SUPREME COURT
FILED

JUN 23 2010

Frederick K. Ohlrich Clerk
Deputy

CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS

PE CG PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT

June 23, 2010

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CLERK SUPREME COURT

Frederick K. Ohlrich
Court Administrator and Clerk of the Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

RE: **Supreme Court Case No. S183411**

PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT el al., Plaintiffs and Appellants, v. ARNOLD SCHWARZENEGGER, as Governor, etc. et al., Defendants and Respondents; JOHN CHIANG, as State Controller, etc., Defendant and Appellant.

CALIFORNIA ATTORNEYS, etc., Plaintiff and Appellant, v. ARNOLD SCHWARZENEGGER, as Governor, etc. et al., Defendants and Respondents; JOHN CHIANG, as State Controller, etc., Defendant and Appellant.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000, Plaintiff and Appellant, v. ARNOLD SCHWARZENEGGER, as Governor, etc. et al., Defendants and Respondents; JOHN CHIANG, as State Controller, etc., Defendant and Appellant

Court of Appeal, Third Appellate District Case Nos. C061011, C061009, C061020
On Appeal from the Sacramento County Superior Court Case Nos. 34-2008-800000126, 34-2009-80000134, 34-2009-80000135
Honorable Patrick Marlette

Supplemental Letter Brief of Plaintiffs and Appellants Professional Engineers in California Government and California Association of Professional Scientists and Letter Response to the Court's June 15, 2010 Request

Dear Clerk of the Supreme Court:

By order dated June 9, 2010, the Court directed the parties to serve and file

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simultaneous supplemental letter briefs responding to two questions on or before June 23, 2010. Plaintiffs and Appellants Professional Engineers in California Government (PECG) and the California Association of Professional Scientists (CAPS) respectfully submit this supplemental letter brief in response to those two questions.

Additionally, on June 15, 2010, the Court directed the parties to provide additional information regarding several documents referred to in Appellant's Opening Brief in *California Attorneys, etc. v. Schwarzenegger*. This additional information is provided in this letter and follows PECG and CAPS reply to the Court's two questions.

Question 1

What effect, if any, does Government Code section 19996.22 -- which provides in part that "[a]ny employee ... who has been required, by the appointing power, ... to involuntarily reduce his or her worktime contrary to the intent of this article ... may file a grievance with the department" -- have on the validity of the Governor's executive order instituting a mandatory furlough on state employees?

Government Code section 19996.22, and the Reduced Worktime Act (Article 1.6) as a whole, which require that reduced worktime be voluntary, make it clear the Governor lacks the authority to unilaterally reduce state employees' worktime. As such, the Governor lacks the authority to issue an executive order instituting a mandatory furlough on state employees.

The Legislature has defined "reduced worktime" as used in the article as "employment of less than 40 hours per week... ." (Gov. Code § 19996.20.) Section 19996.22 makes it clear that reduced worktime must be *voluntary*. Involuntary reduction of an employee's worktime "contrary to the intent" of the Article is prohibited. As the state as an employer is prohibited from involuntarily reducing an employee's worktime, this demonstrates that the Governor lacks the authority to reduce hours.

As part of the Reduced Worktime Act, the Legislature expressly notes that "Employment opportunities are maximized by providing for voluntary reduced worktime options to a standard workweek." (Gov. Code § 19996.19 (a)(8).) Also, "it is the policy of the state that to the extent feasible, reduced worktime be made available to employees who are unable, or who do not desire, to work standard working hours on a full-time basis..."

(Gov. Code §19996.21(a).) These deviations from the standard 40 hour workweek must not be made unless they are part of a "voluntary" exercise by an employee.

The inclusion of a grievance remedy at Section 19996.22 makes it clear that involuntary reductions in worktime are contrary to the law. Otherwise, if an involuntary reduction is not illegal, what is there to grieve? The grievance machinery covers only individuals. The statute does not provide a grievance mechanism, or any other administrative remedy, for employee organizations such as PECG and CAPS. As discussed below, individual employees would be excused from exhausting this grievance procedure remedy as under the facts presented here, the grievance procedure would be futile. Even if individual employees were found to have an administrative remedy under these facts, it would not preclude PECG and CAPS from filing the writ of mandate and request declaratory relief which initiated this case.

During the course of this litigation, neither the Governor nor Defendant and Respondent Department of Personnel Administration ("DPA") raised any exhaustion claims related to Section 19996.22 or related to DPA's internal grievance procedure. This is consistent with the fact that DPA did not rely upon the Reduced Worktime Act as authority for the furlough program. Instead, DPA followed the instruction it was provided in the Governor's executive order. As such, any grievance that an individual employee might have been able to file under Section 19996.22 does not create an issue of exhaustion of administrative remedies.

Although the exhaustion doctrine has been deemed jurisdictional, a party cannot raise the issue for the first time on appeal. The doctrine of exhaustion of administrative remedies is not an "inflexible dogma", but is subject to numerous exceptions including: situations where the agency indulges in unreasonable delay, when the subject matter lies outside the administrative agency's jurisdiction, when pursuit of an administrative remedy would result in irreparable harm, when the agency is incapable of granting an adequate remedy, and when resort to the administrative process would be futile because it is clear what the agency's decision would be. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 134.)

Here, the DPA implemented the furlough program pursuant to the Govenor's executive order. In addition to the inherent delay of more than 200,000 employees filing individual grievances and the processing of those grievances, DPA's decision would clearly be to

follow the executive order challenged here which the DPA was charged by the Governor with implementing. (PECG JA, Vol. I, Tab A, p. 0018.) As such, resort to the administrative process for individual employees would be futile. This lawsuit by PECG and CAPS is the proper vehicle to review the Governor's furlough of state engineers, state scientists and other state employees.

Question 2

What effect, if any, does the provision of the revised 2008 Budget Act which reduced the appropriation for employee compensation for the 2008-09 fiscal year in an amount comparable to the savings sought to be achieved by the Governor's furlough order (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 2, 36 (SBX3 2, 36), passed by the Legislature and approved by the Governor on Feb. 20, 2009) have on (1) the validity of the Governor's executive order, and/or (2) the remedy, if any, to which the petitioning labor organizations may be entitled in these actions?

Effect on Validity of the Order

The Legislature flatly rejected the Governor's proposed statutory changes which would have given the Governor the statutory authority to furlough state employees by cutting their hours and cutting their pay. (PECG JA, Vol. I, Tab A, p.0048.) The reduction in the appropriation for employee compensation does not in any way authorize the Governor's executive order. 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 Legislature did not, and could not, through this appropriation, substantively amend or change existing statutory law.

As discussed below in response to the Court's question regarding certain documents cited in an opening brief, the Legislature was presented by the Governor with the option of statutorily approving furloughs, but the Legislature did not approve the Governor's proposal. Specifically, the Governor proposed that the Legislature add Section 19826.4 to the Government Code which would have authorized DPA to implement a furlough program, meaning the "placement of employees on temporary, nonduty status to reduce payroll costs" and would have authorized a reduction in salaries to accomplish the purposes of the furlough. (PECG JA, Vol. I, Tab F, p. 0057.) Following rejection of

providing the furlough authority to the Governor and his DPA, the Legislature passed revisions to the 2008-2009 Budget Act, reducing the appropriation for employee compensation by passing Section 36.

A budget bill "must concern only the subject 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 act through an appropriation in a manner which changes the law. The reduced appropriation in Section 36 did not, and could not, authorize a reduction in hours of work or salaries. Whether in a trailer bill or otherwise, specific legislation would be required to authorize changes in hours of work or salaries of state employees as is made clear by the Governor's specific proposals to amend the law. (PECG JA, Vol. I, Tab F, p. 0056.)

Effect on Remedy

The remedy available to PECG and CAPS for the unlawfully withheld salaries associated with the furlough program is not precluded by this reduction in the employee compensation item. The California Constitution's separation of powers clause limits judicial authority over appropriations. Courts cannot directly order the Legislature to appropriate funds or order payment of funds the Legislature has not appropriated. (*County of San Diego v. State* (2008) 164 Cal.App.4th 580, 594.) However, 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 Cal.App.3d 521, 538-539.)

The fact that the 2008-2009 Budget Act is no longer operative is not a deterrent to an award of the unlawfully withheld salaries either. Upon a finding that PECG and CAPS are entitled to an award of the unlawfully withheld salaries, the question will be whether funds 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.)

The Court seeks additional information regarding several documents referred to in Appellant's Opening Brief in *California Attorneys, etc. v. Schwarzenegger*. Were those documents included in any bill or bills that formally were introduced in the Legislature? If so, what is the bill number or bill numbers? If not, were the documents included in any material that the Governor submitted or provided to the Legislature?

The documents referred to by the Court in the Joint Appendix in *California Attorneys, etc. v. Schwarzenegger* are included among the documents which PECG and CAPS filed with the trial court and which are part of the record in *Professional Engineers in California Government et al. v. Schwarzenegger* C061011, at PECG JA, Vol. I, p. 0056 - 0069.

In short, PECG and CAPS' legislative advocate provided a declaration which attached those documents and placed them in context, stating that the statutory changes proposed by the Governor were provided by the Governor to the Legislature as part of the fourth extraordinary session of the Legislature in November 2008 and were introduced again in a Proposition 58 Special Session and a Second Special Session called on December 1, 2008. PECG and CAPS are not aware of whether the proposed legislation ever received a bill number. Before the trial court, the Governor's proposed legislation was attached to the Declaration of Theodore Toppin. (PECG JA, Vol. I, Tab F, p. 0056.)

Mr. Toppin is a legislative advocate for PECG and CAPS. (PECG JA, Vol I, Tab F, p. 0055.) Attached to Mr. Toppin's declaration is a copy of the Governor's November 6, 2008 letter to all state workers regarding the Governor's plan to achieve cost savings. The letter proposed a number of items, including the furlough of state employees, the elimination of two holidays and premium holiday pay, amendments to the law to make it easier for departments to allow employees to work ten hour days, four days per week, and changes in counting leave time for overtime calculation purposes. In the letter, the Governor stated that all of the proposals in the letter would need legislative approval. (PECG JA, Vol. I, Tab D, p. 0051.)

Also on November 6, 2008, the Governor issued a proclamation calling a fourth extraordinary session of the Legislature to act on a number of items, including considering and acting upon legislation to address fiscal and budget related matters. A copy of the Special Session Proclamation is attached to the Toppin declaration. (PECG

JA, Vol. I, Tab E, p. 0054.)

Mr. Toppin's declaration states that in the fourth extraordinary session, the Governor sought legislation to require state employees to take a one day furlough each month between February 1, 2009 and June 30, 2010 and seeking statutory authority to reduce salaries to accomplish the purposes of the furlough. A copy of the statutory changes proposed by the Governor, the same as the language asked about here by the Court, is attached to the Toppin declaration. (PECG JA, Vol. I, Tab F, p. 0056.)

The Legislature did not pass the Governor's proposed statutory changes and the legislative session ended. Following the expiration of the legislative session and the swearing in of two dozen new legislators, the Governor issued two proclamations calling the new Legislature into a Proposition 58 Special Session and calling a second Special Session to address the state's economy. (PECG JA, Vol. I, Tab C, p. 0047 and Tabs G and H, p. 0071, 0073.) In the Special Session which began on December 1, 2008, the Governor proposed the identical statutory changes for state employee furloughs as those he proposed in November 2008 as part of the 2007-2008 Fourth Extraordinary Session. That proposed legislation did not pass. (PECG JA Vol. I, Tab C, p. 0048.)

The Governor's actions in seeking legislative authorization and approval for involuntary furloughs in the November 2008 fourth extraordinary session and again in the Proposition 58 Special Session called on December 1, 2008 make it abundantly clear that he did not, and does not, have the authority in statute, case law, or anywhere else to furlough state engineers, state scientists, or any state employees.

Respectfully submitted,

Gerald A. James
State Bar No. 179,258
Attorney for Appellants Professional Engineers in
California Government and California Association
of Professional Scientists

c: See Attached Service List

PROOF OF SERVICE BY OVERNIGHT DELIVERY

Supreme Court Case No. S183411

Case: PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT el al., Plaintiffs and Appellants, v. ARNOLD SCHWARZENEGGER, as Governor, etc. et al., Defendants and Respondents; JOHN CHIANG, as State Controller, etc., Defendant and Appellant

I declare that I am employed in the County of Sacramento, California. I am over the age of 18 years and not a party to the within entitled cause. The address of my business is 455 Capitol Mall, Suite 501, Sacramento, CA 95814.

On June 23, 2010, I served the **Supplemental Letter Brief of Plaintiffs and Appellants Professional Engineers in California Government and California Association of Professional Scientists and Letter Response to the Court's June 15, 2010 Request** on the parties listed below by placing true copies thereof in sealed envelopes with the fees paid and depositing said envelopes with Federal Express for guaranteed next day delivery:

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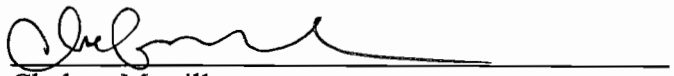
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 23, 2010, at Sacramento, California.



Chelsea Merrill