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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARCIANO PLATA, et al., **Plaintiffs,** **v.** **GAVIN NEWSOM, et al.,** **Defendants.**	**CASE NO. 01-cv-01351-JST** **MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF IN RESPONSE TO ORDER TO SHOW CAUSE RE: RECEIVER'S RECOMMENDATION ON MANDATORY VACCINATION DATED AUGUST 9, 2021** Hearing Date: September 24, 2021 Time: 9:30: a.m. Judge: Hon. Jon S. Tigar Courtroom: 6

MOTION FOR LEAVE TO FILE

Movant, SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000 ("SEIU" or "amicus curiae"), respectfully requests leave to file the attached amicus brief in response to the Order to Show Cause Re: Receiver's Recommendation on Mandatory Vaccination dated August 9, 2021, and in opposition to the Receiver's recommendation for a mandatory vaccination policy for all California Department of Corrections and Rehabilitation (hereinafter "CDCR") institutional staff.

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INTEREST OF AMICUS CURIAE

SEIU is the exclusive representative for over 99,000 California state employees across nine bargaining units. Over 12,000 of those SEIU represented employees work at CDCR institutions. SEIU's mission is to protect the rights of the employees that it represents, including those working at CDCR facilities, who would be subject to the mandatory vaccination policy proposed by the Receiver. The Ralph C. Dills Act (Cal. Govt. Code, §§ 3512 - 3524) (hereinafter "the Dills Act") provides recognized employee organizations with collective bargaining rights on behalf of the employees they represent, including the right to meet and confer "prior to arriving at a determination of policy or course of action." (Cal. Gov. Code, § 3517.) The Receiver recommends that the State impose a mandatory vaccination policy on CDCR institutional employees without any consideration whatsoever for the bargaining rights of SEIU under the Dills Act. Thus, SEIU has a direct interest in asserting its collective bargaining rights and opposing a mandatory vaccination policy imposed on state employees before SEIU has had the opportunity to engage in effects bargaining with the State, as required by law.

The proposed amicus curiae brief will assist the Court in deciding the matter by highlighting the procedural requirements and bargaining rights afforded under the Dills Act prior to the implementation of a new policy affecting state workers' rights and conditions of employment. WHEREFORE, SEIU respectfully requests leave to file the attached brief as amicus curiae.

NO PAYMENT BY ANY PARTY TO PREPARE THIS APPLICATION

This motion and amicus curiae brief was prepared exclusively by SEIU and its counsel. SEIU did not receive any contribution or payment from any party, party's counsel, or any other person or entity, to fund the preparation or submission of this brief.

Dated: August 23, 2021

Respectfully Submitted,

By: **/S/ Theresa C. Witherspoon**
Theresa C. Witherspoon, Asst. Chief Counsel for
SEIU LOCAL 1000
Amicus Curiae

AMICUS CURIAE BRIEF OF SEIU

I. INTRODUCTION

SEIU joins other employee organizations in opposing mandatory vaccinations for all CDCR institutional staff. SEIU believes that ordering mandatory vaccinations is an extreme and unnecessary measure, the imposition of which involves the violation of fundamental collective bargaining rights. Such a violation could have detrimental effects on all represented employees, including the over 12,000 CDCR employees represented by SEIU. Any such measure has to be preceded by meeting and conferring in good faith under the Ralph C. Dills Act (Cal. Gov. Code, § 3512, et seq.) (hereinafter the "Dills Act").

Forcing mandatory vaccinations would prevent CDCR from being able to meet and confer in good faith, as the outcome of the negotiation would already be predetermined. Bypassing this essential and legally required process could have detrimental effects on collective bargaining as a whole as it may become a loophole employers would use to bypass the meet and confer process entirely.

The Receiver may claim emergency, urgency, or some other reason why his request must be granted right now, bypassing the standard bargaining process. However, no such emergency exits. Infection rates among the staff and inmate population are low. The COVID-19 pandemic is now 18 months old. Infection rates peaked long ago in California. Since the winter peak, they have come down significantly and stabilized at a very low rate in the institutions monitored by the Receiver. There is no reason for immediate action. There is no reason to act without first consulting the affected employee's representative organization and participating in the statutorily required meet and confer process.

II. ARGUMENT

A. CDCR Has an Obligation Under the Ralph C. Dills Act to Meet and Confer With SEIU Before Implementing a Mandatory Vaccination Policy.

The Dills Act provides that a state "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", except in cases of emergency as provided. (Cal. Gov. Code, § 3516.5.) "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." (Cal. Gov. Code, § 3517.) The Dills Act further provides that it is unlawful for the state to "[r]efuse or fail to meet and confer in good faith with a recognized employee organization." (Cal. Gov. Code, § 3519(c).)

California courts have found that "[a]n employer's unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate" and a violation of collective bargaining statutes. (*California State Employees' Assn. v. Public Employment Relations Bd*. 51 Cal. App. 4th 923, 934 (1996); see also *Regents of the University of California* (2021) PERB Dec. No. 2783-H, p. 18 (hereinafter "*Regents of the UC*"), a copy of which is attached hereto as Exhibit A.) A unilateral change violation arises when "(1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the change has a generalized effect or continuing impact on represented employees' terms and conditions of employment; and (4) the employer reached its decision without first providing advance notice of the proposed change to the employees' union and negotiating in good faith at the union's request, until the parties reached an agreement or a lawful impasse." (*Regents of the University of California* (2018) PERB Dec. No. 2610-H, p. 32.) "A change of policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members." (*Grant Joint Union High School District* (1982) PERB Dec. No. 196, p. 9.) Even if the policy change itself is outside the scope of representation, before implementing a non-negotiable change, the parties must first negotiate over aspects of the change that impact matters within the scope representation. (*Regents of the UC* (2021) PERB Dec. No. 2783-H, p. 28, citing *Trustees of the California State University* (2012) PERB Dec. No. 2287-H, p. 11.) (Emphasis added.)

A recent decision by the Public Employment Relations Board[1] (hereinafter "the Board" or "PERB") found that an employer (the University of California) "was not privileged to implement [a] vaccination policy before completing negotiations over its effects because the [employer] did not meet and confer in good faith prior to implementation" and thus, violated the affected unions' collective bargaining rights under the Higher Education Employer-Employee Relations Act[2] (Cal. Gov. Code, § 3560 *et seq.*) ("HEERA"). (*Regents of the UC* (2021) PERB Dec. No. 2783-H.) The Board stated that "an employer must give notice sufficiently in advance of reaching a firm decision to allow the representative an opportunity to consult its members and decide whether to request information, demand bargaining, acquiesce to the change, or take other action." (*Id*. at 22, citing *Regents of the University of California, supra*, PERB Dec. No. 2610-H, p. 45.) The Board found the employer's mandate that all employees who work on its premises receive an influenza vaccination was an obvious change in policy, which had a generalized effect or continuing impact on represented employees' terms and conditions of employment. (*Id*. at 21-22.) Finally, PERB held that although the employer's implementation of a mandatory vaccination policy was outside the scope of representation, the employer still had a duty to meet and confer over the "reasonably foreseeable effects" of the policy "that are within the scope of representation" (otherwise known as "effects bargaining"), and the employer's failure to do so was an unfair practice and violation of collective bargaining rights. (*Id*. at 28, citing *County of Santa Clara, supra*, PERB Dec. No. 2680-M, pp.11-12.)

SEIU is the exclusive representative for over 12,000 state employees, across seven bargaining units, who work at CDCR institutions. Pursuant to the Dills Act, the State has an obligation to meet and confer with SEIU "prior to arriving at a determination of policy or course of action." (Cal. Gov. Code, § 3517.) A policy requiring mandatory COVID-19 vaccination of all CDCR staff who enter a CDCR institution, parallels the policy at issue in *Regents of the UC* (which mandated influenza vaccinations for employees and students, who entered University

[1] PERB is the state agency that administers the public sector collective bargaining statutes in California.

[2] HEERA is largely identical to the Dills Act, but applies to employees of the University of California, the Hastings College of the Law, and the California State University systems.

premises, in light of the COVID-19 pandemic). The Receiver's proposed policy i a new CDCR policy, applied on an ongoing basis to all CDCR institutional employees, and would have a generalized effect or continuing impact on represented employees' terms and conditions of employment. Even if the decision to implement the policy mandating vaccination of CDCR institutional staff is found to be outside the scope of representation, pursuant to the Dills Act and prior PERB decisions, the State still has the obligation to negotiate with SEIU over aspects of the policy that impact matters within the scope of representation before the policy is actually implemented. Thus, adopting the Receiver's recommendation and ordering CDCR to implement a new policy mandating COVID-19 vaccination of all state employees working at CDCR institutions, without first meeting and conferring with SEIU and other affected unions, would effectively violate the rights afforded to unions under the Dills Act. (See *Regents of the UC* (2021) PERB Dec. No. 2783-H, p. 17.)

The opportunity for SEIU to meet and confer regarding such a policy is imperative because SEIU-represented employees may suffer the consequences of failure to obtain the COVID-19 vaccine presently and well into the future, and this policy may set a precedent for the State's ability to subject state workers to similar vaccination mandates.

B. The Need for Mandatory Vaccination is Not So Urgent that CDCR Cannot Meet and Confer with Unions.

The COVID-19 pandemic has been ongoing for over a year. It has ebbed and flowed through a few cycles. The current cycle, here in California, is by no means the worst. Thus, we agree with California Correctional Peace Officers Association that voluntary vaccination efforts should be pursued and given sufficient time to succeed, prior to implementing a mandatory vaccination policy for CDCR institutional staff. Per the Receiver's report, 53% of all CDCR staff statewide have already voluntarily received at least one dose of the vaccine and 72% of healthcare staff are already fully vaccinated. (Report of J. Clark Kelso, Receiver, dated August 4, 2021, pp. 21-22.) Moreover, the CDCR inmates have an equal opportunity to protect themselves by getting vaccinated and in fact, the Receiver's report states that, as of August 1, 2021, 73% of inmate-patients in CDCR facilities statewide are vaccinated. (*Id.*, Exhibit A, p. 1.)

CDCR carefully tracks COVID-19 cases among its population and staff and publishes the numbers on its website.[3] As of the writing of this brief, the inmate population had a total of 100 confirmed cases in the last 14 days, out of a total of 49,723 since the start of the pandemic in March 2020. (Aug. 18, 2021, 9:56 a.m., https://www.cdcr.ca.gov/covid19/population-status-tracking/.) CDCR's "trend" or historical view data shows that the COVID-19 virus is well under control, and the infection rate is among the lowest it has ever been. (Exhibit B). Among CDCR staff there are currently 562 active cases, out of a total of 18,527 cases since the start of the pandemic, also a small percentage of the total. (Aug. 18, 2021, 10:20 a.m., https://www.cdcr.ca.gov/covid19/population-status-tracking/.)

The Receiver pleads an emergency, as a shield to bypass collective bargaining. This is a blatant violation of SEIU's, as well as other unions', statutory rights. A properly implemented meet and confer process may find alternatives to a mandatory vaccination policy that is agreeable to all parties. The Receiver argues that CDCR should be forced to take drastic steps in the face of an unprecedented threat, but the numbers betray their position. There is no urgency. There is no emergency. There is no reason to act in a manner that would interfere with the State's obligation to meet and confer with SEIU, and other affected unions, or to forego voluntary vaccination efforts before they have been given a chance. Again, the pandemic has been going on for 18 months now. The time needed for CDCR to follow the law is but a few weeks.

III. CONCLUSION

For the foregoing reasons, SEIU asks that the Court consider the collective bargaining rights of SEIU, and other affected unions, as well as the rights of thousands of state workers, in not ordering implementation of the Receiver's recommendation.

Dated: August 23, 2021

Respectfully Submitted,

By: **/S/ Theresa C .Witherspoon**
Theresa C. Witherspoon, Asst. Chief Counsel for
SEIU LOCAL 1000
Amicus Curiae

[3] https://www.cdcr.ca.gov/covid19/

Certifications

IT IS HEREBY CERTIFIED THAT:

1. SEIU Local 1000 is not aware of any persons, associations of persons, firms, partnerships, corporations (including parent corporations), or other entities, other than the named parties to the action, to have either: (i) a financial interest of any kind in the subject matter in controversy or in a party to the proceeding; or (ii) any other kind of interest that could be substantially affected by the outcome of the proceeding. (Civil L.R. 3-15(a).)
2. There is no parent or publicly held corporation that owns 10% or more of SEIU Local 1000's stock. (Rule 26.1, Federal Rules of Appellate Procedure, Corporate Disclosure Statement.)

Dated: August 23, 2021

By: **/S/ Theresa C. Witherspoon**
Theresa C. Witherspoon, Asst. Chief Counsel for SEIU LOCAL 1000
Amicus Curiae

Exhibit A

STATE OF CALIFORNIA
DECISION OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD

AMERICAN FEDERATION OF STATE, COUNTY & MUNICIPAL EMPLOYEES LOCAL 3299; UNIVERSITY PROFESSIONAL & TECHNICAL EMPLOYEES, COMMUNICATION WORKERS OF AMERICA, LOCAL 9119, Charging Parties, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. SF-CE-1300-H
TEAMSTERS LOCAL 2010, Charging Party, v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, Respondent.	Case No. SF-CE-1302-H PERB Decision No. 2783-H July 26, 2021

Appearances: Leonard Carder by Arthur Liou, Attorney, for American Federation of State, County & Municipal Employees Local 3299, and University Professional & Technical Employees, Communication Workers of America, Local 9119; Beeson, Tayer & Bodine by Robert Bonsall and Kena C. Cador, Attorneys, for Teamsters Local 2010; Sloan Sakai Yeung & Wong by Timothy G. Yeung and Chris Moores, Attorneys, for Regents of the University of California.

Before Banks, Chair; Shiners and Paulson, Members.

DECISION

SHINERS, Member: These consolidated cases are before the Public Employment Relations Board (PERB or Board) for a decision based on the evidentiary record from a hearing before an administrative law judge (ALJ). The operative complaints allege that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act (HEERA)[1] by issuing an Executive Order requiring "all students, faculty, and staff living, learning, or working" on University premises to receive an influenza vaccination by November 1, 2020,[2] without providing Charging Parties American Federation of State, County & Municipal Employees Local 3299 (AFSCME), University Professional and Technical Employees, Communication Workers of America, Local 9119 (UPTE), and Teamsters Local 2010 (Teamsters) with prior notice or an opportunity to meet and confer over the decision or its effects. The complaints further allege that this conduct interfered with employee rights.

We have reviewed the entire administrative record and considered the parties' arguments in light of applicable law. For the reasons set forth below, we find that the decision to adopt the influenza vaccination policy was outside the scope of representation because under the unprecedented circumstances of a potential confluence of the COVID-19 and influenza viruses, the need to protect public health was not amenable to collective bargaining or, alternatively, outweighed the benefits of

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[1] HEERA is codified at Government Code section 3560 et seq. Unless otherwise indicated, all statutory references are to the Government Code.

[2] Subsequent dates are 2020, unless otherwise noted.

bargaining over the policy as to University employees. We also find, however, that the University was not privileged to implement the vaccination policy before completing negotiations over its effects because the University did not meet and confer in good faith prior to implementation. Based on these findings, we conclude that the University's implementation of the vaccination policy constituted an unlawful unilateral change in violation of HEERA.

FINDINGS OF FACT[3]

The Parties

Charging Parties AFSCME, UPTE, and Teamsters are employee organizations within the meaning of section 3562, subdivision (f)(1), and exclusive representatives within the meaning of section 3562, subdivision (i). The University is an employer within the meaning of section 3562, subdivision (g). AFSCME represents the following bargaining units at the University: Patient Care Technical (EX), Service (SX), and Skilled Craft UCSC (K7). UPTE represents the following bargaining units at the University: Health Care Professionals (HX), Research Support Professionals (RX), and Technical (TX). Teamsters represents the following bargaining units at the University: Clerical & Allied Services (CX), Skilled Craft UCLA (K4), Skilled Craft UCSD (K6), Skilled Craft UCSB (K8), Skilled Craft UCI (K9), and Skilled Craft Merced (KM).

[3] The parties stipulated to many of the material facts. We have made additional factual findings based on the testimony and exhibits introduced at hearing.

University Influenza Vaccination Policies Before July 31, 2020

The University has five medical centers, which are part of the UC Davis Health, UC Irvine Health, UC Los Angeles Health, UC San Diego Health, and UC San Francisco Health systems. Before July 31, the five medical centers each maintained policies regarding influenza vaccinations for employees.

The UC Irvine Health policy entitled Influenza: Seasonal Plan for Mandatory Personnel Vaccination required an influenza vaccination for all "medical center employees, College of Health Sciences employees, licensed independent practitioners, volunteers, students, temporary workers, researchers, physicians and other College of Health Sciences faculty and staff." The policy required compliance "no later than the Friday of the week following Thanksgiving weekend of each year." The policy allowed for exemptions based on the following:

> "1. Persons with moderate (generalized rash) or severe (life-threatening) allergies to eggs, vaccine components, or prior influenza vaccines. Documentation from personal physician is required.
>
> "2. Persons with a history of Guillain-Barre Syndrome. Documentation from personal physician is required.
>
> "3. Written documentation of other medical contraindication from a medical provider. Documentation from personal physician is required.
>
> "4. Written documentation of a qualifying religious exception. Documentation from religious organization is required.
>
> "5. Pregnancy does not constitute as a contraindication. Pregnancy is condition at high risk for illness and complication."

The UC San Diego Health policy entitled Influenza: Seasonal Plan for Healthcare Worker required an influenza vaccination for "all faculty, staff, clinicians, students, contractors and volunteers at UC San Diego Health[,] . . . [which] include (but are not limited to): UC San Diego Health Hillcrest – Hillcrest Medical Center and UC San Diego Health's affiliated clinics and clinical practices, UC San Diego Health La Jolla – Jacobs Medical Center and Sulpizio Cardiovascular Center (SCVC)." The policy required compliance by the flu season as designated by the San Diego County Public Health Officer. The policy allowed for exemptions based on the following:

> "1. Persons with moderate (generalized rash) or severe (life-threatening) allergies to eggs, vaccine components, or prior influenza vaccines.
>
> "i. Persons with a history of Guillain - Barre Syndrome.
>
> "ii. Other medical contraindication from a medical provider.
>
> "iii. A qualifying religious or strongly held belief exception."

The UC San Francisco Health Policy No. 4.02.10 entitled Occupational Health Services: Influenza Vaccination for Employees and Staff required vaccination for "[a]ll UCSF Medical Center employees, faculty, temporary workers, trainees, volunteers, students, and vendors, regardless of employer. This includes staff who provide services to or work in UCSF Medical Center patient care or clinical areas." The policy required compliance by the annual onset of the flu season as published by the San Francisco Department of Public Health and deemed the flu season to be from December 15 to March 31. The policy allowed for the following exemptions:

"a. Severe allergies to eggs, vaccine components, or prior influenza vaccines.

"b. History of Guillain-Barre Syndrome.

"c. Declaration of another medical contraindication. Pregnancy is a high-risk condition for influenza illness and does not constitute an exception.

"d. Declaration of a qualifying religious contraindication to vaccination."

The UC Davis Medical Center policy entitled Employee Immunization Program required influenza vaccination for "new hires, established employees, visitors, observers, volunteers, volunteer faculty and those participating in academic/ educational pursuits." The policy required compliance by the beginning of the flu season as determined by the UC Davis Health Infection Prevention Officer and the State/Sacramento County Public Health Officer. The policy allowed for medical exemptions.

The UCLA Health policy entitled Employee Influenza Vaccination Program - Occupational Health Administrative HS IC 7404 required "all Health Care Personnel [to] receive the influenza vaccination." The policy required compliance by the annual flu season and/or by October 1. The policy allowed for exemptions for documented medical contraindication.

These vaccination policies applied to employees in the bargaining units represented by Charging Parties. With limited exceptions, employees represented by Charging Parties who worked at University locations other than the medical centers were not required to be vaccinated against the flu.

The COVID-19 Pandemic and Influenza Virus

On March 4, 2020, California Governor Gavin Newsom declared a state of emergency due to COVID-19. On March 11, 2020, the World Health Organization announced that COVID-19 had become a pandemic.

The intersection of the 2020-2021 flu season with the ongoing COVID-19 pandemic created an unprecedented public health emergency. Like COVID-19, the influenza virus is also a highly contagious serious illness that is transmitted in ways that are similar to COVID-19, thereby increasing the need to prevent and manage both illnesses simultaneously. The California Department of Public Health and the Centers for Disease Control and Prevention accordingly advised the public that being vaccinated against influenza during the 2020-2021 flu season was "more important than ever."

At the hearing, the University offered two witnesses, Dr. Arthur Reingold and Dr. Lee Riley, who were qualified by the ALJ as experts on infectious diseases. Each testified about the public policy behind mandatory influenza vaccination during the COVID-19 pandemic.

Dr. Reingold testified that during the Spring of 2020 many experts were concerned there would be a large number of people hospitalized with COVID-19 at the same time as an influenza outbreak, causing an insurmountable patient load in hospitals.[4] Dr. Reingold stated his belief that mandatory influenza vaccination policies

[4] Indeed, COVID-19 cases continued to increase during the 2020-2021 flu season. As of January 13, 2021, California reported 2,781,039 total cases and 31,102 deaths due to COVID-19. That day the state also reported a 1.9% increase in the number of COVID-19 related deaths from the prior day.

generally have the effect of increasing the rate of vaccination, and are more effective than other methods of encouraging vaccination.

Dr. Riley testified that because the pandemic is the worst in our lifetimes, managing outbreaks of two respiratory diseases like influenza and COVID-19 at the same time can place significant stress on testing and healthcare facilities. He also testified that implementing a mass vaccination effort has the effect of reducing respiratory symptoms experienced by the population, thereby reducing the number of people who may need to be tested or receive treatment. The University's experts testified that no other safety precaution by itself, such as masking, social distancing, or social isolation, was sufficient to substitute for vaccination against influenza.

The Executive Order

On July 17, 2020, Executive Vice-President of University Health Systems Dr. Carrie Byington recommended to then-University President Janet Napolitano that she issue an Executive Order requiring all students, faculty, and staff on University premises during the 2020-2021 flu season be vaccinated against influenza. In a decision memorandum to President Napolitano, Dr. Byington advised issuing such an Executive Order "[d]ue to the uncertainties regarding the COVID-19 pandemic, the unknown potential for illness when both the Influenza and SARS-CoV2 viruses have concurrent widespread community transmission, the high rates of contagion and morbidity of both of these viruses, the high attack rate of influenza in young adults, and the anticipated very high burden of illness expected from Influenza and SARS-CoV2 viruses during the 2020-21 academic year." Dr. Byington's memorandum represented the scientific opinions of professionals in the University Health System

that the University's campuses and hospitals would be healthier and safer with an influenza vaccination requirement in place.

According to Dr. Byington, "vaccinating against COVID was not possible [in July 2020]. Influenza is a known pathogen that produces every winter outbreaks of disease that strain our health system . . . I had concern that we would also experience a winter surge of COVID-19, and that if we had a combination of the normal winter surge for influenza plus a winter surge for COVID-19, that we would be at risk of overwhelming our hospital capacity." Dr. Byington testified that allowing an exemption for personal reasons while requiring such individuals wear a mask would be ineffectual against stopping the spread of both infections as the University Health System was already mandating masking for employees during the pandemic. She testified that for pandemic disease prevention to be effectual, layering of protections is required, including social distancing, environmental controls, immunization, handwashing stations, and the like. When the University issued the Executive Order, a Food and Drug Administration approved COVID-19 vaccination was not yet available.

On July 31, President Napolitano issued an Executive Order, effective for the 2020-2021 flu season, requiring that "students, faculty, and staff who are living, learning, or working" at any University location be vaccinated against influenza by November 1. Specifically, the Executive Order provides:

> "WHEREFORE AS PRESIDENT OF THE UNIVERSITY OF CALIFORNIA I DECLARE:
>
> "On the authority vested in me by Bylaw 30, Bylaw 22.1, Regents Policy 1500 and Standing Order 100.4(ee), and based on the foregoing circumstances, I hereby issue the

following order, to be effective through the 2020-2021 flu season, and direct the following:

"1. Each campus shall strongly encourage universal vaccination for all students, faculty, staff, and their families by October 31, 2020. Subject only to the exemptions and processes described below or in Attachment A:

"a. Deadline. Effective November 1, 2020, all students, faculty, and staff living, learning, or working at any UC location must receive a flu vaccine.

[¶] . . . [¶]

"c. Employees. Effective November 1, 2020, no person employed by the University or working on-site at any location owned, operated, or otherwise controlled by the University may report to that site for work unless they have received the 2020-2021 flu vaccine or an approved medical exemption. Requests for disability or religious accommodations will be adjudicated through the interactive process consistent with existing location policies and procedures.

"2. The University's health plans provide coverage for routine health maintenance vaccinations, including seasonal influenza vaccine, without copays to any covered students, faculty, staff, or their covered families.

"3. The Vice President for Human Resources or her designee shall ensure that any applicable collective bargaining requirements are met with respect to the implementation of this order.

"4. The Provost and the Executive Vice President or their designee(s) shall immediately consult with the Academic

Senate on implementation of this order with respect to members of the University's faculty.

"5. The Executive Vice President for UC Health or her designee shall provide technical guidance to the campuses at their request to facilitate execution of this mandate.

"All University policies contrary to the provisions of this Executive Order, except those adopted by the Regents, shall be suspended to the extent of any conflict, during the period of this Order.

"The Executive Vice President - UC Health shall have the authority to issue further guidance about the parameters and use of this mandate, in consultation with the Provost and the Interim Vice President - Systemwide Human Resources."

(Emphasis in original.)

Attachment A to the Executive Order provides for medical exemptions:

"**Medical Exemptions**

"A list of established medical contraindications to and precautions for flu vaccine can be found at the Centers for Disease Control and Prevention website, *Guide to Contraindications*, online at: https://www.cdc.gov/vaccines/hcp/acip-recs/general-recs/contraindications.html (scroll to ITV) and currently includes:

Contraindications:	Severe allergic reaction (e.g., anaphylaxis) after previous dose of influenza vaccine or to vaccine component.
Precautions:	Guillain-Barre Syndrome <6 weeks after a prior dose of influenza vaccine

> Moderate or severe acute illness with or without fever
>
> Egg allergy other than hives, e.g., angioedema, respiratory distress, lightheadedness, recurrent emesis; or required epinephrine or another emergency medical intervention (IIV may be administered in an inpatient or outpatient medical setting and under the supervision of a health care provider who is able to recognize and manage severe allergic conditions).

> "Any request for medical exemption must be documented on the attached Medical Exemption Request Form and submitted by an employee to the designated campus medical official (collectively an 'Authorized HCP')."

(Emphasis in original.)

On September 29, the new University President, Dr. Michael Drake, issued a revised version of the Executive Order. The revised Executive Order extended religious and disability accommodations to students but did not change the requirement that employees and other individuals must be vaccinated against influenza, have an approved medical exemption, or have a disability or religious accommodation to be on site at a University location. Employee exemptions listed in Attachment A to the revised Executive Order did not change.

In addition to the Executive Order, the University issued a "frequently asked questions" (FAQ) explaining additional details of the policy. As of October 27, the FAQ stated:

"**Frequently asked questions for employees about the 2020-21 UC influenza vaccination order** *[Revised Oct. 27, 2020]*

"**Q1. Is the flu vaccination requirement a permanent change to the Immunization Policy? Will those subject to the Executive Order be required to get the flu vaccine from now on?**

"A1. No. The new requirement is based on the University's assessment of the current situation and will be revisited as the situation demands.

"**Q2. To whom does the order apply?**

"A2. The Executive Order mandates flu vaccination for all students, faculty, other academic appointees, and staff living, working, or learning at any UC location, subject only to medical exemptions. Individuals may also request disability and religious accommodations. If for any reason you believe you should receive an exception to the vaccination requirement, please contact your supervisor to be referred to the appropriate office to discuss whether you may be eligible.

"**Q3. Why hasn't UC required flu immunizations of all faculty, other academic appointees, and staff in the past?** ·

"A3. Faculty, other academic appointees, and staff working in the university's clinical facilities have long been required to participate in a flu immunization program. The additional action is needed at this time, given the unique and serious conditions of the COVID-19 pandemic in circulation simultaneously with influenza. The influenza vaccination requirement for those faculty, other academic appointees, and staff living or working on campus was deemed necessary to maintain a safe workplace. We also believe the Executive Order will contribute to the health of the entire community and ensure our health care systems and

> our communities are able to maintain capacity to care for our patients.
>
> "**Q4. Is there a penalty or consequence for faculty, other academic appointees, and staff if they do not get a flu shot?**
>
> "A4. Individuals who do not certify that they have received the 2020-2021 flu vaccine or have an approved exemption or accommodation will not have access to University facilities effective November 16, 2020. If the inability to access University facilities affects an employee's ability to perform job functions, supervisors will work with employees to find alternatives so they can continue to work."

(Emphasis in original.)

After it issued the Executive Order, the University extended the date for compliance with the vaccination policy to November 16. As of that date, individuals were not permitted to be on site at any University location if they were not vaccinated or did not have an approved exemption or accommodation. At least some employees in all of the bargaining units represented by Charging Parties are unable to work remotely and must be on site at their respective campus, medical center, or other University location to perform their work.

The University's Meetings with AFSCME and UPTE

On August 7, Peter Chester, Executive Director of Systemwide Labor Relations, sent an e-mail message to University unions announcing the new Executive Order. Teamsters sent a written demand to bargain over the decision and effects of the Executive Order on August 10. AFSCME sent a similar bargaining demand on August 17, as did UPTE on August 25. Having received no response to its demand, Teamsters renewed its demand on August 25. In response to these bargaining

demands, the University said it would not bargain the decision to issue the new influenza vaccination policy on the grounds that it was not a mandatory subject of bargaining but would bargain over effects of the policy.

UPTE and the University met at least four times. On October 8, UPTE identified specific effects it was seeking to bargain, including: "(1) time off to obtain the vaccine, (2) payment for costs associated with obtaining the vaccine, (3) the availability of clinics or sites at University facilities where workers can be vaccinated, (4) consequences for failure to obtain the vaccine, including the ability to work and whether the University intends to discipline employees who fail to comply, (5) timelines for workers to be vaccinated, and (6) exceptions to the vaccination requirements and the exemption process, including standards for religious, medical, or other accommodations." UPTE and the University executed a side letter over time off to obtain the vaccine. Although the University would not agree to UPTE's proposal to pay all costs associated with obtaining the vaccine, it did provide UPTE with a list of influenza vaccine clinics that employees could go to and suggested that employees utilize their health insurance to cover the cost of the vaccine. The University did not agree to UPTE's proposals on the remaining topics. UPTE and the University then agreed to place their negotiations on hold pending the outcome of this case.

The University and AFSCME met twice. On September 10, AFSCME identified the following impacts of the influenza vaccine requirement: "wages, benefits, hours of work, discipline, and other terms and conditions of employment, including those currently provided by our contracts, because workers who do not meet the University's new requirement will be deprived of the benefits and terms in the agreements."

AFSCME's negotiator Seth Newton Patel testified that at a mid-November bargaining session, Chester explicitly said the University would not entertain proposals about alternatives to discipline or leave without pay as consequences for failure to comply with the vaccination policy.[5] The University's negotiator, E. Kevin Young, testified that the subject of consequences for noncompliance was discussed during bargaining but did not give any detail about what those discussions included. AFSCME did not make any proposals related to the effects of the influenza vaccine requirement, and did not come to any agreement with the University regarding such effects.[6]

PROCEDURAL HISTORY

AFSCME and UPTE filed the unfair practice charge in Case No. SF-CE-1300-H on October 19, alleging that the University violated HEERA section 3571 by not providing notice and meeting and conferring with AFSCME and UPTE before issuing the July 31 Executive Order. On the same day, Teamsters filed a similar charge in

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[5] Although Chester did not testify at the hearing, the statements attributed to him are not hearsay because they were made during negotiations while Chester was acting in his role as Executive Director of Systemwide Labor Relations, and therefore constitute party admissions, a recognized exception to the hearsay rule. (*Bellflower Unified School District* (2014) PERB Decision No. 2385, pp. 10-11, citing Evid. Code, § 1220; see Evid. Code, § 1222.) Because Chester's statements fall under an exception to the hearsay rule, they would be admissible in a civil action and thus can form the evidentiary basis for a factual finding. (*Bellflower Unified School District*, *supra*, PERB Decision No. 2385, pp. 8-11; PERB Reg. 32176 [PERB Regulations are codified at Cal. Code Regs., tit. 8, § 31001 et seq].)

[6] Teamsters did not introduce evidence of effects bargaining with the University because it withdrew its effects bargaining allegation at the start of the hearing.

Case No. SF-CE-1302-H.[7] Concurrently with its charge, Teamsters filed a Request for Injunctive Relief asking the Board to seek a court injunction to stay implementation of the Executive Order. The Board denied the Request on October 27.

OGC issued the complaint in Case No. SF-CE-1302-H on October 28. The complaint alleged the University violated HEERA section 3571, subdivisions (a) and (c) by issuing the Executive Order without providing Teamsters prior notice or an opportunity to meet and confer over the decision or its effects. On October 29, the Board granted Teamsters' request to expedite the case at all divisions of PERB. The University answered the complaint on November 17, denying all material allegations and asserting additional defenses.

OGC issued a largely identical complaint in Case No. SF-CE-1300-H on December 15. The University answered the complaint on January 4, 2021, again denying all material allegations and asserting additional defenses.

On December 28, the ALJ consolidated the cases for a formal hearing, which was held by videoconference on January 20, 21, 22 and 26, 2021. The parties filed closing briefs on March 19, 2021.

On March 24, 2021, the Board's Appeals Office notified the parties that the consolidated cases had been placed on the Board's docket for decision.[8] The

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[7] A third charge, Case No. SF-CE-1303-H, was filed on October 20 by the International Association of Firefighters, Local 4920 (IAFF). All three cases were consolidated for hearing, but IAFF withdrew its charge on the first day of hearing.

[8] PERB Regulation 32320, subdivision (a)(1) allows the Board itself to "[i]ssue a decision based upon the record of hearing." PERB Regulation 32215 allows the Board itself to direct a Board agent to "submit the record of the case to the Board itself for decision."

University requested the cases be remanded to the ALJ for decision, arguing that the ALJ is better suited than the Board to make credibility determinations because he observed the witnesses testify at the hearing. After considering responses from Charging Parties, the Board denied the University's request.

DISCUSSION

I. Unilateral Change

HEERA section 3570 requires a higher education employer or its designee to meet and confer "with the employee organization selected as exclusive representative of an appropriate unit on all matters within the scope of representation." Refusal or failure to meet and confer as required by section 3570 is an unfair practice. (HEERA, § 3571, subd. (c).)

"An employer's unilateral change in terms and conditions of employment within the scope of representation is, absent a valid defense, a per se refusal to negotiate and a violation of HEERA." (*California State Employees' Assn. v. Public Employment Relations Bd.* (1996) 51 Cal.App.4th 923, 934.) To establish a prima facie unilateral change violation, the charging party must prove that: (1) the employer took action to change policy; (2) the change in policy concerns a matter within the scope of representation; (3) the change has a generalized effect or continuing impact on represented employees' terms and conditions of employment; and (4) the employer reached its decision without first providing advance notice of the proposed change to the employees' union and negotiating in good faith at the union's request, until the parties reached an agreement or a lawful impasse. (*Regents of the University of California* (2018) PERB Decision No. 2610-H, p. 32.)

AFSCME and UPTE argue the University was required to meet and confer in good faith over both the decision to require an influenza vaccination and the foreseeable effects of that decision, and that the University did neither. Teamsters argues only that the University failed to meet and confer over the decision to adopt the vaccination policy. The University admits it refused to meet and confer over the decision to adopt the vaccination policy but argues the decision is outside the scope of representation. The University further contends that it satisfied its obligation to negotiate with AFSCME and UPTE over the foreseeable effects of the decision.

The primary issue in this case is whether the University's decision to mandate that all employees who work on University premises receive an influenza vaccination is within the scope of representation. Before reaching that issue, we briefly address the other elements of the unilateral change test as applied to the University's decision.

A. Change in Policy

There are three primary types of policy changes that may constitute an unlawful unilateral change: (1) a deviation from the status quo set forth in a written agreement or written policy; (2) a change in established past practice; and (3) a newly created policy or application or enforcement of existing policy in a new way. (*County of Merced* (2020) PERB Decision No. 2740-M, p. 9; *Pasadena Area Community College District* (2015) PERB Decision No. 2444, p. 12, fn. 6.)

Prior to July 31, 2020, each University medical center had its own policy regarding employee influenza vaccination and all provided for a medical contraindication exemption. The general medical contraindications included a form of egg allergy and/or swelling, Guillain-Barre Syndrome, or other medically documented

contraindication. Generally, the University Health System policies allowed an exemption for a history of the Guillain-Barre Syndrome, while the Executive Order changed the exemption to seemingly require a diagnosis within less than six weeks after a prior dose of the influenza vaccine. This changed one of the medical exemptions related to Guillain-Barre Syndrome.

While the UC Irvine, UC San Diego, and UC San Francisco policies had a religious exemption, only UC San Diego had a strongly held belief exemption. The Executive Order did not allow an employee to decline to receive an influenza vaccination for strongly held personal reasons. The Executive Order thus changed the types of exemptions from mandatory influenza vaccination available at UC San Diego Health.

The Executive Order also changed the date by which the employees were required to provide proof of vaccination. The UC Irvine Health System defined the beginning of the flu season as the "week following Thanksgiving weekend of each year," while UCLA Health System defined it as October 1, and UC San Francisco defined it as December 15. The remainder defined the flu season to begin when local health departments deemed it began. By unilaterally changing the date for requiring the influenza vaccination, the Executive Order changed policy.

Finally, prior to July 31, 2020, no University or campus policy required employees working at locations other than medical centers to receive an influenza vaccination. Starting on July 31, 2020, the Executive Order required "all students, faculty, and staff living, learning, or working" on University premises to receive an influenza vaccination by November 1, 2020.

The Executive Order thus changed the written policy for a subset of medical center employees, and also created a new policy for employees who work at locations other than the medical centers, as they were not previously required to receive an influenza vaccination. We therefore easily conclude that the Executive Order constituted a change in policy.

B. Generalized Effect or Continuing Impact

"A change of policy has, by definition, a generalized effect or continuing impact upon the terms and conditions of employment of bargaining unit members." (*Grant Joint Union High School District* (1982) PERB Decision No. 196, p. 9.) As discussed *ante*, the Executive Order changed the existing written influenza vaccination policy at University medical centers and created a new vaccination policy for non-medical center employees where none existed before. While the University's new policy was only effective during the 2020-2021 flu season, the requirement of a vaccination has a generalized or continuing effect as employees may suffer the consequences of failure to obtain the vaccine well into the future. (*City of Davis* (2016) PERB Decision No. 2494-M, 24, citing *San Jacinto Unified School District* (1994) PERB Decision No. 1078 [the duration of the unilateral act does not necessarily determine whether there was a unilateral change].) Furthermore, because the University relied on the management rights clause in its contracts with Charging Parties when making the decision to require influenza vaccinations, employees could be subject to similar vaccination mandates in the future. (*City of Davis*, *supra*, PERB Decision No. 2494-M, p. 21.) Because these policy changes applied on an ongoing basis to all employees represented by Charging Parties, they have a generalized effect or continuing impact

on bargaining unit members' employment conditions. (*State of California (Departments of Veterans Affairs and Personnel Administration)* (2008) PERB Decision No. 1997-S, pp. 18-19.)

C. Notice and Opportunity to Meet and Confer

Although the amount of time varies depending on the circumstances of each case, "an employer must give notice sufficiently in advance of reaching a firm decision to allow the representative an opportunity to consult its members and decide whether to request information, demand bargaining, acquiesce to the change, or take other action." (*Regents of the University of California*, *supra*, PERB Decision No. 2610-H, p. 45.) The University issued the Executive Order on July 31, but did not provide notice of the change to Charging Parties until August 7. The University clearly did not give Charging Parties advance notice or an opportunity to meet and confer before reaching a firm decision.

D. Scope of Representation

The scope of representation applicable to the University includes "wages, hours of employment, and other terms and conditions of employment" but excludes "[c]onsideration of the merits, necessity, or organization of any service, activity, or program established by law or resolution of the regents or the directors, except for the terms and conditions of employment of employees who may be affected thereby." (HEERA, § 3562, subd. (q)(1).) The "merits, necessity, or organization" language of HEERA section 3562, subdivision (q)(1) recognizes "the right of employers to make unconstrained decisions when fundamental management or policy choices are involved." (See *Building Material & Construction Teamsters' Union v. Farrell* (1986)

41 Cal.3d 651, 663 (*Building Material*) [interpreting similar language in the Meyers-Milias-Brown Act, § 3500 et seq.].)

Under HEERA, "[a] subject is within the scope of representation" "as a 'term or condition of employment'" "if: (1) it involves the employment relationship, (2) it is of such concern to both management and employees that conflict is likely to occur and the mediatory influence of collective bargaining is an appropriate means of resolving the conflict, and (3) the employer's obligation to negotiate would not unduly abridge its freedom to exercise those managerial prerogatives (including matters of fundamental policy) essential to the achievement of the employer's mission. [Citation.]" (*California Faculty Assn. v. Public Employment Relations Bd.* (2008) 160 Cal.App.4th 609, 616; *Regents of the University of California* (2012) PERB Decision No. 2300-H, p. 21.)

As to the first prong, the Executive Order involves the employment relationship because it created new conditions that had to be met for employees to perform their work on University premises: receiving an influenza vaccination or being granted a medical exemption, or disability or religious accommodation. The first prong therefore is met.

As to the second prong, mandatory influenza vaccination is not an issue that tends to create conflict between employees and management that could be resolved through collective bargaining. In *Riverside Unified School District* (1989) PERB Decision No. 750 (*Riverside USD*), the district unilaterally changed its policy by instituting an indoor smoking ban on district premises. The Board found this subject "is not one that divides people along management-union lines, but rather tends to split smokers and nonsmokers in both camps." (*Id.* at p. 19.) The Board further found that

"[c]ollective negotiations between the District and employee organizations is not an appropriate means of dealing with this public health hazard." (*Ibid.*)

Like smoking, the subject of influenza vaccinations is not one that divides people along management-union lines, but rather splits people—students, faculty, and staff—into those who can and will get vaccinated versus those who cannot or will not get vaccinated. And just like *Riverside USD*, the Executive Order "was implemented to alleviate a potential health hazard to all persons who may enter public school facilities, as opposed to assuring the safety of employees only." (*Riverside USD*, *supra*, PERB Decision No. 750, p. 19; see *Trustees of the California State University* (2009) PERB Decision No. 1876a-H, p. 16 [collective bargaining was not appropriate to resolve conflict over parking location and availability because students' interests would not be represented at the bargaining table].) The decision to require influenza vaccinations in response to a public health hazard that affects not just employees, but also students and the general population, thus was not amenable to collective bargaining.

As to the third prong, both the courts and PERB have repeatedly recognized that a public employer's concern for employee and public safety can outweigh the benefits of bargaining. (See, e.g., *Building Material*, *supra*, 41 Cal.3d 651, 664, citing *San Jose Police Officer's Assn. v. City of San Jose* (1978) 78 Cal.App.3d 935, 948-949.) For example, decision bargaining was not required when a county decided to staff a particular shift at a health center with a non-bargaining unit sworn peace officer rather than a public safety officer within the unit because the county made the decision based on a legitimate concern for employee and public safety. (*County of Santa Clara* (2019) PERB Decision No. 2680-M, p. 11.)

The University issued the Executive Order because of grave concerns by its experts (as well as the California Department of Public Health and the Centers for Disease Control and Prevention) that the 2020-2021 flu season, combined with the ongoing COVID-19 global pandemic, had the potential to overwhelm its hospitals due to the simultaneous spread of both respiratory illnesses. Dr. Riley testified that managing outbreaks of two respiratory diseases like influenza and COVID-19 at the same time can place significant stress on healthcare facilities. Dr. Reingold explained that the convergence of COVID-19 at the same time as an influenza outbreak would cause insurmountable patient load in hospitals. Dr. Reingold also agreed that mandatory influenza vaccination policies increase the rate of vaccination, and are more effective than an optional vaccination policy. The implementation of the University's influenza vaccination policy was a direct response to a potential confluence of the COVID-19 global pandemic and an outbreak of the influenza virus causing catastrophic outcomes and needless loss of life. This potential catastrophe affected not just University employees, but also its students and the general public who may have needed to use University hospitals. Under these unprecedented circumstances, requiring the University to negotiate the decision to require influenza vaccination would abridge its right to determine public health policy during a pandemic.

Charging Parties urge us to follow a series of private sector decisions involving one Washington hospital that purportedly hold influenza vaccination policies are within the scope of representation—*Virginia Mason Hospital* (2012) 358 NLRB 531; *Virginia Mason Hospital* (2011) 357 NLRB 564; and *Virginia Mason Hosp. v. Washington State*

Nurses Assn. (9th Cir. 2007) 511 F.3d 908 (collectively referred to as the *Virginia Mason* decisions). Although federal judicial and administrative precedent is not binding on PERB, it may provide persuasive guidance in construing California's public sector labor relations statutes. (*County of Santa Clara* (2019) PERB Decision No. 2670-M, p. 19, fn. 20 & p. 28; *Capistrano Unified School District* (2015) PERB Decision No. 2440, p. 15, citing *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal.3d 608, 616-617.) Having reviewed the proffered federal authorities, we do not find them persuasive.

First, the two National Labor Relations Board (NLRB) decisions cited by Charging Parties, *Virginia Mason Hospital*, *supra*, 358 NLRB 531 and *Virginia Mason Hospital*, *supra*, 357 NLRB 564, did not involve a vaccination mandate but rather an influenza prevention policy requiring nurses who declined to get an immunization or take antiviral medication to wear masks while on duty. (*Virginia Mason Hospital*, *supra*, 357 NLRB at p. 565.) The NLRB concluded the policy was a work rule that affected nurses' working conditions and thus was within the scope of representation. (*Id.* at p. 566.) The University's influenza vaccination mandate, in contrast, is more than a mere work rule because it applies to all individuals who work, live, or study on University premises.

Second, in *Virginia Mason Hospital*, *supra*, 511 F.3d 908, the court affirmed an arbitration award that required the hospital to bargain with the nurses' union over a mandatory influenza vaccination policy. (*Id.* at pp. 912-913.) The arbitrator reasoned that "inherent in every collective bargaining agreement" is "the foundational labor law principle that management must bargain with recognized union representatives over

terms and conditions of employment." (*Id.* at p. 915.) Although the court recognized that this principle is embodied in the National Labor Relations Act (NLRA), neither the arbitrator nor the court analyzed why this particular immunization requirement was within the NLRA's scope of representation.[9] Absent such analysis, we decline to extrapolate the court's deferential affirmance of the arbitrator's conclusion into a general holding that all mandatory vaccination policies are within the scope of representation.

Finally, and arguably most importantly, none of the *Virginia Mason* decisions addressed an influenza vaccination mandate in the context of a "once-in-a-century pandemic." (*Gompers Preparatory Academy* (2021) PERB Decision No. 2765, p. 14.) Nor did any of the *Virginia Mason* decisions balance whether the public safety justification for the influenza prevention policy outweighed the benefits of bargaining over it. Unlike the flu prevention policies in those cases, the University's decision to mandate influenza vaccinations for employees and students serves a greater public health purpose by preventing University medical centers and other healthcare facilities from being overwhelmed by a simultaneous influx of COVID-19 and influenza patients. Because the *Virginia Mason* decisions did not have to weigh such a factor, we find them unpersuasive in these circumstances.[10]

We conclude for these reasons that the University's decision to adopt a mandatory influenza vaccination policy was outside HEERA's scope of

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[9] The NLRA is codified at 29 U.S.C. section 151 et seq.

[10] Because this case does not present such a situation, we express no opinion on whether a policy mandating influenza vaccination in the absence of a concurrent global pandemic would be within the scope of representation.

representation.[11] This conclusion does not end our inquiry, however, because we still must determine whether the University complied with its duty to meet and confer over reasonably foreseeable effects of the decision that are within the scope of representation. (*County of Santa Clara*, *supra*, PERB Decision No. 2680-M, pp. 11-12.)

II. Effects Bargaining

Before implementing a non-negotiable change, the parties must first negotiate over aspects of the change that impact matters within the scope of representation. (*Trustees of the California State University* (2012) PERB Decision No. 2287-H, p. 11.) Once a firm non-negotiable decision is made, the employer must "provide notice and a meaningful opportunity to bargain over the reasonably foreseeable effects of its decision before implementation, just as it would be required to do before making a decision on a mandatory subject of bargaining." (*County of Santa Clara*, *supra*, PERB Decision No. 2680-M, p. 12.)

In *Compton Community College District* (1989) PERB Decision No. 720 (*Compton CCD*), the Board identified the limited circumstances under which an employer may implement a decision on a non-mandatory subject prior to exhausting its effects bargaining obligation: (1) the implementation date is based on an immutable deadline or an important managerial interest, such that a delay in implementation beyond the date chosen would effectively undermine the employer's right to make the decision; (2) the employer gives sufficient advance notice of the decision and

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[11] In light of this conclusion, we do not address the University's argument that Charging Parties contractually waived their right to meet and confer over the decision.

implementation date to allow for meaningful negotiations prior to implementation; and (3) the employer negotiates in good faith prior to implementation and continues to negotiate afterwards as to the subjects that were not resolved by virtue of implementation. (*Id.* at pp. 14-15.) The University claims it sufficiently satisfied this bargaining obligation before implementing the vaccine policy; AFSCME and UPTE disagree.[12]

We need not address whether the first and second requirements were met because the University did not satisfy the third requirement that it meet and confer in good faith prior to implementation.[13] AFSCME and UPTE claim the University was unwilling to bargain over several subjects, including payment of vaccine costs for employees who did not have insurance, the availability of influenza vaccine clinics, alternatives to unpaid leave or discipline as consequences for not getting vaccinated, when the University would begin enforcing the access ban for workers who had not complied, and exemptions to the vaccination requirement. We need not address all of these subjects because the record shows that the University refused to bargain over alternative consequences for not getting vaccinated.

The Executive Order and FAQ did not expressly state the consequences employees could face for noncompliance with the vaccination requirement; the FAQ merely said that non-compliant employees would not be allowed on University

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[12] As noted above, Teamsters withdrew its effects bargaining allegation.

[13] While it is not at issue here, vaccination requirements set by the Centers for Disease Control and Prevention, state or local public health departments, or municipalities could supply immutable deadlines for the purposes of *Compton CCD*'s first requirement.

premises as of November 16. But during negotiations the University indicated that non-compliant employees could be disciplined or put on unpaid leave.

"PERB has long held that implementation of policies that include the potential for disciplinary action may have a direct impact on wages, health and welfare benefits, and other terms and conditions of employment since such action may reduce or eliminate entitlement to those items." (*Trustees of the California State University* (2003) PERB Decision No. 1507-H, adopting proposed decision at p. 12.) Accordingly, when a non-negotiable decision has foreseeable effects on discipline, such as creating a new type of evidence that may be used to support discipline or a new ground for discipline, those effects are negotiable. (See, e.g., *Rio Hondo Community College District* (2013) PERB Decision No. 2313, pp. 14-16 [use of surveillance camera video for disciplinary purposes was a negotiable effect of non-negotiable decision to install cameras]; *Trustees of the California State University*, *supra*, PERB Decision No. 1507-H, pp. 3-4 & adopting proposed decision at pp. 12-13 [disciplinary effects of computer use policy are within the scope of representation].) And, of course, placing an employee on unpaid leave has a direct effect on wages, an enumerated subject within the scope of representation. (HEERA, § 3562, subd. (q)(1).) An employer's outright refusal to bargain over matters within the scope of representation constitutes a per se violation of the duty to bargain in good faith. (*Los Angeles Unified School District* (2018) PERB Decision No. 2588, pp. 8-10; *Mount San Antonio Community College District* (1983) PERB Decision No. 334, pp. 10-11.)

AFSCME's and UPTE's negotiators testified that the University was unwilling to discuss any alternatives to leave without pay or discipline for an employee's failure to

comply with the vaccination policy. Most notably, at a mid-November bargaining session, Chester explicitly said the University would not entertain proposals about alternatives to discipline or leave without pay as consequences for failure to comply with the vaccination policy. Although University negotiator Young testified that the subject of consequences for noncompliance was discussed during bargaining, neither he nor any other witness contradicted Charging Parties' testimony that University representatives refused to discuss alternatives to discipline or unpaid leave. Based on this evidence, we find the University outright refused to bargain over the vaccination policy's effect(s) on discipline and wages. We accordingly find the University did not meet and confer in good faith over negotiable effects of the decision to mandate influenza vaccinations.

Because the University failed to satisfy all of the requirements under *Compton CCD*, it was not privileged to implement the influenza vaccination policy prior to completing effects bargaining with AFSCME and UPTE. The University's implementation of the policy thus constituted an unlawful unilateral change in violation of HEERA.

REMEDY

A "properly designed remedial order seeks a restoration of the situation as nearly as possible to that which would have obtained but for the unfair labor practice." (*Modesto City Schools* (1983) PERB Decision No. 291, pp. 67-68.) The usual remedy for an employer's violation of its effects bargaining obligation is an order to bargain with the exclusive representative over the effects, with a limited backpay award to make employees whole for losses suffered and to mitigate as much as possible the

imbalance in the parties' bargaining positions resulting from the employer's unlawful conduct. (*County of Santa Clara*, *supra*, PERB Decision No. 2680-M, p. 14; *Bellflower Unified School District*, *supra*, PERB Decision No. 2385, pp. 12-13.)

The University's influenza vaccination policy expired by its own terms at the end of the 2020-2021 flu season. There is thus no reason to order the University to bargain with AFSCME and UPTE over foreseeable negotiable effects of that particular policy.

It is appropriate, however, to order the University to make employees whole for any losses suffered as a result of the University's failure to meet and confer in good faith over the policy's effects. Although AFSCME and UPTE presented no evidence that any employee suffered a loss as a result of noncompliance with the vaccination policy, an unfair practice finding creates a presumption that employees suffered some loss as a result of the employer's unlawful conduct. (*Bellflower Unified School District* (2019) PERB Order No. Ad-475, p. 10; *Desert Sands Unified School District* (2010) PERB Decision No. 2092, pp. 31-32.) Consistent with the presumption, AFSCME and UPTE will have the opportunity to establish in compliance proceedings that any employees they represent suffered a loss as a result of the vaccination policy, such as discipline, unpaid leave, and out-of-pocket payment of vaccine costs.

It also is appropriate to order the University to cease and desist from the unlawful conduct found in this decision, and to post physical and electronic notices of its violation. (*City of Sacramento* (2013) PERB Decision No. 2351-M, pp. 43-45.)

ORDER

Upon the foregoing findings of fact and conclusions of law, and the entire record in the case, it is found that the Regents of the University of California

(University) violated the Higher Education Employer-Employee Relations Act (HEERA), Government Code section 3571, subdivision (c), by failing to meet and confer in good faith with Charging Parties American Federation of State, County & Municipal Employees Local 3299 (AFSCME), and University Professional and Technical Employees, Communication Workers of America, Local 9119 (UPTE) (collectively Unions) over negotiable effects prior to implementing the mandatory influenza vaccination policy. All other allegations in Case No. SF-CE-1300-H are DISMISSED.

Because Teamsters Local 2010 withdrew the allegation in Case No. SF-CE-1302-H that the University failed to meet and confer in good faith over negotiable effects of the Executive Order, and we find that the University was not required to negotiate over the decision to require mandatory influenza vaccinations, the complaint in Case No. SF-CE-1302-H is DISMISSED.

Pursuant to Government Code section 3563, subdivisions (h) and (m), it is ORDERED that the University, its governing board, and its representatives shall:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with the Unions by unilaterally deciding to mandate influenza vaccinations, without giving the Unions reasonable notice and an opportunity to meet and confer over foreseeable effects of the decision.

2. Interfering with employees' right to participate in the activities of an employee organization of their own choosing.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF HEERA:

1. Make employees whole for any losses suffered as a result of the University's unlawful implementation of the mandatory influenza vaccination policy. Any compensation awarded shall be augmented by interest at a rate of 7 percent per year.

2. Within 10 workdays of the date this decision is no longer subject to appeal, post at all work locations where notices to employees in AFSCME's and UPTE's bargaining units customarily are posted, copies of the Notice attached hereto as Appendix A. The Notice must be signed by an authorized agent of the University, indicating that it will comply with the terms of this Order. Such posting shall be maintained for a period of 30 consecutive workdays.[14] The Notice shall also be sent to all bargaining unit employees by electronic message, intranet, internet site, or other electronic means customarily used by the University to communicate with employees

[14] In light of the ongoing COVID-19 pandemic, the University shall notify PERB's Office of the General Counsel (OGC) in writing if, due to an extraordinary circumstance such as an emergency declaration or shelter-in-place order, a majority of employees at one or more work locations are not physically reporting to their work location as of the time the physical posting would otherwise commence. If the University so notifies OGC, or if a Unions requests in writing that OGC alter or extend the posting period, require additional notice methods, or otherwise adjust the manner in which employees receive notice, OGC shall investigate and solicit input from all relevant parties. OGC shall provide amended instructions to the extent appropriate to ensure adequate publication of the Notice, such as directing the University to commence posting within 10 workdays after a majority of employees have resumed physically reporting on a regular basis; directing the University to mail the Notice to all employees who are not regularly reporting to any work location due to the extraordinary circumstance, including those who are on a short term or indefinite furlough, are on layoff subject to recall, or are working from home; or directing the University to mail the Notice to those employees with whom it does not customarily communicate through electronic means.

in AFSCME's and UPTE's bargaining units. Reasonable steps shall be taken to ensure that the Notice is not reduced in size, altered, defaced, or covered with any other material.

3. Written notification of the actions taken to comply with this Order shall be made to the General Counsel of the Public Employment Relations Board, or the General Counsel's designee. The University shall provide reports, in writing, as directed by the General Counsel or his/her designee. All reports regarding compliance with this Order shall be concurrently served on each of the Unions.

Chair Banks and Member Paulson joined in this Decision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS BOARD
An Agency of the State of California

After a hearing in Unfair Practice Case No. SF-CE-1300-H, *American Federation of State, County & Municipal Employees Local 3299; University Professional and Technical Employees, Communication Workers of America, Local 9119 v. Regents of the University of California*, in which all parties had the right to participate, it has been found that the Regents of the University of California (University) violated the Higher Education Employer-Employee Relations Act, by failing to meet and confer in good faith with Charging Parties American Federation of State, County & Municipal Employees Local 3299, and University Professional and Technical Employees, Communication Workers of America, Local 9119 (collectively Unions) over negotiable effects prior to implementing the mandatory influenza vaccination policy.

As a result of this conduct, we have been ordered to post this Notice and we will:

A. CEASE AND DESIST FROM:

1. Failing and refusing to meet and confer in good faith with the Unions by unilaterally deciding to mandate influenza vaccinations, without giving the Unions reasonable notice and an opportunity to bargain over foreseeable effects of the decision.

2. Interfering with employees' right to participate in the activities of an employee organization of their own choosing.

B. TAKE THE FOLLOWING AFFIRMATIVE ACTIONS DESIGNED TO EFFECTUATE THE POLICIES OF THE HEERA:

1. Make employees whole for any losses suffered as a result of the University's unlawful implementation of the mandatory influenza vaccination policy. Any compensation awarded shall be augmented by interest at a rate of 7 percent per year.

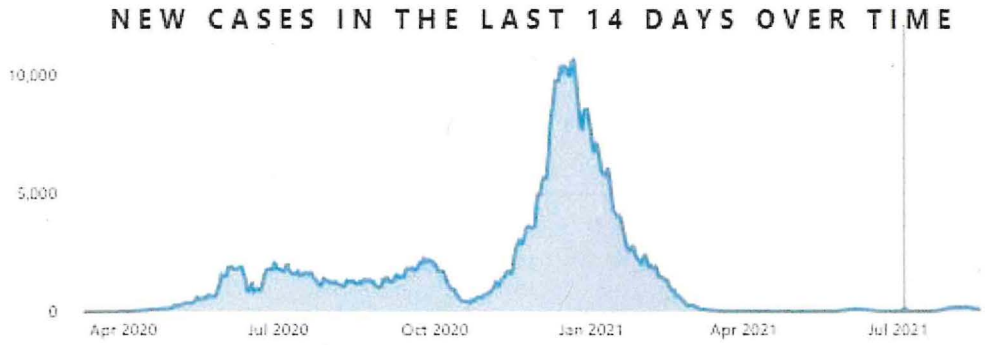
Dated: _____

REGENTS OF THE UNIVERSITY OF CALIFORNIA

By: _____
Authorized Agent

THIS IS AN OFFICIAL NOTICE. IT MUST REMAIN POSTED FOR AT LEAST 30 CONSECUTIVE WORKDAYS FROM THE DATE OF POSTING AND MUST NOT BE REDUCED IN SIZE, DEFACED, ALTERED OR COVERED WITH ANY OTHER MATERIAL.

Exhibit B



(Aug 18, 2021 10:05 AM https://www.cdcr.ca.gov/covid19/population-status-tracking/).

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UNION, Local 1000

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

MARCIANO PLATA, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

CASE NO. 01-cv-01351-JST

[PROPOSED] ORDER

Hearing Date: September 24, 2021
Time: 9:30 a.m.
Judge: Hon. Jon S. Tigar
Courtroom: 6

This matter having come before the Court by motion of proposed amicus curiae Service Employees International Union, Local 1000, seeking leave to file a brief amicus curiae in the above-captioned matter, and the Court having reviewed the file and pleadings herein, and being otherwise fully advised in the matter, hereby finds good cause to allow amicus participation.

IT IS HEREBY ORDERED:

The Motion for Leave to File an Amicus Curiae Brief is GRANTED.

This ____ day of _____, 2021.

_____
The Honorable Jon S. Tigar