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16

17 CALIFORNIA CORRECTIONAL
18 PEACE OFFICERS' ASSOCIATION,

19 Charging Party,

20 v.

21 CALIFORNIA DEPARTMENT OF
22 PERSONNEL ADMINISTRATION;
STATE OF CALIFORNIA,

23 Responding Party.
24

Injunctive Relief Request No. 542
PERB UPC No. SA-CE-1665-S

**REPLY TO OPPOSITION TO REQUEST FOR
INJUNCTIVE RELIEF
(PERB REGULATION § 32450)**

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1 CCPOA replies to the Opposition to Request for Injunctive Relief. CCPOA's
2 demand for a resumption of bargaining is an issue of first impression under the Dills Act;
3 however, “[c]onstruing and applying the duty to bargain ... [is a] task[] lying at the heart
4 of the Board's function.” (*Ford Motor Co. v. NLRB* (1979) 441 U.S. 488, 497.) And
5 because DPA will not negotiate absent direction from PERB, the Board must rule.¹
6 Notwithstanding the novelty of the issue, PERB need not rule “in the dark” because the
7 law—that “any change in circumstances” breaks an impasse—and the facts—that at least
8 three (3) significant changes have occurred—strongly supports renewed negotiations.
9 Finally, because the appropriate time to negotiate (as triggered by the changed
10 circumstances) is *now*, and not at the end of a normal or expedited PERB process, only an
11 order to bargain issued *at this time* can give CCPOA an appropriate remedy.

- 12 • **DPA READS § 3517.8 UNREASONABLY NARROWLY—THE STATUTE PLAINLY**
13 **REQUIRES A RESUMPTION OF BARGAINING IF "ANY CIRCUMSTANCES**
14 **CHANGE"**

15 DPA contends “*any circumstances change*” really means “if the Union makes
16 concessions.” However, its unreasonably restrictive reading conflicts with: (1) the
17 purpose of the Act favoring *bilateral* resolution of disputes; (2) rules of statutory
18 construction; and (3) the Gorman treatise, NLRA case, and the PERB authorities it cites.
19 DPA also overlooks the fact that the narrow standard it proposes is met by virtue of the
20 State’s bargaining position changing on the significant issue of the length of contract it
21 proposed.

22 **1. DPA’s Refusal To Bargain Conflicts With The Favored Remedy** 23 **Under The Dills Act Of Bilateral Resolution Of Disputes**

24 “It is the purpose of [the Dills Act] to promote full communication between the
25 state and its employees by providing a reasonable method of resolving disputes regarding
26 wages, hours, and other terms and conditions of employment between the state and public

27 ¹ At page 14 (lines 6-14), Respondents assert that injunctive relief is an unnecessary
28 remedy here, and that an order to bargain can issue instead. If PERB believes that such an
order can issue, *CCPOA will accept an order to bargain issued to DPA as a remedy and*
withdraw its request for an injunction.

1 employee organizations.” (Cal.Gov.Code § 3512.) Although the Act acknowledges that
2 temporary impasse is inevitable under some circumstances, it is clear that impasse is the
3 virtual antithesis of the Act’s stated objective. This is why the Dills Act expressly calls
4 for an end to impasse and return to bilateral negotiations “if any circumstances change.”
5 DPA is effectively trying to extend the period when it may legitimately make unilateral
6 changes pursuant to a last, best, and final offer beyond the single financial year’s duration
7 contemplated by § 3517.8.

8 2. DPA’s Arguments Are At Odds With The Plain Meaning Of § 3517.8

9 If the last sentence of § 3517.8 read as follows (or anything close to it), DPA’s
10 argument *might* be reasonable:

11 “Implementation of the last, best, and final offer does not relieve the
12 parties of the obligation to bargain in good faith and reach an
13 agreement on a memorandum of understanding if ~~any circumstances~~
14 change either party significantly changes a bargaining position it held
to impasse, and does not waive any rights the recognized employee
organization has under this chapter.” [Strikethrough of actual
language, hypothetical added language italicized and underlined.]

15 However, § 3517.8 obligates a resumption of bargaining after impasse “if any
16 circumstances change.” “The Legislature is presumed to have meant what it said, and the
17 plain meaning of the language governs.” (*Sutco Construction Co. v. Modesto High School*
18 *Dist.* (1989) 208 Cal.App.3d 1220, 1228; *see also Donnellan v. City of Novato* (2001) 86
19 Cal.App.4th 1097, 1103 [“A construction making some words surplusage is to be
20 avoided.”]) “If the Legislature had meant otherwise it could have easily said so. It is not
21 for us to rewrite the statute.” (*Glacier Gen. Assurance Co. v. Superior Court* (1979) 95
22 Cal.App.3d 836, 841.)

23 3. Both The Gorman Treatise And PERB Precedent Recognize That 24 While A Concession By A Party Is One “Change In Circumstances,” It 25 Is Not The Only One

26 Gorman readily acknowledges that impasse may be broken by factors other
than a change in bargaining position:

27 An impasse is a fragile state of affairs. “[I]n almost all cases,” an
28 impasse is “eventually broken, *through either* a change of mind *or*
of the application of economic force.” In such a case, the parties are

1 obligated to resume negotiations and the employer is no longer free
2 to implement changes in working conditions without bargaining.
3 Just as there is no litmus test to determine when an impasse has
4 been created, there is none which determines when it has been
5 broken. ***The Board will look to “all the circumstances.” Most***
6 ***obviously***, an impasse will be broken when one party announces a
7 retreat from some of its negotiating demands. But, as the Fifth
8 Circuit Court of Appeals puts it, ***“anything that creates a new***
9 ***possibility of fruitful discussion (even if it does not create a***
10 ***likelihood of agreement) breaks an impasse.[]”*** Examples are a
11 change in business circumstances, a change in persons doing
12 bargaining, and even the passing of time.

13 Gorman LABOR LAW (2nd ed. 2004) § 20.13, p. 614 [citations omitted; emphasis added].

14 Indeed, the cases cited by DPA in favor of its minutely narrow interpretation
15 actually support the “plain language” meaning ascribed to the Act by CCPOA. For
16 example, in *PERB v. Modesto City* (1982) 136 Cal. App. 3d 881, 899, the Court of Appeal
17 states: “legal impasse can be terminated by ***nearly any change*** in bargaining-related
18 circumstances.” The fact that the Court states that a concession is merely the “[m]ost
19 obvious[]” change of circumstances, confirms that there are others.²

20 Similarly, in *Regents of the University of California* (1996) PERB Dec. No.
21 1157, the Board stated that the duty to bargain will be revived following impasse “by
22 some changed circumstances, such as a significant concession by either party.” PERB’s
23 use of the qualifying phrase “such as” demonstrates that a bargaining concession is merely
24 one type of change that will break impasse. DPA’s position that ***only*** a concession will
25 break impasse is undermined by the authorities it cites.

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- **DPA APPLIES THE WRONG STANDARD IN ANALYZING THE CHANGES IN CIRCUMSTANCES IDENTIFIED BY CCPOA**

DPA does not dispute that circumstances have changed only that the changes
“do not increase the potential for agreement.” (Opposition at pp. 6 to 10.) The correct
standard is not whether the potential for agreement is increased, but whether “a new

² It is also noteworthy that the Educational Employment Relations Act (“EERA”) has no analog to Government Code § 3517.8. Thus, EERA does not explicitly dictate, as does the Dills Act, that an impasse is broken when “any” change of circumstances arises.

1 *possibility* of fruitful discussion (even if it does not create a likelihood of an agreement)”
2 is created. (*Gulf States Mfg., Inc. v. NLRB* (5th Cir. 2002) 315 F.3d 499 [emphasis
3 added].) The fiscal emergency and the announced 10% decrease in budget make it
4 imperative to both sides to discuss—*possibly* fruitfully—the impact of these events on
5 “wages, hours and other terms and conditions of employment.” (§ 3512.)

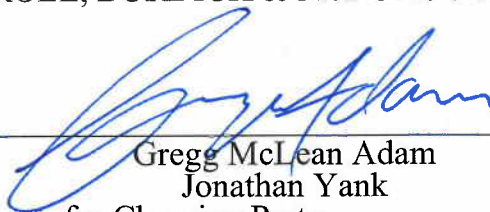
6 • **PERB MUST ORDER A RESUMPTION OF BARGAINING—NOW**

7 CCPOA contends that it is entitled to bargain at this time because of the
8 change in circumstances under Section 3517.8. Separately, in Charge SA-CE-1621-S,
9 CCPOA contends it is entitled to negotiate “prior to the adoption by the state of its final
10 budget for the ensuing year.” Charge 1621 is scheduled for hearing on April 16 and 17,
11 2008. Under either charge, the need to negotiate is immediate and a PERB remedy
12 months or even weeks from now would deprive CCPOA of any meaningful opportunity to
13 meet its statutory obligation to bargain for employees it represents.

14 Dated: March 14, 2008

15 CARROLL, BURDICK & McDONOUGH LLP

16
17 By _____


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21 Association
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1 *California Correctional Peace Officers' Association v. State of California (Department of*
2 *Personnel Administration)*, PERB Unfair Practice Charge No. SA-CE-1665-S; Injunctive
3 Relief Request No. 542

4 **PROOF OF SERVICE – ELECTRONIC MAIL**
5 **AND UNITED PARCEL SERVICE (UPS) – NEXT DAY AIR**

6 I declare that I am employed in the County of San Francisco, California. I am
7 over the age of eighteen years and not a party to the within cause; my business address is
8 44 Montgomery Street, Suite 400, San Francisco, CA 94104. On March 14, 2008, I
9 served the attached:

10 **REPLY TO OPPOSITION TO REQUEST FOR INJUNCTIVE RELIEF**

11 on the parties (listed below) by arranging a true image thereof to be electronically
12 transmitted to the electronic address listed below. I am readily familiar with the Firm's
13 practice of processing and transmitting correspondence via electronic transmission(s) and
14 such correspondence would be transmitted in the ordinary course of business;

15 and, by causing the same to be sent via **United Parcel Service (UPS) – Next Day Air** on
16 the parties in said cause listed below:

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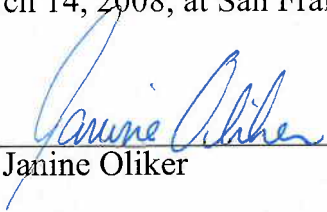
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I declare under penalty of perjury that the foregoing is true and correct, and
that this declaration was executed on March 14, 2008, at San Francisco, California.



Janine Olikier