STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

JOYCE SAXTON,	)	
	)	
Charging Party,	)	Case No. LA-CO-633
	)	
v.	)	PERB Decision No. 1109
	)	
AMERICAN FEDERATION OF TEACHERS COLLEGE GUILD, LOCAL 1521,	)	May 31, 1995
	)	
Respondent.	)	
	)	

Appearances; Joyce Saxton, on her own behalf; Lawrence Rosenzweig, Attorney, for American Federation of Teachers College Guild, Local 1521.

Before Carlyle, Garcia and Caffrey, Members.

DECISION

GARCIA, Member: This case is before the Public Employment Relations Board (PERB or Board) on appeal by Joyce Saxton (Saxton) from a PERB administrative law judge's proposed decision (attached) dismissing the unfair practice complaint. Saxton's charge alleged that the American Federation of Teachers College Guild, Local 1521 (AFT) had violated Educational Employment Relations Act (EERA) sections 3543.6(b), 3543.1(a), and 3544.9.*

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.6 states, in pertinent part:

> It shall be unlawful for an employee organization to:
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights

After reviewing the entire record, including the transcript, proposed decision, Saxton's appeal, AFT's motion to dismiss and response to appeal,[2] the Board hereby affirms the proposed decision.

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guaranteed by this chapter.

Section 3543.1 states, in pertinent part:

> (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative of an appropriate unit pursuant to Section 3544.1 or 3544.7, respectively, only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

Section 3544.9 states:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

[2]AFT filed a motion to dismiss the appeal and a response to "findings of fact-clarification." The motion to dismiss is based on two procedural grounds: Untimeliness of appeal and failure to comply with the regulation governing appeals. The Board denies the motion to dismiss because it finds that the appeal was timely filed and that those portions of the appeal that comply with the regulation are minimally sufficient. However, those portions of the appeal that did not comply with PERB Regulation 32135 (Cal. Code Regs., tit. 8, sec. 17) (references to matters not contained in the record) were not considered.

ORDER

The complaint and unfair practice charge in Case No. LA-CO-633 are hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Carlyle and Caffrey joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

JOYCE SAXTON, Charging Party, v. AMERICAN FEDERATION OF TEACHERS COLLEGE GUILD, LOCAL 1521, Respondent.	)	Unfair Practice Case No. LA-CO-633 PROPOSED DECISION (1/24/95)

Appearances: Philip Hoffman, Attorney, for Joyce Saxton; Lawrence Rosenzweig, Attorney, for American Federation of Teachers College Guild, Local 1521.

Before James W. Tamm, Administrative Law Judge.

PROCEDURAL HISTORY

On May 31, 1994, Joyce Saxton (Saxton or Charging Party) filed this charge against the American Federation of Teachers College Guild, Local 1521 (AFT). On August 30, 1994, a complaint was issued by the general counsel's office of the Public Employment Relations Board (PERB or Board) alleging violations of section 3543.6(b), 3543.1(a), and 3544.9 of the Educational Employment Relations Act (EERA or Act).[1] The complaint alleged

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code. The pertinent portion of section 3543.6 reads:

> It shall be unlawful for an employee organization to:
>
> (b) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

that by urging the Los Angeles Community College District (District) to take administrative action against Saxton the AFT failed in its duty to fairly represent Saxton, retaliated against Saxton because of her protected activities, and caused or attempted to cause the District to violate Saxton's rights.

A settlement conference was held, but the matter remained unresolved. A formal hearing was held November 28, 1994. Transcripts were waived and at the conclusion of the hearing the parties made oral arguments. The parties were given additional time to file case citations and the case was submitted for decision on December 12, 1994.

FINDINGS OF FACT

Joyce Saxton is an instructor with the Department of Nursing at Harbor College, one of nine campuses within the District. She

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Section 3543.1(a) reads:

> (a) Employee organizations shall have the right to represent their members in their employment relations with public school employers, except that once an employee organization is recognized or certified as the exclusive representative . . . only that employee organization may represent that unit in their employment relations with the public school employer. Employee organizations may establish reasonable restrictions regarding who may join and may make reasonable provisions for the dismissal of individuals from membership.

Section 3544.9 reads:

> The employee organization recognized or certified as the exclusive representative for the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

is a member of the certificated bargaining unit, which is exclusively represented by the AFT.

The grievance process in the collective bargaining agreement between the AFT and the District includes three steps. The first step requires a formal written grievance and provides for a conference with a campus administrator. If not settled at that stage, the grievance can then be moved to step two, an appeal to the college president. The third and final step is binding arbitration. The decision to submit a grievance to binding arbitration must be approved by an AFT step three screening committee (screening committee). The screening committee consists of the AFT's grievance representatives from all nine campuses, plus several other AFT officials.

Saxton's first grievance was filed when she became upset with the process used to evaluate her.[2] The evaluation was written by department Chair Nancy Carson, who is also a member of the bargaining unit represented by the AFT. The evaluations are considered "peer" evaluations. Although the evaluation included some negative comments, it rated Saxton as satisfactory overall.

Saxton filed a grievance and was represented by Enid Diamond, the AFT grievance representative at Harbor College. Together, Diamond and Saxton met with campus Vice President Pat Wainwright in a step one meeting. The District eventually denied

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[2]The date of this grievance is not clear, but it was probably prior to March 1993. None of the grievances in question were offered into evidence.

the grievance because the collective bargaining agreement specifically prohibits grievances over satisfactory evaluations.[3]

Saxton wanted to appeal to step two, so Diamond represented her in a meeting with the college president. After that meeting the District again denied the grievance because the contract did not allow such grievances.

Saxton then wanted to take the grievance to arbitration. Diamond believed the grievance was a weak case to take to arbitration because the contract so clearly prohibited such grievances. When the screening committee met, Diamond argued against taking the case to arbitration.[4]

After discussing the grievance, the screening committee voted unanimously not to take the grievance to arbitration. During the discussion, however, one committee member suggested, that they should hear directly from Saxton. A second meeting was scheduled and Saxton was given an opportunity to present her

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[3]Article 28, section A(1) states, in pertinent part:

> The grievance procedure is not for the adjustment of complaints relating to . . .
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> > . . . evaluation reports in which the overall evaluation indicates that the employee is 'satisfactory.'

[4]There was some vague and confusing testimony that at the screening committee meeting Diamond claimed that Saxton's grievance was motivated by Saxton's desire to sue the District. It is unnecessary to resolve disputed testimony on this subject, however, because it is clear that Diamond did not support taking the case to arbitration.

arguments directly. After the presentation, the screening committee again voted unanimously to drop the grievance.

Saxton's next grievance occurred around March 1993, when she felt she was being harassed by Carson. According to Saxton, when Carson had prepared Saxton's latest evaluation, Carson had solicited comments about Saxton's performance from students. Additionally, Carson had asked Saxton to show Carson the tests that Saxton had given to students. Saxton felt those actions constituted harassment.

Once again, Saxton was represented at steps one and two by Diamond. Once again, the grievance was not taken to arbitration. The reason the case was dropped was disputed at the hearing.. Diamond testified that she had talked Saxton out of pursuing the matter because it was also a weak case. Saxton testified that Diamond agreed to take the case to arbitration and then failed to do so. Saxton testified, however, that she never asked Diamond why she failed to take the case to arbitration and that other union leaders gave only vague answers that were unresponsive.

I find Diamond's testimony more credible than Saxton's. It seems unlikely that Diamond would commit to taking the case to arbitration when she felt that the case was weak and only the screening committee has this authority. I therefore find that Diamond had not agreed to take the case to arbitration.

Diamond represented Saxton again in October, 1993 during a meeting with Dean of Instruction, Chris McCarthy. Saxton had expressed a great urgency to Diamond about attending the meeting.

Diamond's husband had just undergone cancer surgery and Diamond had not wanted to leave his bedside. However, because Saxton indicated to Diamond that the matter was extremely urgent, Diamond went to represent Saxton. It turned out that Saxton's problem concerned her core schedule which she had known about for several weeks, if not months, and had previously done nothing about. When Diamond and McCarthy discovered the nature of Saxton's problem, they both became angry with Saxton for demanding an urgent meeting for such a frivolous and untimely reason.

Saxton's next dispute arose when she accused Carson of assault and battery. According to Saxton, Carson had grabbed her arm and forced her hand into a painful position. Saxton filed a complaint with the campus police department, but they chose hot to act on the complaint. She then filed a report with the Los Angeles Police Department, but the district attorney's office declined to file a complaint against Carson.

Saxton wanted to file a grievance about the alleged assault and battery, but did not have faith that Diamond would adequately represent her. Saxton contacted Eloise Crippens, the AFT grievance representative at the West Los Angeles College campus of the District. Saxton asked Crippens if she would represent her in the grievance. The contract is silent about which union representative may represent a grievant. While nothing in the contract prohibits a representative from a different campus, it had been a very rare occurrence, if at all.

Crippens contacted Diamond to ask if Diamond minded whether Crippens represented Saxton. Diamond told Crippens she would be delighted because Saxton was a "pain in the ass." Crippens then notified Saxton that she would represent her.

On about December 1, 1993, Crippens learned that the AFT executive board had decided not to provide representatives from one campus to grievants on a different campus. Crippens was told not to represent Saxton. Crippens then contacted Saxton and told her that she could not represent her and that Diamond would have to do so.[5]

Saxton wrote up a grievance and listed Diamond as her representative, however, she never called Diamond to tell her of the grievance or to ask her to represent her in the grievance.

When Diamond eventually learned that Saxton had listed her as Saxton's representative, Diamond set up a meeting with Saxton. Saxton did not show up for that meeting. Diamond tried to schedule a second meeting, however, Saxton never called her back. Diamond did not pursue it further.

By that time it had become clear to Diamond that Saxton no longer wanted Diamond to represent her. That provided Diamond with a feeling of relief. On December 3, 1993, McCarthy and Diamond had a chance meeting in the hallway. When McCarthy raised the issue of Saxton, Diamond told McCarthy that she no

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[5]At the hearing Charging Party offered speculation and hearsay testimony that the reason Crippens was not allowed to represent Saxton was because the AFT president was a friend of Carson's. Charging Party offered no supporting evidence of this theory and it is therefore given no weight.

longer represented Saxton and expressed her happiness about that fact. Diamond compared Saxton to a previous district employee named Aklampke. While it is not completely clear from the record, the District had apparently taken some administrative action against Aklampke.

McCarthy's notes of this hallway meeting suggest that Diamond felt the District should "administratively stop" Saxton or put her on medical leave to prevent Saxton from further harassing Carson.[6] Diamond denied ever stating that Saxton should be stopped administratively or that Saxton should be placed on leave. For several reasons I credit Diamond's testimony over the version- reflected in McCarthy's notes. McCarthy's notes were written several days after the brief encounter in the hallway. McCarthy also testified that his notes reflected his opinions and did not reflect the words spoken by Diamond. Also, the accuracy of McCarthy's notes in general is questionable. For example, his notes also refer to an August meeting involving Saxton and Diamond. All participants to that meeting testified that it occurred in October, not August, and that the notes were not an accurate reflection of what occurred at the meeting. I therefore find that Diamond did not urge the District to administratively stop Saxton or put her on leave of absence.

[6]No evidence was offered about what was meant by the term "administratively stopped."

McCarthy testified that at a meeting on December 8, 1993, other district managers expressed a belief that both Carson and the AFT had voiced extreme concern over Saxton's behavior. According to McCarthy, however, he did not know who the other managers were referring to within the AFT. McCarthy's testimony and supporting notes are not only vague, but are also hearsay and double hearsay. As such they are an insufficient basis for a finding of fact that the AFT, or more specifically Diamond, tried to undermine Saxton with other District managers.

According to McCarthy, nothing that was said or done by Diamond contributed to any action taken against Saxton by the District.[7]

ISSUE

Did the AFT fail in its duty to fairly represent Saxton, or take adverse action against Saxton because of her protected activity, or attempt to cause the District to violate Saxton's rights by urging that Saxton be stopped administratively or put on leave?

DISCUSSION

Failure of the Duty to Fairly Represent Saxton

Section 3544.9 of the EERA requires exclusive representatives to fairly represent employees. That duty is breached if the employee organization's conduct toward an employee is arbitrary, discriminatory or in bad faith. (Rocklin

[7]It is unclear from the record what action, if any, the District did take against Saxton.

Teachers Professional Association (Romero) (1980) PERB Decision No. 124; Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369].) Matters which are strictly internal union issues are not subject to the duty of fair representation. (Service Employees International Union Local 99, (Kimmett) (1979) PERB Decision No. 106; El Centro Elementary Teachers Association (Willis) (1982) PERB Decision No. 232; Fontana Teachers Association, CTA/NEA (Alexander, et al.) (1984) PERB Decision No. 416.)

Employee organizations are afforded a broad range of discretion and latitude in fulfilling their obligations. Negligence or judgment errors have been insufficient to establish a violation. (Sacramento City Teachers Association (Fanning, et al.) (1984) PERB Decision No. 428; California School Employees Association (Ciaffoni, et al.) (1984) PERB Decision No. 427; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) A union's conduct must be without a rational basis or devoid of honest judgment to be found arbitrary. (Vaca v. Sipes, supra, 386 U.S. 171.)

This complaint alleges that by urging the District to stop Saxton administratively or put her on leave, Diamond breached her duty to fairly represent Saxton. However, the only evidence supporting that claim is McCarthy's notes, which have been found not to be credible. The most that can be determined from credible evidence is that Diamond expressed her pleasure at no longer having to represent Saxton and that Saxton was compared to a former employee named Aklampke. Such statements made in that

context, by a person believing she no longer represented Saxton, are insufficient to prove a violation.

Even assuming for the sake of argument only, that Diamond had suggested that the District take administrative action to stop Saxton's harassment of a fellow unit member, that would not by itself prove a violation. Unions must frequently take positions unfavorable to one unit member in order to protect the rights of other unit members. Unless it can be shown that the conduct was without rational basis or devoid of honest judgment, that conduct would not violate the AFT's duty of fair representation. The burden here is upon Saxton to show how the AFT abused its discretion and not on the AFT to show that it properly exercised it. (United Teachers-Los Angeles (Vigil) (1992) PERB Decision No. 934.) Charging Party has offered speculation and hearsay rather than credible evidence and has therefore failed in her burden.

While not specifically alleged in the complaint, the Charging Party also argues that the AFT's lack of support for taking Saxton's grievances to arbitration and its refusal to allow Crippens to represent Saxton also breaches its duty.

The evidence clearly supports a finding that Diamond opposed taking Saxton's grievances to arbitration because they lacked merit. This is supported by unanimous votes of the screening committee. Saxton was even provided an opportunity to meet with the screening committee and make her own arguments, not relying upon Diamond. The screening committee remained unpersuaded and

again voted unanimously to drop the grievance. Thus, Diamond's lack of support for the cases, or the screening committee's decision not to pursue arbitration on what they believed were meritless grievances cannot be considered arbitrary, discriminatory or in bad faith. (San Juan Teachers Association CTA/NEA (Spade) (1994) PERB Decision No. 1075; Sacramento City Teachers Association, supra, PERB Decision No. 428.)

Furthermore, EERA section 3541.5(a)(1) establishes a six month statute of limitations for unfair practice complaints. The AFT's unwillingness to take Saxton's grievances to arbitration occurred more than six months prior to the filing of this charge. Therefore, even if the issue had merit, which it doesn't, it would be untimely.

Charging Party has also failed to prove that the AFT's decision to remove Crippens as Saxton's union representative was without a rational basis. The evidence shows that the AFT decided against having job stewards from one campus represent grievants at other campuses. There was no obligation for the AFT to provide Saxton with a representative of her choice. (California Faculty Association (Wang) (1988) PERB Decision No. 692-H; Castelli v. Douglas Aircraft Co. (9th Cir. 1985) 752 F.2d 1480 [118 LRRM 2717].) The method by which a union assigns representatives to grievances is an internal union matter and therefore not subject to the duty of fair representation. (United Teachers-Los Angeles (Bracey) (1987) PERB Decision No. 616; Service Employees International Union, Local 99 (Kimmett),

supra. PERB Decision No. 106.) The AFT did not refuse to provide a representative to Saxton. It was Saxton's choice not to contact or meet Diamond about her final grievance.

For the above reasons, Charging Party's allegations regarding the duty of fair representation should be dismissed.

Retaliation Against Saxton

A second allegation specified in the complaint is that the AFT took adverse action against Saxton because she engaged in protected activity. In order to prevail in this allegation, the Charging Party must establish that she engaged in protected activity, that the activity was known to the AFT, and that the AFT took adverse action against her because of such activity. Unlawful motivation is essential to the Charging Party's case. Proof of a connection or nexus between the protected activity and the adverse action may be established by direct or circumstantial evidence and inferences drawn from the record as a whole. (Novato Unified School District (1982) PERB Decision No. 210; State of California (Department of Developmental Services (1983) PERB Decision No. 344-S; Carlsbad Unified School District (1979) PERB Decision No. 89; Livingston Union School District (1992) PERB Decision No. 965.)

In this case the charging party has shown that she engaged in protected activities. She filed grievances and she requested AFT representation in meetings with administrators. The AFT obviously knew of this protected activity because they represented her in the process. Charging Party has failed to

prove, however, that the AFT took adverse action against her because she engaged in this protected activity.

The only adverse action alleged in the complaint is that Diamond told McCarthy that Saxton should be stopped administratively or put on leave of absence. As mentioned earlier, however, evidence of that claim has been discredited. Diamond's expressions of pleasure at no longer having to represent Saxton and comparing Saxton to Aklampke cannot be seen as adverse action.

Charging Party again argues that the AFT's lack of support for taking her grievances to arbitration and its refusal to allow Crippens to represent her also constitute adverse action. However, the union is under no obligation to take cases which it believes to be meritless to arbitration. (San Juan Teachers Association CTA/NEA (Spade), supra, PERB Decision No. 1075; Sacramento City Teachers Association (Fanning, et al.), supra, PERB Decision No. 428.) Thus, Diamond's lack of support, or the screening committee's decision not to pursue arbitration cannot be considered adverse action. Furthermore, as mentioned earlier, even if this were considered adverse action, it would be untimely.

Charging Party has also failed to prove that the AFT's decision to remove Crippens as her union representative was adverse action. The evidence shows that the AFT decided against having job stewards from one campus represent grievants

at other campuses. However, Charging Party argues that because the collective bargaining agreement did not specifically prohibit Crippens from representing her, the AFT's failure to provide Crippens as a representative amounted to adverse action. As found earlier in this decision, however, the method of selecting grievance representatives is clearly an internal union matter. Unions are under no obligation to provide employees with the representative of their choice. (California Faculty Association (Wang), supra. PERB Decision No. 692-H.) Diamond was available to Saxton as a representative. Saxton's failure to get her preferred representative does not amount to adverse action.

Finally, once again assuming only for the sake of argument that the AFT did take adverse action against Saxton, she has failed to prove that any of the AFT's actions were taken because she had engaged in protected activity. There was no evidence showing that the AFT took adverse action against Saxton because she had filed grievances or requested representation in meetings with the administration. Those grievances were filed with the support of the AFT. Diamond represented Saxton at many meetings regarding the grievances. It is far more probable that any comments made by Diamond or action taken by the union was based upon a sincere belief that Saxton's claims were without merit and/or that Saxton actually was harassing Carson, a fellow unit member. Charging Party's allegations of retaliation must therefore be dismissed.

Urging the District to Violate Saxton's Rights

The final allegation, that Diamond attempted to cause the District to interfere with Saxton's rights or retaliate against her because of her protected activity must also be dismissed. The Charging Party has offered no reliable evidence on this allegation. Even crediting Charging Party's evidence entirely (which I am not willing to do) Diamond at most suggested that the District take action not for the purpose of interfering with Saxton's rights or because of her protected activity, but rather to stop Saxton from harassing another unit member.

CONCLUSION AND ORDER

Charging Party has failed to prove that the AFT acted in a manner which was arbitrary, discriminatory or in bad faith. It has therefore not been shown that the AFT breached its duty to fairly represent employees. Charging Party has also failed to prove that the AFT took any adverse action against Saxton because she engaged in protected activities. Finally, Charging Party has failed to prove that Diamond attempted to cause the District to violate Saxton's rights. This complaint is therefor DISMISSED.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a request for an extension of time to file exceptions or a statement of exceptions with the Board itself.

This Proposed Decision was issued without the production of a written transcript of the formal hearing. If a transcript of the hearing is needed for filing exceptions, a request for an

extension of time to file exceptions must be filed with the Board itself (Cal. Code of Regs., tit. 8, sec. 32132). The request for an extension of time must be accompanied by a completed transcript order form (attached hereto). (The same shall apply to any response to exceptions.)

In accordance with PERB regulations, the statement of exceptions must be filed with the Board itself within 20 days of service of this Decision or upon service of the transcript at the headquarters office in Sacramento. The statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code of Regs., tit. 8, sec. 32300.) A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . . or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . ." (Cal. Code of Regs., tit. 8, sec. 32135; Cal. Code of Civ. Proc, sec. 1013 shall apply.) Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (Cal. Code of Regs., tit. 8, secs. 32300, 32305 and 32140.)

James W. Tamm
Administrative Law Judge