LOCAL 1000
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Stronger Together

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April 21, 2010

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

RE: SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000 v. JOHN CHIANG, as State Controller, etc.; ARNOLD SCHWARZENEGGER, as Governor, etc., et al.
Court of Appeal Case No. C061020; Sacramento Superior Court Case No. 34-2008-80000135
SEIU's Supplemental Reply Letter Brief

Dear Clerk of the Court:

Respondents' brief illuminates little or no additional substantive support for the Governor's position that he is authorized to unilaterally impose furloughs based upon the laws and provisions he has previously identified.

In the waning months of the furloughs and the Governor's administration, one realizes how little was accomplished by his actions and blatant over-reaching. Feckless state policy-makers have done little to resolve the annual conundrum of too little income combined with too many expenses. Reflecting on his actions played out in his year-old executive orders, the Governor may contemplate that (once again) he was ill-suited for the role he played. Like MacBeth during his decline, the Governor is susceptible to rationalizing that his own conduct - however excessive - was justified by the exigencies of the time.[1] However, illegal conduct

[1] William Shakespeare, MacBeth, Act 5, scene 5. This scene shows that Macbeth has been undone by events and his loss of power. He concludes there is no meaning or purpose in life. However, if everything is meaningless, then Macbeth's crimes are somehow made less awful, because, like everything else, they too "signify nothing."

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should not be minimized by the notion that it was provoked by others or by circumstances.

As for the five questions posed by the Court, the Governor strains his interpretations to contrive the desired result. By contrast, as set forth in the Letter Briefs of Appellants and the Controller, ample authority supports the only possible conclusion that the Governor's actions exceeded the limits of his power. For the reasons set forth in prior briefs, as well as the additional reasons below, the trial court's ruling must be reversed.

I. ARGUMENT

Question 1- Interpretation of Section 19851

Respondent's answer to the first question is not correct. No proper reading of the language in section 19851 can reach the result desired by the Governor. His first essential, *albeit* incorrect, conclusion is that the state "policy" set forth in 19851 is really more of an option. Citing vague and ambiguous references to the dictionary definition of state policy, he ignores the fundamental point of the phrase - the workweek of the state employee shall be 40 hours. Dissecting the word policy from the remainder of the sentence is a feeble attempt to lessen the import of the mandate of this law - creating a 40-hour week. Prior briefs from Appellants and the Controller explain the historical significance of a national drive to a 40-hour week for all workers. Unfortunately, the Governor's attempted interpretation completely ignores this.

Moreover, the Governor's interpretation set forth in his Letter Brief fails for an

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To-morrow, and to-morrow, and to-morrow,
Creeps in this petty pace from day to day,
To the last syllable of recorded time;
And all our yesterdays have lighted fools
The way to dusty death. Out, out, brief candle!

Life's but a walking shadow, a poor player
That struts and frets his hour upon the stage
And then is heard no more: it is a tale
Told by an idiot, full of sound and fury,
Signifying nothing.

additional reason - the State must follow consistent policies or their actions which deviate from those consistent policies will fail as improper underground rule-making. If adherence to a 40-hour week is optional and can diverge both up and down, then its varied application for a plethora of reasons would completely undermine the point of having a 40-hour week policy. Indeed, there would be no reason to set it forth in statute at all. Moreover, the Governor's whimsical approach would run afoul of state rule-making requirements.

Clearly, as previously argued, the Administrative Procedures Act, the State must articulate its rules and policies pursuant to the proper process. Government Code section 11340.5, provides in pertinent part:

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a "regulation" as defined in Section 11342.600, unless . . . [it] has been adopted as a regulation AND filed with the Secretary of State pursuant to this chapter.

Moreover, under the APA (Government Code section 11342.600) a regulation is broadly defined as:

> every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.

To attempt to argue that a state law dictates a "policy" but that policy is by definition something optional or a less than valid mandate makes no sense under the umbrella of state government operations. Seemingly, the Governor would like to imply in the scope of his office the flexibility of a private-sector Chief Executive. However, these principles of flexibility contravene existing law which require the State to be more direct, transparent and observant of process issues.

Ultimately, concerning the proper interpretation of 19851, the Controller's supplemental letter brief sets forth in great detail the proper interpretation of this

section. SEIU joins that argument in its entirety particularly concerning the need to interpret the meaning of the phrase "a different number of hours...." The Governor's argument in response ignores the fundamental purpose of the entire section - to ensure payment of overtime in excess of 40 hours. It is simply not reasonable to dissect the first sentence of this section from the remainder of the paragraph, ignore the purpose of the remainder, and then expand upon the intent of the first sentence in a manner that is unrelated to the purpose of the remaining words.

If this type of analysis was the proper statutory interpretation, then the written law would be meaningless. Instead, the Court's fundamental task in construing a statute is to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute. (*Torres v. Automobile Club of So. California* (1997) 15 Cal.4th 771, 777; *People v. Jenkins* (1995) 10 Cal.4th 234, 246). The court looks to the statutory language, giving the words their usual and ordinary meaning. *(People v. Lawrence* (2000) 24 Cal.4th 219, 230.) If the terms of a statute provide no definitive answer, then courts may resort to extrinsic sources, including the ostensible objective and the legislative history. (*Granberry v. Islay Investments* (1995) 9 Cal.4th 738, 744.) In such circumstances, the court is to "select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences." (*People v. Jenkins* (1995) 10 Cal.4th 234, 246.) "[T]he court must consider the consequences that might flow from a particular construction and should construe the statute so as to promote rather than defeat the statute's purpose and policy." (*Sylva v. Board of Supervisors* (1989) 208 Cal.App.3d 648, 654.)

With this view of the legislative history, the only interpretation that supports the intent of the 19851 in its entirety, is that of Appellants and the Controller. For the reasons set forth before, and as incorporated above, it does not permit the Governor to unilaterally reduce hours. Moreover, the Governor relies on legislative history taken out of context and makes assumptions not based on the record to reach this conclusion. Unfortunately, the governor completely misstates the July 3, 1947 letter from the California State Employees Association. The Governor's reading of this letter is devoid of any understanding of the historical context of the national drive to a 40-hour work week. An employee association (especially the predecessor to Local 1000) would be arguing for a reduction in work hours to a regularized 40 hours for the purpose of establishing practices that are consistent nationally. It is unreasonable to assert that an employee organization - advocating for worker rights

- would be divesting itself from work hour protections and fully vesting the entire discretion in management solely and exclusively. The Governor's claim of the meaning of this letter borders on the ridiculous.

Question 2 - Mutually Agreed Furloughs

The Governor correctly concedes that the Dills Act contemplates a scope of representation which makes furloughs a subject of bargaining. The Governor further admits the existence of provision already in the MOUs which permit furloughs under the defined circumstances. These two admissions support Appellants' and Controller's position that furloughs were the subject of bargaining and not susceptible to a unilateral imposition of the nature taken by the Governor.

However, when the Governor contends that the State's Rights clause further supports his unilateral action (allegedly because "furloughs" are now a matter of "scheduling"), he oversteps proper interpretation. Indeed a valid reading of the State's Rights clause is set forth in early briefs. Briefly, the State's Rights clause of the MOU found in section 4.1 begins with a limiting instruction stating "except for those rights which are **abridged or limited by this Contract**, all rights are reserved to the State." (MOU § 4.1(A))[2](Emphasis added.) This clause of the MOU, far from granting the authority to furlough employees, limits the ability of the Governor to act only in accordance with law that is neither contradicted nor superseded by the MOU.

As previously indicated, the entire subject of a forty-hour week is defined and limited by the contractual agreement of the parties. Therefore, the parties cannot alter it. Moreover, the State can only claim "management rights" over those matters of the nature listed in Section 4.1 (B) and not otherwise defined by contract. Consistent with the arguments set forth above and in prior briefs, the Unions clearly maintain that a 40-hour week is signed, sealed and delivered by the contract.

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[2]State Bargaining Unit 1 (JA, Vol. II, Tab MM, JA000363); State Bargaining Unit 3 (*Id.*, Vol. III, Tab NN, JA000559); State Bargaining Unit 4 (*Id.*, Vol. IV, Tab OO, JA000798); State Bargaining Unit 11 (*Id.*, Vol. V, Tab PP, JA000943); State Bargaining Unit 14 (*Id.*, Vol. VI, Tab QQ, JA001110); State Bargaining Unit 15 (*Id.*, Vol. VII, Tab RR, JA001251); State Bargaining Unit 17 (*Id.*, Vol. VIII, Tab SS, JA001430); State Bargaining Unit 20 (*Id.*, Vol. IX, Tab TT, JA001635); and State Bargaining Unit 21 (*Id.*, Vol. X, Tab UU, JA001793-JA001749.)

In a new effort to use the management rights clause as a sword instead of shield, the Governor claims that furloughs are a matter of employee "scheduling." However, this flies in the face of a reasonable interpretation of "scheduling" which normally applies to work shifts and days of work, as opposed to the mandatory 40-hour week. In the SEIU contracts, scheduling of shifts and days is contained in 19.1B - D, as opposed to 19.1 A - the 40 hour week.

In these sections of 19.1, it is clear that the 40-hour week is a mandate - as set forth in subsection A. By contrast, looking at the subsections that relate to traditional scheduling - 19.1 B, C and D - varying degrees of management flexibility is retained under the specific language of these subsections. (*Id.*) As a result, even certain management rights pertaining to "scheduling" have been "abridged or limited" by specific contract language, and thus it cannot be used in the manner claimed by the Governor.

Question 3 - Section 3516.5 as a Basis to Take Action

The Governor's response to question 3 is incorrect. Unable to find applicable authority to support his misinterpretation, the Governor reaches out to private sector labor principles which find few ties to the applicable scenario in the California public sector when the overarching disputes stem from constitutional protections and distinct provisions of the Dills Act. The Governor articulates no connections between the principles of the National Labor Relations Act (29 U.S.C. § 158(d)) and Government Code section 3516.5. While the NLRA asserts the same fundamental principle against unilateral changes in terms and conditions of employment, the nuances of the employers' ability to act in for an economic justification does not automatically translate to the Dills Act. (*NLRB v. Katz*, 369 U.S. 736 (1962) (unilateral changes by an employer concerning mandatory subject of bargaining are regarded as *per se* refusals to bargaining, and thus, illegal).

Without waiving an earlier argument relating to PERB's *exclusive jurisdiction* to determine violations of its provisions, it is obvious the Governor misses the fundamental point of the procedural process set forth in section 3516.5 - that is, when a true emergency occurs, a meet and confer is supposed to follow as soon as practicable. In the scenario involved in this case, the Governor cites to no efforts he made to meet and confer after his unilateral act. Indeed, the fact that he took his action by executive order rather than a meet and confer notice undercuts any notion that he made any effort to comply with the procedural steps of section 3516.5.

In addition, the cases he cites simply do not support the ultimate conclusion he draws. The Governor cites these cases with the notion that they support two exceptions to the requirement to meet and confer with the Union to negotiate changes in conditions of employment. (Governor's Brief, p. 15) Clearly, the Union has not engaged in tactics designed to delay bargaining. Assuming *arguendo* that these cases are applicable, the Governor has not shown that he meets the second exception for economic exigencies compelling prompt action. A closer reading of the Governor's citations discloses his flawed logic.

Respondents attempt to persuade this court to adopt the NLRB "economic exigencies" standard for exempting the duty to meet and confer and to unilaterally implement changes. Although respondents promote this standard to the court they fail to acknowledge the proper test that is used to determine whether this exigency is really present. In *RBE Electronics v. NLRB*, the court states that, "The exigency is limited **only** to those exceptions in **which time is of the essence and which demand prompt action**... consistent with the requirement that an employer prove that its proposed changes were 'compelled,' the employer must additionally demonstrate that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable." (*RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995).)

Even if this standard applied, the Governor could not possibly satisfy it. First, time was not "of the essence." It took months for the Governor to predict the alleged budget crisis, call the legislature together, fail to reach a political conclusion, and then draw out the alleged solution over 18 months. Second, external events did not cause the economic situation, political disputes caused it. Third, it was not beyond the employer's control, it was squarely within the State's control to find financial solutions for the budget problem. It simply did not have the political spine to do so. Finally, the budget crisis is now an annual event. It is hard to see how it fits the definition of being "not reasonably foreseeable."

In addition, even a real economic exigency does not ultimately excuse the duty to meet and confer. Courts have found in almost all cases that the duty to bargain was, indeed, not excused. In *Dixon Distributing Company v. NLRB*, the court held that "even with full-fledged bargaining for a contract going on...matters arise where the exigencies and economics of a situation seem to require rather prompt action. In such circumstances, 'bargaining' may well be in good faith, and lawful, without being protracted, and without any agreement being reached." (*Dixon Distributing*

Co., 211 NLRB 241, 244 (1974).) Obviously, the court still required 'bargaining' even with the economic exigencies found to be present.

In *Winn-Dixie v. NLRB* the court demonstrated the harm that would occur if the duty to meet and confer were down graded to the point that Respondents now promote. "An employer eventually would be able to implement any and all changes it desired regardless of the state of negotiations between the bargaining representative of its employees and itself." (*Winn-Dixie Stores,* 243 NLRB 972, 974 (1979) .) The court went on, "we cannot endorse an approach so clearly in disparagement of the collective-bargaining process." (*Id.*)

The Governor's own citations do not support his conclusion. His assertions dismantle the purpose of having collective bargaining apply to wages and hours of work. The Governor's citations to the NLRA precedent also fail to acknowledge that in the present dispute, a contract was in effect. When a contract is in place, the State is also limited by the Entire Agreement clause of 24.1 A.[3]

Ultimately, under the Dills Act, when a contract is in place, the Governor must abide by the other provisions of the Dills Act. Not only does it require funding in the annual budget act, there are specific dictates when full funding is not available. (Gov. Code § 3517.6 (b).[4] When there is a failure to fund, the Governor must then exercise the steps of another Dills act provision - to open all or part of the MOU.

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[3]State Bargaining Unit 1 (JA, Vol. II, Tab MM, JA000504-JA000505); State Bargaining Unit 3 (*Id.*, Vol. III, Tab NN, JA000688); State Bargaining Unit 4 (*Id.*, Vol. IV, Tab OO, JA000909-JA000910); State Bargaining Unit 11 (*Id.*, Vol. V, Tab PP, JA001077); State Bargaining Unit 14 (*Id.*, Vol. VI, Tab QQ, JA001218-JA001219); State Bargaining Unit 15 (*Id.*, Vol. VII, Tab RR, JA001399); State Bargaining Unit 17 (*Id.*, Vol. VIII, Tab SS, JA001563-JA001565); State Bargaining Unit 20 (*Id.*, Vol. IX, Tab TT, JA001763), and State Bargaining Unit 21 (*Id.*, Vol. X, Tab UU, JA001889-JA001890.)

[4] Section 3517.6(b) provides "if any provision of the memorandum of understanding requires the expenditure of funds, those provisions of the [MOU] may not become effective unless approved by the Legislature in the annual Budget Act."

(Gov. Code § 3517.7.[5]) None of these steps were taken, none of these provisions followed. Surely in the 18 months of the furlough executive order, some nod to the traditional process would have been made, but not by this Governor. Flouting all these protections, he simply acted alone and unilaterally, exercising authority he did not possess.

Moreover, the Governor fails to document with citations to the record that any of the actual steps of section 3516.5 were followed. When he cites to none, it is difficult to take seriously the notion that the Governor intended to follow the enumerated steps of the bargaining process either in section 3516.5 or those above. Consequently, it is a difficult pill to swallow when the Governor cloaks himself in the protections of laws he did not follow.

Interestingly, in the Governor's answer to Question 3, he claims essentially that section 3516.5 provides a substantive legal right to act in an emergency. Yet in his answer to Question 4, he acknowledges that section 3516.5 "does not provide the Governor with any new substantive authority , it provides a mechanism" for initiating changes. If the statute provides no substantive rights but does provide a "mechanism" then it is as Appellants and the Controller state - a procedural device. However, the substantive right to act must reside within another provision of the law. As to this issue, the Appellants' and Controllers position has been fully briefed. There exists no other authoritative right to act unilaterally - such action required either Legislative or Union approval. The law contemplates that these separate approvals would occur sequentially.

Question 4 - Under Section 3615.5 - The Governor May not Override MOUs

The Governor's response to Question 4 is both difficult to understand and has no legitimate legal basis. As just stated, he acknowledges that section 3516.5 "does not provide the Governor with any new substantive authority, it provides a mechanism" for initiating changes in working conditions. The Governor's conclusion that section 3516.5 permits him to override MOU provisions flies in the face of his own contentions and other applicable law.

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[5] Section 3517.7 provides "if the Legislature does not approve or fully fund any provision of the [MOU] which requires the expenditure of funds, either party may reopen negotiations on all or part of the [MOU].

A procedural mechanism not changing substantive law does not allow for the impairment of contractual rights. Appellants and Controller have extensively briefed the issue of the constitutional protections against the impairment of contracts and the Dills Act provisions. The Governor cannot disrupt these bodies of law with one short, unsupported and incorrect conclusion.

Moreover, in his answer to this question, the Governor provides no meaningful response to SEIU's argument in the opening letter brief regarding the history of the requirement allowing the state employee unions meaningful input on the regulatory-type changes that overlap with wages, hours and working conditions. Instead, the Governor tap-dances around this - the more obviously correct answer - and concludes as summarily as he has before that because it was a fiscal crisis and very important, he could issue an executive order.

Contrary to the Governor's cavils, the Union's interpretation does not prevent any Governor from acting in an emergency. Indeed, prior to this Governor, **all prior** governors were able to respond to **all prior** emergencies effectively and efficiently, and without jeopardizing state services or state employees pay. Consequently, it seems a bit like crying wolf for this single Governor - after 30 years of state operations under the Dills Act - to wail plaintively that this interpretation will prevent governors from responding to emergencies. No shred of evidence exists to support this bald claim.

Question 5 - Section 3516.5 and its Legislative History

The Governor's response to this question is both overly conclusory and contrived. First, he concedes that Government Code section 3523 bears on a proper interpretation of section 3516.5, but then reaches an illogical conclusion.

Once again, the Governor drifts back to the already discredited reliance on California Constitution, article IV, section 10(f) to support his unilateral action. However, for the many reasons previously addressed in Appellants' and Controller's prior briefs, this section merely allows him to call the Legislature into session and propose language. It does not grant him substantive power to act in place of the Legislature.

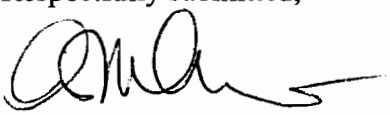
Relying on procedural provisions of law does not grant the Governor substantive power to act unilaterally. Trying to call a defined fiscal measure - a 15 % furlough with an 18-month span and a start and specific far-off future end date - seems

inherently inconsistent with any notion of a true emergency. The State's annual fiscal drama does not bear a comparable relationship to the other types of real emergencies depicted in section 3523. As a result, the Govern's conclusion fails. By contrast, Appellants and the Controller have previously set forth a correct analysis of these provisions and the Court should adopt that analysis and its conclusion.

II. CONCLUSION

For all these reasons, as well as those set forth by all Appellants and the Controller, the Governor's action must be remedied by this appeal. There is no substantive legal support for his unilateral and illegal furloughs.

Respectfully submitted,



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PROOF OF SERVICE

CASE NAME: *SEIU LOCAL 1000 v. ARNOLD SCHWARZENEGGER, et al.*
COURT NAME: Sacramento County Superior Court / Third District Court of Appeal
CASE NUMBER: 34-2009-80000135 / C061020

I am a citizen of the United States and a resident of the County of Yolo. I am over the age of eighteen (18) years and not a party to the above-entitled action. My business address is 1808 14th Street, Sacramento, California 95811.

I am familiar with SEIU Local 1000's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a United States mailbox after the close of each day's business.

On April 22, 2010, I served the following:

SEIU's Supplemental Reply Letter Brief

[ ] (BY PERSONAL DELIVERY) by delivering by hand and leaving a true and correct copy via messenger with the person at the address shown below:

[ ] (BY FACSIMILE) placing a true copy thereof into a facsimile machine addressed to the person and address shown below, which transmission receipt is attached hereto.

[ ] (BY OVERNIGHT DELIVERY) on the following party(ies) in said action, by placing a true copy thereof enclosed in a sealed envelope, with delivery fees paid or provided, and placed in the designated recepitcle for such overnight mail, addressed as set forth below. In the ordinary course of business, mail placed in that recepticle is picked up that same day for delivery the following business day.

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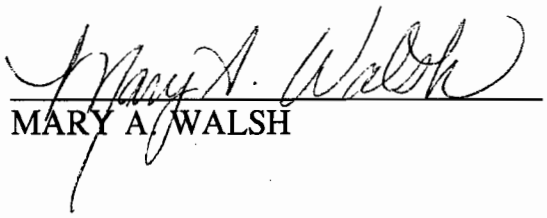
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on April 22, 2010, at Sacramento, California.



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