

8. Reply to Complainant's Answer to Motion to Dismiss filed by Barton County Community College received on May 24, 1982.

9. Order by the Secretary sent to parties denying Respondent's Motion to Dismiss on July 15, 1982.

10. Complaint 72-CAE-14-1982 filed by David Schauner, Attorney for Barton County Community College-NEA (BCCC-NEA) on April 7, 1982.

11. Respondent, Barton County Community College, files answer to 72-CAE-14-1982 on April 26, 1982.

12. Motion to Dismiss 72-CAE-14-1982 filed by respondent on May 10, 1982.

13. K-NEA's Answer to Respondent's Motion to Dismiss filed on May 17, 1982.

14. Reply by respondent to K-NEA's Answer to Respondent's Motion to Dismiss filed on May 24, 1982.

15. Respondent's Motion to Dismiss denied by Order of the Secretary on July 15, 1982.

16. Motion for Consolidation of 72-CAE-11-1982 and 72-CAE-14-1982 filed by K-NEA on July 29, 1982. Letter from respondent indicating no objection to the Motion for Consolidation received on August 19, 1982. Motion granted.

17. Pre-hearing conference on complaint 72-CAE-11-1982 and 72-CAE-14-1982 held on October 27, 1982.

18. Hearing before Jerry Powell on November 9 and 10, 1982.

19. Department of Human Resources issued a subpoena to Jimmie Downing on October 27, 1982.

20. Motion to Quash Subpoena of Jimmie Downing filed by Barton County Community College on November 2, 1982.

21. Subpoena for production of documents issued to Jimmie Downing on November 3, 1982 by the Department of Human Resources.

22. Respondent's Motion to Quash the Subpoena issued to Jimmie Downing granted on November 2, 1982.

23. Respondent's Motion to Quash Subpoena for production of documents filed on November 10, 1982.

24. Complainant's Memorandum in Opposition to Respondent's Motion to Quash Subpoena received on November 22, 1982.

25. Motion to Quash Subpoena for production of documents denied by the Secretary on November 20, 1982.

26. Bill of Particulars filed by Complainant on March 4, 1983.

27. Respondent's Answer to Bill of Particulars filed on March 21, 1983.

28. Subpoena served on Bert Besthorn on May 9, 1983.

29. Hearing on complaints 72-CAE-11-1982 and 72-CAE-14-1982 before the Honorable Jerry Powell on May 24 and 25, 1983.

30. Brief for the Complainant filed on July 22, 1983.

31. Brief for the Respondent filed on July 25, 1983.

FINDINGS OF FACT

Based on the record the Secretary finds:

1. That BCCC-NEA had a petition for a certification election on file with the Secretary of Human Resources at the time of the alleged violations of the Act and therefore has standing to bring this complaint.

2. That the BCCC Board of Trustees is the "board of education" of the Barton County Community College for the purposes of the Act and therefore is the appropriate respondent in this matter.

3. That in November, 1981, BCCC-NEA presented a petition for recognition to the Board of Trustees of BCCC. (T - 18)

4. That the Board of Trustees subsequently denied the petition referred to in finding of fact number three (3). (T - 19)

5. That on December 1, 1981, BCCC-NEA filed a petition for certification with the Kansas Department of Human Resources. (T - 19)

6. On February 1, 1982, Mr. Bert Besthorn, President of BCCC-NEA, attempted to deliver a letter of intent to negotiate to BCCC President, Jim Downing. (T -23)

7. That Mr. Downing refused to accept the letter referred to in finding of fact number six (6). (T - 25)

8. That on February 1, Mr. Bert Besthorn sent the letter referred to in finding of fact number six (6) by certified mail. (T - 26)

9. That on February 18, 1983, Mr. Robert Keenan, Chairman of the BCCC Board of Trustees, read a letter to Bert Besthorn during the Board meeting.

10. That the letter referred to in finding of fact number nine (9) set forth the following reasons for rejecting the BCCC-NEA's intent to negotiate:

1. The request is contrary to Kansas Statutes
2. The request ignores and abridges the individual rights of our professional employees.

(Complainant's Exhibit 3)

11. The letter referenced in finding of fact number nine (9) charges the union with being "most concerned about its own rights and obtaining money from employees' pockets."

(Complainant's Exhibit 3)

12. The letter referenced in finding of fact number nine (9) reflects the board's intention

to follow the statutory procedure for determining representation issues. (Complainant's Exhibit 3)

13. That Mr. Besthorn was present when the letter referenced in finding of fact number nine (9) was read by Mr. Keenan. (T - 33)

14. That Mr. Besthorn testified that he felt angry and upset at the contents of the letter referenced in finding of fact number nine (9). (T - 33)

15. That Mr. Besthorn testified that he felt threatened by Mr. Keenan's tone of voice. (T - 33)

16. Copies of the letter referenced in finding of fact number nine (9) went to all faculty members of BCCC. (T - 34)

17. That on February 19, 1982, Mr. Besthorn sent a letter to all BCCC faculty members explaining why BCCC-NEA had delivered to the Board an intent to negotiate. (T - 37, Complainant's Exhibit 4)

18. That on February 23, 1982 Mr. Jimmie Downing sent a memo to faculty members. (T - 40)

19. That the memo referenced in finding of fact number eighteen (18) made the following points:

1. That unions are not a charity. They sell their services like any other salesperson.
2. That salary levels and benefits are not guaranteed. They may be reduced in negotiations.
3. That KNEA may trade present or future salary or benefits for an agency shop or dues deduction.
4. That the college has no intention or desire to reduce salaries or benefits, but negotiations are unpredictable.
5. Once rights are given up to a union, it's hard to get them back. (Complainant's Exhibit 5)

20. That Mr. Besthorn testified that he felt threatened and upset about what was said in the memo referenced in finding of fact number nineteen (19). (T - 40)

21. That Mr. Besthorn testified that he feared nonrenewal due to the memo referenced in finding of fact number nineteen (19). (T - 42)

22. That after the memo referenced in finding of fact number nineteen (19), many people ceased to take an active part in the membership drive. (T - 43)

23. That NEA sought an injunction after the memo referenced in finding of fact number nineteen (19) was issued. (T - 43)

24. That the request for an injunction referenced in finding of fact number twenty-three (23) was denied. (T - 45)

25. That after the hearing for the injunction request referenced in finding of fact

number twenty-three (23) organizing efforts came to a standstill. (T - 45)

26. That in March of 1982, Mr. Downing addressed the faculty at a mandatory faculty meeting. (T - 46)

27. That the speech referenced in finding of fact number twenty-six (26) made the following main points:

1. That the administration of BCCC does not want a union partly because it restricts their ability to communicate to faculty.
2. That Mr. Downing was speaking from a written text because he felt the union's presence created a need for him to document what he said.
3. He provided a factual account of what transpired when BCCC-NEA presented its intent to negotiate.
4. That the Board's letter to BCCC-NEA (finding of fact number nine (9)) was an exercise of the Constitutional Right to free speech.
5. That the memo by Mr. Downing (finding of fact number nineteen (19)) to all faculty members was an exercise of his right of free speech.
6. That an injunction was sought and denied that would have restrained the employer from talking about organizational matters.
7. That Mr. Downing was upset about the lawsuit filed by BCCC-NEA and he felt it was wrong.
8. Mr. Downing explained the Board's arguments to the court in the injunction hearing.
9. That BCCC-NEA sought to prevent the Board from making lawful expressions.
10. That NEA stresses its benefits through campaign propoganda yet seeks to "muzzle" the Board.
11. That he would rather deal directly with the faculty than through the NEA.
12. That NEA might take actions without the permission of the faculty.
13. He asks whether the faculty wishes to sacrifice "shared governance" for union representation.
14. That if NEA is certified, the teachers can no longer speak for themselves regarding matters of negotiations.
15. That the Board felt the union's request for salary and fringe benefit information was improper since they were not yet certified.
16. That the NEA campaign propoganda inaccurately reflected salary levels.
(Complainant's Exhibit 7)

28. That Mr. Besthorn felt angry, threatened and intimidated by the speech referenced in finding of fact number twenty-seven (27). (T - 47)

29. That Mr. Besthorn felt threatened because of his probationary status and potential merit pay. (T - 51)

30. That KNEA withdrew its petition for a certification election on April 26, 1982. (T - 62, Complainant's Exhibit 10)

31. That numerous pieces of campaign literature supporting BCCC-NEA were circulated between January and May of 1982. (T - 68, 69, 70, 71, 72, Respondent's Exhibit 1a)

CONCLUSIONS OF LAW

Two complaints have been filed with the Secretary of Human Resources alleging that the Barton County Community College Board of Trustees committed prohibited practices during an employee organizing campaign. 72-CAE-14-1982 was filed by David Schauner, Attorney for BCCC-NEA, and alleges that on February 23, 1982, Jimmie Downing issued a memorandum to all faculty members. The complaint alleges that the contents of the memo constitute a prohibited practice under K.S.A. 72-5430 (b) (1) (2). In addition, the complaint alleges that Jimmie Downing's speech at a mandatory faculty meeting of March 11 was a prohibited practice under K.S.A. 72-5430 (b) (1) (2). 72-CAE-11-1982 was filed by David Schauner, whose title in this complaint is "General Counsel-NEA." The complaint alleges that on February 18, 1982, a letter was read by Mr. Keenan, Board Chairman, at a board meeting and copies of the letter were sent to all certificated employees at BCCC. The contents of the letter are alleged to be a prohibited practice under K.S.A. 72-5430 (b) (1) (2) which states;

"(b) It shall be a prohibited practice for a board of education or its designated representative willfully to:

- (1) Interfere with, restrain or coerce professional employees in the exercise of rights granted in K.S.A. 72-5414;
- (2) dominate, interfere or assist in the formation, existence, or administration of any professional employees' organization;"

THE ISSUES

Upon review of the record and counsels' post-hearing briefs, the examiner has determined that the following issues have been raised:

1. Did Mr. David Schauner have standing to file 72-CAE-11-1982?
2. Was the memo of February 23, 1982, issued by Jimmie Downing, President of Barton County Community College, a prohibited practice under K.S.A. 72-5430 (b) (1) (2)?
3. Was the speech by Jimmie Downing on March 11, 1982, a prohibited practice under K.S.A. 72-5430 (b) (1) (2)?
4. Was the letter of February 18, 1982 by the Board of Trustees, read and sent to faculty members a prohibited practice under K.S.A. 72-5430 (b) (1) (2)?

Issue #1 - Standing To File

The Secretary finds respondent's arguments regarding Mr. Schauner's standing to file to be without merit. Mr. Schauner is and was at the time of the filing of both complaints, General Counsel for the Kansas National Education Association (K-NEA). The association attempting to organize the professional employees at Barton County Community College was affiliated with K-NEA. The association made clear the affiliation by virtue of its title, BCCC-NEA. In addition, the Secretary believes an association retains the right to file a prohibited practice from the moment it shows an interest in organizing the professional employees. To find otherwise would render useless the statutory provisions that protect employees from coercion in the formation or selection of an employee organization. Furthermore, there is nothing in K.S.A. 72-5413 et seq. which requires an association to get permission from membership to file complaints with the Secretary. When officers are elected to represent an employee organization, it is generally implicit in that selection that the representative will act on behalf of its members in organization matters. Certainly members of the association may place limits on the authority of their officials. Whether they choose to do so is strictly an internal organizational matter. Therefore, the Secretary finds that Mr. Schauner, as Counsel for NEA, had a right to file a complaint on behalf of BCCC-NEA. There was no statutory obligation that Mr. Schauner or BCCC-NEA President Bert Besthorn obtain permission from NEA membership to file the complaints.

Issue #2 - Mr. Downing's Memo Dated February 23, 1982

In finding of fact number nineteen (19), the Secretary has listed the major points contained in the memo of February 23, 1982. The Secretary will discuss each point separately.

1. Unions are not a charity. They sell their services like any other salesperson.

The Secretary finds this statement to be based on fact.

2. That salary levels and benefits are not guaranteed. They may be reduced in negotiations.

The Secretary finds this statement to be based on fact. Negotiations clearly may result in reduced wages or benefits. Of course, a board also may in the absence of union representation unilaterally reduce wages or benefits. The Secretary finds nothing in this statement that would constitute a threat. Rather, Mr. Downing was stating one possible consequence of lawful negotiations. Naturally, a reduction of salary levels and benefits is among the most negative of consequences that might occur. However, the Secretary believes that the employer has a right to persuade his employees to reject an organization, so long as no force, threat or promise is expressed or implied.

3. That K-NEA may trade present or future salary or benefits for an agency shop or dues deduction.

Based on the rationale set forth in the previous discussion of issue number two, the Secretary finds this statement to be the expression of one possible consequence of lawful collective bargaining. This statement does not express or imply any force, threat or promise.

4. That the college has no intention or desire to reduce salaries or benefits, but negotiations are unpredictable.

The Secretary finds this statement to correctly describe the uncertainties of negotiations. The statement does not imply that the college's intentions will change if the association is certified. It simply suggests that negotiations would add another party's intention or desires to the decisionmaking process.

5. Once rights are given up to a union, it's hard to get them back.

The Secretary finds this statement to be an expression of opinion which is too ambiguous to be based on fact. The Secretary finds no express or implied force, threats or promises of benefits contained in this statement.

In summary, the Secretary finds that the memo by Jimmie Downing, dated February 23, 1982 was not a prohibited practice. The letter contained expressions of opinion and statement based on fact. While the statements were clearly selected as an attempt to persuade the professional employee, they did not contain any express or implied force, threats or promises of benefits. The Secretary believes that the legislature did not intend to "gag" the board during an organizational campaign. Had it intended to do so, it would have prohibited any communications by the board to the professional employees regarding the organizing campaign. Rather, the legislature prohibits only those actions or words which would interfere with, restrain or coerce the employees in the formation or selection of an employee organization. The Secretary believes that the terms "interference, coercion and restraint" refer to exercise of force, the erection of barriers or to threats or promises that an employer has the power to fulfill. Mr. Downing made no statements that are prohibited by the Professional Negotiations Act.

Issue #3 - The Speech by Jimmie Downing on March 11, 1982

The Secretary refers to finding of fact number twenty-seven (27) for the major points of the speech and will discuss each point individually.

1. The administration of BCCC does not want a union partly because it restricts their ability to communicate to faculty.

The Secretary believes this point to be a statement of administration concerns. This aspect of the speech does not contain any threats and is not coercive.

2. That Mr. Downing was speaking from a written text because he felt the union's presence created a need for him to document what he said.

The Secretary believes that Mr. Downing was simply stating his concerns. This portion of the speech contained no threats or promises nor was it coercive.

3. Mr. Downing provided a factual account of what transpired when BCCC-NEA presented its intent to negotiate.

The Secretary believes these statements contained no threats or promises and they were not coercive.

4 and 5. That the Board's letter and Mr. Downing's memo were an exercise of the right of free speech.

The Secretary finds this point to be a statement of opinion. This portion of the speech contained no threats or promises and it was not coercive.

6. That an injunction was sought and denied that would have restrained the employer from talking about organization matters.

The Secretary believes this portion of the speech to be factual in nature. It contained no threats or promises, and it was not coercive.

7. That Mr. Downing was upset about the lawsuit filed by BCCC-NEA and he felt it was wrong.

The Secretary finds this aspect of the speech to be an expression of Mr. Downing's opinion. It contained no threats or promises, and it was not coercive.

8. Mr. Downing explained the Board's arguments to the court in the injunction hearing.

The Secretary finds this portion of the speech to be factual. It contained no threats or promises and it was not coercive.

9. That BCCC-NEA sought to prevent the Board from making lawful expressions.

The Secretary finds this portion of the speech to be an expression of opinion. It contained no threats or promises and it was not coercive.

10. That NEA stresses its benefits through campaign propaganda yet seeks to "muzzle" the Board.

The Secretary finds this portion of the speech to be an expression of opinion. It contained no threats or promises and it was not coercive.

11. That he would rather deal directly with the faculty than through NEA.

The Secretary finds this portion of the speech to be an expression of opinion. It contained no threats or promises and it was not coercive.

12. That NEA might take actions without the permission of the faculty.

The Secretary finds this portion of the speech to be a discussion of one possible consequence of organization. The Secretary has discussed this aspect of organization previously in this order. It is customary for an official of an organization to take certain actions without the permission of the membership to take those specific actions. This portion of the speech is, therefore, factual in nature, contained no threats or promises and was not coercive.

13. Mr. Downing asks whether the faculty wishes to sacrifice "shared governance" for union representation.

In the opinion of the Secretary, this portion of the speech correctly describes one possible consequence of union representation. A system of "shared governance" involves decisionmaking at the faculty level. The decisions then flow upward to the administration. With union representation, the administration would no longer be able to implement faculty decisions that relate to negotiable items. Rather, these decisions would have to be reached via negotiations with the exclusive representative of the professional employees. Therefore, the Secretary finds that this portion of the speech to be factual. Furthermore, this portion of the speech contained no threats, promises or coercive statements.

14. That if NEA is certified, the teachers can no longer speak for themselves concerning matters of negotiations.

The Secretary finds this statement to be only partially true. The Professional Negotiations Act provides that professional employees may speak directly to the board and make "their positions or proposals known." However, no decisions regarding the proposals may be reached without first negotiating them with the employee organization. This portion of the speech contained no threats or promises and it was not coercive.

15. That the Board felt the union's request for salary and fringe benefit information was improper since they were not yet certified.

The Secretary finds this portion of the speech to be an expression of opinion. It contained no threats or promises and it was not coercive.

16. That the NEA campaign propaganda inaccurately reflected salary levels.

The Secretary is uncertain as to whether this statement was factual. However, the complainant has not sufficiently proved to the contrary. This portion of the speech contains no threats or promises and it was not coercive.

In summary, the examiner finds that the contents of the speech delivered by Mr. Downing does not constitute a prohibited practice. The examiner emphasizes that this conclusion is based on the contents of the speech, not the tone of voice or body language associated with its delivery. The examiner believes that only words or actions may constitute threats for the purposes of this act. Any other form of threat is based on individual perception. The record in this instant case clearly indicates that what is threatening to one person may not be threatening to another.

Issue #5 - The Letter of February 18, 1982 by the BCCC Board of Trustees

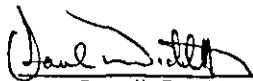
The letter read by Mr. Keenan, Chairman of the Board was a response to the association's letter of intent to negotiate. The record indicates that the association gave no reason for delivering its intent to negotiate. The Secretary would not suggest that the association

must explain its every move. However, the letter of intent would lead the reasonable employer to believe that the association was seeking recognition without an election. The Secretary is fully aware that the association was merely trying to meet the notice requirements of the statute so that they might negotiate during the 1982-83 school year if they were successful in the certification election. However, the omission of this explanation was destined to elicit an emotional response from the board. The board's letter is replete with opinion but contains no threats or promises and it is not coercive.

In summary, the Secretary finds the BCCC Board of Trustees and President Jimmie Downing to be free of wrongdoing during this election campaign. This is not to suggest that the Secretary condones the tactics utilized by either party in this campaign. The Secretary believes that negative campaigning reduces the satisfaction of the electorate with either choice.

Complaints 72-CAE-11-1982 and 72-CAE-14-1982 are hereby dismissed.

IT IS SO ORDERED THIS 17th DAY OF Aug, 1983, BY THE SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES.

 For JERRY POWELL
Jerry Powell, Employment
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