STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PHILIP A. KOK, Charging Party, v. AMERICAN FEDERATION OF TEACHERS, COACHELLA VALLEY FEDERATION OF TEACHERS AND CALIFORNIA TEACHERS ASSOCIATION, COACHELLA VALLEY TEACHERS ASSOCIATION, Respondents.	Case No. LA-CO-798 PERB Decision No. 1352 September 29, 1999

Appearances: Philip A. Kok, on his own behalf; California Teachers Association by Robert E. Lindquist for Coachella Valley Teachers Association.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

AMADOR, Member: This case is before the Public Employment Relations Board (Board) on appeal by Philip A. Kok (Kok) to a Board agent's dismissal (attached) of his unfair practice charge. Kok filed an unfair practice charge alleging that the American Federation of Teachers, Coachella Valley Federation of Teachers and the California Teachers Association, Coachella Valley Teachers Association (CTA/CVTA) breached the duty of fair representation in violation of section 3544.9 of the Educational Employment Relations Act (EERA)[1] and/or interfered with his

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. EERA section 3544.9 provides:

> The employee organization recognized or certified as the exclusive representative for

exercise of rights under EERA section 3543, thus violating EERA section 3543.6(b),[2] when they failed to assist him and inform him

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the purpose of meeting and negotiating shall fairly represent each and every employee in the appropriate unit.

[2]EERA section 3543 states:

> 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. Public school employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.
>
> Any employee may at any time present grievances to his employer, and have such grievances adjusted, without the intervention of the exclusive representative, as long as the adjustment is reached prior to arbitration pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8 and the adjustment is not inconsistent with the terms of a written agreement then in effect; provided that the public school employer shall not agree to a resolution of the grievance until the exclusive representative has received a copy of the grievance and the proposed resolution and has been given the opportunity to file a response.

EERA section 3543.6 states, in pertinent part:

> It shall be unlawful for an employee organization to:
>
> (b) Impose or threaten to impose reprisals

of his legal rights.

After investigation, the Board agent dismissed the charge for untimeliness and for failure to establish a prima facie case.

The Board has reviewed the entire record in this case, including the original and amended unfair practice charge, the Board agent's warning and dismissal letters, Kok's appeal and CTA/CVTA's response. The Board finds the warning and dismissal letters to be free of prejudicial error and adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CO-798 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Chairman Caffrey and Member Dyer joined in this Decision.

> 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.

STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95814-4174
(916)322-3198

July 13, 1999

Philip A. Kok

Re: Philip A. Kok v. American Federation of Teachers, California Teachers Association, Coachella Valley Federation of Teachers, and the Coachella Valley Teachers Association
Unfair Practice Charge No. LA-CO-798
DISMISSAL LETTER

Dear Mr. Kok:

In this charge originally filed May 10, 1999 by Philip A. Kok (Kok), previously a teacher at Coachella Valley Unified School District (District), it is alleged that the American Federation of Teachers (AFT) and the California Teachers Association (CTA) failed to assist you and inform you of your legal rights including the right to file a writ of mandamus, in violation of Government Code section 3543.6 of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated June 21, 1999, that the above-referenced charge did not state a prima facie case. You were advised that, if there were any factual inaccuracies or additional facts which would correct the deficiencies explained in that letter, you should amend the charge. You were further advised that, unless you amended the charge to state a prima facie case or withdrew it prior to July 8, 1999,[1] the charge would be dismissed.

I received a first amended charge and additional material on July 8 and 12, 1999, respectively. The first amended charge adds the Coachella Valley Federation of Teachers (CVFT) and the Coachella Valley Teachers Association (CVTA) as Respondents and makes several arguments which I summarize here. First, the amended charge argues that despite the lack of a written agreement between the District and the CVFT, there was an oral agreement extending the contract which should be given effect. Second, Charging Party asserts that the CTA and AFT should have been aware that Mr. Kok was seeking assistance in pursuit of his grievance and arbitration. Third, although a grievance wasn't

[1]The Warning Letter mistakenly stated that the due date was August 4, 1998. However, this error was corrected in a telephone conversation and letter on July 1, 1999.

filed against the employee organizations, it should be implied that the grievances against the employer included the employee organizations. Fourth, "[i]t is contended that the employee organizations animus towards employee [Charging Party] stemmed from their perception of him as a 'religious teacher." Fifth, the present charge is timely because "[e]ver since the original complaint was filed with the Public Employment Relations Board, the matter has been in agency or judicial hands, which means the time is tolled."

Based on the facts and argument described above, the first amended charge, does not cure the deficiencies described in the Warning Letter and the charge is dismissed for the reasons contained in the Warning Letter and below.

The lack of a written agreement between the District and the CVFT is not crucial to this case. The central reason that this case must be dismissed is untimeliness. The only Respondent that owed a duty of fair representation to the Charging Party was CVFT. It was clear in October 1997 that CVFT was not going to assist the Charging Party in pursuit of his grievance or request for arbitration. This charge was filed on May 10, 1999, more than 18 months later.

Charging Party argues that the grievance filed against the District should toll the statute with regard to his claim against CVFT. There is no legal authority supporting such a finding. In addition, the. filing of the grievance against the District did not put the CVFT on notice that Charging Party was displeased with its performance on his behalf. Thus, this argument is without merit.

Charging Party also argues that the filing of previous charges and claims with PERB and the courts should toll the statute. However, the Public Employment Relations Board has found that the Educational Employment Relations Act only permits tolling by the filing of a grievance under a contract procedure that ends in binding arbitration. (San Dieguito Union High School District (1982) PERB Decision No. 194. The type of equitable tolling that Charging Party seeks was found by the Board to be inapplicable to PERB proceedings in San Diego Unified School District (1992) PERB Decision 885. Therefore, tolling is not appropriate under the circumstances of this case.

Finally, Charging Party argues that the employee organization's animus toward him was generated by his status as a religious teacher. However, there are no facts which support this conclusion. Charging Party must provide facts demonstrating a prima facie violation, mere legal conclusions are insufficient. State of California, Department of Food and Agriculture (1994) PERB Decision No. 1071-S. Thus, even if the charge was timely filed, the charge fails to state facts which would demonstrate a

violation by the Respondents. Therefore, I am dismissing the charge based on the facts and reasons contained in this and my June 21, 1999 letter.

Right to Appeal

Pursuant to Public Employment Relations Board regulations, you may obtain a review of this dismissal of the charge by filing an appeal to the Board itself within twenty (20) calendar days after service of this dismissal. (Cal. Code Regs., tit. 8, sec. 32635(a).) Any document filed with the Board must contain the case name and number, and the original and five (5) copies of all documents must be provided to the Board.

A document is considered "filed" when actually received before the close of business (5 p.m.) on the last day set for filing or when mailed by certified or Express United States mail, as shown on the postal receipt or postmark, or delivered to a common carrier promising overnight delivery, as shown on the carrier's receipt, not later than the last day set for filing. (Cal. Code Regs., tit. 8, sec. 32135(a); see also Cal. Code Regs., tit. 8, sec. 32130.)

A document is also considered "filed" when received by facsimile transmission before the close of business on the last day for filing together with a Facsimile Transmission Cover Sheet which meets the requirements of Cal. Code Regs., tit. 8, sec. 32135(d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code. Regs., tit. 8, secs. 32135(b), (c) and (d); see also Cal. Code Regs., tit. 8, secs. 32090 and 32130.)

The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95814-4174
FAX: (916) 327-7960

If you file a timely appeal of the refusal to issue a complaint, any other party may file with the Board an original and five copies of a statement in opposition within twenty (20) calendar days following the date of service of the appeal. (Cal. Code Regs., tit. 8, sec. 32635(b).)

Service

All documents authorized to be filed herein must also be "served" upon all parties to the proceeding, and a "proof of service" must accompany each copy of a document served upon a party or filed with the Board itself. (See Cal. Code Regs., tit. 8,

sec. 32140 for the required contents and a sample form.) The document will be considered properly "served" when personally delivered or deposited in the first-class mail, postage paid and properly addressed. A document filed by facsimile transmission may be concurrently served via facsimile transmission on all parties to the proceeding. (Cal. Code Regs., tit. 8, sec. 32135(c).)

Extension of Time

A request for an extension of time, in which to file a document with the Board itself, must be in writing and filed with the Board at the previously noted address. A request for an extension must be filed at least three (3) calendar days before the expiration of the time required for filing the document. The request must indicate good cause for and, if known, the position of each other party regarding the extension, and shall be accompanied by proof of service of the request upon each party. (Cal. Code Regs., tit. 8, sec. 32132.)

Final Date

If no appeal is filed within the specified time limits, the dismissal will become final when the time limits have expired.

Sincerely,

ROBERT THOMPSON
Deputy General Counsel

Attachment

cc: Larry Rosenzweig
Robert Lindquist

STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC EMPLOYMENT RELATIONS BOARD

Office of the General Counsel
1031 18th Street
Sacramento, CA 95814-4174
(916) 322-3198

June 21, 1999

Philip A. Kok

Re: Philip A. Kok v. American Federation of Teachers and California Teachers Association
Unfair Practice Charge No. LA-CO-798
WARNING LETTER

Dear Mr. Kok:

In this charge filed May 10, 1999 by Philip A. Kok (Kok), previously a teacher at Coachella Valley Unified School District (District), it is alleged that the American Federation of Teachers (Federation or AFT) and the California Teachers Association (Association or CTA) failed to assist you and inform you of your legal rights including the right to file a writ of mandamus, in violation of Government Code section 3543.6 of the Educational Employment Relations Act (EERA).

My investigation has revealed the following information. On July 21, 1997 you filed a unfair practice charge (LA-CE-3822) against the District and an unfair practice charge (LA-CO-746) against the Coachella Valley Federation of Teachers, CFT/AFT (CVFT). The charge against the District was dismissed on August 20, 1998 and the charge against the CVFT was dismissed on August 27, 1998. Both dismissals were appealed to the Public Employment Relations Board itself. The Board upheld both dismissals on December 11, 1998 in PERB Decisions 1303 and 1302 respectively.

Although the facts of those cases were extensively described therein, for convenience, I will summarize them here because they relate to the present unfair practice charge. You were hired as a probationary teacher by the District in August 1994. In February 1996, you were notified that the District took action to non-reelect you for the following school year. You received your final performance evaluation for the 1995-96 school year on or about May 13, 1996. On or about May 16, 1996, you filed a Level I grievance regarding the evaluation, which was denied at Level I on May 22, 1996. The grievance claimed that your Principal, A. Franco, did not follow the contractually agreed upon provisions for evaluation of a teacher, resulting in an unsatisfactory evaluation. Your exclusive representative at that time was the CVFT. On May 29, 1996, you moved the grievance to Level II, and it was denied on June 5, 1996.

The District and CVFT agreement, which had expired in 1995,[1] provided for arbitration at Level III. Your Level III grievance, with a request for arbitration, was signed and filed on June 12, 1996. The form indicates that if you are not satisfied with the Level II disposition, the grievant may file within five days after the Superintendent's written decision for review at Level III. The form has the statement "I hereby request arbitration of the dispute from the State Conciliation Service." The form also provides, in part, that "Within five days, the grievant and the District shall request the State Conciliation Service to supply a panel of five names of persons experienced in hearing grievances in public schools."[2] Thereafter, not hearing back from the CVFT, the District assumed the CVFT did not wish to take the grievance to arbitration.

On June 28, 1996, the Coachella Valley Teachers Association (CVTA) became the new exclusive representative for the unit,[3] and you continued to contact the District regarding the processing of your grievance. The District advised the CVTA of your continued interest in the grievance. You continued to write to the District requesting that the matter proceed to arbitration. In January 1997, you wrote to the CVFT, the CVTA, and the District "asking for a written response to the level III grievance, and in regards to arbitration." You wrote to Supt. Colleen Gaines on January 30, 1997. By letter from the District dated February 7, 1997, you were advised as follows,

> In regards to the status of your Level III grievance, this information was submitted to

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[1]You dispute that the agreement had expired and assert that the contract had been orally extended at the bargaining table. If the contract was expired the District would not be required to take the grievance to arbitration. In State of California, Department of Youth Authority (1992) PERB Decision No. 962-S, PERB adopted the U.S. Supreme Court rule in Litton Financial Printing Div. v. NLRB (1991) 501 U.S. 190, 115 L. Ed.2d 177 [137 LRRM 2441] (Litton) that arbitration clauses do not continue in effect after the expiration of a collective bargaining agreement, except for disputes that involved facts and occurrences that arose before expiration, or that involved post-expiration conduct that infringes on rights accrued or vested under the contract, or that under normal principles of contract interpretation, survive expiration of the agreement.

[2]The expired agreement permitted an individual employee to elevate the grievance to arbitration (Article 24, section 24.4)

[3]On November 12, 1996, the Coachella Valley Teachers Association and the District agreed to a new contract effective July 1, 1996 through June 30, 1999.

> the American Federation of Teachers as per formal grievance procedures under the contract. The Superintendent's Response to your Level III grievance was the same as Level I and II - 'Proper procedures followed. Grievance not valid.'[4]
>
> The contract specifies that if a grievant is not satisfied with the disposition of Level Two, he/she may submit the grievance to the Superintendent, in writing, for arbitration of the dispute. The fees and expenses of the arbitrator shall be borne equally by the District, the Federation, and/or grievant.
>
> The above information was shared with AFT and the assumption was that they did not care to take this matter to arbitration. If you feel otherwise, please contact this office so that we make arrangements to take this matter to arbitration.

You contacted all the parties in writing in February 1997. You also wrote to some of the above parties in March, April and May 1997 "requesting a written response to the level-three grievance and/or a request for arbitration." The District wrote to you on May 22, 1997 and stated,

> As I stated in my letter of February 7th, if you wish to go to arbitration, the following is the process you need to follow: you must contact the California Arbitration Board [State Conciliation Service], request a list of arbitrators, pay the fee and provide the District with a list. Upon receipt of the list, the District and you will mutually agree upon arbitration and set up a meeting with the arbitrator.
>
> The District is under no obligation to take any further steps in regards to this matter. I have contacted AFT and CTA and neither union is interested in being involved.

By letter to Sylvia Gullingsrud of CTA dated June 3, 1997, your brother, Andrew J. Kok, Esq. pointed out that you had not

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[4]You indicate that the Federation contract requires that the Superintendent state in writing the rationale for the denial at Level II, and that no rationale was given, nor were proper procedures followed.

received a written response to your Level 3 grievance. On your behalf, he requested a written response and arbitration of this matter. By letter to you dated June 9, 1997, CTA indicated that AFT was the "bargaining agent" when the grievance was filed and appealed to Level II in May 1996. CTA was unsure if you or AFT requested arbitration by a June 12, 1996 deadline.

CTA was certified as the new exclusive representative on June 28, 1996. CTA indicated that binding arbitration was not available, because when you filed your grievance, the AFT contract had already expired. CVTA bargained a new contract, making changes in the evaluation and grievance articles. CTA believed that if the duty of fair representation was applicable to you, AFT had the responsibility to advise you they were not taking the grievance to arbitration at Level III. Under the CVTA contract, only the Association may take a grievance to arbitration on behalf of a unit member. Finally, as you were no longer employed at the District, and based on the above, CTA indicated it would not take your case to arbitration.

You wrote to Kent Braithwaite, previously with AFT, on October 9, 1997. By letter dated October 15, 1997, he indicated, in part, that in 1996, he was no longer active as a union leader and was not your representative, although he may have discussed your case with you. He also indicated, in part,

> The best I can remember, your grievance was represented by the then (and current) CVFT President, Mr. DeLaCruz. Mr. DeLaCruz has assured me that you were represented to the fullest extent of your contract rights and the law as well as to the best of his most excellent abilities. Mr DeLaCruz has also assured me he informed you in detail of how the union handled your grievance, including the decision to pursue or not to pursue Level 3, whatever that decision may have been.[5] I was not in the decision-making loop. I am not now in the decision making loop. I will not make any statement concerning any CVFT decision....

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[5]You indicated to me, in part on July 22, 1998 by telefax that you were "only told to file the level 3 grievance and 'be patient'." You also indicated "The decision [whether to pursue Level 3], based on my knowledge and the fact that I was being abused, was to seek arbitration. The union reps (sic) were informed of this decision, and said, 'be patient'."

Braithwaite also suggested you communicate in the future with DeLaCruz.[6]

Based on the above information, the charge fails to state a prima facie violation of the EERA for the reasons which follow.

You have alleged that CTA and AFT denied you the right to fair representation guaranteed by EERA section 3544.9 and thereby violated section 3543.6(b). The duty of fair representation is owed by the exclusive representative to the employee. Neither the CTA or the AFT, which are both statewide organizations, were the exclusive representative at the District. As such, neither can be charged with a violation of the duty of fair representation.

While you were employed at the District, the Coachella Valley Federation of Teachers (CVFT), an affiliate of AFT, was the exclusive representative. As the exclusive representative it owed all members of the bargaining unit a duty of fair representation. The case against CVFT was already litigated in your earlier unfair practice charge against them, LA-CO-756. That case was dismissed and the dismissal was upheld by the Board itself in PERB Decision No. 1302.

Because the CVTA became the exclusive representative only <u>after</u> you had ceased being employed by the District, it does not owe you a duty of fair representation.

Even assuming AFT owed you a duty of fair representation, you have failed to file the charge within the statute of limitations period. Section 3541.5(a)(1) of the EERA prohibits the Board from issuing a complaint "in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge." The failure of the AFT to provide legal advice including information regarding your right to file a writ of mandate appears to have occurred shortly after your last correspondence with AFT representative Kent Braithwaite in October 1997. The present charge was filed on May 10, 1999, approximately a year and a half later.

In our discussion of June 8, 1999, you indicated that there was case law indicating that the statute of limitations should be tolled. However, my research determined that the statute and case law provides for tolling only when a grievance raising the issues of the unfair practice has been pursued. There is no information indicating that any grievance was filed <u>against</u> AFT.

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[6]Your July 22, 1998 telefax also indicates, "I had been and continue attempting to communicate with all relevant parties, including DeLaCruz."

Finally tolling is limited to a grievance raising the issues in the unfair practice charge which is filed under a procedure that ends in binding arbitration.(North Orange County Community College District (1998) PERB Decision No. 1268 (to toll the statute the grievance must raise the issue contained in the unfair practice charge), San Diego Unified School District (1991) PERB Decision No. 885 (equitable tolling inapplicable to PERB proceedings.)) The facts of this case do not meet these requirements.

Finally, even if the procedural impediments to this charge can be overcome, the charge does not describe a prima facie violation of the duty of fair representation. The duty of fair representation imposed on the exclusive representatives extends to grievance handling. (Fremont Teachers Association (King) (1980) PERB Decision No. 125; United Teachers of Los Angeles (Collins) (1982) PERB Decision No. 258.) In order to state a prima facie violation of this section of EERA, you must show that the unions' conduct was arbitrary, discriminatory or in bad faith. In United Teachers of Los Angeles (Collins), the Public Employment Relations Board stated:

> Absent bad faith, discrimination, or arbitrary conduct, mere negligence or poor judgment in handling a grievance does not constitute a breach of the union's duty. [Citations.]
>
> A union may exercise its discretion to determine how far to pursue a grievance in the employee's behalf as long as it does not arbitrarily ignore a meritorious grievance or process a grievance in a perfunctory fashion. A union is also not required to process an employee's grievance if the chances for success are minimal.

In order to state a prima facie case of arbitrary conduct violating the duty of fair representation, a Charging Party:

> ". . . must at a minimum include an assertion of sufficient facts from which it becomes apparent how or in what manner the exclusive representative's action or inaction was without a rational basis or devoid of honest judgment. (Emphasis added.)" [Reed District Teachers Association, CTA/NEA (Reyes) (1983) PERB Decision No. 332, p. 9, citing Rocklin Teachers Professional Association (Romero) (1980) PERB Decision No. 124.]

You filed your own grievance and nothing indicates that you requested AFT to represent you. In addition, the AFT contract permits an individual grievant to go to arbitration without the AFT. You requested to go to arbitration on your own. On May 22, 1997, the District advised you that neither union was interested in being involved. Based on the above, it does not appear that the AFT was obligated to process this grievance and their actions or inaction do not appear to be arbitrary, without a rational basis, discriminatory, or in bad faith.

For these reasons the charge, as presently written, does not state a prima facie case. If there are any factual inaccuracies in this letter or additional facts which would correct the deficiencies explained above, please amend the charge. The amended charge should be prepared on a standard PERB unfair practice charge form, clearly labeled First Amended Charge, contain all the facts and allegations you wish to make, and be signed under penalty of perjury by the charging party. The amended charge must have the case number written on the top right hand corner of the charge form. The amended charge must be served on the respondents' representatives[7] and the original proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before August 4, 1998, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3543.

Sincerely,

Robert Thompson
Deputy General Counsel

[7]The CFT/AFT representative is Lawrence Rosenzweig, Esq. 2450 Broadway, #550, Santa Monica, CA 90404 and CTA is represented by Robert E. Lindquist, Staff Counsel, P.O. Box 2153, Santa Fe Springs, CA 90670.