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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

UNITED TEACHERS LOS
ANGELES et al.,

Plaintiffs and Appellants,

v.

LOS ANGELES UNIFIED SCHOOL
DISTRICT,

Defendant and Respondent.

B276235

(Los Angeles County
Super. Ct. No. BS149305)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary H. Strobel, Judge. Affirmed.

Trygstad, Schwab & Trygstad, Lawrence B. Trygstad, for Plaintiffs and Appellants.

Marcos F. Hernandez, Associate General Counsel, Los Angeles Unified School District, for Defendant and Respondent.

Defendant and respondent Los Angeles Unified School District (LAUSD) employs classroom teachers and home school teachers. Home school teachers provide one-on-one instruction to students who cannot physically attend their local schools, and the teachers are designated part-time or full-time depending on the number of students assigned to them. Education Code section 45025¹ mandates that pay for part-time teachers “bear[] the same ratio to the amount provided full-time employees as the time actually served by such part-time employees bears to the time actually served by full-time employees of the same grade or assignment.” We consider whether LAUSD is misapplying the statute by including a “conference/preparation” period that a collective bargaining agreement allocates to full-time home school teachers when deciding on the ratio by which part-time teachers (who are not allocated such a preparation period) should be paid.

I. BACKGROUND

A. *Facts*

Petitioner United Teachers Los Angeles (UTLA) represents most non-management certificated LAUSD teachers. These include both traditional classroom teachers and home school teachers. Petitioners Krysia Finley (Finley), Susan Zarakov (Zarakov), and Elizabeth Aronson (Aronson) are or were home school teachers employed by LAUSD.²

Home school teachers provide one-on-one instruction to students who cannot physically attend their local schools, visiting

¹ Undesignated statutory references are to the Education Code.

² Finley and Zarakov are now retired.

students for 60-minute sessions at their homes or in hospitals. The number of students assigned to a home school teacher varies based on the number of students requiring home teaching.

At all times relevant to this action, the employment relationship between LAUSD and petitioners was governed by a 2008-2011 collective bargaining agreement (CBA) negotiated between LAUSD and UTLA. The CBA requires home school teachers to teach between three and five students each day.³ Importantly for purposes of this appeal, section 35.2(a) of the CBA, which governs home school teacher hours and benefits, states that “[a] full-time assignment shall consist of five days a week of five hours of actual teaching and one conference/preparation period per day.”⁴

Home school teachers’ pay depends on the number of students assigned to them. Teachers with the maximum of five students assigned to them receive full-time pay. Prior to 2011, teachers with four students assigned to them received 4/5 (80%)

³ When there are not enough students for each home school teacher to satisfy the minimum of three students, the CBA provides that these teachers will receive special temporary assignments.

⁴ There is evidence in the record that “[b]ack in 1999 and 2000, proposals were made during the course of labor negotiations to provide part-time home school teachers with fractional pay for a conference/preparation period. The proposed language . . . [was]: ‘Contract Home School Teachers assigned less than five students shall receive the same fraction of preparation time as the fraction of assignment bears to a full-time assignment.’” These proposals were not ultimately accepted for inclusion in any agreement.

of full-time pay, and teachers with three students assigned to them received $\frac{3}{5}$ (60%) of full-time pay.

In 2011, however, Joe Salvemini (Salvemini), the principal to whom home school teachers report, sent home school teachers a memo announcing a change to their compensation scale based on LAUSD's re-evaluation of the applicable legal and contractual requirements. The memo states that for the 2011-2012 school year, "home teachers who have a full-time assignment (5 students assigned to their full-time roster), will be provided the conference period associated with that full-time assignment, together with its commensurate pay." In other (and more direct) words, the memo informed part-time teachers that they were not entitled to a conference/preparation period and would no longer be paid a pro-rata share of full time pay as if they had worked a pro-rata share of such a period.

In mathematical terms, the Salvemini memo meant LAUSD would calculate part-time pay using a pay ratio denominator of 6 (5 students plus the CBA-granted preparation period) rather than a denominator of 5 (5 students only). Under the revised pay scale, home school teachers who had four students assigned to them saw their pay reduced from $\frac{4}{5}$ (80%) of full-time pay to $\frac{4}{6}$ (66.67%) of full-time pay. Teachers who had three students assigned to them saw their pay reduced from $\frac{3}{5}$ (60%) of full-time pay to $\frac{3}{6}$ (50%) of full-time pay.

B. Procedural History

UTLA has challenged the revised pay scale in multiple fora. First, an arbitrator resolved a grievance filed by UTLA alleging that LAUSD violated the CBA by failing to compensate part-time home school teachers for preparation time. The arbitrator found

this arrangement did not violate the CBA. The arbitrator’s grant of authority under the CBA, however, did not extend to addressing the legal requirements of section 45025. Petitioners also filed an Unfair Practice Charge with the Public Employment Relations Board, but the challenge was subsequently withdrawn.

Petitioners then filed this action seeking a writ of mandamus and declaratory relief. Petitioners claimed the revised 2011 pay scale violated section 45025’s requirement that the ratio of part-time to full-time pay equal the ratio of time actually served by part-time and full-time teachers. The thrust of petitioners’ argument was (1) LAUSD had long paid part-time teachers based only on the number of students taught and (2) the CBA’s allocation of a conference/preparation period to full-time home school teachers “does not really change anything because[] [¶] . . . Home School Teachers do not have a conference/preparation period.”

As evidence in support of their writ petition, petitioners submitted virtually identical declarations from Finley, Zarakov, and Aronson, as well as an attorney declaration from Lawrence B. Trygstad. Finley, Zarakov, and Aronson all stated, among other things, that “Home School Teachers do not work in periods and therefore do not have conference periods.” But they did not include any facts in their declarations concerning whether they performed any preparation work when teaching only three or four students, and they accordingly also did not address how much of any such preparation time was required.⁵ Rather, their briefing

⁵ An exhibit to Finley’s declaration, labeled “Relation to Formula Set Forth in CA Ed Code 45025,” includes—without further elaboration or explanation—an assertion that “[t]eachers with fewer students also need their numerators proportionally

in support of the petition rested solely on the observation that “[i]t is axiomatic” that teaching fewer than five students requires precisely the same pro rata amount of time, including preparation time, as would be required for teaching five home school students.

At a hearing to consider petitioners’ request for writ relief, petitioners took a different tack than they had in their briefing (or at least markedly changed their points of emphasis). They asserted their argument was premised not only on the negative theory that full-time teachers do not serve a conference period, but also on the affirmative theory that “if the District wants to say, well, [full-time teachers] get a preparation period, then a part-time teacher has to get a percentage of that compensation because they are actually putting in that time”

The change was not lost on the trial judge, who observed: “[T]his argument that is being presented today is not the theory on which the writ was based. The theory throughout the opening writ was that the denominator should be five, not six, because the Home School teachers were not using this conference time. So that’s the theory under which the Court analyzed whether the evidence that was presented and the theory was presented, whether there was a violation of the statute.” Counsel for petitioners acknowledged he had only “said in the brief it’s axiomatic” that “everybody has to prepare” and that “[i]f you have to prepare for three students, that takes three[-]fifths of the amount of time it would take to prepare for five students.” But counsel stated “if there’s any doubt in Your Honor’s mind, I would

adjusted because all home teachers must prepare, regardless of how many students they teach.”

ask the indulgence of the Court to let me call just one of the petitioners to state that for the record,” noting counsel “thought that was implicit in . . . everything that we—that we said.” The court denied petitioners’ request for an opportunity to present live witness testimony (or to continue the hearing for submission of additional evidence) and announced it would deny the writ petition and prepare a statement of decision.⁶

The trial court’s statement of decision found petitioners had not satisfied their burden “to establish, by the preponderance of [the] evidence, that full-time Home School Teachers do not actually work the preparation period.” The court observed that “[p]etitioners’ theory, as presented in their opening brief, is not that part-time Home School Teachers actually serve time in conference/preparation; rather the theory is that full-time Home School Teachers do not work or ‘actually serve’ the conference/preparation time allotted to them in the CBA. [Citation.] However, there is no substantial evidence in the record to support that assertion. . . . Although Petitioners claim that Home School Teachers do not have ‘conference periods,’ they do not claim that full-time Home School Teachers do not use their assigned preparation periods. Moreover, Petitioners do not show personal knowledge as to whether other full-time Home School Teachers actually serve the preparation period.”

⁶ In this appeal, petitioners do not challenge the trial court’s denial of their request to present live testimony or further written evidence.

II. DISCUSSION

Petitioners argue the conference/preparation period granted only to full-time home school teachers by the CBA “bears no relationship to the ‘time actually served’ mandate of [section] 45025.” They claim both that the preparation period is a fiction and that part-time and full-time home school teachers spend the same amount of time preparing for each student.

Under the governing standard of review, we are not persuaded. There is no evidence in the record that undermines the trial court’s conclusion that petitioners did not carry their burden to demonstrate full-time home school teachers do not actually serve the preparation period they are allocated by the CBA. Similarly, there is also no substantial evidence that part-time home school teachers prepare to teach fewer than five students, or if they do prepare, that they do so in precisely a proportional amount to the time spent on preparation by a full-time five-student teacher.

A. *Standard of Review*

Petitioners sought a writ of mandate pursuant to Code of Civil Procedure section 1085, subdivision (a). This relief is available only if a petitioner demonstrates both “a clear, present and ministerial duty” on the part of respondent and “a clear, present and beneficial right to performance of that duty.” (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916.) In reviewing a judgment either granting or denying a writ of mandate, we apply the substantial evidence standard to the court’s factual findings but independently review questions of law. (*McMahon v. City of Los Angeles* (2009) 172 Cal.App.4th 1324, 1331; *James v. State of*

California (2014) 229 Cal.App.4th 130, 136; *Cox v. Los Angeles Unified School Dist.* (2013) 218 Cal.App.4th 1441, 1444.)

B. Analysis

1. Section 45025 and “time actually served”

Section 45025 establishes a mandatory ratio between part-time and full-time teachers’ salaries. It provides in pertinent part that, “[i]n fixing the compensation of part-time employees, governing boards shall provide an amount which bears the same ratio to the amount provided full-time employees as the time actually served by such part-time employees bears to the time actually served by full-time employees of the same grade or assignment.”

In *California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, our Supreme Court construed identical language in section 45025’s predecessor, former section 13503.1. The Court considered whether the statute obligated the defendant community college district to calculate the pay of part-time instructors based on “classroom hours only” or rather based on all time “working on the job, including time spent both inside and outside of the classroom.” (*Id.* at p. 697.) The Court held the latter was the correct interpretation. (*Id.* at p. 702.) Courts have since reiterated that, although part-time instructors need not be compensated for voluntary non-teaching activities, they are to be compensated for time actually served performing work “expected” of them. (*Rooney v. San Diego Community College Dist.* (1982) 129 Cal.App.3d 977, 983; *Ferris v. Los Rios Community College Dist.* (1983) 146 Cal.App.3d 1, 7-8.)

2. *Reversal is not warranted on this record*

The trial court found that the 2011 pay scale did not violate section 45025. The court explained that petitioners failed to satisfy their burden to show a clear, present, and ministerial duty to revert to the pre-2011 pay scale because, despite arguing that full-time home school teachers do not actually serve a *conference* period, they failed to show that full-time home school teachers do not actually serve a *preparation* period. Petitioners contend that the trial court was mistaken because (1) LAUSD's responses to petitioners' requests for admission establish that full-time teachers do not actually spend an hour preparing for their lessons and (2) all home school teachers spend the same amount of time preparing for each student. Petitioners failed to develop a record to support either theory.

Petitioners contend LAUSD's responses to their requests for admission establish LAUSD reduced part-time home school teachers' pay solely to comply with the CBA. For example, LAUSD admitted that "prior to July 1, 2011, pay for part-time Home School Teachers was calculated in a manner inconsistent with the dictates of the [CBA]," but "effective July 1, 2011, pay for part-time home school teachers was adjusted to be consistent with the dictates of the [CBA]." The argument appears to be that if LAUSD reduced part-time teachers' pay for no reason other than to comply with the CBA, it must not have considered time actually worked.

Petitioners' only support for this assumption is the fact that, in their words, the CBA "does not even state how long the artificial conference/preparation period is." The CBA provides that a full-time day consists of "five hours of actual teaching and one conference/preparation period." But as the trial court

correctly found, “[p]etitioners have not submitted any evidence that would suggest the conference/preparation period negotiated in the CBA is not one hour,” and “[t]he burden is on [petitioners] . . . to show that [LAUSD’s] calculation is incorrect.” (*California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1154.)

Petitioners also persist in arguing it is self-evident that all home school teachers must spend the same amount of time preparing for each student taught. Typing a sentence into a brief, even with the label “axiomatic,” is no substitute for evidence—and there was no substantial evidence on this point introduced below. Despite submitting three declarations from three separate teachers, none of the declarations competently address what preparation a part-time teacher engages in, and none says anything about whether or why any such preparation would be directly proportional to the time a full-time teacher spends on preparation during the CBA-allocated preparation period.⁷ Petitioners had the burden to establish LAUSD had a ministerial duty to calculate part-time pay as they would have it (*California Correctional Peace Officers Assn. v. State Personnel Bd.*, *supra*, 10 Cal.4th at pp. 1153-1154), and petitioners’ evidence was simply not up to the task.

⁷ There are good reasons to be skeptical that preparation time would be precisely proportional. It is certainly plausible that necessary preparation time increases exponentially with each additional student added, rather than simply in direct proportion. But the key to resolving this appeal is that there was no evidence, backed by adequate foundation, that addresses the issue.

DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

KIM, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.