STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

WALNUT VALLEY EDUCATORS ASSOCIATION,	)	
	)	
Charging Party,	)	Case NO. LA-CE-516
	)	
v.	)	PERB Decision No. 289
	)	
WALNUT VALLEY UNIFIED SCHOOL DISTRICT,	)	February 28, 1983
	)	
Respondent.	)	

Appearances: Sandra H. Paisley, Attorney for Walnut Valley Educators Association; Patrick D. Sisneros, Attorney (Wagner & Wagner) for Walnut Valley Unified School District.

Before Gluck, Chairperson; Tovar and Jaeger, Members.

DECISION

JAEGER, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Walnut Valley unified School District (District) to the hearing officer's proposed decision finding that the District violated subsections 3543.5(a) (b) and (c) of the Educational Employment Relations Act (EERA)[1] when it unilaterally adopted and

[1]The Educational Employment Relations Act is codified at Government Code section 3540 et seq. All statutory references are to the Government Code unless otherwise noted.

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

It shall be unlawful for a public school employer to:

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

applied an evaluation policy governing the issuance of certificates of competence to certificated employees over the age of sixty-five (65) and refused to negotiate with the Walnut Valley Educators Association (Association), the exclusive representative of certificated employees, concerning such policy and application.

The District's refusal to negotiate this matter is conceded. However, the District contended it was not required to negotiate because the matter was not within the scope of representation. The hearing officer found the matter to be within the scope of representation because "the process used by the District to determine the continued status of certificated employees past the age of 65 related to the "procedures to be used for the evaluation of employees."

The District also asserted three affirmative defenses to the charges: (1) the charge was time-barred, (2) Education Code section 23922 required the District to unilaterally adopt Policy No. 6460 and (3) the Association contractually waived the right to negotiate by agreeing to include retained rights

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> 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.

and conclusiveness of agreement clauses in the collective negotiating agreement.

The hearing officer found that the charge was not time-barred because the District failed to timely assert the defense in answer to the original charge or the amended charge. He concluded:

> By its failure to timely plead the statute of limitations or to provide evidence of extraordinary circumstances excusing such untimely filing, the District waived its right to assert the statute of limitations as an affirmative defense.

The hearing officer found that Education Code section 23922 did not require the District to act unilaterally because "unless the statutory language clearly evidences an intent to set an inflexible standard of insure immutable provisions, the negotiability of a proposal should not be precluded. Since nothing in Education Code section 23922 impelled a governing board to take unilateral action, the Distrtict should have met both of its obligations by promulgating the rules and regulation through the negotiating process." (Citations omitted.)

Finally, the hearing officer found that the Association did not contractually waive its right to negotiate because "neither the language of Article XIV nor the bargaining history indicates that the Association has clearly and unmistakably waived its right to negotiate the change in evaluation procedures . . . . In addition, the Association did not waive

its right to negotiate by any other demonstrated behavior . . . even if this zipper clause could be construed to preclude the Association from demanding negotiations during the life of the agreement, it cannot be seen to grant the District the right to make unilateral changes in matters within the scope of representation."

FACTS

The Board has reviewed the entire record in this matter, including the hearing officer's findings of fact. Finding them to be substantailly free from prejudicial error, we adopt and incorporate them herein. We affirm the hearing officer's conclusions of law insofar as they are consistent with the discussion below.

DISCUSSION

The Association charged that the District refused to negotiate "regarding continued employment of bargaining unit members beyond the age of 65" and that the District unilaterally adopted policy No. 6460 which "sets forth rules and regulations governing the certification of competency for teachers beyond the age of 65."[2]

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[2]Charging Party Exhibit 1 entitled, "Regulation 6460," provides in relevant part:

> The superintendent shall evaluate the employee's request . . . . The evaluation may include, but shall not be limited

The Procedure for Evaluating

Initially, we note that the policy at issue dictates both the procedure and the criteria for evaluating the continued employment of certificated personnel beyond the age of 65.

Subsection 3543.2(a) states in relevant part:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean . . . procedures to be used for the evaluation of employees . . .

> to, any or all of the following factors:
>
> 1. The capabilities of the employee.
> 2. The employee's effectiveness as a teacher.
> 3. The employee's classroom management and control.
> 4. The employee's professionalism.
> 5. The employee's planning and preparation.
> 6. The employee's mental and physical health.
>
> The policy also requires employees who wish to continue employment to file a written request with the superintendent before December 31 of the year in which he/she turns 65. It also allows an employee to request reemployment for all or part of the next school year and provides that retirement can become effective prior to the completion of a school year.

Thus, those aspects of Policy No. 6460 which set forth the procedure for evaluating certificated employees are negotiable.[3]

The Criteria for Evaluating

The face of the charge, as well as the record before the Board, demonstrates that the Association sought negotiations concerning the entire policy, including the criteria the District would employ in determining whether to continue the employment of certificated personnel over the age of 65.

In Anaheim Union High School District (10/28/81) PERB Decision No. 177, the Board developed a test for determining whether a subject not specifically enumerated in section 3543.2 is within scope. In Holtville Unified School District (9/30/82) PERB Decision No. 250, rev. den. (11/19/82) 4 Civil No. 28419, hg. den. (12/8/82), the Board applied Anaheim, supra to conclude that the criteria to be used in determining whether to terminate employees who have reached 70 years of age is negotiable. The Board stated:

> . . . we find that the subject of mandatory retirement clearly is of concern to both

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[3]They are: (1) the employee must submit by December 31 a request to continue, (2) a physical and/or psychological examination may be required, (3) the board considers the matter in executive session, (4) the decision of the board is final, (5) failure to submit a request results in retirement and (6) for the 1978-79 school year the request must be submitted by April 1, 1978.

management and employees and likely to create conflict because of its profound effect on a most fundamental aspect of employer-employee relations -- termination of employment. Further, the process of collective negotiations is a viable means of resolving such disputes since it furthers the statutory objective of bringing a matter of mutual vital concern within the framework of peaceful, private resolution and provides employees with the opportunity to dissuade the employer or offer alternatives to the employer's chosen course of action.

Anaheim requires that the Board exclude from scope those matters which so lie at the core of entrepreneurial control or which are of such fundamental policy that the duty to bargain about them would significantly abridge the employer's freedom to manage the enterprise or achieve the District's mission. Here, the District has offered no evidence that teachers of seventy years of age or over, as a class, are incompetent or otherwise unfit for continued employment . . . .

The remaining prong of the Anaheim test is to determine to which subjects enumerated in section 3543.2, if any, the subject of mandatory retirement is reasonably and logically related.

Probably the most fundamental aspect of the employment relationship is its continuity under lawful terms and conditions. Where termination policies are not the result of preemptive statutory requirement,

> the employee loses his job at the commmand of the employer; . . . the effect upon the "conditions" of the person's employment is that the employment is terminated; and, we think . . . the affected employee is entitled under the Act to bargain collectively through his duly selected representatives concerning such termination. Inland Steel Co. 1948 77 NLRB 1

> [21 LRRM 1316], enforced (7th Cir. 1948) 170 F.2nd 247 [22 LRRM 2505], cert. denied (1949) 356 U.S. 960 [24 LRRM 2019].

The retirement policy at issue in Holtville, supra, vested three district-appointed educators with complete discretion to "consider the competency of teachers . . . who wish to continue." Thus, unlike Policy No. 6460, specific criteria and procedures were not established as part of the Holtville District's policy. Nonetheless, in concluding that both aspects were negotiable the Board held:

> Because of the pervasive impact of compelled retirement on the subjects enumerated in section 3543.2, we cannot limit negotiation of such a policy to the procedures to be employed in determining whether aged employees are to be retained or terminated. To so limit bargaining is to give management virtually unlimited and total control over this fundamental employment relationship which the Legislature intended to be subject to the collective negotiation scheme. Without the opportunity to negotiate the standards for compelled retirement, the employee would be limited to little more than deciding through which door he or she must exit.

In this matter, the hearing officer did not address the distinction between criteria and procedure. Instead he found the entire policy to be within scope. Upon review, however, the dual nature of the policy is noted.

Policy No. 6460 states that:

> . . . the evaluation may include, but shall not be limited to any or all of the following factors:

1. The capabilities of the employee.

2. The employee's effectiveness as a teacher.

3. The employee's classroom management and control.

4. The employee's professionalism.

5. The employee's planning and preparation.

6. The employee's mental and physical health.

These six factors amount to criteria for determining competency to continue employment because they establish the areas the District will evaluate. As such they are negotiable because they relate to wages, hours and terms and conditions of employment. This matter is of such concern to both the employees and the employer that conflict is likely to occur for it touches the most fundamental aspect of the employment relationship, its continuity. The mediatory influence of collective negotiations would help to assure that all concerned have the opportunity to discuss a matter of mutual interest within the framework of peaceful, private resolution. Finally, the evidence does not indicate that these six items are issues of fundamental policy which would significantly abridge the employer's freedom to manage the enterprise or achieve its mission. We conclude, therefore, that Policy No. 6460 in its entirety, including both the procedure and the criteria to be employed in evaluating the competency of employees over 65 to continue employment was negotiable.

The Charge Was Not Barred

The District asserted at trial and on exception that the charge in this matter was time-barred by the six-month statute of limitations contained in subsection 3541.5(a)(1)[4] and PERB regulation 32640(f).[5] The District did not raise this defense in either its initial answer or in its answer to the Association's amended charge. This defense was raised by the District for the first time during the Association's case in chief at the unfair labor practice hearing.

The hearing officer made two discrete findings concerning the statute of limitations defense. He found the District had

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[4]Subsection 3541.5(a)(1) states:

> Any employee, employee organization, or employer shall have the right to file an unfair practice charge, except that the board shall not do either of the following: (1) issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the filing of the charge; . . .

[5]PERB regulations are codified at California Administrative Code, title 8, section 31001, et seq. PERB regulation 32640(f) was amended effective September 20, 1982. The identical rule is now contained at 32644(c)(6) of the regulations.

PERB regulation 32640(f) stated:

> The answer . . . shall contain . . .:
>
> . . . . . .
>
> (f) A statement of any affirmative defense; . . .

waived its right to assert the statute of limitations because of its failure to timely raise it or demonstrate extraordinary circumstances excusing the failure as required by subsection 3541.5(a)(1) and PERB Regulation 32640(f). Additionally, he concluded that the violation asserted, the refusal to meet and negotiate concerning Policy No. 6460, was such that courts would consider it continuing in nature. Thus, he found that the "statute of limitations does not apply to the continuing violation occurring within six months prior to the filing of this charge."[6]

It is a well-settled principle of California law that the statute of limitations is a personal privilege which must be affirmatively invoked by appropriate pleading or it is waived. 3 Witkin Cal.Procedure (2d. ed) Procedure section 939. The defense must be asserted either by demurrer or affirmatively in the answer. Stafford v. Russell (1953) 117 CA 2d 319. Thus, under Califoria law, the District waived this defense by failing to raise it in a timely fashion. Travelers Indemnity Co. v. Bell (1963) 213 Cal.App.2d 541; Mitchell v. County Sanitation District (1957) 150 Cal.App.2d 366. PERB regulation 32640(f) is in accord with California civil procedure.

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[6]Since we conclude that the District's failure to timely plead waived its right to assert the statute of limitations as a defense, it is unnecessary to reach this finding of the hearing officer. Thus this conclusion concerning the continuing violation theory was not considered by the Board and we reserve comment until a time when the issue is squarely before us.

In the federal sector, the courts require affirmative defenses be raised in the answer or, alternatively, by motion to dismiss or for summary judgment. 5 Federal Practice and Procedure, Wright and Miller, 300. Similarly, the National Labor Relations Board (NLRB), interpreting section 10(b) of the National Labor Relations Act which is virtually identical to section 3541.5(a) of EERA, holds that the statute of limitations is not jurisdictional but is an affirmative defense which must be timely raised in the answer or it is waived. Chicago Roll Forming Corp. (1967) 167 NLRB 916, [66 LRRM 1228] NLRB v. A. E. Nettleton Co. (2nd Cir 1957) 241 F2d 130.[7]

The District's additional contention on exception concerning the statute of limitation, appears to assert that the hearing officer should not have relied on facts that occurred before the six-month period preceding the filing of the charge. This exception fails to take into account a well-settled principle of law. The application of the policy and procedure for certifying the competency of employees occurred well within the statutory period. The District's earlier conduct is considered only for the purpose of clarifying the conduct at issue today. Events occurring

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[7]It is appropriate for the Board to take guidance from federal labor law precedent when applicable to public sector labor relations issues. Firefighters Union, Local 1186 v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507]; Los Angeles County Civil Service Commission v. Superior Court (1978) 23 Cal.3d 65 [151 Cal.Rptr. 547].

outside the six-month statute may be relied upon to shed light on the actionable conduct. Potlatch Forests Inc., 87 NLRB 1193, [25 LRRM 1192]; Local 1418, International Longshoreman's Association 102 NLRB 720 [31 LRRM 1365]; NLRB v. General Shoe Corp. 192 F2d 504 [29 LRRM 2112].

The Education Code did not Require the District to Act Unilaterally

The District asserts that the portion of Education Code section 23922 which allowed the governing board of a school district to adopt rules concerning the certification of competency of employees over 65 years of age gave the District the power to adopt a certification policy without negotiating with the Association.[8]

The Board has reviewed the record in light of the hearing officer's findings of fact and conclusions of law respecting this issue. The Board finds that they are substantially free from prejudicial error; thus we adopt and incorporate them herein.

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[8]Education Code section 23922 provided in relevant part:

> . . . any member who has attained age 65 and desires to continue in employment beyond the age of normal retirement shall have the right to do so upon the certification by his employer pursuant to rules and regulations adopted by each respective retirement board or governing body that he is competent . . . (Added by Stats 1977, c. 852 section 2, effective 9/16/77, repealed by Stats 1979, c.796 section 13 effective 9/5/79.)

The Association did not Contractually Waive its Right to Negotiate This Issue

The District asserts that the Association waived its rights to negotiate this issue by agreement to Article XIV - Conclusiveness of Agreement and Article II - Retained Rights, Provisions in the Contract.[9]

The Board has reviewed the record in light of the hearing officer's findings of fact and conclusions of law respecting this issue. The Board finds that they are accurate and substantially free from prejudicial error, thus we adopt and incorporate them herein.

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[9]Article II provides in pertinent part:

> 1.0 It is understood and ackowledged that the Board retains and reserves unto itself all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the statutes of the State of California.
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> 2.0 The rights of management not expressly limited by the clear and explicit language of this Agreement are expressly reserved to the Board even though not enumerated, and the express provisions of this Agreement constitute the only contractual limitations upon the Board's rights.

Article XIV provides:

> During the term of this Agreement, both parties expressly waive and relinquish the right to meet and negotiate and agree that either party shall not be obliged to meet and negotiate, except by mutual consent of both parties, with respect to any subject or matter referred to or covered in this Agreement.

The Issue of the Negotiability of Policy No. 6460 is Not Moot

Finally, the District asserts that the issue of whether Policy No. 6460 is negotiable is moot because of subsequent legislation.[10]

The Board has reviewed the record in light of the hearing officer's findings of fact and conclusions of law respecting this issue. Additionally, the Board notes that pursuant to the Board's holding in Holtville, supra, p. 10, the duty to bargain is not suspended by Education Code section 44906, which provided at the relevant time:

> Except in districts situated wholly or partly within the boundaries of a city or city and county where the charter of the city or city and county provides an age at which employees, including certificated employees of the districts, shall be retired, when a permanent or probationary employee reaches the age of 65 years, his permanent or probationary classification shall cease and thereafter employment shall be from year to year at the discretion of the governing board.[11]

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[10]See footnote 8, infra.

[11]Section 44906 was amended by Stats 1979, c.471, p. 1628, section 2, effective September 5, 1979, to require:

> Except in districts situated wholly or partly within the boundaries of a city or city and county where the charter of the city or city and county provides an age at which employees, including certificated employess of the districts, shall be retired, when a permanent or probationary employee reaches the age of . . . 70 years,

THE REMEDY

The hearing officer ordered the District to "offer reinstatement . . . to any certificated employee . . . who was denied such employment by virtue of the implementation of policy 6460." He was without authority to order this remedy. Section 44906 of the Education Code required that certificated employees' permanent status and classification be terminated and section 23922 required that their competency be certified in order to continue employment. However, since the Code did not mandate total dismissal and since employees were, nevertheless, dismissed in contravention of the District's duty to negotiate without any showing of cause, it is appropriate to provide the means by which the employees may be made whole while at the same time protecting the District from the obligation to continue the services of employees who might have been terminated if the District's initial action were lawful.

The Board finds it appropriate to order that Mrs. Gallucci be paid at the rate she would have received had she been reemployed as a year-to-year teacher from the date she would have been so reemployed, less any retirement benefits she received, until one of the following conditions is met:

> his or her permanent or probationary classification shall cease and thereafter employment shall be from year to year at the discretion of the governing board.

1. The status of Mrs. Gallucci is determined pursuant to a negotiated procedure for mandatory retirement which conforms to Education Code 44906 or after final impasse has been reached, or

2. The status of Mrs. Gallucci is determined pursuant to a settlement agreement reached by the parties.

The Board will also order the District to cease and desist from further implementation of its unlawful unilateral policy and direct the parties to negotiate a procedure for mandatory retirement upon request. The District will also be required to post a Notice to Employees.

ORDER

Based on the entire record in this case, the Public Employment Relations Board finds that the Walnut Valley Unified School District violated subsections 3543.5(a), (b), and (c) by unilaterally adopting an evaluation policy governing the issuance of certificates of competence to certificated employees over the age of sixty-five (65) and by refusing to negotiate such policy with the Walnut Valley Teachers Association, the exclusive representaive of certificated employees, and by terminating employee Helen Gallucci, pursuant to such unlawful unilateral policy. The Board ORDERS that:

The Walnut Valley Unified School District shall:

A. CEASE AND DESIST from:

(1) Implementing its unilateral procedure for evaluating the competency of employees over the age of 65; and

(2) Refusing to negotiate with the Walnut Valley Teachers Association about a procedure for evaluating the competency of certificated employees of the District over the age of 65.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

(1) Pay to Helen Gallucci the sum of money she would have received had she been reemployed as a year-to-year teacher from the date she would have been so reemployed until the District determines that she shall be terminated or employed as a year-to-year teacher, pursuant to procedures to be negotiated by the parties or until the parties settle the dispute or reach final impasse. This sum shall be reduced by the amount of retirement benefits she received, if any, and augmented by payment of interest at the rate of 7 percent per annum.

(2) Post a copy of the Notice attached hereto as Appendix A for a period of thirty (30) consecutive workdays commencing ten (10) days after service of this Decision and Order upon the District.

(3) Notify the regional director, Los Angeles Regional Office, within twenty (20) calendar days thereafter of the steps it has taken in compliance with this Order.

Chairperson Gluck and Member Tovar joined in this Decision.

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
AN AGENCY OF THE STATE OF CALIFORNIA

After a hearing in the Unfair Practice Case No. LA-CE-516, Walnut Valley Educators Association v. Walnut Valley Unified School District, in which both parties participated, it has been found that the Walnut Valley Unified School Distirct violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act by unilaterally adopting an evaluation policy governing the issuance of certificates of competency to employees over the age of sixty-five (65) and by terminating one certificated employee pursuant to that policy. As a result of these actions, we have been ordered to post this Notice and abide by the following:

A. CEASE AND DESIST from:

(1) Implementing the unilateral procedure for evaluating the competency of employees over the age of 65 years; and

(2) Refusing to negotiate with the Walnut Valley Teachers Association about a procedure for evaluating the competency of certificated employees of the District over the age of 65.

B. TAKE AFFIRMATIVE ACTION TO:

Pay Helen Gallucci at the rate she would have received had she been reemployed as a year-to-year teacher from the date she would have been so reemployed, less any retirement benefits she received, until the date when one of the following conditions is met:

(1) The status of Mrs. Gallucci is determined pursuant to a negotiated procedure for mandatory retirement which conforms to Education Code 44906 or after final impasse has been reached.

(2) The status of Mrs. Gallucci is determined pursuant to a settlement agreement reached by the parties.

This sum shall be augmented by payment of interest at the rate of 7 percent per annum.

WALNUT VALLEY UNIFIED SCHOOL DISTRICT

By _____
Authorized Agent of the District

Dated: _____

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

ORIGINAL PROPOSED DECISION
NOT ATTACHED TO FINAL

PUBLIC EMPLOYMENT RELATIONS BOARD

OF THE STATE OF CALIFORNIA

WALNUT VALLEY EDUCATORS ASSOCIATION, Charging Party, v. WALNUT VALLEY UNIFIED SCHOOL DISTRICT, Respondent.	Unfair Practice Case No. LA-CE-516 PROPOSED DECISION (10/22/80)

Appearances: Sandie Paisley, Attorney for Walnut Valley Educators Association; Patrick Sisneros, Attorney (Wagner & Wagner) for Walnut Valley Unified School District.

Before Bruce Barsook, Hearing Officer.

PROCEDURAL HISTORY

On September 7, 1979, the Walnut Valley Educators Association (hereafter Association) filed an unfair practice charge against the Walnut Valley Unified School District (hereafter District) alleging a violation of section 3543.5(b) and (c) of the Educational Employment Relations Act (hereafter EERA).[1] In essence, the charge alleges that the District refused to meet and negotiate with the Association by

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

unilaterally changing the evaluation procedures for certificated employees over the age of 65.

The Association amended its charge on February 27, 1980 by alleging a violation of section 3543.5(a) in addition to its claim of a violation of section 3543.5(b) and (c).[2]

After an informal conference failed to resolve the dispute, a formal hearing was conducted on April 14, 1980.

Post-hearing briefs were filed and the matter was submitted on July 14, 1980, the date the last brief was filed.

FINDINGS OF FACT

At all times relevant to this case, the District was a public school employer within the meaning of the EERA and the Association, as the exclusive representative of the certificated employees, was an employee organization within the meaning of the EERA.[3]

In late 1977 or early 1978, the president of the Association, Charles Sismondo, learned of the District's intention to adopt a policy regarding certificated employees

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[2]Although not specifically alleged, sec. 3543.5(a) has been considered to be alleged by virtue of the language in the amended charge: "has additionally denied certificated employees their right to form, join and participate in the activities of employee organizations for the purpose of representation as stated in sec. 3543 of the EERA."

[3]Official notice has been taken of the Public Employment Relations Board (PERB) representation case file in Case No. LA-R-83.

who wished to continue their employment past the age of 65. The stated reason for the policy was the effort by the District to conform to a recently enacted Education Code provision. That provision, Education Code section 23922,[4] itself an attempt to conform to a federal mandate rejecting mandatory retirement at age 65 provided employees with the right to continue employment after age 65 upon certification of the "employer pursuant to rules and regulations adopted by each respective. . . governing board."

The collective bargaining agreement then in effect contained a provision on evaluation.[5] The section (Article VII) contained a timetable for evaluations and required that all data collected be related to the employee's job description. The District's proposed policy established a different timetable and included a provision that permitted the District superintendent, in his discretion, to require a physical and/or mental examination of the employee.

The collective bargaining agreement also contained provisions on Retained Rights (Article II)[6] and

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[4]Repealed, Stats. 1979, ch. 796, sec. 13.

[5]Article VII - 1977-79 Agreement. Subsequent agreements contain an identical provision.

[6]Article II provides in pertinent part:

> 1.0 It is understood and acknowledged that the Board retains and reserves unto itself

Conclusiveness of Agreement (Article XIV). Article XIV provided that:

> During the term of this Agreement, both parties expressly waive and relinquish the right to meet and negotiate and agree that either party shall not be obliged to meet and negotiate, except by mutual consent of both parties, with respect to any subject or matter referred to or covered in this Agreement.

No evidence was presented on the bargaining history of the agreement then in existence (1977-79 contract). While there was testimony that the identical provision in the 1979-81 agreement was meant to foreclose either party from negotiating further subjects without the concurrence of the other side, there was no evidence presented indicating that the subject of evaluations for certificated employees over the age of 65 was ever negotiated.

On first learning of the proposed policy, the Association requested that the District negotiate with it regarding the evaluation procedures for certificated employees age 65 and

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> all powers, rights, authority, duties and responsibilities conferred upon and vested in it by the statutes of the State of California.
>
> 2.0 The rights of management not expressly limited by the clear and explicit language of this Agreement are expressly reserved to the Board even though not enumerated, and the express provisions of this Agreement constitute the only contractual limitations upon the Board's rights.

over. The District rejected the Association's demand to negotiate and on March 20, 1978 proceeded to unilaterally adopt the challenged policy, Policy 6460.[7]

On May 15, 1978, the Association filed a grievance regarding the District's adoption of the policy and its application to a member of the negotiating unit, Helen Gallucci. The grievance was denied at Level 1 of the 4 level grievance procedure. However, after the grievance was denied, Mrs. Gallucci was granted a certificate of competence for the 1978-79 school year and the Association did not pursue its grievance.

Between May and September 1978, Mr. Sismondo continued to discuss informally with the District the matter of negotiating the District's evaluation policy. Further requests to negotiate were made orally on September 7, 1978 and in writing on May 8, 1979 and August 8, 1979. These requests to negotiate were all denied.

In spring 1979, the challenged policy was applied again to Mrs. Gallucci, this time for the 1979-80 school year. The Association communicated with the Board of Trustees in writing and made an oral presentation at a board executive meeting

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[7]Regulations were adopted pursuant to the Policy and are known as R6460.

regarding the applicable law on mandatory retirement.[8] Nevertheless, on June 11, 1979, Mrs. Gallucci was denied a certificate of competency for the 1979-80 school year.

ISSUE

1. Did the District's refusal to negotiate its implementation of Policy 6460 violate section 3543.5(a), (b) or (c) of the EERA?

CONCLUSIONS AND ANALYSIS

The Association has alleged that the District's unilateral implementation of a policy regulating the continued employment of certificated employees past the age of 65 constitutes a violation of section 3543.5(a), (b) and (c).

Based on a reading of the Association's brief and the evidence it presented in the hearing, it is apparent that its primary concern is that the District's actions indicate a failure to meet and negotiate in good faith, a violation of section 3543.5(c). Consequently, that issue shall be addressed first and the subdivision (a) and (b) allegations discussed later.

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[8]Among other arguments, the Association argued that Gov. Code sec. 7508 superseded Ed. Code sec. 23922 to the extent that sec. 23922 permitted mandatory retirement before the age of 70, (sec. 7508, effective January 1, 1979, prohibits mandatory retirement of specified employees prior to the age of 70). No judgment will be made on the merits of the Association's contention as it is outside this agency's jurisdiction to enforce or invalidate such laws.

Section 3543.5(c) provides that it shall be unlawful for a public school employer to:

> Refuse or fail to meet and negotiate in good faith with an exclusive representative.[9]

Section 3540.1(h) states that "meeting and negotiating" means:

> . . . meeting, conferring, negotiating, and discussing by the exclusive representative and the public school employer in a good faith effort to reach agreement on matters within the scope of representation . . ..

The scope of representation is delineated in section 3543.2 and provides in pertinent part:

> The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment. "Terms and conditions of employment" mean . . . procedures to be used for the evaluation of employees . . ..

Thus, in order for the District to have violated section 3543.5(c) it must be shown that it failed to negotiate with the Association on a matter within the scope of representation.

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[9]Similarly, sec. 8(a)(5) and 8(d) of the National Labor Relations Act (hereafter NLRA), as amended, (29 U.S.C. sec. 151 et seq.) makes it unlawful for an employer to refuse to bargain in good faith with an exclusive representative. Where state legislation is essentially the same as federal legislation, federal precedent offers significant guidance in interpreting the state statute. Fire Fighters Union v. City of Vallejo (1974) 12 Cal.3d 608 [116 Cal.Rptr. 507, 87 LRRM 2453]. San Francisco Unified School District (10/3/78) PERB Decision No. 75. Federal precedent will thus be cited where guidance and interpretation is appropriate.

It is uncontroverted that the District did not meet and negotiate with the Associaton on the District's implementation of the policy regulating the continued employment of certificated employees past the age of 65. Furthermore, it is evident that the process used by the District to determine the continued status of certificated employees past the age of 65 relates to the "procedures to be used for the evaluation of employees." For example, Policy 6460 provides for a timetable for evaluating affected employees different from that provided for in the parties' contract.

Were the examination to end here, the District very well may have been guilty of failing to meet and negotiate in good faith with the Association. However, the District poses a number of defenses which it believes excuses it from liability. An examination of these defenses is therefore in order.

The District first argues that the Association's charge is time-barred by the provisions of Government Code section 3541.5(a) and that the Association has not shown a justification for its late filing. The District first raised this defense during the hearing and it reiterated it in its post-hearing brief.

Section 3541.5(a) provides that the PERB shall not "issue a complaint in respect of any charge based upon an alleged unfair practice occurring more than six months prior to the

filing of the charge . . . ." Section 3541.5(a) is similar to and apparently modeled after section 10(b) of the NLRA[10] which establishes a six-month limitation for complaints issued by the general counsel. Cases interpreting section 10(b) hold that the section "is a statute of limitations and is not jurisdictional. It is an affirmative defense, and if not timely raised, is waived." Chicago Roll Forming Corp. (1967) 167 NLRB 961, 971 [66 LRRM 1228], enf. sub. nom. NLRB v. Chicago Roll Forming Corp. (7th Cir. 1969) 418 F.2d 346 [72 LRRM 2683]. Accord, Shumate v. NLRB (4th Cir. 1971) 452 F.2d 717 [78 LRRM 2905].[11]

Thus, the issue is not, as the District argues, whether the Association timely filed its charge but whether the District timely raised the statute of limitations as a defense. The PERB's regulations provide at Title 8, California Administrative Code, section 32635(a) that the respondent "shall file with the Board an answer to the unfair practice charge within 20 calendar days or at a time set by the Board agent following the date of service of the charge by the Board agent." The rules further provide at Title 8, California

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[10] 29 U.S.C. sec. 160.

[11] See also, Travelers Indemnity Co. v. Bell (1963) 213 Cal.App.2d 541, 547; Mitchell v. County Sanitation District (1957) 150 Cal.App.2d 366, 371.

Administrative Code, section 32640(f) that the answer shall contain "[a] statement of any affirmative defense."

The Association's original charge was filed on September 7, 1979 and amended on February 27, 1980. The District failed to plead the statute of limitations in its two answers. It was not until April 14, 1980, 26 days after the time set for filing the answer to the amended charge, and after the Association began the presentation of its case in chief, that the District first objected to the introduction of evidence about alleged unilateral actions taken by the District with regard to the implementation of Policy 6460.

By its failure to timely plead the statute of limitations or to provide evidence of extraordinary circumstances excusing such untimely filing, the District has waived its right to assert the statute of limitations as an affirmative defense.[12]

In any event, even if one assumes that the District is not precluded from asserting the six-month statute of limitations as a defense the nature of the Association's charge, a continuing refusal to meet and negotiate over the course of approximately 20 months, is such that courts would consider it to constitute a continuing violation: and thus the statute

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[12]The District's implied argument that the Association should be estopped from making its claim because it waited almost 18 months after the promulgation of Policy 6460 before filing its charge is likewise rejected.

of limitations does not apply to the continuing violation occurring within six months prior to the filing of this charge. Cf. NLRB v. Basic Wire Products, Inc. (6th Cir. 1975) 516 F.2d 261 [89 LRRM 2257]; NLRB v. Los Angeles-Yuma Freight Lines (9th Cir. 1971) 446 F.2d 210 [77 LLRM 3076].

The District's second argument is that the governing board of the District was statutorily required to adopt a policy on continuation of employment (Policy 6460). The District notes that it adopted Policy 6460 in order to conform to the 1977 enactment of Education Code section 23922 (repealed Stats. 1979, ch. 796, sec. 13). That section provided in pertinent part:

> Notwithstanding any other provision of law, any member who has attained age 65 and desires to continue in employment beyond the age of normal retirement shall have the right to do so upon the certification by his employer pursuant to rules and regulations adopted by each respective retirement board or governing body that he is competent to do so and the filing of a notice from the member and his employer that the member is continuing in employment.

The District seizes upon the language "pursuant to rules and regulations adopted by each . . . governing board . . ." and argues that the Legislature, acting after passage of the EERA, sought to give governing boards sole authority to adopt such rules and regulations. The District's argument is not persuasive.

As previously indicated, the rules and regulations adopted to certify continued employment have a direct impact on the procedures for evaluating employees and as such they are negotiable. Furthermore, unless the statutory language clearly evidences an intent to set an inflexible standard or insure immutable provisions, the negotiability of a proposal should not be precluded. Healdsburg Union High School District (6/19/80) PERB Decision No. 132. See also, Jefferson School District (6/19/80) PERB Decision No. 133; Sonoma County Office of Education (11/23/77) EERB Decision No. 40. Since nothing in Education Code section 23922 impelled a governing board to take unilateral action, the District should have met both of its obligations by promulgating the rules and regulations through the negotiating process. Its failure to do so is thus not excused.

The District's third argument is that the Association waived any right it may have had to negotiate a policy concerning continuation of employment. As support, the District cites Article XIV - Conclusiveness of Agreement and Article II, section 2.0 - Retained Rights.[13]

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[13]Although sec. 3541.5(b) prohibits the Public Employment Relations Board (hereafter PERB) from enforcing agreements between the parties, by analogy to National Labor Relations Act precedent this Board may analyze a collective negotiations agreement where necessary to the determination of an unfair practice charge. See NLRB v. C & C Plywood (1967) 385 U.S. 421 [64 LRRM 2065]. In addition, it should be noted that the agreement between the parties does not provide for binding arbitration.

It has been recognized that an employee organization may relinquish the statutory right to negotiate if, as part of the negotiating process, it elects to do so. In order to prove that the exclusive representative has waived its right to negotiate, the employer must show either clear and unmistakable language, Amador Valley Joint Union School District (10/2/78) PERB Decision No. 74, or demonstrative behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer. San Mateo County Community College District (6/8/79) PERB Decision No. 94. The burden is on the employer to show that the charging party waived its right to negotiate. San Mateo Community College District, supra.

Article II, section 2.0[14] is part of the description of management's retained rights. It applies only to matters "not expressly limited by the clear and explicit language of this Agreement." Since Article VII - Evaluation explicitly covers the subject of evaluations of certificated employees, Article II cannot be interpreted to authorize unilateral District action.

Article XIV purports to be a waiver or zipper clause.[15] The NLRB has given waiver clauses even greater scrutiny where

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[14]The text of Article II, sec. 2.0 is found at footnote 5, supra.

[15]The text of Article XIV is found on p. 3, supra.

waiver is asserted to justify unilateral action by the employer, as opposed to a request by a union to bargain during the term of a contract. In New York Mirror (1965) 151 NLRB 834, the NLRB held that it "will not find that contract terms of themselves confer on the employer a management right to take unilateral action on a mandatory subject of bargaining unless the contract expressly or by necessary implication confers such right." (151 NLRB at 839-840.) See also, Morris, The Developing Labor Law, pp. 470-471. A broadly written waiver clause will be scrutinized in light of the contract negotiations to determine if the union "consciously yielded" the right to negotiate on the matter in question by inclusion of the waiver language. New York Mirror, supra, pp. 839-840.

In the present case, neither the language in Article XIV nor the bargaining history indicates that the Association has clearly and unmistakably waived its right to negotiate the change in evaluation procedures. There is no mention of evaluation of certificated employees over the age of 65 in Article XIV nor is there evidence that the subject was ever discussed during negotiations. Thus, the Association did not consciously yield its right to negotiate on this particular subject.

In addition, the Association did not waive its right to negotiate by any other demonstrated behavior. To the contrary, as early as December 1977, the Association requested to

negotiate. Thereafter, the Association repeatedly made requests to negotiate. Each request was denied.

Finally, even if this zipper clause could be construed to preclude the Association from demanding negotiations during the life of the agreement, it cannot be seen to grant the District the right to make unilateral changes in matters within the scope of representation.

The District's fourth defense is that because of subsequent legislation the issue of negotiability of the policy has become moot. The District notes that Education Code section 23922, which required a governing board to develop rules and regulations regarding certification for continued employment past age 65, has been repealed and is no longer in effect. The result, according to the District, is that the District is now left with complete discretion to determine whether to continue the employment of an employee who has reached the age of 70.[16]

The issue is not moot, however. It is settled law that where the issues persist beyond the specific case, the case is not rendered moot. See Amador Valley Joint Union High School District, supra (and cases cited therein). In Amador Valley, the PERB was faced with a claim that a charge alleging that the district had acted unlawfully by taking unilateral action on a negotiable matter was moot because of an intervening settlement

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[16]Cf. Ed. Code, sec. 44906.

of the contract as well as a salary settlement in a court action. In ruling that the action was not moot, the PERB noted that the contract was prospective only, and although the monetary effect of the action was remedied by the court order, the order did not deal with the nature of the District's conduct as the matter was not in issue in the civil suit.[17] Similarly in this case, the intervening repeal of the statute in issue does not resolve the issue of the District's action (i.e., taking unilateral action on a negotiable matter). Furthermore, and unlike the situation in Amador Valley, the adverse impact on an individual caused by the implementation of Policy 6460 has not been remedied.

All four of the District's defenses to the allegation that it did not meet and negotiate in good faith have been found to be unpersuasive. Accordingly, it is hereby held that the District violated section 3543.5(c) by its unilateral change in evaluation procedures.

In addition to alleging a violation of section 3543.5(c), the Association has also alleged that this same conduct also violated section 3543.5(a) and (b). Section 3543.5(a) and (b) provides:

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[17]See also, Healdsburg Union High School District, supra, (negotiability of various subjects not rendered moot because of passage of contract year during which the issues arose).

> 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.

In San Francisco Community College District (10/12/79) PERB Decision No. 105, the PERB held that section 3543.5(a) and (b) were derivative violations of a section 3543.5(c) violation. Consequently, the District has also violated section 3543.5(a) and (b) in addition to section 3543.5(c).

In its brief the Association raises the claim that the District has negotiated with individual employees, thus violating section 3543.[18] Assuming the Association was even permitted, at this late date to "amend its charge to conform to proof," and assuming that negotiating with an individual would violate section 3543, the Association has not presented any material evidence to indicate that the District sought to

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[18]Sec. 3543 provides in pertinent part:

> Public school employees shall have the right to form, join, and participate in the activities of employee organizations of their own choosing for the purpose of representation on all matters of employer-employee relations. Public school

negotiate with individual employees. The claim is baseless and consequently dismissed.

Remedy

Under Government Code section 3541.5(c), the Public Employment Relations Board is given:

> . . . 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, . . . as will effectuate the policies of this chapter.

In the present case, the District has violated section 3543.5(a), (b) and (c) by unilaterally changing the evaluation procedures for certificated employees age 65 and above. A remedy requiring the District to return to the status quo ante is appropriate to effectuate the policies of the EERA because it restores, to the extent possible, the positions the parties occupied prior to the unilateral change in the status quo. Plycoma Veneer Co. (1972) 196 NLRB 1009 [80 LRRM 1222]. Consequently, the District shall be ordered to offer

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> employees shall also have the right to refuse to join or participate in the activities of employee organizations and shall have the right to represent themselves individually in their employment relations with the public school employer, except that once the employees in an appropriate unit have selected an exclusive representative and it has been recognized pursuant to Section 3544.1 or certified pursuant to Section 3544.7, no employee in that unit may meet and negotiate with the public school employer.

reinstatement with full back pay and benefits plus interest at the rate of 7 percent per annum[19] to any certificated employee who desired to continue employment with the District and was denied such employment by virtue of the implementation of District Policy 6460. The amount is to be offset by earnings obtained as a result of other employment during this period.

Additionally, it is appropriate to order that the District cease and desist from any further unilateral actions on matters within the scope of representation without providing the exclusive representative notice and an opportunity to negotiate.

It also is appropriate that the District be required to post a notice incorporating the terms of the order. The notice should be subscribed by an authorized agent of the District indicating that it will comply with the terms thereof. The notice shall not be reduced in size. Posting such a notice will provide employees with notice that the District has acted in an unlawful manner and is being required to cease and desist from this activity and to restore the status quo. It effectuates the purposes of the EERA that employees be informed of the resolution of the controversy and will announce the District's readiness to comply with the ordered remedy. See Placerville Union School District (9/18/78) PERB Decision

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[19]Cf. San Mateo County Community College District, supra.

No. 69. In Pandol and Sons v. ALRB and UFW (1979) 98 Cal.App.3d 580, 587, the California District Court of Appeal approved a posting requirement. The U.S. Supreme Court approved a similar posting requirement in NLRB v. Express Publishing Co. (1941) 312 U.S. 426 [8 LRRM 415].

PROPOSED 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(c), it is hereby ordered that the Walnut Valley Unified School District, its governing board and its representatives shall:

1. CEASE AND DESIST FROM

a. Failing or refusing, upon request, to meet and negotiate in good faith with the Walnut Valley Educators Association with respect to matters within the scope of representation as defined in Government Code section 3543.2, and specifically with respect to the unilateral change in evaluation procedures of bargaining unit employees represented on an exclusive basis by the Association, in violation of Government Code section 3543.5(c);

b. Denying the Association its right to represent unit members by failing and refusing to meet and negotiate about matters within the scope of representation;

c. Interfering with employees because of their exercise of their 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.

2. TAKE THE FOLLOWING ACTION WHICH IS DESIGNED TO EFFECTUATE THE PURPOSES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

a. Return to the status quo as of March 20, 1978, when the unilateral change in evaluation procedures for certificated employees age 65 and above, became effective.

b. Offer reinstatement with full back pay and benefits plus interest at the rate of seven (7) percent per annum to any certificated employee who desired to continue employment with the District and was denied such employment by virtue of the implementation of District Policy 6460. The amount is to be offset by earnings obtained as a result of other employment during this period.

c. Within five (5) calendar days after this decision becomes final, prepare and post copies of the NOTICE TO EMPLOYEES attached as an appendix hereto, signed by an authorized agent of the District, for at least thirty (30) workdays at its headquarters office and in conspicuous places at the locations where notices to certificated employees are customarily posted. It must not be reduced in size and reasonable steps should be taken to see that it is not defaced, altered, or covered by any material.

d. Immediately upon completion of the posting period, give written notification to the Los Angeles Regional Director of the Public Employment Relations Board, of the actions taken to comply with this order.

3. The allegation that the District violated Government Code section 3543 by negotiating with individual employees is hereby DISMISSED.

Pursuant to California Administrative Code, title 8, part III, section 32305, this Proposed Decision and Order shall become final on November 12, 1980 unless a party files a timely statement of exceptions. See California Administrative Code, title 8, part III, section 32300. Such statement of exceptions and supporting brief must be actually received by the executive assistant to the Board at the headquarters office of the Public Employment Relations Board in Sacramento before the close of business (5:00 p.m.) on November 12, 1980 in order to be timely filed. See California Administrative Code, title 8, part III, section 32135. Any statement of exceptions and supporting brief must be served concurrent with its filing upon each party to this proceeding. Proof of

service shall be filed with the Board itself. See California Administrative Code, title 8, part III, sections 32300 and 32305, as amended.

Dated: October 22, 1980

Bruce Barsook

BRUCE BARSOOK
Hearing Officer

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-516, Walnut Valley Educators Association v. Walnut Valley Unified School District, in which all parties had the right to participate, it has been found that the Walnut Valley Unified School District violated Government Code section 3543.5(a), (b) and (c).

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

1. CEASE AND DESIST FROM:

a. Failing or refusing, upon request, to meet and negotiate in good faith with the Walnut Valley Educators Association with respect to matters within the scope of representation as defined in Government Code section 3543.2, and specifically with respect to the unilateral change in evaluation procedures of bargaining unit employees represented on an exclusive basis by the Association, in violation of Government Code section 3543.5(c);

b. Denying the Association its right to represent unit members by failing and refusing to meet and negotiate about matters within the scope of representation;

c. Interfering with employees because of their exercise of their 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.

2. TAKE THE FOLLOWING ACTION WHICH IS DESIGNED TO EFFECTUATE THE PURPOSES OF THE EDUCATIONAL EMPLOYMENT RELATIONS ACT:

a. Return to the status quo as of March 20, 1978, when the unilateral change in evaluation procedures for certificated employees age 65 and above, became effective.

b. Offer reinstatement with full back pay and benefits plus interest at the rate of seven (7) percent per annum to any certificated employee who desired to continue employment with the District and was denied such employment by virtue of the implementation of District Policy 6460. The amount is to be offset by earnings obtained as a result of other employment during this period.

DATED: _____

Walnut Valley Unified School District

By _____

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.