COURT OF APPEAL, STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000, Plaintiff/Appellant, vs. JOHN CHIANG, as State Controller, etc., Defendant/Appellant, ARNOLD SCHWARZENEGGER, as Governor, etc., et al., Defendants/Respondents.	Court of Appeal Case No. C061020 (Sacramento County Superior Court Case No. 34-2009-80000135-CU-WM-GDS) FILED OCT - 5 2009 COURT OF APPEAL - THIRD DISTRICT DEENA C. FAWCETT, Clerk BY_____ Deputy

On Appeal from the Judgment dated February 11, 2009
of the Superior Court for Sacramento County
The Honorable Patrick Marlette

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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, Plaintiff and Appellant
v.
John Chiang as State Controller, etc., Defendant and Appellant
Arnold Schwarzenegger, as Governor, etc., et al, Defendants and Respondents

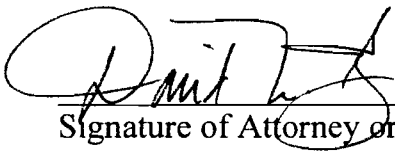
Court of Appeal Case Number: C061020

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. Please see attached	
2.	
3.	
4.	

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



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ATTACH PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE

Approved for Optional Use Within the Third Appellate District. 01/01/2007

Attachment to Certificate of Interested Entities or Persons.

Full Name of Interested Entity or Person	Nature of Interest
Bill Lockyer, as State Treasurer of California	Intervenor and Appellant in related case filed in Third District Court of Appeal.
Board of Administration of California Public Employees' Retirement System	Petitioner in related case filed in San Francisco County Superior Court.
California Association of Professional Scientists	Petitioner and appellant in related cases filed in Sacramento County Superior Court and Third District Court of Appeal
California Association of Psychiatric Technicians	Petitioner in related case filed in Sacramento County Superior Court.
California Attorneys, Administrative Law Judges and Hearing Officers in State Employment	Petitioner and appellant in related cases filed in Third District Court of Appeal, First District Court of Appeal, San Francisco County Superior Court, and Alameda County Superior Court.
California Board of Equalization	Intervenor and Appellant in related case filed in Third District Court of Appeal.
California Correctional Peace Officers Association	Petitioner in related case filed in Alameda County Superior Court.
California Professional Public Employees' Association	Petitioner in related case filed in Sacramento County Superior Court.
CDF Firefighters	Petitioner in related case filed in Sacramento County Superior Court.
Debra Bowen, as Secretary of State of California	Intervenor and Appellant in related case filed in Third District Court of Appeal.
Edmund G. Brown, Jr., as Attorney General of the State of California	Intervenor and Appellant in related case filed in Third District Court of Appeal.
Jack O'Connell, as Superintendent of Public Instruction for the State of California	Intervenor and Appellant in related case filed in Third District Court of Appeal.
John Chiang, as Controller of the State of California	Respondent and Appellant in related case filed in Third District Court of Appeal.
John Garamendi, as Lieutenant Governor of the State of California	Intervenor and Appellant in related case filed in Third District Court of Appeal.
Kenneth Hamidi	Petitioner in related case filed in Sacramento County Superior Court.
Professional Engineers in California Government	Petitioner and appellant in related cases filed in Sacramento County Superior Court and Third District Court of Appeal
Union of American Physicians and Dentists	Petitioner in related case filed in Alameda

	County Superior Court
Yvonne Walker	Petitioner in related case filed in Alameda County Superior Court and Sacramento County Superior Court.

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MISCELLANEOUS

I.

INTRODUCTION/SUMMARY OF ARGUMENT

Appellant Service Employees International Union, Local 1000 ("Appellant" or "SEIU") appeals from the final judgment of the Sacramento County Superior Court denying Appellant's petition for writ of mandate challenging Governor Arnold Schwarzenegger's issuance of Executive Order S-16-08 (the "Executive Order") directing twice monthly furloughs of state employees. [1]

The fundamental issue before this Court is whether the Governor of the State of California may exercise the executive power, granted him by the California Constitution, statutes, and Memorandum of Understanding ("MOU") between Appellant and the State, to furlough temporarily state employees as one means of addressing a fiscal crisis of unprecedented dimension. The undisputed evidence submitted to the trial court established that the State was facing an unprecedented budget deficit and, according to estimates by the State Controller, was on the brink of running out of cash at the time the Governor issued the Executive Order. To address this crisis, the Governor determined that temporarily furloughing state employees two days a month was one of the necessary steps to help alleviate the budget and solvency crisis facing the State. Thus, pursuant to

[1] On July 1, 2009, the Governor issued Executive Order S-13-09 directing a third furlough day for state employees. This Executive Order was issued subsequent to the judgment in this case and is not before this Court.

his inherent executive authority as established by the California Constitution, various statutes in the Government Code, and provisions in the MOUs between the State and state employee bargaining units, the Governor issued Executive Order S-16-08 directing the temporary, twice monthly furloughs of state employees.

As the trial court found, and as demonstrated by the discussion below, the Governor, in role his as the state employer, has the authority pursuant to Government Code sections 19851 and 19849 to furlough state employees. In addition, the MOU between the State and Appellant grants the Governor the authority to furlough state employees in State Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20, and 21, the state bargaining units represented by SEIU. Ultimately, the record before this Court affirms the Governor possesses the authority to furlough state employees. The record further demonstrates every effort was made to avert the necessity of adopting furloughs. However, directing temporary furloughs of state employees was an authorized and necessary response to address the budgetary and cash crisis facing the State. Appellant's arguments to the contrary fail to address the obvious: there was a serious fiscal emergency requiring immediate action and the Governor, in furloughing state employees, took a step within his authority to respond to that emergency.

II.

STATEMENT OF THE CASE

A. Statement of Facts.

1. Efforts to Resolve the State Budget Crisis Prior to the Issuance of Executive Order S-16-08.

On July 31, 2008, Governor Schwarzenegger issued Executive Order S-09-08 directing the State of California to take various budget mitigation measures in light of the State's budget impasse. (Joint Appendix ["JA"], Vol. I, Tab. R, p. JA210.)[2] This Executive Order directed all state agencies and departments "to cease and desist authorization of all overtime for employees effective July 31, 2008." (*Id.*)

On September 23, 2008, Governor Schwarzenegger signed into law a new budget for the 2008-2009 fiscal year. (JA, Vol. I, Tab. S, p. JA214.) However, the downturn in the national economy shortly thereafter resulted in an unanticipated and significant reduction in revenues from those forecasted in the 2008-2009 budget. (JA, Vol. I, Tab. T, p. JA219.) The State's Department of Finance determined the shortfalls in the budget compromise would cause a budget deficit of approximately $11.2 billion. (*Id.*) The Department of Finance also initially determined that revenue for the 2009-2010 fiscal year would be $13 billion lower than projected. (*Id.*) The Department of Finance concluded the "State will run out of cash in February and be unable to meet all of its obligations for the rest of the

[2] All references to the Joint Appendix are to the SEIU Joint Appendix.

year." (*Id.*) The Department of Finance issued an October 2008 Finance Bulletin that stated, "Preliminary General Fund agency cash for October was $923 million below the 2008-09 Budget Act forecast of $10.667 billion." (JA, Vol. I, Tab U, p. JA243.) The Department of Finance also concluded, "year-to-date revenues are $1.06 billion below the $22.58 billion that was expected." (*Id.*)

In response to the unanticipated budget deficit, the Governor issued a special session proclamation on November 6, 2008 calling for an emergency session of the Legislature to address this budget crisis. (JA, Vol. I, Tab. V, p. JA246.) On the same day, the Governor issued a letter to all state workers informing them of the potential impact of some of the cost-savings plans he was considering. (JA, Vol. I, Tab. W, p. JA248.) He also informed state employees of the emergency session of the Legislature. (*Id.*)

The Legislature failed to reach a resolution of the pending budget crisis in the November 2008 special session. (JA, Vol. I, Tab. AA, p. JA258.) As a result, on December 1, 2008, the Governor issued a Fiscal Emergency Proclamation pursuant to his authority under Article IV, section 10(f) of the California Constitution. (*Id.*) In his Fiscal Emergency Proclamation, the Governor specifically identified the nature of the fiscal emergency "to be the projected budget imbalance and insufficient cash

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reserves for Fiscal Year 2008-2009 and the projected insufficient cash reserves and potential budgetary and cash deficit in Fiscal Year 2009-2010 which are anticipated to result from the dramatically lower than estimated General Fund revenues in Fiscal Year 2008-2009." (*Id.*) In his Fiscal Emergency Proclamation, the Governor reconvened the Legislature for another special session to address the fiscal emergency. (*Id.*)

The Governor's proclamation of a fiscal emergency was supported by the Department of Finance's further review and updating of its revenue estimates, which found that actual revenues for the 2008-2009 fiscal year were expected to be $14.8 billion below the estimated revenues at the time the 2008-2009 budget was passed. (JA, Vol. II, Tab. FF, p. JA286.) The Department of Finance determined that the deficit would increase to $41.6 billion by the end of the 2009-2010 fiscal year. (*Id.*) The deficit had increased by more than $3 billion in the span of approximately two months. (*Id.*) As a result of the devastating budget deficit, the conclusion reached was that the State would run out of cash by February 2009. (*Id.*)

During this same period of time, and in an effort to work with state bargaining unit representatives, the Department of Personnel Administration ("DPA") put forth proposals to the labor unions in early November 2008 including, but not limited to, a proposed one-day furlough and elimination of two holidays per year. (JA, Vol. II, Tab. GG, pp. JA292-JA294.) Prior to the issuance of Executive Order S-16-08, none of

the state bargaining units agreed to either of these proposals. (*Id.*) The state employee organizations, however, including Appellant here, all recognized and acknowledged the State of California was facing a serious and immediate fiscal crisis. (JA, Vol. I, Tabs X, Y, and Z, pp. JA251-JA257.)

2. Executive Order S-16-08.

Faced with the unresolved and mounting fiscal crisis, the Governor issued Executive Order S-16-08 on December 19, 2008. (JA, Vol. II, Ex. BB, p. JA261.)

With respect to employees represented by recognized bargaining units, the Executive Order directed "that effective February 1, 2009 through June 30, 2010, the Department of Personnel Administration shall adopt a plan to implement a furlough of represented state employees and supervisors for two days per month, regardless of funding source." (*Id.*)

With respect to unrepresented employees, the Executive Order provided "that effective February 1, 2009 through June 30, 2010, the Department of Personnel Administration shall adopt a plan to implement an equivalent furlough or salary reduction for all state managers, including exempt state employees, regardless of funding source." (*Id.*)

Executive Order S-16-08 articulated clearly, and in detail, the justification for the actions ordered by the Governor. It noted that "the cash reserve in the State Treasury is below the amount established by the State

Controller to ensure that the cash balance does not reach zero on any day in the month." (*Id.*) The Executive Order confirmed that in two separate special sessions in November and December 2008, "the Legislature failed ... to enact any bills to address the State's significant economic problems." (*Id.*) The Executive Order concluded by noting "immediate and comprehensive action is needed to address the fiscal and cash crisis facing the State of California." (*Id.*)

In order to address the fiscal and cash crisis as described, the Governor issued the Executive Order pursuant to his authority under Government Code section 3516.5 before meeting and conferring with public employee unions. (*Id.*)

3. Confirmation of State Fiscal Crisis Following Issuance of Executive Order S-16-08.

On December 19, 2008, the California State Controller, John Chiang, released a statement urging the Governor and Legislature to reach a resolution in order to prevent the State from running out of cash in late February 2009. (JA, Vol. I, Tab CC, p. JA264.) On December 22, 2008, Controller Chiang sent a letter to the Governor and the Legislature, reiterating the severity of the fiscal crisis the State was facing. (JA, Vol. I, Tab DD, p. 266.) In this letter, Controller Chiang stated,

> [I]f current projections hold true, the State is less than seventy days from running out of cash. Worse, my office's analyses indicate there will be no shelter from the storm as the State's cash

> position will remain negative throughout the remainder of the fiscal year. As I indicated during the recent Legislative Budget Session, the failure of the Governor and the Legislature to quickly arrive at an agreement to responsibly address the State's $41 billion budget crisis would begin a cascading series of regrettable actions necessary to conserve the State's dwindling cash reserves.

(*Id.*)

On January 13, 2009, the Director of the Department of Finance, Michael Genest, issued a special report titled "California at the Brink of Financial Disaster" detailing the State's financial crisis and the immediate harm that will be caused when the State runs out of cash. (JA, Vol. II, Tab FF, p. JA285.) He confirmed the State was expected to run out of cash in February 2009. (*Id.*)

On February 19, 2009, the Legislature agreed on a new State budget which, in relevant part, included a spending reduction of $1.4 billion in state employee payroll over the 17-month period from enactment of the new budget. Section 38 of the February 2009 budget compromise legislation, added Section 3.90 to the Budget Act of 2008 to provide that each item of appropriation in the Budget Act of 2008 would be reduced to reflect a reduction in employee compensation. Reductions in employee compensation were to be achieved through the collective bargaining process for represented employees *or existing administration authority*, with a proportionate reduction for nonrepresented employees. At the time

of the budget compromise, "existing administration authority" included the authority to furlough state employees pursuant to Executive Order S-16-08 and DPA's furlough plan as the trial court so ruled on January 30, 2009.

4. Evidence Presented to the Trial Court Regarding Cost Savings Resulting to the State from Furloughs.

The trial court was presented with uncontradicted evidence showing that for the 2008-2009 fiscal year, the two-day furlough was estimated to result in savings to the General Fund in the amount of $298,541,141. (JA, Vol. I, Tab P, pp. JA199-JA204.) The savings to the General Fund for excluded unrepresented employees was estimated at $76,837,793 for fiscal year 2008-2009. (*Id.*) For the 2009-2010 fiscal year, the two-day furlough was estimated to result in savings to the General Fund in the amount of $716,498,739. (*Id.*) The savings to the General Fund for fiscal year 2009-2010 for excluded unrepresented employees was estimated at $184,410,703. (*Id.*) The savings to the General Fund was estimated at $75,075,787 per month by implementing a temporary two-day a month furlough for represented and excluded unrepresented employees covering a seventeen-month period. (*Id.*)

5. Efforts to Meet and Confer with State Public Employee Unions Regarding Furloughs Following Issuance of Executive Order S-16-08.

Appellant SEIU is covered by Memoranda of Understandings (MOU) that remain in full force and effect.[3] (JA, Vol. II, Tab MM, p. JA347, *et seq.*; Vol. III, Tab NN, p. JA542, *et seq.*; Vol. IV, Tab OO, p. 782, *et seq.*; Vol. V., Tab PP, p. JA926, *et seq.*; Vol. VI, Tab QQ, p. JA1092, *et seq.*; Vol. VII, Tab RR, p. JA1234, *et seq.*; Vol. VIII, Tab SS, p. JA1413, *et seq.*; Vol. IX, Tab TT, p. JA1619, *et seq.*; Vol. X, Tab UU, p. JA1779-JA1906.)

On December 19, 2008, DPA telephoned and sent out letters to all of the state public employee unions advising them of the furloughs and offering to bargain over the impacts of their implementation. (JA, Vol. II, Tab GG, pp. JA291-JA294; Vol. II, Tab HH, pp. JA295-JA310.) After sending out the letter, DPA met with various bargaining units to meet and confer over the impact of the furloughs. (JA, Vol. II, Tab GG, pp. JA291-JA294.)

B. Procedural History.

1. Action by State Public Employee Unions Challenging Executive Order S-16-08.

Less than one month following the Governor's issuance of Executive Order S-16-08, state employee organizations filed suits in Sacramento County Superior Court challenging the Governor's authority to furlough

[3] Although the MOUs between Appellant SEIU and the State have expired, both remain in force and effect pursuant to Government Code § 3517.8(a).

state employees. On December 22, 2008, the first petition for writ of mandate and complaint for injunctive and declaratory relief was filed in Sacramento County Superior Court by Appellants Professional Engineers in California Government ("PECG") and California Association of Professional Scientists ("CAPS"), Case No. 2008-80000126, against the same Respondents named here. (JA, Vol. I, Tab B, p. JA18.) PECG and CAPS represent, and filed their petitions on behalf of, all state employees in Bargaining Units 9 and 10. (*Id.*)

On January 5, 2009, a second petition was filed against Respondents by California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment ("CASE") in the Sacramento County Superior Court, Case No. 2009-80000134. (JA, Vol. I, Tab B, p. JA18.) CASE represents, and filed its petition on behalf of, all state employees in Bargaining Unit 2. (*Id.*)

On January 7, 2009, a third petition was filed against Respondents in Sacramento County Superior Court by Service Employees International Union, Local 1000 ("SEIU"), Case No. 2009-80000135. (JA, Vol. I, Tab A, pp. JA1-JA17.) SEIU represents, and filed its petition on behalf of, all state employees in Bargaining Units 1, 3, 4, 11, 14, 15, 17, 20, and 21. (*Id.*)

On January 9, 2009, the parties in Case No. 2008-80000126 (PECG/CAPS), Case No. 2009-80000134 (CASE) and 2009-80000135

(SEIU) appeared and stipulated that a hearing on the merits in those cases would be heard on January 29, 2009. (JA, Vol. I, Tab C, p. JA20.)

2. The Trial Court's Ruling.

On January 29, 2009, the Sacramento County Superior Court held oral argument on the three cases. (JA, Vol. X, Tab VV, p. 1907.) All parties were present and appeared at the hearing. (*Id.*) On January 30, 2009, the Sacramento trial court issued an amended and final order denying all three of the petitions and entering judgment for Respondents. (JA, Vol. X, Tab WW, pp. JA1915-JA1927.) The Sacramento trial court's Final Order states in relevant part:

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

(*Id.*, p. JA1924.) The trial court ruled the provisions of the Executive Order constitute "a rule in that they establish a standard of general application to state employees." (*Id.*, p. JA1921.)

The trial court specified two separate grounds for its ruling affirming the Governor's authority to furlough state employees pursuant to Executive Order S-16-08. First, the court found "[t]he Governor has the statutory authority to reduce the hours of state employees pursuant to Government Code section 19851 and 19849." (*Id.*, p. JA1920.) With respect to the application of these two statutes, the trial court stated:

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

(*Id.*, p. 1921.)

Second, the trial court found "on two separate bases, that the Governor has authority to reduce the work hours of the state employees represented by the petitioners in these actions pursuant to the terms of the MOUs the State entered into with the petitioner employee organizations...." (*Id.*) In the first of these two separate bases, the trial court ruled,

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

(*Id.*)

The trial court also ruled "certain of the petitioners' MOUs expressly permit the State either to reduce hours in case of lack of funds or to take all necessary action to carry out its mission in emergencies." (*Id.*, p. JA1922.) In applying these provisions of the MOUs between the parties, the trial court found "that the current fiscal emergency, which is amply documented in the evidence the respondents have submitted, authorizes the Governor to reduce the working hours of state employees under these cited terms of the various MOUs." (*Id.*)

Based upon the above findings, the trial court ruled "both statutory law and the provisions of the petitioners' MOUs authorized the Governor to reduce the work hours of state employees through a furlough in the current fiscal emergency." (*Id.*, p. JA1923.) In so ruling, the court specifically found Government Code section 19826(b) "does not preclude the Governor from taking such action." (*Id.*)

Judgment was entered by the trial court on February 11, 2009. (JA, Vol. X, Tab DDD, p. JA1988.)

III.

ISSUES ON APPEAL

1. Whether pursuant to his constitutional and statutory authority, the Governor has the inherent executive authority to issue an Executive Order directing temporary twice monthly furloughs of state employees.

a. Whether Government Code section 19851 provides such authority.

b. Whether Government Code section 19849 provides such authority.

2. Whether the Governor has the authority pursuant to the MOUs between the State and Appellant to direct temporary, twice monthly furloughs of state employees.

3. Whether the issuance of an Executive Order is an appropriate and authorized means of directing the temporary furloughs of state employees.

4. Whether the "emergency" provision contained in the Ralph C. Dills Act (the "Dills Act," Gov. Code § 3512, *et seq.*), Government Code section 3516.5, authorized the Governor to issue the Executive Order directing twice monthly furloughs of state employees prior to meeting and

conferring with the recognized employee organizations representing state employees.

IV.

ANALYSIS

A. Pursuant to His Constitutional and Statutory Authority, the Governor As the State Employer Has the Inherent Power to Issue the Executive Order Implementing Furloughs.

It is undisputed the Governor and DPA are statutorily "vested with the duties, purposes, responsibilities, and jurisdiction ... with respect to the administration of salaries, hours, and other personnel related matters." (Gov. C. § 19816(a).) Furthermore, as the Chief Executive of the State, the Governor has the authority to issue orders to ensure the fiscal viability of the State and to safeguard the continual operations of all state departments. (Cal. Const., Art. V, § 1.) As part of his constitutional authority, the Governor also has the authority to proclaim a fiscal emergency whenever he determines that for a particular fiscal year "General Fund revenues will decline substantially below the estimate of General Fund revenues upon which the budget bill for that fiscal year, as enacted, was based, or General Fund expenditures will increase substantially above that estimate of General Fund revenues, or both." (Cal. Const. Art. IV, § 10(f).)

Faced with an unprecedented fiscal crisis requiring immediate action, the Governor, using the authority vested in him by the California Constitution, statutes and the MOUs, issued a Fiscal Emergency

Proclamation on December 1, 2008. (JA, Vol. I, Tab AA, p. JA258.) On December 19, 2008, he issued Executive Order S-16-08, instructing DPA to adopt a plan temporarily furloughing the state work force two days per month. (JA, Vol. I, Tab BB, p. JA261.) The Governor's use of the Executive Order to promulgate this temporary change to work hours was appropriate and authorized by statutes granting him power to modify work hours to meet the needs of the State during a fiscal crisis. The trial court's ruling so finding is supported by the record and for this reason the trial court's judgment should be affirmed.

1. Government Code Sections 19849 and 19851 Authorize the Governor to Furlough Employees By Reducing Their Work Hours.

In response to the State's fiscal crisis, the Governor was authorized to furlough employees reducing the 40-hour workweek to "workweeks and workdays of a different number of hours ...in order to meet the varying needs of the different state agencies." (Gov. Code § 19851.) Government Code section 19849 authorizes DPA to "adopt rules governing hours of work." Included within this authority is the ability to adopt rules reducing hours as directed by the Executive Order.

The plain language of Government Code sections 19851 and 19849 provide the Governor and DPA with the authority to reduce hours. Whenever a dispute arises over statutory interpretation, statutes should first be interpreted using the plain meaning of the language. (See *Green v. State*

of California (2007) 42 Cal.4th 254, 260.) If the language is clear and unambiguous there is no need to go further and the language should be applied pursuant to its plain meaning. (*Ibid.*) "The statute's plain meaning controls the court's interpretation unless its words are ambiguous. If the plain language of a statute is unambiguous, no court need, or should, go beyond that pure expression of legislative intent." (*Ibid. Torres v. Parkhouse Tire Service* (2001) 26 Cal.4th 995, 1003 ["In interpreting a statute where the language is clear, courts must follow its plain meaning"].)

If the language is vague and subject to interpretation, reference to legislative history and prior case precedents may be necessary. (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal. 4th 116, 129.) Here, the language on its face is clear and does not require reference to Legislative history. (*Green v. State of California, supra,* 42 Cal.4th at 260.) However, even the legislative history coupled with Governor's reasonable use of these statutes support the temporary reduction of hours in order to address the fiscal crisis. (*MacIsaac v. Waste Management Collection & Recycling, Inc.* (2005) 134 Cal. App. 4th 1076, 1082.)

a. **Section 19851 provides the State with authority to establish work schedules to meet the varying needs of different state agencies and departments.**

The Governor, as the state employer, has the statutory authority to reduce the hours of state employees pursuant to Government Code section

19851. Government Code section 19851(a) states in relevant part as follows:

> It is the policy of the state that the workweek of the state employee shall be 40 hours and the workday of state employees shall be 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.

(Emphasis added.)

Section 19851 states that it is only the *policy* of the State that workweeks are 40 hours and workdays are 8 hours. The term "policy" is defined in Black's Law Dictionary, 4th Ed., as "[t]he *general principles* by which a government is *guided in its management* of public affairs, or the legislature in its measures. This term, as applied to a law, ordinance or rule of law, *denotes its general purpose or tendency* considered as directed to the welfare or prosperity of the state or community." (Emphasis added.) Thus, the term "policy" is not synonymous with "mandate" or "obligation" and does not impose on the State an absolute, unequivocal duty to establish 40-hour workweeks for state employees. Furthermore, section 19851 grants the State the discretion to establish workdays and workweeks of a "different number of hours," i.e., less than 40 hours a workweek, to meet the varying needs of different state agencies and departments.

The fact that section 19851 was intended to provide the State with flexibility to establish work schedules of differing hours depending on

operational needs is well established in the legislative history of the statute. The predecessor code to section 19851, Government Code section 18020, was adopted in 1945. As early as 1945, at the time of the statute's adoption, the Legislature demonstrated a clear intent to create a flexible policy for establishing workday and workweek schedules for state employees. The Legislature expressly provided for exceptions to the 40-hour workweek when the operational demands of the various state agencies and departments required it. Section 18020 was amended several times until 1981 when section 19851 was adopted as a replacement statute. All of these amendments to section 18020 preserved the State employer's right to adjust employee's workweeks.

Former section 18020's history demonstrates the Legislature's intent to provide the Governor and state agencies and departments flexibility in scheduling workweeks other than 40-hour workweeks. For instance, in 1955, the Legislature sought to amend former section 18020. This amendment focused on the abolition of the State Personnel Board's four-tiered employee classification system for determination of workweeks. The Office of Legislative Counsel summarized Assembly Bill 1464, in the following manner:

> Recasts existing sections and deletes provisions establishing four work week groups and requiring overtime compensation for first three groups. Provides it is state policy that work week shall be 40 hours, *but work weeks with*

different number of hours may be established to meet needs of state agencies

(Emphasis added.)

The Office of the Attorney General also summarized Assembly Bill 1464 as setting forth "a statement of State policy that State workers shall be employed forty hours a week, *except that to meet the varying needs of the different State agencies workweeks of a different number of hours may be established.*" (Emphasis added.)

When section 19851 finally replaced section 18020 in 1981, it incorporated the nearly 40-year legislative history of providing the state employer with the discretion and flexibility to adjust work hours consistent with the "varying needs of the different state agencies." In this case, the reduction in the work hours of state employees is indisputably related to the "varying needs of the state agencies." The fiscal solvency of the State and the ability to retain cash reserves directly impacts every single state agency and department. The State's cash reserve is used to pay employees and to fund essential services provided to the public by these agencies and departments. Reducing the hours of state employees increases the state's cash reserves and helps to balance the budget deficit. Due to the extraordinarily dire fiscal circumstances facing the State, the Governor's issuance of the Executive Order to reduce temporarily the working hours of

state employees was justified "in order to meet the varying needs of the different state agencies." (Gov. Code § 19851.)

Appellant has provided no support for the proposition that Government Code section 19851 was not intended to incorporate the State employer's authority to reduce hours. Appellant argues that Government Code section 19852, which grants the State the authority to establish 40-hour workweeks consisting of four 10-hour days, prohibits the Governor from establishing workweeks of less than 40 hours. (See Appellant's Opening Brief, pp. 24-25.) Yet, the fact the State has the flexibility to establish 40-hour workweeks of four 10-hour days cannot be read as a limitation on the authority to establish workweeks of less than 40 hours. Such an interpretation of section 19852 would effectively nullify the language of section 19851, which states it is the policy of the State to establish 40-hour workweeks, "*except* that workweeks ... *of a different number of hours* may be established to meet the varying needs of the differing state agencies." The plain meaning of section 19851 is the State may establish workweeks consisting of a number of hours different than 40. Appellant's proffered interpretation of sections 19851 and 19852 would render this language meaningless and, therefore, must be rejected. (See *Compulink Management Center, Inc. v. St. Paul Fire and Marine Ins. Co.* (2008) 169 Cal.App.4th 289, 296, ["[a] statutes every word and clause

should be given effect so that no part or provision is rendered meaningless or inoperative."].)

b. **Section 19849(a) Provides the State with Authority to Adopt Rules Regarding Work Hours.**

Whereas section 19851 provides the State with the overall flexibility to establish work schedules of varying numbers of hours, Government Code section 19849(a) provides the State with authority to adopt rules regarding work hours that must be enforced by the varying agencies and departments of the State. That code section provides in relevant part:

> The department [DPA] shall adopt rules governing hours of work ... Each appointing power shall administer and enforce such rules.

Read together, sections 19851 and 19849 provide the state employer with the statutory authority to establish hours of work including workweeks of less than 40 hours to meet the varying needs of the State. These statutes also establish the Governor's authority, acting as the state employer, to issue the Executive Order furloughing state employees two days per month.

B. The Governor Has the Authority to Direct Temporary, Twice Monthly Furloughs Pursuant to the MOUs Between the State and Appellant.

In addition to his constitutional and statutory authority to furlough state employees, the trial court found the Governor had such authority pursuant to the MOUs between the State and the various state bargaining units that were represented at the January 29, 2009 hearing. (JA, Vol. X, Tab WW, p. JA1921.) The trial court found there were two separate and

independent bases on which the MOUs provided the Governor this authority.

First, the trial court ruled that each of the subject MOUs expressly incorporated the terms of sections 19851 and 19849 into the agreement between the parties. (*Id.*) In this regard, the trial court further found the terms of the MOUs do not conflict with these statutes, notwithstanding that the MOUs call for a normal workweek of 40 hours. (*Id.*) Thus, the trial court found these provisions of law were not superseded by the MOUs, and the Governor retained the authority, pursuant to law and contract, to take any actions he would be permitted to take pursuant to Government Code sections 19851 and 19849 as described above. (*Id.*)

Second, the trial court ruled the "State Rights" clauses in some of the MOUs also provided the Governor with authority to issue the Executive Order directing the furloughs of state employees. (*Id.*, at JA1922.)

"All modern California decisions treat labor-management agreements, whether in public employment or private, as enforceable contracts which should be interpreted to execute the mutual intent and purpose of the parties." (*Glendale City Employees Assn., Inc. v. City of Glendale* (1975) 15 Cal.3d 328, 339.) In order to achieve this goal, courts "must thus interpret the intent and scope of the agreements by focusing on the usual and ordinary meaning of the language used and the circumstances

under which the agreement was made." (*Riverside Sheriff's Assn. v. County of Riverside* (2009) 173 Cal.App.4th 1410, 1424.)

Application of these rules of interpretation to the parties' MOUs at issue demonstrates that both grounds articulated by the trial court for finding the MOUs support the Governor's authority to furlough state employees are supported by the record. Accordingly, the trial court's judgment should be affirmed.

1. The MOUs Between the State and Appellant Incorporate the Provisions of Government Codes Sections 19851 and 19849 and, Therefore, these Statutes Are Not Superseded by the MOUs.

The Dills Act is a supersession statute. (*Department of Personnel Administration v. Superior Court (Greene),* (1992) 5 Cal.App.4th 155, 174-175.) Government Code section 3517.6 lists a variety of code sections which, *if in conflict with the provisions of the MOU*, are superseded by the MOU. Both sections 19851 and 19849 are listed among those code sections superseded *if in conflict with the provisions of the parties' MOU.* Thus, the critical question in applying the rules of contract interpretation cited above to the question of whether sections 19851 and 19849 are superseded by the parties' MOUs is whether those code sections conflict with any provision of the MOUs.

Far from being in conflict with any provisions of the parties' MOUs, sections 19851 and 19849 *are expressly incorporated as terms of the parties MOUs.* The MOUs between the State and multiple bargaining units

represented by SEIU expressly incorporate sections 19851 and 19849. For instance, the MOU for State Bargaining Unit 1 represented by SEIU provides at section 5.6:

> The following Government Code sections and all DPA regulations and/or rules related thereto are hereby incorporated into this MOU.

Subsection 11 of section 5.6 is entitled, "Workweek," and lists section 19851 as one of the code sections expressly incorporated into the MOU. Similarly, subsection 12 of section 5.6 is entitled, "Overtime," and expressly incorporates the provisions of section 19849 into the MOU. (See e.g., JA, Vol. II, Tab MM, JA000364 – JA000367.) The incorporation of sections 19851 and 19849 also are found at the exact same sections of the MOUs for State Bargaining Unit 3 (JA, Vol. III, Tab NN, JA000560 – JA000566), State Bargaining Unit 4 (*Id.*, Vol. IV, Tab OO, JA000800-JA000805.), State Bargaining Unit 11 (*Id.*, Vol. V, Tab PP, JA000944 – JA000950), State Bargaining Unit 14 (*Id.*, Vol. VI, Tab QQ, JA001111 – JA001117.), State Bargaining Unit 15 (*Id.*, Vol. VII, Tab RR, JA001252 – JA001257.), State Bargaining Unit 17 (*Id.*, Vol. VIII, Tab SS, JA001431 – JA001436.), State Bargaining Unit 20 (*Id.*, Vol. IX, Tab TT, JA001637 – JA001642.), and State Bargaining Unit 21 (*Id.*, Vol. X, Tab UU, JA001795 – JA001800.)

Appellant argues, however, that these provisions of the MOUs between the parties cannot be read to authorize furloughs because section 5.6 of the MOUs states

> [I]f any other provision of this Contract alters or is conflict with any of the Government Code sections enumerated below the Contract shall be controlling and supersede said Government Code sections or parts thereof any rule, regulation, standard, practice, or policy implementing such provisions.

(See e.g., JA, Vol. II, Tab MM, p. JA364.)

Appellant argues that sections 19851 and 19849 conflict with other provisions of the MOU, specifically section 19.01 of the MOUs, which Appellant contends establish 40-hour workweeks for state employees governed by the MOUs. (See Appellant's Opening Brief, pp. 33-35.) Section 19.01 of the parties' MOUs, entitled "Hours of Work," provides at subsection A that "*unless otherwise specified herein*, the regular workweek of full-time employees shall be forty (40) hours...." (Emphasis added.) (See e.g., JA, Vol. II, Tab MM, p. JA479.) Yet, in arguing that section 19.01 of its MOUs unequivocally establish a 40-hour workweek for employees in affected bargaining units, Appellant conveniently ignores section 19.01B, which provides, in language identical to that found in Government Code section 19851, "[w]orkweeks and work shifts of different number of hours may be established by the employer *in order to meet varying needs of the State agencies.*" (*Id.*) Thus, rather than

establishing a rigid requirement for 40-hour workweeks, the very section of the MOUs on which Appellant relies provides the same discretion and flexibility as Government Code sections 19851 and 19849, which the trial court found grant the Governor the authority to furlough state employees.

Given that sections 19851 and 19849 provide the Governor with authority to furlough state employees, as established above, the inescapable conclusion is that the MOUs similarly authorize such action by the Governor in light of the fact that the MOUs expressly incorporate the provisions of those two code sections. Accordingly, application of sections 19851 and 19849 do not conflict with the MOUs and, as a consequence of their express incorporation into the MOUs, the Governor has contractual authority, in addition to his constitutional and statutory authority, to furlough state employees governed by these MOUs.

2. The "State Rights" Clauses of the MOUs Give the Governor the Authority to Furlough Employees Subject to those MOUs.

As an independent ground for finding the Governor was authorized by the parties' MOUs to furlough state employees, the trial court found that the State Rights clauses in the MOUs provided contractual authorization for the furloughs. (JA, Vol. X, Tab WW, p. JA1922.) The State Rights clause at section 4.1 of the parties' MOUs 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." (See e.g., JA, Vol II, Tab MM, p. JA363.) This language certainly provides the state employer with the right to furlough employees governed by the MOU to maintain efficient operation and fulfill the mission of the varying state agencies and departments during the fiscal emergency faced by the State.

Appellant argues these provisions in its MOUs with the State must be given a narrow interpretation and the reference to "emergencies" contained in the State Rights clauses must be limited to those emergencies described in Government Code section 8558, a part of the Emergency Services Act. (See Appellant's Opening Brief, pp. 40-41.) Appellant's argument, however ignores the fact there are a variety of different emergencies recognized under California law, including the declaration of a local state of emergency (Gov. Code, §8630), the Governor's proclamation of a state of emergency (Gov. Code, §8558), the Governor's proclamation of a fiscal emergency (Cal. Const., Art. IV, §10(f)), and emergencies in labor relations context that excuse an employer's bargaining obligation before implementation of a new work rule to address an emergency situation. (See Gov. Code § 3516.5; *Sonoma County Organization v. County of Sonoma* (*Sonoma County*) (1991) 1 Cal.App.4th 267.)

Here, the Governor exercised his authority pursuant to Article IV, section 10(f) of the California Constitution, enacted in 2004 pursuant to

Proposition 58, to issue a proclamation declaring a fiscal emergency. The Governor issued such a proclamation on December 1, 2008, less than three weeks prior to issuing Executive Order S-16-08. (JA, Vol. I, Tab AA, p. JA258.) In order to issue the fiscal emergency proclamation, the Governor was required by law to make certain determinations, *i.e.,* that for the current fiscal year, General Fund revenues will decline substantially below the estimate upon which the budget bill for the current fiscal year, as enacted, was based or General Fund expenditures will increase substantially above the estimate of General Fund revenues, or both. It is the conditions giving rise to the Governor's fiscal emergency proclamation that are relevant to the issue before this Court. The undisputed evidence presented to the trial court regarding the satisfaction of the conditions for proclaiming a fiscal emergency created a presumption – unrebutted by the petitioners or the Controller in the trial court – that the State was indeed facing a budget and fiscal deficit in the current fiscal year and needed extraordinary action to address the fiscal emergency. There is nothing in this constitutional provision suggesting the otherwise inherent executive powers the Governor possesses as the Chief Executive Officer of the State of California (see Cal. Const. Art. V, § 1) or as the state employer (see Gov. Code §19816(a)) are in any way diminished in the face of the fiscal crisis. The Governor relied upon the authority granted to him pursuant to Government Code sections 19851 and 19849, provisions specifically incorporated into the parties'

MOUs, in order to realize the necessary savings via the temporary furloughs. As such, the Executive Order falls squarely within his executive powers and the powers expressly granted him under the State Rights provision of the parties' MOUs. Accordingly, the trial court's judgment should be affirmed.

C. The Emergency Provision of the Dills Act Allows the Governor to Issue the Executive Order Temporarily Implementing Furloughs Without First Meeting and Conferring With the Recognized Employee Organizations.

Although furloughs may be subject to the meet and confer process under the Dills Act, the Dills Act also authorized the Governor to unilaterally act because of the extreme fiscal crisis at the time of the issuance of the Executive Order. (Gov. Code, § 3516.5, see also *Sonoma County Organization v. County of Sonoma, supra,* 1 Cal.App.4th 267.)

Government Code section 3516.5 establishes the duty of the state employer to bargain over any proposed rule or regulation impacting terms and conditions of employment. This statutory duty to meet and confer prior to implementation is a general governing principal in labor relations. However, the Legislature in enacting Government Code section 3516.5 also added a specific exception to this general obligation to meet and confer. Government Code section 3516.5 provides, in relevant part:

> *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...
>
> In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately *without prior notice or meeting with a recognized employee organization*, the [employer] ... shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation.

(Emphasis added.) This legislatively enacted exception authorizes the Governor to enact rules affecting terms and conditions of employment without first meeting and conferring in cases of emergency.

In *Sonoma County, supra*, the court interpreted language in the Meyers Milias Brown Act ("MMBA," Gov. Code, § 3504.5) providing an emergency exception to local public employers' bargaining obligations that is nearly identical to the language found in Government Code section 3516.5. The court held a county employer was not required to bargain with one of its unions before implementing a new work rule giving local supervisors authority to put employees on unpaid leave of absence in the wake of job actions by union members. The court held that irrespective of the county's possible managerial right to implement the new work rule, the county's *obligation to meet and confer was excused by an emergency.* (Emphasis added; *Sonoma County, supra*, 1 Cal.App.4th at p. 274.) The

court further held that since the county already had determined there was an emergency, as reflected in the emergency ordinance, the burden shifted to the union to demonstrate there was not a bona fide emergency. (*Id.*, at p. 275-76, citing Evid. Code, § 663—presumption that public officers have properly exercised their duties.) The California Supreme Court, in approving the holding in *Sonoma County*, has held courts review public employer declarations of an emergency under an abuse of discretion standard. (See *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 652, 669.)

Here, the evidence presented to the trial court overwhelmingly demonstrated the State of California was facing a fiscal crisis of unprecedented dimension at the time the Governor issued the Executive Order. On December 1, 2008, the Governor issued a Proclamation of Fiscal Emergency pursuant to Article IV, section 10, subdivision (f) of the California Constitution. (JA, Vol. I, Tab AA, p. JA258.) The Governor's fiscal emergency proclamation created a rebuttable presumption an emergency in fact existed. (See *Sonoma County*, *supra*, 1 Cal.App.4th at p. 275-276 and Evid. Code, § 664.) The burden in the trial court shifted to the Appellant to demonstrate there was not an emergency justifying the Governor's action. Yet, Appellant failed to present any evidence demonstrating the absence of an emergency or rebutting the Governor's fiscal emergency proclamation.

To the contrary, the record in the trial court established that Appellant conceded the extreme magnitude of the fiscal crisis. (JA, Vol I, Tabs X, Y, and Z, pp. JA251-JA257.) PECG admitted in its "Weekly Update" of January 9, 2009, "the state is running out of cash." (*Id.*) Other public employees similarly acknowledged their awareness "of the fact that California is facing an unprecedented financial crisis." (*Id.*), and SEIU stated "California is headed over a cliff." (*Id.*)

The Governor's Executive Order S-16-08 made several specific findings regarding the extreme fiscal crisis. (JA, Vol. I, Tab BB, p. JA261.) Specifically, the Executive Order stated, "due to developments in the worldwide and national financial markets, and continuing weak performance in the California economy, there is an approximately $15 billion General Fund deficit for the 2008-09 fiscal year, which without effective action, is estimated to grow to a $42 billion General Fund budget shortfall over the next 18 months" and that "without effective action to address the fiscal and cash crisis, the cash reserve in the State Treasury is estimated to be a negative $5 billion in March 2009." (*Id.*) The Executive Order further stated that "it [is] likely that the State will miss payroll and other essential services payments at the beginning of 2009." (*Id.*)

The Department of Finance and the State Controller's Office agreed at the time an unprecedented fiscal crisis existed. (JA, Vol. I, Tab CC, p. JA264; Tab DD, p. JA266; Tab EE, p. JA270; Tab FF, p. JA 285.) In a

statement on the Governor's website, Michael Genest, Director of the Department of Finance stated "[i]n a matter of weeks, California, the world's eighth largest economy, will run out of cash and delay making refunds to our hard-working taxpayers." (JA, Vol. I, Tab FF, p. JA285.)

In a statement at the Senate and Assembly Joint Convention on December 8, 2008, Controller John Chiang commented, "[f]ailure to act threatens our ability to respond to natural disasters, our ability to provide life preserving care to the elderly and the ill, and our ability to protect our communities from crime." (JA, Vol. I, Tab O, p. JA155.) Controller Chiang went on to state, "[t]he size of the revenue shortfall for the remainder of the fiscal year was most recently estimated at $7.8 billion by the Legislative Analyst and at $9.7 billion by the Department of Finance. My office's economists think even $9.7 billion may be an understatement. My office tested the latest cash flows associated with this $9.7 billion deterioration, and what we found was a clear threat to the State's ability to pay all of its bills starting this spring. By February, we will only have $882 million in cash on-hand. By March, we will have exhausted our general and borrowable funds and run more than $1.9 billion in the red. If revenues continue to deteriorate, this number will only grow." (*Id.*)

Based on this evidence, which was uncontradicted by Appellant, the trial court was correct to conclude the Governor's proclamation of fiscal emergency was "amply documented in the evidence the respondents have

submitted." (JA, Vol. X, Tab WW, p. JA1922.) The existence of such a fiscal emergency specifically authorized the Governor to bypass the State's meet and confer requirement prior to directing the temporary, twice monthly furloughs of state employees pursuant to Government Code section 3516.5.

D. The Governor's Executive Order Implementing Furloughs Is Not a Reduction in Salary Ranges.

While the adoption and implementation of temporary furloughs has resulted in a reduction of hours worked by state employees, this temporary reduction in total hours and corresponding reduction in total compensation to state employees is not a salary range reduction in violation of Government Code section 19826(b) as Appellant claims. Moreover, Appellant's reliance on *Department of Personnel Administration v. Superior Court (Greene), supra,* 5 Cal.App.4th 155 as authority for invalidating the Governor's Executive Order is misplaced because *Greene* is inapposite to this case.

1. Furloughs Are Not Synonymous with "Salary Ranges" as that Term Is Used in Section 19826.

One of Appellant's principal claims is the two-day furloughs ordered by the Governor in his Executive Order violate Government Code section 19826(b). That code section provides as follows:

> Notwithstanding any other provision of law, the department shall not establish, adjust, or recommend *a salary range* for any employees in an appropriate unit where an employee

> organization has been chosen as the exclusive representative pursuant to Section 3520.5.

(Emphasis added.)

Contrary to Appellant's claims, furloughs, and the corresponding diminution in total compensation to state employees, are not equivalent to reductions in salary ranges. Employees' wage rates or salary ranges have not been reduced as a result of the furlough. A furlough only constitutes a reduction in hours worked, not a reduction in the wage rate paid for that work. The undisputed evidence presented to the trial court was that the hours worked will be impacted by the furloughs, not the rate of pay for those hours worked.

A change to the number of hours worked does not impact an employee's "salary range" as that term is used in section 19826(b). Appellant's argument to the contrary would lead to absurd results. For example, when an employee works overtime, his or her total compensation is increased due to the increased hours. If Appellant's argument is that a change in work hours is synonymous with a change in salary range, then Appellant also would have to agree that a violation of section 19826(b) occurs every time an employee is paid increased compensation resulting from working overtime hours. Obviously, Appellant is not making such a claim. A furlough is a reduction in hours resulting in a reduction in total compensation in the same way that overtime is an increase in hours resulting in an increase in total compensation. Neither one, however,

constitutes a change in "salary range." A salary range adjustment occurs where an employee's total work hours remain unchanged and their corresponding pay either increases or decreases.

This conclusion is supported by longstanding DPA regulations regarding salary issues. The DPA regulations, enacted twenty years prior, define "salary range" as the "minimum and maximum rate currently authorized for the class." (2 CCR § 599.666.1.) "Rate" for hourly employees is "any one of the dollar and cents amounts found within the salary range." (*Id.*) In this respect, "[m]onthly or hourly rates of pay may be converted from one to the other when the Director of [DPA] considers it advisable." (2 CCR § 599.670.) In other words, "salary range" concerns the hourly rate an employee is paid. "Salary range" does not refer to the employee's "total compensation." Accordingly, the Governor's Executive Order establishing two-day a month furloughs for state employees does not fall within the ambit of section 19826(b).

2. Section 19826 Is Suppressed by Operation of the Dills Act Due to the Existence of the Current Terms and Conditions in Effect in the MOUs Between the Parties.

Government Code section 19826 is also inapplicable to the case at hand because it is superseded by existing MOUs between the parties. The Dills Act governs the labor relations between the State and its employees. Pursuant to Government Code section 3517.8(a) contained in the Dills Act,

> If a memorandum of understanding has expired, and the Governor and the recognized employee

> organization have not agreed to a new memorandum of understanding and have not reached an impasse in negotiations, subject to subdivision (b), *the parties to the agreement shall continue to give effect to the provisions of the expired memorandum of understanding, including, but not limited to, all provisions that supersede existing law*, any arbitration provisions, any no strike provisions, any agreements regarding maters covered in the Fair Labor Standards Act of 1938."

(Emphasis added.) (Gov. Code, § 3517.8(a).)

In this case, Appellant is a party to continuing, albeit expired, MOUs with the State of California. (JA, Vol. II, Tab MM, p. JA347, *et seq.*; Vol. III, Tab NN, p. JA542, *et seq.*; Vol. IV, Tab OO, p. 782, *et seq.*; Vol. V., Tab PP, p. JA926, *et seq.*; Vol. VI, Tab QQ, p. JA1092, *et seq.*; Vol. VII, Tab RR, p. JA1234, *et seq.*; Vol. VIII, Tab SS, p. JA1413, *et seq.*; Vol. IX, Tab TT, p. JA1619, *et seq.*; Vol. X, Tab UU, p. JA1779-JA1906.) Appellant has alleged neither that successor MOUs have been agreed upon, nor that the parties have reached a labor impasse in negotiations for new MOUs. Accordingly, pursuant to Government Code section 3517.8(a), the parties must continue to give effect to the terms and conditions of the expired MOUs, including all provisions which supersede existing law.

As stated in *Department of Personnel Administration v. Superior Court (Greene), supra,* 5 Cal.App.4th 155, 174-175, a case heavily relied upon by Appellant,

> The Dills Act is a 'supersession statute', designed so that, in the absence of a MOU, as is the case when an existing MOU has expired and the parties have bargained to impasse, numerous Government Code provisions concerning state employees' wages, hours and working conditions take effect. One of the provisions which is effective in the absence of an MOU is section 19826."

(Emphasis added.) Thus, the present case is exactly the opposite situation of that in *Greene*. In that case, the State and two of its employee bargaining units had reached impasse in their labor negotiations resulting in no MOU remaining in effect and, therefore, numerous provisions of the Government Code, including section 19826, had taken effect. Here, in contrast, the parties' labor relations continue to be governed by expired MOUs that remain in effect and, therefore, pursuant to section 3517.8, the parties must continue to give effect to that MOU, including all provisions which supersede existing law.

California Government Code section 3517.6(a) sets forth the code sections superseded by an MOU in effect between the parties. Among the superseded code sections identified in section 3517.6(a) is section 19826. Therefore, section 19826 is superseded by the Dills Act and the terms of the expired MOUs. In other words, unlike the situation with sections 19851 and 19849, which were specifically incorporated into the parties' MOUs, section 19826 has no legal force and effect between these parties in the face of a valid, operative MOU because that code section has been superseded

by the MOUs as specified in the Dills Act. As section 19826 is superseded, it is inapplicable to the matter at hand and has no role in consideration of the validity of the Executive Order.

3. Appellant's Reliance on *DPA v. Greene* is Misplaced.

Appellant's reliance on Government Code section 19826 as a ground for challenging furloughs is premised on the decision rendered in *Greene, supra*. However, *Greene* is distinguishable from this case. In *Greene*, the Court held DPA could not implement a final wage proposal containing a salary reduction after having bargained to impasse. (5 Cal.App.4th 155, 172.) In particular, the *Greene* court held the Legislature retains "ultimate authority over state workers' employment conditions," and section 19826 was a specific delegation of this authority to the DPA with respect to unrepresented employees but not with respect to represented employees. (*Id.* at 177-8.) "As a consequence, the question of represented employees' wages at impasse must ultimately be resolved by the Legislature itself." (*Id.* at 178.)

There are several key factual distinctions between *Greene* case and this case. First and most significantly, *Greene* involved an across-the-board 5% salary reduction for employees. (*Id.* at 164.) In *Greene*, employees were going to continue working their normal hours but receive 5% less pay, an effective reduction in their rate of pay. (*Id.*) Here, no such reduction in state employees' rate of pay will occur. Rather, state employees' rate of

pay will remain exactly the same; those employees will work fewer hours for a temporary period.

Second, in *Greene* the parties had bargained to impasse on their MOUs when the employer decided to adopt the pay reductions. (*Id.* at 172.) Here, it is undisputed that the labor relations between the parties are defined by their MOUs, which legally remain in force and effect. (See Govt. C. §3517.8(a).) In fact, *Greene* was decided before the enactment of Government Code section 3517.8, which incorporated the "evergreen" provision of the Dills Act cited above, *i.e.*, MOUs between the state employer and its bargaining units remain in force and effect past the expiration of the MOU as long as the parties remain in good faith bargaining for a successor MOU. Pursuant to section 3517.8(a), the current terms and conditions contained in the MOUs remain in effect until the parties either reach impasse or agree to a new MOU.

Third, it is important to note the *Greene* court held section 19826 only prohibited the state employer from altering salary ranges. The *Greene* court was never asked to consider the legality of furloughs. In fact, the *Greene* court held the state employer was authorized to reduce and limit employee total compensation in other ways. (See *Greene, supra*, 5 Cal. App. 4th at 187.) For example, DPA has the authority to layoff employees which reduces the work force. (See Gov. Code § 19997.) DPA is also authorized to reduce or eliminate overtime which directly reduces

employees' total compensation. (See Gov. Code § 19816.10) None of these actions implicate section 19826. Indeed, although *Greene* held DPA could not unilaterally reduce employees' salaries, it nevertheless found DPA could unilaterally reduce an employee's benefits, even though this would limit an employee's total compensation. (See *Greene, supra*, 5 Cal. App. 4th at 187.) The adoption of temporary furloughs is an alternative method of reducing employee total compensation without implicating Government Code section 19826 (b).

Finally, *Greene* did not involve the Governor's exercise of the emergency authority granted him by section 3516.5 to adopt a temporary, pre-impasse rule in an emergency situation. In short, *Greene* is inapposite to the present situation and its holding does not serve as a legal impediment to the Governor's exercise of his statutory and executive authority to issue the Executive Order.

E. The Governor's Issuance of the Executive Order Was a Proper Method of Adopting the Rule Implementing Furloughs.

The California Constitution grants the Governor "supreme executive power" and requires him to see that the law is faithfully executed. (Cal. Const., Art. V, § 1.) Article V, section 1, of the California Constitution grants the Governor the authority to issue directives to subordinate civil executive officers concerning the enforcement of the law. (63 Ops.Cal.Atty.Gen. 583 (1980) WL 96881 (Cal.A.G.).) The Governor is

charged with supervising the official conduct of all executive and ministerial officers. (Gov. Code, § 12010.) The subject Executive Order constitutes a proper exercise of the Governor's executive authority, as the state employer, to set the work hours of state employees.

In addition to the executive powers granted him by the California Constitution, the Governor is also vested with the sole authority to collectively bargain on behalf of the state employer with the state bargaining unit representatives. DPA is charged with representing the Governor, as the State employer, in administering those aspects of the state personnel system subject to collective bargaining under the Dills Act, Government Code section 3512, et seq. (See Gov. Code 3513(j), 19815.4(g), 19816(a), 19816.4, 19816.8, 19816.17, 19819.5-19819.7.) Included within these powers is the duty to bargain and meet and confer with the state bargaining units' exclusive representatives over wages, hours, and terms and conditions of employment. (Gov. Code §§ 3512, 3517; *CCPOA v. State of California* (2006) 142 Cal.App.4th 198, 202.) DPA acts as the Governor's representative for purposes of meeting and conferring with all of the state bargaining units. (Gov. Code § 3517; *CCPOA v. State, supra*, 142 Cal.App.4th at 202.) The Governor's Executive Order ordering furloughs and DPA's implementation of the furloughs falls within the category of "wages, hours, terms and conditions of employment," and

therefore, are within the scope of collective bargaining pursuant to the Dills Act.

Appellant claims the Governor's Executive Order violates the separation of powers between the Executive and the Legislature because California law grants to the Legislature exclusive authority to set the salaries of state employees. Separate and apart from the fact that the furlough of state employees does not impact state employee salary rates, Appellant has misapplied the concept of separation of powers to the matter before the court. The separation of powers doctrine places limits upon the actions of each branch with respect to the other branches to prevent one branch from usurping authority of the other branches. (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52-53.) However, the separation of powers doctrine does not require a sharp demarcation between the operations of the three branches of government. Rather, California courts have long recognized that, in reality, the separation of powers doctrine allows the three departments of government to affect each other significantly. (*Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1, 24-25.)

The Executive Order was issued in order to alleviate part of the State's catastrophic and ever-worsening fiscal crisis. In the absence of immediate action, the State was projected to run out of cash by February 2009. (JA, Vol. I, Tab BB, p. JA261.) By issuing the Executive Order, the

Governor took action to address the fiscal crisis and directed the DPA to implement a temporary two-day furlough in order to realize immediate necessary cash savings to the General Fund. (*Id.*) The Governor relied upon the authority granted to him pursuant to Government Code sections 19851 and 19849 in order to realize the necessary savings via the temporary furloughs. As such, the Executive Order in no way impairs, limits or hinders the powers of the Legislature or Judiciary, but rather falls squarely within the authority delegated to the Governor by the California Constitution, Government Code sections 19851 and 19849, and the Dills Act to address the fiscal crisis of the State and to administer the wages, hours, and terms and conditions of state employment through the DPA.

The constitutional and statutory provisions cited above, as well as Government Code sections 19851 and 19849 already discussed, establish the Governor's authority to issue the Executive Order in question. As such, the Executive Order constitutes a proper exercise of the Governor's executive authority. (See e.g., *Superior Court v. County of Mendocino, supra,* 13 Cal.4th 45, 52-53; *Marine Forests Society v. California Coastal Com., supra,* 36 Cal.4th 1, 24-25.)

F. The Remainder of Appellant's Arguments Are Improper Because They Were Not Raised in the Trial Court Below and Lack Merit.

Appellant raises three additional arguments in its opening brief to this Court, all of which are improper because they were not raised in the

trial court below. Appellate courts generally do not consider issues that were not raised in the trial court. (See (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218, 222, *citing Johanson Transportation Service v. Rich Pik'd Rite, Inc.* (1985) 164 Cal.App.3d 583, 588.)) None of the arguments discussed below were raised in the trial court. (See JA, Vol. I, Tab H, p. JA101; Vol. II, Tab JJ, p. JA316.) For this reason, these arguments should be disregarded by this Court. Regardless, the arguments lack substantive merit and thus fail to provide a basis for challenging the trial court's ruling.

1. The Trial Court's Ruling Does Not Constitute an Impairment of Contract.

Appellant argues the trial court's ruling impairs the vested contract rights of its members. (See Appellant's Opening Brief, pp. 41-50.) Appellant failed to raise this issue in the trial court (see JA, Vol. I, Tab H, p. JA101; Vol. II, Tab JJ, p. JA316) and, therefore, the argument should be disregarded by this Court. Nonetheless, the argument lacks merit.

The Contract Clauses of both the federal and California Constitutions prohibit a State from passing laws impairing the obligation of contracts. (U.S. Const., art. I, § 10, cl. 1; Cal. Const., art. I, § 9.) Appellant argues that the trial court's 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. In making this argument, however, Appellant ignores the fact that the trial court expressly found furloughs to be authorized by the MOUs. Conduct that is authorized by the language of the contract is *a fortiori* not conduct that impairs rights under that same contract.

In any event, Appellant's argument on this point ignores basic impairment of contract jurisprudence. For instance, in *Sonoma County Organization of Public Employees v. County of Sonoma* (1979) 23 Cal.3d 296, 305-306, the California Supreme Court discussed at length U. S. Supreme Court precedent on the impairment of contract doctrine. The *Sonoma County* court noted the U.S. Supreme Court has held the contracts clause "is not to be read with literal exactness like a mathematical formula. [Citation.] The state's police power remains paramount, for a legislative body cannot bargain away the public health or public morals." (Citing, *Home Building & Loan Assn. v. Blaisdell* (1934) 290 U.S. 398, 428.) Similarly, in *Teachers' Retirement Bd v. Genest* (2007) 154 Cal.App.4th 1012, 1026-1027, the court stated as follows:

> Not every impairment runs afoul of the contract clause, however. The constitutional prohibition against contract impairment does not exact a rigidly literal fulfillment; rather, it demands that contracts be enforced according to their just and reasonable purport; not only is the existing law read into contracts in order to fix their obligations, but the reservation of the essential attributes of continuing governmental power is also read into contracts as a postulate of the legal order. [¶] And because it is a sovereign

> power, the state occupies a unique position, giving rise to principles that may limit whether an impairment has occurred as a matter of constitutional law. An attempt must be made to reconcile the strictures of the contract clause with the essential attributes of sovereign power. The contract clause and the principle of continuing governmental power are construed in harmony ... [Internal citations omitted.]

In *Blaisdell, supra*, the U. S. Supreme Court identified four factors for determining whether there has been an unconstitutional impairment of contract: (1) whether there was emergency justification for the enactment; (2) whether the enactment was for the protection of a basic interest of society as opposed to advantaging a particular individual or group; (3) whether the enactment was appropriate to the emergency and the conditions it imposed were reasonable; and (4) whether the enactment was temporary and limited to the exigency which provoked the legislative response. (See *Sonoma County, supra,* at 305.)

These factors demonstrate the absence of an unconstitutional impairment of contract here. The Governor issued Executive Order S-16-08 in response to an unprecedented and undisputed fiscal crisis. The Governor's Executive Order was issued to address the budgetary and cash crisis faced by the State, a matter of great societal interest, and was applied to state employees even-handedly so as to not advantage a particular group or individual. The Executive Order was an appropriate and proportional response to the State's fiscal emergency. Finally, furloughs imposed by the

Executive Order were temporary and limited to the emergency that led to its issuance. In short, there is no impairment of contract here.

2. The Trial Court's Decision Does Not Violate Appellant's Due Process Rights.

Appellant argues the trial court's ruling violates the due process rights of its members. (See Appellant's Opening Brief, pp. 50-52.) Appellant failed to raise this issue in the trial court (see JA, Vol. I, Tab H, p. JA101; Vol. II, Tab JJ, p. JA316) and, therefore, the argument should be disregarded by this Court. Nonetheless, the argument lacks merit.

The trial court's decision was rendered after all parties were given a full opportunity to brief and argue all issues raised by the Governor's Executive Order. The trial court found the Executive Order was legally authorized by the California Constitution, statutes, and provisions of the parties MOUs. There was no deprivation of due process here and Appellant's claims to the contrary are without merit.

3. Appellant Is Estopped from Claiming the Trial Court's Decision Infringes the Public Employment Relations Board's ("PERB") Exclusive Initial Jurisdiction over State Labor Matters.

Appellant argues that the trial court's ruling "violated long-standing principles concerning PERB's jurisdiction." (Appellant's Opening Brief, p. 53.) While this issue was raised in the trial court, Appellant is estopped from making this argument to this Court because Appellant took precisely the opposite position in the trial court.

The criteria for the application of judicial estoppel are as follows: 1) the same party has taken two positions; 2) the positions were taken in judicial or quasi-judicial administrative proceedings; 3) the party was successful in asserting the first position; 4) the two positions are totally inconsistent; and 5) the first position was not taken as a result of fraud, ignorance or mistake. (*Safai v. Safai* (2008) 164 Cal.App.4th 233, 246; *Jackson v. City of Los Angeles* (1998) 60 Cal.App.4th 171, 183.) These criteria are present here. In the trial court, Respondents demurred to Appellant's petition on the ground it was barred by PERB's exclusive initial jurisdiction over disputes arising under the Dills Act. (See Gov. Code § 3514.5; JA, Vol. I, Tab D, p. JA24; Tab E, p. JA29.) Appellant opposed that demurrer in the trial court. (JA, Vol. I, Tab N, p. JA135.) In fact, Appellant argued in the trial court, "[t]his court, not PERB, has jurisdiction to grant the requested relief." (JA, Vol. II, Tab JJ, p. JA316.) Appellant was successful in the trial court in convincing the trial court it had jurisdiction over the dispute and, as a consequence, the trial court overruled Respondent's demurrer. (JA, Vol. X, Tab WW, pp. JA1918-JA1920.) The trial court's ruling on the demurrer has not been appealed and Appellant cannot now reverse course and take the position that the trial court did not have jurisdiction over the dispute. Appellant is estopped from taking this position before this Court based on the arguments it made in the trial court.

V.

CONCLUSION

At the time of the Governor's issuance of Executive Order S-16-08, the State was in a dire fiscal emergency and was only weeks away from insolvency. Appellant did not, and cannot, dispute the existence of this fiscal emergency in the trial court. The Governor has the inherent constitutional, statutory, and contractual authority to address this emergency. Moreover, the emergency provision of the Dills Act was created specifically to permit the Governor to address this type of fiscal emergency through unilateral action such as the issuance of the subject Executive Order. The Governor's Executive Order was a constitutionally, statutorily, and contractually authorized use of his executive powers to address the fiscal emergency. Accordingly, Respondents respectfully requests this Court affirm the judgment of the trial court.

Dated: October 5, 2009

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CERTIFICATE OF WORD COUNT

I, David W. Tyra, Attorney for Defendants/Respondents GOVERNOR ARNOLD SCHWARZENEGGER and DEPARTMENT OF PERSONNEL ADMINISTRATION, hereby declare under penalty of perjury that the number of words in Respondents' Brief equals 11,968 words, as per the word count feature in Microsoft Word.

Dated: October 5, 2009

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A Law Corporation

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PROOF OF SERVICE

I, May Marlowe, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action; my business address is 400 Capitol Mall, 27th Floor, Sacramento, CA 95814-4416. On October 5, 2009, I served the within documents:

RESPONDENTS' BRIEF

☐ by transmitting via facsimile from (916) 321-4555 the above listed document(s) without error to the fax number(s) set forth below on this date before 5:00 p.m. A copy of the transmittal/confirmation sheet is attached.

☒ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.

☐ by causing personal delivery by Messenger of the document(s) listed above to the person(s) at the address(es) set forth below.

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☐ by causing to be transmitted via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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

Executed on October 5, 2009, at Sacramento, California.

May Marlowe

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