/FR-375/

FACTFINDING REPORT

IN THE MATTER OF THE FACTFINDING BETWEEN:

ARCADIA UNIFIED SCHOOL DISTRICT

and

ARCADIA TEACHERS ASSOCIATION, CTA

Hearing Held:

February 25, 1988

Chairman

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BACKGROUND

The Arcadia Unified School District comprises six elementary schools, three junior high schools, a high school, and a continuation high school, with a combined enrollment of approximately 7,649 students. Located in the San Gabriel Valley, the District's 566 employees include 348 classroom teachers, 172 classified employees, and 46 administrative employees. The teachers have been represented by the Arcadia Teachers Association, CTA, since 1977.

Negotiation of the terms of the collective bargaining agreement to become effective July 1, 1987, commenced in May 1987. Unable to reach agreement, even after mediation, the dispute was certified to factfinding on January 25, 1988. The chairman of the factfinding panel was appointed by letter dated February 8, 1988, and a hearing was held on February 25, 1988, the parties having waived the time limits in Government Code §ó3548.2. The factfinding panel held an executive session on March 9 and on March 23, 1988.

FINDINGS AND RECOMMENDATIONS

ISSUE 1. EMPLOYER RIGHTS AND DISTRICT POWERS

Position of the Association:

ARTICLE VI should be amended so that it "will preclude arbitrary and punitive actions against unit members" by deleting "language denying the Association and/or unit members the right

to grieve any abuse of these District powers; limiting contracting out work to past practice; and . . . [establishing] a just cause due process discipline procedure to replace the current unlimited District right to discipline."

Position of the District:

ARTICLE VI should not be amended.

Findings:

The Association did not establish any evidence of "abuse of power," although it does appear that the language of ARTICLE VI is rather convoluted. Section A declares that by adopting ARTICLE VI the parties did not intend to "diminish the rights of the Association or its members" or to limit the obligation of either party to negotiate on subjects specified in Government Code § 3543.2, Scope of Representation. Then, Section B requires that none of the enumerated powers reserved to the District under Section C are subject to the grievance and arbitration procedure "unless a dispute of Section A above is alleged."

It is difficult to imagine, except in the broadest terms, how a grievance over, for example, a disputed application for personal leave (ARTICLE XII E.) could also comprise a violation of the declarations of Section A. Every grievance, to be arbitrable, must allege that the District has, somehow, diminished the rights of the Association or its members.

It should be noted that the language of ARTICLE XVI, Section B, states, "The provisions of this Agreement shall not be interpreted or applied in a manner which is arbitrary, capricious or discriminatory." This is certainly a proscription against

abuse of power and, in that event, the Association already has the protection which it seeks. However, a grievance alleging violation of this provision must also allege a violation of Section A, ARTICLE VI. This is cumbersome and, perhaps, serves to defeat legitimate grievances.

The Association's desire to limit contracting out, one of the enumerated management rights in Section C of ARTICLE VI, does not address a demonstrated problem. The District has contracted out work in only one area. Following adoption of Proposition 13 in 1978, the District has contracted student driver training instruction which was not fully funded by the State. There is no other evidence of contracting out. The Association has not demonstrated that the District has attempted to undermine the bargaining unit by contracting out work which should properly be performed by members of the bargaining unit.

A reading of ARTICLE VI, the parties agree, reveals that a unit member may not grieve any disciplinary action because the right to discipline is an enumerated District right and the contract contains no other relevant language except the proscriptions in ARTICLE XVI, Section B which are limited as discussed above. Thus, absent any agreement on discipline (within the scope of bargaining as defined by Government Code § 3543.2), the provisions of Education Code § 44944 govern suspensions. The District argues that the hearing procedures of § 44944 are sufficient. That section provides for a hearing conducted by a Commission on Professional Competence, as defined, only in the event of a suspension or a dismissal. The statute does not

address the Association's concern about the ability to protest lesser forms of discipline, for example, written warnings.

A straightforward declaration of the rights reserved to management, with the caveat "unless elsewhere limited by this agreement," (or similar language) would serve to clarify the intent of the parties. This is the traditional approach found in tens of thousands of collective bargaining agreements. It should be noted, however, that such a declaration merely serves as a confirmation, because management retains all rights which it had prior to the advent of collective bargaining unless specifically restricted by the collective bargaining agreement. This is the "reserved rights doctrine" to which arbitrators universally adhere.

Recommendations:

ARTICLE VI, Section B, should be amended to read as follows:

> Any dispute arising out of, or in any way connected with, either the existence of or the exercise of any of the following rights of the Employer is not subject to the grievance and arbitration provisions set forth in Article VII unless the right is expressly limited elsewhere in this agreement.

The issue of just cause for discipline is addressed in the next section.

ISSUE 2. JUST CAUSE AND DUE PROCESS RIGHTS

Position of the Association:

A detailed procedure for imposing discipline (except for termination, which is governed exclusively by Education Code §044944) only for just cause, and with due process rights along

the lines of progressive discipline, should be incorporated into the collective bargaining agreement.

Position of the District:

A detailed procedure for suspending employees for just cause should be incorporated into the agreement, but the procedure should not apply to lesser forms of discipline.

Findings:

There is common agreement by the parties that the concept of just cause for discipline should be incorporated into the collective bargaining agreement. The District seeks to limit application of just cause principles to suspensions, fearing that there will be a flood of objections by teachers to documents placed in their personnel file. The District does not want to discuss the validity of the information contained in such documents until that information is used for some disciplinary purpose and then only if the discipline comprises a suspension, which shall not exceed 15 days.

It is almost universal for collective bargaining agreements to require that discipline be administered only upon a finding of just cause. Just cause is required for all discipline, not just the more severe forms such as suspension without pay. The concept of just cause encompasses the question of whether the discipline is appropriate for the offense as well as other due process requirements such as notice and uniformity of application.

Discipline founded upon just cause is corrective in nature and not punitive; it is progressively more severe depending on

the seriousness of the offense. Clear notice of the rules to which disciplinary sanctions attach is a fundamental element of progressive discipline. An initial major offense would call for the most severe discipline as would the repeated failure to correct a minor infraction. Just cause is sometimes characterized as the exercise of management discretion which is neither arbitrary, capricious, or discriminatory. No one can reasonably object to these concepts. Indeed, as has been noted above, ARTICLE XVI, Section B., already embraces these ideas.

How discretion is to be applied in the individual case is sometimes made the subject of detailed procedures which often, somehow, do not quite fit the situation at hand. If the parties wish to negotiate detailed procedures for progressive discipline, they may, of course, do so. Frequently, detailed progressive disciplinary steps are adopted by District rule, and the Association has the freedom to challenge their application in the individual case. It is to be noted that nonrenewal decisions with respect to probationary teachers are governed by the provisions of Education Code § 44882 and midyear dismissals are governed by § 4948.3. Grimsley v. Board of Trustees of Muroc Joint Unified School District 189 Cal.App.3d 1440 (1987).

It is sufficient that the collective bargaining agreement call for just cause for all forms of discipline and that the grievance procedure be available to resolve application of the concept of just cause in the individual case. The grievance procedure contained in ARTICLE VII, as now written, applies to disputes over application and interpretation of the language of

the collective bargaining agreement.

Recommendations:

ARTICLE XVI, Section B, should be amended to read as follows (added words are underlined):

> The provisions of this Agreement shall not be interpreted or applied in a manner which is arbitrary, capricious or discriminatory; nor shall the District discipline unit members without just cause.

To prevent a retroactive application, which would be manifestly unfair, this provision should not be effective until 30 days after the parites have adopted the amending language.

ISSUE 3: GRIEVANCE PROCEDURE

Position of the District:

The grievance procedure should be amended to provide that the cost and fees of arbitration be borne by the losing party and that an arbitrator's cancellation fee, if any, shall be paid by the party cancelling the arbitration, unless there is a mutual agreement to cancel.

Position of the Association:

The grievance procedure should not be so amended.

Findings:

Only four grievances have culminated in arbitration since commencement of the collective bargaining relationship in 1977. The most recent arbitration was eight years ago. Two of these arbitrations were of grievances arising out of Article XIII Transfers, which was amended in 1981 and in 1984. Those amendments successfully removed the source of those grievances.

There has been no abuse of the grievance arbitration procedure. The prevailing contract provision in unified school districts is that the expense of the arbitrator, including cancellation fees, is shared equally, unless, of course, the parties agree otherwise when settling a particular grievance.

Recommendations:

ARTICLE VII Grievance Procedure should not be amended as proposed by the District.

ISSUE 4. SALARIES, FRINGE BENEFITS, and TERM OF AGREEMENT

Position of the Association:

Salaries should be increased 7 1/2% effective July 1, 1987. Annual fringe benefit contributions should be increased from $2,116 to $2,350, or $234 annually (11.06%). The term of the agreement should be one year.

Position of the District:

The term of the agreement should be three years. There should be a compensation-fringe benefit package increase of 3.02% effective July 1, 1987, comprising a 2.48% increase on the salary schedule effective July 1, 1987, and an increase in the annual fringe contribution from $2,116 to $2,328, which is $212 and equivalent to a .54% salary schedule increase. In addition, a formula should be mutually developed "whereby an appropriate share of P2 growth ADA income, above current projections, would be added to the 1987-1988 compensation package."

For both 1988-89 and 1989-90, total annual compensation, with the distribution between salary and fringe benefits mutually

determined, should be calculated by either of the following formulas:

A. If the District receives a Base Revenue Limit (BRL) cost of living increase (COLA) from the State at or below 4.5%, the compensation package increase shall be equal to the District's BRL rate increase.

B. If the District receives a BRL COLA from the State at or above 4.6%, the compensation package increase should be 4.5%, plus 1.3 times the difference between 4.6% and the actual BRL COLA.

The District needs a 4.5% minimum annual BRL COLA from the State in order to maintain its programs. Above that minimum increase, the District is willing to grant a larger share (1.3 times) of the increase in the form of compensation to the unit members.

Findings:

The District is now apparently at the end of a long period of declining enrollment which saw an ADA of 9613 in 1977-78 decline 23% to 7416 for 1986-87. 1987-88 P2 is estimated to increase to 7546.

The District spends about 82.5% of its total budget on salaries and fringes. Since 1983-84, the District has ranked number two out of 42 Los Angeles unified school districts in the percentage of total budget expended on salaries, except for the most recent year when it ranked number one. However, in percent of budget spent on fringe benefits it ranked between 39th and 35th during those years. During this time the District's unrestricted ending balance has fluctuated between 5.2% and 2.6%

and it is estimated to be 2.8% at the end of 1987-88, an improvement of approximately $115,000 from the prior year.

Lottery funds in prior years have been placed in the general fund and, therefore, they have been made available for salary increases in the same percentage as revenue from other sources.

The average teacher's salary is currently about 12% above the Los Angeles County and Statewide averages, an advantage which has increased about two percentage points since 1983. This is partly because almost two-thirds of the 348 teachers are at the highest step in their respective column on the salary schedule. This superior salary position, however, is tempered by the realization that the District ranks last among the Los Angeles unified school districts in the dollar amount expended for fringe benefits.

The Association points to revenue of $1,051,000 which was received from sale of surplus property, purchased in 1927 by the District for $2,000, as a source of funds which should be diverted to the general fund and made available for salaries. The District responds, and correctly, that Education Code § 39363 requires that funds from the sale of surplus property must be used for capital outlay or deferred maintenance unless a finding is made by the District and the State Allocation Board that no reconstruction or deferred maintenance is needed within five years from the date of the sale. No such finding has been made and the District states that it is developing an application for construction funds, as well as an amendment to its deferred

maintenance plan, first begun in 1980.

During 1987-88 the District allocated or expended from the general fund approximately $270,000 for discretionary capital spending. This was done for the purpose of retaining intact the fund from the sale of property, although no specific plans were set forth for its utilization. It is agreed that money from the sale of property fund could be transferred to the general fund to cover all or a portion of this expenditure if necessary.

The average salary adjustment for 30 Los Angeles County unified school districts for which data are available at the time of this factfinding is 4.4%. The average salary increase in Los Angeles County does not take into account a number of settlements not yet consummated and merely represents a mid-point in a wide range of settlements. The increase in the consumer price index for 1987-88 is 4.0%

A 1% increase in salaries would incur an annual cost of approximately $122.000. The uncertain future of school financing makes it unfeasible to recommend the dollar amount of an economic package for more than one year. The parties have traditionally entered into multi-year agreements.

Recommendations:

The compensation-fringe benefit package increase effective July 1, 1987, should be 4.4%. The parties should negotiate the allocation of the total package between salaries and fringe benefits. The term of the contract should be for three years ending June 30, 1990, with reopeners on salaries and fringes in 1988 and in 1989.

ISSUE 5. EVALUATIONS

Position of the Association:

ARTICLE XIV Procedures for Evaluation should be amended in Section C. Personnel Files to include the provisions of California Administrative Code, Title 5, Governing Boards of School Districts, § 16023 (B). This section provides that "Information of a derogatory nature as defined in Education Code § 44031 shall be Class 1 -- Permanent only after it becomes final. This information becomes final when: 1. The time for filing a grievance has lapsed, or 2. The document has been sustained by the grievance procedure."

Education Code § 44031 provides that "materials in personnel files of employees that may serve as a basis for affecting the status of their employment are to be made available for the inspection of the person involved." This material, which is defined to exclude ratings, reports and records obtained prior to employment of the person involved, and examination records, "shall not be entered or filed unless and until the employee is given notice and an opportunity to review and comment thereon. An employee shall have the right to enter, and have attached to any derogatory statements, his own comments thereon."

Position of the District:

ARTICLE XIV should not be so amended.

Findings:

ARTICLE XIV sets forth detailed procedures for periodic teacher evaluation, but the Association's proposed amendment pertains only to Section C which concerns material placed in

personnel files "which may serve as a basis for affecting the status of their [unit member's] employment." The current provisions of Section C defining derogatory material and the teachers' right to comment in rebuttal generally follow the Education Code section cited above. There is no specific language, as in the Administrative Code, as to when the material "shall become final." The provisions of Administrative Code § 16023 apply, of course, even though they are not incorporated into the collective bargaining agreement. As the collective bargaining agreement is now interpreted, derogatory material placed in a teacher's file may not be made the subject of a grievance; the sole available response is to file rebutting material.

The District argues that a teacher is not harmed by the prohibition against filing a grievance to establish the validity of derogatory material because no action is taken merely by that filing. And, after all, the District has the burden of proving its validity at the time, if any, that the material is used to justify action affecting the teacher's status.

This argument ignores the real possibility that passage of time may destroy the ability of a teacher to effectively rebut derogatory material, even though a written statement was prepared in response at the time of initial filing. Time may work against the District, too, in trying to utilize such material to justify an action affecting a teacher's status. But that timing is in the control of the District; the affected teacher is unable to anticipate or to control when the District may use derogatory

material. Evidence which may be crucial in a response by the affected teacher may not be available when the District decides to take action. The teacher should have the option of responding by filing a written statement rebutting the derogatory material or responding by filing a grievance seeking to have the material removed from the file, undertaking to carry the burden of proof to establish that the material is false.

Recommendations:

This factfinding report recommends under ISSUE 2 that the collective bargaining agreement be amended in Article XVI to provide that discipline may be imposed only for just cause. Filing derogatory material in a teacher's personnel file is a form of discipline. This action is to be distinguished from evaluation comments with which the teacher disagrees. Evaluation is a form of instruction and it is not disciplinary. However, to make the matter clear, the contract should expressly permit teachers to grieve derogatory material. ARTICLE XIV, Section C.4. should be amended by adding a new paragraph "c. Additionally, a unit member may file a grievance protesting the truth of the derogatory material."

ISSUE 6. RESIGNATIONS

Position of the District:

ARTICLE XVI Miscellaneous Provisions should be amended by deleting Section C which states, "A unit member's resignation shall remain revocable until such time as the Board officially takes action on said resignation." This is in accord with the

prevailing practice and will allow the Distinct "an efficient opportunity to select the best possible replacement" for teachers who resign.

Position of the Association:

This provision should remain in the contract. The Board can easily schedule a meeting to speed up the process. If a teacher resigns the first day of school, as the District fears, it can require the teacher to provide service under the provisions of Education Code § 44420. This section allows suspension of credential of teachers who "refuse, without good cause, to fulfill a valid contract."

Findings:

About three-fourths (30 out of 39) of the Los Angeles unified school districts provide that a superintendent or designee may accept a teacher's resignation with finality, making Board action unnecessary to make the resignation final. The Arcadia School Board meets regularly, every two weeks during the school year and monthly during the summer. There is, therefore, a period of uncertainty during which a teacher may withdraw a previously tendered resignation. During this period the District may not make binding offers to replacements. It is possible that a desired candidate may become unavailable because of the delay. It is also possible, as the Association points out, that a teacher may have resigned in haste and the waiting period provides an opportunity for reconciliation.

While there are equities on both sides, no actual incidents of remorse on the part of a resigning teacher were submitted into

evidence. The District cited a recent case in which the District could not act to hire a replacement until after school started and selection of the most qualified teacher was impaired.

Recommendations:

Section C of ARTICLE XVI should be deleted from the contract.

ISSUE 7. TEACHER IN CHARGE

Position of the District:

ARTICLE XVI Miscellaneous Provisions should be amended to provide for a teacher in charge classification to act as a site administrator in the absence of the principal at single-administrator campuses. The compensation should be $100 per quarter. This will permit effective decision-making when the principal is unavoidably absent, allow evaluation of teachers' administrative abilities, and provide an opportunity for them to experience administrative responsibilities.

Position of the Association:

The teacher in charge classification should not be added to the contract. The District's proposal leaves too many unanswered questions about how much time and responsibility would be imposed upon the classification, adequacy of compensation, and impact on other teachers who would be required to cover for the teacher in charge.

Findings:

Only ten unified school districts in Los Angeles County have implemented the teacher in charge concept. The duties of such a

position are not well defined and it is difficult, based upon the evidence, to determine what should be the appropriate compensation. Only one teacher at the District is affected.

Recommendations:

The parties did not present sufficient information for the factfinding panel to make a recommendation on this issue.

ISSUE 8. FAIR SHARE

Position of the Association:

An agency fee provision should be added to the contract in order to permit the Association to properly perform its responsibilities. The Association will agree to a separate election conducted by the PERB to decide the issue.

Position of the District:

The District is unalterably opposed to any language which compels payment of agency fees by its employees.

Findings:

Approximately 88% of the teachers are members of the Association and, therefore, the amount of additional revenue to be gained by an agency fee provision is not large. Only 14 of the 42 Los Angeles unified school districts have agency fee provisions.

The question of union security is one about which reasonable persons may differ, although their differences are often expressed most unreasonably. The District sternly points out that "The factfinding panel is empowered to make findings and recommendations based upon fact, not based upon supposition or

philosophic ideas," apparently not realizing that the District's unyielding position is based upon a philosophic idea which has been rejected by the United States Supreme Court in Abood v. Detroit Board of Education, 430 U.S. 209 (1977). On the other hand, the Association perhaps overestimates the advantage to be gained by eliminating "free riders" in view of the overwhelming voluntary support of the teachers which it now enjoys.

Recommendations:

Absent a finding of persuasive area practice or evidence of need, a recommendation should not be made by the factfinding panel that the agency fee provision be incorporated into the contract.

ISSUE 9. CONCERTED ACTIVITIES

Position of the Association:

The language of ARTICLE XX Concerted Activities is restrictive and overly broad. It should be eliminated.

Position of the District:

The language of ARTICLE XX should be retained without change.

Findings:

The language of ARTICLE XX is quite far-reaching, describing in detail the Association's and its members' duty to comply with the no-strike provision and that failure to do so will result in discipline.

A no strike clause is the Association's quid pro quo for inclusion of binding arbitration over interpretation and

application of the terms of the collective bargaining agreement, a protection which this report recommends be enhanced. (See ISSUES 2, 3, and 5.) Very little is added to the concept by repetition of the obvious fact that violation of the no strike clause is a disciplinary offense.

ARTICLE XX provides in Section E. that "This Article shall remain in full force and effect until such time as the parties have fully exhausted the impasse procedures as set forth in Government Code Sections 3548 through 3548.4." Under those circumstances the contract most probably would have expired. It appears reasonable that the parties intended that the provision apply only to interim reopeners. In view of the recommendation for a three year contract, Section E. should be appropriately amended.

Recommendations:

ARTICLE XX should remain in the collective bargaining agreement. Section E. should be amended to read as follows:

> If the parties have not reached agreement on a reopened salary or fringe benefit provision, following exhaustion of the impasse procedures as set forth in Government Code Sections 3548 through 3548.4, this Article shall no longer be in effect with respect to the unresolved reopened provision.

ISSUE 10. TRANSFER

Position of the District:

The District seeks non-substantive changes as well as major changes in ARTICLE XIII Transfer which will accomplish the following:

A. Equal consideration of all transfer volunteers and outside candidates in an attempt to secure the best teacher available for each vacancy.

B. The ability to involuntarily transfer a unit member on the basis of: an unwillingness to continue to perform a

cocurricular assignment, or the determination that a transfer will maximize the contribution of the employee to the District.

C. A voluntary transfer will be granted to the most senior employee when a transfer volunteer is being selected for a vacancy, and when all criteria are judged equal by the District.

Position of the Association:

The current transfer language should be retained. This article has successfully served the teachers and the District since the last major revision in 1981, producing no grievances during that time.

Findings:

The discussion of the District's proposal at the factfinding hearing centered primarily on the problem posed by the example of a teacher who voluntarily assumed cocurricular duties, e. g., coaching duties in addition to classroom assignments, and then refused to continue to perform the cocurricular duties. In such a case, the District may be required to hire a new part-time teacher solely for the cocurricular duties, at additional cost. A teacher, it was explained, may not refuse such duties if they were included as part of the original job posting because, in that event, the duties are not treated as voluntarily undertaken. There is no evidence as to how frequently this problem has arisen.

The changes proposed by the District go far beyond the above example. Most importantly, every voluntary transfer request would open up the requested position to outside candidates based upon "the educational contribution that the administrator believes can be met by the outside candidate or potential

transferee." The transfer would also be subject to the "preference of the sending and receiving principal." Involuntary transfers would be subject to two additional criteria: "C. Judgment by the District that a transfer would maximize the contribution of the employee to the District. D. Unwillingness to continue performing cocurricular assignment."

The present voluntary transfer criteria are as follows:

a. Credentials to perform the required services.
b. Affirmative action requirements.
c. The choice of the local site Administrator shall be limited to matters relating to the employee's experience (including cocurricular capabilities) and evaluative performance as they reasonably relate to the position requested.
d. Length of service.

These criteria do not restrict the District from reaching its objective of efficient deployment of personnel. Seniority is only one factor which must be considered along with credentials, affirmative action requirements, and experience.

The Association's argument that the District's proposal imports vague and subjective criteria into the voluntary transfer selection process is well taken. However, refusal by a teacher to continue to perform cocurricular activities which were understood and accepted as part of the job at the time of the teacher's engagement for the position, may place a real economic burden on the District.

Recommendations:

Article XIII, Section C. Involuntary Transfer, paragraph 1., should be amended by adding a sub-paragraph c. as follows: "Unwillingness to perform a cocurricular activity undertaken as

part of the consideration for initial employment or transfer." (This provision should become effective commencing 30 days after adoption by the parties to avoid retroactive applicaiton.)

ISSUE 11. LIMITED ENGLISH PROFICIENCY (LEP) COORDINATOR POSITION

Position of the Association:

A LEP Coordinator position should be established to be paid $1,265 per year at the high school and $633 at the junior high.

Position of the District:

A LEP Coordinator position is needed, but the position should be paid $809 at the high school and $411 at the junior high.

Findings:

The parties agree that a LEP Coordinator is needed, but they cannot agree upon the appropriate compensation. Comparisons are difficult to make with any precision. The District pays a wide range of annual rates to teachers who perform various extra duties. The Association's proposal sees the LEP Coordinator as equivalent to, for example, High School Social Science Chairperson ($1265). The District compares the LEP Coordinator in worth to, for example, high school foreign language and industrial arts chairpersons or similar to extra duty work on high school newspaper, yearbook, or drill team. Both parties value the services of the LEP Coordinator at the junior high level as worth approximately half as much as at the high school level.

Recommendations:

Without detailed knowledge of the various positions it is

not possible for the panel to make a recommendation on this issue.

March 23, 1988
Tustin, California

C. Chester Brisco
Chairman

SIGNATURES OF PANEL MEMBERS

Date March 29, 1988

Concur __ Dissent X

Thomas L. Brown
Association Panel Member

Date March 25, 1988

Concur ✓ Dissent ✓

Bruce Julian
District Panel Member

ARCADIA UNIFIED SCHOOL DISTRICT

CONCURRING AND DISSENTING OPINION

DISTRICT'S REPRESENTATIVE TO FACTFINDING PANEL

CASE NO., LA-F-339 (M-1805, R-121A)

I concur in part and I dissent in part to the factfinding report in the above entitled matter. I concur with the Chairperson's report recommendations, except as noted below.

While I disagree with his recommendations on the issues of teacher-in-charge, concerted activities, and transfer, I must dissent vigorously on two other major areas of the Chairperson's report recommendations: 1) the proposed discipline/evaluation modifications, and 2) the compensation package for 1987-88 and beyond.

1. With regard to the proposed discipline/evaluation modifications, which involve three different contract articles, the Chairperson has allowed his opinions as an arbitrator to supersede his statutory obligations as a factfinder under the Educational Employment Relations Act (EERA). The Arcadia Teachers Association (ATA) initiated bargaining about a just cause disciplinary procedure with absolutely no adverse impact experiences in the District to justify any type of contract language on the subject. If the Association did not cite even one example of "unjust" cause discipline in the twelve year history of collective bargaining in the Arcadia Unified School District (AUSD), and if the Chairperson could not cite even one of the statutory criteria in the EERA to justify his "factfinding" recommendations, then the contractual modifications he is proposing must be discussed as opinion-giving, rather than factfinding.

Closely related is the Chairperson's proposal that employee personnel file entries of a derogatory nature be grievable. That recommendation would effectively give a unit member and/or the Association "two bites of the apple": the ability to challenge post-employment/non-evaluative derogatory material in a binding arbitration procedure, and (if that challenge is not successful) to contest the material again at a later date should the District choose to use it in some type of suspension, salary dock, or dismissal action. In such potential and subsequent disciplinary actions, as the arbitrator-Chairperson knows better than most, it is the District's enormous obligation to prove the validity of the derogatory material. The District should not be put into this double jeopardy type situation.

Parenthetically, later in his report on another subject, the Chairperson ignores the District proposal for a voluntary teacher-in-charge program since only ten unified school districts in Los Angeles County have implemented such a concept; presumably, a prevailing practice of ten (10) of forty-two (42) other County

unified districts was not enough factual evidence to persuade the Chairperson to recommend the District proposed on that subject. However, on the issue of personnel file grievability, the Association did not offer evidence that even <u>one</u> of the unified school districts in the County had such a provision!

Once again, the Chairperson's opinion as an arbitrator, rather than his statutory obligation as a factfinder appears to have formed the basis of his recommendation on personnel file grievability, and once again, therefore, his opinion must be dismissed.

2. The Chairperson's total compensation recommendation of a 4.4% increase for 1987-88, while <u>far</u> closer to the District's position than that of the ATA, disregards the critical financial data submitted to the Factfinding Panel by the District:

a) In its primary source of additional annual income, the AUSD received only a 2.48% increase in its Base Revenue Limit (BRL) rate per average daily attendance (ADA) for 1987-88.

b) The unchallenged District budget figures for 1987-88 income and expenditure estimates provide for a realistic anticipation of growth in ADA; and if that anticipated ADA of 7546 is a bone of contention between the parties, the District has offered to develop a formula to share income from ADA in excess of its projection.

c) In light of its 3.02% total compensation offer, the District will fall below the three percent (3%) minimum reserve fund level recommended by the Office of the Los Angeles County Superintendent of Schools.

d) The District has already made 1987-88 budget cuts of more than $457,000 in actual expenditures from a year ago, including at least 16 less full time equivalent employees than in 1986-87! Those $457,000+ budget cuts represent the equivalent of a little more than a 2 1/2% salary increase for all District employees. The District approached those painful budget cuts with the goal of providing its remaining employees with a compensation increase for 1987-88, in spite of the refusal of the State of California to fund its public schools at the 4 to 4 1/2% level needed in order to avoid program and staff reductions.

e) In the last year for which data are available, 1986-87, no other unified school district in Los Angeles County made a greater budgetary effort toward teacher salaries than the Arcadia Unified School District; AUSD spent a greater

percentage of its current expenses of education for teacher salaries than any of the other 42 unified school districts. That type of effort has always been a commitment of the District, in part because the ATA has also placed its bargaining emphasis on the salary portion of total compensation.

f) In 1986-87, also the latest year of available data tabulation, the average teacher salary in the Arcadia Unified School District ($35,129) was more than 12% above both the average teacher salary in Los Angeles County ($31,327) and in the State ($31,269). This phenomena is a product of District salary improvement efforts, and the fact that over half of the District's teachers are paid both on the highest point of the salary schedule ($40,295 for 1987-88 under the AUSD proposal), and in addition, they also receive extra longevity increment payments.

g) One of the statutory criteria for factfinding consideration is the Consumer Price Index (CPI). Using the Urban Wage Earners and Clerical Worker CPI index for Los Angeles-Long Beach-Anaheim for the past four (4) years, the District's cumulative salary raises for teachers over that period have been just about double the cumulative increase in the CPI index.

h) Also over that same four year period, the District's cumulative total of salary increases for teachers has been almost 1/3 higher than the Base Revenue Limit Rate/ADA cost of living adjustments it has received from the State.

Factors a through h, above, present an array of compelling facts to support the fact that the compensation position of the Arcadia Unified School District for 1987-88 is both appropriate and reasonable. In response, however, the Arcadia Teachers Association offered only a list of the salary settlements reached thus far among Los Angeles County unified school districts for 1987-88. That information is flawed in two respects: 1) the other districts that have not yet settled teacher salaries are obviously having a financial disagreement with their unions, and therefore those eventual settlements are expected to be lower than the current settlements, thereby lowering the current average settlement; and, 2) as long as facts are apparently used situationally by the Chairperson, what other districts are able/willing to do about 1987-88 salaries should have no more impact on AUSD salaries than the life style impact, if any, generated on us as individuals by our personal neighbors who may live more frugally or extravagantly than we do.

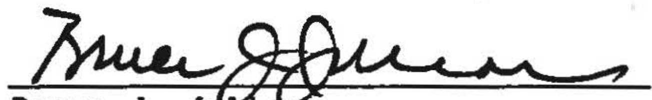
While the Chairperson doesn't say so in so many words, he

seems to infer that the special reserve account of $1,051,000 generated from a recent sale of District property can be transferred into paying for general fund capital outlay expenditures, thereby liberating general fund money (that would have been spent for capital outlay) to finance his 1987-88 compensation recommendation. Even if that were an appropriate manipulation, it would involve the usage of one-time funds on continuing expenditures, and it wouldn't be long before the special reserve account was gone, but the salary schedule increase(s) it originally spawned would remain in perpetuity. Also, the Chairperson made his inference about utilization of special reserve funds for salaries without knowing the actual balances and/or encumbrances that may have already been made in that reserve.

Lastly, on the issue of compensation, the Chairperson has proposed a salary and fringe benefit bargaining reopener provision for both 1988-89 and 1989-90, thereby recommending a three (3) year contract term. His reasoning for the reopener provision is the uncertainty of future school funding. The District proposal for compensation increases for 1988-89 and 1989-90 was based precisely on that uncertainty: in general, the Association would get a salary COLA from the District that matches the COLA the District would get from the State in its base revenue limit rate per ADA. Adoption of the District's salary proposal for the next two years would provide an optimum period of labor stability that would facilitate the educational process of the District by virtue of a much needed respite from the debilitating effects of protracted and acrimonious negotiations. As the Chairperson was informed, bargaining between the Association and the District for their past three collective bargaining agreements has averaged ten (10) months per agreement! By virtue of the Chairperson's annual salary and fringe benefit reopener recommendation, the parties could find themselves at an identical stage <u>next</u> March - assuming they can reach bilateral agreement on their current impasse within the coming weeks.

While the Chairperson may have been working in a difficult set of circumstances, his recommendations must be viewed from the point of view of whether or not they are based upon the facts presented at the hearing. I do not believe that they were, and therefore they should be dismissed as opinions.

Respectfully submitted



Bruce J. Julian
Panel Member

Date March 25, 1988

FACTFINDING REPORT

In the Matter of Factfinding Between: ARCADIA UNIFIED SCHOOL DISTRICT, Employer, and ARCADIA TEACHERS ASSOCIATION, CTA/NEA, Exclusive Representative.	MINORITY POSITION PERB CASE NO. LA-F-339 (M-1805, R-121A)

PROCEDURAL DISSENT

The Chairman has committed a sequence of procedural errors which have compromised his neutrality in this instance and deprived the parties of the benefits of the factfinding process.

The Public Employment Relations Board sent the Chairman his appointment notice on February 4, 1988. The appointment letter included the following instructions:

> Please contact the panel members as soon as possible to arrange for a meeting date. Government Code section 3548.1 requires that the panel meet within ten days after its appointment (i.e., ten days from the date of service of this letter). It is your responsibility to ensure compliance with this statute, or in the alternative, to obtain a waiver of this time period from the parties. (Underlining added)

The letter was served on February 4. (See Attachment A) The statute required that "the panel shall, within ten days after its appointment, meet with the parties or their representatives..."

The Chairman, ignoring both the instructions in his appointment letter and the law, refused to schedule a meeting of the panel with the parties, or their representatives, until February 25, 1988, which was the date requested by the District's panel member.

Although the Chairman has known from the outset that the Arcadia Teachers Association and its panel member were unwilling to waive the statutory time limits (see Attachment B), the Chairman deliberately misrepresented that fact on the first page of his report by claiming that the parties had waived the time limits.

The Chairman's efforts to accommodate the District go well beyond violating the procedural time limits and were evidenced in a series of substantive changes in his report.

On February 25, a hearing was held where both parties were provided with an opportunity to present documentary evidence and testimony along with arguments supporting their positions on each of the several issues. Following the meeting, the Chairman drafted his report and recommendations to be reviewed by the other panel members at a meeting on March 9. The Chairman's draft was complete except for findings and recommendations on the economic issues. The panel members had previously agreed to review the records pertaining to the District's financial ability at that meeting.

During that meeting, the Chairman revised his recommendation to delete section B from the Employer Rights and District Powers article. The revision was made at the request of the District's panel member, even though there were absolutely no new facts or evidence presented to justify such change.

Chairman's First Report

Following the March 9 meeting and the panel's review of the District's financial statements, the Chairman issued his complete report to the other panel members on March 14. The March 14 report included the revision to the Employer Rights and District Powers article requested by the District's panel member, and it included the Chairman's recommendations regarding a 4.4% salary/ fringe benefits package, and a term of the agreement of one year, which were the result of the panel's review and deliberations at the March 9 meeting.

The Chairman's March 14 report was mailed to the panel members with a cover letter which included the following instructions:

> "A copy of the factfinding report in the above referenced matter is enclosed. I have included an extra signature page for execution and deposit in the mail along with your comments, if any, no later than March 23, 1988, as we have agreed. I will be in my office between 11:00 a.m. and noon on that date to receive a joint telephone call, if either panel member desires.
>
> "If you find any errors or omissions, please inform me and I will make the appropriate changes. Of course, any portion of the report may be revised by mutual agreement." (See Attachment C.)

The Association panel member submitted his signature and comments to the Chairman's report on March 21, 1988. On March 22, the District panel member notified the Association panel member by phone that he had been communicating directly with the Chairman about the report and was requesting another meeting of the panel because he was desirous of having the Chairman make additional changes in his report.

Over the objections of the Association panel member, the Chairman agreed with the District's panelist and called a meeting for the following day, March 23.

The Chairman came to the March 23 meeting already having penciled in on his copy of the report the revisions requested by the District's panel member. The Chairman indicated that he was going to revise his report again at the request of the District representative--and once again, over the objections of the Association-appointed panel member.

At that meeting the District's panel member gave the Chairman a report which indicated that the District's special reserve fund was almost totally depleted. That report indicated that the million dollars reported to have been in the fund at the February 25 hearing no longer existed and that fund had an actual balance of only $94,772 remaining. All of the other monies from that million dollar special reserve had already either been expended or had been committed to expenditures and were encumbered. This information was in sharp contrast to that which was provided the panel on February 25--but, more importantly, was given to the Chairman after the hearing and without providing the Association an opportunity to challenge or respond. In deference to the Association panel member's repeated objections, the Chairman returned the document to the District's panel member--but only after spending several minutes reviewing and discussing it in detail.

Following the March 23 meeting, the Chairman once again revised his report at the request of the District's panel member

--and without benefit of new facts or evidence to justify such a change.

SUBSTANTIVE DISSENT

This panel member must disagree with the Chairman's recommendations in each of the following areas:

Employer Rights and District Powers

The Association proposed the deletion of the phrase "contract out work" from the list of retained district rights in Article IV. The Chairman's observation that the District has not used that right to undermine the bargaining unit is beside the point. The fact is that the subject of contracting out work is a mandatory topic of bargaining and the Public Employment Relations Act requires school districts to negotiate with the bargaining agent prior to contracting out any bargaining unit work.[1] In this instance, the District wants to retain a broad, general waiver of the Association's right to bargain about any prospective contracting out that the District may at some future time wish to initiate. PERB has repeatedly held that any bargaining waiver must be clear and unequivocal, and may not be broad and general as in this instance.[2]

Because this broad, general language which the District seeks to retain cannot be used as a shield against the District's bargaining obligation, the only likely result of retaining it in

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[1] Healdsburg Union High School District (1984) PERB Decision No. 375, Pg. 95-100. [8 PERC 15021]

[2] San Mateo School District (1980), PERB Decision No. 129. [4PERC 11092]

the contract will be to cause a misunderstanding and unnecessary conflict at some future date.

The Chairman's original recommendation to delete paragraph B from the article was appropriate and still is the best way to avoid ambiguity and controversy in the future. The District panel member's request, and the Chairman's subsequent agreement to retain paragraph B, invites unnecessary controversy.

Salary/Fringe Benefits

The Chairman appears to have erred in his recommendation regarding compensation. The 4.4% in his recommendation appears to be a combined salary and fringe benefit package. However, the 4.4% average salary settlement in the county is exclusive of the fringe benefit increases. The Arcadia School District has offered a $212.00 annual increase in fringe benefits while the average fringe benefit increase in the county, in addition to the 4.4% salary increase, is a $281.00. (See Association Exhibits G and H.) Accordingly, a package including a 4.4% increase in salary and a separate $212.00 increase in fringe benefits is still approximately $70.00 per year less for Arcadia teachers than their colleagues in other districts will receive this year. No evidence or even argument was given to justify this relative pay cut for Arcadia teachers.

The Chairman's willingness to change his March 14 recommendation for a one-year term will make it significantly more difficult for the parties to come to agreement. The District representative's insistence that a three-year term is necessary--"because the superintendent wanted it"--is simply not

justification for revising the original recommendation.

There are initiatives pending that represent significant potential money for class size and other changes. It is absolutely foolish for the Association to agree to a closed contract for the next three years when teachers throughout California have been investing time and money to ensure that additional monies will be available to make dramatic improvements beginning with the 1988-89 school year.

It is true that the parties have had multi-year agreements in the past, but those agreements were bought by the District with salary raises ranging between 6% and 10%. The Chairman's decision to revise his recommendation from a one-year term to a three-year term for the sole purpose of accommodating the District's negotiator and superintendent is unjustified by the facts, and may give the District unrealistic expectations that can only serve to delay settlement.

CONCLUSION

The parties have been ill-served by the factfinding process in this instance, and it is hoped that when they return to the bargaining table there will be a more realistic effort to win an agreement rather than an argument.

DATED: March 29, 1988

Respectfully submitted,

Thomas L. Brown
Panel Member for the Association

ATTACHMENT A

PROOF OF SERVICE BY MAIL
C.C.P. 1013a

I declare that I am a resident of or employed in the County of Los Angeles, California. I am over the age of 18 years and not a party to the within entitled cause. The name and address of my residence or business is Public Employment Relations Board, 3530 Wilshire Blvd., Suite 650, Los Angeles, California 90010-2334. I am readily familiar with the ordinary practice of the business in collecting, processing and depositing correspondence in the United States Postal Service and that the correspondence will be deposited the same day with postage thereon fully prepaid.

On February 4, 1988, I served the Letter Re: E-339 Arcadia USD

on the parties listed below by placing a true copy thereof enclosed in a sealed envelope for collection and mailing in the United States Postal Service following ordinary business practices at Los Angeles, California, addressed as follows:

C. Chester Brisco
17371 Jacaranda Avenue
Tustin, CA 92680

Bruce Julian
Julian & Associates, Inc.
32392 Crete Road
Laguna Niguel, CA 92677

Tom Brown, Consultant
California Teachers Association
225 N. Barranca Ave., Suite 220
West Covina, CA 91791

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on February 4, 1988, at Los Angeles, California.

Deidra J. McKinley
(Type or print name.)

(Signature.)

1901d

PERB 3A (12/87)

ATTACHMENT B

California Teachers Association

SERVICE CENTER ONE
225 North Barranca Avenue, Suite 220, West Covina, California 91791
(818) 339-5431 or (818) 967-7527

February 9, 1988

Roger Smith
Public Employment Relations Board
3530 Wilshire Boulevard, Suite 650
Los Angeles, CA 90010

RE: Arcadia Unified School District
Factfinding, LA-F-339

Dear Mr. Smith:

The purpose of this letter is to follow up in writing the discussion that we had by telephone yesterday afternoon.

For the several reasons previously discussed, the Arcadia Teachers Association is unwilling to waive the statutory time limits for the factfinding process.

Mr. Brisco had available dates, and offered them to the parties for the initial hearing, but, at the District's request, he has agreed to delay the hearing until well past the ten day time limit. The panel is scheduled to meet with representatives of the parties for the first time on the afternoon of February 25, with the first full day of hearing scheduled for March 2. Mr. Brisco has allowed the District to schedule the hearing at its convenience in spite of the law and thereby deprived the Association of its right to a timely hearing. This compromises the factfinder's neutrality in the eyes of the Association leadership.

The Arcadia Teachers Association is requesting that your office appoint a different person to chair the panel in the above case. Specifically, the Association is requesting a panel chairperson who will adhere to the prescribed time limits regardless of the District's desire to delay the process.

We understand the difficult position in which the District has placed Mr. Brisco in this instance, however, the statute is clear. Therefore, the Association has requested this office to prepare and file an unfair practice charge against the District for its refusal to participate in the impasse procedure in good faith.

Sincerely,

Thomas L. Brown
Consultant

TLB:dd

cc: C. Chester Brisco
Bruce Julian
Dr. Stephen A. Goldstone, AUSD Superintendent
Jeanne Leonhard, ATA President
Kelly Horner

ATTACHMENT C

MAR 15 1988

Arbitrator
C. CHESTER BRISCO
Attorney at Law
(714) 730-6688

17371 Jacaranda Avenue
Tustin, California 92680

March 14, 1988

Thomas L. Brown, Consultant
California Teachers Association
Service Center One
225 N. Barranca Avenue,
Suite 220
West Covina, CA 91791

Dr. Bruce J. Julian
Julian & Associates
32392 Crete Road
Laguna Niguel, CA 92677

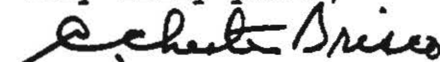
Re: Factfinding between Arcadia Unified School District and Arcadia Teachers Association, LA-F-339 (M-1805, R-121A)

Gentlemen:

A copy of the factfinding report in the above referenced matter is enclosed. I have included an extra signature page for execution and deposit in the mail along with your comments, if any, no later than March 23, 1988, as we have agreed. I will be in my office between 11:00 a.m. and noon on that date to receive a joint telephone call, if either panel member desires.

If you find any errors or ommissions, please inform me and I will make the appropriate changes. Of course, any portion of the report may be revised by mutual agreement.

Very truly yours,



C. Chester Brisco

cc: Roger Smith (no enclosure)
Encl.

PROOF OF MAILING

I am a citizen of the United States and a resident of the County of Orange, State of California; I am over the age of eighteen years; my business address is:

17371 Jacaranda Avenue, Tustin, California 92680

On March 30, 1988, I mailed the Award of Arbitrator in the matter of: Factfinding between Arcadia Unified School District and Arcadia Teachers Association, LA-F-339 (M-1805, R-121A) to the interested parties by placing it in a sealed envelope with postage thereon fully prepaid, in the United States mail at Tustin, California, addressed as follows:

Thomas L. Brown, Consultant
California Teachers Association
Service Center One
225 N. Barranca Avenue
Suite 220
West Covina, CA 91791

Dr. Bruce J. Julian
Julian & Associates
32392 Crete Road
P.O. Box 6179
Laguna Niguel, CA 92677

Dr. Mimi Burgdorf-Hennessy
Assistant Superintendent, Personnel
Arcadia Unified School District
234 Campus Drive
Arcadia, CA 91006

Kelly Horner
Consultant
California Teachers Association
Service Center One
225 North Barranca Avenue
Suite 220
West Covina, CA 91791

Jean Leonhard
President
Arcadia Teachers Association
309 Patrician Way
Pasadena, CA 91105

Dr. Stephen A. Goldstone
Superintendent
Arcadia Unified School District
234 Campus Drive
Arcadia, CA 91006

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on March 30, 1988, at Tustin, California.

[signature]