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CASE SLB

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DEENA C. FAWCETT
BY_____ Deputy

March 1, 2010

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

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

Dear Ms. Fawcett:

By letter dated January 29, 2010, this Court directed the parties to provide supplemental letter briefs on five questions. Plaintiff and Appellant California Attorneys, Administrative Law Judges and Hearing Officers in State Employment ("CASE") hereby addresses those questions.

I. SECTION 19851 ALLOWS WORKWEEKS TO BE GREATER OR LESS THAN 40 HOURS, PROVIDED THE DEVIATION IS ESTABLISHED TO MEET THE VARYING NEEDS OF THE DIFFERENT STATE AGENCIES

This Court's first question reads as follows:

> 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 C Al. 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 the 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? If so, does the legislative history of the statute indicate whether the Legislature intended those words to allow, under certain

> circumstances, the hours of the 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 needs of a state agency?

A. The Words of the Statute are not Reasonably Susceptible to More than One Interpretation

The first question posed in the above excerpt is whether the italicized words of Government Code section 19851 are reasonably susceptible to more than one interpretation. They are not. Accordingly, the plain, commonsense meaning of the words controls. Section 19851 establishes unambiguously that the general policy of the state is that state employees will work eight hours per day, and forty hours per week. Deviations in this policy are permitted, but only where such deviations are necessary to "meet the varying needs of the different state agencies."

Appellant CASE concedes that this statute, by allowing "a different number of hours," does permit workweeks to deviate both upward and downward from the 40-hour norm. However, the limitation on such deviations is clear and express: such deviations are permissible only when necessary to meet the varying needs of the different state agencies. This limitation bears further discussion. Because it refers to "varying needs" the statute expressly contemplates that the needs will not be uniform. Sometimes, the needs will require different deviations from the 40-hour workweek than at other times. Also, because the statute refers to "different state agencies" it expressly contemplates that the needs will differ among the departments.

Simply by way of example, a State department like the California Department of Forestry and Fire Protection may well need to have its firefighters work a different number of hours, particularly during fire season. As another example, other departments may determine that, in the interest of promoting employee morale and efficiency, they will establish alternate work schedules, such as the 4/10/40 or the 9/8/80 schedule. Under the 4/10/40 schedule, employees work only four days per week, but work 10 hours per day, thus maintaining the 40-hours per week standard. Under the 9/8/80 schedule, employees average 40 hours per week over two weeks, as follows. During the first week, they work nine hours per day four days per week, and work eight hours on the fifth day, for a total of 44 hours that first week. Then, during the second week, they again work nine hours per day for four days, and are off the fifth day. Over the course of two weeks, the employees work a total of 80 hours, but do so in a manner that differs slightly from the eight hours per day standard.

B. Section 19851 Only Permits Variation in the Workdays and Workweeks In Order to Meet the Varying Needs of the Different State Agencies

The error in relying upon section 19851 for the proposition that the furloughs ordered by the Governor in this case are legal is that the Governor failed utterly to

consider the varying needs of the different state agencies. No effort was made whatsoever to consider the varying needs of any of the state agencies. Rather, the Executive Order purported to change the 40-hour per week statewide standard across the board for all departments, regardless of their particular and varying needs.

Even more troubling is the fact that the purported justification for the furloughs was the State's fiscal crisis. Respondent below argued that "the national economy took a serious downturn resulting in an unanticipated and significant reduction in revenues forecast in the 2008-2009 budget." (JA 145.) Respondent also argued that in addition to the overall budget deficit, the State was in danger of running out of cash. (*Ibid.*) Given that set of facts, it is reasonable to conclude that those State departments which actually generate revenue, including the Franchise Tax Board and the Board of Equalization, would need more personnel resources, not less, so that they could increase or at least maintain the State's incoming revenue streams. When the State is running out of money, it is undeniable that the "needs" of such agencies would militate against imposition of furloughs. The obvious discrepancy between the needs of these agencies and the Executive Order simply highlights the fact that the varying needs of the state agencies were not the basis for the furloughs. It is not enough to merely consider the impact of furloughs on the agencies. The statute expressly requires that any change be done "in order to meet the needs" of the agencies. Thus, a prerequisite to altering the number of hours is that there exist some need or needs of the agencies justifying the change. In this case, there was no such need ever offered or argued. Accordingly, section 19851 cannot justify the furloughs.

As part of the first question, this Court also asked whether the legislative history of section 19851 illuminated the question of whether the section operates merely as a one-way ratchet (i.e. only allowing workweeks to exceed 40 hours), or whether it also permits workweeks of less than 40 hours. Because Appellant CASE has already demonstrated that the statute is plain and unambiguous, resort to legislative history is unnecessary. The statute plainly does contemplate workweeks of greater than and less than 40 hours. However, it expressly allows those different workweeks subject to the very strict limitation described above – the needs of the different agencies.

One final point bears noting with regard to section 19851. Pursuant to subdivision (b) of the statute, it is expressly subject to supersession by a memorandum of understanding (MOU). This fact is significant because, whatever authority the statute may confer with regard to altering workweeks, it is undeniable that that authority yields to the provisions of an MOU. Thus, even assuming section 19851 could somehow be read to allow the Governor to impose furloughs in the abstract (assuming it was in order to meet the varying needs of different state agencies), the Legislature has provided that that power could be overridden by a contrary agreement reached through collective bargaining. The significance of this limitation in the statute is explained more fully in the answer to this Court's second question. However, sections 6.2 and 6.3 of the CASE MOU provide for hours of work. Thus, according to section 4.4 of the MOU, those provisions control and supersede Government Code section 19851. (See Argument II.B, *infra,* for a full discussion of those sections of the

MOU; see also CASE AOB, pp. 10-11 for a discussion of the supersession of Government Code section 19851.)

II. DPA AND A UNION COULD AGREE TO A FURLOUGH PROVISION IN THEIR MOU, BUT SUCH AN AGREEMENT WOULD BE VOLUNTARY

This Court's second question reads as follows:

> 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)?

This question is difficult to answer, because it presupposes the possibility that parties could agree to a provision, yet that provision could still be characterized as "involuntary." Assuming such an agreement could exist without being contradicted by its own terms, Appellant CASE submits that DPA and a union could reach such an agreement. For the reasons which follow, however, it is doubtful that such an agreement would ever be reached.

A. A Provision Allowing "Involuntary" Furloughs Would Likely Never Be Reached

This Court's question asks whether a union could agree with DPA to include an "involuntary furlough provision" in an MOU. Presumably, such an agreement would resemble the following:

> CASE agrees that the State may, in its sole discretion, unilaterally implement furloughs of employees at any time and in any manner. Such furloughs will be implemented by a reduction in the number of hours worked, and will be accompanied by a proportional reduction in pay.

As should be apparent, such an agreement would render virtually all other significant portions of any MOU completely meaningless, because it would allow the State to unilaterally and involuntarily furlough employees (and similarly reduce their pay) for any reason or for no reason whatsoever. It is difficult to conceive of any union agreeing to give such unbridled power to the employer. Nevertheless, such an agreement is at least theoretically possible.

B. A Provision Could and Has Been Reached Which Permits "Voluntary" Furloughs

The foregoing conclusion, however, does not appear to advance the analysis that this Court appears to be undertaking in light of the detailed questions posed in the

order for supplemental briefing. In an effort to provide as much assistance as possible to this Court, Appellant CASE respectfully suggests that the better question is whether DPA and a union could agree to a provision allowing furloughs *under some circumstances*. Not only does this question pose a more realistic hypothetical, but it also better illustrates the limitations within which the parties are free to negotiate.

Appellant CASE submits that DPA and CASE could indeed agree to a provision which allowed the implementation of furloughs under certain circumstances. In fact, it appears that CASE and DPA have already reached such an agreement. Section 10.3 of the MOU provides as follows:

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

(CASE JA 445.) This section contemplates the possibility that DPA might propose, and the union might agree via "concurrence" to accept a reduction in the number of hours worked by employees.

There are several significant limitations to this agreement. First of all, this provision may only be invoked as an alternative to layoffs. This means that before a reduction in hours can even be proposed by the State, the conditions must first exist which allow the State to implement layoffs. And pursuant to section 10.1 of the MOU, layoffs are only permissible when "it is necessary because of a lack of work or funds, or whenever it is advisable in the interest of economy to reduce the number of permanent and/or probationary employees. . . ." (CASE JA 443.) Thus, before a reduction in hours could even be proposed, there would have to be a lack of work or funds, or other economic need. Accordingly, this agreement, unlike the hypothetical "involuntary furlough provision" discussed above, could not be implemented at the sole discretion of the employer.

Second, this provision reflects the ability to agree to a reduction in hours, but does not expressly contemplate a reduction in pay. The furloughs ordered by the Governor in this case are exactly the opposite of the sort contemplated by this agreement, because they resulted in a reduction in pay but not a reduction in hours worked. This is so because pursuant to section 6.3 of the CASE MOU, the vast majority of CASE members are categorized as workweek E ("exempt") or SE ("statutorily exempt"). (See CASE JA 298-299, 416.) Pursuant to that section of the MOU, all of the attorneys, administrative law judges and hearing officers are required to "work all hours necessary to accomplish their assignments and fulfill their responsibilities." (CASE JA 416.)[1] As is common under state and federal labor

[1] There are approximately 150 CASE members who are not exempt, and are paid on an hourly basis. They are categorized as work week group 2 employees. (See CASE JA 415.) The other 3,240 members of CASE are attorneys (work week group SE) or

principles, salaried employees are entitled to their full salary regardless of the number of hours worked. "[A]n exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked." (*Kettenring v. Los Angeles Unified School District* (2008) 167 Cal.App.4th 507, 514, citing 29 C.F.R. §541.602.)

In addition to this well settled principle of law, section 6.2 of the MOU also specifies that full pay is required. For work week group E employees, "the regular rate of pay is *full compensation* for all hours worked to perform assigned duties." (CASE JA 415, emphasis added.) For work week group SE employees, "[t]he regular rate of pay is *full compensation* for all time that is required for the WWG SE employees to perform assigned duties." (CASE JA 415, emphasis added.) Thus, read in conjunction with the requirement in section 6.3 that employees must work all hours necessary to accomplish their assignments, the MOU clearly requires full compensation regardless of the number of hours worked. Accordingly, the provision agreed upon by DPA and CASE would perhaps allow for a reduction in hours for those few hourly employees who are CASE members in work week group 2. However, it would not allow for a reduction in pay for work week group E and SE members, as they are entitled to their full salary regardless of the number of hours they work. Moreover, it would likely not be effective to permit a reduction in the number of hours for the E and SE employees, simply because other provisions of the MOU require them to work all hours necessary.

In order to overcome these significant limitations, section 10.3 would have to be read very broadly, so as to allow CASE to not only accept furloughs, but to also accept a reduction in pay. Furthermore, the provision would have to be read so as to allow the parties to renegotiate the terms of sections 6.2 and 6.3 of the MOU. Assuming both parties were amenable to the necessary agreements, then it is theoretically possible that DPA and CASE could agree to a provision which would allow the furloughs to be implemented. However, as should be plain from the discussion of the pertinent sections of the MOU, it would be difficult to characterize the resulting provision as "involuntary," because it could only come about after agreements to modify a number of other provisions, which presumably would only be reached voluntarily.

III. GOVERNMENT CODE SECTION 3516.5 DOES NOT ALLOW THE GOVERNOR TO IMPOSE FURLOUGHS

This Court's third question reads as follows:

> 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,

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administrative law judges and hearing officers (work week group E). (CASE JA 298-299, 415.)

> does section 3516.5 provide a Governor with the authority to impose involuntary furloughs on represented state 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?

As an initial matter, it must be observed (in response to this Court's question) that the statute does not expressly authorize furloughs or any other type of reduction in hours or pay. Thus, the authority to do so, if it exists at all, must be found by implication. In order to best answer this Court's question, it is first necessary to clarify the scope of section 3516.5.

A. Section 3516.5 Does Not Apply to Executive Orders

Section 3516.5 appears in Chapter 10.3 of Division 4 of Title 1 of the Government Code, which is formally known as the Ralph C. Dills Act. (Gov. Code §3524.) The section reads as follows:

> 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 first paragraph of the statute is mandatory, and by its terms requires an employer to provide written notice to the unions of "any law, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the employer." Thus, as a preliminary matter, it is apparent that section 3516.5's scope is fairly limited. It only comes into play when there is a "law, rule, resolution, or regulation" which the employer proposes to be adopted. If the "law, rule, resolution, or regulation" is being proposed by some entity other than the employer, the section has no application. Similarly, if the employer is proposing

something other than a "law, rule, resolution, or regulation," the statute likewise has no effect.

In this case, the furloughs were instituted by executive order. The Legislature clearly knows how to distinguish between laws, rules, and executive orders, because they did exactly that in Government Code section 3516, the statute which *immediately precedes* section 3516.5. That statute, which defines the scope of representation, expressly refers to "any service or activity provided by law *or executive order*." (Emphasis added.) This is significant because it demonstrates that, in the context of the Dills Act, an executive order is something other than a "law, rule, resolution, or regulation." For that reason alone, section 3516.5 has no application, because its reach is confined to a "law, rule, resolution, or regulation" and does not include executive orders.

B. Section 3516.5 Confers No Additional Power During an Emergency

Section 3516.5 has two paragraphs. The first specifies the authority of the employer during non-emergencies. The second paragraph specifies that in an emergency, the employer may act "immediately" but does not otherwise enlarge the scope of authority; it simply allows the employer to act more quickly than in non-emergencies. In both cases, the employer may adopt a "law, rule, resolution, or regulation" but during an emergency the employer is excused (temporarily) from the notice and meet and confer requirements. In other words, the presence of absence of an emergency does not alter the scope of power conferred upon the employer; it only changes the time frame within which that power can be exercised.

C. Section 3516.5 Allows the Imposition of Terms on Matters Not Covered By an MOU

The question remains, however, as to what exactly the scope of authority is under this section. The answer depends upon the scope of the MOU applicable to the union in question. The CASE MOU is 113 pages (CASE JA 499) and covers many, but by no means every possible issue that may fall within the scope of representation. The parties were aware of the fact that circumstances may change after the execution of the MOU, and accounted for that in section 4.3. Section 4.3.A specifies that it is the full agreement between the parties *"regarding the matters herein."* (CASE JA 398, emphasis added.) It specifically provides that as to "other matters," i.e. those not provided for in the MOU, subsection B controls. (CASE JA 398.) Subsection 4.3.B provides, in relevant part:

> 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 CASE of the proposed change thirty (30) days prior to its proposed implementation.

(CASE JA 398.)

Thus, the MOU makes clear that the *only* time the State can impose new terms is when the MOU does not already cover the subject matter of the new terms. Section 3516.5 mirrors this principle, and allows for negotiation through the meet and confer process on whatever changes the employer seeks to impose, provided of course that the MOU allows the changes. To the extent that the State chose to negotiate an MOU with a union that did not include language like that which appears in section 4.3 of the CASE MOU, then an argument could be made that section 3516.5 would allow broader changes, including changes to matters already covered by the MOU. However, since that is not the case with respect to the CASE MOU, it is speculative to assess the reach of section 3516.5 in that context. It is also speculative to analyze the effect section 3516.5 might have if the terms of an MOU were no longer in effect, as that is not the case in the instant proceeding.

D. Section 3516.5 Does Not Provide a Governor With Authority To Impose Involuntary Furloughs on CASE Members

With the foregoing limitations of section 3516.5 in mind, it is now apparent that the answer to the Court's third question must be in the negative. This Court astutely inquired about imposing furloughs "on represented employees" presumably because it was aware that the Dills Act expressly contemplates that the employer and the union shall bargain in good faith (Gov. Code § 3517), that MOUs shall be reached (Gov. Code § 3517.5), and that such MOUs shall continue in effect after the expiration of their term while negotiations for a successor MOU are ongoing (Gov. Code § 3517.8). Accordingly, the MOU controls the scope of authority conferred by section 3516.5

For CASE members, hours of work are a matter covered by the MOU in section 6.3. (CASE JA 416.) Also, the salaries for all CASE members have already been negotiated, and are set forth in detailed salary tables at the back of the MOU. (CASE JA 485-488.) The furloughs at issue in the present case involve (at least in theory) a reduction in hours and a reduction in salary. Since both of these topics are matters covered by the MOU, section 4.3 precludes the imposition of any new terms in this area while the MOU remains in effect. Accordingly, the interplay between section 3516.5 and the CASE MOU means that a Governor does not have the authority to impose involuntary furloughs. Further, for the reasons explained in Argument III.B, the presence or absence of an emergency does not change the analysis.

Finally, Appellant CASE notes that this Court's question assumes that "an emergency thereafter exists within the meaning of Government Code section 3516.5." Assuming arguendo there was a true emergency as that term is defined in the Dills Act, like an earthquake, massive wildfire, or some other calamity, it is difficult to imagine the State as an employer needing to furlough its employees. The most likely response

to such a disaster would be to demand that certain critical employees work *more* than forty hours per week, not less. A disaster might also require employees to engage in duties outside of their normal area of expertise, but in any event the employees would be working more, not less. Indeed, it is doubtful that an emergency or natural disaster could be imagined which would create the need for the State, as the employer, to urgently demand that its employees work less time, simply because it is difficult to imagine how working less would in any way be a rational or effective response to the type of natural disaster contemplated by the section.

IV. SECTION 3516.5 ONLY ALLOWS THE IMPOSITION OF NEW TERMS TO THE EXTENT THEY DO NOT CONTRADICT THE EXISTING MOU

This Court's fourth question reads as follows:

> 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 involuntary 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 emergency, or to allow the imposition of entirely new terms in an MOU?

Once again, this question has several questions within it, but they may be disposed of in relatively short order.

The first part of the question asks for examples of the types of rules a Governor may impose under section 3516.5. Consistent with section 4.3 of the MOU, there are a number of matters that are not covered by the MOU for which the employer might impose new conditions. For example, the State might elect to have its attorneys work on specific cases rather than others. Nothing in the CASE MOU addresses the matter of case assignment, and thus such a rule would not be precluded by section 4.3 of the MOU. Thus, if there was a large backlog of cases in an area where the State was required to meet federal timelines, the State might enact a rule reassigning lawyers and judges to work on those cases rather than their normal case work.

Another example might occur during an emergency. Thus, if California were struck by a devastating earthquake which leveled major metropolitan areas, the employer might be able to direct that its legal workforce set aside all of their legal work and assist in clearing the rubble and burying the dead. This would make sense, especially since in the hypothetical disaster, courts would be closed (or destroyed) and there would be an immediate need for an "all hands on deck" approach to responding to the immediate needs of the State. Nothing in the CASE MOU specifies the particular job duties to which legal professionals may be assigned. While it is presumed that in the general course, CASE members will work on legal matters for the

State, it is possible that in certain dire circumstances the State might conclude that the legal work of the State should be put on hold until the immediate threats to the health and welfare of the people of California were addressed.

There are numerous other examples, some of which have actually transpired recently. For example, the State may implement a new computerized method of processing travel claims. While section 12.1 of the MOU discusses generally the right to reimbursement, it does not specify a precise procedure that the State is required to use to process the reimbursement claims. Thus, the State could implement a new procedure after meeting and conferring with the union on that topic.

Similarly, continuing with the example of travel reimbursement, the State might insist that in an effort to combat fraud, travel claims must be signed under penalty of perjury. Nothing in the CASE MOU specifies the signature requirements of a travel claim, and thus section 4.3 of the MOU would not prohibit the imposition of such a rule.

Respondent may argue that section 3516.5 somehow trumps section 4.3 of the CASE MOU and allows for the employer to impose any terms, even those already covered by the MOU. Such an argument is untenable in light of the express purpose of the Dills Act (in which section 3516.5 appears). Government Code section 3512 sets forth the purposes as follows:

> It is the purpose of this chapter to promote full communication between the state and its employees by providing a reasonable method of resolving disputes regarding wages, hours, and other terms and conditions of employment between the state and public employee organizations. It is also the purpose of this chapter to promote the improvement of personnel management and employer-employee relations within the State of California by providing a uniform basis for recognizing the right of state employees to join organizations of their own choosing and be represented by those organizations in their employment relations with the state. It is further the purpose of this chapter, in order to foster peaceful employer-employee relations, to allow state employees to select one employee organization as the exclusive representative of the employees in an appropriate unit, and to permit the exclusive representative to receive financial support from those employees who receive the benefits of this representation.

It is difficult to argue that interpreting section 3516.5 so as to allow the employer to contravene express provisions of an MOU would advance the purpose of "promot[ing] the improvement of personnel management and employer-employee relations within the State of California." It is likewise difficult to imagine how such an interpretation would "foster peaceful employer-employee relations." Indeed, interpreting section 3516.5 to allow the employer to impose any new rule, at its sole discretion, even those which contravene provisions of a valid MOU, would render the entire Dills Act meaningless because there would be absolutely no point to engaging in collective

bargaining. Any MOU reached would immediately be subject to unilateral changes by the employer without negotiation. The untenable nature of such an interpretation is made more apparent by the seemingly endless nature of the State's "fiscal crisis," because the interpretation would allow the employer to disregard entire MOUs at virtually any time, without limitation.

The Dills Act expressly contemplates that the employer and the union shall bargain in good faith (Gov. Code § 3517), that MOUs shall be reached (Gov. Code § 3517.5), and that such MOUs shall continue in effect after the expiration of their term while negotiations for a successor MOU are ongoing (Gov. Code § 3517.8). All of these statutory provisions would be rendered meaningless if section 3516.5 was interpreted to allow the Governor to impose whatever new terms he desired.

The second question posed by this Court in Question #4 asked whether section 3516.5 is "designed to override the terms of an MOU in case of emergency." The answer is an unqualified no. For the reasons just discussed, the statute cannot be read to allow an employer to override the terms of an MOU, as such an interpretation would be completely inconsistent with the rest of the Dills Act, the very chapter in which section 3516.5 appears. Nor can it be read to allow the employer to override an MOU "in case of emergency," because, as has been demonstrated *supra*, the statute does not confer any additional authority during emergencies, but rather simply allows for already authorized actions to be executed more quickly. (See Arg. III.B, *supra*.)

The third and final question posed by this Court in Question #4 is whether section 3516.5 might "allow the imposition of entirely new terms in an MOU." As should be apparent, the answer is yes, with limitations. If the new rule impacts matters not covered by an MOU, then those "entirely new terms" could be imposed after the employer engages in a good faith meet and confer process. During an emergency, such terms could theoretically be imposed immediately. Thus, to the extent "entirely new terms" do not relate to matters already covered in the MOU, they may be imposed. However, if they do relate to matters covered by the MOU, they may not be imposed. (See CASE JA 398.)

V. THE LEGISLATIVE HISTORY OF SECTION 3516.5 IS SILENT AS TO THE MEANING OF "EMERGENCY"

This Court's fifth and final question reads as follows:

> 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?

A. The Legislative History of Section 3516.5 Does Not Provide Any Clarification of the Meaning of the Term "Emergency"

A review of the legislative history was unhelpful. Senate Bill 839 which was the vehicle for enacting the Dills Act was introduced on April 6, 1977. What would

later become Government Code section 3516.5 was amended into the bill on August 1, 1977, in section 3530.5. (Journal of the Assembly of California, 1977-1978, pp. 6072-6073.) A subsequent amendment to the bill on August 31, 1977 renumbered the section to its present location, section 3516.5. The next year, AB 3053 was introduced, and among the many amendments to that bill, on August 31, 1978, Government Code section 3516.5 was amended to change "state, its agencies, departments, commissions or boards" to "employer" and it has remained unchanged ever since.

A review of the Assembly and Senate Committee and Final Analyses of the respective bills (available on microfiche) was unhelpful, and shed no light on the types of emergencies included within the meaning of the statute.

Appellant CASE submits that because the legislative history of section 3516.5 does not illuminate the meaning of emergency, that term should be interpreted by reference to the other statutory provisions in the Dills Act.

B. There Is No Emergency of the Type Contemplated by Section 3516.5

Government Code section 3523 is a statute located later in the Dills Act. Subdivision (b) of that section refers to cases of emergency as provided in subdivision (d). Subdivision (d) in turn refers 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." Thus, section 3523 clarifies that "emergencies" are things like earthquakes, fires, and other such natural disasters.

The singular unifying characteristic of emergencies as defined in the statute is that they are beyond the control of the employer. The "fiscal crisis" relied upon by Respondent is not of that character. The fiscal crisis is man-made, is entirely avoidable by the State provided its government officials act responsibly, and most importantly, is not the type of sudden and unpredictable event that one commonly thinks of as a disaster. Quite the opposite, the fiscal crisis has unfortunately become the norm in California. As the Supreme Court has observed, "in recent years the timely adoption of the budget bill in California has proven to be the exception, rather than the rule." (*White v. Davis* (2003) 30 Cal.4th 528, 533.)

Section 3523 is in the same chapter as section 3516.5, and thus its definition of emergencies is applicable to the chapter. The placement of a provision within the code is one relevant factor in determining its meaning. (*People v. Silverbrand* (1990) 220 Cal.App.3d 1621, 1626.) There is no other definition of emergency provided elsewhere in the chapter, and thus the only reasonable interpretation of the word "emergency" in section 3516.5 is that which is provided in section 3523, subdivision (d).

Given that definition, it is plain that no emergency exists in the instant case. The facts of this case demonstrate that the "fiscal crisis" relied upon by Respondent is not the type of emergency contemplated by section 3516.5. As explained in the CASE AOB at pp. 18-19, the Governor raised the possibility of furloughs as early as November 6, 2008. (CASE JA 306.) He issued the executive order on December 19, 2008. However, the furloughs did not begin until February 6, 2009. Section 3516.5

contemplates an emergency wherein the ability to provide notice and an opportunity to meet and confer do not exist. But the facts of this case illustrate quite plainly that the Governor had *three months* in which to provide notice and meet and confer, but failed to do so. This was not an emergency justifying quick action by the employer.

Accordingly, section 3516.5 provides the Governor no authority whatsoever to impose involuntary furloughs as he did in this case. The statute only applies to a "law, rule, resolution, or regulation," not an executive order. Moreover, the "fiscal crisis" at issue in this case is not the type of emergency contemplated by the statute, and in any event, emergencies confer no additional power under the statute.

CONCLUSION

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

Patrick Whalen
Attorney for Plaintiff and Appellant CASE

PROOF OF SERVICE

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

On March 1, 2010 I served the following documents:

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

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

_XX_ depositing the sealed envelopes with the United States Postal Service with the postage fully prepaid.
_____ placing the sealed envelope for collection and mailing following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed as follows

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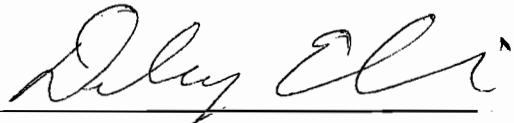
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on March 1, 2010



Delaney Ellison