

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

¹The 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

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 District 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 substantially 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

²Charging 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

³They 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 command 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.2d 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

⁴Subsection 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; . . .

⁵PERB 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 California 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.

⁶Since 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 FEERA, 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 IRRM 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

⁷It 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 NRB 1193, [25 IRRM 1192]; Local 1418, international Longshoreman's Association 102 NRB 720 [31 IRRM 1365]; NRB v. General Shoe Corp. 192 F2d 504 [29 IRRM 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.

⁸Education 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.

⁹Article II provides in pertinent part:

1.0 It is understood and acknowledged 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.

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

¹⁰see footnote 8, *infra*.

¹¹Section 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 employees 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 4490 6 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 representative 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 District 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.