

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



ASSOCIATED CALEXICO TEACHERS,)	
)	
Charging Party,)	Case No. LA-CE-1259
)	
v.)	PERB Decision No. 265
)	
CALEXICO UNIFIED SCHOOL DISTRICT,)	December 20, 1982
)	
Respondent.)	

Appearances; Charles R. Gustafson, Attorney for Associated
Calexico Teachers; and Suzanne C. Rawlings, Attorney for the
Calexico Unified School District.

Before Gluck, Chairperson; Morgenstern and Jensen, Members.

DECISION

GLUCK, Chairperson: The Calexico Unified School District
(District) excepts to a hearing officer's finding that its
unilateral rescission of teachers' option to receive their
July, August and September pay warrants all at the end of the
regular school year violated subsections 3543.5(a), (b) and (c)
of the Educational Employment Relations Act (EERA).¹

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

Subsections 3543.5(a), (b) and (c) provide:

It shall be unlawful for a public school
employer to:

- (a) Impose or threaten to impose reprisals
on employees, to discriminate or threaten to

FACTS

Pursuant to District policy, all teachers employed on or before the first day of school receive 12 pay warrants per year.² Twelve-month teachers who so notified the District before May 1 could collect their July, August, and September warrants on the last day of the school year. This practice had been in effect for at least seven years, but was not embodied in the parties' negotiated agreement.

The Associated Calexico Teachers (ACT)³ learned on September 4, 1980, from County Superintendent of Schools Herb Farrar, that the District intended to suspend this pay option. Farrar, citing the county counsel's opinion that the Education Code does not authorize lump sum payments, indicated

discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.

(b) Deny to employee organizations rights guaranteed to them by this chapter.

(c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

²School board policy 515.2 provides:

"Twelve Pay" contracts shall be written for all full-time regular certificated employees on or before the first day of school and "Ten Pay" contracts shall be written for all certificated employees employed after the first day of school.

³ACT is the exclusive representative of the District's certificated employees.

that cash flow problems in the various school districts made rescission of this method of payment necessary. ACT's attorney, who was present at the meeting where Farrar made this announcement, immediately voiced his disagreement with the county counsel's opinion. The day after this meeting, ACT's president, Irene Rael, distributed a bulletin to her members informing them of the District's proposed action.⁴

The county superintendent handles the District's payroll and issues warrants to District employees.⁵ On September 5,

⁴The bulletin reads, in pertinent part:

UNIT MEMBERS:

We have been informed that our option of taking a lump sum payment with our June pay is no longer feasible since the County Council [sic] has ruled and informed the Districts that the County Board of Education would no longer be able to honor the requests.

.....

CIA legal service has informed us that they disagree with this ruling and will meet with the County Council to come to some conclusion on the matter.

.....

This letter is just to alert you of an option that might be coming your way.

.....

⁵See Education Code section 42649.5, text at page 16, infra.

Farrar wrote all district superintendents of his decision to eliminate the lump sum option and suggested that the superintendents inform their staffs by a memo joined in by the various teachers association officers. He also urged the districts to offer 10-, 11-, or 12-month pay options as provided in the Education Code.

On September 8, Ms. Rael met with Dr. R. F. Valdez, superintendent of the Calexico District, and asked why she had not been informed of this change earlier. He told her that his hands were tied by the county counsel's opinion and that the District was having a cash flow problem. They discussed alternatives to the lump sum system, including a 10-payment plan which Valdez indicated the teachers would have to opt into by September 11 if the District were to meet its bookkeeping obligations.

On September 9, Valdez's secretary visited Rael in her classroom and asked her to initial a memorandum to all staff informing them of the changes that Rael and Valdez had discussed on the previous day.⁶ According to her testimony,

⁶This memo reads, in pertinent part:

. . . effective this school year, certificated employees will have their post school year monies paid in three installments: at the end of June, at the end of July, and at the end of August. This will take place automatically unless you elect to cancel the withholding of one-sixth

Ms. Rael believed that her initials were requested only to signify that the memo accurately recited the contents of her conversation with Valdez. He initially testified that the purpose of having her sign the memo was to have ACT join in informing the staff of the change in pay options. However, he later contradicted himself, claiming that the memo reflected an agreement between himself and Rael.

During these events, the parties were negotiating a new collective agreement. Although the subject of salaries had not been settled, neither party raised the lump sum issue during negotiations. Impasse was jointly declared on September 15, and on September 19, Rael wrote Valdez demanding that negotiations be reopened to consider the lump sum dispute. By a letter dated September 26, Valdez refused, explaining that there was nothing to negotiate because the District could not legally move from the position it had taken.⁷

of your salary each month and to receive your salary in ten equal payments. If you choose to exercise this option, please return the attached form . . . no later than September 11, 1980.

⁷During mediation, the ACT negotiating team did inform the mediator of the lump sum dispute. Whether the mediator discussed the matter with the District's bargaining team is disputed. He did, however, recommend that ACT drop the demand. ACT followed his advice, hoping to get a contract as soon as possible and to settle the lump sum issue through an unfair practice charge.

After ratification on October 22 of the agreement the parties did reach, Rael again wrote to Valdez requesting negotiations over the lump sum payment. He refused, stating that negotiations were over until the following year's reopeners and again citing the county superintendent's refusal to issue lump sum warrants and the county counsel's opinion. ACT then filed this charge on November 26 alleging that the District violated subsections 3543.5(a), (b), and (c) by unilaterally "affecting the method of payment of wages to certificated employees" by suspending the lump sum option.

The hearing officer determined that the lump sum arrangement was a matter related to wages; the Education Code did not prohibit the arrangement; and that ACT did not waive its right to bargain over this change. He also rejected the District's claim that the county superintendent's authority over pay matters made negotiating impossible.

In its exceptions, the District argues that: 1) the Education Code precludes negotiating over the lump sum practice; 2) the District did in fact negotiate with ACT at the September 8 meeting between Valdez and Rael; 3) by joining with Valdez in issuing the September 9 memo, Rael waived ACT's right to negotiate over the change and ACT is therefore guilty of laches; and 4) the county superintendent's exclusive authority over payroll matters made it impossible for the District to negotiate over the change in pay methods.

DISCUSSION

The Education Code Preemption

In Jefferson School District (6/19/80) PERB Decision No. 133, PERB considered the apparent conflicts between section 3540 and section 3543.28 which defines the scope of negotiations. The Board concluded:

⁸Section 3540 reads, in pertinent part:

Nothing contained herein shall be deemed to supersede other provisions of the Education Code and the rules and regulations of public school employers which establish and regulate tenure or a merit or civil service system or which provide for other methods of administering employer-employee relations, so long as the rules and regulations or other methods of the public school employer do not conflict with lawful collective agreements.

Subsection 3543.2(a) reads, in pertinent part:

The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean health and welfare benefits as defined by Section 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of

. . . those proposals which otherwise meet our test of negotiability are within scope, unless a conflicting Education Code provision precludes variance from its terms. Jefferson, supra, p. 8.

We do not find that the Education Code precludes negotiations on lump sum payment plans. Several Education Code sections govern district pay practices:

Section 45038;

The governing board of any school district may arrange to pay the persons in positions requiring certification qualifications employed by it, or any one or more of such employees or one or more groups or categories of such employees in either ten or eleven or twelve equal payments instead of by the school month.

In lieu thereof, orders for the payment of salary and payroll orders for the payment of salary and warrants for the payment of salary of employees employed in positions requiring certification qualifications may be drawn once each two weeks, twice a month, or once each four weeks as determined by the Governing Board. [Emphasis added.]

Section 45039;

Where the governing board of any school district arranges to pay persons employed by

the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.

it in twelve equal payments for the year, it may pay each monthly installment at the end of each calendar month, whether or not the persons are actually engaged in teaching during the month. [Emphasis added.]

Section 45040 provides, in relevant part;

The governing board of any school district not paying the annual salary of persons employed by the district in twelve equal monthly payments may withhold from each payment made to each employee an amount equal to 16 2/3 percent thereof.

The total of the amount deducted from the salary of any employee during any school year shall be paid to him in two equal installments, one installment to be paid not later than the fifth day of August next succeeding, and one installment not later than the fifth day of September next succeeding. . . .

Section 45048 provides, in relevant part;

Each salary payment for any calendar month may be made on the last working day of the month and shall be paid not earlier than the last working day of the month and not later than the fifth day of the succeeding calendar month. . . . [Emphasis Added.]

.

This section shall not prohibit a school district from making a payment of earned salary prior to the last working day of the month or payroll period.

The District argues that Education Code sections 45038, 45039, and 45048 read together, require payments on the 12-pay plan to be equal and evenly spaced on a calendar month basis. Therefore, an arrangement, such as that in Calexico, by which employees receive 12 separate and equal pay checks but receive

3 at the same time, contravenes the Code. It further argues that the last paragraph of section 45048 does not allow unrestricted advancement of earned salary but limits advances only within the particular month in which the pay was earned.

We find these interpretations unnecessarily narrow and restrictive. Section 45038 establishes a variety of alternative pay systems, including one by which employees are paid in 12 equal installments. Read by itself, this section would seem to prohibit lump sum arrangements. Although the statute does not literally address the timing of payments, it could be argued that the requirement of "equal" payments cannot be circumvented by simply distributing three equal warrants at the same time. However, section 45039 gives districts which pay on a 12-pay contract system discretion to pay each monthly installment even if teachers did not actually work during the month. The obvious purpose of this section is to allow teachers entitled to 12 payments to receive warrants during the summer months when they are not actually teaching.

Further, section 45048 reflects a principal concern of the Code that teachers not be paid until they have performed the work. It provides that teachers be paid for work performed by not later than the fifth day of the following month, but permits a district to pay earned salary "prior to the last day of the month or payroll period." It does not limit how much earlier than the last day of the month or pay period such

payment may be made except that the salary must have been earned. We find no reason why the words "prior to the last day of the month or pay period," do not mean "anytime before . . ." or why they should limit advanced payment of earned salary only within an arbitrarily designated month.

We see this reading of the Education Code as consistent with its purposes; namely, to assure that teachers are paid at least by a certain date following their completion of the work involved, while, at the same time, precluding the advance of public funds which have not been earned.

There is no question that the advances previously made by the District were for work already completed by the teachers. Whether the three warrants were issued simultaneously or not, the funds they represented were committed and undoubtedly legally encumbered.⁹

In Jefferson, supra, we held that pay days are related to wages and negotiable. The District here does not argue otherwise.

The District's Unilateral Acts

The District insists that both Rael and Valdez considered their September 8 meeting to be a negotiating session; both knew that the District needed to cease lump sum payments and

⁹The pay warrants were pre-printed and simultaneously delivered to the District at the end of the school year.

that alternative payment methods had to be exercised by September 15 to meet bookkeeping requirements. The District points to Rael's September 5 bulletin to unit members as evidence that ACT knew the District had to act quickly to resolve alternative arrangements. The District claims that by reaching the mutual understanding embodied in the joint memorandum the Association waived its right to negotiate over the unilateral change in the future.

But, at the September 8 meeting, Valdez presented Rael with a fait accompli. He said that his "hands were tied" by the county counsel's opinion and the county superintendent's refusal to honor lump sum warrants. He acted on Farrar's instructions to inform the staff of the change as soon as possible by a joint memorandum with ACT officers. It was for this reason he met with Rael. Furthermore, we note that Valdez did not claim an agreement had already been reached when he refused to reopen negotiations on the pay announcements. Instead, he repeated his claim that legal considerations prevented him from bargaining on the matter.

Even granting that Ms. Rael "agreed" that the District could no longer continue to issue warrants in a lump sum payment, we find no waiver. An acknowledgement that Valdez was following orders is neither acquiescence in his conduct nor admission that his conduct was lawful under EERA. Her September 5 bulletin to unit members informed them that the

District intended to make these changes. But it also explained that the California Teachers Association legal staff disagreed with the county counsel's opinion and implied that the matter was far from settled. We do not find in these facts waiver of "a reasonable opportunity to bargain over a decision not already firmly made by the employer." San Mateo County Community College District (6/8/79) PERB Decision No. 94.

Laches Defense

The District's laches defense rests in its claim that it relied on ACT's alleged acquiescence to the unilateral change when it offered to employees the 10-month pay option and notified the county superintendent to modify the payroll procedures accordingly.

In order to assert successfully the defense of laches, a defendant must show that the plaintiff unreasonably delayed in asserting its claim and that the plaintiff either acquiesced in the act about which he now complains or that the defendant relied to his detriment on the plaintiff's conduct or silence. Cal.Jur.3d Equity, Sec. 45.10

ACT did not delay in asserting its claims. At the very meeting where the change was announced, CTA's attorney voiced his objections to the county counsel's opinion. Rael met with

¹⁰The doctrine is embodied in California Civil Code section 3527: "The law helps the vigilant, before those who sleep on their rights."

Valdez at the earliest opportunity and objected to his not having informed her earlier of the impending action. As early as September 19, she formally demanded to bargain over the altered pay procedure, although she probably had no duty to do so.¹¹

Further, the District has not shown that it acted to its own detriment in reliance upon ACT's conduct or silence. It was not ACT's actions which caused the District to change the pay schedule or to offer the 10-month option to employees, but the county superintendent's instructions. While the District's bookkeeping may have made it necessary that employees notify it by a certain date if they chose to be paid 10 times a year, ACT was not obligated to respond at all to the District's 10-month payment suggestion which was made as part of an unlawful change in negotiable policy.

The Impossibility Defense

The District claims that it is impossible for it to negotiate over the elimination of the lump sum option since the county superintendent has ultimate authority over pay warrants; because he would no longer honor lump sum warrants, it had no choice but to offer other payment plans. The District relies on Education Code section 42649.5, which reads:

¹¹The District sought a change in policy and was therefore obligated to request negotiations.

In a county in which the board of supervisors has transferred educational functions to the county board of education pursuant to Section 1080, and a single budget has been authorized for the purposes of the county school service fund, county board of education, county committee on school district organization, and the office of the county superintendent of schools pursuant to Sections 1620 to 1625, inclusive, the duties of the county auditor specified in this article shall be performed by the county superintendent of schools.

A listing of all warrants, approved and allowed by the county superintendent of schools pursuant to this section shall be forwarded to the county auditor on the same day the warrants are forwarded to the school district or the payee. The form of the warrant and the form and content of the warrant listing shall be as prescribed by the county auditor.

Notwithstanding Section 27005 of the Government Code, or any other section requiring orders for warrants or warrants to be signed by the county auditor, the county treasurer in counties subject to this section shall pay warrants which are signed by the county superintendent of schools, and the county auditor shall not be liable under his bond or otherwise for a warrant issued pursuant to this section.

This section shall apply only in those counties in which the county board of supervisors has adopted its provisions by resolution. (Emphasis added.)

Under this section, the duties of the county auditor "specified in this article are to be performed by the Superintendent." However, the duties of the county auditor, as defined, do not include prescribing pay methods or otherwise directing districts' pay practices.

The second paragraph of this statute apparently allows the county superintendent to "approve and allow" warrants. But Education Code section 42636 provides:

The county superintendent of schools may examine each order on school district funds transmitted to him, in the order in which it is received in his office. If it appears that the order is properly drawn for the payment of legally authorized expenses against the proper funds of the district, and that there are sufficient moneys in the fund or funds against which the order is drawn to pay it, he shall endorse upon it "examined and approved," and shall, in attestation thereof, affix his signature and number and date the requisition and transmit it directly to the county auditor, in the order in which the order is received in his office. The county superintendent may prescribe alternative methods for districts determined to be fiscally accountable pursuant to Section 42650. (Emphasis added.)

The superintendent must endorse pay orders if they are drawn for payment of legally authorized expenses and if there are sufficient funds. Thus, while the section authorizes the superintendent to refuse to issue pay warrants when funds are lacking, it does not authorize him to decide the pay practices of the District.

Finally, Education Code section 35160 provides the governing board of school districts with omnibus authority to "act in any manner which is not in conflict with . . . any law"¹² Because the lump sum payment does

¹²Section 35160. Authority of governing boards commencing

not conflict with any law, the District was empowered to initiate that arrangement and to resist the county's attempt to discontinue it. It was not impossible for the District to successfully defend its pay practices against the county superintendent's directive. Its failure to do so implicates the District in the unilateral change for which it will be held liable.

Consequently, we find that the District has violated Government Code subsection 3543.5(c) and concurrently violated subsections 3543.5(a) and (b). San Francisco Community College District (10/12/79) PERB Decision No. 105.

ORDER

Based on the foregoing findings of fact and conclusions of law and the entire record of this case, and pursuant to Government Code subsection 3541.5 (c), it is hereby ORDERED that the Calexico Unified School District shall:

A. CEASE AND DESIST FROM:

1. Unilaterally discontinuing teachers' option to receive their July, August and September pay warrants on the

January 1, 1976.

On and after January 1, 1976, the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law and which is not in conflict with the purposes for which school districts are established.

last day of the regular school year without notifying the Associated Calexico Teachers and affording it an opportunity to negotiate.

2. Denying the Associated Calexico Teachers its right to represent unit members by discontinuing the lump sum pay option without meeting and negotiating with ACT.

3. Interfering with employees because of their exercise of their right to select an exclusive representative to negotiate with the employer on their behalf by unilaterally discontinuing the lump sum pay option.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS:

1. Restore to teachers the option to receive their July, August and September pay warrants on the last day of the regular school year and direct the county superintendent of schools to honor such pay orders as required by Education Code section 42636 commencing with the 1982-83 school year.

2. Within thirty (30) calendar days following the date of service of this Decision, post at all work locations where notices to employees are customarily posted copies of the attached Notice. Such posting shall be maintained for a period of thirty (30) consecutive workdays. Reasonable steps shall be taken to insure that such notices are not altered, defaced, covered by other material or reduced in size.

Members Morgenstern and Jensen joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Case No. LA-CE-1259 in which all parties had the right to participate, it has been found that the Calexico Unified School District violated the Educational Employment Relations Act by unilaterally eliminating teachers' option to receive their July, August and September pay checks on the last day of the regular school year. It has also been found that this same action interfered with the District's employees' exercise of rights protected by the Educational Employment Relations Act and has interfered with the Associated Calexico Teachers' right to represent unit members. As a result of this conduct, we have been ordered to post this Notice and we will abide by the following:

1. CEASE AND DESIST FROM:

Unilaterally eliminating teachers' option to receive their summer pay warrants on the last day of the regular school year.

2. TAKE AFFIRMATIVE ACTION TO:

Reinstate the lump sum pay option and direct the county superintendent of schools to honor the July, August and September pay orders as required by Education Code section 42636.

Calexico Unified School District

Dated: _____ By _____
Authorized Agent of the District

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR THIRTY (30) CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED BY ANY MATERIAL.