

1 K. WILLIAM CURTIS
Chief Counsel, Bar No. 095753
2 WARREN C. STRACENER
Deputy Chief Counsel, Bar No. 127921
3 KENNETH R. HULSE
Assistant Chief Counsel, Bar No. 099349
4 PAUL M. STARKEY
Labor Relations Counsel, Bar No. 109434
5 JENNIFER GARTEN
Labor Relations Counsel, Bar No. 232979
6 KAMILLA KODAMA
Labor Relations Counsel, Bar No. 227869
7 CORINA B. DRAGAN
Legal Counsel, Bar No. 234799
8 LANCE YAMAMOTO
Legal Counsel, Bar No. 252084
9 Department of Personnel Administration
State of California
10 1515 S Street, North Building, Suite 400
Sacramento, CA 95811-7258
11 Telephone: (916) 324-0512
Facsimile: (916) 323-4723
12 E-mail: paulstarkey@dpa.ca.gov

13 Attorneys for Responding Party

14 STATE OF CALIFORNIA

15 PUBLIC EMPLOYMENT RELATIONS BOARD

16 CALIFORNIA CORRECTIONAL PEACE)
17 OFFICERS' ASSOCIATION ,)
18 Charging Party,)
19 v.)
20 STATE OF CALIFORNIA, DEPARTMENT)
OF PERSONNEL ADMINISTRATION,)
21 Responding Party.)

) Case No. I.R. 542
) (PERB UPC No. SA-CE-1665-S)
)
) OPPOSITION TO REQUEST FOR
) INJUNCTIVE RELIEF

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1 **INTRODUCTION**

2 On September 18, 2007, after months of fruitless bargaining ending in stalemate between the
3 State of California and the California Correctional Peace Officers Association (CCPOA or Union),
4 the State lawfully implemented terms of its last, best, and final offer. Since then, nothing has
5 happened to break the impasse. Neither party has offered a concession nor changed its position with
6 respect to the issues that resulted in impasse. No circumstances have changed that give rise to any
7 expectation that further talks would be fruitful in reaching an agreement. While the calendar has
8 moved ahead, and the seasons have changed, the parties are at the same place--stalemate. CCPOA's
9 latest request for injunctive relief must be denied because CCPOA has stated no facts to demonstrate
10 changed circumstances by the parties and CCPOA has cited no law that requires the Public
11 Employment Relations Board (PERB or Board) to seek extraordinary injunctive relief to force the
12 State back to the bargaining table. In short, no irreparable harm exists. CCPOA has demonstrated
13 no reason why the State's lawful exercise of its Dills Act right to implement terms of its last, best
14 and final offer is improper. Because CCPOA's request for injunctive relief is unsupported in fact
15 and law, the Board must decline the request.

16 **STATEMENT OF FACTS**

17 On May 10, 2007, after months of bargaining, the State requested a PERB ordered mediation
18 or alternatively a declaration of impasse. On May 17, 2007, the Board declared the State and
19 CCPOA to be at impasse and ordered the parties to mediation. The State asks that the Board take
20 administrative notice of its findings concerning impasse and mediation.

21 Mediation commenced on June 21, 2007, and ended unexpectedly on August 22, 2007, when
22 CCPOA unilaterally abandoned the process. On September 12, 2007, the Union abandoned the
23 negotiations process altogether and instead sponsored an eleventh hour "contract" bill in the
24 Legislature, which was withdrawn by its author. (Decl. Pamela Schneider, ¶ 7.)

25 On September 12, 2007, the State presented its last, best, and final offer (LBFO) to the
26 Union. On September 17, 2007, the Union rejected the State's LBFO by written letter. (Decl.
27 Kristine Rodrigues, ¶ 5.)

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1 On September 18, 2007, the State implemented specified terms of its LBFO. (Decl. Kristine
2 Rodrigues, ¶ 6.)

3 In various correspondences between CCPOA and the State, from December 27, 2007,
4 through March 5, 2008, CCPOA insisted that the State return to the bargaining table because of
5 “changed circumstances.” (Decl. Kristine Rodrigues, ¶ 7.) In its charge, CCPOA gives three
6 instances of “changed circumstances”:

7 “(1) the DPA’s failure to secure legislative approval to implement its
8 purported [sic] last, best, and final offer (‘LBFO’), preventing
9 implementation of the State’s offered five (5) percent pay increase,
10 increased health benefits, increased sick and vacation leave, increased
11 night and weekend differential pay, increased uniform allowances, and
12 increased monetary recruitment incentives (among other beneficial
13 terms);

14 (2) Governor Arnold Schwarzenegger’s declaration of a fiscal state of
15 emergency impacting all state departments, including the California
16 Department of Corrections and Rehabilitation (‘CDCR’); and

17 (3) issuance by PERB of a complaint against the State, which resulted
18 in the State’s voluntary rescission of years two and three of its LBFO.”

19 The State declined CCPOA’s demand because CCPOA would not return to bargaining except
20 on the untenable condition that the parties return to the terms of the expired MOU and, further,
21 because nothing had happened to break the existing bargaining stalemate between the parties. (Decl.
22 Kristine Rodrigues, ¶ 7.)

23 CCPOA filed its charge and request for injunctive relief on March 11, 2008. CCPOA alleges
24 the State’s failure to return to the bargaining table in light of alleged “changed circumstances”
25 constitutes bad faith bargaining. CCPOA is wrong because no relevant circumstances have changed
26 which would revive the bargaining obligation as to the matters at impasse, and, in any event,
27 CCPOA has not demonstrated any basis to request that PERB seek injunctive relief.

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1 the expenditure of funds shall be presented to the Legislature for
2 approval and, if approved, shall be controlling without further
3 legislative action, notwithstanding Sections 3517.5, 3517.6, and
4 3517.7. Implementation of the last, best, and final offer does not
5 relieve the parties of the obligation to bargain in good faith and reach
6 an agreement on a memorandum of understanding if any
7 circumstances change, and does not waive any rights that the
8 recognized employee organization has under this chapter. (Gov.
9 Code, § 3517.8.)

10 Although Government Code section 3517.8 has not been specifically addressed by the Board,
11 the court and the Board have addressed impasse under the Educational Employment Relations Act
12 (EERA). Specifically, in *PERB v. Modesto City Schools District* (1982) 136 Cal.App.3d 881, 899,
13 the court stated:

14 Indeed, it is well settled in the private sector that a legal impasse can
15 be terminated by nearly any change in bargaining-related
16 circumstances. "An impasse is a fragile state of affairs and may be
17 broken by **a change in circumstances which suggests that attempts
18 to adjust differences may no longer be futile.** In such a case, the
19 parties are obligated to resume negotiations and the employer is no
20 longer free to implement changes in working conditions without
21 bargaining. Just as there is no litmus-paper test to determine when an
22 impasse has been created, there is none which determines when it has
23 been broken Most obviously, an impasse will be broken when
24 one party announces **a retreat** from some of its negotiating demands."
25 [Gorman, Labor Law (1976) p. 449; see also *N. L. R. B. v. Sharon
26 Hats, Incorporated* (5th Cir. 1961) 289 F.2d 628.] (Emphasis added;
27 *Id.*)

28 The court further stated:

...it is necessary that PERB embrace the concept of the duty to bargain
which revives when impasse is broken. "The existence of impasse
resolution procedures does not negate this conclusion. Whether one
considers impasse to happen at the beginning, the end, or throughout
the statutory impasse resolution mechanism, at some point that
impasse can be broken, just as in the private sector. When it is, the
duty to bargain revives." (*Id.*)

After reviewing all information available in March 1980, PERB
concluded that Association's concessions were sufficient to break the
impasse which formerly existed between District and Association.
Before us, PERB argues, "Collectively, the post-factfinding
concessions of the Association **marked a significant shift in its
negotiating posture.** The Association had dropped its demand for a
short contract term, scaled down its demands for health benefit

1 improvements and offered a union security clause significantly less
2 favorable than what it originally had sought. Yet, despite these
3 changes in the Association's position, the District refused to resume
4 negotiations." We conclude there was reasonable cause to believe that
5 District was in violation of its duty to bargain in good faith.
6 Association's concessions **were not insubstantial** or frivolous and
7 broke the legal impasse. (Emphasis added; *Id.* at 900.)

8 Following *PERB v. Modesto City Schools*, the Board further examined impasse and changed
9 circumstances in light of the court decision. In *Modesto City Schools* (1983) PERB Dec. No. 291,
10 the Board stated:

11 ...impasse suspends the bargaining obligation only until "changed
12 circumstances" indicate an agreement is possible. [Citations omitted.]
13 **"Changed circumstances" are those movements or conditions**
14 **which have a significant impact on the bargaining equation.**
15 Among those circumstances which will restore the obligation to
16 negotiate is a concession or series of concessions by one of the parties.
17 [Citations omitted.] The concessions need only "indicate that further
18 face-to-face bargaining might be fruitful." *R. James Span* (1971)
19 189 NLRB 219 [76 LRRM 1671]. The courts have looked to the
20 NLRB to establish **whether concessions were substantial enough to**
21 **"open a ray of hope with a real potentiality for agreement if**
22 **explored in good faith in bargaining sessions."** *NLRB v. Webb*
23 *Furniture* (4th Cir. 1966) 366 F.2d 315 [63 LRRM 2163]. (Emphasis
24 added; *Modesto City Schools* (1983) PERB Dec. No. 291.)

25 In *Rowland Unified School District* (1994) PERB Dec. No. 1053, the Board stated:

26 ...impasse suspends the parties' obligation to bargain only until
27 changed circumstances indicate that an agreement may be possible
28 [Citations omitted.]...The duty to bargain revives when one party
proposes a concession from its earlier bargaining position which
indicates that agreement may be possible. (*Rowland Unified School*
District (1994) PERB Dec. No. 1053, citing to *PERB v. Modesto City*
School District, supra, 136 Cal. App. 3d and *NLRB v. Sharon Hats,*
Inc. (5th Cir. 1961 289 F.2d 628.) (Emphasis added.)

In *Regents of the University of California* (1996) PERB Dec. No. 1157, the Board stated:

It is well established that the declaration of impasse ends the parties'
formal obligation to meet and confer....[citations omitted] That duty
remains dormant unless revived by some changed circumstances, such
as **a significant concession by either party.** [Citations omitted]
(*Regents of the University of California* (1996) PERB Dec. No. 1157.)
(Emphasis added.)

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1 In *Orange Unified School District* (2000) PERB Dec. No. 1416, the Board stated:

2 Impasse suspends the parties obligation to bargain only until changed
3 circumstances indicate that an agreement may be reached. [Citation
4 omitted.] However, the duty to bargain is revived when one party
5 proposes a **concession** from its earlier bargaining position **which**
6 **indicates that agreement may be possible.** (Emphasis added;
7 *Orange Unified School District* (2000) PERB Dec. No. 1416.)

8 The Board's precedent on "changed circumstances" under EERA has been recognized under
9 the Dills Act, albeit in an administrative law judge (ALJ) decision. In *State of California*
10 (*Department of Personnel Administration*) (1992) Docket No. S-CE-518-S, 16 PERC 23059, ALJ
11 Fred D'Orazio stated:

12 Changed circumstances or significant concessions by either party may
13 break the impasse and reestablish the obligation to continue
14 negotiations. (*Modesto City Schools, supra*, PERB Decision No. 479,
15 pp. 32-34; *Charter Oak Unified School District* (1991) PERB
16 Decision No. 873, pp. 9-10). As the Board observed in *Modesto*, at p.
17 34, [U]nder NLRB precedent, impasse suspends the bargaining
18 obligation only until 'changed circumstances' indicate an agreement
19 may be possible. [Citations omitted] 'Changed circumstances' are
20 those movements or conditions which have a significant impact on the
21 bargaining equation. Among the circumstances which will restore the
22 obligation to negotiate is a concession or series of concessions by one
23 of the parties. [Citation omitted] The concessions need only 'indicate
24 that further face-to-face bargaining might be fruitful.' [Citation
25 omitted] The courts have looked to the NLRB to establish whether
26 concessions were substantial enough to 'open a ray of hope with a real
27 potentiality for agreement if explored in good faith in bargaining
28 sessions.' [Citation omitted]

29 Based on the foregoing PERB authorities, in order to establish that impasse has been broken,
30 the Union must show not just *any* "changed circumstance" but rather, a concession or movement that
31 has a significant impact on bargaining that indicates an agreement may be possible.

32 2. Lack of legislative approval does not increase the potential for agreement

33 Despite this well established PERB doctrine, CCPOA argues failure to secure legislative
34 approval for the economic terms in the State's last, best and final offer constitutes a changed
35 circumstance breaking impasse, thus requiring DPA to resume negotiations.

36 As set forth above, the Union must show a concession or movement that has a significant
37 impact on bargaining that indicates an agreement may be possible. That DPA has yet to secure
38 legislative approval in no way indicates a change in circumstances or that an agreement may be

1 possible. A more reasoned view would find this circumstance to be an impediment rather than a
2 “significant ray of hope” of the concessions CCPOA desires.

3 First, there is no statutory authority that permits DPA to enact legislation to implement the
4 economic portions of the State’s Implemented Terms. Such a provision would, of course, violate the
5 separation of powers doctrine. Rather, Government Code section 3517.8 simply provides that any
6 proposal in the state employer’s last, best, and final offer that, if implemented, would...require the
7 expenditure of funds shall be presented to the Legislature for approval....” (Gov. Code, § 3517.8.)
8 Independent of DPA’s role in presenting the proposal to the Legislature for approval, is the
9 Legislature’s role in enacting the bill, which is outside of DPA’s statutory purview.

10 Second, CCPOA is premature in declaring there has been a failure to secure legislative
11 approval. The State implemented its LBFO on September 18, 2007. The Legislature did not resume
12 session until January 7, 2008. (Decl. Pamela Schneider, ¶ 10.) Thus, it has been less than four
13 months that the Legislature would have had an opportunity to enact any bill. Further, a bill can be
14 amended at any time to include new language up until the last day of the Legislature’s session,
15 which is August 31, 2008. (Decl. Pamela Schneider, at ¶ 7.) This is what happened with the bill
16 CCPOA attempted to pass last session to increase bargaining Unit 6 compensation. (Decl. Pamela
17 Schneider, at ¶ 7.) That bill contained different language but on the last day of session, CCPOA
18 found an author to amend the bill with the new language. (*Id.*) Also, typically with MOU bills,
19 where an MOU is being approved by the Legislature, the bill is not amended until July or August,
20 but still is able to complete the legislative process, by receiving rule waivers. (Decl. Pamela
21 Schneider, ¶ 10.) Therefore, the Legislature has until August 31, 2008 to enact a bill to implement
22 the economic terms of the State’s LBFO.

23 Third, CCPOA contends that if the LBFO is not approved by the Legislature within a
24 reasonable time period, the financial terms will lapse and not be controlling which presumably
25 implicates Government Code section 3517.7. (Request for IR, at 5:18-20.) There is no legal support
26 for this statement and CCPOA offers none. The plain language of section 3517.7 reveals the section
27 would not apply to the current situation. Government Code section 3517.7 states: “If the
28 Legislature does not approve or fully fund any **provision of the memorandum of understanding**

1 which requires the expenditure of funds, either party may reopen negotiations on all or part of the
2 **memorandum of understanding.**” (Emphasis added.) The Legislature would not be approving or
3 disapproving any provision of the memorandum of understanding; rather the Legislature would be
4 approving an Implemented Term. Thus, on its face, section 3517.7 does not apply because there is
5 no MOU.

6 Lastly, CCPOA argues, without injunctive relief, the State will be able to avoid its obligation
7 under Government Code section 3517 to bargain prior to the State’s final budget. (Request for IR, at
8 11:7-8.) However, like Government Code section 3517.7, section 3517 also contemplates a scenario
9 where the parties are negotiating a memorandum of understanding, and not where the parties are at
10 impasse and the State has implemented its LBFO.

11 Government Code section 3517 provides the State Employer endeavor to reach agreement on
12 matters within the scope of representation prior to the adoption by the state of its final budget for the
13 ensuing year and the process should include adequate time for the resolution of impasses. (Gov.
14 Code, § 3517.) Thus, section 3517 applies to “agreements” and not to “Implemented Terms.” The
15 parties have already endeavored to reach an agreement, but after being unable to and impasse
16 declared, the State implemented its LBFO pursuant to Government Code section 3517.8. Now, it is
17 up to the Legislature to decide whether to approve expenditures for the Implemented Terms, as set
18 forth in Government Code section 3517.8.

19 Further, PERB has ruled the State does not commit an unfair labor practice if it does not
20 present economic proposals prior to the budget. In *State of California (Department of Personnel*
21 *Administration)* (1986) PERB Dec. No. 569, PERB found that “the statutorily imposed obligation
22 “to endeavor” can by no means be interpreted to create an absolute standard pursuant to which a
23 failure to present proposals by June 15 must be judged a per se violation.”

24 Given the fact no favorable changes have occurred and the Legislature still has the
25 opportunity to act, CCPOA has failed to establish an unfair labor practice.

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1 **3. A fiscal crisis and budget cuts do not increase the potential for agreement**

2 The State's fiscal crisis is not a change in circumstance that warrants renewed bargaining
3 because CCPOA has made no concessions and no movement to indicate that an agreement may be
4 possible.

5 There exists no reasonable cause to conclude the statewide fiscal emergency constitutes a
6 change of circumstance breaking the current state of impasse and giving rise to a duty to bargain
7 because there has been no concession nor any movement to indicate an agreement may be possible.
8 (*Rowland Unified School District, supra*, PERB Dec. No. 1053.) Returning to the bargaining table
9 would be futile.

10 CCPOA argues the fiscal emergency has created a new possibility for fruitful discussion by
11 speculating as to how CDCR's planned cost-cutting would affect their employees. In making this
12 argument, CCPOA relies on *Kit Manufacturing*. (*Kit Manufacturing Company, Inc.* (1962)
13 138 NLRB 1290). CCPOA concedes *Kit Manufacturing* is distinguishable from the current situation
14 because it involves improved financial conditions yet wishes to convince PERB that the reasoning
15 and analysis should apply to the current situation. In *Kit Manufacturing* the parties were at impasse.
16 A changed circumstance occurred when the employer experienced an unexpected inordinate amount
17 of profit, as CCPOA admits in its own pleading. The opposite is true here. CCPOA offers no
18 explanation as to why a fiscal emergency in 2008 would create a possibility for fruitful discussion
19 when stable financial conditions in 2007 failed to do so. If anything the changed fiscal crisis has
20 reduced the likelihood that an agreement is possible. The statement by CCPOA that there exists a
21 current fiscal emergency is neither a concession nor an indication that an agreement may be possible.

22 CCPOA makes blanket demands to negotiate without any indication of concession or
23 movement toward an agreement. (Rodrigues Decl., ¶ 7.) In fact, CCPOA's return to bargaining is
24 conditioned on operating under the terms of the non-existent MOU.

25 A "vague request by one party for additional meetings, if unaccompanied by an indication of
26 the areas in which that party foresees future concessions, is equally insufficient to defeat an impasse
27 where the other party has clearly announced that its position is final." (*TruServ Corp. vs. NLRB*
28 (D.C. Cir. 2001) 254 F.3d 1105) In *TruServ Corp.*, following impasse, the Union's attorney made

1 statements that no impasse existed and requested further negotiations. (*Id.*) The court found no facts
2 to show the impasse broke and indicated “[a]bsent conduct demonstrating willingness to
3 compromise further, a bald statement of disagreement by one party to the negotiations is insufficient
4 to defeat an impasse.” (*Id.* at 1117.) Similarly, CCPOA’s correspondence demands a conditioned
5 return to the negotiating table and without demonstrating a willingness to work toward an
6 agreement.

7 Mere statements of willingness to return to the table are not enough. “There must be
8 substantial evidence in the record that establishes changed circumstances sufficient to suggest that
9 future bargaining would be fruitful.” (*Serramonte Oldsmobile, Inc. v. NLRB* (D.C. Cir. 1996) 318
10 U.S. App.D.C. 153, at 233) The court of appeals stated that “not a single one of the Union’s
11 statements ... actually committed the Union to a new position or contained any specific proposals
12 [reflecting] only vague generalities and neither explicitly agreed to any of the employer’s proposals
13 nor offered any specific counterproposals.” (*Id.*) The court found the union’s statement offered
14 “about as much as a handful of air.” (*Id.*) Concluding that there exists no “basis for requiring a
15 negotiating party to probe the sincerity of another party’s contentless statements after an impasse has
16 already been reached” the court pointed out that “it is incumbent on the party asserting that the
17 impasse has been broken to point to the changed circumstances that would justify such a finding.”
18 (*Id.*)

19 Thus, it is unreasonable to conclude that the impasse is broken and the Board, based upon its
20 precedent, must refuse to support CCPOA’s request for an injunction.

21 **4. The decision to implement only the first year as economic proposals in**
22 **response to a PERB complaint does not increase the potential for**
23 **agreement**

24 The union alleges as another example of change of circumstance “the issuance by PERB of a
25 complaint against the State, which resulted in the State’s voluntary rescission of years two and three
26 of its LBFO.” (Charge addendum, ¶ 6 (d), p.2.) First, the allegation on its face is incorrect. The
27 State did not modify its LBFO, but withdrew “the second- and third-year *economic proposals of its*
28 *implementation package.*” (Adam Declaration, Exh. B., Starkey letter to Roger Smith, dated
December 13, 2007, ¶ 3; emphasis added.) The letter goes on to state, “The State will continue to

1 implement the first year of the economic proposal, *subject to Legislative approval.*” (*Id.*; Emphasis
2 added.) CCPOA is correct, however, that the State’s response was made in view of the PERB
3 complaint and was done to moot the “three-year duration” issue of the complaint. (*Ibid.*, ¶ 4; also
4 Exh. A, complaint, ¶¶ 4-7.) Moreover, the Union fails to allege any facts to show how this action by
5 the State constituted a “changed circumstance” that would require renewed bargaining. As charging
6 party, the Union bears the burden to state sufficient facts to state a claim. An unfair practice charge
7 must include a “clear and concise statement of the facts and conduct alleged to constitute an unfair
8 practice.” (Cal. Code Regs., tit. 8, § 32615, subd. (a)(5).) The charging party’s burden includes
9 alleging the “who, what, when, where and how” of an unfair practice. (*State of California*
10 (*Department of Food and Agriculture*) (1994) PERB Decision No. 1071-S, citing *United Teachers-*
11 *Los Angeles (Ragsdale)* (1992) PERB Decision No. 944.) Mere legal conclusions and argument are
12 insufficient to state a prima facie case. (*Ibid.*; *Charter Oak Unified School District* (1991) PERB
13 Decision No. 873.) Because the Union has alleged no facts to show that the stalemate has been
14 broken, the charge fails.

15 Turning to CCPOA’s argument, it also fails because it confuses bargaining proposals with
16 the State’s statutory right to implement “any or all of its last, best and final offer.” (Gov. Code, §
17 3517.8.) What the Union characterizes (without facts) as a “concession” (Request for IR, 9:20) is
18 simply the State determining how it intends to implement the terms of its LBFO. It is not a
19 concession that revives the opportunity for bargaining. In fact, because the parties are post impasse
20 and the State has implemented, the issue of salaries and economic proposals lie with the Legislature,
21 not DPA.

22 For all of the above reasons, CCPOA fails to support its charge.

23 **B. The Union’s Charge Fails To Show That Extraordinary Injunctive Relief Is**
24 **Warranted And Just And Proper**

25 **1. The Union cannot meet the high standard necessary to show irreparable**
26 **harm**

27 The primary issue in a request for injunctive relief is whether relief is just and proper. The
28 grant of injunctive relief is an extraordinary power to be exercised always with great caution and
should be undertaken only in those cases where it appears that the moving party will suffer

1 irreparable harm in the absence of speedy relief.¹ (*Eureka School District* (1980) PERB Dec. No.
2 IR-14 [4 PERC ¶11096].) It may be used only when an employer has committed an unfair labor
3 practice which, under the circumstances, would “render any final order of the Board meaningless or
4 so devoid of force that the remedial purposes of the Act will be frustrated.” (*Public Employment*
5 *Relations Board v. Modesto City School Districts*, *supra* 136 Cal.App.3d at 902-903.) In order to
6 find that an injunction would be just and proper, the Board must determine that (1) the purpose of
7 the relevant labor relations statutes would be frustrated absent injunctive relief, (2) the efficacy of a
8 PERB final order may be nullified or (3) PERB’s administrative procedures would be rendered
9 meaningless. (*Id.*; *Agricultural Labor Relations Bd. v. Cal. Coastal Farms, Inc.* (1982) 31 Cal.3d.
10 469, 480.) An injunction is an extraordinary remedy and the courts consistently proceed only with
11 great caution in exercising this power, and have required a clear showing that the threatened and
12 impending injury is great, and can be averted only by the injunction. (*Fremont Unified School Dist.*
13 (1990) PERB Order No. IR-54, p. 8.) A court is precluded from granting injunctive relief in any
14 case involving or growing out of a labor dispute except after finding, among other things, irreparable
15 harm. (Labor Code § 1138.1, subd. (a).)

16 As discussed below CCPOA has failed to demonstrate “extraordinary circumstances” for
17 which injunctive relief is warranted in this instance. CCPOA fails to allege any irreparable harm, or,
18 any legally cognizable harm whatsoever.

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27 ¹ In Fiscal Year 2006-2007, only one out of 16 injunctive relief requests considered by PERB
28 was granted. This reflects the “high standard of proof the affected party must meet when attempting
to pursue this course of action.” (PERB Annual Report: Letter of Chair Karen L. Neuwald, October
15, 2007.)

1 **2. Injunctive relief is not just and proper because the purpose of the Dills**
2 **Act is not frustrated and the Union will not suffer independent**
3 **irreparable harm.**

4 **(a) The purpose of the Dills Act is not frustrated**

5 CCPOA fails to identify any irreparable harm that requires PERB to seek injunctive relief.
6 There are no facts to demonstrate the purpose of the Act will be frustrated unless temporary relief is
7 granted. Rather, the State is acting lawfully and consistently with rights guaranteed to it by the Dills
8 Act.

9 **(i) As a matter of law, the State has the prerogative to**
10 **implement any or all terms of its LBFO except as expressly**
11 **limited by the Legislature (Gov. Code, §§ 3517 and 3517.8)**

12 The Union fails to rebut the State's statutory prerogative to implement terms at a stalemate.
13 Government Code section 3517.8 allow an employer to implement "any or all" of the proposals in its
14 LBFO. In implementing any or all of its LBFO, the State is lawfully doing what the Dills Act
15 permits it to do. This is not a frustration of the Dills Act, and therefore this conduct – following the
16 statutory provision – does not amount to irreparable harm.

17 **(ii) Because legislative approval may still be obtained the**
18 **Union fails to state a claim for injunction**

19 Contrary to CCPOA's assertions, the issuance of injunctive relief would operate to frustrate
20 the purpose of the Dills Act. Government Code section 3517.8 provides that any proposal in the
21 state employer's last, best, and final offer that, if implemented, would ... require the expenditure of
22 funds shall be presented to the Legislature for approval ..." (Gov. Code § 3571.8.)

23 DPA has not failed to obtain legislative approval, as alleged. (Request for IR, at 5:2.)
24 Rather, the state presented the proposed bill language to the Legislature. The state has honored its
25 commitment to take the proposal to the Legislature, since the time the Legislature reconvened in
26 January 7, 2008. Further, the time to secure legislative approval does not expire until the legislative
27 session ends in August 31, 2008. Thus, the Legislature has adequate time remaining in which it may
28 act upon the LBFO. Moreover, the proposal is now in the Legislature's hands and out of DPA's
29 purview.

1 Further, all the parties comprehend that under the separation of powers doctrine, the
2 Legislature is an independent body which may choose to act or not act in its legislative authority.
3 Neither PERB or the parties may force the Legislature to act through the injunctive relief process.

4 **(iii) The PERB administrative process provides an adequate**
5 **legal remedy**

6 CCPOA is wrong in its claim that “the State’s refusal to bargain, following numerous
7 changes in bargaining-related circumstances, necessarily satisfies the irreparable harm standard.”
8 (Request for IR, at 10:19-21.) Assuming, for argument, CCPOA establishes the State improperly
9 refused to bargain, an adequate legal remedy is available: an order to bargain. There is no need for
10 PERB to resort to the courts for injunctive relief. In fact, if time is of the essence, the Board may
11 expedite this matter without seeking relief in court. By exercising its own authority, the Board can
12 elevate this matter as a priority for decision. (Cal. Code Regs., tit. 8, § 32147.) For this reason,
13 PERB’s ordinary administrative procedures are not rendered meaningless. The union will not suffer
14 irreparable harm if the Board resorts to its own process to expedite this dispute, if necessary.

15 **(b) CCPOA will not suffer independent irreparable harm in the**
16 **absence of injunctive relief**

17 CCPOA alleges it will suffer independent irreparable harm if the State is not ordered to cease
18 refusing to bargain. (Request for IR, at 10:24.) It further contends the Dills Act imposes a “duty to
19 ‘[m]eet and confer in good faith’ ... to endeavor to reach agreement on matters within scope of
20 representation prior to the adoption by the state of its final budget for the ensuing year. The process
21 should include adequate time for the resolution of impasses.” (Request for IR at 10:25-27, 11:1-2,
22 citing Gov. Code § 3517.) As stated above, section 3517 applies to “agreements” and not
23 “implemented terms.” Additionally, the State does not commit an unfair practice if it does not
24 present proposals prior to the June 15 budget deadline. (See *State of Cal. (Dept. of Personnel*
25 *Admin.)*, *supra*, PERB Dec. No. 569.) Yet, without any analysis or explanation, CCPOA concludes
26 irreparable harm must be prevented. Speculative assumptions do not create irreparable harm. To
27 establish irreparable harm, the injury must be immediate and not speculative, and must be supported
28 by actual evidence. “An injunction cannot issue in a vacuum bases on the proponent’s fears about

1 something that may happen in the future.” (*Korean Philadelphia Presbyterian Church v. California*
2 *Presbytery* (2000) 77 Cal.App.4th 1069, 1084.) Before the trial court can exercise its discretion “the
3 applicant must make a prima facie showing of entitlement to injunctive relief. The applicant must
4 demonstrate a real threat of immediate and irreparable injury [citations] due to the inadequacy of
5 legal remedies.” (*Triple A Machine Shop, Inc. v. State of California* (1989) 213 Cal.App.3d 131,
6 138.)

7 **(i) The Union’s implicit claim of monetary harm is insufficient**
8 **to obtain injunctive relief**

9 To the extent CCPOA’s claim alleges irreparable harm will occur because it will be
10 prejudiced in its ability to negotiate with the State over wages, or other items of economic value,
11 such harm still does not constitute irreparable harm warranting injunctive relief. (See Request for IR
12 at 11:14-15.) Generally speaking, monetary harm is insufficient. (*White v. Davis* (2003) 30 Cal.4th
13 528, 556.) Such harm can be remedied by retroactive application of the economic terms. Such harm
14 may also be remedied by an order to bargain, issued by PERB after a hearing on the merits of an
15 unfair practice charge. For these reasons, injunctive relief is not warranted or proper.

16 **(ii) The Union’s claims of loss of status are speculative and**
17 **contradicted by the actions of the parties post**
18 **implementation**

19 CCPOA has provided no evidence that a single member has left or intends to leave the
20 organization due to CCPOA’s loss of status directly resulting from DPA’s implementation of its
21 LBFO.

22 Without demonstrating any actual harm, CCPOA speculates that DPA’s implementation of
23 its LBFO will cause it to lose status in the eyes of its membership and concludes without analysis
24 that irreparable harm is presumed under that circumstance. (Req. for Injunctive Relief, p. 11.)

25 CCPOA utterly fails to demonstrate that loss of status among its membership, if any, is due
26 to or attributable to DPA’s implementation of its LBFO as opposed to its own conduct during the
27 entire bargaining process. Further, there is no evidence of any harm to CCPOA or its members.
28 There is no evidence of defections from the union or that its membership is dwindling due to the
implementation of the LBFO.

1 **II. THE UNION'S CONDUCT AND THE FACTS OF THIS CASE BAR EQUITABLE**
2 **RELIEF**

3 **A. The Union's "Unclean Hands" Bar Injunctive Relief**

4 The defense of unclean hands arises from the maxim, "He who comes into Equity must come
5 with clean hands." (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1059.) The unclean hands
6 doctrine is available in legal as well as equitable actions. (*Fibreboard Paper Products Corp. v. East*
7 *Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 728; *Burton v. Sosinsky* (1988) 203
8 Cal.App.3d 562; 574.) The doctrine demands that a plaintiff act fairly in the matter for which he
9 seeks a remedy. He must come into court with clean hands, and keep them clean, or he will be
10 denied relief, regardless of the merits of his claim. (*Precision Co. v. Automotive Co.* (1945) 324
11 U.S. 806, 814-815; *Hall v. Wright* (9th Cir. 1957) 240 F.2d 787, 794-795.) As stated by the
12 California Supreme Court in *Lynn v. Duckel*, (1956) 46 Cal.2d 845, 850:

13 The rule is settled in California that whenever a party who, as actor,
14 seeks to set judicial machinery in motion and obtain some remedy, has
15 violated conscience, good faith or other equitable principle in his prior
16 conduct, then the doors of the court will be shut against him *in limine*;
the court will refuse to interfere on his behalf to acknowledge his right,
or to afford him any remedy.

17 The Union has indicated it will only go to the bargaining table on a conditional basis. It
18 improperly insists that the expired MOU be reinstated before it is willing to enter into any
19 negotiations. This conduct is an exhibition of behavior that gives rise to the claim of unclean hands.

20 **B. The Union Is Estopped To Seek Injunctive Relief**

21 At this time of crisis and overcrowding in California's prison system, a fact of which the
22 Board can take administrative notice, there are no reasonable grounds for the State to continue to
23 suffer the Union's bad faith tactics. As a matter of necessity, the State must move forward by
24 implementing the LBFO. The citizens of the State of California expect and deserve that their
25 government will do its job, within the bounds of the law. The September 18, 2007, implementation
26 of the LBFO is nothing more and nothing less.

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1 **CONCLUSION**

2 For the foregoing reasons, the request for extraordinary injunctive relief should be denied.

3 Dated: March 13, 2008

4 Respectfully submitted,

5 K. WILLIAM CURTIS
6 Chief Counsel

7 WARREN C. STRACENER
8 Deputy Chief Counsel

9
10 By: 

11 PAUL M. STARKEY
12 Labor Relations Counsel
13 Attorneys for Respondent
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1 **PROOF OF SERVICE**

2 CASE NAME: California Correctional Peace Officers Association v. State of California
3 (Department of Personnel Administration)

4 CASE NUMBER: UPC No. SA-CE-1665-S; IR Request No. 542

5 I, Renee Whitehead, declare:

6 I am employed in the County of Sacramento, California. I am over the age of 18 years, and
7 not a party to the within action. My business address is 1515 S Street, North Building, Suite 400,
8 Sacramento, California 95811-7258. I am readily familiar with my employer's business practice for
9 collection and processing of correspondence for GSO, U.S. Mail, Fax Transmission and/or Personal
10 Service.

11 On March 13, 2008, I caused the following documents to be served:

- 12 1) **OPPOSITION TO REQUEST FOR INJUNCTIVE RELIEF;**
13 2) **DECLARATION OF KRISTINE RODRIGUES IN SUPPORT OF THE**
14 **OPPOSITION TO REQUEST FOR INJUNCTIVE RELIEF; and**
15 3) **DECLARATION OF PAMELA SCHNEIDER IN SUPPORT OF THE**
16 **OPPOSITION TO REQUEST FOR INJUNCTIVE RELIEF.**

17 on the parties listed as follows:

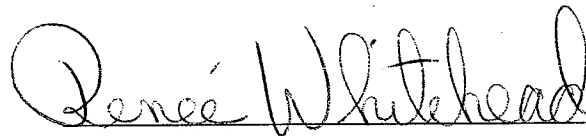
18 XX via faxing a true copy followed by e-mail as well as overnight mail by GSO.

19 Gregg McLean Adam, Esq.
20 Carroll, Burdick & McDonough, LLP
21 44 Montgomery, Suite 400
22 San Francisco, CA 94104-4606
23 Fax (415) 989-0932
24 E-mail: gadam@cbmlaw.com

25 Christine Albertin
26 California Correctional Peace Officers Association
27 755 Riverpoint Drive, Suite 200
28 West Sacramento, CA 95605-1634
Fax (916) 372-9805
E-mail: christine.albertine@ccpoa.org

29 I declare under penalty of perjury under the laws of the State of California that the above is
30 true and correct.

31 Executed on March 13, 2008, at Sacramento, California.

32 
33 Renee Whitehead