STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

PHILIP A. KOK, Charging Party,	)	Case No. LA-CE-3822
v.	)	PERB Decision No. 1303
COACHELLA VALLEY UNIFIED SCHOOL DISTRICT, Respondent.	)	December 11, 1998

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 failing to process a grievance to arbitration and 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

retaliating against him for his participation in protected activities.

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. 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-CE-3822 is hereby DISMISSED WITHOUT LEAVE TO AMEND.

Members Dyer and Amador joined in this Decision.

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applicant for employment or reemployment.

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 650
Los Angeles, CA 90010-2334
(213) 736-3127

August 20, 1998

Philip A. Kok

Re: Philip A. Kok v. Coachella Valley Unified School District
Unfair Practice Charge No. LA-CE-3822, Amended Charge
DISMISSAL AND REFUSAL TO ISSUE A COMPLAINT

Dear Mr. Kok:

In this charge filed July 21, 1997 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 process a 1996 grievance to arbitration, in violation of Government Code section 3543.5 of the EERA.

I indicated to you, in my attached letter dated July 24, 1998, 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 31, 1998, the charge would be dismissed.

On July 28 and 30, 1998, you filed (cert, mail) a "First Amended Charge." You also telefaxed several additional corrections and clarifications on July 29, 31 and on August 3, 1998.[1] I will summarize the relevant new information or arguments you provided at this point.

You allege that by its conduct, the District violated EERA section 3543.5(a) and (c).[2] Regarding the May 1996 grievance involving your evaluation, you contend that the District failed to provide a rationale in denying the grievance at Levels I and II. Article 24, section 24.2 provides that where the District fails to meet the timelines in the grievance procedure, "the resolution-sought -shall be effectuated." You argue the District

[1]Copies of these documents were provided to counsel for the District by me and Mr. Kok.

[2]An individual does not have standing to file a charge alleging violation of EERA section 3543.5(c). See Oxnard School District (Gorcey & Tripp) (1988) PERB Decision No. 667. Therefore, this allegation will be dismissed.

should suffer the same fate for not providing a rationale; and that the remedies you requested in filing the grievance "were not intended to be a list of perfunctory options for the employer, but it was intended that remedies listed were points which would be elaborated upon once it was admitted that remedy was not only entitled, but demanded."

Without providing specific facts or specific dates, you allege that [in 1996 while an employee], the District violated your rights by threatening discipline for your protected activity, which activity "consisted of statements of personal/public concern (dual)." In determining whether you timely processed your grievance, you point in part to Article 24, section 24.1 of the AFT contract which defines a day as a regular teacher work day exclusive of summer school.[3]

You argue that the AFT contract did not expire in 1995 and was in effect during the 1995-96 school year. You base this on the fact that there is nothing to indicate the AFT contract expired in 1995, and that you were advised by J. Cottrell of CTA that AFT rolled the contract over for 1995-96.[4] You also advised me verbally on August 18, 1998 that you were checking into whether the contract was orally extended. However, you have provided me no further information on this point.

You cite California State Employees Association (O'Connell) (1989) PERB Decision No. 726-H for the holding that "union misrepresentation during contract ratification is subject to DFR if it had/has a substantial impact on employee's relationship

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[3]You allege, in part, that the District's [Level II] response was received on either June 1 or June 7, 1996. Using the facts in my July 24, 1998 letter, Level II was denied on June 5, 1996 (according to the District), and you elevated the grievance to Level III on June 12, 1996 (within 5 business days). Excluding June 8 and 9, 1996 (Saturday & Sunday), you have arguably met the required five day window; and Untimeliness of your request for arbitration will not be used as a basis for dismissing your charge.

[4]I advised you on August 15, 1998, in part, that the contracts and documentation provided to PERB indicated that the AFT agreement did not role over beyond 1995, and thus, there was no agreement in effect at the time of your 1996 grievance regarding your evaluation and prior to the decertification election in June 1996. Pursuant to your written request on August 17, 1998, I telefaxed you that same day Roger Smith's April 26, 1996 letter to the parties from Case No. LA-D-304 (LA-R-361) which stated that as of that date, the contract had expired. I also explained to you on August 18, 1998, the reasons the contract expired prior to 1996.

with employer." (emphasis in original.) You argue the intent of this decision is to insure fair representation of the employee whether the contract was currently in effect, or pending ratification; and you believe the "employer has a similar obligation" to an employee during contract ratification." A review of O'Connell reveals that the Board held, in part, that when dealing with matters involving internal union business, the fact misrepresented must have a substantial impact on the relationships of the unit members to the employer, and a knowing misrepresentation during the contract ratification process was an example of bad faith. I disagree with you as the duty of fair representation is only applicable to the exclusive representative. I am aware of no authority making it applicable to the District.

You cite Robinson v. Shell Oil Company (1997) 519 U.S. 337, 117 S. Ct. 843, 136 L.Ed.2d 808, indicating that "the question of vested interest of 'employee' (past/former) as opposed to 'employee' (present/current) it was affirmed that an 'employee' (past/former) retains certain rights and has some vested interests in terms of obligations of the employer. Hence, logically, an employee (current) during contract ratification would have similar, if not more, rights and vested interests."

In Shell Oil, a former employee, shortly after being fired, filed a charge against the employer with the Equal Employment Opportunity Commission (EEOC) alleging that he had been fired because of his race. During the pendency of that charge, he applied for a position with another company, which contacted the former employer for a job reference. A negative reference was given and the former employee sued the former employer under section 704(a) of Title VII of the Civil Rights Act of 1964 (42 U.S.C.S. 2000e-3(a)) which made it unlawful for the employer to discriminate against employees or applicants that have availed themselves of Title VII's protections or assisted others in doing so. The Supreme Court held that the term "employees" in section 704(a) includes former employees so that a former employee could sue the former employer for its post employment actions that were allegedly taken in retaliation for the employee's having filed an EEOC complaint. This case is inapplicable to your case.

You argue (likely referring to State of California, Department of Youth Authority (1992) PERB Decision No. 962-S) (DYA) that if the contract had expired, "some of the events (or lack of) leading to the formal filing of the grievances had begun in a prior time period, while, the contract was still in effect..." And that some parts of the evaluation process were violated at the beginning of the 1994-95 school year.

Next, you argue that if the contract had expired, you had "'vested rights' under the agreement due to the fact the contract had been 'rolled over' allegedly and/or the 'employee' retains

certain rights beyond the time employed by the employer, which logically extends to rights accrued while still employed, but perhaps, awaiting contract ratification..." You also cite the above language quoted above from the Shell Oil case.

Finally, you argue that I stated in my July 24, 1998 letter that "'the agreement has no separate authority' which would make arbitration mandatory outside of the contract." And you argue that this statement is not true. You have misstated what I said in my letter which I will discuss below.

Based on the above facts, the amended charge fails to state a prima facie violation of the EERA. First, you have not provided a clear and concise statement of alleged retaliatory conduct which occurred while you were still an employee of the District in 1996. Also, EERA section 3541.5(a)(l) provides that the Public Employment Relations Board shall not, "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." The amended charge does not provide facts indicating that this new retaliatory conduct is timely. Having occurred in 1996, more than two years ago, the allegations are time barred and must be dismissed. Even if it relates back to your initial charge filed in July 1997, such conduct of threatening discipline took place prior to January 1997, and is still untimely.

As noted on page 6 of my July 24, 1998 letter to you, in DYA, PERB adopted the 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 involve facts and occurrences that arose before expiration, or that involved post-expiration conduct that infringes on rights accrued under the contract, or that under normal principles of contract interpretation, survive expiration of the agreement."

The one action by the District you have raised which is not time barred was its alleged failure to process your May 1996 grievance[5] to arbitration. This conduct by the District allegedly occurred in 1996 and 1997. The grievance regarding your May 1996 evaluation claimed that your Principal failed to follow the contractually agreed upon provisions for evaluation of a teacher, which resulted in an unsatisfactory evaluation. I conclude that the District's conduct occurred after expiration of the AFT contract in 1995.

[5]As noted previously, the AFT contract expired in 1995, well before your May 1996 grievance.

Next, I disagree with your contention that the District's conduct infringed on vested rights under the agreement. The Board concluded in DYA at page 11 that the employee did not have a vested right to be free of the retaliatory action. Similarly, you have obtained no vested rights under the AFT agreement involving the District's post-expiration conduct in this case.

Finally, as noted above, you misstated the test in Litton and one of my comments from page 6 of my July 24, 1998 letter. I indicated that the AFT contract "has no separate authority that under normal principles of contract interpretation, require the continuation of the arbitration provisions." Similarly, at page 11 of DYA. PERB noted that the expired agreement in that case had no independent authority which, under normal principles of contract interpretation, requires that the arbitration provisions continue.

Therefore, I am dismissing the charge based on the facts and reasons contained above and in my July 24, 1998 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 of Regs., tit. 8, sec. 32635(a).) To be timely filed, the original and five copies of such appeal must be actually received by the Board itself before the close of business (5 p.m.) or sent by telegraph, certified or Express United States mail postmarked no later than the last date set for filing. (Cal. Code of Regs., tit. 8, sec. 32135.) Code of Civil Procedure section 1013 shall apply. The Board's address is:

Public Employment Relations Board
1031 18th Street
Sacramento, CA 95814

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 of 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 of 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.

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 of 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

Marc S. Hurwitz
Regional Attorney

Attachment

cc: Sherry G. Gordon, Esq. of Atkinson, Andelson, Loya Ruud and Romo, Riverside, CA

PUBLIC EMPLOYMENT RELATIONS BOARD

Los Angeles Regional Office
3530 Wilshire Blvd., Suite 650
Los Angeles, CA 90010-2334
(213)736-3127

July 24, 1998

Philip A. Kok

Re: Philip A. Kok v. Coachella Valley Unified School District
Unfair Practice Charge No. LA-CE-3822
WARNING LETTER

Dear Mr. Kok:

In this charge filed July 21, 1997 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 process a 1996 grievance to arbitration, in violation of Government Code section 3543.5 of the Educational Employment Relations Act (EERA).

Attachments to your charge and my investigation have revealed the following information. You were hired as a probationary teacher for 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.[1] Your exclusive representative at that time was the Coachella Valley Federation of Teachers (Federation, CVFT or AFT). On May 29, 1996, you moved the grievance 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 199 6 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 arbitration of the dispute. [Level III]. Federation representation may be requested by the grievant.

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

> 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, 199 6, it received an unsigned Level III request to move the matter to arbitration, which request it shared with the Federation. You allege that your 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 you continued to contact the District on the processing of your grievance. The District advised the Association 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 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,

> In regards to the status of your Level III grievance, this information was submitted to the American Federation of Teachers as per formal grievance

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

> 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.

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.

I note that at Article 24, section 24.2 of the Federation agreement, there are consequences if the parties fail to meet the timeliness specified in the formal grievance procedures. Also, the Federation agreement at Article 24, section 24.4 provides that if the grievance at Level I and II is denied, the District "shall state, in writing, the rationale for the denial." You contend that no rationale was given.

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[3]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.

By letter to Sylvia Gullingsrud of CTA dated June 3, 1997, your brother, Andrew J, Kok, Esq. pointed out that you had not 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. Next, CTA indicated that binding arbitration was not available, because when you filed your grievance, the AFT contract had already expired. Next, CTA bargained a new contract, making changes in the evaluation and grievance articles. Next, 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 CTA 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.[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....

[4]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.[5]

I called you on July 21, 1998, and asked you what contact you had with the unions, and I requested copies of any correspondence that you had. You indicated that you sent numerous letters to them regarding your Level III grievance asking, "What's going on?" You did not receive any response from either union until you received the letter from CTA dated June 9, 1997, discussed above. You also advised me by telefax on July 22, 1998 that other than the letters discussed above, you did not have anything more. Copies of the correspondence you sent are unavailable since, in part, the computer disc they were on may no longer be available. You also indicated that during "the 1996-97 year",

> To paraphrase, the correspondence to the CTA and the AFT/CVFT was specifically addressed to agents/representatives A. DeLaCruz, K. Braithwaite, and [CTA's] M. Rosenfeld, all who received several notices stating that employee would like to have an answer to the Level III grievance, and would like arbitration as promised by the employer (and guaranteed by contract).

Finally, you indicated that "There was no other communication from any of the other representatives, despite what K. Braithwaite contends in his letter."

Based on the above information the charge fails to state a prima facie violation of the EERA for the following reasons. A review of the facts indicates that the District was not obligated to take the grievance to arbitration for several reasons. In other words, you have no legal right to claim that the District was obligated to arbitrate your 1996 grievance.

First, your request at Level III for arbitration was untimely as it was not filed within five (5) days following the written decision by the Superintendent. You took seven (7) days to file. At Article 24, section 24.2, of the AFT contract, it provides, in part, that "Failure of the grievant and/or the Federation to meet the timelines specified in the formal grievance procedures shall render the grievance void and the denial for cause by the grievant and/or the Federation." Thus, the failure to timely file the request for arbitration renders the grievance void and the District had no obligation to process your request for Level III review.

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

Second, even if your request for arbitration was timely, by operation of law, the District was not required to take the grievance to arbitration as the agreement between the District and the AFT, the exclusive representative until June 28, 1996, had expired in 1995. 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 involve 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. In this case, the District had no duty to arbitrate the grievance as the District's actions occurred after the expiration of the AFT contract, the District's conduct did not infringe on vested rights under the agreement, and the agreement has no separate authority that under normal principles of contract interpretation, require the continuation of the arbitration provisions.

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 proof of service must be filed with PERB. If I do not receive an amended charge or withdrawal from you before July 31, 1998, I shall dismiss your charge. If you have any questions, please call me at (213) 736-3543.

Sincerely,

Marc S. Hurwitz
Regional Attorney

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