

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



VINCENT J. FURRIEL,)
)
 Charging Party,) Case No. LA-CO-307
)
 v.) PERB Decision No. 583
)
 RIO HONDO COLLEGE FACULTY)
 ASSOCIATION, CTA/NEA,) July 30, 1986
)
 Respondent.)

Appearances: Vincent J. Furriel, on his own behalf; Charles R. Gustafson, Attorney for Rio Hondo College Faculty Association, CTA/NEA.

Before Morgenstern, Porter and Craib, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by Vincent J. Furriel to the attached proposed decision of a PERB administrative law judge (ALJ). In her proposed decision, the ALJ dismissed Furriel's charge that the Rio Hondo College Faculty Association, CTA/NEA (Association) violated section 3543.6(b) of the Educational Employment Relations Act (EERA or Act)¹ by refusing to appoint him to a seat on a joint Association-employer

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code.

Section 3543.6 provides, in pertinent part:

committee because of his exercise of rights guaranteed by the Act. For the reasons which follow, we affirm the dismissal.

FACTS

Furriel does not substantially dispute the ALJ's findings of fact, nor does this Board, on its own review, find any prejudicial errors of fact. We therefore adopt the ALJ's findings of fact as the findings of the Board itself.

DISCUSSION

The ALJ concluded that the Association did not violate its duty of fair representation when it refused to appoint Furriel to a seat on the Sabbatical Leave Review Committee (Committee). She noted that, while the Board has said, ". . . a breach of the duty of fair representation occurs when a union's conduct toward

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.

The duty of an exclusive representative to represent its members fairly is set forth in EERA section 3544.9. That section provides:

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.

a member of the bargaining unit is arbitrary, discriminatory, or in bad faith" (Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124, at p. 7.), the duty of fair representation extends only to union "activities that have a substantial impact on the relationships of unit members to their employers" and does not apply to those "activities which do not directly involve the employer or which are strictly internal union matters." Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106, at p. 8.

The ALJ found that the Committee is a creature of the collective bargaining agreement between the Association and the Rio Hondo Community College District (District). The contract provides that the Committee is composed of three representatives designated by the District and three representatives designated by the Association. The ALJ reasoned that, because the Committee is an extension of the contract, it is akin to a negotiating team. Noting that PERB has previously determined that selection of bargaining team members is an internal union matter not subject to the duty of fair representation (SEIU, supra), absent a showing of substantial impact on the employees' relationship with the employer, the ALJ concluded that selection of its representatives to the Committee is an internal union matter. As the Association's rejection of Furriel to the Committee did not substantially impact his employment relationship, the duty of fair representation did not apply. We agree.

The Committee, in this case, is similar to a negotiating team. It is established that:

[T]he union has responsibility as exclusive bargaining agent to formulate the employees' position on terms and conditions of employment. This responsibility may be delegated by the union membership. Such delegation is an internal union procedure from which non-union employees properly may be excluded. However, the delegatee, once selected, must in turn function as a representative for all the employees in the bargaining unit. Letter Carriers, Branch 6000 v. NLRB (D.C. Cir. 1979) 595 F.2d 808 [100 LRRM 2346].

Thus, the exclusive representative's responsibility to represent all the bargaining unit members in terms and conditions of employment may be delegated by the union's membership to a committee. Such delegation is an internal union matter and may exclude non-union employees. Put another way, selection to such committees is not subject to the duty of fair representation unless such an internal union matter has a substantial impact on the terms and conditions of employment.

The duty of fair representation generally has been limited to an exclusive representative's conduct in negotiating and administering contracts. (See SEIU, supra, at p. 9, and cases cited therein.) If the exclusive representative's negotiating team fails to represent the entire unit, it has violated the duty of fair representation. Likewise, if the Committee fails to represent the entire unit, it has violated the duty of fair representation. Since both the negotiating committee and the Committee are subject to the same legal duty, it follows that

the selection of members to the Committee, a Committee that makes on-going recommendations about leaves, should be considered like the selection to a negotiating team, an internal union matter.

Contract administration is part of the collective bargaining process. This Board has held that:

[I]t is well settled that administration of the contract is an essential part of the collective bargaining agreement. Jefferson School District (1980) PERB Decision No. 133, rev. den. (7/1/83) 1 Civ. 50241. See also Modesto City Schools and High School District (1986) PERB Decision No. 518a.

There is no reason to treat selection to the Committee differently than selection to a negotiating team. Both are essential parts of the same process.

Under the terms of the Association-District agreement relevant here, the Association has the sole authority to appoint three of the Committee's six members. Selection of members to a committee whose purpose is to effectuate the terms of an agreement for the benefit of all unit members closely resembles the selection to a bargaining team whose purpose is to represent all bargaining unit members in negotiations.

The similarity between selection to a negotiating team and selection to the Committee is reinforced when it is recognized that the Association's representatives on the Committee do in fact serve a representative function like members of a bargaining team. When the Association and the District agreed to the formation of a committee on sabbatical leaves, with three

"representatives designated by the Association and three representatives designated by the District," the representational authority of the Association did not come to an end. As members of the Committee, the Association's representatives, in concert with the District's representatives, rank candidates who have applied for sabbatical leaves.

As the representative of all bargaining unit members, the Association is responsible for seeing that the Committee discharges its function in accord with the contract and in the best interests of the unit. The Association, of course, may not discriminate against non-members in deciding who may receive sabbatical leaves. However, Furriel charges only that the Association discriminated in not selecting him for the Committee.

Member Porter claims that the negotiated Committee allows the Association to engage in academic decision making. Therefore, "it goes well beyond a labor union's role of negotiating the employees' wages, hours and terms and conditions of employment." (Dissent, at p. 20.) We disagree.

Leaves are a specifically enumerated subject of bargaining. (Section 3543.2(a).) Moreover, according to the contract, the philosophy and purpose of sabbatical leaves are:

. . . to provide an opportunity for professional growth of full-time unit members which will result in more effective services to the District.

Sabbatical leaves would thus appear to be an aspect of training, a negotiable subject. Healdsburg Union High School District, et al. (1984) PERB Decision No. 375. Although a sabbatical leave

could also be characterized as an alternative academic assignment, the effects of any assignment are likely to touch on negotiable subjects such as wages or hours. In ranking applicants for sabbatical leaves, this Committee makes on-going decisions concerning leaves, training and other matters that, at the very least, touch on matters within scope.

In our view, if a matter may be negotiated, its inclusion in a contract is proper. Once in a contract, the Association must administer its provisions on behalf of all unit employees. If, in administering a contractual term, it is necessary to select Committee members, the procedures and qualifications for selection are an internal union matter.

Because we find that selection to the Committee is an internal union matter, and there is no evidence that rejection of Furriel had a substantial impact on his relationship to his employer and/or had a substantial impact on the relationship of other employees to their employer, we conclude that there is no violation of either section 3544.9 or 3543.6(b). We, therefore, affirm the ALJ's dismissal of this charge.

²In SEIU, supra, the Board recognized that the conduct proscribed by section 3543.6(b) encompasses more than a breach of the duty of fair representation set forth in section 3544.9. However, in that case the Board concluded that it will not find a protected right under either section 3344.9 or 3543.6(b) if the union conduct at issue involves internal union matters and those internal union matters have no substantial impact on the employees' relationship with their employer.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ORDERED that the unfair practice charge and complaint against the Rio Hondo College Faculty Association, CTA/NEA, are DISMISSED.

Member Morgenstern joined in this Decision. Member Porter's dissent begins on page 9.

Porter, Member, dissenting: I dissent and would reverse the administrative law judge's (ALJ) finding that the Association did not commit an unfair practice. Inasmuch as the ALJ specifically found that the sole reason Charging Party was not selected to serve on the Sabbatical Leave Committee (Committee) was because he was not a member of the Association (a finding not excepted to by the Association), the Association has clearly committed an unfair practice. The Committee is not an internal union committee, it does not make policy decisions on behalf of the Association, nor do its members represent the interests of the Association per se. It is an academic committee, established to make academic decisions, based on academic policies.¹ Because of the nature of the Committee and the function it performs, a refusal by the Association to appoint Charging Party solely on the basis of his nonmembership status violates the Association's duty of fair representation, deprives him of his statutory right not to participate in the activities of employee organizations and constitutes interference with and discrimination and reprisal for the exercise of his protected rights, in violation of Government Code sections 3543.6(b) and 3544.9.

¹Notwithstanding that "leaves" is a specifically enumerated subject of negotiations under Government Code section 3543.2, I question whether the actual selection of the faculty members who will be granted sabbatical leaves is a negotiable subject since, in reality, it is an alternative assignment. This issue, however, was not raised in this case.

Section 3543 establishes the cornerstone of rights guaranteed to employees under EERA. It provides that public school employees shall have the right to form, join and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. No less significant is the employees' guaranteed right not to join or to participate in the activities of employee organizations. Section 3543.6(b) makes it unlawful for an employee organization to:

[i]mpose 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.

Further, section 3544.9 specifically imposes upon the exclusive representative the duty to fairly represent each and every employee in the bargaining unit.²⁻

Clearly, then, employees have the right not to join or participate in the activities of an employee organization and, in so choosing, be free from reprisals or threats of reprisals or discrimination and otherwise be free from interference, restraint or coercion for having made that choice. Also,

²Section 3544.9 provides:

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.

having decided not to join the organization that is the exclusive representative, the employee does not thereby forfeit his right to be represented fairly on matters involving his employment relations with his employer.

Previous PERB decisions have established that, while the duty of fair representation set forth in section 3544.9 is actionable under section 3543.6(b), the latter section encompasses more than this duty. In the leading PERB decision, Service Employees International Union, Local 99 (Kimmett) (1979) PERB Decision No. 106, the Board stated in regard to section 3543.6(b):

The language of this section is identical to that of section 3543.5(a) which covers employer conduct, and the Board sees no reason to analyze those sections differently. Under the test articulated in Carlsbad Unified School District (1/30/79) PERB Decision No. 89, the conduct alleged to constitute an unfair practice must tend to or actually result in some harm to employee rights granted under the EERA

However, the conduct proscribed by section 3543.6(b) encompasses more than a breach of the duty of fair representation, and charging party's allegations must be examined to determine whether they constitute a violation of that section separate and apart from any violation of section 3544.9. SEIU (Kimmett), id. at pp. 13-15.

The Board concluded that it will not find a protected right under either section 3544.9 or 3543.6(b) if the union conduct at issue involves strictly internal union matters, unless those internal union matters have a substantial impact on the employees' relationship with their employer.

Thus, a three-step analysis is required to determine if a violation of section 3543.6(b) or 3544.9 has occurred. First, it must be determined whether the employee organization is acting in its capacity as the exclusive representative, that is, does it, by virtue of its status as the exclusive representative, possess the exclusive means of access to the benefit, process or procedure at issue for bargaining unit members? The two clearest examples of this are negotiating the contract and taking a grievance to binding arbitration. These are both rights granted by statute solely to the exclusive representative. (See sections 3543, 3543.1 and 3548.5.) If the exclusive representative is acting in such capacity, then both sections (3543.6(b) and 3544.9) apply. If the exclusive representative is not so acting, or the organization is not the exclusive representative, then only section 3543.6(b) will apply.

Next, it must be determined whether the conduct complained of is an internal union matter. If not, then the standards for determining violations of sections 3543.6(b) and/or 3544.9 should be applied to determine if the conduct is violative of the Act.³

Finally, even if the conduct does involve an internal union matter, then it will be examined nevertheless to ascertain

³These tests respectively are the "Carlsbad" test, adopted by the Board in Carlsbad Unified School District (1979) PERB Decision No. 89, and the "arbitrary-discriminatory-or-bad-faith" test articulated by the Board in Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.

whether it has a substantial impact on the relationship of unit members to their employer. SEIU (Kimmett), supra, p. 8. If not, then the employee has no protected right to have the matter resolved in any particular fashion, nor will this Board find a violation of the Act. If it does have a substantial impact on the relationship of unit members to their employer, then the conduct will be analyzed under the respective tests set forth in footnote 2, as if it did not involve an internal union matter.

In the present case, applying the first step of the analysis, the right to select representatives to the Committee is not a right accorded the Association by statute but, rather, is a right created by the Association itself through negotiations and set forth in the collective bargaining agreement. Nevertheless, by virtue of the contract, the sole avenue of access of unit members to participation on the Committee is through the Association.⁴ Clearly, then, the Association acts in its capacity as the exclusive representative, and both sections 3543.6(b) and 3544.9 apply.

The second step in the analysis is to determine whether the selection of the Committee participants is strictly an internal union matter. PERB has not previously articulated a clear standard of what constitutes an "internal union matter," but some guidance may be gleaned from previous decisions in which

⁴**This** presumes, of course, that faculty members are not selected as the District's representatives.

complained-of conduct was found to constitute an internal union matter. In SEIU (Kimmett), supra, the matters found to involve internal union affairs included: choice of a general meeting time; the decision regarding holding on-site union meetings with bargaining unit members; lack of formal union procedures for providing input to the union from the various groups of employees; and procedures for selection of the negotiating team members. The Board also stated that an exclusive representative has a duty to fairly represent all employees in the unit in meeting and negotiating, consulting on educational objectives, and administering the written agreement. Id., at p. 8.

Selection or endorsement of union officers was an internal union matter (Service Employees International Union (Pottorff) (1982) PERB Decision No. 203), as was the amendment of the Association's bylaws to omit the right of nonmembers to vote on negotiation proposals and contract ratification, since there were other avenues of input available to nonmembers (El Centro Elementary Teachers Association (Willis et al.) (1982) PERB Decision No. 232).

Internal union disciplinary procedures and decisions do not subject a union to claims of violation of EERA unless they have a significant impact on the relationship of the employees with their employer (California School Employees Association and its Shasta College Chapter #381 (Parisot) (1983) PERB Decision No. 280). In Parisot, id., the Board recognized that a union's internal discipline procedures can have a substantial impact on

the relationship of employees to their employer, notwithstanding the absence of a demonstrable impact on the employees' wages, hours or terms and conditions of employment.

Finding no discipline was involved in the recall of the chapter president, the regional attorney, in a decision adopted by the Board, dismissed the charges in California School Employees Association, Chapter 318 (Harmening) (1984) PERB Decision No. 442, since selection and removal of union officers is an internal union matter.

In California State Employees' Association (Norgard) (1984) PERB Decision No. 451-S, the Board assumed for purposes of argument that a decision by CSEA to affiliate with the AFL-CIO impacted upon the employees' relationship with their employer to such an extent that the duty of fair representation was implicated. The Board then found that such decision did not violate the duty of fair representation.

The Board summarily affirmed the regional attorney's decision dismissing the charges in Compton Education Association (Sanders) (1985) PERB Decision No. 509. The regional attorney found the following allegations to involve internal union activities without significant impact on the employees' relationship with their employer, based either on the charges themselves or on the regional attorney's investigation: failure to adequately receive input from members regarding contract negotiations; failure to notify teachers of a dues increase; acting in

meetings without a quorum; "friends" of the executive director on the executive board supported her actions; union clerks received too-high salaries; a conflict of interest existed because the organization's auditor was married to the financial secretary; the membership was not offered a choice of health plans; charging party was not put on the negotiating team; insufficient notice was provided for a membership meeting; the voting on the contract occurred in parts, rather than on the whole document; a negotiation agreement resulted in the loss of a tax-sheltered annuity; the organization did not provide copies of its negotiating proposals; the union proposed a change in health plans; the union failed to perform an adequate survey of members to determine their preference for a health plan.

From these previous decisions, certain categories of activities evolve that generally constitute internal union matters. Those categories can be described as follows:

1. internal operation, management, or structure of the organization itself;
2. policy decisions and implementation of those policies as to direction and goals of the organization (i.e., negotiations);
3. decisions regarding how the organization will allocate its resources for its own operations;
4. procedures and/or methods by which the organization will inform its constituency of various representational matters, and obtain input from those members.

Among those activities previously determined to be internal, the only possible analogy to the instant case is the union's

right to select members to its negotiating team. This is the analogy relied on by both the ALJ in the proposed decision, as well as the majority in its opinion. The majority would, in fact, find that the Committee merely extends the representational authority of the Association, and members of that Committee serve in a representational capacity akin to negotiators acting on behalf of the Association. Thus, the majority opinion concludes that this situation falls within the well-settled case law that holds that the process by which a union selects its officials and representatives is an internal union matter and not subject to the duty of fair representation.

While superficially the foregoing conclusion has the appearance of consistency with previous case law, in fact this case raises a novel issue that can be resolved only by examining the nature, function and purpose of the Committee itself. Therefore, a review of the Education Code scheme is warranted, as well as an analysis of the Committee itself as established by the contract.

Sabbatical leaves are created and governed by the Education Code. Sabbatical leaves in community college districts are authorized by Education Code Section 87767 et seq.⁵ That section provides that the governing board may grant a

⁵See Education Code section 44966 et seq. for the sabbatical leave provisions for teachers of kindergarten through grade twelve.

certificated employee a leave of absence not to exceed one year,
for the purpose of permitting study or travel
by the employee which will benefit the
schools and the students of the district.

The employee must have rendered at least six consecutive years of service to the district prior to the board granting the leave, and not more than one leave may be granted in a six year period. Education Code section 87768. The board may prescribe the standards of service that will entitle the employee to the leave. Education Code section 87768. The employee on sabbatical leave may be required to perform such services during the leave as the board and employee agree upon in writing. Education Code section 87769. Every employee granted a sabbatical leave is required, as a condition of the leave, to agree in writing to render service to the district upon return from sabbatical, for a period of time equal to twice the period of the leave. Education Code section 87770. The employee who receives compensation from the district while on leave is required to furnish a bond indemnifying the district against loss in the event the employee fails to render the agreed-upon period of service following the leave, unless the board in its discretion adopts a resolution declaring the interests of the district will be protected by the employee's written agreement to return. Education Code section 87770.

That sabbatical leaves are academic in nature and are for the purpose of benefiting the district at large is evident from the foregoing statutory provisions. While leaves are specified as a

topic of bargaining (Government Code section 3543.2), no other type of leave is similar, either in purpose or in procedural requirements. Sabbatical leaves are, in actuality, an alternative academic assignment.

Turning then to the terms of the contract itself, it is readily apparent that the Committee functions in an academic capacity, rather than in a traditional labor relations role. According to the contract, the philosophy and purpose of sabbatical leaves is:

. . . to provide an opportunity for professional growth of full-time unit members which will result in more effective services to the District. Such leaves may include, but not be limited to, study, travel, research, and related work experience.

In addition to setting out the eligibility requirements and application procedures, the contract also creates the Sabbatical Leave Committee under a section entitled, "Approval of Sabbatical Leaves." The terms of this section distinguish this Committee from other more traditional labor relations committees, such as a negotiating team. Initially, sabbatical leave requests are reviewed by the Committee, which consists of three representatives designated by the Association and three designated by the District. The Committee itself, in reviewing requests, determines how it will consider the criteria on the sabbatical leave request form. It then "shall determine those applications which shall be recommended and those which shall not be recommended." The Committee ranks its "recommended"

sabbaticals and forwards them to the superintendent for transmittal to the board of trustees.

The contract specifies that the District "shall" provide up to five sabbatical leaves in accordance with the ranked recommendations of the Committee. Thus, if the Board grants any sabbaticals, according to the contract the first five people are actually ranked and selected by the Committee. If the superintendent recommends more than five sabbatical leaves, then the superintendent must first consider the Committee's additional ranked recommendations. If the superintendent recommends someone either out of order according to the Committee's ranking, or not included in the Committee's recommendations, then the superintendent is required to provide written rationale for his recommendation to both the Committee and the employee who was recommended by the Committee.

As can readily be seen, this Committee has the role of actually deciding who will receive the first five sabbatical leaves granted by the board of trustees. This is an academic decision, affecting both the quality of the educational program of the District itself, as well as the opportunities for expanded training of individual faculty members. It goes well beyond a labor union's role of negotiating the employees' wages, hours and terms and conditions of employment. Consequently, the Association has no legitimate interest or right, as an organization, to limit the participants to members only. There

is nothing that would suggest that the operation of the Committee in ranking and selecting sabbatical leave candidates furthers the policies of the employee organization, nor does the Committee implement internal goals and agendas of the Association as an entity, as does the negotiating team. While the exclusive representative represents all unit members, its representatives in negotiations are, in actuality, representing the organization as well as the bargaining unit members. They are exercising the organization's statutory right to engage in collective bargaining and, through that process, to achieve and secure the organization's rights granted it by statute. Consequently, the organization has a legitimate interest in having its members, and only its members, fulfill that responsibility. When, as here, however, the Association secures for itself the right to designate representatives to participate in an academic decision-making process, it does not thereby obtain the right to exclude nonmembers from involvement in this process.

If the Association's role was merely one of ensuring that the leave provisions were complied with, or if the Association could select some, but not all, of the faculty participants on the Committee, there could be an argument that those selected acted as representatives of the Association, such that the selection process was an internal matter. In such a case, limitation to members only might be reasonable. That, however, is not the situation we confront in this case. Consequently,

the selection of participants to the Committee is not an internal union matter, and the Association's conduct must be analyzed under both the Carlsbad test and the "arbitrary, discriminatory, or bad-faith" standard for alleged violations of the duty of fair representation. As discussed below, application of those tests results in finding a violation of the Act.

The Carlsbad test requires charging party to establish that the complained-of conduct "tends to or does result in some harm to employee rights granted under EERA" (Carlsbad, supra, at p. 10. Once this has been demonstrated, a prima facie case exists. Where the harm is slight, and the respondent offers justification based on operational necessity, the competing interests of the respondent and the charging party will be balanced and the charge resolved accordingly. However, where the harm is inherently destructive of employee rights, the respondent's conduct will be excused only on proof that it was occasioned by circumstances beyond the respondent's control and that no alternative course of action was available. Irrespective of the foregoing, a charge will be sustained where it is shown that the respondent would not have engaged in the complained-of conduct but for an unlawful motivation, purpose or intent. Carlsbad, id., at pp. 10-11.

The harm caused by the Association's conduct here is readily apparent. Its action makes clear to employees who choose to exercise their statutory guarantee not to participate in union

activities that, in so doing, they forfeit an opportunity to participate in the academic decision-making process. Charging Party's motivation in seeking a spot on the Committee was to help his department have one of its members be selected for a sabbatical, for the benefit of the applicant, the department and the college at large. Due to the highly technical nature of the department and the sabbatical leave request, as well as Charging Party's own practical experience in the selection process, he believed there would be a better chance for his colleague to obtain the sabbatical leave if the department was represented on the Committee. However, since Charging Party was not a member of the Association, the Association president refused to consider his request to participate. Such action has the natural consequence of harming his right not to participate as a member of the union, and a prima facie violation exists.

Such conduct by the Association is inherently destructive of the employee's right not to participate in union activities. The Association has negotiated for itself the exclusive avenue by which a faculty member may serve on this academic Committee. It has then foreclosed that avenue to nonmembers of the organization. No clearer statement can be made that if the employee chooses not to join the union, he sacrifices involvement in a campus committee engaged in academic decision making. The Association failed to offer any evidence that its decision to exclude Charging Party was due to circumstances

beyond its control and that no alternative course of action was available. On the contrary, the selection was exclusively within its control.

Further, under Carlsbad, irrespective of any proffered justification, the Association's motivation was to exclude Charging Party because he was not a member. This is rank discrimination and obviously not a lawful basis upon which to base the selection decision. Given the uncontested conclusion reached by the ALJ that his lack of union membership was the sole reason Charging Party was rejected, the "but for" standard of Carlsbad is met and the complaint should be sustained.

On the question of the duty of fair representation, the Association's action will be deemed to violate this duty if it is arbitrary, discriminatory, or in bad faith. See Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124. In San Francisco Federation of Teachers, Local 61, CFT/AFL-CIO (Hagopian) (1982) PERB Decision No. 222, the Board found that the union had violated both sections 3543.6(b) and 3544.9 when it required nonmembers to pay a fee before the Federation would represent them in an arbitration hearing. The collective bargaining agreement provided that only the Association could decide when to appeal a grievance to arbitration. The Board concluded that the union's policy of imposing a fee on nonmembers was discriminatory, since it did not similarly condition the processing of arbitration by

dues-paying members on their paying a specific fee for arbitration. Thus, "the Federation has drawn a distinction between members and nonmembers, and to this extent discriminated against Charging Party." Id., at p. 10.

Here, too, the Association controlled the exclusive means by which Charging Party could participate on an academic committee. As the Board also stated in San Francisco, "[o]nce an agreement provides for a grievance procedure as in the instant case, it must apply equally and fully to all the employees in the unit, whether members or nonmembers." Id., at p. 8. So, too, in the present case, once the agreement provides the exclusive means by which employees may be considered for serving on the Committee, the selection procedure must apply equally and fully to all employees in the unit, whether members or nonmembers. Thus, the Association's discriminatory conduct in the present case violated its duty of fair representation.

Alternatively, even if it could be concluded that selection of Committee members was an internal union matter, under the third step of the analysis the conduct involved in the selection process is not insulated from inquiry if the matter has a substantial impact on the relationship of unit members to their employer. Charging Party amply demonstrated such an impact in his presentation regarding the functioning of the Committee.⁶

⁶While Charging Party argued on appeal that service on committees has an impact on a faculty member's promotional opportunities, he failed to put any evidence in the record to

The faculty members on the Committee review sabbatical leave requests from the campus at large. According to Charging Party, committee members may add their own input or understandings to supplement or explain the sabbatical leave requests. Faculty members control one-half the votes on the Committee in deciding the ranking and who will receive sabbaticals. That decision impacts the various departments, since, according to the policy statement, the person on sabbatical has an opportunity for professional growth which "will result in more effective services to the District" and, in the case at issue here, bring more technical expertise into the department. Further, Charging Party presented testimony that, based on his past experience serving on the review committee, an applicant for sabbatical leave has a better chance of being selected if there is someone from his department on the Committee. Therefore, the selection of members to the Committee does have a substantial impact on the relationship of employees in the unit to their employer. As a consequence, this conduct should be analyzed as if it did not involve an internal union matter. As demonstrated above, such analysis results in finding that the Association has violated both sections 3543.6(b) and 3544.9.

This Board was established for the purpose of ensuring that employees are guaranteed the rights granted to them by statute.

this effect, and therefore this dissent is not based on this argument. I would find a substantial impact without the need to consider Charging Party's assertion regarding promotions.

Chief among those rights is the right to either participate in union activities or not, without such choice interfering with the employment relationship or resulting in discriminatory or retaliatory action against them by an employee organization.

In the present case, where the Association successfully negotiated the right to select faculty representatives to participate in an academic decision-making process, it did not thereby acquire the right to exclude nonmembers from involvement in that procedure. Having taken such action against Charging Party, the Association violated its duty of fair representation and discriminated and retaliated against and interfered with Charging Party's right not to join the Association.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD



VINCENT J. FURRIEL,)
)
Charging Party,) Unfair Practice
) Case No. LA-CO-307
)
V.) PROPOSED DECISION
) (8/14/85)
)
RIO HONDO COLLEGE FACULTY)
ASSOCIATION, CTA/NEA,)
)
Respondent.)
_____)

Appearances: Vincent J. Furriel in Pro Per, Charles R. Gustafson (California Teachers Association), Attorney for Rio Hondo College Faculty Association, CTA/NEA.

Before Barbara E. Miller, Administrative Law Judge.

I. PROCEDURAL HISTORY

On November 5, 1984, Vincent J. Furriel (hereinafter Charging Party or Furriel) filed an Unfair Practice Charge against the Rio Hondo College Faculty Association, CTA/NEA (hereinafter Respondent or Association). In his Charge Furriel alleges that the Association violated section 3543.6(b) of the Educational Employment Relations Act (hereinafter EERA).¹ Furriel alleges that the EERA was violated when the Association

¹The EERA is codified beginning at Government Code section 3540, et seq. Unless otherwise specified, all statutory references are to the Government Code. Section 3543.6 provides, in relevant part, as follows:

It shall be unlawful for an employee organization to:

This Board agent decision has been appealed to the Board itself and is not final. Only to the extent the Board itself adopts this decision and rationale may it be cited as precedent.

failed to give him a position on the Sabbatical Leave Review Committee (hereinafter, on occasion, Committee) allegedly because the president of the Association refused to appoint a "non-Association/non-dues paying member."

Pursuant to the procedures of the Public Employment Relations Board (hereinafter Board or PERB), the charge was investigated and a Complaint issued on November 27, 1984. Thereafter, on December 19, 1984, the Association filed its Answer variously admitting and denying the allegations in the Charge/Complaint and, as an affirmative defense, alleging that the designation of representatives to the Sabbatical Leave Review Committee is strictly an internal union matter over which PERB has no jurisdiction.

An informal conference was scheduled and when the parties were unable to resolve their dispute, a formal evidentiary hearing was scheduled and conducted on April 15, 1985. Thereafter a responsive post-hearing briefing schedule was established. The Charging Party filed an opening brief, the Respondent filed a responsive brief, and thereafter the Charging Party did not avail himself of the opportunity to file

(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.

a reply brief. Accordingly, on July 8, 1985, the case was submitted for proposed decision.

II. FINDINGS OF FACT

The Association is an employee organization within the meaning of section 3540.1(d) of the EERA and it is the exclusive representative of the certificated bargaining unit of the Rio Hondo Community College District. Furriel is an employee as that term is defined in the Act, is a member of the bargaining unit, but is not a member of the Respondent Association.

The collective bargaining agreement between the Association and the Community College District has an extensive article providing for sabbatical leaves. The section entitled "Approval of Sabbatical Leaves" provides, in relevant part, as follows:

Sabbatical leave requests shall be reviewed by a Sabbatical Leave Review Committee comprised of three representatives designated by the Faculty Association and three representatives designated by the District.

The thrust of Furriel's Complaint is that the Association did not select him as one of its three representatives on the Committee.

Furriel's Application for a Position on the Sabbatical Leave Review Committee

Stephen A. Collins is an Associate Professor in the Public Service Department and the Social Science Department of the Rio Hondo Community College. Early in September 1984, Collins

approached Furriel to discuss his interest in being selected for a sabbatical. Furriel, who several years before had served on the Sabbatical Leave Review Committee, told Collins that it would be in Collins¹ interest if a member of his own department served on the Committee and, apparently, Furriel volunteered to serve in that capacity.

Thereafter, on or about September 24, 1984, Collins contacted Leon East, the president of the Association, and inquired as to whether appointments had already been made to the Sabbatical Leave Review Committee. Ascertaining that appointments had not yet been made, Collins informed Mr. East that Furriel was willing to serve on that Committee. Collins testified regarding his recollection of East's response to his nomination of Furriel for a position on the Committee. He stated in response to Furriel's question:

My recollection is that Mr. East would be very reluctant to appoint anyone to this committee who was not a member of the Faculty Association and he informed me that you were not. I didn't know that at the time. And that's the jist of it.

According to Collins, East did not set forth any criteria for appointment to the Committee, but repeated, on several occasions, that he would not be inclined to appoint someone who was not a dues paying member of the Association. During direct examination, Collins indicated that when he finished his conversation with East, he had the clear impression that the

Charging Party would not be considered for appointment to the Committee because of his non-membership in the Association.

During the course of cross examination, Collins indicated that East did not specifically say he would not appoint Furriel, but that Collins clearly drew that inference. The following conversation ensued between Collins and Charles Gustafson, counsel for the Association:

Q. What precisely did Mr. East say on that occasion from which you made the inference?

A. Well, I can't say precise that I can recall.

Q. To the best of your recollection.

A. It was when I advised him that Mr. Furriel was available for appointment, I recall a silence, a sort of a chuckle, and words being carefully selected then at that point that Mr. Furriel was not a member of the Faculty Association and that he, Mr. East, would be very reluctant, emphasis on that word, pauses again, to appoint someone who was not a member of the organization to a committee of this kind. And it was reiterated in conversation more than once, or it was said again, over my protestation, that you know, that it didn't seem to be an issue.

Q. What did you say in protestation?

A. Something like I didn't think that made any difference or I didn't understand that because he had been a member of this committee in years past and some dismay on my part.

Q. In response to your protestation, as you characterize them, what did Mr. East say, if anything?

A. He again repeated his position that that would not be something he would be willing or likely to do.

In his testimony, Leon East's version of his conversation with Collins differed in several respects. East testified that he reported to Collins, not that he was disinclined to appoint someone who was not a member of the Association, but rather he questioned whether he had the authority to do so. Moreover, East testified that during the course of the conversation, he expressed surprise that someone who had recently terminated his relationship with the Association would have any interest whatsoever in serving on any committee. East further testified that, based on his experience as Vice-President, President-Elect and then President of the Association, he found it extraordinarily difficult to find volunteers from among the Association membership and, accordingly, to have someone volunteer who was not a member of the Association, was quite impressive.

Based upon the testimony of Collins and East, it is concluded that Collins correctly interpreted East's remarks and, at least at the time of the telephone conversation, East had no intention of appointing anyone as a Committee member who was not a member of the Association. East did not seem direct in his testimony and although personable, he gave the impression of withholding information.

The Faculty Meeting and selection of Members for the Sabbatical Leave Review Committee"

A faculty meeting was scheduled for September 27, 1984, in the District's board room at 12:15 p.m. The agenda of that meeting made no reference to the fact that volunteers for the Sabbatical Leave Review Committee were going to be sought. East testified that the agenda was prepared prior to his September 24 conversation with Collins and he had no particular plausible explanation for his failure to include reference to the Sabbatical Leave Review Committee. During the President's report portion of the meeting, East indicated that he needed volunteers for the Committee. By a show of hands he had two volunteers. Nevertheless, he indicated that others, if interested, should place their names on slips of paper and submit them to him. East testified as follows:

After the meeting I had information and names and so on on little slips of paper and I sorted through all of those and I knew that I had two volunteers by an indication of hands during the meeting but I was pleased to find I had another one that I hadn't realized. Right after the meeting I found that out.

When asked when he made his decision about who would serve on the Sabbatical Leave Review Committee, East responded that he made his decision within 24 hours.

Although East testified that he seriously considered Furriel's application, his testimony is not credited. The

basis for this conclusion is East's general demeanor while testifying and his somewhat reluctant admission that he did not establish any criteria for considering who should or should not be on the committee. Although East testified that he had seen Furriel interact with the previous President of the Association and that he concluded his style was "bombastic," I find that East reached that conclusion based upon a conversation with Furriel after East had determined to accept the Association member volunteers and reject Furriel's nomination.

That conversation, which took place on October 2, 1984, was, according to East's recollection, fairly hostile. Furriel challenged East's conclusion and decision and he challenged his refusal to fairly consider Furriel. Although I do not dispute East's conclusion that Furriel was hostile, I also do not dispute Furriel's contention that he was not fairly considered and he was not considered because he was not an active member of the Association and in fact might be characterized as a dissident.

Although East's actual justification for selecting the members of the Sabbatical Leave Review Committee may indeed have been valid, it appeared to the undersigned that those justifications were articulated and considered for the first time when East was examined by the undersigned, in other words, it is found that East did not select Furriel because,

for reasons which are not entirely clear, he disliked Furriel and because Furriel was not a member of the Association. Upon reflection, however, East was able to come up with any number of different and less questionable reasons for not selecting Furriel. For example, East testified that based upon his observations of Furriel, Furriel was not entirely agreeable or easy to get along with. Moreover, East testified that based on his contact over the years with the persons who were selected, he found that they were able representatives of the Association and had what could generally be characterized as a committee spirit.

For example, East selected Bob Beauchemin, who was an instructor in the drafting program. East testified that Beauchemin is fairly active in Association activities in that he is one of the few people who attends meetings regularly. Since 1972, East has had numerous conversations with Beauchemin and has reached the conclusion that Beauchemin is a "thoughtful, considerate person and listens a lot." Moreover, East testified that he trusts Beauchemin and knows "that he doesn't make rash judgments. In my experience he's one who thinks before he speaks. . . ."

East also appointed Alicia Hernandez, who is a counselor for the college. He knows her because of her participation in Association activities and because she refers students to him

in her role as a counselor. Finally, East appointed Leonora Holder, an English teacher, who he characterized as perhaps the most active in Association events of all those selected. When asked if he seriously considered appointing Furriel when he saw the three Association volunteers, East testified "yes, I considered it and I was, had no trouble in ranking him as fourth in the field of four."

East did candidly testify, however, that he did not establish a list of criteria and he did not make a list of the qualities or attributes of the candidates for the Sabbatical Leave Review Committee. East also admitted, however, that he thought Furriel's only interest in being on the Committee was so that he could advance the interest of the person in his department, namely Collins.

East's Conversation with Furriel After the Selection Process

According to Furriel, he had a conversation with East on October 2, 1984, at which time he informed East that Collins had reported East's lack of inclination to appoint someone on the Sabbatical Leave Review Committee who was not a member of the Association. Furriel asked East to reconsider his position, and according to Furriel, East responded by stating:

He then repeated again that it was in his opinion that as the Association President and responsibility for appointing, that he did not feel that he had to appoint non-Association members, that he thought it was within his purview to do exactly that, appoint only Association members to these committees.

According to Furriel, East further indicated that the subject was moot, because the appointments had already been made. Furriel also indicated that he told East that East's actions were discriminatory and a violation of the contract. East's recollection of the conversation is somewhat different. Basically, the difference in his recollection has to do with the tenor of the conversation. He stated "I recall an angry man talking to me a lot on the phone and my doing a lot of listening." East admitted that the topic of membership or non-membership in the Association was discussed at length, but he attributes the discussion to Furriel and stated that he simply listened and ultimately responded by saying "it's too late to do anything about this."

Based upon East's demeanor while responding to Furriel's questions, and Furriel's aggressive and contentious manner of asking questions during the hearing, it is concluded that East's rendition of this particular conversation should be credited.

The Relationship of Service on the Sabbatical Leave Review Committee and a Committee Member's Employment with the Community College District

Very little testimony was offered during the course of the hearing as to what impact, if any, service on the Sabbatical Leave Review Committee has on one's employment relationship with the Community College District. It is clear that service

on the Committee does not result in any monetary compensation nor in release time from one's regular teaching responsibilities or office hours. It was acknowledged, however, that when one served on the Committee the service did not have to be in addition to the 40-hour workweek certificated employees were expected to be on campus.

Moreover, according to the testimony of Furriel, in his annual evaluations, he did get credit for service on various committees. There was no evidence, however, that his non-appointment to the Sabbatical Leave Review Committee would reflect negatively on his evaluation or that he was precluded from serving on other university committees.

The Association's General Relationship with Non-Members

According to the uncontroverted testimony presented at the hearing, membership in the Association is not a requirement on the question of ratification of collective bargaining agreements. Moreover, there is no discrimination between members and non-members with respect to receipt of agendas of Association meetings or the ability to attend such meetings and to speak, debate, make motions and vote. Moreover, there is no formal or informal policy or practice established by the Association which precludes non-members from being selected to serve on any committee appointed by the President of the Association with the exception of the Community Involvement

Committee, which is the political action arm of the Association and, therefore, subject to extraordinary restrictions.

III. ISSUE

1. Since East failed to select Furriel because of his non-membership in the Association, does such conduct violate the EERA?

IV. CONCLUSIONS OF LAW

Section 3544.9 of the EERA provides as follows:

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.

This is the Legislature's statutory version of the duty of fair representation as developed in the private sector. Vaca v. Sipes (1967) 386 U.S. 171 [64 LRRM 2369]; Ford Motor Co. v. Huffman (1953) 345 U.S. 330 [31 LRRM 2548]. The test established by the Board to determine whether this section has been violated, likewise, has been adopted from the private sector.

For example, in Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124, the Board, following federal precedent noted:

. . . a breach of the duty of fair representation occurs when a union's conduct toward a member of the bargaining unit is arbitrary, discriminatory or in bad faith.
Id. at 7*

See also California School Employees Association (Dyer) (1983) PERB Decision No. 342; Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332.

Furriel claims that the Association discriminated against him because he was not a member. I disagree. Although the Association was free to appoint a non-member, it was not obligated to do so.

The Committee is a creature of the collective bargaining agreement between the Association and the District, and the duties and responsibilities of the Committee are comprehensively set forth therein. Under the terms of the contract, appointment of employees to the Committee is solely within the authority of the Association. As such, it is an internal union matter which is not covered by the duty of fair representation unless it has a "substantial impact on the relationships of unit members to their employers." Service Employees International Union, Local 99 (Kimmitt) (1979) PERB Decision No. 106, at 10. Here, while some impact may occur in granting sabbatical leaves, it cannot be judged as "substantial." That is the necessary conclusion because there was no evidence that any unfairness existed in the operation of the Committee. Rather, the Committee, as an extension of the collective bargaining contract, is more akin to a negotiating team. While the negotiating team acts to establish the contract in the first instance, the committee similarly acts to

administer a part of the contract. Because of the similarity of functions, appointments to the Committee are not covered by the duty of fair representation.

Indeed, it is well established that the exclusive representative has the exclusive right to choose the members of its bargaining committee and to determine how they are selected. As noted in Kimmett, supra:

[T]he election to select a representative to the negotiating team is not subject to the duty of fair representation. The negotiating team must represent all employees in the unit fairly, but that obligation does not entail the selection of negotiators in any particular matter. Id. at 12.

Based on the foregoing, appointment to the Committee is not covered by section 3544.9. The Charging Party's Complaint is therefore dismissed.

PROPOSED ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is hereby ordered that the unfair practice charge and complaint against the Rio Hondo College Faculty Association, CTA/NEA, are DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on September 3, 1985, unless a party files a timely statement of exceptions, In accordance with the rules, the statement of exceptions should identify by page citation or

exhibit number the portions of the record relied upon for such exceptions. See California Administrative Code, title 8, part II, section 32300. Such statement of exceptions and supporting brief must be actually received by the Public Employment Relations Board itself at the headquarters office in Sacramento before the close of business (5:00 p.m.) on September 3, 1985, or sent by telegraph or certified United States mail, postmarked not later than the last day for filing in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall be filed with the Board itself. See California Administrative Code, title 8, part III, section 32300 and 32305.

Dated: August 14, 1985

Barbara E. Miller
Administrative Law Judge