CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS

November 20, 2023

Sheena J. Farro
Senior Regional Attorney
Public Employment Relations Board
Sacramento Regional Office
1031 18th Street
Sacramento, CA 95811

RE: **California Association of Professional Scientists' (CAPS) Position Statement; Unfair Practice Charge No. SA-CO-526-S**

Dear Ms. Farro,

Pursuant to your November 13, 2023, letter, CAPS hereby submits the following position statement to the California Department of Human Resources' (CalHR) Unfair Practice Charge No. SA-CO-526-S.

CalHR, on behalf of Governor Gavin Newsom, alleges that the California Association of Professional Scientists (CAPS) violated the Dills Act when it called for three days of rolling strikes on November 15, 16, and 17, 2023. In doing so, CalHR attempts to relitigate a duly issued impasse declaration, and confuses and conflates various public employee collective bargaining laws.

As discussed below, the Board must reject CalHR's charge for failure to state a prima facie case, must not issue a complaint under Government Code section 3514.5, and must deny the remedies sought.

STATEMENT OF FACTS

The last Memorandum of Understanding (MOU) between CAPS, the exclusive representative for employees in Bargaining Unit 10, and the Governor, as represented by CalHR, expired on July 1, 2020. Since then, the parties engaged in negotiations to reach a successor agreement for approximately 1288 days and counting. The parties met approximately 77 times, comprising more than 352 hours of negotiation. Tentative agreements were reached on 163 out of approximately 175 terms of the 2018-2020 MOU. The parties were unable to reach agreement on 9 remaining terms. On September 19, 2023, CAPS

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requested the California Public Employment Relations Board (PERB or the Board) declare impasse. On September 26, 2023, PERB declared impasse between the parties and subsequently assigned a mediator.

The parties met for mediation on Wednesday, November 8 from approximately 9:30am until approximately 3:00pm. Despite having over one month to prepare for mediation, CalHR offered no ideas for forward progress, no proposals nor counterproposals, and indicated it needed additional time to ponder what might be done to move the parties from impasse.

On Thursday, November 9 at 12:31am, CAPS notified CalHR of its intention to engage in three days of rolling strikes on November 15, 16, and 17, 2023, as is its right under state law.

At approximately 5:29 pm the same day, CAPS received CalHR's Unfair Labor Practice Charge against CAPS as well as its Motion to Expedite ("Motion") the review of CAPS' call for a strike based on alleged violations of the Dills Act (Government Code Section 3512 et seq.) and requesting various remedies. (CalHR PERB Filing.)

ARGUMENT

I. CAPS AND CALHR ARE AT IMPASSE.

PERB declared impasse on September 26,2023. That impasse has not been broken. Impasse, therefore, currently, and at all times relevant, exists.

II. THERE ARE NO FORMALLY DEFINED IMPASSE PROCEDURES UNDER THE DILLS ACT REQUIRING FURTHER ACTION OF THE PARTIES.

A. Post-Impasse, the Evergreen Clause No Longer Binds the Parties to the Expired MOU.

CalHR claims Government Code Section 3517.8 (the "Evergreen Clause") maintains the terms of the expired CAPS MOU because the Evergreen Clause applies until the parties agree to a successor MOU "or until impasse is declared and its mediation procedures are exhausted." "Presently," says CalHR, "neither condition has occurred." It further argues that the parties have not completed

impasse procedures and thus alleges an unfair practice violation. (CalHR PERB Filing, ¶3.)

Section 3517.8 says that the parties shall give continued effect to the terms of an expired MOU, including any no strike provisions, until they agree to a new MOU "and have not reached an impasse." Here, PERB declared that the parties have reached an impasse in negotiations on September 26, 2023. Therefore, per section 3517.8, the parties were no longer bound to give continued effect to the provisions of the expired memorandum of understanding. CalHR's charge addresses the requirement that "mediation procedures are exhausted" but provides no statutory support for that requirement. (CalHR PERB Filing, ¶3.)

After PERB declared impasse, the parties were sent to mediation where no progress was made. While other public employee bargaining statutes provide for more specific procedures post-impasse, the Dills Act spells out no further obligation on the parties beyond what has occurred to date. This is true even if CalHR wishes otherwise. PERB must not allow CalHR to revise or create new statutes.

B. **The Legislature Designed Different Collective Bargaining Laws Differently**.

CalHR relies on PERB decisions finding a rebuttable presumption that the union is refusing to negotiate in good faith or to participate in impasse procedures in good faith if it strikes prior to the exhaustion of statutorily mandated impasse procedures. It relies on decisions decided under laws other than the Dills Act.(CalHR PERB Filing,¶ 24) (See *Regents of the University of California* (2010) PERB Decision No 2094-H; *Sacramento City Unified School District* (1987) PERB Order No IR-49; *San Ramon Valley Unified School District* (1984) PERB Order No IR-46) As such, these cases are inapplicable.

The Dills Act does not create a statutory impasse procedure. The only guidance offered by the Dills Act comes in Section 3517, which defines "meet and confer in good faith" as:

> [T]he Governor or such representatives as the Governor may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to

> exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the state of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses.

Notably, the legislature chose to construct the final sentence of this section using the word "should" rather than "shall." As discussed below, CalHR's conduct since the parties' last day of bargaining, during the impasse request process, and during mediation, support that sufficient time for the resolution of impasse has lapsed and the Evergreen Clause does not bar Unit 10's employees from exercising their statutory right to strike.

Compare the Dills Act with the Meyers-Milias-Brown Act (MMBA, Government Code Section 3500 et seq.), which covers California's local government public employees. Section 3505.4 of the MMBA sets out a detailed procedure for parties after PERB declares an impasse, including timelines, and specific obligations for each party. No analogous procedure exists under the Dills Act.

Compare the Dills Act with the Educational Employment Relations Act (EERA, Government Code Section 3540 et seq.), which covers public employees at California's public schools and community colleges. Section 3543.6 makes it an unfair practice for employee organizations to refuse to participate in good faith in the impasse procedure set forth under EERA. EERA is far more detailed, with an entire Article dedicated to its impasse procedures (Government Code Section 3548 et seq.) However, no analogous process or unfair practice presumption exists under the Dills Act.

Compare the Dills Act with the Higher Education Employer-Employee Relations Act (HEERA) covering California State University and University of California College of the Law, San Francisco, which makes it unlawful for an employee organization to refuse to participate in good faith in the impasse procedure it sets forth. Like EERA, HEERA also sets forth an extensive process and timeline for impasse proceedings and mediation. Unlike EERA and HEERA, the Dills Act does not.

Both the Legislature (and the electorate via the initiative process) are deemed to be aware of laws in effect at the time they enact new laws and are conclusively presumed to have enacted the new laws in light of existing laws

having direct bearing on them. (*McLaughlin v. State Bd. of Education* (1999) 75 Cal. App. 4th 196, 212)

The Legislature is also presumed to act intentionally and purposely when it includes language in one section but omits it in another. In *Citibank, N.A. v. Tabalon*, the court noted: "We presume the Legislature intended everything in a statutory scheme, and we do not read statutes to omit expressed language or to include omitted language . . . . When a statute on a particular subject omits a particular provision, the inclusion of such a provision in another statute concerning a related matter indicates an intent that the provision is not applicable to the statute from which it was omitted." (209 Cal. App. 4th Supp. 16, 20–21)

Both EERA (1976) and the MMBA (1968) were enacted prior to the Dills Act, which was enacted in 1978. The Legislature enacted HEERA in 1979. The Legislature was aware of EERA's and the MMBA's extensive post-impasse procedures when it enacted the Dills Act in 1978, choosing not to prescribe as detailed a process. It subsequently chose to align HEERA with EERA and MMBA, rather than with the Dills Act.

Finally, PERB cannot rewrite statutes to encompass a purpose the Legislature chose not to include. (*International Union of Operating Engineers v. SPB, DPA*, PERB Precedential Decision No. 1864-S, 2006).

To adopt CalHR's view requires PERB to make not one, but two changes to the Dills Act. If the Legislature intended for the Dills Act to prescribe specific impasse procedures, timelines, or processes similar to EERA and HEERA, it would have done so. Even if PERB alters the Dills Act to find an implied impasse or mediation procedure, the Legislature also chose not to make a union's failure to follow that procedure an unfair practice.

While Section 3519.5 of the Dills Act requires a union to participate in good faith in the mediation procedure set forth in Section 3518, Government Code Section 3518 is inapplicable to the current controversy. Section 3518 applies to situations where the parties mutually agree upon the selection of a mediator and voluntarily participate in mediation. This statute is inapplicable to post-impasse mediation. Again, had the Legislature intended to include conduct in impasse proceedings as part of Section 3519.5 it could have done so - as it did in other collective bargaining laws.

Because the Dills Act creates no statutory impasse procedure, CalHR's arguments related to economic strikes versus unfair labor practice strikes and their propriety are irrelevant. (CalHR PERB Filing, ¶ 25-27) CAPS has no burden to overcome a presumption of an unlawful strike since its strike is wholly lawful under the Dills Act. Thus, it would be improper to read into the Dills Act requirements that exist only in wholly separate statutory schemes. The Legislature established different collective bargaining laws for different governmental entities' employees.

C. **CalHR Points to No Specific Post-Impasse Procedures nor Explains What Might Exhaust Them**.

Even if CalHR were allowed to invent an impasse procedure and exhaustion requirement under the Dills Act where none exists, CalHR fails to define what exactly exhausts their would-be impasse procedures, despite arguing they have not been exhausted. Instead, CalHR argues that the parties must continue to negotiate with no defined end until an agreement is reached. Throughout this time, it argues, CAPS is prohibited from ever calling a strike. (CalHR PERB Filing, Motion to Expedite, p. 3, ("Indeed, the union must abide by the terms it specifically agreed to, until all negotiations have concluded and an agreement is reached….") This is contrary to defined PERB precedent, as the right to strike "goes to the essence of labor law." (*San Mateo County Superior Court v. SEIU Local 521*, (2019) Case No. SF-CO-7-C, PERB No. IR-60-C, citing *Fresno Unified School Dist. v. National Education Assn.* (1981) 125 Cal.App.3d 259, 268; *see also County Sanitation Dist. No. 2 v. Los Angeles County Emps. Assn.,* 38 Cal. 3d 564, 609, 699 P.2d 835 (1985)), holding that "a flat ban on public employee strikes is by no means the least restrictive method" to preventing "immediate and serious threats to the public health and safety.")

CalHR next argues that CAPS specifically violated the Dills Act section 3519, subsection (c). Section 3519, however, defines *employer* misconduct under the Act.

CAPS, however, agrees that Section 3519(c) applies to the instant situation: specifically, it applies to CalHR's threats to discipline employees for participation in a lawful strike. (CalHR PERB Filing, ¶28) Assuming, however, that CalHR meant to cite Section 3519.5, which defines unlawful *union* conduct, and to the extent CalHR argues that CAPS's planned lawful strike violates its duty to meet and confer in good faith, that argument also must fail under the law.

III. VIOLATIONS OF COLLECTIVE BARGAINING AGREEMENTS ARE APPROPRIATELY RESOLVED THROUGH GRIEVANCE AND ARBITRATION, NOT BY PERB.

If PERB determines that, notwithstanding the Dills Act's plain language, the No-Strike provision found in Article 13.1 of the CAPS MOU is still enforceable under the Evergreen Clause (Government Code Section 3517.8), then Government Code Section 3514.5(b) limits PERB's authority to act here.

If the No-Strike provision lives on, the grievance and arbitration procedure found in the parties MOU is the only appropriate mechanism to enforce it. The Dills Act prohibits the Board from enforcing agreements and from issuing a complaint on any charge that is also a violation of the MOU if that violation would not also constitute an unfair practice under the Act. As discussed, CAPS conduct does not support an unfair practice charge under any grounds alleged by the state.

Therefore, if the Board determines that the MOU is still effective under the Evergreen Clause, enforcement of Article 13.1, then the matter would be appropriately determined via the grievance process, not by PERB. Under Government Code Section 3514.5, CalHR must exhaust the grievance machinery of the CAPS MOU. CalHR has not filed a grievance on the claimed violation of Article 13.1, the grievance machinery has not been exhausted, and thus CalHR has not demonstrated that resorting to the contract grievance procedure would be futile.

IV. CALHR'S CONDUCT DEMONSTRATES IT IS NOT INTERESTED IN REACHING A SUCCESSOR MOU.

At mediation on November 8, CalHR made no new proposals or counter proposals. CalHR could have presented new proposals or counter proposals at any time during the 63 days between the last bargaining session and the November 8 mediation. It did not.

Instead, CalHR has exhibited a pattern of rejecting CAPS' proposals and waiting for CAPS to negotiate against itself. CalHR acknowledges this by saying "the state rejected" a proposal "on August 31, 2023, and has not received a counter proposal" from CAPS. (CalHR's Filing, ¶11.) Next, CalHR highlights "four bargaining proposals that have been rejected by the state, to which the union has not yet responded." (*Id.*, ¶12.) CalHR concludes by saying "there are

approximately six bargaining proposals the state has received from the union, to which the state has yet to respond." (*Id.*) Asking CAPS to negotiate against itself and refusing to respond to CAPS' proposals for more than 63 days, including at mediation, is clear evidence of bad faith.

Given this, it is odd that CalHR argues that CAPS has moved "further away from reaching a deal." (CalHR PERB Filing, ¶ 14.) In addition to wanting CAPS to negotiate against itself, CalHR seeks to have it both ways: first, by saying that the parties are making progress and impasse is unnecessary, but then arguing the union is moving further away from progress. Despite the above, CalHR claims "CAPS had not yet given the state the opportunity to respond to its request before filing its request for impasse." Again, CalHR made zero proposals or counter proposals in the 63 days since the last bargaining session, nor at the November 8 mediation. It has made clear it has no interest in moving from its position whatsoever.

V. **CALHR'S RELIANCE ON A "TOTALITY OF THE CIRCUMSTANCES" TEST IS MISPLACED**.

CalHR consistently references the "totality of the circumstances test" or the "weight of the evidence" to assert that CAPS has participated in "bad faith bargaining" in its unfair practice charge. (CalHR PERB Filing, ¶ 14, 25.) However, as PERB held in *Trinity v. United Public Employees of California*, this test does not apply once impasse has been declared because the duty to bargain has lifted. ("Last, the County urges that the Board find UPEC's tactics unlawful under a totality of circumstances standard. As explained above, the parties were at impasse, and not engaged in negotiations, at the time of the second strike. The totality of circumstances standard, which applies in *surface bargaining cases*, does not apply here." (*County of Trinity v. United Public Employees of California, Local 792*, (2016) p.8, Case No. SA-CO-125-M PERB Decision No. 2480-M.) Here, as in *Trinity*, the parties are no longer engaged in negotiations - they are at impasse.

VI. **PREPARING AND CALLING FOR A STRIKE IS PERMISSIBLE, CONSISTENT WITH PERB RULINGS**.

CalHR argues that CAPS's call for a strike is an attempt to place "undue pressure on the state at the bargaining table." (CalHR PERB Filing, Motion to Expedite, p. 4.) PERB has recognized that "[w]hen an employer refuses to yield, whether on

questions concerning its bargaining proposals or alleged unfair conduct, a strike becomes the ultimate, and often only, recourse available to employees. (*Regents of the University of California v. AFSCME local 3299* (2019), PERB Decision IR-62-H, pp.10-11, citing *County Sanitation*, supra, 38 Cal.3d at p. 581.) Indeed, "every strike is meant to inflict economic harm on the employer to achieve the union's collective goals," and this does not automatically turn that action into an unlawful strike. *Id.* Even in pre-impasse circumstances, PERB has held that preparing and calling for a strike does not constitute unlawful coercive action. (*Sweetwater Union High School District v. Sweetwater Education Association* (2014), PERB Decision IR-58. at 16.) As PERB held in *Sweetwater*, "the fact that these tools of persuasion may convince one side or the other to make concessions does not render their use unlawful under our statutes." *Id.*

VII. **CALHR'S REQUESTED REMEDIES ARE INAPPROPRIATE AND SHOULD BE DENIED**.

CalHR requests many remedies - first among them a declaration that CAPS interfered with CalHR's rights under the Dills Act. As discussed above, CAPS calling for a strike and Unit 10 employees responding by engaging in that strike is a lawful action. CAPS has not violated the Dills Act. Nor has CAPS acted in bad faith. CAPS wishes nothing more than to reach a successor agreement on the MOU and its actions have supported that time and again. CalHR's actions, on the other hand, do not support that it wishes to reach agreement. Likewise, a declaration that CAPS engaged in statutory impasse procedures in bad faith would be wrong in two ways: first, CalHR relies on other statutes' impasse procedures, not the Dills Act's; and second, CAPS has acted only in good faith. Under Government Code Section 3517.8, because PERB declared impasse, the expired MOU is no longer enforceable - including the no-strike clause. Therefore, PERB cannot find that CAPS calling for a strike violates the CAPS MOU.

CalHR also requests PERB award "make-whole" damages related to their claim of an unlawful strike. (CalHR PERB Filing, Remedy, ¶8) Section 3514.5 of the Dills Act makes clear that PERB has no authority to "award damages for costs, expenses, or revenue losses incurred during, or as a consequence of, an unlawful strike."

Next, CalHR seeks attorneys' fees and costs for having to bring their charge. PERB has awarded attorneys' fees in two different types of situations. Under the first standard, CalHR must show CAPS engaged in "sanctionable conduct" by

"litigating the same case before PERB." (*Sacramento City Teachers Association v. Sacramento Unified School District* (2020) PERB Decision No. 2749, p. 11.) No one, including CAPS and CalHR, has litigated this issue before PERB under the Dills Act. Moreover, CalHR has not argued, and is unable to argue, that CAPS calling for a strike after an impasse declaration is sanctionable. To find this sanctionable would have a chilling effect on a union's right to strike or even their ability to call for one. The Board has awarded attorneys' fees in another category where the award is necessary to make a party whole "for legal expenses it reasonably incurred in a separate proceeding to remedy, lessen, or stave off the impacts of the other party's unfair practice." (*Sacramento City USD*, supra, PERB Decision No. 2749, pp. 11-12, citing *Omnitrans* (2009) PERB Decision No. 2030-M, p. 30; *City of Palo Alto* (2019) PERB Decision No. 2664-M, p. 8.) As set forth above, CalHR cannot establish an unfair practice violation. Under both standards, CalHR's request should be denied.

CONCLUSION

The No Strike provision contained in Article 13.1 of the now-expired CAPS MOU became unenforceable the day PERB confirmed the parties are at impasse. Accordingly, CAPS did not violate the Dills Act when it subsequently called for three days of rolling strikes. The Board must reject CalHR's charges and deny all remedies sought.

Yours truly,

Christiana Dominguez
Senior Legal Counsel
California Association of Professional Scientists

DECLARATION

I am the attorney of record for CAPS in this matter. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 20th day of November, 2023, in Sacramento, California.

Christiana Dominguez
Senior Legal Counsel
California Association of
Professional Scientists

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*)