

# PHILIP TAMOUSH

**Arbitrator-Factfinder**

Post Office Box 1128

Torrance, California 90505-0128

(800) 747-9245 (Voice) (800) 903-4266 (Fax)

([www.factualdisputeresolution.com](http://www.factualdisputeresolution.com) [philip@tamoush.com](mailto:philip@tamoush.com))

(Principal Office & Mailing Address)

## FACTFINDING REPORT AND RECOMMENDATIONS

September 6, 2011

CALIFORNIA STATE UNIVERSITY

v.

CALIFORNIA FACULTY ASSOCIATION

California PERB Case No. LA-IM-3616-H

### FACTFINDING PANEL

Philip Tamoush, Chair

John Travis, CFA Designee Panel Member

Bill Candella, CSU Designee Panel Member

Hearings Held: July-August, 2011

Record Closed: August 16, 2011

Report and Recommendations Issued: September 6, 2011

This is a unique Factfinding Process in that it deals with the year of 2009-2010 salary re-opener. 2009-10 is the third and final year of a three-year collective bargaining agreement. The parties have extended the agreement, for the most part, until now and are currently in the process of negotiating a new multi-year agreement.

Readers are referred to the Factfinding Report of Chair, John Kagel, and the Panel for the 2008-2009 year (Union Exhibit I-4). That report outlines in quoted detail the relevant portions of the parties' collective bargaining agreement and the 'Compact'

(“Higher Education Compact, Agreement between Governor Schwarzenegger, the University of California, and the California State University, 2005-2006 through 2010-11”) which lay out the essential elements leading to this present proceeding. While this process is indeed not *pro forma* in any respect, it is clear that it is part of the cycle of annual negotiations which must be played out before the parties can engage in more definite, specific and “serious” bargaining, in which they are engaged currently. Just as there have been factfinding proceedings in each of the past 10 years, it would be anticipated that the parties will begin a similar proceeding for 2010-2011 soon.

The Chair of this process conducted a four-day hearing during which the parties presented detail about the finances of the University system, where funds might be used for even a minimal salary adjustment for the some 24,000 faculty members affected by this factfinding. The undersigned, in an attempt to expedite deliberations and a conclusion, has concentrated on the CSU management’s opening documents and early exhibits in its binder, the CFU’s in-depth opening statement in its exhibit binder, brief discussions with his fellow-factfinders, and the Kagel report. The CFA opening statement lays out well the essence of information which brought the parties to their current state of negotiations and its applications of standard criteria in the making of meaningful recommendations for settlement. The Kagel report can be incorporated into this current report and, except for many of the financial figures which, of necessity are updated, his narration, leading to his recommendations, are also incorporated herein. (Chair’s Note: The principal participants in the 2008-2009 factfinding process were the same as in the instant proceeding. That prior hearing was report and transcribed. The parties are encouraged to refer to the transcripts of that hearing for some relevant background and generic information).

During the factfinding proceedings, the CFA produced a proposal which it laid out verbally that would produce ‘equity’ and SSI (non-base bonuses) adjustments. There is no provision for a GSI increase. The CSU did a concise analysis of the proposal (CSU Exhibit 39), attached herein. The CFA agreed with the analysis and indicated, for the record, that it could incorporate it as the CFA’s detailed proposal

Below is an Expedited consideration of the fact finding process. The process outlined by the CFA, in justifying its 1.3% proposal relies to a great extent on the standard criteria in ‘interests’ disputes (although the parties have not agreed on this process as designed to create recommendations which are in any way final and binding as in an arbitration forum. The CFA analysis includes:

1. Salaries of other professors, especially in the West (AAUP Survey indicating ‘continuing’ faculty salaries of 2.3% for 2010/11)

2. Failure of the CSU to honor the negotiated increases found in the parties' collective bargaining agreement (2007-2010).
3. The negative impact on recruitment and retention of faculty.
4. Retention of the 0% adjustment advocated by the CSU would maintain salaries at the bottom 10% of all comparable jurisdictions.
5. CSU salaries today put it at 18<sup>th</sup> in the traditional CPEC 20 group of traditionally comparative institutions.
6. The 1.3% adjustment proposed by the CFA provides that, at the least, CSU increases would approximate the traditional Consumer Price Index.
7. Wage increases for the MPP and Executive Management group at the CSU have resulted in an expenditure of 5.9 million dollars, or .5% of faculty salaries. Coupled with the highest salary paid the new CSU San Diego president, results in a most demoralizing effect on the bargaining unit.
8. State employees generally received their usual step increases within their salary schedules, while most CSU employees did not.

Regarding the CSU's financial position, it is virtually impossible to review and disagree with either party's positions. While student tuitions have increased, the provision of funds from the State generally continues a traumatic decline. The CFA argues that funds can and should be used from auxiliary sources (Extended Education, etc.). Campuses received extensive grant funds in 2009-10 which could be used to offset decreases in other outside funding.

The CSU contends that the student fee revenue increase was minimal. Any savings in 'operating expenses' were as a result of furloughs, layoffs, etc. But these savings were used to cover the decreased revenues. Much of the increased revenue laid out by the CFA is actually 'offset' money from federal sharing funds and application of accounting devices which do not actually make funds available.

Finally, the CSU contends, funds should not be utilized for 2009-10 which can be applied to negotiations for 2011-12 and forward. Even the CFA, in its current negotiation proposals is not seeking retroactive adjustments.

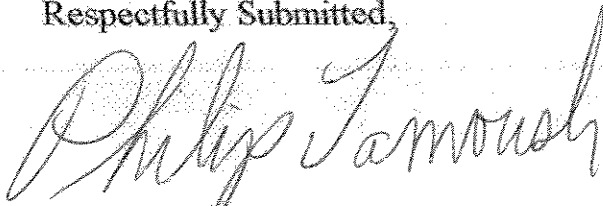
Based on the hearing and argument provided by Counsel, and their final positions, and the discussion as laid out above, it would appear appropriate to adopt the 1.3% CFA offer, as analyzed and offered by the CSU in its Exhibit 39, attached. The Chair has encouraged his fellow members of the Factfinding Panel to offer their own positions, in writing, as acceptable attachments to the Chair's report and considerations. Hopefully, with three analyses, rather than one consensus approach, the parties can accept the report and, as required and encouraged by the law, further negotiate, not only in the context of 2009-10, but also in their current negotiations affecting 2011-??.

## RECOMMENDATIONS

The Chair, with the concurrence of at least one member of the Panel, recommends:

1. that the parties review the 2008-09 Kagel Factfinding Report for the excellent background and summary analysis it provides for the philosophical and overall analysis of the parties' situation.
2. that the parties implement the 1.3% salary adjustment for the Bargaining Unit as outlined in the attached exhibit (CSU Exhibit 39).
3. that the parties commence negotiations forthwith not only to implement and finalize settlements dealing with the 2009-10 year, but also for 2011 and future years.
4. that the parties review this report, especially the written opinions of the partisan Factfinders involved in this current process, in an attempt to further resolve their impasse.
5. that the parties review the Invoice accompanying this Report and pay the Chair's fees as previously agreed.

Respectfully Submitted,



Philip Tamoush, Chair

/s/ Bill Candella, Dissent

Bill Candella

/s/ John Travis, Concur

John Travis

A77.1

CSUX-39

**Estimated cost of CFA proposal to resolve 2009/10 salary reopener**

**Assumptions:**

Intent of CFA's proposal is that anyone whose equity award was predicated on future SSIs should get a full SSI. For this model, only those individuals who received benchmark awards (or stipends) in year 1 and who have SSI eligibility now are included. Year-of-entry recipients are not included. In year 2, all recipients who have SSI eligibility are included.

In addition to salary costs, salary related benefits costs have been added to base costs using a figure of 25.825% of salary. Salary-related benefits include employer-paid contributions to Social Security, Medicare, and retirement. For those faculty members receiving non-base increases, salary-related benefits include employer-paid Social Security and Medicare contributions only.

Total cost of a full 2.65% SSI was estimated as \$16,407,475. This was extrapolated from the estimated SSI cost provided by Budget for an SSI of 1.8% (CSU Book 1, tab 6).

*Annual Base costs*

**\$6,000,000** for Equity 2, per union proposal.

**\$3,495,100** for SSIs for the SSI-eligible population who received Equity 2 awards

**\$644,215** for SSIs for individuals now eligible for SSIs who received benchmark awards (or stipends) in the Equity 1 program.

*Total base costs:*

**\$10,139,315**

*Remaining SSI costs (as non-base bonus)*

**\$10,496,065**

(This amount is lower than the previous estimate -it has been adjusted to exclude retirement contributions, which were included in the previous estimate. Non-base bonuses are not treated as income subject to retirement.)

**Total is \$20,635,380**

Budget estimates 1% costs as \$15,510,000 for 2010/11

Therefore cost of CFA proposal is 1.33% of Unit 3 compensation and base cost is 0.654% of Unit 3 compensation.

*Note:* The CSU has also estimated that the *additional* cost of providing SSIs to everyone who received an Equity 1 award and now has SSI eligibility would be \$1,800,056, raising the cost of providing SSIs to the Equity 1 population to \$2,444,271. This would shift the *ongoing* base costs of the proposal to \$11,939,371 (0.77% of Unit 3 compensation pool) and drop the one-time costs to \$8,956,021. Total cost would increase slightly to \$20,895,392.

Att. 2

CFA Concurrence with the Recommendations of the Panel Chair

During the factfinding process CFA made a modest proposal, as Chair Tamoush noted in his report. CFA stressed the importance of completing the equity program begun in 2007-08, and urged the Chancellor to provide a one-time SSI payment to those eligible to help mitigate compensation stagnation to faculty who have had no salary increases for three years, while many administrators have received equity increases and raises. CFA believed these proposals reflected an honest assessment of the CSU budget in 2009-10, and would, in fact, represent no harm to the university nor its students and staff if accepted by Chancellor Reed.

This report authored by Chair Tamoush, like the one authored previously by Chair Kagel cited herein, urge the parties to negotiate fairly and honestly even in difficult budget times. The chancellor's representatives refused to move off the position they had maintained for the past three years.

/s/ John Travis

John Travis, CFA

Concur   X

ATTB

CSU Dissent to the Report of the Panel Chair:

The CSU respectfully dissents from the advisory recommendations of the Panel Chair. When the parties negotiated the 2007-2010 Collective Bargaining Agreement, they mutually agreed that a failure by the state to fund the Higher Education Compact in any of the years of the Agreement would require the parties to meet and confer to reconsider the amount of any General Salary Increase or Service Salary Increase for that year. This trigger was met for fiscal year 2009-2010. The parties met subsequently on several occasions, but were not able to reach an agreement on these issues. After the commencement of this hearing, the CFA presented CSU with an amended demand that the CSU estimates would cost the CSU some \$20.6 million dollars for the current fiscal year 2011-12<sup>1</sup>. Of that, over \$10 million would be paid as base salary increases. While acknowledging the modified demand from the CFA, CSU's position remains unchanged. During a year in which the CSU is grappling with a \$650 million reduction in its state appropriation, and while facing the very real prospect of a further \$100 million mid-year cut, the CSU's priorities must remain resolutely focused on serving as many students as possible while retaining as many jobs as possible. CFA obviously maintains a different position, and it was/is this fundamental dissonance between the parties' positions that led to impasse being declared.

As part of the HEERA mandated impasse procedure, the parties presented four days of evidence and argument to the fact-finding panel. In addition to the oral testimony of multiple expert witnesses, the parties also submitted several hundred pages of documentary exhibits and supporting argument. The Panel Chair's report makes virtually no reference to any of this evidence. Instead, he explains that

*"The undersigned, in an attempt to expedite deliberations and a conclusion, has concentrated on the CSU managements opening documents and early exhibits in its binder, the CFU's (sic) in-depth opening statement in its exhibits binder, brief discussions with his fellow fact-finders, and the Kagel report".*

Accordingly, by the Panel Chair's own admission, this report makes no attempt to consider the full record of the hearing, nor does it attempt to undertake any kind of detailed rational analysis of the parties' respective positions as presented in the hearing. Instead, the Panel Chair invites the parties to "offer their own positions in writing" and thereafter review them "in an attempt to further resolve their

---

<sup>1</sup> At the beginning of the fact-finding process, CFA's demand was for \$80.7 million for 2011-2012.

*impasse*". With respect, the CSU understands CFA's position on these issues and, likewise, after multiple negotiation sessions, a mediation process, and four days of hearing, the CFA can be presumed to understand the CSU's position. The salient point here is that the CSU and CFA fundamentally disagree with one another over the underlying elements of this dispute. The CSU entered this process in the hope that a third party neutral's review of the facts would help each side better understand the relative strengths and weakness of their positions and, at a minimum, help the parties narrow down their points of disagreement as they continue to negotiate over them. The Panel Chair's failure to conduct a comprehensive review of the parties' positions, and thereafter actually make some findings of fact, amounts to little less than a complete abrogation of the Panel Chair's statutory responsibilities under the HEERA.

Specifically, the CSU finds the Panel Chair's report to be unacceptable on multiple grounds. First, the report is riddled with factual errors. Second, to the extent that the report does attempt to reference CSU's position in the hearing, it misrepresents/misstates the CSU's position on key issues. Third, the Panel Chair provides advisory recommendations that far exceed the scope of the matters properly before the factfinding panel. Fourth, the Panel Chair's wholesale incorporation of the 2008/09 fact-finding process is inappropriate, given that the issues and evidence before the Kagel Panel were substantially different than those presented during this hearing. The CSU also notes that despite purporting to adopt the narration and analysis of the Kagel report, the Panel Chair then goes on to make advisory recommendations that go far beyond those made by Kagel on both the equity and SSI issues.

#### **I: Factual Inaccuracies**

(i) In the very first sentence of the report, the fact-finder states, in reference to the 2007-2010 Collective Bargaining Agreement, that the parties have *"extended the agreement for the most part until now, (2011)"*. In fact, the Agreement expired on June 30th, 2010. The only part of the agreement extended by MOU was the grievance process in Article 10 of the expired Agreement. This was clear from the evidence presented to the Panel by both parties.

(ii): In paragraph 2 of the report, the Panel Chair states

*"While this current process is indeed not pro forma in any respect it is clear that it is part of the cycle of annual negotiations which must be played out before the parties can engage in more definitive, specific and "serious" bargaining, in which they are engaged currently. Just as there have been factfinding proceedings in each of the past 10 years, it is anticipated that the parties will begin a similar proceeding for 2010-11 soon".*

Firstly, there have not been factfinding proceedings "in each of the past 10 years". Factfinding proceedings have only been held on four occasions in the last decade: in 2008/09 over the GSI/SSI/equity provisions (Chair John Kagel); at the conclusion of full contract bargaining in 2007 (Chair Sylvia Skratek); in 2004 (Chair Walt Daugherty); and then again in 2002 (Chair John Caraway).

Secondly, CSU does not understand what the Panel Chair intended to convey by his statement that these proceedings must be "played out before the parties can engage in more definitive, specific and "serious" bargaining, in which they are engaged currently". The CSU takes strong issue with any suggestion that these are not "serious" negotiations, or any suggestion that the CFA's demand in these proceedings represents "a minimal salary adjustment". The CSU takes these negotiations extremely seriously, particularly given the tremendous strain being placed on the California State University in this fiscal year following a \$650 million reduction in its state appropriation (a cut of 23% from the previous year), combined with the very real prospect of a further \$100 million cut at some point mid-year. Within this context, \$20.6 million dollars is a very substantial amount of money even for an organization as large as the CSU, equating as it does to approximately 315 full-time temporary faculty positions (or 3,150 course sections), or the marginal cost funding for more than 2,800 full-time students. It strikes the CSU as inconceivable that there should be no consideration, or even recognition, of these undisputed facts anywhere in this report.

Thirdly, the factfinding Panel was presented with exhibits that confirm that there is actually no current dispute between the parties in the current successor contract negotiations on salary increases for 2010-11. Both parties, in their written proposals, have agreed that there should not be any salary increases for 2010-11. Based on this undisputed fact, CSU is again at a total loss to understand the Panel Chair's comment about a "similar proceeding for 2010-11 soon" other than to note that these exhibits were

submitted later in the proceedings and, therefore, were unfortunately not among the CSU's "opening documents and early exhibits" relied upon by the writer for the preparation of this report.

(iii) As a final point of information, the bargaining unit does not consist of "some 24,000 faculty members". For 2010, bargaining unit headcount was 22,032. This information was presented to the panel in CSU exhibit CSU/12. Even the CFA in its submission claims only "20,000-plus faculty".

**II: Misrepresentations/Misstatements of CSU's position and submissions.**

(i) The CSU categorically refutes that at any stage it represented that "student fee revenue increase was minimal". Such a statement is clearly inaccurate and impossible to reconcile with the very clear evidence presented to the panel on the student fee increases that the CSU has been obliged to impose following the reductions in its state appropriations. In 2009, the Board of Trustees increased student fees by a total of 32%, providing an "estimated net increase of \$283 million for CSU operations, measured against 2007-08" (CSU/17). Further, the Trustees also increased fees by a further 5% in July 2010 and by a total of 22% through actions taken in November 2010 and July 2011. In making these hard decisions, the CSU understood the impact of these fee increases on its students, but ultimately felt that such increases were essential in order to maintain the ability of the University to fulfill its core mission. To suggest that CSU in any way represented that these increases were "minimal" is a gross misrepresentation of the facts that cannot be left unchallenged. The truth is that such substantial increases were an unavoidable response to the reductions in state appropriations that have now taken place over multiple years, leaving the CSU with the same level of state support that it received for the 1998-99 fiscal year while serving an additional 72,000 students.

(ii) The CSU never used the word "savings" in respect of the steps it took to reduce expenditures in fiscal year 2009-10. The CSU was required to reduce its expenditures to match its reduced operating revenues for that year. In that context, there are no "savings" being made in any sense of that word's usage.

(iii) CSU does not understand what the Panel Chair means by "Much of the increased revenue laid out by the CFA is actually "offset" money from federal sharing funds and application of accounting devices which do not actually make funds available." CSU is left to assume that this sentence is the Panel Chair's attempt to deal with the evidence presented during the hearing around CFA's reliance on the 2010 CSU Financial Statement as evidence of CSU's ability to meet CFA's salary demands, and its insistence that CSU can somehow pay for salary increases out of one-time federal grants under the American Recovery

and Reinvestment Act (ARRA), sponsored programs, and the Continuing Education Revenue Fund. In rebuttal, CSU adduced extensive evidence to explain the differences between financial statement reporting and state budget reporting requirements; the legal and equitable limitations on the use of monies held in designated funds; the fact that the one-time monies received in fiscal year 09/10 pursuant to ARRA were a direct offset for the \$716 million that the legislature had reverted to the state treasury in the 2009 Budget Act; and the calculation and campus use of indirect costs from sponsored programs and extended education. By his own admission, the Panel Chair makes no serious effort to analyze the extensive evidence presented to him over several days on these issues, or draw any meaningful conclusions in respect of that evidence. Instead he chooses to deal with these critical issues by simply stating that that he finds it "virtually impossible to review and disagree with either party's positions". Nevertheless, despite his admitted inability to disagree with CSU's position, he then goes on to conclude that it "would appear appropriate to adopt the 1.3% CFA offer" in these proceedings. Given that he is recommending that CSU make over \$20 million dollars worth of salary increases at a time when its state appropriations have been decimated, is it so unreasonable for the CSU to expect that the Panel Chair provide some explanation somewhere in the report as to why he has concluded that it would be "appropriate" to make these payments to this limited population of faculty at this time?

### III: The Limited Scope of the Issues before the Panel for its Advisory Recommendation:

There is no dispute between the parties that the only contractual provisions in dispute in these proceedings are Article 31.11 which provides that

*"The General Salary Increases provided in ...09/10 shall be reconsidered if the CSU does not receive..."*

and Article 31.26, which further provides that

*"The Service Salary Increases provided in ...09/10 shall be reconsidered if the CSU does not receive...."*

The CBA is clear that these are the only two things subject to reconsideration as a result of the state failing to meet its obligations under the Higher Education Compact. After the commencement of this hearing, the CFA presented a modified salary demand in which it dropped its demand for a GSI, and proposed a form of SSI in which the payment does not form part of the faculty member's base salary.

The expired contract, whose terms and conditions the parties are legally required to maintain, has no provision in place that provides for such payments. CSU took the position in the hearing that both an equity program and the establishment of a new "one-time" SSI payment are issues outside of the very limited scope of bargaining required by the meet and confer obligations agreed to by both CFA and CSU in Articles 31.11 and 31.26. While there is arguably no technical bar to the Panel Chair making an advisory recommendation that the CSU should engage in permissive bargaining over these issues, the CSU is entirely within its rights to decline to do so, and hold the CFA to the language that it agreed to in the 2007 Collective Bargaining Agreement. Of course, CSU's stated refusal to bargain over these issues in this negotiation is entirely without prejudice to the current successor contract bargaining in which the parties are engaged and in which the CFA has made a similar demand in 2011-2012 for an equity program and an SSI payment.

The CSU also takes issue with the Panel Chair's recommendations in so far as they reference the current successor contract negotiations. The Panel has no statutory authority to make any advisory recommendations as to issues not before it under the terms of the HEERA impasse procedure.

#### **IV: The incorporation and reliance of the 2008/09 Kagel Report:**

CSU takes issue with the statement that

*"The Kagel report can be incorporated into this current report, except for many of the financial figures which, of necessity are updated, his narration, leading to his recommendations, are also incorporated herein."*

The first point that the CSU would make is that the issues before the Kagel Panel were significantly different than those before this Panel, as are the financial conditions in which the CSU is operating. In 2008/09 the CSU determined neither to grant GSIs, SSIs, nor the negotiated equity program for that year. The CSU/CFA subsequently agreed that this decision not to implement the equity program would be determined using the same contractual/statutory process as the GSI/SSI issue. That is why the equity program was properly before the Kagel Panel.

The second point is that while it is true that the parties were the same in the two processes, the evidence and arguments advanced by both parties in this hearing were substantially different from those presented to the Kagel Panel.

The third, and perhaps most perplexing issue for the CSU, is that while the Panel Chair seems happy to adopt the Kagel Panel report analysis, he ends up making a recommendation that goes far beyond that made by the Kagel Panel without giving any explanation for this decision. In the Kagel report, the key recommendation is that

*"It is important to reemphasize that the recommendation is limited in scope solely to alleviate such current inversion and compaction, that not necessarily all of the 2008-09 \$7,000,000 equity increase would be required.... Similarly, any SSI funding necessary to complete the program would not be across the board SSI funding but would be tailored solely to end the inversion and compaction involved."*

The Kagel panel also recognized that equity issues are necessarily a moving target due to the relative changes that take place within departments through new appointments, promotions, and other salary adjustments.

*"Given the passage of time the Oversight Committee would have to restudy who would be eligible for equity increases since promotions and other salary adjustments would have occurred, and assumptions as to whose salary was inverted or compacted compared to others would necessarily have changed."*

Following the publication of the Kagel Panel report in 2010, CSU made a good faith proposal tailored to respond to this recommendation by proposing that the parties pool some \$1.95 million of residual monies left from the PPI program and first year of the equity program, and then target this money at the group most affected by equity/compression/inversion issues at the time of the distribution. The CFA flatly rejected this approach, maintaining that the residual equity money only (about \$1.25 million) should go to the population established by the Equity Oversight Committee based on 2008 salaries, irrespective of whether they had any demonstrable current equity issues. The Panel Chair's advisory recommendation to adopt the CFA's proposal on equity is, therefore, a recommendation that is inconsistent with not only the CSU's position on equity, but also the Kagel Panel recommendation as to the appropriate eligible population for any future equity award.

However, in addition to making an advisory recommendation for a \$6 million equity program, and equity related SSI payments of over \$4million, the Panel Chair goes on to recommend the payment of a general "one-time" SSI payment totally unconnected to equity/inversion/compaction issues of some \$10

million. Nowhere in his report is there any discussion or explanation as to why it is "appropriate" to make such a payment. This omission is particularly glaring given that Kagel specifically concluded that there was no basis for recommending a general SSI payment in a year when the CSU was not dealing with a potential \$750 million dollar reduction in its state appropriation.

In conclusion, the CSU must respectfully dissent from adopting the majority Panel Chair's recommendations for the reasons given above. The exception is the Panel Chair's recommendation #5. Pursuant to HEERA, the CSU confirms that it will review and discharge the Panel Chair's invoice for his time spent in this matter.

For the California State University,

/s/ Bill Candella

Bill Candella, Sr. Director – Collective Bargaining