

June 30, 2010

Honorable Chief Justice Ronald M. George
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

RE: **Supreme Court Case No. S183411**
Professional Engineers in California Government et al., Plaintiffs and Appellants, v. Arnold Schwarzenegger, as Governor, etc. et al., Defendants and Respondents; John Chiang, as State Controller, etc., Defendant and Appellant.
Court of Appeal Case No. C061011 and Consolidated Appeals C061009, C061020

To the Honorable Chief Justice and the Associate Justices
of the California Supreme Court:

Pursuant to the Court's order dated June 9, 2010, Plaintiffs and Appellants Professional Engineers in California Government (PECG) and the California Association of Professional Scientists (CAPS) respectfully submit this supplemental reply letter brief in response to the arguments by Defendants and Respondents Arnold Schwarzenegger and the Department of Personnel Administration in their June 23, 2010 letter brief.

Question 1 The effect of Government Code section 19996.22

Section 19996.22 and the Reduced Worktime Act Confirm the Governor Lacks Authority to Involuntarily Reduce Work Hours

The Governor concedes that the Reduced Worktime Act does not provide authority for an involuntary furlough of state employees. In doing so however, the Governor argues that Section 19996.22 is “inapplicable to the issue before this Court

and does not serve to invalidate the Governor's furlough Executive Orders." (Respondents' Supplemental Letter Brief at p. 8.) While PECG and CAPS agree that the Reduced Worktime Act does not provide authority for furloughs, the Governor's position ignores the significance of the Legislature proactively enacting by statute a limited reduction in the 40-hour workweek of state employees. Furthermore, it also ignores that this limited ability to reduce the 40-hour workweek is only for employees *voluntarily* choosing to reduce their worktime when the reduced worktime is also feasible for the state and that *involuntary* reductions of work hours are prohibited. (Gov. Code §§ 19996.21(a) and 19996.22 .) It is clear by the statutory approval of a voluntary reduced workweek program requiring agreement by the employee and the employer, that involuntary reduced workweeks, i.e., furloughs, are prohibited.

The Governor's current contention that Section 19996.22 is "inapposite" to the issues before the Court is a new position. Previously in this litigation, the Governor took a different tact regarding the impact of the Reduced Worktime Act. The Governor had argued that the Reduced Worktime Act code sections "serve to further demonstrate the Governor's inherent authority as the state employer to establish varying schedules for state employees." (Respondents' Combined Brief in Response to Opening Briefs at p. 26.) Far from a demonstration of any "inherent authority," the Legislature had to specifically authorize reduced worktime of state employees by passing a statute to establish the program. It is clear that under that program and the statutes passed by the Legislature, involuntary workweek reductions are prohibited. (Gov. Code § 19996.22.)

The Reduced Worktime Act, which prohibits unilateral worktime reductions, and Government Code section 19851, which establishes the 40-hour workweek as the policy of the state, together demonstrate that there is no "Governor's inherent authority" over hours of work, rather the Legislature has, and retains, authority over hours of work for state employees. Within this framework, a reduction in hours of work could either be authorized by the Legislature or could be negotiated in a collective bargaining agreement. (Gov. Code § 3517.6.) The Legislature twice rejected the Governor's statutory proposal to cut hours through the proposed furlough program (PECG JA, Vol. I, Tab F, p. 00056) and no collective bargaining agreement or memorandum of understanding (MOU) to reduce hours is in place for state engineers or state scientists. In fact, as described in other briefs, the PECG MOU expressly provides that the regular work week of full-time (PECG represented) Unit 9 employees shall be forty (40) hours. There is no exception to this mandatory statement of the 40-hour work week. (PECG JA, Vol. I, Tab N, p. 00172;

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PECG and CAPS April 22, 2010 Supplemental Reply Brief.) For CAPS represented Unit 10 employees, the MOU required 40-hour workweek is protected by the parties' negotiated "No Lockout" provision. (PECG JA, Vol. II, Tab O, p.00301.)

Section 19996.22 Does Not Provide an Administrative Remedy Which Need be Exhausted

The Governor argues that if Section 19996.22 is applicable to the Governor's executive orders, then the courts lack subject matter jurisdiction over these and other furlough lawsuits because an administrative remedy exists which was not exhausted. The Governor's assertion that exhaustion is "not a matter of judicial discretion" and is a "jurisdictional prerequisite to resort to the courts" is not an accurate statement of the law regarding exhaustion as applied to these facts. (Respondents' Supplemental Letter Brief, p. 7.)

As argued in PECG and CAPS' letter brief, any argument the Governor may have had regarding exhaustion claims under Section 19996.22 cannot be raised for the first time on appeal and is waived as the argument was not timely asserted. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 134.) *Mokler* analyzed and applied *Green v. City of Oceanside* (1987) 194 Cal.App.3d 212, noting that the court in *Green* recognized that exhaustion is a "judicially-created rule of procedure" which the courts should not allow a party to use inequitably. *Mokler* noted it is "generally accepted that courts may excuse the failure to exhaust all available remedies where the agency indulges in unreasonable delay." In applying that rule, the court held that by waiting to raise exhaustion until after a full trial on the merits, the County in that case unmistakably engaged in "unreasonable delay." (*Mokler, supra*, 157 Cal.App.4th at p. 136.)

Here, the Governor or DPA could have raised a failure to exhaust this administrative remedy before the trial court in January 2009, but chose not to. To allow the failure to exhaust to be applied now, after employees have been furloughed for the full 17 scheduled months of the program and with the matter having been litigated through the trial court and on appeal to this Court, would reward "unreasonable delay."

Further, as argued in PECG and CAPS' letter brief, any applicable exhaustion requirement should be excused as a resort to the administrative process would be futile

because it is clear what the agency's decision would be. (*Id.* at 134.) In addressing the more than 200,000 employee grievances, DPA would follow the executive order which it was charged by the Governor with implementing. As such, resort to the grievance process under Section 19996.22 would be futile and any exhaustion requirement which might otherwise apply must be excused.

Question 2 The effect of the revised 2008 - 2009 Budget Act which reduced the appropriation for employee compensation for the 2008-09 fiscal year.

The Reduced Appropriation Contemplated Savings to be Achieved Through Collective Bargaining or Existing Authority and Did Not Provide Furlough Authority to the Governor

The Governor argues that in reducing the appropriation for employee compensation, the Legislature validated the Governor's actions pursuant to "existing administrative authority" and "impliedly authorized the Governor to continue the furloughs in order to achieve necessary budget savings." (Respondents' Supplemental Letter Brief, pp. 13-14.) Contrary to those assertions, the Legislature simply reduced the amount appropriated for employee compensation and made no other changes.

The plain language passed by the Legislature in the Budget Act and the law regarding the limits of what can be accomplished through an appropriation make clear the Legislature's action did not validate or authorize the furlough of state employees. The Governor lacked the authority to furlough state employees prior to the Legislature passing the revised Budget Act. With the passage of the revised Budget Act reducing the appropriation for employee compensation, the Governor did not gain any new authority.

The reduction in employee compensation was to be "...achieved through the collective bargaining process for represented employees or through existing administration authority..." (Stats. 2009, 3d Ex. Sess. 2009-2010, ch.2, 36 (SBX3 2, 36) ("Section 36".) The text of this language does not refer to furloughs. Similarly, it does not refer to the Governor's executive order or the trial court decision ruling on that order. The Governor cannot point to anything in the language passed by the Legislature which demonstrates that the Legislature contemplated furloughs as a means to implement the employee compensation reductions.

As passed by the Legislature through the appropriation language, the only two methods to achieve the employee compensation reductions were through the collective bargaining process or existing administrative authority. The Governor does not contend here that he even attempted to utilize the collective bargaining process to negotiate compensation savings, instead he contends the Legislature authorized him to implement furloughs under “existing administrative authority.”

Any “existing administrative authority” of the Governor would require some statutory or constitutional basis. It cannot be rooted in a decision of a trial court judge which was on appeal at the time of the Legislature’s passage of the revised 2008 - 2009 Budget Act. (PECG JA, Vol III, Tab YY, p. 00673.) Also, since the administrative authority had to be “existing,” that implies something that existed prior to the adoption of the revised Budget Act, not something provided to the Governor by the revised Budget Act. To the extent the Governor argues that the revised Budget Act gave him furlough authority, that would be contrary to the language “existing” at the time the Legislature passed the revised 2008 - 2009 Budget Act.

At the time the revised 2008 - 2009 Budget Act was passed, the Governor possessed existing authority to achieve reductions in employee compensation in a number of areas. The Governor’s authority included instituting hiring freezes which would save money on employee compensation through attrition, the elimination of vacant positions, and potentially layoffs pursuant to Government Code section 19997, et seq. Salary reductions for represented employees were not within that authority. (*Tirapelle v. Davis* (1994) 20 Cal.App.4th 1317, 1325; *Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal.App.4th 155, 174 - 175.)

The Governor’s own actions confirm he needed statutory authority to furlough when only months before this budget language was adopted, the Governor specifically proposed that the Legislature provide him furlough authority. (PECG JA, Vol. I, Tab F, p. 0057.) Following that rejection of providing statutory furlough authority to the Governor and his DPA, the Legislature passed revisions to the 2008-2009 Budget Act. These revisions only reduced the appropriation for employee compensation.

The Governor’s contention that the Legislature ratified the Governor’s furlough authority in passing the revised 2008 - 2009 Budget Act if accepted, would conflict with the single-subject rule which requires that the budget bill “must concern only the subject

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of appropriations to support the annual budget and may not constitutionally be used to substantively amend or change existing statutory law.” (*Association for Retarded Citizens v. Director of Developmental Services* (1985) 38 Cal.3d 384, 394.) The Legislature could not, and did not, expressly act through an appropriation in a manner which changes the law.

The Governor Lacks Any Implied Constitutional Authority to Furlough State Employees

Perhaps in recognition that the Legislature did not, or could not, expressly amend existing law in the appropriations contained in the revised Budget Act, the Governor argues the Legislature “impliedly authorized the Governor to continue the furloughs...” The Governor provides no direct authority for this supposition other than saying an executive order need not be predicated on a specific statute, but can be implied from the Constitution. Here he argues the Constitutional duty to maintain a balanced budget allows him to unilaterally furlough employees through an executive order. (Respondents’ Supplemental Letter Brief, p 14.) This sweeping notion of implied authority is simply wrong relative to separation of powers issues. It would incorrectly expand the Governor’s role to legislate through executive orders and confuses the Governor’s role relative to the legislative process of adopting a state budget.

The Governor here also argues that he was able to “step into the breach” and make sure the laws are fully executed by issuing an executive order to realize fiscal and cash savings from furloughs. This also misstates the Governor’s role relative to both the state budget process and hours of work and pay for state employees. The setting of pay and hours of work are legislative functions in which the Legislature retains the ultimate authority regarding wages of state employees. (*Department of Personnel Administration v. Greene* (1992) 5 Cal.App.4th 155.)

PECG and CAPS contend that their collective bargaining agreements expressly set the hours of work and directly set the salaries of covered employees. However, even if they did not, only the Legislature may make a change in the pay of represented state employees or the hours of state employees. The Governor may not invade the province of the Legislature and is not empowered, by executive order or otherwise, to amend the

effect of, or to qualify the operation of existing legislation. (*Lukens v. Nye* (1909) 156 Cal. 498, 503-504.)

The Governor acts in a legislative capacity in submitting the annual budget bill to the Legislature and in approving it after its adoption. (Cal.Const., art. IV. ss 10, 12; *Veterans of Foreign Wars v. State of California* (1974) 36 Cal.App.3d 688, 697.) While the Governor, through his Department of Finance, has control over the enforcement of budgets of state agencies, the Governor is not given plenary authority over all state activities and is statutory precluded from cutting the pay of represented state employees. (*Tirapelle v. Davis* (1994) 20 Cal.App.4th 1317, 1325.)

In direct conflict with the broad “implied authority” the Governor opines he has to maintain a balanced budget, the California Constitution specifically outlines and limits the actions that a Governor may take in a fiscal year when General Fund revenues will decline substantially below the estimated revenues or expenditures will increase substantially above the estimated revenues.

Article IV, Section 10(f) of the California Constitution provides as follows:

(1) If, following the enactment of the budget bill for the 2004-05 fiscal year or any subsequent fiscal year, the Governor determines that, for that fiscal year, General Fund revenues will decline substantially below the estimate of General Fund revenues upon which the budget bill for that fiscal year, as enacted, was based, or General Fund expenditures will increase substantially above that estimate of General Fund revenues, or both, the Governor may issue a proclamation declaring a fiscal emergency and shall thereupon cause the Legislature to assemble in special session for this purpose. The proclamation shall identify the nature of the fiscal emergency and shall be submitted by the Governor to the Legislature, accompanied by proposed legislation to address the fiscal emergency.

(2) If the Legislature fails to pass and send to the Governor a bill or bills to address the fiscal emergency by the 45th day following the issuance of the proclamation, the Legislature may not act on any other bill, nor may the Legislature adjourn for a joint recess, until that bill or those bills have been passed and sent to the Governor.

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(3) A bill addressing the fiscal emergency declared pursuant to this section shall contain a statement to that effect.

As listed in the Constitution, the Governor may call a special session by issuing a proclamation, accompanied by proposed legislation to address the fiscal emergency. If the Legislature fails to pass and send the Governor a bill or bills to address the fiscal emergency by the 45th day, the Legislature may not act on any other bill, nor adjourn for a joint recess until the bill or bills have been sent to the Governor. This is consistent with the notion that the fiscal crisis is a legislative issue, not one the Governor may act on unilaterally. The California Constitution clearly lays out the power provided to the Governor in the exact fiscal emergency situation we faced in December 2008. Such power does not include the power to engage in unilateral action in violation of statute.

While the Governor was within his authority to propose that the Legislature adopt statutory provisions to allow him to implement the furlough program as a response to the fiscal emergency, once the Legislature rejected his proposal and declined to give him that authority, he could not then ignore the law [and the parties' labor contracts which specifically call for a 40-hour work week with no exception (state engineers) and specifically preclude a "lock-out" of state scientists] and take an action he had no authority to take.

The reduced appropriation in Section 36 did not, and could not, authorize a reduction in hours of work or salaries. The Governor and DPA lack legal authority to reduce hours and salaries and the furloughs must be reversed.

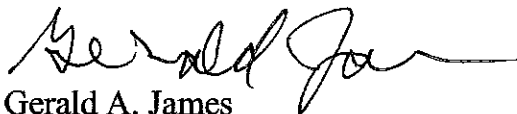
An Award of Unlawfully Withheld Salaries Does Not Create an Appropriation or Result in a Separation of Powers Issue

The Governor argues that an order of the Court would require the restoration of funds to the budget contrary to the reduced budget appropriation. For the reasons set forth in PECG and CAPS' letter brief, this assertion is simply wrong. While the Constitution's separation of powers clause limits judicial authority over appropriations, no such separation of powers occurs if the court orders payment from an existing appropriation. (*Carmel Valley Fire Protection Dist. v. State of California* (1987) 190

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Cal.App.3d 521, 538-539.) No separation of powers issues would arise from a Court's order which calls for the payment of unlawfully withheld salaries that are "reasonably available from appropriations entered in the Budget Act in effect at the time of the court's order, as well as from similar appropriations in subsequent Budget Acts." (*Id.* at pp. 540 citing *Serrano v. Priest* (1982) 131 Cal.App.3d 188.)

Respectfully submitted,



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c: See Attached Service List