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STATE OF CALIFORNIA

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF CALIFORNIA (DEPARTMENT OF HUMAN RESOURCES), Charging Party, v. CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS (CAPS), Respondent.	Case No. SA-CO-526-S **CHARGING PARTY'S CLOSING BRIEF**

TABLE OF CONTENTS

INTRODUCTION

Based on the undisputed facts in this case, Respondent, California Association of Professional Scientists (CAPS or Union) failed and refused to bargain in good faith with Charging Party, California Department of Human Resources (CalHR), in violation of the Ralph C. Dills Act (Dills Act) (Gov. Code, § 3512 et seq.). Specifically, CAPS violated the Dills Act by directing and participating in an unlawful strike during the pendency of negotiations for a successor Memorandum of Understanding (MOU) for Bargaining Unit 10 (BU10). CAPS's strike activity occurred while the parties were engaged in PERB-ordered mediation and therefore constituted a refusal to participate in good faith in mediation procedures, which is a clear violation of Government Code section 3519.5, subdivision (d).[1] CAPS also unilaterally repudiated the no-strike clause of the parties' MOU, and thus committed an unlawful unilateral change in violation of sections 3517 and 3519.5, subdivision (c). Based on the above violations, CalHR requests that PERB order CAPS to cease and desist from bargaining in bad faith, issue a declaration that CAPS engaged in bad faith bargaining, and award such further relief as PERB deems just and proper, including an award of attorneys' fees and costs.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

CalHR and CAPS have been in negotiations for a successor MOU for BU10 since sunshining proposals on January 14, 2020. (Joint Stipulation, ¶ 9.) Although the BU10 MOU expired by its own terms on July 1, 2020, the parties have continued to give effect to the terms of the MOU following contract expiration pursuant to section 3517.8. (Joint Stipulation, ¶ 25; Joint Exhibit 1.)

On December 16, 2022, the parties reached a total tentative agreement for a successor MOU. Subsequently, on or about February 1, 2023, CAPS membership rejected the agreement during the ratification process. (*Ibid*.) Following this rejection, the parties continued to meet and confer in good faith in an effort to come to an agreement on a successor MOU. (Joint Stipulation, ¶ 9.) Throughout negotiations the parties made steady and meaningful progress toward reaching an

[1] All further statutory references are to the Government Code unless otherwise indicated.

agreement. The parties reached tentative agreements on approximately 164 contract terms. (Joint Stipulation, ¶ 10.) Only fourteen successor and proposed new articles presently remain open, four of which are items commonly reserved for completion until the end of the bargaining process. (*Id.* at ¶¶ 10-11.)

Around September 2023, the parties were attempting to finalize agreement on several remaining salary and compensation items. (Joint Stipulation, ¶ 11.) On or about September 19, 2023, CAPS filed a request with PERB for impasse determination and the appointment of a mediator. (Joint Stipulation, ¶ 12; Joint Exhibit 3.) CalHR opposed the request, arguing the parties were not at impasse and were making progress in their negotiations. (Joint Exhibit 4). Both parties had made significant concessions in negotiations to that point and CAPS appeared to be adopting a bargaining strategy designed to move the parties away from, rather than toward, agreement. (*Ibid*.) Subsequently, on September 26, 2023, PERB issued a finding that the parties were at impasse and ordered the appointment of a mediator. (Joint Stipulation,¶ 14; Joint Exhibit 6.) On or about October 4, 2023, PERB appointed mediator Ken Glenn to assist the parties in reaching an agreement. (Joint Stipulation, ¶ 15.)

On November 8, 2023, the parties participated in mediation with Mr. Glenn, at which the parties continued to make progress toward an agreement. (Joint Stipulation, ¶ 16.) A second day of mediation was scheduled for November 28, 2023. (*Ibid*.) However, on or about November 9, 2023, prior to the completion of mediation, CAPS announced that its members would be engaging in a strike from November 15, 2023, through November 17, 2023. (*Id.* at ¶ 17; Joint Exhibit 7.)

Prior to the completion of PERB-ordered mediation, CAPS did, in fact, engage in a strike against the State of California on November 15, 16, and 17, 2023. (Joint Stipulation, ¶ 20.) The strike was rolling in nature, with employees at selected work sites striking on November 15, employees at additional work sites striking on November 16, and ultimately the entire bargaining unit striking on November 17, 2023. (Joint Stipulation, ¶ 21.)

CAPS participated in the above job action despite the fact that the parties were actively engaged in PERB-ordered mediation. In addition, CAPS engaged in the strike even though the parties' MOU contains a no-strike clause. (Joint Exhibit 1, § 13.1, p. 89.) Despite the Union's

unlawful strike activity, CalHR continued to bargain in good faith with CAPS and participated in several subsequent mediation sessions with Mr. Glenn on November 28 and December 4, 5, 6 and 13, 2023. (Joint Stipulation, ¶ 24.) In addition, throughout mediation, CalHR continued to observe and honor the terms of the MOU. (Joint Stipulation, ¶ 25.)

CAPS, on the other hand, chose to move the parties away from agreement by repudiating the no-strike clause, and engaging in a strike during PERB-ordered mediation. (Joint Stipulation, ¶ 21.) Although CAPS asserted the no-strike clause was no longer in effect following impasse, CAPS and its members continued to receive and enjoy, without objection, all of the other benefits and rights afforded to them under the MOU, including the contractual grievance and arbitration procedure, the "no lockout" provision, enhanced leave accruals, and numerous other pay differentials and allowances. (Joint Stipulation, ¶ 25.)

PROCEDURAL HISTORY

On November 9, 2023, CalHR filed the instant Unfair Practice Charge with PERB, alleging that CAPS violated the Dills Act by threatening and planning to engage in a strike. (Joint Exhibit 9.) On November 20, 2023, PERB issued a complaint alleging that CAPS violated the multiple provisions of the Dills Act by threatening and in fact engaging in the November strike. (Joint Exhibit 11.)

ARGUMENT

I. The Union's Decision to Call for and Participate in a Strike Prior to the Completion of Statutory Mediation and Impasse Procedures Was an Unfair Labor Practice.

Sections 3519.5, subdivisions (d) and 3519, subdivision (e) expressly state that it is an unfair labor practice to refuse to participate in good faith in PERB-ordered mediation. PERB also has affirmatively held, "A unilateral change in a negotiable subject prior to the completion of bargaining or the completion of impasse procedures is a 'per se' violation." (*Regents of the University of California (AFSCME, Local 3299)* (2010) PERB Decision No. 2105-H, citing *Grant Joint Union High School District* (1982) PERB Decision No. 196; *Redwoods Community College District* (1996) PERB Decision No. 1141.)

Here, it is undisputed CAPS encouraged and directed its members to strike prior to the completion of PERB-ordered mediation. (Joint Stipulation, ¶ 17; Joint Exhibit 7.) It is undisputed that the parties were actively engaged in mediation at the time CAPS directed the strike. (Joint Stipulation, ¶ 18.) In fact, the parties had already met once with the mediator and had additional mediation sessions scheduled even before CAPS called for the strike. (*Id.* at ¶ 16.) Thereafter, CAPS orchestrated three separate strike activities over a three-day period on November 15, 16, and 17, 2023, while the parties were still engaged in mediation. (*Id.* at ¶¶ 16, 20.) Accordingly, CAPS' strike activity occurred in the midst of PERB-ordered mediation, which is part of the impasse process under the Dills Act, and thus constituted bad faith bargaining in clear violation of section 3519.5, subdivisions (c) and (d).

II. The Union Committed a Unilateral Change by Calling for and Conducting a Strike in Direct Violation of the MOU's No-Strike Clause.

The Union's initiation of and participation in the strike by BU10 employees also constitutes an unlawful unilateral change in violation of the no-strike clause of the parties' MOU. The MOU's no-strike clause states as follows:

> A. During the term of this Agreement, neither CAPS nor its agents nor any Bargaining Unit 10 employee, for any reason, will authorize, institute, aid, condone or engage in a work slowdown, work stoppage, strike, or any other interference with the work and statutory functions or obligations of the State.
>
> B. CAPS agrees to notify all of its officers, stewards, and staff of their obligation and responsibility for maintaining compliance with this Section, including the responsibility to remain at work during any activity which may be caused or initiated by others, and to encourage employees violating this Section to return to work.

(Joint Exhibit 1, § 13.1, p. 89.) This clause prohibits both the Union and BU10 employees from authorizing, instituting, aiding, condoning, or engaging in job actions such as a strike. CAPS's strike activity in November 2023 constituted an unlawful labor practice in clear violation of the terms of the MOU. (Joint Stipulation, ¶ 17; Joint Exhibit 7.)

CAPS argues this provision of the MOU was no longer in effect at the time of the strike because PERB had already declared the parties were at impasse. (Joint Exhibit 11.) CAPS cites section 3517.8 in support of this argument. (*Ibid.*) According to CAPS, once PERB declared the

initiation of impasse procedures on September 26, 2023, "the parties were no longer bound to give continued effect to the provisions of the expired memorandum of understanding." (*Id.* at p. 4.)

The Union's interpretation of section 3517.8 is inconsistent with the general purpose and plain language of the Dills Act. Particularly when read in context, the legislative intent behind section 3517.8 was clearly to require the parties to give effect to the terms of an expired MOU throughout PERB-ordered mediation, until either the parties reach an agreement, or the state implements its last, best, and final offer (LBFO). As discussed below, this interpretation best harmonizes the various statutory provisions of the Dills Act and the Legislature's stated purpose in enacting section 3517.8, which was to provide stability to the parties throughout the bargaining process, to protect employees from the hardship and disruption of eliminating the contractual status quo, and to encourage the parties to reach a successor agreement. (Request for Judicial Notice (RJN), **Exhibit B**, Assem. Com. on Public Employees, Retirement and Social Security, Analysis of Sen. Bill No. 683 (1999-2000 Reg. Sess.), July 14, 1999; RJN, **Exhibit C**, Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen Bill No. 683, August 18, 2000.)

Section 3517.8 of the Dills Act provides:

> (a) If a memorandum of understanding has expired, and the Governor and the recognized employee organization have not agreed to a new memorandum of understanding and have not reached an impasse in negotiations, subject to subdivision (b), the parties to the agreement shall continue to give effect to the provisions of the expired memorandum of understanding, including, but not limited to, all provisions that supersede existing law, any arbitration provisions, any no strike provisions, any agreements regarding matters covered in the Fair Labor Standards Act of 1938 (29 U.S.C. Sec. 201 et seq.), and any provisions covering fair share fee deduction consistent with Section 3515.7.
>
> (b) If the Governor and the recognized employee organization reach an impasse in negotiations for a new memorandum of understanding, the state employer may implement any or all of its last, best, and final offer. Any proposal in the state employer's last, best, and final offer that, if implemented, would conflict with existing statutes or require the expenditure of funds shall be presented to the Legislature for approval and, if approved, shall be controlling without further legislative action, notwithstanding Sections 3517.5, 3517.6, and 3517.7. Implementation of the last, best, and final offer does not relieve the parties of the obligation to bargain in good faith and reach an agreement on a memorandum of understanding if circumstances change, and does not waive rights that the recognized employee organization has under this chapter.

Section 3517.8 expressly requires the parties to continue to give effect to the provisions of an expired MOU until a new MOU is reached or the parties reach "an impasse in negotiations, subject to subdivision (b)." (See also *Standard School District* (2005) PERB Decision No. 1775; *Pittsburg Unified School District* (1982) PERB Decision No. 199; *Modesto City Schools* (1983) PERB Decision No. 291.)

The question for purposes of this case is, what did the Legislature mean when referring to "impasse" in section 3517.8? Did the Legislature use "impasse" to mean the point at which PERB declares the initiation of impasse procedures and orders the parties to mediation? Or, did the Legislature understand impasse to only occur after mediation has been exhausted and when the state is allowed to implement its LBFO?

In construing the meaning of a statute, the words of the statute are "generally the most reliable indicator of legislative intent." (*People v. King* (2006) 38 Cal.4th 617, 622.) "If the plain, common sense meaning of the statute's words is unambiguous, the plain meaning controls." (*Fitch v. Select Products Co*. (2005) 36 Cal.4th 812, 818.) However, the plain meaning rule does not prevent a court from determining whether the literal meaning of the statute comports with its purpose. (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1083.) Thus, although the words used by the Legislature are the most useful guide to its intent, the language of the statute should not be viewed in isolation. (*Ibid*.) Rather, words of the statute should be construed in context, keeping in mind the statutory purpose. (*Ibid*.) The plain meaning of the statute need not be followed "when to do so would frustrate the manifest purposes of the legislation as a whole or lead to absurd results." (*Ibid*.) Instead, courts and other adjudicative bodies must interpret legislation reasonably and attempt "to give effect to the apparent purpose of the statute." (*Ibid*.)

Here, the language, purpose, and context of section 3517.8 support an interpretation that extends the terms of an expired MOU until after impasse procedures have been completed, i.e., PERB-ordered mediation has been exhausted. In section 3517.8 the existence of "impasse" noted in subdivision (a) is expressly made "subject to subdivision (b)." In other words, subdivision (b) of section 3517.8 clarifies the conditions that must occur before the parties are at "impasse."

Subdivision (b) states:

> (b) If the Governor and the recognized employee organization reach an *impasse* in negotiations for a new memorandum of understanding, *the state employer may implement any or all of its last, best, and final offer*.

(Emphasis added.) Here, subdivision (b) clarifies that "impasse" does not occur until and unless "the state employer may implement any or all of its last, best, and final offer." In other words, subdivision (a) requires the parties to give effect to the expired MOU provisions until subdivision (b) is triggered, i.e., at some point after impasse and mediation procedures are completed and the state is able to implement its LBFO. The state's ability to implement its LBFO is thus a necessary prerequisite to a finding that the parties are at true impasse. Until that point occurs, the provisions of the expired MOU remain in effect. For purposes of this case, the question of whether the terms of the MOU remained in effect during the PERB-ordered mediation depends on whether the state could implement its LBFO. If the state was not allowed to implement its LBFO during that time, then the parties were not truly at impasse and the terms of the MOU remained in effect.

As noted above, PERB has held that it is an unfair labor practice for either party "to make a unilateral change to a negotiable subject" prior to "the completion of impasse procedures." (See, e.g., *Regents of the University of California (AFSCME, Local 3299)* (2010) PERB Decision No. 2105-H; *Redwoods Community College District* (1996) PERB Decision No. 1141.) Under the Dills Act, impasse procedures include participation in and exhaustion of PERB-ordered mediation. (See Gov. Code, § 3518.) It cannot reasonably be disputed that implementation by the state of an LBFO would constitute a "unilateral change to a negotiable subject" prior to "the completion of impasse procedures." Consequently, since the state was prohibited from implementing its LBFO during mediation, then the parties were not truly at "impasse" during that time within the meaning of section 3517.8. This means the terms of the MOU remained in effect during mediation, thus prohibiting CAPS from engaging in or encouraging a strike prior to the exhaustion of mediation procedures. In other words, if the state is barred from implementing its LBFO during mediation, then the Union should likewise be barred from unilaterally changing the MOU during mediation by engaging in a strike.

This interpretation makes practical sense as well—if PERB's pre-mediation declaration of impasse were sufficient to permit the state to implement its LBFO and allowed either party to ignore the provisions of the MOU, it would essentially render PERB's impasse procedures meaningless. As noted above, the plain meaning of a statute must not be followed if to do so "would frustrate the manifest purposes of the legislation as a whole or lead to absurd results." (*MacIsaac v. Waste Management Collection & Recycling, Inc.*, *supra*, 134 Cal.App.4th at p. 1083.) One of the main purposes of mediation is to "advance the parties' efforts to reach agreement…." (*Modesto City Schools* (1983) PERB Decision No. 291 [citing *Moreno Valley Unified School District* (1982) PERB Decision No. 206].) However, if either party can simply walk away from the agreement the moment PERB declares impasse, then its mediation procedures cannot serve their intended purpose. Such a construction would frustrate the legislative purpose in requiring the parties to undergo mediation, which is to assist the parties in resolving their disputes and reaching an agreement. (*MacIsaac v. Waste Management Collection & Recycling, Inc*., *supra*, 134 Cal.App.4th at p. 1083.) For this reason, impasse under section 3517.8 must be interpreted to mean at some point *after* the parties in good faith have exhausted the PERB-ordered mediation process.

The above interpretation is further supported by the legislative history of section 3517.8. In construing the legislative intent of a statutory provision, "courts may employ a variety of extrinsic construction aids, including legislative history, and will adopt the construction that best harmonizes the statute both internally and with related statutes." (*Branciforte Heights, LLC v. City of Santa Cruz* (2006) 138 Cal.App.4th 914,926 (citing *Pacific Gas & Electric Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1152; *Hsu v. Abbara* (1995) 9 Cal.4th 863,871; *Summers v. Newman* (1999) 20 Cal.4th 1021, 1026.) The legislative history of a statute may serve as one extrinsic aid to determining the legislative intent. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230.)

Section 3517.8 was enacted by the Legislature in September 2000. (**Exhibit A**, Sen. Bill No. 683 (1999-2000 Reg. Sess.).) The legislative bill analyses regarding the passage of section 3517.8 state that it was enacted in response to the result in *Department of Personnel Administration v. Superior Court* (*Greene*) (1992) 5 Cal.App.4th 155 (hereafter *Greene*). (**Exhibit B**, Assem.

Com. on Public Employees, Retirement and Social Security, Analysis of Sen. Bill No. 683 (1999-2000 Reg. Sess.), July 14, 1999.) The court in *Greene* held as follows:

> The Dills Act is a "supersession statute," designed so that, in the absence of a MOU, as is the case when an existing MOU has expired and the parties have bargained to impasse, numerous Government Code provisions concerning state employees' wages, hours and working conditions take effect.

(*Greene, supra*, 5 Cal.App.4th at pp. 174-175; see also Gov. Code, § 3516.61.) Thus, according to *Greene*, when the MOU expires the provisions of the Government Code spring back to life and supersede the provisions of the parties' MOU. (*Ibid*.) According to the legislative history, section 3517.8 was intended to protect state employees and their exclusive representatives from the result in *Greene*. (See **Exhibit B**, Assem. Com. on Public Employees, Retirement and Social Security, Analysis of Sen. Bill No. 683 (1999-2000 Reg. Sess.), July 14, 1999.) Proponents argued that *Greene* put the employees' representative at a disadvantage in negotiations because of the loss of contract benefits. (See **Exhibit C** Sen. Rules Com., Off. Of Sen. Floor Analyses, Analysis of Sen Bill No. 683, August 18, 2000.) Further, the loss of union security provisions (e.g., union dues) upon expiration of the MOU put the union at risk at the very time it was trying to forge a new agreement. (See *Ibid*.) In short, section 3517.8 was intended to protect the Dills Act rights of employees and their exclusive representatives by providing "a level playing field" for the parties and continuation of the provisions of the expired MOU, thereby creating a contractual status quo. (*Ibid*.)

Given this legislative history, the most reasonable construction of section 3517.8 is that it was intended to protect state employees, not simply until PERB declares the initiation of impasse procedures, as CAPS claims, but rather to continue the contractual status quo until the conclusion of PERB-ordered mediation. The need to maintain a contractual status quo and to protect employees and their exclusive representatives from the disruption of having their benefits terminated in the middle of negotiations does not end once PERB orders the parties to mediation. Such an interpretation would arbitrarily cut off the contractual status quo exactly at the moment when the parties need it most.

If the Union's interpretation were adopted, it would mean that as soon as PERB declared the start of impasse procedures and ordered the parties to mediation, the state could immediately implement its LBFO and the Union could immediately engage in strike activity. It would also mean all of the benefits normally afforded to employees under their MOU would fall away—benefits such as pay differentials, enhanced leave accruals, and the grievance and arbitration provisions of the MOU. This would create considerable confusion and hardship during a sensitive time in negotiations. Such an interpretation would severely undercut PERB's mediation procedures and the Dills Act preference for a negotiated labor agreement.

Thus, the legislative history confirms what is clear from the text of the statute, namely, that section 3517.8 extends the reach of the contractual status quo until after the exhaustion of PERB-ordered mediation.

Accordingly, the Union's contention that the terms of the MOU were no longer in effect during PERB-ordered mediation, must be rejected. Such an interpretation is inconsistent with the plain language, context, and purpose of section 3517.8. The no-strike clause, as well as all other provisions of the MOU, remained in effect during mediation. As a result, CAPS committed a unilateral change by engaging in a strike during the mediation proceedings in direct violation of the Dills Act and the MOU.

CONCLUSION

For all of the above reasons, PERB should find that the Union committed an unfair labor practice and issue an appropriately strong remedy to discourage this type of conduct in the future.

Dated: March 8, 2024

Respectfully Submitted,

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I declare that I am a resident of or employed in the County of Sacramento,

State of California. I am over the age of 18 years. The name and address of my

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On March 8, 2024 (*Date*), I served the Charging Party's Closing Brief (*Description of document(s)*)

_____ (*Description of document(s) continued*) in Case No. SA-CO-526-S (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.*)

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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 March 8, 2024 (*Date*),

at Sacramento, CA (*City*) (*State*).

Christina Guthrie

Christina Guthrie

(*Type or print name*) | (*Signature*)