SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

Date: 03/12/2009 Time: 01:30:00 PM Dept: 19

Judicial Officer Presiding: Judge Patrick Marlette
Clerk: D. Rios

Bailiff/Court Attendant: Deputy Munoz
ERM:
Reporter: K Nowack #6987

Case Init. Date: 02/09/2009

Case No: 34-2009-80000158-CU-WM-GDS Case Title: Arnold Schwarzenegger Governor vs. State of Controller John Chiang

Case Category: Civil - Unlimited

Event Type: Petition for Writ of Mandate - Writ of Mandate
Moving Party: David A Gilb Director of Department of Personnel Administration, Department of Personnel Administration, Arnold Schwarzenegger Governor
Causal Document & Date Filed:Petition for Writ of Mandate, 02/09/2009

Appearances:

David W. Tyra appearing on behalf of Petitioner
Mark Beckington, Dep. A.G. appearing on behalf of the Respondent and the Intervenors

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The above entitled cause came on this date for Hearing on the Petition for Writ of Mandate with the above named counsel present before the Court.

Counsel presented their respective arguments to the Court and the matter was submitted.

The Court having received and read the pleadings filed herein, and further having heard the arguments of counsel, affirmed the tentative decision as posted in the Court's web site, a copy of which is attached hereto and incorporated in this minute order, and adopted it as the Court's ruling in this case.

The following shall constitute the Court's tentative ruling on the petition for writ of mandate, set for hearing in Department 19 on Thursday, March 12, 2009. The Court anticipates that all parties will appear at the hearing. Oral argument shall be limited to no more than 20 minutes per side.

This is a petition for writ of mandate under Code of Civil Procedure section 1085 which presents the issue of whether the Governor's Executive Order of December 19, 2008, directing a furlough of represented state employees and supervisors for two days per month, and an equivalent furlough or salary reduction for all state managers, applies to employees of other elected California civil executive officers. Such officers include the Lieutenant Governor, the Secretary of State, the State Treasurer, the State Controller, the Superintendent of Public Instruction, the Insurance Commissioner, the Attorney General, and members of the State Board of Equalization. The Governor and the Department of Personnel Administration are the petitioners in this action, and the State Controller is the respondent. All of the other elected civil executive officers, except the Insurance Commissioner, have intervened in this action and are aligned with the State Controller in opposition to the petition.

Petitioners have filed a request for judicial notice of certain legislative history material related to Government Code section 19851. Respondent and intervenors have filed a request for judicial notice of various Executive Orders issued by the Governor (including the Executive Order at issue in this case), press releases issued by the Governor's office, a document regarding the 2009 Budget Act Package

published on the Web site of the California Department of Finance, records of this court from several recent actions involving the Executive Order at issue here, and an article from the Sacramento Bee newspaper regarding the recently-passed 2009 budget. No objections have been made to the requests, and the matters contained therein being proper subjects for judicial notice, the requests are granted.

Respondent and intervenors have filed objections to certain portions of the declarations petitioners submitted with their reply brief. The Court has read the declarations and considered the objections. The objections are overruled on the basis that the declarants have personal knowledge of the matters contained in their declarations, and that the matters stated therein are not inadmissible opinion testimony, being based on the declarants' personal participation in and observation of the events about which they testify.

In four cases brought by unions that represent state employees in various bargaining units (referred to herein as the "union writ cases"), this Court previously ruled that the Governor's Executive Order imposing furloughs on represented and unrepresented state employees was a valid exercise of his power as the employer of such employees in response to the recent state budget crisis.

After the rulings in the union writ cases had been issued, a dispute arose between the Governor and the State Controller over whether those rulings applied to the employees of elected civil executive officers, who were not parties to any of those actions. The Governor asserted that the rulings did apply to employees of those officers; the Controller asserted that they did not, and refused to implement the reduction in pay anticipated as a result of furloughs of those state employees. In an attempt to resolve the dispute, the Controller sent a letter to the Court requesting a ruling on that issue; in a minute order dated February 4, 2009, the Court stated that its ruling in the union writ cases "...did not address, or make any ruling regarding, the Governor's authority to order furloughs for the employees of those officers and officials. Accordingly, the Court expresses no views regarding that issue." Following the issuance of that minute order, the Governor filed the present writ proceeding.

The starting point for this proceeding is the Court's rulings in the union writ cases that the Governor has the authority, under statute and under the Memoranda of Understanding of the unions involved, to order furloughs for represented and unrepresented state employees. The pleadings in this action do not put that matter at issue or mount any challenge to the Court's rulings in the union writ cases. The Governor's petition in this action seeks an order compelling the State Controller, the only respondent named in the petition, to comply with the implementation of furloughs for the employees of the above-listed civil executive officers. The State Controller, in his opposition to the petition, and the intervenors, in their Complaint in Intervention (which is, in substance, an opposition to the petition), ask the Court to rule that the provisions of the Governor's Executive Order imposing furloughs on represented and unrepresented state employees may not be applied to their own employees.

Thus, the issue before the Court, as framed by the pleadings in this case, is whether the provisions of the Executive Order directing two-day-a-month furloughs for represented and unrepresented state employees apply to employees of the civil executive officers who are parties to this case.

If that question were answered in the affirmative, given the presence of the civil executive officers as parties in the case, the relief granted in the judgment and writ would be twofold: an order requiring the civil executive officers who are parties to this action to comply with the Executive Order by implementing furloughs for their employees; and an order requiring the State Controller to process the resulting pay reduction for such employees.

If that question were answered in the negative, the relief granted in the judgment would be a declaration that the Executive Order does not apply to the employees of respondent and intervenors insofar as it orders employee furloughs, and therefore the State Controller does not have a duty to reduce the pay of such employees as if they had been furloughed.

Respondent and intervenors contend that the Executive Order may not be applied to their employees on two main grounds.

First, they argue that applying the Order to their employees would violate the system of divided executive power embodied in the State Constitution and would interfere with the independent powers and duties that have been assigned to their offices.

Second, they argue that the Executive Order does not actually apply to their employees, either because the Order is now moot (the circumstances that led to its issuance allegedly having ceased to exist), or because the express terms of the Order do not direct furloughs of their employees, or because the Governor should be estopped, as a matter of equity, from asserting that they do.

The first contention is not persuasive because it is established law that, notwithstanding the divided executive power concept, civil service employees of civil executive officers, as those officers are enumerated in Government Code section 1001, are generally "...subject to the jurisdiction of the State Personnel Board with respect to the merit aspects of their employment and to the Department of Personnel Administration with respect to the nonmerit aspects of employment." (Schabarum v. California Legislature (1998) 60 Cal. App. 4th 1205, 1225.)

While the Schabarum case dealt with employees of the Legislative Counsel's office, and not employees of elected executive branch officers, the chief of the Legislative Counsel's office and the elected officials who are parties to this action are all "civil executive officers" as that term is used in applicable statutory law. The Court therefore concludes that the civil service employees of the elected civil executive officers who are parties to this case are subject to the jurisdiction of the Department of Personnel Administration with respect to the nonmerit aspects of employment.

The nonmerit aspects of the state's personnel system extend generally to the state's financial relationship with its employees, and embrace such matters as salary, layoffs and nondisciplinary demotions. (See, Tirapelle v. Davis (1993) 20 Cal. App. 4th 1317, 1322.) As the Court found in the union writ cases, the adjustment of state employees' hours to respond to a fiscal emergency falls within the scope of the Governor's authority as the employer of such employees. Such action is related to the nonmerit aspects of state employment. On that basis, the Court concludes that the civil service employees of respondent and intervenors are subject to the Governor's power to order a furlough under the authority that served as the basis for the Court's ruling in the union writ cases. It is not necessary to restate that authority here.

The Court further finds to be unpersuasive the contention of respondent and intervenors that recognizing the Governor's authority over their employees, at least for the purpose of ordering a furlough under the circumstances of the budget crisis, impermissibly interferes with the powers and duties that have been assigned to their offices. The reason this contention is not persuasive is that the Governor's power to order employee furloughs is not unlimited, but rather is controlled by law, and therefore cannot be exercised in an arbitrary or capricious manner. As the Court found in the union writ cases, the Governor's authority to order state employee furloughs arises ultimately from his statutory power, as the "employer" of such employees, to reduce their hours to meet the varying needs of state agencies. (See, e.g., Government Code section 19851.) In other words, the Governor must have a legitimate reason to reduce the hours of state employees in this manner, one that is related to the legitimate needs of state agencies. The recent fiscal crisis and budget impasse provided such a legitimate reason, as the Court found in the union writ cases. Thus, in this case at least, the Governor's action was not arbitrary or capricious, and does not impermissibly interfere with the powers and duties of other elected civil executive officers.

Respondent and intervenors argue here, however, that the circumstances that gave rise to the furlough order, and which may have justified it at the time, no longer exist. In particular, they contend that the Legislature's failure to enact a budget, which was cited in the Executive Order as the reason for the furlough, has now been rectified through the recent passage of the Budget Act of 2008, and that furloughs therefore are neither necessary nor proper in view of current circumstances. In essence, respondent and intervenors contend that this matter has been rendered moot by events post-dating the rulings in the union writ cases.

This contention is unpersuasive as well, because the evidence submitted by the Governor demonstrates that furloughs for state employees, including the employees of the elected civil executive officers who are parties to this case, explicitly were factored into the fiscal assumptions underlying the Budget Act of 2008.

As set forth in the Declaration of Diana L. Ducay, Program Manager for the Administration Unit of the California Department of Finance, who oversees the unit with direct responsibility for the employee

compensation and retirement benefits components of the State Budget: "[B]udget reduction figures legislatively mandated by both sections 3.90 [of the Budget Act] for fiscal years 2008-2009 and 2009-2010 were calculated by the Administration Unit of the Department of Finance...in cooperation with the Department of Personnel Administration prior to those figures being included in the legislation. Our calculation of these figures was based, in part, on the assumption that all state employees, including those who work in the offices of the civil executive officers of the State, i.e., the Lieutenant Governor, the Secretary of State, the Treasurer, the Attorney General, the Controller, the Superintendent of Public Instruction, the Insurance Commissioner and the Board of Equalization, would be furloughed two days a month from February 2009 to June 2010 as required by Governor Schwarzenegger's Executive Order S-16-08, dated December 19, 2009. Thus, the assumptions underlying the required budget savings specified in section 3.90 for fiscal years 2008-2009 and 2009-2010 include two-day a month furloughs for the employees of the civil executive officers."

The text of Section 3.90(a) of the Budget Act confirms this statement, providing: "Notwithstanding any other provision of this act, each item of appropriation in this act...shall be reduced, as appropriate, to reflect a reduction in employee compensation achieved through the collective bargaining process for represented employees or through existing administration authority and a proportionate reduction for nonrepresented employees (utilizing existing authority of the administration to adjust compensation for nonrepresented employees) in the total amounts of $385,762,000 from General Fund items and $285,196,000 from items relating to other funds. It is the intent of the Legislature that General Fund savings of $1,024,326,000 and other fund savings of $688,375,000 in the 2009-2010 fiscal year shall be achieved in the same manner described above."

By contrast, respondent and intervenors have not cited any provisions of the Budget Act of 2008 that explicitly repudiate or abrogate furloughs.

Because the cost savings called for in the Budget Act were based in part on the savings resulting from furloughs for state employees, including employees of the elected civil executive officers who are parties to this action, the issue of whether the Governor has the legal authority to order such furloughs is not moot.

Similarly, the recent agreement between the Department of Personnel Administration and the Service Employees International Union reducing furloughs for members of that organization to one day per month, does not render the two-day per month furloughs for other employees moot. Section 3.90 of the Budget Act, quoted in the main text above, explicitly recognizes that employee compensation savings may be achieved through a combination of the collective bargaining process and existing administration authority, i.e., through a combination of agreements with individual employee unions and the Governor's authority to direct furloughs.

Respondent and intervenors also argue that the Governor's line item vetoes cutting the budgets for certain of the elected civil executive officers as set forth in the recent Budget Act rendered this matter moot by making furloughs of those officers' employees unnecessary to achieve the savings called for in the Act. In support of this argument, respondent and intervenors have cited statements by the Governor indicating that the cuts were implemented to "...reflect equity among all executive branch agencies for the state employee compensation reductions within the budget through furloughs, elimination of positions, overtime reform and reducing paid state holidays" and that "[t]he Constitutional Officers will have flexibility to implement the savings within their own offices. " Such statements, however, do not demonstrate that the Governor intended the line item vetoes to substitute for furloughs. Instead, the line item vetoes simply represented additional budget cuts for the affected officers. Moreover, those cuts applied only to the 2009-2010 fiscal year. Respondent and intervenors have not argued that such additional cuts would be in any way improper (or unreasonable under the circumstances); indeed, the petition and complaint in intervention in this action do not raise any issue regarding the propriety of the line item vetoes. The Court therefore does not find that the line item vetoes rendered the furloughs, as applied to the employees of respondent and intervenors, either unnecessary or in any way improper.

As described above, respondent and intervenors also contend that the Governor's Executive Order, by its terms, did not apply to their employees. Based on the language of the Order itself, the Court finds this contention to be without merit.

The operative provisions of Executive Order S-16-08 (i.e., those that actually direct the furloughs)

provide:

"IT IS ORDERED 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. This plan shall include a limited exemption process.

"IT IS FURTHER ORDERED 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."

This language of the Order is broad in scope, applying generally to "state employees" with no stated exceptions for employees of elected civil executive officers.

At the same time, the Order does contain one provision that amounts to a recognition that certain agencies are beyond the scope of the Governor's authority to direct furloughs. That provision states:

"IT IS REQUESTED that other entities of State government not under my direct executive authority, including the California Public Utilities Commission, the University of California, the California State University, California Community Colleges, the legislative branch (including the Legislative Counsel Bureau), and judicial branch, implement similar or other mitigation measures to achieve budget and cash savings for the current and next fiscal year."

None of the elected civil executive officers who are parties to this action are included in the list of entities that the Governor recognized as not being under his direct executive authority for purposes of the Order. No other provision of the Order excludes them from its reach. The Court therefore concludes that the Order, by its terms, addresses the employees of respondent and intervenors.

The final question before the Court is whether the Governor should be estopped from asserting that the Executive Order applies to the employees of respondent and intervenors, i.e., whether the Order should not be enforced as to them even if the Governor has the authority to make the Order and the Order by its terms addresses their employees.

As stated in Golden Day Schools, Inc. v. Department of Education (1999) 69 Cal. App. 4th 681, 693, "[t]he necessary elements of an estoppel claim are: (1) the party to be estopped must be appraised of the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) he must rely upon the conduct to his injury."

The concept of estoppel also has been described as a conclusive presumption under Evidence Code section 623 as follows: "Whenever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement, permitted to contradict it."

The party seeking to impose equitable estoppel must have acted in a reasonable manner in relying on the conduct of the other party. (See, Golden Gate Water Ski Club v. County of Contra Costa 165 Cal. App. 4th 249, 257-258.)

When estoppel is successfully invoked, the result is that "...the court in effect closes its ears to a point – a fact, argument, claim or defense – on the ground that to permit its assertion would be intolerably unfair." (See, Hoopes v. Dolan (2008) 168 Cal. App. 4th 146, 162.)

The essence of respondent's and intervenors' claim of estoppel in this case is that the Governor intentionally misled them by telling them that the Executive Order did not, and would not, apply to their employees. As support for this contention, respondent and intervenors have offered declarations made by representatives of their various offices, all of which focus on a telephone conference call that took place on January 9, 2009 between the declarants and representatives of the Department of Personnel Administration, acting on behalf of the Governor. Although the declarations differ in the amount of detail they offer, and sometimes differ among themselves as to who said what, in substance they tell the same story. Accordingly, the following excerpt from the Declaration of Collin Wong-Martinusen, Chief Deputy

State Controller/Chief of Staff, is illustrative:

"4. On January 9, 2009, the Department of Personnel Administration conducted a conference call with representatives of the various constitutional and state-wide elected officials. Ms. Debbie Endsley, Chief Deputy Director, DPA, participated in that conference call. I represented the State Controller on that telephone call. In response to a question as to the applicability of the order to the employees of the constitutional officers, Ms. Endsley stated that the executive order did not apply but urged the voluntary compliance of the constitutional officers."

In response to these declarations, the Governor has submitted the Declaration of Debra L. Endsley, Chief Deputy Director of the Department of Personnel Administration, which tells a different story:

"3. On January 9, 2009, I participated in a conference call with Paul Feist, Deputy Cabinet Secretary for the Governor. The conference call included representatives from the various State of California civil executive officers. The topic of the call was furloughing of state employees, including the employees in the offices of the civil executive officers.

"4. During the course of the telephone call, Mr. Feist explained that it was the Administration's understanding that the Governor could not legally furlough the employees of the civil executive officers. One of the participants in the telephone call, a representative from the Insurance Commissioner's office, questioned the legal interpretation that the furloughs did not apply to the civil executive officers. Following this question, I told the group that the Department of Personnel Administration would have our legal office research the authority to furlough employees of constitutional offices and get this information to the Governor's Office. At the conclusion of the telephone call, the question of whether the furloughs applied to the employees of the civil executive officers, and the Governor's legal authority to furlough that group of employees, was definitely unresolved and the subject left open."

Based upon this evidence, and viewing it in the light most favorable to respondent and intervenors, the Court finds that the doctrine of estoppel should not be applied here. In essence, respondent and intervenors contend that, as of January 9, 2009, the Governor made a clear statement that he would not seek to apply the Executive Order to their employees regardless of its terms and regardless of the circumstances. Even if this characterization of events were taken as true, the Court finds that such a representation was not one on which respondent and intervenors reasonably could rely. They acknowledge that the Governor was urging them to implement equivalent savings voluntarily, which indicates that they knew they were not exempt from the need to cut costs. At the same time, with the State's financial situation in January being extremely critical, and moreover, according to the State Controller's projections, worsening practically on a daily basis (as was amply documented by the evidence submitted in the union writ cases), respondent and intervenors could not reasonably assume that their voluntary efforts would exempt them from the need to make further, deeper cuts later. In other words, even if the Governor initially stated that he would not apply the Executive Order to their employees, respondents and intervenors could not reasonably assume that he might not adjust course later under the pressure of worsening fiscal conditions. Thus, the Court does not find that the budgetary savings these officers realized voluntarily should be seen as reasonably having been made in reliance on the Governor's statements regarding the Executive Order, since they would have been required to make the cuts in any event under the circumstances. Similarly, the Court does not find that such efforts precluded the Governor from adjusting his position regarding enforcement of the Executive Order, since it was not reasonable to assume that further cuts would be unnecessary.

In addition, the Court does not find, under all of the circumstances of fiscal crisis present in this case, that it would be "intolerably unfair" to permit the Executive Order to be applied to the employees of respondent and intervenors. Notwithstanding the recent passage of the Budget Act, serious fiscal problems remain. All sides recognize that spending cuts may be one necessary part of an effective response to these problems. The Governor's decision to require the employees of the elected civil executive officials to make an additional contribution to that response through furloughs – even if, as argued, that decision was belated or represented a reversal of the Governor's original approach – is not intolerably unfair.

Finally, the Governor contends that the rulings in the union writ cases decided the issue of whether the Governor has the authority to direct furloughs for the employees of elected civil executive officers. In light of the Court's ruling in this proceeding that the Governor has the authority to direct furloughs for the

employees of elected civil executive officers, it is unnecessary to address that contention.

For the reasons stated above, the Court finds that the Governor's Executive Order S-16-08, directing two-day-per-month furloughs for state employees, applies to the civil service employees of the respondent and intervenors in this case.

Further, in Tirapelle v. Davis (1993) 20 Cal. App. 4th 1317, the Third District Court of Appeal held that the State Controller may not refuse to implement an executive action that is authorized by law, even though the action affects state employees' pay. The Controller therefore lacks authority to refuse to implement the reduction in pay resulting from the Governor's Executive Order as to the employees of his own office and those of the intervenors. Since it is clear from the facts before the Court that the State Controller is refusing to perform a duty he is legally required to perform, the petition for writ of mandate is granted, and the Court's judgment and writ in this matter shall include an order directing the Controller to take all necessary and appropriate steps to implement the provisions of the Governor's Executive Order imposing furloughs on state employees of the parties to this action, including the reduction in such employees' pay.

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In the event that this tentative ruling becomes the final ruling of the Court, counsel for petitioners is directed to prepare the order, judgment and writ of mandate in accordance with the ruling under the procedure set forth in Rule of Court 3.1312.