C061020

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE THIRD APPELLATE DISTRICT C061020

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,

Petitioner/Plaintiff and Appellant,

v.

ARNOLD SCHWARZENEGGER, as Governor, State of California; DEPARTMENT OF PERSONNEL ADMINISTRATION; JOHN CHIANG, as State Controller, and DOES 1 THROUGH 20, INCLUSIVE,

Respondents/Defendants.

_____/

STAY REQUESTED
[C.R.C. 8.116]

RELATED APPEALS PENDING

Docket No._____

Superior Court No. 34-2009-80000135

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PETITION FOR WRIT OF SUPERSEDEAS OR OTHER APPROPRIATE STAY ORDER AND REQUEST FOR TEMPORARY STAY ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF CALIFORNIA; POINTS AND AUTHORITIES IN SUPPORT THEREOF

County of Sacramento
The Honorable Patrick Marlette

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TO: THE HONORABLE COURT OF APPEALS OF THE STATE OF CALIFORNIA, FOR THE THIRD APPELLATE DISTRICT.

INTRODUCTION

Petitioner and Appellant Service Employees International Union (SEIU) petitions this Court for a writ of supersedeas to stay enforcement of an order denying a writ of mandate issued by a ruling of the Superior Court of California, County of Sacramento ("Ruling"). The Ruling causes defendant/respondent John Chiang, Controller of the State of California ("Controller"), to immediately reduce, among other things, the full salaries of California State employees and directing the Controller to implement the Governor's executive order. By the Ruling, payment of salaries to state employees must be reduced effective from February 1, 2009. Employees who perform work after February 1, 2009, will have their normal pay summarily reduced and such reductions will continue unabated for 17 months. The Ruling violates the Constitution, the laws of the State of California, the federal Fair Labor Standards Act, as well as the collective bargaining agreements of the affected workers. SEIU seeks supersedeas, an appropriate stay and a temporary stay pending a ruling on the merits by this Court on appeal.

PETITION

SEIU alleges as follows:

1. The Ruling was filed on January 29, 2009. (A copy of the Ruling is attached to this petition and is incorporated herein as Exhibit "A.") The Ruling

was amended on January 30, 2009. (A copy of the Amended Ruling is attached to this petition and is incorporated herein as Exhibit "B.") (Hereinafter "Ruling")

2. SEIU filed a Notice of Appeal from the Ruling on February 5, 2009. (A copy of this Notice is attached to this petition and is incorporated herein as Exhibit "C.")

3. Defendant/Respondent John Chiang requested clarification of the Court's ruling on February 3, 2009. (A copy of the Request for Clarification is attached to this petition and is incorporated herein as Exhibit "D.") The Superior Court issued a clarification as indicated in a Minute Order issued on February 4, 2009. (A copy of the Minute Order is attached to this petition and is incorporated herein as Exhibit "E.")

4. The action that resulted in the Ruling was initiated by SEIU Local 1000 against ARNOLD SCHWARZENEGGER, as Governor, State of California; the DEPARTMENT OF PERSONNEL ADMINISTRATION; and JOHN CHIANG, State Controller.

5. The complaint asserted that on December 19, 2008, Governor Arnold Schwarzenegger ("Governor") issued Executive Order S-16-08 ("Executive Order"), an illegal Executive Order that instructed all State departments and agencies to implement a furlough of represented state employees and supervisors for two days per month, regardless of funding source. (A true and correct copy of Executive Order S-16-08 is attached to this petition and is incorporated herein as Exhibit "F".) Through such an illegal order, the Governor

sought to immediately cut salaries of state employees by approximately ten (10) percent over a seventeen (17) month period. As legal authority for the furlough, the Order cited to California Government Code section 3516.5, a portion of the Ralph C. Dills Act. Section 3516.5, however, did not authorize the Governor or the Department of Personnel Administration ("DPA") to issue furloughs or reduce the salaries of represented state employees. Local 1000 sought the Court's intervention to block implementation of the Governor's illegal Order.

6. The complaint also asserted that the furlough would violate provisions of the Fair Labor Standards Act by altering the exempt status of those state employees who were currently considered FLSA-exempt. To be specific, the furlough would destroy a state employees' exempt status during the workweek that a state employee is furloughed. Local 1000 sought a declaration that FLSA-exempt state employees represented by Local 1000 are entitled to overtime compensation during a furlough week.

7. Other complaints were filed by other labor representatives of state civil service bargaining units. All those complaints were noticed as related cases, subjected to a joint hearing and briefing process, joined for the purposes of the issuance of the Court's Ruling, but not formally consolidated. Those related cases are: PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT; CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS, Petitioners/Plaintiffs, v. ARNOLD SCHWARZENEGGER, Governor, STATE OF CALIFORNIA; DEPARTMENT OF PERSONNEL ADMINISTRATION;

STATE CONTROLLER JOHN CHIANG; and DOES 1 through 20, Case No. 34-2008-80000126; and CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS IN STATE EMPLOYMENT, Petitioners/Plaintiffs, v. ARNOLD SCHWARZENEGGER as, Governor of the State of California; DAVID GILB as Director of the Department of Personnel Administration; JOHN CHIANG, Case No. 34-2009-80000134.

8. SEIU is a labor organization that represents approximately 95,000 state employees. SEIU filed this action because its members rely on their regular paychecks at their regular rate of pay to meet living expenses. Any reduction in such salary, particularly at the significant rate demanded by the Executive Order, and for the requisite length and duration, will cause substantial harm to the lives, savings, social security status, tax status and credit history of virtually all the state workers affected.

9. The Ruling declares in relevant part that:

> The Governor's Executive Order reduces the normal work hours of state employees for a temporary period due to the state's current fiscal crisis. The emergency measure will result in an accompanying deduction from pay for the hours not worked, but the order does not change established salary ranges. The Governor's authority for this action is found in statutes in the Government Code **and in the employment contracts** of the unions challenging the order.
>
> ***
>
> The Governor has the statutory authority to reduce the hours of state employees pursuant to

Government Code sections 19851 and 19849.

(p. 6) (Emphasis added.)

10. The Ruling further states in relevant part, after denying the writs of mandate/complaints for declaratory relief, that:

> The Court's judgment in this matter therefore shall include an order **directing** the Controller to take all necessary and appropriate steps to implement the provisions of the Governor's Executive Order imposing furloughs on state employees, including the reduction in such employees' pay. (p. 12)

11. Unless a temporary stay or writ of supersedeas issues, SEIU members and other state employees face certain losses concerning their constitutional rights and employment status and will be deprived of a significant portion of their wages effective beginning February 1, 2009. Such losses and deprivations will continue throughout the duration of this appeal. The resultant ruling on appeal will not remedy the losses suffered by such individuals. Balancing the relative harms from the issuance of this requested stay, state employees will suffer certain and long-term losses if it is not granted, while defendants will have the opportunity to achieve the savings at a later date.

12. The appeal is based on the following grounds:

a. The Ruling violates the separation of powers doctrine. The Governor's power is valid only to the extent it is exercised consistent with the authority vested in that office by the California Constitution, or delegated by the Legislature. (Cal. Const. § 1, Art. V.)

b. The Ruling violates the constitutional prohibition against the impairment of contracts;

c. The Ruling constitutes an abuse of discretion because it is violates applicable laws including the Dills Act, the Administrative Procedures Act, among others. It ignores applicable law concerning the exclusivity of the jurisdiction of the Public Employment Relations Board while affirmatively ruling upon the relevant terms and conditions of state employment. It ignores applicable law concerning the necessary steps to promulgate state rules while affirmatively ruling upon the existence of the furlough as a state rule.

d. The Ruling violates the supremacy clause of the United State Constitution in that it denies employees rights guaranteed them by the federal Fair Labor Standards Act ("FLSA");

13. The Controller submitted an answer to the petition and complaint in which the pertinent and operative facts in contention were admitted. (This answer was submitted in a related case and should be considered to be the answer to this instant matter as well, though due to the abbreviated briefing schedule, no answer could be found in this matter.) Further the Controller requested relief by issuance of a writ of mandate declaring the furloughs illegal, as had been alleged in the petition and complaint. (A copy of the Controller's Answer is attached to this petition and is incorporated herein as Exhibit "G.")

14. The Controller admitted in the Answer that he has no authority to furlough employees or reduce pay based upon the Executive Order.

15. Issuance of the stay and the writ is necessary because 215,000 state employees will suffer severe hardship if they must face continued uncertainty about their constitutional rights and then suffer the immediate and abrupt loss of

pay effective from February 1, 2009.

16. Issuance of the stay and the writ is necessary because the damages caused by the implementation of an unlawful Executive Order in violation of the constitutional principles, federal law and other state laws, poses an unnecessary impairment of rights and is an unlawful abuse of power which cannot be remedied by a decision on appeal reversing the Superior Court's order. Balancing the relative hardships, Defendants and Respondents will simply operate under the status quo during the appeal and will suffer no tangible loss or impairment, merely a public relations loss.

17. Issuance of the stay and the writ is necessary to maintain the status quo during the appeal. The unlawful Executive Order has become a political tool to seek advantage in State budget talks in an effort to obtain a compromise from recalcitrant legislators.

18. The joint Petitioners in the Related Matters requested the Superior Court to Stay its decision pending appeal. That request was denied.

Request for Writ of Supersedeas or Other Stay During Appeal

WHEREFORE, SEIU prays that this Court issue a writ of supersedeas or another appropriate stay of the Ruling, which denied relief from implementation of an unlawful executive order, pending the determination of this appeal.

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Request For Temporary Stay

SEIU further prays that this court grant a temporary stay of the Ruling pending determination of this petition.

Respectfully submitted,

SERVICE EMPLOYEES
INTERNATIONAL UNION LOCAL 1000

Date: February 5, 2009 By: _____

ANNE M. GIESE, Attorney
(SBN 143934)
Attorney for Appellant
SERVICE EMPLOYEES
INTERNATIONAL UNION LOCAL 1000

VERIFICATION

I, YVONNE WALKER, declare as follows:

That I am the elected President for SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1000, the Petitioner and Appellant in the above-entitled action, and am authorized to make this verification on behalf said entity.

That I have read the foregoing **Petition for Writ of Supersedeas and Request for Temporary Stay on Appeal From a Final Ruling and Order of the Superior Court of California; Points and Authorities in Support Thereof** and am informed and believe the matters therein stated are true, and on that ground allege them to be true.

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

Executed this 5th day of February, 2009, at Sacramento, California.

YVONNE WALKER

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF SUPERSEDEAS AND REQUEST FOR TEMPORARY STAY ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF CALIFORNIA

I.

INTRODUCTION

SEIU petitions this Court for a writ of supersedeas and to stay enforcement of the Final Ruling. This Court has authority to issue this writ and stay the Ruling to preserve both the status quo and its jurisdiction. As argued below, irreparable harm will result unless the writ and stay issue. Although the Ruling denied writs of mandate/complaints for declaratory relief, this stay is vital to the public interest. It is essential to maintain the status quo of the parties and the State, pending consideration of the appeal to avoid the gross violations of law that will otherwise be committed. These violations include that state employees face certain losses concerning their constitutional rights and employment status and will be deprived of a significant portion of their wages effective beginning February 1, 2009. The damages caused by the implementation of an unlawful executive order – in violation of constitutional principles, federal law and other state laws posing an unnecessary impairment of rights and an unlawful abuse of power – cannot be remedied by a decision on appeal reversing the Superior Court's order. Moreover, though the Court denied all causes of action, it still

affirmatively ordered the Controller to alter its status quo - mandating compliance with the Executive Order.

The Ruling violates the separation of powers doctrine. The Governor's power is valid only to the extent it is exercised consistent with the authority vested in that office by the California Constitution, or delegated by the Legislature. (*See*, p. 5, Art. V, § 1.) The Ruling constitutes an unconstitutional impairment of contracts between civil servants and the state in violation of the United States and California Constitutions. The Ruling constitutes an abuse of discretion because it is violates and ignores applicable laws including the Dills Act, the Administrative Procedures Act, among others. Finally, the Ruling also violates the supremacy clause of the United State Constitution in that it denies employees rights guaranteed them by the federal Fair Labor Standards Act ("FLSA"). For these reasons, Petitioners request that the writ and stay issue.

II.

STATEMENT OF FACTS

On or about December 19, 2008, the Governor issued Executive Order S-16-08. The Executive Order states in relevant part:

> **IT IS FURTHER ORDERED** that effective February 1, 2009 through June 30, 2010, the Department of Personnel Administration shall adopt a plan to implement a furlough of represented state employees and supervisors for two days per month, regardless of funding source.

///

Pursuant to the Executive Order, represented state employees - operating under an existing collective bargaining contract - would have their work hours unilaterally reduced by two days per month beginning in February 2009.[1] In other words, the Executive Order doubled a previously designated furlough from one day each month to two days each month. This two day furlough also resulted in the doubling of the "pay cut" to the salaries of the thousands of represented state employees'– from five to ten percent. The Governor cited no proper authority to support an Order that would reduce the wages for represented state employees–a legislative act. Instead, the Governor relied on Government Code, section 3516.5,

---

[1] Prior to the Executive Order, on or about November 6, 2008, the Governor released a letter addressed to "Valued State Workers" discussing a projected revenue shortfall confronting the State, and the need for spending reductions. The Governor also acknowledged that "spending reductions will impact our state workers." The Governor noted that state employees "deliver important services every day." Nevertheless, the Governor's letter proposed to furlough state employees for one-day per month for eighteen (18) months. In that letter, the Governor made clear that his intent was to reduce the salaries of state employees by five percent (5%). Remarkably, the Governor referred to the furloughs interchangeably with the term "pay cut":

> "Furloughs: All state employees will be furloughed one day each month for the next year and half, a total of 19 days. This will result in a pay cut of about ***5 percent***. The ***pay cut*** will not affect retirement and other benefits for which you are eligible."

(***Id.***)(emphasis added). In other words, the Executive Order doubled the furlough from one day each month to two days each month. This two day furlough will also result in the doubling of the "pay cut" to the salaries of the thousands of represented state employees'– from five to ten percent.

a portion of the Ralph C. Dills Act that has no relationship to the setting of salaries or work hours for state employees.

To implement the illegal Order, on January 9, 2009, the Director for the DPA issued a memorandum that outlined the Governor's furlough implementation plan. (A copy of the DPA memorandum is attached to this petition and is incorporated herein as Exhibit "H.") In part, DPA's implementation memo provided that:

> For operations that cannot close, Agency Secretaries (and Directors who do not report to an agency) may request approval from DPA to use a "self-directed" furlough for specific positions. There will be two types of furloughs:
>
> - Employees take two furlough days each month but on days chosen by the employee and approved by the supervisor. For example, revenue-generating positions may be considered for this type of furlough.
>
> - Employees accrue two furlough days per month to be taken when feasible. Furlough days that cannot be used within the same month must be taken within two years following the end of the furlough program. Furlough days will not be cashed out. Posted positions in 24/7 facilities such as prisons and hospitals automatically qualify for this self-directed furlough and do not require prior approval from DPA.

As with the Executive Order, the DPA implementation plan provides no procedures or mechanism to insure that formerly exempt employees are properly paid overtime wages due on pay day. As detailed below, the Executive Order and plan were illegal for a number of reasons, and the Court incorrectly denied issuance of the writ of mandate/complaint for declaratory relief.

III.

ARGUMENT

A. This Court Should Issue a Writ of Supersedeas to Stay Enforcement of the Trial Court's Ruling.

1. This Court Has the Inherent Power to Issue a Writ of Supersedeas or Stay to Maintain the Status Quo and to Preserve Its Jurisdiction.

It is well-settled that California appellate courts have the inherent power, in the exercise of their appellate jurisdiction, to stay proceedings on an appealed judgment or order. (Cal. Rules of Court, rule 8.112; Code of Civ. Proc., §§ 916, 923.) The purpose of supersedeas is to suspend the enforcement of a judgment or order pending appeal therefrom. (*In re Dabney's Estate* (1951) 232 P.2d 481, 484.) The California Supreme Court, in *People ex rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville* (1968) 69 Cal.2d 533, 536-37 [72 Cal.Rptr. 790, 792; 446 P.2d 790], cited the rule:

> So, too, the rule now is that in aid of their appellate jurisdiction the courts will grant supersedeas in appeals where to deny a stay would deprive the appellant of the benefit of a reversal of the judgment against him, provided, of course, that a proper showing is made. On principle, it would be a terrible situation if in a proper case an appellate court were powerless to prevent a judgment from taking effect during appeal, if the result would be a denial of the appellant's rights if his appeal were successful.

In formulating such rules, the Supreme Court reaffirmed the inherent power of courts to issue a writ of supersedeas to preserve their own jurisdiction.

(*Id.* at 537.)

2. Irreparable Harm Will Result Unless a Writ of Supersedeas and Temporary Stay Are Issued.

An appellate court can issue a writ of supersedeas to preserve its own jurisdiction in appeals which involve difficult questions of law and where the "fruit of a reversal would be irrevocably lost unless the status quo is maintained." (*People ex rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville, supra*, 69 Cal.2d 533 at 537; *Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861 [159 Cal.Rptr. 679]; *see also, Deepwell Homeowners' Protective Ass'n. v. City Council of Palm Springs* (1965) 48 Cal.Rptr. 321, 324, *West Coast Home Improvement Co. Inc. v. Contractors' State License Board of the Dept. Of Professional and Vacational Standards* (1945) 68 Cal.App.2d 1, 6 (party seeking the stay must show substantial questions will be raised on appeal).

In deciding upon a petition for writ of supersedeas, courts necessarily must consider the litigant's respective rights, evaluating such rights to determine if they would be disproportionately injured should the court deny or grant the petition. (*People ex rel. San Francisco Bay Conservation and Development Commission v. Town of Emeryville, supra*, 69 Cal.2d 533, 537; *Nuckolls v. Bank of California, National Assn.* (1936) 7 Cal.2d 574, 578 [61 P.2d 927]; *Sacramento Newspaper Guild v. Sacramento Co. Board of Supervisors,* (1967) 62 Cal.Rptr 819, 820 [255 Cal.App.2d 51].) *In Sacramento Newspaper Guild*, the Sacramento County

Board of Supervisors ("Board') sought a writ of supersedeas pending their appeal from a preliminary injunction enjoining it from holding any closed meetings in violation of open meeting laws. The court issued a limited writ of supersedeas to permit the Board and its members to confer with County counsel under conditions in which the attorney-client privilege would obtain. (*Id.* at 822.) The court analyzed the issue of irreparable injury, and noted that the Board of Supervisors did not allege any injury to justify issuance of the writ. (*Id.* at 820.) The court did acknowledge, though, that for purposes of the limited writ of supersedeas:

> Pending this appeal the public rights claimed by the plaintiffs will suffer no permanent damage if the supervisors are permitted to confer with County Counsel under circumstances carefully calculated to comply with the Evidence Code sections dealing with attorney-client privilege. Deprived of that permission, the county may suffer irretrievable losses in litigation. (*Id.* at 822.)

The *Sacramento Newspaper Guild* case demonstrates the court's careful consideration of the litigants' rights and its sensitivity towards potential irreparable harm to the parties in the event a writ does or does not issue.

Ample authority supports the issuance of a writ and stay in this matter to avoid certain irreparable harm. For example, in the case of *Goodall v. Brite* (1934) 1 Cal.2d 583 [36 P.2d 190], the trial court enjoined a hospital from admitting or taking any person into the hospital or furnishing any medical, surgical or hospital care, treatment or service to any person in the hospital who was able to pay for or obtain the necessary care elsewhere in the county. The

county sought a writ of supersedeas from the Supreme Court, pointing out that the injunction would make it necessary for the Defendants to:

> change their plans, policies and methods of conducting the hospital in such manner as to disrupt the organization thereof, reduce the staff of physicians, nurses and other employees, permit extensive [equipment] to remain idle, and deny the benefits of the hospital and its organization to many persons believed by Petitioners to be entitled to such benefits, and who would be so entitled were this court to reverse the judgment of the lower court herein; that all of said results would bring irreparable injury to the hospital and to the people of Kern County and to patients and persons who would thus be denied the benefits of the hospital. . . pending the appeal. (*Id.* at 585.) (Emphasis added.)

Based on these facts, the Court granted the Writ of Supersedeas finding that:

> The policy controlling the conduct of the institution appears to be one of long standing. No doubt, to literally obey the mandate of injunction would cause interruption and perhaps confusion in the organization and conduct of the hospital. (*Id.* at 586.)

Here, as in *Goodall*, not only do the same considerations apply, but they are greatly magnified. Hundreds of thousands of civil servants will suffer irreparable harm by the implementation of an unlawful Executive Order during the pendency of the appeal. They will incur the wrath of their creditors, suffer unmitigated decline in their credit ratings during a time of unprecedented pre-existing financial chaos, generate losses in their social security status, suffer impairments in meeting living expenses, and may, by the injunction's conversion

of their FLSA status from "exempt" to "hourly," choose not to go to work because of confusion from the arbitrary implementation of the furlough, wreaking havoc for the citizens of the state who rely on the regular employment of state civil servants. The State may become liable for hundreds of millions of dollars in Fair Labor Standards Act penalties and for damages suffered by employees who do not receive their lawful pay in a timely fashion. In contrast, the State can point to no irreparable harm that they will suffer if the writ of supersedeas and temporary stay are issued. If the Court permits and continues the status quo, the State will still, ultimately, get its determination on the legal issues.

Supporting the issuance of a stay and writ, the Court in *Food & Grocery Bureau v. Garfield* (1941) 18 Cal.2d 174 [14 P.2d 579], granted supersedeas, noting that the abrupt abolishment through the preliminary injunction of appellant's merchandising practices would cause disruption in the conduct of his business and a loss of patronage and customer good will that may be irreparable. The Court then pointed out that respondent was not directly injured by the activity of the appellant. *(Id.* at 178.) In the present case, the same is true: state employees stand to suffer irreparably through non-receipt of their monthly paychecks, yet the Plaintiff/Respondents are not directly injured by the Controller's timely payment of the State's obligations. Additionally, the temporary conversion of 215,000 skilled state employees to volunteers will severely limit their purchasing power and severely change their consumption patterns and adversely impact and disrupt the state's economy.

Furthermore, in *California Table Grapes Com. v. Dispoto* (1971) 14 Cal.App.3d 314, 316 [92 Cal.Rptr. 268], the Court issued supersedeas, focusing again, in significant part, on the fact that there was no prejudice to the respondent:

> The record before us reflects that there is no threat to the health or well being of the public and no disadvantage or prejudice to the Respondent if this petition for supersedeas is granted, while to grant the writ and preserve the status quo during appeal from the money judgment would prevent irreparable damage to appellant.

(*Id.* (emphasis added.))

In order to comply with the existing authority cited above, supersedeas is appropriate when alteration of the status quo will cause irreparable harm. The harm that civil servants face in the instant dispute is far more widespread and severe than that encountered in *Goodall, Food & Grocery*, or *Dispoto*. For this reason, the writ and stay should issue.

B. A Court Can Issue a Writ of Supersedeas to Maintain Its Jurisdiction.

The law governing the issuance of a writ of supersedeas to stay operation of on order pending appeal is well settled. Courts have inherent power to issue the writ if such action is necessary or proper to the complete exercise of its appellate jurisdiction. (*Food & Grocery Bureau of Southern California v. Garfield* (1941) 18 Cal.2d 174, 176.) Under Code of Civil Procedure section 923, the court may "make any order appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its

jurisdiction." (C.C.P. section 923.)

In the present case, the requested relief of a stay is necessary because enforcement of the Ruling during the appeal will radically change the status quo of the parties. In particular, the Ruling actually prevents the Controller from performing the duties of her office and/or requires the Controller to perform illegal functions. As the Controller's position is mandated by the Constitution (Art. V, § 11), it is imperative to the public that he be allowed to perform only those functions which are legal and constitutional. To actively prevent him from complying with his mandate forces the Controller to neglect his duties, and, thus, denies him and the public the rights of office. All of this harm will occur from an unlawful Executive Order which is permitted to go into effect during the pendency of an appeal.

Moreover, the State will face, because of an unlawful Executive Order, the prospect of a tidal wave of litigation. As argued below, the Executive Order and Court Ruling disregards applicable laws concerning due process, payment of wages and impairment of contract. The 215,000 civil servants affected by the Executive Order each will suffer individualized and irreparable harm as a result of the unlawful Executive Order and Ruling. Such a great level of harm surely indicates a dramatic change in the status quo--the requisite hallmark for relief through a Stay.

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C. Petitioner Raises Gross Errors of Law in the Order That Warrant the Issuance of a Writ of Supersedeas and a Stay.

A court will issue a writ of supersedeas when probable error has been shown by the petitioner. (*People v. Smith* (1945) 71 Cal.App.2d 211, 212; *Nuckolls v. Bank of California National Assn., supra.*) In this case, the court made gross errors of law in issuing an Order which violates the federal and state constitutions as well as federal and state statutes, all of which warrant supersedeas.

1. The Trial Court's Order Violates the Due Process Rights of Civil Service Employees.

The Order disregards applicable law and causes substantial harm to tenured civil servants by converting them to an ad hoc system of furloughs in which they suffer the loss of pay and job status without notice and opportunity to respond. Consequently, the Order violates the due process rights of all civil servants by failing to afford them the proper notice and opportunity to be heard prior to the deprivation of a fundamental property interest.

Indisputably, the state cannot deprive an individual of life, liberty or property without notice and opportunity to respond in an appropriate manner. (*Mullane v. Central Hanover Bank & Trust Co.*, (1950) 339 U.S. 306, 313 [70 S.Ct. 652, 656; 94 L.Ed. 865].) The Fourteenth Amendment of the United States Constitution imposes procedural constraints on the government when the government deprives one of property interests. (*Memphis Light, Gas & Water v. Craft*, (1978) 436 U.S. 1, 9 [98 S.Ct 1554, 1560; 56 L.Ed.2d 30].)

To be afforded due process protection, civil servants must have vested property rights. A property right in public employment is a creation of state law. (*Board of Regents v. Roth*, (1972) 408 U.S. 564, 577; 92 S.Ct. 2701; 33 L.Ed.2d 548.) In *Skelly v. State Personnel Board,* (1975)15 Cal.3d 194, 206 [124 Cal.Rptr. 14; 539 P.2d 774] the court found that California's statutory scheme "confers upon an individual who achieves the status of permanent employee a property interest in the continuation of his [or her] employment." Consequently, a permanent public employee is afforded due process protection when the state deprives the employee of his or her property interests in continued employment. The California legislature cannot elect to provide a property interest to their public employees, only to have a court order the state to divest its employees of such an interest without appropriate procedural safeguards. (*Cleveland Board of Education v. Loudermill*, (1985) 470 U.S. 532, 541 [105 S.Ct. 1487, 1492-1493; 84 L.Ed.2d 494].) The due process rights of all state civil service employees will be violated if the trial court is allowed to compel the state to deprive its employees of vested property rights.

The Legislature created the civil service laws to protect the due process rights of all employees. However, the trial court erred by failing to recognize the scope of this protection. Indeed, the Order treats the state's tenured civil servants as if they had rights no greater than those attaching to "at will" employment. Such an Order disregards the merit principle embodied in Article VII of the California Constitution which mandates that the appointment, promotion, and reductions of

salary of employees be made under a general system of merit. The loss of salary is tantamount to discipline in violation of the merit principle and thus the Constitution itself.

Finally, the Executive Order disregards applicable law which specifically governs the reduction in salaries as a result of the Legislature's inability to agree upon a budget. Government Code section 1231 provides in pertinent part as follows:

> No state officer or employee shall be deemed to have a break in service or to have terminated his or her employment, for any purpose, **nor to have incurred any change** in his or her authority, status, or jurisdiction or **in his or her salary** or any other conditions of employment, solely because of the failure to enact a budget act for that fiscal year prior to the beginning of that fiscal year.

Based on the foregoing authority, the trial court reached an erroneous conclusion of law that state civil servants would lose pay as a result of the State budget problems. To uphold the Executive Order defies logic, reason, and applicable law, and causes serious injury to 215,000 civil servants.

2. The Trial Court's Ruling Impairs Vested Contractual Rights and Is Unconstitutional.

The United States Constitution prohibits a state from enacting a "law impairing the obligation of contracts." (Art. I, § 10(1).) Likewise, the California Constitution provides in part that a "law impairing the obligation of contracts may not be passed." (Art.1, § 9.) "Under well settled principles, these contract clauses limit the power of a state to modify its own contracts with other parties." (*Valdes*

v. Cory (1983) 139 Cal.App.3d 773, 783 [189 Cal.Rptr. 212.])

In California, the terms and conditions of civil service employment are fixed by statute and not by contract. (*Miller v. State of California* (1977) 18 Cal.3d 808, 813-814 [135 Cal.Rptr. 386; 557 P.2d 970.]) Nevertheless, courts have long recognized that the payment of salary to public employees involve obligations protected by the contract clause of the Constitution. In *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 853 [179 P.2d 799], the Supreme Court noted that "public employment gives rise to certain obligations which are protected by the contract clause of the Constitution, including the right to the payment of salary which has been earned." A public employee's salary is part of the employee's compensation and is earned immediately upon the performance of services for a public employer and cannot be destroyed without impairing a contractual obligation of the employing entity. (*Id.*; *Valdes v. Cory, supra*, 139 Cal.App.3d 773 at 783-784.) In *Valdes*, the court concluded that "a statute will be treated as a contract with binding obligations when the statutory language and circumstances accompanying its passage clearly ". . . 'evince a legislative intent to create private rights of a contractual nature enforceable against the State'." (*Id.* at 786.)

In California, numerous statutes govern public sector labor relations and create private rights of a contractual nature enforceable against the state. The Ralph C. Dills Act (State Employer-Employee Relations Act, "SEERA", Gov. Code, §§ 3512, *et seq.*) requires public employers to meet and confer with recognized employee organizations on all matters relating to employment

conditions, including wages. (Gov. Code, §§ 3516; 3517; 3570.) If agreement is reached, the parties must reduce it to a written memorandum of understanding ("MOU"). In the case of the Dills Act, the parties present the MOUs to the Legislature for determination (Gov. Code, § 3517.5). In interpreting the Meyers-Milias-Brown Act, the companion act to the Dills Act for local public agencies, the Supreme Court specifically recognized the sanctity and viability of a MOU, noting that once it was adopted by the public employer, it was "indubitably binding." (*Glendale City Employees Association v. City of Glendale* (1975) 15 Cal.3d 328, 336-338 [124 Cal.Rptr. 513; 340 P.2d 609].)

In the instant case, SEIU is the recognized employee organization for State employees in nine bargaining units. Each bargaining unit entered into a MOU setting forth salary and benefit levels. The salary provisions in the these MOUs remain in effect after expiration by operation of law and because they have been adopted by the Legislature in the Budget Act. (Gov. Code §§ 3517.8(a), 19826(d); *Department of Personnel Administration v. Superior Court*, (1992) 5 Cal.App.4th 155, 181-182 [6 Cal.Rptr.2d 714].) Indeed, after the expiration of a MOU, the public employer is required to continue to pay the wages established in the MOU. (*San Joaquin County Employees Association, Inc. v. City of Stockton* (1984) 161 Cal.App.3d 813, 818 [207 Cal.Rptr. 876]; cited with approval in *Department of Personnel Administration v. Superior Court, supra.*) The Executive Order and Ruling blatantly disregard this requirement.

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The Ruling impermissibly impairs the contracts entered into between SEIU and the State because it affirmatively prohibits the State Controller from paying to state employees the wages set forth in the MOUs for the various bargaining units. Inasmuch as the trial court disregarded the provisions of the MOUs and denied state employees their right to contractually mandated wages, it impaired the obligation of valid contracts. To the extent the court impaired contractual obligations, it violated both the federal and state constitutions prohibiting the impairment of contracts. "Neither the court nor the legislature may impair the obligation of a valid contract (Cal. Const., Art. I, §§ 1, 16 [now Cal. Const., Art. I, § 9]) and a court cannot lawfully disregard the provisions of such a contract or deny to either party his rights thereunder." (*Bradley v. Superior Court* (1957) 48 Cal.2d 509 [310 P.2d 613] (emphasis added); *Newhall v. Newhall* (1964) 227 Cal.App.2d 800 [236 Cal.Rptr. 755].)

In this case, the trial court ignored the sanctity of the laws applicable to state employment as well as the employees' contracts and impaired the obligations created thereunder. Thus, the Order violates the contract clauses of both the United States and California Constitutions and is unlawful. Numerous decisions have upheld this position.

In *Sonoma County Organization of Public Employees* v. *County of Sonoma* (1979) 23 Cal.3d 296 [152 Cal.Rptr. 903], the Supreme Court was presented with the issue whether Government Code section 16280 impaired the obligation of public employee collective bargaining agreements in violation of the

contract clauses of the United States and California Constitutions. Section 16280 prohibited the distribution of state surplus or loan funds to any local public agency granting to its employees a cost of living wage or salary increase for the 1978-1979 fiscal year which exceeded the cost-of-living increase provided to state employees. The section also declared null and void any agreement by a local agency to pay a cost-of-living increase in excess of that granted to state employees. The enactment of this section was apparently necessitated by Proposition 13 and its fiscal limitations.

A dispute arose after several local agencies entered into memoranda of understanding to pay a wage increase for the 1978-79 fiscal year to their employees represented by labor organizations. (*Id.)* The labor agreements were ratified by resolution or ordinance adopted by the local governing bodies. Although the Legislature provided in the 1978-1979 budget for a 2.5 percent salary increase for state employees, the Governor vetoed the increase. Thereafter, the local entities refused to authorize the additional wages called for in the agreements which they had previously ratified. The labor organizations representing the local employees sought writs of mandate to compel the local agencies to grant the increases called for in the agreements and to prohibit the state from enforcing the condition for payment of state funds set forth in section 16281. (*Id.*)

In its analysis, *Sonoma* cited *Glendale City Employee's Assn., Inc.* v. *City of Glendale* (1975) 15 Cal.3d 328, 337-338 [124 Cal.Rptr. 513] for the well-

settled principle that once adopted by the governing body, public sector collective bargaining agreements are "indubitably binding." *Sonoma* then cited *Home Building & Loan Assn.* v. *Blaisdell* (1934) 290 U.S. 398, 428 [78 L.Ed. 413, 423, 54 S.Ct. 231] for an analysis of legislative impairment which relied on four factors: whether the legislative impairment was justified by an emergency; whether it was enacted for the protection of a basic interest of society; whether it was appropriate to the emergency and the conditions it imposed were reasonable; and, its duration. (*Sonoma County Organization of Employees* v. *County of Sonoma*, *supra*, 23 Cal.3d at pp. 305-306 [152 Cal.Rptr. 903].) Here, like *Sonoma*, the Ruling fails under the *Blaisdell* standard.

The Supreme Court in *Sonoma* issued a peremptory writ of mandate directing respondent local entities to pay to their officers and employees the salary increases provided in the 1978-1979 agreements without regard to the invalid restrictions contained in section 16280. (*Id.*) The Court concluded in part that respondents did not demonstrate that Proposition 13 created an emergency warranting the invalidation of salary increases called for in the labor organizations' contracts. (*Id.* at 313.) *Sonoma* upheld the sanctity of public employee collective bargaining agreements and found unconstitutional the legislative impairment of the salary provisions contained in those agreements. (*Id.*)

In a case involving state employees, the Court in *Theroux* v. *State* (1984) 152 Cal.App.3d 1 [199 Cal.Rptr. 264] found that the exclusion of state employees

from retroactive pay increases by virtue of an arbitrary cut-off date impaired their vested contractual rights under the State contract clause. The court noted that "[d]uring the period in question respondents' right to full compensation for services rendered matured immediately upon their rendition, regardless of the date the amount of such compensation was finally fixed." (*Id.* at 8-9.)

In a case similar to the present dispute, the Ninth Circuit, in *University of Hawaii Professional Assembly, et al.* v. *Benjamin J. Cayetano, et al.* 183 F.3d 1096 (9th Cir. 1999), affirmed the lower court's issuance of an injunction and held that a Hawaiian statute providing for "pay lags" in the payment of state employee salaries violated the contract clause. The statute, a "pay lag law," would allow the State of Hawaii to postpone by one to three days the dates on which state employees were to be paid; it would also authorize the state to make six delayed salary payments and provided that the delays were "not subject to negotiation." (*Id.* at 1099-1100.) The district court granted the *University of Hawaii Professional Assembly*'s ("UHPA's") motion for preliminary injunction, finding that *UHPA* showed a likelihood of success on the merits, that the possibility of irreparable harm existed, and that the balance of hardships tipped in *UHPA*'s favor. (*Id.* at 1101.) On appeal, the Ninth Circuit found that the pay lag statute not only adversely affected plaintiffs' contractual expectations but "slam[med] the door on any effective remedy." (*Id.* at 1104.) The Court noted that the only other conceivable remedies would be a prohibited practice complaint or binding arbitration. (*Ibid.*) Furthermore, it agreed with the lower court that the

impairment of plaintiffs' collective bargaining agreement would be substantial and impose a hardship on many state employees who would be unable to meet their financial obligations in a timely manner. (*Id.* at 1104-1106.) Finally, the Ninth Circuit agreed with the lower court that plaintiffs "met their burden of showing that if the pay lag is implemented, they likely will suffer irreparable harm and that damages, even if available, [would] not adequately compensate plaintiffs for hardships caused by the delay in the receipt of pay," and that the balance of hardships tipped in favor of the plaintiffs. (*Id.* at 1107-1108.)

Applying the principles of the *UHPA* case to the present dispute compels only one conclusion: the failure to pay state employees their negotiated wages constitutes an unconstitutional impairment of contract. Here, as in *UHPA*, state employees would not receive the payment of full wages, as had been negotiated and ratified by legislative action. Moreover, the harm to employees and their families is equal if not even greater, and their remedies sorely lacking. The primary difference between the cases is the cause of the impairment. In *UHPA*, employees would suffer a loss of pay due to Legislative impairment. In this matter, judicial impairment by way of a Ruling would prevent state employees from receiving full and timely salaries. Unlike *Sonoma* which involved legislative impairment and the application of the *Blaisdell* factors, at issue herein is a judicial impairment, and according to *Bradley* v. *Superior Court, supra*, 48 Cal.2d at p. 519 [310 P.2d 634], "a court cannot lawfully disregard the provisions of such contracts or deny to either party his rights thereunder." The correct

application of *Bradley* leads to the inescapable conclusion that judicial impairment is strictly prohibited.

The employees in *Sonoma*, *Theroux* and *UHPA*, like the state employees represented by SEIU, worked under express and/or implied contracts; they worked with the expectation that they would be timely and fully compensated for their work; and, the state contract clause protected their vested contractual rights from judicial impairment. As a matter of law, the State's contract clause constitutionally mandates the regular and full payment of salaries to state employees who work during a state budget impasse.[2]

3. The Ruling Violates Applicable Laws including the Dills Act, the Administrative Procedures Act, among other Violations.

The Ruling constitutes an error of law and/or an abuse of discretion because it is violates applicable laws including the Dills Act, the Administrative Procedures Act, among others. It ignores the applicable law concerning the exclusivity of the jurisdiction of the Public Employment Relations Board (PERB)

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[2]Government Code section 1231 provides in pertinent part that "no state officer or employee shall be deemed to have a break in service or to have terminated his or her employment, for any purpose, **nor to have incurred any change** in his or her authority, status, or jurisdiction or in his or her salary or other conditions of employment, solely because of the failure to enact a budget act for a fiscal year prior to the beginning of that fiscal year." Pursuant to section 1231, a state officer or employee is entitled to the regular and full payment of salary for work performed during a budget impasse. Under *Frates* v. *Burnett* (1970) 9 C.A.3d 63, 69 [87 Cal.Rptr. 731], section 1231 in effect becomes part of a state employees' contract with the state, and the state contract clause would also protect this statutory obligation.

while affirmatively (albeit incorrectly) ruling upon the relevant terms and conditions of state employment. It ignores applicable law concerning the necessary steps to promulgate state rules while affirmatively ruling upon the existence of the furlough as a state rule.

a. PERB Exclusivity

Once the Court determined (however incorrectly) that is was necessary to delve into the terms of the MOU between the Union and the State - by finding no other constitutional or statutory defect invalidating the Executive Order - it necessarily should have deferred the matter to PERB's exclusive jurisdiction. To fail to have done so violated long-standing principles concerning PERB's jurisdiction.

The Union is a state employees' union subject to the Ralph C. Dills Act - the collective bargaining law for state employees. (Gov. Code, section 3512, et seq.) The Dills Act, Gov. Code, § 3512 et seq., was enacted to govern labor relations between the State of California, certain state employees and employee organizations. (*Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.* (2005) 35 Cal.4th 1072, 1085.) Further, the Dills Act grants to the PERB the necessary authority to interpret and apply the provisions of this law. (Gov. Code § 3514.5.) In fact, section 3514.5 states that *only PERB* shall have *exclusive jurisdiction* as to whether certain allegations constitute an unfair practice charge and, if so, what are the appropriate remedies. (*Id.*) (emphasis added.)

PERB is an "expert, quasi-judicial administrative agency, modeled after the National Labor Relations Board' with the authority to adjudicate unfair labor practice charges" arising under the Dills Act and other public sector labor relations laws. (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 179.) Pursuant to its statutory authority, PERB is charged with investigating unfair labor practice charges relating to any violation of the Dills Act and with taking action to effectuate the purposes of the Act. (*Id.*)

Courts have uniformly concluded that "PERB has exclusive jurisdiction to determine unfair labor practice claims" (*Anderson v. California Faculty Association* (1984) 25 Cal.App.4th 207, 211 (emphasis added); Gov. Code § 3514.5 [provision vesting PERB with exclusive jurisdiction over unfair practices].) In addition, PERB's exclusive jurisdiction extends to all disputes that "*arguably* could give rise to an unfair practice claims." (*Personnel Committee of the Barstow Unified School District v. Barstow Unified School District* (1996) 43 Cal.App.4th 871, 886, original italics.)

Once the Court eliminated the constitutional and statutory bars to the Executive Order and set forth into the arena of contract interpretation, the only possible accurate description of the dispute between the parties was whether the Executive Order violated the terms of the existing MOUs or whether the Governor committed an unfair labor practice by declaring a fiscal emergency, thereby by passing bargaining with the employee organizations over the implementation of employee furloughs as a cost saving measure. Even the trial court defined the

remaining dispute as one of interpretation of the relative contractual rights. Having done so, the Court should have then deferred the matter to PERB.

If it was necessary to delve into contractual rights, it was inescapable that "the initial determination as to whether the charges of unfair practices are justified, and, if so, what remedy is necessary to effectuate the purposes of this chapter, shall be a matter within the exclusive jurisdiction of the board." (Gov. Code § 3415.5.) Moreover, according to *California Association of Professional Scientists v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 381, "the assignment of exclusive initial jurisdiction in section 3514.5 to the Board means that the only forum to pursue a cause of action for violation of the statutory rights conferred in the Dills act is before the Board". In this regard, courts have acknowledged that the scope of PERB's exclusive jurisdiction is construed broadly in favor of allowing PERB to exercise its expertise over public sector labor relations in this state. (*El Rancho Unified School District v. National Education Association* (1983) 33 Cal.3d 946, 953; *San Diego Teachers Association v. Superior Court* (1979) 24 Cal.3d 1, 12-14.)

Judicial deference to PERB's administrative process was both necessary and appropriate if PERB was to fulfill its legislatively assigned mission "to help bring expertise and uniformity to the delicate task of stabilizing labor relations." (*San Diego Teachers Association, supra,* 24 Cal.3d at p. 12; *Local 21 International Federation of Professional and Technical Engineers, AFL-CIO v. Bunch* (1995) 40 Cal.App.4th 670, 676-679 [discussing the broad scope of

PERB's exclusive, initial jurisdiction]; *City and County of San Francisco, supra*, 151 Cal.App.4th at p. 945 [finding that a party may not evade PERB's jurisdiction through artful pleading]; *El Rancho Unified School District, supra*, 33 Cal.3d at p. 954, fn. 13 [stating that a court must defer to PERB when the underlying conduct alleged "may fall within PERB's exclusive jurisdiction".)

b. Administrative Procedures Act

Further complicating the errors in this Ruling, the Court found it necessary to conclude that the furlough plan constituted a rule of general application, so that the Court could pigeon-hole the plan into the State's Right clause of the MOU. However, in concluding that the plan was a rule of general application, the Court abused its discretion and erred in its application of the law. It is well-settled that rules of general application constitute regulations which must be properly promulgated under the Administrative Procedures Act. No such regulation was properly promulgated, and the rule is null and void.

The Administrative Procedures Act, as specified in 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 11342.600 "regulation" as defined in Section 11342, unless . . . [it] has been adopted as a regulation filed with the Secretary of State pursuant to this chapter. [emphasis added.]

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The California Supreme Court in *Armistead v. State Personnel Board,* (1978) 22 Cal.3d 198 made compliance with the requirements of the Administrative Procedures Act mandatory for all state agencies. Under the APA, Government Code section 11342.600 broadly defines a regulation 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.

The California Supreme Court adopted a two part test in *Tidewater Marine Western v. Bradshaw*, (1996) 14 Cal.4th 557, 570-71 to determine when an agency rule is a regulation under Government Code section 11342 (g) - subsequently renumbered to 11342.600. The test first determines whether the agency intended its rule to apply generally or to a specific case. Secondly, the rule must implement, interpret or make specific the law enforced, administered or governed by the agency.

When applying the test in *Tidewater Marine*, the Court's Ruling - recognizing the existence of a rule by which the State will implement statewide furloughs, office closures and/or pay reductions pursuant to the Governor's executive order - fits under the definition of a regulation defined in Government Code section 11342.600. However, the Court essentially adopted this rule on behalf of the State without any of the mandatory administrative procedures set forth in the Administrative Procedures Act and required by *Armistead.*

Such an action may not be allowed to stand.

4. The Trial Court's Order Disregards Applicable Law Requiring the Payment of Wages.

The Executive Order failed to adequately address the Controller's obligations to adhere to the Fair Labor Standards Act ("FLSA"). (29 U.S.C. § 201, *et. seq.*), and the Ruling permits this error to continue. Consequently, the trial court's conclusions with regard to the payment of wages are erroneous and cause severe injury to civil servants by depriving them of their full rights under the law.

The Supremacy Clause of the United States Constitution (Art. VI, § 2) requires the following:

> the Laws of the United States. . . shall be the supreme law of the land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

The California Constitution adopts the central tenet of the Supremacy Clause. Specifically, Article III, section 1 states "the United States Constitution is the supreme law of the land." Furthermore, federal law controls over conflicting state law regardless of whether that state law is constitutional or statutory and the Supremacy Clause compels state courts to enforce federal statutes. (*Miller v. Municipal Court* (1943) 22 Cal.2d 818, 851 [42 P.2d 297].) In the present dispute, the FLSA controls the issue of the Controller's obligation to pay employee wages, but the Trial Court's Order fails to ensure compliance with FLSA mandates.

The Executive Order further conflicts with, and changes the FLSA exemption status of numerous Local 1000 members. The FLSA is codified in 29 U.S.C. sections 201-219. The FLSA establishes standards for minimum wages, overtime pay, and record-keeping, among other things. These standards apply to both full-time and part-time workers in the private and public sectors. The FLSA covers state and local government agencies regardless of their dollar volume of business.

a. The Order Does Not Provide a System or Mechanism to Properly Compensate the Thousands of State Employees Who Will Lose Their Exempt Status as a Result of the Furloughs.

The FLSA requires that employers pay overtime compensation for time worked beyond forty (40) hours in a workweek. (29 U.S.C. § 206(a).) All overtime work that is ordered, approved, or "suffered or permitted" must be compensated. (*Id.*) Section 213(a)(1) of the FLSA provides a complete minimum wage and overtime exemption for "any employee employed in a bona fide executive, administrative, or professional capacity," as those terms are defined in 29 C.F.R. section 541.0. An employee may qualify for exemption if the test relating to duties and salary are met. Exempt employees are not entitled to, and do not receive overtime compensation. An employee is exempt if the employee meets the "salary basis" test. As noted in 29 CFR § 541.602(a):

> [a]n employee will be considered to be paid on a "salary basis" . . . if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of

> the employee's compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided in [29 C.F.R. § 541.602(b)], an 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.*** (emphasis added)

But the FLSA provides that if a public employer, such as the State of California, furloughs a FLSA-exempt employee, the employee loses her or his exempt status during the furlough work week. To be specific, 29 CFR § 541.710(b) provides:

> Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid on a salary basis ***except*** in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced. (emphasis added)

A significant number of Local 1000 members employed by the State are considered exempt under the FLSA. In fact, the State expressly recognizes that a substantial number of state employees represented by Local 1000 are exempt under the FLSA. In relevant part, section 19.1 of the parties' memorandum of understanding provides as follows:

> State employees who are exempt/excluded from the FLSA are not hourly workers. The compensation they receive from the State is based on the premise that ***they are expected to work as many hours as is necessary to provide the public services for which they were hired.*** Consistent with the professional status of these employees, they are accountable for

their work product, and for meeting the objective of the agency for which they work. (emphasis added.)

Based on this contract language, FLSA-exempt Local 1000 members are contractually obligated to work as many hours as necessary to complete their assignments. Because FLSA-exempt state employees subject to the Local 1000 memorandum of understanding are obligated to work as many hours as necessary to accomplish their tasks, those employees will be required to work well beyond 40 hours in each workweek to make up for the lost work time due to the two day a month furloughs. As such, the furlough Order is illegal as it does not provide any requirement or mechanism to insure that Local 1000 members are paid overtime for the work that will undoubtedly be necessary to provide the public services for which they were hired. Neither the Order or the following DPA implementation plan provide any means or mechanism to provide for record-keeping, computation and payment of overtime wages.

On January 9, 2009, DPA issued a memorandum that outlined the state's furlough implementation plan. The implementation memo provided, in part, that:

For operations that cannot close, Agency Secretaries (and Directors who do not report to an agency) may request approval from DPA to use a "self-directed' furlough for specific positions. There will be two types of furloughs:

- Employees take two furlough days each month but on days chosen by the employee and approved by the supervisor. For example,

revenue-generating positions may be considered for this type of furlough.

- Employees accrue two furlough days per month to be taken when feasible. Furlough days that cannot be used within the same month must be taken within two years following the end of the furlough program. Furlough days will not be cashed out. Posted positions in 24/7 facilities such as prisons and hospitals automatically qualify for this self-directed furlough
and do not require prior approval from DPA.

As with the Executive Order, the DPA implementation plan provides no procedures or mechanism to insure that formerly exempt employees are properly paid overtime wages due and owing on pay day. In fact, neither the Executive Order or the DPA implementation memorandum address the complex logistical problems facing the state in recording, calculating and issuing overtime payments to formerly exempt employees. Because the Executive Order does not account for this legal obligation, the Governor seeks to implement an Executive Order that violates the FLSA on its face.

b. The Order Violates the FLSA Requirement that All Wages Due Be Paid on the Next Regular Pay Day.

The rule is that all FLSA wages, whether minimum or overtime wages, must be paid "when due," which normally means at the next regularly scheduled pay day. Section 778.106, Title 29, of the Code of Federal Regulations, provides

required pay periods for overtime wages:

> There is no requirement in the Act that overtime compensation be paid weekly. The general rule is that overtime compensation earned in a particular workweek ***must be paid on the regular pay day for the period in which such workweek ends***. When the correct amount of overtime compensation cannot be determined until some time after the regular pay period, however, the requirements of the Act will be satisfied if the employer pays the excess overtime compensation as soon after the regular pay period as is practicable. Payment may not be delayed for a period longer than is reasonably necessary for the employer to compute and arrange for payment of the amount due and in no event may payment be delayed beyond the next payday after such computation can be made. (emphasis added)

Under the FLSA, "late pay" is generally the same as "no pay." (*Biggs v. Wilson*, 1 F.3d 1537 (9th Cir. 1993).) This is important because an employer that fails to pay wages when due is liable for liquidated damages (double damages). The implementation plan runs afoul of the FLSA because it requires certain employees to lose ten percent (10%) of their salary each month despite the fact that the employee worked each and every day without being furloughed. To be specific, those employees who fall under the second type of furlough will have their FLSA rights violated because each will work a full-month but not receive their full salary on the next scheduled pay date.

In *Biggs v. Wilson* (9th Cir. 1993) 1 F.3d 1537, cert. denied (1994) 114 S.Ct. 902, the Court of Appeals held that the state's failure to timely pay wages to state workers violated the FLSA (29 U.S.C. § 206(b)) and subjected the State of

California to liability for the payment of liquidated damages. (29 U.S.C. § 216(b).) The court rejected the state's arguments that the application of FLSA to the state would be a derogation of the state's constitutional and statutory budget provisions, and that the exposure to damages infringes on the state's sovereignty under the Tenth Amendment. (*Biggs, supra*, 1 F.3d at 1543.) Rather, the *Biggs* court found that while the FLSA does not require California to pass a budget on time, it does require California to do what all employers must do--to pay its employees on payday. (*Id.*)

Thus, regardless of any budget impasse, the state is required to pay state employees their proper wages on their regularly scheduled payday. Failure to do so subjects the state to damages in an amount equal to the wages due, as well as attorneys fees and costs.

IV.

CONCLUSION

For all the foregoing reasons, the Petitioner respectfully requests that this Court issue both the stay and writ.

Respectfully submitted,

SERVICE EMPLOYEES
INTERNATIONAL UNION, LOCAL 1000,

Date: February 5, 2009 By: _____

ANNE M. GIESE
Attorney for Petitioners and Appellant
SERVICE EMPLOYEES
INTERNATIONAL UNION, LOCAL 1000

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204(c)(1). I certify that the foregoing brief contains 11,692 words, as determined by the "word count" feature of the word processing system used to prepare it.

ANNE M. GIESE

Feb 5, 2009
DATE

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, THIRD APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number:
ATTORNEY OR PARTY WITHOUT ATTORNEY (*Name, State Bar number, and address*): ANNE M. GIESE (SBN 143934) SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000 1808 14th Street Sacramento, CA 95811 TELEPHONE NO.: (916) 554-1279 FAX NO. (*Optional*): (916) 554-1292 E-MAIL ADDRESS (*Optional*): agiese@seiu1000.org ATTORNEY FOR (*Name*): Petitioner/Plaintiff/Appellant	Superior Court Case Number: 34-2009-80000135 ***FOR COURT USE ONLY***
APPELLANT/PETITIONER: Service Employees Int'l Union, Local 1000 RESPONDENT/REAL PARTY IN INTEREST: Arnold Schwarzenegger, et al.	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Service Employees Int'l Union, Local 1000

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: February 6, 2009

ANNE M. GIESE ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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INDEX OF EXHIBITS

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B. Trial Court Amended Ruling dated January 30, 2009

C. Notice of Appeal dated February 5, 2009

D. Defendant/Respondent John Chiang Request for Clarification of the Court's ruling dated February 3, 2009

E. Trial Court Minute Order regarding Request for Clarification issued on February 4, 2009

F. Governor Arnold Schwarzenegger's Executive Order S-16-08 dated December 19, 2008

G. Controller's Answer to Petition for Writ of Mandate dated January 20, 2009

H. Department of Personnel Administration's Memorandum re: State Employee Furlough dated January 9, 2009

A

PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT, et al., v. GOVERNOR ARNOLD SCHWARZENEGGER, et al., Case No. 2008-80000126;

CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS IN STATE EMPLOYMENT, v. GOVERNOR ARNOLD SCHWARZENEGGER, et al., Case No. 2009-80000134;

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000, v. GOVERNOR ARNOLD SCHWARZENEGGER, et al., Case No. 2009-80000135.

The following shall constitute the Court's final rulings on the demurrers and petitions for writ of mandate and complaints for declaratory relief in the above-captioned matters:

//

Introduction and Background:

On December 19, 2008, in a response to the current State budget crisis, Governor Arnold Schwarzenegger issued Executive Order S-16-08. As relevant to this action, the Executive Order directed the Department of Personnel Administration, effective February 1, 2009 through June 30, 2010, to adopt a plan to implement a furlough of represented state employees and supervisors for two days per month, and to adopt a plan to implement an equivalent furlough or salary reduction for all state managers, including exempt state employees.

Several organizations representing state employees affected by the Executive Order have filed three separate petitions for writ of mandate and complaints for declaratory relief challenging the provisions of the Order imposing the furloughs, and seeking to overturn them.

The first such action, Case No. 2008-80000126, was filed by petitioners Professional Engineers in California Government ("PECG") and California Association of Professional Scientists ("CAPS") on December 22, 2008. That action initially was assigned to Department 33 of this Court, Judge Lloyd Connelly, presiding; it was reassigned to this Department after respondents filed a peremptory challenge to Judge Connelly pursuant to Code of Civil Procedure section 170.6 on January 7, 2009.

The second such action, Case No. 2009-80000134, was filed by petitioner California Attorneys, Administrative Law Judges and Hearing Officers in State Employment ("CASE") on January 5, 2009. That action was assigned to Department 33 of this Court, Judge Lloyd Connelly, presiding. Petitioner simultaneously filed a Notice of Related Case in that action, stating that it was related to Case No. 2008-80000126.

The third such action, Case No. 2009-80000135, was filed by petitioner Service Employees International Union, Local 1000 ("SEIU"), on January 7, 2009. The action was assigned to Department 29 of this Court, Judge Timothy M. Frawley, presiding. Petitioner simultaneously filed a Notice of Related Case in that action, stating that it was related to Cases Nos. 2008-80000126 and 2008-80000134

On January 9, 2009, the Court heard simultaneous ex parte applications by the petitioners and respondents in Case No. 2008-80000126 for orders shortening time that would have the effect of setting a hearing on respondents' demurrer to the petition and the hearing on the merits of the petition itself for a date prior to February 1, 2009, when the furloughs would go into effect.

At the hearing on January 9, 2009, counsel for the petitioners in Cases Nos. 2009-80000134 and 2009-80000135 appeared and stipulated on the record that those cases would be treated as related to Case No. 2008-80000126, and that those cases would be transferred to this Department for hearing pursuant to Rule of Court 3.300(h)(1)(a). Counsel for respondents in Case No. 2008-80000126 also stated on the record that he represented the respondents in one of the other two cases, and most likely would represent the respondents in the other (although at that time, the petition had not formally been served on the respondents), and also stipulated on the record that the three cases would be heard in this Department as provided above. The parties further agreed to a briefing schedule and to a combined hearing on the respondents' demurrers to, and the merits of, the three petitions. The parties to all three actions have filed their briefs and other papers according to the agreed-upon schedule and the Court heard oral argument on the matter on Thursday, January 29, 2009.

On January 12, 2009, a fourth action was filed challenging the Governor's Executive Order, entitled *California Correctional Peace Officers Association v. Governor Arnold Schwarzenegger, et al.*, Case No. 2008-80000137. The Court issued an order finding that case to be related to the three cases captioned above and further ordered that case assigned to this Department. That case has been set for hearing on Friday, February 5, 2009.

Ruling on Preliminary Evidentiary Issues:

Respondents[1] have made two requests for judicial notice, filed January 9, 2009 and January 13, 2009, along with an Amended Request for Judicial Notice on January 23, 2009 in response to the Court's order directing them to submit complete copies of the Memoranda of Understanding ("MOUs") involved in these actions. No objections to the requests have been filed. The Court has reviewed the requests and the documents attached thereto and finds that all such documents are proper subjects for judicial notice. Respondents' requests for judicial notice are therefore granted.

Respondents' evidentiary objection to the Declaration of Peter Flores, Jr. is overruled on the ground that the lack of a signature on the declaration has been remedied by the filing of an amended declaration, unchanged in substance, which bears Mr. Flores' signature.

Ruling on Respondents' Demurrers to the Petitions:

Respondents' demurrers are overruled on the following basis:

The petitions and complaints allege generally that the provisions of the Governor's Executive Order S-16-08 that implement a furlough of represented state employees and supervisors for two days per month, and an equivalent furlough or salary reduction for state managers, effective February 1, 2009 through June 30, 2010, are invalid in that such action on the

[1] In using the terms "respondents" or "defendants" in this ruling, the Court is referring to Governor Arnold Schwarzenegger and the Department of Personnel Administration. Although State Controller John Chiang also has been named as a respondent in these actions, the Controller has filed an Opposition to the Respondents'/Defendants' Demurrer stating that his interests are actually aligned with the petitioners and that, but for the short time frame, he would have filed a formal motion to realign the parties, seeking to be redesignated as a petitioner/plaintiff. The Controller's position in these actions will be discussed further below. In this ruling, the Court also has treated the terms "the Governor", "the Department of Personnel Administration" (or "the department" or "DPA") and "the State" as being essentially interchangeable.

part of the Governor is not authorized by law, and moreover is forbidden by certain provisions of law, in particular, Government Code section 19826(b).

The Court finds that such allegations are sufficient to state a cause of action for issuance of a writ of mandate or for declaratory relief, regardless of whether Government Code section 19826(b) is superseded by the terms of the MOUs petitioners have entered into with the State (as respondents argue), because the petitions and complaints allege, in essence, that the Governor lacks the positive authority to make the challenged order in the first instance, irrespective of any statutory prohibition that may or may not apply. The allegation that the Governor lacks any authority to make the challenged order is sufficient to state a cause of action on its own.

The Court further finds that the issue of the Governor's authority to make the challenged order is not an issue within the exclusive initial jurisdiction of the Public Employment Relations Board, because it involves issues of statutory interpretation and separation of powers between the Governor and the Legislature, which are matters properly within the jurisdiction of the courts, and not issues of unfair practices under the Ralph C. Dills Act, which are matters properly within the jurisdiction of the Board. (See, e.g., *California School Employees Association v. Azusa Unified School District* (1984) 152 Cal. App. 3rd 580, 592-593; *California Teachers' Association v. Livingston School District* (1990) 219 Cal. App. 3rd 1503, 1519.) Moreover, the petitions and complaints in effect allege that the Governor's Executive Order regarding an employee furlough violates the provisions of the petitioners' MOUs with the State governing wages and hours. The Board does not have the authority to enforce agreements between the parties. (Government Code section 3514.5(b); see also, *San Lorenzo Education Association v. Wilson* (1982) 32 Cal. 3rd 841.)

Moreover, even if this Court were to conclude that the Board did have jurisdiction over this matter, it would conclude that the normal policy reasons requiring parties to exhaust available administrative remedies do not apply in this case for many of the reasons stated by the Third District Court of Appeal in a case arising out of an earlier state budget crisis: namely, that the facts are undisputed, so there is no need for administrative development of the record; judicial intervention will not interfere with the expertise of the agency or create problems of judicial economy, given that the underlying issues are within the expertise of the courts and undoubtedly would be resolved ultimately by the courts even if initial jurisdiction were found in the Board; and, given that this case raises questions of first impression which most likely are bound for ultimate determination in the appellate courts, there is little concern of conflicting decisions between the Board and the courts. (See, *Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal. App. 4th 155, 168-169.)

In addition, even if this Court were to conclude that the Board did have jurisdiction over this matter, it would conclude that exhaustion of administrative remedies by resort to the Board should be excused on the ground that requiring exhaustion under the particular circumstances of this case would cause both the State and its employees to suffer irreparable injury, again, for many of the reasons stated in the 1992 *Greene* case: specifically, that the extremely grave nature of the fiscal crisis faced by the state, and the urgent need for resolution of these issues in as expeditious a manner as possible, create a great potential for irreparable harm in the nature of layoffs of state employees, with a concomitant reduction in the nature of state services, all of which are amply demonstrated by the declarations and documents that have been filed by parties in this matter (many of them by respondents). Even if, as the Court of Appeal stated in the *Greene* case, there is a possibility that the Board could order the same relief that petitioners seek here, it is extremely unlikely that the entire process of Board adjudication followed by judicial review as provided by law would be completed in a sufficiently timely manner to address the immediate

crisis. (See, *Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal. App. 4th 155, 170-171.)

Petitioners SEIU and CASE raise additional claims for declaratory relief regarding the effect of the furlough on the exempt status of employees under the federal Fair Labor Standards Act ("FLSA"). The SEIU complaint alleges that a significant number of its employees will be required to work in excess of 40 hours during furlough weeks, that such employees will no longer be considered exempt employees as a matter of law during those weeks, that such workers will be entitled to overtime pay during such weeks, and that respondents lack any mechanism or systems in place to move employees from exempt to non-exempt status from week-to-week, with the result being that such employees will not receive the overtime pay to which they are entitled under the FLSA. Such facts are sufficient to state a cause of action in declaratory relief based on the theory that respondents are not willing and able to comply with their obligations under the FLSA, at least for the purpose of withstanding a demurrer. Respondents' contention that the complaint on its face shows that petitioner's FLSA claim is not ripe for review, and seeks only an advisory opinion, because there is no allegation that respondents actually have failed to pay any overtime that is due, is unpersuasive.[2]

The CASE complaint alleges the same facts regarding the effect of the furloughs on its employees' exempt status under the FLSA. The complaint lacks the specific allegations present in the SEIU complaint regarding respondents' lack of willingness and ability to comply with the FLSA, but alleges in general terms that respondents' actions will result in denial of the protection of the laws regarding overtime compensation. In essence, this complaint is identical in substance to the SEIU complaint; the Court concludes that it also states a cause of action for declaratory relief.

Respondents' demurrers are therefore overruled.

Ruling on the Petitions and Complaints:

The petitions for writ of mandate and complaints for declaratory relief challenging the provisions of the Governor's Executive Order imposing furloughs on state employees are based on twin contentions: that the Governor lacks any authority, statutory or otherwise, to take such action; and that applicable statutory law expressly forbids him from taking such action. For the reasons stated below, the Court finds that these contentions are unpersuasive.

The facts regarding the implementation of the furlough are essentially undisputed, as is the fact that the State faces an extremely urgent fiscal crisis.[3] According to documents submitted to the Court, the Governor, through the Department of Personnel Administration, has developed a furlough plan that will result in the closing of general government operations on the first and third Fridays of each month, beginning on Friday, February 6, 2009. The unpaid furlough days are not work days and employees shall not report to work. For state operations that cannot close, a "self-directed" furlough will be used that will result in state employees either taking two furlough days each month on days chosen by the employees and approved by their supervisors, or accruing two

[2] This is, of course, distinct from the issue of whether there is any proof tending to demonstrate that FLSA violations actually will occur. This issue is dealt with in the Court's ruling on the merits, below.

[3] There do appear to be disputes of fact over whether the implementation of the furlough will result in violations of the federal FLSA. This issue will be discussed separately below.

furlough days per month to be taken when feasible. Salaries will be adjusted to reflect the unpaid furlough days, but benefits will remain the same.[4]

The Governor's Executive Order thus reduces the normal work hours of state employees for a temporary period due to the state's current fiscal crisis. The emergency measure will result in an accompanying deduction from pay for the hours not worked, but the order does not change established salary ranges. The Governor's authority for this action is found in statutes in the Government Code and in the employment contracts of the unions challenging the order.

The Governor has the statutory authority to reduce the hours of state employees pursuant to Government Code section 19851 and 19849.

Section 19851(a) provides: "It is the policy of the state that the workweek of the state employee shall be 40 hours, and the workday of the state employee 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."

Section 19849(a) provides that the Department of Personnel Administration "...shall adopt rules governing hours of work and overtime compensation and the keeping of records related thereto, including time and attendance records. Each appointing power shall administer and enforce such rules."

The Court finds that these two statutes, taken together, provide the Governor with authority to reduce the workweek of state employees to meet the needs of state agencies, and to do so by adopting a rule. The provisions of the Executive Order regarding the furlough are a rule in that they establish a standard of general application to state employees. Under the circumstances of the current fiscal crisis, the reduction in the workweek of state employees under the furlough order is indisputably related to the needs of the various state agencies, which, from the evidence respondents have submitted to the Court, run the imminent risk of running out of money and thus being unable to carry out their missions, if immediate action is not taken to reduce expenditures.

The Court further finds, on two separate bases, that the Governor has authority to reduce the work hours of the state employees represented by the petitioners in these actions pursuant to the terms of the MOUs the State entered into with the petitioner employee organizations, which remain in effect, although technically expired, pursuant to Government Code section 3517.8(a).

First, each of the petitioners' MOUs expressly incorporates the terms of sections 18949 and 19851 into the agreement between the parties[5], and the terms of the MOU do not conflict

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[4] See, Memorandum dated January 9, 2009 from David A. Gilb, Director of the Department of Personnel Administration, to Agency Secretaries, et al., regarding "State Employee Furlough per Governor's Executive Order S-16-08", attached to the Amended Declaration of Peter Flores, Jr. as Exhibit H.

[5] See, Respondents' Request for Judicial Notice, filed January 9, 2009, Exhibit A, p. 80 (PECG MOU); Exhibit B, p. 75 (CAPS MOU); Respondents' Amended Request for Judicial Notice, filed January 23, 2009, Exhibit A, p. 16 (CASE MOU); Exhibit B, p. 20 (SEIU MOU for Bargaining Unit 1); Exhibit C, p. 22 (SEIU MOU for Bargaining Unit 3); Exhibit D, p. 21 (SEIU MOU for Bargaining Unit 4); Exhibit E, p. 21 (SEIU MOU for Bargaining Unit 11); Exhibit F, pp. 22-23 (SEIU MOU for Bargaining Unit 14); Exhibit G, p. 21 (SEIU MOU for Bargaining Unit 15); Exhibit H, p. 21 (SEIU MOU for Bargaining Unit 17); Exhibit I, p. 21 (SEIU MOU for Bargaining Unit 20); Exhibit J, p. 19 (SEIU MOU for Bargaining Unit 21). In addition, the PECG MOU provides, in Article 17.1, which appears under the heading "State Rights", that: "All the functions, rights, powers and authority not specifically abridged by this MOU are

with these statutes, notwithstanding that the MOUs call for a normal work week of 40 hours. Thus, these provisions of law are not superseded by the MOUs, and the Governor retains the authority, pursuant to law and contract, to take any actions he would be permitted to take pursuant to Government Code sections 19849 and 19851 as described above.

Second, the specific terms of certain of the petitioners' MOUs expressly permit the State either to reduce hours in case of lack of funds or to take all necessary action to carry out its mission in emergencies.

For example, Article 3.1.B of the MOU between the State and petitioner CASE, which appears under the heading "State Rights", provides that "[t]o the extent consistent with law and this MOU, the rights of the State include, but are not limited to, the exclusive right to...relieve its employees from duty because of lack of work, lack of funds, or for other legitimate reasons...[and to] take all necessary actions to carry out its mission in emergencies."[6]

Article 10.3 of the CASE MOU, which appears under the heading "Layoff", further provides: "The State may propose to reduce the number of hours an employee works as an alternative to layoff. Prior to 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."[7]

Article 12.1.B of the CAPS MOU, which appears under the heading "State Rights", provides that: "Consistent with this Agreement, the rights of the State shall include, but not be limited to, the right...to take all necessary action to carry out its mission in emergencies."[8]

Article 4.B of each of the SEIU MOUs similarly provides that: "Consistent with this Contract, the rights of the State shall include, but not be limited to, the right...to take all necessary action to carry out its mission in emergencies."[9]

The Court finds that the current fiscal emergency, which is amply documented in the evidence respondents have submitted, authorizes the Governor to reduce the work hours of state employees under these cited terms of the various MOUs. The nature of the fiscal emergency is such that the state employee furloughs imposed by the Governor's Executive Order are both necessary and reasonable under the circumstances.[10]

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retained by the employer." (See, Respondents' Request for Judicial Notice, filed January 9, 2009, Exhibit A, p. 72.)

[6] See, respondents' Amended Request for Judicial Notice, filed January 23, 2009, Exhibit A, p. 11.

[7] See, Respondents' Amended Request for Judicial Notice, filed January 23, 2009, Exhibit A, p. 59.

[8] See, Respondents' Request for Judicial Notice, filed January 9, 2009, Exhibit B, p. 71.

[9] See, Respondents' Amended Request for Judicial Notice, filed January 23, 2009, Exhibit B, p. 16 (Bargaining Unit 1); Exhibit C, p. 17 (Bargaining Unit 3); Exhibit D, p. 17 (Bargaining Unit 4); Exhibit E, p. 17 (Bargaining Unit 11); Exhibit F, p. 18 (Bargaining Unit 14); Exhibit G, p. 17 (Bargaining Unit 15); Exhibit H, p. 17 (Bargaining Unit 17); Exhibit I, p. 16 (Bargaining Unit 20); Exhibit J, p. 15 (Bargaining Unit 21).

[10] At oral argument on these matters, counsel for CASE and PECG argued that many of their members work in so-called "special fund" agencies, and that the Governor's order, which was designed to deal with a looming General Fund deficit, was not reasonably related to the fiscal emergency insofar as it orders furloughs for those employees. (CASE also raised this issue in its reply brief.) This contention was not raised in any of the petitions or complaints for declaratory relief, and petitioners did not submit any evidence to support it. The Court therefore makes no findings on it.

The existence of the current emergency also authorized the Governor to make his order without first meeting and conferring with state employee organizations pursuant to Government Code section 3516.5.

The Court accordingly finds that both statutory law and the provisions of the petitioners' MOUs authorized the Governor to reduce the work hours of state employees through a furlough in the current fiscal emergency.

The Court finds that Government Code section 19826(b) does not preclude the Governor from taking such action.

Section 19826(b) states that the Department of Personnel Administration 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 Government Code section 3520.5, which is the case for all of the petitioners in these actions.

This case, however, does not involve the establishment, adjustment or recommendation of a salary range for represented state employees. This case involves a temporary reduction in the hours worked by certain state employees, which will result in a loss of pay for the hours not worked. The order does not change established salary ranges at all: state employees will continue to receive their normal pay according to established ranges in weeks that do not include a furlough day. In essence, state employees are subject to a temporary deduction from their total pay under the established ranges, and not to being paid under a new or adjusted salary range.

The present case is therefore distinguishable from *Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal. App. 4th 155, which involved an across-the-board salary cut of 5% with no furlough or reduction in work hours. *Greene* also involved the issue of what the State was entitled to do in the bargaining process under the Ralph C. Dills Act, specifically, whether the State could unilaterally impose the salary cut as part of its "last, best and final offer" when it was officially at impasse with the state employee organizations. The present case does not involve bargaining issues in that the parties are not at impasse, and petitioners' pleadings have raised issues regarding the Governor's positive authority to make the challenged order rather than issues regarding any failure to comply with his collective bargaining obligations under the Dills Act.

Moreover, the *Greene* case did not address any provisions of the employee organizations' MOUs that might have authorized the salary reduction in that case, on the basis of an emergency or otherwise, because the case technically involved a situation in which there was an absence of a MOU, as is the case when an existing MOU has expired and the parties have bargained to impasse. (See, *Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal. App. 4th 155, 174.) As noted above, the petitioners' MOUs in this case remain in effect pursuant to Government Code section 3517.8(a), and contain provisions authorizing the Governor's order reducing work hours. The *Greene* case therefore is not controlling here.

The Court accordingly rules that, with regard to the issues raised by all petitioners regarding the Governor's authority to make the challenged order, the petitions for writ of mandate are denied and judgment shall be entered for the defendants (respondents) on the complaints for declaratory relief. This ruling applies to both state employees represented by all of the petitioners under the Dills Act and to those state employees represented by petitioners PECG and CAPS who are excluded from the Dills Act by law, as the authorities on which the Court has relied in finding

that the Governor has the authority to take the challenged action apply to both classes of employees.[11]

With regard to the causes of action for declaratory relief raised by SEIU and CASE raising issues involving possible non-compliance with the FLSA, the Court finds that as a matter of proof, as distinguished from a matter of pleading, petitioners' claims that implementation of the Governor's order will actually result in employees formerly considered to be exempt from the Act's provisions working overtime within the meaning of the Act during a furlough week, and that the State will not comply with the Act with regard to employees who do so, are entirely hypothetical and speculative prior to implementation of the furloughs, and thus not ripe for decision.

As respondents point out, under applicable federal regulations, employees may be furloughed for budget-related reasons without affecting their exempt status, except for the workweek in which the furlough occurs.[12] The viability of petitioners' FLSA claims therefore depends upon proof that there will be, as a matter of fact, employees who work more than 40 hours during a furlough week. At this point, before the furlough actually has been implemented, there is no evidence before the Court regarding any employee actually doing this, let alone any evidence that this will be the case with large numbers of state employees. Petitioners' allegations that this will happen are merely hypothetical.

Similarly, the evidence that petitioner CASE has submitted demonstrating that the State's payroll system is antiquated and lacks the flexibility and reliability to be able to cope with the kind of week-to-week changes in an employee's exempt status that will occur when furloughs are implemented[13], is not necessarily proof that the State will not be able to cope with paying overtime pay to those to whom it is entitled. Once again, petitioners' proposition that the FLSA will be violated depends upon proof that employees actually will be entitled to overtime, and that there will be sufficient numbers of them that the State will not be able to comply with the FLSA. Such proof is lacking at this point.

Finally, even if petitioners were able to prove that the State was likely to fail to comply with the FLSA with regard to some number of state employees, it would not necessarily follow that they would be entitled to the relief they seek, which is the invalidation of the furlough order itself. Any actual violation of the FLSA would give rise to remedies arising under the FLSA, i.e., for recovery of the unpaid overtime compensation[14], but the failure to comply with the FLSA in that situation would be a separate issue from the validity of the furlough. Notwithstanding this Court's ruling upholding the Governor's order, any affected employee retains his or her rights

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[11] At oral argument, counsel for petitioner SEIU raised the contention that the Governor's order amounted to an unconstitutional impairment of contracts. This contention was not raised in any of the petitions, and was not briefed by the parties. Petitioner SEIU did cite several out-of-state cases in its reply brief in which government employee furloughs were challenged on this basis. Those cases were cited, however, for the proposition that a furlough is equivalent to a reduction in employee salary, and not in support of the contention that the Governor's action impaired the petitioner's contracts with the State. Because such contention was not raised by the petitions or briefed by the parties, the Court makes no finding on it.

[12] See, Title 29, Code of Federal Regulations, section 541.710.

[13] See, Declaration of Don Scheppmann, chief of Personnel/Payroll Services Division of the Office of the California State Controller, dated October 14, 2008 and filed in the case entitled *David A. Gilb, California Department of Personnel Administration v. John Chiang, Office of State Controller, et al.*, which is pending in the United States District Court for the Eastern District of California, attached to CASE's opposition to respondents' demurrer as Exhibit A.

[14] See, e.g., 29 U.S.C. Section 216.

and remedies under FLSA, and the Court's ruling that petitioners have not proven an actual violation of the FLSA at this point does not preclude them, or their individual members, from exercising those remedies once an actual violation can be proven. Thus, FLSA compliance issues, hypothetical or otherwise, do not serve as a basis for overturning the Governor's Executive Order regarding furloughs.

The Court therefore finds in favor of defendants (respondents) on the SEIU and CASE complaints for declaratory relief regarding alleged non-compliance with the FLSA.

A final issue remains with regard to the State Controller. As noted in footnote 1 above, the Controller, although named as a respondent/defendant, has taken a position in these actions in alignment with the petitioners, specifically stating that his office "...has no intention of implementing the reduction in pay as contemplated in the Governor's Order, unless determined otherwise by a court of law."[15] In *Tirapelle v. Davis* (1993) 20 Cal. App. 4th 1317, the Third District Court of Appeal held that the Controller may not refuse to implement an executive action affecting state employees' pay that is authorized by law. In this case, the Court has ruled that the provisions of the Governor's Executive Order reducing the work hours of state employees through a furlough, and thereby affecting their pay during the furlough weeks, is authorized by law. The Controller therefore lacks authority to refuse to implement the Governor's Executive Order. The Court's judgment in this matter therefore shall include an order directing the Controller to take all necessary and appropriate steps to implement the provisions of the Governor's Executive Order imposing furloughs on state employees, including the incidental reduction in such employees' pay.

At the close of the hearing, counsel for CASE made an oral motion on the record that the Court stay its ruling pending appellate review. The Court denied the motion.

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Counsel for respondents is directed to prepare the orders and judgments in accordance with this ruling under the procedures set forth in Rule of Court 3.1312.

[15] See, Controller's Opposition to Respondents' Demurrer, p. 2:15-17.

B

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

DATE/TIME	**: 01/30/09**	**DEPT. NO**	**: 19**
JUDGE	**: P. MARLETTE**	**CLERK**	**: D. RIOS, SR.**
REPORTER	**: none**	**BAILIFF**	**: none**
		PRESENT:	

Professional Engineers in California Government;\California Association of Professional Scientists,
Plaintiff,

VS. Case No.: 2008-80000126

Arnold Schwarzenegger, Governor, State of California\Department of Personnel Administration\State Controller John Chiang\and Does 1 through 20 inclusive,
Defendant.

Nature of Proceedings: Amended Minute Order

The Court is issuing a revised version of its final ruling in these matters. The revision makes no substantive changes in the ruling, but corrects an editing error in the last sentence of the third paragraph from the end of the ruling, regarding the State Controller, by deleting the word "incidental". The revised final ruling which follows shall be the final ruling of the Court.

PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT, et al., v. GOVERNOR ARNOLD SCHWARZENEGGER, et al., Case No. 2008-80000126;

CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW JUDGES AND HEARING OFFICERS IN STATE EMPLOYMENT, v. GOVERNOR ARNOLD SCHWARZENEGGER, et al., Case No. 2009-80000134;

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000, v. GOVERNOR ARNOLD SCHWARZENEGGER, et al., Case No. 2009-80000135.

The following shall constitute the Court's final rulings on the demurrers and petitions for writ of mandate and complaints for declaratory relief in the above-captioned matters:

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DATE	**: 01/30/09**
CASE NO.	**: 2008-80000126**
CASE TITLE	**: PECG; CAPS v. SCHWARZENEGGER**

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO

BY: D. RIOS, SR.,
Deputy Clerk

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Introduction and Background:

On December 19, 2008, in a response to the current State budget crisis, Governor Arnold Schwarzenegger issued Executive Order S-16-08. As relevant to this action, the Executive Order directed the Department of Personnel Administration, effective February 1, 2009 through June 30, 2010, to adopt a plan to implement a furlough of represented state employees and supervisors for two days per month, and to adopt a plan to implement an equivalent furlough or salary reduction for all state managers, including exempt state employees.

Several organizations representing state employees affected by the Executive Order have filed three separate petitions for writ of mandate and complaints for declaratory relief challenging the provisions of the Order imposing the furloughs, and seeking to overturn them.

The first such action, Case No. 2008-80000126, was filed by petitioners Professional Engineers in California Government ("PECG") and California Association of Professional Scientists ("CAPS") on December 22, 2008. That action initially was assigned to Department 33 of this Court, Judge Lloyd Connelly, presiding; it was reassigned to this Department after respondents filed a peremptory challenge to Judge Connelly pursuant to Code of Civil Procedure section 170.6 on January 7, 2009.

The second such action, Case No. 2009-80000134, was filed by petitioner California Attorneys, Administrative Law Judges and Hearing Officers in State Employment ("CASE") on January 5, 2009. That action was assigned to Department 33 of this Court, Judge Lloyd Connelly, presiding. Petitioner simultaneously filed a Notice of Related Case in that action, stating that it was related to Case No. 2008-80000126.

The third such action, Case No. 2009-80000135, was filed by petitioner Service Employees International Union, Local 1000 ("SEIU"), on January 7, 2009. The action was assigned to Department 29 of this Court, Judge Timothy M. Frawley, presiding. Petitioner simultaneously filed a Notice of Related Case in that action, stating that it was related to Cases Nos. 2008-80000126 and 2008-80000134

On January 9, 2009, the Court heard simultaneous ex parte applications by the petitioners and respondents in Case No. 2008-80000126 for orders shortening time that would have the effect of setting a hearing on respondents' demurrer to the petition and the hearing on the merits of the petition itself for a date prior to February 1, 2009, when the furloughs would go into effect.

At the hearing on January 9, 2009, counsel for the petitioners in Cases Nos. 2009-80000134 and 2009-80000135 appeared and stipulated on the record that those cases would be treated as related to Case No. 2008-

80000126, and that those cases would be transferred to this Department for hearing pursuant to Rule of Court 3.300(h)(1)(a). Counsel for respondents in Case No. 2008-80000126 also stated on the record that he represented the respondents in one of the other two cases, and most likely would represent the respondents in the other (although at that time, the petition had not formally been served on the respondents), and also stipulated on the record that the three cases would be heard in this Department as provided above. The parties further agreed to a briefing schedule and to a combined hearing on the respondents' demurrers to, and the merits of, the three petitions. The parties to all three actions have filed their briefs and other papers according to the agreed-upon schedule and the Court heard oral argument on the matter on Thursday, January 29, 2009.

On January 12, 2009, a fourth action was filed challenging the Governor's Executive Order, entitled *California Correctional Peace Officers Association v. Governor Arnold Schwarzenegger, et al.*, Case No. 2008-80000137. The Court issued an order finding that case to be related to the three cases captioned above and further ordered that case assigned to this Department. That case has been set for hearing on Friday, February 5, 2009.

Ruling on Preliminary Evidentiary Issues:

Respondents[1] have made two requests for judicial notice, filed January 9, 2009 and January 13, 2009, along with an Amended Request for Judicial Notice on January 23, 2009 in response to the Court's order directing them to submit complete copies of the Memoranda of Understanding ("MOUs") involved in these actions. No objections to the requests have been filed. The Court has reviewed the requests and the documents attached thereto and finds that all such documents are proper subjects for judicial notice. Respondents' requests for judicial notice are therefore granted.

Respondents' evidentiary objection to the Declaration of Peter Flores, Jr. is overruled on the ground that the lack of a signature on the declaration has been remedied by the filing of an amended declaration, unchanged in substance, which bears Mr. Flores' signature.

Ruling on Respondents' Demurrers to the Petitions:

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[1] In using the terms "respondents" or "defendants" in this ruling, the Court is referring to Governor Arnold Schwarzenegger and the Department of Personnel Administration. Although State Controller John Chiang also has been named as a respondent in these actions, the Controller has filed an Opposition to the Respondents'/Defendants' Demurrer stating that his interests are actually aligned with the petitioners and that, but for the short time frame, he would have filed a formal motion to realign the parties, seeking to be redesignated as a petitioner/plaintiff. The Controller's position in these actions will be discussed further below. In this ruling, the Court also has treated the terms "the Governor", "the Department of Personnel Administration" (or "the department" or "DPA") and "the State" as being essentially interchangeable.

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CASE TITLE: PECG; CAPS v. SCHWARZENEGGER
PROCEEDINGS: Amended Minute Order

Respondents' demurrers are overruled on the following basis:

The petitions and complaints allege generally that the provisions of the Governor's Executive Order S-16-08 that implement a furlough of represented state employees and supervisors for two days per month, and an equivalent furlough or salary reduction for state managers, effective February 1, 2009 through June 30, 2010, are invalid in that such action on the part of the Governor is not authorized by law, and moreover is forbidden by certain provisions of law, in particular, Government Code section 19826(b).

The Court finds that such allegations are sufficient to state a cause of action for issuance of a writ of mandate or for declaratory relief, regardless of whether Government Code section 19826(b) is superseded by the terms of the MOUs petitioners have entered into with the State (as respondents argue), because the petitions and complaints allege, in essence, that the Governor lacks the positive authority to make the challenged order in the first instance, irrespective of any statutory prohibition that may or may not apply. The allegation that the Governor lacks any authority to make the challenged order is sufficient to state a cause of action on its own.

The Court further finds that the issue of the Governor's authority to make the challenged order is not an issue within the exclusive initial jurisdiction of the Public Employment Relations Board, because it involves issues of statutory interpretation and separation of powers between the Governor and the Legislature, which are matters properly within the jurisdiction of the courts, and not issues of unfair practices under the Ralph C. Dills Act, which are matters properly within the jurisdiction of the Board. (See, e.g., *California School Employees Association v. Azusa Unified School District* (1984) 152 Cal. App. 3rd 580, 592-593; *California Teachers' Association v. Livingston School District* (1990) 219 Cal. App. 3rd 1503, 1519.) Moreover, the petitions and complaints in effect allege that the Governor's Executive Order regarding an employee furlough violates the provisions of the petitioners' MOUs with the State governing wages and hours. The Board does not have the authority to enforce agreements between the parties. (Government Code section 3514.5(b); see also, *San Lorenzo Education Association v. Wilson* (1982) 32 Cal. 3rd 841.)

Moreover, even if this Court were to conclude that the Board did have jurisdiction over this matter, it would conclude that the normal policy reasons requiring parties to exhaust available administrative remedies do not apply in this case for many of the reasons stated by the Third District Court of Appeal in a case arising out of an earlier state budget crisis: namely, that the facts are undisputed, so there is no need for administrative development of the record; judicial intervention will not interfere with the expertise of the agency or create problems of judicial economy, given that the underlying issues are within the expertise of the courts and undoubtedly would be resolved ultimately by the courts even if initial jurisdiction were found in the Board; and, given that this case raises questions of first impression which most likely are bound for ultimate determination in the appellate courts, there is little concern of conflicting decisions between the Board and the courts. (See, *Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal. App. 4th 155, 168-169.)

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In addition, even if this Court were to conclude that the Board did have jurisdiction over this matter, it would conclude that exhaustion of administrative remedies by resort to the Board should be excused on the ground that requiring exhaustion under the particular circumstances of this case would cause both the State and its employees to suffer irreparable injury, again, for many of the reasons stated in the 1992 *Greene* case: specifically, that the extremely grave nature of the fiscal crisis faced by the state, and the urgent need for resolution of these issues in as expeditious a manner as possible, create a great potential for irreparable harm in the nature of layoffs of state employees, with a concomitant reduction in the nature of state services, all of which are amply demonstrated by the declarations and documents that have been filed by parties in this matter (many of them by respondents). Even if, as the Court of Appeal stated in the *Greene* case, there is a possibility that the Board could order the same relief that petitioners seek here, it is extremely unlikely that the entire process of Board adjudication followed by judicial review as provided by law would be completed in a sufficiently timely manner to address the immediate crisis. (See, *Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal. App. 4th 155, 170-171.)

Petitioners SEIU and CASE raise additional claims for declaratory relief regarding the effect of the furlough on the exempt status of employees under the federal Fair Labor Standards Act ("FLSA"). The SEIU complaint alleges that a significant number of its employees will be required to work in excess of 40 hours during furlough weeks, that such employees will no longer be considered exempt employees as a matter of law during those weeks, that such workers will be entitled to overtime pay during such weeks, and that respondents lack any mechanism or systems in place to move employees from exempt to non-exempt status from week-to-week, with the result being that such employees will not receive the overtime pay to which they are entitled under the FLSA. Such facts are sufficient to state a cause of action in declaratory relief based on the theory that respondents are not willing and able to comply with their obligations under the FLSA, at least for the purpose of withstanding a demurrer. Respondents' contention that the complaint on its face shows that petitioner's FLSA claim is not ripe for review, and seeks only an advisory opinion, because there is no allegation that respondents actually have failed to pay any overtime that is due, is unpersuasive.[2]

The CASE complaint alleges the same facts regarding the effect of the furloughs on its employees' exempt status under the FLSA. The complaint lacks the specific allegations present in the SEIU complaint regarding respondents' lack of willingness and ability to comply with the FLSA, but alleges in general terms that respondents' actions will result in denial of the protection of the laws regarding overtime compensation. In essence, this complaint is identical in substance to the SEIU complaint; the Court concludes that it also states a cause of action for declaratory relief.

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[2] This is, of course, distinct from the issue of whether there is any proof tending to demonstrate that FLSA violations actually will occur. This issue is dealt with in the Court's ruling on the merits, below.

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Respondents' demurrers are therefore overruled.

Ruling on the Petitions and Complaints:

The petitions for writ of mandate and complaints for declaratory relief challenging the provisions of the Governor's Executive Order imposing furloughs on state employees are based on twin contentions: that the Governor lacks any authority, statutory or otherwise, to take such action; and that applicable statutory law expressly forbids him from taking such action. For the reasons stated below, the Court finds that these contentions are unpersuasive.

The facts regarding the implementation of the furlough are essentially undisputed, as is the fact that the State faces an extremely urgent fiscal crisis.[3] According to documents submitted to the Court, the Governor, through the Department of Personnel Administration, has developed a furlough plan that will result in the closing of general government operations on the first and third Fridays of each month, beginning on Friday, February 6, 2009. The unpaid furlough days are not work days and employees shall not report to work. For state operations that cannot close, a "self-directed" furlough will be used that will result in state employees either taking two furlough days each month on days chosen by the employees and approved by their supervisors, or accruing two furlough days per month to be taken when feasible. Salaries will be adjusted to reflect the unpaid furlough days, but benefits will remain the same.[4]

The Governor's Executive Order thus reduces the normal work hours of state employees for a temporary period due to the state's current fiscal crisis. The emergency measure will result in an accompanying deduction from pay for the hours not worked, but the order does not change established salary ranges. The Governor's authority for this action is found in statutes in the Government Code and in the employment contracts of the unions challenging the order.

The Governor has the statutory authority to reduce the hours of state employees pursuant to Government Code section 19851 and 19849.

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[3] There do appear to be disputes of fact over whether the implementation of the furlough will result in violations of the federal FLSA. This issue will be discussed separately below.

[4] See, Memorandum dated January 9, 2009 from David A. Gilb, Director of the Department of Personnel Administration, to Agency Secretaries, et al., regarding "State Employee Furlough per Governor's Executive Order S-16-08", attached to the Amended Declaration of Peter Flores, Jr. as Exhibit H.

Section 19851(a) provides: "It is the policy of the state that the workweek of the state employee shall be 40 hours, and the workday of the state employee 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."

Section 19849(a) provides that the Department of Personnel Administration "...shall adopt rules governing hours of work and overtime compensation and the keeping of records related thereto, including time and attendance records. Each appointing power shall administer and enforce such rules."

The Court finds that these two statutes, taken together, provide the Governor with authority to reduce the workweek of state employees to meet the needs of state agencies, and to do so by adopting a rule. The provisions of the Executive Order regarding the furlough are a rule in that they establish a standard of general application to state employees. Under the circumstances of the current fiscal crisis, the reduction in the workweek of state employees under the furlough order is indisputably related to the needs of the various state agencies, which, from the evidence respondents have submitted to the Court, run the imminent risk of running out of money and thus being unable to carry out their missions, if immediate action is not taken to reduce expenditures.

The Court further finds, on two separate bases, that the Governor has authority to reduce the work hours of the state employees represented by the petitioners in these actions pursuant to the terms of the MOUs the State entered into with the petitioner employee organizations, which remain in effect, although technically expired, pursuant to Government Code section 3517.8(a).

First, each of the petitioners' MOUs expressly incorporates the terms of sections 18949 and 19851 into the agreement between the parties[5], and the terms of the MOU do not conflict with these statutes, notwithstanding that the MOUs call for a normal work week of 40 hours. Thus, these provisions of law are not superseded by the MOUs, and the Governor retains the authority, pursuant to law and contract, to take any actions he would be permitted to take pursuant to Government Code sections 19849 and 19851 as described above.

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[5] See, Respondents' Request for Judicial Notice, filed January 9, 2009, Exhibit A, p. 80 (PECG MOU); Exhibit B, p. 75 (CAPS MOU); Respondents' Amended Request for Judicial Notice, filed January 23, 2009, Exhibit A, p. 16 (CASE MOU); Exhibit B, p. 20 (SEIU MOU for Bargaining Unit 1); Exhibit C, p. 22 (SEIU MOU for Bargaining Unit 3); Exhibit D, p. 21 (SEIU MOU for Bargaining Unit 4); Exhibit E, p. 21 (SEIU MOU for Bargaining Unit 11); Exhibit F, pp. 22-23 (SEIU MOU for Bargaining Unit 14); Exhibit G, p. 21 (SEIU MOU for Bargaining Unit 15); Exhibit H, p. 21 (SEIU MOU for Bargaining Unit 17); Exhibit I, p. 21 (SEIU MOU for Bargaining Unit 20); Exhibit J, p. 19 (SEIU MOU for Bargaining Unit 21). In addition, the PECG MOU provides, in Article 17.1, which appears under the heading "State Rights", that: "All the functions, rights, powers and authority not specifically abridged by this MOU are retained by the employer." (See, Respondents' Request for Judicial Notice, filed January 9, 2009, Exhibit A, p. 72.)

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Second, the specific terms of certain of the petitioners' MOUs expressly permit the State either to reduce hours in case of lack of funds or to take all necessary action to carry out its mission in emergencies.

For example, Article 3.1.B of the MOU between the State and petitioner CASE, which appears under the heading "State Rights", provides that "[t]o the extent consistent with law and this MOU, the rights of the State include, but are not limited to, the exclusive right to...relieve its employees from duty because of lack of work, lack of funds, or for other legitimate reasons...[and to] take all necessary actions to carry out its mission in emergencies."[6]

Article 10.3 of the CASE MOU, which appears under the heading "Layoff", further provides: "The State may propose to reduce the number of hours an employee works as an alternative to layoff. Prior to 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."[7]

Article 12.1.B of the CAPS MOU, which appears under the heading "State Rights", provides that: "Consistent with this Agreement, the rights of the State shall include, but not be limited to, the right...to take all necessary action to carry out its mission in emergencies."[8]

Article 4.B of each of the SEIU MOUs similarly provides that: "Consistent with this Contract, the rights of the State shall include, but not be limited to, the right...to take all necessary action to carry out its mission in emergencies."[9]

The Court finds that the current fiscal emergency, which is amply documented in the evidence respondents have submitted, authorizes the Governor to reduce the work hours of state employees under these

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[6] See, respondents' Amended Request for Judicial Notice, filed January 23, 2009, Exhibit A, p. 11.
[7] See, Respondents' Amended Request for Judicial Notice, filed January 23, 2009, Exhibit A, p. 59.
[8] See, Respondents' Request for Judicial Notice, filed January 9, 2009, Exhibit B, p. 71.
[9] See, Respondents' Amended Request for Judicial Notice, filed January 23, 2009, Exhibit B, p. 16 (Bargaining Unit 1); Exhibit C, p. 17 (Bargaining Unit 3); Exhibit D, p. 17 (Bargaining Unit 4); Exhibit E, p. 17 (Bargaining Unit 11); Exhibit F, p. 18 (Bargaining Unit 14); Exhibit G, p. 17 (Bargaining Unit 15); Exhibit H, p. 17 (Bargaining Unit 17); Exhibit I, p. 16 (Bargaining Unit 20); Exhibit J, p. 15 (Bargaining Unit 21).

cited terms of the various MOUs. The nature of the fiscal emergency is such that the state employee furloughs imposed by the Governor's Executive Order are both necessary and reasonable under the circumstances.[10]

The existence of the current emergency also authorized the Governor to make his order without first meeting and conferring with state employee organizations pursuant to Government Code section 3516.5.

The Court accordingly finds that both statutory law and the provisions of the petitioners' MOUs authorized the Governor to reduce the work hours of state employees through a furlough in the current fiscal emergency.

The Court finds that Government Code section 19826(b) does not preclude the Governor from taking such action.

Section 19826(b) states that the Department of Personnel Administration 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 Government Code section 3520.5, which is the case for all of the petitioners in these actions.

This case, however, does not involve the establishment, adjustment or recommendation of a salary range for represented state employees. This case involves a temporary reduction in the hours worked by certain state employees, which will result in a loss of pay for the hours not worked. The order does not change established salary ranges at all: state employees will continue to receive their normal pay according to established ranges in weeks that do not include a furlough day. In essence, state employees are subject to a temporary deduction from their total pay under the established ranges, and not to being paid under a new or adjusted salary range.

The present case is therefore distinguishable from *Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal. App. 4th 155, which involved an across-the-board salary cut of 5% with no furlough or reduction in work hours. *Greene* also involved the issue of what the State was entitled to do in the bargaining process under the Ralph C. Dills Act, specifically, whether the State could unilaterally impose the salary cut as part of its "last, best and final offer" when it was officially at impasse with the state employee organizations. The present case does not involve bargaining issues in that the parties are not at impasse, and petitioners' pleadings have raised issues regarding the Governor's positive authority to make the challenged

[10] At oral argument on these matters, counsel for CASE and PECG argued that many of their members work in so-called "special fund" agencies, and that the Governor's order, which was designed to deal with a looming General Fund deficit, was not reasonably related to the fiscal emergency insofar as it orders furloughs for those employees. (CASE also raised this issue in its reply brief.) This contention was not raised in any of the petitions or complaints for declaratory relief, and petitioners did not submit any evidence to support it. The Court therefore makes no findings on it.

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order rather than issues regarding any failure to comply with his collective bargaining obligations under the Dills Act.

Moreover, the *Greene* case did not address any provisions of the employee organizations' MOUs that might have authorized the salary reduction in that case, on the basis of an emergency or otherwise, because the case technically involved a situation in which there was an absence of a MOU, as is the case when an existing MOU has expired and the parties have bargained to impasse. (See, *Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal. App. 4th 155, 174.) As noted above, the petitioners' MOUs in this case remain in effect pursuant to Government Code section 3517.8(a), and contain provisions authorizing the Governor's order reducing work hours. The *Greene* case therefore is not controlling here.

The Court accordingly rules that, with regard to the issues raised by all petitioners regarding the Governor's authority to make the challenged order, the petitions for writ of mandate are denied and judgment shall be entered for the defendants (respondents) on the complaints for declaratory relief. This ruling applies to both state employees represented by all of the petitioners under the Dills Act and to those state employees represented by petitioners PECG and CAPS who are excluded from the Dills Act by law, as the authorities on which the Court has relied in finding that the Governor has the authority to take the challenged action apply to both classes of employees.[11]

With regard to the causes of action for declaratory relief raised by SEIU and CASE raising issues involving possible non-compliance with the FLSA, the Court finds that as a matter of proof, as distinguished from a matter of pleading, petitioners' claims that implementation of the Governor's order will actually result in employees formerly considered to be exempt from the Act's provisions working overtime within the meaning of the Act during a furlough week, and that the State will not comply with the Act with regard to employees who do so, are entirely hypothetical and speculative prior to implementation of the furloughs, and thus not ripe for decision.

As respondents point out, under applicable federal regulations, employees may be furloughed for budget-related reasons without affecting their exempt status, except for the workweek in which the furlough occurs.[12] The viability of petitioners' FLSA claims therefore depends upon proof that there will be, as a matter of fact,

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[11] At oral argument, counsel for petitioner SEIU raised the contention that the Governor's order amounted to an unconstitutional impairment of contracts. This contention was not raised in any of the petitions, and was not briefed by the parties. Petitioner SEIU did cite several out-of-state cases in its reply brief in which government employee furloughs were challenged on this basis. Those cases were cited, however, for the proposition that a furlough is equivalent to a reduction in employee salary, and not in support of the contention that the Governor's action impaired the petitioner's contracts with the State. Because such contention was not raised by the petitions or briefed by the parties, the Court makes no finding on it.

[12] See, Title 29, Code of Federal Regulations, section 541.710.

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO

BY: D. RIOS, SR.,
Deputy Clerk

employees who work more than 40 hours during a furlough week. At this point, before the furlough actually has been implemented, there is no evidence before the Court regarding any employee actually doing this, let alone any evidence that this will be the case with large numbers of state employees. Petitioners' allegations that this will happen are merely hypothetical.

Similarly, the evidence that petitioner CASE has submitted demonstrating that the State's payroll system is antiquated and lacks the flexibility and reliability to be able to cope with the kind of week-to-week changes in an employee's exempt status that will occur when furloughs are implemented[13], is not necessarily proof that the State will not be able to cope with paying overtime pay to those to whom it is entitled. Once again, petitioners' proposition that the FLSA will be violated depends upon proof that employees actually will be entitled to overtime, and that there will be sufficient numbers of them that the State will not be able to comply with the FLSA. Such proof is lacking at this point.

Finally, even if petitioners were able to prove that the State was likely to fail to comply with the FLSA with regard to some number of state employees, it would not necessarily follow that they would be entitled to the relief they seek, which is the invalidation of the furlough order itself. Any actual violation of the FLSA would give rise to remedies arising under the FLSA, i.e., for recovery of the unpaid overtime compensation[14], but the failure to comply with the FLSA in that situation would be a separate issue from the validity of the furlough. Notwithstanding this Court's ruling upholding the Governor's order, any affected employee retains his or her rights and remedies under FLSA, and the Court's ruling that petitioners have not proven an actual violation of the FLSA at this point does not preclude them, or their individual members, from exercising those remedies once an actual violation can be proven. Thus, FLSA compliance issues, hypothetical or otherwise, do not serve as a basis for overturning the Governor's Executive Order regarding furloughs.

The Court therefore finds in favor of defendants (respondents) on the SEIU and CASE complaints for declaratory relief regarding alleged non-compliance with the FLSA.

A final issue remains with regard to the State Controller. As noted in footnote 1 above, the Controller, although named as a respondent/defendant, has taken a position in these actions in alignment with the petitioners, specifically stating that his office "...has no intention of implementing the reduction in pay as contemplated in the Governor's Order, unless determined otherwise by a court of law."[15] In *Tirapelle v. Davis*

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[13] See, Declaration of Don Scheppmann, chief of Personnel/Payroll Services Division of the Office of the California State Controller, dated October 14, 2008 and filed in the case entitled *David A. Gilb, California Department of Personnel Administration v. John Chiang, Office of State Controller, et al.*, which is pending in the United States District Court for the Eastern District of California, attached to CASE's opposition to respondents' demurrer as Exhibit A.

[14] See, e.g., 29 U.S.C. Section 216.

[15] See, Controller's Opposition to Respondents' Demurrer, p. 2:15-17.

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SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO

BY: D. RIOS, SR.,
Deputy Clerk

(1993) 20 Cal. App. 4th 1317, the Third District Court of Appeal held that the Controller may not refuse to implement an executive action affecting state employees' pay that is authorized by law. In this case, the Court has ruled that the provisions of the Governor's Executive Order reducing the work hours of state employees through a furlough, and thereby affecting their pay during the furlough weeks, is authorized by law. The Controller therefore lacks authority to refuse to implement the Governor's Executive Order. The Court's judgment in this matter therefore shall include an order directing the Controller to take all necessary and appropriate steps to implement the provisions of the Governor's Executive Order imposing furloughs on state employees, including the reduction in such employees' pay.

At the close of the hearing, counsel for CASE made an oral motion on the record that the Court stay its ruling pending appellate review. The Court denied the motion.

//

Counsel for respondents is directed to prepare the orders and judgments in accordance with this ruling under the procedures set forth in Rule of Court 3.1312.

Certificate of Service by Mailing attached.

BOOK : 19
PAGE : 2008-80000126-13009
DATE : 01/30/09
CASE NO. : 2008-80000126
CASE TITLE : PECG; CAPS v. SCHWARZENEGGER

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SACRAMENTO

BY: D. RIOS, SR.,
Deputy Clerk

CASE NUMBER: 2008-80000126 **DEPARTMENT: 19**
CASE TITLE: PECG; CAPS v. SCHWARZENEGGER
PROCEEDINGS: Amended Minute Order

CERTIFICATE OF SERVICE BY MAILING
C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above entitled notice in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

Gerald James
Attorney at Law
660 J Street, Suite 445
Sacramento, CA 95814

David W. Tyra
KRONICK, MOSKOVITZ, TIEDEMANN
& GIRARD
400 Capitol Mall, 7th Floor
Sacramento, CA 95814

Patrick Whalen
ELLISON WILSON ADVOCACY, LLC
1725 Capitol Avenue
Sacramento, CA 95814

Brooke D. Pierman, Staff Attorney
S.E.I.U.
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J. Felix DeLa Torre, Staff Attorney
S.E.I.U.
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Will M. Yamada
Department of Personnel Administration
Legal Office
1515 S Street, No. Bldg., Ste. 400
Sacramento, CA 95811

RICHARD CHIVARO, Chief Counsel
Ronald V. Placet,
Sr. Staff Counsel
Office of the State Controller
300 Capitol Mall, Ste 1850
Sacramento, CA 95814

Dated: 1/30/09

Superior Court of California,
County of Sacramento

By: D. RIOS, SR.,
Deputy Clerk

BOOK : 19
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CASE NO. : 2008-80000126
CASE TITLE : PECG; CAPS v. SCHWARZENEGGER

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO

BY: D. RIOS, SR.,
Deputy Clerk

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C

PAUL E. HARRIS, III, Counsel (SBN 180265)
ANNE M. GIESE, Counsel (SBN 143934)
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1000
1808 14th Street
Sacramento, CA 95814
Telephone: (916) 554-1279
Facsimile: (916) 554-1292

Attorneys for Petitioner/Plaintiff
SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1000

FILED
ENDORSED
FEB - 5 2009
By N. WALLACE
Deputy Clerk

65
100

SEIU LOCAL 1000
1808 14th Street, Bldg. 1
Sacramento, California 95814
Telephone: (916) 554-1279

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SACRAMENTO

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,

Petitioners/Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, as Governor, State of California; DEPARTMENT OF PERSONNEL ADMINISTRATION; JOHN CHIANG, as State Controller, and DOES 1 THROUGH 20, INCLUSIVE,

Respondents/Defendants.

CASE No. 34-2009-80000135

NOTICE OF APPEAL

Dept: 19
Judge: Hon. Patrick Marlette

TO THE CLERK OF THE SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SACRAMENTO:

NOTICE IS HEREBY GIVEN THAT Petitioner and Appellant SEIU Local 1000 appeals to the Court of Appeals of the State of California, Third Appellate District, from the court's final ruling denying writs of mandate/complaints for declaratory relief and Petitioner's oral request for stay entered on or about January 29, 2009, from the whole of such ruling and order.

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///

///

60023

The Court issued the final ruling denying the writ of mandate/complaint for declaratory relief on January 30, 2009.

Dated: February 4, 2009

SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 1000

By _____
ANNE M. GIESE
Attorneys for SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000

SEIU LOCAL 1000
1808 14th Street, Bldg. 1
Sacramento, California 95814
Telephone: (916) 554-1279

DECLARATION OF SERVICE

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

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 February 5, 2009, I served the following:

NOTICE OF APPEAL

[X] (BY ELECTRONIC SERVICE) Based upon a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[SEE ATTACHED]

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 February 5, 2009, at Sacramento, California.

MARY A. MEDINA

SEIU Local 1000
1808 14th Street
Sacramento, California 95811
Telephone: (916) 554-1279

ATTACHMENT TO DECLARATION OF SERVICE

GERALD JAMES
660 J Street, Ste. 445
Sacramento, CA 95814
Tel: (916) 446-0400 Fax: (916) 446-0489
e-mail: *gjames@blanningandbaker.com*

Attorneys for Petitioners/Plaintiffs, *PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT and CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS*

PATRICK J. WHALEN, General Counsel
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Tel: (916) 448-2187 Fax: (916) 448-5346
e-mail: counsel@calattorneys.org

Attorneys for Petitioner/Plaintiff, *California Attorneys, Administrative Law Judges, And Hearing Officers in State Employment*

DAVID W. TYRA
KRONICK, MOSKOVITZ, TIEDMAN & GIRARD
400 Capitol Mall, 27th Floor
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Tel: (916) 321-4500 Fax: (916) 321-4555
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Attorneys for Defendants/Respondents, *ARNOLD SCHWARZENEGGER, Governor; STATE OF CALIFORNIA; and DEPARTMENT OF PERSONNEL ADMINISTRATION*

WILL M. YAMADA
Department of Personnel Administration
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Sacramento, CA 95814
Tel: (916) 324-0512 Fax: (916) 323-4723
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Attorneys for Defendants/Respondents, *ARNOLD SCHWARZENEGGER, Governor; STATE OF CALIFORNIA; and DEPARTMENT OF PERSONNEL ADMINISTRATION*

RICK CHIVARO, Chief Counsel
RONALD V. PLACET
Office of the State Controller
300 Capitol Mall, Ste. 1850
Sacramento, CA 95814
Tel: (916) 445-3028 Fax: (916) 322-1220
e-mail: rchivaro@sco.ca.gov

Attorneys for Respondents/Defendants, *John Chiang, Office of the State Controller*

JOHN CHIANG
California State Controller

February 3, 2009

The Honorable Patrick Marlette
Superior Court of California
County of Sacramento
Gordon D. Schaber Courthouse
Department 19
720 Ninth Street
Sacramento, CA 95814

Re: *Professional Engineers in California Government, et al. v. Governor Arnold Schwarzenegger, et al.*, Case No. 2008-80000126

California Attorneys, Administrative Law Judges and Hearing Officers in State Employment v. Governor Arnold Schwarzenegger, et al., Case No. 2009-80000134

Service Employees International Union, Local 1000 v. Governor Arnold Schwarzenegger, et al., Case No. 2009-80000135

Dear Judge Marlette:

This office has received the enclosed letters from the independently elected Constitutional Officers and other elected state-wide officials including the Lieutenant Governor, Office of the Attorney General, Secretary of State, State Treasurer, Superintendent of Public Instruction, and Insurance Commissioner regarding the applicability of the recent ruling in the above-referenced cases to employees of those offices.

Prior to the ruling, the Governor and his staff contacted the constitutional officers and informed them that their offices were not affected by the executive order inasmuch as those officers were not under the direct authority of the Governor. Based on this contact, none of the constitutional officers sought to challenge the executive order. The specific terms of the executive order state that it only applies to state employees under the Governor's direct authority. However, since your decision was issued, the Governor's office has construed the ruling in its broadest possible sense to apply to all state employees and, basing its decision on this reading, has now notified the independent constitutional officers and state-wide officials that their employees are impacted by the ruling.

300 Capitol Mall, Suite 1850, Sacramento, CA 95814 ♦ P.O. Box 942850, Sacramento, CA 94250
Phone: (916) 445-2636 ♦ Fax: (916) 322-1220

The issue of whether independently elected constitutional and state-wide officers are subject to a Governor's executive order and/or whether the Governor's executive order applies to constitutional and state-wide officers, their agencies and staff was not an issue before the court and, therefore, was never pled, briefed, litigated or argued by any of the parties. Therefore, the State Controller's Office respectfully requests clarification of the breadth of the court's ruling. Specifically, we ask that the court clarify whether the ruling was intended to confer broad authority in the Governor to cover issues that were not properly before the court. Given the fact that the Governor intends to implement his order on February 6, 2009, your prompt response would be appreciated.

Sincerely,

RICHARD J. CHIVARO
Chief Counsel

RONALD V. PLACET
Senior Staff Counsel

RJC/RVP/ac

Enclosures
Letter from Lieutenant Governor John Garamendi
Letter from Secretary of State Debra Bowen
Letter from California State Treasurer Bill Lockyer
Letter from Superintendent of Public Instruction Jack O'Connell
Letter from Insurance Commissioner Steve Poizner
Letter from Chief Deputy Attorney General James M. Humes

cc: David W. Tyra, Kronick, Moskovitz, Tiedemann & Girard

Will M. Yamada, Personnel Relations Counsel,
Department of Personnel Administration

J. Felix De La Torre and Brook Pierman, SEIU Local 1000

Patrick Whalen, California Attorneys, Administrative Law Judges and
Hearing Officers in State Employment

Gerald James, Professional Engineers in California Government and
California Association of Professional Scientists

Gregg McLean Adam, Carroll, Burdick & McDonough

Professional Engineers in California Government, et al. v. Governor Arnold Schwarzenegger, et al.
Sacramento County Superior Court Case No. 2008-80000126

California Attorneys, Administrative Law Judges and Hearing Officers in State Employment v. Governor Arnold Schwarzenegger, et al.
Sacramento County Superior Court Case No. 2009-80000134

Service Employees International Union, Local 1000 v. Governor Arnold Schwarzenegger, et al.
Sacramento County Superior Court Case No. 2009-80000135

PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. At the time of service, I was at least 18 years of age, a United States citizen employed in the county where the mailing occurred, and not a party to the within action. My business address is 300 Capitol Mall, Suite 1850, Sacramento, CA 95814.

On February 3, 2009, I served the foregoing document entitled:

CONTROLLER'S LETTER TO JUDGE MARLETTE DATED FEBRUARY 3, 2009

on all interested parties in this action by placing a true and correct copy thereof enclosed in a sealed envelope, addressed as follows:

David W. Tyra
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814

Will M. Yamada, Personnel Relations Counsel
Department of Personnel Administration
1515 S Street, North Building, Suite 400
Sacramento, CA 95814

J. Felix De La Torre
Brook Pierman
SEIU Local 1000
1808 14th Street
Sacramento, CA 95814

Patrick Whalen
California Attorneys, Administrative Law Judges and Hearing Officers in State Employment
Law Office of Brooks Ellison
1725 Capitol Avenue
Sacramento, CA 95814

Gerald James
Professional Engineers in California Government and California Association of Professional Scientists
660 J Street, Suite 445
Sacramento, CA 95814

Gregg McLean Adam
Carroll, Burdick & Mcdonough LLP
44 Montgomery Street, Suite 400
San Francisco, CA 94104

[X] **BY MAIL**
I placed the envelope for collection and processing for mailing following this business's ordinary practice with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on February 3, 2009, at Sacramento, California.

Amber A. Camarena

LIEUTENANT GOVERNOR JOHN GARAMENDI

February 2, 2008

The Honorable John Chiang
State Controller
P.O. Box 942850
Sacramento, CA 94250-5872

Dear Controller Chiang:

I am writing to clarify my position with regard to employee furloughs affecting state constitutional offices, and to request that you not implement a furlough applying to employees under my direction. I respectfully maintain that the Governor does not have the power to mandate a furlough.

I understand these are extraordinary times. We are facing unprecedented economic challenges and there is no question that all state offices must share in making hard choices to cut costs and preserve cash. I have agreed to substantial cuts in my operating budget, including two consecutive 10% reductions this fiscal year, which more than offset savings from a furlough.

It is my responsibility to structure cost savings that preserve the integrity of my office.

Nothing in Judge Marlette's ruling could be construed to modify historical precedent which requires Constitutional officers to manage their budget and operations in a manner which will allow for the most effective discharge of their duties. This includes decisions relating to effective staffing requirements.

I appreciate your cooperation in this request, and will await the Court's direction.

Sincerely,

JOHN GARAMENDI
Lieutenant Governor

STATE CAPITOL, ROOM 1114, SACRAMENTO, CALIFORNIA 95814 • PHONE (916) 445-8994

Secretary of State
DEBRA BOWEN
State of California

February 2, 2009

The Honorable John Chiang
California State Controller
P.O. Box 942850
Sacramento, CA 94250-5872

Dear Mr. Chiang:

I write regarding Governor Schwarzenegger's direction to you following the January 29, 2009, Superior Court ruling concerning the Governor's ability to furlough certain state employees. I do not believe this ruling can legally be applied to state employees working at the Secretary of State's office, nor do I believe it is in California's best interests. I respectfully ask that you not apply the ruling to the employees under my control and direction.

I am committed to doing my part to address California's unprecedented budget situation. However, implementation of the Governor's Executive Order as written will interfere with my ability to provide services, such as filing corporate documents and accepting Uniform Commercial Code filings, that are critical to business and commercial activity in the state.

Moreover, reducing the number of employee hours spent now will result in overtime hours being spent later, thus costing taxpayers money rather than saving it. I support the Governor's overall goal of reducing state spending, which is why I reduced my 2008-09 General Fund budget by 10%. For 2009-10, I am committed to achieving savings equal to or greater than the amount of money the Governor seeks to achieve by furloughing people who work for the Secretary of State's office.

As you are aware, California's Constitutional officers were not a party to the Superior Court litigation because they were repeatedly told that the Governor believed he lacked authority over their employees.

Executive Order S-09-08, issued on July 31, 2008, recognized that Governor Schwarzenegger did not have the authority to impose the requirements on the state's Constitutional officers because they are not under his direct executive authority:

> "IT IS FURTHER REQUESTED that other entities of State government not under my direct executive authority, including the California Public Utilities Commission, the University of California, the California State University, California Community Colleges, constitutional officers, the legislative branch

> (including the Legislative Counsel Bureau), and judicial branch, assist in the implementation of this Order and implement similar mitigation measures that will help to preserve the State's cash supply during this budget impasse."

Similarly, Executive Order S-16-08, issued on December 19, 2008, explicitly omitted agencies not under the Governor's direct executive authority:

> "IT IS REQUESTED that other entities of State government not under my direct executive authority, including the California Public Utilities Commission, the University of California, the California State University, California Community Colleges, the legislative branch (including the Legislative Counsel Bureau), and judicial branch, implement similar or other mitigation measures to achieve budget and cash savings for the current and next fiscal year."

As recently as January 9, 2009, the Governor's own staff conceded in a telephone conference, that the Governor had no authority to apply Executive Order S-16-08 to the agencies of other Constitutional officers. They requested that the Constitutional officers implement the order voluntarily.

While the Superior Court's ruling upholds Executive Order S-16-08, it does not address the employees of California's other Constitutional officers because that issue was never raised during the litigation. I did not join the lawsuit filed against the Governor because I am not under his direct executive authority and his staff assured me and the other Constitutional officers that we were not subject to his order. Having thus ensured that I would have had no standing to challenge the order in court, the Governor cannot now use the decision of the Superior Court to require my staff to take unpaid furlough days.

If you have any questions about my position in this matter, or if you need further information, please contact me at (916) 653-7244.

Sincerely,

Debra Bowen
Secretary of State

DB:elg:pg

BILL LOCKYER
TREASURER
STATE OF CALIFORNIA

January 30, 2009

John Chiang
State Controller
P.O. Box 942850
Sacramento, CA 94250-5872

RE: State Employee Furlough per Governor's Executive Order S-16-08

Dear Mr. Chiang:

In light of the ruling issued by Judge Marlette yesterday, I am requesting that the State Controller's Office not implement the furlough order in connection with employees under my control and direction. It is my position that the Governor does not have the authority to unilaterally impose a furlough on the employees of the other constitutional officers without their consent and that there is nothing in Judge Marlette's ruling that deals with these issues, which were neither argued nor pled in his court. His order cannot be interpreted to authorize furloughs in the departments under the control and management of constitutional officers other than the Governor.

Government Code section 12302 provides the Treasurer with the exclusive authority, subject to the Civil Service Act, to appoint and fix the salaries of the employees necessary to carry out the duties of the office. In addition, as the office of a separately elected constitutional official, this office has been granted inherent powers and responsibilities and the authority to act independently within certain constraints. For instance, the Treasurer must act within the constraints of budget appropriations and legislative enactments. However, the Treasurer retains the authority to determine how best to carry out his duties without interference from other executive branch elected officials.

I would note that both in private conversations and in statements to the press, representatives of the Governor's Office have previously acknowledged and assured our offices that constitutional officers are not required to comply with Executive Order S-16-08. I do not see anything in Judge Marlette's ruling that would suggest that generally accepted principle to be overturned.

915 CAPITOL MALL, ROOM 110, SACRAMENTO, CALIFORNIA 95814 • (916) 653-2995 • FAX (916) 653-3125

As this matter progresses, we would certainly comply with an appellate court order upholding the Governor's Executive Order and applying it to the constitutional offices; any legislative action taken to impose furloughs on state employees; or agreements reached with state employee bargaining units that are subsequently ratified by the Legislature. However, at this time and as noted above, I am asking that the Controller's Office not implement the Executive Order with respect to employees under my control and direction.

Sincerely,

BILL LOCKYER
California State Treasurer

CALIFORNIA
DEPARTMENT OF
EDUCATION

JACK O'CONNELL
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

February 2, 2008

The Honorable John Chiang
State Controller
P.O. Box 942850
Sacramento, CA 94250-5872

Dear Controller Chiang:

I write in response to the Sacramento Superior Court's ruling upholding Governor Arnold Schwarzenegger's employee furlough plan, specifically, the Governor's recent directive to apply his plan to departments not under his auspices. I request that you not apply the furlough to employees under my control and direction, based on my belief that the Governor lacks the authority to unilaterally impose a furlough on state employees who work for an elected constitutional officer other than the Governor. The court proceedings did not address this issue, and the court's order cannot be read to allow or require that my employees be subjected to a furlough at the Governor's directive.

There is good reason why the court's order cannot be given such sweeping application. Until the court's ruling, representatives of the Governor's Office and the Department of Personnel Administration explicitly advised the various constitutional offices that they were not required to comply with Executive Order S-16-08. Instead, the Governor's representatives sought our commitment to achieving the Executive Order's primary objective of a ten percent reduction in General Fund expenditures. This approach is consistent with the position of elected constitutional officers as separately elected leaders charged with the duty to fulfill the obligations of their offices. The State Superintendent of Public Instruction (SSPI) must act within budgetary limitations and legislative enactments, but as an elected official, the SSPI retains inherent powers to determine the manner in which the duties of the office are carried out.

Under my direction, the California Department of Education will do its part to address the state's dire financial situation and achieve General Fund savings. My Department has frozen hiring and contracting, and substantially limited travel and other expenditures. All expenditures are being closely monitored and trimmed. However, reductions will be made by me in a thoughtful manner that preserves, where ever possible, our capacity to carry out vital programs. As an example, it makes no sense to drastically cut federally funded programs that provide meals to needy children, when the goal is a reduction in General Fund spending. In addition, the needs of students at

California's State Special Schools, which operate on a 24-hour basis, must be given careful consideration.

I remain hopeful that these difficult circumstances can be resolved without the imposition of unilateral furloughs for any state employee, and will follow the progress of further judicial proceedings, collective bargaining efforts, and legislative action. But at this time, for the reasons described above, I ask that the Controller's Office not implement Executive Order S-16-08 for the Department under my control and direction.

Sincerely,

JACK O'CONNELL

JO:gp

STEVE POIZNER
Insurance Commissioner

February 2, 2009

Honorable John Chiang
State Controller
300 Capitol Mall
Sacramento, CA 95814

Dear Controller Chiang:

The Governor's office has informed me that they intend to apply Judge Marlette's court ruling to the Department of Insurance as well as to the offices of the other independently-elected statewide officers. There is legal uncertainty as to the Governor's authority in this matter.

The court's ruling did not specifically address the question of whether the Governor's executive authority to order furloughs extends to other statewide offices. Therefore, I ask you to withhold implementation the ordered furloughs at the Department of Insurance until this matter is resolved.

Thank you for your immediate attention to this request.

Sincerely,

STEVE POIZNER
Insurance Commissioner

300 Capitol Mall, Suite 1700
Sacramento, California 95814
Phone (916) 492-3500 • Facsimile (916) 445-5280

STATE OF CALIFORNIA
OFFICE OF THE ATTORNEY GENERAL
JAMES M. HUMES
CHIEF DEPUTY ATTORNEY GENERAL

February 2, 2009

Honorable John Chiang
California State Controller
300 Capitol Mall, Suite 1850
Sacramento, CA 95814

RE: *Professional Engineers in California Government v. Schwarzenegger*
Sacramento Superior Court Case No. 34-2008-80000126-CU-WM-GDS

California Attorneys, Administrative Law Judges, etc. v. Schwarzenegger
Sacramento Superior Court Case No. 34-2009-800000134-CU-WM-GDS

Service Employees International Union, Local 1000 v. Schwarzenegger
Sacramento Superior Court Case No. 34-2009-80000135-CU-WM-GDS

Dear Mr. Chiang:

I understand that the Governor's Office has changed its position regarding the applicability of the Governor's furlough order on other constitutional officers. Before Judge Marlette's January 29, 2009 minute order, the Governor's Office encouraged, but did not require, other constitutional officers to comply with the furlough order. Accordingly, this office did not intervene in these cases. But emboldened by the minute order, the Governor's Office now informs us that it wants to apply the furlough order to other constitutional officers after all. Because we believe that the Governor's interpretation of the minute order is incorrect, and because we believe that the furlough order cannot be forced on other constitutional officers under these circumstances, we ask the Controller's Office to refrain from implementing the furloughs called for in Executive Order S-16-08 on our employees.

It appears that the Governor's Office is attempting to use the *absence* of any ruling addressing whether the Governor has authority to furlough employees of constitutional officers like the Attorney General as a ground to assert that authority. This tactic is improper for several reasons.

1300 I STREET • SUITE 1730 • SACRAMENTO, CALIFORNIA 95814 • PHONE (916) 324-5435 • FAX (916) 445-6749

To begin with, the question of whether the Governor has authority to furlough employees of the other constitutional officers was not before the court. As you know, the writ actions were each brought by unions asking the court for an order holding that the Governor's executive order requiring the furloughs is illegal. Thus, unions were trying to prove that you had a ministerial duty not to follow the Executive Order for the reasons set forth in their writ petitions. (*Sacramento County Fire Protection Dist. v. Sacramento County Assessment Appeals Bd. II* (1999) 75 Cal.App.4th 327, 331 [describing the requirements for a writ as "a clear, present (and usually ministerial) duty on the part of the respondent; [and] (2) a clear, present and beneficial right in the petitioner in the performance of that duty." (citation omitted)].) The court rejected the unions' position and intends to render a judgment denying the writ petitions. But that judgment, whenever it is signed, cannot be interpreted to address issues that were not before the court, much less to grant affirmative relief in favor of the Governor on those issues as if he had prosecuted his own petition for writ of mandate against you.

Nor can the Governor's authority to unilaterally impose a furlough on employees of the other constitutional officers be lightly implied from his more general authority. While a full briefing regarding the Governor's authority to issue executive orders is beyond the limited scope of this letter, our Supreme Court has noted, "[u]nlike the federal Constitution, the California Constitution . . . embodies a structure of divided executive power." (*Marine Forests Soc. v. California Coastal Com'n* (2005) 36 Cal.4th 1, 31; see also Cal. Const., art. V, § 11 [providing for the election of the Lieutenant Governor, Attorney General, Controller, Secretary of State, and Treasurer]; Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers* (2004) 51 UCLA L. Rev. 1079, 1113 ["the California Constitution explicitly and repeatedly creates a multiple executive. The Lieutenant Governor, Attorney General, Secretary of State, Treasurer, and Controller all are directly elected and do not answer to the Governor."] The Attorney General has a constitutional duty to ensure that the laws are uniformly and adequately enforced in California (Cal. Const., art. V, § 13) and statutory control over the Department of Justice. (Gov't Code, § 15000.) Dozens of statutes impose various duties on the Attorney General and DOJ. Thus, there can be no question that the Attorney General, like the other constitutional officers, wields executive authority as surely as the Governor does. For this reason, we do not believe that an executive order, which has been defined as "a formal written directive of the Governor which by interpretation, or the specification of detail, directs and guides *subordinate officers* in the enforcement of a particular law" (63 Ops.Cal.Atty.Gen. 583, 584 (1980), emphasis added), applies to the Attorney General. Accordingly, the Governor lacks the authority to compel the Attorney General to comply with the executive order mandating furloughs.

The Attorney General would have intervened in these writ actions had he believed that the Governor intended to apply mandatory furloughs to DOJ employees. He did not do so only because the Governor's Office previously took the position, both in private conversations and

publicly, that the constitutional officers were not required to participate in the furlough program. (See Goldmacher, *Statewide Dems Say No to Furloughs For Own Staff*, Sacramento Bee (January 12, 2009) [article notes that Governor's Office "has said the furloughs can't be mandated on other constitutional offices" and quotes Governor's spokesman stating that with respect to constitutional officers, furloughs are "their decision"] <available at http://www.sacbee.com/static/weblogs/capitolalertlatest/018524.html>.) For the Governor presently to take the position, based on Judge Marlette's order, that he is entitled to require furloughs for the constitutional officers' employees, is tantamount to a bait-and-switch.

We urge the Controller not to implement the furlough order against DOJ employees.

Sincerely,

JAMES M. HUMES
Chief Deputy Attorney General

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

DATE/TIME	: 2/04/09	DEPT. NO	: 19
JUDGE	: P. MARLETTE	CLERK	: D. RIOS, SR.
REPORTER	: NONE	BAILIFF	: NONE
		PRESENT:	

Professional Engineers in California Government; California Association of Professional Scientists,
Petitioners,

VS. Case No.: 34-2008-80000126

Arnold Schwarzenegger, Governor, State of California; Department of Personnel Administration; State Controller John Chiang; and Does 1 through 20 inclusive,
Respondents.

California Attorneys, Administrative Law Judges and Hearing Officers in State Employment,
Petitioners,

VS. Case No.: 34-2009-80000134

Arnold Schwarzenegger, Governor, State of California; David Gilb as Director of the Department of Personnel Administration; John Chiang Controller of the State of California; and Does 1 through 10,
Respondents.

BOOK : 19
PAGE : 2008-80000126-1909
DATE : 2/04/09
CASE NO. : 2008-80000126, et al
CASE TITLE : PECG; CAPS v. SCHWARZENEGGER, et al

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO

BY: D. RIOS, SR.,
Deputy Clerk

Service Employees International Union, Local 1000,
Petitioners,

VS. **Case No.: 34-2009-80000135**

Arnold Schwarzenegger, Governor, State of California; Department of Personnel Administration; State Controller John Chiang; and Does 1 through 20 inclusive,
Respondents.

Nature of Proceedings: **MINUTE ORDER ON STATE CONTROLLER'S REQUEST FOR CLARIFICATION OF COURT'S RULING**

The Court has received and reviewed a letter dated February 3, 2009 from Richard J. Chivaro, Chief Counsel of the California State Controller's Office, requesting clarification of the Court's ruling in these matters, specifically, on the issue of whether the ruling is applicable to employees of independently elected Constitutional Officers and other elected state-wide officials, including the Lieutenant Governor, Office of the Attorney General, Secretary of State, State Treasurer, Superintendent of Public Instruction and Insurance Commissioner. The letter to the Court attaches copies of letters to the State Controller from those officers or their representatives raising issues regarding the Governor's authority to order furloughs of their employees.

The Court's ruling in the above-captioned matters addressed petitions for writ of mandate and complaints for declaratory relief brought by four recognized employee organizations, raising issues regarding the Governor's authority to order furloughs of their members, as employees of executive branch agencies. The independently elected Constitutional Officers and other elected state-wide officials referenced above were not parties to these matters. The petitions and complaints upon which the Court ruled did not raise any issues regarding the Governor's authority to order furloughs for the employees of those officers and officials. The Court's ruling therefore did not address, or make any ruling regarding, the Governor's authority to order furloughs for the employees of those officers and officials. Accordingly, the Court expresses no views regarding that issue.

Certificate of Service by Mailing attached.

CERTIFICATE OF SERVICE BY MAILING
C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above entitled Minute Order in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

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Ronald V. Placet,
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Sacramento, CA 95814

Gregg McLean Adam
CARROLL, BURDICK & McDONOUGH
44 Montgomery Street, Ste. 400
San Francisco, CA 94104

Dated: February 4, 2009

Superior Court of California,
County of Sacramento

By: D. RIOS, SR.
Deputy Clerk

F

Office of the Governor ARNOLD SCHWARZENEGGER THE PEOPLE'S GOVERNOR

12/19/2008

WHEREAS, due to developments in the worldwide and national financial markets, and continuing weak performance in the California economy, there is an approximately $15 billion General Fund deficit for the 2008-09 fiscal year, which without effective action, is estimated to grow to a $42 billion General Fund budget shortfall over the next 18 months; and

WHEREAS the cash reserve in the State Treasury is below the amount established by the State Controller to ensure that the cash balance does not reach zero on any day in the month; and

WHEREAS without effective action to address the fiscal and cash crisis, the cash reserve in the State Treasury is estimated to be a negative $5 billion in March 2009; and

WHEREAS on November 6, 2008, due to concerns regarding dramatically declining revenues, I issued a Special Session Proclamation and convened the Legislature of the State of California to meet in extraordinary session to address the fiscal crisis that California faces; and

WHEREAS the Legislature failed during that Special Session to enact any bills to address the State's significant economic problems; and

WHEREAS on December 1, 2008, due to the worsening fiscal crisis, I declared that a fiscal emergency exists and convened the Legislature to meet in extraordinary session to address the fiscal crisis that California faces; and

WHEREAS on December 1, 2008, due to the fiscal emergency and the nationwide economic recession, I also issued a Special Session Proclamation and convened the Legislature of the State of California to meet in extraordinary session to address the economic crisis; and

WHEREAS on December 17, 2008, the California Pooled Money Investment Board took the unprecedented action to halt lending money for an estimated 2,000 infrastructure projects as a result of the cash crisis, including the substantial risk that California will have insufficient cash to meet its obligations starting in February 2009; and

WHEREAS in the December 1, 2008 fiscal emergency extraordinary session, the Legislature failed to effectively address the unprecedented statewide fiscal crisis; and

WHEREAS immediate and comprehensive action is needed to address the fiscal and cash crisis facing the State of California; and

WHEREAS failure to substantially reduce the deficit carried forward from the current fiscal year into the next fiscal year will likely prevent the State from being able to finance the cashflow shortages of billions of dollars, thus making it likely that the State will miss payroll and other essential services payments at the beginning of 2009; and

WHEREAS immediate and comprehensive action to reduce current spending must be taken to ensure, to the maximum extent possible, that the essential services of the State are not jeopardized and the public health and safety is preserved; and

WHEREAS State agencies and departments under my direct executive authority have already taken steps to reduce their expenses to achieve budget and cash savings for the current fiscal year; and

WHEREAS a furlough will reduce current spending and immediately improve the State's ability to meet its obligations to pay for essential services of the State so as not to jeopardize its residents' health and safety in the

current and next fiscal year.

NOW, THEREFORE, I, ARNOLD SCHWARZENEGGER, Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and statutes of the State of California, do hereby determine that an emergency pursuant to Government Code section 3516.5 exists and issue this Order to become effective immediately:

IT IS ORDERED that effective February 1, 2009 through June 30, 2010, the Department of Personnel Administration shall adopt a plan to implement a furlough of represented state employees and supervisors for two days per month, regardless of funding source. This plan shall include a limited exemption process.

IT IS FURTHER ORDERED that effective February 1, 2009 through June 30, 2010, the Department of Personnel Administration shall adopt a plan to implement an equivalent furlough or salary reduction for all state managers, including exempt state employees, regardless of funding source.

IT IS FURTHER ORDERED that effective January 1, 2009 through June 30, 2010, the Department of Personnel Administration shall work with all State agencies and departments to initiate layoffs and other position reduction and program efficiency measures to achieve a reduction in General Fund payroll of up to ten percent. A limited exemption process shall be included.

IT IS FURTHER ORDERED effective January 1, 2009, the Department of Personnel Administration shall place the least senior twenty percent of state employees funded in any amount by General Fund resources on the State Restriction of Appointment (SROA) list.

IT IS FURTHER ORDERED that effective January 1, 2009 through June 30, 2010, all State agencies and departments under my direct executive authority, regardless of funding source, are prohibited from entering into any new personal services or consulting contracts to perform work as a result of the furloughs, layoffs or other position reduction measures implemented as a result of this Order.

IT IS REQUESTED that other entities of State government not under my direct executive authority, including the California Public Utilities Commission, the University of California, the California State University, California Community Colleges, the legislative branch (including the Legislative Counsel Bureau), and judicial branch, implement similar or other mitigation measures to achieve budget and cash savings for the current and next fiscal year.

This Order is not intended to create, and does not create, any rights or benefits, whether substantive or procedural, or enforceable at law or in equity, against the State of California or its agencies, departments, entities, officers, employees, or any other person.

I FURTHER ORDER that, as soon as hereafter possible, this Order shall be filed in the Office of the Secretary of State and that widespread publicity and notice be given to this Order.

IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 19th day of December, 2008.

ARNOLD SCHWARZENEGGER
Governor of California

ATTEST:
DEBRA BOWEN
Secretary of State

G

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Chief Counsel, State Bar No. 124391
RONALD V. PLACET
Senior Staff Counsel, State Bar No. 155020
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Attorneys for Respondent/Defendant CALIFORNIA STATE CONTROLLER JOHN CHIANG

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT; CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS,

Petitioners/Plaintiffs,

vs.

ARNOLD SCHWARZENEGGER, Governor, STATE OF CALIFORNIA; DEPARTMENT OF PERSONNEL ADMINISTRATION; STATE CONTROLLER JOHN CHIANG; and DOES 1 THROUGH 20, INCLUSIVE,

Respondents/Defendants.

Case No. 34-2008-80000126

ANSWER TO PETITION FOR WRIT OF MANDATE & COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

(Exempted from fees (Govt. Code § 6103)

I. INTRODUCTION

Respondent/Defendant JOHN CHIANG (hereinafter "Respondent"), answers the Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief filed by Petitioners PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT and the

CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS (hereinafter "Petitioners") as follows:

II. RESPONSES TO GENERAL ALLEGATIONS; PARTIES

1. Answering paragraphs 1 and 2 of the Petition, Respondent affirmatively alleges that Government Code sections 3513, 3520.5, and 3527 speak for themselves as duly enacted provisions of law. Respondent also admits that Executive Order S-16-08 speaks for itself. Finally, based on information and belief, Respondent admits to the remaining allegations contained in those paragraphs.

2. Answering paragraphs 3 and 4 of the Petition, Respondent affirmatively alleges that Government Code sections 3513, 3517, 3527 and 19815.2 speak for themselves as duly enacted provisions of law and admit the remaining allegations contained in those paragraphs.

3. Answering paragraph 5 of the Petition, Respondent admits that the Respondent/Defendant CALIFORNIA STATE CONTROLLER JOHN CHIANG is a state constitutional officer and as the duly elected Controller of the State of California is being sued in his official capacity only. Respondent affirmatively alleges that Government Code sections 12410 and 12440 speak for themselves as duly enacted provisions of law and are not in any way limitations on Respondent's authority. Except as admitted and/or affirmatively alleged, Respondent denies each and every allegation contained in that paragraph.

4. Answering paragraph 6 of the Petition, Respondent lacks information or belief as to the matters therein alleged, and on that basis denies the allegations contained in that paragraph.

III. RESPONSES TO VENUE

5. Answering paragraphs 7 and 8 of the Petition, Respondent admits the allegations contained in those paragraphs.

IV. RESPONSE TO THE GOVERNOR'S DECEMBER 19, 2008 EXECUTIVE ORDER

6. Answering paragraph 9 of the Petition, Respondent affirmatively alleges that Article III, section 3 of the Constitution of the State of California speaks for itself as a duly enacted provision of law.

7. Answering paragraph 10 of the Petition, Respondent affirmatively alleges that Article V, section 1 of the Constitution of the State of California speaks for itself as a duly enacted provision of law.

8. Answering paragraph 11 of the Petition, Respondent affirmatively alleges that Government Code section 12010 speaks for itself as duly enacted provision of law.

9. Answering paragraph 12 of the Petition, Respondent admits that the Governor may issue directives to subordinate executive officers under his direct executive authority, which directs and guides these individuals in the enforcement of a particular law. Respondent further affirmatively alleges that 63 Ops.Cal.Atty.Gen. 583 (1980), a published opinion of the California Attorney General, speaks for itself. Except as admitted, Respondent denies each and every other allegation contained in paragraph 12.

10. Answering paragraph 13 of the Petition, Respondent admits the first sentence of that paragraph. In addition, Respondent affirmatively alleges that *Lukens v. Nye* (1909) 156 Cal. 498, speaks for itself as a duly issued opinion of the California Supreme Court. Except as admitted, Respondent denies each and every other allegation contained in paragraph 13.

11. Answering paragraph 14 of the Petition, Respondent admits the allegations contained in that paragraph.

12. Answering paragraph 15 of the Petition, Respondent admits that Executive Order S-16-08 speaks for itself. Except as admitted, Respondent denies each and every other allegation contained in paragraph 15.

13. Answering paragraph 16 of the Petition, Respondent affirmatively allege that Government Code section 3516.5 speaks for itself as duly enacted provision of law. Except as expressly admitted, Respondent, Controller John Chiang, denies each and every other allegation contained in paragraph 16 that relates to himself and the Office of the State Controller. Respondent, Controller John Chiang, denies he or his office has sought implementation of "the salary and hour cut" through the implementation of Executive Order S-16-08. In addition, the Respondent, Controller John Chiang, alleges that these remaining allegations contained in paragraph 16 could only apply to the other Respondents/Defendants named in this action.

14. Answering paragraph 17 of the Petition, Respondent admits to the allegations contained in this paragraph.

15. Answering paragraph 18 of the Petition, Respondent admits the first sentence of that paragraph. Furthermore, Respondent affirmatively alleges that *Lowe v. Resources Agency* (1991) 1 Cal.App.4th 1140, speaks for itself as a duly issued opinion of the California Court of Appeals for the Third Appellate District. Except as expressly admitted, Respondent denies each and every other allegation contained in paragraph 18.

16. Answering paragraph 19 to the Petition, Respondent affirmatively alleges that Government Code section 19826 speaks for itself as duly enacted provision of law.

17. Answering paragraph 20 to the Petition, Respondent admits the allegations in paragraph 20. Furthermore, Respondent affirmatively alleges that *Department of Personnel Administration v. Greene* (1992) 5 Cal.App.4th 155, speaks for itself as a duly issued opinion of the California Court of Appeals for the Third Appellate District.

18. Answering paragraph 21 to the Petition, Respondent affirmatively alleges that Government Code section 19851 speaks for itself as duly enacted provision of law.

19. Answering paragraph 22 to the Petition, Respondent affirmatively alleges that Government Code section 19852 speaks for itself as duly enacted provision of law.

20. Answering paragraph 23 to the Petition, Respondent admits the allegations contained in paragraph 23.

21. Answering paragraph 24 to the Petition, Respondent, Controller John Chiang, denies each and every allegation contained in the first sentence of paragraph 24 that relates to himself and the Office of the State Controller. Respondent, Controller John Chiang, denies he or his office has sought to enact or enforce Executive Order S-16-08. Further, the Respondent, Controller John Chiang, alleges that these remaining allegations contained in the first sentence of paragraph 24 could only apply to the other Respondents/Defendants named in this action. In addition, Respondent, Controller John Chiang, admits the allegations contained in the second sentence of paragraph 24.

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V. THE CONTROLLER'S ALLEGED DUTY REGARDING THE EXECUTIVE ORDER

22. Answering paragraph 25 to the Petition, Respondent admits the first sentence of that paragraph. Further, Respondent affirmatively alleges that Government Code section 12440 speaks for itself as a duly enacted provision of law and is not in any way a limitation on Respondent's authority. In addition, Respondent affirmatively alleges that *Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, speaks for itself as a duly issued opinion of the California Court of Appeals for the Third Appellate District. Except as admitted and/or affirmatively alleged, Respondents deny each and every allegation contained in that paragraph.

23. Answering paragraph 26 to the Petition, Respondent admits the allegations contained in the first sentence of this paragraph. Respondent admits that the Department of Personnel Administration has no authority to unilaterally change the salary of represented employees. Further, Respondent admits the Governor and the Department of Personnel Administration currently have no authority, under Executive Order S-16-08, to implement a furlough, and therefore, the Controller has no authority to reduce salaries as a result of this proposed furlough.

RESPONSE TO FIRST CAUSE OF ACTION

(PETITION FOR WRIT OF MANDATE)

24. Answering paragraph 27 to the Petition, Respondent hereby fully incorporates by reference all of the foregoing paragraphs as though fully set forth herein.

25. Answering paragraph 28 to the Petition, Respondent admits that on December 19, 2008 the Governor issued Executive Order S-16-08 which speaks for itself. Except as affirmatively alleged, Respondents deny each and every allegation contained in paragraph 28.

26. Answering paragraphs 29, 30, and 31 to the Petition, Respondent admits the allegations contained in those paragraphs.

27. Answering paragraph 32 to the Petition, Respondent admits that the Governor and the Department of Personnel Administration's proposed furlough conflicts with Government Code section 19826, subdivision (b). Further, Respondent admits that based on Government Code section 19826, subdivision (b), and other legal authorities, including but not

limited to constitutional provisions, statutes, Attorney General Opinions and case law identified in paragraphs 9, 10, 11, 12, 13, 18, 19, 20, 21 22 and 25, the Governor and Department of Personnel Administration do not have the authority to unilaterally implement the furlough. The Respondent admits to all other allegations contained in paragraph 32.

28. Answering paragraphs 33 and 34 to the Petition, Respondent admits the allegations contained in those paragraphs.

RESPONSE TO SECOND CAUSE OF ACTION

(COMPLAINT FOR DECLARATORY INJUNCTIVE RELIEF)

29. Answering paragraph 35 to the Petition, Respondent hereby fully incorporates by reference all of the foregoing paragraphs as though fully set forth herein.

30. Answering paragraph 36 to the Petition, Respondent admits the allegations contained in that paragraph.

31. Answering paragraph 37 to the Petition, and based on the current lack of legislative authorization or other adequate legal authority for implementing the Governor and the Department of Personnel Administration's furlough of state employees, Respondent Controller John Chiang admits that he does not intend to implement the Department of Personnel Administration's furlough proposal if such a proposal is submitted to his office by the Department.

32. Answering paragraphs 38 and 39, Respondent admits the allegations contained in those paragraphs.

33. Answering paragraph 40, Respondent denies each and every allegation contained in that paragraph regarding Respondent/Defendant John Chiang and the Office of the State Controller. Except as denied, Respondent John Chiang admits each and every allegation contained in that paragraph regarding the other Respondents/Defendants.

34. Answering paragraph 41, Respondent admits the allegations contained in that paragraph.

35. Answering paragraph 42, Respondent denies each and every allegation contained in that paragraph regarding Respondent/Defendant John Chiang and the Office of the State

Controller. Except as denied, Respondent John Chiang admits each and every allegation contained in that paragraph regarding the other Respondents/Defendants.

36. Answering paragraph 43, Respondent admits the allegations contained in that paragraph.

37. Answering paragraph 44, Respondent denies each and every allegation contained in that paragraph regarding Respondent/Defendant John Chiang and the Office of the State Controller. Except as denied, Respondent John Chiang admits each and every allegation contained in that paragraph regarding the other Respondents/Defendants.

WHEREFORE, Respondent requests the following:

1. That the Court issue a peremptory writ in the first instance commanding the Governor and the Department of Personnel Administration to comply with their duties under Article III, section 3 and Article V, section 1 of the California Constitution and Government Code sections 19826 and 19851 and to set aside the portions of the Governor's Executive Order S-16-08 calling for a furlough and salary reduction for state employees in that the Executive Order is unlawful and illegal;

2. As the Respondent/Defendant John Chiang takes a position in support of the Petitioners/Plaintiffs, no peremptory writ need be issued as to this Respondent/Defendant if the above peremptory writs are issued against the Governor and the Department of Personnel Administration;

3. That the Court issue a declaration that the portions of the Governor's Executive Order S-16-08 calling for a furlough and salary reduction for state employed engineers and scientists is unlawful and illegal in that the Governor and the Department of Personnel Administration have violated and continue to violate the provisions of Article III, section 3 and Article V, section 1 of the California Constitution and Government Code sections 19826 and 19851 by calling for and implementing a furlough and salary reduction for state employees.

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4. As the Respondent/Defendant John Chiang takes a position in support of the Petitioners/Plaintiffs, he does not object to the issuance of a preliminary and permanent injunction against the Governor and the Department of Personnel Administration to cease and desist taking action to furlough state employed engineers and scientists by reducing their hours and reducing their pay under an unlawful Executive Order;

5. That the Court grant other and further relief as the Court may deem just and proper.

Respectfully submitted,

Dated: January 20, 2009

OFFICE OF THE STATE CONTROLLER

By: _____
RICHARD J. CHIVARO, Chief Counsel
Attorney for Respondent/Defendant

H

DEPARTMENT OF PERSONNEL ADMINISTRATION ARNOLD SCHWARZENEGGER, Governor

MEMORANDUM

DATE: January 9, 2009

TO: Agency Secretaries
Undersecretaries
Directors

FROM: David A. Gilb
Director
Office of the Director
(916) 322-6193; FAX (916) 322-8378

SUBJECT: State Employee Furlough per Governor's Executive Order S-16-08

To reduce current spending to ensure that essential services of the State are not jeopardized and the public health and safety is preserved, the Department of Personnel Administration, under the Governor's authority and at the direction of the Governor, has developed a furlough plan that will result in the closing of general government operations on the first and third Fridays of each month, beginning this February. As such, these unpaid furlough days are not work days and employees shall not report to work. The first furlough day under this plan will be February 6, 2009.

DPA will post details on its website early next week and send a memo to personnel offices with additional information.

For operations that cannot close, Agency Secretaries (and Directors who do not report to an agency) may request approval from DPA to use a "self-directed' furlough for specific positions. There will be two types of self-directed furlough:

- Employees take two furlough days each month but on days chosen by the employee and approved by the supervisor. For example, revenue-generating positions may be considered for this type of furlough.
- Employees accrue two furlough days per month to be taken when feasible. Furlough days that cannot be used within the same month must be taken within two years following the end of the furlough program. Furlough days will not be cashed out. Posted positions in 24/7 facilities such as prisons and hospitals automatically qualify for this self-directed furlough and do not require prior approval from DPA.

Salaries will be adjusted to reflect the unpaid furlough days, but benefits will remain the same (i.e., the furlough will not affect payouts for unused leave, service credit, health and retirement benefits, etc.)

Please note: The state continues to meet with representatives for state employees about the impact of this program and will notify you of any further developments.

DECLARATION OF SERVICE

CASE NAME: *SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000 v. ARNOLD SCHWARZENEGGER, et al.*
COURT NAME: Third District Court of Appeal
Sacramento Superior Court No. 34-2009-80000135
CASE NUMBER:

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 February 6, 2009, I served the following:

PETITION FOR WRIT OF SUPERSEDEAS OR OTHER APPROPRIATE STAY ORDER AND REQUEST FOR TEMPORARY STAY ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT OF CALIFORNIA; POINTS AND AUTHORITIES IN SUPPORT THEREOF

I served the aforementioned document(s) by enclosing them in an envelope and personally hand delivering them to the addresses listed below:

The Honorable PATRICK MARLETTE
Sacramento County Superior Court
720 Ninth Street, Department 19
Sacramento, CA 95814
(2 Copies)

California Supreme Court
350 McAllister Street
San Francisco, CA 94102
(4 Copies) (*Lodged w/ the Appellate Court*)

ATTACHMENT TO DECLARATION OF SERVICE

DAVID W. TYRA
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& GIRARD
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Tel: (916) 321-4500 Fax: (916) 321-4555
e-mail: dyra@kmtg.com
Attorney Defendant/Respondent, *ARNOLD SCHWARZENEGGER, GOVERNOR STATE OF CALIFORNIA; and DEPARTMENT OF PERSONNEL ADMINISTRATION*

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Attorneys for Defendant/Respondent *John Chiang, Office of the State Controller*

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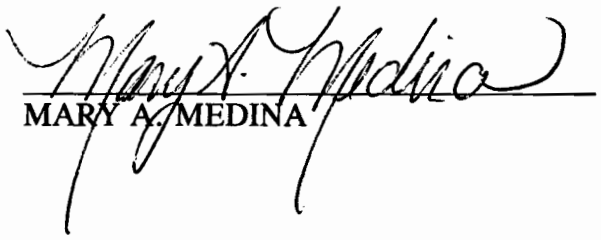
Attorneys for Petitioner/Plaintiff, *California Attorneys, Administrative Law Judges and Hearing Officers in State Employment*

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 February 6, 2009, at Sacramento, California.



MARY A. MEDINA