

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD



CALIFORNIA SCHOOL EMPLOYEES)
ASSOCIATION, CHAPTER 45 AND)
JIMMIE THOMPSON,)
)
Charging Party,) Case No. LA-CE-1865
)
v.) PERB Decision No. 720
)
COMPTON COMMUNITY COLLEGE DISTRICT,) March 1, 1989
)
Respondent.)
_____)

Appearances: Lawrence Rosenzweig, Attorney, for California School Employees Association, Chapter 45 and Jimmie Thompson; O'Melveny & Myers by Richard N. Fisher, Attorney, for Compton Community College District.

Before Hesse, Chairperson; Craib and Porter, Members.

DECISION

CRAIB, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the respondent, Compton Community College District (District), to the proposed decision of a PERB administrative law judge (ALJ). The ALJ found that the District violated section 3543.5, subdivision (c) of the Educational Employment Relations Act (EERA) and derivatively, section 3543.5, subdivisions (a) and (b),¹ when it

¹EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references are to the Government Code. Section 3543.5 provides that it is an unlawful practice 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

failed to negotiate in good faith over the effects of layoffs and when it unilaterally reduced the health benefit contribution prior to the completion of impasse procedures with the California School Employees Association (CSEA or Association). We affirm that portion of the ALJ's proposed decision which found a violation for unilaterally reducing the benefit plan contributions and reverse that portion which found a violation for failure to negotiate over the effects of layoffs, for the reasons set forth below.

FACTUAL SUMMARY

The events giving rise to CSEA's 1983 complaint began during the 1981-82 fiscal year, when the District experienced significant financial difficulties. During that year, the District seriously overestimated the nonresident tuition funds it expected to receive, due to the federal freeze on funds for Iranian students. This resulted in a \$325,000 loss in anticipated revenue, for which the District had already budgeted. The second budgeting problem arose when the state imposed a cap on funded enrollment. Since the District's enrollment exceeded the cap by over 350 students, it received \$779,000 less in

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.

revenue from the state than it anticipated and budgeted. Finally, the District discovered a \$409,000 accounting error. Restricted funds had been included in general revenues and impermissibly committed to certificated salary increases. Since these problems were not discovered in time to institute cost-saving measures during the 1981-82 fiscal year, the District was forced to obtain a \$750,000 emergency advance apportionment from the Legislature in order to meet its constitutional mandate to balance its annual budget. The advance apportionment was ultimately converted into a three-year loan, payments commencing in the 1983-84 fiscal year.

The District's financial difficulties were exacerbated during the 1982-83 fiscal year. After the District had adopted its budget, the state reclassified certain course offerings. This reclassification resulted in a reduction in the number of courses which could be included in determining the District's average daily attendance (ADA), and hence the apportionment received from the state. Additionally, the District experienced an unexpectedly high attrition rate, which also reduced the amount of ADA-generated income. These combined events resulted in a total loss of \$460,000 in anticipated revenue. The District again sought and obtained a state loan, this time for \$350,000, to cover outstanding expenditures for the 1982-83 fiscal year. During the year, the District took numerous actions directed at reducing its financial problems. These included: eliminating 136 part-time positions, terminating an outreach program,

eliminating 8.5 administrative positions, laying off 34.6 classified personnel, reducing the work year from 12 to 11 months for 19 classified positions, deferring \$100,000 in scheduled building maintenance, reducing support for the Child Development Center in the amount of \$98,000, and generally reducing all areas of proposed expenditures for supplies and services.

The District prepared a tentative budget for the 1983-84 fiscal year in April of 1983,² which listed expenditures that exceeded projected total income by more than \$1,300,000. Despite the overestimate of ADA-generated income which led to its shortfall in 1982-83, the District, included as income, the maximum fundable ADA. Absent passage of special legislation for such funding, the District would not receive the budgeted amount. The District was obligated to submit a tentative budget to the county superintendent of schools by July 1. (Ed. Code, sec. 7785023, subd. a.) A final, balanced budget had to be filed with the superintendent by September 6. (Ed. Code, sec. 85023, subd. d.)³ In early September, the District obtained an extension of the filing deadline to September 15. The District filed its final budget on September 15.

²All the remaining dates in this decision refer to 1983 unless otherwise indicated.

³A one-time-only emergency measure was passed by the Legislature, effective September 29, 1983, which extended the filing deadline for the final budget to October 7, 1983. (Ed. Code, sec. 85023, subd. f.)

In order to meet the constitutional requirement for a balanced budget, the District took numerous cost-cutting measures during the spring and summer of 1983.⁴ These included: eliminating two management positions, eliminating matching funds for deferred maintenance work, closing the swimming pool, eliminating the use of District vehicles, reducing certificated salaries by five percent, and increasing certificated workload by the equivalent of one extra class. Three additional reductions, which affected the classified staff, formed the bases for the charges filed by CSEA. These included: laying off 6.5 classified personnel, reducing the District contribution to the benefit plan from \$2,682 to \$2,500, and reducing classified staff's work year from twelve to eleven months.⁵

The collective bargaining agreement, in effect at the time of the events complained of by CSEA, provided for the reopening of negotiations on salaries, health and welfare benefits for the period of July 1, 1983 to June 30, 1984, and on one other article of each party's choice. (Article XV of the 1982-85 Agreement.) Negotiations concerning these items were to commence no later than February 1 and to conclude by June 30. The parties exchanged initial reopener proposals in early 1983, covering

⁴In February 1983, the District eliminated 6.5 classified employee positions and laid off the affected employees. The parties continued to negotiate the effects of these layoffs during their negotiations.

⁵The ALJ found that the Association had waived its right to negotiate the reduction in work year. Neither party excepted to this finding, therefore, it is not before the Board.

hours of employment, compensation (which included health and welfare benefits and parking fees), and leaves of absence. The proposals were "sunshined," and the parties commenced negotiations on February 14.

At the negotiations, the District was represented by Robert Nunez, director of personnel; the Association was initially represented by Vivian Baldwin, chair of the CSEA negotiating committee. The Association also had two resource people on the negotiating team, Elvert Waltower and Jimmie Thompson. Baldwin and Waltower both left the team in March. Waltower was replaced in May by Dave Dawson, but Dawson attended only one session before becoming ill and missing the majority of the subsequent meetings. In late May, Bruce McManus replaced Baldwin as the chief negotiator, although Thompson testified that she served in that capacity during the intervening months. CSEA, thus, experienced great difficulty engaging in meaningful negotiations because of the turnover in its negotiating team.

On May 26, obviously growing weary of the repeated delays and aborted negotiating sessions due to CSEA's disorganization, District negotiator Nunez sent a memorandum to CSEA's representative, Thompson, outlining the most recent sessions and requesting that the parties meet sooner than the next scheduled session of June 7, in order to complete negotiations for the 1983-84 budget. Nunez also informed CSEA, for the first time, that the District would probably recommend additional layoffs in the classified service to the board of trustees. In closing,

Nunez indicated that the issues still requiring resolution were the contract reopeners and the effects of the proposed layoffs. There is nothing indicating that CSEA ever responded to this memorandum. On June 1, Nunez wrote another memorandum to Thompson suggesting that a negotiating session be scheduled before June 7. Again, there is nothing in the record to indicate that CSEA responded.

The parties met again on June 9.⁶ On June 9, the District went over its counterproposal and expressed a desire to meet as often as possible to resolve the parties' differences. CSEA sought to limit the negotiations to compensation, while the District wanted all items to be on the table. At this meeting, neither Thompson nor Dawson were present and McManus, CSEA's chief negotiator, indicated that no decisions could be made without their presence. At this time, the District also requested that the parties expedite negotiations and seek expedited mediation and factfinding if the parties had not reached agreement by June 25. This was a request the District reiterated during each succeeding meeting. CSEA later informed the District that it would not be willing to expedite the impasse procedures. A meeting was scheduled for June 13, but later cancelled by CSEA.

On June 14, Thompson wrote two letters, one to the board of trustees and one to Nunez. In the letter to the board, Thompson

⁶There is nothing in the record to explain why there was no meeting on June 7 as scheduled.

indicated that CSEA would be willing to negotiate the impact and effects of "this proposed lay-off exclusively," and proposed a June 16 meeting. In the letter to Nunez, Thompson outlined CSEA's position on the reopeners and indicated that CSEA would not combine the layoff negotiations with the ongoing reopener negotiations. The parties next met on June 16, and the District again requested expedited procedures, which was again rejected by the Association. Nothing of substance appears to have been exchanged at that session. The parties met again on June 22 with a similar result.

The District submitted its request for a determination of impasse to PERB on July 5. It indicated that the parties had twelve negotiating sessions and had met for approximately 30 hours. One mediation session was held in August, at which time the mediator certified the dispute for factfinding. Factfinding was scheduled for and held on October 31. A final factfinding report was issued. The parties met in post-factfinding negotiations and apparently reached agreement on the disputed matters.⁷

Meanwhile, the District's tentative budget was due on July 1. At the June 22 session, the District notified CSEA that it would recommend that the board of trustees adopt a resolution

⁷The post-factfinding negotiations and agreement, as well as the factfinding report, were relied upon to a certain extent by the ALJ and will be discussed further.

eliminating certain classified positions at its June 28 meeting.⁸ The board took the recommended action and eliminated 1.5 positions, effective July 29. CSEA's only response, reflected in the record, appears to be a July 21 letter from McManus to Nunez demanding to negotiate the decision and the effects of Report No. IV-G, which set forth the reductions adopted by the board of trustees on June 28.⁹ No proposals accompanied the letter.

The board of trustees met again on August 31 and adopted a resolution declaring a state of fiscal emergency. Among other cost-cutting measures, the board eliminated 6.5 classified positions and directed that the affected employees be laid off effective September 30. The board also reduced the District benefit plan for all District employees to \$2,500. There is no evidence in the record of CSEA's response, if any, to the August 31 action.

CSEA filed its charge in this matter on October 24, alleging that the District unlawfully instituted unilateral changes in working conditions "without completing the collective bargaining

⁸The parties met briefly on June 28. The District informed the Association, in writing, that it would recommend that the board of trustees reduce the work year to eleven months. Nunez also indicated to CSEA the District's willingness to negotiate the effects of the layoffs to be recommended. No agreements were reached on June 28.

⁹The thrust of the letter was directed primarily at the reduction in the work year from twelve to eleven months.

process,"¹⁰ by the layoffs authorized in June and August, the reduction in the work year, and the reduction in the benefit package. PERB issued a complaint and the matter was heard by an ALJ on May 16 and 17, 1984.

In her proposed decision, the ALJ concluded that the District violated EERA when it implemented the layoffs in June and August,¹¹ because it failed "to negotiate in good faith with CSEA over the effects of the layoffs." She rejected the District's argument that the Association waived its right to negotiate because of its dilatory conduct which impeded the negotiation process. She concluded that the District did not exhaust its alternatives before implementing its July layoff because the District had until at least September 6 before it had to submit its final budget. She also concluded that the August decision to lay off was made without providing notice and an opportunity to negotiate and rejected the District's financial crisis as a defense to the action. With regard to the reduction in the benefit plan, the ALJ concluded that the District failed to demonstrate an operational necessity, and failed to demonstrate that it attempted to explore alternatives with CSEA

¹⁰This allegation is sufficient to encompass conduct occurring both before and after the declaration of impasse in July. (See Moreno Valley Unified School District v. PERB (1983) 142 Cal.App.3d 191, 201-02.)

¹¹Although the ALJ indicated that the layoffs were "implemented" in June and August, the actual implementations were in July and September. The District excepted to this finding. We note the misstatement and have considered the actual implementation dates in formulating our decision.

through the mediator or on its own during July and August. As to the reduction in the work year, the ALJ found no violation. She ordered that the employees affected by the layoff be made whole for any losses suffered from July 29 to October 31, and September 30 to October 31. She also ordered that the employees be compensated for the reduction in benefits plan contributions from September 6 to October 31. She limited the recovery to this two-month period because she considered the factfinding report an agreement by the parties. She also included ten-percent interest and the usual cease-and-desist order.

THE EXCEPTIONS

CSEA filed exceptions on the very limited issue of the benefit plan remedy. It claims that the factfinding report is a recommendation only and that there is no evidence that CSEA agreed to it. The Association seeks to have the make-whole remedy continue to the present.

The District has filed forty exceptions to many factual findings and omissions,¹² as well as to the legal conclusions reached by the ALJ. Three major issues lie at the heart of the District's exceptions: whether the Association adequately met its burden of proof to establish the District's failure to negotiate the effects of the layoffs; whether the District

¹²We have set forth the facts gleaned from the record as thoroughly as possible. Many of the District's exceptions to the factual findings and omissions therein have been addressed by their inclusion in the factual summary, any others we have not found to be determinative of the issues before the Board.

established a business necessity defense; and whether the Association waived its right to negotiate by its dilatory conduct.

As discussed below, we conclude that the Association did not meet its burden to establish that the District failed to complete negotiations on the effects of the July and September layoffs. We do not, however, find that the District has established an adequate defense to the reduction in benefits charge. Finally, we conclude that the appropriate remedy for the unilateral reduction in benefit plan contributions is a make-whole order from September 6, 1983, until the parties reached a subsequent agreement on the annual benefit plan contribution.

DISCUSSION

Layoffs

CSEA contends that the District violated EERA section 3543.5(c) by making unilateral changes in working conditions without completing the collective bargaining process. The Association does not contend in its charge that the District refused to negotiate, only that the process was not concluded prior to the implementation of the layoffs. EERA requires parties, subject to its jurisdiction, to meet and negotiate in good faith over subjects within the scope of representation prior to instituting changes. (See secs. 3540.1, subd.(h) and 3543.2, subd. (a).) When the issue to be negotiated is a mandatory subject of bargaining, the parties must negotiate to impasse and participate in the statutory impasse proceedings. (See

sec. 3543.5, subd. (e).)

However, the Board has long held that a public school employer is free to unilaterally determine that a layoff is necessary without bargaining. The employer, nevertheless, must provide the exclusive representative with notice and an opportunity to bargain over the effects of layoffs which have an impact upon a matter within scope. (Newark Unified School District (1982) PERB Decision No. 225.) In Newman-Crows Landing Unified School District (1982) PERB Decision No. 223, the Board cogently summarized its reasoning:

[T]he layoff of employees unquestionably impacts on their wages, hours and other conditions of employment. It may concurrently impact upon those employees who remain. Nevertheless, the determination that there is insufficient work to justify the existing number of employees or sufficient funds to support the work force, is a matter of fundamental managerial concern which requires that such decisions be left to the employer's discretionary prerogative. . . .

(Ibid. at pp. 12-13.)

Thus, the District acted within its discretion when it determined that, due to its financial difficulties, layoffs of classified employees were necessary. Its sole obligation was to give CSEA reasonable notice and an opportunity to bargain the effects of its decision, once a firm decision to lay off was made. (Mt. Diablo Unified School District (1983) PERB Decision No. 373.) Board precedent indicates that an employer, under certain circumstances, may implement a nonnegotiable decision prior to the completion of the bargaining process. In

Mt. Diablo, supra, PERB Decision No. 373, the Board held that, given the notice requirements of Education Code sections 44949 and 44955, the district would have been justified in implementing its decision to lay off prior to completing the negotiation process had it negotiated during the period between its decision and the implementation date. In Oakland Unified School District (1985) PERB Decision No. 540, the Board held that the passage of a resolution setting an implementation date two months hence would not be a per se violation of the duty to bargain, since it afforded the parties an ample opportunity to bargain prior to implementation.

While neither Mt. Diablo nor Oakland involved a situation like the present, where the employer did negotiate in good faith for a reasonable time prior to implementation, those decisions provide a framework upon which to analyze this case. We believe that under some circumstances an employer, prior to agreement or exhaustion of impasse procedures, may implement a nonnegotiable decision after providing reasonable notice and a meaningful opportunity to bargain over the effects of that decision. In such cases, we will apply the following requirements:

1. the implementation date is not an arbitrary one, but is based upon either an immutable deadline (such as the one set by the Education Code or other laws not superseded by EERA) or an important managerial interest, such that a delay in implementation beyond

the date chosen would effectively undermine the employer's right to make the nonnegotiable decision;

2. notice of the decision and implementation date is given sufficiently in advance of the implementation date to allow for meaningful negotiations prior to implementation; and
3. the employer negotiates in good faith prior to implementation and continues to negotiate in good faith after implementation as to those subjects not necessarily resolved by virtue of the implementation.

(See Lake Elsinore School District (1988) PERB Decision No. 696, at pp. 23-24 (dis. opn. of Craib, Member).)

In the present case, the Association was on notice May 26 that the District contemplated layoffs of classified personnel prior to the beginning of the 1983-84 school year. Again, on June 1, the District notified the Association that it would recommend layoffs. On June 28, the board of trustees adopted a formal resolution to lay off 1.5 classified positions effective July 30; and, again, on August 31, a formal resolution to lay off was passed, effective September 30. Prior to the implementation of the layoff on July 30, the Association had two months to negotiate the effects of the proposed layoff; prior to the implementation of the layoff on September 30, the Association had four months. There is no evidence that the Association ever pursued negotiations or presented proposals involving the layoffs after receiving the District's notice. CSEA had ample

opportunity to do so. The District's willingness to negotiate, and the need to reduce its expenditures prior to the submission of the final budget by September 6, warranted the chosen implementation dates. Furthermore, the District had already sought mediation to resolve this dispute, as well as others, by seeking a declaration of impasse from PERB; thus, it continued to pursue negotiations in good faith. Therefore, we find that the Association failed to establish that the District violated its duty to bargain in good faith.

Although the District also argues that the Association waived its right to bargain the effects of the layoffs due to its dilatory conduct, we need not address the adequacy of the District's argument since we have found that the Association failed to meet its initial burden. Nor need we discuss the District's business necessity defense.

Benefit Plan

The District's August 31 decision to reduce its contribution to the benefit plan from \$2,682 to \$2,500 presents an entirely different issue. The benefit plan contributions were part of the parties' mid-contract reopener negotiations. The proper analytical framework for the District's unilateral change in benefit plan contributions is that utilized for any unilateral change in contract terms without first exhausting the statutory impasse procedures. The Board has long held that, even "following a declaration of impasse, a unilateral change regarding a subject within the scope of negotiations prior to the

exhaustion of the impasse procedure is, absent a valid defense, per se an unfair practice." (Moreno Valley Unified School District (1982) PERB Decision No. 206, p. 5.) The District admits that it unilaterally changed its contribution to the plan, but argues that the Association waived its right to negotiate the decision. Alternatively, the District contends that it had an affirmative right to change its contribution due to its serious financial crisis, which the District argues amounted to a business necessity.

During the negotiations in early 1983, the parties both presented proposals on the benefit plan contributions. The Association proposed a raise in the District's contribution to \$4,000; the District proposed a reduction to \$2,500. The record does not indicate how seriously this particular item was discussed at the table. The testimony and exhibits before the Board make no reference to the benefit contribution negotiations prior to the August 31 resolution adopted by the board of trustees to reduce the contribution for financial reasons.¹³

The District argues that the Association waived its right to negotiate the reduction in benefit plan contributions because of

¹³The ALJ concluded that the District could have raised the reduction of the benefits plan with CSEA at the time that it sought an expedited impasse procedure in order to persuade CSEA to reconsider its decision to refuse to expedite impasse. The District argues that there was no evidence that the District did not bring up the issue of the benefit plan reduction when impasse was sought. However, since the District bears the burden of proving that the Association waived its rights, it cannot rely on the absence of evidence to prove its case.

its dilatory bargaining conduct. The Board has consistently held that a waiver will not be found absent clear and unmistakable language or demonstrative behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer. (Sutter Union High School District (1981) PERB Decision No. 175.) The facts of this case can only be analyzed under the second prong of the test, since there is no evidence that the Association ever expressly waived its right to bargain.

The District contends that from the outset of negotiations in early 1983, the Association evinced an uncooperative and unproductive attitude. It outlines the repeated cancellation of meetings, as well as the truncated meetings, to support its theory that the Association intentionally waived its right to bargain. The District also places particular importance on CSEA's refusal to expedite the impasse procedure during June to bolster its waiver argument.

We do not find the District's arguments persuasive. The Board has recognized that finding that an employee organization has waived its right to bargain is a serious matter, not to be found without convincing evidence of the organization's intent. In Placentia Unified School District (1986) PERB Decision No. 595, the Board held that not only did the district bear the burden of proving the affirmative defense of waiver, but that any doubts must be resolved against the party asserting waiver. "[T]he 'clear and unmistakable' standard requires that the evidence of waiver be conclusive." (Ibid. at pp. 7-8; see also

Caravelle Boat Co. (1977) 227 NLRB 1335 [95 LRRM 1003, 1006] ("[T]he [NLRB] and courts have repeatedly held that a waiver of bargaining rights by a union will not be lightly inferred and must be clearly and unequivocally conveyed.".) We have not previously been faced with a case in which the union's dilatory conduct forms the basis for a waiver argument,¹⁴ therefore, federal precedent in the area is helpful.¹⁵ The Ninth Circuit Court of Appeal, in circumstances similar to those before the Board, has held that "an employer must show that the union had clear notice of the employer's intent to institute the changes sufficiently in advance of actual implementation so as to allow a reasonable opportunity to bargain about the change." (American Distributing Co. v. NLRB (9th Cir. 1983) 715 F.2d 446 [115 LRRM 2046, 2049].) That court also held that waiver may be found by conduct during bargaining only if the negotiations "reveal that the subject was 'fully discussed or consciously explored' and the union 'consciously yielded' its interest in the matter." (Ibid.)

¹⁴The issue has been briefly addressed in two opinions, Mt. San Antonio Community College District (1983) PERB Decision No. 297 (no waiver where the Association waited only a few days before responding to the district's invitation) and Anaheim Union High School District (1982) PERB Decision No. 201 (no waiver where the parties mutually agreed that they would not negotiate over the summer). However, given the less complex facts facing the Board, in neither case did it establish an appropriate test for waiver by dilatory conduct.

¹⁵The California courts have found that federal labor precedent is persuasive where the statutory scheme and the interests to be fostered are similar. (See, e.g., Moreno Valley Unified School District v. PERB, supra, 142 Cal.App.3d at 196.)

We find that while the Association's conduct should not be applauded, nor emulated by other parties, it was a product of inexperience and ineptitude. The District did not present evidence that the subject was fully discussed or consciously explored or that CSEA consciously yielded its interest in negotiating the reduction in benefit plan contributions.¹⁶ Furthermore, the Association's conduct must be viewed in light of the fact that there is no evidence that the District even notified the Association, prior to the August 31 board of trustees' meeting, of its intention to reduce its contribution on September 6. Therefore, we must conclude that the District failed to meet its burden of showing that the Association, by its dilatory conduct, waived its right to bargain over the District's reduction in benefit plan contributions.

The District also argues that its financial plight was so severe that it was justified in taking unilateral action prior to exhausting the impasse procedures, in order to balance its budget by September 6. In order to establish a business necessity defense, the District must show that the financial crisis

. . . is an actual financial emergency which leaves no real alternative to the action taken and allows no time for meaningful negotiations before taking action.

¹⁶Moreover, it is important to note that the District's unilateral action took place in the midst of reopener negotiations. Consequently, even if we were to agree with our dissenting colleague that the Association's dilatory conduct constituted bad faith, we seriously question whether that would excuse a unilateral change in an existing contract term.

(Calexico Unified School District (1983) PERB Decision No. 357, at p. 20.)

In Calexico, the district unilaterally imposed a freeze on teachers' step and column increases, which were being negotiated as part of the parties' reopener negotiations, in order to present a balanced budget to the superintendent by September. The freeze was effective the start of school in September. Testimony indicated that the district could have technically balanced its budget without implementing the freeze but declined to do so because such action would have reduced the district's reserves and, thus, would not have been financially responsible. The district further argued that it remained willing to continue to negotiate even after the decision was unilaterally made. The Board rejected all of the district's arguments and held that, even though the district presented convincing evidence of the difficult financial circumstances it faced, the district failed to show that it had no alternative to instituting the unilateral freeze prior to the completion of bargaining. Furthermore, the Board found that the district's financial problems were not the result of a sudden, unexpected change in circumstances, but rather resulted from budgetary problems which arose much earlier in the year. (See also San Francisco Community College District (1979) PERB Decision No. 105.)¹⁷

¹⁷In a somewhat analogous situation, the Ninth Circuit recently rejected an employer's appeal, in which it argued that its implementation of a unilateral change was justified due to "its dire financial condition and the union's unwillingness to meet." (NLRB v. Auto Fast Freight (1986) 793 F.2d 1126 [122 LRRM

Compton Community College District found itself in a similar situation in June of 1983. It, too, wished to conclude reopening negotiations with a significant reduction in costs, prior to the final deadline for a balanced budget. We find that the District faced a real financial crisis, albeit one in the making for months, if not years, prior to the implementation of the reduced benefit plan contribution. Although the District knew that it must reduce its financial obligations in order to balance its budget, the record reflects that it, nevertheless, did not impress upon the Association the need for the benefit plan reduction either at the time of the declaration of impasse or after the declaration and prior to the August 31 resolution.¹⁸ While the record reflects that the parties met once with the

3058,3061].) The court affirmed the NLRB, which concluded that "there is nothing in the record to show that the Unions intentionally were ducking the [employer]. . . . It does appear that the Unions were not well coordinated, and possibly were uncertain of their administrative responsibilities, but those facts do not justify [the employer's] unilateral actions." (Ibid.) The NLRB also rejected the employer's business necessity defense, noting that the employer had been aware of its severe economic problems for at least four months prior to its elimination of health benefits and reduction of wages, and that the financial "crisis" had been in the making for three years. Therefore, the Board (and the court) found that the financial difficulties did not "suddenly rise" to the level of urgency that would justify taking unilateral action. (Ibid.)

¹⁸While the duty to bargain is dormant while the parties are at impasse, there is an analogous duty to participate in good faith in the statutory impasse procedures. (See sec. 3543.5, subd. (e); Moreno Valley Unified School District v. PERB, supra, 142 Cal.App.3d at 200-01; Victor Valley Union High School (1986) PERB Decision No. 565.) Thus, the District was not free to unilaterally change contractual provisions.

mediator during August, the only matter apparently discussed was certification of the dispute to factfinding.

Without more persuasive evidence that the District had no opportunity to resolve the specific dispute over the benefit plan contributions prior to the unilateral implementation of the reduction, we are unable to conclude that the District satisfied its burden of proving a genuine financial crisis offering no real alternative and no opportunity for meaningful negotiations. The District contends that it would have been futile to continue to negotiate since the Association had indicated an unwillingness to negotiate. We disagree, since there is no evidence that the District ever indicated that, absent a concession by the Association, it would be required for financial reasons to implement the benefit plan reduction. Furthermore, it is not clear from the record that the reduction in the benefit plan contributions were required to present a balanced budget. Like the situation in Calexico, it may have been possible to formulate a budget that did not require the reduction. The District failed to present evidence that unilateral action was its only alternative. Since the unilateral change took place after the parties had reached impasse, we find that the District violated section 3543.5, subdivision (e).

SUMMARY

In conclusion, we find that the Association failed to meet its burden to establish that the District failed to negotiate in good faith over the effects of its decision to lay off classified

employees in July and September, prior to the completion of impasse proceedings. We also conclude that the District has failed to meet the test set forth by the Board in Calexico, and has thus not presented a valid business necessity defense to justify its decision to reduce its benefit plan contributions. Nor has the District adequately met its burden of proving that the Association waived its right to bargain over the benefit plan contribution reduction. The District, thus, violated sections 3543.5, subdivision (e), and, derivatively, subdivision (b).¹⁹

REMEDY

Section 3541.5(c) gives PERB broad statutory authority to fashion appropriate remedies for unfair practices. Since we have concluded that the District violated its duty to participate in good faith in the statutory impasse procedures, it is appropriate to order the District to cease and desist from taking unilateral action on matters within the scope of representation without first affording CSEA an opportunity to negotiate thereon.

In cases involving unilateral action, PERB generally orders the employer to restore the status quo as it existed prior to the violation. (Santa Clara Unified School District (1979) PERB Decision No. 104.) However, the status quo will not be restored and liability will be cut off if the parties have, in the interim, reached agreement on the matter. (Pittsburg Unified

¹⁹We decline to find a section 3543.5, subdivision (a) violation as there was no evidence submitted that the District's conduct affected the exercise of protected rights of members of the CSEA.

School District (1984) PERB Decision No. 318a.) We disagree with the ALJ that the District's liability to make the employees whole for its unilateral reduction in contributions should end at the time the factfinding report issued. As CSEA points out, its member on the factfinding panel was not authorized to negotiate nor to enter into any agreement for the Association. Furthermore, CSEA's benefit plan contribution proposal is insufficient to bind CSEA absent an actual agreement. Therefore, the District is ordered to pay the amount it reduced its contributions to the benefit plan from September 6, 1983, the date it implemented the change, until such time as the parties reached agreement on the issue.²⁰

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in this case, and pursuant to section 3541.5(c) of the Educational Employment Relations Act, it is hereby ORDERED that the Compton Community College District, its Board of Trustees, Superintendent and its agents shall:

²⁰Neither the date of such an agreement, nor its contents, are reflected in the record. However, we take official notice of the parties' written agreements on file with the regional office pursuant to PERB Regulation 32120 (PERB regulations are codified at California Administrative Code, title 8, sec. 31001 et seq.). Subsequent to the 1982-85 agreement, there is no record of an agreement being reached by the parties in this case prior to the 1988-91 agreement between the District and the Compton Community College Federation of Employees signed on October 10, 1988, and effective July 1, 1988. Therefore, based on the record before us, it is found that the liability period referred to above will run from September 6, 1983 to July 1, 1988.

A. CEASE AND DESIST FROM:

1. Failing to meet and negotiate through statutory impasse procedures with the exclusive representative by taking unilateral action on matters within the scope of representation, including the unilateral reduction of the benefit plan contribution in September 1983.

2. Denying to the California School Employees Association and its Chapter 45 rights guaranteed by the Educational Employment Relations Act, including the right to represent members.

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

1. Unless otherwise agreed to by the parties, compensate any affected unit employee for monetary losses incurred as a result of the reduction of the benefit plan contributions from the date of the change (September 6, 1983) until an agreement was reached on this matter. All monetary losses will include interest at the rate of 10 percent per annum.

2. Within thirty-five (35) days following the date this Decision is no longer subject to reconsideration, post at all school sites and all other work locations where notices to classified employees are customarily placed, copies of the Notice attached as an Appendix hereto. The Notice must be signed by an authorized agent of the District indicating that the District will comply with the terms of this order. Such posting shall be maintained for a period of thirty (30) consecutive workdays.

Reasonable steps shall be taken to insure that this Notice is not reduced in size, altered, defaced or covered by any material.

3. Written notification of the actions taken to comply with this Order shall be made to the Los Angeles regional director of the Public Employment Relations board in accordance with his/her instructions.

IT IS FURTHER ORDERED that that portion of the complaint alleging that the Compton Community College District unilaterally eliminated classified positions in July and September of 1983 without first negotiating the effects of this Decision with CSEA is DISMISSED.

Chairperson Hesse joined in this Decision. Member Porter's concurrence and dissent begins on p. 28.

Porter, Member, concurring and dissenting: I concur that, as to the issue of negotiating the effects of the layoffs, there was no violation. Regarding the alleged benefits plan reduction violation, I respectfully disagree with my colleagues as I believe the facts establish a business necessity defense as well as a waiver.

The record in this case vividly portrays the steadily worsening financial picture in the District during the two fiscal years preceding the 1983-84 fiscal year. This included various revenue setbacks in the 1981-82 fiscal year which caused the District to obtain a \$750,000 advance apportionment from the Legislature to meet its obligations for that year. Because the District was then faced with being unable to meet its 1982-83 financial obligations if its revenues from the state were offset by the \$750,000, it was able to have the advance apportionment converted into a loan repayable in three years, repayment to commence in the 1983-84 fiscal year.

Further revenue shortcomings occurred during the 1982-83 fiscal year, and the District, with no reserves, had to obtain an additional advance from the state in the amount of \$350,000 to cover its remaining 1982-83 expenditures. The District took various cost-cutting measures during the 1982-83 fiscal year to reduce expenditures, which measures included: the layoff of 24.6 classified personnel; the reduction of the workyear from 12 to 11 months for 19 classified positions; the further layoff of 10 full-time equivalent (FTE) positions in the classified service;

the revision of the class schedule to eliminate 136 part-time positions; the reorganization of the administrative staff to eliminate 8.5 administrative positions; the termination of the Outreach Program; the reduction of support for the Child Development Center in the amount of \$98,000; the elimination of scheduled deferred maintenance on the roof for a savings of \$100,000; and the reduction of all areas of proposed expenditures for supplies and services.

As the 1983-84 fiscal year approached, the District budget committee--which included members from each bargaining unit's exclusive representative, including the Association--developed a tentative 1983-84 budget which showed anticipated expenditures exceeding projected total income by more than \$1,300,000. The District was thus faced with an unbalanced budget, no reserve funds, and the required repayment of the \$1,100,000 in state advance apportionments commencing in the 1983-84 fiscal year. Also, the District was under a constitutional requirement (Cal. Const., art. XVI, sec. 18) to adopt a balanced budget, with a tentative budget to be adopted by July 1, and a final balanced budget by September 6, 1983.

In order to have a balanced budget for the 1983-84 fiscal year, the District had to commence reducing its expenditures in order to achieve the necessary savings and balancing during the 1983-84 fiscal year. Since most of the discretionary cuts in supplies and nonpersonnel expenditures had already been made, the only area left for significant cost cutting was in the personnel

area, which comprised 85 percent of the District's budget. Accordingly, in addition to the previously noted 1982-83 cost-cutting measures, the District, during the summer of 1983, clearly signaled its intention to take the following actions to reduce expenditures: reducing certificated teachers' salaries by 5 percent; reducing District contribution to the "cafeteria plan" health and welfare benefits for all employees and board members to \$2,500; laying off an additional 6.5 classified personnel; reducing the classified staff's workyear to 11 months; increasing the workload for certificated faculty by the equivalent of one extra class; further consolidating administrative assignments to reduce management positions by 2; reducing the managers' workyear to 11.5 months and adding a noncompensated teaching assignment at night to all managers' assignments; stopping the use of District vehicles and eliminating budgeted expenditures for maintenance, repairs and fuel; eliminating matching funds for critical deferred maintenance work; and closing the swimming pool to reduce supplies, utilities and maintenance costs.

It is clear from the record that the District faced a financial crisis in the summer of 1983, as, indeed, the school board declared on August 31, when it implemented the reduction in the benefits contribution from \$2,682 to \$2,500 for each employee. The ALJ, in her proposed decision, recognized that the District faced critical financial problems for the 1983-84 fiscal year. The Association knew of the District's financial plight. The District proposed the benefit plan reduction to the

Association in February 1983, at the very outset of the negotiations, and the parties met approximately 13 times thereafter until impasse on June 22. During the preimpasse negotiations, the District continually attempted to gain the Association's cooperation in moving the negotiations along, and requested that the Association agree to expedite the mediation and fact-finding procedures in the event of no agreement. The Association was uncooperative and informed the District that it would not be willing to expedite the impasse proceedings.

Given the totality of the circumstances herein, I would find that the worsening financial crisis in the summer of 1983, coupled with the events in which the District found itself after it unsuccessfully attempted in good faith to resolve the crisis within the law, present sufficient evidence of a business necessity to excuse the District's unilateral implementation of the benefits reduction.

The majority acknowledges that the District, indeed, faced a financial crisis. However, citing Calexico Unified School District (1983) PERB Decision No. 357, the majority rejects the District's business necessity defense on the theory that the District failed to prove that there was no other available alternative and that there was no opportunity for meaningful negotiations with the Association prior to making the reduction. In Calexico, the school board had a viable alternative for balancing its budget by taking the necessary amount out of its existing reserves fund. While the Calexico school board made a

financial decision that it was not prudent to reduce its reserves fund, the record showed that the alternative nevertheless existed. In the instant case, on the other hand, the District lacked a reserves fund and, moreover, was forced to obtain advance apportionments, in 1981-82 of \$750,000 and in 1982-83 of \$350,000, to meet its financial obligations. Furthermore, the District budget committee, on which an Association representative sat, had established that the proposed expenditures for 1983-84 exceeded projected total revenues by \$1,300,000. In addition, the District was entering the 1983-84 fiscal year in which it had to commence repaying the \$1,100,000 in advance apportionments received from the state. Regardless of whether the District could have obtained a further extension of the September final budget deadline, it still had to begin implementing meaningful cost-saving measures. (See San Mateo Community College District (1979) PERB Decision No. 94, pp. 23-24.) Finally, as to the issue of opportunity for meaningful negotiations, the record reflects the District's repeated unsuccessful attempts to move the preimpasse negotiations along, the Association's uncooperativeness, and the District's unsuccessful attempts to gain the Association's agreement to expedite the negotiations and/or expedite the impasse proceedings.

Independent of the business necessity defense, I would also find that the record in this case sustains the District's waiver defense. The Association was well aware of the District's

financial plight prior to the commencement of the 1983-84 negotiations. The events of 1981-82 and 1982-83, combined with the layoffs, reductions, and other cost-cutting measures undertaken by the District in 1982-83, clearly were not insignificant. When negotiations began in February 1983, the District had already made clear that further reductions, layoffs, and other cost-cutting measures, including reduction of its benefit plan contribution from \$2,682 to \$2,500, would be necessary. It is noteworthy that, under these financial circumstances, the record reveals that the Association proposed that the District raise its contribution from \$2,682 to \$4,000 per employee. The District budget committee, having an Association representative as one of its members, then established that the proposed expenditures exceeded the projected total revenues by \$1,300,000. The record is replete with evidence of the District's notifications to the Association of the need to expedite the negotiations and of the District's numerous attempts to expedite the negotiations on its own. The record also reflects the Association's uncooperativeness, its dilatory negotiating tactics, and its refusal to expedite either the preimpasse negotiations or the mediation and fact-finding procedures.

If, in this case, the District had charged the Association with failing to negotiate in good faith, I would have no trouble finding, from this record, that the Association's conduct amounted to bad faith. In Stockton Unified School District

(1980) PERB Decision No. 143, this Board found the district evidenced bad faith by missing or canceling several meetings, being recalcitrant in scheduling new meetings, unilaterally ending some meetings, renegeing on ground rules, and refusing to discuss substantive issues until new ground rules were established. In Gonzales Union High School District (1985) PERB Decision No. 480, this Board found that the union engaged in bad faith bargaining when it refused to negotiate in the summer, refused to negotiate certain mandatory subjects, refused to negotiate outside of work hours, insisted on discussing ground rules prior to substantive issues, and refused to make counter-proposals. The ALJ therein stated that, among other things, delaying meetings or scheduling infrequent meetings is usually taken as evidence of underlying bad faith.

Here, however, the question is whether such bad faith conduct by the Association constitutes, in effect, a waiver by the Association and thus excuses the District's subsequent unilateral action. While there is no specific precedent addressing whether bad faith conduct equates to a waiver, the following keen observation by this Board in San Mateo Community College District (1979) PERB Decision No. 94, page 22, is on point:

In this regard, the Board is mindful of the particular burdens that public sector finances may impose on employee representatives to reach speedy resolution of hard economic problems. Employee organizations may not shield themselves behind a restraint on unilateral employer actions as a way of avoiding a measure of

responsibility for mitigating or resolving financial dilemmas confronting a public employer.

Where, as here, the record demonstrates that a party engages in what amounts to bad faith negotiating conduct during a dire financial crisis, and refuses the other party's request to expedite the negotiations and/or to expedite the impasse proceedings, I submit that such conduct constitutes a waiver.

I would dismiss the bad faith bargaining charge concerning the District's reduction in its benefits plan contribution.

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-1865, California School Employees Association and its Chapter 45 and Jimmie Thompson v. Compton Community College District in which all parties had the right to participate, it has been found that the District violated Government Code section 3543.5, subdivisions (b) and (e) by unilaterally reducing its benefit plan contributions for classified unit employees without affording the exclusive representative notice and the opportunity to negotiate.

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

A. CEASE AND DESIST FROM;

1. Failing to meet and negotiate through statutory impasse procedures with the exclusive representative by taking unilateral action on matters within the scope of representation, including the unilateral reduction of the benefit plan contribution in September 1983.

2. Denying to the California School Employees Association and its Chapter 45 rights guaranteed by the Educational Employment Relations Act, including the right to represent members.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION DESIGNED TO EFFECTUATE THE POLICIES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT;

1. Unless otherwise agreed to by the parties, compensate any affected unit employee for monetary losses incurred as a result of the reduction of the benefit plan contribution from the date of the change (September 6, 1983)

