STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

BRAWLEY UNION HIGH SCHOOL TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-1311
v.	)	PERB Decision No. 266
BRAWLEY UNION HIGH SCHOOL DISTRICT,	)	December 21, 1982
Respondent.	)	

Appearances; Charles R. Gustafson, Attorney for Brawley Union High School Teachers Association, CTA/NEA; Suzanne C. Rawlings, Attorney for Brawley Union High School District.

Before Gluck, Chairperson; Jaeger and Morgenstern, Members.

DECISION

MORGENSTERN, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Brawley Union High School Teachers Association, CTA/NEA (Association), to a hearing officer's proposed decision dismissing its charge. The charge alleged that the Brawley Union High School District (District) violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[1] by unilaterally refusing to make a "lump

[1]EERA is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise specified.

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

sum" payment of wages for June, July and August 1981, as required by the collective bargaining agreement between the parties.

The hearing officer found that the lump sum payment contract provision directly conflicts with Education Code provisions governing the time and manner of payment and that, therefore, the District had no duty to bargain about the provision and did not violate EERA, by refusing to comply with its requirements.

After a review of the record and the arguments on appeal, the Board reverses the hearing officer's proposed decision for the reasons set forth below.

FACTS

The case was submitted on stipulated facts as follows:[2]

> It shall be unlawful for a public school employer to:
>
> (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.
>
> (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.

[2]The stipulation of facts are as paraphrased by the hearing officer with no substantive change. Neither party excepts to the facts as paraphrased.

1. [The Association] is the exclusive representative of a unit consisting of all certificated employees . . . .

2. A collective bargaining agreement between the District and the Association is in effect and expires August 1, 1981.

3. Said agreement contains the following pertinent provisions:

> Article VI, Compensation, Section D, Salary, subsection 3:
>
> A non-management certificated employee on a 12 payment plan may receive a "lump sum" settlement of the July, August and September warrants by filing a request with the business office no later than May 15th.
>
> Article XXIII, Savings, Section A:
>
> This is the entirety of the Agreement between the District and the Association.
>
> If any article, sections or provisions of this agreement shall be found by a court of competent jurisdiction or by a superior court upon appeal, to be contrary to, or in conflict with, federal or state law, that article, section or other provision only shall be rendered void. All other articles, sections or provisions of this Agreement shall continue in full force and effect.
>
> Article XXVI, Effect of Agreement, Section A:
>
> It is understood and agreed that the specific provisions contained in this Agreement shall prevail over District practices and procedures and over state law to the extent permitted by state law.

4. The reference in Subsection 3, of Section D Salary of Article VI of the collective bargaining agreement . . . relating to "lump sum" settlement of

the July, August and September warrants refers to salary accruing to the months of June, July and August.

5. In 1980, employees opting to receive "lump sum" settlement under the contract actually received three separate checks on June 5, 1980.

   The checks were for identical amounts and were dated identically but one specified June payment, one July payment, and one August payment.

   The "lump sum" payments made to employees during the summer of 1980 were monies which had been earned for services performed between September 1979 and June 1980. [Salaries to be paid during summer 1981 are for services already performed.]

6. Parties were negotiating wages in a contract reopener from approximately May, 1980 to October, 1980. Neither the Association nor the District requested to negotiate on the lump sum payment provision.

7. In August, District was informed by the Office of the County Superintendent of Schools that, pursuant to a County Counsel opinion . . ., "lump sum" payments such as described in the agreement were not authorized by the Education Code and therefore the County Superintendent would not honor warrants drawn for such lump sum payments.

8. On September 5, 1980, a memo was issued to District Superintendents from Herb Farrar, County Superintendent . . ., indicating his office would not allow the districts to pay the lump sum payments. The memo further requested districts take immediate action to offer employees options of 10, 11 or 12 payments as provided for in the Education Code.

9. If called to testify, Woodrow Wilkes, Assistant Superintendent Business Services, Office of the Imperial County Superintendent of Schools would testify that all certificated employees of the Brawley UHSD are currently enrolled in either the 10 equal pay plan, 11 equal pay plan or 12 equal pay plan pursuant to Education Code Section 45038 and that the district has never notified the county office of an intent to use section 45040 (one-sixth withholding plan) for any certificated employees nor has any employee. He would testify that each employee's election to use a pay

plan is based upon the Notice of Employment, a copy of which is on file in the county office. Mr. Wilkes would also testify that in 1981 employees electing the 12 pay plan will receive the June check on the last day of school in June, and the July and August checks at the end of each respective month. This testimony is accepted as competent and relevant without objection.

10. The Imperial County Superintendent of Schools is lawfully responsible for maintaining and disbursing funds pursuant to Article 4, Chapter 9, Part 24 of the Education Code (sec. 42630 et seq.) and issuing pay warrants and pay checks to employees on behalf of the Brawley Union High School District. The district does not issue its own pay warrants pursuant to Education Code section[s] 42647 [or 42649].

11. In late August or early September 1980, Superintendent Fragale discussed the reasons for the inability to pay the "lump sum" payments with Ms. Rosalie Banagan, Association President.

12. In early September, a memo was issued from the District Superintendent to all certificated employees . . . informing employees that the lump sum payment in June was no longer an option and notifying certificated employees of their option to elect ten, eleven or twelve monthly payments of their annual salaries for the 1980-81 school year. The memo specified it must be returned by September 10. This was necessary because the employee's election would affect the amount of his September paycheck and the deadline for the District to submit its September payroll to the County Superintendent's office was September 15, 1980.

13. In a letter dated September 29, 1980 . . . to Ms. Joanne Yeager, Deputy County Counsel, County of Imperial, Mr. Charles Gustafson, attorney for California Teachers Association stated the Association's position that the lump sum payment procedure is not prohibited by the Education Code.

14. In a letter dated November 11, 1980 . . . to Mr. Richard Fragale[,] Superintendent, Ms. Rosalie Banagan, Association President, requested to know whether the District intended to abide by the contract provision for lump sum payments.

15. Mr. Fragale responded in a letter dated December 1, 1980 . . . that the District would be unable to honor the lump sum provision of the contract because the County Superintendent was unable to honor the provision.

The stipulated record also included exhibits consisting of relevant portions of the parties' 1978-1981 collective bargaining agreement, a 1980 Imperial County Counsel opinion interpreting a school district's authority to make lump sum payments under the Education Code, a memorandum to all district superintendents from the county superintendent of schools ending the issuance of lump sum pay warrants, and an exchange of letters between charging party and the District regarding lump sum payments.

DECISION

The collective bargaining agreement between the parties provides, at Article VI, section D, subsection 3, as follows:

> A non-management certificated employee on a 12 payment plan may receive a "lump sum" settlement of the July, August and September warrants by filing a request with the business office no later than May 15th.

The Board has held that the timing of the payment of wages is a negotiable matter. Jefferson School District (6/19/80) PERB Decision No. 133.

However, the Education Code contains several sections which regulate the time and manner of payment of certificated

employees[3] and which, the District contends, preclude the negotiability of the above-cited lump sum payment provision.

Section 3540 of the EERA provides, in part, " . . . Nothing contained herein shall be deemed to supersede other provisions

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3Relevant Education Code sections provide, in pertinent part, as follows:

> 45038. Number of payments. 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 . . ., in either 10 or 11 or 12 equal payments instead of by the school month.
>
> In lieu thereof, orders for the payment of salary . . . may be drawn once each two weeks, twice a month, or once each four weeks as determined by the governing board.
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> 45039. Payment. Where the governing board of any school district arranges to pay persons employed by it in 12 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.
>
> 45040. Authority to withhold part of salary for payment in August and September when annual salary not paid in 12 equal monthly payments. The governing board of any school district not paying the annual salaries of persons employed by the district in 12 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 amounts 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 to be paid

of the Education Code . . . ." In Healdsburg Union High School District and Healdsburg Union School District (6/19/80) PERB

> not later than the fifth day of September next succeeding.
>
> . . . . . .
>
> 45048. Time of payment. 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 . . . .
>
> If the school district provides for the payment of the salary of employees employed in positions requiring certification qualifications once each two weeks, twice a month, or once each four weeks, pursuant to Section 45038, each salary payment may be made on the last working day of the payroll period and shall be made not earlier than the last working day of the payroll period and not later than the eighth working day of the following payroll period.
>
> 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.
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> 45049. Time of payment for additional activities. When any school district employs a certificated employee to perform teaching or other services in addition to his regular teaching duties, or when a school district employs a certificated employee to perform teaching or other services at a summer school maintained by the district, the district shall pay the employee for such services either in one lump sum or at an hourly, daily, biweekly, quadriweekly, or monthly rate of pay. If the pay is in one lump sum, the district shall pay the employee within 10 days after the termination of the services. If the pay

Decision No. 132, the Board held (at p. 19) that, where a provision of the Education Code requires a certain action, the parties are prohibited from negotiating a provision which directly conflicts with the statutory requirement. The Board stated at pp. 15 and 18:

> If PERB were to adopt the view that the mere existence of a statutory provision precluded negotiability, many issues of central employee concern would be excluded from negotiations . . . .
>
> [T]he supersession language of section 3540 should similarly be read to preclude negotiability only where the Education Code provisions in conflict would be replaced, set aside or annulled by the language of the proposed contract clause . . . .

Therefore, the sole issue before us is whether the lump sum payment provision directly conflicts with any provision of the Education Code such that the statutory provision would be replaced, set aside or annulled by the negotiated contract language. We find that it does not.

In Calexico Unified School District (12/20/82) PERB Decision No. 265, the Board construed the same sections of the Education Code in a similar factual situation.[4]

> is at an hourly, daily, biweekly, quadriweekly or monthly rate, the district shall pay the employee within 10 days after the end of each calendar month or pay period during which the services are performed.

[4]In Calexico, long standing district practice provided that teachers could collect their July, August and September pay warrants on the last day of the school year if they

After a careful analysis of the statutory language, we concluded that nothing in the code can reasonably be construed as prohibiting such lump sum payment. We therefore found that the Education Code does not preclude negotiations on lump sum payment plans and we rejected the District's supersession argument.

We find the construction of these Education Code sections in Calexico dispositive of the issue here. Therefore, we conclude that the lump sum payment provision does not conflict with the Education Code and was negotiable at the time the parties agreed to include it in their collective bargaining agreement. The District's refusal to honor this provision constitutes a change of policy having "a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members." Grant Joint Union High School District (2/26/82) PERB Decision No. 196. As such, the District's conduct breached its duty to bargain, in violation of subsection 3543.5(c), and interfered with the rights of employees and the Association, in violation of subsections 3543.5(a) and (b), concurrently. San Francisco Community College District (10/12/79) PERB Decision No. 105.

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notified the district before May 1. Pursuant to the same county counsel opinion and memo from the county superintendent of schools at issue here, the district unilaterally changed its past practice and relied on the same Education Code sections as a defense.

REMEDY

The hearing officer recommended that, if the Board finds the contract provision to be negotiable, the record should be reopened to allow the District to address its "apparent defenses of legal inability to pay and lack of jurisdiction over the county superintendent of schools," issues not addressed in the proposed decision. Nothing in the record suggests that such an order was requested by the parties themselves, and we do not find such an order necessary or appropriate here for several reasons.

First, neither party excepted to the hearing officer's failure to make findings or conclusions regarding such defenses. Pursuant to PERB rule 32300(c),[5] "An exception not specifically urged shall be waived." Moreover, we find that no such defense was ever raised by the District - neither in its Answer, Brief nor Exceptions. "It is the policy of the law that litigation shall not be had in piecemeal and that when a party has a defense to a pending cause of action it must be presented then, otherwise it will be deemed waived." Wieczovek v. The Texas Co. (1941) 45 Cal.App.2d 450, 459 [114 P.2d 377]. Therefore, we find that the District waived its right to assert additional defenses by failing to present them prior to or at the time of hearing or in its exceptions on appeal.

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[5]PERB Rules are codified at California Administrative Code, title 8, section 31000 et seq.

In addition, the very defenses referred to by the hearing officer were fully argued and considered by the Board in Calexico Unified School District, supra, and were found to be without merit. While not binding on the parties in the instant case, our recent disposition of apparently identical issues militates against a remand here.

Finally, our determination on this matter does not preclude the District's assertion of such defenses in a compliance hearing. See Santa Monica Community College District (9/21/79) PERB Decision No. 103; San Francisco Community College District, supra. Or, as an alternative, the District may sue the county superintendent directly to enforce its contract to pay warrants (assuming a contract exists), or to compel the performance of its ministerial duty, with the Association joining.

For these reasons, we do not find that it would effectuate the policies of the EERA to order a remand here.

We have found that Brawley Union High School District violated subsections 3543.5(a), (b) and (c) of the EERA. As a remedy for those violations, the District will be ordered to cease and desist from further such violations and to post the Notice attached hereto as an appendix which announces the District's readiness to comply with the ordered remedy. These

measures are consistent with the Board's remedial authority as set forth at subsection 3541.5(c)[6] of the EERA.

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to Government Code section 3541.5, it is hereby ORDERED that the Brawley Union High School District and its representatives shall:

A. CEASE AND DESIST FROM:

1. Refusing and failing to meet and negotiate in good faith with the exclusive representative by taking unilateral action on matters within the scope of representation with respect to the date of payment to certificated employees of summer salary warrants.

2. Refusing to comply with Article VI, section D, subsection 3 of the collective bargaining agreement in effect between the parties regarding the lump sum payment of summer salary warrants to certificated employees.

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[6]Section 3541.5(c) provides as follows:

> (c) The board shall have the power to issue a decision and order directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

3. Denying the Brawley Union High School Teachers Association, CTA/NEA, its right to represent unit members by unilaterally eliminating the lump sum payment of summer salary warrants without meeting and negotiating with the Association.

4. Interfering with employees' right to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally changing matters within the scope of representation without meeting and negotiating with the exclusive representative.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS WHICH ARE NECESSARY TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

1. On request of the Brawley Union High School Teachers Association, CTA/NEA, restore to teachers the option to receive their July, August and September pay warrants in a lump sum payment and direct the county superintendent of schools to honor such pay orders commencing with the 1982-83 school year.

2. Within five (5) workdays after the date of service of this Decision, post copies of the Notice to Employees attached as an appendix hereto, signed by an authorized agent of the District. Such posting shall be maintained for at least thirty (30) consecutive workdays at all work locations where notices to

employees customarily are placed. Such Notice must not be reduced in size and reasonable steps shall be taken to ensure that it is not defaced, altered or covered by any material; and

3. Within thirty (30) workdays from service of this decision, notify the Los Angeles regional director of the Public Employment Relations Board, in writing, of the steps the employer has taken to comply with the terms of this ORDER. Continue to report in writing to the regional director periodically thereafter as directed. All reports to the regional director shall be served concurrently on the charging party herein.

Chairperson Gluck and Member Jaeger 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 unfair practice Case No. LA-CE-1311, Brawley Union High School Teachers Association, CTA/NEA v. Brawley Union High School District, in which all parties had the right to participate, it has been found that the Brawley Union High School District violated the Educational Employment Relations Act by refusing and failing to meet and negotiate in good faith with the Brawley Union High School Teachers Association, CTA/NEA, on the subject of lump sum payment of summer pay warrants.

As a result of this conduct, we have been ordered to post this notice and we will abide by the following:

A. CEASE AND DESIST FROM:

1. Refusing and failing to meet and negotiate in good faith with Brawley Union High School Teachers Association, CTA/NEA, by taking unilateral action on matters within the scope of representation with respect to the date of payment to certificated employees of summer salary warrants.

2. Refusing to comply with Article VI, section D, subsection 3 of the collective bargaining agreement entered into with Brawley Union High School Teachers Association, CTA/NEA, regarding the lump sum payment of summer salary warrants to certificated employees.

3. Denying the Brawley Union High School Teachers Association, CTA/NEA, its right to represent unit members by unilaterally eliminating the lump sum payment of summer salary warrants without meeting and negotiating with the Association.

4. Interfering with employees' right to select an exclusive representative to meet and negotiate with the employer on their behalf by unilaterally changing matters within the scope of representation without meeting and negotiating with the exclusive representative.

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Dated: _____ BRAWLEY UNION HIGH SCHOOL DISTRICT

By _____
Authorized Representative

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

definition be applied and, on the other, that a more narrow interpretation was intended.

The recent case of San Mateo, supra, contains each Board member's view of the appropriate resolution of the tension between the language "relating to" and "limited to", and those views need not be repeated at length here. While differing as to the reasons for and significance of the particular structure of section 3543.2, two members agree that the appropriate means of determining the negotiability of a specific subject or proposal is a balancing test. As stated in San Mateo and as discussed more fully infra, a subject is negotiable if it first logically and reasonably relates to wages, hours or one of the enumerated terms and conditions of employment. If this threshold test is met, the proposal will be analyzed in terms of its degree of concern to the employees and the employer, the suitability of the negotiating process as a means of resolving the dispute and whether the employer's obligation to negotiate would significantly abridge its managerial prerogatives or educational and public policy considerations.[3]

3The basic difference between my view and that of the Chairperson's is that I would specifically factor into the balancing process educational and public policy considerations, as well as managerial prerogatives.

In his opinion in Palos Verdes/Pleasant Valley, supra, Dr. Gonzales proposed a balancing test. However, in San Mateo, he rejects a balancing test because it is a subjective