**STATE OF CALIFORNIA**
**DECISION OF THE**
**PUBLIC EMPLOYMENT RELATIONS BOARD**

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| BALDWIN PARK EDUCATION ASSOCIATION, CTA/NEA, | ) | |
| Charging Party, | ) | Case No. LA-CE-2964 |
| v. | ) | PERB Decision No. 903 |
| BALDWIN PARK UNIFIED SCHOOL DISTRICT, | ) | September 24, 1991 |
| Respondent. | ) | |

Appearances: California Teachers Association by Deborah S. Wagner, Attorney, for Baldwin Park Education Association, CTA/NEA; Liebert, Cassidy & Frierson by Mary L. Dowell, Attorney, for Baldwin Park Unified School District.

Before Hesse, Chairperson; Shank and Carlyle, Members.

DECISION

HESSE, Chairperson: This case is before the Public Employment Relations Board (PERB or Board) on appeal by the Baldwin Park Education Association, CTA/NEA (Association) of an administrative law judge's (ALJ) proposed decision (attached hereto) which dismissed the Association's allegations that the Baldwin Park Unified School District (District) violated section 3543.5(e) and, derivatively, (a) and (b) of the Educational Employment Relations Act (EERA).[1] Specifically, the Association

[1]EERA is codified at Government Code section 3540 et seq. Unless otherwise indicated, all statutory references herein are to the Government Code. Section 3543.5 states, in pertinent part:

> It shall be unlawful for a public school employer to do any of the following:
>
> (a) Impose or threaten to impose reprisals on employees, to discriminate or threaten to

alleged that the District violated section 3543.5(e) by insisting to impasse on a proposal for advisory arbitration. The Board has reviewed the stipulated record, proposed decision, Association's exceptions, and District's response thereto, and finds the ALJ's findings of fact and conclusions of law to be free of prejudicial error and therefore adopts them as the decision of the Board itself consistent with the following discussion.

ASSOCIATION'S EXCEPTIONS

The Association filed five exceptions to the proposed decision. The Association excepts to the ALJ's conclusions that: (1) the EERA does not require binding arbitration; (2) advisory arbitration falls within the scope of bargaining and

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> discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of rights guaranteed by this chapter. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
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> (b) Deny to employee organizations rights guaranteed to them by this chapter.
>
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

Although the complaint and proposed decision state the Association alleged the District violated section 3543.5(e) and, derivatively, (a) and (b), the Board has discontinued the practice of derivative violations. (See The Regents of the University of California (California Nurses Association) (1989) PERB Decision No. 722-H, p. 10, citing Tahoe-Truckee Unified School District (1988) PERB Decision No. 668.) As the Board affirms the ALJ's dismissal of the unfair practice charge and complaint in this case, there is no prejudice to the parties due to the use of the derivative violation terminology.

is a mandatory subject of bargaining; (3) as long as grievance resolution is a mandatory subject of bargaining, the various manners or processes used to resolve those grievances are automatically mandatory subjects of bargaining; (4) the Association's arguments are fatally flawed by its inability to overcome established PERB precedent; and (5) the advisory arbitration clause in the parties' collective bargaining agreement is significantly different from the language of most advisory arbitration clauses, and is not a mandatory subject of bargaining.

In its brief in support of exceptions, the Association merely repeats previous arguments which were addressed by the ALJ in her proposed decision. First, the Association asserts that EERA section 3543.2, and its references to sections 3548.5, 3548.6, 3548.7 and 3548.8, mean that the grievance procedure, defined as within the scope of representation, is limited to binding arbitration. The Association argues that these statutory sections evidence a clear legislative intent to require binding arbitration in any agreement which contains arbitration procedures. Because advisory arbitration renders the entire contract unenforceable and therefore nonbinding on the District, in violation of section 3540.1(h), the Association contends advisory arbitration is a nonmandatory or permissive subject of bargaining. Therefore, the District's insistence to impasse on the inclusion of an advisory arbitration clause is per se bad faith bargaining.

Next, the Association argues that the modified Anaheim test is applicable to the case, and that the subject of advisory arbitration is not mandatory because it cannot meet the third prong of the test. (See Anaheim Union High School District (1981) PERB Decision No. 177 [Anaheim]. as modified in South Bay Union School District (1990) PERB Decision No. 791 [South Bay]. affd. South Bay Union School District v. PERB/Southwest Teachers Association. CTA/NEA (1991) 228 Cal.App.3d 502 [279 Cal.Rptr. 135].) The Association argues that advisory arbitration inhibits the effective operation of the union by eviscerating the union's right to negotiate on behalf of the employees. Additionally, the Association argues advisory arbitration allows the District to make a final and binding decision on every grievance. Therefore, there is no true advocacy process. In essence, the Association objects to advisory arbitration because it allows the employer to violate the agreement at will, while the Association is held to the terms of the agreement.

Finally, the Association argues that the ALJ's reliance on the language in Anaheim City School District (1983) PERB Decision No. 364 (Anaheim CSD) is misplaced. The Association states the language regarding whether advisory arbitration is within the scope of bargaining should be regarded as mere dicta. Even if the language is not regarded as dicta, the Association urges the Board to reject the logic of Anaheim CSD, and find that advisory arbitration is not a mandatory subject of bargaining.

DISTRICT'S OPPOSITION TO EXCEPTIONS

In its opposition, the District urges the Board to affirm the proposed decision. The District first argues that the language in Anaheim CSD is not dicta. The District argues the Board was required to reach the conclusion that a grievance procedure culminating in advisory arbitration is also negotiable in order to determine whether a violation had occurred. In addition, the Association has provided no plausible argument in support of its assertion that the language is dicta. Further, there is nothing on the face of the Board's decision to suggest that its conclusion regarding the negotiability of advisory arbitration was merely dicta. Finally, the District notes that the Association has provided absolutely no basis on which the Board could conclude that the precedent established in Anaheim CSD is erroneous and should be overruled.

With regard to the Association's interpretation of the statutory provisions of EERA, the District argues that the Association has misread the language of the statute. The District asserts that the express language of the statute does not create an obligation to agree to binding arbitration. The District notes that section 3548.5 is phrased permissively:

> A public school employer and an exclusive representation . . . may include in the agreement procedures for final and binding arbitration . . . . [Emphasis in quote.]

With regard to the use of the modified Anaheim test, the District notes that the Board, in a subsequent case, rejected the analysis that had been used by Member Craib in South Bay which

depended on the modified Anaheim test, and instead adopted the rationale used by Member Camilli. (See Chula Vista City School District (1990) PERB Decision No. 834 [Chula Vista].) Nothwithstanding this argument, the District states that when the ALJ applied the modified Anaheim test, she correctly concluded that advisory arbitration is a mandatory subject of bargaining. Despite the Association's professed fears, the District asserts it does not have unfettered discretion to disavow a collective bargaining agreement that contains advisory arbitration as a dispute resolution mechanism. Thus, under the Board's precedents, whether the Anaheim test has been modified or not, advisory arbitration meets the test for a mandatory subject of negotiations. As the District did not insist to impasse on a nonmandatory subject of bargaining, the ALJ was correct in her conclusion that no violation of section 3543.5(e) occurred. Therefore, the ALJ's proposed decision should be affirmed.

DISCUSSION

With regard to the application of the modified Anaheim test after the Board's decision in South Bay, the Board has not relied upon the modified Anaheim test in subsequent decisions regarding the exclusive representative's right to file grievances in its own name. Instead, the Board held that the exclusive representative's right to file grievances in its own name is a statutory right, and, consequently, a nonmandatory subject of bargaining. (Chula Vista; Mt. Diablo Unified School District (1990) PERB Decision No. 844 [Mt. Diablo].) In Chula Vista, the

Board affirmed the ALJ's conclusion, but rejected the ALJ's reliance on the modified Anaheim test. As stated by the Board:

> We therefore affirm the ALJ's conclusion that the District violated EERA by insisting to impasse that the Association waive its statutory right to file grievances in its own name, but reject the ALJ's reliance on a modified version of the Anaheim test to reach that result. Application of the Anaheim test to determine the negotiability of the grievance proposals is unnecessary since the District is not actually insisting to impasse on a term or condition of employment, but rather is insisting that the Association waive a basic statutory right. [Citation.]
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> (Chula Vista City School District, supra, PERB Decision No. 834, pp. 22-23.)

Similarly, in Mt. Diablo, the Board expressly rejected that portion of the ALJ's analysis that utilized the modified Anaheim test. The Board stated:

> In reaching its conclusion regarding the District's insistence to impasse on the two grievance proposals discussed above, the majority in Chula Vista expressly rejected utilization of a modified version of the test set forth in Anaheim Union High School District (1981) PERB Decision No. 177 (Anaheim) to determine whether the proposals in question were mandatory subjects of bargaining. Similarly, in the instant case, although we agree with the ALJ that the grievance proposals in question are nonmandatory subjects of bargaining, we expressly reject that portion of his analysis that utilizes a modified version of the Anaheim test (See Prop. Dec, p. 15, par. 2 through p. 17, par. 1, 1st sentence; p.20, par. 1.) and adopt instead the "statutory right" analysis as set forth in Chula Vista. [Fn. omitted.]
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> (Mt. Diablo Unified School District, supra, PERB Decision No. 844, p. 3.)

Despite these two subsequent decisions which reject the modified Anaheim test, the modified Anaheim test was never a view held by the majority of the Board. In South Bay, the modified Anaheim test was adopted only by Member Craib. Member Camilli wrote a concurrence wherein he analyzed the issue as a statutory right. He concluded that the right of an exclusive representative to file a grievance in its own name was a statutory right pursuant to section 3543.1(a) of EERA. Chairperson Hesse dissented and concluded that the exclusive representative's right to file a grievance in its own name was a mandatory subject of bargaining. Chairperson Hesse expressly rejected Member Camilli's statutory right analysis, as well as Member Craib's modification of the Anaheim test.[2] Finally, in affirming the Board's South Bay decision, the Court of Appeal relied upon the concurrence and referred to the Board's subsequent decisions in Chula Vista and Mt. Diablo. The court specifically rejected the use of the modified Anaheim test. (South Bay Union School District v. PERB/Southwest Teachers Association. CTA/NEA, supra, 228 Cal.App.3d 502, 508.)

As the modified Anaheim test has never been adopted by more than one Board member, has been rejected by the Court of Appeal and has been expressly rejected in two subsequent Board decisions, the Board rejects the Association's arguments

[2] In Chula Vista and Mt. Diablo, Chairperson Hesse changed her analysis and conclusion based on a recent Court of Appeal case. Chairperson Hesse found that the exclusive representative's right to file a grievance in its own name is a statutory right, and nonmandatory subject of bargaining.

concerning the application of the modified Anaheim test to the present case.

Even assuming the modified Anaheim test applies to the present case, the ALJ concludes that advisory arbitration is a mandatory subject of bargaining. However, the ALJ does not rely only on the modified Anaheim test for her conclusion. Rather, the ALJ relies upon Anaheim CSD, wherein the Board expressly held that advisory arbitration is a mandatory subject of bargaining. In Anaheim CSD, the Board was faced with an allegation that the school district failed to maintain the grievance procedure after the collective bargaining agreement had expired. In discussing the negotiability of grievance procedures, the Board stated:

> Section 3543.2 expressly includes within the scope of representation "procedures for the processing of grievances" established pursuant to sections 3548.5, 3548.6, 3548.7, and 3548.8. The Act places no express restrictions or a [sic] limitations on the types of grievance procedures which are negotiable. The reference to subsections 3548.5-.8 is meant to reflect a specific legislative sanctioning of binding arbitration. It follows that a grievance procedure culminating in advisory arbitration, a lower level of terminal dispute resolution than binding arbitration, is also negotiable. [Fns. omitted.] [Id, at pp. 14-15.)

Based on the conclusion that grievance procedures, up to and including procedures culminating in binding arbitration, are negotiable, the Board found that the grievance procedure, including the provision for advisory arbitration, survived the expiration of the collective bargaining agreement absent clear evidence of an intent to the contrary. Based on Anaheim CSD,

it seems clear that the Board expressly held that advisory arbitration, as well as binding arbitration, is a mandatory subject of bargaining.

Finally, the Board rejects the Association's misconstrued interpretation of EERA. The statutory language of section 3543.2(a),[3] and its references to sections 3548.5, 3548.6, 3548.7

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[3]EERA section 3543.2(a) states:

> 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 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, the layoff of probationary certificated school district employees, pursuant to Section 44959.5 of the Education Code, and alternative compensation or benefits for employees adversely affected by pension limitations pursuant to Section 22515 of the Education Code, to the extent deemed reasonable and without violating the intent and purposes of Section 415 of the Internal Revenue 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.

and 3548.8, cannot be interpreted to require only binding arbitration in a collective bargaining agreement. The statutory language does not require binding arbitration, but merely authorizes the parties to enter into negotiations for a collective bargaining agreement that may include binding arbitration. Further, the language of section 3548.5 is phrased permissively:

> A public school employer and an exclusive representative who enter into a written agreement covering matters within the scope of representation may include in the agreement procedures for final and binding arbitration of such disputes as may arise involving the interpretation, application, or violation of the agreement. [Emphasis added.]

Additionally, sections 3548.6, 3548.7 and 3548.8 provide direction to the parties in the event they agree to binding arbitration. However, these statutory provisions do not require the parties to agree to binding arbitration.

Based on the statutory language of EERA section 3543.2(a), and its references to sections 3548.5, 3548.6, 3548.7 and 3548.8, and the Board's holding in Anaheim CSD, the Board finds the District did not violate EERA by insisting to impasse on a proposal for advisory arbitration.

ORDER

For the reasons stated above, the unfair practice charge and complaint in Case No. LA-CE-2964 is hereby DISMISSED.

Members Shank and Carlyle joined in this Decision.

STATE OF CALIFORNIA
PUBLIC EMPLOYMENT RELATIONS BOARD

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| BALDWIN PARK EDUCATION ASSOCIATION,<br><br>Charging Party,<br><br>v.<br><br>BALDWIN PARK UNIFIED SCHOOL DISTRICT,<br><br>Respondent. | ) | Unfair Practice Case No. LA-CE-2964<br><br>PROPOSED DECISION (2/27/91) |

Appearances: California Teachers Association by Deborah S. Wagner, Attorney, for Baldwin Park Education Association, CTA/NEA; Liebert, Cassidy & Frierson by Mary L. Dowell for Baldwin Park Unified School District.

Before Martha Geiger, Administrative Law Judge.

PROCEDURAL HISTORY

This case arises out of an unfair practice charge filed by the Baldwin Park Education Association, CTA/NEA (Charging Party or Association), against the Baldwin Park Unified School District (Respondent or District). The charge alleged that the District violated section 3543.5(c) of the Educational Employment Relations Act (EERA) by insisting to impasse on a proposal for nonbinding grievance arbitration.[1] In a complaint issued by the office of the General Counsel of the Public Employment Relations Board (PERB or Board), the District's conduct was alleged to have violated EERA sections 3543.5(e) and, derivatively, (a) and (b).[2]

[1]The EERA is codified at California Government Code section 3540 et seq.

[2] Government Code section 3543 states, in relevant part:

In lieu of a hearing, the parties submitted a stipulation of facts. Thereafter, the parties submitted briefs on December 17, 1990, to an administrative law judge (ALJ) of this agency. By order of the Chief Administrative Law Judge, the matter was transferred to the undersigned on February 1, 1991, and this decision follows.

The charge in this case alleged a violation of the duty to bargain in good faith, EERA section 3543.5(c). The facts, however, alleged in the charge and the complaint concerned the Respondent's actions during the impasse resolution procedures. Adherence to a same position on a nonmandatory subject through

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> It shall be unlawful for a public school employer to do any of the following:
>
> (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. For purposes of this subdivision, "employee" includes an applicant for employment or reemployment.
>
> (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.
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> . . . . . .
>
> (e) Refuse to participate in good faith in the impasse procedure set forth in Article 9 (commencing with Section 3548).

impasse procedures is be a violation of EERA section 3543.5(e), as was alleged in the complaint.[3]

The discrepancy between the charge and complaint can be easily dealt with, however, because litigation of a (c) allegation is identical in all practical respects to litigation of an (e) violation as pled in the complaint. The sole difference between the (c) and the (e) violations is that one occurs prior to impasse. The burden of proof is same, only the timing is different. Thus, this decision will dispose of the allegation of the (e) violation, as well as the attendant (a) and (b) derivatives, but the result would be the same if the complaint had alleged a (c) violation.

STIPULATION OF FACTS

On November 14, 1990, the parties submitted the following stipulation of facts.

1. Charging Party is an employee organization within the meaning of Government Code section 3540.1(d) and is an exclusive representative of a unit of Respondent's employees within the meaning of Government Code section 3540.1(e).

2. Respondent is a public school employer within the meaning of Government Code section 3540.1(k).

[3]No mention is made in any of the papers on file to date as to whether the (c) allegation in the charge was a typographical error, or whether the Charging Party wished to litigate a (c) allegation.

3. In 1987, the parties negotiated a collective bargaining agreement for the benefit of the unit of certificated employees represented by Charging Party, which expired on June 30, 1989.

4. The collective bargaining agreement negotiated in 1987 contained a grievance procedure.

5. Between March 1989, and December 12, 1989, the parties met over forty times in an effort to reach agreement on a successor collective bargaining agreement. On December 12, 1989, Charging Party declared impasse and petitioned PERB to certify an impasse.

6. Between December 12, 1989 and July 6, 1990, Charging Party and Respondent participated in impasse procedures pursuant to Government Code sections 3548 through 3548.3.

7. During negotiations, Respondent bargained to impasse on a proposal giving Respondent the power to make grievance decisions that would be binding on all parties; Respondent further insisted during impasse on this proposal.

8. On or about August 2, 1990, the parties executed a new collective bargaining agreement covering the period July 1, 1989 through June 30, 1992.

9. The collective bargaining agreement now in effect between the parties contains a grievance procedure that vests in a third-party arbitrator the authority to render a decision that is final and binding on both parties.

10. The foregoing facts, and no others, are necessary to a determination whether, as a matter of law, Charging Party is entitled to a decision in its favor in this matter.

The relevant documents consisting of the current contract, the prior contract, and the District's negotiating proposal for a continuance of the prior contract's non-binding arbitration procedure, were attached to the stipulation.

ISSUE

Is advisory arbitration a nonmandatory subject of bargaining; and if so, did the District violate the EERA by bargaining to impasse on that subject?

CONCLUSIONS OF LAW

Initially, the District argues that the case should be dismissed as moot because, after mediation, the parties herein did agree to a contract proposal for binding arbitration. This argument must be rejected, however.

PERB has often ruled that the subsequent signing of a contract does not moot an allegation of bad faith bargaining.[4] Even here, where the parties settled on the disputed provision on the exact terms favorable to the Charging Party, mootness is not appropriate. As the Board noted in Amador Valley,

> There must be evidence that the party acting wrongfully has lost its power to renew its conduct. In cases clarifying parties' rights and obligations under a new law, the public

[4] Amador Valley Joint Union High School District (1978) PERB Decision No. 74; Oakland Unified School District (1980) PERB Decision No. 126; Jefferson School District (1980) PERB Decision No. 133.

> interest is served by deciding the underlying issue. (Amador Valley Joint Union High School District, supra, citations omitted.)

Here, whether a particular item is a mandatory or nonmandatory subject of bargaining can arise again any time during any subsequent negotiations. The District may have abandoned its position in this contract, but it may wish, in some future negotiations, to propose a nonbinding grievance procedure. Since the scope of bargaining is a subject of continuing interest and likely to reoccur, resolution on the merits is appropriate.

In addressing the merits of the case, the Association correctly argues that insistence to impasse on a nonmandatory subject is an unfair bargaining practice. (See Ross School District (1978) PERB Decision No. 48; Lake Elsinore School District (1986) PERB Decision No. 603.) Here the parties stipulated that the District did bargain to impasse on its proposal for nonbinding arbitration. Thus, the seminal issue to be decided is whether nonbinding arbitration is a mandatory or nonmandatory subject within scope.

In a novel argument, the Association maintains both that binding arbitration is a statutory right, and that nonbinding arbitration is not a mandatory subject of bargaining. The Association, in support of these theories, first cites EERA section 3543.2, which provides, "The scope of representation shall be limited to . . . procedures for processing grievances pursuant to sections 3548.5, 3548.6, 3548.7 and 3548.8." Contrary to the Association's argument, those specific sections

do not require binding arbitration but merely authorize a public employer to enter into negotiations for a collective bargaining agreement that may include binding arbitration. There is no statutory requirement that binding arbitration be guaranteed to either party.

The Association's analysis of whether the scope of bargaining can be read to exclude advisory arbitration is also flawed, in several respects. The statute section that defines scope actually says, "The scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment." The Board has long held that while some subjects within scope are enumerated specifically (e.g., wages, health and welfare benefits), others are nonenumerated but are included within scope by implication. In the latter case, the three-part test formulated by the Board in Anaheim Union High School District (1981) PERB Decision No. 177 (Anaheim) must be applied to determine whether the subject falls within scope, or should (as the Association argues here) be excluded.

Assuming for the moment that "advisory arbitration" (or nonbinding arbitration) is a wholly different process from "binding arbitration," does advisory arbitration pass the Anaheim test? Since advisory arbitration is logically and reasonably related to a term and condition of employment, it meets the first part of Anaheim. Applying the second part of the test, advisory arbitration is a matter of great concern to employer and employee

alike, likely to be a source of friction between them, and thus is appropriate for the mediatory influences of collective negotiations. The real question is whether the third part of the Anaheim test can be met.

The original Anaheim test formulated as the third step a finding that a requirement for management to negotiate over the disputed subject would not specifically abridge the employer's freedom to exercise those managerial prerogatives essential to the achievement of the employer's mission. Here, the employer has not indicated any reluctance to bargain about advisory arbitration. Instead, the Association is accusing the District of negotiating "too well," i.e., to impasse, on a subject the Association believes is outside the scope of mandatory subjects.

The Association therefore requests that the "modified" Anaheim test set forth in South Bay Union School District (1990) PERB Decision No. 791 (South Bay) be used. In that case, the lead opinion held that whether a union had a right to file a grievance in its own name was a nonmandatory subject of bargaining. In reaching this conclusion, the opinion altered the third part of the Anaheim test by asking whether negotiation about a particular subject "significantly abridges the organization's freedom to exercise those representational prerogatives essential to the achievement of the organization's mission as exclusive representative of the negotiating unit." South Bay, supra.

The Association's reliance on South Bay is misplaced. That case dealt with the issue of standing to file a grievance, not with the grievance process itself. However, assuming that reliance on the modified test found in South Bay is appropriate here, the argument advanced by the Association is unpersuasive. The Association states that advisory arbitration "inhibits the effective operation" of the Association.[5] This statement, however, is merely a bald assertion based on a desire to have binding arbitration. There is no reason why a grievance process that results in advisory arbitration significantly abridges the organization's freedom to exercise those functions needed to achieve its mission of representation. Advisory arbitration still exposes the contractual problem to an advocacy process wherein both sides are permitted to present their respective views of the problem.

The Association raises as an example of how its mission of representation is abridged is by noting that grievants under an advisory arbitration system are without a remedy if the employer chooses not to adopt a recommendation in favor of the grievant. To adopt the Association's view in this matter could lead to absurd attacks on the grievance process whenever the Association (or for that matter, the District) is unhappy with the mechanics

[5] The Association rejects the opinion of another ALJ that used as a standard whether advisory arbitration (as opposed to binding arbitration) rendered the Association incapable of performing its statutory mission. See Etiwanda Elementary School District (1983) PERB Decision No. HO-U-189. While not binding on these parties, the Etiwanda decision is persuasive but for the Association's citation of the recent South Bay decision.

of the process. For example, if a grievance would normally need to be filed within 30 days of the alleged contract violation, would the Association be less "inhibited" in its ability to represent its members if the limitation period was extended to one year? or five years? Obviously grievances filed outside the limitations period leave those employees without a remedy, so why should not the Association be able to file a grievance at any time, with no limitations period? Such a result would follow by accepting the Association's argument. Therefore, because even under the "modified" Anaheim test the Association's freedom of representation is not abridged, advisory arbitration is a mandatory subject of bargaining.

As noted supra, the Association's position is also flawed for other reasons. The Association's argument presupposes that advisory arbitration and binding arbitration are two separate and discrete processes, each one of which is a subject of bargaining. But the more logical view is that advisory arbitration and binding arbitration are both parts of the entire subject of contract grievance resolution. In other words, as long as grievance resolution is a mandatory subject of bargaining (and no party has disputed this), the various manners or processes used to resolve those grievances are automatically mandatory subjects of bargaining. Statutory and case law have long favored contractual agreements for resolution of problems arising under particular statute. (See United Steelworkers of America v.

Warrior & Gulf Navigation Co. (1960) 363 U.S. 574.) That agreed upon process may be limited to discussion by a joint labor-management committee. Or it could involve a grievance procedure that is binding when used but is only a voluntary process. (See. e.g., Groves, et al. v. Ring Screw Works (1990) 498 U.S. _____ [59 U.S.L.W. 4043; 135 LRRM 3121].) But nowhere in any of the case discussions concerning grievance processing is it indicated that the negotiability of a grievance resolution procedure is dependent upon the components of the procedure itself. Instead, the question is whether grievance resolution itself is mandatorily negotiable. Since it is, so must be the myriad types of procedures used to achieve that resolution.

Finally, the Association's arguments are fatally flawed by its inability to overcome established PERB precedent. In Anaheim City School District (1983) PERB Decision No. 364, the Board specifically held that,

> [Government Code] section 3543.2 expressly includes within the scope of representation "procedures for the processing of grievances" established pursuant to sections 3548.5, 3548.6, 3548.7 and 3548.8. The Act places no express restrictions or . . . limitations on the types of grievance procedures which are negotiable. The reference [in section 3543.2(a)] to subsections 3548.5 - .8 is meant to reflect a specific legislative sanctioning of binding arbitration. It follows that a grievance procedure culminating in advisory arbitration, a lower level of terminal dispute resolution than binding arbitration, is also negotiable. (Anaheim City School District, supra. pp. 14-15, emphasis added, fns. omitted.)

Charging Party has presented no reason why this long-established precedent should be overruled.

## CONCLUSION AND ORDER

The District did not violate the Educational Employment Relations Act when it bargained to impasse over a proposal to maintain advisory arbitration in the collective bargaining agreement. The charge and complaint in Case No. LA-CE-2964 is hereby DISMISSED.

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 Board itself at the headquarters office in Sacramento within 20 days of service of this Decision. 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. See California Code of Regulations, title 8, section 32300. A document is considered "filed" when actually received before the close of business (5:00 p.m.) on the last day set for filing ". . .or when sent by telegraph or certified or Express United States mail, postmarked not later than the last day set for filing . . . ." See California Code of Regulations, title 8, section 32135. Code of Civil Procedure section 1013 shall apply. 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 California Code of Regulations, title 8, sections 32300, 32305 and 32140.

Dated: February 27, 1991

Martha Geiger
Administrative Law Judge