STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

ARVIN ELEMENTARY TEACHERS ASSOCIATION, CTA/NEA,	)	
Charging Party,	)	Case No. LA-CE-1294
v.	)	PERB Decision No. 300
ARVIN UNION SCHOOL DISTRICT,	)	March 30, 1983
Respondent.	)	

Appearances; Charles R. Gustafson, Attorney for Arvin Elementary Teachers Association, CTA/NEA; and Frank V. Fekete Attorney (Schools Legal Service) for Arvin Union School District.

Before Gluck, Chairperson; Tovar and Burt, Members.

DECISION

TOVAR, Member: This case is before the Public Employment Relations Board (PERB or Board) on exceptions filed by the Arvin Union School District (District) to the hearing officer's proposed decision. In that proposed decision, the hearing officer concluded that a procedure for certificated employee discipline short of dismissal (the Policy) is a subject within the scope of representation and the District's failure to negotiate such a procedure with the exclusive representative of the certificated employees, the Arvin Elementary Teachers Association, CTA/NEA (Association), constitutes a violation of subsection 3543.5(c). Further, the hearing officer found that the Association did not waive its right to such negotiations

and concluded that the District violated subsections 3543.5(a), (b) and (c) of the Educational Employment Relations Act[1] (EERA or the Act). The hearing officer's proposed decision is incorporated by reference herein.

The Board has carefully reviewed the record in light of the District's exceptions and adopts the hearing officer's findings of fact as free from prejudicial error. We also adopt his conclusions of law insofar as they are consistent with this Decision.

DISCUSSION

The District asserts it has the inherent authority to impose discipline short of dismissal and that since 1976, it along with all other California school districts, has enjoyed

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[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise specified, all references shall be to the Government Code.

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

> It shall be unlawful for a public school employer to:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter.
>
> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (c) Refuse or fail to meet and negotiate in good faith with an exclusive representative.

the power to discipline through the provision of Education Code section 35160. That section states that:

> . . . the governing board of any school district may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with or inconsistent with, or preempted by, any law which is not in conflict with the purposes for which school districts are established.

We acknowledge the District's inherent right to discipline. However, there is no conflict in the interface of this education code section and the scope of negotiations provision under EERA. Finding that a subject is within the scope of negotiations does not deprive the District of its ultimate authority to discipline. It only means that the District has an obligation to negotiate in good faith prior to the adoption and implementation of such a policy.

The District contends that the Policy at issue in the instant case is a subject which is outside the scope of negotiations, and that it was therefore free to unilaterally adopt and implement it. The scope of negotiations is defined at section 3543.2 of EERA.[2] In Anaheim Union High School

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[2]Section 3543.2 provides as follows:

> (a) 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 health and welfare benefits as defined by Section 53200, leave, transfer and reassignment

District (10/28/81) PERB Decision No. 177,[3] the Board articulated a test to be applied in determining whether a particular matter is within the statutory scope of negotiation. That test provides that a subject is negotiable if it first logically and reasonably relates to wages, hours or one of the enumerated terms and conditions of employment. If this threshold test is met, the proposal will be analyzed in

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> policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to Section 3546, procedures for processing grievances pursuant to Sections 3548.5, 3548.6, 3548.7, and 3548.8, and the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code. In addition, the exclusive representative of certificated personnel has the right to consult on the definition of educational objectives, the determination of the content of courses and curriculum, and the selection of textbooks to the extent such matters are within the discretion of the public school employer under the law. All matters not specifically enumerated are reserved to the public school employer and may not be a subject of meeting and negotiating, provided that nothing herein may be construed to limit the right of the public school employer to consult with any employees or employee organization on any matter outside the scope of representation.
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> . . . . . .

[3]The hearing officer and the parties refer to the Board's scope test enunciated in Healdsburg Union High School District (6/19/80) PERB Decision No. 132. This case is currently on appeal. See Cal. Supreme Court, Docket No. 82-W-0077, (1 Civil 50199).

terms of 1) its degree of concern to the employees and the employer, 2) the suitability of the negotiating process as a means of resolving the dispute and 3) whether the employer's obligation to negotiate would significantly abridge its managerial prerogatives.

In the instant case, the Policy in question contemplates imposition of fines and suspension without pay. Obviously, imposition of a fine directly affects wages, and a suspension without pay directly affects both hours and wages. Thus, the threshold test of negotiability is met.

The District concedes that the Policy has an impact upon wages and hours, but contends that it is merely an "incidental" impact because the penalties imposed are not permanent. Clearly, a fine is a permanent reduction in wages, and a suspension without pay permanently deprives employees of both wages and hours. In addition, a finding, per Anaheim, that a matter bears a logical and reasonable relationship to enumerated subjects does not turn on whether the matter "permanently" affects an enumerated item.

Having found that the disciplinary policy affects enumerated items within scope, we must next evaluate the proposal in light of the other standards set out in the Anaheim test.

The subject of discipline is one of great concern to employees and management alike because it impacts on wages,

hours and benefits, and because such a policy sets the standards of behavior at the work site. It is also one of the ways in which the District may be assured of keeping order and running an effective and professional program.

The subject of discipline is one with a great potential for conflict since the imposition of discipline presumes a confrontation between employer and employee. Collective negotiations regarding procedures for discipline provides a mediatory influence and a forum for conflict resolution. It also provides the employees with an opportunity to assure that the disciplinary criteria and procedures are fair.

We do not find that the unique value of collective negotiations for formulation of criteria and procedures for discipline is outweighed by the extent to which such a requirement would abridge the District's freedom to exercise managerial prerogatives. The District would maintain its inherent right to initiate discipline and retain the authority to determine the manner in which a negotiated disciplinary policy would be applied to a particular situation. In addition, the obligation to negotiate such an issue would not interfere unduly with the District's achievement of its educational mission.

In San Bernardino City Unified School District (10/29/82) PERB Decision No. 255, at p. 11, we held that " . . . rules of conduct which subject employees to disciplinary action are

subject to negotiation both as to criteria for discipline and as to procedure to be followed. The unilateral adoption of such rules therefore violates the employer's duty to notify the exclusive representative and provide it with an opportunity to negotiate."

The holding that disciplinary procedures are within scope is in accord with established precedent under the National Labor Relations Act. See Peerless Publications, Inc. (1977) 231 NLRB 244 [95 LRRM 1611]; Alfred M. Lewis, Inc. (1977) 229 NLRB 757 [95 LRRM 1216]; Schraffts Candy Co. (1979) 244 NLRB No. 89, [102 LRRM 1274].

For the aforementioned reasons we conclude that the Policy is within the scope of negotiations.

The District contends that Healdsburg, supra, which held that procedures for discipline are within scope, is distinguishable because the unit in that case was composed of classified employees whereas the instant case deals with certificated employees. This contention is not persuasive. The District has failed to demonstrate any factors peculiar to classified employees which would render the decision that disciplinary procedures are within scope inapplicable to certificated employees. The Board's decision in Healdsburg is based on an analysis of the scope of representation language of the Act in relation to the proposed disciplinary procedure and not on any employment trait associated exclusively with

classified employees. As noted above, the Board recently held disciplinary procedures to be within scope in a case dealing with certificated employees. San Bernardino City Unified School District, supra.

The District further contends that AB 777 (Chapter 100, Statutes of 1981),[4] which amended the scope language of subsection 3543.2 to expressly include causes and procedures for disciplinary action short of dismissal, is an indication that the Legislature did not intend for such matters to be within scope prior to the effective date of that legislation, January 1, 1982. The District argues that, when the Legislature added the new enumerated subjects to the scope section, it meant that those new subjects were outside scope prior to the amendment.

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[4]AB 777 adds the following to the scope of representation language in Government Code section 3543.2.

> (b) Notwithstanding Section 44944 of the Education Code, the public school employer and the exclusive representative shall meet and negotiate regarding causes and procedures for disciplinary action, other than dismissal, affecting certificated employees. If the public school employer and the exclusive representative do not reach mutual agreement, then the provisions of section 44944 of the Education Code shall prevail.

AB 61 (Chapter 1093), further amended AB777 to provide that negotiation on causes and procedures for dismissal need only take place on request of either the employer or employees.

The addition of a new enumerated subject to the scope section doesn't mean such a subject was not previously related to an enumerated item. The change in the law means that the negotiability of specific procedures for disciplinary action arising after January 1, 1982 no longer need be analyzed in terms of the Anaheim balancing test. We apply our Anaheim test to analyze those items which were not enumerated prior to the effective date of the legislation, or which are not currently enumerated, but which may be related to an enumerated item within the scope of representation.

Waiver Argument

The District asserts that the Association has waived its right to negotiate regarding the adoption of the Policy. This contention is also rejected.

Current PERB and NLRB precedent support the hearing officer's finding that an exclusive representative's waiver of the right to negotiate must be "clear and unmistakable." In San Mateo County Community College District (6/8/79) PERB Decision No. 94 at p. 22 the Board held that, for an employer to show that a union waived its right to negotiate, it must demonstrate:

> . . .either clear and unmistakable language, Amador Valley Joint Union High School District (citation), or demonstrative behavior waiving a reasonable opportunity to bargain over a decision not already firmly made by the employer. [citations.] (Emphasis added.)

In accord, see Harrison Manufacturing v. UAW (1980) 253 NLRB No. 97 [106 LRRM 1021]; NLRB v. Cone Mills (4th Cir. 1967) 373 F.2d 595 [64 LRRM 2536]; Caravelle Boat (1977) 227 NLRB No. 162 [95 LRRM 1003].

In the instant case the certificated employees came back for orientation during the week of August 25-29, 1980. The governing board of the District had its "first reading" of the Policy on August 6, 1980. The only way the District gave notice of the meeting was to post the agenda at various school locations. This general publication of the board agenda does not constitute effective notice to the exclusive representative of proposed changes in scope matters. It was also not the practice for the Association to attend board meetings unless it was aware of items of special concern to its members. Mr. Mark Salvaggio, the president of the Association, could not recall exactly when he first received the minutes of the August 6 special board meeting. The evidence indicates the earliest he might have had actual notice of the minutes was August 13, when the District and the Association met at the Association's offices for a mediation session. However, he did testify that he certainly had the minutes of the August 6 meeting as of August 22, when the parties had a subsequent mediation session. The governing board adopted the proposed discipline procedure, Policy 5.117, at its meeting on August 21, 1980.[5]

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[5]John Davis, the District superintendent, testified that

The District argues Mr. Salvaggio had an opportunity to comment on the Policy at the mediation session held between the Association and the District on August 22 if not earlier. While this might be true, it is irrelevant to a determination as to whether the right to negotiate prior to a policy's adoption has been waived.

The Association's failure to protest the adoption of the disciplinary procedure until December 30[6] does not constitute a waiver, because the Association did not have a reasonable opportunity to negotiate prior to the adoption of the Policy. It would have been futile for the Association to request negotiations after adoption of the policy on August 21.[7] San Mateo Community College District, supra.

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the notice for regular board meetings is posted 48 hours in advance at the District office and special meetings, 24 hours in advance, also at the District office. He indicated that the board has a policy that it must have a first reading of any policy at a separate board meeting prior to its adoption.

[6]Mr. Salvaggio objected to the District about the policy at a December 30th meeting he had with District Superintendent John Davis, after Salvaggio learned that the policy was to be applied to an employee. Mr. Davis testified that at that meeting Salvaggio said he [Salvaggio] "felt it was an unfair labor practice because we had adopted it unilaterally."

[7]The Policy itself bears the date "6/80" on the bottom of the page. Even if we assume that Mr. Salvaggio had actual notice of the minutes as of August 13, the earliest he could have received a copy, we still do not find that the failure to demand negotiations for eight days constituted a sufficient failure of vigilance to constitute a waiver. In addition, the charge was filed within the six-month statute of limitations applicable to unfair labor practices under the Act. See subsection 3541.5(a)(1).

Request for Oral Argument

The District requests an opportunity to present oral argument before the Board. The only argument it cites in support of such a request is that a decision by the Board that there was no mandatory duty to negotiate on this subject prior to January 1, 1982, will not harm the interests of those who seek to negotiate this subject after January 1, 1982, but a contrary decision will do "wholesale violence to the structure and purpose of the Rodda Act and collective bargaining."

We deny the District's request. The Board has conducted a full and fair hearing. The parties have had extensive opportunity to present briefs in support of their arguments, and have availed themselves of that opportunity. The Board finds the issues and evidence sufficiently clear and complete to render oral argument unnecessary.

The District did not except to the hearing officer's proposed remedy. We hereby affirm the remedy.

ORDER

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

A. CEASE AND DESIST FROM:

1. Violating subsection 3543.5(c) by refusing to negotiate in good faith with the exclusive representative,

Arvin Elementary Teachers Association, by unilaterally adopting a new policy on certificated employee discipline that is within the scope of representation under the Educational Employment Relations Act.

2. Violating subsection 3543.5(a) by interfering with employee rights under the Educational Employment Relations Act by unilaterally adopting a new policy on certificated employee discipline that is within the scope of representation under the Educational Employment Relations Act.

3. Violating subsection 3543.5(b) by interfering with employee organization rights under the Educational Employment Relations Act by unilaterally adopting a new policy on certificated employee discipline that is within the scope of representation under the Educational Employment Relations Act.

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

1. Rescind District Policy 5.117 - Certificated Discipline Short of Dismissal, adopted August 21, 1980.

2. Restore to any certificated employee(s) all salary, rights and privileges such employee(s) would have earned but for the implementation of District Policy 5.117 (8/21/80). Any such retroactive salary shall be accompanied by interest at a 7 percent per annum rate.

3. Delete all references to any attempted disciplinary action(s) from all District records, including but not limited

to, the affected employee(s) personnel records relating to any disciplinary action implemented or initiated pursuant to District Policy 5.117 (8/21/80).

C. Within five (5) workdays after the date of service of this Decision, prepare and post copies of the Notice To Employees attached as an appendix hereto, signed by an authorized agent of the employer. Such posting shall be maintained for at least thirty (30) consecutive workdays at all work locations where notices to employees customarily are placed. Such Notice must not be reduced in size and reasonable steps shall be taken to ensure that they are not defaced, altered or covered by any material.

D. Within twenty (20) workdays from service of this Decision, notify the Los Angeles regional director of the Public Employment Relations Board, in writing, of the steps taken to comply with this Order.

Member Burt joined in this Decision.

Chairperson Gluck's Concurrence and Dissent begins on page 15.

Gluck, Chairperson, concurring and dissenting: I find difficulty in reconciling the majority's conclusions that an employer has the "inherent right" and "ultimate authority" to impose discipline and "determine the manner in which a negotiated disciplinary policy would be applied" but must nevertheless negotiate its proposed policy.

As I see it, the employer's legitimate interest in assuring the orderly processing of its day-to-day operations does not endow it, in pursuit of that objective, with the unilateral power to modify the employees' wages, hours or working conditions. Here, the District's disciplinary policy incorporating suspension from employment directly modifies the employees' wages and hours. It cannot be single-handedly imposed.[1]

The District's argument that Education Code section 35160 relieves it of the obligation to negotiate on discipline, misconceives the supersession requirement. As PERB has repeatedly held, a subject otherwise meeting the Anaheim test of negotiability will be found nonnegotiable where an immutable and contravening Education Code provision precludes the employer from exercising its discretion with respect to a pertinent proposal.[2]

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[1]Government Code section 3543.2.

[2]Healdsburg Union High School District, supra; Jefferson School District (6/19/80) PERB Decision No. 133; San Bernardino Unified School District, supra.

The Code section on which the District relies makes it clear that this constraint does not exist. It reads in pertinent part:

> . . . the governing board . . . may initiate and carry on any program, activity, or may otherwise act in any manner which is not in conflict with . . . or preempted by, any law and which is not in conflict with the purposes for which school districts are established.

Certainly, EERA is not a law which conflicts with such purposes. Indeed, its very thrust is the preemption of unilateral school board power by the bilateral process of negotiations as to those matters the Legislature has chosen to place within scope.

The provision for disciplinary fines; I find this provision of the policy particularly problematical. The policy is remarkably vague, shedding no light on the grounds for or nature of such disciplinary action. Are they intended as punitive assessments against some undefined employee conduct which the District considers objectionable? Are they meant to recover for the District losses it sustains as a result of employee misconduct, much in the nature of compensatory damages or valid offsets against wages?3 Are the fine amounts to be

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3See Kerr's Catering Service v. Department of Industrial Relations (1962) 57 Cal.2d 319, upholding respondent's ruling that the employer's recoupment of daily breakage losses from employee commissions was illegal absent employee negligence or wrongdoing resulting in the losses.

fixed and certain or to be arbitrarily assessed by the District on an ad hoc basis? Absent answers to these questions, the negotiability of this aspect of the policy - indeed, the legality of such a provision4 - cannot be determined.[5]

Section 221 of the California Labor Code provides:

> It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee.[6]

In Shalz v. Union High School District (1943) 58 Cal.App.2d 599, 606, the court, in considering Labor Code section 224, which permits certain employer deductions from wages pursuant to written agreement of the employee, stated:

> The purpose and intent of the Act is plain and its object should not be defeated by overnice construction. (20 Cal. Jur. 981.) It is not the punishment of the offender in the sense ordinarily applicable to the term, but rather the recovery of the penalty as a fixed sum by way of indemnity . . .
>
> We may fairly assume from the wording of section 224 of the Labor Code that it was undoubtedly the express intent of the

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[4]See Chairman Gluck's opinion that a union proposal for fines to be assessed against the school district is not negotiable. Jefferson School District, supra, p. 45.

[5]Jefferson School District, supra, pp. 10, 11.

[6]Applicability of this section and section 224 of the Labor Code to public employees is not clear. The public policy reflected in these sections would appear to pertain to the employees here since section 220 of the Code expressly makes only section 200-211 and 215-219 inapplicable.

> Legislature to allow proper deductions of the kind involved in this appeal. . .[the lower court] held that such charges must bear some reasonable relation to the services furnished, and with such statement of the law we are entirely in accord, (pp. 606, 607.)

And, in People v. Power (1958) 159 Cal.App.2d Supp. 869, it was held that because of the economic position of the average worker and, in particular, his dependence on wages for the necessities of life for himself and family, it is essential to public welfare that he receive his wages when due.

Thus, it seems manifest that employee fines which bear no relation to services furnished and which are intended purely as punitive measures, contravene this Legislative declaration of public policy and were not intended to be included among those negotiable matters listed in section 3543.2. See Morris, Developing Labor Law (1971 Ed.) pp. 435-439; a proposal calling for illegal conduct is not negotiable.

I conclude, therefore, that aside from the matter of unilateral imposition, the charging party is entitled to receive from the District clarification of this portion of the policy in the form of a specific proposal which will enable it to form a belief as to its negotiability.[7]

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[7]Jefferson School District, supra.

The waiver issue; The employer's obligation to give notice to the exclusive representative exceeds that implied in the majority's decision. Since unilateral action on negotiable subjects is prohibited, the employer who wishes to effect changes in such matters must give direct and specific notice to the exclusive representative of its desire to enter into pertinent negotiations. Proper notice cannot be achieved by rumor or announcement intended for another's eyes. It should be in no lesser form than that required of an exclusive representative which seeks to open negotiations.

This does not mean that an exclusive representative having actual knowledge of unilateral action can invariably escape a waiver defense. "Clear and unmistakable" evidence that the representative has consciously relinquished its bargaining right will defeat an unfair practice charge of the kind filed here.[8] Nor do I rule out the possibility that unreasonably prolonged silence or inactivity following such knowledge would have a similar effect. The procedural structure of public agencies, where executive action is undertaken by quasi-legislative boards at periodic public meetings pursuant to public notice and "second reading" requirements, may demand that a more stringent obligation be placed on a protesting organization than that imposed in the private sector.

8Caravelle Boat Co. (1972) 227 NLRB 1335 [95 LRRM 1003].

Be that as it may, the facts here do not support a finding of waiver. Had Salvaggio seen the August 6 minutes prior to August 21, he would have known that the school board deferred action on the policy to a date uncertain. There would have been no pressing need for immediate reaction. He next "heard" of the policy after its adoption. Thereafter, despite its delay in filing the charge, the Association was neither silent nor inactive. Its president met with the school superintendent to get information concerning the policy. Thereafter, it sought legal advice on the matter. Finally, it filed this charge promptly after the first implementation of the policy - and within the six-month period the statute allows.[9] None of these events demonstrate assent or disinterest in the District's action. They contradict the claim that the Association consciously relinquished its right to negotiate.

To the extent indicated, I concur in the findings that the District, by its unilateral adoption of the disciplinary policy, violated subsections 3543.5(a), (b) and (c) of the Act.

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[9]Government Code section 3541.5. This section indicates that "delayed" filings, at least absent special circumstances, are not condemned by the Legislature.

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-1294, in which all parties had the right to participate, it has been found that the Arvin Union School District violated the Educational Employment Relations Act (EERA) by unilaterally promulgating a certificated employee comprehensive discipline procedure short of dismissal and by such action (1) failed to meet and negotiate in good faith with the Arvin Elementary Teachers Association on the subject of the promulgation of such procedure, in violation of subsection 3543.5(c); (2) denied the employee organization rights guaranteed them in violation of section 3543.5(b); and (3) interfered with the employees in their exercise of guaranteed rights in violation of subsection 3543.5(a). As a result of this conduct, we have been ordered to post this Notice and we will abide by the following:

A. CEASE AND DESIST FROM:

1. Refusing to negotiate in good faith with the exclusive representative, Arvin Elementary Teachers Association, CTA/NEA, by unilaterally adopting a new policy on certificated employee discipline that is within the scope of representation under the Educational Employment Relations Act.

2. Interfering with employee rights under the Educational Employment Relations Act by unilaterally adopting a new policy on certificated employee discipline that is within the scope of representation under the Educational Employment Relations Act.

3. Interfering with employee organizations rights under the Educational Employment Relations Act by unilaterally adopting a new policy on certificated employee discipline that is within the scope of representation under the Educational Employment Relations Act.

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

1. Rescind District Policy 5.117 - Certificated Discipline Short of Dismissal, adopted August 21, 1980.

2. Restore to any certificated employee(s) all salary, rights and privileges such employee(s) would have earned but

for the implementation of District Policy 5.117 (8/21/80). Any such retroactive salary shall be accompanied by interest at a 7 percent per annum rate.

3. Delete all references to any attempted disciplinary action(s) under Policy 5.117 from all District records, including but not limited to, the affected employee(s) personnel records relating to any disciplinary action implemented or initiated pursuant to District Policy 5.117 (8/21/80).

DATED: _____ ARVIN UNION SCHOOL DISTRICT

By: _____
Authorized Representative

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