

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

BEFORE THE HONORABLE PETER J. BUSCH, JUDGE PRESIDING

DEPARTMENT NUMBER 301

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CALIFORNIA ATTORNEYS,)
ADMINISTRATIVE LAW JUDGES AND)
HEARING OFFICERS IN STATE)
EMPLOYMENT, GLEN GROSSMAN,)
MARK HENDERSON, GEOFFREY SIMS,)
AND DOES 1 - 500)
)
Petitioners/Plaintiffs,) Case No. 09-509205
)
vs.)
) Pages 1 - 16
)
ARNOLD SCHWARZENEGGER, AS)
GOVERNOR OF THE STATE OF)
CALIFORNIA; DAVID GILB AS)
DIRECTOR OF THE DEPARTMENT OF)
PERSONNEL ADMINISTRATION; JOHN)
CHIANG, CONTROLLER OF THE)
STATE OF CALIFORNIA; JAN)
FRANK, AS PRESIDENT OF STATE)
COMPENSATION INSURANCE FUND,)
AND DOES 1 - 50,)
)
Defendants/Respondents.)
_____)

Reporter's Transcript of Proceedings

Thursday, July 9, 2009

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1 WEDNESDAY, APRIL 15, 2009

2 **P R O C E E D I N G S**

3 **THE CLERK:** Line 8, California Attorneys Administrative Law
4 Judges, et al., versus Arnold Schwarzenegger, Governor of the
5 State of California.

6 **MR. TYRA:** Good morning, Your Honor. David Tyra on behalf
7 of the Governor.

8 **THE COURT:** Good morning.

9 **MR. WHALEN:** Patrick Whalen on behalf of the petitioners,
10 Your Honor.

11 **MR. TUROVSKY:** I'm Ron Turovsky on behalf of respondent Jan
12 Frank.

13 **THE COURT:** Good morning.

14 **MR. TUROVSKY:** Good morning.

15 **MS. SEARGEANT:** Kristanne Seargeant on behalf of the
16 Governor, Your Honor.

17 **THE COURT:** Good morning. All right, this is the
18 petitioner's motion for either a determination that the Court's
19 order on writ of mandate is a prohibitory injunction and
20 therefore not stayed, or alternatively, that the Court lift the
21 stay from what is a mandatory injunction that is otherwise
22 imposed by the respondent, the Governor having filed a notice of
23 appeal.

24 I agree with the Governor that what we're dealing with here
25 is a mandatory injunction. That's what I'm doing. The order
26 changed the status quo, and the fact that it also included a
27 paragraph that was supportive of that by saying that certain
28 things couldn't be done I don't think changes the basic effect

1 of the order.

2 But of course, that's not the end of the inquiry. Under
3 Section 1110(b) of the Code of Civil Procedure, the Court does
4 have discretion to lift the mandatory stay on a finding that
5 there would otherwise be irreparable harm.

6 I think there is sufficient evidence of irreparable harm.
7 The only evidence that the Court has is the declaration
8 suggesting hardship to those who would continue to have their
9 salaries reduced under the furlough plan. There's no evidence
10 to suggest that those hardships do not exist.

11 It is true that it's about money, but it is about basic
12 livelihood as well here. The effect of withdrawing portions of
13 people's salaries is a little different than the usual kind of
14 contract, who owes what on a contract.

15 It's not clear that a balancing of hardships is the
16 appropriate test here, but to the extent it is, I think it would
17 clearly tip in favor of lifting the injunction. On the one
18 hand, there are the hardships that I've already referred to that
19 the petitioners would suffer, and they would ultimately lose the
20 benefit, potentially at least, of their victory in this case
21 depending on how long the appeal takes to resolve and how long
22 the furlough orders remain in effect. In any event, they would
23 lose a very substantial portion of those benefits. To say that
24 they would ultimately get the money back should they prevail I
25 don't think answers the interim problems that they would face,
26 even accepting, of course, the full value of the state's promise
27 to be able to repay money in the future.

28 On the state's side, the state has never contested that

1 paying this money in fact has any impact on the state's
2 financial crisis given the fund from which this money comes, and
3 being totally unlinked from the general fund or state revenue at
4 all. The state will be getting the benefits of the value of the
5 services for which it is paying, so it's not really out any
6 value to the extent that it is the state paying at all for
7 purposes of this analysis.

8 So for all of those reasons, as indicated, I'm inclined to
9 grant this motion and lift the stay. Maybe we should start with
10 you, Mr. Tyra.

11 **MR. TYRA:** Thank you, Your Honor.

12 Your Honor has anticipated my arguments, and so all I can do
13 is begin by saying I respectfully disagree to begin with. I
14 don't believe there has been sufficient evidence submitted to
15 you of irreparable harm. There's been no evidence that in fact
16 there has been any financial detriment that has been realized by
17 the petitioners here or its members, no notices of foreclosure,
18 no repossession of cars, no unpaid bills, nothing along those
19 lines.

20 **THE COURT:** Surely we don't have to wait until a crisis
21 occurs. Indeed, it's an ironic argument.

22 **MR. TYRA:** At the very least, it needs to be more than the
23 speculative nature of what's been presented to you.

24 In contrast -- and I would submit to you that a balancing of
25 the relative interests here is most appropriate because in
26 contrast to that, the evidence of the state's fiscal meltdown is
27 all around us. And this is not simply a matter of budgetary
28 issues; it's a cash crisis. The state is issuing IOUs now to

1 state contractors and vendors. I can represent to you
2 personally the impact of the issuance of IOUs on state
3 contractors and vendors.

4 **THE COURT:** There is no evidence before the Court that the
5 Court could use SCIF's money for those purposes anyway. It
6 couldn't, could it?

7 **MR. TYRA:** It's simply a matter of cash on hand, Your Honor,
8 the ability to -- of the state to have sufficient cash to meet
9 its needs, which it does not.

10 And the fact that we are now creating a special class --
11 this ruling and the failure to allow the stay that comes
12 automatically with the appeal of a mandatory injunction is
13 creating a special class of employees within the state who will
14 receive their full pay, as opposed to all of the other state
15 employees who will be subject to the Governor's furlough order.

16 **THE COURT:** Of course, the legislature created that class.
17 That was the basis for the Court's order to begin with. If the
18 Court is wrong about that, then this house of cards falls down.

19 **MR. TYRA:** And if the Court is wrong, then the state will
20 never realize the cash savings that would otherwise have been
21 realized from the maintenance of the automatic stay.

22 On the other hand, if the Court of Appeal agrees with Your
23 Honor, the make whole remedy does exist here for the SCIF
24 members of Bargaining Unit 2. So in terms of relative interest
25 here, I would submit that the state's interest far surpasses
26 that of the individual members, Bargaining Unit 2 employed by
27 the State Fund, and for that reason the stay should remain in
28 place.

1 **THE COURT:** Mr. Whalen.

2 **MR. WHALEN:** Briefly, Your Honor. I don't think there's any
3 real dispute about whether the harm here is speculative. In
4 Mr. Tyra's own opposition papers filed two days ago he points
5 out that the employees have been suffering under the furloughs
6 since February of 2009. Were the stay not to be lifted, that
7 would continue. There's no speculation here; the pay is
8 reduced.

9 **THE COURT:** No, that's not the issue that's raised by
10 Mr. Tyra; it's whether there are in fact any irreparable
11 consequences to the level of decrease that your client's members
12 are enduring along with their colleagues throughout the state
13 system.

14 **MR. WHALEN:** Exactly. And I would simply point out and
15 explicate the point Your Honor made, which is that the whole
16 reason we went to court is to prevent the full effect of this
17 furlough period taking place, during which time it would be
18 inevitable for some portion of our members employed at State
19 Fund to suffer the exact kinds of consequences that Mr. Tyra was
20 describing. I don't think it's appropriate to wait until that
21 happens.

22 With respect to the balance of harms that Mr. Tyra refers
23 to, his papers and even his comments here today I don't think
24 really address the point that Your Honor recognizes, which is
25 that State Fund's money used to pay these salaries is not the
26 state's money at all.

27 **THE COURT:** His argument there -- I don't know how far it
28 goes -- is it's money that's sitting in the state treasury, and

1 when the treasurer issues warrants it's because the treasurer
2 has looked in his pocket and it's empty.

3 **MR. WHALEN:** Except, Your Honor, as I pointed out in my
4 papers, the treasurer --

5 **THE COURT:** I'm sorry, the controller. Excuse me.

6 **MR. WHALEN:** The controller is required under law to keep a
7 special ledger account for State Fund monies. It's true that
8 it's in the umbrella of funds over which the controller has
9 authority, but they cannot be commingled by law. The State Fund
10 monies are separate, must be used exclusively for State Fund
11 expenses, and cannot be used for other general fund
12 expenditures.

13 In fact, by way of analogy, going back to 1992, one of the
14 earlier budget crises, when other state employees were suffering
15 pay cuts State Fund did not for that very reason: Separate
16 funds.

17 **THE COURT:** You've got something to pay back now.

18 **MR. WHALEN:** And lastly, Your Honor, with respect to
19 Mr. Tyra's notion of creating a special class of employees, it's
20 worth pointing out the very executive order that this is based
21 on itself exempted whole classes of employees, including, for
22 just one example, employees at the Public Utilities Commission
23 where CASE has attorney members who are not being furloughed.
24 So the dam has already been broken in that respect.

25 There were also contemplated exemptions of various
26 departments, so this notion that it has to be one-size-fits-all
27 is belied by the very terms of the order.

28 Your Honor, with respect to the prohibitory nature of the

1 injunction, if I could just make a few comments. While it might
2 be argued that the lifting of the stay in some ways moots that
3 issue, I think it's important for a couple reasons.

4 One is procedurally, if the tentative order is adopted, DPA,
5 as Your Honor may be aware, may well seek a writ of supersedeas
6 in the Court of Appeal, and were that granted, we would be back
7 in the same situation. And so certainly as to whether or not
8 this Court's order could take effect prospectively, we would be
9 back in the situation where paragraph 5 of the order says "cease
10 and desist reducing payments," which sounds prohibitory in
11 nature, and yet would arguably be precluded by what Your Honor
12 just indicated with respect to the prohibitory nature.

13 Mr. Tyra didn't respond to the points made in my papers
14 about the fact that each new pay period -- by statute each new
15 month is a new pay period. Each new pay period entitles the
16 employee to their full salary, and each time a new check is cut,
17 that is a new deduction. So to say that by issuing this
18 proclamation I've established the status quo from now until
19 eternity, essentially, or whenever I decide to end it cannot
20 really be the inquiry. The inquiry has to be when is each harm
21 suffered.

22 And under this --

23 **THE COURT:** I don't know that that's the right inquiry. A
24 new furlough order does not have to be issued every pay period.
25 The furlough order which the Court has dealt with in its writ of
26 mandate proceeding is an order which lasts until it expires by
27 whatever mechanism it's lifted.

28 **MR. WHALEN:** The order itself may last, but the illegal

1 conduct that is implemented by that order occurs on a monthly
2 basis.

3 So the fact that the Governor issued an order for a set
4 period of time doesn't negate the fact that what he essentially
5 said is each month deduct the pay, keep committing this illegal
6 action each month.

7 And what we're saying is that in light of Your Honor's
8 ruling on the merits of this issue, it's incumbent -- it is
9 important to prevent that continuing violation from occurring
10 until the end of the furlough period.

11 I would also point out, as Your Honor may be aware, on the
12 eve of the Governor's declaring or issuing a second executive
13 order that implemented a third furlough day which occurred on
14 July 1st, the day before we filed another writ proceeding in
15 this court to prevent that clarifying that the terms of your
16 injunction that you issued in paragraph 5 were in fact
17 prohibitory may be very much in the interest of judicial economy
18 to prevent us from having the same litigation merely because the
19 Governor chose to issue a second order.

20 Coming down here today I heard on the radio there may be yet
21 another order to follow. So clarifying that it's prohibitory
22 and should not continued into the future, now that we know what
23 the law is, seems to be very much in the interest of avoiding
24 future litigation and the cost of the stay to Mr. Tyra.

25 **THE COURT:** Mr. Tyra, anything else?

26 **MR. TYRA:** Well, simply with respect to those last comments
27 on the prohibitory nature, this action was filed after the
28 issuance of the executive order, after Mr. Whalen and CASE had

1 filed an initial action in Sacramento Superior Court.

2 The status quo at the time the action commenced, as well as
3 at the time Your Honor issued his ruling, was that furloughs
4 were in place. The ruling altered that status quo, and
5 therefore it's mandatory in nature.

6 **MR. TUROVSKY:** Your Honor, on behalf of Jan Frank, may I
7 make a few comments that I think are pertinent to this
8 discussion? I'll actually move to the podium because there was
9 a direction to do so, and also because I'm not necessarily a
10 real respondent or petitioner in the matter.

11 In any event, as I said, I represent Jan Frank in this, and
12 we urge you to adopt the tentative ruling and do agree with the
13 arguments made by Mr. Whalen in particular with respect to both
14 your description of the State Fund monies and the ability of the
15 state or the general fund to utilize those monies. In response
16 to that I won't go beyond that, other than to say we agree
17 wholly in that.

18 But we also urge you -- I want to address a related issue
19 having to do with the scope of the order now that -- assuming
20 the tentative ruling is adopted so that we understand, as it
21 goes on appeal, the nature of what the order would be, that it
22 is now going to be not stayed.

23 So with respect to that, I would urge you to clarify the
24 order, and the injunction, and the writ, and the order itself to
25 make it clear that this determination is for all State Fund
26 employees, not just the petitioners.

27 **THE COURT:** Your client, had your client chosen to step
28 forward and participate in this litigation in some way other

1 than a side sitter, could have created that kind of relief, but
2 I can't get there now and I'm not going to get there now.

3 Your client chose to stay out of this, chose to just say, "I
4 don't know," while these petitioners sought relief for their
5 members. That's all that's before me. That's all I'm going to
6 do. I'm not going to broaden it from that.

7 I would think that everybody can read the order and make
8 their determinations with respect to what can and can't be done,
9 but it wouldn't be appropriate for me to go further, wouldn't be
10 appropriate for me to now take your clients' invitation as if
11 your client had actually taken an active role in this from the
12 beginning when she expressly chose not to, and to make rulings
13 that go beyond the interests of the parties who are before me.
14 I'm not going to do that.

15 **MR. TUROVSKY:** Your Honor, in part I'm asking with respect
16 to the specifics of the language of the writ itself, which is
17 the reason I'm asking for clarification in that regard.

18 It does -- in terms of the writ, the language of the writ,
19 which is part of why I'm raising this, is directed -- it
20 specifically orders the controller -- it says, first of all,
21 that John Chiang has failed to exercise his legal duty to ensure
22 the salaries of State Fund employees not be reduced as a result
23 of the furlough."

24 And also, it actually commands John Chiang to immediately
25 pay State Fund employees their full salary without any reduction
26 pursuant to the illegal furlough directed by the unlawful
27 executive order. It's directed to all State Fund employees.

28 I'm simply pointing out that we think that it would be

1 useful to clarify that that is in fact the scope of the --

2 **THE COURT:** I have no motion from your client to clarify
3 anything; therefore, I have no opposition to whatever requests
4 you might have made. It's not clear that it would be
5 appropriate given that there is a notice of appeal pending.

6 All of these things are things, again, that had your client
7 chosen not to just sit on the fence initially could have been
8 addressed and dealt with. I think it's totally unfair to the
9 parties and to the Court for her to now decide, the chips having
10 fallen on one side of the fence as opposed to the other, to step
11 in in this way and ask the Court to do things that she wasn't
12 willing to ask before.

13 **MR. TUROVSKY:** Your Honor, I'll accept that. I obviously
14 disagree with the characterization about sitting on the fence
15 and other things. We explained our position and I will stand by
16 those papers.

17 **THE COURT:** I tried to find out what the position really was
18 at some length, and all I ultimately got was "Whatever Your
19 Honor orders is what we'll live with." There wasn't a position.

20 But that's neither here nor there. The point now is a
21 procedural point that there's nothing pending before the Court
22 to do the things that you are now asking.

23 The Court has issued an order. The order says what it says.
24 It is on appeal. I can't act now, affect the merits of that
25 order, which would deprive the appellate court of jurisdiction
26 to review this Court's order. It's not clear that even if there
27 were a motion pending before me, that it would be appropriate
28 for the Court to act on it. But in any event, there's nothing

1 pending before me.

2 **MR. TUROVSKY:** Thank you, Your Honor.

3 **MR. WHALEN:** Your Honor, if I could, Mr. Turovsky's comments
4 brought to light a hypothetical that may not be all that
5 hypothetical, which is given the limits of your order and your
6 characterization -- or your determination that the writ was not
7 prohibitory --

8 **THE COURT:** The writ includes language in the paragraph to
9 which you referred, which is in (a) of the order which prevents
10 the Governor from imposing a furlough.

11 **MR. WHALEN:** And yet the Governor issued a second executive
12 order imposing a third furlough day and did not exempt State
13 Fund employees, and it may issue --

14 **THE COURT:** If the Governor chooses to disobey my order
15 there are ways to deal with that.

16 **MR. WHALEN:** Thank you, Your Honor.

17 **THE COURT:** I have no reason at all to think that the
18 Governor will do that.

19 The order is what it is. It doesn't seem to me that it's
20 very vague with respect to the rights of the parties, and once
21 the stay on the order is lifted, then it's lifted.

22 **MR. WHALEN:** I simply point out that the Governor by his own
23 actions in issuing yet another order perhaps doesn't see it as
24 clearly as Your Honor.

25 **THE COURT:** Anything else?

26 **MR. TYRA:** Submitted, Your Honor.

27 **MR. WHALEN:** Submitted.

28 **MR. TUROVSKY:** Submitted, Your Honor. Thank you.

1 **MR. WHALEN:** Yes.

2 **MR. TYRA:** Well, if we're going to interlineate --

3 **MR. TUROVSKY:** Could you attach the tentative and indicate
4 it's been confirmed?

5 **MR. TYRA:** Right. We could just attach the tentative and
6 incorporate it by reference.

7 **THE COURT:** All right. Why don't you all go out in the
8 hallway and do something that you can all then initial, and
9 bring it back for the Court's signature.

10 **MR. TUROVSKY:** Thank you, Your Honor.

11 **THE COURT:** Thank you.

12 (Whereupon, the proceedings were concluded.)

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