REMCHO, JOHANSEN & PURCELL, LLP
ATTORNEYS AT LAW

201 DOLORES AVENUE
SAN LEANDRO, CA 94577
PHONE: (510) 346-6200
FAX: (510) 346-6201
EMAIL: mprinzing@rjp.com
WEBSITE: www.rjp.com

SACRAMENTO PHONE: (916) 264-1818

Joseph Remcho (1944-2003)
Robin B. Johansen
Kathleen J. Purcell (Ret.)
James C. Harrison
Thomas A. Willis
Karen Getman
Margaret R. Prinzing
Kari Krogseng

March 1, 2010

VIA HAND DELIVERY

Clerk of the Court
Court of Appeal, Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814

Re: *Professional Engineers in California Government, et al. v. John Chiang, as State Controller, etc.; Arnold Schwarzenegger, as Governor, etc., et al.*, No. C061011

Dear Clerk of the Court:

Pursuant to the Court's order dated January 29, 2010, defendant and appellant John Chiang respectfully provides additional briefing in response to the following questions.

1. Whether the legislative history of Government Code section 19851 indicates that the Legislature intended to allow workweeks of less than 40 hours.

The Court has asked whether section 19851's provision that "workweeks and workdays of a different number of hours may be established in order to meet the varying needs of the different state agencies" has more than one apparent meaning. Two phrases within that provision are at issue in this appeal: (1) "a different number of hours" and (2) "the varying needs of the different state agencies."

Only the first phrase is reasonably susceptible to more than one interpretation in the context of this appeal. As described in the Controller's Reply Brief, the second phrase is not. The reference to "the varying needs of the different state agencies" cannot be stretched to include an across-the-board cut in the hours of every employee subject to the Governor's control. (*See* Controller's Reply Brief at pp. 3-8.) As for the first phrase, all that can be known with certainty is that "a different number of hours" means that workers may be required to work more than 40 hours, given that other provisions of section 19851 expressly contemplate that some workers may be required to work overtime. Yet no other provision of section 19851 expressly refers to workweeks of less than 40 hours. This indicates that "a different number of hours" was never intended to mean less than 40 hours.

The legislative history of section 19851 confirms that interpretation. The evolution of the statute documents the State's gradual movement towards today's policy of providing state workers with overtime pay for work in excess of 40 hours a week or eight hours a day. Nothing in that history suggests that anyone contemplated that those words might be used to reduce employee workweeks below 40 hours, let alone indicates that the Legislature intended to authorize such a result. Rather, the Legislature enacted and subsequently amended section 19851 to establish a uniform 40-hour workweek for state employees, taking note that various departments might need to depart from that workweek to accommodate the need for longer weeks.

Prior to 1955, section 18020 divided the state workforce into three groups with workweeks of 40, 44, and 48 hours respectively, and a fourth group "with unusual conditions or hours of work requiring the establishment . . . of special provisions governing hours of work. . . ." (Appellant State Controller's Request for Judicial Notice filed with this Court on July 21, 2009 ["Controller's RJN"], Exh. H at 2.) Section 18021 provided that workers in the first three groups "shall, if required and ordered to work in excess of the hours prescribed for the group, receive overtime compensation for all such overtime work." (Controller's RJN, Exh. H at 5.) Nothing in either provision referred to establishing or permitting workweeks of less than 40 hours.

On January 15, 1955, AB 1464 was introduced as legislation "relating to overtime in the state service." (Controller's RJN, Exh. H at 2.) This bill, as amended, abolished the various workweek groups and added the language at issue in this appeal to establish the 40-hour workweek and permit "a different number of hours . . . to meet the varying needs of the different state agencies." (Controller's RJN, Exh. H at 6; *see also id.* at 9-10.) AB 1464 also added the following language to section 18020:

> . . . It is the policy of the State to avoid the necessity for overtime work whenever possible. This policy does not restrict the extension of regular working hour schedules on an overtime basis in those activities and agencies where such is necessary to carry on the state business properly during a manpower shortage.
>
> (Controller's RJN, Exh. H at 6.)[1]

[1] AB 1464 amended section 18020 to provide in full:

> ~~The State Personnel Board shall establish the work week for each position or class in the state service for which a monthly or annual salary range is fixed, whether or not the position or class is subject to state civil service, by allocating, and reallocating as the needs of the service require, each class or position to one of the following groups:~~

(continued . . .)

Thus the statutory language refers only to overtime. Similarly, neither the Legislative Counsel's digest of AB 1464, nor the Attorney General's memo to the Governor analyzing AB 1464 suggest that the new provisions might be used to reduce the length of workweeks below 40 hours. (*See*, *e.g.*, Appellant State Controller's Supplemental Request for Judicial Notice ["Controller's Supp. RJN"], Exh. 1.)

Section 18020 was next amended in 1974 by AB 3436, another bill "relating to overtime in the state service." (Controller's RJN, Exh. I at 2.) The key provision of AB 3436 was to establish the 8-hour workday as state policy, so that workers would be entitled to overtime compensation for days when they worked more than 8 hours, rather than just receiving overtime compensation for days when they worked more than 40 hours.[2] (Controller's RJN,

---

~~(1) Classes and positions with a work week of 40 hours;~~
~~(2) Classes and positions with a work week of 44 hours;~~
~~(3) Classes and positions with a work week of 48 hours;~~
~~(4) Classes and positions with conditions or hours of work requiring the establishment by the Personnel Board of special provisions governing hours of work or methods of compensation for overtime.~~

It is the policy of the State that the work week of the state employee shall be 40 hours, except that work weeks of a different number of hours may be established in order to meet the varying needs of the different state agencies. It is the policy of the State to avoid the necessity for overtime work whenever possible. This policy does not restrict the extension of regular working hour schedules on an overtime basis in those activities and agencies where such is necessary to carry on the state business properly during a manpower shortage.

(*Compare* Controller's RJN, Exh. H at 2 *with id.* at 6, strikethrough and emphasis added to reflect legislative amendments.)

[2] AB 3436 amended section 18020 to provide in full:

It is the policy of the state that the workweek of the state employee shall be 40 hours, and the workday of state employees eight hours, except that workweeks and workdays of a different number of hours may be established in order to meet the varying needs of the different state agencies. It is the policy of the state to avoid the necessity for overtime work whenever possible. This policy does not restrict the extension of regular working-hour schedules on an overtime basis in those activities and agencies where such is

(continued . . .)

Exh. I at 2.) As mentioned in the Controller's Opening Brief (pp. 20-21), the Bill Analysis prepared by the Assembly Committee on Employment and Public Employees described the subject of AB 3436 as "Overtime in State Service in excess of normal workday" and summarized the amendment to section 18020 as providing "that overtime be paid when a state employee works in excess of his normal workday or in excess of his normal workweek." (Controller's RJN, Exh. I at 49.)

Once again, nothing in the legislative history refers to reducing workweeks below 40 hours. To the contrary, the analysis of the legislation by the Legislative Analyst and the enrolled bill report contemplate *increased* labor costs due to "additional overtime hours." (Controller's Supp. RJN, Exh. 2 at 20, 22; Exh. 3 at 28, 32; Exh. 5 at 70.) There is no suggestion that the bill might decrease labor costs.[3] (*Id.*) Furthermore, the bill was sponsored by the California State Employees' Association and the California School Employees' Association, which "strongly" supported the changes to the "state's overtime law." (*Id.*, Exh. 2 at 24; Exh. 4 at 49.) Organizations representing state employee unions were no more likely in 1974 to support reductions in the workweeks and wages of their members than are today's public employee unions, which are aligned with the Controller in opposition to these furloughs.

The complete absence of any reference to reduced workweeks indicates that the concept formed no part of the Legislature's intent with respect to section 19851. (*See, e.g., National Assn. for Advancement of Colored People v. Civiletti* (D.C. Cir. 1979) 609 F.2d 514, 519 ["Had Congress intended to abrogate federal sovereign immunity for purposes of the Awards Act, some discussion of the matter by the respective House and Senate Committees responsible for the legislation in their Committee Reports might have been expected."]; *see also* 2A Sutherland Statutes and Statutory Construction (7th ed. 2008) § 48:6 ["Silence in a committee report on a significant issue is important . . ."].)

To summarize, the legislative history of section 19851 reveals that when the Legislature empowered state agencies to establish "a different number of hours" of work for their employees, it contemplated only workweeks in excess of 40 hours, not less.

---

necessary to carry on the state business properly during a manpower shortage.

(Controller's RJN, Exh. I at 2-3, emphasis added to reflect legislative amendments; *see also id.* at 8-9.)

[3] The Department of Motor Vehicles, however, suggested there might be some administrative cost savings due to "a simplified method of records keeping." (Controller's Supp. RJN, Exh. 5 at 71.)

2. Whether the DPA and a recognized bargaining unit may agree to include an involuntary furlough provision in an MOU.

The Court has asked whether the DPA and a recognized bargaining unit may agree to include an involuntary furlough provision in their memorandum of understanding. The answer is yes, but only if the furlough provision is either consistent with the state law in place at the time of the agreement, or receives the approval of the Legislature.

At the outset, it is important to remember that furloughs would not be truly "involuntary" if they were imposed pursuant to an agreement in an MOU between a union and DPA. It is difficult to imagine such a provision that did not circumscribe the employer's authority in some way or another, either by delineating the types of circumstances under which such furloughs could occur, the duration of the furloughs or the number of days per month that could be imposed, or the types of employees who would be affected, or a combination of all of these things. Assuming this is what the Court had in mind in framing its question, the issue is under what types of circumstances such an agreement could be reached.

When the Legislature enacted the Dills Act in 1977, it declined to relinquish its ultimate authority over the terms and conditions of public sector employment. As the bill analysis of the Dills Act prepared by the Assembly Office of Research described it, the new law would:

> Require[ ] representatives of the Governor to confer in good faith and to endeavor to reach agreement with the employee organization. If agreement is reached, the parties would prepare a memorandum of understanding and *present it to the Legislature for determination*. . . .
>
> (Controller's Supp. RJN, Exh. 8 at 160, ¶ 7, emphasis added.)

This basic structure remains in place today. The Dills Act requires the Governor and a union to meet and confer in good faith for the purpose of reaching agreement on "wages, hours, and other terms and conditions of [state] employment." (Gov. Code, §§ 3516, 3517.) If the parties reach agreement, that agreement is set forth in a written memorandum of understanding. (*Id.*, § 3517.5.) The Act specifically identifies a number of code provisions that may be trumped by MOUs "without further legislative action." (*Id.*, § 3517.6(a).) If, however, an MOU conflicts with a provision that is not among those code sections, or if the provision

requires an expenditure of funds, it "may not become effective unless approved by the Legislature." (*Id.*, § 3517.6(b).)[4]

Because an involuntary furlough provision relates to both wages and hours, it is well within the scope of representation. (*See, e.g., Public Employment Relations Bd. v. Superior Ct.* (1993) 13 Cal.App.4th 1816, 1819-1820 [PERB takes the position that furloughs are within the scope of representation of the Dills Act].) This means that the Governor and a union could agree to an involuntary furlough provision, which could go into effect if it were consistent with legislative enactments. Although an involuntary furlough program like the Governor's runs afoul of section 19851, which establishes the 40-hour workweek, and section 19826, which prohibits the DPA from adjusting salary ranges for represented employees, both code sections are among those that may be trumped by MOUs without further legislative approval. (Gov. Code, § 3517.6(a).) Thus, the tentative agreement reached between DPA and SEIU Local 1000 includes a Mandatory Personal Furlough Leave Program, retroactive to February, 2009, that provides for one furlough day per month that will be credited to each employee as compensatory time off that must be used by July 1, 2012. (Controller's Supp. RJN, Exh. 9 at 90-93.)[5]

Of greater difficulty for the Governor's involuntary furlough program is Government Code section 11020(a), which generally requires that "all offices of every state agency shall be kept open for the transaction of business from 8 a.m. until 5 p.m. of each day from Monday to Friday." Section 11020 includes a provision that expressly yields to contrary MOUs entered into with the represented employees of the University of California and California State University.[6] (Gov. Code, § 11020(b).) Other MOUs are not included, which

---

[4] Section 3517.6(b) provides that "[i]f any provision of the memorandum of understanding requires the expenditure of funds, those provisions of the memorandum of understanding may not become effective unless approved by the Legislature in the annual Budget Act." Section 3517.6(b) also provides: "If any provision of the memorandum of understanding requires legislative action to permit its implementation by amendment of any section not cited above [in subdivision (a)], those provisions of the memorandum of understanding may not become effective unless approved by the Legislature."

[5] Because the SEIU tentative agreement requires the expenditure of funds, it must be approved by the Legislature pursuant to subdivision (b) of section 3517.6. The agreement is pending in the Legislature as AB 964.

[6] Section 11020(b) states in relevant part that:

> If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 12 (commencing with Section 3560) of Division 4 of Title 1, the memorandum of understanding shall be controlling without further legislative action . . . .

(continued . . .)

means that the Governor and a union would have to seek legislative approval of this aspect of an involuntary furlough program before implementing it as part of an MOU.

For these reasons, the DPA and a union could agree to include an involuntary furlough provision in an MOU, but they would first have to seek legislative approval to the extent that the provision required the closure of government offices during regular business hours.

3. Whether Government Code section 3516.5 gives the Governor the authority to impose involuntary furloughs on represented state employees during an emergency.

The Court has asked whether, absent the assent of a union or an existing statute allowing involuntary furloughs for civil service employees, section 3516.5 gives the Governor the authority to impose voluntary furloughs on represented state employees during an emergency. Section 3516.5 does not, regardless of whether an emergency exists within the meaning of the statute.

To answer the question in the affirmative, the Governor would have to identify some provision of section 3516.5 that grants the Governor substantive legislative or rulemaking authority in times of emergency that the Governor does not otherwise possess. It is apparent from the language of the statute itself that section 3516.5 grants no new substantive legislative authority of any kind; instead, it imposes procedural *restrictions* on the Governor's existing substantive authority and then provides that those restrictions yield only in times of emergency and only until "the earliest practical time" that they can be implemented.

Thus, the first paragraph of the statute imposes upon the Governor the procedural requirement to give unions "reasonable written notice" and "the opportunity to meet and confer" about any proposed law or regulation which is within the scope of representation. The second paragraph of the statute relieves the Governor of that requirement as an initial matter "[i]n cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately . . . ."[7] (§ 3516.5.) All an emergency may do is temporarily relieve the

---

The provisions of the Government Code referred to are from the Higher Education Employer-Employee Relations Act.

[7] The statute provides in full that:

> Except in cases of emergency as provided in this section, the employer shall give reasonable written notice to each recognized employee organization affected by any law, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the employer, and shall give such recognized employee organizations the opportunity to

(continued . . .)

Governor of his obligation to meet and confer with unions. It does not vest him with new legislative powers.

The legislative history confirms that section 3516.5 was enacted to restrict the Governor's authority, not increase it. The provision was not part of the original legislation that eventually became the Dills Act. (Controller's Supp. RJN, Exh. 6 at 2-7.) As introduced, SB 839 would have required the State to "meet and confer in good faith regarding wages, hours, and other terms and conditions of employment" with recognized employee organizations, and to prepare a binding memorandum of understanding setting forth any provisions agreed to by the parties. (*Id.* at 4-5.) One organization – the Coalition of Independent State Employee Organizations ("CISEO") – drafted a letter explaining that it opposed SB 839 to the extent that it failed to provide state workers with the "minimum protections" enjoyed by other public sector employees. (*Id.*, Exh. 7 at 146.) Among other concerns, CISEO worried that the bill was rendered "somewhat meaningless" by its silence "on the obligation of the state with respect to notifying recognized employee organizations . . . of proposed changes to be adopted which are within the scope of representation." (*Id.*) In other words, CISEO wanted assurance that the State would be required to negotiate not only when a new contract was necessary, but whenever there were proposed changes in the law or regulations that affected matters within the scope of employment. CISEO proposed that the Dills Act be amended to include language to that effect from the Meyers-Milias-Brown Act, which covers collective bargaining rights for local government employees.[8] (*Id.* at 146-147.) Less than one month later, the Dills Act was amended to include the precise language proposed by CISEO. (*Compare id.* at 147 *with* Controller's Supp. RJN, Exh. 6 at 33.)

Nowhere does the legislative history suggest that anyone contemplated that this provision might enhance the Governor's power in emergency situations to impose terms or

---

> meet and confer with the administrative officials or their delegated representatives as may be properly designated by law.
>
> In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the administrative officials or their delegated representatives as may be properly designated by law shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation.
>
> (Gov. Code, § 3516.5.)

[8] This language was taken verbatim from the Meyers-Milias-Brown Act, which provided collective bargaining rights to local government employees. (Controller's Supp. RJN, Exh. 7 at 146, 249; Gov. Code, § 3504.5.)

conditions on workers that could not otherwise have been imposed. Such a change would be noteworthy, to say the least, but this provision garnered virtually no attention. The Assembly Office of Research did not even refer to the provision in its descriptions of the bill's major provisions. (Controller's Supp. RJN, Exh. 8 at 159-162.) Although the Department of Industrial Relations described the amendment in an analysis of SB 839, its only comments were that the new provision is "not unlike the provisions presently found in the Meyers-Milias-Brown Act" and that the Department is obligated to remain neutral on any proposed legislation "to maximize its effectiveness in dealing with the parties." (Controller's Supp. RJN, Exh. 7 at 249.)

To summarize, section 3516.5 allows the Governor to do nothing in a time of emergency that he cannot do in non-emergency times other than to postpone his obligation to meet and confer until the earliest practical time. As described in the Controller's principal briefs, the Governor lacks the authority to unilaterally impose involuntary furloughs on any state employees, and of course, the statutory provisions that allow the Governor to implement involuntary furloughs as part of an MOU do not apply in the absence of an MOU.[9]

Thus, although the Legislature has determined that some of its laws may yield in the wake of a contrary agreement between public sector employees and their employers, it has not determined that those same laws will yield in the wake of unilateral action by the Governor. Nothing in section 3516.5 or any other provision of the law grants the Governor the authority to operate free of these constraints, even in a time of emergency.

4. Whether section 3516.5 is designed to override the terms of an MOU in case of an emergency.

The Court has asked (1) what types of rules a Governor may impose in times of emergency under section 3516.5, and (2) whether the statute is designed to override the terms of an MOU, or to allow the imposition of entirely new terms in an MOU. As described in the answer to question 3 above, in times of emergency, section 3516.5 only allows the Governor to impose the types of rules that he would be allowed to impose in other times. This is not because section 3516.5 grants him the power to do so, but rather because he already has the power to do so. All section 3516.5 adds to the situation is temporary relief from the procedural requirement that he first meet and confer with represented employees in times of emergency.

---

[9] The section of the Dills Act that allows particular code provisions to be trumped by contrary provisions of the MOU states in relevant part:

> In any case where the provisions of Section . . 19826 [or] . . . 19851 . . . are in conflict with the provisions of a memorandum of understanding, the memorandum of understanding shall be controlling without further legislative action.
>
> (Gov. Code, § 3517.6(a)(1).)

In answer to the Court's question about what types of rules the Governor may impose in times of emergency, we begin with the language of the statute. The first paragraph of section 3516.5 describes the types of rules that would trigger the meet and confer requirement:

> Except in cases of emergency as provided in this section, the employer shall give reasonable written notice to each recognized employee organization affected by any *law*, *rule*, *resolution*, *or regulation* directly relating to matters within the scope of representation proposed to be adopted by the employer . . . .
>
> (Gov. Code, § 3516.5, emphasis added.)

The second paragraph of section 3516.5 uses the same language:

> In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the administrative officials . . . shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation.
>
> (*Id.*)

Thus, section 3516.5 only applies to laws, rules, resolutions or regulations. There is no mention of executive orders. An executive order is clearly not a law, a resolution, or a regulation, all of which must be adopted according to clear procedural requirements. Thus, if section 3516.5 applies at all to the Governor's furlough order, it must be because the order falls within the definition of a rule. Because the Legislature clearly intended that the meet and confer requirements of the Dills Act should apply broadly to matters within the scope of employment,[10] the Controller will assume for purposes of the discussion here that the term "rule" should be read to include an executive order.

As noted above, however, the only new rules that the Governor may impose in an emergency are those already authorized by law. Although the Controller has been unable to find any cases applying section 3516.5 in a relevant context, some applications of the statute are obvious. To expand upon an example included in the Controller's Reply Brief (p. 4), one can imagine a situation in which the State of California is confronted with a sudden, widespread H1N1 flu outbreak, and the Governor determines that workers from the California Department of

[10] *See* section 3512: "It is the purpose of this chapter to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between the state and public employee organizations."

Public Health must work longer hours to protect the public's health. A rule requiring work days longer than 8 hours and workweeks longer than 40 hours would not violate section 19851, which allows the Governor to establish workdays and workweeks of "a different number of hours . . . in order to meet the varying needs of the different state agencies. . . ." Presumably this rule would also not violate the relevant MOU, which is likely to anticipate the need for flexibility during public health emergencies. Accordingly, section 3516.5 appears to allow the Governor to implement such a rule without first meeting and conferring with represented employees. Under the statute, however, he must do so at "the earliest practical time" following adoption of the rule.

This example answers half of the Court's second question: section 3516.5 does appear to allow the imposition of entirely new terms on represented employees without immediately meeting and conferring about those terms. However, the answer to the other half of the Court's second question – whether in times of emergency the Governor may impose a rule that directly violates an existing MOU – is no.

The legislative history and the rules of statutory construction indicate that section 3516.5 is not meant to allow employers to override existing MOUs in times of emergency, but instead was only intended to address new proposals. As described above (p. 8), section 3516.5 was added at the request of a union seeking to enhance the protections afforded to workers, not the government seeking to enhance its powers to act in an emergency. Specifically, at the time this provision was added to the Dills Act, the draft legislation already imposed a duty to meet and confer and required that any labor-management agreement be memorialized in an MOU. Left unaddressed was whether the obligation to meet and confer extended to new issues that arose during the life of an existing MOU. Section 3516.5 was intended to remedy that shortcoming. (Controller's Supp. RJN, Exh. 7 at 146.)

Furthermore, the legislative history reveals that this amendment was treated as though it were a minor change to the Dills Act, not even worthy of mention in descriptions of the bill's major provisions. (*See* p. 9 above.) That treatment makes sense if the Legislature merely intended to subject employment proposals that arise after an MOU becomes effective to the same meet and confer requirements imposed on employment proposals that are discussed at the time the MOU is negotiated. That silence makes far less sense if the Legislature intended to empower the Governor to unilaterally re-write MOUs in times of crisis. One would expect at least a reference to that possibility in the legislative history if such a result were intended, or even contemplated.

Instead, it seems clear that the Legislature intended for DPA and the unions to address the issue themselves in their MOUs, just as was done in the SEIU, CASE, and CAPS agreements. (*See* CASE JA 397-398; SEIU JA 363; CAPS JA 300.) As discussed in the Controller's principal briefs, it defies belief that the unions would have agreed to include a fiscal crisis among the types of emergencies under which the Governor could suspend the terms of their agreements. (Controller's Opening Br. at 36-38; Controller's Reply Brief at 26-29.)

The case law relating to section 3504.5, a nearly identical provision in the Meyers-Milias-Brown Act, is equally sparse.[11] At the time the Legislature enacted the Dills Act, only one published decision shed light on this aspect of the MMBA, and nothing in that decision suggested that section 3504.5 vested an employer with the authority to unilaterally re-write MOUs. (*See generally Internat. Assn. of Fire Fighters Union v. City of Pleasanton* (1976) 56 Cal.App.3d 959.)

At issue in the *Internat. Assn. of Fire Fighters Union* case was whether section 3504.5 required the City of Pleasanton to meet and confer with represented employees before implementing three personnel changes. Specifically, the City sought to decrease the notice it was required to provide to applicants before administering its competitive employment examinations; lengthen the period of time probationary employees would have to wait before becoming eligible for merit pay increases; and reclassify certain employees as middle management. (56 Cal.App.3d at 963-965.) Although none of these proposals was criticized for conflicting with the MOU in place at the time, two of the proposals amended a city ordinance that predated the MOU, and the third proposal superseded one of the City's longstanding practices. (*Id.* at 964-965.) The City took the position that it could unilaterally adopt the amendments as "management prerogatives," but the First District Court of Appeal agreed with the firefighters that the proposed changes were void because the City had failed to negotiate with the union concerning the proposed changes. (*Id.* at 964, 971, 973, 976.)

---

[11] Section 3504.5 provides in relevant part:

> (a) Except in cases of emergency as provided in this section, the governing body of a public agency, and boards and commissions designated by law or by the governing body of a public agency, shall give reasonable written notice to each recognized employee organization affected of any ordinance, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the governing body or the designated boards and commissions and shall give the recognized employee organization the opportunity to meet with the governing body or the boards and commissions.
>
> (b) In cases of emergency when the governing body or the designated boards and commissions determine that an ordinance, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the governing body or the boards and commissions shall provide notice and opportunity to meet at the earliest practicable time following the adoption of the ordinance, rule, resolution, or regulation. . . .

Because the firefighters' case was decided the year before the Legislature enacted the Dills Act, we must presume that the Legislature had it in mind when it modeled section 3516.5 on section 3504.5 of the MMBA. (*People v. Harrison* (1989) 48 Cal.3d 321, 329 [Legislature "is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof."].) The most likely interpretation of section 3516.5, therefore, is that the Legislature intended the provision to apply to new proposals outside the scope of current MOUs. Certainly there is no evidence either in the case law or the legislative history that the Legislature intended to authorize the Governor or DPA to redraft MOUs currently in effect.

Although it appears that section 3516.5 does not allow the Governor to rewrite an MOU in times of emergency, this Court need not reach the issue for at least two reasons. Regardless of whether the Governor's furloughs violate the MOUs, they violate state law and are void for that reason. Furthermore, as described below, there is no emergency that would justify invocation of section 3516.5 in any event.

5. Whether the legislative history of Government Code section 3516.5 discloses that the statute intended to include California's chronic budget crises within the meaning of the term "emergency."

The Court has asked what the legislative history of section 3516.5 discloses about the types of emergencies included within the meaning of the statute. Although the legislative history does not directly address the meaning of "emergency" in section 3516.5, it does provide a powerful indication that the Legislature construed the term in ways that exclude long-term budget problems.

When the Dills Act was originally enacted in 1977, it included another provision that defined emergency in a separate though analogous context. Section 3523 required unions and employers to present their meet and confer proposals at public meetings, and, "[e]xcept in cases of emergency," to wait at least seven days after publicly presenting their proposals to commence meeting and conferring about the proposals. (Gov. Code, § 3523(a) & (b).) The statute then goes on to provide more specifically when the seven-day waiting period may be waived:

> when the employer determines that, *due to an act of God, natural disaster, or other emergency or calamity affecting the state, and which is beyond the control of the employer or recognized employee organization*, it must meet and confer and take action upon such a proposal immediately and without sufficient time for the public to become informed and to publicly express itself. In such cases the results of such meeting and conferring shall be made public as soon as reasonably possible.
>
> (Gov. Code, § 3523(d), emphasis added.)

Under the ordinary principles of statutory construction, two provisions enacted at the same time and relating to the same subject matter should be construed together. (*People v. Coker* (2004) 120 Cal.App.4th 581, 588 ["'[S]imilar words or phrases in statutes in pari materia [that is, dealing with the same subject matter] ordinarily will be given the same interpretation.' [Citations]"; *accord Bonner v. County of San Diego* (2006) 139 Cal.App.4th 1336, 1351; *In re Balasubramanian v. San Diego Community College Dist.* (2000) 80 Cal.App.4th 977, 988; *Bittaker* (1997) 55 Cal.App.4th 1004, 1009.) It is therefore reasonable to conclude that the Legislature had the same kind of emergency in mind for section 3516.5.

Indeed, it would be unreasonable to conclude that the Legislature had something different in mind in this instance, where the two provisions are so similar that it would make little sense to apply different definitions. (*See* 2B Sutherland Statutes and Statutory Construction (7th ed. 2008) § 51:1 ["Experience indicates that a legislature does not deliberately enact inconsistent provisions, when it is cognizant of them both, without expressly recognizing the inconsistency."].) Both sections 3516.5 and 3523.5 allow "emergencies" to operate as the only relief from the obligation to include others – either the unions or the public – in the process of reaching an agreement concerning the terms and conditions of public employment. It would make no sense to relieve this requirement based on one kind of emergency in one context and a different kind of emergency in the other context.

Although no cases have yet applied this (or any other) definition of emergency in the context of interpreting either section 3516.5 or 3523.5, it is clear that section 3523.5's definition does not include the Governor's furlough program. A chronic budget crisis that grinds on month after month for years has little in common with an "act of God" or a "natural disaster." Similarly, the fact that the Governor fixed an end-date of June 30, 2010[12] for the furlough program is inconsistent with the concept of an emergency, which is almost always of uncertain duration.

The only reasonable alternative to this definition of emergency is the long accepted definition of the term employed by the California courts. In 1914, the California Supreme Court described the meaning of emergency "that obtains in the mind of the lawyer as well as in the mind of the layman" to be an "unforeseen occurrence" of "grave character and serious moment" that "calls for an immediate action." (*San Christina Investment Co. v. City & County of San Francisco* (1914) 167 Cal. 762, 773.) The Court applied this definition – with its emphasis on the "pressing necessity" for an "immediate action or remedy" – to cast doubt on whether the City of San Francisco could justify the imposition of an "emergency" tax hike in 1910 on the basis of the 1906 earthquake. (*Id.*) The same is, of course, true of a chronic budget shortage that the Governor anticipates will last from February, 2009 to June 30, 2010.

The Supreme Court's definition of emergency is the same one used to interpret the provision of the Meyers-Milias-Brown Act that served as the model for section 3516.5. (*See*

[12] CASE JA 347.

Sonoma County Organization of Public/Private Employees v. County of Sonoma (1991) 1 Cal.App.4th 267, 276-277, citing *Christina Investment Co. v. City & County of San Francisco*, 167 Cal. at 773.) At issue in *Sonoma County* was whether county employees' work stoppages had led to an "emergency" within the meaning of section 3504.5 that justified the county's decision to place county employees on unpaid administrative leave without first meeting and conferring over the issue.

Because the Meyers-Milias-Brown Act does not define "emergency," the Court relied on the term's long accepted meaning "in California as an unforeseen situation calling for immediate action." (1 Cal.App.4th at 276.) Although the meaning of the term varies according to the "special circumstances" of the case, the Court listed some of the relevant circumstances and particular "identifying characteristics of an emergency." (*Id.* at 277.) The situation must be urgent, "grave" and "serious." (*Id.*) An emergency is *not* "synonymous with expediency, convenience, or best interests," and it must be a response to "'more . . . than merely a general public need.'" (*Id.*, citation omitted.) All emergencies require the existence of "'a substantial likelihood'" of imminent, serious harm "unless immediate action is taken." (*Id.*, citation omitted.) Yet, particularly in cases of a public sector labor dispute, "perhaps the most important [ ] criterion" is "an imminent and substantial threat to public health or safety." (*Id.*) Applying these principles, the *Sonoma County* Court agreed that work stoppages constituted an emergency where they led the county hospital to evacuate patients and close down certain areas of the hospital, and forced the mental health department to make do without most of its "outpatient" and "inpatient" workers, and nearly half of its "continuing care" workers. (*Id.* at 278.)

The Governor's furlough provision fits no more readily into this definition than the other. The State's budget problems and its cash crisis did not threaten the public health or safety. The very fact that the furloughs did not go into effect until 6 weeks after the Governor issued the Executive Order implementing the program proves that the furloughs did not address an "imminent" threat.

Respectfully submitted,

REMCHO, JOHANSEN & PURCELL, LLP

Margaret R. Prinzing
Attorneys for Defendant and Appellant
John Chiang

MRP:NL
(00103410-6)

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause or action. My business address is 201 Dolores Avenue, San Leandro, CA 94577.

On March 1, 2010, I served a true copy of the following document(s):

Supplemental Letter Brief

on the following party(ies) in said action:

Please see attached service list.

☒ **BY UNITED STATES MAIL:** By enclosing the document(s) in a sealed envelope or package addressed to the person(s) at the address above and

- ☐ depositing the sealed envelope with the United States Postal Service, with the postage fully prepaid.
- ☒ placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the businesses' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, located in San Leandro, California, in a sealed envelope with postage fully prepaid.

☐ **BY OVERNIGHT DELIVERY:** By enclosing the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ **BY MESSENGER SERVICE:** By placing the document(s) in an envelope or package addressed to the persons at the addresses listed and providing them to a professional messenger service for service.

☐ **BY FACSIMILE TRANSMISSION:** By faxing the document(s) to the persons at the fax numbers listed based on an agreement of the parties to accept service by fax transmission. No error was reported by the fax machine used. A copy of the fax transmission is maintained in our files.

☐ **BY EMAIL TRANSMISSION**: By emailing the document(s) to the persons at the email addresses listed based on a court order or an agreement of the parties to accept service by email. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

I declare, under penalty of perjury, that the foregoing is true and correct.

Executed on March 1, 2010, in San Leandro, California.

Michael Narciso

SERVICE LIST

Gerald A. James
Professional Engineers in California Government
455 Capitol Mall, Suite 501
Sacramento, CA 95814-4433
Phone: (916) 446-0400
Fax: (916) 446-0489

Attorneys for Plaintiffs and Appellants Professional Engineers in California Government, et al.

David W. Tyra
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814
Phone: (916) 321-4500
Fax: (916) 321-4555

Attorneys for Defendants and Respondents Governor Arnold Schwarzenegger and Department of Personnel Administration

Will M. Yamada
Chief Counsel
Department of Personnel Administration
1515 "S" Street, Suite 400
Sacramento, CA 95811-7246
Phone: (916) 324-0512
Fax: (916) 323-4723

Attorneys for Defendant and Respondent Department of Personnel Administration

Richard Chivaro
State Controller's Office
Chief Counsel
300 Capitol Mall, Suite 1850
Sacramento, CA 95814
Phone: (916) 445-6854
Fax: (916) 322-1220

Attorneys for Defendant and Appellant State Controller John Chiang

Jeffrey Ryan Rieger
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105
Phone: (415) 543-8700
Fax: (415) 391-8269
(courtesy copy)

Attorneys for Amicus Curiae as Appellant Teachers Retirement Board of the California State Teachers' Retirement System

Clerk to the
Honorable Patrick Marlette
Sacramento County Superior Court
720 Ninth Street, Department 19
Sacramento, CA 95814

California Supreme Court
Electronic Copy Served Pursuant to
CRC Rule 8.212