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Docket No. C061020

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE THIRD APPELLATE DISTRICT

C061020

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

Sacramento County
Judge: Patrick Marlette
Sacramento County No. 34200980000135CUWMGDS

APPELLANT'S OPENING BRIEF

On Appeal of an Order and Judgment
by the Sacramento Superior Court
No. 34-2009-80000135-CU-WM-GDS
The Honorable Patrick Marlette

FILED

SEP - 3 2009

COURT OF APPEAL - THIRD DISTRICT
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SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,

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v.

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DEPARTMENT OF PERSONNEL ADMINISTRATION;
JOHN CHIANG, as State Controller, and
DOES 1 THROUGH 20, INCLUSIVE,

Defendants and Respondents.

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I. INTRODUCTION AND SUMMARY OF THE CASE

The separation of powers - *trias politica* - is a fundamental element of democratic governance throughout history. However, when one branch of government oversteps its proper boundaries, the foundations of this democracy are at grave risk. In this case, the Governor believed that he could unilaterally impose - without legislative action - changes to state employee pay through a 10% cut and a two-day per month "furlough." Moreover, now a third furlough day and additional pay cut have also been unilaterally imposed.

Alleging violations of its constitutional and statutory rights, SEIU LOCAL 1000 (herein Local 1000), challenged an Executive Order dated December 19, 2009 which mandated two-day furloughs for all State employees effective February 1, 2009. Local 1000's challenge asserted that the Executive Order furloughs were invalid for reasons including:

- the Governor had no legal authority to order such furloughs;
- the State (Department of Personnel Administration) was legally proscribed from unilaterally changing salaries;
- the Executive Order constituted a violation of the separation of powers.

After an expedited briefing and hearing schedule, the Superior Court denied the challenge finding authority in statute for the Governor to unilaterally reduce the "work week," and authority in the parties' Memorandum of Understanding to act in an "emergency." Local 1000 appealed the final judgment.

The Court will find that no legislative authority existed to support the Governor's executive fiat. Instead, state civil service workers - covered by collective bargaining agreements - are entitled to the protection of their exclusive representation and to have such changes negotiated at the table. The notion that a "fiscal emergency" could be used to bypass the protections of the Constitution and the laws of the state is a dangerous step toward an authoritarian form of government. The governor, is not the *uber-legislature*; his actions cannot exceed the limits of his authority.

Thomas Jefferson stated wisely in 1816 that "[t]he way to have good and safe government is not to trust it all to one, but to divide it among the many, distributing to every one exactly the function he is competent to." Without proper lines between the authority of the branches of government the separation of powers is lost.

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II. QUESTIONS PRESENTED ON APPEAL

1. Whether the Governor had legal authority to use an Executive Order in a manner which made new law or modified or qualified existing law.
2. Whether the Governor violated constitutional principles by acting in excess of proscribed authority.
3. Whether the Executive Order exceeded and violated any statutory authority cited as justifying the action.
4. Whether the Executive Order caused an unconstitutional impairment of contract.
5. Whether the Executive Order caused an unconstitutional violation of Due Process rights.

III. STATEMENT OF FACTS AND OF THE CASE

The Governor first announced the threat of cuts and furloughs for state workers in a letter to them on November 6, 2008. (SEIU JA 124-125; CASE JA 306-307.)[1] That letter, signed with his authority, stated these cuts needed to be "approved by the Legislature." (*Id.*)

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[1] The Union cites to three separate joint appendices filed in the three related appeals: those in appeal of PECG appellate case no. C061011 (PECG JA); those in appellate case C091009 (CASE JA) and those in this appeal (SEIU JA).

Simultaneously, the Governor called for an assembly of the Legislature in special session to address the fiscal crisis and his proposed legislation. (SEIU JA 247; CASE JA 309.) Included in that legislation was a proposal to add Government Code section 19826.4 requiring the Departments of Finance and Personnel Administration to "implement a program for the furlough of state employees." The Legislature did not pass the proposed legislation.

Shortly thereafter, on December 1, 2008, for the second time, the Governor called for an assembly of the Legislature in special session invoking Proposition 58 - Article IV, section 10(f) of the Constitution - to address the fiscal crisis and his proposed legislation to furlough state workers. (SEIU JA259-260; CASE JA 326.) Once again, the Legislature did not pass the proposed legislation.

Local 1000 filed the underlying petition for writ of mandate after the further action of the Governor on December 19, 2008, at which time he 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. (SEIU JA 262-263.) Through this 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 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. (SEIU JA 11.)

Local 1000 also argued that the illegal order violated the constitutional principle of the separation of powers as it was solely within legislative purview to determine the necessity of adopting reductions in employee compensation. (SEIU JA 5 114-115.)

Additional complaints were filed by other labor representatives of state civil service bargaining units. Those complaints were noticed as related cases, subjected to an accelerated joint hearing and briefing process, joined for the purposes of the issuance of the Court's Ruling, but not formally consolidated. Those cases are still the related cases on appeal.

In response, the State argued that it had legal authority in Government Code sections 19851(a) and 19849(a) to reduce employees work weeks, that the fiscal "emergency" and authority adopted pursuant to Proposition 58 allowed such an order, and that the salary reduction caused by the furlough was simply a reduction in the work week not the salary

range of employees. (SEIU JA 173-181.)

After hearing, the Court ruled with the State on the foregoing points. (SEIU JA 1907-1914.) The Ruling was filed on January 29, 2009, and amended on January 30, 2009. (SEIU JA 1915-1927.)

SEIU filed a Notice of Appeal from the Ruling on February 5, 2009. (SEIU JA 1945.)

The State Controller John Chiang requested clarification of the Court's ruling on February 3, 2009. (SEIU JA 1928-1930.) The Superior Court issued a clarification as indicated in a Minute Order issued on February 4, 2009. (SEIU JA 1943.)

On February 20, 2009, the Governor signed a 2008-09 Budget Act. (Controller's Request for Judicial Notice, Exh. C.) This Act is contained in the chaptered laws of the State. [Chapter 1, Statutes of 2009-10 Third Extraordinary Session. ("SB3X1") .] The Budget Act specifically acknowledged that reductions to state employee compensation should be achieved through collective bargaining or existing administration authority. Indeed, SEIU negotiated with the State over a furlough day through collective bargaining. (SEIU JA 77.)

Pursuant to the illegal Executive Order, represented state employees had their work hours reduced by two days per month beginning in February

2009. In other words, the Order doubled the 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.[2]

The Union incorporates by reference the other facts and citations set forth in the Opening Brief on Appeal by the State Controller filed in this matter and in the related appeals.

IV. STANDARD OF REVIEW

As the trial court's ruling and order involved in every substantive way, issues of law and undisputed facts, this Court's review of that ruling should be on a *de novo* basis. (*Hofman Ranch v. Yuba County Local Agency Formation Comm.* (2009) 172 Cal.App.4th 805, 810; *Riverside Sheriffs' Assn. v. County of Riverside* (2009) 173 Cal.App.4th 1410, 1418.)

However, to the extent the trial court based its ruling on an interpretation of the collective bargaining agreements between the State and affected Unions, it should have afforded the parties the opportunity to present an evidentiary record. Whether in the trial court or through deferral to the Public Employment Relations Board, evidence was needed particularly regarding the meaning of the specific terms and provisions of

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[2]Such a cut has now been tripled.

the labor agreement on which trial court relied in rendering its decision.

V. LEGAL ARGUMENT

A. THE GOVERNOR IS WITHOUT AUTHORITY TO FURLOUGH STATE EMPLOYEES AND SUCH AN ORDER IS UNLAWFUL

1. The Governor's Power to Issue Executive Orders is Limited to Those Matters Authorized by the California Constitution or Delegated by the Legislature

Under our system of government, the Governor operates as one branch of government balanced by the separate authorities of the legislature and the courts. This separation of powers is set forth clearly in Article III, section 3 of the state constitution, which states: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of others except as permitted by this Constitution."

In this system, "none of the coordinate branches of our tripartite government may exercise power vested in another branch." (*Cirone v. Cory* (1987) 189 Cal.App.3d 1280, 1286.) Likewise, no Governor may exercise the powers of the legislature,

> An executive officer, [the Governor] is forbidden to exercise any legislative power or function except as in the constitution expressly provided. His powers, as part of the legislative department, are specifically enumerated in the constitution. . . [The Governor's] approval

> makes such a bill a part of the statute law, next to the constitution, the highest manifestation of the will of the people. The governor cannot qualify it or change it. . . That would be to permit the governor and the persons concerned to make law to suit themselves without the concurrence of the legislative houses. (*Lukens v. Nye* (1909) 156 Cal. 498, 502-03.)

In utilizing the power of the executive order, the Governor still may not alter this fundamental boundary of his authority. The sole and exclusive purpose of the executive order is as a vehicle to carry out his legitimate authority, but it is not a a source of new or independent authority. The longstanding definition of an "executive order" is 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.) It "may properly be employed to effectuate a right duty or obligation which emanates or may be implied from the Constitution or to enforce public policy embodied within the Constitution and laws." (*Id.*) However, *"the Governor is not empowered, by executive order or otherwise, to amend the effect of, or to qualify the operation of existing legislation."* (*Id.*, emphasis added.)

As the Governor has no constitutional or delegated authority to order the furlough, and moreover, as explained further below, the furlough order actually impairs or amends other existing legislation, the order is

constitutionally flawed and must fail. While the Governor's power may be valid when it is exercised consistent with the authority vested in that office by the California Constitution, or delegated by the Legislature, (Cal. Const. Art. V, § 1), when it is used in excess of these parameters, the Governor has exceeded his authority. Such is the case in this appeal.

The California Constitution describes the "executive power" of the Governor as follows: "The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed." (Cal. Const. Article V, § 1.)

Therefore, the Governor's authority to issue an executive order derives, in part, from the constitutional provisions conferring executive power on the Governor, and providing that he shall see that the laws are "faithfully executed." Because only the Legislature is empowered to create laws, the Governor is authorized to issue executive orders only as permitted by those statutes approved by the Legislature which explicitly delegate executive discretion to the Governor over particular areas. Consequently, the Governor's power to issue any executive order must be rooted in a statute, if not found in the constitution.

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a. The Only Constitutional Authority Governing Fiscal Emergencies Still Does Not Permit the Governor's Executive Order

The specific provision of the constitution upon which the State relies to justify the Governor's Executive Order is found in article IV, § 10(f)(1). The State also seems to rely on other supreme executive power, but they provide no citation for this sweeping authority.

The Constitution contains only one relevant delegation of authority to the Governor to act in the event of a "fiscal emergency." It found in article IV, § 10(f)(1), and provides that if the Governor determines that there will be a substantial imbalance in General Fund revenues and expenditures,

> (1) He may issue a proclamation declaring a fiscal emergency and shall thereupon cause the Legislature to assemble in special session for this purpose. The proclamation shall identify the nature of the fiscal emergency and shall be submitted by the Governor to the Legislature, accompanied by proposed legislation to address the fiscal emergency.
> (2) If the Legislature fails to pass and send to the Governor a bill or bills to address the fiscal emergency by the 45th day following the issuance of the proclamation, the Legislature may not act on any other bill, nor may the Legislature adjourn for a joint recess, until that bill or those bills have been passed and sent to the Governor.

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Interestingly, the Section grants authority to the Governor for the limited purpose of declaring a fiscal emergency, assembling the Legislature and submitting legislation to address the fiscal emergency. Thus, this language clearly conveys that the role of the Governor is to proclaim an emergency, assemble the politicians and propose legislation. This section does not in any way authorize the Governor to unilaterally enact a new law or amend an existing law.[3] These types of action are clearly still within the specific realm of the Legislature.

Likewise, in subsection 10(f)(2), the Constitution prohibits the Legislature from taking action on other bills or even calling a recess unless and until it addresses the fiscal emergency proclaimed by the Governor.

In sum, this Constitutional provision is a specific instruction on the power of the Governor - it is the power of a proclamation of fiscal emergency. The breadth of the power of this proclamation is to "assemble" the Legislature in a special session. The purpose of the special session is to address - by the enactment of legislation - the fiscal emergency.

The State voters did not carve out any other new executive power

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[3] The Governor's own description of the Proposition 58 submitted to the voters clearly describes the limitations and intent of the amendment. (SEIU Request for Judicial Notice, Exhibit 1.) It in no way comes close to describe the overarching power he now claims it provides.

when they enacted this provision by voting for Proposition 58. Instead, they simply authorized the Governor to bring the Legislature together in a special session to address the proclaimed fiscal emergency. However, by issuing the Executive Order at issue in this case, the Governor went far beyond the authority found in this section. While it may be necessary at times, to take legislative action to address or mitigate the fiscal emergency, unilateral executive action was not expanded by Proposition 58 aside from the authority to *assemble* the Legislature.

b. What the Governor Failed to Obtain by Voter Approval, He Has Taken by Executive Fiat.

The Governor's understanding of the authority vested by Proposition 58 transformed dramatically between 2005 and the present. In 2005, just a year after new language was approved in Proposition 58, the Governor believed that its authority was *insufficient* to address matters rooted squarely within a public sector collective bargaining agreement. As a result, he proposed, in an effort to expand the Executive authority to override a negotiated contract, Proposition 76 and placed it on the ballot for a vote of the public. In that Proposition, he proposed giving himself specific authority to unilaterally "blue pencil" reductions to appropriations and

override public sector collective bargaining agreements.[4] This proposal, however, was rejected by the voters.

If the Governor believed then - as his press releases indicate now - that he always had the authority to override collective bargaining agreements, it simply would have been both unnecessary and redundant to initiate Proposition 76.

Moreover, a similar measure was already proposed in 1992 with Proposition 165, which also failed.[5] History indicates that specific authority was needed in order to override collective bargaining agreements, and likewise, history shows repeated failed efforts to obtain that authority. This raises serious doubts about the alleged authority which the Governor now believes is so extensive and rooted in his "emergency" assembly power. The Legislative Analyst's breakdown of Proposition 165 provided voters in the Voters' Pamphlet, described why a constitutional amendment was needed and what the proposed measure would have accomplished:

> Eliminates Need for Law Changes to Make Certain Cuts. This measure allows the Governor to make some spending cuts that now require passing a separate law. These cuts could include

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[4] A copy of the Voter Information for Proposition 76 is included in the accompanying Request for Judicial Notice filed by SEIU.

[5] A Copy of the Voter Information for Proposition 165 is included in the accompanying Request for Judicial Notice filed by SEIU.

> reductions in state public assistance programs ... *The Governor also could reduce state employee salaries or work time by up to 5%, except for employees covered under a collective bargaining agreement (unless the agreement allows such reductions.* (Emphasis added.) (*See,* SEIU's Request for Judicial Notice, Exh. 3 at p. 47.)

Such proposed amendments to the constitution clearly indicate that the Governor, as well as his predecessors, did not consider themselves empowered with the authority they now claim is inherently obvious. In fact, making the proposed constitutional amendments (in 1992 and again in 2005) was the **only way** to confer on the Executive Branch the authority it now seeks to uphold. Until 2008, the constitutional separation of powers was viewed as a significant barrier to the Governor exercising any authority that has a quintessentially legislative character.

The Governor invoked his Proposition 58 authority to declare fiscal emergencies on two occasions in 2008. On both occasions, the Governor sought to reduce budget expenditures on salaries. However, the legislative results of these proposals failed to accomplish his purpose. Then, in the third Extraordinary Session of the Legislature, legislation was finally adopted and chaptered into law effectuating salary savings. (Chapter 1, Statutes of 2009-10 Third Extraordinary Session.) ("SB3X1") However, in this legislation - as argued in more detail below - the Legislature

demanded that such savings be achieved consistent with existing law and through collective bargaining. (Section 3.90 of the SB3X1.)

Ultimately, the State repeatedly relies on the theory that because the Governor used the emergency power to assemble the legislature, he also had the power to achieve the legislative result. In effect, the end justified the means. This reasoning has been rejected by courts. In *Lukens v. Nye*, the California Supreme Court concluded that the Governor is "forbidden to exercise any legislative power of function except as in the constitution expressly provided." (*Lukens v. Nye* (1909) 156 Cal. 498, 501.)

If courts may decide cases on the theory that the ends justify the means, it would render meaningless the common law system and constitutional jurisprudence. And, in this case, such a ruling would undermine the separation of powers doctrine.

c. No Statute Permits the Governor's Express or Implied Authority to Impose Furloughs

Since the Governor has no constitutional authority to impose furloughs by executive order, he can only rely on any authorization by statute. However, contrary to the ruling of the trial court, however, no such authority exists. An executive order may be used "to enforce public policy embodied with the Constitution and laws." Without either constitutional or statutory authority, however, such actions by the executive branch must fail.

(1) The Trial Court Properly Found that Government Code section 3516.5 Does Not Authorize the Governor's Executive Order

In issuing Executive Order S-16-08, the Governor cited only to California Government Code section 3516.5 as legal authority. The trial court was not persuaded by this assertion, and it should likewise be ineffective on appeal.

In relevant part, section 3516.5 states:

> Except in cases of emergency as provided in this section, the employer shall give reasonable written notice to each recognized employee organization ***affected by any law, rule, resolution, or regulation*** directly relating to matters within the scope of representation proposed to be adopted by the employer, and shall give such recognized employee organizations the opportunity to meet and confer with the administrative officials or their designated representatives as may be properly designated by law.
>
> In cases of emergency when the employer determines that a ***law, rule, resolution, or regulation*** must be adopted immediately without prior notice or a meeting with the recognized employee organization, the administrative officials or their designated representatives as may be properly designated by law shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following adoption of such law, rule, resolution, or regulation.

There were numerous problems with the Governor's reliance on section 3516.5. First section 3516.5 does not authorize the Governor to unilaterally furlough state employees. In fact, section 3516.5 has nothing to do with furloughs, the setting of salaries, or establishing work days and work hours for state employees. The statute simply permits the state to temporarily forego meeting and conferring with a union over a proposed change in the law when the state can show there is a legitimate emergency.[6]

Second, the meet and confer exemption under section 3516.5 does not apply to executive orders; it applies **only** to proposed changes in a "law, rule, resolution or regulation." The California Legislature is the only state entity with the authority to pass a "law or resolution." While a state agency or department may adopt a regulation, the regulation must first be authorized by a statute and subsequently adopted through the procedure contained in the Administrative Procedures Act ("APA"). (Gov. Code § 11340 *et seq.*) If a state agency issues, enforces, or attempts to enforce a rule without following the APA, the rule is called an "underground regulation." (1 Calif. Code of Regs. § 250.) State agencies are prohibited from enforcing underground regulations. (*Tidewater Marine Western Inc.*

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[6] As argued in more detail below, the Trial Court did not allow evidence concerning the proper interpretation of the word "emergency." A reasonable definition is found in Government Code section 8558.

v. Bradshaw (1996) 14 Cal.4th 557.) It is important to note that section 3516.5 exempts only proposed changes in the law–which is a Legislative function. The purpose of an executive order is to "execute" the law; not create or change laws. Thus, section 3516.5 cannot apply to an executive order, which is not a proposed "law, rule, resolution, or regulation."

Second, even assuming an executive order qualifies as a "law, resolution, or regulation," section 3516.5 is inapplicable where the proposed law, resolution, or regulation is enacted without the requisite legal authority. For example, the state could not rely on a section 3516.5 exemption, and avoid its meet and confer obligations, if the proposed regulation were enacted in violation of the APA. Thus, before section 3516.5 is even applicable, the proposed statutory or regulatory change must be valid. Where an Executive Order is issued without authority, as in this case, the order is invalid. Consequently, section 3516.5 does not confer on the Governor the power to reduce the salaries of represented state employees. Though this section has been in effect for decades, no previous "emergency" or "budget impasse" has so singularly eroded the fundamental nature of collective bargaining nor caused an interpretation allowing the unilateral imposition of salary reductions or furlough.

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(2) Gov. Code section 19826(b) Explicitly Restrains the State from Modifying the Salary of Represented Employees

The Legislature (not the executive) has been tasked with setting compensation and work schedules for represented state workers. (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1325, fn. 10; *Lowe v. California Resources Agency* (1991) 1 Cal.App.4th 1140, 1151.) The Legislature specifically reserved the function of setting the salaries and work hours for represented state employees to itself. Those elected representatives enacted Government Code section 19826(b) which states:

> **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. (emphasis added.)

This statute specifically withheld from the Governor and DPA any authority to "establish, adjust, or recommend" changes in salaries for represented state employees. The statute expressly "preclude[s] DPA from unilaterally adjusting represented employees' wages." (*Dept. of Personnel Administration v. Superior Court* (1992) 5 Cal.App.4th 155, 178.) Accordingly, "the question of represented employees' wages . . . must ultimately be resolved by the Legislature itself." (*Ibid.*) As a consequence,

the Governor is expressly forbidden from changing the salaries of represented employees.

California courts have long held that setting salaries is a legislative function, with ultimate authority residing in the legislative body. *(See, Pacific Legal Foundation* v. *Brown* (1981) 29 Cal.3d 168, 188-89; *Dept. of Personnel Administration* v. *Greene* (1992) 5 Cal.App.4th 155.) But we and the trial court's attempt to distinguish a furlough program from a salary adjustment should be rejected on the basis of the following arguments.

Since the *Greene* decision it has been indisputable that section 19826 prevented DPA from imposing a 5% pay cut - after an impasse in negotiation. Specifically, the *Greene* court rejected the conclusion that DPA had authority - unilateral or otherwise - concerning "salary-setting." In responding to the Governor's contention that it would be "shut out" of the salary setting process, the court stated:

> [G]iven that DPA's and the unions' authority to set salaries derives from a legislative delegation, it is not at all absurd that the Legislature would reserve its authority to act in the event of a stubborn wage dispute . . . *Considering also the highly political nature of this dispute, it makes further sense that it will ultimately be resolved in the political branch.* Our conclusion is consistent with the Dills Act, which represents only a limited delegation of the Legislature's salary-setting function, and includes numerous provisions suggesting the Legislature intended

> to retain final determination of state salaries.
> (Emphasis added.) (*Id.* at 182.)

Governor Schwarzenegger and the trial court rest on a narrow thread of reasoning when they contend that the furloughs and cuts do not violate section 19826 because they do not reduce salary ranges. This is a distinction without a difference. It is simply unfathomable that a cut in pay - spread out over a lengthy period of time and combined with a reduction in hours - is not precisely the same effect as a reduction in the salary range. Schwarzenegger conceded as much in his November 6, 2008 "Letter to "Valued State Workers" when he described the furlough as a cut in pay and reduction in 19 days of work spread out over one and half years. (SEIU JA 124-125.) It is not surprising that he has conveniently forgotten this admission, as well as the one that indicated Legislative approval was necessary. (SEIU JA 125.)

Just as in *Greene,* the present controversy over the furlough is quintessentially a political dispute. It involves fundamental decisions about the budget impasse and appropriate remedies, which are by nature **legislative** in character. The primary options are tax or revenue increases, or program or services cuts through legislation or budget actions. Decisions about the types of revenues or taxes, and likewise the relative value of programs or services, fall squarely within the elected politicians' job duties.

The governor, by contrast, is not the *uber-legislature*. He simply does not possess the authority to step into the vacuum of political power to make decisions when other politicians fail to do so. To camouflage these purely legislative actions under the disguise of an "emergency" is simply letting the politicians "off the hook" for their inertia. While the legislature (or voters, for that matter) could have delegated this authority to step in to address salary reductions, when considering that specific possibility, they expressly declined to do so.

The State cannot deny that the specific purpose of the furlough program was to impose a "pay cut" on state employees for the specific goal of saving state funds. In *Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, the court addressed the state's authority to reduce salaries for exempt employees, but made clear that the very nature of collective bargaining precluded unilateral action in the case of represented employees:

> Principles of collective bargaining require that upon expiration of an MOU the employer must maintain the status quo until a new bargain is reached or negotiations reach an impasse ... Upon impasse, the employer may take action with respect to compensation and other matters. However, with respect to represented employees, the Legislature has reserved the power to set salaries to itself. *(Id.* at 1332.)

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Whether a furlough order is considered a direct salary reduction or a reduction in operations which has the direct and intended consequence of reducing salaries, it is subject to the meet and confer process that is part and parcel of collective bargaining and cannot be unilaterally imposed. The record is devoid of evidence that this meet and confer process actually took place.[7]

(3) Sections 19851(a) and 19849 provide no authority for the Governor's Action Because these Statutes Anticipate a 40-hour Week

In addition to salaries, the forty hour workweek of represented state employees is similarly protected by statute. Government Code section 19851 states in relevant part:

> 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.

Government Code section 19852 states:

> When the Governor determines that the best interests of the state would be served thereby, the Governor may require that the 40-hour

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[7]As the law makes clear, the meet and confer process has specific requirements to be observed before ultimately reaching "impasse." (Gov. Code section 3517.8.)

> workweek established as the state policy in Section 19851 shall be worked in four days in any state agency or part thereof.

These statutes highlight California's policy that State employees shall work a 40-hour week. Even though the Governor is given limited authority to establish a four day workweek in section 19852, state employees must still work a forty hour week. Thus, all section 19852 allows is the creation of what is commonly referred to as "four tens," or a four day workweek with ten hour days. Notably, sections 19851 and 19852 are similarly listed in the Dills Act as supersedable statutes. The parties may therefore agree to a provision in a memorandum of understanding which conflicts with the statutory requirements. Neither the Governor nor the DPA have the authority to effect a reduction in hours for represented state employees without Legislative approval. Yet, the furlough portion of the Executive Order reduces state employees' workweeks to thirty-two (32) hours two times a month. A thirty-two (32) hour workweek directly conflicts with "the policy of the state" to maintain a forty (40) hour workweek codified in sections 19851 and 19852.

When the Court incorrectly concluded that furloughs initiated through the Executive Order constituted "a change in work hours" - as opposed to salaries - it erroneously decided that sections 19851 and 19849

provided adequate authority to justify the result.

Section 19849 requires DPA to "adopt rules governing hours of work and overtime compensation." Dispensing with analysis, the Trial Court summarily concluded that these statutes "provide the authority to reduce the workweek of state employees to meet the needs of state agencies and to do so by adopting a rule." Of course, to complete the result, the Trial Court then needed to conclude that the Executive Order was just the type of rule that was contemplated by the Legislature in 19851 and 19849.

Such a conclusion, however, flies in the face of numerous countervailing doctrines, including the separation of powers, the collective bargaining process and, the administrative rule-making process. Section 19851 provides no independent authority for a furlough. A furlough - on the statewide basis initiated - is not a new work week or work day, nor a response to the "varying needs of different state agencies." It is a budget reduction measure to accomplish the legislative purpose of balancing the budget otherwise at an impasse.

Similarly, section 19849 provides no independent authority for the furlough. In contrast, it speaks to the legislative requirement for a reasoned rule-making process to provide administrative and procedural protections - which were otherwise lacking in the Governor's executive fiat.

The only logical conclusion of the meaning of the "notwithstanding any other provision of law" language in section 19826 and the terms of the MOUs, is to preclude the Governor or DPA from taking action - even if arguably otherwise permitted by sections 19851 and 19849 - when those actions **would result** in changing the salaries or work hours of represented employees. This is particularly so when such unilateral actions run contrary to or violate the very legislative policies supported by the collective bargaining system.

Indeed, section 19851 must be viewed in the context of the regulation of the hours of work. Section 19824 provides for monthly salaries to be paid to state workers, and section 19843 allows the State to establish "workweek groups" for each position with a monthly or annual salary range. But in the State service, state regulations establish workweeks. (2 California Code of Regulations §§ 599.701-599.703). The fundamental purpose of workweeks has always been to establish what constitutes full-time work before overtime accrues. This conclusion is supported by a review of the State's laws and rules. The State's regulation 599.701 provides that "each position or class . . . for which a monthly or annual salary range is "fixed" is either in 'Work Week Group 1' which covers *'classes and positions with a work week of 40 hours'* or 'Work Week

Group 4,' which includes *'classes and positions for which special provisions are made by rule because of the varying needs of state agencies and prevailing overtime practice.'* "

The Legislature has defined a "full-time" position or appointment as a "position or appointment in which the employee is to work the amount of time required for the employee to be compensated at a full-time rate." (Gov. Code §18550.) When employees are hired into the civil service on full-time status, their employment contract with the state presupposes hours of work that are also full-time hours for that position. This presumption is supported by references to the State's treatment of other classifications of employees, part-time and permanent intermittent, which provide for less than full-time. If DPA could correctly redefine a full-time workweek to permit any number of fewer hours, the state could require those employees to be paid the same full-time rate for the reduced hours.[8]

Alternate workweek schedules still must conform to the 40-hour per week default. Further, section 19851 and regulation 599.701 which connect changes to the workweek or workday to the needs of the agencies can be

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[8]Even the initial "Notice of Personnel Action Form" that all employees get when they are hired or promoted shows the amount of hours they are expected to work - generally full-time status. This is incompatible with the furlough order.

compared with section 19852(a). That section allows the Governor to unilaterally adjust the standard work schedule by requiring state employees to work their 40 hours during a four-day workweek without the need to relate such a schedule to the "needs of the agency." The legislature thus specifically permits the governor to create alternate workweek schedules by altering employee work hours in a particular way by allowing "full-time" hours, i.e., 40 hours, that can be performed in a four-day workweek. If section 19851 confers virtually unlimited authority on the Governor to change hours at will, as the Trial Court suggests, section 19852 would have been unnecessary to create and would continue to be superfluous. Long-standing rules of statutory construction simply do not allow a pair of laws to be interpreted in a manner that gives meaning to one, while another is rendered meaningless. (*Slocum v. State Bd. of Equalization* (2005) 134 Cal.App.4th 969.)

Even if this Court could construe section 19851 providing authority for changing or reducing the workweek, the furlough program imposed by the executive order still does not meet the requirements of that provision. It was not implemented to "'meet the varying needs of state agencies." Moreover, it does not meet the "special needs" category described in regulation 599.701. The Executive Order makes no connection to any kind

of assessment of case-by-case operational needs. The "one-size-fits-all" nature of the furlough order compels the conclusion that it was not instituted to respond to the "varying needs of the different state agencies." Instead, it was instituted solely to reduce employee costs on a wholesale nature - particularly when the desired political result was not achieved. This was certainly a meat axe approach given the array of other possible alternatives.

A detailed review of section 19851(a) confirms that this section was simply to provide operational flexibility rather than additional independent authority to reduce hours and salary:

> It is the policy of the state to avoid the necessity for overtime work whenever possible. This policy does not restrict the extension of regular working-hour schedules on an overtime basis in those activities and agencies where it is necessary to carry on the state business properly during a manpower shortage.

Legitimate statutory interpretation, gives meaning to all parts of a statute not just its piece-meal parts. In this section, the references to the "varying needs" of the agencies, the concern for "avoid[ing] the necessity for overtime work," and the "necess[ity] for carry[ing] on the state business properly during a manpower shortage" lead to the conclusion that section 19851 was designed to provide needed flexibility in scheduling in order to

efficiently perform the particular agency's tasks. Likewise, no reasonable interpretation supports the conclusion that it was intended as general authority to unilaterally adjust salaries camouflaged as changed workweeks.

This reading of section 19851 is actually reinforced by section 19849, which states that DPA "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." (Emphasis added.) Section 19849 was primarily designed to provide DPA with authority to promulgate rules regulating work hours and overtime, but only in a manner consistent with other statutory law. The other statute must be consistent with the "needs" language of section 19851, as well as with the statutory responsibilities of each agency. The State has implemented this authority with regulations 599.701-703.

Concerning, administrative implementation of statutory authority, a "rule" is only valid to the extent it is authorized by law, and an agency can only exercise the authority delegated it by the Legislature. (*See, e.g., Assn. for Retarded Citizens-California v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 392 (holding that state agency action must be consistent with enabling statutes and it cannot alter the scope of a state program by

administrative action).) Section 19849, was meant to allow DPA to adopt those general procedures needed to implement the substantive provisions of section 19851 and the surrounding statutes. The reference to record keeping requirements support the interpretation that its focus is on the mechanics of implementing law rather than on a grant of independent authority.

Ultimately, after putting section 19851 into context with other statutory provisions and DPA's own regulations, we see it is designed to allow the state to respond to specific operational needs, but only after undertaking the public rule making process. Even if the Legislature has given DPA the authority to use a "rule" to regulate the workweek in the manner asserted by the Trial Court, the record is devoid of any evidence that DPA did so properly. If DPA was supposedly implementing a "rule" in this case to change the "workweek," it violated the APA as there was no public notice and hearing process prior to its adoption. Though the State claims the APA does not apply to the Dills Act, the default rule is that it applies unless specifically exempted by statute. No statute exempts the DPA and the State never cites an exception.[9]

Sections 19851 and 19849 have long been in effect and have never

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[9] While a statute exempts compliance from the APA if an MOU provides for it (section 19817.10), no such opt out of the APA exists in this case for any DPA actions.

been considered to provide authority to reduce salaries or furlough employees. Historically, these sections have been construed and applied in a more narrow and practical fashion. Moreover, section 19826 has been considered a bar to the kind of adverse and punitive salary action that the furloughs represent.

The Governor failed to initially assert sections 19849 and 19851, as authority for its actions instead relying solely on section 3516.5. The State is making last-ditch efforts to contrive or justify the result through any means. Arguments and interpretations that fit the result are forwarded as needed, and any suggestion to the contrary is dismissed as interfering with the Governor's supreme power.

d. The State and Court Wrongly Conclude that the Parties' Memorandum of Understanding is Supercedable

(1) Supercession

The concept of supercession in collective bargaining is well-established and amply-defined by case law: The Legislature designs certain statutes to be controlled by the results of the collective bargaining process when the mutually agreed language reaches a result on the same topic. As an added feature in this case, the contract at issue herein also **incorporates** the provisions of law enumerated in a list - including sections in dispute in

this matter (*e.g.* Gov. Code §§ 19824, 19843, and 19851.)

Under the general principle of supercession, the Legislature has dictated that if any contract provision is in conflict with an enumerated section, the contract shall control and supercede the provision in question or any "parts thereof." Although the Union's MOU at issue has expired, section 3517.8 requires that the terms of the MOU continue in effect, **including** any provisions that supersede statutes, except until the parties reach impasse. However, in this case, the parties clearly did not reach impasse. As a result, it is indisputable that terms of the then-existing MOU continued in effect.

While the state contended that section 19851 (and also 19826) was superceded by the MOU, it failed to specify any provision in the MOU that was inconsistent with the section. Moreover, while the Trial Court correctly concluded that sections 19849 and 19851 were **incorporated** into the MOU, it incorrectly concluded that "the terms of the MOU do not conflict with these statutes, **notwithstanding** that the MOUs **call for a normal work week of 40 hours** (emphasis added.)" In this context, the only conclusion that may be drawn is that the *policies* expressed in section 19851(a) and the MOUs are in conflict, but section 19851 does not offer the Governor any of the additional authority claimed by the state.

Moreover, because the apparent flexibility bestowed on the state through the language of section 19851(a) is inconsistent with the MOU provision on the same point, supercession principles demand that because the MOU is more specific, it **should control** over the arguably more general flexibility offered in section 19851(a) - as it relates to the 40-hour workweek. So even if this Court does not conclude that furloughs should be prohibited by section 19826 (as a change in salary), even attempting to view it as a work hour change, it would **still be prohibited by the MOU**.

(2) The MOU prohibits the Furlough By Explicitly Defining the Length of a Work Week

In the SEIU MOU (Article 19.1 "Hours of Work"), the parties agreed that *"unless otherwise specified herein,* the regular workweek of full-time employees shall be forty (40) hours, Monday through Friday, and the regular work shift shall be eight (8) hours." Unlike section 19851, this language does not make any reference to any potential "policy" but concludes that the workweek "shall be" 40 hours unless otherwise specified in the MOU. The only stated exception is a special "workweek group" for FLSA-exempt employees.

Granted the MOU also says that "Workweeks and work shifts of different numbers of hours may be established by the employer in order to

meet varying needs of state agencies," and other sections of the MOU define the meaning of "workweeks and work shifts of different numbers of hours." (*Id.* , at 19.1(B).) However, a unilateral statewide furlough does not fit within the meaning of meeting the "varying needs of state agencies" for the reasons explained above. The Trial Court failed to address these other sections of the MOU, but they are compelling because they explain and define an "alternate workweek" as that term is used in Article 19.1.

Specifically, Article 19.8 defines an "alternate workweek" as "a fixed work schedule other than *standard work hours* (emphasis added.)" However, the term "standard work hours" appears to be related specifically to Article 19.1- 8 hours per day, Monday through Friday. In short, the twice-monthly furlough program does not meet the definition of an "alternate workweek." Furthermore, it borders on ludicrous to believe that unilateral furloughs fits the concept or policy connoted by "alternate workweek."

The MOU also defines "flexible work hours" and "reduced work time." The reference to reduced worktime is clearly and specifically tied to Gov. Code, sections 19996.20 through 19996.29. However, Article 19.8 makes clear that both these options must be **initiated by the employee**, and not unilaterally: "*Upon request by the Union or an employee,* the State shall

not unreasonably deny a request for flexible work hours, an alternate workweek schedule or reduced workweek schedule." (SEIU JA 483.) (MOU, 19.8(B).)

This language expressly states that reduced hours cannot be forced on employees, and reflect specific statutory and administrative regulations prohibiting involuntary reductions in hours. (*See, e.g.*, section 19996.22 and regulation 599.832.) However, in defiance to these clear statutory guidelines, this is exactly what the Governor's unilateral furlough does.

Ultimately, the Trial Court incorrectly relied on an isolated reading of the language of "workweeks and workdays of a different number of hours" - ostensibly from sections 19851 and the MOU. Sequestering the phrase from any other section of the MOU or statute, the Court proceeded to define it absolutely inconsistently with the other provisions of the MOU and far beyond the principals of the collective bargaining process. This rendered those other words meaningless, null and void. The fundamental point of this type of provision is to make it absolutely clear that the forced reduction of employee salary cannot be accomplished by unilaterally reducing hours. To the extent the contract terms make the 40-hour "policy" expressed in section 19851 specifically applicable to SEIU, the contract terms prevail.

e. Alternatively, a Failure to Fund the Provisions of the MOU Should Have Led to the Application of Section 3517.5

The process for State employee contracts involves the preparation of a written MOU which is presented to the Legislature for a determination. (Government Code, § 3517.5.) Moreover, the Legislature has adopted methodology for handling MOU-related situations involving the lack of funding, as well as provisions requiring Legislative action. First, the Dills Act states:

> if any provision of the [MOU] requires the expenditures of funds, those provisions ... may not become effective unless approved by the Legislature in the annual Budget Act.

The MOU in effect for the parties had been funded in the 2008 budget act. When the Governor assembled the Legislature pursuant to his Proposition 58 authority, the Legislature took further action specifically related to the MOU funding. In the 2009-10 Budget Act [Chapter 1, Statutes of 2009-10 Third Extraordinary Session - adopted in the third extraordinary session and chaptered into law] the Legislature included the language highlighting that the Legislature knew how to implement a salary reduction in a manner consistent with the requirements of the Dills Act and its collective bargaining obligations.

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Section 3.9 of the Budget Act of 2009-2010 provides that:

> (a) Notwithstanding any other provision of this act, each item of appropriation in this act, with the exception of those items for the California State University, the University of California, Hastings College of the Law, the Legislature (including the Legislative Counsel Bureau) and the judicial branch, shall be reduced, as appropriate, to reflect a reduction in employee compensation *achieved through the collective bargaining process* for represented employees or through existing administration authority and a proportionate reduction for nonrepresented employee (utilizing existing authority of the administration to adjust compensation for nonrepresented employees) . . . . The Director of Finance shall allocate the necessary reductions to each item of appropriation to accomplish the employee compensation reductions required by this section.

By including an unallocated amount for the budget reduction in employee compensation, the Legislature indicated that it did not approve or intend to approve the unilateral actions of the Governor. This Legislative ratification would have had to occur in order for the Governor's Proposition 58 authority to withstand constitutional scrutiny. Having failed to achieve Legislative ratification for his actions, the Governor simply had to resort back to his ordinary authority to carry out the laws of the state.

In another provision of the Dills Act, the Legislature predetermined the course of events should they fail to fund "any provision of the [MOU]

which requires the expenditure of funds." In this scenario, either party may "reopen negotiations on all or part of the [MOU]. (Gov. Code, section 3517.7.) This is mandatory process when an issue about lack of funding arises. Interestingly, the Legislature indicates that it does not intend to take away either side's bargaining authority in such a situation. Instead, it upheld the bargaining authority as being paramount and found the natural next step to be a funding problem. Unfortunately, the Governor - in a rush to a political power play - utterly vitiated the applicable laws. While the Trial Court had the opportunity to correct this error, it failed to do so.

f. The Proper Meaning of the "emergency clause of the MOU is in Line With the Definition Provided by the ESA"

The trial court erred when it ruled on the language of the SEIU MOUs to the effect that "the rights of the State shall include, but not be limited to the right .... to take all necessary action to carry out is mission in emergencies." (SEIU JA 363.)[10]

The court sided with the State in concluding that furloughs were a "necessary and reasonable" response to the so-called fiscal emergency. SEIU's MOU never defined the nature of the emergencies that would be

[10]Moreover, as argued in more detail below, the Court should not have stepped into the role of interpreting terms of a labor agreement.

covered by this clause. However, to give it the meaning subscribed by the court is so broad to render it meaningless. Alternatively, to interpret the term - absent the bargaining history of the parties - the court is only able to give it a plain and ordinary meaning. In context, it is clearly intended to cover the types of natural disasters contemplated in Government Code section 8558, the State's Emergency Services Act. That Act considers emergencies as "conditions of disaster" or peril

> caused by such conditions as air pollution, fire, flood, storm, epidemic, riot, drought, sudden or sever energy shortage, plant or animal infestation or disease, . . . earthquake or volcanic prediction.

A fiscal crisis is not a natural disaster, act of God or act of Mother Nature. It is a political failure. Any previous failure does not justify arbitrary acts the Governor wishes to take to remedy the political debacle.

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

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.) Nevertheless, courts have long recognized that the payment of salary to public employees involves obligations protected by the Contract Clause of the Constitution. In *Kern v. City of Long Beach* (1947) 29 Cal.2d 848, 853, 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, 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.)

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In California, numerous statutes govern public sector labor relations and create private rights of a contractual nature enforceable against the state. Many of the important terms and rights of state employees are explained in detail in the arguments above. As set forth above, the Dills Act (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 an agreement is reached, the parties must reduce it to an MOU and present it 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, 338.)

In the instant case, each bargaining unit entered into a MOU setting forth salary and benefit levels. The salary provisions in the these MOUs (as well as the other provisions cited above) 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); *Dept. of Personnel Administration v. Superior Court*, (1992) 5 Cal.App.4th 155, 181-182.)

Moreover, even 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 Assn., Inc. v. City of Stockton* (1984) 161 Cal.App.3d 813, 818.) The Executive Order and the court's ruling blatantly disregard this requirement.

The ruling impermissibly impairs the contract between SEIU and the State because it affirmatively prohibits the State Controller from paying the wages set forth in the MOUs for the various bargaining units. Inasmuch as the trial court disregarded the law and denied state employees their legal and statutory protections as well as their right to contractually mandated wages, it impaired the obligation of valid contracts.

Because the Court's ruling also impaired legal, statutory and contractual obligations, it also 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 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, 519 (emphasis added); *Newhall v. Newhall* (1964) 227 Cal.App.2d 800.)

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In this case, the trial court ignored the sanctity of the laws applicable to state employment, the employees' contracts, and the court also impaired the obligations created thereunder. Thus, the Order violates the Contract Clauses of both the United States and California Constitutions and is unlawful. In *Sonoma County Organization of Public Employees* v. *County of Sonoma* (1979) 23 Cal.3d 296, the Supreme Court was presented with the issue of 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 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 Bldg. & Loan Assn.* v. *Blaisdell* (1934) 290 U.S. 398, 428 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, the duration of the legislation. (*Sonoma County Organization of Employees* v. *County of Sonoma*, *supra*, 23 Cal.3d at 305-

306.) Here, like *Sonoma*, the Trial Court's Ruling fails under the *Blaisdell* standard.

The *Sonoma* court 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.*, at 321.) 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.*, at 314.)

In a case involving state employees, the court in *Theroux* v. *State* (1984) 152 Cal.App.3d 1 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.)

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In a case similar to the present dispute, the Ninth Circuit, in *University of Hawaii Professional Assembly* v. *Cayetano* ("UHPA") 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.) On appeal, the Ninth Circuit found that the pay lag statute not only adversely affected plaintiffs' contractual expectations but also "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. (*Id.*) 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.)

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 are similarly 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 here is judicial impairment, and according to *Bradley* v. *Superior Court*, *supra*, 48 Cal.2d at 519, "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 implied contracts. They worked with the expectation that they would be timely and fully compensated for their work and the state Contract Clause must protect their vested contractual rights from judicial impairment. As a matter of law,

the state's Contract Clause constitutionally mandates the statutory protections of state workers vis-a-vis the rights set forth above as well as the regular and full payment of salaries to state employees.

3. 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 an 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.) 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.)

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.) In *Skelly v. State Personnel Board,* (1975) 15 Cal.3d 194, 206 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 decide to provide a property interest to their public employees, only to have a court command 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.) 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 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 no such rights. 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 payment of salaries. Explained in detail above are the panoply of laws that ensure that State employees will be spared the unilateral cuts in salary and work hours as exacted by the Governor's order.

Based on the foregoing authority, the trial court reached an erroneous conclusion of law that state civil servants would not 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.

4. The Ruling Violates Several Applicable Laws, including the Dills Act and the Administrative Procedures Act.

The Ruling constitutes an error of law because it is violates applicable laws including the Dills Act, the Administrative Procedures Act, among others. It ignores applicable law concerning the exclusive jurisdiction of the Public Employment Relations Board (PERB), and affirmatively rules upon the relevant terms and conditions of state employment by means of incorrect legal reasoning. It also ignores applicable law concerning the necessary steps to promulgate state rules, but

affirmatively finds the existence of the furlough to be a state rule.

a. PERB Has Been Vested With Exclusive Jurisdiction Over Labor Disputes of this Sort.

Once the Court determined (however incorrectly) that it was necessary to interpret 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. The failure to do so violated long-standing principles concerning PERB's jurisdiction.

The Union is a state employees' union subject to the Dills Act - the collective bargaining law for state employees. (Gov. Code, § 3512, et seq.) The Dills Act 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 relating to conduct or misconduct constitute an unfair practice charge and, if so, what the appropriate remedies are. (*Id.*) (emphasis added.)

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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.) 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 Assn.* (1984) 25 Cal.App.4th 207, 211 (emphasis added);*see also,* Gov. Code § 3514.5 [vesting PERB with exclusive jurisdiction over unfair practices].) In addition, PERB's 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 entered into the arena of contract interpretation, the dispute between the parties became an issue of 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 bypassing bargaining with the employee organizations as a cost saving measure. The trial court recognized this, and defined the remaining dispute as one of interpretation of the relative contractual rights. Having done so, the Court should have then submitted the matter to PERB. If it was necessary to delve into contractual rights, it was inescapable that "[t]he 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 (internal citations omitted), "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, 961; *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 12; *see also, 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 945 [finding that a party may not evade PERB's jurisdiction through artful pleading]; and *El Rancho Unified School District, supra*, 33 Cal.3d at 954, fn. 13 [stating that a court must defer to PERB when the underlying conduct alleged "may fall within PERB's exclusive jurisdiction.")

b. The Trial Court's Ruling Violates the Administrative Procedures Act by Inappropriately Finding that the Furlough Order is a Rule of General Application.

Further complicating the errors in this Ruling, the Court concluded that the furlough plan constituted a rule of general application which allowed the Court to maneuver the plan to fit into the State's Right clause of the MOU. However, in concluding that the plan was a rule of general application, the Court erred in its application of the law. It is well-settled that rules of general application are tantamount to regulations which must

be properly promulgated under the Administrative Procedures Act. No such regulation was properly promulgated, and therefore 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 "regulation" as defined in Section 11342.600, unless . . . [it] has been adopted as a regulation AND filed with the Secretary of State pursuant to this chapter.

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) a regulation is 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 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 *Tidewater Marine* test, the Court's Ruling - recognizing the existence of a rule by which the State will implement statewide furloughs, office closures and pay reductions pursuant to the Governor's executive order - constitutes a regulation, as defined in Government Code section 11342.600. 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.

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VI.

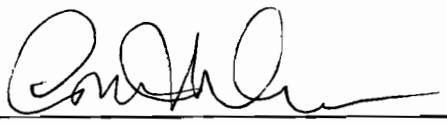
CONCLUSION

For all the foregoing reasons, the Trial Court's ruling should be found in error and reversed.

Dated: September 2, 2009

Respectfully submitted,

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,

By: 

ANNE M. GIESE
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SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, Rule 8.204(c)(1). I certify that Appellant's Opening Brief contains 13,437 words, as determined by the "word count" feature of the word count feature in the Word Perfect processing system used to prepare it.

Dated: September 2, 2009

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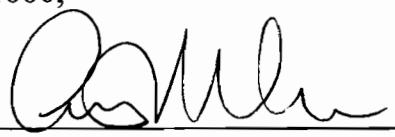
By: 

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PROOF OF SERVICE

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

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

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

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SEE ATTACHED LIST

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 September 2, 2009, at Sacramento, California.

MARY A. MEDINA

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State of California
Court of Appeal
Third Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rules of Court, rules 8.208, 8.490(i), 8.494(c), 8.496(c), or 8.498(d)

Court of Appeal Case Caption: SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000
v.
ARNOLD SCHWARZENEGGER, ET AL.

Court of Appeal Case Number: C061020

Please check here if applicable:

☐ There are no interested entities or persons to list in this Certificate as defined in the California Rules of Court.

Name of Interested Entity or Person (Alphabetical order, please.)	Nature of Interest
1.Professional Engineers in California Government	Petitioner in related case filed in Sacramento County Superior Court
2. California Association of Professional Scientists	Petitioner in related case filed in Sacramento County Superior Court
3. California Attorneys, Administrative Law Judges, and Hearing Officers	Petitioner in related case filed in Sacramento County Superior Court
4. CDF Firefighters	Petitioner in related case filed in Sacramento County Superior Court
5. California Association of Psychiatric Technicians	Petitioner in related case filed in Sacramento County Superior Court

Please attach additional sheets with Entity or Person Information, if necessary.

Brooke D. Pierman
Signature of Attorney or Unrepresented Party

Date: 9-3-09

Printed Name: Brooke D. Pierman
State Bar No: 220630
Firm Name & Address: Service Employees International Union, Local 1000
1808 14th Street, Sacramento, California 95811

Party Represented: Service Employees International Union, Local 1000

ATTACH PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE

AMENDED PROOF OF SERVICE

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On September 3, 2009, I served the following:

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