and tear on a District vehicle as he would drive to Santa Fe to purchase the food at Sam's Club. (Hearing Audio Day 2 at 32:45 - 33:02; 39:46 -40:20; 2:04:00 - 2:05:45; 2: 17:55 -2:19:23).

56. In addition to Gurule's stipend the Bilingual Coordinator stipend and Chief Procurement Officer stipend were also discontinued by the District. (Hearing Audio Day 2 at 2:05:57 -2:06:11).

57. After removal of the Food Services stipend, Gurule chose to voluntarily resign from the position of Athletic Coordinator. (Hearing Audio Day 1, Part 1 at 2:58:18-2:58:23).

58. At a February 18, 2020, School Board Meeting, Debi Conrad (AFT-NM Staff) attempted to report to the Board the results of a bargaining unit survey that showed issues with the Superintendent. At the Superintendent's urging, she was prevented from presenting those survey results at that meeting. (Burns Testimony, Day 1, Pt. 2, at 00:24:34 – 00:25:34; Anglada Testimony, Day 1, Pt. 2, at 03:22:13-03:23:10; Hamilton Testimony, Day 2 at 04:22:31 – 04:24:43; Exhibit 13.)

59. Based on the erroneous belief that Darren Griego (no relation to the Hearing Officer) was the one responsible for distributing the Union survey, Superintendent Hamilton placed him on administrative leave because she alleged that he "without consent from this office, created an alleged survey and then placed the survey in the mailboxes of school employees." (Burns Testimony, Day 1, Pt. 2, at 00:29:38 – 00:33:15). Exhibit K).

60. The survey was "part of the Collective Bargaining Agreement process" and "[s]ince our union had not been active, this was a tool for AFT New Mexico to learn more about faculty and staff needs, resources and overall work environment." (Exhibit K, email "Response to Administrative Leave Pending an Investigation at 1).

61. The School Board met on March 4, 2020, at which meeting Complainants spoke and/or attended and at which the Board voted not to renew Superintendent Hamilton's contract. (Exhibit 14, at 2-3).

62. The School Board met again on March 9, 2020, at which meeting Complainants spoke and/or attended and at which the Board took another vote, reversed itself, and renewed Superintendent Hamilton's contract. (Exhibit 12 at 1-2).

63. School Board President Amanda Bissell, in her interactions with Superintendent Hamilton, noted that she expressed frustration with having to deal with the Union as a result of her uncertainty over the Union's status, because having to deal with collective bargaining was diverting energy away from her priorities, and because the union was distributing surveys. (Bissell Testimony, Day 1, Pt. 2, at 02:16:54).

64. At the District, the contract renewal process includes principals making an initial recommendation to renew or not renew teachers' annual contracts. Aaron Mitchell's recommendation was to retain Mr. Burns as a teacher and he expressed surprise when he was not renewed. (Mitchell Testimony, Day 1, Pt. 2, at 03:50:58 – 03:52:24).

65. Mr. Burns attended the February 18, 2020, March 4, 2020, and March 9, 2020, School Board meetings described above, wearing a union sticker. (Burns Testimony, Day 1, Pt. 2, at 00:24:34 – 00:29:37).

66. At the March meetings, Mr. Burns presented as a collective the Union's position, which was that Ms. Hamilton's contract should not be approved. He spoke at both of them. During the March 9, 2020, meeting, he identified himself as the

Union President, and asked all that supported the union's position to stand in support. (Id.)

67. School Board President Amanda Bissell corroborated Mr. Burns' testimony that he spoke at both March meetings after identifying himself as the Union President, and further testified that she could read the Union stickers worn by those addressing the Board as saying "Stronger Together AFT-NM when the speakers were at the podium. (Bissell Testimony, Day 1, Part 2 at 02:00:42 – 02:03:52; 02:09:45 – 02:10:34; Exhibit J).

68. In an exchange of emails asking for permission from Superintendent Hamilton to post notice of union-sponsored PPE distribution on the School's Facebook page, he identified himself and other "AFT-PISD" members Estrella Lopez, Kaori Lopez, Marissa Sandoval, Marcella Cordova, Grace Vissagara, who "as a collective" thanked the school board President for her support of the PPE distribution program. (Exhibit F, at page 4; Burns Testimony, Day 1, Part 2 at 00:33:16 – 00:35:42).

69. In response to those efforts, he received an email from Superintendent Hamilton which stated, in part, "I also request that you refrain from identifying yourself as the Union President for PISD." (Exhibit L).

70. Marissa Sandoval, a teacher with 18 years of experience, was employed by the District as the HS/MS Spanish teacher during the '18-'19 and '19-'20 school years, supervised by her Principal, Marina Lopez. (Sandoval Testimony, Day 1, Part 2 at 04:03:13 – 04:03:52; 04:22:04 – 04:22:34).

71. Ms. Sandoval's classroom performance while employed by the District was evaluated by either Marina Lopez or an outside consultant and at all times her evaluations rated her as exemplary. (Exhibit D).

72. Marina Lopez's overall impression was that Ms. Sandoval was a very good teacher and she recommended that she be retained for the upcoming school year based on her observation and supervision. (Lopez Testimony, Day 1, Part 2 at 02:22:40 - 02:23:01).

73. Superintendent Hamilton did not discuss with Ms. Lopez her recommendation that Ms. Sandoval be retained before terminating Ms. Sandoval. (Id. at 02:28:10 – 02:30:40).

74. Ms. Sandoval spoke at both of the March 2020 School Board meetings against retaining Superintendent Hamilton, sat with other Union members and wore a Union sticker at both meetings. (Sandoval Testimony, Day 1, Part 2 at 04:24:43 – 04:27:02; Bissell Testimony, Day 1, Part 2 at 02:00:42 – 02:03:52; Exhibit J).

75. On May 2, 2020, she received a letter (Exhibit J-5) notifying her she was being terminated for "unprofessional interactions with students, community members and staff" in violation of District policy G-0850, but no factual details supporting the alleged violation was provided. (Exhibit J-6).

76. Prior to receiving the letter Exhibit J-5), she was unaware of any allegations of unprofessional interactions with students, community members against; she was not written up, called to the office, disciplined, or put on a growth plan in connection with any such allegations. (Sandoval Testimony, Day 1, Part 2 at 04:32:59).

77. Ms. Sandoval acknowledges and her supervisor, Ms. Lopez, was only made aware of one complaint from a custodian that Ms. Sandoval had unprofessionally berated her. Ms. Lopez interviewed both parties at the time of the complaint and determined it was a simple miscommunication. (Lopez Testimony, Day 1, Part 2 at 02:30:40 – 02:33:10; 02:36:58 – 04:40:30).

78. None of the salacious details Ms. Hamilton testified the custodian told her about the incident were reported to Ms. Lopez during her investigation; she received no letters of concern from students or parents. She received one parent call complaining about her bathroom policy and one about a grade discrepancy, investigated and found no issues that would cause her not to recommend retaining Ms. Sandoval and Superintendent Hamilton never spoke to Ms. Sandoval about any such concerns before the termination letter. Consequently, the employer's testimony to the contrary are not credible. (Id.; Hamilton Testimony, Day 2 at 04:56:18 – 04:56:58).

79. Amy Garcia, who is in charge of the District's Human Resources matters, including payroll and benefits, acknowledged that union dues deductions have been made from teachers' paychecks despite her inability to secure a copy of a Collective Bargaining Agreement authorizing those deductions. (Hearing Audio Day 2 at 02:16:50 - 2:17:21).

80. Among those for whom dues deductions were being made were Miguelangel Burns (beginning in December of 2019) and Darren Griego. (Id. at 02:26:08 – 02:28:27).

REASONING AND CONCLUSIONS OF LAW:

I undertake analysis of the Complainants' claims on two related but distinct tracks: First, as claims alleging discriminatory or retaliatory adverse action for union activities in violation of §§ 19(A), (B), (D) and (E). Second, as claims for interference with concerted action prohibited by § 10-7E-5(B).[2]

As this case presents what is referred to as a "dual motive" or a "mixed motive" case, in which there is evidence that the District had both lawful and discriminatory reasons for terminated Complainants' employment, both parties correctly appeal to the two-part analysis set forth in *Wright Line*, 251 NLRB 1083 (1980) to determine whether an employee has been disciplined or otherwise discriminated against for union activity. Under *Wright Line,* the employee first must "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision" to take certain adverse employment action." Id. at 1089. A *prima facie* case is established by showing there was (a) union activity, (b) knowledge of such union activity, and (c) animus against the union. See *Carpenters Health & Welfare Fund,* 327 NLRB 262, 265 (1998). Animus can be inferred from circumstantial evidence. Id. Second, once a *prima facie* case is established, the burden will shift to the employer to establish that the same action would have taken place even in the absence of the protected conduct. *Wright Line* at 1089; See also *NRLB v. Transportation Management Corp.,* 462 US 393 (1983), *Northern Wire Corp. v. NLRB*, 887 F.2d 1313, 1319 (7th Cir. 1989) and *Carpenters*, supra, at 265-266. Once the burden has shifted the employer must prove that the lawful reason it posits was the motivating factor in the employment decision.

[2] § 10-7E-5(B) provides that in addition to the protections afforded in subparagraph (A) to "form, join or assist a labor organization", public employees also have the right to "engage in other concerted activities for mutual aid or benefit." Violation of rights protected by § 5(B) constitutes a Prohibited Labor Practice under § 10-7E-19(G).

Although the evidentiary burdens shift back and forth under this framework the ultimate burden of persuading the trier of fact remains at all times with the Complainant. *See CWA v. Dept. of Health,* PELRB Case No. 108-08, Hearing Examiner's Report (July 15, 2008) applying the *Wright Line* test and concluding that, although the union established a *prima facie* case of retaliation, it failed meet its ultimate burden refute the Department's business justifications by a preponderance of the evidence.

§ 19(A) Claim. § 10-7E-19(A) prohibits discrimination on the basis of an employee's membership in a labor organization:

> "A public employer or the public employer's representative shall not:
> A. discriminate against a public employee with regard to terms and conditions of employment because of the employee's membership in a labor organization…"

The kind of conduct recognized by this board as supporting a claim for retaliation includes conduct alleged here constituting discrimination in hiring, tenure or term and condition of employment, because of union involvement. See *American Federation of State, County, and Municipal Employees, Council 18, AFL-CIO,* No. A-1-CA-34737 (J. Hanisee, September 5, 2017) (In re: PELRB 105-09; 11 PELRB 2009). In that case the New Mexico Court of Appeals affirmed and adopted this Board's order finding the Department to have violated § 19(A) of the Act and in so doing recognized that union membership is an identifiable characteristic that may not serve as the basis for treating an otherwise similarly situated public employee differently with respect to the terms and conditions of his or her employment. Respondent argues that evidence showing Superintendent Hamilton worked well with AFT-NM and had once been an AFT organizer in her career does not negate an inference of anti-union animus considering evidence that the converse of a preference for working with AFT-NM is a preference *not* to work with Peñasco Federation of United

School Employees Local 4285 or its officers. I agree with Respondent that a generalized hostility toward labor is not sufficient to sustain a claim of anti-union animus, but such a generalized claim is not at issue here. Rather, there is evidence of specific animosity toward the local union and its officers once it began emailing concerns and speaking out at School Board meetings.

Adverse action in this case is not disputed (with the exception of Complainant Gurule) because the Respondent terminated complainants' employment. But to prevail on its claim under § 19(A) Complainants must also demonstrate that the District treated those employees (who were officers or members of the union) differently than employees who were not. Id. at ¶ 11.

To prove differing treatment regarding those terminations Complainants rely generally upon evidence that the usual process followed when making a decision whether to renew a teacher's contract is to rely on recommendations by the principals supervising that teacher and that Superintendent Hamilton deviated from that process as to all individual Complainants (except Gurule, discussed further on in this decision) after being expressly directed by the Peñasco School Board to follow that policy. (Hamilton Testimony Day 2 at 04:54:49 – 05:00:38). I analyze that evidence as to each Complainant.

Miguelanjel Burns. The confused, exaggerated and inaccurate testimony by Complainant Burns resulted in a finding that he lacks credibility except concerning his testimony that is otherwise supported by documentary evidence, the testimony of other witnesses or that is not contested by the Respondent. I include in that category of supported testimony or uncontested testimony those facts found herein.

Prior to his termination, Mr. Burns was active in Peñasco Federation of United School Employees Local 4285, serving as its President since February of 2020 and attending public

school board meetings wearing union insignia, including one in February of 2020 in which a union representative attempted to present the results of a collective bargaining survey, and meetings in March in which he voiced opposition to continuing the Superintendent's contract with the District after identifying himself as the local union President. Superintendent Hamilton was present at those meetings at which Burns and others wore identifying union sticker on their clothing, which stickers were readable by the Board as union members addressing the Board from the speaker's podium. As the Board President could and did read the stickers, I infer that so could and did Superintendent Hamilton who was seated in the same general location as the Board members. The Superintendent's testimony that she could not read the stickers is not credible. However, even if she is taken at her word, it is less important that Superintendent Hamilton could read what was on the union stickers than it is whether she was aware that the sticker, whatever it may have said, indicated support for the union and in this case, opposition to the continuation of her contract as School Superintendent. I infer from the circumstances that Ms. Hamilton was aware that those wearing the union sticker were union members opposed to continuation of her contract.

From approximately April 27, 2020 to May 9, 2020, Miguelanjel Burns was actively engaged in a AFT-NM sponsored effort to distribute personal protective equipment to PISD employees at the outbreak of COVID-19, about which he communicated via email signed "Miguelangel Burns, 4th Grade Teacher, AFT-PISD President" and which communication was acknowledged by Superintendent Lisa Hamilton. His teaching abilities were highly rated by both his former supervisor and his principal on April 29, 2020 immediately preceding his termination. I conclude from that evidence that Burns engaged in protected union activities and that Superintendent Hamilton was aware of those protected activities on behalf of the

Complainant union at least as of March 4, 2020 so as to satisfy that aspect of the first prong of the *Wright Line* test.

A preponderance of the evidence supports an inference that Superintendent Hamilton harbored anti-union animus against the recognized bargaining representative, Peñasco Federation of United School Employees Local 4285. She objected at the February School Board meeting, to a bargaining unit survey, a commonly accepted method for a bargaining unit representative to ascertain its members' priorities. Pursuant to § 15(H) of the Act, an exclusive representative shall have the right to use the electronic mail systems or other similar communication systems of a public employer to communicate with the employees in the bargaining unit regarding:

> (1) collective bargaining, including the administration of collective bargaining agreements;
> (2) the investigation of grievances or other disputes relating to employment relations; and
> (3) matters involving the governance or business of the labor organization.

The survey in question clearly falls within one or more of the categories of communication a representative is privileged to use. When the Superintendent mistakenly believed that Darren Griego was responsible for distributing the surveys she placed him on administrative leave in contemplation of discipline.

Here, I digress to address the Superintendent's repeated unanswered requests that Burns or AFT-NM provide proof of a copy of bargaining unit certification and most recent Collective Bargaining Agreement. (Exhibits F, L, 5 and 6). To the extent the Employer may argue that in the absence of such proof it is under no obligation to afford Peñasco Federation of United School Employees Local 4285 or its officers the benefits and protections of § 15, such an interpretation is inconsistent with the purpose of the Act espoused in §§ 2 and 5. While I have sympathy for Superintendent Hamilton's frustration with the union's lack of

response, the objective fact is that Peñasco Federation of United School Employees Local 4285 was recognized by this Board as an incumbent exclusive collective bargaining representative on June 4, 2007. I take administrative notice of this Board's records in *Peñasco Federation of United School Employees Local 4285 and Peñasco Independent School District,* PELRB 303-07 in which the Determination of Incumbency may be found. To deny the union the benefits and protections of the Act to which it is objectively entitled because it did not produce the documents requested, would be unjust.[3] The union should not bear the entire burden for producing such evidence when needed. The District is under the same obligation as the Union is for maintaining accurate records of its bargaining obligation. Neither party contacted this Board to ascertain recognition status prior to the filing of this PPC. I note that Amy Garcia, who is in charge of the District's Human Resources matters including payroll and benefits, acknowledged that the District had been deducting union dues from teachers' paychecks despite her inability to secure a copy of a Collective Bargaining Agreement authorizing those deductions. Those deductions must have been sent somewhere (apparently to AFT-NM according to Respondents argument, though there is no evidence to that effect on the record) and must have been authorized at some point in time. To whom such deductions were authorized to be paid is a definite indication of the existence of a collective bargaining representative necessarily known to the District. Even if there was doubt as to whether dues were being paid to the appropriate union, it cannot reasonably be denied that the teachers authorizing dues deductions belonged to *some* union, thus entitling them to the protections of § 15 and subjecting the Employer to liability under § 19.

[3] The employer's obligation under the Act to bargain in good faith might be analyzed differently because this Board may relieve an Employer of that obligation if it can demonstrate a good-faith, reasonable uncertainty that the union still enjoys majority support.

Additional evidence upon which Complainants rely to show that Superintendent Hamilton harbored anti-union animus includes the Superintendent asking Mr. Burns to cease identifying himself as the local Union President. Her frustration with the Union non-responsiveness was noted by School Board President Amanda Bissell. That the frustration may be legitimate does not mean it is not indicia of animus. Similarly, that once upon a time the Superintendent was an AFT organizer herself does not negate an inference that she harbored animus against this particular union or its particular officers at the particular material times. It was this Union and the particular people involved in in it e.g. Miguelangel Burns, that publicly advocated for her removal as Superintendent. Within two months thereafter, Mr. Burns and other Union members' she terminated the Mr. Burns' employment and that of other active Union members. I also note that in April 2020, after speaking at the March School Board meetings, Mr. Burns was reprimanded by his Principal, at the Superintendent's direction, for violating chain of command by his sending a "letter of concern" to the School Board regarding staff involvement in budget discussions. Another teacher, Marcella Cordova, wrote a similar letter of concern to the Superintendent at the same time as did Mr. Burns and after collaborating with him on her letter but was not disciplined. Ms. Cordova did not address the School Board as did Mr. Burns and in her email Ms. Cordova is expressly writing as a "concerned member of the staff" as contrasted with writing as a member of, or on behalf of PFUSE Local 4285.

Based on the foregoing circumstantial evidence, I conclude that Complainants have established a *prima facie* case that Respondent discriminated against Miguelangel Burns (and other employees discussed individually below) on the basis of membership in a labor organization. Accordingly, applying the *Wright Line* standard, the burden shifts to the employer to establish that the same action would have taken place even in the absence of the

protected conduct. For these reasons, Respondents' reliance on *The New Otani Hotel & Garden and Hotel Employees and Restaurant Employees Union, Local 11, Hotel Employees and Restaurant Employees International Union AFL–CIO*. Case 21–CA–30841. (June 17, 1998) is inapposite because the absence of discrimination and anti-union animus upon which those cases depend, are present here.

Respondent posits that lawful reasons exist for its terminations (Mr. Gurule's coaching position and concessions stipend will be discussed separately) because Complainants Burns, Sandoval, and Anglada were each non-tenured teachers, employed at-will. Without a doubt Complainants Burns and Sandoval each had a one-year contract for employment with the District, ending on May 28, 2020 (Exhibits 1 and 2) and pursuant to the School Personnel Act may be terminated for any reason the District deems sufficient. See NMSA 1978 § 22-1 0A-24(A). Respondent argues that it provided lawful and legitimate reasons for the non-renewal of each, wholly unrelated to union activity so that non-renewal of those contracts was proper within the Superintendent's discretion.

That Mr. Burns and Ms. Sandoval may be terminated in the Superintendent's discretion for any reason she deems appropriate does not end the inquiry, however, because, as Respondent recognized by its citation to *NLRB v. Transp. Mgmt. Corp.,* 462 U.S. 393, 394 (1983), under substantive labor law on this subject, an employee at will may be discharged an employee for a good reason, a bad reason, or no reason, *so long as it is not for an unlawful reason.* (Emphasis added.)

As concerns Mr. Burns specifically, there were three stated reasons for non-renewal of his contract:

1. He held an "inappropriate discussion with fourth grade students regarding [his] drug use" referred to in Exhibit J-2;

2. He supposedly committed an "insubordinate action of instructing employees not to participate in a voluntary survey needed to obtain a grant money for the District" in Exhibit J-2 (sent to teachers without first submitting the survey for review to a community grants committee assembled for that purpose) when he Burns wrote to those teachers telling them that they need not feel compelled to answer the survey;

3. He violated Board Policy by committing the other two alleged violations of District policies and regulations.

In *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), the Supreme Court explained that proof an employer's explanation for the adverse employment action is not believable is circumstantial evidence that is probative of intentional discrimination. Id. at 147. As the Court noted, "it is permissible for the trier of fact to infer the ultimate fact of discrimination from the falsity of the employer's explanation." Id. Moreover, "[t]he factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the *prima facie* case, suffice to show intentional discrimination. Thus, rejection of the defendant's proffered reasons will permit the trier of fact to infer the ultimate fact of intentional discrimination." Id. Therefore, I consider the Complainants' evidence countering the stated reasons for non-renewal of Mr. Burns' contract.

The parties stipulate that Mr. Burns is a recovered prescription drug abuser. He was not notified prior to his termination that discussion of his previous drug abuse in the context of a red-ribbon drug abuse awareness week class presentation, was inappropriate. The same presentation was approved by his supervising principal the prior school year. After a parent complaint and questions by Superintendent Hamilton about the propriety of Mr. Burns

discussing his prior prescription drug abuse, his current supervising principal, Aaron Mitchell, wanted a meeting to discuss the context of his discussion. Because that meeting did not happen before Mr. Burns' employment was terminated, I conclude Ms. Hamilton was unaware of that context before rendering her determination that District policies were violated by Burns' "inappropriate discussion with fourth grade students regarding [his] drug use."

The preponderance of the evidence demonstrates that Mr. Burns never received any corrective action relating to the issues stated as the basis for non-renewal of his contract nor had Superintendent Hamilton ever spoken to him about those concerns. Consequently, I do not believe the Superintendent is being completely truthful when she testified that the class room discussion of his prior drug dependence was the basis for his termination, nor do I believe that she made the termination decision in January, 2020, before the union activities at issue.

Concerning the purported insubordination surrounding Mr. Burns' objections to the grant survey, although the evidence is at odds over whether the survey was a mandatory prerequisite for the grant, there is no dispute that the District considered completing the survey to be voluntary. The District ultimately received the grant despite any action by the Union or Mr. Burns, and so, for the purpose of this § 19 analysis (as contrasted with the § 5 concerted activities analysis further on in this report recommended decision) I construe the conflicting evidence in favor of the Complainants. I concern myself here with those emails Burns signed in his union capacity and less so with those that he did not sign in that capacity. It avails the Respondent little to selectively concentrate on evidence that does not support his engaging in union activity while ignoring evidence supporting such activity.

Prior to writing the email Exhibit 9 dated April 8, 2020, discouraging participation in the survey, Mr. Burns discussed his concerns with its lack of anonymity with his immediate supervisor, Principal Aaron Mitchell. As I read the email, Mr. Burns apparently primarily resent a cut-and-pasted message from AFT's attorney Shane Youtz informing AFT-PISD "brothers and sisters" that the survey sent out previously was not appropriate or scientific and their participation in it was voluntary. As anticipated in that email, on April 9, 2020 "counsel for AFT New Mexico and its Penasco local" sent an email to Superintendent Hamilton objecting to the survey and requesting its removal. (Exhibit N).

As one of the stated bases for non-renewal of his contract I conclude that the survey issue implicates the union's role as collective bargaining representative and Mr. Burns' role as President of AFT-PISD.

Based on the foregoing, I do not believe the Superintendent's claim that Burn's opposition to the survey was either insubordinate or a legitimate reason for his termination, much less that the termination decision was made in January because opposition to the survey did not begin until April. In infer, therefore that the stated reasons were a pretext for discrimination.

The third and final basis for Mr. Burn's termination stated in Exhibit J-2 does not state any new basis other than the preceding two alleged policy violations. I consider that to be "piling on"; compounding the charges by adding a charge where no new facts would justify the additional charge. Doing so supports an inference of both anti-union animus and pretext for discrimination.

I consider it to be an important fact that, in accord with School Board policy, Mr. Burns' immediate supervisor recommended to the Superintendent that his contract be renewed shortly before she terminated him, as much for the recommendation itself as for the Superintendent's deviation from that practice. This casts doubt upon the Superintendent's

after-the-fact testimony that she had already decided to terminate Burns' and Sandoval's employment in January 2020, prior to the union activities relied upon in this decision. Because there is no corroborating contemporary evidence of a decision having been made in January, I conclude the decisions were made sometime thereafter. When considered together with the fact that none of the Complainants had any issues raised with their performance or conduct until the employment actions taken by Superintendent Hamilton in May of 2020 and the timing of the terminations a little over two months after the Complainants' open opposition to the Superintendent, I conclude the reasons given by the Respondent are a pretext for discrimination and that the protected activity was the actual reason for the terminations.

For the foregoing reasons, after applying the shifting burden standard set forth in *Wright Line,* I conclude that Miguelangel Burns has met his ultimate burden of proving by a preponderance of evidence that Respondent discriminated against him regarding terms and conditions of employment because of their membership in a labor organization in a manner prohibited by NMSA 1978 §10-7E-19(A) when his contract was not renewed in May of 2020 and that animus against PFUSE, Local 4285 (and perhaps in favor of AFT-NM) was a substantial motivating factor for the adverse action taken.

Marissa Sandoval. As in the case of Miguelangel Burns above, Ms. Sandoval was active in reviving the dormant Peñasco Federation of United School Employees Local 4285, becoming its Treasurer in February of 2020. She was involved in the Union's effort to distribute PPE in the District. There is less evidence of communicating her union involvement to the Respondent than exists for Miguelangel Burns. She acknowledges that she never informed the District of her position as Union Treasurer. There is no evidence that she signed any correspondence to the District in her capacity as AFT-PISD Treasurer or

as a member of the Union. However, she not only attended the March 4, 2020 School Board meeting attended by Superintendent Hamilton but she addressed the Board in opposition Hamilton's contract renewal. During that meeting she wore the same union support sticker as did other union members in attendance and for the reasons stated herein I conclude the that the Superintendent could read those stickers worn by those addressing the Board or understood that wearing the sticker meant union support. Ms. Sandoval also spoke at the March 9, 2020 School Board meeting concerning non-renewal of the Superintendent's contract although she could not recall if she was wearing a union sticker during that meeting. At both meetings she sat among other Union members.

I conclude from that evidence that Ms. Sandoval engaged in protected union activities during the two School Board meetings in March and that Superintendent Hamilton was aware of those protected activities on behalf of the Complainant by that time if not earlier, thereby satisfying that aspect of the first prong of the *Wright Line* test.

I incorporate my discussion of anti-union animus in connection with this claim as though fully restated herein and conclude that element has been met concerning Ms. Sandoval's § 19(A) claim.

Based on the foregoing, I conclude that Complainants have established a *prima facie* case that Respondent discriminated against Marissa Sandoval on the basis of membership in a labor organization. Accordingly, applying the *Wright Line* standard, the burden shifts to the employer to establish that the same action would have taken place even in the absence of the protected conduct.

Respondent offers one reason for terminating Ms. Sandoval's employment: her "unprofessional interactions with students, community members and staff." The facts underlying the alleged violation were not given at the time she was terminated. (See, Joint

Exhibit 6). At the Merits Hearing Respondent bolstered the lack of specificity in Exhibit 6 with testimony from Sheila Rodriguez that the alleged unprofessional conduct concerned Ms. Sandoval belittling her son, one of Ms. Sandoval's students. Ms. Rodriguez also testified that Ms. Sandoval adopted a rule in her class that only two students per week could be excused from the classroom to use the restroom. If true, I consider the bathroom restriction to be of no consequence. Reasonable minds can differ on the propriety of such a rule if for no other reason that to keep students on task. Her supervising principal, Ms. Lopez, received no letters of concern from students or parents about Ms. Sandoval's classroom policies. She received one parent call complaining about her bathroom policy and one about a grade discrepancy but after investigating them, did not find any issues that would cause her not to recommend retaining Ms. Sandoval.

Nicaea Chavez testified that she complained to Ms. Sandoval's principal about the number of students failing her class and that Ms. Sandoval did not implement modifications for failing students. There was testimony that Ms. Sandoval used harsh language in front of her students such as when she allegedly said "I hope I'm dead when all of you graduate."

I do not give such testimony much weight because it is an after-the-fact justification for the termination not communicated to Ms. Sandoval at the time of the termination. She was not written up, called to the office, disciplined, or put on a growth plan concerning any of the allegations against her prior to her termination, so I tend not to believe that testimony. Her Supervisor, Ms. Lopez, was made aware of only one complaint, that being from a custodian allegedly berated. She interviewed both the custodian and Ms. Sandoval after the incident and determined it was a simple miscommunication, not requiring any corrective action. The custodian did not report to Ms. Lopez any of the details Ms. Hamilton testified constituted unprofessional conduct in Ms. Sandoval's interaction with the custodian, therefore I do not

believe they are accurate. In weighing the direct testimony of Principal Lopez, who investigated the incident at the time it occurred, against Ms. Hamilton's hearsay testimony about what the custodian allegedly told her long after the fact and revealed for the first time at the Hearing on the Merits, I must decide in favor of Ms. Sandoval's position. Superintendent Hamilton never spoke to Ms. Sandoval about any of the concerns expressed at the trial on the Merits and as they were not communicated at the time of her termination, I conclude that the reasons given by the Respondent for non-renewal of Marissa Sandoval's contract are a pretext for discrimination and that the protected activity of speaking at the two March 2020 School Board meeting in connection with her union membership was the actual reason for the terminations.

For the foregoing reasons, after applying the shifting burden standard set forth in *Wright Line*, I conclude that Marissa Sandoval has met her ultimate burden of proving by a preponderance of evidence that Respondent discriminated against her regarding terms and conditions of employment because of her membership in a labor organization, an act prohibited by NMSA 1978 §10-7E-19(A) when her contract was not renewed in May of 2020.

Deborah Anglada. I do not credit the Respondent's assertion in argument that Ms. Anglada did not have a contract for employment as none was found in her personnel file because it strains credulity that a teacher could be paid or would assume teaching duties without one. Other evidence assumes a contract because the stated reason for termination was "non-renewal of your existing contract" (See Exhibits J-3 and 4) and it does not serve the District's purpose to assert now that one does not exist.[4]

[4] If the stated reason for termination was non-renewal of Anglada's contract, yet no such contract existed, the stated reason would be false and serve as evidence of a pretext for discrimination.

As with Mr. Burns and Ms. Sandoval the fact that Ms. Anglada is non-tenured and subject to employment at will does not end my analysis because even though an employer may discharge an employee for any reason or no reason, the reason may not be an unlawful reason. Complainant Deborah Anglada was a dues-paying union member who was present at the February School Board meeting where Debi Conrad tried to read the results of the collective bargaining survey, standing in the doorway wearing the Union sticker. The evidence is conflicting as to whether Superintendent Hamilton saw her at that meeting. However, Ms. Anglada was also present during the school board meetings in March referred to above, again wearing union insignia. I conclude that her presence and participation at all three meetings is sufficient in view of her union dues deductions known to the District to infer that the District had knowledge of her union activities.

Shortly after those meetings in late April, Ms. Anglada received a letter terminating her employment for substandard performance. As with Marissa Sandoval the explanatory letter gives no facts to support allegations of substandard performance. At the Hearing on the Merits Respondent elicited a good deal of testimony to support Anglada's alleged substandard performance. I give that testimony little weight not only because it is refuted by Ms. Anglada but because there are no contemporaneous records of the events having occurred. None of the events are reflected on Ms. Gonzales' evaluations and she received no corrective actions or counseling despite Ms. Gonzales' claim that reported them to "administration". Superintendent Hamilton never spoke to Ms. Anglada about any alleged performance concerns prior to terminating her employment. There is no evidence that any of the alleged events were known to Ms. Hamilton at the time she terminated Ms. Anglada's employment.

However, unlike Complainants Burns and Sandoval, Ms. Anglada's supervisor, Aaron Mitchell, testified he did not make a recommendation either to renew or not renew her contract given the extremely difficult circumstances arising from her husband being ill with cancer that year. I infer from that testimony that the Superintendent followed the standard procedure including consulting the supervising principal prior to terminating her employment. Therefore, the necessary element of disparate treatment is missing from the § 19(A) analysis as it applies to Ms. Anglada and I conclude she has not met her burden of proving that the District treated her differently than employees who were not associated with the Union and therefore no *prima facie* case has been made on a claim under § 19(A).

Brandon Gurule. Mr. Gurule is a physical education teacher and until recently was the Athletic Coordinator and boys' basketball coach at PISD. He has been a dues-paying union member for three years. He attended the March 4 and March 9 School Board meetings while wearing a sticker showing support of the union and stood when Mr. Burns asked that all supporting the Union's position do so. That the Coach and Athletic Coordinator positions are not bargaining unit positions does not effect Mr. Gurule's standing because the PEBA protects persons, not merely bargaining unit positions. See §§ 10-7E-2 and 10-7E-5.

On May 10, 2020, approximately two months after those meetings, Superintendent Hamilton relieved him of his coaching duties and cut his stipend in half because the concessions work he had been doing was being removed to Food Services Department. Gurule has established by a preponderance of the evidence his union affiliation and that he engaged in protected activity when he attended School Board meetings and stood in support of the union's position in opposition to retaining the Superintendent. Whether the employer was aware of his participation in protected activities beyond the wage deduction of union dues is harder to establish than for those Complainants who corresponded with the

Superintendent in their union capacity or addressed the School Board on behalf of their union. However, assuming for the sake of argument that the District was aware of Gurule's union activities, there is a more important distinction between Burns' and Sandoval's adverse actions and Gurule's that necessitates a different outcome.

To establish disparate treatment necessary to prove a claim under § 19(A), the procedure followed by Respondent in terminating Burns and Sandoval was compared to the usual procedure, which included consulting with their supervising principals. That comparison does not exist here because Gurule was not terminated. His supervising principal's opinion concerning whether he was a "successful" coach is irrelevant. Coaching success, like beauty, is in the eye of the beholder and in this case the eye that counts is the Superintendent's. It is not productive to argue over which measure of "success" is better when ultimately it is only the Superintendent's opinion that matters. I decline to second guess Ms. Hamilton's measure of success and because at its most elemental level a "successful" coach would have a winning record, which Gurule admitted he did not have, I cannot conclude that the Superintendent's reasons for ending Gurule's coaching contract was unreasonable or a pretext for discrimination. [5]

Even more so, I cannot conclude that the Superintendent's reasons for ending Gurule's concessions duties was unreasonable or a pretext for discrimination. The economic efficiencies associated with moving concessions to the Food Services department, not to mention the quality control and sanitary standards improvements are so obvious that I am surprised it took the District 8 months much less 8 years to bring them about.

[5] Superintendent Hamilton testified as to Gurule's poor win/loss record, that she felt pressured by parents and community members to not renew him as the coach and her observation of his anger directed at his players.

Accordingly, Gurule has not met his burden of proving a *prima facie* case that the District treated Gurule differently than employees who were not associated with the Union necessary to prevail on a claim under § 19(A).

§ 19(B) Claims. § 19(B) of the PEBA makes it a prohibited practice for a "public employer or his representative" to "interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the [PEBA]". The protected rights alleged to have been violated are those in § 5 of the PEBA giving public employees the right to "form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion and to otherwise engage in concerted activity for mutual aid and protection. The provision of § 5 concerning protection from interference, restraint or coercion for engaging in concerted activity for mutual aid and protection is discussed separately in this decision.

Unlike discrimination or retaliation cases under § 19(A) motive is not a critical element of interference claims under § 19(B). It is well settled under NLRB precedent that "interference, restrain, and coercion… does not turn on the employer's motive or whether the coercion succeeded or failed." Rather, "[t]he test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." See *American Freightways Co.,* 124 NLRB 146, 147 (1959).

In the instant case I examine whether the termination of the four employees in question primarily or other employer conduct generally, tended to interfere with the free exercise of Complainants' associational rights under the Act. I look to precedent under NLRB decisions for guidance. In *NLRB v. Gissell Packing Co.*, 395 U.S. 575, 616-618 (1969), an employer was found to have violated the right to form, join or assist a union without interference when it threatened employees with economic reprisals such as layoffs or termination, if employees

select union representation. See also, *NLRB v. Nueva Engineering, Inc.,* 761 F.2d 961 (1985).

Miguelanjel Burns. Here, Miguelanjel Burns was one of three employees who were not merely threatened with termination, but actually terminated. In turn, their terminations serve as a threat to others in the union. In construing whether an employer's act is coercive threatening or intimidating under § 19(B) "the test … is whether, from the standpoint of the employees, it has a reasonable tendency to interfere with, restrain or coerce the employees in the exercise of protected rights."); and *Double D Construction Group, Inc.,* 339 NLRB 303, 303 ("[t]he test … is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction").For the reasons discussed under the § 19(B) analysis above there is a nexus between those employees' union activities and the terminations.

My conclusion that Mr. Burns' termination for an "inappropriate discussion with fourth grade students regarding [his] drug use" has been deemed pretext for discrimination supports a conclusion that Mr. Burns met his burden of proof to establish of Section 19(B) claim.

The second of the stated bases for Mr. Burns' termination was violations of Board Policy G-0650. Principles II and III. According to the Respondent, these policies were violated by his "insubordinate action of instructing employees not to participate in a voluntary survey needed to obtain a grant money for the District". Putting aside for the moment the doubt outlined in the § 19(A) analysis above concerning whether his act was insubordinate and whether the survey was in fact needed to obtain a grant money for the District, even if it was insubordinate, the insubordination was excused. An employer may not discipline union officers for statements, demeanor and/or certain conduct while engaged in union business. See, *Union Fork and Hoe Company*, 241 NLRB 907, 908 (1979); Although a steward may be

disciplined for excessive or "opprobrious" conduct or for disobeying a direct order there is no evidence that either of those circumstances exist here.

His termination tends to interfere with, restrain or coerce the union employees in the exercise of protected associational rights under § 5.

Marissa Sandoval. Having concluded that Respondent discriminated against her regarding terms and conditions of employment because of her membership in a labor organization, in violation of § 19(A) of the Act I likewise conclude that her termination tended to interfere with, restrain or coerce her and other bargaining unit members in the exercise of rights under § 5 of the PEBA to "form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion.

Deborah Anglada. Because the Respondent followed the usual procedure, including consulting the supervising principal prior to terminating Ms. Anglada's employment and the necessary element of disparate treatment is missing needed to prevail on a claim under § 19(A),. I conclude she has not met her burden to prove a claim under 19(B) by a preponderance of the evidence both because non-renewal of her contract does not rise to the level of adverse employment action on par with that suffered by Burns and Sandoval and because the level of union activity is not on par with theirs. Therefore, I do not conclude her termination has the same tendency to interfere with, restrain or coerce her or other bargaining unit members in the exercise of associational rights under section 5.

Brandon Gurule. I conclude Mr. Gurule has not met his burden to prove a claim under 19(B) by a preponderance of the evidence both because non-renewal of his coaching contract and concessions stipend does not rise to the level of adverse employment action on par with that suffered by Burns and Sandoval so that their removal would serve as a catalyst

for intimidation and because the level of union activity is not on par with theirs so that the nexus between the two has not been established. Therefore, I do not conclude it has the same tendency to interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the PEBA.

Claims under § 19(D). Because § 19(D) prohibits discrimination in regard to hiring, tenure or a term or condition of employment in order to encourage or discourage membership in a labor organization, the same facts upon which I conclude in favor of or against anti-union discrimination violations of Section 19(A) weigh in favor of a conclusion as to those complainants' claims under § 19(D). Therefore, I conclude that Miguelangel Burns and Marissa Sandoval have met their burden of proof that Respondent discriminated against them in regard to tenure or a term or condition of employment in order to discourage membership in a labor organization. Conversely, Brandon Gurule and Deborah Anglada have not met that burden.

§ 19(E) Claims. For the same reasons I conclude that Miguelangel Burns and Marissa Sandoval have met their burden of proof that Respondent discriminated against them in regard to tenure or a term or condition because a of their forming, joining or choosing to be represented by a labor organization, NM-PISD, thereby violating § 19(E) of the Act. Conversely, Brandon Gurule and Deborah Anglada have not met that burden.

§ 5 Claims for interference in concerted activity for mutual aid and protection. NMSA 1978 § 10-7E-5(B) (2020) provides:

> "Public employees have the right to engage in other concerted activities for mutual aid or benefit. This right shall not be construed as modifying the prohibition on strikes set forth in Section 10-7E-21 NMSA 1978."

Complainants allege that by their actions and omissions Respondent violated § 5. Any such violation constitutes a prohibited labor practice under § 19(G), which prohibits refusal or failure to comply with the Public Employee Bargaining Act.

The 2020 Amendments to the Act expressly incorporated into § 5 protections for concerted activities that long existed under both the NLRA and PEBA case precedent. For example, as early as 2007, one non-binding PELRB Hearing Officer's recommended decision recognized that § 5 protected concerted activities when it found that PEBA protected the circulation of a petition directed to improving the terms and conditions of employment that is signed by employees and circulated, even in the absence of union involvement. See *AFSCME v. Department of Health,* PELRB Case No. 168-06, Hearing Examiner Report (Aug. 30, 2007). Remedial statutes are to be given a liberal construction to affect their purpose), and JOHN E. HIGGINS, THE DEVELOPING LABOR LAW 7th Ed.) Chapters 6.I.B.1; 6.I.B.3; 6.III.A.3; 6.II.A.4 and cites therein regarding standards for protected concerted activity.

Accordingly, ambiguity as to the Complainants' union member or officer status is not dispositive on the question whether their conduct is protected as "concerted activity". This becomes a critical distinction when considering the second stated reason for non-renewal of Mr. Burns' teacher contract – encouraging teachers not to participate in the District's "voluntary" grant survey. Superintendent Hamilton views that action as insubordinate. I do not. But even if it is insubordinate, it is protected concerted activity for which insubordination is excused. To rule otherwise would be to write out of the law protections for concerted activity in favor of employer policy and directives even though they may be contrary to the PEBA. Similarly, under § 5 analysis, whether the Superintendent could read union stickers or understood Complainants' status as union members or officers at the School Board meetings in February and March 2020 is not material to an inquiry whether

they were retaliated against for engaging in concerted activity for mutual benefit or protection. I conclude that those in attendance at any of those meetings and particularly those advocating for the Superintendent's removal at any of those meetings were engaged in protected activity.

The Respondent's case authorities are distinguishable. For example, in *Epilepsy Foundation of Northeast Ohio v. National Labor Relations Board,* 268 F.3d 1095 (D.C. Cir. 2001) Petitioner, challenged a NLRB decision finding, in a non-union setting, that it committed unfair labor practices when it discharged two employees for sending a memorandum to a supervisor outlining several complaints with his supervision and identifying occasions when, in their opinion, he acted inappropriately and unprofessionally. The court reversed a NLRB decision that the employees were terminated for engaging in protected concerted activities because there was no evidence on the record that the situation fell within the "narrow category of cases" where "the identity of the supervisor is directly related to terms and conditions of employment" and concerted activity "to effect the discharge or replacement of [that] supervisor" may thus be protected, citing to *NLRB v. Oakes Mach. Corp.*, 897 F.2d 84, 89 (2d Cir. 1990).

NLRB v. Oakes Mach. Corp. held that a violation of Sec. 8(a)(1) of the NLRA is established if (1) the employee's activity was concerted; (2) the employer was aware of its concerted nature; (3) the activity was "protected" by the act; and (4) the discharge or other adverse personnel action was motivated by the protected activity. (citations omitted).

Unlike the *Oakes Mach. Corp.* case there is ample evidence to support a determination not only that "the identity of the supervisor is directly related to terms and conditions of employment" but that all elements of protected activity exist. For example, concerning Mr. Burns, Miguelanjel Burns was actively engaged in a AFT-NM sponsored effort to distribute

personal protective equipment to PISD employees at the outbreak of COVID-19, about which he communicated via email signed "Miguelangel Burns, 4th Grade Teacher, AFT-PISD President". This is evidence that he was engaged in concerted activity as contrasted with acting individually on his own behalf. Likewise, the Burns telling his colleagues that they need not feel compelled to answer the survey in the District's "voluntary" survey, the April 8, 2020 email from Mr. Burns to Superintendent Hamilton on this subject refers to "Our state, local and national union take pride in community schools. Our NM AFT union president is part of the PED statewide community schools task force initiative". Exhibit 9 is an email dated April 8, 2020, informing AFT-PISD "brothers and sisters" that the survey sent out previously was not appropriate or scientific and their participation in it was voluntary. Mr. Burns speaking at the school board meeting in March attended by Superintendent Hamilton and at which her retention was the topic under consideration was done in his capacity as President of the AFT local union at Peñasco Independent Schools, not on his own behalf. Similarly, Complainants Marissa Sandoval, Brandon Gurule and Deborah Anglada were present during the school board meetings in March, not pursuing an individual agenda but wearing union insignia and appearing as part of a group. Because the individual Complainants are personally known to Superintendent Hamilton and she was both the recipient of their several email messages on behalf of others and present at the meetings where complainants appeared as a group, one may reasonably infer that she was aware of the concerted activity, thus establishing the first and second elements of a claim under § 5. That the discharge or other adverse personnel action was motivated by the protected activity is established by the evidence outlined above in the analyses of § 19. Unlike the *Oakes* case the evidence here supports a conclusion that the concerted activity is protected.

As stated in *Oakes*, employee action seeking to remove a supervisor is normally unprotected activity "because it lies outside the sphere of legitimate employee interest." Putting aside for the sake of argument whether the School Superintendent is a "supervisor" as contemplated by the *Oakes* case, the test for protected activity in that case does not apply to public employees in this case. Unlike private sector employees such as those in the *Oakes* the public sector employees here have a Constitutionally protected right to publicly address their government employers at public meetings concerning the "identity" of the School Superintendent and to advocate against extension of her public contract. As acknowledged in *Oakes*, replacement of a supervisor may be protected provided the identity of the supervisor is "directly related to terms and conditions of employment". *Hoytuck Corp.*, 285 N.L.R.B. No. 120 n. 3 (1987). Whether employee activity aimed at replacing a supervisor is directly related to terms and conditions of employment is a factual inquiry, based on the totality of the circumstances, including (1) whether the protest originated with employees rather than other supervisors; (2) whether the supervisor at issue dealt directly with the employees; (3) whether the identity of the supervisor is directly related to terms and conditions of employment; and (4) the reasonableness of the means of protest. *NLRB v. Sheraton Puerto Rico Corp.*, 651 F.2d 49, 51-52 (1st Cir.1981); *Abilities and Goodwill*, 612 F.2d at 8-9; *Okla-Inn,* 488 F.2d at 502-03.

Can it be reasonably doubted that a Superintendent with sole authority by statute over personnel matters in the absence of a collective bargaining agreement school district the identity of the supervisor is directly related to terms and conditions of employment? I conclude that it cannot.

Therefore, under the circumstances of this case, the identity of the Superintendent generally, and Superintendent Hamilton specifically, was within the realm of proper employee interest.

The concern over working conditions originated with employees rather than other supervisory personnel; Hamilton dealt directly with employees. The Complainants' conduct in sending letters of concern, emails objecting to employer action, objecting to a "voluntary" employer survey, distributing their own collective bargaining survey through the District's internal mail system and demonstrating against the Superintendent's retention were all objectively reasonable actions. Accordingly, I conclude that the Respondent infringed upon the rights of Complainants Burns and Sandoval to engage in concerted activities for mutual aid or benefit and that such infringement constituted a prohibited labor practice under § 19(G). Although Complainants Anglada and Gurule also engaged in protected concerted activity, for the reasons discussed under the § 19 analysis herein, there is insufficient evidence that the adverse employment actions taken against them was because of the concerted activity or that the employer would not have taken the same action but for the concerted activity.

DECISION: The preponderance of the evidence supports a conclusion that at all times material Superintendent Hamilton was an agent for and acted on behalf of the Peñasco Independent School District and her acts within the scope of her duties are imputed to the District.

I give little weight to the Respondent's after-the-fact justifications for non-renewal because there is no contemporaneous corroborating evidence and they inapposite with the most recent employee evaluations. For example, Carmen Gonzales, an Educational Assistant who worked with Complainant Anglada, testified that she reported to "Administration" her concerns about the lack of teaching, but there is no corroborating evidence of any such report. Certainly, it is not reported in her supervising principal's evaluation. Similarly, testimony that Anglada told her students they were "all going to get cancer and die" and

calling the students "animals" are not reflected on her evaluations and there are no documented complaints from other parents or students.

For the same reasons I give little weight to Sheila Rodriguez's testimony that Ms. Sandoval twice belittled her son nor do I ascribe a negative connotation to her testimony that Sandoval adopted a rule limiting the number of students who could use the restroom during her class to two per week. I give little weight to the testimony of Nicaea Chavez that she complained to Sandoval's principal about Sandoval's interactions with students and parents and her failure to implement modifications for students failing her class because those complaints are not recorded and had no impact on the positive evaluation by that same principal.

For similar reasons I give little weight to the hearsay testimony from the Respondent's Human Resources Director, Amy Garcia, that Sandoval told students in her class "I hope I'm dead when all of you graduate" or to complaints that Ms. Sandoval berated a custodian fully investigated and found to be a miscommunication of little significance.

Based on the foregoing findings and rationale I conclude that Miguelangel Burns and Marissa Sandoval have proven by a preponderance of evidence that Respondent discriminated against them regarding terms and conditions of employment because of their membership in a labor organization in a manner prohibited by NMSA 1978 §§ 10-7E-19(A), (D) and (E) when their contracts were not renewed in May of 2020 and that animus against PFUSE, Local 4285 was a substantial motivating factor for the adverse action taken.

I conclude that Complainants Gurule and Anglada have not met their burden to establish a violation of NMSA 1978 §§ 10-7E-19(A), (D) or (E).

I also conclude that Miguelangel Burns and Marissa Sandoval have proven by a preponderance of evidence that non-renewal of their contracts and other adverse

employment action has a reasonable tendency to interfere with, restrain or coerce the employees in the exercise of protected rights under § 5 of the Act. Complainants Gurule and Anglada have not met their burden to establish a violation of NMSA 1978 §10-7E-19(B). Finally, I conclude that Miguelangel Burns and Marissa Sandoval have proven by a preponderance of evidence that Respondent infringed upon their rights to engage in concerted activities for mutual aid or benefit and that such infringement constituted a prohibited labor practice under § 19(G). Although Complainants Anglada and Gurule proved that they also engaged in protected concerted activity, for the reasons discussed under the § 19 analysis herein, there is insufficient evidence that the adverse employment actions taken against them was because of the concerted activity or that the employer would not have taken the same action but for the concerted activity.

Therefore, I recommend that that this Board enter an order as follows:

A. Dismissing the claims of Complainants Anglada and Gurule;

B. Requiring Respondent to cease and desist from all violations of the PEBA;

C. Post and email to the District's employees notice of its violations of the PEBA and assurances that it will comply with the law in future, in a form substantially conforming that attached to this recommended decision as Appendix A;

D. Rescission of the Notices of non-renewal of Complainants Burns and Sandoval;

E. Awarding actual damages related to union dues deductions, back pay and benefits in an amount to be determined after a subsequent hearing or agreement of the parties.

Issued, Monday, November 16, 2020.

Thomas J. Griego, Hearing Officer
Hearing Officer
Public Employee Labor Relations Board
2929 Coors Blvd. N.W., Suite 303
Albuquerque, New Mexico 87120

APPENDIX A

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE PUBLIC EMPLOYEE LABOR RELATIONS BOARD
An Agency of the State of New Mexico

The Public Employee Labor Relations Board has found that we violated the Public Employee Bargaining Act by discriminating against, intimidating threatening or coercing Peñasco Federation of United School Employees, Local 4285, AFT-NM, Miguelanjel Burns and Marissa Sandoval in the exercise of protected statutory right and has ordered us to post and obey this notice.

You have the right under the Public Employee Bargaining Act § 10-7E-5 to form, join or assist a labor organization for the purpose of collective bargaining through representatives chosen by public employees without interference, restraint or coercion and to otherwise engage in concerted activity for mutual aid and protection. That right is protected by:

1. § 10-7E-19(A), making it a prohibited practice for a public employer or its representative to discriminate against a public employee with regard to terms and conditions of employment because of the employee's membership in a labor organization;
2. § 10-7E-19(B), making it a prohibited practice for a public employer or its representative to interfere with, restrain or coerce a public employee in the exercise of a right guaranteed pursuant to the PEBA;
3. § 10-7E-19(D), making it a prohibited practice for a public employer or its representative to discriminate in regard to hiring, tenure or a term or condition of employment in order to encourage or discourage membership in a labor organization;
4. § 10-7E-19(E), making it a prohibited practice for a public employer or its representative to discharge or otherwise discriminate against a public employee because he has signed or filed an affidavit, petition, grievance or complaint or given information or testimony pursuant to the provisions of the Public Employee Bargaining Act or because a public employee is forming, joining or choosing to be represented by a labor organization and
5. § 10-7E-19(G) prohibiting refusal or failure to comply with § 10-7E-5(B), which provides that public employees have the right to engage in concerted activities for mutual aid or benefit.

We acknowledge the above-described rights and responsibilities and will not in any like manner discriminate against members of interference, restraint or coercion

PEÑASCO INDEPENDENT SCHOOL DISTRICT

_____ Date:_____

By Lisa Hamilton, Superintendent