STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

In re:

MCKINLEY COUNTY FEDERATION
OF UNITED SCHOOL EMPLOYEES
LOCAL 2212, AFT-NM,

Complainant,

v. PELRB 102-21

GALLUP-MCKINLEY COUNTY
PUBLIC SCHOOLS,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board ("Board") on a request by Respondent Gallup-McKinley County Schools for Board review of the Hearing Officer's Decision on cross-motions for summary judgment in this case, and that the Chair recuse herself from participation in the review due to bias against the Respondent. After review of the Hearing Officer's Decision and the parties' briefs, and accepting oral argument from the parties, the Board being otherwise sufficiently advised, the Board voted 3-0 as follows:

1. The request for recusal of the Chair on the basis of bias is without merit and is **DENIED**;
2. No further requests for recusal will be entertained by the Board in this case; and
3. The Board adopts the Hearing Officer's Decision as its own with the following modification:
    a. In the remedies ordered, the word "apology" be replaced with the phrase "acknowledgement of wrongdoing".

IT IS ORDERED: The Hearing Officer's Decision on Motions for Summary Judgment is adopted with the above modification. The Respondent shall:

(1) Cease and desist from all violations of the PEBA.

(2) Post and email notice of the foregoing violations of the PEBA and its assurances that it will comply with the law,

(3) Rescind its email of January 22, 2021, with an acknowledgment of wrongdoing to all employees to whom it was sent, and

(4) Reissue its compliance directive in a form acceptable to the Union.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Marianne Bowers
MARIANNE BOWERS, BOARD CHAIR

6/1/2021
DATE

STATE OF NEW MEXICO
PUBLIC EMPLOYEE LABOR RELATIONS BOARD

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March 24, 2021

Himes, Petrarca and Fester, Chtd.
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Chicago, Illinois 60601-6702
Attn: A. Lynn Himes

Youtz & Valdez, P.C.
900 Gold Avenue S.W.
Albuquerque, New Mexico 87102
Attn: Shane Youtz

Re: *MCFUSE, Local 3313 v. Gallup McKinley County Schools; PELRB 102-21*

Dear Messrs. Himes and Youtz:

This letter constitutes my decision denying Respondent's Motion for Summary Judgement and granting Complainant's Motion for Summary Judgement.

PROCEDURAL BACKGROUND

After this Board issued Order 19-PELRB-2020 on December 23, 2020, affirming and expanding a TRO/Preliminary Injunction issued by its Hearing Officer in PELRB Case No. 122-20, the Complainant filed a Motion for Order to Show Cause why sanctions should not be entered to enforce compliance with that Order and following notice and a hearing on January 20, 2021, the PELRB issued Order 23-PELRB-2021, finding that the District violated the December 23, 2020 Order, and issuing clarifications to the Order for the District's compliance.

In response, on January 22, 2021, Jvanna Hanks II, the District's Assistant Superintendent for Business Services, sent an email to "GMCS Teachers", attached as Exhibit A to the Complaint in this case. This case presents the question of whether Sections 5(A), 19(B) and 19(E) of the Public Employee Bargaining Act ("PEBA") were violated by sending that email to bargaining unit employees.

A Scheduling Conference was held on February 19, 2021, in which the parties stated their belief that this matter may be resolved by motion upon stipulated facts, as a matter of law. Accordingly, Cross-Motions for Summary Judgment were scheduled to be filed on March 15, 2021. Responses thereto shall be filed by close of business on Monday, March 22, 2021. Both parties timely submitted their Motions and respective Responses. Having read both Motions and Responses I conclude that further argument or factual development is not necessary.

STANDARD OF REVIEW

When deciding a motion for summary judgment, the PELRB follows the New Mexico Rules of Civil Procedure, Rule 1-056. See *AFSCME Council 18 v. New Mexico Dep't. of Labor*, 01-PELRB-2007 (October 15, 2007). "Summary judgment is appropriate in the absence of any genuine issues of material fact and where the movant is entitled to judgment as a matter of law." *Montgomery v. Lomos Altos, Inc.,* 2007–NMSC–002, ¶ 16, 141 N.M. 21, 150 P.3d 971; Rule 1-056(C) NMRA. (Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.") Once the movant meets its burden, the non-moving party then must "demonstrate the existence of specific evidentiary facts which would require trial on the merits." *Summers v. Ardent Health Serv.,* 2011 - NMSC- 017 ¶ 10, 150 N.M. 123. "Summary Judgment will be granted only when there are no issues of material fact, with the facts viewed in the light most favorable to the non-moving party." *AFSCME v. State of N.M., Regulation & Licensing Dep't*, 5-PELRB-2013, PELRB No. 124-12, 2013 (Feb. 21, 2013). "The movant has the burden of producing 'such evidence as is sufficient in law to raise a presumption of fact or establish the fact in question unless rebutted.'" *Id.* "If that threshold burden is met by the Movant, the non-moving party then must 'demonstrate the existence of specific evidentiary facts which would require trial on the merits.'" *Id.*

STATEMENT OF UNDISPUTED MATERIAL FACTS

The following facts were alleged in the Prohibited Practices Complaint and admitted by Respondent in its Answer:

1. The McKinley County Federation of United School Employees, Local 3313, AFT-NM, ("the Union" or "MCFUSE") is a "labor organization" as that term is defined in Section 4(L) of the PEBA and is the exclusive bargaining representative of a bargaining unit of employees at the Gallup-McKinley County Public Schools ("the District").
2. Respondent is a "public employer" as that term is defined in Section 4(S) of PEBA.
3. The PELRB has subject matter jurisdiction over this dispute, and personal jurisdiction over the parties.
4. On or about October 15, 2020, Respondent sent an email directing employees to have "employee monitoring software" installed on the computers they had been issued by the District and using for remote working. That instruction was not required for employees working from the worksite. In response, the Union filed the Prohibited Practices Complaint given PELRB Case No. 122-20 and filed a Petition for a Temporary Restraining Order and Preliminary Injunction.
5. On November 25, 2020, following oral argument on November 20, 2020, the Executive Director of the PELRB issued a Temporary Restraining Order and Preliminary Injunction in PELRB Case No. 122-20.
6. On December 15, 2020, the Union filed in PELRB Case No. 122-20 a Request for Judicial Enforcement of the TRO and Preliminary Injunction.
7. On December 23, 2020, following an evidentiary hearing, the PELRB issued Order 19-PELRB-2020, affirming and expanding the TRO/Preliminary Injunction.

8. On January 11, 2021, the Union filed a Motion for Order to Show Cause in PELRB Case No. 122-20.
9. On January 20, 2021, the PELRB issued Order 23-PELRB-2021, finding that the District violated the December 23, 2020 Order, and issuing clarifications to the Order for the District's compliance.
10. In response, on January 22, 2021 the District sent the email attached as Exhibit A to the Complaint. In full, that email states:

"GMCS Teachers,
Your local AFT-McFuse union, led by President Patrice Carpenter and Vice President Brian Bernard, have successfully advocated to allow the following disruptions in your classroom:

- Currently, anytime you admit a principal in TEAMS and make them part of the classroom, the principal will verbally announce their presence and you as a teacher must verbally acknowledge that the principal has entered. GMCS fully understands that you as a teacher are already capable of knowing when a principal enters and exits the classroom in the TEAMS environment. Nonetheless, your AFT-McFuse union has advocated for this to be an added requirement of you in your teaching/classroom environment.
- Please note the italicized language below. This language is somewhat unclear and grammatically confusing, but administrators and teachers are expected to adhere to it.

AFT-McFuse Vs GMCS ruling language as written by Marianne Bowers, PELRB Board Chair:

'The School shall keep their camera on with School staff being visible to teachers at all times. Any time School staff is not visible on camera to school teachers, that School staff member shall physically log out of TEAMS before leaving view of the camera. Keeping the camera on and being visually seen on the screen at all times when physically exiting out of TEAMS when no longer visible is sufficient notice to teachers that the School has left the class and the teacher is no longer being observed by the School.'

"GMCS has and will continue to advocate for these disruptions to be eliminated so that learning can continue without harm to learning environment. Any concerns or questions about these interruptions should not be directed to your principal. It is your AFT-Union that advocated for these requirements so please direct comments or concerns to Patrice Carpenter, McFuse President or Brian Bernard, McFuse Vice President (bbernard@gmcs.org).

"Policy and agreements that reference much of the language that was in the discontinued assurance documents are already found in Board Policy and the Collective Bargaining Agreement. Please note the following highlighted sections.

> "Complete electronic collections can be assessed by clicking on the hyperlinks provided. All staff should be familiar with these polices and agreements and must follow them to continue the education in our district and to protect yourself and our students. The prior Remote Instruction Assurances documents for Semester 1 of the 2020-2021 School year is currently unenforceable.
>
> "**GMCS Board Policy**
> - Section I: I-0050 IA INSTRUCTIONAL GOALS AND OBJECTIVES
> - Section I: I-6411 IJNDB-R Use of Technology Resources in Instruction
> - Section G: G-0650 GBEA Staff Ethics
> - Section G: G-4600 GCL Professional Staff Schedules and Calendars
>
> **Collective Bargaining Agreement 2019-2022**
> - Article 6 District Rights
> - Article 13 Workweek-Certified Employees
> - Article 14 Workday-Classified Employees
> - Article 27 Teaching Environment
> - Article 30 Leaves and Absences
> - Memorandum of Agreement between Gallup-McKinley County School District and MCFUSE August 18, 2020."

ANALYSIS AND CONCLUSIONS

Section 5 of the PEBA prohibits violations of an employee's right to form, join or assist a labor organization for the purpose of collective bargaining or to refuse such activities. There is frequently overlap among claims for discrimination under § 19(A) and (E) as have been brought here, and those under § 5 for interference. See JOHN E. HIGGINS, THE DEVELOPING LABOR LAW (7th Ed.) Chapters 6.I.C, 7.I., II.8 and III; ("[t]he Board has noted since its earliest days that a violation by an employer of any of the … subdivisions of Section 8," the NLRA prohibited practice section, "is also a violation of subdivision one," the NLRA's prohibition on interfering, restraining or coercing employees).

Unlike discrimination or retaliation cases motive is not a critical element of interference claims. Under NLRB precedent it is well settled that "interference, restraint, 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). See also *Dover Energy, Inc.* 261 NLRB No. 48, at 1-2 (2014).

A violation of § 5 can be found based on ambiguous language or conduct. See *Joseph Chevrolet,* 343 NLRB 7, 12 (2004). "the test … is not whether the statement is unambiguous; it 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."). See also, *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").

Generally, making disparaging or belittling comments about bargaining unit employees, the union or union representatives will not "reasonably … tend to interfere with the free exercise of employee rights" under PEBA, unless such statements are coupled with or evidence some prohibited conduct. Similarly, merely being difficult or unpleasant to employees and/or union representatives, even when the latter is engaged in conducting union business, does not violate PEBA unless coupled with or rising to the level of some prohibited conduct. Consequently, transmittal of the email at issue in the context of the prohibited practice complaints underlying it matters significantly. *Webco Industries, Inc. v. NLRB*, 217 F.3d 1306, 1317 (10th Cir. 2000).

Section 19(B) at issue here, prohibits not only interference with, restraint or coercion of a public employee in the exercise of a right guaranteed pursuant to the Act, but also prohibits the use of public funds to influence the decision of its employees to support or oppose a labor organization that represents those employees. I read the protections afforded under Sections 5 and 19(B) together as requiring more neutrality on the part of a public employer with regard to its employees' union activities than is evident here.

To be more specific, I concur with the Union's interpretation of the District's email that it falsely and maliciously blamed the Union and its officials for "disruptions in your classroom", which were, in fact, caused by Respondent's unlawful surveillance of employees and were ameliorated by the Union's efforts. Likewise, I concur with the Union's interpretation that the email claimed that the Union's PPC and the resulting Board order caused "harm to learning environment," and by directing all employees to take up any concerns they had with the Union rather than the ordinary chain of command (i.e., through their supervisors, the principals) I conclude that the District engaged in conduct that may reasonably be said to tend to interfere with the free exercise of employee rights under the PEBA.

As stated in the Union's Motion for Summary Judgment:

> "…targeting specific individuals, falsely blaming them for the consequences of the employer's illegal actions, and directing employees to take up their concerns with the Union and its officials, will have a chilling effect on Union activity as well as employees' willingness to participate in and be witnesses for PELRB proceedings."

I also agree with and adopt the Union's closing statement to the effect that:

> "This Board's Order [23-PELRB-2021] correctly ameliorated the harm caused by Respondent's unlawful employee surveillance. Rather than abide by that order and accept the consequences of its violations of PEBA, Respondent falsely blamed the Union and its officials, and sought to cause distrust of the Union by the bargaining unit. It used public resources—its email system and the employee time in generating the email—in its effort to convince the bargaining unit that the fault lay with the

> Union, rather than the employer. It did so in a threatening and heavy-handed way. Such actions violate Sections 19(B) and 19(E) of the PEBA."

DECISION

Based on the foregoing, Complainant's Motion for Summary Judgment, shall be and is hereby **GRANTED**. The Respondent's Motion for Summary Judgment shall be and is hereby, **DENIED.** As a remedy, Respondent shall be ordered to:
(1) Cease and desist from all violations of the PEBA.
(2) Post and email notice of the foregoing violations of the PEBA and its assurances that it will comply with the law,
(3) Rescind its email of January 22, 2021, with an apology to all employees to whom it was sent, and
(4) Reissue its compliance directive in a form acceptable to the Union.

Sincerely,

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director