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.	)	Request for Reconsideration PERB Decision No. 266
BRAWLEY UNION HIGH SCHOOL DISTRICT,	)	PERB Decision No. 266a
Respondent.	)	April 7, 1983

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

Before Gluck, Chairperson; Jaeger and Morgenstern, Members.

DECISION

MORGENSTERN, Member: Pursuant to regulation 32410(a)[1] of the Public Employment Relations Board (PERB or Board), the Brawley Union High School Teachers Association, CTA/NEA

[1]PERB regulations are codified at California Administrative Code, title 8, section 31001 et seq.

Section 32410 provides, in pertinent part:

> Any party to a decision of the Board itself may, because of extraordinary circumstances, file a request to reconsider the decision within 20 days following the date of service of the decision. An original and 5 copies of the request for reconsideration shall be filed with the Board itself in the headquarters office and shall state with specificity the grounds claimed and, where applicable, shall specify the page of the record relied on. Service and proof of

(Association) requests reconsideration of a portion of the Board's decision in Brawley Union High School District (12/21/82) PERB Decision No. 266.

DISCUSSION

In PERB Decision No. 266, we found that the Brawley Union High School District (District) violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act (EERA)[2] by unilaterally refusing to make a "lump sum" payment

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> service of the request pursuant to Section 32140 are required. The grounds for requesting reconsideration are limited to claims that the decision of the Board itself contains prejudicial errors of fact, or newly discovered evidence or law which was not previously available and could not have been discovered with the exercise of reasonable diligence.

[2]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:

> 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.

of summer wages as required by the collective bargaining agreement between the parties.

To remedy the violations, we ordered the District to cease and desist from such further violations, to restore the lump sum payment option and direct the county superintendent of schools to honor such pay orders on the Association's request and to post an appropriate notice informing employees of the decision. In so doing, we rejected the hearing officer's recommendation that, if we found the contract provision to be negotiable, we should remand to allow the District to address its "apparent defenses of legal inability to pay and lack of jurisdiction over the county superintendent of schools." We found that it would not effectuate the purposes of the Act to remand for several reasons:

1. Since neither party excepted to the hearing officer's failure to make findings or conclusions regarding such defenses, such exception was waived, pursuant to PERB regulation 32300(c) which states that, "an exception not specifically urged shall be waived."

2. Since no such defense was ever raised by the District - neither in its answer, brief nor exceptions, we found the District had waived its right to assert such defenses under the rule stated in Weiczovek v. The Texas Co. (1941) 45 Cal.App.2d 450, 459 [114 P.2d 377] that it is the policy of the

law that litigation shall not be had in piecemeal and when a party has a defense to a pending cause of action, it must be presented then; otherwise it will be deemed waived.

3. Our disposition of the apparently identical defenses in Calexico Unified School District (12/20/82) PERB Decision No. 265 militated against remand.

4. The Board stated, "our determination of this matter does not preclude the District's assertion of such defenses in a compliance hearing," citing Santa Monica Community College District (9/21/79) PERB Decision No. 103 and San Francisco Community College District (10/12/79) PERB Decision No. 105.

The Association urges reconsideration of only this fourth and last statement on the grounds that:

1. No PERB regulation or procedure for a compliance hearing exists. To permit such a hearing would, therefore, be contrary to PERB regulations; and

2. To permit the District to raise matters previously waived would be contrary to the waiver rule cited by the Board itself in this decision and would be prejudicial to the Association.

The Association's first ground for seeking reconsideration is without merit. Though PERB has no rule specifically governing compliance hearings, such hearings are conducted

pursuant to the Board's statutory authority under section 3541.3:

> (h) To hold hearings . . . relating to any matter within its jurisdiction;
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> (i) To investigate unfair practice charges or alleged violations of this chapter, and take such action and make such determinations in respect of such charges or alleged violations as the board deems necessary to effectuate the policies of this chapter.
>
> (j) To bring an action in a court of competent jurisdiction to enforce any of its orders, decisions or rulings . . . .
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> . . . . . .
>
> (n) To take such other action as the board deems necessary to discharge its powers and duties and otherwise to effectuate the purposes of this chapter.

Additionally, subsection 3542(d) provides, in pertinent part, as follows:

> If the time to petition for extraordinary relief from a board decision has expired, the board may seek enforcement of any final decision or order in a district court of appeal or a superior court in the district where the unit determination or unfair practice case occurred. The board shall respond within 10 days to any inquiry from a party to the action as to why the board has not sought court enforcement of the final decision or order. If the response does not indicate that there has been compliance with the board's final decision or order, the board shall seek enforcement of the final decision or order upon the request of the party. . . .

In order to determine whether there has been compliance with the Board's final decision or order, it may be necessary for the Board to conduct a hearing on the issue, consistent with its above-cited general grant of authority.

However, the Association's second ground for requesting reconsideration has merit.

The general and well-established rule is that "a right once waived is gone forever" (Jones v. Maria (1920) 48 Cal.App.171 [191 P. 943]) and may not be re-asserted, Hein Estate (1939) 32 Cal.App.2d 438 [90 P.2d 100]; Faye v. Feldman (1954) 128 Cal.App.2d 319 [275 P.2d 121]. Consistent with this rule, we found that the District waived its right to raise these defenses to the finding of violation. That is, the District is precluded from arguing that its refusal to make lump sum payments was lawful because justified by business necessity.

However, we recognize that, while inability to pay and lack of jurisdiction over the superintendent will not be considered as defenses to the violation, as a practical matter, they may well affect the District's ability to comply with our ordered remedy. To that extent, they may necessarily have to be considered at a compliance hearing.

DECISION AND ORDER

The request for reconsideration is GRANTED. Upon reconsideration, we hereby amend and clarify that portion of

our decision which indicated that, at a compliance hearing, the District is not precluded from asserting defenses which it had previously waived.

Should a compliance hearing became necessary to determine whether the District has complied with the Board's decision and order in this case, defenses waived by the District may not be re-asserted to excuse or justify its violation of the Act. The District may not argue the matter of its legal right to make unilateral changes in its pay policy, irrespective of its reasons.

It is so ORDERED.

Chairperson Gluck and Member Jaeger joined in this Decision.