

November 8, 2010

Clerk of the Court  
Court of Appeal - First Appellate District, Division 2  
350 McAllister Street  
San Francisco, CA 94102

Re: ***California Correctional Peace Officers Assn. v. Arnold Schwarzenegger, et al.***; A127292

Dear Sir/Madam:

Pursuant to this Court's letter dated October 6, 2010, Petitioners Governor Arnold Schwarzenegger, Department of Personnel Administration, California Department of Corrections and Rehabilitation, California Department of Mental Health, and California Department of Juvenile Justice ("State Appellants") submit this supplemental letter brief to address the impact of the Supreme Court's decision in *Professional Engineers in California Government v. Schwarzenegger* ("*Professional Engineers*") (2010) 50 Cal.4th 989<sup>1</sup> on this case.

## **I. INTRODUCTION.**

In *Professional Engineers*, the California Supreme Court definitively resolved any question regarding the validity of the furloughs of state employees initiated pursuant to Governor Schwarzenegger's December 19, 2008 Executive Order S-16-08. The Court

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<sup>1</sup> The page numbers cited in this supplemental letter brief are to the Slip Opinion.

held that the California Legislature's passage of the Revised Budget Act of 2008 on February 19, 2009 validated the Governor's furlough Executive Order.

In mid-February 2009 – shortly after the furlough program went into effect – the Legislature enacted, and the Governor signed, legislation that revised the Budget Act of 2008 (2008 Budget Act) by, among other means, reducing the appropriations for employee compensation contained in the original 2008 Budget Act by an amount that reflected the savings the Governor sought to obtain through the two-day-a-month furlough program. The February 2009 legislation further provided that the specific reduction in the appropriations for employee compensation could be achieved either through the collective bargaining process or through ‘existing administration authority.’ That phrase, in the context in which the revised budget act was adopted and in light of the provision's legislative history, reasonably included the furlough program that was then in existence and that had been authorized by the current gubernatorial administration. In particular, the bill analyses considered by the Legislature made specific reference to furlough-related reductions of employee compensation costs. Under these circumstances, we conclude that the Legislature's 2009 enactment of the revisions to the 2008 Budget Act operated to ratify the use of the two-day-a-month furlough program as a permissible means of achieving the reduction of state employee compensation mandated by the act. [¶] Accordingly, we conclude that the 2009 budget legislation validated the Governor's furlough program here at issue, and reject plaintiffs' challenge to that program.

(Slip Opn., pp. 3-4.)

In the present action, Respondent California Correctional Peace Officers' Association (“CCPOA”) challenges the furlough program as applied to employees in State Bargaining Unit 6 (“BU 6”). Specifically, CCPOA challenges the use of “self-

directed” furloughs by which an employee working in a 24-hour, 7-day-a-week facility (e.g., a correctional institution) was permitted to “bank” furlough days for later use in those instances in which that employee was unable to take his or her furlough days off in the same pay period in which his or her pay was reduced. At the trial court, CCPOA raised two challenges to the use of self-directed furloughs: (1) self-directed furloughs violate the proscription against modification of “salary ranges” found in Government Code section 19826, subdivision (b), and (2) self-directed furloughs violate the requirement in Labor Code section 223 that an employer pay its employees at a wage rate mandated by contract or statute. The trial court ruled in favor of CCPOA on both these grounds and accordingly issued a writ of mandate compelling the State to cease the use of self-directed furloughs for BU 6 employees. (Appellants’ Appendix [“AA”], Vol. VII, Tab 217, pp. 1686-1696.)

While the arguments raised by State Appellants in the briefs already filed with this Court establish grounds for issuing a writ of mandate compelling the trial court to set aside its decision in favor of Respondent CCPOA, the Supreme Court’s decision in *Professional Engineers* compels such a result. The Supreme Court held that the Legislature’s enactment of the Revised Budget Act of 2008 validated the Governor’s furlough program. At the time the Legislature passed the Revised Budget Act of 2008 on February 19, 2009, that furlough program included the use of self-directed furloughs. Accordingly, the Legislature’s enactment of the Revised Budget Act of 2008 constituted

a legislative validation of the use of self-directed furloughs as part of the overall furlough program.

In addition, the Supreme Court's decision in *Professional Engineers* resolves the two bases relied upon by CCPOA for challenging the use of self-directed furloughs. The Legislature's validation of the Governor's furlough program resolves any argument that furloughs constituted an impermissible alteration of salary ranges in violation of Government Code section 19826, subdivision (b), because that code section does not limit legislative authority. Furthermore, the Court's holding that the budget act constituted a legislative reduction of the appropriation for state employees' wages reflected in the memoranda of understanding that existed at the time of the furlough Executive Orders disposes of the claim that the payment of reduced wages violated Labor Code section 223. As this Court knows from briefing already filed in this action, the terms and conditions of BU 6 employees was not controlled by a memorandum of understanding, but rather by the implemented terms of the State's last, best, and final offer. Nonetheless, the Court's holding that the Legislature's enactment of the 2008 Budget Act constituted a legislative reduction in the appropriation for employee compensation is as applicable to BU 6 employees as state employees governed by a labor agreement. (See Gov. Code § 3517.8, subd. (b).)

Based on the Court's holding in *Professional Engineers*, as well as the arguments previously made to this Court, State Appellants respectfully submit that this Court should

issue a writ of mandate compelling the trial court to set aside its judgment in favor of CCPOA and to enter a new judgment in favor of State Appellants.

**II. THE RATIONALE FOR THE SUPREME COURT'S HOLDING IN *PROFESSIONAL ENGINEERS* RESOLVES ANY QUESTION REGARDING THE THIRD FURLOUGH DAY ADDED IN JULY 2009 PURSUANT TO EXECUTIVE ORDER S-13-09.**

The furlough program at issue in *Professional Engineers* was the two-day-a-month program initiated pursuant to Executive Order S-16-08. The Court did not have before it the third furlough day added on July 1, 2009 pursuant to Executive Order S-13-10. This case, however, raises claims relating to this third furlough day. While the validity of the third furlough day added by Executive Order S-13-09 was not at issue in *Professional Engineers*, the Court's rationale for its holding in that case resolves any claim regarding the validity of the third furlough day.

As noted above, the Court in *Professional Engineers* held that the Revised Budget Act of 2008 constituted a legislative validation of the Governor's furlough program. The Court reached this conclusion on the basis of language in the act, which directed that personnel cost savings equivalent to the savings resulting from furloughs were to be achieved through either the collective bargaining process or through "existing administration authority." (*Professional Engineers, supra*, Slip Opn. p. 71.) With respect to the latter phrase, the Court held that "'existing administration authority' as employed in the February 20, 2009, budget legislation, most reasonably is understood as

embodying a legislative decision to permit the mandated reductions in employee compensation to be achieved through the then-existing furlough plan.” (*Id.* at p. 72.)

On July 1, 2009, Governor Schwarzenegger issued Executive Order S-13-09 adding a third furlough day per month for state employees. On July 23, 2009, the Legislature passed ABX 4 1, the Revised Budget Act of 2009, which was signed by the Governor on July 28, 2009. The 2009 Budget Act directs personnel cost reductions using the same language as contained in the Revised Budget Act of 2008. Specifically, Section 552 of the Revised Budget Act of 2009 provides:

SEC. 552. Section 3.90 of the Budget Act of 2009 is amended to read:

Sec. 3.90. (a) Notwithstanding any other provision of this act, each item of appropriation in this act, with the exception of those items for the California State University, the University of California, Hastings College of the Law, the Bureau of State Audits, the Legislature (including the Legislative Counsel Bureau), and the judicial branch, shall be reduced, as appropriate, *to reflect a reduction in employee compensation achieved through the collective bargaining process for represented employees or through existing administration authority and a proportionate reduction for nonrepresented employees (utilizing existing authority of the administration to adjust compensation for nonrepresented employees) in the total amounts of \$1,477,917,000 from General Fund items and \$973,058,000 from items relating to other funds.* The Director of Finance shall allocate the necessary reductions to each item of appropriation to accomplish the employee compensation reductions required by this section.

(b) The Department of Personnel Administration shall transmit proposed memoranda of understanding to the Legislature promptly and shall include with each such

transmission estimated savings pursuant to this section of each agreement.

(c) Nothing in this section shall change or supersede the provisions of the Ralph C. Dills Act (Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1 of the Government Code).

(Emphasis added.)

The Revised Budget Act of 2009 uses the same language to validate reduction of state personnel costs through the use of a third furlough day used in the 2008 Budget Act to validate the reduction of state personnel costs through use of the original two-day-a-month furlough program. Accordingly, the rationale underlying the Court's holding in *Professional Engineers* is applicable to the third furlough day. As a result, all challenges to this third furlough day must be resolved in favor of State Appellants.

### **III. THE FURLOUGH PROGRAM VALIDATED BY THE LEGISLATURE THROUGH ENACTMENT OF THE REVISED BUDGET ACT OF 2008 INCLUDED SELF-DIRECTED FURLOUGHS.**

In *Professional Engineers*, the Court held the 2008 Budget Act “embod[ied] a legislative decision to permit the mandated reductions in employee compensation to be achieved through the *then-existing furlough plan*.” (Slip Opn., p. 72. Emphasis added.)

On February 3, 2009, the DPA issued a memorandum to Personnel Management Liaisons (“PML”), which authorized the use of self-directed furloughs. The PML memo specifically stated:

If your operation can't close, and has an approved self-directed furlough plan, several options will be managed by departments”

**Where services must continue and employees normally must work on holiday:** Employees will be allowed to choose which two days they take off each month. Supervisors must approve the days chosen.

**For posted positions in 24/7 facilities:** Management will work with employees to determine which two days in the month will be taken off. When this is not operationally feasible and would jeopardize security, health or safety, management will work with employees to select time off in the future....”

Decisions about which positions will use self-directed furloughs have been made at the agency level. You can access the listing of approved departments/functional areas for self-directed furloughs at <http://www.dpa.ca.gov/personnel-policies/furloughs/requests-to-alter-furlough-method.pdf>.

(AA, Vol. II, Tab 30, p. 0441.)

Two weeks later, on February 19, 2009, the Legislature validated the State's furlough program through its enactment of the Revised Budget Act of 2008. The “then-existing” furlough program the Legislature validated included the use of self-directed furloughs as the PML memo establishes. Accordingly, the Court's decision in *Professional Engineers* resolves all challenges to self-directed furloughs in favor of State Appellants.

**IV. THE SUPREME COURT’S HOLDING IN *PROFESSIONAL ENGINEERS RESOLVES ANY CHALLENGE TO SELF-DIRECTED FURLOUGHS BASED ON GOVERNMENT CODE SECTION 19826.***

Even if the Court’s decision in *Professional Engineers* did not resolve globally all challenges to the use of self-directed furloughs, that decision resolves in State Appellants’ favor the specific arguments raised by CCPOA. With respect to CCPOA’s claim that self-directed furloughs violate Government Code section 19826, subdivision (b),<sup>2</sup> the trial court premised its ruling on the concept that “salary setting for state employees is a power held only by the Legislature,” citing *Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1325. (AA, Vol. VII, p. AA001690.) The trial court ruled that self-directed furloughs violated section 19826, subdivision (b), because they constituted an action taken by the DPA that reduced salary ranges for affected employees. (*Id.* at 1690-1691.)

The premise that self-directed furloughs constitute an action by the DPA reducing salary ranges in violation of section 19826, subdivision (b), no longer is viable following the Court’s decision in *Professional Engineers*. As the Court concluded at page 74 of its opinion, “the phrase ‘existing administration authority’ – as used in section 36 of Senate

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<sup>2</sup> Government Code section 19826, subdivision (b), reads as follows:

Notwithstanding any other provision of law, the department shall not establish, adjust, or recommend a salary range for any employees in an appropriate unit where an employee organization has been chosen as the exclusive representative pursuant to Section 3520.5.

Bill 3X 2 – was intended to encompass the then-existing furlough program. By enacting this provision, the Legislature, *through the exercise of its own legislative prerogative*, authorized the substantial reduction in the appropriations for employee compensation, mandated in the revised budget legislation, to be achieved through the two-day-a-month furlough plan.” (*Professional Engineers, supra*, Slip Opn., p. 74. Emphasis in original.) Thus, the Court in *Professional Engineers* held that furloughs constituted legislative action to reduce employee compensation, authority which the trial court acknowledged the Legislature possessed. Accordingly, the trial court’s finding that the furlough program here at issue, including self-directed furloughs, constituted action by the Governor and DPA in violation of section 19826, subdivision (b), is no longer accurate as a result of the California Supreme Court’s holding that the furloughs became an exercise of the legislative prerogative as a result of the Legislature’s validation of furloughs in the 2008 Budget Act.

**V. THE SUPREME COURT’S HOLDING IN *PROFESSIONAL ENGINEERS* RESOLVES ANY CHALLENGE TO SELF-DIRECTED FURLOUGHS BASED ON THE CALIFORNIA LABOR CODE.**

The Court’s decision in *Professional Engineers* also disposes of CCPOA’s claims that self-directed furloughs violate Labor Code section 223.<sup>3</sup> At page eight of its ruling,

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<sup>3</sup> Labor Code section 223 provides:

the trial court found that “the wage scales of employees [in BU 6] were set by a memorandum of understanding with the State which, by operation of Government Code section 3517.8, remains in effect until negotiation of a new agreement, or until impasse is reached and the state employer implements a last, best and final offer approved by the Legislature. Regardless of whether the wage scale currently in effect here is considered a contract or a wage implemented by operation of statute, Labor Code section 223 is applicable.”<sup>4</sup> (AA, Vol. VII, Tab 217, p. AA001694.)

The trial court’s analysis, however, no longer is valid in light of the decision in *Professional Engineers*. The trial court’s ruling is premised on the lack of legislative action affecting the approved wage rate contained in a memorandum of understanding between the parties, or that remained in effect as part of the State’s last, best and final offer. Yet, as the Court concluded in *Professional Engineers*,

[O]n February 19 and 20, 2009, when the Legislature enacted, and the Governor then signed, legislation revising the 2008 Budget Act, the validity of the mandatory furlough program fundamentally changed. The new legislation explicitly

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Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract.

<sup>4</sup> As pointed out in the briefs already submitted to this Court, the terms and conditions of employment for BU 6 employees were not governed by a memorandum of understanding at the time of the furlough Executive Orders, but by the implemented terms of the State’s last, best, and final offer as a result of an impasse in the parties’ labor negotiations.

reduced the 2008-2009 fiscal year appropriation for state employee compensation to a level reflecting the reduced compensation to be paid to employees under the Governor's furlough plan. *By reducing the appropriation for employee compensation, the Legislature no longer 'fully funded' the provisions of the MOU's supporting the higher level of pay that previously had been approved, and thus, under sections 3517.6 and 3517.7, the provisions of the applicable MOU's that supported the higher level of pay the employees had been receiving prior to the implementation of the furloughs no longer were effective.*

(Slip Opn., pp. 68-69. Emphasis added.)

The Court ruled that the Legislature reduced the appropriation for state employee wages as reflected in the State's various memoranda of understanding and replaced it with a new wage rate to reflect the personnel cost savings resulting from furloughs. Thus, the "wage rate" on which CCPOA premised its argument that Labor Code section 223 had been violated was no longer in effect following the Legislature's enactment of the Revised 2008 Budget Act. As a result, the predicate on which the trial court premised its finding of a violation of that code section no longer exists following the Court's decision in *Professional Engineers*.

Furthermore, as a result of the decision of this Court rendered after the briefing in this case, an additional premise underlying the trial court's finding that Labor Code section 223 was violated by self-directed furloughs no longer can be sustained. At the trial court, State Appellants argued that the provisions of Labor Code section 223, along with other provisions of the Labor Code on which CCPOA relied, were inapplicable to

the State. The trial court rejected this argument, ruling that “Labor Code Section 220 specifies those sections of the Labor Code that do not apply to state employees; neither section 223 or 1171 [another section of the Labor Code on which CCPOA relied] appear on that list.” (AA, Vol. VII, p. AA001695.)

In *California Correctional Peace Officers’ Association, et al v. State of California, et al*, (2010) 188 Cal.App.4th 646, this Court rejected such a narrow reading of Labor Code section 220. In that case, CCPOA argued the State was violating meal and rest period provisions contained in the Labor Code. This Court held that in the absence of express language rendering provisions of the Labor Code applicable to the state employer, such provisions are inapplicable. In response, CCPOA made the same argument with respect to section 220 as was made and accepted by the trial court here, namely, that only those code section expressly listed in section 220 were inapplicable to the State. This Court rejected that argument, holding as follows:

CCPOA contends that because the Legislature expressly exempted public entities from these specific Labor Code provisions referred to in subdivision (a) of section 220, the Legislature must have intended the entirety of chapter 1 to be generally applicable to public entities. Aside from the bald assertion that section 220, subdivision (a) “confirms that [s]ection] 226.7 applied to state employers,” CCPOA provides no argument of authority to support its position. In light of the statute’s plain language, this deficiency is not surprising. Section 220, subdivision (a) merely provides that in certain instances (§§ 201.5 [motion picture industry], 201.7 [oil drilling], 203.1 [fringe benefits], 203.5 [failure of bonding company], 204 [semimonthly payments], 204a

[employees of several employers], 204c [semimonthly payments exception], 204.1 [employees of vehicle dealers], 205 [agricultural and domestic employment], & 205.5 [agricultural employees]), the statutory requirements pertaining to the timely payment of wages do not apply to employees directly employed by the State. These specific exemptions cannot, by implication, be read as making chapter 1 generally applicable to public entities. Such an interpretation would violate the maxim that when the Legislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded.

*(California Correctional Peace Officers' Association, et al v. State of California, et al., supra, 188 Cal.App.4th 646, 653-654. Internal citations omitted.)*

Therefore, the trial court's ruling that Labor Code section 223 is made applicable to the State through Labor Code section 220 is no longer valid.

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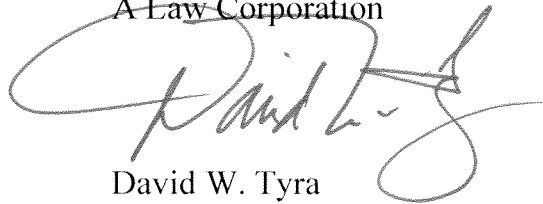
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**VI. CONCLUSION.**

The California Supreme Court's ruling in *Professional Engineers* fully disposes of the issues in this case. Accordingly, this Court should issue the requested writ of mandate and direct the trial court to vacate its order finding in favor of Respondent CCPOA and entering a new order finding in favor of State Appellants.

Sincerely,

KRONICK, MOSKOVITZ, TIEDEMANN &  
GIRARD  
A Law Corporation

A handwritten signature in black ink, appearing to read "David W. Tyra", is written over the printed name below.

David W. Tyra

DWT/mm3

955047.1

**PROOF OF SERVICE**

I, May Marlowe, declare:

I am a citizen of the United States and employed in Sacramento County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 400 Capitol Mall, 27th Floor, Sacramento, California 95814. On November 8, 2010, I served a copy of the within document(s):

**Appellants' Supplemental Brief**

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
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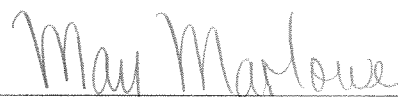
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I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on November 8, 2010, at Sacramento, California.



May Marlowe