No. C061011

COPY

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT, et al.,
Plaintiffs and Appellants,

v.

JOHN CHIANG, as State Controller, etc.,
Defendant and Appellant;

ARNOLD SCHWARZENEGGER, as Governor, etc., et al.,
Defendants and Respondents.

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On Appeal of an Order and Judgment
by the Sacramento County Superior Court
Case No. 34-2008-80000126-CU-WM-GDS
The Honorable Patrick Marlette

APPELLANT STATE CONTROLLER'S REPLY BRIEF

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INTRODUCTION

In a time of crisis, it is easy to understand why a chief executive may grow impatient with the legislative process. As Justice Douglas wrote in his concurrence in *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579, 629-630, "[l]egislative action may indeed often be cumbersome, time-consuming, and apparently inefficient," but "[w]e . . . cannot decide this case by determining which branch of government can deal most expeditiously with the present crisis." The answer, Justice Douglas wrote, "must depend on the allocation of powers under the Constitution." (*Id.* at 630.)

So it is here. In defending his decision to furlough state employees, the Governor repeatedly relies on the severity of the State's fiscal crisis for justification, just as President Truman did when he seized the steel mills in 1952 because of a labor dispute. But like President Truman, the Governor cannot identify any constitutional or statutory basis for his action. Nothing in any of the statutes or collective bargaining agreements upon which the Governor relies gives him the authority to furlough the vast majority of the State's employees, thereby reducing their salaries by 15 percent. Decisions over state employee's salaries and working conditions are set by state law, passed by the Legislature. It is the Governor's duty to see that state law is faithfully executed; he has neither the duty nor the authority to make law himself. Once again, Justice Douglas's words are applicable here: "[T]he emergency did not create power; it merely marked an occasion when power should be exercised." (*Id.* at 629.) In this case, our Constitution makes clear that the power should be exercised by the Legislature.

On this occasion, the Legislature has exercised its power in a way that precludes respondents' actions. The key provision from which the Governor purports to draw his authority – Government Code section 19851 – allows the administration to depart from the 40-hour workweek only on an as-needed basis, not on a statewide basis for a period of 18 months. Nothing else the Governor cites as support for his actions – not Government Code section 19852, not his inherent executive authority, and certainly not the fiscal crisis – validates these furloughs. Indeed, many of the authorities the Governor relies upon actually reiterate the very constraints that he was obliged to follow but did not. Recent actions by the Legislature and the voters have only emphasized the legislative conviction that it is not for the Governor to determine state employee salaries.

ARGUMENT

I.

THE GOVERNOR LACKS THE AUTHORITY TO REDUCE THE 40-HOUR WORKWEEK SET BY STATE LAW

A. Government Code Section 19851 Sets The Workweek At 40 Hours

Government Code section 19851 provides that:

> It is the policy of the state that the workweek of the state employee shall be 40 hours, and the workday of state employees eight hours, except that workweeks and workdays of a different number of hours may be established in order to meet the varying needs of the different state agencies. . . .
>
> (Gov. Code, § 19851(a).)

This language establishes a general rule – the 40-hour workweek – with one exception: "*different*" numbers of hours may be established to meet "the *varying* needs of the *different* state agencies." In other words, the State can carve out exceptions to the state policy establishing a 40-hour workweek on an "as needed" basis, if a particular agency needs a workweek of a different length for a reason that varies from the norm. (Appellant State Controller's Opening Brief ["Controller's Opening Br."] at 17-18.)

To justify his furloughs, the Governor needs to extract far more from this language than it will yield. He needs to explain how a limited exception can be read to embrace an exception so broad that it consumes the 40-hour workweek rule and how the authority to set a "different" number of hours permits the setting of a lower number of hours. As the Controller explains in his opening brief and below, the rules of statutory construction do not permit either interpretation.

Respondents urge the Court to conclude that the text of section 19851 so plainly supports their position that no further inquiry is required. (Respondents' Combined Brief in Response to the Opening Briefs of PECG and the Controller ["Resp. Br."] at 18-19, citing *Green v. State of Cal.* (2007) 42 Cal.4th 254, 260 ["The statute's plain meaning controls the court's interpretation unless its words are ambiguous."].) Yet this "plain meaning" rule does not help respondents because their interpretation runs afoul of the exception's only obvious application. Under that application, it is clear that section 19851 permits the Governor or DPA to depart from the 40-hour workweek if a particular agency requires relief from the 40-hour requirement for a particular reason. For example, the Governor might properly exercise his discretion under this

provision to require workers from the California Department of Public Health to work longer workweeks during H1N1 flu outbreaks in order to address a public health emergency more effectively. Yet nothing in the text of section 19851 plainly permits more than that, because the Legislature established the 40-hour workweek as state policy and *limited* the Governor's discretion to depart from that policy in particular ways.

Had the Legislature intended to provide respondents with the discretion to jettison the 40-hour workweek in favor of a blanket rule imposing shorter workweeks, it would have drafted section 19851 more along the following lines:

> ~~It is the policy of the state that t~~ The workweek of the state employee shall be 40 hours, and the workday of state employees eight hours, except that workweeks and workdays of a different number of hours may be established in order to meet the ~~varying~~ needs of the ~~different~~ state ~~agencies~~.

Or, alternatively, the Legislature could have chosen to use language similar to that in section 19852, a statute enacted at the same time and as part of the same legislation as section 19851.[1] As described in the Controller's opening brief, section 19852 allows the Governor to require that state workers work the 40-hour workweek in four rather than five days. (Controller's Opening Br. at 21-22.) Yet it allows the Governor to do so under far broader circumstances than the circumstances prescribed under section 19851. Section 19852 provides that:

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[1] The current versions of section 19851 and 19852 were added to article I by Stats. 1981, ch. 230, p. 1168, § 55, and amended by Stats. 1983, ch. 1040, § 30.

> *When the Governor determines that the best interests of the state would be served thereby*, the Governor may require that the 40-hour workweek established as the state policy in Section 19851 shall be worked in four days in any state agency or part thereof.
>
> (Gov. Code, § 19852, emphasis added.)

Where the Legislature uses one provision in one statute relating to a particular subject, but omits that "'provision from a similar statute concerning a related subject,'" that omission "'is significant to show that a different intention existed.'" (*Western States Newspapers, Inc. v. Gehringer* (1962) 203 Cal.App.2d 793, 799-800, quoting *People v. Valentine* (1946) 28 Cal.2d 212, 142 and *City of Burbank v. Metropolitan Water Dist.* (1960) 180 Cal.App.2d 451, 461-462.) Applying that rule here, the fact that the Legislature granted broad discretion to the Governor in section 19852, while granting only narrow discretion to the Governor in section 19851, demonstrates that the Legislature intended to restrict the Governor's discretion under section 19851 to serve the "varying needs of the different state agencies," *not* to allow him to substitute his judgment for the Legislature's about "the best interests of the state."[2]

The Governor's interpretation is further undermined by the well-known canon of statutory construction that "'[c]ourts should give

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[2] The Governor dismisses the significance of section 19852 without addressing the import of this key provision of the statute. According to the Governor, section 19852 in general cannot limit the executive's ability to reduce the 40-workweek because that interpretation would nullify section 19851's authorization to establish workweeks with "different" numbers of hours. (Resp. Br. at 25.) But that argument only works if "different" means less, which it does not, as discussed below.

meaning to every word of a statute if possible.'" (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1118, quoting *Reno v. Baird* (1998) 18 Cal.4th 640, 658, additional citations omitted.) When one interpretation requires the elimination of words while another interpretation "'give[s] meaning to every word,'" the latter interpretation is favored. (*Id.*) In this case, only the Controller's (and the unions') interpretation honors the legislative policy favoring the 40-hour workweek and gives meaning to every word in the phrase "the varying needs of the different state agencies."

It is important to consider the fact that the Governor's interpretation targets for exclusion the very words the Legislature inserted to place limits around the Governor's discretion. That has constitutional ramifications, because the Governor is encroaching upon legislative power while enlarging his own. And he is doing so with the effect of utterly obliterating, at least for the time being, a state-wide policy established by the Legislature: the 40-hour workweek.

This is no small matter, but nothing in respondents' brief acknowledges that fact. The Governor instead dismisses the 40-hour workweek as mere "policy," offered as guidance rather than a "mandate." (Resp. Br. at 19.) But the "determination and formulation of legislative policy" is one of the essential functions of the Legislature. (*State Bd. of Education v. Honig* (1993) 13 Cal.App.4th 720, 750; *Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 299.) After all, the Legislature legislates by translating policies into law. (*State Bd. of Education v. Honig*, *supra*, 13 Cal.App.4th at 750 [describing the Legislature's role as "'declaring a policy and fixing a primary standard'" and then delegating to executive officers the "'"power to fill up the

details.'"'"], quoting *First Industrial Loan Co. v. Daugherty* (1945) 26 Cal.2d 545, 549.) In short, legislative policy *is* law.

Furthermore, "'[n]o statutory provisions are intended by the [L]egislature to be disregarded.'" (*Cox v. California Highway Patrol* (1997) 51 Cal.App.4th 1580, 1587, quoting *Edwards v. Steele* (1979) 25 Cal.3d 406, 410.) This is particularly clear here, where the Legislature stated in no uncertain terms that state employees' workweeks "*shall* be 40 hours" except under prescribed circumstances. (Gov. Code, § 19851(a), emphasis added.) Under the ordinary rules of statutory construction, "'shall' is mandatory." (*In re Estate of Miramontes-Najera* (2004) 118 Cal.App.4th 750, 758.) It is therefore wrong to suggest, as the Governor does, that this "policy" does not impose upon him "an absolute, unequivocal duty to establish 40-hour workweeks for state employees." (Resp. Br. 19-20.) To the contrary, the Governor has the constitutional duty to "see that the law is faithfully executed,"[3] including the law establishing the 40-hour workweek on a statewide basis.

Even if governors could disregard legislative "policies" when implementing statutes (they cannot), legislative policy cannot be disregarded when interpreting statutes. It is well-established that the "first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386.) That inquiry into legislative intent turns on "public policy considerations." (*Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 509.) The relevant policy

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[3] Cal. Const., art. V, § 1; *see also Lukens v. Nye* (1909) 156 Cal. 498, 504.

consideration here is the Legislature's decision to enshrine the 40-hour workweek as the norm for state workers, with limited exceptions. The Governor's interpretation turns that policy on its head, using the exception to swallow the 40-hour workweek rule whole. The Legislature could not have intended that result.

Perhaps in recognition of these problems, the Governor strains to fit the State's current fiscal circumstances into the circumstances encompassed by the statute's language. Thus, the Governor argues that he is meeting the needs of the "different state agencies" if he meets the need of the whole State, including all state agencies, for more cash. (Resp. Br. at 21-22.) But if the members of the Legislature wished to permit the Governor to substitute his judgment for theirs concerning which workweek meets the needs of the State as a whole, they would have said so.

Equally problematic to the Governor is the fact that neither the text of section 19851 nor its legislative history reveals any intent to authorize workweeks of fewer than 40 hours. Although the legislative history reveals an intent to proscribe the executive's ability to *increase* worker's workweeks, it does not reveal that the Legislature even contemplated reduced workweeks, let alone intended to permit the Governor to impose them. (Controller's Opening Br. at 19-21.) The Governor points to the summaries of the 1955 amendment written by Legislative Counsel and the Attorney General, which refer to the Governor's discretion to establish workweeks of "'different numbers of hours.'" (Resp. Br. at 20-21.) But "different" does not necessarily mean lower, as other Government Code provisions make clear.

The sections of the Government Code that do authorize the imposition of workweeks of less than 40 hours are sections 19996.21

and 19996.22, which the Governor dismisses without actually addressing. Section 19996.21 provides that workweeks may be reduced for employees "who are unable, or who do not desire" full-time work, or for employees who voice interest in participating "in voluntary reduced worktime" when their department or agency is facing layoffs. Section 19996.22(b) gives an employee the right to file a grievance if he or she is "being coerced, or . . . required . . . to involuntarily reduce his or her worktime." (*See also* Controller's Opening Br. at 22-23.)

To the Governor, the reference to shorter workweeks in these provisions just "serve[s] to further demonstrate" his "inherent authority . . . to establish varying schedules for state employees." (Resp. Br. at 26.) In fact, those provisions further constrain the ways in which the Governor can exercise that authority, and he has violated those constraints as surely as he violated the constraints in section 19851.

B. Government Code Section 19849 Does Not Permit DPA To Impose Furloughs On State Employees

Government Code section 19849 provides in relevant part that:

> The department shall adopt rules governing hours of work and overtime compensation and the keeping of records related thereto, including time and attendance records. . . .
>
> (Gov. Code, § 19849(a).)

As argued in the Controller's opening brief, this provision does not confer authority on the DPA to do anything apart from that which other statutes authorize the DPA to do. It merely provides the DPA with a process for performing its regulatory function. (Controller's Opening Br. at 24-25.)

Respondents ignore this problem, insisting without explanation that section 19849 "provides the State with authority to adopt rules regarding work hours that must be enforced by the varying agencies and departments of the State." (Resp. Br. at 26.) It does no such thing. What it does do is impose upon respondents yet another constraint that they have cast aside: compliance with the notice and comment requirements of the Administrative Procedure Act.

C. The Governor's Actions Violate Government Code Section 11020, Which Sets The Hours During Which State Agencies Must Be Open

Further undermining any argument that respondents have the authority they claim is section 11020 of the Government Code, through which the Legislature exercised its authority to proscribe the days and hours in which "all offices of every state agency *shall be kept open for the transaction of business.*" (Emphasis added.) That section provides in relevant part:

> (a) Unless otherwise provided by law, all offices of every state agency shall be kept open for the transaction of business from 8 a.m. until 5 p.m. of each day from Monday to Friday, inclusive, other than legal holidays, but the office of Treasurer shall close one hour earlier. However, any state agency or division, branch or office thereof may be kept open for the transaction of business on other hours and on other days than those specified in this subdivision.
>
> (b) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Chapter 12 (commencing with Section 3560) of Division 4 of Title 1, the memorandum of understanding shall be controlling without

> further legislative action, except that if the provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.
>
> * * *
>
> (Gov. Code, § 11020.)

Here again, the Legislature has exercised its clear right to determine how the State should conduct its business. Nothing in this provision provides respondents with discretion to substitute their judgment for the Legislature's by closing general government offices on the first and third Friday of each month, or at any other time.[4] (CASE Joint Appendix ["CASE JA"] 347, 350.)

D. The Governor's Executive Power Does Not Include The Inherent Authority To Furlough State Employees

The Governor invokes a litany of powers inherent in his executive authority as further justification for his Executive Order. (Resp. Br. at 50.) However, the ability to "supervis[e]" or "issue directives to subordinate civil executive officers" hardly bestows the authority to issue unlawful directives. This very point is made in the California Attorney General opinion cited by the Governor: "[T]he Governor is not empowered, by executive order or otherwise, to amend the effect of, or to qualify the operation of existing legislation." (63 Ops.Cal.Atty.Gen. 583

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[4] As described in the Controller's opening brief, at the time of the trial court's order in this matter, the Governor had implemented two furlough days per month. (Controller's Opening Br. at 3-5.) On July 1, 2009, the Governor issued an Executive Order instituting a third furlough day each month for state employees. (Controller's RJN, Exh. E.)

(1980), 1980 WL 96881, at *2, citing *Lukens v. Nye*, *supra*, 156 Cal. at 503-504.)

The Governor brushes aside separation of power concerns with the observation that the "doctrine does not require a sharp demarcation between the operations of the three branches of government." (Resp. Br. at 52.) Yet the very cases relied on by the Governor for that proposition note that the separation of powers doctrine nevertheless "unquestionably places limits upon the actions of each branch with respect to the other branches." (*Superior Ct. v. County of Mendocino* (1996) 13 Cal.4th 45, 53.) In fact, those cases specifically note that the executive branch cannot do what it has done here, which is to "disregard legislatively prescribed directives and limits." (*Id.*; *Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 25 [same].)

E. The Governor Has Admitted That Furloughs Require Legislative Authorization

Respondents' brief disavows the need for legislative approval of their furlough plan. Yet the Governor saw things differently last year.

On November 6, 2008, when the Governor announced the possibility of furloughing state workers along with other proposed spending reductions, he acknowledged that "[a]ll of the actions we're proposing *must first be approved by the Legislature*." (CASE JA 307, emphasis added.) The Legislature, however, never approved these furloughs. Accordingly, the Governor now seeks to walk back from this admission, claiming that he only "attempted to work collaboratively with the Legislature." (Resp. Br. at 54.) The disclaimer is not convincing, because back in 2008, he did not say he would attempt to work with the Legislature; he said he would seek its approval.

Nor, as the Controller points out in his opening brief, is this the first governor to recognize the need for the Legislature's approval of furloughs for state workers. (Controller's Opening Br. at 32, fn. 20.) Seventeen years ago, when Governor Wilson advocated his plan to reduce the work time of most state employees, he sought voter approval. (Appellant State Controller's Request for Judicial Notice; Declaration of Jeffrey Ball ["Controller's RJN"], Exh. J.) The voters did not provide it. (Abbreviated Record, Record: 983, Popular Vote at <http://holmes.uchastings.edu/cgi-bin/starfinder/26783/calprop.text> [as of Nov. 23, 2009].)

Forty-seven years ago, the Attorney General described the interplay between the Legislature and the executive branch in setting state employee workweeks. In response to a request for a legal opinion about whether workers must receive overtime credit for time spent "on call," the Attorney General observed that, to a certain extent, "the length of the work week of state civil service employees is fixed by law . . . but the hours the individual employee shall work during each day is largely a matter of administrative determination in the discretion of the head of the employee's department or agency." (39 Ops.Cal.Atty.Gen. 261, 264 (1962).) The Attorney General went on to describe the agency's discretion "to fix within reasonable bounds" working hours, "provided the required 40-hour minimum work week is preserved." (*Id.*)

Furthermore, while the DPA has promulgated regulations based on section 19851 over the years, none of those regulations has contemplated workweeks of less than 40 hours. To the contrary, DPA has provided that state employees with fixed salaries "shall be assigned" either to Work Week Group 1, which has "a work week of 40 hours," or Work

Week Group 4. (Cal. Code Regs., tit. 2, § 599.701.) Group 4 is reserved for those "[c]lasses and positions for which special provisions are made by rule because of the *varying* needs of *different* state *agencies*." (*Id.* at § 599.701(b), emphasis added.) The only defined categories of workers in Group 4 are workers with "a minimum work week of 40 hours" or workers with "a minimum average of 40 hours a week." (*Id.* at § 599.703.) Similarly, the regulation addressing how to convert monthly or hourly rates of pay for workers with workweeks of varying numbers of hours addresses only workweeks of 40, 44, and 48-hour weeks. (*Id.* at § 599.670.) As this review of the relevant regulations demonstrates, nothing in the DPA's use of its regulatory authority suggests that it previously contemplated that section 19851 authorized fixed workweeks of less than 40 hours.

The "'contemporaneous administrative construction of the enactment by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized.'" (*City of Los Angeles v. Rancho Homes, Inc.* (1953) 40 Cal.2d 764, 770-771, quoting *Coca-Cola Co. v. State Bd. of Ed.* (1945) 25 Cal.2d 918, 921; *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, *supra*, 43 Cal.3d at 1388 [same].) In this case, the past conduct and interpretation of all administrative actors further undermines respondents' recent insistence that they have the authority they now claim.

II.

STATE LAW PROHIBITS RESPONDENTS FROM REDUCING THE SALARIES OF REPRESENTED EMPLOYEES BY THE USE OF MANDATORY FURLOUGHS

Even if the Governor somehow has the authority to furlough unrepresented employees in subordinate agencies of the Governor, he cannot impose furloughs on employees who are members of recognized bargaining units. The Legislature has taken great pains to protect the rights of represented employees, including allowing collective bargaining agreements to supersede certain statutes and prohibiting the Department of Personnel Administration from even recommending changes to salary ranges for represented employees. Despite these clear protections, the Governor claims to find the authority to shorten workweeks, with a resulting 15 percent pay cut, in both statute and the provisions of petitioners' collective bargaining agreements. Neither the Legislature nor the employees themselves have granted the Governor the sweeping authority that he claims.

A. The Furloughs Violate Government Code Section 19826

Respondents insist that the Governor's order does not violate subdivision (b) of Government Code section 19826, which reads:

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

Respondents argue that a "diminution in total compensation to state employees" is "not equivalent to reductions in salary ranges" and

that a "furlough only constitutes a reduction in hours worked, not a reduction in the wage rate paid for that work." (Resp. Br. at 43-44.)

Respondents cite to DPA regulations that define "'salary range'" as the "'minimum and maximum rate currently authorized for the class'" and that define "'rate'" for hourly employees as "'any one of the dollars and cents amounts found within the salary range.'" (Resp. Br. at 44-45, citing Cal. Code Regs., tit. 2, § 599.666.1.) They also cite California Code of Regulations, title 2, section 599.670, which provides that "'[m]onthly or hourly rates of pay may be converted from one to the other when the Director of [DPA] considers it advisable.'" (*Id.* at 45.)

However, respondents fail to cite California Code of Regulations, title 2, section 599.699, which expressly states what the salary range encompasses and which reads in pertinent part:

> The salary range for each class represents the rate of pay for full-time monthly employment *unless the pay plan specifically states otherwise*. Monthly employment shall consist of a pay period prescribed by the Department of Finance and *containing either 21 or 22 work days*. Where there is part-time or irregular employment in a position for which a monthly salary range is established, the employee shall normally be paid the proportionate part of the

> monthly rate or on an hourly basis for the time actually employed . . . .
>
> (Cal. Code Regs., tit. 2, § 599.669, emphasis added.)[5]

Thus, a salary range is based on "full-time monthly employment" unless the pay plan specifically states otherwise. The definition of "pay plan" appears in California Code of Regulations, title 2, section 599.666:

> The pay plan for the state civil service consists of the salary ranges and steps established by the Department of Personnel Administration *and the rules contained in this article.*
>
> (Emphasis added.)

One of the rules contained in article 5 of title 2 of the California Code of Regulations is section 599.669's provision that "[t]he salary range for each class represents the rate of pay for full-time monthly employment unless the pay plan specifically states otherwise," which the pay plans at issue here do not. Full-time monthly employment means 21 or 22 work days. Put another way, the principle of full-time monthly employment, defined as 21 or 22 work days, is an essential element of the salary range for every state employee, unless the pay plan specifically states otherwise. By altering the principle of full-time monthly employment, the Governor's furlough order necessarily alters the salary range for

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[5] Respondents have not suggested that the Governor's order somehow converted full-time employees to part-time. In fact, the Governor's order expressly told State employees that their retirement and other benefits would remain untouched, something that would not be the case if they were part-time employees. (CASE JA 306.)

represented employees, in clear violation of Government Code section 19826.

Respondents also argue that if "a change in work hours is synonymous with a change in salary range, then . . . a violation of section 19826(b) occurs every time an employee is paid increased compensation resulting from working overtime hours." (Resp. Br. at 44.) Not so. DPA's own regulations make clear that "[u]nless otherwise indicated in the pay plan, the rates of pay set forth represent the total compensation in every form *except for overtime compensation.*" (Cal. Code Regs., tit. 2, § 599.671, emphasis added.) By DPA's own admission, "salary ranges" do not include overtime. They do, however, include the principle of full-time employment, as demonstrated above.

B. Section 19826 Is Not Superseded By Existing MOUs Between The Parties

Respondents make much of the fact that the Dills Act, which governs labor relations between the State and its employees, allows an MOU to supersede otherwise applicable statutes, including Government Code section 19826. (Resp. Br. at 45-47.) They argue that because petitioners PECG and CAPS are parties to continuing but expired MOUs, "the parties must continue to give effect to the terms and conditions of the expired MOUs, including all provisions which supersede existing law." (*Id.* at 46.)

So far, so good. The problem is that none of the MOUs supersedes existing law, because they specifically state that they only supersede certain enumerated statutes if they are in conflict with the

statutes.[6] *Section 19826 is not listed among those statutes.* Even if it were, nothing in either MOU is in conflict with the notion that DPA cannot change or even recommend salary ranges for represented state employees. That task belongs at the bargaining table, and it would be difficult to imagine a union that would agree to anything else.

This means, of course, that section 19826 is applicable here, as is the case law that interprets it. The principal case is *Department of Personnel Admin. v. Superior Ct. (Greene)* (1992) 5 Cal.App.4th 155, in which this Court held that section 19826(b) prohibited DPA from imposing a 5 percent wage cut on represented employees in response to "an unprecedented budgetary crisis" in 1991-92. (*Id.* at 163.) The issue arose in the context of a bargaining impasse, following which DPA claimed the right to impose its last, best offer, which included the 5 percent wage cut.

Respondents insist that the procedural context of a bargaining impasse distinguishes *Greene* from this situation, because here petitioners' MOUs remain in effect. That might be the case if the MOUs included section 19826 among the statutes they superseded in the event of a conflict – and if a conflict existed. As demonstrated above, however, section 19826 is not listed among the statutes subject to supersession in either MOU, and there is no conflict. Section 19826, therefore, applies here.

Respondents also try to distinguish *Greene* on the basis that the 5 percent wage cut at issue there was not accompanied by furloughs, which provide compensatory time off. (Resp. Br. at 48.) First, that

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[6] PECG Joint Appendix ("PECG JA") 192-197 & 301-308; SEIU Joint Appendix ["SEIU JA"] 364-369; CASE JA 399-405.

argument ignores the fact that, under their MOU, the CASE petitioners must perform the same amount of work that they did before, but for much less pay. (Appellant's Reply Brief ["CASE Reply Brief"] at 16-18.) The same is true of some members of both PECG and CAPS.[7] Second, as demonstrated above, imposing mandatory furloughs that result in a 15 percent cut in pay for 18 months does in fact adjust salary ranges. That was the whole point: to save the State money on its labor expenses.

Respondents also argue that the *Greene* court "held the state employer was authorized to reduce and limit employee total compensation in other ways" than altering salary ranges. (Resp. Br. at 49.) Respondents mention layoffs and reductions in overtime as two examples, citing Government Code sections 19997 and 19816.10 respectively. (*Id.*) Those are not, of course, the options that respondents chose here, and the fact that layoffs and reductions in overtime may be available to the Governor does not mean that furloughs are.

The third cost-cutting option that the *Greene* court upheld was the Governor's decision to reduce employee health care benefits. Here, the fact that the parties in this case are not at impasse does make a difference, because the holding in *Greene* depended upon the parties having reached impasse. Because they were at impasse, the *Greene* court held, Government Code section 22825.15, which the Legislature had passed expressly to deal with the fiscal crisis, allowed DPA to impose its last, best

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[7] PECG JA 171, art. 8.2, § B(4) (employee workload for Work Week Group E should take 40 hours to accomplish, but "inherent in their job is the responsibility and expectation that work weeks of a longer duration may be necessary."); PECG JA 284, art. 7.7, § B(2)(d) (same).

offer with respect to health care premium contributions. (5 Cal.App.4th at 187, 190-191.) Because the Legislature repealed Government Code section 22825.15 in 2004,[8] even that option would not be available to respondents, even if the parties had reached impasse.

The most important thing about the *Greene* court's discussion of the health benefit option is the care the court took to assure that the Legislature had in fact intended to grant DPA the authority it claimed. The court's discussion covers seven pages, in which it examines not only the legislative history of section 22825.15, but also the context in which it was passed, applicable principles of statutory construction, and related provisions of both state and federal labor law. Having done that, the court concluded that "section 22825.15 contains undebatable evidence the Legislature intended it to supersede the provisions of section 22825.1 which refer to the manner by which contribution rates are determined." (5 Cal.App.4th at 192.)

Because respondents have not offered any evidence, much less undebatable evidence, that the Legislature intended to allow the Governor to impose furloughs and cut employee pay, the Governor's order is barred by section 19826.

C. Because Respondents' Interpretation Of Government Code Sections 19851 And 19849 Conflicts With Petitioners' MOUs, The Provisions Of The MOUs Control

Respondents point out that the MOUs at issue here expressly incorporate Government Code section 19851, regarding the 40-hour workweek, and section 19849, regarding DPA's rulemaking authority over

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[8] *See* Stats. 2004, ch. 69, § 23.

hours of work. (Resp. Br. at 29-33.) That may be true, but that does not mean that when they entered into those agreements, the unions interpreted those sections nearly as broadly as respondents do. As demonstrated above, respondents' interpretation of sections 19851 and 19849 is distinctly at odds with both the plain language and the legislative history of those sections. It is also distinctly at odds with other provisions of the MOUs, which unequivocally contemplate a 40-hour workweek unless otherwise specified. (PECG JA 172 & 283; SEIU JA 479-480; CASE JA 415-416.)

There is other evidence that the unions interpret section 19851 differently than does the Governor: In the MOU for SEIU Bargaining Unit 17, which covers registered nurses, the parties have actually *changed* language parallel to that of section 19851 to read much more like what respondents are arguing here. Section 19.1 of the MOU reads:

> The regular workweek of full-time Unit 17 employees shall be forty (40) hours and eight (8) hours per day. Workweeks and workdays of a different number of hours may be scheduled by the State in order to meet the varying needs of the State.
>
> (SEIU JA 1536.)

Thus, for Bargaining Unit 17, the State may schedule workweeks and workdays "of a different number of hours" to meet the varying needs of the *State*. All the other MOUs incorporate the language of section 19851, which reads differently: "workweeks and workdays of a different number of hours may be established in order to meet the varying needs of the *different state agencies.*" (Gov. Code, § 19851(a), emphasis added.) An across-the-board, 18-month furlough that applies to virtually

every state agency under the authority of the Governor does not fall within the usual understanding of that phrase. "Different state agencies" means just that; it does not mean virtually every state agency.

As demonstrated in Part I above, imposing workweeks of a "different number of hours" does not mean fewer hours. If the Court disagrees, that may mean that for registered nurses, anyway, the MOU may permit the State to impose shorter workweeks for less pay. Any such finding, however, should only be made after allowing the parties an opportunity to brief the issue and submit any relevant extrinsic evidence to explain the reason for the difference in language. (*See, e.g., Los Angeles City Employees Union, Local 347, SEIU, AFL-CIO v. City of El Monte* (1985) 177 Cal.App.3d 615, 622-623 [intended meaning of phrase in collective bargaining agreement may be implied by resort to custom and usage]; *United Teachers of Oakland, Local 771, AFT, AFL-CIO v. Oakland Unified School Dist.* (1977) 75 Cal.App.3d 322, 330 [trial court properly admitted extrinsic evidence to resolve latent ambiguity in collective bargaining agreement].)

Finally, all but one of the MOUs provide for a voluntary, personal leave program pursuant to which employees may opt to work the same number of hours for 5 percent less pay and in exchange be credited with eight hours of leave, which can be used in the same manner as vacation time. (PECG JA 154 & 258; SEIU JA 42.) In each case, the programs are described as voluntary personal leave programs. A rule that allows the Governor and DPA to impose an *involuntary*, across-the-board program requiring a ten or fifteen percent pay cut is certainly not consistent with these provisions of the MOUs.

Thus, the fact that the MOUs incorporate Government Code section 19851 is meaningless unless the parties construe that section in the same way. More importantly, applying respondents' construction of those statutes to these MOUs would violate elementary principles that govern the interpretation of contracts: that "[t]he whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other," (Civ. Code, § 1641), and that contract language is generally presumed to have been used in its usual sense. (Code Civ. Proc., § 1861.) In this case, those principles preclude inserting respondents' interpretation of section 19851 into these contracts. Allowing the Governor or DPA to justify furloughs under section 19851's provision that workweeks of different hours "may be established in order to meet the varying needs of the different state agencies" not only conflicts with the 40-hour workweek provisions discussed above, but also belies the "usual sense" of what it means to accommodate "the varying needs of the different state agencies." As noted above, the phrase "different state agencies" is not the same as "the State." Similarly, "varying needs" indicates a temporal difference: A single state agency might find itself under or overstaffed at different times and adjust workweeks accordingly. Because respondents' interpretation of these provisions conflicts not only with the other provisions of the MOUs but with common sense, it cannot control the interpretation of the MOUs themselves.[9]

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[9] As noted in the Controller's opening brief, if there were any serious question about the significance of incorporating sections 19851 and 19849 in the MOUs, the trial court should have afforded petitioners an opportunity to present evidence to explain the parties' understanding and the

(continued . . .)

D. The Governor's Order Is Not Authorized By The State Rights Clauses Of The MOUs

Respondents argue that the State Rights clauses of the MOUs provide contractual authorization for the furloughs, citing as an example section 12.1 of the CAPS MOU. This section, they say, "expressly provides the rights of the State include, but are not limited to, the right to 'maintain efficiency of State operations,' 'to determine . . . the procedures and standards for . . . scheduling,' and 'to take all necessary action to carry out its mission in emergencies.'" (Resp. Br. at 34, citing PECG JA 300.) Respondents neglect to point out the sentence that immediately precedes the quoted language:

> A. *Except for those rights which are abridged or limited by this Agreement*, all rights are reserved to the State.
>
> (PECG JA 300, art. 12, § 12.1(A), emphasis added.)

As demonstrated above, the MOUs, including PECG's, expressly provide for a 40-hour workweek unless otherwise specified in the MOU.[10] (PECG JA 172 & 283; SEIU JA 479-480; CASE JA 415-416.)

(. . . continued)
circumstances under which the agreements were reached. (Controller's Opening Br. at 36.)

[10] In response to the fact that the State Rights clause in the PECG MOU provides that the State retains "[a]ll the functions, rights, power, and authority not specifically abridged by this MOU," respondents argue that the employer retains the right to furlough because it is not specifically abridged. (Resp. Br. at 34.) Because PECG's MOU contains the same 40-hour workweek language as the others, however, that statement is incorrect. (PECG JA 172.)

Because the right to change that rule is "abridged or limited by this agreement," the 40-hour workweek prevails.

E. The Furloughs Cannot Be Justified As A Legitimate Use Of The Emergency Power

Respondents try to justify their furloughs by arguing that they are authorized by the emergency provisions of the MOUs, which give the State the right "'to take all necessary action to carry out its mission in emergencies'" and by Government Code section 3516.5. (Resp. Br. at 34-42.)

Respondents begin by repeating their arguments about Government Code section 3516.5, which as explained in the Controller's opening brief, does not provide any independent authority for the Governor to act in an emergency; it merely allows him to act without first meeting and conferring with the unions. (*Id.* at 26-27.) The Governor must find his authority to impose furloughs elsewhere. Section 3516.5 does not allow him to impose furloughs any more than it would allow him to make mid-year cuts in the Budget Act or adjust salary ranges for represented employees in violation of Government Code section 19826(b).

Even if that were not the case, section 3516.5 requires the Governor or his representatives to meet and confer with the unions "at the earliest practical time" following whatever action is taken. That language simply cannot be squared with an "emergency" that the Governor projects

will last for 18 months,[11] nor does it permit him to postpone his duty to meet and confer in the interim.

Inexplicably, respondents also rely on *Sonoma County Organization of Public/Private Employees, Local, 707 SEIU, AFL-CIO v. County of Sonoma* (1991) 1 Cal.App.4th 267. (Resp. Br. at 37-39.) It is true, as respondents claim, that in that case, the court held that a declaration of emergency was entitled to deference. However, no party in this case has questioned the validity of the Governor's declaration of a *fiscal* emergency under article IV, section 10(f) of the California Constitution. Instead, the parties question whether this is the kind of emergency contemplated by section 3516.1 and the right of the Governor to take the actions he did in response to the fiscal emergency. On the latter issue, *Sonoma County* makes very clear that the County's actions in both declaring and dealing with an emergency caused by work stoppages were those of the Board of Supervisors acting in its legislative capacity. (*See, e.g.*, 1 Cal.App.4th at 275-276 [citing case law and concluding that "the general judicial attitude is one of pronounced deference to the legislative decision."].) If anything, *Sonoma County* underscores the fact that the power to take specific action in response to an emergency must emanate from the Legislature.

The same is true of *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, on which respondents also rely. At issue there was whether the City properly

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[11] The Emergency Services Act, Government Code section 8627.5, limits the period for which the Governor may declare a state of emergency to no more than 60 days.

exercised its discretion under a charter provision that exempted from arbitration bargaining disputes involving any rule or policy "necessary to ensure compliance with . . . antidiscrimination laws." (*Id.* at 661.) In deferring to the City's exercise of discretion under the charter provision, the Court noted that "the discretion granted an agency by the legislation authorizing its duties, and hence the appropriate standard of review, may vary depending on the language and intent of that legislation." (*Id.* at 669.) Once again, the legislation controls.

In this case, controlling legislation is found in Proposition 58, which added article IV, section 10(f) to the Constitution and which delineates the Governor's authority to deal with a fiscal emergency. The Governor focuses on his authority to declare a fiscal emergency pursuant to that provision, but denies that the Constitution limits him to the procedures that the measure imposed. (Resp. Br. at 35-36.) That interpretation defies not only common sense, but elementary rules of statutory and constitutional construction. By setting up a specific procedure to deal with a fiscal emergency, the people established that it was the *legislative*, not the executive, branch that must make the policy decisions about how to resolve the crisis. Proposition 58's scheme is therefore a perfect example of the principle of *expressio unius est exclusio alterius*, which the California Supreme Court has translated to mean "'the expression of certain things in a statute necessarily involves exclusion of other things not expressed.'" (*Dyna-Med, Inc. v. Fair Employment & Housing Com.*, *supra*, 43 Cal.3d at 1391, fn. 13, citation omitted.)

It is hard to imagine that when they passed Proposition 58, the people thought they were giving the Governor the power to legislate whenever he declared a fiscal emergency. The process that they set in

place is precisely the opposite: article IV, section 10(f) expressly provides that after declaring a fiscal emergency, the Governor "shall thereupon cause the Legislature to assemble in special session *for this purpose.*" (Emphasis added.) Even if the Legislature fails to act, the Constitution does not give the Governor emergency power to impose his own solution. The remedy instead is to prohibit the Legislature from acting on any other bill or from adjourning until legislation to address the fiscal emergency has been "passed and sent to the Governor." (*Id.* at § 10(f)(2).) In fact, the Legislature did act by amending the budget in July, 2009, thus ending the emergency.[12]

The Governor's argument that Proposition 58 or any other provision relating to emergencies allows him to impose furloughs pursuant to the emergency provisions of the MOUs is simply unsupportable.

III.

JUDICIALLY NOTICEABLE EVENTS THAT OCCURRED AFTER THE TRIAL COURT'S RULING ARE PROPERLY BEFORE THE COURT

Respondents object to the Controller's discussion of events that occurred after the trial court's ruling, arguing that they are outside the proper scope of this appeal. (Resp. Br. at 56-58.) Those events, however, are subject to judicial notice and clearly relevant here.

First, in February 2009, the Legislature enacted and the Governor signed the 2009-10 Budget Act directing the DPA to achieve reductions in state employee compensation through "the collective

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[12] State Controller's Supplemental Request for Judicial Notice; Declaration of Jeffrey Ball ("Controller's Supp. RJN"), Exh. A.

bargaining process." (Controller's RJN, Exh. C at 31; Exh. D at 633; *see also* Controller's Opening Br. at 6.) The Budget Act did not authorize furloughs. Additional budget legislation enacted in July 2009 called for further reductions in employee compensation to be "achieved through the collective bargaining process." (Controller's Supp. RJN, Exh. A at 425; *see also* Controller's Opening Br. at 7.) That legislation did not authorize furloughs either.

Second, on May 19, 2009, California voters defeated a measure that would have given the Governor authority to reduce – without the Legislature's approval – spending for the operations of certain executive agencies. (Controller's RJN, Exh. G at 5.) Specifically Proposition 1A would have given the Governor authority to reduce appropriations for the operations of executive agencies not under the control of the constitutional officers, to the extent they are not subject to collective bargaining agreements. (Controller's Opening Br. at 15-17.)

Because respondents do not want the Court to consider these additional clear indicia of legislative intent, they insist that the Court must ignore these events because they occurred after the Superior Court issued its ruling. (Resp. Br. at 56.) Yet, the Governor's own cases confirm that the rule excluding such evidence is "flexible," and does not apply to facts that are "not in dispute" or to "legislative changes [that] have occurred subsequent to a judgment." (*Reserve Ins. Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813.)

Furthermore, the exclusionary rule respondents rely upon exists to "preserve[ ] an orderly system of appellate procedure." (*Reserve Ins. Co. v. Pisciotta*, *supra*, 30 Cal.3d at 813.) That purpose cannot be served by depriving a court of valuable, judicially noticeable evidence of

legislative intent in a case that is, at its core, about legislative intent. Under the rules of statutory construction, post-enactment facts are as relevant to discerning legislative intent as pre-enactment facts. (*See, e.g., Estate of Sanders* (1992) 2 Cal.App.4th 462, 474.) And these post-enactment facts further underscore the flaws in respondents' interpretations.

CONCLUSION

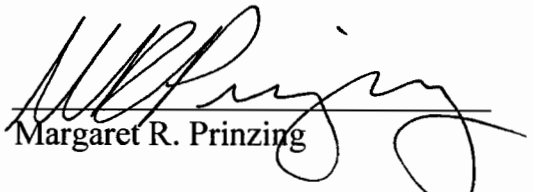
Again and again, the Governor returns to his motivation for issuing his Executive Order as justification for doing so: the State's fiscal crisis generated a cash crisis, and furloughs relieved pressure on the State's cash reserves. (Resp. Br. at 23-24, 52.) No one denies the urgency of the crisis, or the difficulties faced by all of those State officials charged with addressing its fallout, including the Governor, the Legislature, and the Controller. Although there are no easy answers to the fiscal problems confronting the State, some responses are legal while others are not. By implementing these furloughs, the Governor employed a response that ran afoul of the law.

Dated: November 24, 2009

Respectfully submitted,

OFFICE OF THE STATE CONTROLLER

REMCHO, JOHANSEN & PURCELL, LLP

By: 
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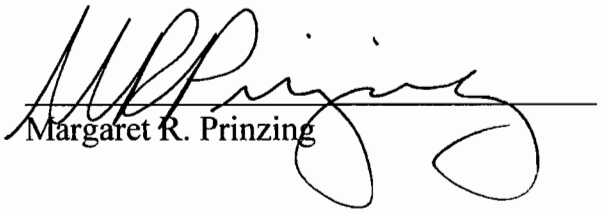

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I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause or action. My business address is 201 Dolores Avenue, San Leandro, CA 94577.

On November 24, 2009, I served a true copy of the following document(s):

Appellant State Controller's Reply Brief

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