

BEFORE THE PUBLIC EMPLOYER RELATIONS BOARD

AFSCME, AFL-CIO

vs.

CITY OF MANHATTAN, KANSAS

Complainant,

No. 75-CAE-11-1980

Respondent.

O R D E R

Now on this 18th day of February, 1980, the above-entitled matter comes on for hearing before the Board. All members of the Board are present except Member Art V. Veach.

Complainant appears by and through its counsel, Terry Watson of Topoka, Kansas. Respondent appears by and through its counsel, William L. Frost of Manhattan, Kansas.

Thereupon, the complainant presents its evidence and rests. Thereupon, respondent presents its evidence and rests. Thereupon, both parties orally argue the matter and submit written briefs.

Now, therefore, and on this 17th day of March, 1980, the above-entitled matter comes on for deliberation before the Board. All members of the Board are present except Member Art V. Veach. Thereupon, the Board after having heard the evidence, oral arguments and considered the written briefs and after due deliberation finds as follows:

FINDINGS OF FACT

1. The City of Manhattan is a public employer within the meaning of K.S.A. 75-4321 et seq.
2. That a representation election was conducted by the Public Employer Relations Board relative to certain employees of the City of Manhattan in approximately November, 1978, involving complainant. The result of that election was a tie vote. The records of the Public Employer Relations Board reflect this information.
3. That a representation election was conducted by the Public Employer Relations Board for certain employees of the City of Manhattan on December 11, 1979, involving complainant; and the results of such

75-CAE-11-1980

election were as follows:

Eligible number of voters -----	104
Votes cast for no representation -----	50
Votes cast for complainant -----	47

4. That the Manhattan City Commission passed first reading of a salary ordinance granting basically a seven percent (7%) pay-raise for all City Employees on December 4, 1979, to be effective for 1980.

5. That a letter over the signature of M. Don Harmon, City Manager of the City of Manhattan, Kansas, dated December 7, 1979, was mailed to all bargaining unit employees on Friday, December 7, 1979. Based upon approximately twenty affidavits of involved employees entered into evidence, some of the employees received the letter after work on Saturday, December 8, 1979, and others received the letter on Monday, December 10, 1979, after work.

6. That the following are excerpts from the letter of Mr.

Harmon:

"Who is the Union President, what has he done, is there any history of corruption in the Union? All these questions and probably more should be answered to your satisfaction before you commit your vote and future to a union."

"Wages, benefits and conditions of employment are not established by the Union. The City's only obligation is to meet and discuss these items and we are already willing to do this with individual employees or work units. The City is not obligated to enter into any contract or agreement with the union."

CONCLUSIONS

Thereupon, and on the 17th day of March, 1980, in open session, the Board finds that respondent committed a prohibited practice as defined by K.S.A. 75-4333 (b) (1). This finding is supported by the yes-votes of Members James J. Mangan, Louisa Fletcher and Urbano Perez. Member Lee Ruggles cast a no-vote and stated that he desired to file a dissenting opinion.

The reasoning of the Board is as follows:

1. Complainant and Respondent had reason to believe that this election would be close. Approximately one year prior thereto an election involving the same union had resulted in a tie-vote. The result of this election is reflected in the records of this Board. The events set out in the following paragraphs then occurred.

2. The City Commission passed first reading of a salary ordinance on December 4, 1979, just seven (7) days before the election. Now, the Board would have difficulty in finding that this action, by itself, could be the basis of a prohibited practice finding. However, the salary increase and the spectrum of events following cannot be divorced. In the Board's opinion they constitute an entity which by analogy to the human body contains one arterial system pumping blood from the heart to all other parts of the body.

3. Mr. M. Don Harmon, City Manager, was an authority figure to City Employees. A letter from him to City Employees would carry weight. In the eyes of the employees he would be a person having knowledge of the provisions of the Public Employer-Employee Relations Act of Kansas. Mr. Harmon, as agent for the City, on Friday (just before a weekend), December 7, 1979, mailed a letter under his signature to the City Employees, containing the excerpts set out in the Findings above. This Board does not take issue with respondent or respondent's right to attempt to or influence the employees against representation by the Union. However, this Board does take issue with the method used. It is obvious that Mr. Harmon's letter was intended to influence some of the employees against Union representation.

4. Mr. Harmon's letter could have been mailed within a time frame which would allow the Union a response. We can only assume that the lateness of the mailing was calculated to prevent an adequate response.

5. Mr. Harmon's letter contained the following statement:

"Who is the union President, what has he done, is there any history of corruption in the union?"

Granted, this statement is made in the form of a question; however, the reference to "corruption" was an effort to instill in the minds of susceptible City Employees a doubt relative to the moral fiber of the Union. It was a general statement without specific facts to substantiate it and could easily be accepted by some employees as a positive, accusatory statement of corruption. We think that this statement was grossly unfair.

6. In Mr. Harmon's letter the following statement was made:

"Wages, benefits and conditions of employment are not established by the union. The City's only obligation is to meet and discuss these items and we are already willing to do this with individual employees or work units. The City is not obligated to enter into any contract or agreement with the union."

The Public Employer-Employee Relations Act certainly encompasses more than contained in the above statements. In fact, if this statement adequately describes this Act, then the Act accomplishes nothing--is worthless. Let's take a look at some of the provisions of the Act itself:

a. K.S.A. 75-4321 (b) states that it is the purpose of the Act to obligate Public Agencies, Public Employees and their representatives to enter into discussions with affirmative willingness to resolve grievances and disputes relating to conditions of employment, acting within the framework of law.

b. K.S.A. 75-4333 covers the subject of prohibited practices. Section (b) (5) states that the refusal of the employer to meet and confer in good faith with representatives of recognized employee organizations is a prohibited practice. Meet and confer in good faith, under the Act, is much broader and stronger than merely to meet and discuss.

c. The letter contained the statement that the City is not obligated to enter into any contract or agreement with the union. It is of course true under the provisions of K.S.A. 75-4331 that a governing body such as a city can reject a proposed memorandum of understanding entered into by its representatives and the employee's representative. However, this section states that if the governing body does reject such a proposed memorandum of agreement, then the matter shall be returned to the parties for further deliberation and again the parties must meet and confer in good faith. If either side fails to do so, then either of them may be found guilty of a prohibited practice under K.S.A. 75-4333 and be subject to the enforcement procedures set out in K.S.A. 75-4334.

7. Counsel for both parties have argued their cases well and have submitted briefs to support their individual positions. In these briefs a number of decisions under the National Labor Relations Act have been cited and discussed. It is true that K.S.A. 75-4333 (e) states that no body of Federal or State law, applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent. However, the Board believes that if the reasoning of those cases is sound, then such reasoning should be adopted by this Board. This Board is of the opinion that substantial and material misrepresentations made in the final hours of an election campaign are grossly unfair and under the proper circumstances, such as the facts in this case, should be the basis of setting an election aside. We realize that unsuccessful parties might object routinely to opponent's campaign statements and this Board might be forced to engage in a painstaking analysis of everything that is said in the campaign. The Board accepts this possibility and its obligation, and states that the overriding consideration must be the fairness of elections.

8. The Board is not unaware of the decision of our Supreme Court as set out in Kansas Association of Public Employees vs. Public Service Employees' Union, 218 KAN 509. However, we feel that under the facts of this case, with the closeness of the prior election and the closeness of the election involved in this matter, that the misrepresentations made by respondent in this case were so misleading as to have inevitably affected the outcome of this very indecisive election. In our opinion, the actions of the City could reasonably be expected to have a significant impact on this election. It is our opinion that the totality of conduct of respondent in this case is unacceptable. We think that the totality of the respondent's conduct in this case interfered with the employees' rights granted to them by K.S.A. 75-4324 and constituted a prohibitive practice as defined by the Act. The sequence of events transcends the boundaries of mere propaganda disseminated by competing organizations vying for employees' votes. We can only conclude that respondent's actions were calculated to unduly influence the election results, thus falling within the definition of a prohibited practice.

THEREFORE, On this 18th day of April, 1980, the Board finds for the complainant and finds that the respondent committed a prohibited practice under the provisions of K.S.A. 75-4333 (b) (1). IT IS THE ORDER OF THE BOARD that said election of December 11, 1979, be set aside, and orders a new election to be conducted by the Public Employer Relations Board's agents within a minimum of thirty (30) days and a maximum of forty-five (45) days from the date of this order.

<u>James J. Mangani</u> James J. Mangani, Chairman	<u>Louisa Fletcher</u> Louisa Fletcher, Member
<u>Urbano L. Perez</u> Urbano Perez, Member	<u>(see attached dissenting opinion)</u> Lee Ruggles, Member

DISSENTING OPINION-CASE NO. 75-CAE-11-1980

Lee Ruggles, PERB Member, dissenting:

I respectfully dissent. In my view, a majority of the PERB, in issuing this order has failed to comply with the current ruling on this same area by the Kansas Supreme Court. In the case, Kansas Association of Public Employees V. Public Service Employees Union, 1976, 218 KAN. 509, the Supreme Court reviewed a similar case in which the Complainant also cried misstatement. In my professional opinion, the language contained in flyers in the above cited case, was much stronger than the single page letter involved in this case, yet the Kansas Supreme Court denied the Complaint. There is nothing in the way of evidence or testimony in the official record to show that the City of Manhattan letter misled anyone or that it changed a single vote in the election. Although AFSCME had ample opportunity to submit such evidence, it failed to do so.

Findings of Fact #4 in this order concerning the first reading of a salary ordinance on December 4, 1979 is incomplete. In both the evidence submitted by the City of Manhattan as well as testimony by city officials during the PERB Hearing, it was well documented that the seven (7) percent salary increase was discussed in public hearings in July and August 1979 and these hearings were covered by the local press so that this proposed budgeted 1980 pay raise could hardly be a secret to either the Union or the employees. This increase was also contained in the official budget for 1980 that was adopted in August of 1979. The action by city authorities on December 4, 1979 was a required action to insure that these employees received their budgeted increase starting in January 1980. According to evidence submitted, historically, the city officials had always accomplished these salary increase authorizations in December, effective January 1. If they failed to do so, all of the city employees would have been unnecessarily penalized.

Although the official record shows that at least five (5) employees had the City's letter three days prior to the election and that Rita During, an AFSCME

official, had this letter the day before the election, it is pertinent to note that no complaint was lodged with the PERB officials prior to the election and no request was ever made by AFSCME to postpone this election. This lack of expressed concern or alarm by AFSCME to PERB election officials is a significant fact to be considered.

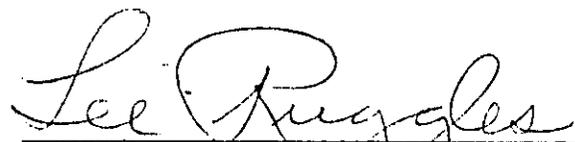
The Kansas Supreme Court, in Syllabus 3 of above cited case, stated:

"To justify setting aside a representation election under the Public Employer - Employee Relations Act, the misconduct of the prevailing party must be shown to have substantially interfered with the free choice of the voting employees."

As the official record will document, the Complainant in this case has failed to show that a single vote was changed, much less to meet the need for more stringent standards of the Supreme Court that the "...misconduct of the prevailing party must be shown to have substantially interfered with the free choice of the voting employees." (emphasis added)

In summary, the Findings of Fact and Conclusion, as set forth in this Order by the majority of the Board, were not supported by substantial evidence and I predict they would be set aside on appeal.

In view of the above facts, the legally correct action by the PERB in this case should be an order dismissing this Complaint by AFSCME.



Lee Ruggles, Member, PERB
Dissenting on Case No. 75-CAE-11-1980