STATE OF IOWA
BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

COLO-NESCO EDUCATION ASSOCIATION and SCOTT BAUER, Complainants, and COLO-NESCO COMMUNITY SCHOOL DISTRICT, Respondent.	)	Case 100001

PROPOSED DECISION AND ORDER

The Colo-Nesco Education Association (hereinafter "the Association") and Scott Bauer filed a prohibited practice complaint with the Public Employment Relations Board ("PERB" or "Board") pursuant to Iowa Code section 20.11 and PERB rule 621—3.1(20). The complaint alleges that the Colo-Nesco Community School District ("the District") committed prohibited practices within the meaning of Iowa Code sections 20.10(2)(a) and (d) when the District's superintendent denied Bauer's request for union representation at an investigatory interview and threatened Bauer's continued employment with the District. The District denies the commission of any prohibited practice.

Pursuant to notice, an evidentiary hearing was held before me in Colo, Iowa, on January 27, 2015. The Association was represented by Jay Hammond and the District by Drew Bracken. The parties submitted initial and reply briefs, the last of which was filed on February 27, 2015. Based upon the entirety of the record, and having considered the arguments of the parties, I

have concluded that the Association has failed to establish the District's commission of a prohibited practice as alleged.

FINDINGS OF FACT

The District is a public employer within the meaning of Iowa Code section 20.3(10) and the Association is an employee organization within the meaning of Iowa Code section 20.3(4). The Association has been certified by the Board as the exclusive bargaining representative for the following unit of the District's employees:

> INCLUDED: All regular full-time and part-time teachers, librarians, counselors and nurse.
>
> EXCLUDED: All other employees of the District, superintendent, principals, athletic director, substitute teachers, confidential and supervisory personnel, custodians, secretaries, bus drivers, cooks and all other persons excluded by Section 4 of the Act.

Complainant Bauer was hired by the District on October 22, 2013, as its technology director (also at times referred to by the parties as the director of information technology). It was the District's expectation that Bauer would be a member of its "administrative cabinet." The technology director position had never been included in the existing bargaining unit, nor had it been considered bargaining-eligible by the District.

Sometime in the fall of 2014, Bauer inquired of the Association's local membership chair whether the technology director position could be added to the existing Association-represented bargaining unit. This inquiry was communicated to Rick Moore, a UniServ director of the Iowa State Education Association—the statewide organization with which the Association is affiliated.

Moore met with Bauer to discuss the matter and told Bauer he would contact the District to determine whether it would be willing to agree to the inclusion of his position in the bargaining unit. Moore also told Bauer that if anyone in administration approached him about the issue, he should "ask for representation."

Moore subsequently sent an email to the District's superintendent, Jim Verlengia, asking whether the District would agree to add the technology director position into the existing bargaining unit. Moore listed the reasons why he thought the position was bargaining eligible but did not say who had initiated or advocated for the proposed amendment. Verlengia replied that the District was reviewing multiple positions, including the technology director, and that it would be premature for him to make a decision.

On September 15, 2015, a week following his email reply to Moore, Verlengia asked Bauer to join him "for a quick meeting" in the District's ICN room. Verlengia was interested in who had initiated the amendment of unit effort, and wanted to ask Bauer about it.

The testimony of Bauer and Verlengia (the only persons present) concerning what was said during the ensuing meeting is in irreconcilable conflict for the most part, but is virtually irrelevant in this particular case.

Following the meeting Bauer contacted Moore and informed him that he had had a "confrontation" with Verlengia, during which Verlengia had denied his request for representation and threatened his job.

On October 28, 2014, the Association filed an amendment of bargaining unit petition with PERB (Case No. 100000) seeking to amend the technology director position into the existing bargaining unit represented by the Association.

On November 5, 2014, the Association filed the instant complaint, alleging the District committed prohibited practices on September 15 when Verlengia denied Bauer's request for representation and threatened Bauer's continued employment during what it characterizes as an investigatory interview.

On December 18, 2015, following a January 13 evidentiary hearing on the Association's amendment of unit petition, a PERB administrative law judge issued a proposed decision and order that the petition be dismissed, based on the conclusion that the technology director position was excluded from chapter 20's coverage as a "representative of a public employer" within the meaning of section 20.4(2). The ALJ's proposed decision and order became PERB's final decision on the chapter 20 status of the technology director position 20 days later when no intra-agency appeal was taken and the Board did not determine it would review the proposed decision on its own motion.

CONCLUSIONS OF LAW

The Association alleges Verlengia's denial of Bauer's request for representation and his threat to Bauer's continued employment constitute prohibited practices within the meaning of Iowa Code sections 20.10(2)(a) and (d), which provide:

> 2. It shall be a prohibited practice for a public employer or the employer's designated representative to:
>
> *a.* Interfere with, restrain or coerce public employees in the exercise of rights granted by this chapter.
>
> . . .
>
> *d.* Discharge or discriminate against a public employee because the employee has filed an affidavit, petition or complaint or given any information or testimony under this chapter, or because the employee has formed, joined or chosen to be represented by any employee organization.

Many of the "rights granted by this chapter" referred to in section 20.10(2)(a) are specified in section 20.8, which provides:

> **20.8 Public employee rights.**
>
> Public employees shall have the right to:
>
> 1. Organize, or form, join, or assist any employee organization.
>
> 2. Negotiate collectively through representatives of their own choosing.
>
> 3. Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the state.
>
> 4. Refuse to join or participate in the activities of employee organizations, including the payment of any dues, fees or assessments or service fees of any type.

Both of the Association's claims—the alleged denial of representation and the alleged making of a threat in response to protected activity—are viable prohibited practice theories under the right set of facts.

A public employee's section 20.8(3) right to engage in concerted activities for the purpose of mutual aid or protection includes what has come to be known as the "*Weingarten* right." *See, e.g., Muscatine County*, 14 H.O. 8744;

City of Dubuque, 88 PERB 3316; *City of Cedar Falls*, 80 PERB 1511. Under the *Weingarten* doctrine, a public employee possesses the right to insist upon the presence of a union representative at an investigatory interview if the employee reasonably believes the interview may result in disciplinary action. Upon its receipt of a request for representation in such circumstances, the employer must grant the request, discontinue the interview, or offer the employee a choice between continuing the interview unaccompanied by a representative or having no interview at all. *See, e.g., City of Dubuque*, 88 PERB 3316. An employer's interference with this section 20.8 right constitutes a prohibited practice within the meaning of section 20.10(2)(a).

And threats of reprisal for a public employee's exercise of protected rights, including an implicit threat such as the Association argues occurred in this case, are classic section 20.10(2)(a) violations because they directly interfere with, restrain or coerce employees in the exercise of such rights. *See, e.g., Black Hawk County,* 97 PERB 5399; *City of Epworth,* 93 H.O. 4826; *State of Iowa (Dept. of Corrections),* 89 PERB 3499.

However, by definition, in order for a public employer's denial of representation or threat to constitute a prohibited practice, the person denied representation or threatened must be a public employee. *See* Iowa Code §§ 20.10(2)(a), (d). And only a "public employee" is granted rights by section 20.8.

Section 20.3(9) defines "public employee" as "any individual employed by a public employer, except individuals exempted under the provisions of section 20.4." Whether Bauer was a "public employee" against whom a section

20.10(2)(a) or (d) prohibited practice could be committed is thus a dispositive threshold issue in this case.

In its brief the Association argues that because the section 20.4 exclusions are to be read narrowly, and because the technology director position is not "clearly excluded by the plain language of Section 20.4," it must be found to have been covered by chapter 20 (*i.e.*, that Bauer must be found to have been a "public employee" on September 15, 2014) in order to effectuate the legislature's intent that the statute have broad application. The Association thus appears to argue, in essence, that unless a position is "clearly excluded" by section 20.4, it must be presumed to be included unless the employer establishes otherwise. I cannot agree.

The need to read the section 20.4 exclusions narrowly in order to effectuate legislative intent that chapter 20 have broad application underlies PERB's established position that in cases concerning the composition of appropriate bargaining units, the party asserting that a position is excluded by section 20.4 bears the burden of establishing that the exclusion applies. *See, e.g., City of Iowa City*, 02 PERB 6353.

But that proposition is not applicable in prohibited practice proceedings such as this, where it is well established that the complainant bears the burden of establishing each element of the charge. *See, e.g., Waterloo Community School Dist.*, 10 PERB 8218; *Broadlawns Medical Center*, 05 PERB 6894; *Tama County*, 05 PERB 6756.

In order to establish a section 20.10(2)(a) or (d) prohibited practice, the complainant must establish interference, restraint or coercion *of a public employee,* or that a public employer discriminated against or discharged *a public employee* because of certain actions the employee has taken. Here, the Association has failed to show that Bauer was a public employee when the alleged prohibited practices occurred.

It is consequently unnecessary to explore the issues of whether the meeting was an "investigatory interview," whether Bauer reasonably believed the encounter might result in disciplinary action, whether he in fact requested representation or whether the alleged threat was in fact made. Even assuming, without deciding, that all of the other elements of the alleged prohibited practices have been established, no prohibited practice has been shown because Bauer has not been shown to have been a public employee as defined in section 20.3(9) on the date the prohibited practices are alleged to have occurred.

Accordingly, I propose the following:

ORDER

The prohibited practice complaint filed by the Colo-Nesco Education Association and Scott Bauer is hereby DISMISSED.

DATED at Des Moines, Iowa, this 11th day of March, 2016.

Jan V. Berry
Administrative Law Judge