

1 Christiana Dominguez, State Bar No. 243547
cdominguez@capsscientists.org
2 Jesse A. Rodriguez, State Bar No. 257585
jrodriguez@capsscientists.org
3 Matt Hanson, State Bar No. 296421
mhanson@capsscientists.org
4 California Association of Professional Scientists (CAPS)
5 555 Capitol Mall, Suite 1155
6 Sacramento, CA 95814
(916) 441-2629

7 Attorneys for Respondent
8 California Association of Professional Scientists (CAPS)

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10 STATE OF CALIFORNIA (DEPARTMENT OF HUMAN RESOURCES)) **PERB Case No. SA-CO-526-S**
11)
12 V.) **FIRST AMENDED OPPOSITION TO**
13 CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS (CAPS)) **CALIFORNIA DEPARTMENT OF HUMAN**
14) **RESOURCES’S MOTION TO EXPEDITE**
15)

16 **INTRODUCTION**

17 The State of California’s (CalHR) Motion to Expedite the Board’s review of its Unfair
18 Practice Charge lacks the specificity required by Board Rule. Even if it sufficiently pleaded its
19 Motion, CalHR’s arguments that the California Association of Professional Scientists (CAPS)
20 violated its expired Memorandum of Understanding’s (MOU) No Strike Clause, that CAPS acted in
21 bad faith, or that CAPS violated a non-existent impasse resolution procedure are unsupported by fact
22 or law. The Board must deny the Motion.

23 **PROCEDURAL BACKGROUND**

24 On November 9, 2023, CalHR sent Respondent, CAPS, a “courtesy copy” email notifying
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1 Respondent that it had filed an *Unfair Practice Charge* and *Motion to Expedite the Processing of the*
2 *Attached Unfair Practice Charge and Order for an Immediate Cease and Desist* (Motion) with
3 PERB. Both of these documents were emailed to CAPS on Thursday, November 9, 2023, after 5pm,
4 and right before the Veteran’s Day state holiday.

5 On the next business day, Monday, November 13, at approximately 7:49 a.m., CAPS
6 received an email from PERB Deputy General Counsel Wendi Ross notifying CAPS of a 12:00 p.m.
7 deadline that same day by which to file a response to CalHR’s Motion. After CAPS emailed Ms.
8 Ross, the deadline for CAPS to respond to the Motion was extended to 3:00 p.m. the same day. Due
9 to an outage on the PERB efile site, CAPS counsel emailed its Opposition to the Motion to
10 Expedite to PERB and CalHR at approximately 3:05pm and the document was subsequently filed
11 when the PERB site was operational again at approximately 4:24pm. CAPS opposed the Motion to
12 Expedite in part on procedural grounds that the time afforded for a response by PERB violated
13 PERB rules. At approximately 4:57 pm on Monday, November 13, Ms. Ross informed the parties
14 that PERB agreed with CAPS that it should have been afforded five (5) business days to respond to
15 CalHR’s Motion, which would now be due on Monday, November 20, 2023. CAPS files this First
16 Amended Opposition to CalHR’s Motion to Expedite in accordance with the November 20, 2023
17 deadline.
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19 **ARGUMENT**

20 **I. CALHR FAILED TO COMPLY WITH RULE 32147’S SPECIFICITY**
21 **REQUIREMENTS**

22 Rule 32147(a)(2) requires CalHR’s Motion to Expedite to state with specificity why one or
23 more of the criteria outlined in 32147(b)(2) are satisfied. CalHR’s Motion lacks the required
24 specificity. Instead, CalHR merely echoes the arguments contained in the Unfair Practice Charge it
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1 filed contemporaneously with the Motion to Expedite.¹ CalHR provides no more than a recitation of
2 the factors that may support its Motion. This includes an implication that compelling circumstances
3 exist to support an expedited process. No explanation of those compelling circumstances is offered.
4 Notwithstanding the lack of specificity, CAPS will address CalHR’s arguments.

5 **II. CALHR MISSTATES THE STATUS QUO WHEN IT CLAIMS THAT THE**
6 **EXPIRED “NO STRIKE” PROVISION OF THE PARTIES’ EXPIRED MOU**
7 **STILL APPLIES.**

8 In its Motion, CalHR asserts in several places that the no-strike clause in the parties’ expired
9 MOU is still in force. It is not. PERB declared impasse between the parties on September 26, 2023,
10 meaning that the Dills Act’s Evergreen Clause (Government Code Section 3517.8) no longer binds
11 the parties to the expired MOU. While CalHR seems to wish to reassert its belief that impasse does
12 not exist, PERB’s September 26 declaration puts that question to rest.

13 CalHR attempts to relitigate PERB’s impasse declaration when it insists its Motion is
14 necessary to force the completion of “pre-impasse mediation procedures.” (CalHR Motion to
15 Expedite, 3:20). There is no mechanism to force the parties to complete (non-existent) pre-impasse
16 mediation procedures.

17 The Board cannot issue a remedy for a violation that did not occur, rendering expedited
18 processing unnecessary.

19 **III. NO REMEDY IS OWED TO CALHR BECAUSE THERE IS NO VIOLATION.**

20 **A. The Dills Act Does Not Contain A Post-Impasse Mediation Procedure And The**
21 **Parties Cannot Be Required To Exhaust A Procedure That Does Not Exist.**

22 CalHR insists that CAPS acted illegally by calling for a strike before “the impasse resolution
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24 ¹ CalHR originally filed its Motion to Dismiss in the same pdf as an Unfair Practice charge, in violation of Rule
25 32147(a)(2). CalHR subsequently filed the Motion to Dismiss anew on November 13, 2023 at approximately 3:23pm as
a stand-alone document. Whether this secondary filing cures the defective first filing is a matter for Board review as
well.

1 procedures have been exhausted.” (CalHR Motion to Expedite, 3:22). It fails to cite the source of the
2 impasse resolution procedures it believes CAPS violated. CalHR raises Government Code Section
3 3519, but that statute applies to the *employer’s* obligations. Even assuming CalHR meant to raise
4 Government Code Section 3519.5 which specifies *union* obligations, there is no impasse-related duty
5 within that code section. Sections 3519 and 3519.5 each contain obligations related to mediation that
6 occurs under Government Code Section 3518, but Section 3518 applies to voluntary *pre-impasse*
7 mediation, not to mediation subsequent to a declaration of impasse by PERB.

8
9 CalHR’s reliance on the rebuttable presumption that a union is engaging in bad faith
10 negotiations or bad faith impasse procedures if it calls a strike before the exhaustion of statutorily
11 mandated impasse procedures is equally flawed. (CalHR Motion to Expedite, 4:6-12) CalHR relies
12 on cases decided under the Educational Employment Relations Act (EERA, Government Code
13 Section 3540 et seq) and the Higher Education Employer-Employee Relations Act (HEERA,
14 Government Code Section 3560 et seq.), rather than PERB Decisions rendered under the Dills Act
15 (Government Code Section 3512 et seq.). While EERA and HEERA contain detailed post-impasse
16 procedures, the Dills Act does not. Accordingly, it would be inappropriate to apply decisions
17 rendered under vastly different statutory schemes to controversies under the Dills Act. With no
18 applicable statutory or decisional law to support its position, CalHR’s Motion to Expedite must fail.

19 **IV. CAPS IS THE ONLY STATE BARGAINING UNIT CURRENTLY WITHOUT A**
20 **MEMORANDUM OF UNDERSTANDING**

21 CalHR claims, without supporting evidence, that its Unfair Practice Charge involves an
22 important and unresolved question of law, the prompt resolution of which would significantly
23 benefit one or more segments of the public sector labor-management community. Out of 21
24 collective bargaining units subject to the Dills Act, only CAPS is without a current Memorandum of

1 Understanding with the State. (See: California Department of Human Resources, Bargaining &
2 Contracts page available at calhr.ca.gov/state-hr-professionals/Pages/bargaining-contracts.aspx).
3 Since the Dills Act applies to only these 21 collective bargaining units comprised exclusively of
4 state employees, and because the 20 other units are all subject to ratified and current Memoranda of
5 Understanding that prohibit strikes, no other unit needs, nor would benefit from, expedited resolution
6 of CalHR's Charge.

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8 **V. AT NO TIME HAS RESPONDENT REFUSED TO ENGAGE IN GOOD FAITH**
9 **NEGOTIATIONS WITH THE STATE AND THE PARTIES ARE NOT**
10 **PRESENTLY AT THE BARGAINING TABLE.**

11 Respondent has engaged in good faith negotiations with the State for years. At many of the
12 bargaining sessions, Respondent presented multiple Subject Matter Experts (SMEs) to explain its
13 position, provided data to support its positions, and has engaged in countless discussions about ideas
14 of how to fix the logjam. But none of it has worked. So now, in accordance with the Dills Act,
15 Respondent has chosen to engage in the protected collective activity of striking only *after* PERB
16 declared impasse. And instead of recognizing the strike as a legitimate plea for relief, the State of
17 California has instead filed a claim to silence that plea. This, in and of itself, may evidence bad faith
18 on CalHR's part.

19 CalHR argues that the strike is unlawful because its purpose is solely to place "undue
20 pressure on the state at the bargaining table." (CalHR Motion to Expedite, 3:28, 4:1) But the parties
21 are no longer at the bargaining table and have not been since PERB declared impasse on September
22 26. As PERB held in *Trinity v. United Public Employees of California*, bad faith conduct tests, such
23 as the Totality of the Circumstances test, do not apply once impasse has been declared because the
24 duty to bargain has lifted. ("Last, the County urges that the Board find UPEC's tactics unlawful
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26

1 under a totality of circumstances standard. . . . [T]he parties were at impasse, and not engaged in
2 negotiations, at the time of the second strike”) (*County of Trinity v. United Public Employees of*
3 *California, Local 792*, (2016) p. 8, PERB Decision No. 2480-M)

4 **CONCLUSION**

5 The Motion lacks specificity, fails to cite any law creating an impasse procedure CAPS could
6 have violated, presents no evidence to support that any remedy is owed to CalHR, provides no
7 compelling circumstances to support expedited processing, and demonstrates no imminent
8 application to any other state employee bargaining unit covered by the Dills Act. Accordingly, under
9 Board Rule 32147, the Board must deny the Motion.
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12 Dated: November 20, 2023

Respectfully submitted:

13 /s/ Jesse A. Rodriguez

14 Jesse A. Rodriguez

Legal Counsel

California Association of Professional Scientists
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PROOF OF SERVICE

I declare that I am a resident of or employed in the County of _____,
State of _____. I am over the age of 18 years. The name and address of my
Residence or business is _____

On _____, I served the _____
(Date) (Description of document(s))

_____ in Case No. _____
(Description of document(s) continued) PERB Case No., if known)

on the parties listed below by (check the applicable method(s)):

placing a true copy thereof enclosed in a sealed envelope for collection and
delivery by the United States Postal Service or private delivery service following
ordinary business practices with postage or other costs prepaid;

personal delivery;

electronic service - I served a copy of the above-listed document(s) by
transmitting via electronic mail (e-mail) or via e-PERB to the electronic service
address(es) listed below on the date indicated. *(May be used only if the party
being served has filed and served a notice consenting to electronic service or has
electronically filed a document with the Board. See PERB Regulation 32140(b).)*

(Include here the name, address and/or e-mail address of the Respondent and/or any other parties served.)

I declare under penalty of perjury under the laws of the State of California that the
foregoing is true and correct and that this declaration was executed on _____,
(Date)
at _____
(City) (State)

(Type or print name)


(Signature)