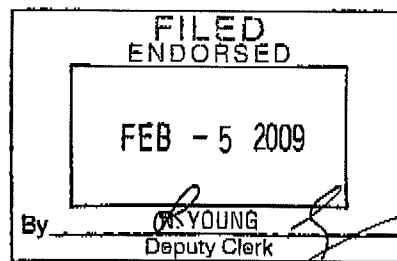


Department 29
Superior Court of California
County of Sacramento
720 Ninth Street
Timothy M. Frawley, Judge
Lynn Young, Clerk



Friday, February 6, 2009, 9:00 a.m.

<p>CDF FIREFIGHTERS</p> <p>v.</p> <p>ARNOLD SCHWARZENEGGER, in his capacity as Governor of the State of California; STATE OF CALIFORNIA, DEPARTMENT OF PERSONNEL ADMINISTRATION; JOHN CHIANG, in his capacity as the Controller of the State of California; and DOES 1 through 20, inclusive</p>	<p>Case Number: 34-2009-0032732</p>
--	--

Proceedings: Ex Parte Application for TRO and OSC re Preliminary Injunction

Filed By: Gary M. Messing, et al., Carroll, Burdick & McDonough LLP, Attorneys for Plaintiff/Petitioner

RULING AFTER HEARING

The ex parte application for a temporary restraining order and order to show cause re preliminary injunction came on regularly for hearing on Friday, February 6, 2009, at 9:00 a.m. in Department 29, Hon. Timothy M. Frawley, presiding. The matter was argued and submitted. Having taken the matter under submission, the Court now rules as follows:

Introduction

This action arises out of the Governor's December 19, 2008, Executive Order (S-16-08) directing the Department of Personnel Administration (DPA) to adopt plans to furlough state represented employees, supervisors, and managers for two days per month, from February 1, 2009, through June 30, 2010. In response to the Executive Order, DPA issued a January 9, 2009, memorandum entitled "State Employee Furlough per Governor's Executive Order S-16-08" (the "Furlough Memo") outlining how it would implement the Executive Order's directives.

The Furlough Memo provides that all general government operations will be closed on the first and third Fridays of each month, beginning Friday, February 6, 2009. The Furlough Memo advises that these unpaid "furlough days" are not work days and that employees shall not report to work on these days. The Furlough Memo further advises that while furlough days will not be cashed out, and salaries will be adjusted to reflect the unpaid furlough days, employee benefits will remain unchanged.

The Furlough Memo also provides that, for operations that cannot close, Agency Secretaries (or Directors) may request approval from the DPA to use one of the following two types of self-directed furloughs: (1) employees take two furlough days each month, but on days chosen by the employee and approved by the supervisor; or (2) employees accrue two furlough days per month to be taken when feasible, but no later than two years following the end of the furlough program. Posted positions in "24/7" facilities automatically qualify for the second self-directed furlough without prior approval from DPA.

On January 23, 2009, Petitioners CDF Firefighters (CFFF) filed a grievance under its Memorandum of Understanding with the State of California (the MOU) alleging that the State's unilateral implementation of the plan to furlough Bargaining Unit 8 employees violates Sections 16.1 and 17.2 of the parties' MOU.

The same day, January 23, 2009, CFFF also filed a Verified Petition for Writ of Mandate/Prohibition and Complaint for Injunctive and Declaratory Relief (the Petition).

CFFF now applies to this Court for a temporary restraining order and order to show cause re preliminary injunction enjoining Defendants/Respondents from taking any further action to implement the Furlough Memo and/or Executive Order as to Bargaining Unit 8 employees. CFFF seeks relief on the following grounds: (1) Defendants/Respondents do not have authority to implement the furlough plan because Government Code § 19826(b) expressly precludes DPA from establishing, recommending, or adjusting the salaries of union-represented state employees; and (2) CFFF has a contractual right under the MOU to have its grievance resolved through the grievance and arbitration procedures of the MOU.

For the reasons described below, the Court denies the application.

Legal Standard

In deciding whether to issue a restraining order, a court must weigh two interrelated factors: (1) the likelihood that the plaintiff will ultimately prevail on the merits at trial, and (2) the interim harm that the plaintiff is likely to sustain if

injunctive relief is denied as compared to the harm that the defendant is likely to suffer if injunctive relief is granted. (*Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1251-1252.) A trial court's determination whether or not to issue a restraining order must be guided by a "mix" of the potential-merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support a restraining order. (*Id.*)

Discussion

In this case, the Court is not persuaded that CDFP is likely to prevail on the merits of its Government Code section 19826(b) claim, for two reasons.

First, CDFP has failed to show that section 19826(b) even applies to this case.

Prior to the enactment of the Dills Act in 1977, state employees' wages, hours, and working conditions were determined by the provisions of the Government Code. Under the Dills Act, in contrast, the parties may negotiate over wages, hours, and other terms and conditions of employment. The Dills Act permits the parties to supersede numerous statutory provisions relating to wages, hours, and working conditions by a MOU. (See Gov. Code § 3517.6.)

Government Code section 19826 is among the statutory provisions that may be superseded by conflicting provisions in an MOU. (Gov. Code § 3517.6(a)(3).) Further, subject to an exception not relevant here, the Legislature expressly stated in section 19826(d) that if the provisions of section 19826 are in conflict with the provisions of a MOU reached between the Governor and a recognized employee organization, the provisions of the MOU shall be controlling. (Gov. Code § 19826(d).) Thus if the provisions of section 19826(b) are in conflict with the provisions of a MOU the language of the MOU controls.

In this case, it is impossible for the Court to ascertain whether section 19826(b) has been superseded because, although CDFP admits its MOU remains in effect (*see* Gov. Code § 3517.8), CDFP did not provide the Court with a complete copy of its MOU. As a result, the Court cannot determine whether there are provisions in the MOU that conflict with section 19826(b). Consequently, the Court cannot determine whether section 19826(b) applies to this case.

Second, even if section 19826(b) applies to this case, that section does not appear to preclude the actions taken by DPA.

Section 19826(b) denies DPA the authority to unilaterally adjust the salaries of represented employees. (Gov. Code § 19826(b); *Dept. of Personnel Admin. v. Superior Court (Greene)* (1992) 5 Cal.App.4th 155, 181-182.) This case involves a temporary adjustment to hours worked, not an adjustment to

salaries. (Cf. Gov. Code § 19826 and §§ 9849, 19851.) While the furlough plan will result in a reduction in pay for the hours not worked, the plan will not change the established salary ranges.

In regard to CDFP's argument that the furlough plan is a "de facto salary reduction" as to Bargaining Unit 8 employees because they are unable to take any time off, the Court finds the argument speculative, difficult to accept at face value, and generally unpersuasive.

CDFP's claim for injunctive relief based on the grievance procedures of the MOU is likewise unpersuasive.

As an initial matter, it is noteworthy that in this suit CDFP has not sought specific performance of the arbitration provisions of the MOU – only injunctive relief to preserve the "status quo" pending resolution of its grievance. To that end, CDFP seeks an injunction to preserve the status quo pending arbitration – a so-called "*Boys Markets* injunction," in reference to the United States Supreme Court's decision in *Boys Markets, Inc. v. Retail Clerks Union, Local 770* (1970) 398 U.S. 235. In *Boys Markets*, the Court held that the federal labor anti-injunction statutes do not prevent a court from issuing an injunction for the purpose of preserving the arbitration and no-strike clauses in a collective bargaining agreement. (*Id.* at p.254.)

Cases decided after *Boys Markets* have held that an injunction in aid of arbitration is appropriate when – but only when -- the actual or threatened harm to the aggrieved party would frustrate or vitiate the arbitration process. (See *Graphic Communications Conf. – Int'l Brotherhood of Teamsters Local 404M v. The Bakersfield Californian* (2008) 541 F. Supp.2d 1117, 1120-1121.) Further, the arbitral process is rendered meaningless only if the arbitral award would substantially fail to undo the harm occasioned by the lack of a status quo injunction. (*Id.*) The arbitral process is not rendered meaningless merely by the inability of the arbitrator to completely restore the status quo ante. (*Id.*) As a result, most cases where injunctions in aid of arbitration have been issued against employers involve physical or ownership changes where the employer's action threatens a permanent and irreparable loss of jobs or benefits. (*Id.* at pp. 1124-1125; see also *Lever Brothers Co. v. Int'l Chemical Workers Union Local 217* (4th Cir. 1976) 554 F.2d 115, 119-120; *Int'l Assn. of Machinists & Aerospace Workers v. Panoramic Corp.* (7th Cir. 1981) 668 F.2d. 276, 285-286.)

In this case, the Court is not persuaded that an injunction is necessary to prevent the arbitration process from becoming a meaningless ritual. Indeed, the Court is aware of no reason why, if CDFP prevails on its claims in arbitration, the arbitrator would not be able to substantially undo the harm occasioned by the employer's actions in the absence of an injunction.

Moreover, if the Court were to enjoin the furlough plan merely because CDFF has filed a grievance challenging the State's unilateral implementation of that plan, it would defeat the Governor's (and DPA's) statutory right to act on matters within the scope of representation without prior notice or meeting "[i]n cases of emergency." (Gov. Code § 3516.5.) CDFF has failed to address the employer's authority to proceed under this section.

Thus, for purposes of this application, the Court concludes that CDFF has failed to show that it is likely to prevail on the merits of its claims.

The question whether the balance of harms favors injunctive relief presents a closer question:

On the one hand, the Court recognizes that implementation of the Governor's furlough plan is likely to cause significant economic hardships for Bargaining Unit 8 employees.

On the other hand, the Court cannot ignore that the State is mired in the midst of an unprecedented budgetary crisis and that enjoining the furlough plan likely would have a material adverse impact on the State's ability to meet its financial obligations, leading to layoffs and a potentially even-greater reduction in State services than would occur under the furlough plan. After weighing these competing harms, the Court concludes that the balance of harms also favors denying injunctive relief.

Because the Court concludes that neither the potential-merit or interim-harm factors support injunctive relief, CDFF's application for a temporary restraining order and order to show cause re preliminary injunction is DENIED. This minute order shall be effective immediately. No formal order pursuant to CRC Rule 3.1312 or further notice shall be required.

Date: Feb. 6, 2009


Timothy M. Fawley
Judge of the Superior Court of California
County of Sacramento