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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

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

Plaintiffs/Appellants,

vs.

ARNOLD SCHWARZENEGGER, et al.,

Defendants/Respondents.

Court of Appeal Case No. C061011

(Superior Court Case No. 34-2009-80000126)

FILED

FEB 20 2009

COURT OF APPEAL - THIRD DISTRICT
DEENA C. FAWCETT
BY _____ Deputy

Appeal from the Superior Court, Sacramento County
Honorable Patrick Marlette

OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS OR OTHER APPROPRIATE STAY ORDER; REQUEST FOR IMMEDIATE STAY

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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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)

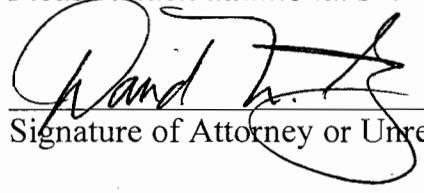
Court of Appeal Case Caption: PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT, CALIFORNIA ASSOCIATION OF PROFESSIONAL SCIENTISTS
v.
ARNOLD SCHWARZENEGGER, ET AL.

Court of Appeal Case Number: C061011

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. California Attorneys, Administrative Law Judges, and Hearing Officers	Petitioner in related case filed in Sacramento County Superior Court
2. Service Employees International Union, Local 1000	Petitioner in related case filed in Sacramento County Superior Court
3. California Correctional Peace Officers Association	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.



Signature of Attorney or Unrepresented Party

Date: February 20, 2009

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Party Represented: Governor Arnold Schwarzenegger, State of California and Department of Personnel Administration

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MISCELLANEOUS

I.

INTRODUCTION

The State of California has been experiencing an unprecedented and continuing financial disaster.[1] Over the past six months, the State's fiscal crisis escalated. The national economic recession, driven in large part by crises in the banking and housing sectors, has deepened significantly since the current State budget was enacted on September 23, 2008. This has had a direct impact on California's budget. The budget enacted on September 23, 2008 was predicated on anticipated revenues that have fallen well below the levels estimated at the time the budget was signed.

In response to the deepening economic crisis, Governor Arnold Schwarzenegger called emergency legislative sessions in November and December 2008 to address the impact of the revenue shortfall on the State budget. However, those legislative sessions did not produce a solution to the State budget crisis. Thus, on December 19, 2008, Governor Schwarzenegger issued Executive Order S-16-08 (the "Executive Order"), directing that state employees be temporarily furloughed two days a month over a 17-month period as a step "to reduce [the State's] current spending." (Exhibit K.)

The California Constitution, as well as relevant provisions of the California Government Code, grant the Governor the executive authority to

[1] On February 19, 2009, the Legislature agreed on a new State budget which, in relevant part, includes a spending reduction of $1.4 billion in state employee payroll. This reduction will be achieved through furloughs, layoffs, elimination of two state holidays, and overtime reform. Employees represented by Service Employees International Union, Local 1000 ("SEIU") will continue to be furloughed two days a month until a tentative agreement reached with the State, which includes one day a month furloughs, is ratified by SEIU and approved by the Legislature. All other bargaining unit employees continue to be subject to the furloughs implemented per the Governor's Executive Order. The State will meet and confer with other state employee unions to reach agreements to achieve necessary spending reductions.

impose furloughs on state employees. In the present case, the Governor also has the authority to impose furloughs under the terms of the Memorandum of Understanding ("MOU") between Petitioner California Association of Professional Scientists ("CAPS") and the State. The furloughs are a necessary spending reduction measure. If the furloughs are stayed pending appeal, the State will lose millions of dollars of needed savings every month.

II.

STATEMENT OF FACTS

A. Efforts to Address the State Budget Crisis Prior to Issuance of the Subject Executive Order.

On September 23, 2008, the Governor signed into law a new budget for the 2008-2009 fiscal year. (Exhibit A.) However, shortly after the budget was signed, the national economy began to decline, creating an unanticipated and significant reduction in revenues from those forecasted in the 2008-2009 budget. (Exhibit B.) Initially, the California Department of Finance ("DOF") determined that revenue for the 2009-2009 fiscal year would be $13 billion lower than projected in the original September 2008 budget. (Exhibit C.) Besides the revenue shortfall, DOF also determined that by the end of the 2008-2009 fiscal year, the State would amass a budget deficit of $11.2 billion based on the shortfalls in the September budget compromise. (*Id.*) The DOF concluded the "state will run out of cash in February and be unable to meet all of its obligations for the rest of the year," absent immediate intervening action. (*Id.*) Specifically, in its October 2008 Finance bulletin, DOF determined that the "Preliminary General Fund agency cash for October was $923 million below the 2008-09 Budget Act forecast of $10.667 billion." DOF further concluded in the October 2008 bulletin that "year-to-date revenues are $1.06 billion below the $22.58 billion that was expected." (Exhibit D.)

On November 6, 2008, the Governor responded to the unanticipated budget deficit by issuing a special session proclamation calling for an emergency session of the Legislature to immediately address this statewide crisis. (Exhibit E.) On the same day, the Governor sent a letter to all state workers informing them of some proposed spending reduction measures he was proposing which would impact state workers. (Exhibit F.) In the letter, the Governor also informed state employees he would be convening the Legislature to attempt to seek a comprehensive solution to the budget crisis. (*Id.*)

In an attempt to resolve part of the budget crisis, the Department of Personnel Administration ("DPA") put forth proposals to the labor unions in early November of 2008 including, but not limited to, a proposed one-day furlough and elimination of two holidays per year. None of the labor unions, including Petitioner CAPS, agreed to either proposal. However, the state employee unions have all recognized and acknowledged the State of California is facing a serious and immediate fiscal crisis. (Exhibits G, H, and I.)

The Legislature convened in special session in early November 2008 in an effort to resolve the pending budget crisis, but failed to reach any resolution. On December 1, 2008, the Governor issued a proclamation addressing the deepening financial crisis and the likelihood that "this fiscal year's deficit will cause the State to miss payroll and school payments at the beginning of 2009." (Exhibit J.) The Governor also reconvened the Legislature for another special session to address the fiscal emergency. (*Id.*)

DOF recalculated its estimates and found revenues for the 2008-2009 fiscal year were expected to be $14.8 billion below the estimate at the time the 2008-2009 budget was enacted. (Exhibit B, ¶ 4.) The deficit had increased by more than $3 billion in the span of approximately two

months. DOF also determined that the State's inability to reach a solution on the State's deficit had caused the deficit to increase and the State would now have a $41.6 billion deficit by the end of the 2009-2010 fiscal year. (Exhibit B, ¶ 5.) As a result of the devastating budget deficit, DOF concluded in December 2008 that the State would run out of funds by February 2009. (Exhibit B, ¶ 8.)

B. The Executive Order Imposing the Furloughs.

In response to this unprecedented financial catastrophe existing at the time, and because a solution acceptable to both the Governor and the Legislature proved elusive, the Governor, by virtue of his constitutional and statutory authority, issued the Executive Order on December 19, 2008, directing the implementation of a temporary two-day a month furlough plan for all state employees commencing in February 2009 and ending in June 2010. (Exhibit K.) Contrary to Petitioner's contention here, the furloughs are not an express 10 percent pay cut for all state employees, but rather a reduction in the hours worked by state employees. Based on the fiscal crisis existing at the time of the Executive Order, the Governor utilized the authority granted him under the Ralph C. Dills Act ("Dills Act"), Government Code section 3512, *et seq.*, to issue the Executive Order in advance of meeting and conferring with affected public employee unions, including Petitioner. (See Gov. Code § 3516.5; Exhibit K.) In the Executive Order, the Governor reiterated the fact that absent immediate action, the State would run out of cash in February of 2009 and would not be able to meet its obligations. (*Id.*)

C. Confirmation of State Fiscal Crisis Since Issuance of the Executive Order.

The events occurring since the furlough announcement confirmed the very real nature of California's worsening economic situation at the time of the hearing in the trial court. 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. (Exhibit L.) On December 22, 2008, the State Controller sent a letter to the Governor and the Legislature, reiterating the severity of the fiscal crisis the State was facing, if no agreement on a solution was reached. (Exhibit M.) 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 case reserves. (*Id.*)

On January 13, 2009, DOF Director 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. (Exhibit N.)

III.

STATEMENT OF THE CASE

Within a few weeks of the Governor's issuance of the Executive Order, multiple state employee organizations filed suit in Sacramento County Superior Court challenging the Governor's authority to furlough 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 Professional Engineers in California Government ("PECG") and Petitioner CAPS Case No. 2008-80000126, against the current Respondents as well as the Controller.

On January 5, 2009, a second petition was filed in Sacramento County Superior Court by California Attorneys, Administrative Law Judges, and Hearing Officers ("CASE"), Case No. 2009-80000134, against the current Respondents as well as the Controller.

On January 7, 2009, a third petition was filed in Sacramento County Superior Court by Service Employees International Union ("SEIU"), Local 1000, Case No. 2009-80000135, against the current Respondents as well as the Controller.

On January 12, 2009, a fourth petition was filed in Sacramento County Superior Court by California Correctional Peace Officers Association ("CCPOA"), Case No. 34-2009-80000137, against the current Respondents as well as the Controller.

On January 23, 2009, a fifth petition was filed in Sacramento County Superior Court by CDF Firefighters ("CDFF"), Case No. 34-2009-00032732, against the current Respondents as well as the Controller.

On January 23, 2009, a sixth petition was filed in Sacramento County Superior Court by California Association of Psychiatric Technicians ("CAPT"), Case No. 34-2009-80000148.

On or about January 27, 2009, SEIU filed a second petition, the seventh one in these related cases, in Sacramento County Superior Court, Case No. 34-2009-80000150, against the Governor and DPA.

On Thursday, January 29, 2009, the Court heard oral argument on Case Nos. 2008-80000126, 2009-80000134 and 2009-

80000135.[2] All parties were present and appeared at the hearing. On January 30, 2009, the trial court issued an amended and final order denying all of petitioners' writs and entering judgment for the respondents. (Exhibit O.) The 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.

(Exhibit O, p. 10.)

The trial court also found that the provisions of the Governor's Executive Order constitute "a rule in that they establish a standard of general application to state employees." (*Id.*) Finally, the trial court's Final Order states that the State Controller was obligated to comply with its order.

Petitioner CAPS filed a notice of appeal from the judgment and order denying the Petition for Writ of Mandate and Complaint for Declaratory Relief on February 3, 2009. (See Petitioners' Exhibit H.) On February 5, 2009 (the day before the furloughs were to begin) at 4:00PM, Petitioner CAPS filed a petition for writ of supersedeas and immediate stay of the trial court's order and the Governor's Executive Order. Petitioner's

[2] At a scheduling hearing on January, 9, 2009, all parties has stipulated to the joint hearing on January 29, 2009.

request for immediate stay was denied by the this Court because this Court was "unable to determine at this point whether there is a likelihood that appellants will prevail on the merits or that, on balance, respondent will not sustain as much irreparable injury if the stay issues as appellants will sustain if the stay does not issue." (Exhibit P.)

IV.

ARGUMENT

A. Standard for Writs of Supersedeas.

A writ of supersedeas is an extraordinary writ used to "protect the appellate court's jurisdiction," only when absolutely necessary. (*Nuckolls v. Bank of California, National Association* (1936) 7 Cal.2d 574, 578.) A petition for writ of supersedeas should only be granted when "denial of a stay would result in depriving an appellant of the fruits of his appeal should he be successful in securing a reversal of the judgment." (*Deepwell Homeowner's Protective Association v. City Council of the City of Palm Springs* (1965) 239 Cal.App.2d 63, 66.) The power to grant a writ of supersedeas should be "sparingly employed and reserved for the exceptional situation." (*People ex rel San Francisco Bay Conservation and Development Commission v. Town of Emeryville* (1968) 69 Cal.2d 533, 537.)

Petitioner's burden here is twofold: (1) to demonstrate a likelihood of success on appeal by raising substantial questions of probable error by the trial court and (2) to show that the balance of the equities weighs in favor of granting the requested writ. (*Deepwell Homeowner's Protective Association, supra,* 239 Cal.App.2d at 65-67; *West Coast Home Improvement Company v. Contractor's State License Board of Department Professional and Vocational Standards* (1945) 68 Cal.App.2d 1, 6; *Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861; *Nuckolls v. Bank of*

California, National Association, supra, 7 Cal.2d 574, 578.) Petitioner has failed to meet its burden with respect to either of these elements.

Petitioner has failed to demonstrate a likelihood of success on appeal. The trial court's decision upholding the Governor's authority to furlough state employees is well supported by relevant provisions in the California Constitution, California Government Code, and relevant provisions of the MOU between the parties. It is Petitioner's burden to prove substantial questions will be raised in its appeal. Based on the absence of any showing by Petitioner of probable error by the trial court, this Court should refuse to issue the requested writ. (*Saltonstall v. Saltonstall* (1957) 148 Cal.App.2d 109, 114.)

Petitioner also has the burden to show it will suffer irreparable injury if the writ of supersedeas is not granted. (*Mills v. County of Trinity, supra,* 98 Cal.App.3d 859, 861; *Deepwell Homeowner's Protective Association v. City Council of the City of Palm Springs, supra,* 239 Cal.App.2d 63, 66.) Petitioner has failed to demonstrate, or even meaningfully raise the issue, of irreparable harm to it or its members if this writ does not issue. Even had Petitioner addressed this subject in its petition, it would have had to show that the harm to it and its members outweighs any potential for harm to the Respondent if the petition for writ of supersedeas *is* granted. An appellate court should *not* grant a petition for writ of supersedeas when the petition will destroy rights clearly belonging to the respondent if affirmed. (*Sacramento Newspaper Guild v. Sacramento County Board of Supervisors* (1967) 255 Cal.App.2d 51, 53.) "[I]f a stay can be granted only at the risk of destroying rights which would belong to the respondent if the judgment is affirmed, it cannot be said to be necessary or proper to the complete exercise of appellate jurisdiction." (*Nuckolls v. Bank of California, National Association, supra,* 7 Cal.2d 574, 578.) Here, the relative harm to the State of California in not achieving the

expense reduction resulting from the Governor's furlough plan substantially outweighs any harm to Petitioner.

Based upon the discussion to follow, Respondents Governor Arnold Schwarzenegger, the State of California, and the Department of Personnel Administration respectfully request that this Court deny the present petition for writ of supersedeas.

B. The Appeal in This Case Has No Merit Because The Trial Court Did Not Err in Determining That Governor Arnold Schwarzenegger Has Authority to Issue the Executive Order.

Petitioner has failed to meet its burden to show that its appeal will have merit by demonstrating that substantial questions will be raised on appeal. (See *Deepwell Homeowner's Protective Association, supra,* 239 Cal.App.2d at 66; *West Coast Home Improvement Company v. Contractor's State License Board of Department Professional and Vocational Standards* (1945) 68 Cal.App.2d 1, 6.) Petitioner CAPS makes only the two following abbreviated statements. First, "Petitioner and Appellant CAPS asserts the right to a 40 hours workweek and to the payment of full salaries is guaranteed [sic] by the labor contract, only the Legislature, not the Governor can cut the hours of work and cut the pay of state scientists." (Petitioner's Petition for Writ of Supersedeas, p. 11.) Petitioner also states that its appeal will challenge the "Superior Court's conclusion that the statutes and the CAPS labor agreement with the state allow the state employer to alter the 40 hour workweek and to cut the pay of state employed scientists. The labor contracts and the Government Code sections do not provide the state employer the authority to cut hours or to cut pay and the Governor and DPA's action constitutes an illegal act in violation of the separation of powers and an illegal impairment of contract." (Petitioner's Petition for Writ of Supersedeas, p. 5-6.) These brief conclusory passages merely restate CAPS' arguments from the trial court and recite, in the barest of terms, the dispute between Petitioner and

Respondent. These two statements do not meet Petitioner's burden to prove that the appeal has merit. Petitioner makes no showing as to why it believes that the trial court committed error. Therefore, Petitioner has not met its burden and the petition for writ of supersedeas should be denied.

1. Government Code Sections 19851 and 19849 Provide the State with the Authority to Establish the Work Hours of State Employees.

a. Section 19851 Provides the State With Authority to Establish Work Schedules to Meet the Varying Needs of Different State Agencies.

However, even if Petitioner had attempted to meet its burden, Petitioner's appeal would have no merit as the trial court was correct in ruling that the Governor, acting as the state employer, has the statutory authority to reduce the hours of state employees pursuant to Government Code sections 19851 and 19849. As the trial court stated,

> The Court finds that these two statutes [Government Code section 19851 and 19849], taken together, provide the Governor with authority tor educe the workweek of state of 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.

(Exhibit O, p. 7.)

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 provides that the *policy* of the State is 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 or maintain 40-hour workweeks for state employees.

More important, however, 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. 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 code section.

As early as 1945, at the time of the statute's adoption, the Legislature demonstrated a clear intent to create a flexible policy surrounding the adoption of workday and workweek schedules for state employees and expressly provided for exceptions to the 40-hour workweek when the operational demands of the various state agencies required it. Government Code section 19851 has an extensive legislative history. The predecessor code section to 19851, Government Code section 18020, was adopted in 1945. Section 18020 was amended several times from the time of its enactment until 1981 when section 19851 was adopted as a replacement statute.

Former section 18020's history evidences the Legislature's intent regarding 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 the applicable legislation, 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.)

Finally, section 19851 was adopted by the Legislature in 1981. As noted above, the plain language of the code provides the State the discretion and flexibility to adopt work schedules other than traditional 40-hour weeks to meet the "varying needs" of differing state agencies. By 1981, the inclusion of this provision in section 19851 was consistent with a near 40-year legislative history of providing the state employer with this sort of discretion and flexibility. In this case, the reduction in the work hours of state employees is indisputably related to the "varying needs of the different state agencies."

b. Section 19849(a) Provides the State With Authority to Promulgate 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 promulgate rules regarding work hours that must be enforced by the varying agencies 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 establish the Governor's authority, acting as the state employer, to issue the Executive Order furloughing state employees two days a month. This conclusion also is consistent with the language of Government Code section 19816.10(a), which provides:

> In order to secure substantial justice and equality among employees in the state civil service, the department [DPA] may provide by rule for days, hours and conditions of work, taking into consideration the varying needs and requirements of the different state agencies and the prevailing practices for comparable service in other public employment and private business.

These statutes provide the Governor with the authority for issuing the subject Executive Order furloughing state employees. Accordingly, Petitioner's appeal has no merit and this petition for writ of supersedeas should be dismissed.

2. The Governor's Issuance of the Executive Order Does Not Implicate Government Code Section 19826.

As noted above, Petitioner makes only the bare assertion in its petition that "the Government Code sections do not provide the state

employer the authority to cut hours or to cut pay ..." (Petitioner's Petition for Writ of Supersedeas, ¶ 12, p. 6.) Petitioner does not even bother to identify the Government Code sections to which it is referring, but presumably is referring, at least in part, to Government Code section 19826(b) based on the arguments it raised in the trial court. However, the two-day furloughs ordered by the Governor in his Executive Order do not 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.)

Furloughs are not equivalent to reductions in salary ranges. A furlough only constitutes a reduction in hours worked, not a reduction in the wage rate paid for that work. The corresponding rate of pay is not affected and employees will be paid at their normal rate for a reduced number of hours resulting from the two furlough days per month. There is no evidence in this case that the State has any intention of paying state employees at a lesser rate, or to impact state employee salary ranges, for the hours actually worked.

As the trial court stated in its final order,

> This case, however, does not involve the establishment, adjustment or recommendation of a salary range for represented state employees. This case involves a temporary reduction in the hours worked by certain state employees, which will result in a loss of pay for the hours not worked. The order does not change established salary ranges at all; state employees will continue to receive their normal

> pay according to established ranges in weeks that do not include a furlough day.

(Exhibit O, p. 9.)

This conclusion is supported by applicable regulations adopted by DPA. The DPA regulations define "salary range" as the "minimum and maximum rate currently authorized for the class." (2 C.C.R. § 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 C.C.R. § 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), as was determined correctly by the trial court.

3. The Governor's Executive Order Does Not Improperly Interfere with the Legislature's Authority.

The Governor's Executive Order does not constitute "an illegal act in violation of the separation of powers" as Petitioner contends. (See Petitioner's Petition for Writ of Supersedeas, ¶ 12, p. 6.) Petitioner's apparent argument that the Executive Order usurps the legislative prerogative misapplies the concept of separation of powers. The imposition of furloughs is not a legislative function, but an executive one.

The California Constitution grants the Governor "supreme executive power" and requires the Governor 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 the state employer. Thus, the Executive Order in no way infringes on the Legislature's prerogatives.

The constitutional and statutory provisions cited above, including Government Code sections 19851 and 19849, establish the Governor's authority to issue the Executive Order in question. As such, the Executive Order does not violate the notion of separation of powers between the executive branch and the legislative branch. (see e.g., *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 52-53; *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 then existing catastrophic and ever-worsening fiscal crisis. In the absence of immediate action, the State was in imminent danger of running out of money. (Exhibit M.) By issuing the Executive Order, the Governor was abiding by his constitutional mandate to ensure the State's financial solvency. To that end, the Executive Order directed the DPA to implement a two-day furlough in order to realize immediate necessary savings to the State Treasury. (Exhibit Q, ¶ 7.) As such, the Executive Order falls squarely within the authority delegated to the Governor by the California Constitution and the cited sections from the Government Code to address the fiscal crisis and solvency of the State, in part by adjusting the work hours of state employees. Therefore, the Executive Order is a constitutional exercise of the Governor's executive power.

4. The Express Terms of the MOU Provide the Governor With Authority to Institute Furloughs.

The trial court specifically found that, in addition to the Governor's constitutional and statutory authority to furlough state

employees, the Governor had the specific contractual right to do so here based upon relevant provisions of the MOU between Petitioner and the State.

For instance, Article 12.1.B of the parties' MOU, entitled "States Rights," provides that "[c]onsistent with this Agreement, the rights of the State shall include, but not be limited to, the right ... *to take all necessary action to carry out its mission in emergencies*." (Exhibit R, Article 12.1.B. Emphasis added.) This section of the MOU provides the Governor with the express contractual right to take measures, such as ordering the furloughs here, to deal with emergency situations or simply to relieve employees from their duties due to lack of funds, the very situation at issue in this case.

C. The Petition for Writ of Supersedeas Should Not Be Granted Because Petitioner Fails to Meet Its Burden of Showing Irreparable Harm or that the Balance of the Equities Weighs in Favor of Issuing the Requested Writ.

1. Petitioner Fails to Meet Its Burden to Prove That It Will Suffer Irreparable Injury If the Petition is Not Granted.

As noted above, in a petition for writ of supersedeas, the petitioner bears the burden to show both that it will suffer irreparable injury if the writ of supersedeas is not granted, and that respondent will not suffer irreparable harm if the requested writ *is* granted. (*Deepwell Homeowner's Protective Association, supra,* 239 Cal.App.2d at 65-67; *West Coast Home Improvement Company v. Contractor's State License Board of Department Professional and Vocational Standards* (1945) 68 Cal.App.2d 1, 6; *Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861; *Nuckolls v. Bank of California, National Association, supra,* 7 Cal.2d 574, 578.) In this case, Petitioner fails entirely to meet its burden on this point. In fact, Petitioner makes *no* showing that it will suffer irreparable harm if the furloughs are instituted while its appeal from the trial court's judgment is pending.

A writ of supersedeas is *only* granted when it "is reasonably necessary to protect appellant or plaintiff in error from irreparable or serious injury in case of a reversal, and it does not appear that appellant or defendant in error will sustain irreparable or disproportionate injury in case of affirmance." (*Halsted v. First Savings Bank* (1916) 173 Cal. 605, 610; see also *California Table Grape Commission v. Bruno Dispoto* (1971) 14 Cal.App. 3d 314, 316; see also *Mills, supra,* 98 Cal.App.3d at 861.) Petitioner makes only a cursory and limited attempt to prove that irreparable harm will occur if the furloughs are instituted in the time before appeal. Petitioner merely states: "A stay of the judgment is necessary to protect the petitioners/appellants from the irreparable injury they will sustain in the event that their hours of work and their salaries are reduced." (Petitioner's Petition for Writ of Supersedeas, p.7.) A conclusory statement that irrevocable harm may occur is not an affirmative showing of irreparable harm.

Furthermore, irreparable injury is the type of injury that cannot be adequately compensated in damages. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1352.) However, merely losing wages cannot be considered irrevocable harm in this case because it is a harm for which there is an adequate legal remedy. While, Petitioner states that "[d]amages for such a violation would be impossible to quantify and simply do not satisfy the harm to Petitioner (see Petitioner's Petition for Writ of Supersedeas, p. 7.), Petitioner makes no attempt to explain why damages would be impossible to quantify. As above, lost wages could be quantified as damages. Petitioner has made no affirmative showing of irreparable harm, and therefore, this petition for stay should be denied.

2. Respondents' Will Be Irreparably Injured If the Petition For Writ of Supersedeas Is Granted.

If Petitioner's petition is granted, the furloughs will be stayed until the appellate case can be heard, which could take months. During those months, employees will return to their duties on furlough days and the corresponding cost savings to the State will have been lost. The savings to the General Fund from the furlough plan is estimated at $75,075,787 per month. (Exhibit Q, ¶ 7.) If the trial court's decision upholding the Governor's right to furlough state employees is stayed pending appeal, it would permanently destroy the State's rights to a spending reduction of approximately $75 million a month. A grant of a writ of supersedeas that would permanently destroy Respondents' right should not be granted. (*Sacramento Newspaper Guild v. Sacramento County Board of Supervisors, supra,* 255 Cal.App.2d 51, 53; *Nuckolls v. Bank of California, National Association, supra,* 7 Cal.2d 574, 578.)

Petitioner's petition for writ of supersedeas should not be granted because Petitioner fails to meet its burden to show irreparable injury without the stay. Furthermore, even if Petitioner had *attempted* to make a showing of irreparable injury, it would have been unsuccessful, as any damages that Petitioner sustains during the pendency of the appeal can be rectified by the payment of damages. Lastly, the writ of supersedeas should not issue because Respondents would be permanently and irrevocably damaged by its issue.

V.

CONCLUSION

Petitioner has not met its burden to prove that there is a substantial probability that the trial court erred and there will be a successful appeal in this case. Furthermore, Petitioner failed to meet its burden to prove that it

would suffer irreparable injury if the petition was not granted. The State of California has been facing an unprecedented fiscal crisis that required unprecedented actions in order to ensure the continuing financial solvency of the state. The continuation of the trial court's order upholding the furloughs is a necessary for California's fiscal well being . It is imperative that the trial court's order, and Governor Schwarzenegger's Executive Order be allowed to continue during the pendency of the appeal. If the furloughs are stayed, the State will be permanently deprived of millions of dollars of needed savings.

Accordingly, for the foregoing reasons, Respondent respectfully requests that this Court deny the petition for writ of supersedeas.

Dated: February 20, 2009

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation

By _____
David W. Tyra,
Attorneys for Defendants/Respondents
GOVERNOR ARNOLD SCHWARZENEGGER, STATE OF CALIFORNIA and DEPARTMENT OF PERSONNEL ADMINISTRATION

CERTIFICATE OF WORD COUNT

I, David W. Tyra, Attorney for Defendants/Respondents GOVERNOR ARNOLD SCHWARZENEGGER, STATE OF CALIFORNIA AND DEPARTMENT OF PERSONNEL ADMINISTRATION hereby certify that the number of words in Defendant/Respondents equals 5,605 words, as per the word count feature in Microsoft Word.

Dated: February 20, 2009

KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation

By _____
David W. Tyra,
Attorneys for Defendants/Respondents
GOVERNOR ARNOLD SCHWARZENEGGER, STATE OF CALIFORNIA and DEPARTMENT OF PERSONNEL ADMINISTRATION

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 February 20, 2009, I served the within documents:

OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS OR OTHER APPROPRIATE STAY ORDER; REQUEST FOR IMMEDIATE STAY; APPENDIX TO OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS OR OTHER APPROPRIATE STAY ORDER

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.

by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.

by transmitting 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 am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on February 20, 2009, at Sacramento, California.

May Marlowe
May Marlowe