

BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

Anaheim Union High
School District

and

AFSCME, Local 3112, Council 36

Factfinding Panel
Report
&
Recommendations

PERB Case No.
LA-IM-3731-E

BACKGROUND

The Anaheim Union High School District ("District") and AFSCME, Local 3112, Council 36 ("Union") met for a significant period of time in an effort to reach agreement on a number of issues relating wages, hours of employment, and terms and conditions of employment.

As a result of these negotiations, tentative agreements and one MOU were mutually agreed to between the parties. However, other outstanding issues could not be resolved between the parties.

On August 15, 2012, PERB determined the existence of an impasse, and advised that the State Mediation and Conciliation Service would assign a mediator.

On September 24, 2012, mediation was held before State Mediator Gerald Fecher

from the State Mediation and Conciliation Service.

On September 26, 2012, Mr. Fecher in a letter to PERB certified the parties to factfinding.

On September 26, 2012, the District, in a letter from legal counsel Spencer E. Covert, requested PERB to appoint the chair of the Factfinding Panel. Mr. Ron Bennett was named as the District's representative to the Factfinding Panel and Mr. Pete Schnauffer, the Union's Chief Negotiator, named Marcos E. Cardenas as the Union's representative.

On October 16, 2012, PERB notified the parties that Mr. William W. Floyd was appointed the Chair of the Factfinding Panel.

On October 25 and 29, 2012, the three-member Factfinding Panel met and received the presentations, arguments, and evidence, both oral and documentary, from the parties. The witnesses called by the parties presented testimony under oath to the Factfinding Panel. The Factfinding Panel also explored the possibility of reaching tentative agreement, but the parties were unable to do so. The factfinding hearing was submitted to the Factfinding Panel on October 29, 2012 at approximately 7:00 p.m. for the Factfinding Panel's findings and recommendations.

The parties were advised that they could submit briefs to the Chair by 5:00 p.m. on Monday, November 5, 2012. Both Parties submitted timely briefs, which were sent simultaneously to the Panel members and the parties' representatives on November 6, 2012.

RESPONSIBILITIES OF THE FACTFINDING PANEL

The Factfinding Panel has thoroughly reviewed and discussed the presentations, carefully considered the information, testimony and arguments, and makes its recommendations pursuant to criteria enumerated in Section 3548.2 of the California Government Code.

Government Code 3548.2.

(a) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps as it may deem appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. The several departments, commissions, divisions, authorities, boards, bureaus, agencies, and officers of the state, or any political subdivision or agency thereof, including any board of education, shall furnish the panel, upon its request, with all records, papers and information in their possession relating to any matter under investigation by or in issue before the panel.

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

(1) State and federal laws that are applicable to the employer.

(2) Stipulations of the parties.

(3) The interests and welfare of the public and the financial ability of the public school employer.

(4) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services 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) Any other facts, not confined to those specified in paragraphs (1) to (6), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

Government Code 3548.3.

(a) If the dispute is not settled within 30 days after the appointment of the panel, or, upon agreement by both parties, within a longer period, the panel shall make findings of fact and recommend terms of settlement, which recommendations shall be advisory only. Any findings of fact and recommended terms of settlement shall be submitted

in writing to the parties privately before they are made public. The public school employer shall make such findings and recommendations public within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses shall be borne by the board.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's resume on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of such interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public school employer and the exclusive representative. Any separately incurred costs for the panel member selected by each party, shall be borne by such party.

COMPARABILITY ISSUES WITH RESPECT TO FACTFINDING

The EERA, at Section 3548.2(b)(4), refers to comparison of wages, hours, and conditions of employment. The District presented information pertaining to 12 comparable school districts in Orange County. This represents an appropriate "external comparison" for factfinding purposes. The District also presented information pertaining to "internal comparisons" with the three other unions in the District (ASTA, APGA and CSEA) and the subject of "internal equity."

AFSCME presented no facts regarding "external comparison" with the other comparable Orange County school districts. It presented few, if any, facts regarding "internal comparison" and "internal equity" except for a section in its brief where it asserted that the District had entered into a more favorable reopener agreement regarding health and welfare benefits with ASTA.

STIPULATIONS OF THE PARTIES

The following stipulations were agreed to at the hearing:

1. The District is a public school employer within the meaning of Section 3540.1(j) of the Educational Employment Relations Act.
2. The Union is a recognized employee organization within the meaning of Section 3540.1(l) of the Educational Employment Relations Act and has been duly recognized as the representative of the blue collar classified bargaining unit members of the Anaheim Union High School District.
3. The parties to this factfinding have complied with the public notice provisions of Government Code section 3547 (EERA, "Sun shining" requirement).
4. The parties have complied with the Educational Employment Relations Act with regard to the selection of the Factfinding Panel and are timely and properly before the Panel.
5. The parties have complied with all the requirements for selection of the Factfinding Panel and have met or waived the statutory time limitations applicable to this proceeding.
6. On August 15, 2012, an impasse in bargaining was declared by the Public Employment Relations Board. The mediation process proceeded as scheduled, and the parties proceeded to meet with the mediator on Monday, September 24, 2012, in an effort to reach agreement. The mediator certified the matter to factfinding on September 26, 2012, and the factfinding hearing was mutually agreed to be heard on October 25 and 29, 2012.
7. The Union's representative is Mr. Marcos Cardenas and the District's representative is Mr. Ron Bennett.
8. By letter dated October 16, 2012, PERB appointed Mr. William W. Floyd as Chair of the Factfinding Panel. Government Code section 3548.3(a) requires if the dispute has not settled, the Panel must make findings of fact and recommended terms of settlement within 30 days of appointment.
9. It was stipulated that the parties executed Union's Exhibit 13.

ISSUES, DISCUSSION, AND RECOMMENDATIONS

District's Inability to Pay

District Position- The District asserts that it has a significantly deteriorating financial condition which amounts an inability to pay the status quo. The District presented the following in support of its position:

1. The District is dependent on the State for its revenues and the State has a budget crisis.
2. The State has cut the District's unrestricted revenue limit funding by more than 22.3% and its categorical funding by approximately 20%.
3. The District has suffered a significant per-ADA loss of unrestricted revenue limit funding. In 2011-12, as a result of mid-year trigger cuts, the District lost approximately \$55.00 per student for a total of approximately \$1.7 million.
4. Assembly Bill 2756 requires specified District executive employees to certify, in writing, that the costs of a negotiated agreement can be met by the District for the life of the agreement.
5. The District is affected by deficit spending in its unrestricted general fund, which continues.
6. California's economic growth has slowed considerably since the 2011-12 Budget Act was signed.
7. Based on the latest state certified data, the District spent more than 88.4% of its unrestricted general fund budget on personnel salary and benefit expense. The District has insufficient funds left in the rest of the budget to absorb the ongoing state cuts to education funding.
8. The District has lost in excess of 22% of its funding since 2007-08 and must plan for an ongoing reduction of almost 29% in 2012-13.

9. The District's poor financial condition is representative of what school districts are experiencing statewide and, like the District, other school districts are negotiating concessions with employee organizations to remain fiscally solvent.

The District's consulting fiscal expert, Maureen Evans of School Services of California, presented a significant amount of supporting evidence on each of these factors during her sworn testimony.

Union Position- The Union did not present any direct evidence challenging the District's evidence of inability to pay. The Union recognizes that the District is suffering from substantial financial consequences and, as a result, has offered to accept some of the concessions sought by the District. These include furloughs, suspension of personal necessity days which are not charged to sick leave, and caps on medical insurance premiums. The Union, however, has not been agreeable to incorporating these concessions into the CBA. Instead, the Union seeks to memorialize these concessions on an annual basis in a side letter or MOU.

Panel's Discussion/Recommendation- The District has presented largely uncontroverted evidence of its precarious financial condition, which is likely to get worse before it gets better. There can be little doubt that the District, based on the evidence presented, has an inability to pay the status quo. Accordingly, the Panel finds that the District has the inability to pay the status quo.

Article 1- Recognition

District Position- The District proposes eliminating language currently set forth in the parties' Collective Bargaining Agreement ("CBA") which provides that Food Service Assistant III's assigned to an elementary school shall be at least 10.5 month employees. The District is a unified high school district and does not operate elementary schools. It does, however, provide food services to another district's elementary schools on a contract basis. When the language sought to be eliminated was added to the CBA, the elementary schools served by the District were on year round schedules necessitating food service 11.5 months per year. Currently, the majority of the elementary schools served by the District are on a traditional 9-month schedule and there is no need for 10.5 month employees at those schools.

Union Position- The Union appears to recognize and agree that employees working at 9-month schools should not be paid for 10.5 months. However, the Union asserts that the District's proposal could be used to prevent employees at the year round schools from being assigned more than 9 month per year, allowing the District to reduce employee vacation and other benefits and to use substitutes to perform work that should be done by regular employees.

Panel Discussion/Recommendation- The Panel recognizes that it makes no sense to provide for a 10.5 month assignment for an employee working at a school with a 9-month schedule. But, the Panel also recognizes that simply removing this language, as proposed by the District, might result in an ambiguity that could be adverse to the Union's interest. Accordingly, the Panel recommends that the language in question be modified to provide that Food Service Assistant III's working at a year round elementary school be assigned to a 11.5 or a 12 month position and Food Service Assistant III's working at an elementary school with a traditional schedule be assigned to a 9 month position. Further, the panel recommends that Food Service Assistant III substitute assignments at year round schools be offered first, on a seniority basis, to off-duty employees regularly assigned to 9 month positions.

Article 2- Health & Welfare

District Position- The District proposes that Article 2.1 of the CBA be amended to provide for fixed District Contributions for medical insurance coverage. Beginning with the 2013 calendar year, the District proposes a super composite rate of \$1,197.00 per month/\$14,364.00 per year for PPO coverage and \$984.00 per month/\$11,808.00 per year for HMO coverage for eligible employees/dependents. Further, the District's proposal provides for a blended super composite rate of \$13,189.00, which constitutes the maximum District contribution during 2013. The proposal includes a formula for determining the blended super composite rate. Under this proposal, unit employees would have no out of pocket premium expense in the 2013 calendar year as the District is absorbing the increased medical insurance costs for 2013. The increase in premium costs was mitigated substantially by agreements between the District and the Union and the other employee organizations representing District employees to modify plan benefits to reduce plan costs. The District points out that, while the Union has agreed to the District's proposed maximum premium payment amount for

2013, it has not accepted the District's proposal to include the maximum contribution in the CBA. Moreover, the District has demonstrated that its proposed CBA language for a fixed medical insurance contribution has been incorporated into the CBA's of the other 3 employee organizations representing District employees.

The District proposes elimination of Article 2.5, which addresses doctor selection and reimbursement approval, because that language no longer has any applicability.

The District proposes modification to Article 2.6 regarding the Insurance Committee. The Committee consists of representatives from the District and the employee organizations representing District employees. The District's proposal allows time off for designated Union members for Committee meetings without having such time charged against other time off for Union business. More significantly, the District proposes that, if the Insurance Committee has not reached agreement on cost containment measures by November 1 of each year, the the current plan will carry over into the following year and the District is authorized to make payroll deductions in the next year for the difference between the blended super composite rate of the PPO and the HMO from the current year and the blended super composite rate for the new year. This language has been incorporated into to the CBA's of the District's other employee organizations and the District asserts that incorporating this language into the Union's CBA would remove historical inequities that have favored the Union over the other employee organizations regarding medical insurance benefits and costs. The District presented additional evidence on this issue showing that, when compared to several similarly situated school districts in Orange County, the District's total compensation cost (wages/benefits) relative to overall expenses is the highest, yet its revenues are declining precipitously.

The District's final proposal with respect to medical insurance would reduce the benefit eligibility threshold from working 4 hours per day to 6 hours per day for employees hired after July 1, 2012. The District bases this proposal on its need to control costs in the face of its declining revenues and because 5 of the comparable districts in Orange County have a lower benefit eligibility threshold than the District's current threshold.

Union Position- The Union's primary challenge to the District's Article 2 proposal is that the District has waived its right to negotiate on this issue and it is not properly

before the Panel. The Union bases this assertion on the fact that it signed a MOU with the District on October 11, 2012, modifying specified plan benefits only after the District agreed to remove the following language from the MOU at the request of the Union:

“This agreement shall be considered non-precedence setting and in no way relinquishes the right of either party to negotiate in the area of Health and Welfare. This agreement has no effect on any other portion of the District’s benefit plan.”

Essentially, the Union argues that, by agreeing to remove this proposed language, the District waived its right to negotiate any other aspect of the Health and Welfare benefit, including premium caps and eligibility thresholds.

Notwithstanding its contention that the District waived its right to negotiate on this issue, the Union indicated its willingness to agree to the District’s proposed contribution rates for 2012-13, but only via a side letter or MOU. The Union also asserts that the District has a practice of underfunding the Health and Welfare plan to the benefit of the District’s general fund which, if continued, could lead to employees having to pay out of pocket towards their medical insurance coverage. Finally, the Union asserts that, because the District has entered into a MOU with ASTA permitting a reopener until June 13, 2013, ASTA could negotiate a better contribution rate than the Union would have should premium rates increase in the meantime.

Panel Discussion/Recommendation- Before addressing the merits of the Parties’ positions, the Panel must decide if there is merit to Union’s assertion that the District waived its right to raise these Health and Welfare issues before the Panel. It has long been the law under EERA and other labor relations laws applicable in both the public and private sectors that a bargaining waiver must be clear and unmistakable. In its post hearing brief, the District cited several cases supporting this well established legal principle. Conversely, other than its bare assertion of waiver, the Union presented no legal authority for the proposition that the District waived its right to negotiate under the circumstances present in this case. Accordingly, it is the conclusion of the Panel that the District did not waive its right to negotiate the issues addressed in its proposals under Article 2 of the CBA.

The District has established that, based on its declining financial position, its higher ratio of benefit costs to expenditures in comparison to the comparable school districts in Orange County, its goal of consistency among its 4 employee organizations with respect to health and welfare benefits, and the fact that most of the comparable school districts in the County have a maximum district contribution, the District's proposal in Article 2.1 to fix its maximum medical insurance premium contributions is justified. To allow the Union to avoid the same cost controls that apply to the members of the other employee organizations in the District would be inequitable. To ignore the fact that most comparable districts have an employer contribution limit would be irresponsible. Contrary to the Union's concern, the District's MOU with ASTA that permits ASTA to reopen negotiations through June 2013 regarding the District's contribution on medical insurance is of little consequence when one considers that the District's proposal under Article 22 offers the Union a reopener on health and welfare in 2013-14. Moreover, the proposed District contribution rate through calendar year 2013 covers the full premium cost for AFSCME members. If the premium rate is projected to increase in calendar year 2014, the reopener gives the parties the opportunity to negotiate adjustments before it takes effect. Finally, assuming for sake of this analysis, that the Union's argument that the District underfunded the medical insurance fund to enhance its general fund is true, the union produced no evidence to show its members have suffered as a result. In fact, during the period in which the Union claims this underfunding was occurring, its members had no out of pocket premium expense. Based on the foregoing, the Panel recommends that the District's proposal on Article 2.1 be incorporated into a successor CBA. Moreover, the Panel finds that the District's evidence, as set forth above, supports inclusion of its proposed changes to Article 2.6 into the CBA and the Panel so recommends.

The Panel recommends that Article 2.5 be removed from the CBA. The Union did not introduce any evidence to overcome the District's evidence that this language is outdated and unnecessary under the current terms of the medical insurance.

The final issue before the Panel regarding Health and Welfare relates to the District's proposal to increase in the eligibility threshold for benefits from 4 hours of work per day to 6 hours of work per day for employees hired after July 1, 2012. In the other issues pertaining to health and welfare benefits, the District has relied heavily on the fact that the Union's benefit should be comparable to the other employees in the District and that the District's benefits should be more in line with comparable

districts in Orange County. Yet, the District produced no evidence showing that other represented employees in the District are subject to the higher eligibility threshold that it is seeking from the Union or that this lower eligibility threshold is the predominant practice in comparable districts. Accordingly, the Panel recommends that the eligibility threshold for health and welfare benefits currently set forth in the CBA remain as is.

Article 4- Grievance Procedures

District Position- The District opposes the Union's proposal that Article 4.2.1 be modified to permit a AFSCME staff member (non-District employee) to attend informal grievance meetings. The District asserts that the current language, which allows a grievant to be represented by a District employee at an informal meeting, is adequate.

Union Position- The Union's proposal is to allow a Union staff member to attend informal grievance meetings. According to the Union, its staff have attended such meetings over the past several years. The proposed language is necessary to assure vigorous representation of Union members.

Panel Discussion/Recommendation- The Union's assertion that its staff has attended informal grievance meetings in the past was uncontroverted. The District did not produce evidence that such attendance would be disruptive or otherwise detrimental to the early resolution of grievances. The Panel believes that a fundamental purpose of a union is to represent its members before management in grievance proceedings. Accordingly, the Panel recommends that the Union's proposed change to Article 4.2.1 be incorporated into the CBA.

Article 5- Working Hours

District Position- The District is proposing modification to Article 5.1, which addresses the workday, Article 5.3, which addresses the work year, and Article 5.6, which addresses extra hours. In addition, the District is proposing a reduction in the hours and work year of specified food service and transportation employees. This latter proposal is intended to prospectively legitimize a the layoff of several food

service workers and bus drivers who were laid off in 2010 under circumstances found by an arbitrator to have violated Article 5.3 of the CBA.

The District's proposal regarding Article 5.1 is to change the word "conferring" to "consulting" in relation to the District's obligation to meet with the Union when reducing an employee's hours of work via the layoff procedures. Meet and consult would make the language in 5.1 consistent with the language in Article 5.2, which deals with the work week.

The District's proposal relating to Article 5.3 would provide that a work year reduction would no longer require the affected employee's agreement. Further, the District seeks language providing that reductions in the work year would be accomplished via the CBA's layoff procedures after the District meets and consults with the Union. The District asserts that these changes would clarify the ambiguities in the current language that led to the arbitrator's adverse finding against the District regarding work year reductions. In connection with its proposal on Article 5.3, the District seeks to validate its July 1, 2010 work year reductions of food service and bus drivers by incorporating the work year reductions into this new CBA to be effective on July 1, 2012. While the District acknowledges that it is vulnerable to a back pay award for the food service and transportation employees covered by the arbitrator's decision for the period July 1, 2010 to June 30, 2012, it asserts that implementation of its current proposal cures any defect in these work year reductions, prospectively, from July 1, 2012.

The District has proposed language modifying Article 5.6 to limit opportunities for extra hours and extra assignments to occur within the employee's classification. The District has also proposed modifying the language in this Article to eliminate the provision that says regular employees shall be favored over substitute employees and provisions that require the rotation of extra hours and assignments. The District asserts that this proposal is intended to clarify that the opportunity for extra hours and assignments should be within the employee's classification. The clarification will avoid claims for extra work by inexperienced or unqualified employees in other classifications. In addition, the District is monitoring how it fills available part-time work with individuals who have previously served in the classification.

The District's final proposal under Article 5 is to modify Article 5.12.1 to change the way that assignments are made at football games and other events at Handel and Glover Stadiums. Currently, assignments at these events are limited to maintenance and grounds employees that work these assignments at an overtime rate. Some of the employees that work these assignments are electricians, HVAC technicians, plumbers, and other employees at the higher end of the classified employee pay scale. The work that these employees do is mostly outside of their usual work duties and consists of such tasks as monitoring gates and parking lots. The District asserts that these assignments should be made to employees whose classification best meets the type of job performed, which would lower the District's overtime costs.

Union Position- The Union opposes the District's proposal to change Article 5.1, and proposed its own changes to Article 5.1. The Union's proposal requires that any reduction in assigned time for full or part-time employees be accomplished through the layoff procedure and only after agreement is reached between the District, the Union, and the affected employee. Further, the Union's Article 5.1 proposal includes a seniority preference for filling day custodian openings. The Union introduced no evidence regarding its custodian proposal and little evidence to support the balance of its proposal under Article 5.1.

The Union vigorously opposes the District's proposed changes to Article 5.3. It asserts several grounds for its opposition. It asserts that employees should have a say in whether their work year is reduced. The Union objects to the District's practice of giving layoff notices to employees and then offering to bring the employees back at reduced hours or months if the Union agrees to the reductions. The Union also objects to the District's method of recalling and assigning hours and months based on seniority. For example, the Union introduced evidence that in the July 1, 2010 layoff/recall, the District recalled employees by seniority, which resulted in more senior employees getting a higher number of months per year than they had had before they were laid off. This occurred at the expense of lower seniority employees that were recalled to assignments with fewer months per year than they had had before the layoff.

The Union opposes the District's proposed changes to Article 5.6, primarily on the ground that the changes would eliminate the preference for regular employees for

extra duty assignments and allow the District to replace them with non-benefitted substitutes.

The Union also opposes the proposed changes to Article 5.12.1. It says these are rights that were negotiated and the District is trying to change the current practice, at least in part, to permit a classification represented by CSEA to obtain some of this overtime work. Several employees testified that they have worked overtime assignments at Handel and Glover Stadiums for several years.

Panel Discussion/Recommendation- While the District did not articulate any material difference between “confer” and “consult,” there is merit in its rationale that the CBA use the same terminology in related articles. For example, Article 5.2 already uses the word “consult” in regards to changes in the workweek. Using “consult” or “consulting,” in Articles 5.1, 5.2, and 5.3 would provide consistency in the articles pertaining to workday, workweek, and work year.

Also, with respect to Article 5.3, the District seeks to remove the language that requires an employee’s agreement to change the work year and provides that changes to the work year shall occur under the layoff provision in the CBA. Requiring employee approval of a change in the work year effectively gives the employee veto power regardless of the financial and operational needs of the District. This veto power is unreasonable in view of the District’s need for flexibility to reduce costs and to achieve operational efficiency. (This same rationale applies to the Union’s proposal to require employee approval for reductions in hours under Article 5.1.) Further, the District’s proposal to amend Article 5.3 to provide for implementation of reductions in the work year under the layoff procedures, which already define a layoff as including a reduction in hours or months, removes the ambiguity identified by the arbitrator in the aforementioned grievance arbitration regarding reducing the work year. Accordingly, the Panel recommends that the District’s proposed changes to Articles 5.1 and 5.3 be incorporated into the CBA and that the Union’s proposed changes to Article 5.1 not be incorporated.

A very sensitive issue in the negotiations leading to this impasse relates to the July 2010 layoff/recall that was the subject of the grievance arbitration. The District seeks to maintain the changes in hours and months that resulted from the layoff/recall, notwithstanding the arbitrator’s adverse decision towards the District on the issue of

work year reduction. Its primary rationale for doing so is to address the reduced need for longer-term food service workers at the elementary schools and the reduced need for longer-term bus drivers. These changes serve the District's need to save money due to its poor financial circumstances. The financial benefits of this proposal also include mitigation of the back pay liability that faces the District from the arbitrator's award by cutting it off as of July 1, 2012. We note that the arbitrator did not question the District's need for these work year reductions, but only its process for accomplishing them. While the Panel is not unsympathetic to the effects this has had and will continue to have on the affected employees, the Panel has concluded that the District's position is supported by a preponderance of the evidence and recommends that the reductions in work hours proposed by the District, as set forth on Exhibit "A" hereto, be incorporated into the CBA.

The District's proposal to change Article 5.6 is primarily intended to avoid claims for extra work by inexperienced or unqualified employees in classifications other than their own. The Panel believes that this concern can be resolved by incorporating language into Article 5.6 that requires that an employee seeking extra hours or assignment in a classification other than the employee's own classification must have demonstrated skill, ability, and experience to perform the work. Accordingly, the Panel recommends that such language be incorporated into the CBA.

The final issue before the Panel relating to Article 5 is the District's proposal that Article 5.12.1 be amended to, essentially, disqualify higher paid employees from working overtime at Handel and Glover Stadiums. The District's evidence indicates that the overtime cost for AFSCME unit members at Handel and Glover in 2011-12 was \$90,441.52. No doubt, the District would save some money if the overtime is limited to lower paying employees, but the District did not provide evidence of how much would be saved. This unknown savings must be balanced against the fact that, under implementation of the District's proposal, affected employees would lose this overtime in addition to having to undergo furloughs and a reduction in the personal necessity day benefit, plus they would bear some risk of future out of pocket medical insurance premiums. It is the Panel's opinion that the District has not established that changing the status quo would result in a monetary savings of such significance that it justifies the extra financial consequence that these employees would suffer relative to others in the bargaining unit. Accordingly, the Panel recommends that Article 5.12.1 remain as is.

Article 6- Transfer Procedures

District Position- The Union is proposing elimination of Articles 6.2 and 6.7. The District objects.

Union Position- The Union is proposing elimination of Article 6.2 which provides that the Personnel Director shall determine whether classes are sufficiently related to permit transfers between them and sets out the criteria to be used in making that determination. The Union asserts that, since the District has a merit system for its classified employees, the Personnel Commission should make this determination, as it is less likely to show bias than the Personnel Director. The Union did not present evidence supporting its reason for the elimination of Article 6.7 or showing bias on the part of the Personnel Director.

Panel Discussion/Recommendation- The Union's proposal to eliminate Article 6.2 lacks merit. The concept that a determination be made of the relatedness of positions to which employees may transfer is a sound one and promotes efficiency. The Personnel Director is the logical administrator to make that determination. Accordingly, the Panel recommends the status quo for Article 6.2. In view of the dearth of evidence in support of the Union's proposal to eliminate Article 6.7, the Panel recommends that it remain in the CBA.

Article 7- Evaluation Procedures

District Position- The Union is proposing modification of Article 7.1.7 to permit employees to grieve a performance evaluation that is "in effect disciplinary." The Union also proposes adding Article 7.1.10, which would require the District to consecutively number the pages in an employee's personnel file. The District objects to both Union proposals as unnecessary.

Union Position- The Union proposes language in Article 7.1.7 to allow a grievance if a performance evaluation is disciplinary. The Union offered no evidence on what in a performance evaluation would be considered disciplinary, nor did it offer evidence on why this change is necessary. The Union is also seeking a provision in the CBA that would require consecutively numbering pages in personnel files. The Union's

proposal is based on the Union's assertion that an employee's right to respond to adverse comments entered into their personnel file is being thwarted because the response is not always attached to the document with the adverse comment.

Panel Discussion/Recommendation- In view of the Union's failure to produce evidence in support of its proposal on performance evaluations, and the ambiguity over the term "in effect disciplinary," the Panel recommends not making the Union's proposed change to Article 7.1.7. It is unclear how numbering the pages of the personnel file will solve the Union's concern that responses to adverse comments are being filed apart from the document with the adverse comments. It seems more effective to address this concern by including language that provides an employee's response to adverse comments contained in the employee's personnel file will be attached directly to the document with the adverse comments. Accordingly, the Panel recommends adding such language.

Article 11- Wages

District Position- Under Article 11.1, the District is proposing furlough days due to its inability to pay the status quo. The District is proposing a minimum of 2 furlough days in the 2012-13 school year, with the contingency of 7 more furlough days should the BRL/ADA fall below specified amounts during the year. Further, the District is proposing that anytime after November 7, 2012, the District may request, and the Union will agree, to negotiate further reductions, if necessary, because the 7 additional furlough days may not cover the full impact of projected mid-year cuts.

Union Position- The Union indicated that it would agree to the 2 furlough days and the 7 contingent furlough days, provided they are incorporated into a side letter or MOU rather than the CBA. The Union objects to the proposed reopener.

Panel Discussion/Recommendation- Under its evidence on inability to pay, the District has amply demonstrated that furlough days are a necessity. Other evidence that supports the District's proposal on furloughs is the fact that ASTA, APGA, and CSEA have agreed to essentially the same language that the District is proposing to the Union. These furloughs must be considered in the context of the past 12 years wherein salary increases and total compensation settlements received by the Union members have exceeded the state Consumer Price Index as well as the District's

funded cost of living adjustment. Further, the District presented evidence that other area school districts were requiring furlough days for their classified employees and, in some cases, the number of furlough days required in the other districts exceeds those proposed by the District. Finally, the reopener requested by the District is reasonable and, most likely, necessary in view of declining fiscal conditions facing the District. Once again, the District is asking the Union to simply accept what has already been accepted by the other employee organizations representing District employees due to financial necessity. To carve out an exception for the Union would be inequitable.

Times are tough for school districts and are likely to be for some time. The District has presented ample evidence in justification of its proposal under Article 11.1 and, accordingly, the Panel recommends that the District's proposed language under Article 11.1 be incorporated into the CBA.

Article 12- Vacations

District Position- The District is proposing amended language to Article 12.1.4 that would require employees submit vacation calendars before the end of the first month of the employee's work year and changes to the vacation calendar may occur during the year based upon written requests. The District already has similar language in its collective bargaining agreement with CSEA. Saddleback Valley Unified School District has a similar advance vacation request provision. The District asserts that without this proposed language, some employees do not request vacation until the last moment, causing work coordination problems, or forcing managers to deny requests of the employee or the employee's co-workers.

Union Position- The Union did not present evidence or argument in support of its rejection of the District's proposal.

Panel Discussion/Recommendation- Essentially, the District asserts that its proposed change in the method by which vacations are scheduled will improve efficiency by eliminating the consequences of last minute vacation requests. Yet, the District produced no evidence of any actual financial, operational, or other consequence it has suffered due to last minute vacation requests. Nor has it shown that this type of

vacation request procedure is predominant within the District or within other Orange County school districts. Had the District done so, its case for change would be more compelling. As it is, even in the face of no opposing evidence from the Union, the Panel finds that the District proposal is not justified by any demonstrated need.

Article 13- Leaves

District Position- The District is proposing that Article 13.8.4, which permits employees to take 2 paid personal necessity days per year without charge to sick leave, be suspended during 2012-13 and 2013-14. The District proposes possible reinstatement of this benefit in 2014-15. The District asserts that this proposal is related to wages and, presumably, is proposed in order to alleviate its aforementioned inability to pay. With respect to internal comparability, the District introduced uncontroverted evidence that ASTA, APGA, and CSEA have agreed to the District's proposal.

The Union has proposed modifying Article 13.12, which states that the District shall grant unpaid leave as specified under the Family Medical Leave Act, by adding "not run concurrent with sick leave, differential pay, etc." The District opposes this proposed addition to Article 13.12 because it could increase length of an employee's absence by permitting FMLA leave to commence after exhaustion of all paid leaves.

Union Position- The Union did not argue that the District's proposal to suspend the personal necessity days was unjustified. In fact, its representative indicated that the Union was willing to agree to the suspension of personal necessity days, but it wished to do so year by year in a side letter.

The Union presented no evidence in support of its proposal to allow unpaid FMLA leave to run on a non-concurrent basis with paid leaves.

Panel Discussion/Recommendation- The District's proposal to suspend personal necessity days during 2012-13 and 2013-14, with possible reinstatement in 2014-15, is justified by its need to save personnel costs. AFSCME members would be subject only to the same sacrifices made by the employees in the 3 other bargaining units. Accordingly, the Panel recommends that the District's proposal under Article 13.8.4 be incorporated into the CBA.

With regard to the Union's proposal on FMLA leave, the FMLA permits, but does not require, employers to run unpaid leave under the Act concurrently with paid leaves. While the Act does not require such concurrent running of paid and unpaid leaves, many employers do so to avoid the very concern raised by the District, i.e., employees will stack paid and unpaid leaves and be away from work for longer periods than they otherwise would. In view of the Union's failure to produce any evidence that this practice is used in other units within the District or within other school districts, and its failure to produce anecdotal evidence that its members have been harmed under the practice of running paid and unpaid leaves concurrently, the Panel finds no legitimate reason to change the status quo. Accordingly, the Panel recommends that Article 13.12 remain as currently written.

Article 14- Union Rights

District Position- The District is proposing language under Article 14. 7 that would require employee union representatives and officers to provide advance notice and scheduling of release time to perform their Union duties. The District asserts that it is reasonable that AFSCME stewards and officers provide prior notice for their release time so that work schedules can be coordinated with the immediate supervisor. Scheduling concerns should be resolved between the parties. The District had also provided contract language from comparable Orange County school districts that require prior notice for release time.

Union Position- The Union presented no evidence in support of its opposition to the District's proposal.

Panel Discussion/Recommendation- The notion that employee representatives can up and leave their assignments without notice to, and authorization from, their supervisor is unacceptable. Conversely, unreasonably restricting release time is equally unacceptable. It appears to the Panel that the District's proposed language addresses the former, but not the latter. Accordingly, the Panel recommends that the District's proposal on Article 14.7 be adopted with the addition of a final sentence that states: "Notwithstanding the foregoing, release time under this Article shall not be unreasonably denied."

Article 15- Transportation

District Position- The District proposes modifying Article 15.9, which addresses after hours transportation dispatching. The District proposes that this particular duty be compensated by paying employees for actual hours worked with a 15-minute minimum for each incident. Currently, 3 bargaining unit employees rotate this duty during evenings and weekends. During 2010-11 and 2011-12, each employee made approximately \$30,000.00 each year in overtime pay, although one employee made close to \$40,000.00 in overtime pay in 2010-11. On a percentage basis, the 3 employees have earned an average of approximately 45% additional earnings due to their overtime. The District points out that this is a significant financial issue relating to wages, albeit applicable to three employees.

Union Position- The Union opposes the District's proposal. The Union introduced testimony to the effect that this practice has been in place for some time in at least 2 variations. Initially, there was unlimited overtime available, but at some point, the overtime on weekends was limited to 10 hours per day. Although most of the duties can be handled by cell phone from home or other off site locations, occasionally, the employee on duty has to go into the field to resolve a problem. When on after hours duty, an employee has to remain in the area and cannot drink alcohol, so there is some restriction on their personal activities. Adoption of the District's proposal would abruptly and significantly reduce each employee's income.

Panel Discussion/Recommendation- The District's primary argument is that, in view of its financial condition, the cost of after hours transportation dispatching is excessive and needs to be reduced. It offered no evidence, however, regarding how other types of after hours coverage, if any, are handled internally or externally. The Panel recognizes the District's need to reduce its costs and the District's proposal would be a step in that direction. Yet, the District's proposal would not eliminate overtime, it would only reduce it. The actual amount of the reduction is unknown. Conversely, the 3 employees affected by this change would suffer a reduction in compensation significantly above and beyond what other unit and District employees will experience due to furloughs and suspension of personal necessity days. This disproportionate result strikes the Panel as unfair, especially in view of the fact that this issue involves only 3 employees and there were no comparables produced to show whether this pay is excessive, typical, or low. Accordingly, the Panel

recommends a compromise solution to this issue. Except as provided hereinafter, the Panel recommends that the current practice by which after hours transportation dispatching employees are compensated be discontinued. The Panel recommends, instead, that employees assigned to after hours transportation dispatching duties be paid standby pay of two hours at the employee's overtime rate for each day the employee is assigned to be on call and available to respond. If an employee is called while assigned to after hours standby duty, the employee will be paid for actual hours worked at the overtime rate, with a 15 minute minimum per call. To allow them to adjust to the likely reduction in income under this new formula, the 3 employees currently in the rotation for this duty will continue to be paid under the status quo until December 31, 2013 so long as they remain in the rotation. Effective January 1, 2014, all employees assigned to after hours transportation dispatching duties shall be paid under the new formula.

Article 16- Contracting Out

District Position- The District opposes the Union's proposal to modify Article 16.2. The Union's proposal would provide that if the Union requests monthly meetings of the contracting out committee 3 times, and the District fails substantially to meet monthly with this committee, there shall be a rebuttable presumption that the District is attempting to avoid the value of this committee by failing to meet.

Union Position- The Union presented no evidence on this issue.

Panel Discussion/Recommendation- In view of the Union's failure to introduce evidence or an explanation in support of this proposal, and the Panel's opinion that the proposed language stating "the District is attempting to avoid the value of this committee," is ambiguous and confusing, the Panel recommends that Article 16.2 remain as is.

Article 22- Reopener

District Position- The District is proposing a negotiation reopener during 2013-14 and during 2014-15. The scope of the reopeners would be limited to Article 2 - Health and Welfare, Article 11 - Wages and Items Related to Wages, and 1 other Article to be

selected by each party. The District asserts that it is beneficial for the parties to be able to discuss important items during the second and third years of the agreement.

Union Position- The Union produced no evidence on this issue.

Panel Discussion/Recommendation- In view of the lack of evidence supporting the Union's opposition to the District's proposal, and the perceived benefit of the parties being able to periodically address important issues through the bargaining process during the term of the CBA, the Panel recommends incorporation of the District's proposed reopener into the CBA.

Article 23- Duration

District Position- The District proposes that the agreement become effective upon board ratification by both parties and shall remain in full force and effect up to and including June 30, 2015, and thereafter continue in effect year-by-year unless one of the parties has been notified by the other in writing of its intent to terminate. The District asserts that this is a standard duration provision and points out that EERA permits three-year agreements. The District sees no benefit to using the 2011-12 school year as one of the 3 years in the term of a new CBA because it has come and gone.

Union Position- The Union introduced no evidence on this issue aside from Union Exhibit 5, which is an email from Mr. Schnauffer to PERB, in which he says "(AFSCME's written proposal suggests June 30, 2014.)."

Panel Discussion/Recommendation- The Panel believes that the District likely intended its proposal to read, in pertinent part, "upon ratification by both parties" rather than "upon board ratification by both parties." Assuming that is correct, the Panel recommends adoption of the District's proposal with the aforementioned clarification. This CBA duration will promote labor stability for nearly 3 years going forward while allowing the parties to address important issues during the term of the CBA through the reopener clause.

Employee Reinstatement From Layoff

District Proposal- Earlier this year, the District laid off several employees and reduced the hours of several others. The District has proposed the reinstatement of some of these employees from layoff, as well as returning some other employees back to 8 hours per work day. The District's proposal will benefit the affected employees and the District by restoring their services, however, the District's proposal is conditioned on the Union accepting all of the District's other proposals.

Union Position- The Union argues in its Brief that the District's layoff and reduction in hours of the affected employees is an unfair practice under EERA. It asserts that the District has made this proposal primarily to put pressure on the Union to agree to the District's other proposals.

Panel Discussion/Recommendation- It is unfortunate that the affected employees have had to suffer the ongoing indignity and hardship of a layoff or reduction in hours as a result of this bargaining dispute, but, sometimes, such is the world of labor relations. Whether, as the Union alleges, the District has engaged in an unfair practice with regards to these actions is not within the Panel's jurisdiction and, accordingly, the Panel takes no position on that allegation. The Panel recognizes that both parties to this dispute have firmly held, good faith convictions and they have held their ground in these negotiations accordingly. Nonetheless, the Panel recommends that, in the interest of continuity and stability, the District include the following reinstatements as part of the resolution of this impasse even though the Panel has not recommended adoption of each and every one of the District's proposals. The Panel believes that doing so would be a good step in restoring a positive working relationship between the parties.

Accordingly, the Panel recommends that the District reinstate the following positions:

Restore 1 of 2 Equipment Operator positions, 1 position to remain on layoff.

Restore 1 of 2 Grounds Maintenance Worker positions, 1 position to remain on layoff.

Restore 1 more of 9 AFW I positions (4 positions already restored, August 16, 2012), 4 positions to remain on layoff.

Restore 1 Carpenter, 1 HVAC Technician, and 1 AFW II

Further, the Panel recommends that the following classifications return to 8 hour work days:

Auditorium Operations Tech	5 positions
Maintenance Service Worker	11 positions
Grounds Maintenance Worker	4 positions
Pool Maintenance Tech	2 positions
Warehouse Worker	1 position
Transportation Operation Specialist	1 position

Applicable CBA

It was determined during the hearing that the parties have a difference of opinion over the applicable CBA draft. The Union asserts that the 2005-08 CBA draft, which is signed on behalf of both parties, is the CBA currently in effect. The District takes the position that the 2008-11 CBA draft, which is signed on behalf of the District only, is the CBA in effect. The parties' representatives both expressed optimism that the differences between the 2 versions could be reconciled and the Panel urges them to do so.

CONCLUSION

The Panel hereby respectfully submits this Factfinding Panel Report & Recommendations, including Panel Member concurrences and dissents, to the District and the Union with the intent that it guide them to a mutually acceptable agreement on the terms of a successor CBA.

Signatures on Following Page

Issued on November 15, 2012

William W. Floyd

William W. Floyd
Panel Chair

For the District:

 X Concur
_____ Dissent
_____ Concur in Part
_____ Dissent in Part

Report Attached _____

For the Union:

_____ Concur
 X Dissent
_____ Concur in Part
_____ Dissent in Part

Report Attached X

Ron Bennett

Ron Bennett
District Panel Member

Marco E. Cardenas
AFSCME Panel Member

EXHIBIT A

Food Service Reduction in Work Year, Effective July 1, 2012

Classification	No. of Positions	Hours/Months
Food Service Cook	1	8/12 to 8/9
Food Service Assistant IV, Food Production Office	2	8/12 to 8/9
Food Service Assistant I	1	1.25/10.5 to 1.25/9*
Food Service Assistant I	2	2.50/10.5 to 2.50/9*
Food Service Assistant I	6	3.0/10.5 to 3.0/9*
Food Service Assistant I	3	3.50/10.5 to 3.50/9*
Food Service Assistant I	2	3.75/10.5 to 3.7.5/9*
Food Service Assistant I	1	1.25/11.5 to 1.25/9*
Food Service Assistant I	2	3.0/11.5 to 3.0/9*
Food Service Assistant I	3	3.75/11.5 to 3.75/9*
Food Service Assistant III	1	6.0/10.5 to 6.0/9*
Food Service Assistant III	1	6.25/10.5 to 6.25/9*
Food Service Assistant III	4	6.5/10.5 to 6.5/9*
Food Service Assistant III	2	7.0/10.5 to 6.5/9*
Food Service Assistant III	5	7.5/10.5 to 6.5/9*
Food Service Assistant III	1	8.0/10.5 to 6.5/9*
Food Service Assistant III	2	6.5/11.5 to 6.5/9*
Food Service Assistant III	1	6.5/12 to 6.5/9*
Food Service Assistant III-Bilingual	5	7.5/10.5 to 6.5/9*
Food Service Assistant III-Bilingual	1	7.5/12 to 6.50/9*
Food Service Assistant III-Bilingual	1	8.0/12 to 6.5/9*
Custodian	1	8.0/12 to 8.0/9
Warehouse Worker Nutrition Services	5	8.0/12 to 8.0/9

* Single Track Calendar

Transportation Reductions in Work Year, Effective July 1, 2012

Classification	No. of Positions	Months
Bus Driver	4	Remain 10.1 months
Bus Driver	40	Reduce from 10.1 to 10 months
Bus Driver	12	Reduce from 10.1 to 9 months

BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

Anaheim Union High
School District

And

AFSCME Local 3112, Council 36

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PERB Case No.
LA-IM-3731-E

DISSENTING OPINION

Article 1 Recognition

Mr. Schnauffer testified that the language in the current CBA between the parties, referenced here, applied to one or two employees in a floating assignment. It was only applicable if they were assigned permanently to a school. The District did not dispute the testimony of Mr. Schnauffer. It appears that Mr. Schnauffer's testimony was misunderstood by a majority of the fact finding panel.

Article 2 Health and Welfare

The District sought to have AFSCME sign a waiver that the parties could continue to meet and negotiate on Health and Welfare. AFSCME declined and asked to have the paragraph (waiver) omitted. The District agreed to do so. This was presented into the record as Union 1-4. Thus, the burden of proof is on the employer to show that its attempt to obtain the Union's signature on the document, with the waiver paragraph, was not an admission that was needed in order to keep the matter of Health and Welfare in the impasse process.

The panel majority ignores the role of the District and the pattern setter (ASTA) in establishing the Health and Welfare changes for 2014. While all local, state and national unions find themselves in certain jurisdictions to be pattern setters, and in other jurisdictions to be pattern followers, Anaheim has certain pertinent facts that are not apparent in many situations. The District here wishes to modify the impasse procedures of the RODDA Act, and memorialize the role of ASTA and the Insurance committee, then require AFSCME to complete negotiations on the Health and Welfare Reopener every year in 29 days (In the District's proposal is states that "The District and AFSCME agree to negotiate on health and welfare beginning October 2 through October 31 in an effort to negotiate any plan changes or other cost containment matters." In the district's Last, Best, and Final offer, a trigger mechanism is inserted which allows the District to begin payroll deductions for premiums the very next day, November 1).

Article 5 Working Hours

Mr. Schnauffer testified that the District was trying to re-litigate an arbitration that they lost. The fact finding panel has no legal right to re-litigate the arbitration on behalf of the District. Hours are a mandatory subject of bargaining and the District lost a binding arbitration case involving hours of work (Union 6 and Union 9, and the testimony of Gambino Ramos and Frances Morton). The District went to Superior Court and tried to vacate the binding decision of the Arbitrator and lost. Two days after the fact finding panel adjourned, the District appealed the Superior Court ruling. The amount of taxpayers money that is being thrown away at a decision that was clearly lost is absurd. The District is crying poor but is wasting money. I refuse to affix my signature and validate the shenanigans of the District.

Exhibit A

Mr. Schnauffer testified about the tactics that the District used during negotiations. Attempting to modify its Last, Best, and Final Offer is deeply troubling to this fact finding panelist. The District arrived to Mediation and added a new proposal in the form of a settlement of the Arbitration in question. This consists of a long list of food service and transportation titles with their hours and months. On the issue of months, these are the exact number of months that they would have established had they won the Arbitration. In the Arbitrator's opinion and award, Arbitrator Horowitz states, "...the determination of the appropriate remedy shall be remanded to the parties with the arbitrator retaining jurisdiction in the event of a dispute." The fact finding panel can't award a District, that continues to waste taxpayer dollars and lose in Court, nor does this panel have any authority to do so. This is why Exhibit A should not be part of the fact finding report.

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Transportation

I agree with the panel's rationale up until the recommended compromise. The District offered no evidence of how the work would be done differently, how much would be saved, or that overtime would be eliminated. The District's only argument was that the amount of overtime paid was excessive. For the panel to recommend a compromise is unduly harsh on the workers doing the work. The compromise should be that the three workers are "grandfathered in" and that future workers compensation would be negotiated at the bargaining table.

In conclusion, for the reasons stated above, I respectfully dissent.

DATED: November 15, 2012

MARCOS E. CARDENAS
Fact finding panelist

By: 