

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

SERVICE EMPLOYEES
INTERNATIONAL UNION,
LOCAL 1000,
Plaintiff/Appellant,

vs.

JOHN CHIANG, as State Controller, etc.,
Defendant/Appellant,

ARNOLD SCHWARZENEGGER, as
Governor, etc., et al.,
Defendants/Respondents.

Court of Appeal Case No. C061020
(Superior Court Case No. 34-2009-80000135)

Appeal from the Superior Court, Sacramento County
Honorable Patrick Marlette

RESPONDENTS' LETTER BRIEF

DAVID W. TYRA,
State Bar No. 116218
KRISTIANNE T. SEARGEANT
State Bar No. 245489
KRONICK, MOSKOVITZ,
TIEDEMANN & GIRARD
A Law Corporation
400 Capitol Mall, 27th Floor
Sacramento, California 95814
Telephone: (916) 321-4500
Facsimile: (916) 321-4555
E-mail: dtyra@kmtg.com

K. WILLIAM CURTIS
Chief Counsel, State Bar No. 095753
WARREN C. STRACENER
Deputy Chief Counsel, State Bar No. 127921
LINDA A. MAYHEW
Assistant Chief Counsel, State Bar No. 155049
WILL M. YAMADA
Labor Relations Counsel, State Bar No. 226669
DEPARTMENT OF PERSONNEL
ADMINISTRATION
1515 S Street, North Building, Suite 400
Sacramento, CA 95811-7258
Telephone: (916) 324-0512
Facsimile: (916) 323-4723
E-mail: WillYamada@dpa.ca.gov

Attorneys for Defendants/Respondents
GOVERNOR ARNOLD
SCHWARZENEGGER
and DEPARTMENT OF PERSONNEL
ADMINISTRATION

TABLE OF CONTENTS

	Page(s)
TABLE OF AUTHORITIES	ii
QUESTION 1a and RESPONSE THERETO	1
QUESTION 1b and RESPONSE THERETO.....	8
QUESTION 2 and RESPONSE THERETO.....	12
QUESTION 3 and RESPONSE THERETO.....	14
QUESTION 4 and RESPONSE THERETO.....	18
QUESTION 5 and RESPONSE THERETO.....	23
CONCLUSION	26

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

<i>Bottom Line Enterprises</i> (1991) 302 NLRB 373	16, 25
<i>Dixon Distributing Co.</i> (1974) 211 NLRB 241	16
<i>NLRB v. Katz</i> (1962) 369 U.S. 736	16
<i>RBE Electronics</i> (1995) 320 NLRB 80	16
<i>Winn-Dixie Stores</i> (1979) 243 NLRB 972	16

STATE CASES

<i>Bonnell v. Medical Board of California</i> (2003) 31 Cal.4 th 1255	2
<i>California Insurance Guarantee Association v. Worker's Compensation Appeals Board</i> (2007) 153 Cal.App.4 th 524	2
<i>California School Employees Assn. v. Governing Board</i> (1994) 8 Cal.4 th 333	20
<i>California State Employees' Association v. State of California (Department of Transportation</i> (1983) PERB Dec. No. 333-S, p. 6.)	15
<i>Carrisales v. Department of Corrections</i> (1999) 21 Cal.4 th 1132	2
<i>Correctional Supervisors Organization, Inc. v. Department of Corrections</i> (2002) 96 Cal.App.4 th 824	7

<i>Duncan v. Department of Personnel Administration</i> (2000) 77 Cal.App.4 th 1166	19
<i>Fire Fighters Union, Local 1186 v. City of Vallejo</i> (1974) 12 Cal.3d 608	15
<i>Jenkins v. Knight</i> (1956) 46 Cal.2d 220	6
<i>MacIsaac v. Waste Management Collection & Recycling, Inc.</i> (2005) 134 Cal.App.4 th 1076	20
<i>People v. King</i> (2006) 38 Cal.4 th 617	1
<i>People v. Pieters</i> (1991) 52 Cal.3d 894	1
<i>Tirapelle v. Davis</i> (1993) 20 Cal.App.4 th 1317	18

FEDERAL STATUTES

29 U.S.C. § 151, <i>et seq.</i>	15
---------------------------------------	----

STATE STATUTES

Gov. Code	
§ 3512, <i>et seq.</i>	13
§ 3516	13, 17, 18
§ 3516.5	passim
§ 3523	23, 24, 25
§ 18020	9, 10, 11
§ 19816	9, 26
§ 19816.10	17, 18, 19
§ 19851	passim
Cal. Const. Art. V, § 1	26
Cal. Const. Art. IV, § 10(f)	25

OTHER AUTHORITIES

Black's Law Dictionary, 4th Ed..... 3

Respondents Governor Arnold Schwarzenegger and Department of Personnel Administration (“DPA”) submit this supplemental letter brief in response to this Court’s letter of January 29, 2010.

Question 1a: Government Code section 19851 states in part: “It is the policy of the state that the workweek of the state employees 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.*” (Italics added.) Are those words reasonably susceptible to more than one interpretation?

Short Answer: No, the statute, and specifically the italicized phrase, is not susceptible of more than one interpretation. The plain, commonsense meaning of the statute’s words confers on the Governor, acting as the state employer, discretion to adjust the schedules and working of hours of state employees both above and below the 8-hour workday and 40-hour workweek policy expressed in the statute.

As this Court noted in its January 29, 2010 letter, the proper interpretation of Government Code section 19851, subdivision (a), requires this Court to “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.]” (*Id.*) In addition to these well-established principles of statutory construction, Respondents further note as applicable here that when interpreting a statute so as to give effect to its purpose, a reviewing court should not consider statutory language in isolation, but

should “instead interpret the statute as a whole, so as to make sense of the entire statutory scheme.” (*Bonnell v. Medical Board of California* (2003) 31 Cal.4th 1255, 1261; *Carrisales v. Department of Corrections* (1999) 21 Cal.4th 1132, 1135.) This latter principle is important because a review of Appellant SEIU’s supplemental brief to this Court, reveals that SEIU fails to address the argument regarding the plain meaning of the statutory language. Instead, Appellant SEIU moves directly to the legislative intent argument to advance an erroneous interpretation of section 19851(a) that fails to harmonize all parts of that code section, but would instead render as mere surplusage the statutory phrase on which this Court has focused. (See *California Insurance Guarantee Association v. Worker’s Compensation Appeals Board* (2007) 153 Cal.App.4th 524, 532, “words of statutes must be read in context, and [a court] may not render any of them to be surplusage.”)

Government Code section 19851, subdivision (a) reads in its entirety as follows:

(a) 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 it is

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

Section 19851 sets out certain policies regarding the working hours of state employees. In fact, the code section uses the word “policy” on three different occasions. Appellants are misreading section 19851 to create a mandatory duty regarding the establishment of state employee work hours where the plain meaning of the actual word used is not susceptible of such an interpretation. The term “policy” is defined in Black’s Law Dictionary, 4th Ed., as “[t]he *general principles* by which a government is *guided in its management* of public affairs, or the legislature in its measures. This term, as applied to law, ordinance, or rule of law, *denotes its general purpose or tendency* considered as directed to the welfare or prosperity of the state or community.” (Emphasis added.) Thus, the term “policy” is not synonymous with “mandate” or “obligation” and does not impose on the State an absolute, unequivocal duty to assign employees to a particular schedule or a particular number of work hours in a workweek or workday.

In addition to misinterpreting the term “policy,” Appellants (the plural here is meant to indicate both SEIU and the Controller) also misinterpret the phrase in the first sentence of section 19851(a) granting the Governor discretion to set different work hours for state employees than 40 in a workweek and eight in a workday in order to meet the varying needs of

the different state agencies. The first half of the first sentence of section 19851(a) sets forth the basic state policy that workweeks and workdays for state employees shall be 40 hours and eight hours, respectively. The second half of the first sentence of section 19851(a), the language at issue here, provides for an exception to that basic policy. Before addressing the exception, however, it is important to note what the rest of section 19851(a) provides. The second sentence articulates a second “policy” embodied in the code section, namely, that the State shall avoid assigning overtime work to state employees whenever possible. The last sentence of the code section provides for an exception to “[t]his policy,” namely the policy regarding overtime avoidance, by permitting overtime to be assigned in those activities and agencies where it is necessary to carry on the state business properly during a manpower shortage.

In light of the last sentence of section 19851(a), the phrase in the first sentence on which this Court has focused, *i.e.*, the exception to the basic policy of 40 hours workweeks and eight hour workdays to meet the varying needs of different state agencies, cannot be interpreted in the manner Appellants assert. Appellants argue that the exception language in the first sentence of section 19851(a) cannot be read as granting the state employer discretion to lower the workweeks of state employees below 40 hours, and that the code section only is concerned with those conditions under which overtime may be assigned. To read the statute in this fashion,

however, would render the exception language in the first sentence of the code section mere surplusage in light of the last sentence. The last sentence of the code section provides that the basic policy against assigning overtime work to state employees does not restrict the state employer's ability to assign overtime "where it is necessary to carry on the state business properly during a manpower shortage." Thus, the last sentence of the code section specifically addresses the subject of overtime assignments. To read the exception language in the first sentence as addressing the same point renders it superfluous. Furthermore, there is nothing in the plain meaning of the words used in the exception language in the first sentence to indicate a legislative intent to restrict its application only to overtime situations. Rather, the language unambiguously states that the state employer may assign workweeks and workday of a "different number of hours" than 40 and eight, respectively. The phrase "different number of hours" cannot be read as meaning only "greater than" because such a reading is not consonant with the plain meaning of the words used. "Different number of hours" means just what the plain meaning of the phrase implies: hours different than 40 or eight, respectively. Accordingly, the plain meaning of the words used in section 19851(a) confers discretion on the Governor, acting as the state employer, to establish working hours of state employees that are different than 40-hour workweeks and 8-hour workdays, both greater than and less than.

Because decisions made by the Governor to establish state employee work hours pursuant to section 19851(a) are discretionary in nature, his actions undertaken pursuant to that code section cannot be disturbed unless they constitute an abuse of that discretion. (See *Jenkins v. Knight* (1956) 46 Cal.2d 220, 223-224, courts will not interfere with the Governor's performance of discretionary acts.) Nonetheless, Appellants argue that even if the Governor has 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 varying needs of the different state agencies." In effect, Appellants contend that in order to comply with section 19851, the Governor is obligated to engage in an agency-by-agency, department-by-department analysis to determine the varying needs of the different state agencies. Thus, Appellants argue there is but one way for the Governor to exercise his discretion pursuant to section 19851(a) in fixing a different number of hours to meet the varying needs of the different state agencies.

There is nothing in the plain language of section 19851(a) to suggest that there is a single method by which the Governor can exercise his discretion to fix the work hours of state employees. More specifically, there is nothing in the language of section 19851(a) to suggest that during a statewide emergency or crisis, such as natural disasters, time of war, or, as

in this case, a fiscal and cash crisis that was characterized by both the Department of Finance and the Controller as placing California on the brink of insolvency, that the Governor cannot properly exercise his discretion under section 19851(a) by making a uniform decision regarding work hours that affects all state employees similarly when, in the exercise of his discretion, he deems such a course appropriate to meet the varying needs of the different state agencies under the circumstances.

In a case in which the duty sought to be imposed is embodied in a statute such as section 19851(a), and the “statute leaves room for discretion, a challenger must show the [Governor] acted arbitrarily, beyond the bounds of reason, or in derogation of the applicable legal standards” in order to demonstrate a violation of that statutory duty. (*Correctional Supervisors Organization, Inc. v. Department of Corrections* (2002) 96 Cal.App.4th 824, 827.) Appellants have not demonstrated how the plain language of section 19851(a) constrains the Governor’s exercise of the discretion conferred upon him to establish work hours for state employees different than 40 in a workweek and eight in a workday in such a way as to prohibit a single, uniform decision with respect to those work hours. Appellants have not demonstrated how the Governor’s exercise of discretion to uniformly furlough all state employees in the face of the fiscal and cash crisis confronting the state was beyond the bounds of reason or violated the plain language of the code section.

Question 1b: If [section 19851(a) is susceptible to more than one interpretation], 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?

Short Answer: The legislative history supports the conclusion that section 19851(a) was designed to provide the state employer with broad discretion to establish working hours for state employees of more or less than 40 in a workweek or eight in a workday.

The original antecedent to section 19851(a) is section 73 of the State Civil Service Act, adopted in 1943, which read in relevant part:

Within 90 days of the effective date of this section, the State Personnel Board shall for each class in the State service for which a monthly salary range is fixed determine and establish the normal work week for the class. For purposes of determining eligibility for overtime compensation, the State Personnel Board shall allocate, and reallocate as the needs of the service require, each State civil service class for which a monthly salary range is fixed into one of the following groups:

- (1) Classes with a normal work week of 40 hours;
- (2) Classes with a normal work week of 44 hours;
- (3) Classes with a normal work week of 48 hours
- (4) Classes which can not be included in any plan for payment of overtime because:
 - (a) While requiring at least 40 hours per week, the duties and responsibilities are such that they do not adapt themselves to a maximum number of hours per week
 - (b) The performance of duties is required on

a part-time or intermittent basis and does not amount to a maximum of 40 hours per week.

(See Motion for Request for Judicial Notice, Exhibit 1.)

Two points emerge from this original statutory language. First, the establishment of work hours for state employees has been at all times a matter entrusted to the state employer either in the form of the State Personnel Board or its successor, the Department of Personnel Administration. (See Gov. Code, § 19816.) The hours of work for state employees has never been a matter of a fixed statutory duty. The current language of 19851(a) supports this conclusion in that it provides that it is state *policy* that state employees work 40 hours in a workweek and eight hours in a workday. This is not a rigid, inflexible standard. Second, to the extent that a 40-hour or more workweek was addressed in the antecedents to section 19851(a), the original reason for doing so was to establish a method for calculating overtime and not for the purpose of establishing a minimum workweek as Appellants contend.

This conclusion is supported by the enactment of Government Code section 18020 in 1945 as a successor to section 73 of the State Civil Service Act. As originally enacted, section 18020 provided:

For the purpose of determining eligibility for overtime compensation, the State Personnel Board shall establish the normal work week for each class in the State civil service [The remainder of the code section is identical to section 73 of the State Civil Service Act.]

(Emphasis added. See Motion for Request for Judicial Notice, Exhibit 2.)

Thus, the fixing of a “normal work week” was for the purpose of determining overtime eligibility.

In 1947, section 18020 was amended to read as follows:

The State Personnel Board shall establish the work week for each position or class in the state service

(See Motion for Request for Judicial Notice, Exhibit 3.) This amendment to section 18020 provided more flexibility and discretion to the State Personnel Board. First, the concept of a “normal” work week is dropped from the statute. Second, the nexus between an established work week and the calculation of overtime compensation is no long present. The 1947 amendments to section 18020 were the result of the passage of AB 292 (McCollister). The bill was introduced with the approval and support of the California State Employees Association. In a letter of July 3, 1947 from CSEA’s attorney, James H. Phillips, to Beach Vasey, Governor Earl Warren’s Legislative Secretary, Mr. Phillips, on behalf of CSEA, analyzed the purpose behind the amendment to section 18020 as follows:

The combined effect of the amendments to Section 18020 and 18021 is to give the Personnel Board *complete flexibility to make proper and equitable reduction* in the working hours of State employees when such reduction is necessary to bring them into line with prevailing practices in private industry and other public agencies.

(Emphasis added. See Motion for Request for Judicial Notice, Exhibit 4.)

The concept of “complete flexibility” to make “reductions” in work hours of state employees to bring them in line with prevailing practices in the private sector is relevant to the issues in this case. The economic downturn the country faced both at the time the Governor signed the Executive Orders at issue here and now have led to unprecedented statewide unemployment. The private sector has experienced well-publicized layoffs and other downsizing measures to address this downturn. This same economic downturn had a dramatic and negative impact on the state budget as documented by the Governor in a series of Fiscal Emergency Proclamations, which are in the appellate record. (JA, Vol. I, Tab. V, p. JA246; JA, Vol. I, Tab. AA, p. JA258.) In light of this, the Governor was entitled to exercise the “complete flexibility” that has been a part of the predecessor statute to section 19851 since 1947 to reduce state employee work hours to achieve personnel cost savings through furloughs.

Former section 18020 was amended in 1955 pursuant to AB 1464 (Fleury) to the current form found in section 19851(a). There is not a great deal of legislative history connected with AB 1464, but in a June 21, 1955 memorandum from Deputy Attorney General Paul M. Joseph to Governor Goodwin Knight, DAG Joseph explained that the intent behind the changes to the code section was to give “broader work week classification authority to the Board [SPB].” (See Motion for Request for Judicial Notice, Exhibits

5 and 6.) Little has changed in the code section, except for its renumbering, since 1955.

As this legislative history confirms, the antecedents to section 19851(a) have embodied the concept of flexibility for the state employer in establishing work hours of state employees both greater than and less than 40 hours in a workweek and eight hours in a workday. Contrary to the position taken by Appellants, this legislative history does not establish an intent to fix a 40-hour workweek as a minimum for state employers. An interpretation that limits the discretion conferred on the Governor by section 19851(a) to establish only hours of work greater than 40 in a workweek or eight in a workday misreads the plain language of the code section and is inconsistent with the intent to provide flexibility in establishing the work hours of state employees.

Question 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)?

Short Answer: Yes. Furloughs are within the scope of bargaining and DPA and state employee organizations could agree to involuntary furlough provisions to be included in their MOUs. In fact, the current MOUs contain language authorizing the Governor to furlough state employees during times of emergency.

The labor relations between the State and its employees are governed by the Ralph C. Dills Act ["Dills Act"], Government Code

section 3512, *et seq.* Government Code section 3516 sets forth the “scope of representation” under the Dills Act, *i.e.*, the scope of those subjects that are “bargainable” by and between the State and recognized state employee organizations. Section 3516 provides:

The scope of representation shall be limited to wages, hours, and other terms and conditions of employment, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order.

Furloughs are concerned with the hours worked by state employee and, therefore, fall with the scope of bargaining under the Dills Act. Accordingly, the State and recognized bargaining units could, as a result of collective bargaining, include a provision in their MOUs authorizing the state employer to furlough state employees under defined circumstances.

And, in fact, they already have. As the trial court correctly found, and as Respondents argued in detail at pages 23 to 29 of their brief to this Court, the MOUs between the State and Appellant SEIU contain provisions authorizing the State to furlough employees covered by the MOU under specified circumstances. Respondents will not repeat these arguments here. As one example, the State Rights clause at section 4.1 of the parties’ MOUs expressly provides the rights of the State include, but are not limited to, the right to “maintain efficiency of State operations,” “to determine ... the procedures and standards for ... scheduling,” and “to take all necessary

action to carry out its mission in emergencies.” (See e.g., JA, Vol II, Tab MM, p. JA363.) This broad language provides the state employer with the ability to furlough employees governed by the MOU to maintain efficient operations and to take necessary action to address the fiscal emergency faced by the State.

Question 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?

Short Answer: Yes. Government Code section 3516.5 permits the state employer, during an emergency, to unilaterally adopt a law, rule, resolution, or regulation relating to matters within the scope of representation, and thereby unilaterally change the terms and condition of state employment, without first meeting and conferring with affected state employee organizations.

Government Code section 3516.5 states:

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 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.

The critical inquiry with respect to the application of this code section to the issues in this case is what constitutes an “emergency” within the meaning of the code section. The legislative history does not provide a great deal of insight into the definition of “emergency” as used in section 3516.5. However, in interpreting provisions of California’s various labor relations acts, including the Dills Act, California courts routinely turn to precedents established under the National Labor Relations Act [“NLRA”], 29 U.S.C. section 151, *et seq.* as a guide. (See e.g., *Fire Fighters Union, Local 1186 v. City of Vallejo* (1974) 12 Cal.3d 608, 616; *California State Employees’ Association v. State of California (Department of Transportation)* (1983) PERB Dec. No. 333-S at p. 6.)

The NLRB has long recognized two exceptions to the general rule requiring an employer to meet and confer with a recognized collective bargaining representative prior to the implementation of a change to terms and conditions of employment within the scope of bargaining: (1) when a union engages in tactics designed to delay bargaining and (2) “when

economic exigencies compel prompt action” by the employer. (*Bottom Line Enterprises*, (1991) 302 NLRB 373, 374.) “The economic exigency exception set forth in *Bottom Line* derives from the Supreme Court’s decision in *NLRB v. Katz* (1962) 369 U.S. 736, 748, as discussed in the NLRB’s decision in *Winn-Dixie Stores*, (1979) 243 NLRB 972, 974, fn. 9.” (*RBE Electronics* (1995) 320 NLRB 80, 81.) These decisions recognize the economic exigency exception where an “economic business emergency” forces the employer to take prompt action affecting employee terms and conditions without first meeting and conferring. (*Id.*) In a case predating *Bottom Line*, the judge noted that even “during a contract term, matters arise where the exigencies and economics of a situation seem to require rather prompt action.” (*Dixon Distributing Co.* (1974) 211 NLRB 241, 244.) The judge noted there are situations where the employer’s need to run its business take precedence over the duty to bargain. (*Id.*) In the present case, it was undisputed in the trial court that at the time of the Governor’s issuance of the subject Executive Order, the State was faced with an unprecedented fiscal crisis. In fact, the evidence adduced at trial established several admissions by Appellants in which they acknowledged this fact.

NLRB precedent provides that one of the exigencies under which an employer may unilaterally alter the terms and conditions of employment without first meeting and conferring with a recognized employee

bargaining representative is when an economic emergency requires immediate action. Here, the conditions and circumstances leading to the issuance of the Executive Order fall within the concept of “emergency” as used in section 3516.5.

Government Code section 3516 provides that issues affecting state employees’ hours of work are matters falling within the scope of representation. At the same time, the state employer also has the statutory authority to adopt rules regarding hours of work. Government Code section 19816.10, subdivision (a) provides:

In order to secure substantial justice and equality among employees in the state civil service, the department [DPA] may provide by rule for days, hours and conditions of work, taking into consideration the varying needs and requirements of different state agencies and the prevailing practices for comparable service in other public employment and in private business.

Thus, the state employer, acting through the DPA, has been granted discretion to establish rules affecting, *inter alia*, the hours of work of state employees. In cases in which the state employer takes actions, or makes decisions, regarding matters affecting the terms and conditions of state employment over which the state employer specifically has been given authority, such decisions or actions constitute enforceable rules of general application to all state employees. (See e.g., *Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1340-1341.)

Government Code sections 3516, 3516.5, and 19816.10 need to be read in concert to properly address the question posed by the Court. Beginning with section 19816.10, the state employer has the authority to “provide by rule” the hours of work for state employees. Section 3516 states that hours of work is an issue within the scope of bargaining and thus the state employer, under normal circumstances, must meet and confer with recognized employee organizations prior to the adoption of such a rule. Section 3516.5 further provides that, in cases of an emergency, the state employer may adopt a rule without first meeting and conferring with state employee organizations. Taken together, and in light of NLRB precedent defining certain dire economic conditions as an emergency allowing an employer to take action without first meeting and conferring, Governor Schwarzenegger was within his authority to furlough state employees by Executive Order without first meeting and conferring to address the fiscal and cash crisis faced by the State of California at the time of the issuance of that Executive Order.

Question 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?

Short Answer: Interpreting Government Code section 3516.5 as not providing the Governor the authority to issue an Executive Order furloughing state employees without first meeting and conferring with state employee organizations undermines the purpose of the statute. The purpose of the code section is to allow the Governor to override the terms of an MOU during an emergency.

The question posed by this Court asks if section 3516.5 does not give the Governor authority to impose furloughs on represented employees during an emergency, then what are they types of rules the Governor may imposed during an emergency pursuant to the statute. The answer is that if section 3516.5 is interpreted in such a way that it does not permit the Governor to adopt a rule affecting state employee work hours, a matter over which the state employer is given express authority by Government Code sections 19851 and 19816.10, then section 3516.5 essentially is rendered ineffective as a mechanism by which the Governor can respond quickly during an emergency situation.

Government Code section 3516.5 was created to provide a mechanism for the Governor to temporarily address unanticipated emergencies and to temporarily suspend the mandatory duty to meet and confer over terms and conditions of employment. Any interpretation of Government Code section 3516.5 to the contrary would render the provision ineffective to address emergencies. As the court in *Duncan v. Department of Personnel Administration* (2000) 77 Cal.App.4th 1166, 1183,

“[s]urely, in a time of financial crisis, the State has a significant interest in taking quick steps to resolve its economic woes.”

Appellants characterize section 3516.5 a merely “procedural,” as a statutory means of temporarily bypassing collective bargaining obligations, but not providing the Governor with any new substantive authority. Appellants’ argument, however, goes too far and ignores the plain meaning of the statute. While Government Code section 3516.5 does not provide the Governor with any new substantive authority, it provides a mechanism to address situations in which the state employer must change some aspect(s) of the terms and conditions of state employment in a prompt manner through a law, rule, resolution, or regulation affecting state employment to be “adopted” by the State. The Legislature’s use of the word “adopted” must be given its full meaning and import. (“The Legislature’s chosen language is the most reliable indicator of its intent because ‘it is the language of the statute itself that has successfully braved the legislative gauntlet.’” (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal.App.4th 1076, 1082, quoting *California School Employees Assn. v. Governing Board* (1994) 8 Cal.4th 333, 338).) Had the Legislature intended section 3516.5 simply to permit the Governor to bypass collective bargaining before he *enforced* laws affecting state employment that already were in existence during a time of emergency, the Legislature would not have referenced a law, rule, resolution, or regulation to be “adopted” by the

State, but would have referred to a law, rule, resolution, or regulation to be “enforced”, “administered”, or “applied” by the State. If such a “law, rule, resolution, or regulation” already existed, there would be no need for the statute to contemplate its *adoption*. Interpreting section 3516.5 to require the Governor to “adopt” a law, rule, resolution, or regulation that already existed at the time of an emergency is contrary to the plain language and makes no sense. Therefore, section 3516.5 must be read to authorize the Governor to adopt a rule affecting the terms and conditions of state employment not already provided for by substantive law and do so, in times of emergency, without first meeting and conferring with state employee organizations. Accordingly, section 3516.5 provides the Governor with the authority to impose, via an executive order, a standard for state employment of general application not otherwise set forth in an existing law, rule, or regulation.

Not only does section 3516.5 provide the Governor with the authority to adopt a rule, resolution, or regulation affecting state employment during an emergency without first meeting and conferring with state employee organizations, it provides the authority to adopt a rule, resolution, or regulation that overrides the terms of an existing MOU. The code section does not place a limit on the type of law, rule, resolution, or regulation affecting state employment that may be adopted during an emergency. In fact, the first paragraph of section 3516.5 refers to the

State's adoption of *any* law, rule, resolution, or regulation affecting state employment. Nothing in the emergency provision contained in the second paragraph of section 3516.5 suggests the terminology used in the first paragraph is restricted to matters outside an existing MOU. Furthermore, an interpretation of section 3516.5 as limiting the Governor's authority to adopt laws, rules, resolution and regulations affecting state employment during times of emergency to only those matters not otherwise covered by an existing MOU would render the code section ineffective. The appellate record already contains the MOUs between the parties. (JA, Vol. II, Tab MM, p. JA 347, *et seq.*) These lengthy documents are intended to address the vast majority of issues affecting state employment for those employees covered by the MOUs. Given the breadth of the MOUs, if section 3516.5 only permitted the adoption of laws, rules, resolutions, or regulations not covered by the existing MOU, the Governor would be precluded from issuing an executive order adopting a rule affecting state employment to address an emergency. This interpretation prevents the state employer from acting quickly to address an emergency. The plain language of the code section, which references the adoption of *any* law, rule, resolution or regulation within the scope of representation, belies such an interpretation. The language and intent of the code section must be interpreted to authorize the Governor to issue an Executive Order that overrides an existing MOU

during a time of emergency without first meeting and conferring with the affected state employee organization.

Question 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?

Short Answer: The legislative history does not provide much incite into the types of emergencies that fall within section 3516.5. However, interpreting the code section with other code sections adopted at the same time demonstrates that the fiscal and cash crisis that prompted the Governor's issuance of the subject Executive Order was the type of emergency contemplated by section 3516.5

While the legislative history does not provide much incite into the definition of "emergency" as used in section 3516.5, Appellants argue that the definition of the term must read in light of Government Code section 3523, which is also a part of the Dills Act, and which was adopted at the same time as section 3516.5. Respondents agree that reference to section 3523 is helpful, but disagrees with the conclusions drawn by Appellants from such reference.

Section 3523 provides at subdivision (b) that except in cases of emergency as defined in subdivision (d) of the code section, collective bargaining between the State and a recognized state employee organization shall not commence until seven days following the state employee organization's presentation of its initial meet and confer proposals. Subdivision (d) provides that the seven day waiting period 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,” the parties must meet and confer more quickly. The Controller argues at page 14 of his letter brief that this language does not apply to the current situation because “[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.’” However, the Controller ignores the third phrase in section 3523, “or other emergency or calamity affecting the state.” Therefore, this argument must be rejected.

Using section 3523 as an aid to defining “emergency” as used in section 3516.5 supports the finding of an emergency when the Governor issued the furlough Executive Order. First, section 3523 grants to the state employer the exclusive authority to determine when an act of God, natural disaster, or other emergency or calamity affecting the state is of such significance as to warrant suspension of the seven-day waiting period to commence immediate bargaining. Second, the concept of “other emergency or calamity affecting the state” is indisputably applicable to the fiscal and cash crisis facing the State at the time of the Governor’s issuance of the subject Executive Order. The appellate record is replete with evidence regarding the severity of this fiscal and cash crisis. (JA, Vol. I, Tab. V, p. JA246; JA, Vol. I, Tab. AA, p. JA258.) Not only was this evidence undisputed in the trial court, but Respondents submitted additional

evidence of Appellants' admissions regarding the severity of the crisis. Accordingly, reference to the definition of "emergency" in section 3523 as an aid to interpreting that same term in section 3516.5 leads to the conclusion that the latter code section authorized the Governor to issue the Executive Order furloughing state employees in the face of the undisputed fiscal and cash crisis facing the State at the time.

In addition to section 3523, the NLRB precedents cited above also aid in the interpretation of the term what constitutes an emergency for purposes of section 3516.5. As noted, those cases hold that an emergency includes dire economic conditions requiring an employer to take prompt action. (*Bottom Line Enterprises*, (1991) 302 NLRB 373, 374.)

Finally, the Governor exercised his authority pursuant to Article IV, section 10(f) of the California Constitution, enacted in 2004 pursuant to Proposition 58, to issue a proclamation declaring a fiscal emergency as part of the process of ordering the furloughs of state employees. The Governor issued such a proclamation on December 1, 2009, less than three weeks prior to issuing Executive Order S-16-08. (JA, Vol. I, Tab. AA, p. JA258.) In order to issue the Governor fiscal emergency proclamation, the Governor was required to find that for the current fiscal year, General Fund revenues will decline substantially below the estimate upon which the budget bill for the current fiscal year, as enacted, was based or General Fund expenditures will increase substantially above the estimate of General Fund revenues, or

both. It is undisputed in this case that the conditions for proclaiming a fiscal emergency existed here. At the time of this issuance of the Governor's Executive Order directing furloughs of state employees, the State was facing a budget and fiscal deficit in that fiscal year and needed extraordinary action to address the fiscal emergency. Thus, the existence of a fiscal emergency was established through the Governor's exercise of his constitutional authority and the otherwise inherent executive powers the Governor possesses as the Chief Executive Officer of the State of California (see Cal. Const. Art. V, § 1) and the state employer (see Gov. Code, § 19816(a)).

CONCLUSION

Based on the arguments state above, as well as those raised in Respondents' brief to this Court, Respondents respectfully request that this Court affirm the judgment of the Sacramento County Superior Court in Respondents' favor.

Dated: April 1, 2010

KRONICK, MOSKOVITZ, TIEDEMANN
& GIRARD

A Law Corporation

By: 

David W. Tyra

Meredith H. Packer

Attorneys for Defendants/Respondents

GOVERNOR ARNOLD

SCHWARZENEGGER and

DEPARTMENT OF PERSONNEL

ADMINISTRATION

CERTIFICATE OF WORD COUNT

I, David W. Tyra, Attorney for Defendants/Respondents GOVERNOR ARNOLD SCHWARZENEGGER and DEPARTMENT OF PERSONNEL ADMINISTRATION hereby certify that the number of words in Defendant/Appellants equals 6,440 words, as per the word count feature in Microsoft Word.

Dated: April 1, 2010

KRONICK, MOSKOVITZ, TIEDEMANN
& GIRARD

A Law Corporation

By: 

David W. Tyra

Meredith H. Packer

Attorneys for Defendants/Respondents

GOVERNOR ARNOLD

SCHWARZENEGGER and

DEPARTMENT OF PERSONNEL

ADMINISTRATION

PROOF OF SERVICE

I, May Marlowe, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814-4416. On April 1, 2010, I served the within documents:

RESPONDENTS' LETTER BRIEF

- by transmitting via facsimile from (916) 321-4555 the above listed document(s) without error to the fax number(s) set forth below on this date before 5:00 p.m. A copy of the transmittal/confirmation sheet is attached.
- by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.
- by causing personal delivery by Messenger of the document(s) listed above to the person(s) at the address(es) set forth below.
- by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.
- by causing to be transmitted via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Attorneys for Petitioner/Plaintiff
SEIU, Local 1000

Paul E. Harris, III, Esq.
Anne Giese, Esq.
SERVICE EMPLOYEES
INTERNATIONAL UNION
LOCAL 1000
1808 14th Street
Sacramento, CA 95814
Fax: (916) 554-1292
Email: agiese@seiu1000.org

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

Attorney for
Defendants/Respondents
Governor Arnold
Schwarzenegger
And Department Of Personnel
Administration

Will M. Yamada
Labor Relations Counsel
Department Of Personnel
Administration
1515 S Street
North Building, Suite 400
Sacramento, CA 95811-7258
Fax: (916) 323-4723
E-mail: WillYamada@dpa.ca.gov

Hon. Patrick Marlette
Sacramento County Superior Court
720 Ninth Street – Dept. 19
Sacramento, CA 95814

Attorney for
Respondent/Defendant State
Controller John Chiang

Richard J. Chivaro, Esq.
OFFICE OF THE STATE
CONTROLLER
300 Capitol Mall, Suite 1850
Sacramento, CA 95814
Fax: (916) 322-1220
Email: rchivaro@sco.ca.gov

Attorneys for Amicus Curiae
Applicant

Harvey L. Leiderman
Jeffrey R. Rieger
REED SMITH
101 Second Street, Suite 1800
San Francisco, CA 94105
Fax: (415) 391-8269

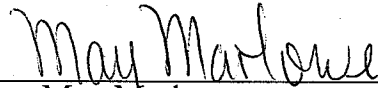
Supreme Court of California (4
copies)
350 McAllister Street
San Francisco, CA 94102-4797

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage

thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

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



May Marlowe