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12 **UNITED STATES DISTRICT COURT**
13 **NORTHERN DISTRICT OF CALIFORNIA**

14 **MARCIANO PLATA, et al.,**) **CASE NO. 01-cv-01351-JST**
15 **Plaintiffs,**) **MOTION FOR LEAVE TO FILE**
16 **v.**) **AMICUS CURIAE BRIEF AND BRIEF**
17 **GAVIN NEWSOM, et al.,**) **IN RESPONSE TO ORDER TO SHOW**
18 **Defendants.**) **CAUSE RE: RECEIVER’S**
) **RECOMMENDATION ON**
) **MANDATORY VACCINATION DATED**
) **AUGUST 9, 2021**

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

23 **MOTION FOR LEAVE TO FILE**

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

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1 **INTEREST OF AMICUS CURIAE**

2 SEIU is the exclusive representative for over 99,000 California state employees across
3 nine bargaining units. Over 12,000 of those SEIU represented employees work at CDCR
4 institutions. SEIU’s mission is to protect the rights of the employees that it represents, including
5 those working at CDCR facilities, who would be subject to the mandatory vaccination policy
6 proposed by the Receiver. The Ralph C. Dills Act (Cal. Govt. Code, §§ 3512 - 3524)
7 (hereinafter “the Dills Act”) provides recognized employee organizations with collective
8 bargaining rights on behalf of the employees they represent, including the right to meet and
9 confer “prior to arriving at a determination of policy or course of action.” (Cal. Gov. Code, §
10 3517.) The Receiver recommends that the State impose a mandatory vaccination policy on
11 CDCR institutional employees without any consideration whatsoever for the bargaining rights of
12 SEIU under the Dills Act. Thus, SEIU has a direct interest in asserting its collective bargaining
13 rights and opposing a mandatory vaccination policy imposed on state employees before SEIU
14 has had the opportunity to engage in effects bargaining with the State, as required by law.

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

20 **NO PAYMENT BY ANY PARTY TO PREPARE THIS APPLICATION**

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

24 Dated: August 23, 2021

Respectfully Submitted,

25
26 By: **/S/ Theresa C. Witherspoon**
Theresa C. Witherspoon, Asst. Chief Counsel for
27 SEIU LOCAL 1000
Amicus Curiae
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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 exists. 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,

1 and shall give such recognized employee organizations the opportunity to meet and confer with
2 the administrative officials or their delegated representatives”, except in cases of emergency as
3 provided. (Cal. Gov. Code, § 3516.5.) “The Governor, or his representative as may be properly
4 designated by law, shall meet and confer in good faith regarding wages, hours, and other terms
5 and conditions of employment with representatives of recognized employee organizations, and
6 shall consider fully such presentations as are made by the employee organization on behalf of its
7 members prior to arriving at a determination of policy or course of action.” (Cal. Gov. Code, §
8 3517.) The Dills Act further provides that it is unlawful for the state to “[r]efuse or fail to meet
9 and confer in good faith with a recognized employee organization.” (Cal. Gov. Code, § 3519(c).)

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

1 A recent decision by the Public Employment Relations Board¹ (hereinafter “the Board”
 2 or “PERB”) found that an employer (the University of California) “was not privileged to
 3 implement [a] vaccination policy before completing negotiations over its effects because the
 4 [employer] did not meet and confer in good faith prior to implementation” and thus, violated the
 5 affected unions’ collective bargaining rights under the Higher Education Employer-Employee
 6 Relations Act² (Cal. Gov. Code, § 3560 *et seq.*) (“HEERA”). (*Regents of the UC* (2021) PERB
 7 Dec. No. 2783-H.) The Board stated that “an employer must give notice sufficiently in advance
 8 of reaching a firm decision to allow the representative an opportunity to consult its members and
 9 decide whether to request information, demand bargaining, acquiesce to the change, or take other
 10 action.” (*Id.* at 22, citing *Regents of the University of California, supra*, PERB Dec. No. 2610-H,
 11 p. 45.) The Board found the employer’s mandate that all employees who work on its premises
 12 receive an influenza vaccination was an obvious change in policy, which had a generalized effect
 13 or continuing impact on represented employees’ terms and conditions of employment. (*Id.* at 21-
 14 22.) Finally, PERB held that although the employer’s implementation of a mandatory
 15 vaccination policy was outside the scope of representation, the employer still had a duty to meet
 16 and confer over the “reasonably foreseeable effects” of the policy “that are within the scope of
 17 representation” (otherwise known as “effects bargaining”), and the employer’s failure to do so
 18 was an unfair practice and violation of collective bargaining rights. (*Id.* at 28, citing *County of*
 19 *Santa Clara, supra*, PERB Dec. No. 2680-M, pp.11-12.)

20 SEIU is the exclusive representative for over 12,000 state employees, across seven
 21 bargaining units, who work at CDCR institutions. Pursuant to the Dills Act, the State has an
 22 obligation to meet and confer with SEIU “prior to arriving at a determination of policy or course
 23 of action.” (Cal. Gov. Code, § 3517.) A policy requiring mandatory COVID-19 vaccination of
 24 all CDCR staff who enter a CDCR institution, parallels the policy at issue in *Regents of the UC*
 25 (which mandated influenza vaccinations for employees and students, who entered University
 26

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

28 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.

1 premises, in light of the COVID-19 pandemic). The Receiver's proposed policy is a new CDCR
 2 policy, applied on an ongoing basis to all CDCR institutional employees, and would have a
 3 generalized effect or continuing impact on represented employees' terms and conditions of
 4 employment. Even if the decision to implement the policy mandating vaccination of CDCR
 5 institutional staff is found to be outside the scope of representation, pursuant to the Dills Act and
 6 prior PERB decisions, the State still has the obligation to negotiate with SEIU over aspects of the
 7 policy that impact matters within the scope of representation before the policy is actually
 8 implemented. Thus, adopting the Receiver's recommendation and ordering CDCR to implement
 9 a new policy mandating COVID-19 vaccination of all state employees working at CDCR
 10 institutions, without first meeting and conferring with SEIU and other affected unions, would
 11 effectively violate the rights afforded to unions under the Dills Act. (See *Regents of the UC*
 12 (2021) PERB Dec. No. 2783-H, p. 17.)

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

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

19 The COVID-19 pandemic has been ongoing for over a year. It has ebbed and flowed
 20 through a few cycles. The current cycle, here in California, is by no means the worst. Thus, we
 21 agree with California Correctional Peace Officers Association that voluntary vaccination efforts
 22 should be pursued and given sufficient time to succeed, prior to implementing a mandatory
 23 vaccination policy for CDCR institutional staff. Per the Receiver's report, 53% of all CDCR
 24 staff statewide have already voluntarily received at least one dose of the vaccine and 72% of
 25 healthcare staff are already fully vaccinated. (Report of J. Clark Kelso, Receiver, dated August 4,
 26 2021, pp. 21-22.) Moreover, the CDCR inmates have an equal opportunity to protect themselves
 27 by getting vaccinated and in fact, the Receiver's report states that, as of August 1, 2021, 73% of
 28 inmate-patients in CDCR facilities statewide are vaccinated. (*Id.*, Exhibit A, p. 1.)

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

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

19 III. CONCLUSION

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

23 Dated: August 23, 2021

Respectfully Submitted,

24
 25 By: /S/ Theresa C. Witherspoon
 26 Theresa C. Witherspoon, Asst. Chief Counsel for
 27 SEIU LOCAL 1000
 28 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

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