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IN ARBITRATION PROCEEDINGS
PURSUANT TO AGREEMENT OF THE PARTIES

In the Matter of a Controversy between)
CARPINTERIA ASSOCIATION OF)
UNIFIED SCHOOL EMPLOYEES,)
Union,)
and)
CARPINTERIA UNIFIED SCHOOL)
DISTRICT,)
Employer,)
Re: Classified Performance Evaluations.)

RULING ON ARBITRABILITY
CSMCS Case No. ARB-20-0076

This matter came before Catherine Harris, Esq., a neutral arbitrator mutually selected by the parties to render a final and binding decision.¹ By agreement of the parties the case was bifurcated to submit issues of procedural arbitrability to the arbitrator.²

At this juncture in the proceeding, the Carpinteria Unified School District (herein “the District”) requests that the arbitrator dismiss the grievance in its entirety. On the other hand, the Carpinteria Association of United School Employees (herein “CAUSE”) requests that the arbitrator deny the District’s request to dismiss the grievance on procedural grounds and allow the case to move forward. As reflected in their opening and reply briefs, the parties agree that the sole issue currently before the arbitrator is whether the grievance is arbitrable and that, absent a finding that the grievance is arbitrable, the current hearing dates will be vacated. For reasons explained herein, the arbitrator determines that the grievance, with the limitation acknowledged by CAUSE, will proceed

¹ The arbitrator was selected from a list supplied by the California State Mediation and Conciliation Service (CSMCS).

² Arrangements for submission of evidence and arguments related to procedural arbitrability issues were made in a telephonic conference between the arbitrator and the representatives of the parties (Jacqueline Litra, Esq., Fagen, Friedman & Fulfroost, LLP for the District) and Jason Wojciechowski, Esq., Bush Gottlieb for CAUSE).

1 to a hearing on the merits.

2 **RELEVANT PROVISIONS OF THE AGREEMENT**

3 The parties agree that the relevant agreement for purposes of resolving this dispute
4 is the Agreement between the District and CAUSE for the period July 1, 2018 – June 30,
5 2019 (herein “the Agreement”) which contains the following provisions:

6 **ARTICLE 3. GRIEVANCE PROCEDURES**

7 3.1 The following definitions shall apply to the processing of grievances:

8 3.1.1 A “grievance” is defined as a statement by an employee covered
9 hereby, or CAUSE, that the District has violated an express term of
10 this Agreement and that by reason of such violation his or her rights
11 have been adversely affected.

11 3.1.2 A “day” is a day in which the central administrative office of the
12 District is open for business.

12 3.1.3 The “immediate supervisor” is the lowest level supervisor having
13 immediate jurisdiction over the grievant who has been designated by
14 the District to adjust grievances.

14 3.2 By this grievance procedure, the parties intend to provide, at the lowest
15 administrative level, a means by which a grievance may be resolved in an equitable,
16 efficient manner in an atmosphere of courtesy and cooperation.

16 3.3 The parties hereto shall make an earnest effort to settle grievances promptly
17 through the steps listed below:

18 3.3.1 Step One: The grievant shall orally present the alleged grievance to
19 his/her immediate supervisor, with or without the CAUSE representative
20 being present.

20 3.3.2 Step Two: If the grievance is not settled in Step One, the grievance
21 shall be submitted in writing within twenty (20) days after the employee
22 knew, or reasonably should have known, of the occurrence of the facts on
23 which the grievance is based. Failure to file within this time waives the
24 grievance for all purposes. The grievance may be filed by either the grievant
25 and/or CAUSE representative to the grievant’s immediate supervisor. The
26 immediate supervisor shall meet with the grievant and/or a CAUSE
27 representative within five (5) working days after presentation at Step Two
28 ... If the grievance is not settled, the immediate supervisor’s response shall
be provided in writing within five (5) days of the meeting.

25 3.3.3 Step Three: If the grievance is not settled in Step Two, the employee
26 may appeal the grievance to the Superintendent or his/her designee within
27 ten (10) working days after the termination of Step Two. The District
28 Superintendent or his/her designee shall meet, within five (5) working days
after the filing of such appeal, with the grievant, and/or a CAUSE
representative. A decision shall be rendered by the District Superintendent
or his/her designee within five (5) working days from the date of such

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meeting.

3.3.4 Step Four – Mediation. If the grievance is not settled in Step Three or a decision not received within five (5) working days from the Superintendent or designee, CAUSE or the District, (after advising the other party), may initiate mediation. If neither the District nor CAUSE initiates mediation, the grievance shall be continued at the arbitration stage of this process. Either the District or CAUSE may contact the State Mediation and Conciliation Service to schedule a date as soon as calendars can be coordinated. Both the District and CAUSE agree to participate in the mediation process in good faith and to utilize the Interest Based Conflict Resolution Process to seek options that meet the interests of both the District and the grievant.

3.3.5 Step Five – Arbitration: If within a period of ten (10) days after receipt of the decision of the appropriate administrator, the grievant is not satisfied with the decision rendered at Step Three or Four, and wishes to appeal the grievance further, he/she may, with the approval of CAUSE, submit in writing, to the Superintendent, an appeal for Arbitration. It is expressly understood that the only matters that are subject to Arbitration are grievances as defined in Section 3.1.1, which were processed and handled in accordance with the limitations and procedures of this Article. Processing and discussing the merits of an alleged grievance by the District shall not constitute a waiver by the District of a defense that the dispute is not grievable.

...

3.4 The written grievance shall state the following information at a minimum: the exact nature of the grievance, the act or acts complained of and when they occurred, the identity of the grievant or grievants, the specific section or provisions of this Agreement which the grievant or grievants claim the District has violated, and the remedy sought.

3.5 If a grievance is not processed by the employee in accordance with the time limits set forth in this Article, it shall be waived for all purposes and shall be considered settled. If the District fails to respond to the grievance in a timely manner at any step, the grievant may proceed to the next step.

...

ARTICLE 10. EVALUATION OF EMPLOYEE PERFORMANCE

10.1 The District shall provide for at least an annual evaluation of all permanent employees in the District in achieving the standard of work performance required. Employees who receive not effective ratings on their Classified Employee Performance Appraisal (CEPA) must be provided prior written notice of the performance problem. The notice must specify the improvement (areas), linked to the CEPA. If subsequently, the CEPA shows a “not effective” rating for the improvement area (s) specified in the prior written notice, the CEPA will include the following: (1) specific improvement needed; (2) the specific assistance/training that has been and/or will be provided to help the employee become “effective,” and; (3) a reasonable time frame for the employee to become “effective.” The time frame will also specify a series of “feedback” meetings; so that the employee can understand his/her progress toward the specified improvement deadline. Written notice previously provided will be attached to the CEPA. If the identified problem is corrected, the Supervisor shall note the improvement and attach it to the CEPA. The CEPA shall be forwarded to Human Resources by the supervisor.

1 10.2 Each employee shall be given a copy of the evaluation form prepared by
2 his/her supervisor. Copies of these reports shall be available only to the supervisor,
3 the Assistant Superintendent-Business Services, the Personnel Department, the
4 Superintendent, and the Board of Education and other members of the District
5 management team.

6 10.3 On or before a probationary employee completes his or her probationary period
7 (130 working days), the employee shall receive at least one written evaluation.

8 10.4 Permanent employees shall be evaluated at least once a year by the end of the
9 school year for 10-month employees and by the end of the last work day in June for
10 11-month and 12-month employees, and at other times as the supervisor, the
11 Assistant Superintendent Business Services or the Superintendent may require
12 evaluation of an individual, a class or all employees.

13 ...

14 **STATEMENT OF THE FACTS**

15 **The Filing of the Grievance**

16 On July 25, 2020,³ CAUSE submitted a grievance at Step Two on behalf of the
17 classified unit which raises the issue of whether the District has complied with the
18 requirements of Article 10 with regard to evaluation of classified employees. The
19 grievance was e-mailed by CAUSE on Saturday July 25 to Superintendent Diana Rigby and
20 Director of Human Resources Diana Zapata and received on the next business day, i.e.,
21 Monday July 27. The grievance includes the text of two “inquiry letters” (requests for
22 bargaining information pursuant to EERA), dated July 2 and July 16, which raise concerns
23 about alleged inappropriate marks and comments, evaluation processes, and skipped or
24 incomplete evaluations. After the District failed to provide responses to either of the two
25 inquiry letters, the instant grievance followed.

26 On August 4, at 11:21 a.m., CAUSE President Jay Hotchner directed an e-mail to
27 Superintendent Diana Rigby in which he questions why CAUSE has received no verbal or
28 written response to its grievance. The record contains no response to this e-mail. On the
same date, i.e, August 4, at 5:48 p.m., Hotchner submitted the Step Three grievance to
Superintendent Rigby. As noted by CAUSE in its opening brief, even if the Saturday filing
on July 25 only took effect on Monday July 27, the District still failed to meet with CAUSE

³ Unless otherwise specified, all references to dates herein are to calendar year 2020.

1 to discuss the grievance within five working days, i.e., Tuesday(July 28), Wednesday (July
2 29), Thursday (July 30) and Friday July 13) , as well as Monday (August 3) of the
3 following week.⁴

4 **The District’s Refusal to Respond to the Grievance as Formulated by CAUSE**

5 On August 5, at 3:04 p.m., after making a determination that the grievance did not
6 comply with Section 3.4, the District’s Human Resources Director Diana Zapata “returned”
7 the grievance to CAUSE, i.e., essentially refusing to respond to the grievance until it
8 received additional information about the details of each category allegedly requiring
9 additional specificity, i.e., act or acts complained of, specific section or sections violated,
10 as well as the identities of the affected employees. While the grievance does identify
11 provisions of Section 10, as well as acts being complained of, no individual employees are
12 identified, i.e., the grievance merely states that although several individuals have already
13 come forward, CAUSE fears that others may have been subjected to the conditions that are
14 being challenged by way of the grievance. Zapata’s letter, directed to CAUSE President
15 Hotchner, also questions the submission of the grievance at Step Two, i.e., noting that the
16 District was not aware of any classified employee having presented a grievance to his or
17 her immediate supervisor. The District also claimed that without being supplied with the
18 requested information, it would be impossible to determine whether there is any validity to
19 what the District characterizes as “the purported grievance.” Zapata’s letter dated August
20 5, 2020 omits mention of the fact that CAUSE had elevated the grievance to Step Three a
21 day earlier.

22 In her letter dated August 7, Superintendent Rigby likewise “returned” the Step
23 Three grievance to CAUSE on the grounds that the District was still unable to determine
24 the substance of the grievance. The letter also informs CAUSE that in the spirit of courtesy

25
26 ⁴ Absent contrary evidence or argument, the arbitrator accepts the representation of
27 CAUSE that the school calendar shows that the District was open on the days that were counted by
28 CAUSE in computing the last date on which the District was required to schedule a meeting, i.e.,
as the party with the burden of proving its affirmative defense, the District has not challenged this
representation.

1 and cooperation, the District is allowing CAUSE “ an opportunity to amend to include
2 the necessary information in the grievance.” The letter also offers to meet with CAUSE on
3 Tuesday August 11, 2020 to “ ... discuss the allegations that CAUSE is attempting to make
4 to assist CAUSE in articulating and amending its purported grievance.”

5 **The Union’s Response to the District’s Offer to Allow Amendment of the Grievance**

6 In a letter dated August 18 to Human Resources Director Zapata, CAUSE
7 responded to the District’s August 7 letter as follows:

8 Whereas we believe the grievance is clear, we will accept your offer to amend the
9 grievance. However, please note that we have notified the District on more than
10 one occasion that we need more information to help us investigate the grievance.
11 Unfortunately, although the District is in possession of this information, the District
12 has ignored our requests. **Accordingly, whereas we will provide to you as much
detail as possible, we are not able to provide every detail until the District
produces the requested information. At that time, we may need to amend our
grievance.** Emphasis supplied.

13 In response to the District’s request for additional details, this letter also alleges that seven
14 (7) classified employees were not provided a timely performance evaluation; that three (3)
15 employees who were rated “not effective” did not receive written notice of performance
16 issues and other information and assistance as required by Article 10.1; and that the District
17 did not use the required CEPA form for one (1) employee.⁵ On August 19, CAUSE
18 renewed its request to be supplied with the information that it had earlier requested on July
19 2 and 16.

20 **The District’s Efforts to Schedule a Step Two Meeting on the “Amended Grievance”**

21 On August 21, HR Director Zapata e-mailed President Hotchner offering to meet
22 via Zoom on Tuesday August 25.⁶ In responding to this offer, Hotchner indicated that a
23 meeting would likely not be productive without the requested information but that the

24 _____
25 ⁵ All of these alleged contract violations occurred on specified dates in 2020 and the
26 names of the employees are provided.

27 ⁶ It is evident from Zapata’s letter that even though the Union had stated that it might
28 amend its grievance after receiving the information requested in its “inquiry letters” dated July 2
and July 16, the District had decided by this time to characterize Hotchner’s August 18 letter as
“an amended grievance.”

1 Union was willing to listen. In an e-mail dated August 24, at 5:58 p.m., Zapata made the
2 following statements in support of the District's narrative:

3 On July 27, 2020, CAUSE filed a level II grievance regarding classified
4 evaluations. Thereafter, on August 5, 2020, the District requested that CAUSE
5 amend its grievance to include information describing how the District allegedly
6 violated the Classified Collective Bargaining Agreement, and which employees
7 were adversely affected. **On August 19, 2020, CAUSE amended its grievance to
8 include the necessary information.** Emphasis supplied.

9 Consistent with Section 3.3.2 of the Classified Collective Bargaining Agreement,
10 the District is attempting to schedule a level II grievance meeting to provide
11 CAUSE the opportunity to present its amended level II grievance. The District is
12 available to meet tomorrow, in the morning between 8:00 a.m. and 12:00 p.m., or
13 after 2:30 p.m. If CAUSE does not wish to meet, please let me know and the
14 District will provide a written response to CAUSE's amended grievance on or
15 before September 2, 2020.

16 On August 24, at 7:10 p.m., President Hotchner disputed the accuracy of the above-
17 referenced highlighted statement, i.e., noting that CAUSE did *not* amend either its Step
18 Two or Step Three grievance and that, instead, CAUSE had supplemented its filings in an
19 effort to help the District understand its concerns and its allegations of contract violations.

20 On August 25, Zapata once again expressed the view that any meeting would be a Step
21 Two meeting to discuss the "amended grievance." These dualing characterizations of the
22 up and coming meeting continued in additional e-mail exchanges up to the date of the
23 eventual meeting.

24 After the parties met on September 1 to discuss the grievance, the District issued its
25 first written response to the grievance which it described as "Response to Amended Level
26 II Grievance - Classified Evaluations." The District denied the grievance on the grounds
27 that the alleged failure to present the grievance orally to each affected employee's
28 supervisor⁷ in violation of Step One requirements results in a forfeiture of the grievance.
The District also denied the grievance as to any evaluation that dates back to the 2018-2019
school year as any such grievance would have had to have been filed on or before July 29,

26 ⁷ The District noted that at the September 1 meeting it requested that CAUSE identify
27 which employees had approached their supervisors about their evaluations, the dates on which this
28 occurred, and the content of these discussions. According to the District, CAUSE refused to
provide the information, i.e., thus invalidating the entire grievance.

1 2019. At this meeting, CAUSE continued to take the position that it could not have a
2 meaningful discussion with the District about the grievance until it received the
3 information it had been requesting since July.

4 On September 22, CAUSE asked the District if it was interested in pursuing
5 mediation at Step Four of the grievance procedure. The District responded that the
6 amended grievance was still at Step Two. On October 6, CAUSE requested arbitration of
7 the grievance pursuant to Step Five of the grievance procedure. In a letter dated October 8
8 from HR Director Zapata, CAUSE was informed that pursuant to Section 3.5 of the
9 grievance procedure, the grievance was waived for all purposes and considered “settled.”
10 Noting that the “amended grievance” was denied at Level II on September 9, the District’s
11 rationale for refusing to proceed to arbitration is as follows:

12 Per Section 3.3.3 of the Classified CBA, CAUSE had ten (10) working days
13 following the termination of Step Two to appeal its grievance to Step Three. As
14 such, CAUSE had until September 23, 2020 to advance its grievance to Step Three.

15 In a letter dated March 10, 2021, CAUSE, through its attorneys, informed the District that
16 absent agreement to proceed to arbitration, CAUSE would petition for an order to compel
17 arbitration, including a request for its attorney’s fees. Thereafter, the District agreed to
18 submit the procedural arbitrability issues to this arbitrator for final and binding resolution.

18 **POSITION OF THE DISTRICT**

19 CAUSE failed to advance its grievance within the timelines set forth in Section 3.3.
20 CAUSE filed the grievance more than one year after the first allegation and without
21 satisfying the requirements of Step 1. The initial grievance failed to include the
22 information required by Section 3.4. At a grievance meeting, CAUSE refused to supply
23 additional information. The grievance process did not start at Step Two until CAUSE
24 amended the grievance. When CAUSE finally amended the grievance, CAUSE
25 erroneously claimed that the grievance was at Step 4, and not Step 2. CAUSE failed to
26 advance its amended grievance by September 23, 2020. Even under CAUSE’s timeline,
27 CAUSE failed to timely advance its grievance. CAUSE had until August 25, 2020 to
28 advance its grievance to arbitration and did not request arbitration until October 6.

1 CAUSE cannot proceed to arbitration because it has not complied with the grievance
2 procedures.

3 **POSITION OF CAUSE**

4 The District defaulted at Step Two by not sending any type of response to the
5 Union's grievance until the eighth working day after the filing of the grievance after
6 CAUSE had already advanced the grievance to Step Three premised on the District's
7 default. Section 3.3.2 of the Agreement requires that management arrange a meeting
8 within five working days after presentation of the grievance. Assuming arguendo that
9 CAUSE moved the grievance to Step Three prematurely, the result should be a return to the
10 grievance process. CAUSE followed the Agreement in moving the grievance from Step
11 Two to Step Three when it did. Under these circumstances, the District cannot meet its
12 burden of proving that the grievance is not arbitrable. The District's positions are frivolous
13 to the extent that the arbitrator should order the District to reimburse CAUSE for the
14 additional costs it has incurred.

15 **POSITION OF THE DISTRICT ON REPLY**

16 CAUSE mischaracterizes the District's position. The District seeks to dismiss the
17 grievance because 1) CAUSE filed its grievance more than one year late regarding the
18 evaluations that occurred during the 2018-2019 school year; 2) improperly skipped Step
19 One of the grievance procedure; 3) repeatedly refused to provide the minimum information
20 required by Section 3.4 of the Classified CBA to articulate a grievance; 4) missed the
21 deadline to advance its grievance whether or not it was at Step Two or Step Three; and
22 5) by its conduct deprived the District of its right to address the grievance pursuant to
23 Sections 3.2 and 3.3. CAUSE acted in bad faith and should be required to pay the District's
24 attorney's fees.

25 **CAUSE'S POSITION ON REPLY**

26 The Union concedes that it failed to timely file with respect to the evaluations that
27 occurred within the 2018-2019 school year and will limit its grievance to violations
28 regarding the 2019-2020 school year. The District's claim that the Union failed to timely

1 move the grievance from Step Two to Step Three is premised on the District's September 9
2 denial and the erroneous notion that moving the grievance to Step There on August 4 was
3 invalid because the original grievance contained insufficient information.

4 **OPINION**

5 As correctly noted by CAUSE in its brief, the party who claims that an issue of
6 procedural arbitrability precludes the arbitrator from reaching the merits of the grievance
7 has the burden of proof with respect to this issue. After considering the evidence and
8 arguments presented by both parties, the arbitrator finds that the District has not met its
9 burden.⁸

10 ***The failure of CAUSE to establish that unit employees presented an oral grievance to***
11 ***their immediate supervisors does not serve to bar the grievance.***

12 By the terms of Article 3, Section 3.1.1, a grievance may be a statement of an
13 alleged contract violation by an employee, or by CAUSE. In this case, the grievance was
14 filed on behalf of classified unit members (who allegedly did not receive the negotiated
15 benefits of the Agreement pertaining to evaluations) by CAUSE. CAUSE is not an
16 employee who reports to an immediate supervisor but rather the employee organization
17 that represents classified employees. Under these circumstances, there is no identifiable
18 "immediate supervisor" within the meaning of Section 3.3.1. Accordingly, there is no
19 requirement, pursuant to Section 3.3.1, that CAUSE orally present the alleged grievance
20 to his or her supervisor.

21 This conclusion also follows from the definition of "immediate supervisor" that
22 appears in 3.1.3 of the Agreement, i.e., the "immediate supervisor" is the lowest level
23 supervisor having immediate jurisdiction over the grievant *who has been designated by the*
24 *District to adjust grievances.* Here, there is no showing that any immediate supervisor has

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26 ⁸ Consistent with Section 3.3.2, CAUSE has now conceded in its reply brief that it cannot
27 meet the 20-day timeliness requirement for filing a grievance as it pertains to evaluations
28 conducted during the 2018-2019 school year. Accordingly, the grievance will be limited to the
2019-2020 school year.

1 been designated by the District to adjust grievances filed by CAUSE on behalf of the
2 classified unit. Any other interpretation would be nonsensical where the language reads
3 that the oral presentation to the immediate supervisor can be made *with or without the*
4 *CAUSE representative being present.*

5 In sum, the Step One language invoked by the District does not apply to a grievance
6 filed by CAUSE on behalf of the classified unit. Assuming arguendo that the language
7 was applicable, e.g., if the grievance involved a statement by an employee (as opposed to a
8 statement by CAUSE), the District's argument is a failed attempt to shift its burden of
9 establishing that the grievance procedure has not been followed to the proponent of the
10 grievance. Under these circumstances, the language of Section 3.3.1 does not serve to bar
11 the grievance.

12 ***The alleged failure of CAUSE to provide sufficient information does not establish that***
13 ***the grievance lacks procedural arbitrability.***

14 As a threshold matter, the arbitrator cannot fail to note that CAUSE has been
15 seeking information from the District since at least July 2, 2020 pertaining to the subject
16 matter of the instant grievance. CAUSE has consistently noted that in order to have a
17 meaningful discussion about the merits of the grievance, it would need to review the
18 requested information. Yet, rather than supply information *to* CAUSE, the District has
19 continued to delay the processing of the grievance pending receipt of additional
20 information *from* CAUSE. Thus, the District, while withholding a response to requests for
21 information (directly relevant to the processing of the grievance), continued to press for
22 more factual details regarding its alleged failure to conduct evaluations in compliance with
23 contract procedures, i.e., seeking information within its own custody and control.

24 To be sure, Section 3.4 provides that the written grievance shall state the exact
25 nature of the grievance; however, CAUSE has set forth in detail the basis for its grievance.
26 The grievance, as originally filed, amply reflects that CAUSE is complaining about the
27 District's alleged failure to conduct timely evaluations in accordance with the negotiated
28 procedures contained in Article 10. The original grievance also reflects that the "act or acts

1 complained of” are the alleged failure to initiate or timely complete evaluations in
2 accordance with Article 10 procedures during the 2019-2020 school year. To the extent
3 that the District seeks to defeat the grievance based on the failure of CAUSE to identify the
4 grievant or grievants, this argument is also unavailing because Section 3.1.1. permits
5 CAUSE to allege contract violations on behalf of the classified unit. Finally, the original
6 grievance specifies the remedies sought by CAUSE in abundant detail (expungement of
7 negative comments, amended evaluations, completion of late evaluations etc. as listed in 13
8 separate bullet points). In the arbitrator’s view, CAUSE complied with the requirements
9 of Section 3.4 such that no amendment of the grievance was required as a condition
10 precedent to the processing of the grievance.

11 Nor does the fact that CAUSE agreed to provide additional information upon
12 request of the District render its original grievance defective. Nothing in Article 3,
13 Section 3.4 gives the District the right to challenge the sufficiency of a grievance *filed by*
14 *CAUSE on behalf of the classified unit* for the reasons asserted by the District in its opening
15 and reply briefs. Under the circumstances presented here, the arbitrator determines that
16 the District was not entitled to demand that the Union rewrite its grievance with additional
17 specificity, or to characterize the additional information supplied by CAUSE as an
18 “amended grievance.”

19 ***The District has not established that the alleged failure of CAUSE to timely advance the***
20 ***grievance, either at Step Two or Step Three, defeats the grievance.***

21 **Step Two to Step Three**

22 The arbitrator cannot accept the District’s argument that CAUSE prematurely
23 advanced the Step Two grievance. Having failed to hold a meeting with CAUSE within
24 five working days, as required by Section 3.3.2, the District cannot now complain that
25 CAUSE took immediate steps, after passage of the time limit for setting a meeting, to
26 appeal the matter to the Superintendent.

27 The District argues that after it eventually denied the “amended grievance” at Step
28 Two on September 9, CAUSE failed to move the grievance to Step Three on or before

1 September 23. This argument assumes, without foundation, that CAUSE agreed to
2 withdraw its original grievance and to substitute an amended grievance, thus restarting the
3 response times applicable to the District (at least at Step Two, as the District does not
4 argue that the so-called “amended grievance” should have been orally presented to
5 bargaining unit members’ supervisors). While the Agreement obviously contemplates that
6 the parties will exchange information during the processing of the grievance, it does not
7 provide that information sharing will result in a whole new grievance and recalculation of
8 negotiated time limits.

9 In reaching this conclusion, the arbitrator cannot fail to note that CAUSE has
10 steadfastly maintained that it never agreed to amend its grievance and that it only agreed to
11 supplement an ongoing grievance with additional information. The record also clearly
12 reflects that CAUSE took the position, and communicated to the District, that upon receipt
13 of the information it had been requesting since at least July 2, 2020, *it would then evaluate*
14 *whether or not to amend its grievance*. Under these circumstances, the District cannot
15 successfully claim that CAUSE amended its grievance, thus restarting the running of the
16 District’s response times. The District’s argument also ignores the fact that the grievance
17 was submitted to the Superintendent, i.e., at the Step Three level, on August 4, 2020.

18 **Step Three to Step Four**

19 Superintendent Rigby’s response to the Step Three grievance was to “return” the
20 grievance on the grounds that the District was still unable to determine the substance of the
21 grievance while at the same time agreeing to meet with CAUSE. She did not render a
22 decision on the grievance as required by Section 3.3.3. (based on the District’s theory that
23 its recasting of the grievance as an “amended grievance” relieved her of this responsibility).
24 In any event, CAUSE reasonably concluded that the grievance had not settled at Step Three
25 and attempted to advance the grievance to Step Four – Mediation. Article 3 of the
26 Agreement contains no specific time limit for moving the grievance from Step Three to
27 Step Four. To the contrary, the language merely provides: “If the grievance is not settled at
28

1 Step Three or a decision not received within five (5) working days from the Superintendent
2 or designee, CAUSE or the District (after advising the other party), *may* initiate mediation.”

3 **The Request for Arbitration**

4 While the District argues that CAUSE made an untimely request for arbitration, this
5 assertion is not supported by the language of the Agreement. Section 3.3.5 authorizes, but
6 does not compel, CAUSE to proceed to arbitration ten (10) days after receipt of a decision
7 at Step Three, or completion of the mediation process. This section provides only that an
8 appeal for arbitration “may” be submitted and does not impose a limitations period
9 (violation of which results in forfeiture of the grievance). To the extent that the District
10 claims that CAUSE is precluded from arbitrating the merits of the grievance per Section
11 3.3.5, the arbitrator also notes that the ten-day period applies to grievances filed by
12 individual employees *with the approval of CAUSE* and not to grievances filed by CAUSE.

13 **CONCLUSION**

14 For the reasons stated, the District has not met its burden of establishing that the
15 grievance is not procedurally arbitrable. This decision flows from a plain reading of the
16 language of the grievance procedure without reference to the past practice of the parties, or
17 the parties’ bargaining history.

18 . Based on the foregoing findings and conclusions, the following award is made:

19 **RULING ON ARBITRABILITY**

20 The grievance is procedurally arbitrable except with respect to those claims that
21 date back to the 2018-2019 school year.

22 The parties shall proceed to a hearing on the merits, as previously scheduled for
23 November 29 and November 30, 2021.

24 The costs for the services of the arbitrator shall be borne equally by the parties.

25
26 Dated: October 26, 2021



27 **CATHERINE HARRIS, Arbitrator**