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Representative for Charging Party  
CASE

**BEFORE THE PUBLIC EMPLOYMENT RELATIONS BOARD**

California Attorneys, Administrative	)	<b>STATEMENT OF FACTS AND REQUESTED REMEDY FOR AN UNFAIR LABOR PRACTICE</b>
Law Judges and Hearing Officers	)	
In State Employment (CASE)	)	
	)	
v.	)	
	)	
Arnold Schwarzenegger, the State of	)	
California and the Department of	)	
Personnel Administration	)	
_____	)	

COMES NOW, the charging party, CALIFORNIA ATTORNEYS,  
ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS IN STATE  
EMPLOYMENT (CASE), as the exclusive representative of all the legal professionals  
employed by the State of California in Bargaining Unit 2, and states as follows the  
allegations of an Unfair Labor Practice by the Governor Arnold Schwarzenegger, the  
State of California, and the Department of Personnel Administration (“DPA”):

**General Allegations**

CASE is the exclusive collective bargaining representative of approximately  
3,500 legal professionals in State Bargaining Unit 2 pursuant to Government Code  
section 3520.5. CASE represents approximately 450 legal professionals employed at  
State Compensation Insurance Fund. All CASE members would be directly impacted if  
the Controller implemented the draft pay letter. The vast majority of CASE members are

attorneys employed in Work Week Group (“WWG”) SE. Approximately 600 CASE members are administrative law judges or hearing officers employed in WWG E. Approximately 150 CASE members are employed in WWG 2. (Exhibit A, ¶ 2.)

The last Unit 2 MOU expired on June 30, 2007. CASE has been engaged in bargaining with DPA – the Governor’s representative – since 2007 regarding a successor MOU. (Exhibit A, ¶ 5.) The parties have met numerous times within the last 36 months. Those negotiations are ongoing, but to date the parties have not reached an MOU. Some tentative agreements have been reached on non-economic issues, but the parties are still far apart on the issue of wages and compensation. In the absence of an MOU, pursuant to Government Code section 3517.8, CASE members have been laboring under the provisions of the prior MOU, with no pay raises or cost of living adjustments.

On June 4, 2010, Governor Schwarzenegger sent an open letter to Senate President pro Tempore Darrell Steinberg. In that letter, Governor Schwarzenegger stated unequivocally, “I will not sign a budget this year without budget reform and pension reform.” (Exhibit B, p. 1.) He also identified “four elements that must be done legislatively separate and apart from any memorandums of understanding.” (*Ibid.*) Those four elements were:

1. Roll back the expansion of pension benefits adopted in Senate Bill 400 (Chapter 555, Statutes of 1999) for all new hires upon adoption by the Legislature.
2. Permanent five percent increase in employee pre-tax contribution toward retirement benefits.
3. Calculate the retirement rate based on the highest three years of wages during employment instead of the highest single year.
4. Require the CalPERS chief actuary to submit a report to the Legislature on investment return assumptions based on both lower and higher estimates than the actuarial return assumption and have this report evaluated by a qualified third party.

(Exhibit B, pp. 1-2.)

On June 16, 2010, Governor Arnold Schwarzenegger announced via press release that his administration had reached tentative agreements with four employee

organizations, including CAHP (Unit 5), CDFP (Unit 8), CAPT (Unit 18) and AFSCME (Unit 19.) (Exhibit C.) That same day, the Sacramento Bee reported that the tentative agreements included protections from minimum wage in the event of a budget impasse. (Exhibit. D, p. 1.)

On or about June 23, 2010, DPA Director Debbie Endsley sent a memo to all California state agencies, which read as follows:

Here's an update on the furlough and minimum wage situations.

With respect to furloughs, the current program ends June 30, and the Administration expects the State to resume normal hours of operation in July. The Governor's budget proposal includes four proposals to reduce employee compensation costs: a wage cut, one day per month of unpaid leave, increased employee contributions to pensions, and the workforce cap. The Governor retains the right and authority to order furloughs if necessary to address a fiscal and cash crisis.

As for the prospect of state workers receiving minimum wage in lieu of full wages, it will depend on when the Legislature and the Governor reach a budget agreement. The California Supreme Court ruled in 2003 (*White v. Davis*) that absent an appropriation, which for most of the payroll comes through the annual state budget, the Controller is prohibited from paying state workers beyond what is required by the federal Fair Labor Standards Act (FLSA). Absent a state budget, we will send instructions to the Controller to pay wages in accordance with the FLSA for the July pay period.

The four unions that recently reached tentative agreements on new contracts (CHP officers, firefighters, psychiatric technicians, and some medical professionals) would not be subject to any new furlough program or minimum wage payments, assuming their contracts are ratified in a timely manner.

Debbie Endsley

(Exhibit E, ¶ 2.)

On the same day as the above memo was distributed, DPA Labor Relations Officer Jacquelyn Sanders sent a letter announcing a deadline within which to accept the State's bargaining proposal. (Exhibit F.)

On June 25, DPA spokeswoman Lynelle Jolley was asked by the Sacramento Bee how the Governor would exclude units who had reached tentative agreements from

minimum wage, and she responded, “We expect those contracts to be ratified in a timely manner and we will abide by our agreement.” (Exhibit G.)

On June 28, 2010, Governor Arnold Schwarzenegger announced via press release that his administration had reached tentative agreements with two additional employee organizations, including UAPD (Unit 16) and IOUE (Unit 12). (Exhibit H.)

On July 1, 2010, DPA Director Debbie Endsley sent a letter to State Controller John Chiang directing him to reduce state employee salaries consistent with the California Supreme Court’s decision in *White v. Davis* but exempting the six bargaining units with whom the administration had already reached agreement. (Exhibit I.) In her letter, she stated:

The six Bargaining Units with tentative agreements are not included because we are seeking and expect the Legislature to approve a continuous appropriation for these six units. We anticipate passage of a continuous appropriation for these bargaining units before the end of the month.

(Exhibit I, p. 1.)

Director Endsley’s letter also stated that “in the absence of an approved state budget, the Controller has no legal authority to pay state employee wages and salaries except as required by federal labor law.” (Exhibit I, p. 1.)

The pay letter attached to Director Endsley’s letter states, in section one, that employees in WWG SE “are not entitled to Regular Pay or the Minimum Wage Pay Differential” and thus would be paid zero. (Exhibit I, p. 2.) Employees in WWG SE would be paid \$1,971.66 per month. (Exhibit I, p. 4.) Employees in WWG 2 would be paid the federal minimum wage of \$7.25 per hour, or between \$1,218 and \$1,276 per month, depending on the number of days in the month. (Exhibit I, p. 3.)

Notwithstanding the above, employees in State Bargaining Units 5, 8, 12, 16, 18, and 19 would receive their full pay. Specifically, the pay letter states “These bargaining units have a continuous appropriation and will receive their regular compensation.” (Exhibit I, p. 4.)

Government Code section 3517 provides that:

“The Governor, or his representative as may be properly designated by law, shall meet and confer in good faith regarding wages, hours, and other

terms and conditions of employment with representatives of recognized employee organizations, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.”

Neither the Governor, nor his representatives, have attempted to meet and confer in good faith regarding the Governor’s unilateral decision to issue the pay letter.

## **Unfair Practices**

### **A. Bad Faith Bargaining**

#### *1. The Administration Engaged in a Series of Coercive Tactics Designed to Force Units to Agree to Concessions or Face the Threat of Reduced Wages*

The administration has engaged in a series of actions to unlawfully increase their bargaining leverage in an effort to force CASE to concede to Governor Schwarzenegger’s demands.

First, in his June 4, 2010 letter, Governor Schwarzenegger identified his “demands.” (Exhibit B.) In that same letter, he set the state for a possible budget impasse by declaring “I will not sign a budget” unless his demands were met. (*Ibid.*) Then, having put the bargaining units on notice of the possibility of minimum wage, Governor Schwarzenegger announced on June 16, 2010 that he had reached tentative agreements with four bargaining units. (Exhibit C.) That same day news media reported that those agreements included protection from the threat of minimum wage. (Exhibit D.)

One week later, DPA Director Debbie Endsley sent a memo to all state agencies. The final paragraph of that letter stated “The four unions that recently reached tentative agreements on new contracts would not be subject to [] minimum wage payments.” (Exhibit E.) This memo was the first official proclamation that agreeing to the Governor’s demands would exempt a bargaining unit from the threat of reduced wages in the absence of a budget. Thus, all of the bargaining units that were still negotiating in good faith were officially put on notice that their failure to agree with the administration’s demands would expose their members to severe wage reductions.

The same day that director Endsley sent her statewide memo, DPA Labor Relations Officer Jacquelyn Sanders sent CASE a letter giving CASE five calendar days within which to accept the State's last bargaining proposal. (Exhibit F.) That proposal had been on the table for more than four months. There was no reason to withdraw it on the eve of the deadline for the state to reach a budget. The only possible motive for sending the letter was to remind CASE that the window within which to reach a deal was closing.

On June 25, 2010, DPA spokeswoman increased the pressure by telling the Sacramento Bee that units that reached a deal would be excluded from minimum wage. (Exhibit G.) On June 28, 2010, the administration reached tentative agreements with two other units.

Finally, on July 1, 2010, the administration made good on its threat by issuing a pay letter that purported to reduce wages pursuant to *White v. Davis* but which expressly exempted those six units that had already reached tentative agreements, despite the fact that there were no appropriations for those units.

The tentative agreements reached by the six bargaining units have been posted on DPA's website. Those agreements contain provisions for protection from minimum wage for the term of the agreements. (Exhibit E, ¶ 4.) Thus, the administration has set the stage for engaging in similar unlawful tactics in future budget years.

## 2.     *The Decision in White v. Davis*

The pay letter received by the Controller was expressly based on the California Supreme Court's opinion in *White v. Davis* (2003) 30 Cal.4th 528. Accordingly, it is useful to understand the court's holding in that opinion.

In *White v. Davis*, the Supreme Court made clear that it was deciding "whether the Controller is authorized to pay state employees their full and regular salaries during a budget impasse." (*Id.* at p. 534.) With respect to that issue, the Court concluded:

State employees who work during a budget impasse obtain the right, protected by the contract clauses of the federal and state Constitutions, to

the state's ultimate payment of their full salary for work performed during the budget impasse. . . .

(*Id.* at p. 535.) However, as to the timing of those payments, the Court reasoned that Article XVI, section 7 of the California Constitution prohibited salary payments in the absence of an appropriation. (*Id.* at p. 566.)

The Court expressly held that appropriations for state employee salaries need not be made only in the annual budget act. (*White v. Davis, supra*, 30 Cal.4th at p. 567.) The Court also observed that “in some instances state employee salaries currently are paid from continuing appropriations . . . .” (*Ibid.*) The Court specifically mentioned employees at the State Compensation Insurance Fund. (*Id.* at p. 567, fn. 15.)

The pay letter states that “Employees in WWG SE are not entitled to Regular Pay or the Minimum Wage Pay Differential in the absence of a Budget.” (Exhibit I.) All of the CASE members employed at State Fund are attorneys in WWG SE. (Flores Dec., ¶¶ 2, 4.) Thus, implementation of the pay letter would result in those attorneys being paid no wages in the absence of a budget. However, this is directly contrary to the Supreme Court’s holding that the salaries of employees at State Fund are continuously appropriated and thus they are entitled to their full pay on the normal pay day.

It is also important to note that in footnote 15, the Supreme Court made clear that there are other agencies subject to continuous appropriations. (*White v. Davis, supra*, 30 Cal.4th at p. 567.) Currently, continuing appropriations exist for dozens of state departments, programs, and services, including but not limited to the following:

- Accountant contracts for litigation (Business and Professions Code § 5025.3);
- AIDS Drug Assistance Program Rebate Fund (Health & Safety Code § 120956);
- Alfred E. Alquist Earthquake Fund (Government Code § 8899.23);
- Blind Vendor Revolving Loan Fund (Welfare and Institutions Code § 19630.5);
- Buy California Program (Food and Agricultural Code § 58750);
- California Discount Prescription Drug Program Fund (Health and Safety Code § 130542);
- Veterans Cemetery Perpetual Maintenance Fund (Military and Veterans Code § 1403);

County Correctional Facility Capital Expenditure and Youth Facility Bond Act of 1988 (Penal Code § 4496.40);  
Department of Housing and Community Development (Health and Safety Code § 50400.5);  
Child Support Payment Trust Fund (Family Code § 17311);  
Fish and Game Mitigation and Protection Endowment Principal Account (Fish and Game Code § 13014);  
Housing Trust Fund (Health and Safety Code § 50841);  
Litigation deposits fund (Government Code § 16427);  
Parks Project Revolving Fund (Public Resources Code § 5019.10);  
Rural Health Care Equity Program (Government Code § 22877);  
Self-funded dental care plans for state employees (Government Code § 22952 et seq.);  
Self-funded or self-insured state employee benefit programs (Government Code § 19816.18);  
State employee pretax parking fund (Government Code § 1156.1);  
Transportation Investment Fund (Revenue and Taxation Code § 7104.2);  
Unemployment Fund (Unemployment Insurance Code § 1521);  
Victims of Corporate Fraud Compensation Fund (Corporations Code § 1502.5);  
Workers' compensation (Labor Code § 3716).

CASE members work in more than eighty different state departments, boards, and commissions. (Exhibit A, ¶ 2.) Many of those departments are recipients of one or more of the aforementioned funds, and many CASE members are employed in positions that are subject to continuous appropriations. Accordingly, implementation of the pay letter would mean that many CASE members who are lawfully entitled to their full, regular pay would be paid zero, contrary to the holding of the California Supreme Court.

The issuance of the pay letter is thus a patent example of the administration attempting to ensure that CASE members receive no wages despite the fact that even under the administration's own reading of *White v. Davis*, those CASE members employed in positions funded out of a continuous appropriation are entitled to their full salaries. The pay letter thus represents an example of the administration attempting to punish CASE members for failing to agree to the Governor's demands.

Director Endsley's letter to the Controller also stated that as to the six bargaining units exempted from the wage reductions, "we are seeking and expect the Legislature to approve a continuous appropriation for these six units." (Flores I, p. 1.) However, no

such continuous appropriation has been enacted. No such legislation has even been introduced. (Exhibit A, ¶ 4.)

In *White v. Davis*, the Supreme Court held that:

State employees do not have a contractual right actually to receive the payment of salary *prior to the enactment of an applicable appropriation*, and that the Controller is not authorized under state law to pay those salaries prior to such an appropriation.

(*White v. Davis, supra*, 30 Cal.4th at p. 535, emphasis in original.) The pay letter seeks to pay employees in some bargaining units in anticipation of an appropriation for those units. (Exhibit I.) However, there is no appropriation applicable only to employees in those bargaining units. (Exhibit A, ¶ 4.) Thus, implementation of the pay letter would result in the payment of salary “prior to the enactment of an applicable appropriation” in direct contravention of the holding in *White v. Davis*. The pay letter thus serves as evidence of the administration’s attempt to go to any length, including violating the law of California as determined by the California Supreme Court, in an effort to punish those bargaining units who did not agree to the Governor’s demands at the bargaining table.

The administration announced its demands, and in the same breath threatened a budget impasse. (Exhibit B.) As the deadline for a budget approached, the Administration repeatedly ratcheted up the pressure on CASE by making various announcements about the impending minimum wage and the fact that units who agreed to the demands would be exempted from minimum wage. (Exhibits C, D, E, G, H.) The administration also withdrew an offer from the bargaining table that had been open for four months, for no reason other than to increase the pressure on CASE. Finally, the administration issued a pay letter which not only violated the mandate of *White v. Davis* by exempting certain units for which there was no appropriation, but also singled out CASE members by ordering that they receive no pay despite the fact that the Supreme Court has already held that they are entitled to full wages if they are funded by continuous appropriations.

There can be no better example of an administration attempting to coerce a bargaining unit into accepting concessions at the bargaining table. More shocking is the fact that the administration made no efforts to conceal its unlawful behavior. Quite the

contrary, the administration let all of their threats and demands play out in the media for maximum effect.

### **The Impact on CASE**

By exempting the six bargaining units from the effect of the pay letter, and by further discriminating against CASE by directing that its attorneys (in WWG SE) get paid zero regardless of the funding source for their positions, the administration will impact CASE and its members in several serious respects.

#### **A. Refusal to Remit Membership Fees**

Under Government Code section 3515.7, the State is required to deduct membership dues from members' pay, and remit those dues to the exclusive representative. Section 2.7 of the Unit 2 MOU reiterates this requirement in greater detail. Because the vast majority of Unit 2 members are in WWG SE, they will be paid nothing as a result of the pay letter. Given that their pay will be zero, there will necessarily be nothing from which to deduct the membership dues. Accordingly, the direct effect of the pay letter is to immediately deprive the exclusive representative of the funds it needs to continue to operate. This effort to "starve" Unit 2 into submission is a form of union-busting that violates the express and implicit provisions of the Dills Act. It also constitutes a violation of Government Code section 3519, subdivision (d).

#### **B. Unilateral Change in Working Conditions – Health Insurance**

Under the terms of the pay letter, the vast majority of Unit 2 members would receive no pay. As a result, there will be no pay from which to deduct employee shares of health care premiums. And, since Unit 2 members will not be earning any money to pay the premiums, the pay letter operates to eliminate health, dental, and vision care to the vast majority of Unit 2 legal professionals. The Governor failed to meet and confer

on this unilateral change in violation of Government Code section 3517. The effects of this particular unilateral change in working conditions could be exceptionally dramatic. For example, if a Unit 2 member were to sustain a catastrophic injury during the portion of time when the member had no health insurance coverage as a result of the pay letter, that member could potentially be exposed to millions of dollars of medical costs, or worse, a complete lack of any healthcare whatsoever.

#### C. Unilateral Change in Working Conditions – Retirement Contributions

Most Unit 2 members enrolled in the Tier I retirement system have 6% of their gross monthly pay deducted as the employee share of the retirement contribution. Some of our members who are categorized as “safety employees” have 7% of their gross pay deducted each month. Because the vast majority of our members will receive zero pay under the pay letter, most of our members will have nothing from which to deduct their monthly contribution to retirement. As a result, their retirement benefits may be affected in ways that are difficult to calculate. CalPERS’ financial solvency and its ability to pay pensions depends on a steady revenue stream of both employer and employee contributions. CalPERS uses these contributions to invest, so that over time, investment proceeds can be generated to pay for the defined benefit pension plans that Unit 2 members have been vested in under Tier I. By denying Unit 2 members the ability and opportunity to continue their retirement contributions, the Governor is unilaterally changing the conditions of employment because the retirement benefits will be adversely affected.

#### D. Unilateral Change in Working Conditions – Insurance Premiums

Under the terms of the pay letter, the vast majority of Unit 2 members would receive no pay. As a result, there will be no pay from which to deduct employee shares of voluntary long term disability and life insurance premiums. And, since Unit 2 members will not be earning any money to pay the premiums, the pay letter operates to eliminate long term disability and life insurance to the vast majority of Unit 2 legal

professionals. The Governor failed to meet and confer on this unilateral change in violation of Government Code section 3517. The effects of this particular unilateral change in working conditions could be exceptionally dramatic. For example, if a Unit 2 member were to sustain a catastrophic injury during the portion of time when the member had no long term disability insurance coverage as a result of the pay letter, that member could potentially be exposed to financially disastrous consequences. Further, if a Unit 2 member was to die during the portion of time when the member had no life insurance coverage, that member's spouse, children, or other beneficiaries would not be able to receive any life insurance proceeds with which to survive financially.

#### E. Discriminatory Treatment of Unit 2

The pay letter expressly exempts employees in certain bargaining units, but does not exempt the legal professionals in Unit 2. Accordingly, CASE members will suffer the full impact of the pay letter. However, under the reasoning of *White v. Davis* upon which the administration purports to rely, there is no authority to pay any state employees in the absence of an appropriation. Notwithstanding that lack of authority, the administration has chosen to exempt certain groups from the effects of the pay letter. The Governor's decision to exempt certain state employees and allow them to continue to collect their full wages, while simultaneously causing Unit 2 to suffer the full effects of the pay letter (zero pay for its members), reveals an intention to discriminate against Unit 2. It also constitutes a violation of Government Code section 3519, subdivisions (a) and (b).

#### F. Lack of Written Notice

Pursuant to Government Code section 3516.5, the employer is required to give written notice of any action "directly relating to matters within the scope of representation proposed to be adopted by the employer." CASE received no notice

whatsoever of the administration's intent to transmit the unlawful pay letter to the Controller.

## **REMEDY**

CASE respectfully requests the following remedies:

Under 8 CCR § 32325, "The Board shall have the power to issue a decision and order in an unfair practice case directing an offending party to cease and desist from the unfair practice and to take such affirmative action, including but not limited to the reinstatement of employees with or without back pay, as will effectuate the policies of the applicable statute."

CASE requests the Board find that Governor Schwarzenegger and the DPA have violated the prohibition of Government Code sections 3515.7, 3516.5, 3517, 3517.8, and 3519, subdivisions (a), (b), (c), and (d) by failing to meet and confer in good faith prior to taking this unilateral action, and by discriminating against Unit 2, interfering with the administration of Unit 2, and denying Unit 2 the rights to which it is entitled under the Dills Act. CASE further requests the Board, pursuant to its remedial powers, to issue an order directing the Governor to cease and desist from the unfair practice. CASE further requests the Board order the Controller to continue making payments of full wages due to Unit 2 members.

Dated: July 21, 2010

Respectfully submitted:

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Patrick Whalen  
CASE General Counsel