

**IN THE MATTER OF THE FACTFINDING BETWEEN**

<p><b>GROSSMONT-CUYAMACA COMMUNITY COLLEGE DISTRICT</b></p> <p style="text-align: center;"><b>PUBLIC EMPLOYER</b></p> <p><b>AND</b></p> <p><b>UNITED FACULTY OF GROSSMONT-CUYAMACA COMMUNITY COLLEGE</b></p> <p style="text-align: center;"><b>EMPLOYEE ORGANIZATION</b></p>	<p><b>RECOMMENDATIONS OF FACTFINDING PANEL</b></p> <p><b>PERB CASE NO. LA-IM-3443-E</b></p> <p><b>RONALD HOH, NEUTRAL FACTFINDING PANEL CHAIRPERSON</b></p> <p><b>ROBERT EYGENHUYSEN, DISTRICT PANEL MEMBER</b></p> <p><b>ALBERT TACCONE, ASSOCIATION PANEL MEMBER</b></p>
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**APPEARANCES**

For the District:

Timothy Garfield, Attorney

For the Association:

Michael Baranic, Attorney

**AUTHORITY**

This proceeding arises pursuant to the provisions of the Educational Employment Relations Act, California Government Code 3540, et seq. (hereinafter EERA). Grossmont-Cuyamaca Community College District (hereinafter District) and United Faculty of Grossmont-Cuyamaca Community College District (hereinafter Association) have been unable to agree upon the terms of their collective bargaining agreement for the 2006-07 and 2007-08 fiscal years through their negotiations and mediation. Pursuant to Section 3548.1 of the EERA, they therefore jointly chose the undersigned factfinding panel to make "findings of fact and recommended terms of settlement" in accordance with Section 3548.3 of the EERA.

A hearing was held before the factfinding panel on May 27 and 28, 2008 in El Cajon, California and was completed on the May 28 date. During the hearing, all parties were afforded the opportunity to submit documentary and oral testimony and argument in support of their respective positions. Subsequent to completion of the hearing, the parties requested and were granted the opportunity to file post-hearing summary briefs and argument. Those briefs were received by the panel on June 10, 2008.

After the receipt of the briefs, and subsequent to the panel chairperson's completion of a draft factfinding report, the factfinding panel met in executive session via telephone on July 15, 2008 to discuss the outstanding issues. This report is issued in accordance with the panel's determinations at that executive session.

At the hearing, the Association withdrew all but one of the non-economic issues it had previously indicated were before the panel, and presented evidence in three areas: 1) salary level for the 2006-07 school year; 2) salary level for the 2007-08 school year; and 3) effective dates for the Supplemental Employee Retirement Program (hereinafter SERP Program). The District presented evidence in the areas of: 1) grievance procedure; 2) no strike, no lockout; 3) sabbatical selection process; 4) overload banking; 5) reassigned time; 6) job descriptions; 7) ability to pay; 8) salary level for the 2006-07 school year; and 9) salary level for the 2007-08 school year.

During the presentation of the Association in the category of SERP Program Effective Dates, it became apparent to the panel chairperson that the dispute in this area, as well as the stated District issue of early retirement/SERP for fiscal years 2007-08 and 2008-09, actually concerned a contract interpretation issue regarding whether the SERP program was intended by the parties under their current contract as a continuing or perpetual program. Given this contract interpretation dispute, the panel subsequently recommended that the parties

resolve their contract interpretation issue in this area before a grievance arbitrator. At the suggestion of the panel, the parties agreed to and signed the following stipulation that the subject of SERP and its elements would no longer be before the panel:

### **Agreement to Arbitrate Dispute**

The District and United Faculty agree that the question of whether the SERP program contained in Section 10.2 of the 2003-2006 UF collective bargaining agreement, and previous agreements, has expired or continues to be in effect, shall be submitted directly to contract arbitration, without intervening steps, pursuant to the contract grievance procedure. The grievance filing deadline will not be at issue in the grievance proceeding. In the event that arbitration determines the SERP program to have rolled over into the existing contract, the factfinding panel retains jurisdiction to address the outstanding issues relating to SERP.

### **STATUTORY CRITERIA**

Section 3548.2 of the EERA concerns the criteria to be followed by the factfinding panel. It provides as follows:

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

- (1) State and federal laws that are applicable to the employer.
- (2) Stipulations of the parties.
- (3) The interests and welfare of the public and the financial ability of the public school employee-employer.
- (4) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services and with other employees generally in public school employment in comparable communities.
- (5) The consumer price index for goods and services, commonly known as the cost of living.
- (6) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits; the continuity and stability of employment; and all other benefits received.

- (7) Such other facts, not confined to those specified in paragraphs (1) to (6), inclusive, which are normally or traditionally taken into consideration in making such findings and recommendations.

The panel's recommendations herein have been made with due regard to the above statutory criteria.

## **FINDINGS OF FACT**

### **BACKGROUND**

The District is a public community college that serves the East San Diego County area. It employs about 2380 employees, including about 1478 full and part-time faculty, 49 administrators/managers and 37 supervisors and confidential employees. It serves each semester approximately 18,000 full-time students at the Grossmont campus and 9,000 full-time students at the Cuyamaca campus.

The Association represents a bargaining unit of 304 full-time and 1174 part-time faculty. The parties engaged in twenty-six bargaining sessions during negotiations of this contract, which began the spring of 2007. The mediation phase of the impasse procedure, which occurred between September 2007 and February 2008, likewise failed to produce voluntary contract agreement between the parties, and lead ultimately to the selection of the factfinding panel here.

### **COMPARABILITY**

The parties agreed at the hearing that the seventy-one other community college districts in California constitute the appropriate comparability group under Section 3548.2(b)(4) of the EERA, and that such a group has been used for comparison purposes by the parties for at least the past two years.

The District also utilized a comparability group of seventeen community college districts, including the District. Those districts and their total student headcounts are set forth below.

DISTRICT	TOTAL HEADCOUNT ENROLLMENT (2006-07)
San Diego	134,502
State Center	49,531
Los Rios	119,607
Coast	71,512
West Valley-Mission	38,661
Southwestern	31,092
Foothill-DeAnza	73,250
North Orange	91,553
West Hills	10,800
Kern	38,087
Chabot-Las Positas	32,826
Contra Costa	58,541
Rancho Santiago	114,063
San Bernardino	27,959
San Mateo	41,960
South Orange	55,836
Grossmont-Cuyamaca	43,486

**ISSUE #1 - ABILITY TO PAY**

Initially in this case, the District makes a claim that it has the inability to afford the Association's economic proposals under Section 3548.2(3) of the EERA. A brief discussion of that contention – made only at the hearing and not addressed in the District's post-hearing brief – is appropriate before any panel consideration of the contract language and economic proposals of the parties.

In support of that inability to pay contention, the District points to its fiscal year 2006-07 ending balance summary showing a net ending balance of only \$682,891, or less than 1% of its total budget. It contends that all but \$29,000 of its \$6.3 million available for bargaining has already been allocated to fixed expenses, other District union contract agreements, and its proposals before the factfinding panel here. It points out that since the 2007-08 budget was developed, the state has reduced the District's funding by \$1.4 million due to property tax revenue shortfalls, and that the District has already allocated those shortfalls among its three sites for the current year. It asserts that no State cost of living adjustment (hereinafter

COLA) is projected for fiscal year 2008-09, and that the District currently estimates a 3% deficit for that fiscal year. It points out that each of the District's colleges as well as the District office has therefore been told to present 3% and 5% potential reduction budgets to the District Board. It argues that, in addition to funding full employee health insurance and step/column movement, it must pay \$1,237,440 and \$1,262,778 for retiree medical costs in 2006-07 and 2007-08, respectively.

The Association argues that the District has the ability to pay for the Association's proposals in this case. In support of that contention, it argues that the most recent documentation of unrestricted general fund available dollars showed an amount of \$4,392,892 for fiscal 2007-08 through May 20, 2008, and that the same document showed an increase in general fund surplus and carryover of nearly \$4.6 million since fiscal year 2003-04. It points out that the State proposes to backfill statewide approximately \$75 million of the previous \$92 million shortfall for the current year. It argues that even District figures show a State equalization dollar addition of \$2.7 million for the District for 2007-08, and that a total of \$6.3 million is available in the budget this year for bargaining. It argues that the 5.92% for 2006-07 COLA is the highest COLA community colleges have received in several years. It claims that the actual District ending balance minus the contingency reserve for 2006-07 is \$9,012,125 – an amount which already includes the District's salary proposal and corresponding benefit factors such as FICA, workers compensation, etc. Finally, it contends that the cost difference between the District and Association proposals for 2006-07 is \$1,263,786 and for 2007-08 is \$771,153, and that the District can easily afford the Association's economic proposals in view of the above data.

#### DISCUSSION

The District's claim of an inability to pay in this proceeding is based largely upon

projected state aid cuts in the 2007-08 school year, and the absence of COLA plus the projected state aid growth of only 1% for fiscal 2008-09, combined with a projected actual student increase of 3% for that year. While these are certainly legitimate concerns, the budgetary data also shows that the District's unrestricted general fund balances have grown significantly since 2003-04, with that amount \$4.6 million larger in 2007-08 than it was in 2003-04. It further shows via its Budget Report 311 that the General Fund actual adoption budget for 2007-08 is \$2,246,000 less than its 2007-08 tentative budget, and that the District like many districts thus over-budgets payroll expenses in order to provide at least some cushion against unexpected expenses or expense increases in other areas. Additionally, even the District's budget data shows a State equalization dollar addition in the District for 2007-08 of \$2.7 million, and that a total of \$6.3 million is available in 2007-08 for bargaining costs.

Given all of these circumstances, it is apparent to the panel majority that the District can afford in each of the subject years the salary proposals made by the Association. The panel majority therefore finds that the District has not met its burden of showing that it has an inability to fund the Association's proposal, and instead finds that the District indeed does have the ability to pay the differences between the parties' proposals here.

## **ISSUE #2 - GRIEVANCE PROCEDURE**

Article XVIII of the parties' current contract addresses the contractual grievance procedure. Current Section 18.5 - Level II Grievance Procedure - provides as follows:

### 18.5. Level II - Grievance Procedure

If the grievance is not resolved at Level 1, [the Association] may appeal the decision in writing to the President or designee within five (5) days after the delivery of the decision by the Level I immediate supervisor. The statement of appeal shall include a copy of the original grievance, the decision rendered, and why the disposition of the grievance at the prior level was unsatisfactory. The President or designee shall communicate a decision in writing to [the Association] and the Chancellor within ten (10) days after receiving the appeal. Either the grievant, the President, or designee may request a joint conference

during this period.

In addition, Section 18.7.4 of the contract provides that:

"Costs for the services of the arbitrator shall be borne equally by [the Association] and the District."

The District proposes to add the following to Section 18.5 of the contract:

"The [Association] will inform the District within ten (10) days after the District receives a request for arbitration, in writing, that they have made contact with the State Mediation Conciliation Service or an arbitrator association requesting an arbitrator. With District agreement, [the Association] may delay (extend the period) beyond the ten (10) days in requesting an arbitrator. However, if an arbitrator is not requested by the Association after the end of the tenth (10th) working day or at the end of the last day of the extended period, the arbitrator request to the District will be determined to be dropped."

The District also proposes to add the following new Section 18.7.4:

"The party that receives an unfavorable decision from the arbitrator is responsible for the total cost of the arbitrator."

The District in support of these proposals argues that the Association has allowed certain grievances to sit at Level 3 of the grievance procedure and remain unresolved for in some cases more than four years. It claims that the first of the above proposals will remedy that problem by forcing the Association to either advance the grievance to arbitration or to abandon it. It further contends that the addition of the proposed contract language in Section 18.7.4 will prevent the Association from filing frivolous grievances and/or unfair labor practice charges.

The Association resists any change to the contract language contained in Article XVIII. It points out that the District has never previously proposed at any time in this set of negotiations any change to this contract area prior to factfinding, and that even the District's original statement of the issues at the factfinding level failed to include this contract area. It further contends that the District's proposal to apply that language to an unfair labor practice charge is contrary to PERB law, and that in one of the District grievances referred to

above, the District's evidence shows that an arbitrator was selected as recently as March 21, 2008.

#### DISCUSSION

The evidence in this subject area shows that these matters, despite the long bargaining history of the parties in this set of negotiations, has never been discussed by the parties since at least October of 2006 – more than seventeen months prior to the instant hearing. If these proposals were as important to the District as it claims, the District would have repeatedly brought this matter up in negotiations, bargained it to impasse, and then at minimum included it in its list of issues. None of these elements occurred under the evidence here.

The function of the factfinding panel simply put, is not to make recommendations on contract language items which the parties themselves have not discussed or have barely discussed. The panel thus does not recommend either of the District's proposed changes to Article XVIII.

#### RECOMMENDATION

The panel recommends no change to the provisions of Section 18.5, and does not recommend the addition of the new language in Section 18.7.4, proposed by the District concerning the grievance procedure.

#### **ISSUE #3 - NO STRIKE/NO LOCKOUT**

The District proposes in this area to add to the contract a new provision concerning no strike/no lockout, as follows:

The District and the [Association] are committed to resolving negotiations in a collaborative fashion. Therefore, the District and the [Association] are committed to "no strike/no lockout" action while at impasse during negotiations.

In support of that proposal, the District argues that such a proposal is largely intended to address the "work to contract" action engaged in by the Association during both the prior and the current set of negotiations, and that such a contract section would make no longer necessary the District's filing of unfair labor practice charges in this area, as it has done concerning these negotiations. It claims that eight of the seventeen districts in its smaller comparability group have no strike/no lockout language similar to that contained in its proposal.

The Association resists addition to the contract of the District's proposed no strike/no lockout language. In support of that position, it argues that there has never been either a faculty strike or a threat of such a strike. It claims that the District has failed to show that the absence of such a clause allows either faculty or the Association to persist in "strike rhetoric," and that there is no past history of such Association action. It further points out that the parties' bargaining history notes reflect virtually no discussion of the subject area of "no strike/no lockout."

#### DISCUSSION

The evidence before the panel, as well as the parties' bargaining notes, once again show virtually no discussion between the parties in negotiations concerning the issue of "no strike/no lockout." In addition, there has never been either an Association strike or a strike threat, and the panel is uncertain whether such a proposal, if adopted, would even properly be applied to the "work to rule" Association actions which the District hopes to impact. For all of these reasons, as well as the panel's view that such an element should only be included in the contract via the give and take of the bargaining process, the panel recommends that such a proposal not be included in the contract.

## RECOMMENDATION

The panel does not recommend inclusion in the contract of the District's proposed "no strike/no lockout" language.

## **ISSUE #4 - SABBATICAL SELECTION**

Article XIV of the parties' contract addresses Sabbatical Leave. It provides, inter alia, for a Sabbatical Committee of three faculty each from the Grossmont and the Cuyamaca campuses, as well as three administrative representatives appointed by the District Chancellor, and that under Section 14.7.3 of the contract the Committee's selections are to be submitted as information items to the District Board at the first business meeting in February of each year for ratification.

The District proposes the following new language to replace the existing Section 14.7.3:

Sabbatical submissions to the Board will be listed in the 500 series of the Board docket. This enables the Board to manage sabbatical leaves.

In support of that proposal, the District argues that the current contract language in this area does not allow the District Chancellor or the District Board to be fiscally responsible for the funding of sabbaticals, nor allow the District Board to check, challenge or defer any sabbatical requests. It claims that its proposal remedies that problem by removing sabbaticals from the "information only" Board docket and moving them to the "Board Action" docket, thereby providing the Board with the ability to challenge or defer any sabbatical request. It asserts that within its smaller comparability group, fifteen of the seventeen comparable districts require Board approval of any sabbatical request.

The Association resists the District's proposed change concerning sabbatical leaves. In support of that position, it points out that the District has multiple opportunities under the contract to challenge sabbatical leave proposals, both at the Sabbatical Committee level

and via the Section 14.5.1 requirement that the Association submit copies of sabbatical leave proposals prior to ranking by the Committee to the District Vice President, Deans/Directors and Department Chairs/ Coordinators for comment. It claims that District Board Dockets show that, under the 600 series, the District Board has removed from the Docket sabbatical leave items in order to ask questions about particular proposals for public answers at District Board meetings by either the Sabbatical Committee or Association representatives. It contends that given these elements, including the ability of the District to question sabbatical leaves at all of these levels, the District has failed to demonstrate that there is a problem with the contractual Sabbatical Leave article.

#### DISCUSSION

The evidence in this area shows that, while the parties have repeatedly discussed this District proposal, it appears that District administrators have the ability to significantly impact the area of sabbatical leaves, if not at the Committee level, then by required submission by the Association of such leave requests to virtually all levels of District administrators, the Chancellor and Department Chairs. Additionally, the District Board has the ability to pull sabbatical leave requests from the "information only" category to get additional information relating to the propriety of such leaves. Given these elements, it appears that the District has both the ability to raise such issues via both administrator and Board input.

In view of these elements, it is the panel's view that the District has not met its burden of clearly showing a problem with the existing contract language. Its proposal is, therefore, not recommended.

#### RECOMMENDATION

The panel recommends no change to the current language of Article XIV concerning Sabbatical Leaves.

## **ISSUE #5 - UNIT JOB DESCRIPTIONS**

Appendices K-1 through K-14 of the contract set forth the District/Association agreed upon job descriptions. Each of those job descriptions contain the following Section II - Specific Responsibilities:

Responsibilities designated with an asterisk are primary to the faculty role. All other listed professional responsibilities are examples of activities which are part of the unique role of each faculty member and is (sic) reflective of their individual expertise and interests.

The District makes the following proposal in the subject area of job descriptions:

Prior to the end of June 30, 2009, faculty job descriptions will be updated to reflect duties that are essential for faculty to perform. To accomplish this, a task force consisting of five (5) District administrators (selected by the Vice Chancellor of Human Resources and Labor Relations), and five faculty (selected by [the Association]) will convene no later than July 1, 2008, to update faculty job descriptions. The task force job description changes will be forwarded to the [Association]/District collective bargaining teams for negotiations and agreement.

In support of that proposal, the District contends that faculty job descriptions have not been updated for several years. It argues that the job duties contained in those descriptions which are not designated with an asterisk were intended by the parties to constitute "essential function job duties," but that over the years they have improperly been interpreted to mean "optional duties." It claims that many of the non-asterisk duties are actually "essential job functions" required to be performed by a faculty members to ensure that the District is able to accomplish academic matters and requirements. It argues that despite this, these essential duties are not being accomplished because the Association has implemented a "work to rule" practice via a March 4, 2008 e-mail from the Association President to all faculty, and thus faculty members are performing only duties that are marked by an asterisk. It asserts that its proposal therefore is needed to assure that essential functions of the faculty member's job are being accomplished.

The Association resists the additional contract language concerning Job Descriptions contained in the District's proposal. In support of that position, it argues that no faculty member has ever been disciplined for not carrying out a non-asterisk item. It admits that the Association in its "work to rule" e-mail has asked for faculty members to perform only required duties, but claims that PERB case law makes clear that "work to rule" actions involving work that is voluntary in nature is protected conduct. Finally, it asserts that the underlying intent of the District's proposal to "update" job descriptions is to prevent faculty from having any voluntary duties.

#### DISCUSSION

The parties clearly disagree via the above arguments as to whether non-asterisk duties contained in the contractual job descriptions are "essential functions" of those jobs, as claimed by the District, or alternatively are "optional duties," as contended by the Association. In addition, the District has filed an unfair labor practice charge in this area with PERB, and hopes to resolve this matter via that procedure.

Given these elements, the dispute between the parties here in the final analysis concerns whether the District under the contract can require faculty employees to perform non-asterisk duties. In the panel's view, in the absence of resolution of this matter under PERB procedures, such a matter is best resolved, should the District choose to do so, by the District requiring faculty members to perform those non-asterisk duties and then enforcing that requirement via disciplinary action. The Association, should it thereafter choose to do so, could thereafter grieve the "just cause" nature of that discipline and the reasonableness in these circumstances of the District's work rule in this area before a grievance arbitrator. Given the bottom line dispute between the parties over the reasonableness of any District's work rule in this area, that route is a significantly better process for resolution of this matter

that the District's proposal here.

#### RECOMMENDATION

The panel does not recommend any change in the contractual provisions of the contract concerning Job Descriptions.

#### **ISSUE #6 - REASSIGNED TIME FOR ASSOCIATION PRESIDENT**

Section 2.4.1 of the current contract provides as follows:

The District shall provide 1.0 LED reassigned time per semester to [the Association] for employee representation business including, but not limited to, the handling of grievances and negotiations.

The District proposes the following additional sentence to Section 2.4.1:

Reassigned Time (Release Time) to the [Association] President will be 1.0 FTE; however, when the [Association] President decides to teach, the teaching assignment is not considered bankable time and will be paid at the part-time faculty rate and paid through the semester of the teaching assignment.

In support of that proposal, the District argues that taxpayer dollars are already paying a faculty member 100% salary to be Association President 100% of the time, although the Association President clearly does not conduct such business 100% of the time. It asserts that when the Association President does teach, it is considered "extra" and its cost is calculated into "overload/banking" – a cost that continues to increase. It points out that the District rather than the Association already pays for the entirety of the Association President's salary, and that this employee should not further benefit at District expense when she is actually teaching.

The Association opposes any change to the contract concerning Association President release time or overload/banking when that person actually teaches. In support of that position, it contends that the real District issue in this area has to do with the person currently occupying the position of Association President, and that the District's proposal is

an attempt to interfere with the Association in carrying out its duties. It points out that the EERA clearly requires the District to release faculty for the purposes of conducting Association business, and that the District's proposal discriminatorily places limitations on that Association President which are not placed on any other faculty member. It argues that other comparable districts do not place limitations on the union president or any other officers and their right to assignment. Finally, it contends that the current Association President has not banked any overload since 1997, and certainly none since she became Association President in 2005.

#### DISCUSSION

The panel chairperson, in a May 15, 2008 letter to the parties, informed them that in the more than 100 interest factfindings and interest arbitrations he has conducted, he has consistently utilized the following standards for recommendations or award for issues involving contract language areas which are non-economic in nature, and that he intended to apply the same standard to such issues in this case:

1. The party proposing the contract language change has the clear burden of justifying the factfinding panel's adoption of that proposed language change;
2. The party proposing the contract language change must: 1) show with specific evidence that a problem exists with the current language; 2) show that it has attempted to resolve the issue with the other party in negotiations without any success; and 3) show that the proposed contract language change resolves the demonstrated problem without being contrary to any other existing contract language.

In this situation, while the District's proposal has an extremely minor economic element, it is properly referred to as a contract language change proposal. Put simply, there was no evidence that a problem exists with the current contract language under the above standards. The current Association President has not banked any load since 1997, and more specifically, none since she became Association President in 2005. There was additionally no

evidence that any other District faculty member would be subject to a similar limitation if the District's proposal were to be recommended by the panel. Similarly, there is no showing of the need for such a provision when this area is compared among any of the comparable districts.

#### RECOMMENDATION

The panel does not recommend inclusion in the contract of the District's proposal concerning Reassigned Time for the Association President, and instead recommends that the language of Section 2.4.1 of the contract remain unchanged.

#### **ISSUE #7 - OVERLOAD BANKING**

Section 7.9 of the contract concerning overload banking provides as follows:

##### 7.9 Overload Banking

The District agrees to Overload Banking effective Fall 1992, as follows:

- 7.9.1 Full-time tenured faculty only.
- 7.9.2 Bank at a maximum of .40 LED per semester
- 7.9.3 Reduce load a maximum of 1.0 LED once every five (5) years.
- 7.9.4 Summer school and Intersession may not be used to bank hours.
- 7.9.5 Current teaching load must be at least 1.0 LED prior to any banking credit being given.
- 7.9.6 Banked time can only be used when a suitable part-time replacement is available and the department chair or coordinator and the appropriate college President, or designee, agree the excellence of the program can be maintained with replacement faculty.
- 7.9.7 Any unused banked overload will be paid off at the current overload rate at time of retirement or separation from District employment.
- 7.9.8 It is understood that this program is untried in this District and problems of program implementation may arise. Should the Governing Board identify such problems, both parties agree to bargain in good faith a resolution to those problems at such time as those problems are identified.

The District proposes that Section 7.9.7 of the contract be deleted and replaced with the following language:

The District finds value in having an overload/banking program for ensuring faculty is available to fill an added class section. In order for the program to be fiscally

responsible, at the end of every two (2) semesters, starting July 1, 2008, all banked load in excess of .60 will be cashed out at the part-time rate, or the faculty may choose to:

- a) Use the load in excess of .60 to make up any load short of 1.0, but not to exceed 1.0 FTE load.
- b) "Take the time off" that is in excess of .60. In this situation, faculty will be paid at the full-time rate.

In support of the above proposal, the District argues that the overload banking program, while valuable to the District, has a current unfunded liability of \$698,895, but that the actual cost to the District if that banked load were taken by instructors during their regular contract assignment would be \$1,418,757. It points out that the language of Section 7.9.8 recognizes that program implementation problems may arise and commits both parties to bargain in good faith over such problems. It claims that it needs to include in the contract in this area an indication of from what source salary schedule "banking" is paid, and that a "cap" to banking accrual should be included to address the continued cost increases in this unfunded liability. It asserts that the major negative element of the current contract language in this area concerns the length of time faculty may "bank" the overload, and that this element has caused the extensive unfunded liability involved. It claims that overload banking was not intended to be the "investment" which it has become, in that salary COLA and step/column increases combine to increase District liability in this area every year. It contends that while twelve of the sixteen District smaller group comparable employers have overload banking in their contracts, virtually all of them have limits to the total load one can accumulate under such a program, and most pay out at retirement/separation at the rate such overload was earned.

The Association resists any change to the overload/banking provisions of Section 7.9 of the contract. It also proposes, however, to add to the existing provision a new Section 7.9.9, which states:

"Banked time shall be paid at the faculty member's current full-time rate on the salary schedule."

It further proposes to add to Section 7.9 a provision stating:

"Faculty shall have no more than 1.0 accrued at any given time."

In support of that position, the Association argues that its comparability data showing that the terms of many other such programs in comparable districts are more favorable to faculty in those districts than are the terms of the current Section 7.9. It contends that much of the unfunded liability problem in this area concerns the manner in which the District manages its banking liability and/or its budget books. Finally, it points out that even the District agrees that overload and banking are beneficial to the District, and that its proposals are sufficient to address the concerns raised by the District in this contract area.

#### DISCUSSION

Both parties have made proposals concerning the contractual provisions relating to "overload/banking," and it is thus clear that both recognize that certain elements of the existing system would benefit from contractual revisions. The Association proposals properly address the District's concerns regarding from what schedule "banking" is paid, and also appear to address to a limited degree the major issue of cost liability by proposing that "faculty shall have no more than 1.0 accrued at any given time." The panel believes that those recommendations, at least as they relate to accumulation and payment of existing overload time, are appropriate and are hereby recommended.

At the same time, however, despite the impact of this area upon available dollars for salary and benefits, the parties have spent limited time in negotiations discussing this element of their dispute. Given its economic impact, this matter would be better resolved by the parties at the bargaining table than via a recommendation by the panel, particularly given its complexity. The parties are in a far better position to resolve their differences via

that forum in view of these elements.

#### RECOMMENDATION

The panel makes the following recommendation concerning contract Section 7.9 relating to overload banking. Otherwise, the panel recommends no change to the existing provisions of Section 7.9.

Add a new Section 7.9.10 as follows: "Faculty shall have no more than 1.0 overload accrued at any one time."

#### ISSUE #8 - FISCAL YEAR 2006-07 SALARIES

Appendices A through E of the parties' contract set forth the salary ranges for full-time employees, as well as the part-time/overload and extra pay assignment pay rate schedules.

For the 2006-07 fiscal year, the District proposes a 4% COLA increase to the current part-time and full-time salary schedules, plus 1.5% additional ranking dollars for "true" part-time faculty, i.e., non-tenured and non-tenure track part-time faculty members who do not have a contract with the District.

In support of that proposal, the District argues that the total cost of its proposal, including step/column and benefit cost increases, would be a total compensation increase of 6.63%, for a year in which the State COLA to the District was 5.92% and the Consumer Price Increase was only 2.3%. It claims that the District's offer constitutes the entirety both of the COLA and equalization dollars received from the State, except for \$800,000 to fund new faculty positions which both parties agree are necessary to maintain District educational quality. It contends that the Association has not identified any District budget category that was excessive or unnecessary, and that the ending balance for the already completed 2006-07 year shows that a large proportion of those dollars has been legally committed either to other necessary budget expenditures or to achieve critical District needs and goals. It further

asserts that the District must provide in its budget for existing unfunded liabilities for both retiree health benefits and SERP in amounts totaling more than \$1.1 million for fiscal 2007-08, with substantial continuing costs for later budget years.

The District further contends that total compensation rather than merely salary levels is the appropriate basis for comparison as required in Section 3548.2(b)(6) of the EERA, and that any salary recommendation should be considered in light of the fact both that the District is one of only four in the District's smaller comparability group that requires no out-of-pocket employee payment for health care coverage, and that it also pays full health benefits to retirees until the age of Medicare eligibility. It points out that the turnover rate for District full-time faculty is virtually nonexistent, indicating a high degree of stability and continuity of employment. It argues that since full-time faculty members have first call on part-time, intersession, and summer overload assignments, such employees can earn significantly more in a given year than their base salary. It asserts that with its proposal included, the District's maximum non-doctorate salary would rank 38th among the 71 California community colleges – well within the District Board stated goal of faculty salaries to be within the middle one-third among California community college districts.

The District further argues that its proposed 1.5% equalization dollar increase for "true" part-time faculty is necessary because the District ranks third from the bottom in its initial part-time salary rate among its smaller regional comparability group, that it therefore has had difficulty recruiting part-time faculty, and that about 58% of the current part-time faculty is on the lowest 1/3 of the part-time salary schedule. It claims that the current system of having part-time faculty on the same schedule as overload pay limits the amounts the District can commit to underpaid part-time faculty, and that a bigger impact can be made in this area if the "true" part-time faculty salary schedule is separated from District overload pay

provisions. It claims that its proposal will bring part-time instructors closer to the salary midpoint among comparable districts – a comparability position already achieved by full-time faculty.

The Association does not disagree that a 4% COLA increase is appropriate for the 2006-07 year. It proposes, however, an additional 2.86% ranking dollar increase for both part-time and full-time faculty, plus an additional 2% increase for part-time only faculty for that year.

In support of that position, the Association argues that the District Board has publicly stated its intention to have a full-time faculty salary ranking at or close to the 50th percentile among California community colleges, and that its proposal would achieve that ranking. It contends the District ranks 58th among the 72 California community college districts in highest non-doctorate salary level for 2006-07, without consideration of agreed-upon increases for that year in other districts, and that in light of those other increases a 9.55% salary increase for 2006-07 would be necessary to bring the District to the 50th percentile among comparable districts. It claims that among nearby districts with which the District competes for part-time faculty, the District is at the bottom when mean hourly salary rates are compared.

The Association further argues that a statewide survey of health benefit costs provided to it by the District in a 2005 bargaining session showed that the District's health insurance costs for employees and retirees ranked 68th lowest among 72 California community college districts at a yearly cost nearly \$3500 below the average in that group, and that the District's claims of extensive costs in this area are thus not supportive of the low District proposal here. It asserts that 51 of the other Statewide community college districts have no out-of-pocket costs for at least one of their health insurance programs, that the District thus compares well in this area with comparable employers, and that this element

likewise is not supportive of the District's proposal. It claims that the District's attempt to bargain on the basis of total costs of salary and benefits is contrary to the salary data compiled by the State Community College Chancellor's office, and that it is unaware of any other comparable district that uses such a blended model for bargaining. It contends in the area of cost of living that housing prices in the San Diego area make that area the 6th least affordable major metropolitan area in the country, that the minimum annual income necessary to rent a one-bedroom apartment in that area is \$48,200, and that the minimum District salary level of \$45,669 is below that figure.

#### DISCUSSION

Initially, it is apparent that the parties agree that 4% is the proper COLA increase amount for bargaining unit personnel for the 2006-07 year. The dispute between the parties instead involves the propriety of the addition of ranking dollars and the amount to be added to the salary schedule for part-time faculty members.

Prior to specifically discussing the panel majority's view of the appropriate increase in this area, it is our belief that certain background elements should first briefly be addressed, which the panel believes legitimately impact the proper salary recommendations for both 2006-07 and 2007-08. Those elements are set forth below.

First, the Association argues that it is improper for the panel to examine total compensation in making its recommendations, and must instead concentrate upon comparability data only in the area of salaries. The panel disagrees. Section 3548.2(b)(6) of the EERA clearly mandates the panel, in making its recommendations, to compare:

The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time; insurance and pensions; medical and hospitalization benefits; the continuity and stability of employment; and all other benefits received.

Under such a statutory mandate, the panel must take into account the total compensation received by bargaining unit employees compared to that received by similarly-situated employees in comparable districts. This is so even if, as the Association contends, such a comparison is contrary to the District Board's expressed intention of bringing faculty salaries to the 50% percentile among California community colleges, and to the State Chancellor's data addressing salary only in those districts.

Second, it is apparent to the panel, and indeed is reflected in the proposals of both parties, that the salary levels of part-time District faculty require an increase over and above that received by full-time District faculty. The evidence shows that among area community colleges with which the District actually competes, the District's average part-time salaries are at either the bottom of or near the bottom of those groups, and trail the averages in those groups by a significant amount. Such data clearly supports a salary increase for those employees above that to be received by full-time faculty members.

Third, it appears that these part-time salaries have been artificially held down, at least to some degree, by the fact that overload salaries for District full-time employees have been tied to the part-time salary rates. There was no demonstrated basis in the data for such a combined salary rate system, and the panel majority sees no reason why such an artificial diminution of part-time salary rates should continue because of that unnecessary connection. The panel majority will therefore recommend that the part-time salary schedule be separated from the overload salary schedule, and that therefore only "true" part-time faculty – non-tenured and non-tenure track part-time faculty who do not have contracts with the District – receive the additional salary increase recommended for part-time faculty by the panel.

Fourth, although it appears that the District's overall compensation costs are

somewhat higher than average since it pays both full retiree health benefits and SERP costs in amounts above the comparability group total cost averages, its existing employee health care costs are significantly below the average among California community college districts. Such lower cost amounts clearly lessen the financial impact of these otherwise higher cost benefits when determining the proper salary recommendation.

Fifth, the panel's recommendations infra concerning overload banking will at least to some degree lessen the rate of increase in the future cost of that benefit, as well as clarify how this contract area should function. Such a recommendation justifies a slightly larger salary increase than would otherwise be recommended had such cost increases for that benefit not been decreased.

Sixth, the District's data concerning "Total Compensation Comparison" of districts in the "Middle 1/3" of comparable statewide districts for 2006-07 shows that the District, even in total compensation, ranks 19th among the 24 districts in that comparison group in the best "apples to apples" comparison of highest non-doctorate salary level less benefits contribution made by the employee. That level, even where the District-argued "total compensation" area is compared, appears to call for a salary increase somewhat above the comparability group average.

Finally in this area, Association data (there was no equivalent District data) in the area of salary settlements in other California community college districts for 2006-07 shows that, in the fifty-one of the seventy-one such districts which have reached salary level contract resolution for 2006-07, the average salary increase is slightly above 6% at 6.003%. Such an average salary percentage again calls for a salary recommendation here above the cost of the District's proposal.

In view of the entire above, and particularly given the above comparability data concerning settlements in other California community colleges, the panel recommends for fiscal year 2006-07, in addition to the agreed upon 4% COLA amount, a 1.36% ranking dollar amount increase for all faculty, and a 2% additional salary increase for "true" part-time faculty members – i.e, those non-tenured and non-tenure track part-time faculty who do not have contracts with the District. That amount would result in an increased salary cost to the District over current salary costs of \$2,209,115 for all faculty, plus \$344,082 for "true" part-time faculty, for a total cost percentage increase of 6.2%. That recommendation would separate the salary schedule for such "true" part-time faculty from the overload schedule, and thus avoid in the future the artificial flattening of part-time salary levels that can be attributed at least in part to its concurrent existence with the overload schedule. It would move District faculty salaries more in the direction of the midpoint in pertinent salary comparison levels – whether the proper comparison is the "middle 1/3" or the 50th percentile among comparable districts – by providing a salary increase slightly above the average among comparable districts. It would likewise move the District more to that midpoint under the District's data, even where total compensation is the appropriate cost measurement. Finally, it addresses to a significant degree the area most in need of salary improvement and the one area where both parties agree a relatively substantial increase in salary is needed – salary increases for "true" part-time faculty members.

#### RECOMMENDATION

For the 2006-07 fiscal year, the panel recommends a 4% across-the-board COLA increase, an additional 1.36% ranking dollars increase for all faculty members, and an additional 2% salary increase for "true" part-time faculty members.

## **ISSUE #9 - THE 2007-08 SALARY INCREASE**

With regard to the 2007-08 fiscal year, the District proposes a 3% COLA increase across the board over the 2006-07 full-time and part-time faculty salary schedules, plus .5% additional ranking dollars to "true" part-time faculty members.

In addition to the above District arguments concerning the 2006-07 year which are also applicable to the 2007-08 year, the District in support of that proposal argues that the State funding COLA for 2007-08 was a 4.53% increase; and that the District has already added \$922,571 to the COLA amount in order to fund compensation improvements for 2007-08 for step/column and health benefit costs, in addition to budgeting amounts necessary to fund the above proposal. It points out that District funding has already been cut by \$1.4 million for 2007-08 due to the large State budget deficit, and that there will be no State COLA for 2008-09, requiring all costs District-wide to be funded from existing revenues, including not only bargaining unit step/column and insurance benefits, but also such staples as utilities, supplies and equipment. It contends that its proposal would once again keep District salary levels in the middle one-third of all statewide community college districts. It asserts that its proposal concerning "true" part-time faculty would again address the District's relatively less competitive position at the lower end of the part-time schedule when compared to districts with which the District competes for part-time faculty, and would do so at a cost of \$73,965 – an amount that is prudent under current unfavorable budget conditions. It points out that the total cost of its 2007-08 proposal is \$2,402,098, or a 5.7% total package increase. Finally, it contends that the Association's proposal for a 1.53% increase in ranking dollars to the salary schedule was never made to the District at any time during the course of negotiations.

The Association agrees that a 3% COLA should be added to both the full-time and part-time faculty salary schedules. It proposes in addition, however, a 1.53% increase to those

schedules in ranking dollars, plus an additional 1% increase to the part-time salary schedule.

In addition to the above Association arguments concerning the 2006-07 year which are also applicable to the 2007-08 year, the Association argues that its proposal for 2007-08 is only equivalent to the 4.53% COLA increase the District received from the State for that year. It contends that the comparability data for 2007-08 shows District salaries to be near the bottom of the statewide ranking at the following benchmarks: 1) Master's degree, step one; 2) Non-doctorate, step 10; 3) Non-doctorate maximum without longevity; 4) Highest earnable salary. It claims in the area of 2008-09 District funding that both the State Chancellor's office and the Community College League of California indicate that the proposed State budget for community colleges will backfill at least \$75 million statewide of the estimated \$93 million property tax shortfall, and that the most recent State budget update for community colleges indicates both an additional \$2.3 billion in Proposition 98 dollars and a 2% enrollment growth funding amount for that year. Finally, it claims that when the District's salary offers for both years are factored in, the District ranks only 54<sup>th</sup> statewide among 72 California community colleges in the category of highest non-doctorate salary ranking for 2007-08.

#### DISCUSSION

Initially in this area, the panel majority believes it improper to consider the Association's proposal in this area where, as here, such a proposal appears to never have been made to the District in the course of negotiations. While it is not improper to make a factfinding proposal higher in cost than a party's best offer made in negotiations, in the event such a higher cost proposal was made in the course of bargaining, it is fundamentally improper (and in some jurisdictions, a per se unfair labor practice) to make a proposal to the factfinder or interest arbitrator which was not made to the other party in the course of negotiations. This is so because the parties should place their emphasis upon voluntary

contract resolution, and utilize impasse steps such as factfinding only when a particular issue cannot be resolved in negotiations, despite full exploration of potential settlement on that issue.

As a result of this impropriety, the panel majority believes it should instead consider as the Association's proposal here the most recent proposal it actually made to the District in negotiations on April 9, 2008: 3% COLA; plus .5% part-time and full-time salary schedule ranking dollars, plus 1% additional to the part-time District salary schedule.

Likewise, the panel majority must discount the Association's arguments concerning its claim of 2007-08 District salaries being near the bottom statewide in the above set forth benchmarks. Those comparisons included the negotiated salary percentage increases where they existed for both 2006-07 and 2007-08 for every comparable district where a settlement was reported, while reporting no increase for District faculty at those benchmarks for either year, and then based the salary rankings upon those two very different sets of numbers. Simply put, such an "apples to oranges" comparison sheds no real light upon the District's actual comparability position among those other districts.

At the same time, however, a close examination of that data does provide a relatively clear picture of the average salary increase for 2007-08 among California community colleges (the District did not provide any data in this area). When that data is examined in the benchmark areas which do not include longevity – the average negotiated salary only increases in the approximately fifty such districts which have reached contract agreement for 2007-08 range between 5.05% and 5.16%, including step/column costs.

In view of this data, and for the reasons set forth above concerning both ability to pay and the salary recommendations for the 2006-07 year, the panel majority recommends, for the 2007-08 year, that the parties agree to a 3% COLA for both the full-time and part-time

salary schedules, retroactive to July 1, 2007, plus .8% increase ranking dollars added to the full-time and part-time salary schedules effective January 1, 2008; plus an additional .8% salary increase for "true" part-time faculty, effective January 1, 2008.

Such a recommended resolution would cost the District about 5% above the then-existing salary costs (3% COLA + 1.2% Step and Column + .4% cost for ½ year in ranking dollars for full and part-time schedules + .4% cost for ½ year for "true" part-time faculty) – an amount entirely consistent with the 2007-08 salary settlement trends found in the data. Because both the addition of ranking dollars and the addition to the salaries of true part-time faculty would be a benefit of .8% (at a District cost of .4%) to each of those groups, such amounts would move in the direction of lessening the gap between those salaries and the salaries among comparable districts, irrespective of whether the comparability basis is other San Diego county districts with which the District competes for part-time faculty, the 50th percentile among California community colleges, or the middle 1/3 of such districts statewide. It would take into account to some degree via its slightly below average cost the economic uncertainties which exist for the District for the upcoming 2008-09 year. Finally, it would once again place emphasis on salary levels for true part-time faculty members – District employees whom both parties agree need additional salary emphasis in order for the District to recruit and retain qualified faculty in those positions.

#### RECOMMENDATION

For the 2007-08 year, the panel recommends in the area of salary as follows:

1. 3% COLA increase to both part-time and full-time District salary schedules, retroactive to July 1, 2007.
2. An additional .8% ranking dollar increase to the full-time and part-time salary schedules, effective January 1, 2008.
3. An additional .8% increase for "true" part-time faculty as defined above, effective January 1, 2008.

## **CONCLUSIONS OF LAW**

In accordance with EERA Section 3548, the factfinding panel, for the reasons set forth above, hereby recommend as follows:

ISSUE #1 – ABILITY TO PAY – That the District does have the ability to pay the differences between the parties' proposals in this matter.

ISSUE #2 – GRIEVANCE PROCEDURE – That the provisions of Article XVIII of the contract concerning grievance procedure remain unchanged .

ISSUE #3 – NO STRIKE - NO LOCKOUT – That the District's proposal concerning No-Strike, No Lockout not be added to the parties' contract.

ISSUE #4 – SABBATICAL SELECTION – That the provisions of Article XIV concerning Sabbatical Selection remain unchanged.

ISSUE #5 – UNIT JOB DESCRIPTIONS – That the provisions of Appendices K-1 through K-14 of the contract concerning Job Descriptions remain unchanged.

ISSUE #6 – REASSIGNED TIME FOR UNITED FACULTY PRESIDENT – That the provisions of Section 2.4.1 of the contract concerning Reassigned Time for the United Faculty President remain unchanged.

ISSUE #7 – OVERLOAD BANKING – That the parties agree to the following concerning Section 7.9 relating to Overload Banking:

Add the following new Section 7.9.10:

“Faculty shall have no more than 1.0 overload accrued at any one time.”

ISSUE #8 – SALARY FOR THE 2006-07 YEAR – That the parties agree to the following salary increase for the 2006-07 year retroactive to July 1, 2006:

- 1) 4% COLA increase to both the full-time and part-time salary schedules;
- 2) An additional 1.36% ranking dollar increase to the full-time and part-time salary schedules;
- 3) An additional 2% salary increase for “true” part-time faculty as defined herein, and separation of the part-time salary schedule from the overload pay schedule.

ISSUE #9 – SALARY FOR THE 2007-08 YEAR – That the parties agree to the following salary increases for the 2007-08 year:

- 1) 3% COLA increase to both the full-time and part-time salary schedules retroactive to July 1, 2007.

- 2) An additional .8% ranking dollar increase to the full-time and part-time salary schedules, effective January 1, 2008.
- 3) An additional .8% salary increase for "true" part-time faculty as defined above, effective January 1, 2008.

July \_\_\_\_, 2008

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RONALD HOH  
Factfinding Panel Chairperson

Concur       Dissent

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ALBERT TACCONE  
Association Panel Member

Concur       Dissent

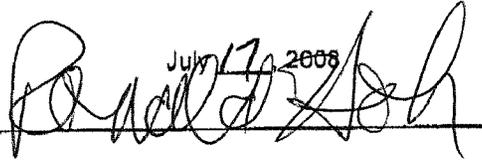
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ROBERT EYGENHUYSEN  
District Panel member

- 3) An additional 2% salary increase for "true" part-time faculty as defined herein, and separation of the part-time salary schedule from the overload pay schedule.

ISSUE #9 – SALARY FOR THE 2007-08 YEAR – That the parties agree to the following salary increases for the 2007-08 year:

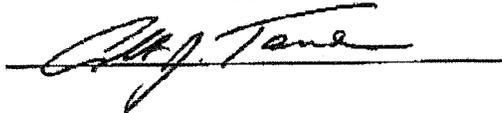
- 1) 3% COLA increase to both the full-time and part-time salary schedules retroactive to July 1, 2007.
- 2) An additional .8% ranking dollar increase to the full-time and part-time salary schedules, effective January 1, 2008.
- 3) An additional .8% salary increase for "true" part-time faculty as defined above, effective January 1, 2008.

July 17, 2008  


RONALD HOH  
Factfinding Panel

Chairperson

Concur       Dissent



ALBERT TACCONE  
Association Panel Member

Concur       Dissent

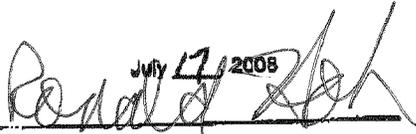
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ROBERT EYGENHUYSEN  
District Panel member

- 3) An additional 2% salary increase for "true" part-time faculty as defined herein, and separation of the part-time salary schedule from the overload pay schedule.

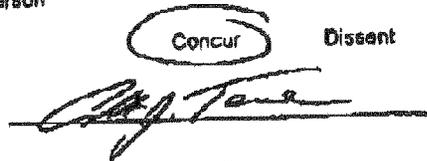
ISSUE #9 - SALARY FOR THE 2007-08 YEAR - That the parties agree to the following salary increases for the 2007-08 year:

- 1) 3% COLA increase to both the full-time and part-time salary schedules retroactive to July 1, 2007.
- 2) An additional .8% ranking dollar increase to the full-time and part-time salary schedules, effective January 1, 2008.
- 3) An additional .8% salary increase for "true" part-time faculty as defined above, effective January 1, 2008.

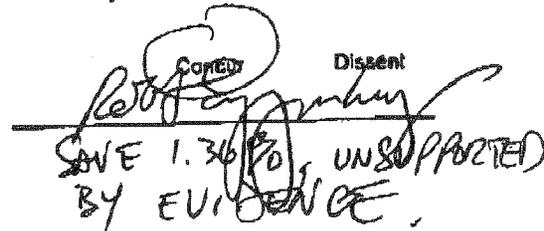
July 17, 2008  


RONALD HOH  
 Factfinding Panel

Chairperson

Concur  Dissent  


ALBERT TACCONE  
 Association Panel Member

Concur  Dissent  
  
 SAVE 1.36% UNSUPPORTED  
 BY EVIDENCE

ROBERT EYGENHUYSEN  
 District Panel member