

In the Matter of the Impasse Between)
)
CALIFORNIA STATE UNIVERSITY,)
LOS ANGELES)
)
Higher Education Employer)
)
- and)
)
CALIFORNIA STATE UNIVERSITY)
EMPLOYEES UNION)
)
)
Exclusive Representative)
)
_____)

FACTFINDING REPORT AND
RECOMMENDED TERMS OF
SETTLEMENT

PERB CASE NO. LA-IMP-3470-H

REPORT ISSUED JUNE 15, 2010

COMPOSITION OF THE FACTFINDING PANEL:

Impartial Chairman: ROBERT BERGESON, Arbitrator/Factfinder
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Employer Member: SHARYN ABERNATHA, Sr. Mgr., Employee
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MAKING PRESENTATIONS TO THE FACTFINDING PANEL:

For the Employer: JOSE L. GALVAN, Dean of Extended Education
& Research

BEN G. PHAN, Director of Operations, Extended
Education

LISA M. SANCHEZ, Asst. Vice President,
Human Resources

ANTHONY SOLANA, JR., Mgr., Employee
Relations

For the Union:

BECKY BISHOP, Student Services Coordinator

ANDY HONG, ELP Instructor

KATHERINE KOUPAI, ELP Instructor

CHRIS LAM, ELP Instructor

SHANNON MARAGHY, ELP Instructor

DENISE MININ, ELP Instructor

NICHOLAS RENTON, ELP Instructor

STEVEN STANLEY, ELP Instructor

BACKGROUND AND PROCEDURAL HISTORY

For many years, current and prospective students of California State University, Los Angeles (CSULA) with limited English skills have had available to them on campus some program through which to enhance their ability to speak and write the language. Beginning in the spring of 1978, there was an American Culture and Language Program (ACLP) through CSULA Auxiliary Services. When that program was disbanded in June 2005, an English Language Center (ELC) was immediately created through CSULA's Division of Extended Education. In August of that year, the English Language Center was retitled the English Language Program (ELP).

The ELP consists chiefly of instruction designed to assist students in achieving greater proficiency in reading, writing and speaking English. In the latter area, pronunciation and grammar are emphasized. Although classes are taught Monday through Friday for five hours per day during each of CSULA's 10-week academic quarters, ELP Instructors may work only three or four days per week. Reflective of certain differences between the ELP and other academic programs at CSULA, a quarter is more frequently referred to as a "session."

Over the years, the great majority of students in the ACLP, ELC and ELP have been from Pacific Rim countries. Student enrollment has vacillated significantly from an initially modest participation in 1978 of just nine to a high of 451 students during the fall of 1989. Recently,

enrollment has generally been about 150 students per session, with the number of ELP Instructors typically being about 15.

At the end of each session, about 10 percent of students return to their country of origin, 60 percent re-enroll and of the students who complete Level 6 or 7, up to 38 percent transfer to an American college or university. Although university credit is not earned, students successfully completing ELP courses earn a Certificate of Participation.

On or about December 28, 2005, California State University Employees Union (Union) petitioned to represent ELP Instructors and on March 3, 2006, CSULA voluntarily recognized the Union as the exclusive representative of those employees in a bargaining unit unto themselves. Since June of 2006, the parties have unsuccessfully attempted to reach agreement on an initial contract to cover such Instructors. Included in such efforts was approximately a year of mediation by Mediator Tony Butka of the State Mediation and Conciliation Service. In May of 2009, the parties agreed to move the impasse to the factfinding process of the Higher Education Employer-Employee Relations Act (HEERA - Government Code sections 3590-3594).

The parties subsequently selected Robert Bergeson to serve as the neutral member of the factfinding panel. CSULA selected Sharyn Abernatha to serve as its panel member and the Union chose Hubert Lloyd to serve as its member of the panel and it was agreed that the statutory timelines for completion of the process would be waived so as to maximize the potential for settlement.

The HEERA authorizes factfinding panels to meet with representatives of the disputing parties through investigation and/or hearing and, if an agreement settling all issues cannot be reached, to make factual findings based on the evidence presented and to recommend terms of settlement. To initiate those quasi-legislative responsibilities hearings were held on the CSULA campus on October 23, 24 and 25 and November 16, 2009, during which CSULA and the Union were given full opportunity to present evidence on the outstanding issues. With the concurrence of the parties, the members of the panel thereafter engaged in mediation efforts, however, a final resolution to the impasse could not be achieved.

The parties then filed post-hearing briefs in January of 2010 and rebuttal briefs a month later for consideration by the panel. The panel chairman subsequently prepared a draft of the instant report and recommendations and the panel met in executive session for purposes of review

and amendment of that draft. The chairman then prepared the final copy of this report and recommendations, which was provided to the partisan panel members for their signature.

RELEVANT FACTORS

HEERA sections 3590-3594 do not specify criteria to be followed in the present process. However, the panel is persuaded that it should follow the parameters of the analogous statute for K-12 school districts. In that regard, Government Code subsection 3548.2(b) states as follows:

In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

- (1) State and federal laws that are applicable to the employer.
- (2) Stipulations of the parties.
- (3) The interests and welfare of the public and the financial ability of the public school employer.
- (4) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours and conditions of employment of other employees performing similar services in comparable communities.
- (5) The consumer price index for goods and services, commonly known as the cost of living.
- (6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits; the continuity and stability of employment; and all other benefits received.
- (7) Any other facts, not confined to those specified in paragraphs (1) to (6) inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

Any criterion which has not been relied upon by the parties has not been considered in arriving at the findings and recommendations made herein.

ISSUES

Although evidence was presented on many issues, the parties have reached tentative agreement on the great majority of them and in the interests of brevity, areas upon which

agreement has been reached will not be addressed herein. Specifically, it was stipulated pre-hearing that only five articles of what would be the parties' initial collective bargaining agreement remain at issue. It was further stipulated that among those five, the Definitions article would be finalized upon reaching agreement on the other four. Accordingly, only those four unresolved articles are addressed in this report, with two of them, Salary and Term of Agreement, being combined herein for purposes of expediency.

It should be said before beginning analysis of the issues that this report differs from the vast majority now issued by factfinding panels appointed through the offices of the Public Employment Relations Board. That is so because with the advent of true collective bargaining in California government 30 or more years ago, very few employees with a right to union representation have not long been covered by a collective bargaining agreement. Thus, only a minute fraction of contemporary factfinding procedures are like the present one in the sense of involving bargaining over an initial such contract as opposed to a successor agreement. That fact has complicated settlement. Another complicating factor has been the nature of the bargaining unit itself. Contrary to other units of California State University employees, the present unit is not systemwide but confined to a single campus. Consistent with that distinction is that the employing entity, the ELP, is funded differently than is otherwise the case for programs of the CSU.

1. ARTICLE 9: EMPLOYEE STATUS

UNION POSITION

As demonstrated by CSULA's own evidence, the vast majority of ELP Instructors are reappointed quarter after quarter. That practice should be acknowledged within the context of Article 9 of the parties' agreement. Although CSULA has committed to the creation of an article dealing with job security, it has refused to agree to codification of the practice of appointments based on years of service at CSULA.

It is acknowledged that there has been fluctuation in ELP enrollment so that CSULA cannot guarantee reemployment to unit members from session to session. However, the Union has addressed that concern through its proposal that in the event of the need for class cancellation or reduction in the number of instructors or number of classes per instructor, class offerings would

be based on seniority in the ELP retroactive to creation of the program in June 2005, with seniority ties broken by comparing the quality of student evaluations. The Union further proposes that in the event an ELP Instructor opts not to teach for a quarter, he or she will retain those same rights to available classes.

CSULA POSITION

The greatest problem with the Union's proposal on this and other articles is the failure to adequately take into consideration the vagaries of student enrollment.

As the Union admits, there are a myriad of English proficiency programs in the Los Angeles metropolitan area against which CSULA's ELP competes for students. Contrary to those at community colleges, since the ELP is in the Division of Extended Education, it is not funded in the same manner as the great majority of programs on campus nor by money coming from the state as with community colleges, but solely through tuition. Community colleges therefore have a relatively consistent revenue stream and generally know prior to the beginning of each semester how many students will be enrolled. However, the ELP does not know until just before the actual commencement of classes how many students it will have. The ELP therefore has less flexibility in this area than is the case elsewhere.

The ELP also differs greatly from other programs at CSULA in the sense that almost 100 percent of its enrollees are international students. Contrary to their peers, ELP students therefore do not enroll months in advance but instead usually less than a week before classes are scheduled to begin. Indeed, even students who sincerely inform the ELP of their interest before that time cannot be counted on to attend since "Given the nature of immigration policy and world events, the ELP program is wholly at the mercy of the U.S. State Department and its Consular offices abroad." The fluidity thereby created is exemplified by the fact that during the summer 2009 term, enrollment dropped to such an extent that only 25 classes could be offered but in fall 2009, enrollment increased to the point 45 classes were offered.

As the Union also acknowledges, in order to effectively compete against similar programs in and proximate to the city of Los Angeles, it is imperative that the ELP improve its facilities and administrative support. Thus, Dean Jose Galvan has brought in a qualified curriculum specialist and is in the process of hiring a receptionist for the ELP's office area. All such necessary changes tax the ability of CSULA to overly commit itself to Union desires.

Turning to job security for ELP Instructors, it should also be kept in mind that this is the first contract between these parties. Thus, although CSULA's proposal may not go as far as members of the bargaining unit would like, should they believe the bargain struck fails to meet their needs, they will have ample opportunity to revisit the issue in the future. Accordingly, the following proposal is quite reasonable and should be adopted by the parties:

An Instructor who had an appointment in two of the prior four sessions and who submitted an application in accordance with [Article] 9.x1 will be considered for appointment. Appointments will be based on factors that include, but are not limited to: the instructor's educational background; professional training; instructor's expertise in program area; years of service teaching and the instructor's stated preferences. The decision on who will be appointed shall be made by the Dean of Extended Education or his/her designee and is not subject to Article 7, Grievance Procedure.

ANALYSIS AND RECOMMENDATION

It should be said at the outset that CSULA's differentiation of the funding for the ELP compared to that of its many competitors is well taken. While it would be nice if the ELP's revenue stream was as consistent and predictable as that of similar programs at community colleges, that is not the case and no evidence was presented to suggest it ever will be. It is therefore the opinion of the panel that comparisons to community colleges such as those made by several Union presenters during the hearing in this matter must be taken with the proverbial grain of sand. Although that does not mean such evidence is irrelevant, it does mean its weight is quite limited.

Turning to substantive differences, the panel can empathize with CSULA in the sense that it is difficult to understand exactly what the Union's position is here. Contrary to CSULA, the Union has made several different proposals on this article not only throughout the lengthy bargaining process but even since the parties reached impasse. Indeed, as CSULA points out in its rebuttal brief, in its initial brief to the panel the Union has apparently even changed its position since the factfinding hearing. It is an old saying in the negotiation of a collective bargaining agreement that it is very difficult to hit a moving target and that is not only CSULA's dilemma but now that of the factfinding panel. Thankfully, however, this panel is not constrained to adopt the proposal of one party or the other but rather is authorized to fashion its own recommended terms of

settlement and in that vein, does so here.

In the opinion of the panel, CSULA is to be commended for including in its proposal the concept of “appointment in two of the four prior sessions . . .” Although unclear from the Union’s brief, it was apparent during the hearing that it is very important to bargaining unit members that they be allowed to take off a session here or there yet still retain some rights to reappointment. Though not conceded by the Union to amount to much of a concession, the panel believes otherwise.

Consistent with the fact they have been organized by the Union and not by California Faculty Association, ELP Instructors are neither typical faculty nor are they very similar to teachers in K-12 school districts. Aside from the funding differences referenced above, what they are most akin to is part-time faculty at community colleges, which many of them also are. Because they also hold such positions with other employers, a large number of ELP Instructors desire the flexibility to simply discontinue teaching for a session yet to be able to return to CSULA with impunity. The fact CSULA’s proposal recognizes that desire despite the potential for inconvenience to management caused thereby is something the panel believes ELP Instructors unfairly ignore. That said, the panel cannot recommend CSULA’s proposal, either.

The panel recommends, as a compromise, the following:

An Instructor who had an appointment in two of the four sessions and who submitted an application in accordance with [Article] 9.x1 will be considered for appointment. Appointments will be based on factors that include, but are not limited to, the instructor’s: educational background; professional training; expertise in program area; years of service teaching; stated preferences; student evaluations; performance appraisal; and years of teaching in the ELP.

2. SALARY/TERM OF AGREEMENT

UNION POSITION

The hourly wages of bargaining unit members were reduced when the ELP came into existence from what they had previously been. They have not been increased since despite the fact tuition for students of the program has risen 37.45% during that time.

Union witnesses Steven Stanley and Andy Hong testified that in 2005, they were earning \$42 and \$44.05, respectively, yet now the hourly wage for ELP Instructors is only \$37.82. “Hong

estimates that the current hourly salary is really closer to \$34 per hour because instructors work 50 days per quarter rather than the 47 days per quarter [CSULA] claims.” Further, the Union presented evidence to the factfinding panel that the average class size has gradually increased from an average of 15.89 in summer 2005 to 20.33 in the summer of 2009. Thus, the dollar per student ratio is significantly less than in 2005.

These discrepancies should be eliminated by increasing salaries as follows: to \$7,500 per academic term for those teaching three classes per week; to \$10,000 for those teaching four classes per week; and to \$12,500 for those teaching five classes per week. Further, it should be agreed that such salaries will be increased by the following anticipated increased percentages in student fees: by 14.63% effective September 1, 2010 and by 17.02% effective September 1, 2010.

CSULA has also failed to address Union proposals that it be guaranteed that Instructors will be paid within 72 hours of the end of a pay period, that Instructors required to work on a day declared a state of emergency on campus by the President receive “informal time off” as compensation, that a formal process be created to address suspected underpayment of wages, and “the name and classification of each recipient of a salary increase” be reported to the Union within 90 days.

CSULA POSITION

Although ELP Instructors are part-time employees and part-timers are typically paid on a per-hour basis, in recognition of the fact these employees are professionals, CSULA proposes they be paid an academic term salary according to the number of classes they teach. Currently, Instructors teaching three classes per day five days per week earn \$6,090 per term and Instructors teaching four classes five days per week are paid \$7,980 per term. CSULA proposes increasing those amounts to \$6,426 and \$8,316, respectively. On a per-hour basis, for Instructors teaching three classes that would amount to an increase from \$37.83 to about \$39.18 and for Instructors teaching four classes that would result in an increase from \$37.82 to about \$38.86. As professionals, Instructors’ duties include lesson preparation, student evaluations, grading, correspondence and other administration duties.

The Union’s reliance on wages paid at community colleges is misplaced as noted above. “ELP does not have the luxury of turning a blind eye to [enrollment volatility] because doing so will endanger the program’s very survival.” Similarly, the Union’s proposal that the salaries paid

to Instructors be directly tied to increases in students fees cannot be sustained. That proposal ignores the need to fully staff the ELP office. (It is beyond dispute that the ELP has suffered from the absence of sufficient administrative support.) Further, the Union's comparison of hourly wages now to what they were in 2005 is a comparison of apples and oranges. The ACLP was maintained by a corporate entity separate and distinct from the Division of Extended Education and that corporate entity is no longer in existence. In other words, any of the present Instructors who taught then now work for an entirely separate employer.

The Union's other proposals regarding payment within 72 hours of the end of a pay period and the like all appear to have originated from isolated instances atypical of the manner in which the ELP is normally run and steps have been taken to ensure there will be no repetition. They therefore need not be the basis for any contractual provision.

ANALYSIS AND RECOMMENDATION

At the outset, it is noted there is no dispute about the length of an agreement once one is reached as both CSULA and the Union believe its term should be three years. The only difference of opinion is the effective date. That issue is addressed below.

With regard to payment of wages, the panel agrees with CSULA that except under highly extraordinary circumstances, a one-time problem for one member of a bargaining unit does not auger for inclusion within a collective bargaining agreement of a provision to address the unlikelihood of further such problems.

As to the amount unit members should be paid for their work, the panel also agrees with CSULA that viewing compensation from a salary perspective lends itself to an air of professionalism as distinct from the hourly wage concept common to blue collar workers. The panel also believes the parties should agree upon the increases proposed by CSULA looking retrospectively.

As CSULA asserts, Instructors are now essentially working for a different employer than was the case five years ago and that fact suggests the ACLP could not have been cost effective. Granted, such cost ineffectiveness cannot be attributed entirely to employee salaries but the point is that what Instructors were then paid cannot be deemed to be a baseline for Instructors' wages as the Union has tried to paint it. Moreover, the Union has acknowledged it is in the parties' mutual interest to improve staffing of the ELP office so as to not only mitigate the chances of a repetition

of the type of administrative problems of which it complains, but also to enhance the chances of current and prospective students believing they are part of a state-of-the-art program. Particularly because of the need for the parties to reach a multi-year agreement after so many years without a contract, it is such a mutual gains approach that the panel believes the parties should seek to create going forward.

While because of its concrete nature the panel is sympathetic to the Union's proposal that future increases be entirely consistent with percentage increases in student fees, the panel also cannot recommend such an approach. Similar to the Union's comparison of present wages with those paid by the ACLP, the Union's position ignores certain economic realities of the ELP. The first is that irrespective of whatever increase is made by the Division of Extended Studies to student fees, the ELP will not realize any increase in revenue if there is a corresponding decrease in the number of students in the program and as CSULA asserts, political exigencies make enrollment projections for a program of this nature very speculative at best.

That said, the panel also cannot fully accept CSULA's assertion that a comparison of ELP wages with those paid by community colleges is entirely a matter of apples and oranges. Granted, the funding sources are completely separate as CSULA says. Nevertheless, community college revenue is tied to student enrollment in the sense that the state provides to those competitors of the ELP revenue based on per-unit attendance.

CSULA further argues that the panel should give short shrift to the testimony of Union witnesses as to hourly wages paid in similar programs at community colleges based on the best evidence rule. While the panel agrees that actual hard copy data would have been the best evidence, that does not mean such testimony should be rejected entirely. As examples, unit member Shannon Maraghy has taught in a similar program at Pasadena City College and she testified her hourly wage has been \$49.11. That testimony was somewhat corroborated by unit member Katherine Koupai, who has also taught at Pasadena and who testified that two-year college has a salary range for such instructors of about \$35 per hour to \$55 per hour. According to Koupai, the wage she has earned while teaching at Los Angeles City College is comparable to the highest amount paid at Pasadena and unit member Nicholas Renton testified that while teaching at Rio Hondo College, he has earned about \$40 per hour. All three averred that as a result, given the choice, they would teach at those community colleges before the ELP if provided

the opportunity.

The conclusions to be drawn are as follows.

First, wages paid to instructors by the ELP are low in comparison to similar programs at community colleges. Therefore, the parties should endeavor to increase them insofar as the ELP has the financial wherewithal to do so. Second, just as is the case with the ELP, regardless of the higher wages paid, employment with the various community colleges is itself sporadic. In other words, probably for the same reasons enrollment in the ELP is variable, the same is true of all such programs, which are therefore in competition with each other for students.

Based on the above, the panel recommends that Instructors be paid a salary of \$2150 per class retroactive to January 1, 2010 and a salary of \$2300 per class effective January 1, 2011. The panel also recommends a signing bonus of \$200 for each Instructor employed as an Instructor in the ELP at the time of ratification plus any Instructor who was employed in two of the prior four academic terms.

3. PERSONAL TIME OFF

UNION POSITION

Instructors should be allotted two days of Personal Time Off (PTO) per session. If unused, Instructors should be allowed to carry one such day over into the following session to a maximum of three days. Further, Instructors should be entitled to be paid for their unused PTO balance.

CSULA POSITION

Instructors should be allowed one PTO day per session, which cannot be carried over into subsequent sessions. If Instructors do not use their PTO day, they will be paid for it at the end of the relevant session.

ANALYSIS AND RECOMMENDATION

The Union provided no data showing that those teaching in comparable programs receive this benefit. On that basis it appears that CSULA's proposal would provide a benefit unavailable to comparable instructors and it is therefore recommended that CSULA's proposal be adopted by the parties.

4. ONE FINAL POINT

In both its initial and rebuttal brief, the Union took pains to argue that CSULA has not bargained with it in good faith. Among the Union's assertions in that regard are that CSULA made only token offers to increase salary during the three plus years which preceded factfinding and that certain proposals were unlawfully conditioned on the Union's acquiescence to matters outside the scope of bargaining.

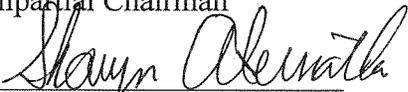
The factfinding panel can certainly empathize with frustration with the length of time over which the parties have unsuccessfully attempted to reach agreement on an initial collective bargaining agreement. However, even assuming strictly for purposes of argument that the Union's assertions contain merit, such allegations are completely outside the authority of this panel. Accordingly, the panel's only comment would be that insofar as continued failure to reach agreement portends further frustration that both parties must now seek to moderate their positions to the greatest possible extent in order to end their longstanding stalemate.

CONCLUSION

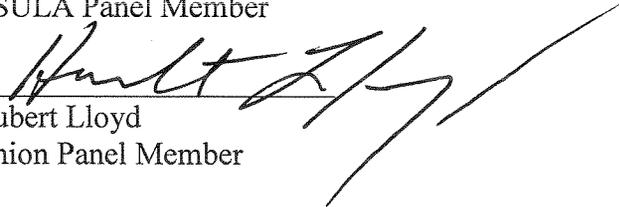
Having so opined, that concludes the factfinding panel's involvement with the parties' dispute.



Robert Bergeson
Impartial Chairman



Sharyn Abernatha
CSULA Panel Member



Hubert Lloyd
Union Panel Member