STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

BOARD OF EDUCATION FOR THE GALLUP-McKINLEY COUNTY SCHOOLS,

Appellant,

v. **D-202-CV-2022-07617**

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

and

STATE OF NEW MEXICO PUBLIC EMPLOYEE LABOR RELATIONS BOARD,

Appellees.

FINAL MEMORANDUM OPINION AND ORDER

THIS MATTER is an appeal under Rule 1-074 NMRA of an Order of the State of New Mexico, Public Employee Labor Relations Board (Board) that determined Appellant (District) committed a prohibited labor practice in violation of the Public Employee Bargaining Act (PEBA), NMSA 1978, §§ 10-7E-1 to -25 (2003, as amended through 2020), by refusing to bargain collectively in good faith with the exclusive representative. The Court **AFFIRMS** the Board's Order.

I. BACKGROUND

The employer in this case is the Gallup-McKinley County Public Schools and it is a "public employer" as defined in Section 4(S) of the PEBA. NMSA 1978, § 10-7E-4(S) (2003). The McKinley County Federation of United School Employees, Local 3313, AFT-NM (Union) is the exclusive bargaining representative of a bargaining unit of employees at the Gallup-McKinley County Public Schools. **[1 RP 37.]** In 2016, the District began employing persons for a position

titled "Instructional Coach." **[1 RP 76.]** Beginning with the 2022-2023 school year, the District will no longer employ individuals as Instructional Coaches. **[1 RP 37.]**

The Union filed a prohibited practices complaint alleging that Instructional Coaches are a bargaining unit position, that the District unilaterally and without notice eliminated the alleged bargaining unit position for upcoming school years, and that the District improperly utilized non-bargaining unit employees to perform the work of bargaining unit employees. The District answered that Instructional Coaches are not bargaining unit employees and that work performed by Instructional Coaches will continue to be performed by other non-bargaining unit employees. **[1 RP 16-17, 21.]**

A Hearing Officer held an evidentiary hearing on September 12, 2022. The Hearing Officer issued a Report and Recommended Decision on September 30, 2022, finding in favor of the Union on the prohibited practice alleged in the Union's complaint. Specifically, the Hearing Officer concluded that the Union proved 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)." The Hearing Officer further concluded that the District committed a *per se* prohibited labor practice by refusing to bargain collectively in good faith with the exclusive representative, *i.e.*, the Union. **[1 RP 86.]**

The Hearing Officer recommended that the District be ordered to rescind the change, restore the *status quo*, and to bargain to agreement or impasse. Additionally, the Hearing Officer recommended the following: (1) the District be ordered to cease and desist all violations of the PEBA as found, and (2) that the District be ordered to post notice of its violation of PEBA as found in a form acceptable to the parties and the Board for a period of thirty (30) days and to provide assurances that it will comply with the law in the future. **[1 RP 86.]**

The Board affirmed the Hearing Officer's decision. The District appealed the Board's Order to this Court pursuant to NMSA 1978, Section 10-7E-23(B) (2003).

II. LEGAL STANDARDS

PEBA provides for judicial review of orders issued by the Board. § 10-7E-23(B). Such appeals "shall be based upon the record made at the board or local board hearing." *Id.* The Court must affirm the order unless it is: (1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record considered as a whole; or (3) otherwise not in accordance with law. *Id.*

III. DISCUSSION

A. The Board has subject matter jurisdiction.

The District argues that outside of a properly-filed unit clarification petition, the Board lacks subject matter jurisdiction to clarify whether a position is a bargaining unit position. Appellee Union responds that the District stipulated that the Board has subject matter jurisdiction and that PEBA grants the Board jurisdiction to resolve disputes and impose administrative remedies.

The Court must review whether an agency has subject matter jurisdiction *de novo*. *Citizen Action v. Sandia Corp.*, 2008-NMCA-031, ¶ 12, 143 N.M. 620. The subject matter jurisdiction of an administrative agency is granted by statute and an agency is limited to exercise only the authority granted by statute. *Id.* Subject matter jurisdiction cannot be created by consent of the parties. *Chavez v. Valencia Cnty.*, 1974-NMSC-035, ¶ 14, 86 N.M. 205.

PEBA grants the Board the authority to adjudicate disputes involving PEBA. Notably, the Board may hold hearings for the purposes of "adjudicating disputes and enforcing the provisions of the Public Employee Bargaining Act and rules adopted pursuant to that act." NMSA 1978, §

10-7E-12(A)(3) (2005). The Board also has the power to enforce PEBA through appropriate administrative remedies. NMSA 1978, § 10-7E-9(F).

The dispute in this case centers around whether the elimination of the Instructional Coach position constituted a prohibited practice under PEBA. PEBA grants the Board the authority to determine whether the elimination of a position constitutes a prohibited practice under PEBA, including the power to make factual determinations necessary to resolve the dispute. NMSA 1978, § 10-7E-12(A)(3). The District argues that a unit clarification petition is mandatory and the exclusive means by which the Board may determine whether a position is a bargaining unit position. However, the District does not cite any authority to support its argument that the Board may not adjudicate this dispute unless it is presented in the form of a unit clarification petition. The Court therefore concludes that the Board had subject matter jurisdiction to determine whether the elimination of the Instructional Coach position constituted a prohibited practice under PEBA.

B. The Board did not act contrary to its regulations.

The District argues that the Board acted in an arbitrary and capricious manner by failing to follow its own regulations. Specifically, the District argues that the Board's regulations require that a decision regarding the bargaining unit status of a particular position must be addressed in a petition for unit clarification. The Union argues that the Board did not act contrary to its regulations because a unit clarification petition is not required by the Board's regulations. The Court agrees with the Union.

The regulation cited by the District does not support its argument. The regulations state that under certain circumstances, *i.e.*, where circumstances surrounding the creation of an existing bargaining unit have "changed sufficiently" or there is a "merger or realignment" of bargaining units represented by the same organization, then the employer or the exclusive representative may file a unit clarification petition. 11.21.2.37(A) NMAC. The parties are not arguing that the

bargaining unit has changed; the parties are disputing whether the position of Instructional Coach is part of the bargaining unit. Further, the regulations do not state that a unit clarification petition is mandatory or that it is the exclusive means by which the Board may decide whether a particular position is in a bargaining unit. The Court therefore finds that the Board did not act contrary to its regulations in this case.

C. The Board's determination was not arbitrary and capricious or in violation of due process.

The District argues that the Board is systemically biased in favor of labor unions and against public employers. As a result, the District argues, the Board's determination is arbitrary and capricious and the Board deprived the District of due process.

1. The District's allegation of systemic bias is based on information outside the administrative record.

First, the District argues that the Board is systemically biased in favor of labor unions as purportedly demonstrated by certain statistical information submitted in the statement of appellate issues. Appellees argue that the information is outside the administrative record and is therefore not properly before the Court. The Court agrees with Appellees.

The Court declines to review the statistical information submitted by the District in support of its claims regarding the Board's systemic bias in favor of labor unions. This Court's review on appeal is restricted to evidence in the administrative record. NMSA 1978, § 10-7E-23(B) ("All such appeals shall be based upon the record made at the board or local board hearing."). Although the District invites this Court to expand the record under review, citing case law from other jurisdictions, such case law is not controlling or persuasive as applied to this case.

2. The Board's decision not to recuse Board Member Marianne Bowers is not arbitrary or capricious.

The District moved to recuse Board Member Marianne Bowers ("Member Bowers") because she is a practicing labor attorney and she allegedly acted unfairly to the District in other

proceedings involving the District. Member Bowers declined to recuse herself, stating that there was no actual bias or the appearance of bias in this case. The Board later voted to deny the District's motion to recuse Member Bowers. The District alleges that the Board's refusal to recuse Member Bowers demonstrates systemic bias. Appellees argue that the District's claim of bias rests on grounds that are legally insufficient and that the Board's decision was justified.

In general, the law presumes that those serving as administrative adjudicators act with honesty and integrity. *See Jones v. N.M. State Racing Comm'n*, 1983-NMSC-089, ¶ 13, 100 N.M. 434. Further, the Board's structure has a "neutral and balanced character." *Am. Fed'n of State, Cnty. & Mun. Emps. v. Martinez*, 2011-NMSC-018, ¶ 8, 150 N.M. 132. This is because the Board consists of one member recommended by labor, one member recommended by public employers, and one jointly recommended by the other two appointees. NMSA 1978, § 10-7E-8(A) (2003).

The Board's decision to deny the motion is reasonable. As noted above, there is a presumption of honesty and integrity for those serving as administrative adjudicators. It was reasonable to find that a history as a "labor union advocate" is not disqualifying. The law requires one Board member to be recommended by organized labor so it is unsurprising that the labor designee may have a history advocating for labor unions. Such a history does not necessarily create impropriety or the appearance of impropriety. *Cf. In re Comm'n Investigation Into 1997 Earnings of U S W. Commc'ns, Inc.*, 1999-NMSC-016, ¶ 41, 127 N.M. 254 (indicating general statements or actions regarding a case's subject matter may not be disqualifying). The District made general allegations regarding Member Bowers' prior conduct, however, the District did not identify specific disqualifying conduct concerning this case. *Cf. Reid v. N.M. Bd. of Exam'rs of Optometry*, 1979-NMSC-005, ¶¶ 4, 9, 92 N.M. 414 (indicating specific improper statements pre-

judging a case can be disqualifying). Therefore, the District has failed to demonstrate the motion to recuse decision was in error.

D. The Board's findings are supported by substantial evidence considering the record as a whole.

The Court must review whether the Board's Order is supported by substantial evidence in view of the record as a whole. The Court will review the evidence "in the light most favorable to the agency decision." *Nat'l Council on Comp. Ins. v. N.M. State Corp. Comm'n*, 1988-NMSC-036, ¶ 7, 107 N.M. 278. The court also must consider contravening evidence. *Id*; *see also Trujillo v. Emp. Sec. Dep't*, 1987-NMCA-008, ¶ 8, 105 N.M. 467 ("[C]ourts are to look also to evidence which is contrary to the finding"). Ultimately, the Court must be satisfied that "the evidence demonstrates the reasonableness of the decision." *Nat'l Council on Comp. Ins.*, 1988-NMSC-036, ¶ 8.

1. Substantial evidence supports the finding that the Instructional Coach position has always been part of the bargaining unit.

At the core of this appeal is the issue of whether the Instructional Coach position has been part of the bargaining unit since the certification of the Union by the Board on February 27, 2008. The District argued that Instructional Coach was a new position created in 2016 after certification of the Union. The Union argued that Instructional Coach is the newest title for a position that has existed and been part of the bargaining unit since the certification of the Union. Relying on the collective bargaining agreement (CBA), and other information, the Board ruled in favor of the Union. **[1 RP 80–82; 2 RP 155–56.]**

The Board's finding that the Instructional Coach position always has been part of the bargaining unit is supported by substantial evidence. In particular, the Board relied on two important facts and one important finding. First, in the "Introduction/Purpose Recognition" section of the CBA, the District acknowledges that the Union represents "all regular

licensed/certified professional employees." **[3 RP 160–161.]** Second, the Instructional Coach position requires a Level 2 teaching license. **[1 RP 82; 2 Audio 56:16–56:46 (Test. of Jvanna Hanks II).]** The Board also found that several different, but similar, job titles all refer to the Instructional Coach position. **[1 RP 76, 82.]**

The Board's reading of the CBA is consistent with other evidence in the record. Evidence supported the fact that some Instructional Coaches were Union members or in Union leadership, such as Jason Wright and Christopher Vian. **[1 Audio 22:03–23:24 (Test. of Jason Wright); 1 Audio 39:35–40:36 (Test. of Kathy Kurpiel).]** Testimony also supported that various job titles, including "Instructional Support Coach," maintained the same duties and were the same position as Instructional Coach. **[1 Audio 1:18:48–1:19:18 (Test. of Jason Wright); 1 Audio 48:15–48:40 (Test. of Kathy Kurpiel).]** Some licensed employees, such as school principals, are outside the bargaining unit. [Audio Pt. 2, Test. of Jvanna Hanks II, 55:15 – 56:03]. However, "Instructional Support Coach" is specifically named in the CBA alongside other "Licensed/Certified Employees" such as nurses. **[3 RP 165.]** There is additional evidence in the record, but a detailed recitation is unnecessary for the Court to find that the Board's decision is supported by substantial evidence.

Upon whole record review, there undeniably is evidence contrary to the finding of the Board. For example, District witness Jvanna Hanks II (District Witness Hanks) testified that the Instructional Coach position was new and that it was created for a specific initiative using Title I funding. **[4 RP 294; 2 Audio 7:01–9:23 (Test. of Jvanna Hanks II).]** District witness Wade Bell's testimony regarding the function of the Instructional Coach position compared to the "Instructional Support Teacher" position also runs contrary to the Board's determination that the positions are one and the same. **[2 Audio 1:09:18–1:10:10 (Test. of Wade Bell).]** The record also generally contains evidence that the District understood Instructional Coaches as non-

bargaining unit positions. **[4 RP 306.]** There is conflicting evidence, yet nothing so compelling as to establish the Board's determination as unreasonable. The Court therefore finds the Board's determination that the Instructional Coach position has always been part of the bargaining unit is supported by substantial evidence.

2. The Board's remaining findings are supported by substantial evidence or are undisputed.

The Board made the following findings before reaching the conclusion that the District committed a per se prohibited practice: (1) the District made changes to the terms and conditions of employment for bargaining unit employees; (2) the duties of the Instructional Coach position were reassigned to non-bargaining unit employees or contractors; and (3) the District did not provide notice to the Union prior to eliminating the Instructional Coach position. **[1 RP 83–86.]** The Board's findings are supported by substantial evidence or are otherwise undisputed.

First, it is undisputed that the District made changes to the terms and conditions of employment for Instructional Coaches. The District eliminated the position. **[1 RP 74 ¶ 7.]** As discussed above, the Board's determination that Instructional Coaches were always part of the bargaining unit is supported by substantial evidence. Therefore, the Board did not err in finding that the District altered the terms and conditions of employment for bargaining unit employees.

Substantial evidence supports that the duties of the Instructional Coach position were reassigned to non-bargaining unit employees and contractors. The parties stipulated that the District will employ individuals as "School Deans" and that certain contractors perform work for the District. **[1 RP 37.]** Testimony supports the conclusion that the work of Instructional Coaches will be performed by non-bargaining unit employees. **[2 Audio 1:15:40–1:17:00 (Test. of Wade Bell); 4 RP 280–81 (noting School Dean is a non-CBA position).]** Other evidence also supports the finding that contractors will perform work previously performed by Instructional Coaches. **[2**

Audio 1:11:29–1:14:51 (Test. of Wade Bell); 4 RP 225–28, 267–68 (Empower agreement and summary of invoices for fiscal year 2021-22).]

It is undisputed that the District did not provide notice to the Union prior to eliminating the Instructional Coach position. District Witness Hanks agreed that the District did not provide notice to the Union regarding the elimination of the Instructional Coach position. **[2 Audio 46:58–47:35 (Test. of Jvanna Hanks II).]** The District, based on the wording of an email to Instructional Coaches, informed them after-the-fact that the Instructional Coach position had been eliminated. **[4 RP 278.]**

E. The Board's conclusions are in accordance with law.

The Board concluded that the District committed a *per se* prohibited practice by refusing to bargain collectively in good faith with the exclusive representative. The Board determined that the District made a unilateral decision to eliminate the Instructional Coach position and presented a *fait accompli* to the Union with no meaningful opportunity to bargain.

The District argues that the Board's conclusion that the District committed a prohibited practice is not in accordance with law and that the District did not commit a *per se* prohibited practice. Specifically, the District argues the Union failed to demand to bargain over the elimination of the Instructional Coach position and therefore waived its right to bargain. The Union argues that the District made a unilateral decision, without notice to the Union, thus depriving the Union of any chance to bargain.

The District has a duty to bargain with the Union on wages, hours, and "all other terms and conditions of employment." NMSA 1978, § 10-7E-17(A)(1) (2020). It is a *per se* prohibited practice to make a unilateral decision and present no opportunity to bargain regarding the subject of mandatory bargaining. Making a unilateral decision without notice is a failure to bargain; the legal term used here is a *fait accompli* or accomplished fact. *See Commc'n Workers of Am., AFL-*

CIO v. State, 2019-NMCA-031, ¶ 20. Further, a union will not be held as waiving its right to bargain over a change that is presented as a *fait accompli*. *Id.* A *fait accompli* can be established through timing or intent. *Id.* ¶¶ 20–21. Notification after implementation of a decision and a notification with evidence of fixed intent, *i.e.*, intent not to make a change, may each establish a *fait accompli*. *Id.* ¶ 21–22.

The Board's conclusion that the District presented a *fait accompli*, and therefore committed a *per se* prohibited practice, is in accordance with law. It is not disputed that the District failed to notify the Union prior to elimination of the Instructional Coach position. The failure to notify the Union prior to unilaterally altering the terms and conditions of employment for Instructional Coaches constitutes a *fait accompli*. The Board's conclusion that the District had a duty to bargain and refused to do so is in accordance with law.

IV. CONCLUSION

The Court affirms the Board's Order.

IT IS SO ORDERED.

ERIN B. O'CONNELL
DISTRICT COURT JUDGE

This is to certify that a true and correct copy of the foregoing document was mailed and/or otherwise delivered to the following on Aug 8, 2023

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