In May 2010, Willet again changed the application form for the approval of college units by adding the statement, "If any of the above courses will be applied towards an advanced degree/credential in Education, please specify." The District distributed the revised forms to school sites so teachers were aware of the criteria before applying for summer courses.

In February 2012, Willet revised the application form for a third time by adding language to include information responding to the most frequently asked questions about course approval. The form was revised to state:

> In general university extension units based on accumulated hours of workshop/conference attendance are not sufficient to warrant salary advancement. Currently, isolated workshops that involve independent study-type follow up activities for courses outside the parameters of a post BA/advanced degree, credential, or certification from an accredited university are not generally approved. All course approval requests are reviewed on an individual basis. It is essential that certificated staff members interested in units for salary advancement seek prior approval before enrolling in a class or registering for a workshop or conference.

Jonathan Kamp (Kamp) teaches geoscience at Turlock High School. In February 2013, Kamp submitted an application for approval of the same Death Valley field study class that Hollister had taken in 2008. After consulting with Willett, Principal Marie Peterson (Peterson) denied the application because the course was an independent field study course that did not qualify for an advanced degree or credential.

On February 11, 2013, the Association requested a copy of the District's Professional Growth Policy. Two days later, District Assistant Superintendent of Human Resources Heidi Lawler (Lawler) responded that she was having difficulty locating a copy, and would respond the following week. In July 2013, after receiving no further response from the District, the

Association again requested a copy of the policy. After a further search, the District located a copy of the policy in the District's historical documents file, and provided it to the Association on August 16, 2013.

DISCUSSION

The District filed two exceptions. Its first exception addresses the ALJ's finding that the District violated EERA when it unilaterally changed the professional growth policy without providing the Association with notice and an opportunity to bargain. The District's first exception objects to the ALJ's exclusive reliance on the District's admission to paragraph 3 of the complaint in outlining the scope of the District's professional growth policy. In its second exception, the District takes issue with the ALJ's finding that the District's six-month delay in furnishing the necessary and relevant information was unlawful, notwithstanding the District's disclosure that it was having "difficulty" locating the requested information.

We address each of these exceptions in turn below.

Unilateral Change

To demonstrate an unlawful unilateral change, the union must prove that (1) the employer took action to change a policy, (2) the change in policy concerned a matter within the scope of representation, (3) the action was taken without giving the union notice and an opportunity to bargain over the change, and (4) the action had a generalized effect or continuing impact on terms and conditions of employment. (*Fairfield-Suisun Unified School District* (2012) PERB Decision No. 2262, p. 9.) The District does not dispute that each of the above requirements were proven. Accordingly, these issues are not before the Board. (PERB Regulation 32300, subd. (c).)

The District's sole exception to this allegation is that the ALJ erred in relying on the District's unequivocal admission to paragraph 3 of the complaint that the professional growth policy was limited to two criteria, instead of the relevant language in the parties' collective bargaining agreement.[3] According to the District, the changes to its professional growth policy merely conformed to the language in the parties' existing collective bargaining agreement and should have therefore been found lawful under *Marysville Joint Unified School District* (1983) PERB Decision No. 314 (*Marysville*).

Under *Marysville*, a past practice of providing benefits more generous than those provided in a collective bargaining agreement may be modified unilaterally if the change merely results in enforcement of the actual terms of the written agreement. (*Marysville, supra*, PERB Decision No. 314.) In order for *Marysville* to apply, however, evidence of the relevant terms of the parties' collective bargaining agreement must be submitted and considered as evidence.

As explained in the proposed decision, the District admitted unequivocally in its answer that prior to February 4, 2013, its professional growth policy had just two requirements: employees required approval before registering for a course, and each employee could take no more than 15 semester units annually. As PERB and the courts have previously held, such an admission in a pleading amounts to a judicial admission which conclusively removes the issue from controversy. (*Regents of the University of California* (2012) PERB Decision

[3] The language contained in the collective bargaining agreement is much broader than the language in the complaint. For instance, unlike the complaint, the collective bargaining agreement language refers to the District's professional growth policy itself, as well as its policy sections. The collective bargaining agreement language also requires that courses approved for salary schedule advancement credit be consistent with a teacher's professional growth plan.

No. 2302-H, proposed decision at p. 15, citing *Pinewood Investors v. City of Oxnard* (1982) 133 Cal.App.3d 1030, 1035; other citations omitted.) As the courts have expressed the rule:

> A judicial admission in a pleading (either by affirmative allegation or by failure to deny an allegation) is entirely different from an evidentiary admission. The judicial admission is not merely evidence of a fact; it is a conclusive concession of the truth of a matter which as the effect of removing it from the issues.

(*City of Oxnard, supra*, at p. 1035, quoting *Walker v. Dorn* (1966) 240 Cal.App.2d 118, 120.)

The effect of such an admission in the pleadings is that it *forbids* consideration of contrary evidence, any discussion of evidence offered to rebut a judicial admission is irrelevant and immaterial. (*County of San Luis Obispo* (2015) PERB Decision No. 2427-M, citing *Valerio v. Youngquist Construction* (2002) 103 Cal.App.4th 1264, 1271, citing *Braverman v. Rosenthal* (1951) 102 Cal.App.2d 30.)

Moreover, the District could have moved to amend its answer at any point in time up until the close of the hearing.[4] The District, however, made no attempt to do so, even after the Association clearly referenced the District's admission at the outset of the hearing. The District is therefore bound by the admission in its answer. (See *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1156, citing *Valerio v. Andrew Youngquist Construction*, *supra*, 103 Cal.App.4th at p. 1272.) Therefore, even assuming that the *Marysville* rule could apply because of the language contained in the parties' collective

[4] Although PERB's Regulations and decisional law have generally been more concerned with preventing undue prejudice by ensuring timely amendments to a complaint (see, e.g., PERB Regulation 32648; *City of Roseville* (2016) PERB Decision No. 2505-M, pp. 15-16, and authorities cited therein), because the hearing officer and all parties must have adequate notice of the allegations and defenses at issue before the record is closed and the case is submitted for decision, the same principles of adequate notice and fair proceedings apply to denials, defenses or other matters alleged in an answer to the complaint. (PERB Regulations 32190; 32170, subds. (a), (f), and (h); *County of San Luis Obispo, supra*, PERB Decision No. 2427-M, pp. 27-18.)

bargaining agreement, the ALJ was correct to reach a different conclusion. Because the District admitted to the scope of the District's professional growth policy in its answer, absent an amendment to the District's answer, the ALJ was forbidden from finding that the terms of the parties' collective bargaining agreement established a different policy. Without a determination regarding what the collective bargaining agreement provided, a waiver defense or application of *Marysville* cannot be considered. (*Marysville*, *supra*, PERB Decision No. 314.)

In its exceptions, the District disputes the characterization of its admission as an admission of fact. It argues that the ALJ determined as a matter of law that the District's professional growth policies were incorporated into the parties collective bargaining agreement but found that because the District admitted changing its policy in its answer, the District committed an unfair labor practice. According to the District, any alleged admission in the District's answer that might contradict the ALJ's legal conclusion should be considered an admission of law and not a judicial admission of fact. We view this argument as nothing more than an attempt by the District to re-cast what it clearly admitted to in its Answer. First, the District did not admit that it "changed a policy" in its Answer. It admitted to what the professional growth policy was: "limited to the following criteria. . . ." This is a factual admission, not a mistaken conclusion of law as the District asserts. Second, the ALJ did not make any "conclusion of law" as to whether the District policies were incorporated into the parties' collective bargaining agreement. While the proposed decision discussed the relevant language of the parties' collective bargaining agreement and the applicability of a *Marysville* defense, it did so by suggesting that in different circumstances it *would have* found that defense compelling. This discussion is purely hypothetical and does not amount to a

growth policy is limited to the requirements that course approval be obtained before registering, and a maximum of 15 semester units each fiscal year.

1. Change in Policy

The unilateral change test requires a determination of whether the District changed the professional growth policy. (*Fairfield-Suisun Unified School District, supra,* PERB Decision No. 2262; *Grant Joint Union High School District, supra,* PERB Decision No. 196.) District administrators admit that some courses previously approved for salary schedule advancement credit are no longer approved. The District previously approved applications for "Time to Teach," an independent study course. For several years, the District also approved the CMEA conference, even though CMEA is not an accredited university. In 2007, the District approved a lower division, independent field study course on Death Valley offered by a community college.

The evidence is clear that the District changed the policy described in the complaint when it began to apply the professional growth policy criteria to reject previously approved courses. Willett explained that when she took on the task of reviewing and approving course applications, she began to strictly apply the policy criteria. As a result, with some exceptions, the District now denies previously approved courses that are lower division, independent study, and not provided by an accredited university.

2. Scope of Representation

The policy allows employees to attain credit to advance on the salary schedule by completing course work. Wages are expressly enumerated and identified as a negotiable subject within the scope of representation. (EERA § 3543.2, subd. (a)(1).) Thus, the policy concerns a matter with the scope of representation.

3. Notice and Opportunity to Bargain

Willett first began to modify the application form in September 2009, indicating on the form new limitations on course approval. After that time, she began to deny courses that had previously been approved. There is no evidence that prior to these events the District provided the Association with notice of its intent to change the professional growth policy, and an opportunity to bargain.

4. Generalized Effect

Finally, the policy change had the effect of removing opportunities for employees to obtain salary schedule advancement credit. The denial of the opportunity to advance on the salary schedule imposed a generalized and continuing impact on bargaining unit employees.

Accordingly, the District did not provide notice and an opportunity to bargain before it implemented changes to the professional growth policy when it began to deny applications for previously approved courses.

Waiver

The District contends that the Association waived its right to negotiate by failing to timely demand to bargain when it learned of the changes Willett made to the course application form. Willett first modified the application form in September 2009 to advise applicants that classes, conferences, workshops, and courses paid with District funds were not eligible for salary schedule advancement credit.

There is no evidence that the Association was aware the District changed the application form. Notice of a proposed change must be given to an official of the employee organization having the authority to act on behalf of the organization. (*Fresno County Office of Education* (2004) PERB Decision No. 1674; *Fairfield-Suisun Unified School District, supra,*

PERB Decision No. 2262.) The notice must be communicated in a manner that clearly informs of the proposed change. (*Lost Hills Union Elementary School District* (2004) PERB Decision No. 1652; *Fairfield-Suisun Unified School District, supra,* PERB Decision No. 2262.) The Board has held, for example, that the general publication of a governing board's agenda does not constitute effective notice to an exclusive representative of proposed changes to matters within the scope of representation. (*Arvin Union School District* (1983) PERB Decision No. 300; *Fairfield-Suisun Unified School District, supra,* PERB Decision No. 2262.) There is no evidence that the District provided a copy of the form to an authorized Association representative in a manner reasonably calculated to put the Association on notice of the change.

Furthermore, when a firm decision to change a negotiable policy has been made, or a unilateral policy change has already been implemented, a union does not waive its right to bargain by failing to pursue negotiations. (*County of Santa Clara, supra,* PERB Decision No. 2321-M.) The Board stated that, "[o]nce an employer takes unilateral action on a matter in which the decision is within the scope of bargaining, the union is excused from demanding to bargain over that fait accompli." (*Id*., p. 24.)

The September 2009 modification of the course application form demonstrates that the District had already taken action to implement the change in policy. Once revised, the application form was delivered to the school sites so that teachers would be aware of the change before they requested approval for salary schedule advancement credit. The Association, therefore, did not waive its right to bargain by failing to demand negotiations after the course application form was modified.

Accordingly, it is found that the District violated EERA when it unilaterally changed the professional growth policy without providing the Association with notice and an opportunity to bargain.

Information Request

The complaint also alleges that the District breached its duty to bargain in good faith when it failed to timely provide the Association with a copy of the professional growth policy.

An exclusive representative is entitled to all information that is "necessary and relevant" to the discharge of its duty to represent bargaining unit employees. (*Stockton Unified School District, supra,* PERB Decision No. 143; *Chula Vista City School District* (1990) PERB Decision No. 834.) Absent a valid defense, an employer's failure to provide such information upon request is a per se violation of the employer's duty to bargain in good faith. (*Stockton Unified School District, supra,* PERB Decision No. 143; *City of Burbank* (2008) PERB Decision No. 1988-M.)

PERB uses a liberal standard, similar to a discovery-type standard, to determine the relevance of the requested information. (*Trustees of the California State University* (1987) PERB Decision No. 613-H; *Chula Vista City School District, supra,* PERB Decision No. 834.) Information pertaining immediately to a mandatory subject of bargaining is presumptively relevant. (*Stockton Unified School District, supra,* PERB Decision No. 143; *State of California (Departments of Personnel Administration and Transportation)* (1997) PERB Decision No. 1227-S; *Ventura County Community College District* (1999) PERB Decision No. 1340; *Chula Vista City School District, supra,* PERB Decision No. 834; *Santa Monica Community College District* (2012) PERB Decision No. 2303.)

Once a valid request is made, the burden shifts to the employer to either provide the information within a reasonable time, or overcome the presumption of relevance. (*State of California (Departments of Personnel Administration and Transportation), supra*, PERB Decision No. 1227-S.) An employer may not simply ignore a request for information. (*Chula Vista City School District, supra*, PERB Decision No. 834.)

An employer's response to a valid request for information must be timely. (*Chula Vista City School District, supra*, PERB Decision No. 834; *Regents of the University of California* (1999) PERB Decision No. 1314-H.) When a good faith demand is made for relevant information, it must be made available promptly and in a useful form. An unreasonable delay in providing requested information is tantamount to a failure to provide the information. (*Chula Vista City School District, supra*, PERB Decision No. 834.) The fact that an employer eventually provides the information does not excuse an unreasonable delay. (*Id*.)

In *Compton Community College District* (1990) PERB Decision No. 790, the Board held that a five-month delay in providing requested information was dilatory, and the employer's heavy workload did not excuse the delay. Even a two-month delay may be untimely under certain circumstances. (*Regents of the University of California, supra*, PERB Decision No. 1314-H, citing *Colonial Press, Inc.* (1973) 204 NLRB No. 126.)

In *City of Burbank, supra*, PERB Decision No. 1988-M, the Board found an employer's late response was a violation even though it eventually produced the information, because the employer failed to act diligently, and the delay interfered with the union's preparation for arbitration. The Board held that the delay would have been excused had it been reasonable, i.e., justified under the circumstances and it did not cause prejudice to the union.

There is no dispute that the professional growth policy was relevant information because it pertained to wages, a mandatory subject of bargaining. The information was also necessary for the Association to enforce the terms of the CBA and represent bargaining unit employees.

The Association first requested a copy of the professional growth policy on February 11, 2013. Lawler responded on February 13, stating she was having difficulty finding a copy and would respond the following week.

No further response from the District was received until the Association submitted a second request for the policy on July 18, 2013. Lawler provided a copy of the policy on August 16. Her office conducted a further search after the Association's second request, and finally located the policy in a historical documents file in the Superintendent's office.

The District took six months from the Association's first request to provide a copy of the policy. The District does not claim that it diligently searched the entire time. Its only excuse is that it had difficulty locating a copy of the policy. There is no evidence that other circumstances justified the delay. Thus, the six-month delay in providing the Association with a copy of the professional growth policy was unreasonable. Accordingly, the District breached its duty to bargain in good faith when it provided an untimely response to the Association's request for necessary and relevant information.

REMEDY

PERB has broad remedial powers to effectuate the purposes of EERA. EERA section 3541.5, subdivision (c), provides:

> The board shall have 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, including but not

> limited to the reinstatement of employees with or without back pay, as will effectuate the policies of this chapter.

It is found that the District failed to meet and negotiate in good faith in violation of EERA section 3543.5, subdivision (c), when it unilaterally changed the professional growth policy without providing the Association with notice and an opportunity to bargain, and when it unreasonably delayed providing necessary and relevant information.

By the same conduct, the District interfered with the rights of employees to be represented by the Association in violation of EERA section 3543.5, subdivision (a); and denied the Association the right to represent bargaining unit employees in their employment relations with the District in violation of EERA section 3543.5, subdivision (b). It is appropriate therefore to order the District to cease and desist from such conduct.

In cases involving an unlawful unilateral change, the appropriate remedy is to restore the status quo by rescinding the change and making employees whole for any actual losses suffered as a result of the change. (*California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 946; *Desert Sands Unified School District* (2010) PERB Decision No. 2092.) The District is ordered to rescind the changes to the professional growth policy that limits approval of lower division, independent study, and courses not provided by an accredited university, until it has satisfied its obligation to meet and negotiate in good faith. There is no evidence in the record that any employee registered for and completed a course after the District denied the employee's application for salary schedule advancement credit. Any actual employee losses can be resolved through compliance proceedings.

In cases involving a failure to provide necessary and relevant information, an employer is typically ordered to provide the requested information. Here, the District provided the

Association with a copy of the professional growth policy on August 16, 2013, and therefore it is unnecessary to order the District to do so again.

Finally, it is appropriate that the District be ordered to post a notice incorporating the terms of the order at all locations where notices to public employees are customarily posted for employees in the bargaining unit. Posting such a notice, signed by an authorized agent of the District, will provide employees with notice that the District has acted in an unlawful manner, it is required to cease and desist from such activity, and it will comply with the order. It effectuates the purposes of the EERA that employees be informed of the resolution of this controversy and the District's readiness to comply with the ordered remedy. (*Placerville Union School District* (1978) PERB Decision No. 69.)

PROPOSED ORDER

Based upon the foregoing findings of fact and conclusions of law, and the entire record in this case, it is found that the Turlock Unified School District (District) violated the Educational Employment Relations Act (EERA or Act), Government Code section 3543.5, subdivisions (a), (b), and (c). The District violated EERA by unilaterally changing the professional growth policy without providing the Turlock Teachers Association (Association) with notice and an opportunity to bargain. The District also violated the Act by its unreasonable delay in providing requested information that is necessary and relevant to the Association's duty to represent bargaining unit employees.

Pursuant to EERA section 3541.5, subdivision (c), it is hereby ORDERED that the District, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Unilaterally changing the professional growth policy without providing notice and an opportunity to bargain.

2. Failing to provide necessary and relevant information in a timely manner.

3. Interfering with the right of bargaining unit employees to be represented by their employee organization.

4. Denying the Turlock Teachers Association the right to represent bargaining unit employees in their employment relations with the District.

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

1. Rescind changes to the professional growth policy until it has satisfied its obligation to meet and negotiate in good faith.

2. Make employees whole for any actual losses resulting from the unilateral change in policy.

3. Within 10 workdays after service of a final decision in this matter, post at all work locations where notices to employees in the District are customarily posted, copies of the Notice attached hereto as an Appendix. The Notice must be signed by an authorized agent of the District, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced or covered with any other material.

4. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board (PERB or Board), or the General Counsel's designee. Respondent shall provide reports, in writing, as directed by

the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on the Turlock Teachers Association.

Pursuant to California Code of Regulations, title 8, section 32305, this Proposed Decision and Order shall become final unless a party files a statement of exceptions with the Public Employment Relations Board (PERB or Board) itself within 20 days of service of this Decision. The Board's address is:

Public Employment Relations Board
Attention: Appeals Assistant
1031 18th Street
Sacramento, CA 95811-4124
(916) 322-8231
FAX: (916) 327-7960
E-FILE: PERBe-file.Appeals@perb.ca.gov

In accordance with PERB regulations, the statement of exceptions should identify by page citation or exhibit number the portions of the record, if any, relied upon for such exceptions. (Cal. Code Regs., tit. 8, § 32300.)

A document is considered "filed" when actually received during a regular PERB business day. (Cal. Code Regs., tit. 8, §§ 32135, subd. (a) and 32130; see also Gov. Code, § 11020, subd. (a).) A document is also considered "filed" when received by facsimile transmission before the close of business together with a Facsimile Transmission Cover Sheet or received by electronic mail before the close of business, which meets the requirements of PERB Regulation 32135, subdivision (d), provided the filing party also places the original, together with the required number of copies and proof of service, in the U.S. mail. (Cal. Code Regs., tit. 8, § 32135, subds. (b), (c), and (d); see also Cal. Code Regs., tit. 8, §§ 32090, 32091 and 32130.)

Any statement of exceptions and supporting brief must be served concurrently with its filing upon each party to this proceeding. Proof of service shall accompany each copy served on a party or filed with the Board itself. (See Cal. Code Regs., tit. 8, §§ 32300, 32305, 32140, and 32135, subd. (c).)

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. SA-CE-2708-E, *Turlock Teachers Association v. Turlock Unified School District*, in which all parties had the right to participate, it has been found that the Turlock Unified School District (District) violated the Educational Employment Relations Act (EERA), Government Code section 3543.5, subdivisions (a), (b), and (c). The District violated EERA by unilaterally changing the professional growth policy without providing the Turlock Teachers Association (Association) with notice and an opportunity to bargain. The District also violated EERA by refusing to provide information that is relevant and necessary to the Association's right to represent bargaining unit employees.

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

A. CEASE AND DESIST FROM:

1. Unilaterally changing the professional growth policy without providing notice and an opportunity to bargain.

2. Failing to timely respond to the Association's requests for information necessary and relevant to its representational duties;

3. Interfering with the right of bargaining unit employees to be represented by their employee organization; and

4. Denying the Association the right to represent bargaining unit employees in their relations with the District.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF EERA:

1. Rescind changes to the professional growth policy until it has satisfied its obligation to meet and negotiate in good faith.

2. Make employees whole for any actual losses resulting from the unilateral change in policy, with interest at 7 percent per annum.

Dated: _____ TURLOCK UNIFIED SCHOOL DISTRICT

By: _____
Authorized Agent

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 REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.