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

Deena C. Fawcett
Clerk of the Court/Administrator
Court of Appeal
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814-4719

RE: Professional Engineers in California Government et al. v. John Chiang, as State
Controller, etc.; Arnold Schwarzenegger, as Governor, etc., et al.
C061011, Sacramento Superior Court Case No. 34-2008-80000126
PECG and CAPS Appellants' Supplemental Letter Brief

Dear Clerk of the Court:

By letter dated January 29, 2010, the Court directed the parties to provide additional briefing in response to five questions. This supplemental letter brief filed on behalf of Appellants Professional Engineers in California Government and the California Association of Professional Scientists responds to those questions.

1. When construing a statute, courts must “ascertain the intent of the lawmakers so as to effectuate the purpose of the law.” (*People v. Pieters* (1991) 52 Cal.3d 894, 898.) The words of a statute are “generally the most reliable indicator of legislative intent.” (*People v. King* (2006) 38 Cal.4th 617, 622.) “If the plain, commonsense meaning of a statute’s words is unambiguous, the plain meaning controls.” [Citation.] But if the statutory language may reasonably be given more than one interpretation,” courts look to legislative history in an effort to ascertain the intent of the lawmaker. (*Ibid.*)

Government Code section 19851 states in part: “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.*”

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(Italics added.) Are those words reasonably susceptible to more than one interpretation? If so, does the legislative history of the statute indicate whether the Legislature intended those words to allow, under certain circumstances, the hours of state employment to be reduced below a 40-hour workweek or does the legislative history reflect only that the words allow work hours to exceed a 40-hour workweek, without violating the legislative policy against overtime, when necessary to meet the varying needs of a state agency?

There is nothing in the plain reading of Section 19851 which suggests it was intended to be used as a justification for cutting state employees hours below 40-hours per week. The words must be read in the context of the statutory scheme regarding hours of work for state employees. This statutory scheme contains only limited and specific legislatively authorized reductions from the 40-hour minimum workweek and grants the Governor very specific and limited powers regarding the number of days in which the 40-hour workweek can be worked. Within that statutory context, it is clear Section 19851 does not allow for the reduction of workweeks below the 40-hour workweek established by the Legislature. That is why the Governor sought in November 2008, but did not obtain, specific statutory authority to furlough employees by placing them on temporary, nonduty status. (PECG JA I, Exh. F, p. 55.)

“The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.] Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute... An interpretation that renders related provisions nugatory must be avoided [citation]...” (*People v. Shabazz* (2006) 38 Cal.4th 55, 67-68.)

In Government Code section 19852, the Legislature expressly provides the Governor limited discretion in determining whether the 40-hour workweek should be worked in four or five days. If Section 19851 gave the Governor the kind of authority which would allow a reduction in hours, then Section 19852 which is a more limited power authorizing the Governor to say when the hours may be worked, would not be necessary. Additionally, Section 19852 confirms that the 40-hour workweek is established as the policy of the state.

There are two instances where the Legislature has authorized a deviation from the 40-hour workweek for state employees. The "Reduced Worktime Act" allows employees to agree to voluntary reductions from the 40-hour standard worktime. (Government Code section 19996.19 et seq.) In 1992, a "Personal Leave Program" which consisted of a salary reduction in exchange for leave credits was arrived at the bargaining table for rank-and-file employees. To implement a similar program for employees excluded from collective bargaining required legislation. (Gov. Code § 19996.3.)

As cited in PECG and CAPS' Opening Brief at pages 28 - 29, in 1962, the Attorney General issued an opinion which reviewed Section 18020 which contains the same language now found at Section 19851. The Attorney General concluded that "the length of the work week of state civil service employees is fixed by law to a certain extent" but that the head of a department or agency "has authority to fix within reasonable bounds the daily working hours of department employees, provided the 40-hour minimum work week is observed." (39 Ops.Cal.Atty.Gen 261, 262 - 263.)

As recounted in the State Controller's Opening Brief at pages 17 - 19, the legislative history confirms that the minimum work week is 40 hours and that the words now found at Section 19851 allow work hours to exceed 40 hours, but do not allow a reduction below 40 hours. The 1955 amendments to then Section 18020 concerned the payment of overtime. Prior to the 1955 amendments, the State Personnel Board was responsible for establishing the work week for each position or class in state service into classes or positions with workweek groups of 40, 44, 48, or "other" workweeks. The 1955 amendment established the 40-hour workweek as the state norm and continued to allow exemptions based on the specific needs of the agency. (State Controller's Request for Judicial Notice, July 20, 2009, Exh. H, page 2.) The workweeks at issue subject to the exemptions were all longer than 40 hours, not shorter.

Even if 19851 were construed to allow a reduction in hours, conflicting language in an MOU would control. (Gov. Code § 3517.6.) The language in the PECG Unit 9 MOU is different than Section 19851. The PECG MOU mandates a 40 hour workweek with no exceptions ("the regular work week of full-time Unit 9 employees shall be forty (40) hours" and only allows for varying "*work shift schedules*" to meet the needs of the State agencies (meaning starting and stopping times) and does not allow for varying workweeks.) (PECG JA I, Tab N, p. 172.) In addition to calling for a 40 hour workweek, the CAPS Unit 10 MOU contains a "No Lockout" provision which would preclude the

Governor's partial closing of state offices preventing Unit 10 employees from working a full workweek. (PECG JA II, Tab O, p. 301.) The parties to the MOU must continue to give effect to the expired provisions of the MOU. (Gov. Code § 3517.8)

Also, even if the Governor had the authority to reduce hours to meet the varying needs of the different state agencies, the Governor's actions would not otherwise comply with Section 19851 as there is no indication or evidence in the record that the Governor's proposed reduction in hours was designed to "meet the needs of the different state agencies." This issue was raised by PECG and CAPS in the trial court. (PECG JA, Vol II, Tab SS, p. 626.)

2. Assuming, for the purpose of discussion, that there is no statutory authority allowing imposition of involuntary furloughs in the absence of an emergency, could the Department of Personnel Administration (DPA) and a recognized bargaining unit (union) agree to include an involuntary furlough provision in their memorandum of understanding (MOU)?

Yes. DPA and a union could agree to a furlough provision in an MOU, but it would require legislative approval and the amendment of other statutes, as explained below. When reached through an agreement between the state employer and the exclusive representative through collective bargaining, the furlough is no longer "involuntary". Hours of work, wages, and other terms and conditions of employment are within the scope of representation under the Dills Act. (Gov. Code § 3516.)

If agreement is reached between the Governor and a union, they jointly prepare a written MOU to present, when appropriate, to the Legislature for determination. (Gov. Code § 3517.5.) If any provision of an MOU between the Governor and the union requires the expenditure of funds, or requires legislative action to permit its implementation by amendment of a non-supersedable statute, those provisions of the MOU shall not become effective unless approved by the Legislature. (Gov. Code § 3517.6.)

Under the bargaining law, comprehensive MOUs have historically been considered to "require the expenditure of funds" and require legislative approval. In addition, a furlough program like the one challenged here which closes state offices three Fridays per month, would conflict with Government Code section 11020 which requires all state offices to be open Monday through Friday from 8 a.m. to 5 p.m. Under a "self directed

furlough” where pay is reduced and leave hours are accrued, but not necessarily used in the same pay period, such an agreement would conflict with provisions of the Labor Code section 1171 which requires the payment of at least the minimum wage for all hours worked.

In passing Section 11020, the Legislature allowed the parties to a *different bargaining law*, the Higher Education Employer-Employee Relations Act covering the employees of the University of California, Hastings College of the Law and the California State University (Gov. Code § 3560, et seq.), to supersede the provisions of Section 11020 through an MOU without specific legislative approval of that conflict (unless the provisions of the MOU require the expenditure of funds).

As Section 11020 and Labor Code section 1171 are not supersedable statutes for MOUs reached under the Dills Act, clearly legislative approval of an MOU provision calling for state offices to be closed three days per month, or employees to work and not be paid for certain hours, would be required as the MOU would conflict with this statute.

3. If DPA and a union could agree to an MOU that includes an involuntary furlough provision, but has not done so, and if an emergency thereafter exists within the meaning of Government Code section 3516.5, does section 3516.5 provide a Governor with the authority to impose involuntary furloughs on represented employees during an emergency, absent an existing statute allowing involuntary furloughs for civil service employees, and then have DPA meet and confer with the union at the earliest practical time thereafter?

No. Section 3516.5 does not provide the state employer with any additional powers. Instead, this section relates to the procedural aspect of the state employer’s obligation to provide notice and opportunity to meet and confer under the state collective bargaining law over the impact of any law, rule, resolution or regulation. For this Section to help the Governor in the instant dispute, the state employer would need to possess the underlying power to unilaterally undertake the action of implementing a furlough after fulfilling its bargaining duty. The Governor lacks this power which is retained by the Legislature.

In order to understand what a Governor could implement without first complying with the notice and bargaining provisions of the Dills Act, it is necessary to analyze the role of a Governor and the role of the Legislature regarding wages and hours. Under the Dills Act,

a Governor could only reduce hours or wages through an agreement with a union, or by obtaining legislative approval of a “last, best and final offer” including a reduction in hours and wages. As the Governor lacks the authority to engage in the legislative acts of cutting pay or cutting hours of state employees, the Governor could not impose furloughs by cutting hours and pay and then meet and confer with the unions.

The Dills Act is a “supersession statute,” designed so that in the absence of an MOU, as is the case when an existing MOU has expired and the parties have bargained to impasse, numerous Government Code provisions concerning state employees’ wages, hours and working conditions take effect. (*Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal.App.4th 155, 174 - 175.)

Salary setting for state employees is a power held only by the Legislature. (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1325.) Government Code section 19826 (b) states that DPA “shall not establish, adjust, or recommend a salary range for any employees in an appropriate unit where an employee organization has been chosen as the exclusive representative.” The statute bars DPA from reducing state employees salaries, reserving such decisions to the Legislature. (*Department of Personnel Administration v. Superior Court (Greene)* 5 Cal.App.4th at 172-173.) Similarly, the hours of work are set by the Legislature at Government Code section 19851 as 40-hours per week. The Legislature retains ultimate authority over salaries and state workers’ employment conditions.

As this Court noted in *Greene*, 5 Cal.App.4th at 177,

The structure of the Dills Act demonstrates that the Legislature’s delegation to DPA of its authority over state employees’ wages, hours and working conditions was not entire. In section 3517.6, the Legislature delegated to DPA and the state unions the authority to determine numerous aspects of state employment by superseding statutory conflict with MOU’s. The Legislature could have achieved the same result simply by repealing the provisions designated for supersession in section 3517.6. By instead allowing the parties to supersede those provisions by negotiated agreements, the Legislature insured that *in the absence of an agreement, those aspects of state employment would continue to be determined by the Legislature.* (Emphasis added.)

Reducing salaries and reducing hours may be accomplished in only two ways, – by the agreement of the parties in an MOU (which may be subject to Legislative approval) or by the employer bargaining to impasse and obtaining legislative approval for a salary reduction and hour reduction. Under the impasse procedures of the Dills Act at Government Code section 3517.8 subdivision (b),

If the Governor and the recognized employee organization reach impasse in negotiations for a new memorandum of understanding, the state employer may implement any or all of its last, best, and final offer. Any proposal in the state employer's last, best, and final offer that, if implemented, would conflict with existing statutes or require the expenditure of funds shall be presented to the Legislature for approval and, if approved, shall be controlling without further legislative action, notwithstanding Sections 3517.5, 3517.6, and 3517.7. Implementation of the last, best, and final offer does not relieve the parties of the obligation to bargain in good faith and reach an agreement on a memorandum of understanding if circumstances change, and does not waive rights that the recognized employee organization has under this chapter.

In the absence of an agreement, including when the parties have reached impasse, the “dormant statutes” covering wages and hours of work fill the void left by the lack of agreement of the parties. (*Department of Personnel Administration v. Superior Court (Greene)*, 5 Cal.App.4th at 176.) The Governor lacks the authority to reduce salaries without legislative approval - either through an approved MOU, or through the implementation of a last, best, and final offer. The Legislature retains the “ultimate authority over state employees’ wages, hours and working conditions.” The Governor’s role is to negotiate as the state employer (through his DPA) or to retain “veto power over any subsequent wage legislation.” (*Id.* at 181-182.)

Section 3516.5 does nothing to provide additional authority to the Governor. Instead it provides that in an emergency the Governor, as the state employer, would be able to exercise powers he already possesses by bypassing certain notice and procedural aspects of the bargaining law and delaying meeting and conferring.

Before the trial court, the Governor cited *Sonoma County Organization, etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267 in support of the argument that Section

3516.5 is a source of “power” for the furloughs and pay cuts. In *Sonoma*, an employee organization under the Meyers-Miliias-Brown-Act, the bargaining law for local public employees, contended there was not a true emergency which allowed the county to adopt an ordinance prior to complying with the meet-and-confer provisions of the MMBA. Thus, the issue in *Sonoma* concerns the validity of a legislative declaration of an emergency and the immediate adoption of an ordinance without first going through the “meet-and-confer” obligations of the bargaining law. The declaration of an emergency in *Sonoma* therefore only raised a procedural issue. It did not expand the county’s substantive power to act at all, it simply allowed the county to immediately implement an ordinance that it already had the power to adopt, rather than having to proceed through the meet-and-confer process before implementation. (*Id.* at 273 - 274, citing Gov. Code § 3504.5.)

Even though *Sonoma* deals only with procedural issues and whether the declaration of an emergency by the county was valid and does not address substantive authority to act, it is obviously distinguishable because of the nature of the public employer. The action being reviewed in that case was a “legislative enactment” of the county. (*Id.* at 279.) The structure of county government is obviously different than state government. Separation of powers issues between the executive branch and the legislative branch were not present in *Sonoma*. Those separation of power issues control this dispute.

As discussed above, the Legislature has made clear that in the absence of an MOU, the Legislature retains the ultimate authority over wages and hours of work. (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317.) Under Section 3516.5, “emergency” action is allowed to be exercised without first bargaining only for something the Governor would otherwise have the substantive power to unilaterally implement after fulfilling his bargaining duty.

4. Assuming, for the purpose of discussion, that absent an existing statute allowing involuntary furloughs for civil service employees, Government Code section 3516.5 does not give a Governor authority to impose furloughs on represented employees during an emergency within the meaning of the statute, then what are the types of rules a Governor may impose pursuant to the emergency provision of the statute? Is this statute designed to override the terms of an MOU in case of an emergency, or to allow the imposition of entirely new terms in an MOU?

First, there must be an “emergency” which does not allow time to meet-and-confer. Here, the Governor issued the initial contested Executive Order on December 19, 2008, which would not take affect until February 2009, and would not impact salaries until the end of the February 2009 pay period. (PECG JA I, Tab A, p. 17-18.) Thus, under any definition of an emergency, an emergency did not exist as contemplated in Section 3516.5.

Government Code section 3516.5 appears to contemplate a controlling MOU not being in place. As discussed above, when an MOU is in place, the relationship is governed by that MOU. The MOUs between the DPA and the unions contain “Entire Agreement” clauses. For example the agreement between PECG and the State provides at Article 19.1 Entire Agreement:

A. This MOU sets forth the full and entire understanding of the parties regarding matters contained herein, and any other prior or existing understanding or MOU by the parties, whether formal or informal, regarding any such matters are hereby superseded. Except as provided in this MOU, it is agreed and understood that each party to this MOU voluntarily waives its right to negotiate with respect to any matter raised in negotiations or covered in this MOU, for the duration of the MOU.

With respect to other matters within the scope of negotiations, negotiations may be required during the term of this MOU as provided in Subsection b. below.

B. The parties agree that the provisions of this Subsection shall apply only to matters which are not covered in this MOU.

The parties recognize that during the term of this MOU, it may be necessary for the State to make changes in areas within the scope of negotiations. Where the State finds it necessary to make such changes, the State shall notify PECG of the proposed change 30 days prior to its proposed implementation.

The parties shall undertake negotiations regarding the impact of such changes on the employees in Unit 9, when all three of the following exist:

1. Where such changes would have an impact on working conditions of a significant number of employees in Unit 9;
2. Where the subject matter of the change is within the scope of representation pursuant to the Dills Act;
3. Where PECG requests to meet with the State.

Any agreement resulting from such negotiations shall be executed in writing and shall become an addendum to this MOU.

As discussed in response to Question 3, while an MOU is in effect, the Governor could not make a change in a matter covered by an MOU, in a matter covered by a dormant (supersedable) statute, or in a matter covered by an existing statute. If the Governor sought to make a change on a matter within the scope of representation while an MOU is in effect, but the change is not covered by the parties MOU, the Governor would follow the entire agreement clause. For this last category of items - matters within scope, but not covered by an MOU or statute, if an emergency truly existed, presumably the Governor could use the emergency provision to bypass the bargaining obligation prior to implementing, and then fulfill the obligation under Section 3516.5 by bargaining as soon as practical.

If the Governor did utilize "emergency" power to bypass bargaining and implemented a provision he otherwise had the power to implement, such an action would not place a new term into an MOU, as an MOU contains only mutually agreed upon provisions. As budget deliberations every year demonstrate, there are lots of ways to address a budget deficit. The Governor violating the law by unilaterally cutting pay while claiming an "emergency" is not one them. There is no authority for the notion that a Governor could unilaterally abrogate any provision of a valid MOU or a statute at any time during an "emergency".

5. What, if anything, does the legislative history of Government Code section 3516.5 disclose about the types of emergencies included within the meaning of the statute?

Section 3516.5 was included within the Dills Act, the collective bargaining law for state employees, when it originally was enacted by the Legislature and signed into law. (SB 839, Dills, Added by Stats. 1977, c. 1159, p. 3754.) PECG and CAPS are not aware of

anything specific in the legislative history regarding the types of emergencies within the meaning of Section 3516.5. However, looking to another statutory provision of the Dills Act, enacted into law through the same bill (SB 839), provides insight into the types of emergencies - acts of God, natural disasters, or calamity affecting the state - the Legislature intended to include within the meaning of the Dills Act.

Government Code section 3523 is the “sunshine provision” of the Dills Act. Under this section, the parties must present their initial bargaining proposals and initial counter proposals at a public meeting. The parties are then precluded from taking action on such proposals for a seven day period to provide the public an opportunity to comment on the proposals or to comment on other possible meet and confer topics except in cases of an “emergency”. Specifically, Section 3523 provides in relevant part:

(b) Except in cases of emergency as provided in subdivision (d), no meeting and conferring shall take place on any proposal subject to subdivision (a) until not less than seven consecutive days have elapsed...

(d) Subdivision (b) shall not apply 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.

Where the same term or phrase is used in a similar manner in two related statutes concerning the same subject, the same meaning should be attributed to the term in both statutes unless countervailing indications require otherwise. (*Dieckmann v. Superior Court* (1985) 175 Cal.App.3d 345, 356.)

Section 3523 does not authorize the Governor to take unilateral action as he did with furloughs. It merely allows the parties during an emergency to begin negotiations without the usual waiting period and to make the meeting and conferring public as soon as possible.

As discussed above, the “emergency” in Section 3516.5 specifically relates to the

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employer determining it must act immediately without the time to meet-and-confer. There is no indication that a "fiscal emergency" under Article IV, Section 10(f) of the California Constitution would meet this criteria. Even if it did, the Governor's powers are clearly defined by that section of the Constitution. The Governor may call a special session by proclamation and submit proposed legislation to address the fiscal emergency. Section 3516.5 does not expand a Governor's power.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Gerald James", with a long horizontal flourish extending to the right.

Gerald A. James
State Bar No. 179,258
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c: See Attached Service List

PROOF OF SERVICE BY MAIL

Court of Appeal Case No. CO61011

Case: Professional Engineers in California Government et al., Plaintiffs and Appellants,
v. John Chiang, as State Controller, etc., Defendant and Appellant; Arnold
Schwarzenegger, as Governor, etc., et al., Defendants and Respondents.

I the undersigned, declare that:

I am a resident of the State of California and over the age of 18 years and not a party to the within entitled cause. The address of my business is 455 Capitol Mall, Suite 501, Sacramento, California 95814. On March 1, 2010, I mailed a copy of the within document **PECG and CAPS APPELLANTS' SUPPLEMENTAL LETTER BRIEF** to the parties listed below by placing a true copy of said documents, enclosed in a postage paid sealed envelope, for collection and mailing following our ordinary business practices.

I am readily familiar with this business's practice of 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 U.S. Postal Service, in a sealed envelope(s) with postage fully prepaid.

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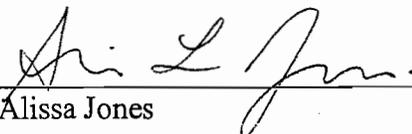
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on March 1, 2010, at Sacramento, California.



Alissa Jones