STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

McKINLEY COUNTY FEDERATION OF UNITED SCHOOL EMPLOYEES LOCAL 3313, AFT-NM,

Complainant,

v. **PELRB No. 104-22**

GALLUP-McKINLEY COUNTY PUBLIC SCHOOLS,

Respondent.

ORDER

THIS MATTER came before the Public Employee Labor Relations Board (hereinafter the "Board") at its open meeting on November 19, 2022 upon the appeal of Gallup-McKinley County Public Schools ("Respondent") from the Hearing Officer's Report and Recommended Decision dated September 30, 2022. The Board heard oral argument on the matter and carefully reviewed the Recommended Decision, the request for review, and the response thereto. Pursuant to the Public Employee Bargaining Act (the "PEBA"), NMSA 1978, Sections 10-7E-1 to -25 (2003, as amended through 2020), and being otherwise sufficiently advised, the Board voted 3-0 to adopt the Recommended Decision and findings therein.

THEREFORE, the Hearing Officer's Report and Recommended Decision dated September 30, 2022 is hereby **ADOPTED**. Respondent is therefore ordered to rescind its action to unilaterally eliminate the Instructional Coach position and reassign its duties outside of the bargaining unit. Respondent is further ordered to cease and desist from all violations of the PEBA as found and post notice of its violation and assurances that it will comply with the law in the future in a form acceptable

to the parties and this Board for a period of not less than thirty (30) days and to immediately engage in bargaining with the Union to impasse or agreement over any changes to the Instructional Coach position and duties.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

HON. NAN NASH, BOARD CHAIR

28 November 2022
DATE

STATE OF NEW MEXICO
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In re:

McKINLEY COUNTY FEDERATION OF UNITED SCHOOL EMPLOYEES LOCAL 3313, AFT-NM,

Complainant,

v. **PELRB No. 104-22**

GALLUP-McKINLEY COUNTY PUBLIC SCHOOLS,

Respondent.

HEARING OFFICER'S REPORT AND RECOMMENDED DECISION

STATEMENT OF THE CASE: This matter comes before Thomas J. Griego, designated as the Hearing Officer, on the merits of the prohibited labor practice charge filed on April 28, 2022 by McKinley County Federation of United School Employees, Local 3313 (the "Union" or "MCFUSE") against Gallup-McKinley County Public Schools ("Schools" or the "Employer") shortly after the District announced the elimination of the Instructional Coach position. On June 2, 2022, MCFUSE filed an amended prohibited practice complaint, and a hearing was held on September 12, 2022 wherein the Parties' representatives and witnesses attended and testified remotely via video conference. 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 in lieu of closing arguments were submitted on September 23, 2022. Both briefs were duly 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:**

The following are stipulated in the parties' pre-hearing order as facts not in dispute:

1. The McKinley County Federation of United School Employees, Local 3313, AFT-NM, ("the Union") is a "labor organization" as that term is defined in Section 4(K) of the PEBA (NMSA 1978, § 10-7E-4(K) (2003)). It is the exclusive bargaining representative of a bargaining unit of employees at the Gallup-McKinley County Schools.
2. Respondent is a "public employer" as that term is defined in Section 4(R) of the PEBA.
3. The PELRB has subject matter jurisdiction over this dispute, and personal jurisdiction over the parties.
4. Respondent has retained a company, Empower, to perform work for the District.
5. Respondent has retained a company, The Stepping Stones Group, to perform work for the District.
6. Beginning with the 2022-2023 school year, the District will no longer employ individuals as Instructional Coaches.
7. Beginning with the 2022-2023 school year, the District will employee individuals as School Deans.

I further find as follows based on the testimony and documentary submissions at trial:

8. The parties have entered into a Collective Bargaining Agreement (CBA) effective July 1, 2019 to June 30, 2022. Joint Exhibit 1.
9. Article 1 of the Parties" CBA, entitled "INTRODUCTION/PURPOSE RECOGNITION", contains two subsection relevant to this case: First, subparagraph A provides in pertinent part:

> "…The District recognizes the Union, pursuant to two Certifications of Majority Support and Bargaining Status, each issued by the State of New Mexico Public Employee Labor Relations Board on February 27, 2008, as the Exclusive Representative of all employees in the two Bargaining Units which consists of Classified Unit employees (all regular custodial, food services, maintenance, and receiving/delivery

> personnel, and all bus drivers, assistant bus drivers and mechanics) and Certified Unit employees ("all regular licensed/certified professional employees") except for supervisory, managerial, confidential, noncertified, casual, or substitute employees."

Second, Article 1, subparagraph C provides:

> "The District hereby recognizes the McKinley County Federation of United School Employees as Exclusive Representative as per the Public Employees Bargaining Act for all regular licensed/certified professional employees (teachers, counselors, nurses, librarians, diagnosticians, school psychologists, interpreters for the deaf, occupational, speech language, and physical therapists) and Classified Unit employees (custodians, food services, maintenance personnel, receiving/delivery, bus drivers, assistant bus drivers, mechanics, educational assistants, instructional assistants, library assistants, and health assistants)"

10. I take special notice of two Certifications of Majority Support and Bargaining Status, issued by this Board on February 27, 2008, certifying the Complainant as the Exclusive Representative of employees in the two Bargaining Units as described in Article 1 of the Parties' CBA.

11. Article 2, subparagraph B(6) provides that when the CBA uses the term "certified employee" (as it does in the heading for Article 10 and in Article 1(C)), it means "any person holding a valid certificate authorizing the person to teach, supervise an instructional program, counsel or provide special instructional services in the public schools of the State of New Mexico." Id. at Art. 2(B)(6).

12. Article 10, Subsection C of the parties' CBA, entitled "Work Year-Certified Employees" provides: "The following employees work one hundred ninety (190) days: Licensed/Certified Employees; SAS, Career and Elementary Counselors; Nurses, Interpreters, Instructional Support Coaches, Early Childhood Coaches, Early Childhood Support Specialists, Technology Support Teachers, and Early Childhood Interventionists." Joint Ex. 1, at p. 6.

13. Article 2, Section B(11) of the parties' CBA provides that when the CBA uses the term "employee" (as it does in Article 10(C)), it means "an employee within the bargaining unit for which the Federation has been recognized as Exclusive Representative." Id. at Art. 2(B)(11).

14. The District created a position called "Instructional Coach" in 2016, (Exhibits 5 and 6)

15. The District changed the job titles of those employees performing Instructional Coach duties multiple times, to Instructional Support Coach and then to Instructional Support Teacher. (Testimony of Jason Wright, Audio Record Part 1 at 23:15 - 27:55.)

16. At the end of the 2021-2022 school year, the District eliminated the Instructional Coach position. Union's Exhibit C.

17. Jason Wright had employment contracts with the District (not in evidence) for each of the three years he worked for the District as an Instruction Coach, then as an Instructional Support Coach and later as an Instructional Support Teacher. Under each of those contracts he performed exactly the same duties. (Testimony of Jason Wright, Audio Record Part 1 at 1:18:35-1:19:31; 1:20:50-1:21:28.)

18. Jason Wright testified that his employment contracts (not in evidence) did not identify him as an at-will employee. To the contrary, when he was first hired as an Instructional Coach he specifically asked Assistant Superintendent, Wade Bell, whether he could still be part of the union in the Instructional Coach position and Mr. Bell assured him that he could. (Testimony of Jason Wright, Audio Record Part 1 at 00:24:55 - 00:25:55.)

19. Mr. Wright was specifically told by District management that Instructional Coaches are not at-will positions. (Id. at 1:05:51-1:06:08.)

20. The District's Deputy Superintendent, Assistant Superintendent of Business Services and Chief Financial Officer, Jvanna Hanks, testified that Instructional Coaches were not part of

the bargaining unit in part because they were at-will employees. However, she acknowledged that the employment contract for Jason Wright for the 2021-2022 school year as an Instructional Support Teacher, was not an at-will contract. That contract was shown to her as an impeachment document, but apparently was not introduced into evidence. (Testimony of Jvanna Hanks, Audio Record Part 2 at 00:42:30 – 00:46:02.)

21. Instructional Coaches are not required to hold an administrator's license - only a Level 2 teaching license. (Testimony of Jvanna Hanks, Audio Record Part 2 at 00:56:25 – 00:56:34; Testimony of Wade Bell, Audio Record Part 2 at 1:22:40 - 1:23:00.)

22. When Jason Wright was hired in the Instructional Coach position, Assistant Superintendent, Wade Bell told him that the reason only a teaching license is required for the position was because the idea behind Instructional Coaches was to have "teachers supporting teachers." (Testimony of Jason Wright, Audio Record Part 1 at 00:28:38 – 00:29:27.)

23. Jason Wright was specifically told by management employees Amanda Claussen, Laura Moore and Wade Bell that he, as an Instructional Coach, was not a supervisor and was not to supervise teachers because he was on an equal footing with teachers. (Testimony of Jason Wright, Audio Record Part 1 at 00:32:46 – 00:33:00.)

24. Jason Wright is a member of the Complainant Union and has served on its negotiating team without objection by the District. (Testimony of Jason Wright, Audio Record Part 1 at 1:07:35-1:08:55; Testimony of Kathy Kurpiel, Audio Record Part 1 at 00:42:00 – 00:43:03; 00:53:57 – 00:54:33.)

25. Instructional Coaches' observations, unlike the evaluations performed by Principals, are not reported to the State and do not form part of their formal evaluation. (Testimony of Jason Wright, Audio Record Part 1 at 00:31:20 – 00:32:46; 1:02:31 - 1:03:01.)

26. A formal "walkthrough", as performed by a Teacher's Principal, is evaluative in nature, whereas an informal one, as performed by an Instructional Coach, is for coaching and helping. (Testimony of Wade Bell, Audio Record Part 2 at 1:19:5-1:20:08.)

27. Only individuals with an administrator's license (which is not a requirement for the Instructional Coach position) can perform formal evaluations of teachers. (Testimony of Wade Bell, Audio Record Part 2 at 1:22:40-1:23:00.)

28. An Instructional Coach's observations are not typically relied on by a Principal preparing a formal evaluation of a teacher; instead, they rely on their own observations, as Wade Bell testified he did when he was a Principal. Id. at 1:19:40-1:19:43.

29. Principals are primarily responsible for discipline and hiring at their schools; to be a Principal (unlike an Instructional Coach) an individual is required to hold an administrative license. (Testimony of Wade Bell, Audio Record Part 2 at 1:23:01-1:23:51.)

30. Jason Wright's job duties, whether as an Instructional Coach, Instructional Support Coach or as an Instructional Support Teacher, included:

    a. Supporting teachers in all areas of instruction and providing good first instruction;
    b. Helping create and implement lesson plans;
    c. Developing classroom instruction through modeling and direct support, if needed;
    d. Observing teachers in the classroom in anticipation of their final evaluation performed by a principal;
    e. Overseeing curriculum materials and resources to make sure teachers have what they need;
    f. Running professional development;
    g. Reviewing data with teachers relating to their teaching and helping them analyze that data;
    h. Intervention whenever an issue concerning instruction or special needs or behavior arose;
    i. acting as substitute teacher;
    j. Acting as LEA[1] for IEPs when administrator couldn't be present;
    k. Consulting and working with outside consultants; and

[1] LEA is the acronym for " Local Educational Agency", which is the person representing the school district in an official capacity with regard to an "IEP" or Individualized Education Program, a written document developed for a public-school child who is eligible for special education. https://adayinourshoes.com/who-is-the-lea-at-iep-meeting/

l. Overseeing outside contractors in the building.

(Testimony of Jason Wright, Audio Record Part 1 at 00:29:28 – 00:31:36.)

31. The duties of the Instructional Coach are still being performed at the District after the District eliminated the Instructional Coach position, i.e. the District created a new non-bargaining-unit position—School Dean—and gave this position some of the job duties performed by the Instructional Coaches. (Union Exhibit B.)

32. The School Dean will do what the Instructional Coach did plus more (Testimony of Wade Bell, Audio Record Part 2 at 1:16:45-1:16:55.)

33. The District has utilized an outside contractor, Empower, to perform certain tasks for the District and the District is in the process of renewing its contract with Empower for those services. Exhibits J-2 and J-3.

34. All of the duties formerly performed by the District's Instructional Coaches are contracted out to Empower to be performed under its contract with the District in addition to coaching administrators, providing Empower materials, and dealing with PE and Athletic programs not previously performed by Instructional Coaches. (Testimony of Jason Wright, Audio Record Part 1 at 00:56:55 – 1:02:30; Testimony of Wade Bell, Audio Record Part 2 at 1:12:55 - 1:14:38; Joint Exhibit 2 at p. 5.)

35. The District provided the Union with no notice prior to eliminating the Instructional Coach position. Testimony of Jvanna Hanks, Audio Record Part 2 at 00:46:55 – 00:47:05.

36. The Union learned of the District's decision to eliminate the Instructional Coach position on March 30, 2022, when Christopher Vian, an Instructional Coach and the Union's Vice President, forwarded to the attorney for the Union, Stephen Curtice, an email, Union Exhibit C, announcing the elimination of that position. (Testimony of Kathy Kurpiel, Audio

Record Part 1 at 00: 39:24 – 00:41:45 – 00:54:33; Testimony of Jason Wright, Audio Record Part 1 at 1:07:35-1:08:55.)

37. The March 3, 2022 email message from Jakob Stokes announcing the elimination of the Instructional Coach position as appears on Union Exhibit C does not constitute notice to the Union. Complainant Exhibit C.

38. After March 30, 2022, the Union requested bargaining over elimination of Instructional Coaches during the bargaining sessions for the successor agreement to Joint Exhibit 1 and demanded restoration of the *status quo ante.* (Testimony of Kathy Kurpiel, Audio Record Part 1 at 00:42:00 – 00:43:03.)

39. Instructional Coaches have not only been members of the Union prior to the elimination of that position but have brought workplace issues forward through the Union, served as Union Officers and as part of the Union's contract negotiation team without objection by the District. For example, Christopher Vian was an Instructional Coach and the Union's Vice-President. Jason Wright was an Instructional Coach and a member of the Union's bargaining team, the constituent VP for elementary schools, and the treasurer of the Union. (Testimony of Kathy Kurpiel, Audio Record Part 1 at 0039:24 – 00:41:03; Testimony of Jason Wright, Audio Record Part 1 at 00:23:05 – 00:23:15; 1:26:50 - 1:27:11.)

REASONING AND CONCLUSIONS OF LAW: The Union's case rises or falls depending on whether the Instructional Coaches at issue are now and always were within the bargaining unit it represents. If so, elimination of that position and the transfer of what would therefore necessarily be bargaining unit work to a position outside of the bargaining unit, would be a mandatory subject of bargaining.[2]

[2] NMSA 1978 § 10-7E-17(A)(2020) provides that public employers and unions must negotiate in good faith over mandatory subjects of bargaining such as wages, hours and all other terms and conditions of employment except for retirement programs provided pursuant to the Public Employees Retirement Act or the Educational Retirement Act. Further, NMSA 1978 § 10-7E-17(G)(2020) specifically requires the parties herein as a public school and as educational employees to bargain over the impact of professional and instructional decisions

I agree with the District's argument that this is not a Unit Clarification Petition hearing. That does not mean however, that I cannot or should not consider evidence of the disputed positions' duties as they pertain to one or more of the categories of public employees excluded from coverage under the Act in order to determine whether the Instructional Coaches at issue are now and always were within the bargaining unit it represents as an essential element of its claims that Sections 17(A) (requiring the District to bargain in good faith with the union regarding wages, hours and all other terms and conditions of employment) and 19(F) of the Act (making it a prohibited practice to refuse to bargain collectively in good faith with the exclusive representative).

Only supervisory, confidential or management employees, as those terms are defined in § 10-7E-4 of the Act, are excluded from collective bargaining so that their inclusion in a bargaining unit would render it "inappropriate". No similar exclusion exists for "administrative" employees. Therefore, it avails the District nothing to assert that the Instructional Coach was created as an administrative position. The performance of administrative duties has never been recognized as an exclusion from coverage under the Act and such duties are commonly disregarded when calculating the amount of time spent by disputed employees in pursuit of executive, supervisory or managerial work.[3]

In the instant case, it is undisputed that the Union was recognized in 2008 as the exclusive representative for "All regular licensed/certified professional employees of the Gallup-McKinley County School District, except for supervisory, managerial, confidential, noncertified, casual, or

made by the employer. This duty to bargain in good faith is ongoing even after the parties have entered into a collective bargaining agreement and during its term, unless it can be demonstrated that the parties clearly and unmistakably waived the right to bargain regarding a particular subject.

[3] For example, Administrative Interns, or "principals-in-training", were found not to be supervisors because they merely assist with some limited supervisory acts. See *American Federation of Teachers Local 4212 and Gadsden Independent School District*, 03-PELRB-2006 (May 31, 2006). Similarly, in *Santa Fe Community College-AAUP and Santa Fe Community College*, 4-PELRB-2017 and *San Juan College v. San Juan College Labor Management Relations Board,* 2011-NMCA-117, 267 P.3d 101, the fact that full-time instructional professionals performing other administrative duties may be properly excluded from the same bargaining unit as those performing 100% instructional duties does not mean that they are excluded from coverage under the Act.

substitute employees (Certified Unit)."[4] Up to the point the Union demanded bargaining over elimination of the Instructional Coach position and return to the *status quo ante*, the preponderance of the evidence supports a conclusion that the District acknowledged that Instructional Coaches were within the bargaining unit and that the work they performed was therefore bargaining unit work. I refer to the findings concerning the "Recognition" clause of the Parties' CBA, incorporating this Board's certification of "all regular licensed/certified professional employees" and that a Level 2 teaching license is a requirement of the position.

Article 10, Subsection C of the parties' CBA, recognizes Instructional Support Coaches among those bargaining unit employees working under 190-day contracts and at Article 2, Section B(11) the District acknowledges that whenever the CBA uses the term "employee", as it does in Article 10(C), it means "an employee within the bargaining unit for which the Federation has been recognized as Exclusive Representative."

I am struck by the fact that during the several years the Union has been recognized as exclusive representative for licensed and certified professional employees, the District never had a problem with Instructional Coaches (by whatever permutation of that title the District has used over the years) being dues-paying members of the Union, serving as Union Officers advancing the interest of bargaining unit members and serving as part of the Union's contract negotiation team. Only now, when the District must defend its admitted elimination of the Instructional Coach position without notice to the Union, and that the same work previously done by Instructional Coaches is now being performed by School Deans or has been contracted out to Empower, that it claims that the Instructional Coach position was not part of the bargaining unit.[5]

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[4] I have taken special notice of the Certification issued by this Board on February 27, 2008 in PELRB Case Nos. 315-07 and 316-07.

[5] The dispute over Instructional Coaches status as at-will employees (without a protected property interest in their continued employment) is a red-herring, inasmuch as although a property interest in employment may be indicia of regular employee status, and therefore, protected under the Public Employee Bargaining Act, it is not the single defining

Based on the foregoing I conclude:

I. THE DISTRICT'S UNILATERAL ELIMINATION OF THE INSTRUCTIONAL COACH POSITION AND REASSIGNMENT OF ITS DUTIES OUTSIDE OF THE BARGAINING UNIT VIOLATES SECTION 17(A)(1) OF THE PEBA, CONSTITUTING A PROHIBITED LABOR PRACTICE BY REFUSING TO BARGAIN COLLECTIVELY IN GOOD FAITH WITH THE EXCLUSIVE REPRESENTATIVE IN VIOLATION OF NMSA 1978, § 10-7E-19(F) (2020).

NMSA 1978, § 10-7E-17(A)(1) (2020) provides that a public employer and a recognized union "shall bargain in good faith on wages, hours, and all other terms and conditions of employment...." The legislature's use of the word "shall" clearly communicates its intent that the mutual obligation to bargain terms and conditions of employment is mandatory before those terms and conditions may be implemented. See also *Montaño v. Los Alamos County*, 1996-NMCA-108, ¶ 5, 122 N.M. 454, 926 P.2d 307 (stating that "the words 'shall' and 'will' are mandatory).

NMSA 1978, § 10-7E-19(F) (2020) makes it a prohibited practice for the public employer to "refuse to bargain collectively in good faith with the exclusive representative." It is a *per se* breach of the duty to bargain to "unilaterally" alter a "mandatory subject of bargaining" without first providing notice and opportunity to bargain to impasse unless the requirement to bargain has been waived. See generally JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapter 13.II.

NMSA 1978, § 10-7E-4(F) (2020) defines "collective bargaining" to mean "the act of negotiating between a public employer and an exclusive representative for the purpose of entering into a written agreement regarding wages, hours and other terms and conditions of employment."

The United States Supreme Court has long held that it is a *per se* violation of the duty to bargain in good faith for an employer to make unilateral changes to an employee's wages, hours, and other terms and conditions of work that are mandatory subjects of bargaining. See *NLRB v. Katz,* 369 U.S.

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criteria so that no one who serves at-will may be considered a regular employee under the Act. See Hearing Officer's Report And Recommended Decision in *UHPNM & UNM Sandoval Regional Medical Center;* PELRB 304-22 (August 23, 2022).

736 (1962); *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198 (1991)[6] ("The Board has determined, with our acceptance, that an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment."); *Visiting Nurse Services of W. Mass., Inc. v. NLRB,* 177 F.3d 52, 57-59 (1st Cir. 1999).

As the *Katz* Court noted:

> "Clearly, the duty thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact – 'to meet … and confer' - about any of the mandatory subjects. A refusal to negotiate in fact as to any subject which is within § 8(d), and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.

369 U.S. at 743.

Moreover, this duty to bargain over changes to terms and conditions of employment prior to unilateral imposition continues during the life of a collective bargaining agreement. In 2020, the New Mexico Legislature strengthened this mid-contract bargaining obligation by providing in Section 17(A)(2) that "Entering into a collective bargaining agreement shall not obviate the duty to bargain in good faith during the term of the collective bargaining agreement regarding changes to wages, hours and all other terms and conditions of employment, unless it can be demonstrated that

[6] The cited provisions of the Public Employee Bargaining Act are substantially the same as the relevant provisions in the National Labor Relations Act upon which they were modeled. See 29 U.S.C. § 158(a)(5) (making it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees...."); 29 U.S.C. § 158(d) (defining "to bargain collectively" to mean "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment....") so that cases decided under the NLRA are instructive. "Absent cogent reasons to the contrary, we should interpret language of the PEBA in the manner that the same language of the NLRA has been interpreted, particularly when that interpretation was a well-settled, long-standing interpretation of the NLRA at the time the PEBA was enacted." *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-31, ¶ 15, 123 NM 239, 938 P.2d 1384.

the parties clearly and unmistakably waived the right to bargain regarding those subjects." Section 17(A)(2) is consistent with the holding in *County of Los Alamos v. Martinez,* 2011-NMCA-027, ¶ 19, 150 N.M. 326, 258 P.3d 1118 that a Union will only be found to have waived its right to insist on bargaining regarding mandatory subjects of bargaining "if the waiver is expressed clearly and unmistakably." See also *IBEW v. NLRB*, 795 F.2d 150, 153 (D.C. Cir. 1986) ("[M]aking unilateral changes in the terms and conditions of employment during the pendency of an existing collective bargaining agreement ... violates [the] duty to bargain."); *Alwin Mfg. Co. v. NLRB*, 192 F.3d 133, 137-38 (D.C. Cir. 1999); *Duffy Tool & Stamping, LLC v. NLRB*, 233 F.3d 995, 996-97 (7th Cir. 2000). There can be no question that the replacement of bargaining unit work with outside contractors or a non-bargaining-unit administrative position as was done here, affects the Instructional Coaches' wages, hours, and other terms and conditions of employment and is a mandatory subject of bargaining. Therefore, the District has an ongoing obligation to bargain over its decision to eliminate the position. The District admits that it gave the Union no prior notification of its intent to eliminate the Instructional Coach position or of its intent to transfer the duties performed by that position to a new non-bargaining unit position called School Deans or to outside contractors Empower or The Stepping Stones Group. The District only notified the Instructional Coaches that their positions had been eliminated after-the-fact. The March 3, 2022 email message from Jakob Stokes announcing the elimination of the Instructional Coach position as appears on Union Exhibit C does not constitute notice to the Union of the change for two reasons: First, as appears on the face of the message it is announcing a *fait accompli*, and; second, as the District's witness, Jvanna Hanks, testified the March 3 email was intended to notify the Instructional Coaches themselves, as contrasted with notifying the Union, of the elimination of their positions. An employer does not satisfy its duty to bargain when it presents a decision such as the one at issue here as a *fait accompli,* with no meaningful opportunity to bargain. "A concomitant element of 'meaningful' bargaining is

timely notice to the union of the decision to close, so that good faith bargaining does not become futile or impossible, ... and [t]he [decision] cannot be a 'fait accompli' which would make good faith bargaining futile or impossible." *NLRB v. Oklahoma Fixture Co.*, 79 F.3d 1030, 1035 (10th Cir. 1996) (made in the context of a plant closure; quotation marks and quoted authority omitted).

DECISION: The Union has also met its burden of proving by a preponderance of the evidence that the District's unilateral elimination of the Instructional Coach position and reassignment of its duties outside of the bargaining unit, violates NMSA 1978, § 10-7E-17(A)(1) (2020). Therefore, the District committed a *per se* prohibited labor practice by refusing to bargain collectively in good faith with the exclusive representative in violation of NMSA 1978, § 10-7E-19(F) (2020). Because the District committed a *per se* violation of the duty to bargain in good faith, I adopt the standard remedy in such cases i.e. to order rescission of the change, restoration of the *status quo*, and bargaining to agreement or impasse. See, *Pressroom Cleaners,* 361 NLRB No. 57, slip op. at 3 (Sept. 30, 2014); *Dorsey Trailers, Inc.*, 327 NLRB 835 (1999); *Embarq Corp.*, 358 NLRB at 1203.

In addition to the foregoing, the Respondent should be Ordered to: (1) cease and desist from all violations of the PEBA as found, (2) post notice of its violation of PEBA as found herein in a form acceptable to the parties and this Board for a period of 30 days and assurances that it will comply with the law in the future.

Issued, Friday, September 30, 2022.

Thomas J. Griego, Hearing Officer
Public Employee Labor Relations Board
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Albuquerque, New Mexico 87120