Christiana Dominguez, State Bar No. 243547
cdominguez@capsscientists.org
California Association of Professional Scientists (CAPS)
555 Capitol Mall, Suite 1155
Sacramento, CA 95814
(916) 441-2629

Attorney for Respondent
California Association of Professional Scientists (CAPS)

BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA (DEPARTMENT OF HUMAN RESOURCES) V. CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS (CAPS)	**PERB Case No. SA-CO-526-S** **RESPONDENT'S CLOSING BRIEF**

INTRODUCTION

The Board's January 20, 2024, Complaint 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. The Board's Complaint impermissibly allows Charging Party, the California Department of Human Resources (CalHR or Charging Party), to relitigate a duly issued impasse declaration, and confuses and conflates various public employee collective bargaining laws.

As discussed below, Respondent did not violate the Dills Act and the Charging Party's requested remedies must be denied.

STATEMENT OF FACTS

CAPS is an employee organization and is the recognized exclusive representative of

California state employees working in classifications assigned to Bargaining Unit 10 within the meaning of Government Code Section 3513(b). (Joint Stipulated Facts, hereinafter "JtF" ¶3) Bargaining Unit 10 is comprised of approximately 4200 employees employed across approximately 117 professional scientific classifications. (JtF ¶5) Pursuant to Government Code Section 3513(j), the Governor is the State Employer for the purpose of meeting and conferring in good faith with the appropriate bargaining representatives, while pursuant to Government Code Section 19815.4(g), CalHR is the Governor's designee for purposes of the Dills Act. (JtF ¶2) The terms and conditions of employment for Bargaining Unit 10 employees are contained in a Memorandum of Understanding ("MOU") between the parties. (JtF ¶6)

The last MOU between CAPS and CalHR expired on July 1, 2020. (JtF ¶8) In January 2020, the parties began negotiations for a successor MOU pursuant to Government Code Section 3517. (JtF ¶7) The parties met to negotiate a successor agreement approximately 77 times between January, 2020 and September 5, 2023. (JtF ¶9) CAPS and CalHR reached tentative agreements on approximately 164 contract terms. (JtF ¶10) The parties were unable to reach agreement on 14 remaining terms, including 4 items commonly reserved until the end of bargaining (Articles 13.6 Supersession, Article 20.1 Entire Agreement, Article 20.2 Duration, and Article 20.3 Contract Appropriation). (JtF ¶10). The full list of unresolved terms includes:

a. Article 2.1 Salaries
b. Article 2.18 New Geographic Pay Differential
c. Article 2.19 New Longevity Pay Differential
d. Article 2.20 Historical Salary Relationships
e. Article 2.21 Special Salary Adjustments
f. Article 2.25 New Pandemic Recognition Bonus
g. Article 5.1 Health, Dental, and Vision
h. Article 13.1 No Strike
i. Article 13.2 No Lockout
j. Article 13.6 Supersession
k. Article 20.1 Entire Agreement

l. Article 20.2 Duration
m. Article 20.3 Contract Appropriation
n. Article 3.25 Employee Donated Release Time Bank

(JtF ¶11)

On September 19, 2023, CAPS requested the California Public Employment Relations Board (PERB or the Board) declare impasse. (JtF ¶12) On September 26, 2023, PERB declared impasse between the parties and subsequently assigned a mediator, Ken Glenn, to assist the parties in overcoming their impasse. (JtF ¶14, 15)

The parties met for mediation on Wednesday, November 8. (JtF ¶16) During the November 8 meeting, the parties scheduled a second day of mediation for November 28, 2023. (JtF ¶16)

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. (JtF ¶18, Joint Exhibit, hereinafter "JtE," 8)

Employees were called to strike on November 15, 16, and 17 according to a specified, rolling, geographically-based schedule, as follows:

a. November 15 - any Unit 10 rank-and-file scientist who reports physically in the ZIP codes 95600-95894.
b. November 16 - those listed on November 15 plus those Unit 10 rank-and-file scientists who report physically in zip codes 94003-95005 and 90000-93199 and to the Region 1 Water Board.
c. November 17 - all Unit 10 rank-and-file employees.

(JtF ¶20, JtE 7, 9)

At approximately 5:29 pm on November 9, 2023, the same day CAPS provided notice of its intent to call a strike, CAPS received CalHR's Unfair Labor Practice Charge against CAPS alleging that CAPS' call for a strike violated the Dills Act (Government Code Section 3512 et seq.) (JtF ¶19, JtE 10)

On November 15, 16, and 17, employees engaged in a strike according to the noticed rolling schedule. (JtF ¶21)

The parties participated in mediation again on November 28, December 4, 5, 6, and 13, 2023. (JtF ¶24)

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. (JtE 6, p 172)

II. THERE ARE NO 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.

The Complaint alleges that CAPS violated the Dills Act by refusing to bargain in good faith with CalHR in violation of Government Code Section 3517, thus committing an unfair practice under Government Code Section 3519.5(c) when it announced that its members would strike from November 15-17, 2023. (JtE 12, pp 209-210) The Complaint also alleges that the announcement of a strike constituted CAPS's failure to participate in impasse procedures in good faith, in violation of Government Code Section 3519.5(d). (JtE 12, p 210) The law supports neither allegation.

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 alleged the existence of a requirement that "mediation procedures are exhausted" but provided no statutory support for that requirement. (JtE 10, p 184) The Complaint similarly alludes to a statutory

obligation to participate in unspecified mediation procedures, but points to no statutory authority for such a requirement.

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 had occurred as of November 9, 2023. (*See e.g.*: Educational Employment Relations Act (EERA), Government Code Section 3540 et seq; Higher Education Employer-Employee Relations Act (HEERA), Government Code Section 3560 et seq.; Meyers-Milias-Brown Act (MMBA), Government Code Section 3500 et seq.) PERB may not create statutory obligations where the Legislature failed to do so.

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

PERB decisions have found a rebuttable presumption that a 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. Each of these decisions, however, were decided under laws other than the Dills Act. (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 to the instant matter.

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."

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 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.

The Legislature designed the Dills Act differently than it did other collective bargaining laws, most of which were in effect at the time the Dills Act was enacted. 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 post-impasse or mediation process. It later 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 support the allegations in paragraphs 5 and 6 of the Complaint requires PERB to make not one, but two changes to the Dills Act. While PERB may possess broad remedial powers, those powers cannot exceed the Legislature's narrow grant of authority to the Board, nor may PERB write new law. 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 exceeds its authority and finds that the Dills Act contains 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. Here, CalHR objected to CAPS's

request for a declaration of impasse and did not voluntarily agree to or participate in mediation, but rather was ordered to do so by the Board. (JtE 4, JtE 6) Again, had the Legislature intended to include conduct in impasse proceedings, and had it intended to specify what constitutes such proceedings, as part of Section 3519.5 it could have done so - as it did in other collective bargaining laws.

C. **With No Specific Post-Impasse Procedures Under the Dills Act, It Is Impossible to Determine What Might Exhaust Them**.

Even if the canons of statutory interpretation allowed for the invention of an impasse procedure and exhaustion requirement under the Dills Act where none exists, the lack of specific statutory authority makes it impossible to define what constitutes exhaustion of these would-be impasse procedures.

CalHR's argument, in its initial Unfair Practice Charge ("UPC"), demonstrates why the creation of an implied exhaustion of an impasse procedure is unworkable. In its Motion to Expedite, it asserted that "the union must abide by the terms it specifically agreed to, until all negotiations have concluded *and an agreement is reached,* or when the impasse resolution procedures have been exhausted" (JtE 10, p 191) As discussed above, the Dills Act contains no statutorily designated impasse resolution procedures, therefore there is no way to know what might constitute their exhaustion. Accordingly, with this one statement, CalHR revealed and summarized its actual position, which is: because a strike is never authorized (or needed) once "an agreement is reached," any Dills Act-covered union that ever announces a strike may be accused of engaging in an unfair practice.

This is contrary to the law and public policy, 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.") Wrongfully restricting that right by baselessly declaring to the union and its members that its strike actions are unlawful may, in itself, constitute a violation of the Act.

III. CAPS'S CALLING FOR A STRIKE DID NOT CONSTITUTE A UNILATERAL CHANGE TO A CONTRACTUAL NO-STRIKE CLAUSE BECAUSE NO NO-STRIKE CLAUSE EXISTED AFTER SEPTEMBER 26, 2023.

A. CAPS Cannot Violate a Contract Term That No Longer Exists.

The Complaint alleges that CAPS unilaterally changed Article 13.1 (No Strike) of the MOU which expired on July 1, 2020, when it announced that its members would strike from November 15 through November 17, 2023. (JtE 12, p 210) But as noted in paragraph 9 of the Complaint, the no-strike provisions of the parties' MOU remained in effect only "until Charging Party and Respondent have reached impasse in their successor negotiations." PERB declared the parties at impasse on September 26, 2023. (JtF ¶12, JtE 6, p 172) Because the parties were at impasse, the MOU no longer bound the parties and no duty to bargain existed. CAPS cannot be found to have committed an unfair practice in November 2023 by changing a policy that no longer existed as of September 26, 2023.

IV. 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 and the existence of impasse, 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, then so must the grievance and arbitration procedure

found in the parties' MOU. Grievance and arbitration are the only appropriate mechanisms to enforce violations of the MOU. 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's conduct does not support an unfair practice charge under any grounds alleged.

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.

V. THE "TOTALITY OF THE CIRCUMSTANCES" TEST DOES NOT APPLY TO THE INSTANT CASE.

Charging Party will likely argue that the Board must apply the "totality of the circumstances test" or the "weight of the evidence" to find that CAPS has participated in "bad faith bargaining." Application of this test would be incorrect. As PERB held in *Trinity v. United Public Employees of California*, the totality of the circumstances 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*, at the time of the declared strike and at all times since September 26, 2023, the parties were (and are) no longer engaged in negotiations - they were (and

are) at impasse.

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

The Complaint finds fault with CAPS announcing the November 15-17 strike. PERB has recognized, however, 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.

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. There is no MOU to violate.

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, even if the strike were found unlawful, 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 did not argue in its initial charge, and is unable to argue now, 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, PERB must deny CalHR's requested remedies.

//

//

//

//

CONCLUSION

The No Strike provision contained in Article 13.1 of the now-expired CAPS MOU became unenforceable the day PERB declared the parties at impasse. Accordingly, CAPS did not violate the Dills Act when it subsequently called for three days of rolling strikes. The Complaint must be dismissed.

PRAYER

Wherefore, Respondent prays for relief as follows:

1. The complaint and the underlying unfair practice charge be dismissed with prejudice in their entirety;
2. An order issued in favor of Respondent CAPS and against Charging Party CalHR;
3. Respondent be awarded costs associated with defending this complaint and underlying unfair practice charge, including reasonable attorneys fees;
4. Charging Party take nothing by this action; and
5. PERB award Respondent such other relief as it deems just and proper.

Dated: March 8, 2023

Respectfully submitted:

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*)