

FACTFINDING REPORT AND RECOMMENDATION

In the Matter of Factfinding

Between the

CHICO UNIFIED SCHOOL DISTRICT

ISSUE: Terminal Step of the Grievance Procedure

And the

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION CHAPTER 110

PERB Case Number SA-IM-3033-E

Panel Members

Philip Tamoush, Chair
Luci Clark, Association Member
Robert Kingsley, District Member

Presenters

Jack Metcalf, Field Representative, CSEA
Paul R. Gant, Attorney for the District

BACKGROUND

A hearing was held before the Panel on June 23, at the District Offices. Subsequently, private sessions of the Panel were held to discuss the issues, evidence and presentations of the parties, and generally to determine the outcome of the Factfinding process.

This is a classified employee representation unit of some 600 employees. The District itself has approximately 13,500 students. The parties have been negotiating on the single issue present to the Panel for more than one year. Thus, officially, the issue being discussed here is for the 2006-2007 year, although realistically, any resolution of the issue will most likely be implemented on a prospective basis. The parties did engage in mediation as well, with the assistance of a mediator from the California State Mediation and Conciliation Service, who ultimately certified the issue to Factfinding.

ISSUE

As indicated by the parties, the issue in this Impasse is essentially proposed changes in the terminal step of the Grievance Procedure, initiated by the Association. The issue has been variously presented as:

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Should the terminal step of the Grievance Procedure be Binding Arbitration; or, should the Factfinding Panel recommend that the District/Association Agreement include Binding Arbitration; or, should there be any change in the terminal step of the Grievance Procedure.

The Association's proposed new Grievance procedure includes a section titled 'Binding Arbitration'. That section ends with the proposed sentence: 'The decision and award of the Arbitrator shall be final and binding' upon both parties', the traditional language found in other binding arbitration agreements. The District management position is that there be no change in the existing terminal step of the Grievance Procedure, although it indicated at the hearing that it would be willing to discuss changes in the previous steps of the Procedure, including those proposed by the Association.

The traditional criteria found in the EERA which are utilized in arriving at recommendations include (in shorthand fashion):

- State and federal laws
- Stipulations of the parties
- Interests and welfare of the public and the financial ability of the employer
- Comparisons of other employees performing similar services and with other employees in public school employment in comparable communities
- Consumer Price Index
- Overall compensation
- Such other facts normally and traditionally taken into consideration

The Chair of the Factfinding Panel considers that the 'Comparisons' criterion is the most important, along with some aspects of 'State and Federal Laws', including related judicial statements. Additionally, Factfinding panels will often 'normally and traditionally' consider matters of 'equity and acceptability' as being of some importance in arriving at recommendations.

With regard to the 'Comparisons' criteria, the Chair finds the following from the presentations and evidence of the parties:

Management: 68% (30 of 44 districts of 1000+ students in the general area) have binding arbitration for either classified, certificated or both categories of employees.

Association: 60% of districts statewide (10,000-15,000 students) have some form of binding arbitration

70% of all districts in the general area have binding arbitration

Chico USD has a Personnel Commission which decides issues in major personnel subjects such as discipline, classification issues, etc.

Chico USD does have binding arbitration in its agreement with certificated employees.

RECOMMENDATION

That the Agreement be changed to provide for final, binding arbitration of rights disputes (grievances) as the terminal point of the grievance procedure. (Alternatively, the parties could agree

to eliminate the existing grievance procedure, retaining the option of more readily being able to process issues directly to and having them determined by the courts. This is not being recommended here, but only suggested as another alternative).

On this Issue, the parties are polarized. The Association seeks the traditional model of binding arbitration found in the private sector and the majority of the public sector, both nationally and in California (as indicated in the above evidence). The District seeks to retain its role as the final decision-maker in the grievance procedure, notwithstanding that it could easily be 'arbitrating' its own decisions or those of its Agent, the Superintendent.

This recommendation seeks to accommodate the axiom that 'no man should be the judge of his own cause', a basic tenet of early common law. While the Association has neither argued for nor indicated any interest in removing the whole grievance procedure in the absence of impartial arbitration, it should consider that alternative.

The principal arguments pro and con binding arbitration are well-known to counsel for the parties and the parties themselves. The issue is not a matter of volume of grievances (the parties have had only two or three grievances moved to the Board level over the years). One will never know the number of potential grievances which have not been processed because of the lack of a neutral due process procedure. The criteria of 3548.2 of the EERA are of not much help here, although the comparisons, especially of districts statewide, as well as in the area indicate the common acceptance of arbitration. It is clearly a matter of 'equity', and 'what is right', that employees, who already have a modicum of due process through the Personnel Commission procedure, should not be denied due process in all rights disputes.

If District management persists in its belief that its current procedure is appropriate, notwithstanding the Association's opposition to it, the fact that all other employees have final and binding grievance arbitration, and the fact that many of the disputes of classified employees are already resolved by the Personnel Commission process, then a brief mention of the essence of traditional arbitration should be provided here.

The Court have universally recognized the efficacy and benefit of grievance arbitration procedures. As early as 1968, in one of the Supreme Court's leading decisions on the subject, Communwealth Coatings Corp. v. Continental Casualty Company 393 U.S. 145 (1968), the court stated:

"In vacating the award, the court noted that Congress in enacting section 10 of the U.S. Arbitration Act showed a desire to provide not merely for any arbitration but for an impartial one... The court concluded with the often cited statement that 'this rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies must not only be unbiased but must avoid even the appearance of bias' (emphasis supplied).

The Chair of the Panel has heard no argument in this instant matter that the Board does not understand its role as a party of interest in the Agreement and the potential conflict of interest when attempting to act as 'judge of its own cause'. For all of these reasons, and in light of the comparisons and equity considerations vis-à-vis other employees of the District, the Chair cannot support the conceptual framework of the District's position.

The California posture in respect of binding grievance arbitration is clear. State policy in support of the concept is reflected by direct reference to the EERA:

- 1) 3540.1 (h) – the binding nature of the agreement between the parties
- 2) 3541.5 (a)(2) – the deferral of unfair labor practice charges to binding arbitration
- 3) 3548.5 – the clear, specific provision for the negotiation of ‘final and binding arbitration... involving the interpretation, application or violation of the agreement’
- 4) 3548.6 – 3548.8 – the encouragement of binding arbitration by providing that the PERB will provide the parties with rules in the absence of their own procedures, and the full recognition of the applicability of the California Arbitration Law (C.C.P., 1280 ff.)

Except for the very few laws in the United States which provide for compulsory grievance arbitration (federal employee statutes such as the Civil Service Reform Act, state of Pennsylvania public sector law and the City of Los Angeles employee relations ordinance), the Chair can find no stronger encouragement for such arbitration than in the EERA. This appears to be a direct reflection of the California courts, which, prior to the enactment of the EERA has consistently supported the notion of binding grievance arbitration in the public sector. See for example: Firefighters Union v. City of Vallejo (1974) 12 Cal.3d 608.

See also Glendale City Employees Association v. City of Glendale, 15 Cal.3d 328, in which the court wrote:

(regarding a memorandum of understanding between the City and its Employee Association) ‘we deal here with a mutually agreed covenant, a labor management contract. We know of no case that holds that one party can impose his own interpretation upon a two-party labor-management contract’.

The arguments of the District reflect an abhorrence of the concept of binding arbitration because of the loss of authority to an outside arbiter. They reflect a faulty misunderstanding of the very nature of the arbitration process as defined by the EERA and the courts. The loss of authority actually occurs when the District signs off on the negotiated Agreement, binding itself to its provisions. Unless the parties agree otherwise, any activity by an arbitrator must be confined to the interpretation, application or violation of the agreement in respect of the rights and obligations of each party. The mutual intent of the parties is paramount. California law is clear that the award of an arbitrator must be vacated if ‘(t)he arbitrators exceeded their powers’ (CCP, Sec. 1286.2(d)).

The Chair has supported true Advisory Arbitration in prior factfinding proceedings and might do so now given a particular set of circumstances. But neither the Association nor the District have indicated any interest in that version of impartial decision-making. The Association is firm in its position regarding final and binding procedures, and the District does not believe that the evidence presented at the hearing was sufficiently compelling for it to move off of its position of retaining the *status quo*, Advisory arbitration, under these circumstances, might only serve to exacerbate the situation, given the parties’ positions.

The argument that the District does not favor binding arbitration because it is not sufficiently prevalent is specious. In the 1970’s, the Chair was involved in factfinding proceedings where this position was minimally acceptable. No one wanted to be first in ceding authority to a third party. Now, however, it is clear even from the record provided here, that some form of arbitration is common. The District would not be unique in the state among Districts of comparable

size, or among Districts in the general geographic area. The District obviously does not want to 'join the crowd' rather than being opposed because it would appear to be unique.

Whether the Board in this case agrees to adopt binding arbitration through good-faith negotiations with the Association is its choice, of course. Hopefully, however, the discussion presented here might at the least guarantee that its decision is an informed one, rather than one based solely on its concept of 'divine rights'. Failure to seriously consider, and adopt, binding arbitration, will ultimately lead to a deterioration of what appears to be an already tenuous relationship. Consideration of a 'no-procedure' alternative may be worth considering given the uselessness of the current procedure.

RECOMMENDATION

That the Agreement be changed to provide for final, binding arbitration of rights disputes (grievances) as the terminal point of the grievance procedure.

(Alternatively, the parties could agree to eliminate the existing grievance procedure, retaining the option of more readily being able to process issues directly to and having them determined by the courts. This is not being recommended here, but only suggested as another alternative).

Respectfully Submitted,



Philip Tamoush, Chair
September 21, 2008

/s/ dissenting, see attached report
Robert E. Kingsley, Member
September 21, 2008

RJ

/s/ concurring, see attached report
Luci Clark, Member
September 21, 2008

RJ

**FACTFINDING PROCEEDINGS UNDER CALIFORNIA
GOVERNMENT CODE SECTIONS 3548.1 TO 3548.3**

In the Matter of a Dispute between)	PERB CASE No. SA-IM-3033-E
)	
Chico Unified School District)	
)	DISSENTING OPINION OF CHICO
and)	UNIFIED SCHOOL DISTRICT
)	
California School Employees)	
Association, and its Chico Chapter #110)	Hearing Date: June 23, 2008

INTRODUCTION

The Chairperson's recommendation does not fulfill its statutory duty to find facts. Instead, the Chair cites inaccurate data and improper legal argument to support his own personal policy preference favoring arbitration. Accordingly, I must dissent.

DISCUSSION

A. The Chair's Analysis Is Not Supported by the Required Comparison of the Employment Conditions of Employees Performing Similar Services and Employees in Comparable Communities.

Government Code § 3548.2(b)(4) requires that the Chair's decision be guided by a "comparison of the . . . conditions of employment of the employees involved in the factfinding proceeding with the . . . conditions of employment of other **employees performing similar services** and . . . with other **employees generally in public school employment in comparable communities.**" The Chair's recommendation states that this criterion was considered "most important . . ." It is, therefore, surprising that the Chair's decision explicitly relies heavily upon inaccurate statistical data presented by CSEA that does not meet the threshold requirements of Section 3548.2.

The Chair found that "60% of districts statewide (10,000 - 15,000 students) have some form of binding arbitration." (Chair's opinion at p.2). This conclusion appears to be drawn from tab 7, table 1 of CSEA's binder, wherein CSEA presented data purporting to represent that 60% of employees in represented bargaining units with a student enrollment of between 10,000 and 15,000 students had contracts ending in binding arbitration. For purposes of fact finding, however, the data is fatally flawed:

- First, the data is inaccurately presented. The chart presented by CSEA shows that only 27 of the 49 (55%, not 60%) represented units analyzed had binding arbitration. The Chair's recommendation explicitly rests upon faulty data presented by CSEA.

- Second, the data is not actually reflective of communities that are comparable to Chico, and does not distinguish between classified and certificated employees. It includes districts such as Los Angeles, which are clearly not comparable to the Chico community. Solely relying on student enrollment within a 5,000 student margin of error is not adequate to ensure the districts being analyzed are comparable. This data should have been ignored as it neither compares employees in similar districts, nor employees performing similar services, as contemplated by statute.
- Third, the data intentionally excludes all districts where classified employees have chosen not to be represented by a union.

At Tab 8 of its binder, CSEA presented data which confirmed that most classified employees in similar communities do not have binding arbitration. *The CSEA data compared eighteen districts, (including Chico) within a one hour radius, with a student enrollment of 700 or more. Of these districts, only eight (44%) had binding arbitration for classified employees.* This result (only 44%) is similar to the data presented by the District from school districts in the relevant geographic area (Butte County and every county that borders Butte County), that had an enrollment of 1,000 or more. *Of the districts surveyed by Chico USD, only twenty-seven percent (27%) had binding arbitration of grievances in their classified employee contracts. These facts are simply omitted from the Chair's report, and it appears they were ignored by the Chair in reaching his conclusion.*¹

The Chair has opined that District arguments flowing from these facts are “specious.”² Through the choice of this word, the Chairperson has concluded that the District’s arguments are somehow deceptive or fallacious. The only statistically proper facts before the Chair compel the conclusion that binding arbitration is not the standard for classified employees in the relevant geographic area. There is nothing deceptive about the fact that *only 27%* of districts in the relevant geographic area have classified employee contracts that end in binding arbitration.

If any argument is specious, it is the Chair’s unsupported personal opinion that “some form of arbitration is common” in present times. This opinion is supported only by his personal anecdotes regarding his experiences from the 1970's. It is clear that the Chair’s decision was guided by his personal opinion, and not by a neutral analysis of the facts presented at the hearing.

¹ The concurring opinion suggests that the District’s data was somehow “cherry-picked;” however, the data presented mirrors the statutory mandate that it be drawn from similar communities and employees (classified) performing similar services. It is clear that Chico is not similar to San Francisco, Sacramento, Los Angeles, or San Diego. Most of Chico’s citizens choose to live in Chico because they appreciate and seek the different lifestyle Chico has to offer. It is this difference that the Legislature recognized when it mandated that the data used in factfinding should reflect similar communities.

² “Specious” is defined as “having the ring of truth or plausibility but actually fallacious.” (The American Heritage Dictionary of the English Language, Fourth Edition, Copyright © 2006 by Houghton Mifflin Co.)

B. As A Merit System District, CSEA and Classified Employees Already Have Review of Discipline and Other Key Decisions by The Personnel Commission.

The Chico Unified School District is a “Merit System District.” In such districts, there is already a separate legal entity (a Personnel Commission) that is responsible for hearing disciplinary appeals, prescribing rules pertaining to personnel practices and ruling on other key areas — e.g. employee classification, reclassification, promotions, etc. Article 1.4.2 of the existing CBA expressly exempts all of these matters from the contractual grievance procedure. These matters would not be affected by either the presence or the absence of binding arbitration. Decisions of the Personnel Commission, in contrast to an arbitrator’s award, can be reviewed through the legal process. (See the discussion at Sections C. and E. below.)

C. The Chair’s Personal Opinion Ignores The Detriments of Binding Arbitration and Eliminates Accountability to Taxpayers.

The Chair, who is himself an arbitrator, unsurprisingly extols the benefits of arbitration. In expressing his opinion, the Chair ignores the fact that binding arbitration will effectively preclude both the District and the Association from asking either the Public Employment Relations Board (PERB) or the Courts to review and rule upon the validity of an arbitrator’s contract interpretation.

At the factfinding hearing, the District posed the following question: “Is it possible to get judicial review of an arbitrator’s decision that is based on flawed facts or a flawed application of the law?” The Chair accurately responded that it is virtually impossible to overturn an arbitrator’s decision. No matter how flawed. No matter how wrong. Indeed, the Chairperson opined that, in the eyes of some, that was a virtue of binding arbitration.

Not everyone does, or will, agree. In a California Supreme Court decision issued on July 17, 2008, the Court observed:

- “Generally, an arbitrator’s decision in a dispute between *parties* to an arbitration agreement is subject to only limited judicial review. This is why: An ‘arbitration decision is final and conclusive *because the parties have agreed that it be so.*’”
- “Arbitration by agreement is often a ‘process in which parties voluntarily trade the safeguards and formalities of court litigation for an expeditious, sometimes roughshod means of resolving their dispute.’”
- “. . .[B]ecause arbitrators are not required to make decisions according to the rule of law, parties to an arbitration agreement accept the risk of arbitrator errors, and arbitrator decisions cannot be judicially reviewed for errors of fact or law even if the error is apparent and causes substantial injustice.” *Berglund v. Arthroscopic & Laser*

Surgery Center of San Diego 79 Cal.Rptr.3d 370 (Cal.), 2008 WL 2757560 (Cal.) (Citations omitted).³

The subjects for which CSEA seeks binding arbitration have the potential to create substantial monetary liability for the District. A wrongfully decided arbitration is no less harmful simply because it has been resolved quickly. An erroneous order to spend public funds, as the result of a roughshod process, is still wrong.

As noted by the Courts, there is a very high standard for the review of arbitration awards. Arbitration awards, no matter how absurd, will be upheld so long as they represent some “plausible interpretation of the contract.” *Phoenix Newspapers, Inc. V. Phoenix Mailers Union Local*, 752, 989 F.2d 1077, 1080 (9th Cir. 1993). In fact, even an arbitration award that is contrary to public policy will not be overturned unless there is an explicit “dominant policy” which “specifically militates against the relief ordered by the arbitrator”. *United Food & Commercial Workers Int’l Union, Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 174 (9th Cir. 1995). This creates the potential for an arbitrator, in a roughshod manner, to render a decision with a big dollar cost to the district without any accountability to its taxpayers. Those same taxpayers will be without any meaningful right to an appeal.

Put simply, the Chair’s recommendation would deny the parties access to PERB or the Courts, and the due process protections afforded by law in those forums.

D. Binding Arbitration Is Only One of Several Dispute Resolution Mechanisms Established by the Legislature.

The Legislature does not agree with the Chairperson that binding arbitration is, or should be, the sole process for resolving contract disputes. In the absence of an agreement between the parties to utilize arbitration (whether advisory or binding), the Legislature established two (2) ways for a party to have a contract dispute reviewed by a neutral person or body. In the public school setting, when one party does not agree with a contract interpretation made by the other, an unfair practice charge may be filed with PERB or a Writ of Mandate may be filed in State Court. Thus, any inference by the Chairperson or CSEA that the public school employer can make any decision it wishes regarding contract interpretation is simply wrong. Or, to use the Chairperson’s term — specious.

By not agreeing in advance to use binding arbitration in all cases, the District has simply ensured that the public’s rights are protected by access to the judicial process. This is critical in light of the subjects for which binding arbitration is sought.

³ The concurring opinion has asserted that this Dissent has somehow “misstated the record” in the cases that have been cited. This Dissent, however, simply provides the opinion of the Court in these cases in the form of direct quotation. While CSEA may argue with the result, the opinion of these judges noting the limited availability of review of arbitration awards coupled with the “roughshod” effect of the arbitration process, is entitled to substantial weight.

Options should be kept open. *The decision to use arbitration, or some other form of alternative dispute resolution, should be made on a case-by-case basis when the nature of the dispute is known.* If both parties do not agree that the particular dispute is appropriate for arbitration, it can be resolved by a neutral PERB or the Courts. The potential subjects for which CSEA seeks binding arbitration are too important to agree in advance (blindly) to place in the hands of a single person (an arbitrator) who is not accountable.

E. The Chair's Recommendation is Unnecessary and Unwarranted.

As a child, my grandmother told me – “If its not broke, don't fix it.”⁴

The Chair has improperly inferred that there is reason to believe the current system is ineffective. To the contrary, the facts presented to the Panel clearly demonstrate that no formal grievances have been filed by either CSEA or by classified personnel employees since 2005. Indeed, between 1980 and 2002, only three grievances were appealed to the Board, one of which was resolved in favor of the grievant. Between 2003 through 2008 only two grievances were appealed to the Board, one was resolved in favor of the District, and the other was withdrawn by the grievant before being heard by the Board.

At hearing, the District demonstrated that the minute number of grievances that have risen to the Board level is likely the result of an interest-based problem-solving process utilized to resolve potential grievances to the satisfaction of both parties at an informal level before the “potential” grievance is even filed. The Chair, however, has ignored these facts and speculates that “one will never know the number of potential grievances which have not been processed because of the lack of a neutral due process procedure.” The Chair cites no declaration, testimony, or other evidence in support of this conjecture. Put simply, there is no history of continuous conflict between the District and the classified bargaining unit. Hence, the Chair has made a recommendation to resolve a non-existent problem.

CONCLUSION

CSEA has said that it prefers binding arbitration. CSEA has made no secret of its organizational goal to have binding arbitration in every district in the Butte service area. This does not render binding arbitration of disputes involving classified employees the right option for this District.

The Chair personally feels that the parties should choose the arbitration process. Clearly, it is the process he would choose if he were an elected school board member. He is not, however, an elected school board member and has no fiduciary duty to the citizens of Chico.

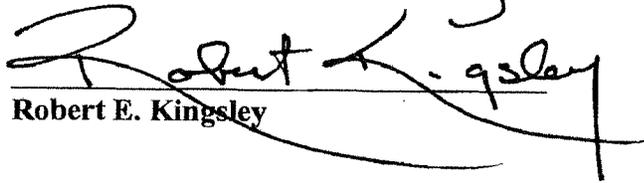
⁴ The concurring opinion attempts to analogize the District's reluctance to blindly place decisionmaking powers in the hands of an arbitrator to prolonging racial discrimination. This assertion, coupled with other buzz words such as “injustice” and “unfair”, are offered in lieu of providing concrete examples that demonstrate where the current system did not work.

The Chair's decision is a prime example of the dangers of binding arbitration. *The Chair's decision demonstrates that an arbitrator's personal policy preferences can control the outcome, regardless of what the facts or data demonstrate.* If this process were binding (which thankfully it is not), there would be no relief from a decision by an arbitrator based upon his personal interpretation of "what is right." (See Chair's decision at p. 3.)

BINDING ARBITRATION SHOULD NOT BE PLACED IN THE COLLECTIVE BARGAINING AGREEMENT between the Chico Unified School District and CSEA, Chapter #110. For the reasons set forth above, and because only twenty-seven percent (27%) of school districts in the relevant geographic area have binding arbitration in their classified employee contracts, **I DISSENT.**

DATE: September 22, 2008

CUSD Representative on the Factfinding Panel



Robert E. Kingsley

CONCURRING OPINION

In the matter of factfinding between

CHICO UNIFIED SCHOOL DISTRICT

And the

CALIFORNIA SCHOOL EMPLOYEES ASSOCIATION CHAPTER #110

PERB Case #SA-IM-3033-E

INTRODUCTION

The Chairperson's recommendation is supported by accurate data and appropriate legal argument as defined in the Government Code Section as will be discussed below. Accordingly, I concur.

DISCUSSION

The Chairperson's recommendation considers that the "comparisons" criterion is the most important, along with some aspects of 'State and Federal Laws', including related judicial statements to which I concur. The evidence presented by the Association and of Management clearly indicates some form of binding arbitration is accepted and widely used by comparable employees, employers and communities as more fully discussed below.

The point the Chairperson makes and which is fully supported by the evidence from both parties is when you compare districts of similar size to Chico Unified, the majority have binding arbitration in their agreements with the Union representing classified employees.

In its dissenting opinion, the District most glaringly fails to point out that only 22.4% of collective bargaining agreements in those similar districts have a grievance procedure that ends in a School Board hearing. The District's position in factfinding fails this test while the Association passes.

The dissenting opinion fails to note the Chair's admonition that:

"The District obviously does not want to "join the crowd" rather than being opposed because it would appear to be unique."

THE CHAIR'S ANALYSIS IS SUPPORTED BY FACTS OF THE REQUIRED COMPARISON OF THE EMPLOYMENT CONDITIONS OF EMPLOYEES PERFORMING SIMILAR SERVICES AND EMPLOYEES IN COMPARABLE COMMUNITIES

The Association's survey comparing districts of similar ADA is reflective of communities that are comparable to Chico and ONLY compares classified bargaining unit contracts. Even if it compared certificated employee contracts, the analysis would still be valid as properly applied by the Chair. The Association's comparisons includes mid-size cities across the state and including some in southern California, but does

not include Los Angeles despite the Dissenting Opinion erroneous assertion. All compared districts by the Association have very similar size urban populations and school districts, a very similar number of students being served by those districts, and a very similar number of classified employees working for those districts. It is a diverse cross-section of districts across the state. The ADA method of comparison is common and widely used as criterion for comparing themselves with other districts.

Further, if we narrow the rate to plus or minus 500 students of Chico Unified's ADA (13,000 to 14,000) the comparisons support the Chairperson's opinion to an even greater degree. In those Districts that have essentially the same ADA as Chico, around 13,500, ten out of thirteen classified contracts have binding arbitration provisions (76.9%). Further and more importantly, only one of thirteen of those contracts has a School Board hearing as the terminal step of the grievance procedure.

The Dissenting Opinion makes a spurious argument when it objects to the "intentional exclusion" of all districts where classified employees are not represented by a union. Factfinding only applies to districts where collective bargaining takes place, and it only takes place in districts where employees are represented by a union. Further, if there is no union, there is no collective bargaining agreement and, therefore, there can be no grievance procedure, let alone binding arbitration of grievances.

In its Dissenting Opinion, the District's representatives completely misrepresent the Association's Exhibit #8 and its own Exhibit A, and omit much of the data and survey results represented by both as follows:

- The second part of the criterion under Government Code that applies to comparisons clearly provides for comparisons with other types of bargaining units and other types of educational institutions. Further, the seventh criteria allows for other traditional and normal factors to be taken into consideration. Industry standards are just one such example. Association Exhibit #8 meets the criterion for comparisons with like employees, employers and communities, plus it meets the industry standards criterion for educational employers throughout the local region in which Chico Unified competes for labor.
- The Association could and did articulate clear, persuasive reasons for the employers it utilized in Association Exhibit #8. All were within a 45 mile radius or an hour's drive. This criterion was applied because these are the public education employers that Chico Unified competes with for labor.
- 33 out of 47 (70%) of the contracts examined in Association Exhibit #8 contained binding arbitration clauses. Almost 90% have some kind of arbitration provision. But, just over 10%, yes only 10% have school board hearings as the terminal step of the grievance process.

Again, the same criterion applies to the District's position. Therefore, when you examine the two positions, it is clear that the District fails spectacularly in its attempts to show that school board hearings are the norm. On the other hand, no matter how you parse the data, CSEA shows that arbitration is well established and the norm locally as well as statewide. **School Boards have the final decision on grievances in only a very few comparable districts, locally or statewide.**

In its dissent, the District's representative asserts District Exhibit A shows that only 27% of the districts surveyed had binding arbitration. During the factfinding hearing, the District's representatives admitted that they "cherry-picked" districts to tailor their exhibit to their "specious" argument in the following ways:

- First they compared with districts far outside of the local area that don't compete with Chico and which are generally very rural. Their comparison districts are not similar in size, the communities are far different and even the method of service delivery in most is far different.
- Second they examined all districts with 1000 ADA or more in their cherry-picked survey area. In their dissent, with regard to CSEA's statewide comparison, they claim that a variance in size of 10,000 to 15,000 ADA is too great. Instead, they would like you to believe that a district of 1000 ADA is more appropriately comparable to Chico Unified. Smaller districts like these are only comparable if they are in direct competition with Chico Unified for labor. The vast majority of the districts that were used by district representatives in their survey were well outside of the local competition area.
- Third and most glaringly, they examined districts within a 100 mile plus radius but excluded any districts within Sacramento County. The district survey skipped over Sacramento County to the west and used Placer County; skipped over it to the east and used Yolo County; skipped over it to the southeast and used El Dorado County. It was skipped by the District representatives because they knew that Sacramento County School District services similar sized communities and has a similar number of students and employees performing similar service, but more importantly, because they knew that Sacramento County has a far higher concentration of contracts with binding arbitration. This is pure cherry-picking done in the hopes of fooling or deceiving the panel.

In desperation due to the lack of any supporting evidence of the district's surveys, the Dissenting Opinion devolves into a personal attack on the Chairperson of the Factfinding Panel. The dissent ignores the facts presented by the Union that the Chairperson relied upon, and resorts to according him of utilizing only his own opinions while relying upon decades old anecdotes.

Further and equally as compelling, the **NEUTRAL** Chairperson's experience in the field of labor relations and contract administration does count and should be relied upon. The District representative could have objected to the Chairperson if they thought experience was not valuable. Both parties selected this Chairperson because he has a reputation for having significant and valuable experience and unquestioned neutrality. The District representative supported and respected the Chairperson's opinions all the way up to the time that the Chairperson disagreed with them.

The Dissenting Opinion also ignores another critical factor under the comparability standard that was, in fact, properly considered by the Chairperson. Internal comparisons are extremely meaningful. We need only to look at the most comparable district of all, Chico Unified. What standard does this employer have regarding the final step of a grievance procedure? How does this employer treat its other employees? What is the internal standard? The only other bargaining unit, the certificated unit, has binding arbitration. By all external and internal standards, binding arbitration is the norm that Chico Unified should adhere to.

MERIT SYSTEM ARGUMENTS AGAINST BINDING ARBITRATION ARE IRRELEVANT AT WORST OR AT BEST SUPPORT BINDING ARBITRATION

Chico Unified is a merit system district. Issues of discipline and classification are addressed by the Personnel Commission under the Merit System Rules and Regulations. Generally, they are not addressed under the collective bargaining agreement under Section 1.4.2 of the contract as the dissent points out. The Union has never claimed that it wanted to reserve these rights under the contract and therefore to subject those issues to binding arbitration. For the record, the Association did not request or suggest a desire for this outcome. For these reasons the merit system and its functions are totally irrelevant to the instant issue.

In fact, as the Chairperson rightly points out, if the merit system has any relevance to this issue, it is this:

“It is clearly a matter of ‘equity’, and ‘what is right’, that employees, who already have a modicum of due process through the Personnel Commission procedure, should not be denied due process in all rights disputes.” (Emphasis added)

THE CHAIR FULLY CONSIDERED THE EFFECTS OF BINDING ARBITRATION AND THE ACCOUNTABILITY TO TAXPAYERS

The Dissenting Opinion again sinks to personal attack on the Chairperson and infers that his recommendations were made out of self-interest rather than on the basis of facts. This tact is not only insulting to the Chairperson, but to the Union and its very persuasive arguments in support of binding arbitration.

The Chairperson did not ignore the fact that binding arbitration eliminates the need for PERB review or court review of issues and decisions. If we were as cynical in our Concurring Opinion, we would conclude that the District representative’s hold their position with an eye toward the big money to be made defending the District in court or in front of PERB rather than through the relatively inexpensive and less time consuming method of binding arbitration. Instead, it is enough to rely on the facts presented by the Association, the body of law, the legislature’s intent and court support for binding arbitration in lieu of litigation or unfair practice charges.

The Dissenting Opinion cites several court cases and states that the court does not agree that the binding nature of arbitration is a “virtue”. (*Berglund v. Arthroscopic & Laser Surgery Center of San Diego* 79 Cal.Rptr.3d (Cal.), 2008 WL 2757560 (Cal)). The Dissenting Opinion completely misstates the case, takes quotes out of context and completely misrepresent its relation to the issue at hand.

The Berglund case involved a business that was not even a party to an arbitration provision. This non-party was seeking judicial review of an arbitrator’s decision to compel them to provide documentary evidence. It was a case involving a third party to a dispute, not the two parties in dispute. It simply bears no relation to the subject at hand.

Ironically, the Supreme Court in the Berglund case ruled that the arbitrator's decision and actions were subject to full judicial review. Further this decision reaffirms six very broad and substantial reasons that an arbitrator's decision may be subject to judicial review by the courts. Those same reasons can essentially be used in the judicial process itself to appeal lower court decisions to higher courts. Yes, a judicial review of any binding decision is limited in this way. That is the nature and point of subjecting a rights dispute to a binding process for resolution, whether it's the court or binding arbitration.

Even more ironic is the fact that the Dissenting Opinion quotes two passages (the first two bullets) from court cases which actually cast binding arbitration provisions in an excellent light and uphold the Chairperson's findings and conclusions that binding arbitration is axiomatic of common law and that the courts have long recognized the efficacy and benefit of grievance arbitration procedures.

The Dissenting Opinion again takes quotes out of context from the Moncharsh and Vandenberg decisions. The first bullet quotes in the Dissenting Opinion comes from the Moncharsh case and the second bullet from the Vandenberg case (Ct. App. 3 C024460/C023922). This second bullet is used as a theme throughout the rest of the Dissenting Opinion where an out of context quote about binding arbitration being a "sometimes roughshod means of resolving their dispute". But the context of this quote actually lies below. In its opinion in the Vandenberg decision the Supreme Court, refers to the Mancharsh decision and wrote:

"Through this detailed statutory scheme, the Legislative has expressed a 'strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution.' [Citations] Consequently, courts will "indulge every intendment to give effect to such proceedings." [Citations] Indeed, more than 70 years ago, this court explained: 'The policy of the law in recognizing arbitration agreements and in providing by statute for their enforcement is to encourage persons who wish to avoid delays incident to a civil action to obtain adjustment of their differences by a tribunal of their own choosing.' ([Citation.]..." (*Moncharsh*, supra, 3 Cal.4th 1, 9.)

Again, the Dissenting Opinion uses specious arguments. They provide quotes from court decisions that seem plausible or truthful, but are actually fallacious and misleading. In this case, the overarching case they cite upheld the right to judicial review of an arbitrator's decision. The quotes contained in that case were taken out of context from earlier cases where the Supreme Court had actually clearly agreed that "there was strong public policy in favor of binding arbitration". A full reading of these three cases completely supports and vindicates the Chairperson's findings and recommendations that binding arbitration is a "virtue", consistent with public policy and supported by the judicial system.

There is also no evidence to support the conjecture in the Dissenting Opinion that there is some unreasonable expectation of erroneous decisions or unwarranted costs to the District as a result thereof. I could make the same case against going to PERB or to the courts. There is absolutely no evidence, nor did the District representatives present any evidence during the factfinding hearing that such bad or

costly decisions are more likely to happen in arbitrations than in PERB hearings or court hearings. After 70 years of the use of arbitration there should be some study somewhere indicating that this problem exists. There isn't even any anecdotal evidence.

The District has had binding arbitration for teachers for decades. Yet, District representatives presented no evidence either in the hearing or in its Dissenting Opinion of any bad or costly experiences as a result of the binding arbitration provision. One would think that every year the District would be attempting to remove binding arbitration from the teacher's contract. But none of this has happened. The sky is not falling.

Just as there is a chance for a wrongfully decided arbitration to cost the District and, by extension taxpayers, substantial monetary liability, there is that same chance that a wrongfully decided arbitration will cost an employee rightful compensation or benefits. Is it any less devastating for an employee to lose a bad decision that may cost them their house, their creditworthiness or their financial and emotional well-being? We would argue that the effects are far worse, yet we understand that the process is inherently fair and has a proven track record of success. While the Dissenting Opinion continues to use the buzz word "roughshod" to describe arbitration decisions, there is nothing in its citations to back up the claim that in any of those cited cases the courts found that the arbitrator had actually ran roughshod. In only one of the cases the potential for this happening was mentioned and then, only the potential.

The Dissenting Opinion also misstates the record in the Phoenix Newspaper case. It is true that in this decision the court discusses the fact that courts do not generally engage in judicial review of cases where the arbitrator made a "rational" and "plausible" ruling based on the entire record of the case and the four corners of the contract. However, the court did not say that this was true in the case of an absurd arbitration decision or award. In point of fact, an absurd arbitration would provide "forceful evidence" in support of judicial review and/or the vacating of an absurd arbitration ruling (Citation is contained in the Dissenting Opinion). Again, the Dissenting Opinion contains specious arguments.

The Dissenting Opinion also misstates the record in the United Food and Commercial Workers v. Foster Poultry Farms case. In that case, the sole reason for the request for judicial review was that the employer felt the arbitrator's award violated public policy. It did not seek to have it vacated because they believed it was wrong, absurd, or somehow "roughshod".

When the court discussed what constitutes "dominant policy" they did not mean some super policy, or extremely important policy. The court defined it as a policy that was "explicit" and "well defined" and that a violation must be "clearly shown". This is a very reasonable standard for review. The court also discussed a violation of public policy that "specifically mitigates against the relief ordered by the arbitrator". But if you read the case fully, what that fancy phrase really means is that an arbitrator cannot force an award or decision on an employer when the employer has constructive knowledge that complying with that award or decision would violate public policy. If the employer can prove a well defined public policy has been clearly violated by the award, judicial relief is in order. Again, the Dissenting Opinion contains specious arguments.

The summary of all the court cases cited by the Dissenting Opinion was that an arbitrator could run "roughshod" and create huge financial liability without any accountability or right of appeal to the taxpayer. Yet none of the cited cases support their arguments. On the contrary, these cases support the Chairperson's findings and recommendations that binding arbitration is, in fact, good, solid public policy. This public policy as it relates to binding arbitration of labor contract disputes dates back to at least 1959-1960 and the Steelworkers Trilogy of decisions. In those five decade old decisions, the Supreme Court found that binding arbitration of labor rights disputes was in the public's interests, and therefore good public policy. The Steelworkers Trilogy starts to set forth the very good reasons for the limits that do exist on judicial review of arbitration awards and decisions. (*United Steelworkers v. Warrior & Gulf Navigation Company* 363 US 574, 46 LRRM 2416 [1960]) (*United Steelworkers v. Warrior & Gulf Navigation Company* 269 F2d 633, 44 LRRM 2567 [5th Cir1959]) (*United Steelworkers v. Enterprise Wheel & Car Corp* 363 US 596, 46 LRRM 2423 [1960])

OTHER DISPUTE RESOLUTION MECHANISMS ARE AVAILABLE

There is no dispute that other mechanisms exist for resolving labor contract disputes. However, there is ample evidence, as contained above, that the legislature and the courts have afforded binding arbitration of contract disputes public policy status. Since the Chairperson did not indicate that it was the only mechanism, any accusation that he was himself being specious in his findings and recommendations is fallacious.

Court cases are costly and take a long time to conclude. Arbitration is far less costly and a far more efficient method of dispute resolution, hence its public policy status. The cynic in me says that the attorneys who use specious arguments against binding arbitration are the only ones who benefit from going to court. PERB is not and has never been intended to settle contract disputes, but rather to settle collective bargaining disputes. The standards are different. And because the standards are different, a decision even more absurd or more costly could ensue. And in both venues, there exists the real possibility of appeals by one or the other party. Once such an appeal is ruled upon, it becomes precedent and affects not only that district, but all similarly situated districts. A district must be selfish to decide it would rather submit an issue to a hearing or hearings where the end result may adversely affect not only themselves, but all districts in the State.

THE CHAIR'S RECOMMENDATION IS WELL CONSIDERED AND WARRANTED

The Dissenting Opinion states:

"As a child, my grandmother told me – If it's not broke, don't fix it."

There is a well known principle in physics that states that organisms that don't evolve wither and die. We are talking about evolution here, not fixing the toaster.

Further, that same line has been used by people in power for time immemorial to oppress and stifle people, growth and change. People who fought to maintain racial segregation used to say the same thing. Separate but equal works, don't fix what ain't

broken. Having one party to a dispute have supreme authority over the other party and over the dispute itself is the same kind of abuse of power. It is an injustice. It is patently unfair. It flies in the face of American concepts of equality for all.

The fact that grievances have not been filed or tendered to the Board for a final decision is not the issue here. The issue is that on those few occasions where a decision needs to be made on a dispute, it must be above reproach. It cannot be tainted. The current process is subject to reproach and it is highly tainted and it must be changed.

The Dissenting Opinion cites the "minute number of grievances" going to the Board as proof that there is an informal system of resolution in place that ensures against the need for final decisions, be they Board or Arbitrator's decisions. Assuming this is true, then showing respect for the Association and classified employees by providing for a neutral, expert decision making process for rights disputes will do nothing but enhance this dynamic. Treat people right, do the right thing and the relationship can only improve.

The Dissenting Opinion ignores the fact that evidence was presented in the hearing that other avenues of recourse have been pursued by the Association, including litigation and unfair practice charges because there was no binding arbitration in the contract. In fact, the Association cited a current unfair practice charge pending. The Association also cited a court case from a few years ago that Chico Unified steadfastly believed was wrong and which cost them approximately \$70,000. Decisions one party disagrees with can occur under all of the available dispute resolutions options, despite what the Dissenting Opinion claims.

The Chairperson relied on this testimony when he stated in his report and recommendations that we cannot know how many grievances might have been filed to the terminal step had it been binding arbitration.

Other testimony was presented that relations have deteriorated in the last few years as well between the administration and the Association that may bode ill for interest based problem solving. We note here that the District has stopped utilizing the services of a facilitator in negotiations to assist in the interest based problem solving process. The services of an arbitrator may assist in reversing this alarming trend by increasing trust and a sense of mutual respect between the administration and the Association and its bargaining unit members.

CONCLUSION

It is true that CSEA has said that it prefers binding arbitration. CSEA has moved to the factfinding process in order to acquire binding arbitration. The reason for CSEA's stance is not based upon a whim. It is based upon strong public policy that supports binding arbitration, strong evidence in comparability studies from both CSEA and the District and strong evidence that binding arbitration is the best method available for dispute resolution. The evidence which was presented during the factfinding process and as recommended by a neutral Chairperson, clearly indicate that the collective bargaining agreement should be changed to provide for final, binding arbitration of grievances as the terminal point of the grievance procedure and I strongly concur based upon all the reasons set forth above.

Arbitration is not a phenomenon of the 1970's. Nothing could be further from the truth. In 1944, the Bureau of Labor Statistics showed that 73% of all labor contracts in America contained arbitration clauses and by the early 1980's that figure had grown to 95% (James L. Stern, Joyce M. Najita, "Labor Arbitration under Fire" 1997) and (Bruce S. Feldacker, "Labor Guide to Labor Law" Third Edition 1990).

Arbitration is a very old method of settling disputes between people and even disputes between different nations. It is true that labor unions helped promote the use of grievance arbitration in the United States, but compulsory arbitration is also now a growing means of dispute resolution in the non-union sector of the United States today. Commercial arbitration is a very old and much relied upon practice of dispute resolution between national and international companies and corporations (Elkouri & Elkouri, "How Arbitration Works", Fifth Edition 1999).

Arbitration is clearly not a phenomenon of the twentieth century nor is it an American invention. Grievance arbitration is the widely accepted means of conflict resolution in the workplace in unionized settings as was presented as undisputed evidence by both CSEA and the District in the factfinding hearing. And it is becoming more accepted in nonunion settings.

As stated in the Chairperson's recommendation, " 'no man should be the judge of his own cause', a basic tenet of early common law." The Association has presented clear and compelling evidence and arguments in favor of changing the collective bargaining agreement between the parties to include binding arbitration as the terminal step of the grievance procedure.

There is no supporting evidence or rationale that the Board can rely upon which will justify a position or stance of not placing binding arbitration as the terminal step of the grievance procedure into the collective bargaining agreement. All arguments the District has used in its factfinding presentation and its Dissenting Opinion in support of its position of not placing binding arbitration in the collective bargaining agreement should be given no consideration based upon the binding arbitration of grievances in the certificated collective bargaining agreement. This one fact, should be most heavily relied upon by the Board as the most comparable and substantial data used to make its decision.

Due to all of the above stated facts, this Concurring Opinion would reiterate that failure of the Board to seriously consider and adopt binding arbitration, will ultimately lead to a deterioration of an already tenuous relationship. It is my sincere hope that the Board will objectively evaluate and review the Chairperson's Recommendation along with this Concurring Opinion and agree with CSEA to change the terminal step of the grievance procedure to binding arbitration.

Dated:

9/22/08

CSEA Representative on the Factfinding Panel



Luci Clark