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 CASE NO. 122-20**

GALLUP MCKINLEY COUNTY PUBLIC SCHOOLS,

Respondent.

ORDER

THIS MATTER comes before the Public Employee Labor Relations Board ("Board") on a Petition for Temporary Restraining Order and Preliminary Injunction and request for judicial enforcement of Executive Director Thomas Griego's Temporary Restraining Order and Preliminary Injunction ("Order") entered on November 25, 2020 by McKinley County Federation of United School Employees ("MCFUSE"). MCFUSE alleges that Gallup McKinley County Public Schools ("School") violated the Order and seeks judicial enforcement of the Order. After hearing testimony from witnesses, parties' pleadings and exhibits, after hearing oral argument and review of the facts *de novo*, the Board being sufficiently advised, finds that a Temporary Restraining Order and Preliminary Injunction is necessary and voted 3-0 as follows:

A. The Board adopts the findings of fact presented in the Director's November 25, 2020 Order;

B. The Board affirms the hearing officer's issuance of the Temporary Restraining Order and Preliminary Injunction pending the outcome of a hearing on the merits with amendment;

C. The Board amends the Order as follows:

i. The School shall announce its presence whenever any School staff is observing any teacher through any software. The presence of School's observing staff must be acknowledged by the teacher. School observing staff shall also inform the teacher when the School staff departs the session and the departure shall be acknowledged by the teacher.

ii. The School shall immediately notify employees that the Remote Instruction Assurances for Quarter 1 of the 2020-21School Year signed by teachers working remotely and any variation thereof is unenforceable; and

D. The request for judicial enforcement of the November 25, 2020 Order is denied without prejudice to any future request that may be necessary to enforce this Order.

IT IS SO ORDERED.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Dec. 23, 2020
DATE

Marianne Bowers
MARIANNE BOWERS, BOARD CHAIR

STATE OF NEW MEXICO
PUBLIC EMPLOYEES LABOR RELATIONS BOARD

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

Petitioner,

v. **PELRB No. 122-20**

GALLUP-McKINLEY COUNTY PUBLIC SCHOOLS,

Respondent.

TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

THIS MATTER comes before the Public Employee Labor Relations Board (Thomas J. Griego, Hearing Officer) on the Petitioner's Motion for a Temporary Restraining Order and Preliminary Injunction. After hearing oral argument on November 20, 2020 and having considered those arguments, the pleadings and being otherwise fully informed in the premises, the Motion is well taken and will be **GRANTED**. Specifically, I **FIND**:

1. The McKinley County Federation of United School Employees, Local 3313, AFT-NM, ("Union") is a "labor organization" as that term is defined in NMSA 1978, § 10-7E-4(L) (2003) and is the exclusive bargaining representative of a bargaining unit of employees at the Gallup-McKinley County Public Schools ("District").
2. Respondent is a "public employer" as that term is defined in NMSA 1978, § 10-7E-4(S) (2003).
3. The PELRB has the power to enforce the PEBA through such remedies as "declaratory or injunctive relief or provisional remedies, including temporary restraining orders or preliminary injunctions" pursuant to NMSA 1978 § 10-7E-9(F) (2020) and therefore has subject matter jurisdiction and personal jurisdiction over the parties.

4. From approximately August 4, 2020 to August 18, 2020 the parties engaged in collective bargaining as demonstrated by a series of offers and counteroffers culminating in a Tentative Agreement, Exhibits 1-11 to Respondent's Answer to the Petition for Temporary Restraining Order/Preliminary Injunction, admitted into evidence by stipulation of the parties.

5. Prior to the negotiations referred to above, the District followed two policies concerning the Use of Technology Resources in Instruction, Policies I-6400 and I-6411, Exhibits 12 and 13 to Respondent's Answer to the Petition for Temporary Restraining Order/Preliminary Injunction, admitted into evidence by stipulation of the parties.

6. Policy I-6400 generally provides for assurances that the Electronic Information Services provided by the District to its employees and students is used in an appropriate manner and for the educational purposes intended, requires each user to sign an "EIS user's agreement" and reserves the right to monitor "(LAN, WAN, Internet), databases, and any computer-accessible source of information, whether from hard drives, tapes, compact disks (CDs), floppy disks, or other electronic sources." By the legal reference on Policy I-6400 I find that the intended purpose of the policy is to comport with the requirements of The Children's Internet Protection Act (CIPA) 47 U.S.C. 254, et seq. was enacted by Congress in 2000 to address concerns about children's access to obscene or harmful content over the Internet.

7. Policy I-6411 more explicitly concerns monitoring computer use for the safety and security of minors. I take administrative notice of the CIPA provisions that schools seeking discounts offered by the E-rate program must certify that they have an internet safety policy that includes technology protection measures that block or filter internet access to pictures that are: (a) obscene; (b) child pornography; or (c) harmful to minors.

8. Nothing in either Policy I-6400 or Policy I-6411 expressly addresses the issue of video cameras in the classroom or surveillance of teachers.

9. Exhibit 1 is the Union's Proposal #7 indicating that on August 4, 2020 the Union proposed that the use of video cameras in any classroom setting is for the "exclusive purpose" of assisting the District in remote learning, to be used "only during a period in which remote or hybrid learning is mandated by the NMPED" and limiting the District's monitoring the computer's camera feed without the knowledge of the educator and its use in employee discipline or evaluation.

10. The District accepted most of the Union's August 4 proposal but on August 6, 2020, rejected the Union proposal that laptop video recording not be used in employee discipline or evaluation and expanded the allowable use in paragraph 2(b) from monitoring use of the District's network to monitoring "computer use" generally. (Exhibit 2).

11. Exhibit 3 is the District's Counter-Proposal dated August 11, 2020, to the Union's proposals and in response to proposal #7 reiterated its August 6, 2020 rejection of the Union's proposal that laptop video recording not be used in employee discipline or evaluation and its expansion of the allowable use from monitoring use of the District's network to monitoring "computer use" generally.

12. As appears from Exhibit 4, on August 12, 2020 the Union proposed to accept the District's August 11 proposal so long as its previously communicated conditions that laptop video recording would not be used in employee discipline or evaluation was accepted.

13. On August 14, 2020 the District submitted another counterproposal in which it did not agree to the Union's August 12, 2020 proposal regarding the use of video cameras,

instead noting "All other proposals from either party are withdrawn." (Exhibit 5).

14. Neither party made a new proposal concerning use of video cameras in their next proposals submitted on August 18, 2020 as appears in Exhibits 6 and 7, the District again reiterating that "All other proposals from either party are withdrawn."

15. A Tentative Agreement to be incorporated into the parties' CBA was reached on August 18, 2020 as appears in Exhibit 11, in which no agreement concerning use of video cameras in the remote locations appears and the District again reiterated that "All other proposals from either party are withdrawn."

16. After negotiating the August amendment to their CBA and after remote working for some of the District's teachers was implemented for a period of time, on or about October 15, 2020, Respondent sent an email to those employees working remotely directing them to have employee monitoring software installed on their employer-issued computers.

17. The Union demanded bargaining regarding the District's directive to have employee monitoring software installed on or about October 19, 2020.

18. On or about October 26, 2020, the District declined to engage in negotiation over installation of monitoring software and has taken the position that it is not obliged to bargain that topic because it was a management right not subject to bargaining, because remote employees had individually signed mandatory "Remote Instruction Assurances for Quarter 1 of the 2020-21 School Year" authorizing the surveillance to which the Union objected and alternatively, because it fulfilled its bargaining obligation as demonstrated by Exhibits 1-11 without the Union extracting a concession from the Respondent that it would not surveille the remote-working employees.

19. On November 12, 2020, in response to Respondent requiring bargaining unit employees

to execute the Remote Instruction Assurances for Quarter 1 of the 2020-21 School Year and the installation of surveillance software on their computers Complainant filed its Prohibited Practices Complaint, alleging violations of §§ 10-7E-17(A)(1) (requiring Respondent and AFSCME to "bargain in good faith on wages, hours and all other terms and conditions of employment"); and 10-7E-19(F) (making it a prohibited practice to "refuse to bargain collectively in good faith with the exclusive representative").

20. On the same date Complainant also filed its Motion for a Temporary Restraining Order and Preliminary Injunction.

21. The parties have been afforded an opportunity to present all factual information to the Hearing Officer and have made all legal argument that they believe is relevant.

LEGAL STANDARD.

This Board has the duty and authority to enforce the Public Employee Bargaining Act through such remedies as "declaratory or injunctive relief or provisional remedies, including temporary restraining orders or preliminary injunctions." NMSA 1978, § 10-7E-9(F) (2020).

The parties have stipulated that in considering whether to grant an injunction in this case I may apply the following factors found in *Aragon v. Brown,* 2003-NMCA-126, ¶ 20, 134 N.M. 459, 464, 78 P.3d 913, 918 (N.M. Ct. App. 2003) citing *Wilcox v. Timberon Protective Ass'n,* 1990-NMCA-137, ¶ 29, 111 N.M. 478, 486-86, 806 P.2d 1068, 1076 (N.M. Ct. App. 1990): (1) the character of the interest to be protected; (2) the relative adequacy to the plaintiff of an injunction, when compared to other remedies; (3) the delay, if any, in bringing suit; (4) plaintiff's misconduct, if any; (5) the interests of third parties; (6) the practicability of granting and enforcing the order or judgment; and (7) the relative hardship likely to result to the defendant if an injunction is granted and to the plaintiff if it is denied.

The above enumerated factors are consistent with the standard set forth in *National Trust for Historic*

Preservation v. City of Albuquerque, 1994-NMCA-057, ¶ 21, 117 N.M. 590, 874 P.2d 798, that "[t]o obtain a preliminary injunction, a plaintiff must show that (1) the plaintiff will suffer irreparable injury unless the injunction is granted; (2) the threatened injury outweighs any damage the injunction might cause the defendant; (3) issuance of the injunction will not be adverse to the public's interest; and (4) there is a substantial likelihood plaintiff will prevail on the merits.

The issuance of an injunction is an extraordinary remedy "that is not a matter of right, but which rests in the sound discretion of the trial court, to be exercised according to the facts and circumstances of each case" *Amkco, Ltd., Co. v. Welborn*, 2001-NMSC-012, ¶ 9, 130 N.M. 155, 157, 21 P.3d 24, 26 (N.M. 2001), citing *Hobbs v. Town of Hot Springs*, 1940-NMSC-063, ¶ 7, 44 N.M. 592, 595, 106 P.2d 856, 858 (N.M. 1940). Pre-adjudication injunction is an extraordinary remedy that must be justified under the circumstances. See *CWA Local 7911 v. Sierra County*, PELRB Case No. 133-08, Hearing Examiner's letter decision on Motion for Immediate Injunction (Aug. 19, 2008).

In addition, the object of a preliminary or temporary injunction "is to preserve the *status quo ante* pending the results of a hearing on the merits of the underlying claim. See, *AFSCME Council 18, NMCPSO & Santa Fe County*, PELRB Case No. 303-14, (May 7, 2014) (The County of Santa Fe and the NMCPSO were enjoined from executing a planned CBA pending the results of a representation petition.); *NEA-NM v. West Las Vegas School District,* 21-PELRB-13 (Aug. 19, 2013) (Board voted 2-1 to grant a pre-adjudication injunction because of a School District's announced intent to unilaterally impose a schedule change not agreed to by the union.)

Section 17(A)(1) of the Public Employees Bargaining Act (NMSA 1978, § 10-7E-17(A)(1) (2003) provides that the employer and the union "shall bargain in good faith on wages, hours, and all other terms and conditions of employment…."; see also *Montaño v. Los Alamos County,* 1996-NMCA-108, ¶ 5, 122 N.M. 454, 926 P.2d 307. NMSA 1978, § 10-7E-4(F) (2003)), in turn, 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." NMSA 1978, § 10-7E-19(F) (2003) makes it a prohibited practice for the public employer to "refuse to bargain collectively in good faith with the exclusive representative."

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. 736 (1962) (finding a per se violation when, during negotiations with the union but prior to impasse, the employer instituted a unilateral wage increase, even without subjective bad faith); *Litton Fin. Printing Div. v. NLRB,* 501 U.S. 190, 198 (1991) ("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."

Katz, 369 U.S. at 743.

ANALYSIS. By its Petition Petitioner seeks to protect several statutory rights protected by the Public Employee Bargaining Act: 1) employee rights to organize and bargain collectively with their employers, and to protect the public interest by ensuring, at all times, the orderly operation and functioning of the state and its political subdivisions found in Section 10-7E-2. 2) Rights of public employees under Section u10-7E-5 to engage in collective bargaining through representatives chosen

by public employees without interference, restraint or coercion. 3) the Petitioner's right as a certified labor organization to serve as the exclusive representative. 3)Moreover the Petition seeks to protects individual privacy rights to be sure from intrusive employer surveillance within their own homes. The treat to those interests posed by the Employers action is great and outweighs any damage an injunction might cause the Respondent. Because of the foregoing and because the net effect of the TRO and preliminary injunction is to require the District to abide by its agreements with the Union and PEBA, the public interest weighs in favor of issuing the TRO and Preliminary Injunction as prayed for. I conclude, particularly in view of District engaging in remote instruction for some period of time before imposing monitoring software, that there is no contrary public interest that would weigh against restraining its use until the matter is either bargained or resolved through arbitration. The adequacy to the Petitioner of an injunction, when compared to other remedies is self-evident. Returning the parties to *status quo ante* is a practical solution in consideration of the minimal hardship likely to result to the District if an injunction is granted.

I further conclude that there is a substantial likelihood that Petitioner will prevail on the merits of the underlying PPC. By reference to NLRB case law on the subject of an employer's surveillance of its employees monitoring employee action by camera is "plainly germane to the 'working environment' and is not among those 'managerial decisions', which lie at the core of entrepreneurial control". In the parlance of the instant case, the terms of its employee monitoring effort is not a management right – it is deemed to be "terms and conditions of employment" and therefore are mandatory subjects of bargaining. *Anheuser-Busch*, 342 NLRB 560 (2004), *aff'd.* in relevant part *sub nom Brewers & Maltsters Local 6 v. NLRB*, 414 F.3d 36 (DC Cir 2005) citing *Ford Motor Co. v. NLRB*, 441 U.S. 488, 498, 99 S.Ct. 1842, 60 L.Ed.2d 420 (1979) (quoting *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 222, 223, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964) (Stewart, J., concurring)). According to the *Anheuser-Busch* case although the Board has recognized that an employer may use

overt surveillance of its employees' protected, concerted activities *where necessary to further its legitimate security concerns*, section 8(a)(l)of the Act prohibits the employer from using that surveillance in a manner having a tendency "to interfere with, restrain, or coerce employees in the exercise of" such activity, 29 U.S.C. § 158(a)(1). See, e.g., *Nat'l Steel Shipbuilding Co.*, 324 N.L.R.B. 499 (1997), *enf'd*, 156 F.3d 1268 (D.C. Cir. 1998). The *potential* for constant monitoring in "the working environment," cannot be said to be free of privacy concerns. The Board reaffirmed its characterization of the use of hidden surveillance cameras as a mandatory subject of bargaining in *National Steel Corp.*, 335 N.L.R.B. 747 (2001). Because the District here refused to consider limiting the scope and use of surveillance for disciplinary or evaluation considerations or to alert the employee when surveillance or monitoring would take place this case falls within the rationale of *Anheuser-Busch* that the installation and use of hidden surveillance cameras in the workplace constitutes a mandatory subject of bargaining, especially in light of the cameras' effects on the employees' job security and the Union did not waive its right to object to the unilateral change in terms or conditions of employment.

As when an employer has violated Section 8(a)(5) and (1) of the NLRA by unilaterally changing terms and conditions of employment, so would an employer subject to the PEBA violate §§ 10-7E-17(A)(1); and 10-7E-19(F), requiring restoration of the *status quo ante* and making employees whole for losses suffered as a result of the unlawful unilateral change.

A conclusion that the present case falls within the *Anheuser-Busch* analysis is supported by the following:

1. A comparison of the "Remote Instruction Assurances for Quarter 1 of the 2020-21 School Year", Exhibit 15, with other exhibits shows that the policy implemented in 2020 varies from the Respondent's previous policies in several ways. First, compared to Exhibit 13's monitoring section, wherein the District is permitted to monitor "periodically or randomly through in-use monitoring or review of usage logs" all computer access to the Internet

through the District electronic information systems (EIS) or stand-alone connection, under its new use agreement computer monitoring is no longer limited to the internet access. Similarly, comparing the prior use agreement, Exhibit 14, to Exhibit 15 the monitoring in that prior agreement is limited to "network activities". The policy states that "users should have no expectation of privacy concerning the use of the GMCS Network" including all electronic communication. Monitoring thereunder is, again, limited to network activity. Consequently, I conclude that the District's right to monitor internet and network access of its employees prior to October 15, 2020 is profoundly different as appears at bullet point 4 of Exhibit 15:

> "I understand that GMCS will have full access to my computer/electronic device and will monitor *all activities taking place on the device at any time. This monitoring includes, but is not limited to the following: internet connectivity, internet use, screen snapshots, Teams activity, other program activity, key stroke activity, video activity, or any other use of the device.*"

(Emphasis added).

The differences in monitoring pre and post October 15 are mandatory subjects of bargaining that must be bargained but have not been. As the District itself has argued, use of laptop computer cameras for monitoring purposes that is part of Exhibit 15 was among the offers and counteroffers in August of 2020 but no agreement was to implement those changes. See Exhibits 1-11.

2. Respondent takes the somewhat unusual position that having failed to reach an agreement with the union on more extensive monitoring for remote workers, it is free to unilaterally impose the more extensive monitoring on the theory that the Union was somehow obligated to bargain the monitoring out of the Memorandum of Agreement reached in August 2020. Respondent therefore places undue emphasis on the fact that toward the end of their negotiations the offers by both parties related to the use of video cameras in the classroom were withdrawn. That fact operates against, not in favor of, the District's position that the

matter was bargained. The evidence shows that the District imposed unilaterally in October of 2020 monitoring provisions that the Union rejected during the August negotiations.

3. In Exhibit 2 one sees that the District proposed that employees sign an acceptable use agreement substantially similar to that seen in Exhibit 15. That proposal was rejected. In Exhibit 3 at page 4 the District again proposed language incorporating monitoring computer use – a proposal that was again rejected. In Exhibit 4, the Union's counterproposal at page 4 item 7 conditioned acceptance of the employer's proposal on employee protection provisions against monitoring without the educator's knowledge and restrictions against using video recordings in employee evaluations or discipline. Those conditions were rejected by the District. The employer's desire to modify monitoring computer use was not in the final agreement Exhibit 11. Neither did the final agreement contain a provision for compelling employees to sign the use agreement Exhibit 15. Having engaged in bargaining but failing to reach agreement for modifications of its monitoring rights, the District's claim that it has no obligation to bargain rings hollow. Its alternative claim that it fulfilled its bargaining obligation is without merit in consideration of there being no agreement as to the terms unilaterally imposed.

4. Creating the ability to invade privacy is enough to constitute irreparable harm even without evidence that the cameras were actually employed for that purpose. It is the possibility of surveillance without the employee's knowledge, that constitutes the harm following the standard set in *Anheuser-Busch, supra.* Conversely, no harm is associated with requiring the District not to surveil pending resolution of the underlying PPC.

For the reasons outlined above, Petitioner has satisfied all elements necessary for a Temporary Restraining Order and Preliminary Injunction to issue. The injury described above is ongoing and unless the parties immediately return to the *status quo ante* each remote teaching session taking place

will repeat that harm. Thus, this TRO and Preliminary Injunction intends to prevent that future harm, not to redress harm that may be proven after a hearing on the merits. Because this is a case in which the imminent harm or conduct is of a continuous nature, the constant recurrence of which renders a remedy at law inadequate, except by a multiplicity of suits, the injury is irreparable at law and relief by injunction is therefore appropriate. See, *City of Sunland Park,* 2000-NMCA-044, ¶ 19; *Winrock Enterprises, Inc. v. House of Fabrics of New Mexico, Inc.*, 1978-NMSC-038, ¶ 6, 91 N.M. 661 579 P.2d 787.

IT IS THEREFORE ORDERED that the Motion for Preliminary Injunction is **GRANTED** as follows:

1. Gallup-McKinley County Public Schools shall cease and desist from implementing District's directive to have employee monitoring software installed on or about October 19, 2020 and shall not implement employee monitoring under software installed pursuant to that directive pending a Board Order or decision on the merits of the underlying PPC herein or execution of an agreement with the Union permitting its implementation, whichever is sooner.
2. Gallup-McKinley County Public Schools is directed to engage in good faith negotiations over installation of monitoring software as contemplated in its October 19, 2020 directive with the objective of reaching agreement with the Union on its implementation or removal.
3. Enforcement of the individually signed mandatory "Remote Instruction Assurances for Quarter 1 of the 2020-21 School Year" authorizing the surveillance to which the Union objected is enjoined pending a Board Order or decision on the merits of the underlying PPC herein or execution of an agreement with the Union permitting its implementation, whichever is sooner.

PUBLIC EMPLOYEE LABOR RELATIONS BOARD

Thomas J. Griego
Executive Director

Dated: November 25, 2020