STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PHILIP A. KOK, Charging Party,	)	Case No. LA-CE-4103
v.	)	PERB Decision No. 1363
COACHELLA VALLEY UNIFIED SCHOOL DISTRICT, Respondent.	)	December 10, 1999

Appearances: Philip A. Kok, on his own behalf; Atkinson, Andelson, Loya, Ruud & Romo by Sherry G. Gordon, Attorney, for Coachella Valley Unified School District.

Before Caffrey, Chairman; Dyer and Amador, Members.

DECISION

CAFFREY, Chairman: This case is before the Public Employment Relations Board (Board) on appeal by Philip A. Kok (Kok) of a Board agent's dismissal (attached) of his unfair practice charge. In the charge, Kok alleged that the Coachella Valley Unified School District (District) violated section 3543.5(a) of the Educational Employment Relations Act (EERA)[1] by

[1]EERA is codified at Government Code section 3540 et seq. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) 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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.

failing to properly evaluate him, threatening to discipline him if he continued to question the evaluation process, and failing to properly process a grievance to arbitration.

The Board has reviewed the entire record in this case including Kok's original and amended unfair practice charge, the Board agent's warning and dismissal letters, Kok's appeal and the District's response thereto.[2] The Board finds the warning and dismissal letters to be free of prejudicial error and hereby adopts them as the decision of the Board itself.

ORDER

The unfair practice charge in Case No. LA-CE-4103 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Amador joined in this Decision.

[2]The District's request that the Board order Kok to pay its attorneys' fees and costs is denied.

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

September 28, 1999

Philip A. Kok

Re: Philip A. Kok v. Coachella Valley Unified School District
Unfair Practice Charge No. LA-CE-4103
DISMISSAL LETTER

Dear Mr. Kok:

In this charge filed July 22, 1999 by Philip A. Kok (Kok), previously a teacher at Coachella Valley High School, it is alleged that the Coachella Valley Unified School District (District) failed to properly evaluate Mr. Kok, threatened to discipline Mr. Kok if he continued to question the evaluation process, and failed to properly process a 1996 grievance to arbitration in violation of Government Code section 3543.5(a) of the Educational Employment Relations Act (EERA).

I indicated to you, in my attached letter dated September 10, 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 September 17, 1999, the charge would be dismissed.

You requested and were granted an extension of time to respond. You filed an amended charge on September 20, 1999.

The amended charge adds information only with respect to the charging party's pursuit of arbitration and thus, the date that the grievance procedure was exhausted. This date is important because it determines whether the allegation that the District improperly evaluated Mr. Kok is timely.

Charging party states that in a July 22, 1997 letter, the District stated that it would not facilitate but would honor its obligation to arbitrate and suggested that charging party contact the "California Arbitration Board". Charging party then contacted the State Mediation and Conciliation Service

which responded on August 5, 1997 offering its services. On August 14, 1997, the District sent charging party a settlement offer but, lacking a positive response, the District informed charging party on October 29, 1997 that it considered the matter closed.

Charging party contacted the Action Dispute Resolution Services (ADRS) and received replies offering its services to both the charging party and the District on September 2, 1998. At the end of 1998 charging party contacted ADRS again. A representative of ADRS left messages at the District but received no response.

These facts are not sufficient to make this charge timely. The District's last communication with the charging party was on October 29, 1997, more than 20 months before the charge was filed. This letter indicated that the District considered the matter closed. It is reasonable to consider that the grievance procedure begun in May 1996 was exhausted at this point. Since the charge was not filed during the six months following October 29, 1998, it is untimely.

Even if the grievance procedure was not exhausted until charging party's contacts with ADRS, the charge is still untimely, having been filed more than six months after the end of 1998.

Therefore, I am dismissing the charge based on the facts and reasons contained in this letter and my September 10 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: Sherry Gordon

PUBLIC EMPLOYMENT RELATIONS BOARD

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

September 10, 1999

Philip A. Kok

Re: Philip A. Kok v. Coachella Valley Unified School District
Unfair Practice Charge No. LA-CE-4103
WARNING LETTER

Dear Mr. Kok:

In this charge filed July 22, 1999 by Philip A. Kok (Kok), previously a teacher at Coachella Valley High School, it is alleged that the Coachella Valley Unified School District (District) failed to properly evaluate Mr. Kok, threatened to discipline Mr. Kok if he continued to question the evaluation process, and failed to properly process a 1996 grievance to arbitration, in violation of Government Code section 3543.5(a) of the Educational Employment Relations Act (EERA).

My investigation has revealed the following information. Mr. Kok was hired as a probationary teacher for the District in August 1994. In February 1996, he was notified that the District had decided to non-reelect him for the following school year. His formal performance evaluation for the 1995-96 school year was completed on May 9, 1996. On or about May 16, 1996, he filed a Level I grievance regarding the evaluation, which was denied at Level I on May 22, 1996. The grievance claimed that the Principal, A. Franco, did not follow the contract provisions for evaluation of a teacher, resulting in an unsatisfactory evaluation.[1] The exclusive representative at that time was the Coachella Valley Federation of Teachers (Federation, CVFT or AFT). On May 29, 1996, the grievance was elevated to Level II, and it was denied on June 5, 1996.

The District and Federation agreement (which had expired in 1995, prior to your May 1996 grievance) provides, in part, at Article 24, section 24.4 that,

> If the grievant is not satisfied with the disposition at Level Two, he/she may within five (5) days following the written decision by the Superintendent, submit the grievance to the Superintendent, in writing, for the

[1]On or about September 8, 1997, the District removed the disputed negative evaluation from your personnel file.

> arbitration of the dispute. [Level III]. Federation representation may be requested by the grievant.
>
> Within five (5) days, the Federation and/or the grievant and the District shall request the State Conciliation Service to supply a panel of five (5) names of persons experienced in hearing grievances in public schools. Each party shall alternately strike a name until only one name remains. The remaining panel member shall be the arbitrator. The order of striking shall be determined by lot.
>
> The fees and expenses of the arbitrator shall be borne equally by the district, the Federation and/or the grievant. All other expenses shall be borne by the party incurring them.

According to the District, on or about June 12, 1996, it received an unsigned Level III request to move the matter to arbitration, which request it shared with the Federation. Mr. Kok alleges that the Level III grievance, with a request for arbitration, was signed and filed on June 12, 1996. Attached to your charge is the June 12, 1996 Certified Personnel Grievance Form-Level 3. 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." Thereafter, not hearing back from the Federation, the District assumed the union did not wish to take the grievance to arbitration.

On June 28, 1996, the Coachella Valley Teachers Association, CTA/NEA (CVTA, CTA or Association) became the new exclusive representative for the unit,[2] and Mr. Kok continued to contact the District on the processing of his grievance. The District advised the Association of his continued interest in the grievance. He continued to write to the District requesting that the matter proceed to arbitration. In January 1997, he wrote to both unions 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,

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[2]On November 12, 1996, CTA and the District agreed to a new contract effective July 1, 1996 through June 30, 1999.

> In regards to the status of your Level III grievance, this information was submitted to 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.'[3]
>
> 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.

Charging party contacted all the parties in writing in February 1997. He 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 responded 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.

Article 24, section 24.2 of the Federation agreement provides that there are consequences if the parties fail to meet the timelines specified in the formal grievance procedures. Also, Article 24, section 24.4 provides that if the grievance at Level I and II is denied, the District "shall state, in writing, the

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[3]Charging party indicates 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.

rationale for the denial." Charging party contends that no rationale was given.

By letter to Sylvia Gullingsrud of CTA dated June 3, 1997, charging party's brother, Andrew J. Kok, Esq. pointed out that charging party had not received a written response to the Level 3 grievance and requested a written response and arbitration of this matter. By letter to the charging party 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 charging party or AFT requested arbitration by a June 12, 1996 deadline. The letter also stated that CTA was certified as the new exclusive representative on June 28, 1996; binding arbitration was not available, because when the grievance was filed, the AFT contract had already expired; CTA had bargained a new contract, making changes in the evaluation and grievance articles; and CTA believed that if the duty of fair representation applied, AFT had the responsibility to advise charging party they were not taking the grievance to arbitration at Level III. Under the CTA contract, only the Association may take a grievance to arbitration on behalf of a unit member. Finally, because charging party was no longer employed at the District, and based on the above, CTA indicated it would not take the case to arbitration.

Charging party 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 charging party's representative. 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.[4] 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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[4]Charging party indicated that he was "only told to file the level 3 grievance and 'be patient." He 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.[5]

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

The charge asserts that the District failed to properly evaluate Mr. Kok, threatened to discipline Mr. Kok if he continued to question the evaluation process, and failed to properly process a 1996 grievance to arbitration, in violation of Government Code section 3543.5(a).

A review of the allegations indicates that the charge is untimely under EERA section 3541.5 which requires in pertinent part:

> the board shall not do either of the following:
>
> (1) Issue 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.

Since these allegations occurred in 1996 and the charge was filed in 1999, the six month period has elapsed. Charging party argues that the allegations should be tolled under EERA section 3541.5(a)(1) which reads in pertinent part:

> The board shall, in determining whether the charge was timely filed, consider the six-month limitation set forth in this subdivision to have been tolled during the time it took the charging party to exhaust the grievance machinery.

Tolling would only cover the allegation that was the subject of the grievance filed by Mr. Kok. North Orange County Community College District (1998) PERB Decision No. 1268. That is, the allegation that the District failed to properly evaluate Mr. Kok. Tolling would cover the period from the filing of the grievance on May 16, 1996 through exhaustion of the grievance machinery. The grievance was not presented to an arbitrator. Rather, the last activity on the grievance was the District's letter dated on May 22, 1997 which 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

[5]Charging party indicates that he continues attempting to communicate with all relevant parties, including DeLaCruz.

> 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.

Since Mr. Kok did not pursue the steps necessary to arbitrate his dispute, it appears that the grievance procedure was exhausted at that point. Thus tolling ended shortly after May 22, 1997 and this allegation is untimely.

Under North Orange County Community College District (1998) PERB Decision No. 1268, the allegations that the District threatened to discipline Mr. Kok if he continued to question the evaluation process and failed to properly process a 1996 grievance to arbitration are not covered by tolling and are also untimely.

In addition, with regard to the allegation that the District failed to properly process the 1996 grievance to arbitration, the Board has already reviewed this allegation and dismissed it in Coachella Valley Unified School District (1998) PERB Decision No. 1303. This decision was also reconsidered in Coachella Valley Unified School District (1998) PERB Decision No. 1303a. There are no new facts presented here that would warrant reversing these determinations.

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 respondent's representative[6] and the original

[6]The District's representative is Sherry G. Gordon, Esq. of Atkinson, Andelson, Loya, Ruud & Romo, Riverside, CA

proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before September 17, 1999, I shall dismiss your charge. If you have any questions, please call me at (916) 327-8381.

Sincerely,

Robert Thompson
Deputy General Counsel