COPY

THE LAW OFFICES OF BROOKS ELLISON
1725 CAPITOL AVENUE
SACRAMENTO, CALIFORNIA 95811
916-448-2187 • FAX 916-448-5346
E-MAIL: lobby@ellisonwilson.com

CASE Reply

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COURT OF APPEAL - THIRD DISTRICT
DEENA C. FAWCETT, Clerk
BY _____ Deputy

April 21, 2010

Deena C. Fawcett, Clerk/Administrator
Court of Appeal, Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814-4179

Re: *California Attorneys, etc. v. John Chiang, Arnold Schwarzenegger, et al.*, case # C061009

Dear Ms. Fawcett:

Respondents filed their supplemental letter brief (hereafter "RB Supp.") on April 1, 2010. By letter dated January 29, 2010, this Court directed appellants to file and serve a supplemental reply brief within 20 days of such filing by respondents. Appellant hereby submits its supplemental reply pursuant to that letter brief. This brief will only address those points raised in respondents' supplemental letter brief which merit further discussion, and expressly incorporates all previous arguments submitted by appellant in this case.

I. GOVERNMENT CODE SECTION 19851 DOES NOT CONFER UNLIMITED DISCRETION TO ALTER HOURS OF WORK

Respondents argue in response to this Court's first question that section 19851 sets forth a mere "policy" and that the Governor has discretion to set different work hours for state employees. (RB Supp. 3.) Respondent further argues that the statute does not impose any mandatory duty or obligation. (*Ibid.*) The argument is disingenuous because it ignores the fact that the statute plainly states that "the workweek of state employees *shall* be 40 hours." It is a well-settled principle of statutory construction that the word "may" in a statute is ordinarily deemed permissive, and the word "shall" is deemed mandatory. (*California Correctional Peace Officers Association v. State Personnel Board* (1995) 10 Cal.4th 1133, 1143.) Accordingly, the statute imposes a mandatory condition that cannot be violated except by the express terms allowed in the subsequent clause, which provides:

> workweeks and workdays of a different number of hours may be established in order to meet the varying needs of the different state agencies.

Notwithstanding this plain limitation on the invocation of the exception, respondents argue that the Governor "can exercise his discretion . . . by making a uniform decision regarding work hours that affects all state employees similarly." (RB Supp. 4.) This bold assertion is in direct contravention of the statutory language on which respondents purport to rely. The statute plainly requires that any "exception" to the normal 40-hour workweek can only be invoked "in order to meet the varying needs of the different state agencies." By its terms, the language expressly prohibits the very "uniform decision" that the Governor reached because he admittedly failed to consider the varying needs of any of the different state agencies. Respondents' argument is simply

that during an "emergency" the Governor is not required to follow the law. Such an argument must be rejected, as it would inevitably lead to chaos.

Respondents also fail to address a significant point raised in the supplemental letter brief filed by appellant. Even assuming arguendo that Government Code section 19851 conferred some authority to reduce hours of work, it provides no authority whatsoever to reduce the salaries of CASE members. (See Appellant's Supplemental Letter Brief, pp. 5-6.) As previously explained, all of the attorneys, administrative law judges and hearing officers are required to "work all hours necessary to accomplish their assignments and fulfill their responsibilities." (CASE JA 416.) And according to the MOU, the State is contractually bound to provide "full compensation" to the salaried professional members of CASE, regardless of the number of hours worked. (CASE JA 415.)

Respondent's failure to address this point is telling. While hourly employees may theoretically be paid less when their hours of work are reduced, the same is not true for salaried professionals. Indeed, that is the entire point of a salary – the employer gets the benefit of the employee's work regardless of the number of hours necessary to complete the task. This relieves the employer of the obligation to pay overtime, but it does not permit the employer to pay less than the contractually established salary. Thus, even if the Governor does have authority to reduce hours of work, it does not permit the reduction in salaries which accompanied the furloughs that were imposed on CASE members.

II. THE APPLICABLE MOU DOES NOT AUTHORIZE THE GOVERNOR TO IMPOSE INVOLUNTARY FURLOUGHS

In purporting to answer this Court's second question, respondents incorporate pages 23 to 29 of their previously filed Respondents Brief which they say demonstrates that "the MOU between the State and Appellant CASE contains provisions authorizing the State to furlough employees covered by the MOU under specified circumstances." (RB Supp. 11.) Respondents then state that they "will not repeat those arguments here." Reference to the cited pages in the RB reveals why respondents chose not to repeat the arguments: they are entirely unpersuasive.

The only "provisions" of the MOU mentioned in the RB at pages 23 through 29 are section 10.3 (see RB 26) and section 3.1 (RB 27.) Neither of those provisions permits the Governor to impose involuntary furloughs. Section 10.3 of the MOU provides as follows:

> 10.3 Alternative to Layoff
> The State may propose to reduce the number of hours an employee works as an alternative to layoff. Prior to the implementation of this alternative to a layoff, the State will notify and meet and confer with the Union to seek concurrence of the usage of this alternative.

This section only allows the State to "propose" a reduction in hours. It says nothing about a reduction in pay or furloughs. Moreover, it expressly requires the Union's "concurrence" in the proposal. Thus, this section provides no authority whatsoever for the Governor to unilaterally impose furloughs, and respondents' continued reliance upon this provision is evidence of the weakness of their argument.

The only other section cited by respondents is section 3.1 of the MOU, the so-called "State rights" clause. However, appellant previously demonstrated in the reply brief that this section

provided no authority whatsoever. (See Reply Brief at pp. 12-13.) In summary, section 3.1 of the MOU begins with an express limitation on the very language upon which respondents rely. Specifically, the "State rights" clause applies only to those matters which are not "expressly abridged" by the MOU. (CASE JA 397.) And as has been repeatedly explained, section 6.3.A of the MOU sets forth a workweek of 40 hours on average, with the recognition that longer workweeks may be required to perform all required duties. (CASE JA 416.) Moreover, Section 6.2.C of the MOU mandates "full compensation." (CASE JA 415.) That full compensation is detailed in the salary tables attached to the MOU (CASE JA 485-488.)

In short, there are no provisions of the MOU which authorize furloughs, and several provisions which expressly prohibit the type of furloughs implemented by the Governor in this case. Respondents offer no counter argument to any of the foregoing, and instead simply reassert and reincorporate their previously rebutted arguments. Accordingly, their "answer" to this Court's second question is entirely unsupported, and should be rejected.

III. GOVERNMENT CODE SECTION 3516.5 PROVIDES NO AUTHORITY FOR THE GOVERNOR TO IMPOSE INVOLUNTARY FURLOUGHS

In response to this Court's third question, respondents argue that in an emergency, the Governor may "unilaterally change the terms and condition [sic] of state employment, without first meeting and conferring with affected state employee organizations." (RB Supp. 12.) This is a rather remarkable assertion, especially in light of the concession which appears later in the brief. Specifically, respondents concede that "Government Code section 3516.5 does not provide the Governor with any new substantive authority. . . ." (RB Supp 17.) The concession is entirely consistent with the argument made by appellant. (See AOB 18.)

Respondents amplify their concession by describing section 3516.5 as merely "a mechanism." (RB Supp. 17-18.) By describing the section as merely "a mechanism" they are essentially acknowledging that the section is merely procedural, a point that has repeatedly been argued by appellant in this case.

In light of respondents' concession that section 3516.5 provides no new substantive authority, they are necessarily arguing that the Governor has the power to furlough state employees even in the absence of that statute. However, they identify no such authority. The argument thus is essentially ipse dixit – because the Governor has asserted the power, he therefore must have it. But this argument proves too much. If the Governor has such broad authority – without any statutory or constitutional tether – then we can dispense with the other branches of government, as they are truly superfluous. While there is statutory authority for the Governor to lay off state employees, (see Gov. Code §19997 et seq.) no such authority is apparently necessary for furloughs. And although this Court has previously determined that the Legislature has specifically withheld from the Governor the power to unilaterally reduce wages (see *Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal.App.4th 155, 178), the Governor apparently can achieve the same end via furloughs.

Respondents fail utterly to address the fact that section 4.3.A of the MOU provides that the MOU is "the full and entire understanding of the parties." (CASE JA 398.) Yet respondents would urge this Court to read into the MOU a power never before contemplated - the power to unilaterally

furlough employees, reducing their hours and salaries, despite a variety of provisions in the MOU which expressly prohibit such action.

The only authority respondents identify is a series of NLRB decisions which stand for the rather uncontroversial proposition that a private sector employer may act promptly during period of economic exigency. (See RB Supp. 13-14.) These decisions do not aid respondents' argument.

While it is true that as a general matter, the NLRA may be used as a guide in interpreting similar state statutory provisions that are similar to those in the federal law, respondents have failed to identify any provision of the NLRA which is similar to section 3516.5. Moreover, courts have recognized that there are important differences which make strict reliance on the NLRA unwise. (*Department of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 189.) Specifically, the Dills Act is subject to supersession. (*Ibid.*) Various provisions of the MOU operate to supersede the ability of the Governor to unilaterally implement new conditions of employment. Appellant CASE previously set forth in its initial supplemental letter brief a thorough discussion of how section 4.3 of the MOU limits the ability of the State to impose new terms and conditions of employment. (See Appellant's Supplemental Letter Brief, pp. 8-9.)

In summary, the State's power is constrained by the MOU, but for "other matters" (i.e. those matters not covered by the MOU,) the parties can negotiate. (See section 4.3 of the MOU, CASE JA 398.) Specifically pursuant to section 4.3.B,

> Where the State finds it necessary to make such changes, the State shall notify CASE of the proposed change thirty (30) days prior to its proposed implementation.

(CASE JA 398.) Arguably, to the extent the State is proposing a change to a matter that is not covered by the MOU, section 3516.5 might allow unilateral implementation of such changes in cases of emergency. But before section 3516.5 could be relied upon for such authority, respondents would have to demonstrate that:

> 1) furloughs are a matter outside of the MOU
> 2) there was truly an emergency requiring immediate action prior to meeting and conferring.

They fail to demonstrate either prerequisite. As to the former, they expressly argue that furloughs are a matter covered by the MOU. (RB Supp. 11.) As to the latter, they have failed to explain the delay in implementing the furloughs. The possibility of furloughs was raised as early as November 6, 2008. (CASE JA 306.) The furloughs were not implemented until three months later, in February 2009. In the intervening three months, as respondents point out, the Governor convened a special session of the Legislature, issued an emergency proclamation, issued the subject executive order, and ultimately agreed to and signed a budget that purported to resolve the fiscal crisis. (RB 5-8.) That three month period of reflection, debate, deliberation, and ultimate action reflects a situation that is the polar opposite of the type of emergency contemplated in section 3516.5.

Reliance in the NLRB cases is suspect for another related reason. They ignore the fact that in the private employment context, there is no danger of violating the prohibition against the impairment of contracts. The rights of CASE members under the MOU are protected by the State and Federal contract clauses because "public employment gives rise to certain obligations which are protected by the contract clause of the Constitution." (*California Association of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 376.)

Article I, § 10 of the United States Constitution provides that "[n]o State shall . . . pass any law . . . impairing the Obligation of Contracts." It has been settled law for more than a century that

"[t]he prohibition of the Constitution against the passage of laws impairing the obligation of contracts applies to the contracts of the State, and to those of its agents acting under its authority, as well as to contracts between individuals." (*Wolff v. City of New Orleans* (1880) 103 U.S. 358, 367.) Article I, § 9 of the California Constitution provides that a "law impairing the obligation of contracts may not be passed."

By agreeing to an MOU, and specifically section 4.3, the State has limited whatever power it may have to alter the terms and conditions of employment. Respondents' argument that the Governor can unilaterally breach the MOU in the event of a fiscal emergency is simply another way of saying that section 3516.5 allows the Governor to impair contracts. Such an interpretation of the statute would be unconstitutional and should therefore be rejected by this Court.

Finally, appellant notes that respondents cite Government Code section 19816 in support of their argument. (RB Supp. 14-15.) However, that statute is of no assistance to respondents, as it contains the same limitation as section 19851. Specifically, it requires that the state consider the varying needs and requirements of different state agencies, as well as the prevailing practices in the private sector. There has been no showing of either.

IV. GOVERNMENT CODE SECTION 3516.5 IS NOT RENDERED INEFFECTIVE

In this Court's fourth question, this Court asked the parties to assume for purposes of discussion that absent other statutory authority, Government Code section 3516.5 does not give a Governor authority to impose furloughs, and then asked for examples of the types of rules that may be imposed in an emergency. In answering this question, respondents refused to engage in the assumption directed by this Court, and instead argued that such an assumption would "render the provision ineffective to address emergencies." (RB Supp. 17.) While respondents' decision to fight the hypothetical is nonresponsive and likely unhelpful to this Court, it is also flatly incorrect.

As explained in appellant's supplemental letter brief, a Governor could implement a wide variety of new conditions of employment in an emergency, provided that such new conditions were not prohibited by the MOU. (See Appellant's Supplemental Letter Brief, pp. 10-11.) While the MOU, like many contracts, attempts to be as comprehensive as possible, there are many areas in which it is silent. In those areas, there is no prohibition against implementing new conditions. In the normal course of events, such new conditions would be subject to negotiation, as specified in section 4.3 of the MOU. (CASE JA 398.) However, during an emergency, Government Code section 3516.5 would appear to allow implementation of new terms and conditions prior to meeting and conferring with the union.

Accordingly, it cannot be said that the statute is rendered ineffective. Rather, it has a relatively wide scope, and is limited only by the terms of the MOU. To the extent respondents desire section 3516.5 to have greater effect, they can simply negotiate in the future for narrower MOUs. By narrowing the number of areas covered by the MOU, they would necessarily increase the number of areas in which section 3516.5 would have effect. In other words, to the extent respondents bemoan the fact that section 3516.5 is of limited effectiveness, they have only themselves to blame, as it is they who agreed to the terms of the MOU which prohibit the broad interpretation of section 3516.5 which respondents claim is necessary.

V. RESPONDENTS' ARGUMENT REGARDING THE MEANING OF "EMERGENCY" DEMONSTRATES THEY LACK THE POWER TO FURLOUGH

In response to this Court's fifth question concerning the types of emergencies contemplated by Government Code section 3516.5, respondents make two noteworthy arguments. First, they concede that reference to Government Code section 3523 is helpful in answering the question. (RB Supp. 21.) Second, they admit that Proposition 58 is relevant to the analysis of the fiscal emergency present in this case.

The concession that section 3523 is helpful is entirely consistent with the argument advanced by appellant (See Appellant's Supplemental Letter Brief, pp. 13-14) and is extremely damaging to respondents' position. They argue simply that the phrase "other emergency or calamity affecting the state" must be read to apply to the fiscal crisis used by the Governor to justify furloughs. (RB Supp. 21-22.) However, a cardinal principle of statutory construction explains:

> When a particular class of things modifies general words, those general words are construed as applying only to things of the same nature or class as those enumerated. This canon of statutory construction, which in the law is known as ejusdem generis, applies whether the specific words follow general words in a statute or vice versa. In either event, the general term or category is restricted to those things that are similar to those which are enumerated specifically.

(*People v. Arias* (2008) 45 Cal.4th 169, 180 internal citations and quotations omitted.) Under this canon of statutory construction, the phrase "other emergency or calamity affecting the state" in section 3523 must be read to include those things that are in the same general class as those items that are specifically enumerated. Those items specifically mentioned are "an act of God" and a "natural disaster." For good reason, respondents do not even attempt to argue that the fiscal crisis is of the same general nature as an act of God or a natural disaster. Rather, it is an entirely man-made situation, and is easily rectified by the Legislature passing and the Governor signing a budget which either increases revenues, decreases expenditures, or both. While this has proven politically difficult in recent years, it is by no means impossible to avoid, as is a natural disaster.

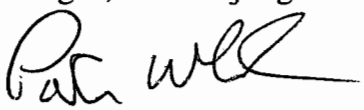
This nature of the fiscal crisis is also significant in light of other language in section 3523. Specifically, subdivision (b) refers to "cases of emergency as provided in subdivision (d)." Subdivision (d), in turn specifies two factors which must exist. First, there must be "an act of God, natural disaster," etc. as previously discussed. Second, it must be an event which is "beyond the control of the employer or recognized employee organization." As explained above, the State, as the employer, could easily address the fiscal emergency. Its failure to do so does not mean it is beyond its control, but simply reflects an unwillingness to act. Because the fiscal crisis relied upon by respondents is not beyond their control, it does not fit within the ambit of section 3523, subdivision (d). Accordingly, their arguments to the contrary must be rejected.

Respondents' admission that Proposition 58 is relevant to the fiscal crisis upon which they rely is also illuminating. Proposition 58 was a constitutional amendment, sponsored by Governor Schwarzenegger, which substantially expanded his power in cases of fiscal emergencies. Specifically, it allows the Governor to introduce legislation to address the fiscal emergency. This is a significant alteration of the balance of power in the respective branches of government, because the Governor is prohibited from exercising any legislative power without express constitutional authorization. (*St. John's Well Child and Family Center v. Schwarzenegger* (2010) 182 Cal.App.4th

590, 619.) Thus, Proposition 58 gives to the Governor a modicum of the power previously reserved to the Legislature. Respondents fail to explain why Governor Schwarzenegger needed to pass a constitutional amendment in order to take certain actions during a fiscal emergency, yet requires no statutory or constitutional authority whatsoever to unilaterally implement furloughs during a fiscal emergency. Indeed, in light of the Governor's repeated acknowledgement that legislative approval of the furloughs was necessary (see CASE JA 306, 307), and his repeated failed attempts to introduce legislation that would authorize furloughs (see CASE JA 312, 343), it is logically inconsistent for him to now take the position that he had the authority to act unilaterally all along. Rather, his actions suggest an executive who is aware of the limits of the power but is not content to act within those limits. It has previously been observed that judicial review is the only effective check upon the exercise of authority by the executive branch. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 665-666.) Accordingly, this Court must reject the Governor's unsupported assertion of power.

CONCLUSION

For the foregoing reasons, and for all of the reasons enumerated in Appellant CASE's earlier briefing, Appellant submits the Governor lacked authority to unilaterally implement furloughs, and the judgment should therefore be reversed.



Patrick Whalen
Attorney for Plaintiff and Appellant CASE

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sacramento, California. I am over the age of eighteen (18) years and not a party to the above-entitled action. My business address is 1725 Capitol Avenue, Sacramento, CA 95811.

On April 22, 2010 I served the following documents:

1. **Appellant's Supplemental Reply Letter Brief**

I served the aforementioned document(s) by enclosing them in an envelope and (check one):

_XX_ depositing the sealed envelopes with the United States Postal Service with the postage fully prepaid.
_____ placing the sealed envelope for collection and mailing following our ordinary business practices. I am readily familiar with this business' 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 in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed as follows

David Tyra
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814
Fax: (916) 321-4555
dtyra@kmtg.com

Attorney for Respondent Schwarzenegger and Department of Personnel Administration

Will Yamada, Deputy Counsel
Chief Counsel
Department of Personnel Administration
1515 S Street, North Building, Suite 400
Sacramento, CA 95811-7246
Fax: (916) 323-4723
willyamada@dpa.ca.gov

Attorney for Respondent Department of Personnel Administration

Robin B. Johansen, Esq.
Remcho, Johansen &
Purcell, LLP
201 Dolores Avenue
San Leandro, CA 94577
Fax: (510) 346-6201
Email: rjohansen@rjp.com

Attorney for Appellant and Respondent
State Controller

Richard J. Chivaro
Office of the State Controller
300 Capitol Mall, Suite 1850
Sacramento, CA 95814
Fax: (916) 322-1220
Email: rchivaro@sco.ca.gov

Attorney for Appellant and Respondent
State Controller

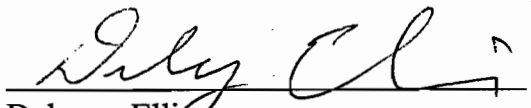
Jeffrey Ryan Rieger
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, CA 94105

Attorney for Teachers' Retirement
Board etc.
Amicus curiae for appellant

Supreme Court of California (4 copies)
350 McAllister Street
San Francisco, CA 94102-4797

Hon. Patrick Marlette
Sacramento County Superior Court
Gordon D. Schaber Downtown Courthouse
720 Ninth Street
Sacramento, CA 95814

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on April 22, 2010



Delaney Ellison