



**STATE OF CALIFORNIA  
PUBLIC EMPLOYMENT RELATIONS BOARD  
UNFAIR PRACTICE CHARGE**

**DO NOT WRITE IN THIS SPACE:** Case No: \_\_\_\_\_ Date Filed: \_\_\_\_\_

**INSTRUCTIONS:** File the original and one copy of this charge form in the appropriate PERB regional office (see PERB Regulation 32075), with proof of service attached to each copy. Proper filing includes concurrent service and proof of service of the charge as required by PERB Regulation 32615(c). All forms are available from the regional offices or PERB's website at [www.perb.ca.gov](http://www.perb.ca.gov). If more space is needed for any item on this form, attach additional sheets and number items.

IS THIS AN AMENDED CHARGE? YES  NO

1. CHARGING PARTY: EMPLOYEE  EMPLOYEE ORGANIZATION  EMPLOYER  PUBLIC<sup>1</sup>

a. Full name: Service Employees International Union, Local 1000  
 b. Mailing address: 1808 14th Street, Sacramento, CA 95811  
 c. Telephone number: (916) 554-1279  
 d. Name, title and telephone number of person filing charge: Paul E. Harris, III, Chief Counsel. (916) 554-1279  
 e. Bargaining unit(s) involved: 1, 3, 4, 11, 14, 15, 17, 20 and 21

2. CHARGE FILED AGAINST: (mark one only) EMPLOYEE ORGANIZATION  EMPLOYER

a. Full name: Department of Personnel Administration / Governor Arnold Schwarzenegger  
 b. Mailing address: 1515 "S" Street, North Building, Suite 400, Sacramento, California 95811-7258  
 c. Telephone number: (916) 324-0512  
 d. Name, title and telephone number of agent to contact: K. William Curtis, Chief Counsel, DPA (916) 324-0512

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 PERSONNEL BOARD  
 SACRAMENTO

3. NAME OF EMPLOYER (Complete this section only if the charge is filed against an employee organization.)

a. Full name:  
 b. Mailing address:

4. APPOINTING POWER: (Complete this section only if the employer is the State of California. See Government Code section 18524.)

a. Full name: State of California, Department of Personnel Administration  
 b. Mailing address: 1515 "S" Street, North Building, Suite 400, Sacramento, California 95811-7258  
 c. Agent: K. William Curtis, Chief Counsel, DPA (916) 324-0512

<sup>1</sup> An affected member of the public may only file a charge relating to an alleged public notice violation, pursuant to Government Code section 3523, 3547, 3547.5, or 3595, or Public Utilities Code section 99569.

5. GRIEVANCE PROCEDURE

Are the parties covered by an agreement containing a grievance procedure which ends in binding arbitration?

Yes  No

6. STATEMENT OF CHARGE

a. The charging party hereby alleges that the above-named respondent is under the jurisdiction of: (check one)

- Educational Employment Relations Act (EERA) (Gov. Code sec. 3540 et seq.)
- Ralph C. Dills Act (Gov. Code sec. 3512 et seq.)
- Higher Education Employer-Employee Relations Act (HEERA) (Gov. Code sec. 3560 et seq.)
- Meyers-Miliias-Brown Act (MMBA) (Gov. Code sec. 3500 et seq.)
- Los Angeles County Metropolitan Transportation Authority Transit Employer-Employee Relations Act (TEERA) (Pub. Utilities Code sec. 99560 et seq.)
- Trial Court Employment Protection and Governance Act (Trial Court Act) (Article 3; Gov. Code sec. 71630 – 71639.5)
- Trial Court Interpreter Employment and Labor Relations Act (Court Interpreter Act) (Gov. Code sec. 71800 et seq.)

b. The specific Government or Public Utilities Code section(s), or PERB regulation section(s) alleged to have been violated is/are: Government Code, sections 3512, 3515, 3515.5 and 3519

c. For MMBA, Trial Court Act and Court Interpreter Act cases, if applicable, the specific local rule(s) alleged to have been violated is/are **(a copy of the applicable local rule(s) MUST be attached to the charge):**

d. Provide a clear and concise statement of the conduct alleged to constitute an unfair practice including, where known, the time and place of each instance of respondent's conduct, and the name and capacity of each person involved. This must be a statement of the facts that support your claim and *not conclusions of law*. A statement of the remedy sought must also be provided. *(Use and attach additional sheets of paper if necessary.)*

See Attachment d.

DECLARATION

I declare under penalty of perjury that I have read the above charge and that the statements herein are true and complete to the best of my knowledge and belief and that this declaration was executed on August 10, 2009 (Date)

at Sacramento, California (City and State)

J. Felix De La Torre (Type or Print Name)

J. Felix De La Torre (Signature)

Title, if any: Staff Attorney, SEIU Local 1000

Mailing address: 1808 14th Street, Sacramento, CA 95811

Telephone Number: (916) 554-1279

AMENDED STATEMENT OF CHARGE

I. INTRODUCTION

The Service Employees International Union, Local 1000 (hereafter "Union") is the exclusive bargaining representative pursuant to the Ralph C. Dills Act ("Dills Act") for State employees in Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20, and 21. These bargaining units represent over 90,000 state employees, in classifications ranging from nurses to analysts, among many others. This charge alleges that Governor Schwarzenegger and the Department of Personnel Administration ("DPA") violated sections 3512, 3515, 3515.5 and 3519 of the Dills Act. Specifically, Local 1000 alleges that the actions alleged herein constitute bad faith bargaining, a unilateral change to a mandatory subjects of bargaining, failure to execute the agreed-on contract, repudiation of the existing MOU, as well as an additional charge of interference and discrimination based on the exercise of protected rights.

II. RELEVANT FACTS

In the midst of the financial downturn, Local 1000 started negotiating a revised Memorandum of Understanding for Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20, and 21.<sup>1</sup> At the time, Governor Schwarzenegger was fully aware of the State's financial predicament, and with that in mind, directed his agent, DPA to bargain a successor contract with Local 1000.

The MOU between the State of California and Local 1000 expired on June 30, 2008. [Exhibit A] Nevertheless, the State of California must continue to give full effect to the expired MOU until the parties agree on a successor contract or impasse procedures are exhausted. (Cal. Gov. Code § 3517.8) Accordingly, the pre-established salaries in the MOU remain in full force and effect. Article 11 of the MOU contains a comprehensive scheme that provides for the payment of pre-established salaries for those employees represented by Local 1000. [Exhibit A, pp. 116 - 158] In addition, the parties included several appendixes that established the specific salary ranges for each classification represented by Local 1000. [Exhibit B](Appendixes: A, C, E, G, I, K, M, O, and Q) The MOU generally defines a salary range as: "the range of rates between, and including, the minimum and maximum rate currently authorized for the class." [Exhibit A, Article 11.1, p. 121]

The MOU further includes a "zipper clause", which prohibits any changes to the agreed upon terms and conditions while the MOU is in effect. Article 24.1 provides:

The parties acknowledge that during the negotiations which resulted in this Contract, each had unlimited right and opportunity to make demands and proposals with respect to any subject or matter not removed by law from the area of collective bargaining, and that the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Contract. Any other prior or existing understanding or agreement by the parties, whether formal or informal, regarding any such

<sup>1</sup> All provisions of the expired MOU remain in effect. (Govt. Code section 3517.8(a).)

matters is hereby superseded. *Except as provided in this Contract, it is agreed and understood that each party to this Contract voluntarily waives its right to negotiate with respect to any matter raised in negotiations or covered in this Contract.*

[Exhibit A, p. 307-308]

On or about November 6, 2008, Governor Arnold Schwarzenegger issued a letter to "Valued State Workers." [Exhibit C] In this letter, the Governor addressed the projected revenue shortfall confronting the State, and the need for spending reductions. The Governor also acknowledged that "spending reductions will impact our state workers". [Id.] In doing so, the Governor pointed out those State workers "deliver important services every day." Nonetheless, his letter proposed a pay cut of five percent (5%):

"Furloughs: All state employees will be furloughed one day each month for the next year and half, a total of 19 days. This will result in a pay cut of about **5 percent**. The pay cut will not affect retirement and other benefits for which you are eligible."

[Id.](Emphasis added)

As stated in the letter, the Governor made it clear that his goal was to reduce the salaries of represented state employees by "about 5 percent." [Id.] Finally, the Governor assured the state workers that he was "working closely with union leadership to achieve results in the least painful way possible." [Id.] In the interim, the Governor, through DPA, has been negotiating a successor MOU. Those negotiations involve discussions about the proposed furlough plan's impact on the successor contract. But at no time did DPA and Local 1000 meet and confer, or bargain, over the furlough's changes the pre-established salaries under the current MOU. While the parties were in the midst of addressing the one-day per month furlough, the State unilaterally implemented a two-day per month furlough.

On or about, December 19, 2008, Governor Arnold Schwarzenegger signed Executive Order S-16-08 ("Order S-16-08"), which instituted two monthly furlough days for state employees and supervisors effective February 1, 2009 through June 30, 2010. Order S-16-08 also instructed DPA to implement an equivalent furlough or salary reduction for all state managers, and instructed DPA to initiate layoffs and other position reduction measures to decrease the size of the state employee workforce. Specifically, the Order recites:

"IT IS ORDERED that effective February 1, 2009 through June 30, 2010, the Department of Personnel Administration shall adopt a plan to implement a furlough of represented state employees and supervisors for two days per month, regardless of funding source. This plan shall include a limited exemption process.

IT IS FURTHER ORDERED that effective February 1, 2009 through June 30, 2010, the Department of Personnel Administration shall adopt a plan to implement an equivalent

furlough or salary reduction for all state managers, including exempt state employees, regardless of funding source.

IT IS FURTHER ORDERED that effective January 1, 2009 through June 30, 2010, the Department of Personnel Administration shall work with all State agencies and departments to initiate layoffs and other position reduction and program efficiency measures to achieve a reduction in General Fund payroll of up to ten percent. A limited exemption process shall be included.

IT IS FURTHER ORDERED effective January 1, 2009, the Department of Personnel Administration shall place the least senior twenty percent of state employees funded in any amount by General Fund resources on the State Restriction of Appointment (SROA) list."

**[Exhibit D]**

Local 1000 did not agree to make any changes to the current MOU's salary ranges or hours of work. As a consequence, the salary ranges and pay rates remain in full force and effect. Despite the State contractually agreed to maintain the current salary ranges in the MOU, the Governor implemented an approximate ten percent (10%) salary reduction through the illegal furlough Order. The executive order violates the current MOU as they reduce the salaries of the Local 1000 members by fifteen (10%) percent. The State, however, refused to meet and confer over the furloughs, claiming that the financial crisis qualified as an "emergency," under Government Code, section 3516.5, which allowed the State to forego bargaining. [Id.]

As support for this Order, the Governor relies on Section 3516.5, which states:

- (a) Except in cases of emergency as provided in this section, the employer shall give reasonable written notice to each recognized employee organization affected by any law, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the employer, and shall give such recognized employee organizations the opportunity to meet and confer with the administrative officials or their delegated representatives as may be properly designated by law.
- (b) In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the administrative officials or their delegated representatives as may be properly designated by law shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation.

There are a number of flaws with the Governor's reliance on section 3516.5. First and foremost, Section 3516.5 does not give the Governor the power to unilaterally change the salaries of state employees. In fact, section 3516.5 has nothing to do with furloughs, the setting of salaries, or establishing work days and work weeks for state employees. Section 3516.5 permits the state to temporarily avoid meeting and conferring with a union over a proposed change in the hours, wages and terms of conditions when the state can show there is a legitimate emergency. Section 3516.5 applies only where the change is a result of a "law, rule, resolution, or regulation." In order to invoke Section 3516.5, the Governor must show to elements: (1) there is an emergency and (2) the proposed "law, rule, resolution, or regulation" is legitimate. Because only the Legislature may pass laws and resolutions, the meet and confer exemption under section 3516.5 does not apply to executive orders. And "rules and regulations" are not legal unless each passes the California Administrative Procedures Act ("APA"). (Ca. Gov. Code § 11340 *et seq.*)

Without question, the Legislature is the only entity with the authority to pass a "law or resolution." One of the fundamental provisions of the Constitution is found in Article III, section 3, and sets forth the doctrine of separation of powers. Article III, section 3 states, "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." The separation of powers doctrine not only guards against the concentration of power in a single branch of government, it also protects one branch against the overreaching of the others. (*Kasler v. Lockyer* (2000) 23 Cal.4th 472, rehearing denied, certiorari denied 121 S.Ct. 1090.) The present case is an example of the Governor overreaching into the powers vested in the Legislature. The Legislature declares public policy and makes provisions for the ways and means of its accomplishment, while carrying out those declared policies is an administrative or "executive" function for purposes of the separation of powers doctrine. (*California Radioactive Materials Management Forum v. Department of Health Services* (1993) 15 Cal.App.4th 841, rehearing denied, review denied.) Article V, section 1, of the Constitution states in relevant part: "The Governor shall see that the law is faithfully executed." The Governor is therefore bound by the Constitution to carry out the laws and policies established by the Legislature, including those laws regarding the salaries and hours of state employees.

While a state agency or department may adopt a rule or regulation, that rule or regulation must first be authorized by a statute and subsequently adopted through the procedure contained in APA. If a state agency issues, enforces, or attempts to enforce a rule without following the APA, the rule is called an "underground regulation." (1 CCR § 250.) State agencies are prohibited from enforcing underground regulations. (*Tidewater Marine Western Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557.) Thus, section 3516.5 applies only proposed changes in the law—which is a Legislative function, or a regulation that must be authorized by a law and approved under the APA. The Governor's Order qualifies as neither a "law or resolution" or a "regulation or rule". It is well established The purpose of an executive order is to "execute" the laws; not to create laws. Thus, section 3516.5 is not applicable to an executive order which is not a proposed "law, resolution, rule or regulation." As stated before, section 3516.5 presupposes that the "law, rule, resolution, or regulation" is lawful. In other words, the Governor cannot rely on Section 3516.5 where the Governor does not have the legal authority to issue an executive order in the first place.

On January 9, 2009, the Director for the DPA issued a memorandum that outlined the Governor's furlough implementation plan. (Exhibit E) In part, DPA's implementation memo provided that:

"For operations that cannot close, Agency Secretaries (and Directors who do not report to an agency) may request approval from DPA to use a "self-directed" furlough for specific positions. There will be two types of furloughs:

- Employees take two furlough days each month but on days chosen by the employee and approved by the supervisor. For example, revenue-generating positions may be considered for this type of furlough.
- Employees accrue two furlough days per month to be taken when feasible. Furlough days that cannot be used within the same month must be taken within two years following the end of the furlough program. Furlough days will not be cashed out. Posted positions in 24/7 facilities such as prisons and hospitals automatically qualify for this self-directed furlough and do not require prior approval from DPA.

**[Exhibit E]**

At the time Governor Schwarzenegger issued Order S-16-08, Local 1000 and the State had been actively negotiating a successor MOU for several months. At no time did the State hint that it was considering furloughs as a means to address the deficit, which the Governor had known existed for some time. Also at that time, the Governor was simultaneously negotiating the State Budget with legislative leaders.

With the Governor's approval, State negotiators and Local 1000 signed the tentative agreement on the new MOU on or about February 14, 2009. The successor MOU was submitted to the Legislature on or about February 24, 2009. The final revised MOU included one furlough day per month, a wage freeze and other cost saving changes. In ratifying this agreement, state employees agreed to make personal sacrifices in order to protect state services. This agreement would have saved California more than \$337 million dollars, and over \$1 billion if those same provisions were adopted for all other state employees.<sup>2</sup> Local 1000 members ratified the MOU on or about March 21, 2009.

On February 19, 2009, the Legislature approved the 2009-10 Budget Act. The Governor signed it on February 20, 2009. The Budget appropriated the funds so that Local 1000 members would be furloughed no more than one-day per month. The Governor, however, reneged on his word by refusing to honor the agreement. Despite that both the negotiated MOU and the approved Budget only included a one-day per month furlough, and the Legislature appropriated

<sup>2</sup> This agreement has not been acted upon by the Legislature.

the funds so the employees would not have to be furloughed beyond one day, the Governor refused to alter his executive order to reduce the furloughs to one-day per month.

On the day the Legislature passed the Budget, Governor Schwarzenegger announced that the budget deal relied in part on cuts in "state workers salaries and compensation." [Exhibit F] When asked about the furloughs, Governor Schwarzenegger replied that further furloughs were still an option, stating: "*Whatever gets us the savings*. I think that with the furloughs and with the sick leave and the holidays and all of those things, I think we get tremendous savings. We just have to look if we need *any further savings*." [Id.](emphasis added) The Governor's statement shows that he wanted to preserve his ability to impose future furloughs and never intended that the deal with SEIU would be approved. As explained below, the Governor was relying on lawmakers within his own party to deliver the death blow to the MOU.

On or about May 4, 2009, Assembly Member, Roger Niello (R-Fair Oaks) lead a group of Republican lawmakers in defeating approval of the MOU. [Exhibit G] After the Republican Legislators successfully defeated approval of the MOU, the Governor's Office made statement to the press that indicated he was in agreement with his Republican colleagues' rejection of the MOU, telling one reporter that he "understood legislators'" concerns. The Governor's spokesperson then added that as a result of the MOU's defeat, "[t]he governor reserves his emergency authority to make further cuts and furloughs – as needed." [Id] In other words, the Governor acknowledged that the defeat of the MOU preserved his right to use furloughs as a tool in addressing the growing deficit. The Governor's position was now in complete contradiction to the MOU terms. The Governor knew that furloughs were an effective tool to pressure and to coerce Democratic lawmakers into making budget adjustments consistent with his personal political philosophy. In short, the Governor needed state workers as economic human shields for his political posturing. It was for this reason, the Governor lobbied Republican lawmakers, behind the scenes, to defeat the MOU. The Governor, however, did not attempt to meet and confer with Local 1000.

About a week later, on May 14, 2009, the Department of Finance issued its May Revise. The State officially learned it had at least a \$15 billion deficit, and possibly up to a \$21 billion deficit. The Governor, however, knew that a new deficit was emerging well before the Department of Finance issued its May Revise. The Governor admitted he was aware of the growing deficit from the time the initial Budget deal was signed in February 2009. In a roundtable discussion, the Governor told the audience that, "as soon as we had done the budget, which was the beginning of February, we have seen that the numbers kept changing. All of a sudden we were told that there was a \$5 billion deficit, then all of a sudden we heard of an \$8 billion deficit..." [Exhibit H] Despite that the Governor was aware of the looming deficit, he did nothing to address the deficit. Certainly, the Governor did not declare a State of Emergency, engage the Legislature, or attempt to negotiate the use of furloughs with the Unions.

When the May Revise placed the deficit at \$15 - \$21 billion, Governor Schwarzenegger still did not find that the deficit provided grounds to declare a State of Emergency or to bargain with the unions over more furloughs. When California voters rejected a series of initiatives intended to raise revenue for the State on May 19, 2009, the Governor still took no action to address the problem. Of relevance, the existence of the now confirmed \$21 billion deficit did not prompt the Governor to declare a State of Emergency or to bargain over furloughs. Instead, the

Governor used the looming crisis as a way to leverage lawmakers into giving him the budget he wanted. To be specific, the Governor told the Legislature that he would sign a Budget bill to fix the \$21 billion deficit only if the budget met his prior approval, which he described as a budget that included no additional taxes, fees, assessments or other revenue-generating mechanisms. The Governor told the Legislature:

“Do your job. Don’t come to us with these complex issues. Live within your means. Get rid of waste and inefficiencies. *And don’t raise taxes.*” [Exhibit I](emphasis added)

In essence, the Governor demanded the Legislature close the deficit without resort to a valuable tool used by government to pay for services. Governor Schwarzenegger refused to consider revenue-generating proposals despite that his own advisor found that California’s economy grew in 2008, but the deficit was a result of the state’s tax structure. [Exhibit J] This requirement made clear that the Governor reneged on his word that Local 1000 members would only be furloughed one-day per month as promised in the tentative agreement, because without the ability to raise revenue, Legislators would be forced to keep the furloughs already imposed by the Governor.

There is further evidence the Governor reneged on his deal with Local 1000. On May 28, 2009, the Governor announced that he wanted to impose a five percent across-the-board pay cut on all state workers. This announcement flew in the face of the tentative agreement in which the Governor promised Local 1000 that he would support a one-day per month furlough. Moreover, the Governor made clear he wanted the Legislature to impose the pay cut to circumvent bargaining. According to the Sacramento Bee: “Schwarzenegger wants the Democratic-controlled Legislature to impose the pay cut outside the contract-negotiation process.” [Exhibit K] This is direct evidence that the Governor was looking for options to circumvent bargaining with Local 1000 and other unions, and that he had abandoned his commitment under the tentative agreement.

On or about June 25, 2009, the Legislature drafted a budget that closed the \$21 billion deficit. Because the budget did not comport with the Governor’s specific political needs, he rejected it. [Exhibit L] The next day, the Governor threatened lawmakers that he would furlough state workers a third day if they did not deliver the budget he wanted. In a press release, the Governor stated, “I cannot force the legislature to act, so I must do what is in my power as Governor to conserve cash so that the state can continue to operate. Today I am directing all agencies to prepare to implement a third furlough day for all employees beginning July 1 ...” [Exhibit M] It was evident the Governor saw the third furlough day as a means to coerce the Legislature into giving him the budget he demanded. In his statement, the Governor further declared that he had been “clear that the legislature must solve the entire deficit and must *not increase taxes.*” [Id.](emphasis added). As important, the Governor ordered the implementation of the third furlough day before declaring a State of Emergency, as such he had no excuse to avoid meeting and conferring with the Unions at that time.

Remarkably, the Governor’s refusal to sign a budget that did not reflect his political philosophy resulted in growth of the deficit by an additional \$2 billion—which nullified any savings the Governor obtained by furloughing state employees.

When state employees exercised their protected employee rights under the Dills Act and tried to tell the Governor—"enough is enough"—he responded in bad faith by demanding pay cuts and instituting additional furlough days. On or about June 19, 2009, petitions, signed by 35,000 state employees, calling for no further pay cuts and a budget that balances the sacrifice were delivered to the Governor's offices in Sacramento, San Francisco, San Diego, Fresno, and to his home in Brentwood.

On or about June 30, 2009, and July 1, 2009, over 4,000 Local 1000 members gathered at the Capitol in Sacramento to participate in a protest rally intended to protect their pay, their benefits, and the vital state services state employees provide. Instead of addressing the state employees' legitimate concerns, on the heels of these protected employee activities, the Governor retaliated against Local 1000 members. As Local 1000 members were rallying in front of the Capitol building, the Governor signed Executive Order S-13-09 ("Order S-13-09"), which ordered DPA to institute three days per month furloughs for state employees. Specifically the order recites:

"IT IS ORDERED that effective July 1, 2009 through June 30, 2010, the Department of Personnel Administration shall adopt an amended plan to implement a furlough of represented state employees for three days per month, regardless of funding source. This plan shall include a limited exemption process.

IT IS FURTHER ORDERED that effective July 1, 2009 through June 30, 2010, the Department of Personnel Administration shall adopt an amended plan to implement an equivalent furlough or salary reduction for all non-represented state employees, including supervisors, managers, and exempt state employees, regardless of funding source."

(Exhibit N)

When the Legislature did not immediately forward the budget he demanded, the Governor threatened a fourth furlough day. Finally, in mid-July, the Legislature passed a budget that maintained the three furlough days the Governor ordered, as without the ability to raise revenues, the Legislature was forced to include savings represented by the three furlough days in the budget bill. While it was the Legislature that ultimately passed a budget which included savings "scored" from the furloughs, it was the Governor that created the circumstances that forced the inclusion of the furloughs. For the reasons listed below, the Governor and DPA's actions leading up to the Budget revision were a series of unfair labor practices.

### **III. THE GOVERNOR'S DILLS ACT VIOLATIONS: UNILATERAL CHANGES, BAD FAITH BARGAINING AND REPUDIATION OF THE MOU TERMS**

The imposition of furloughs is a unilateral change to the terms and conditions of employment under the active MOU, and evidence of bad faith bargaining as the Governor and DPA repudiated the tentative agreement. A public employer cannot change matters within the scope of representation without first providing the exclusive representative notice and an opportunity to negotiate. (*See, e.g. Public Employment Relations Bd. v. Modesto City School*

*Dist.* (1982) 136 Cal. App. 3d 881, 900.) Specifically, the law requires the State of California to meet and negotiate in good faith with a recognized representative about matters within the scope of representation. (Govt. Code section 3516 ["The scope of representation shall be limited to wages, hours, and other terms and conditions of employment"].) This section precludes an employer from making changes in the status quo without giving notice of its action to the appropriate exclusive representative. (*Anaheim City School Dist.* (1983) PERB Dec. No. 364.) Such change must have a generalized effect or continuing impact on terms or conditions of employment. (*Grant Joint Union High School Dist.* (1982) PERB Dec. No. 196 (Grant).)

The issue presented in this charge concerns the payment of wages and working hours; accordingly, the matter is clearly within the scope of representation. Additionally, the unilateral institution of three furlough days per month, which has the effect of reducing state employees' salaries by approximately fifteen (15) percent, has the requisite generalized effect and continuing impact on the bargaining units affected. (*See, e.g. State of CA (Dept. of Youth Authority)* (2000) PERB Dec. No. 1374.) Moreover, it is beyond dispute that Respondent simply chose not to abide by the bargained for successor MOU, and instead unilaterally changed the working hours and wages of state employees.

Even assuming the MOU's zipper clause did not protect Local 1000 from having to bargain over terms and conditions previously agreed to in a MOU, the Governor does not have the independent legal authority to unilaterally change the salaries of represented employees. It is true that the Governor may issue executive orders on certain matters. The Governor's power to issue executive orders originates in Article V, Section 1 of the California Constitution: The supreme executive power of this State is vested in the Governor." Because of this general authority, the Governor can issue orders regarding the actions of the executive branch of government (i.e., State agencies, etc.). But the Governor may only issue orders as allowed by statutes that allow executive discretion over particular matters. So the Governor's power to issue any specific executive order resides in various statutes, and not in any one place, like the Constitution. Therefore to know the power for any particular executive order, one needs to find the legal authority-- that is, statute -- for it. Here, the authorizing statute would have to empower the Governor to reduce salaries for represented employees. As discussed below, no such authority exists.

The Governor and DPA's disregard of the active MOU, through damaging unilateral changes to the salaries and work hours of state employees and constant interference, can only be considered a repudiation of the MOU by the State.

**A. UNILATERAL CHANGES ARE EVIDENCE OF BAD FAITH BARGAINING**

Any unilateral change in a mandatory subject of bargaining before reaching agreement or impasse is a violation of the duty to bargain in good faith because it is tantamount to a refusal to bargain. (*Public Employees Relations Bd. v. Modesto City Schools Dist.* (1982) 136 Cal. App. 3d 881, 900.) PERB describes this type of change as a "per se" refusal to negotiate. (*See Pajaro Valley Unified School Dist.* (1978) PERB Dec. No. 51 (Grant).) Moreover, the refusal to negotiate often evidences a far more invidious motivation: the desire to avoid negotiating with the union altogether. (*Pleasant Valley School Dist.* (1985) PERB Dec. No. 448 (*Pleasant Valley*) [unilateral action often discloses an unwillingness to agree with the union]; quoting *Katz*.)

On these facts, the issuance of Order S-13-19 is particularly egregious. Not only was the failure of the Legislature to pass a budget historically foreseeable, Respondent has stubbornly refused to make even the slightest attempt to negotiate with Local 1000, despite the fact that the parties had already negotiated wages at the bargaining table. Thus, it is apparent that Respondent's refusal to negotiate this change with Local 1000 is tantamount to a refusal to recognize Local 1000 as the exclusive representative of Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20, and 21, and Respondent has unlawfully refused to bargain in good faith.

**B. THE GOVERNOR'S PRETEXTUAL INVOCATION OF HIS EMERGENCY POWERS TO CIRCUMVENT THE STATE'S OBLIGATION TO MEET AND CONFER WITH THE UNION**

The execution of a written memorandum of understanding, or written agreement, is specifically required under the state statutes as part of the duty to bargain in good faith. (See Gov. Code §§ 3505.1 (MMBA), 35175 (the Dills Act), 3540.1(h) (EERA), 3562(m) (HEERA).)

In *Placerville Union School District* (1978) PERB Dec. 69, the Board noted that, "[t]he duty to meet and negotiate in good faith is the core of the collective negotiations process. Collective negotiations refer to a bilateral process whereby the employer and exclusive representative jointly, in good faith, seek to resolve issues of wages, hours and other terms and conditions of employment." *Id.* at p. 5. The Board went on to state:

"Parties which meet and negotiate in good faith should resolve their differences at the negotiating table rather than through unilateral actions which may cause discord in the employer-employee relationship."

(*Id.* citing *NLRB v. Katz* (1962) 369 U.S. 736, (which speaks generally to the requirement that an employer refrain from unilateral actions in derogation of the bilateral negotiating process.)

In the present case, the Governor circumvented the bilateral negotiations process by unilaterally implementing a third furlough without notice and opportunity to meet and confer with the Union. More egregious is the Governor's pre-textual use of his emergency powers to justify his excuse to circumvent the unions and ignore the meet and confer process. The Governor claims he declared a State of Emergency due to "the budget impasse". [Exhibit P] Remarkably, the Legislature and Governor traditionally reach budget impasses. But no other Governor used the budget impasse to justify a "State of Emergency" and the circumvention of collective bargaining. Even Governor Pete Wilson did not declare a State of Emergency in 1992 when the State was forced to issue IOUs due to a budget impasse. Nor did Governor Wilson attempt to circumvent collective bargaining despite a budget deficit.

Moreover, to the extent there was a fiscal crisis on July 1, 2009, that crisis was created by the Governor himself. First, the Governor knew in February 2009 that the deficit existed and was growing. In his Proclamation, the Governor stated:

"WHEREAS within a few weeks after the passage of [the Budget Act of 2009], the global recession caused California's revenue to worsen even more, thus

creating a new budget deficit of approximately \$15.4 billion for fiscal years 2008-09 and 2009-10."

[Exhibit O]

Despite this forewarning, the Governor did nothing to address the problems. There is no question but that the Governor planned on using furlough days to close the looming budget deficit rather than use revenue-generating policies. Yet, the Governor made no effort to meet and confer with Local 1000 or any other union. In addition, Governor Schwarzenegger's refusal to accept a budget unless it met his personal and philosophical views was the genesis of the "budget impasse" that he relied on to declare the State of Emergency. While the deficit was a result of the economic downturn, the inability to balance the budget was created by the Governor's unreasonable and stubborn refusal to use revenue generating mechanisms, such as taxes, fees, and assessments, available to the State. Time and again, the Governor rejected revenue generating policies to address the deficit. Thus, the Governor's use of the emergency powers is nothing more than a political strategy to get his way and avoid having to negotiate with the union. Under similar circumstances, courts have been critical of a government's refusal to consider alternatives to address budget shortfalls. In *Association of Surrogates & Supreme Court Reporters v. New York*, 940 F.2d 766 (2d Cir. 1991) ("Surrogates I"), the court of appeal refused to allow the impairment of a union contract to close a budget deficit where the legislature refused to consider alternatives that raise revenues:

"The legislature had many alternatives available to it, including reducing non-contractual state services and raising taxes and fees. Although neither of these choices may be as politically feasible as the furlough program, the State cannot resort to contract violations to solve its financial problems."

*Id.* at 1211.

Likewise, in this instance, the Governor created the "budget impasse" he now relies on to circumvent negotiations. He did so by waiting to address the problem and then refusing to consider revenue generating alternatives. By removing any alternatives that raised revenues, the Governor held the Legislature and budget hostage. Many of the revenue generating proposals were rational and sound. As one example, the Governor rejected the idea of taxing out-of-state online retailers, such as overstock.com, in the same fashion that California retail businesses pay taxes. [Exhibit P] By rejecting this sound proposal, the Governor made clear that he was more concerned about protecting the interests of out-of-state businesses than about the people living and working in California.

The Governor refused to consider a multitude of revenue generating proposals that would have been beneficial to California and avoided the budget impasse. Among those are:

- An oil severance tax, at the rate of 9.9 percent of the gross value of each barrel extracted from California, with an exemption for "stripper wells." (A tax increase of \$1.1 billion a year, according to the conference committee's materials.)

- A tobacco tax increase equivalent to \$1.50 on each pack of 20 cigarettes. \$1.2 billion a year.
- A requirement that non-retailers register with the Board of Equalization and file use tax returns. (revenue gain of \$28 million in 2009-10 and \$57 million in 2010-11.)
- A provision that would have strengthened the definition of abusive tax shelters to discourage tax avoidance and to increase penalty assessments.
- A revocation of state-issued licenses for unpaid income tax liabilities. (generate \$10 million in 2009-10 and \$15 million to \$20 million in future years.)
- An extension of income tax withholding to independent contractors. (\$1.9 billion in 2009-10, and annual revenue gain of \$300 million in future years from increased tax compliance, according to the committee.)

As such, the so-called emergency declared on July 1, 2009, was a product of Governor Schwarzenegger's refusal to accept sound tax policies because of his own narrow political philosophy. To the extent the situation became an emergency, it was the Governor's acts that created that emergency. The Governor cannot unilaterally implement furloughs without the requisite meet and confer based on an "emergency" he himself created.

There is other evidence the so-called emergency was a sham employed to circumvent bargaining. Between February 19, 2009, and July 1, 2009, the Governor appointed more than *150 people* to various boards and commissions. [Exhibit Q] Many of his political appointments are paid six-figure salaries. As one example, the Sacramento Bee reported that, in February 2009, the Governor appointed Sharon Runner, a former Republican Assembly Member to the Agricultural Labor Relations Board with an annual salary of \$128,109 per year. [Exhibit R] The Bee reported that the ALRB meets only twice per month. In other words, in the midst of the so called fiscal emergency, Governor Schwarzenegger appointed a former colleague to a post paying \$64,000 per meeting. Remarkably, on March 27, 2009, Governor Schwarzenegger then appointed Runner to a second post with the California Unemployment Insurance Appeals Board. As with her position at the ALRB, Runner is paid \$128,109 per year. [Id.]

Even more ironic, the Governor previously told lawmakers that, "there is absolutely no reason to hold onto these redundant boards in this crisis." [Exhibit S] The Governor further stated that "every dollar we save from these boards and commissions is a dollar that can be used to help our most vulnerable citizens." [Id.] Nevertheless, in the midst of the financial crisis, the Governor spent millions of tax dollars on boards and commissions while allowing state employees to lose their homes, cars and credit ratings. While unilaterally furloughing state workers under the guise of an emergency, the Governor was handing out millions of tax dollars to political allies. Had there truly been an emergency, the Governor would have placed many, if not all appointments on hold. It is inconsistent for the Governor to claim that a fiscal emergency justifies a third furlough day while simultaneously handing out millions of dollars in political appointments.

Yet another example that refutes the Governor's claim that a State of Emergency existed is the fact that weeks after declaring a State of Emergency, the State of California negotiated with and approved a pay increase for the California Highway Patrol officers. [Exhibit T] In short, while most state workers suffer unpaid furloughs, California Highway Patrol officers are getting more money. The State's action again contradicts the Governor's claim that he was forced to forego meeting and conferring with Local 1000 over the third furlough because of the emergency. It is evident the State was negotiating with the CHP during the same so-called fiscal emergency, which ultimately resulted in a pay raise for Unit 5 members. Thus, it defies explanation why the Governor could not have met and conferred with Local 1000 in February when he first learned the budget deficit was growing, but was able to bargain with Unit 5 during the same period.

Governor Schwarzenegger's ability to exempt the 7000 CHP Officers from furloughs while simultaneously giving them a pay raise shows that the State's fiscal problems did not rise to the level of an actual emergency. The so-called emergency had no impact on the State's fiscal policies other than to provide Governor Schwarzenegger with a convenient excuse to unilaterally impose furloughs on SEIU and other union members and injure the collective bargaining process.

### C. INTERFERENCE OR DISCRIMINATION BASED ON EXERCISE OF PROTECTED RIGHTS

Under EERA, the Dills Act, and HEERA, it is unlawful for a public employer or an employee organization to impose or threaten to impose reprisals on employees, to discriminate or threaten to discriminate against employees, or otherwise to interfere with, restrain, or coerce employees because of their exercise of representation and organizational rights. (See Gov. Code §§3519(a), 3519.5(b) (the Dills Act), 3543.5(a), 3543.6(b) (EERA), 3571(a), 3571.1(b) (HEERA).)

Freedom of speech is crucial in a democracy. The First Amendment, at its core, protects political speech. The Supreme Court has spoken of the ability to criticize government and government officers as "the central meaning of the First Amendment." (*New York Times v. Sullivan*, 376 U.S. 254, 273 (1964).) As a result of the Governor's bad faith actions in response to protected employee activities, state employees are suffering. They are stressed out, anxious, and wondering how they are going to pay next month's bills, how they are going to keep their homes out of foreclosure, and how they are going put food on the table for themselves and their children. The Governor's retaliation towards state employees on the heels of their exercise of protected employee activities will have a chilling effect on the future exercise of those protected rights. If they cannot engage in protected employee activities without fear of further retribution, state employees will suffer in silence. If the Governor can cut their pay by five percent every time state workers engage in protected employee activities, few state workers will continue to sign petitions, attend rallies, protest, or engage in political discourse. And even though the Governor has broken his word, acted in bad faith, and refuses to act in the best interest of state employees few state workers would be likely to stand up to the Governor—unless this Board takes action to protect the employees and upholds the Dills Act.

#### IV. THE STATE'S UNILATERAL CHANGES ARE A REPUDIATION OF THE MOU

Through its actions, Governor Schwarzenegger and DPA have in essence repudiated the current MOU. The Board recognizes that a party to an MOU, by its unilateral actions, may repudiate the contract. The Board has even upheld the right of public employees to strike when a public employer's unilateral changes to important terms and conditions of employment provoke the strike. *Modesto City Schools* (1983) PERB Decision No. 291. This case, and several others, establish that, while not all strikes are unlawful, a strike prior to the completion of impasse "create[s] something similar to a rebuttable presumption" of an unlawful refusal to negotiate and/or participate in impasse. This presumption of illegality is rebuttable, however, by proof that the strike was provoked by employer conduct. As detailed above, there is ample evidence that the Governor's unlawful actions have been sufficiently severe to provoke and justify a strike.

Here, there is also evidence, as detailed above, that the Governor and DPA have repudiated the existing MOU. To be specific, the Governor has eviscerated the MOU of those rights that are critical to any union contract, namely the provisions related to wages and work hours. The Governor's unchecked ability to unilaterally deprive the union members the those benefits promised under the current MOU, which is in full force and effect by operation of law, has the consequence of undermining the union's status with its members. By issuing furlough days through executive order and circumventing the labor-management process, the union has suffered a demonstrable loss of bargaining power. In essence, the Governor has thwarted the purpose of the Dills Act by his abusive and deceitful use of the emergency powers provided to his office. The emergency powers provided to the Governor as a means to protect the welfare of the State's residents has become nothing more than a political tool for this Governor to violate the Dills Act and circumvent bargaining with the Unions.

The Governor's actions amount to a full repudiation of the existing MOU. Moreover, the Board has found the repudiation of a tentative agreement to amount to an unfair practice. *Charter Oak Unified School District* (1991) PERB Decision No. 873, *Stockton Unified School District*, PERB Decision No. 143; *Placerville Union School District* (1978) PERB Decision No. 69. (repudiation of a tentative agreement by the employer's chief negotiator.) In this matter, the evidence is clear that the Governor bargained in bad faith, as he had no intention of agreeing to limit the furlough days to one per month. In addition, the Governor repudiated the tentative agreement by taking actions inconsistent with his promises to Local 1000. And the Governor misused his emergency powers to avoid implementing a third furlough day in order to pressure the Legislature to pass a budget he approved. The Governor's actions, along with his agents, including DPA, have been in bad faith and violative of the Dills Act.

#### V. REMEDY REQUESTED

1. An order that the Governor and DPA cease and desist from violating the MOU;
2. An order that DPA cease and desist from interfering with the Union's representation of its member by issuing illegal orders that interfere with rights under the MOU;

3. An order that DPA cease and desist from interfering with the Union's right to represent its members on matters concerning wages, hours and working conditions;
4. An order maintaining the status quo with salaries and hours of work until such time as the parties can agree to a successor MOU;
5. An order of back pay with legal interest for those employees whose salaries were illegal reduced;
6. A declaratory order that the Governor and DPA violated the Dills Act;
7. A posting in the manner of the National Labor Relations Board;
8. Attorneys' fees at the lodestar rate; and
9. Any other appropriate remedies that would effectuate the purposes of the Dills Act.