IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

CALIFORNIA ATTORNEYS, etc., Plaintiff and Appellant, v. **JOHN CHIANG, as State Controller, etc.,** Defendant and Appellant; **ARNOLD SCHWARZENEGGER, as Governor, etc., et al.,** Defendants and Respondents.	C061009

Sacramento County Superior Court No. 34-2009-80000134
Honorable Patrick Marlette, Judge

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE CASE

On January 5, 2009, Petitioner California Attorneys, Administrative Law Judges and Hearing Officers in State Employment ("CASE")[1] filed a petition for writ of mandate in the Sacramento Superior Court, case # 34-2009-80000134. (CASE JA 1.)[2] The named respondents were Governor Arnold Schwarzenegger, Director David Gilb of the Department of Personnel Administration ("DPA") and State Controller John Chiang. (*Ibid*.) The petition sought a writ commanding respondents to ensure full payment of salaries and to set aside those portions of Executive Order S-16-08 calling for furloughs of CASE members. (CASE JA 13.) The petition also sought a declaration that the Governor had no authority to unilaterally impose furloughs on represented employees, and an injunction prohibiting the Governor or any state officer from implementing the furloughs. (*Ibid*.)

On January 16, 2009, this case was consolidated with similar actions filed by other employee representatives.[3] (CASE JA 135.) After an

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[1] Petitioner California Attorneys, Administrative Law Judges and Hearing Officers in State Employment ("CASE") is the exclusive collective bargaining representative of legal professionals in State Bargaining Unit 2 pursuant to Government Code section 3520.5. CASE represents approximately 3400 legal professionals in more than 80 different state departments, boards, and commissions. The vast majority of CASE members are attorneys, administrative law judges, and hearing officers. (CASE JA 2.)

[2] "CASE JA" refers to the CASE Joint Appendix being filed and served concurrently with this brief. Citations to the record will be in the format "CASE JA ##."

[3] The case filed by Professional Engineers in California Government ("PECG") and the California Association of Professional Scientists ("CAPS") was case # 34-2008-80000126. The case filed by Service

expedited briefing schedule, the matter was heard on January 29, 2009. (CASE JA 500.) Later that day, the trial court issued an order denying the writs in the consolidated cases. (*Ibid*.) An amended minute order was filed the following day. (CASE JA 508.)

Judgment was formally entered on February 11, 2009. (CASE JA 543.) Appellant timely filed a notice of appeal on February 3, 2009. (CASE JA 535.)

STATEMENT OF APPEALABILITY

This appeal is from a final judgment entered on February 11, 2009, denying a petition for writ of mandate, declaratory, and injunctive relief. The judgment is appealable under Code of Civil Procedure section 904.1. (See *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1029; *California State Employees Association v. State of California* (1988) 199 Cal. App.3d 840, 844.)

STATEMENT OF FACTS

On November 6, 2008, Defendant/Respondent Governor Arnold Schwarzenegger sent a letter to state employees. (CASE JA 306.) In that letter, Governor Schwarzenegger announced that he was "proposing a combination of economic stimulus measures . . . revenue increases, and spending reductions. . . ." (*Ibid*.) The letter then stated, "*<u>If approved by the</u>*

Employees International Union, Local 1000 ("SEIU") was case #34-2009-80000135. Those cases are pending on appeal in this Court in case # C061011 and case # C061020, respectively.

Legislature, these spending reductions will impact our state workers." (*Ibid*, emphasis added.) The Governor thereafter outlined his proposals that would impact state employees, including, inter alia, a furlough of one day per month with a corresponding pay cut of approximately 5 percent. (*Ibid*.) The Governor then stated in the same letter, "All the actions we're proposing must first be approved by the Legislature." (CASE JA 307.)

Also on November 6, 2008, the Governor issued a proclamation calling the Legislature into special session to address the state's fiscal crisis. (CASE JA 309.) The Governor submitted proposed legislation to the Legislature in conjunction with that special session. (CASE JA 311.) In that legislation, the Governor proposed to add section 19826.4 to the Government Code, which read, in pertinent part:

> Notwithstanding the Ralph C. Dills Act (Chapter 3 (commencing with section 3512) of Division 4 of Title 1) or any other provision of law, the Department of Finance and the Department of Personnel Administration shall, commencing on December 1, 2008 and ending on July 1, 2010, implement a program for the furlough of state employees.

(CASE JA 312.) The Legislature did not enact the Governor's proposals during the special session.

On December 1, 2008, the Governor issued two additional proclamations, each calling for additional special sessions, one of which was convened pursuant to Proposition 58. (CASE JA 326, 328.) The proclamation under Proposition 58 recited that the Governor was submitting proposed legislation to the Legislature to address the fiscal crisis. (CASE JA 326.) The Assembly Budget Committee analyzed the Governor's proposed legislation. (CASE JA 330, 343.) That analysis

revealed that the Governor's proposals included an identical plan to furlough state employees for one day per month. (CASE JA 343.) The Legislature did not enact the Governor's proposals during the special sessions.

On December 19, 2008, Governor Arnold Schwarzenegger issued Executive Order S-08-16. (CASE JA 17.) In that Order, the Governor directed the Department of Personnel Administration to "implement a furlough of represented state employees and supervisors for two days per month. . . ." (CASE JA 18.) The furlough would be effective February 1, 2009, through June 30, 2010. (*Ibid*.) The furloughs would result in an approximate 10 percent pay cut for all state employees. (CASE JA 300, 302.) The Governor's Executive Order made a number of proclamations relating to a perceived fiscal cash crisis, and the Legislature's failure to "effectively" address the crisis. (CASE JA 17.)[4]

On January 9, 2009, Director David Gilb sent a memorandum to all state departments announcing that DPA had developed a furlough plan as directed by the Governor in his executive order. (CASE JA 350.) That memorandum stated that general government operations would be closed on the first and third Friday of each month, beginning on February 6, 2009. (*Ibid*.)

On January 23, 2009, Respondent submitted a request for judicial notice which included a complete copy of the CASE Memorandum of Understanding ("MOU"). (CASE JA 381, 387.) Section 6.3 of the MOU between the State and the legal professionals in State Bargaining Unit 2

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[4] The Executive Order failed to mention that the Legislature passed a comprehensive budget package on December 18, 2008 and submitted it to him for signature, which he vetoed on January 6, 2009. (CASE JA 3.)

provides that legal professionals who are exempt from the FLSA "are expected to work all hours necessary to accomplish their assignments and fulfill their responsibilities." (CASE JA 416.) Section 6.2 of the same MOU provides that "the regular rate of pay is *full compensation* for all time that is required" to complete the duties. (CASE JA 415, emphasis added.)

The trial court determined that the Governor had authority to unilaterally impose furloughs on several distinct theories. Generally, the trial court determined that "[t]he Governor's authority for this action is found in statutes in the Government Code and in the employment contracts of the unions challenging the order. (CASE JA 513.) Specifically, the trial court first determined that Government Code sections 19851 and 19849, "taken together, provide the Governor with authority to reduce the workweek of state employees. . . ." (CASE JA 513-514.) Second, the trial court determined that the Memorandum of Understanding ("MOU") incorporated sections 19849 and 19851, and thus the Governor had the power to impose furloughs by contract. (CASE JA 514.) Third, the trial court determined that provisions of the MOU permit the state to reduce hours due to lack of funds or emergencies. (CASE JA 515.)

STANDARD OF REVIEW

Where, as here, the trial court's decision did not turn on any disputed facts, the trial court's decision is reviewed de novo. (*Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 916; *see Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1375 ["in resolving questions of law on appeal from a denial of a writ of mandate, an appellate court exercises its independent judgment"]. The issues before this

Court present questions of law. Accordingly, review of this matter is de novo.

ARGUMENT

I. INTRODUCTION

In the history of the State of California, no Governor has sought to unilaterally impose furloughs on state employees. Nothing in the statutory framework governing State employer-employee relations authorizes the unilateral implementation of furloughs. Nothing in the MOU between the State and CASE authorizes the unilateral implementation of furloughs. Governor Schwarzenegger, like his predecessors before him, has acknowledged that the Governor lacks the power to unilaterally implement furloughs. Notwithstanding the dearth of authority and the admitted lack of same, Respondent unilaterally implemented furloughs on CASE members. The Executive Order imposing the furloughs cited only a single, inapplicable statute as the basis for the order. The trial court offered alternative bases purporting to authorize furloughs, none of which withstand scrutiny. The ruling of the trial court, if allowed to stand, will allow all future Governors to create "emergencies" justifying an extraordinary power never before thought to exist, which is not contemplated in any statute, regulation, or contract, and which would fundamentally alter the nature of labor relations, and would render collective bargaining and any resulting MOUs meaningless and subject to unilateral rescission at the whim of the Governor. Accordingly, the trial court's ruling must be reversed.

II. SECTIONS 19851 AND 19849 DO NOT GRANT THE GOVERNOR THE POWER TO UNILATERALLY IMPOSE FURLOUGHS

The trial court's first rationale for denying the petition was that specific sections of the Government Code permit the Governor to reduce the hours of state employees. (CASE JA 513-514.) Government Code section 19851 provides as follows:

> (a) It is the policy of the state that the workweek of the state employee shall be 40 hours, and the workday of state employees 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. It is the policy of the state to avoid the necessity for overtime work whenever possible. This policy does not restrict the extension of regular working-hour schedules on an overtime basis in those activities and agencies where it is necessary to carry on the state business properly during a manpower shortage.
>
> (b) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if the provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

Government Code section 19849 provides as follows:

> (a) The department shall adopt rules governing hours of work and overtime compensation and the keeping of records related thereto, including time and attendance records. Each appointing power shall administer and enforce such rules.

> (b) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if such provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

A. The Statutes Do Not Authorize Furloughs

As a simple matter of statutory construction, neither section 19849 nor 19851 authorize furloughs. It is a settled principle of statutory construction that a court's "task is to discern the Legislature's intent." (*Krug v. Maschmeier* (2009) 172 Cal.App.4th 796, 802.) In conducting that inquiry,

> "[t]he statutory language itself is the most reliable indicator, so we start with the statute's words, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's plain meaning governs."

(*Ibid*.)

In examining the plain language, it is true that section 19851, subdivision (a) contemplates 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." But this phrase must be read in the context of the immediately preceding clause, which specifies that the workweek is 40 hours and the workday is 8 hours. And it must also be read in the context of the immediately following clause, which specifies that the purpose of the limited flexibility is to meet the needs of varying state agencies. In context, the phrase allowing variation must be read as permitting alternative

schedules where necessary for the proper operation of certain state facilities that must be run on unusual schedules. The clause in no way authorizes a blanket change in the normal work week to something less than 40 hours, and it cannot be reasonably read as permitting a global reduction in the workweek unrelated to the specific needs of the state agencies.

Section 19849 provides no authority for furloughs either. Subdivision (a) merely allows DPA to adopt rules relating to timekeeping, but in no way authorizes global reductions in the 40-hour workweek. In fact, the scope of the rulemaking authority granted by this statute is illustrated by the very types of regulations promulgated pursuant to it. Regulations relating to attendance records (2 CCR § 599.665), rest periods (2 CCR § 599.780), and work week group definitions (2 CCR § 599.701) have all been adopted. But these technical timekeeping regulations in no way suggest that the rulemaking power permits a complete renunciation of the stated policy of having a 40-hour work week with limited exceptions.

The plain language of these statutes does not support the trial court's determination that the Governor has authority to unilaterally furlough CASE members. Accordingly, the trial court's reasoning and conclusion should be rejected.

B. The Statutes are Superseded by the MOU

Even if sections 19849 and 19851 could somehow be read as conferring authority upon the Governor to unilaterally impose furloughs, such an interpretation would provide no support for the trial court's conclusion in this case, because both statutes are superseded by the MOU. Subdivision (b) of both sections establishes that they are subject to

supersession under Government Code section 3517.6, subdivision (a)(1). That section contains a long list of statutes that are subject to supersession, and, as applicable to this case, reads as follows:

> In any case where the provisions of [section 19849, . . 19851] are in conflict with a memorandum of understanding, the memorandum of understanding shall be controlling without further legislative action.

Although the trial court correctly observed that both sections are listed in the CASE MOU (*see* CASE JA 514, fn. 5), the trial court failed to consider the full context of that MOU. In particular, section 4.4 of the CASE MOU (entitled "Supersession") begins with the following clause:

> The following Government Code sections and all DPA regulations related thereto are hereby incorporated into this MOU. *However, if any other provision of this MOU is in conflict with any of the Government Code sections listed below or the DPA regulations related thereto, such MOU provision shall be controlling*.

(CASE JA 399, emphasis added.) The several pages following that introductory clause list a variety of Government Code sections, including section 19849 and 19851. (CASE JA 402.) However, other provisions of the CASE MOU supersede sections 19851 and 19849. For example, section 6.3.A of the MOU provides as follows:

> Employees are expected to work all hours necessary to accomplish their assignments and fulfill their responsibilities. Employees will normally average forty (40) hours of work per week including paid leave; however, work weeks of a longer duration may occasionally be necessary.

(CASE JA 416.)

Thus, this section of the MOU establishes that the work week will be, on average, 40 hours, except that longer work weeks may be occasionally required. This provision is in direct conflict with section 19851, which establishes a work week of 40 hours (without the modifier "on average") and does not provide for longer work weeks of any kind. This same section establishes that CASE members will occasionally work weeks in excess of 40 hours, and thus it supersedes the overtime provisions of section 19849. To the extent the "average" language suggests that CASE members will occasionally enjoy work weeks of less than 40 hours, it must be remembered that under section 6.2.C of the MOU, the rate of pay is "*full compensation* for all the time that is required" to perform the work. (CASE JA 415, emphasis added.) Because the attorneys, administrative law judges and hearing officers in CASE are salaried, their pay cannot be reduced simply because their hours may fluctuate from week to week. Rather, they are entitled to "full compensation," which is the salary range established by the MOU.

Pursuant to the express language in subdivision (b) of both statutes, the statutes are superseded by the MOU, because the foregoing provisions of the MOU conflict with the statutory language. Moreover, pursuant to the express language in the introductory paragraph of section 4.4 of the CASE MOU, the statutes are superseded. (CASE JA 399.) Accordingly, whatever authority those two statutes may give the Governor as a general matter, they confer no authority whatsoever to furlough CASE members.

C. The "Reduction of Hours" is Not a Basis to Reduce the Pay of CASE Legal Professionals

In addition to being superseded, the sections at issue fail to support the trial court's ruling in a critical respect. Even if the sections could be interpreted to allow the Governor to reduce hours, they do not permit a reduction in pay. The scope of the MOU is wages, hours, and other working conditions. (Gov. Code §§ 3516, 3517.6) Not only does the MOU contain specific provisions regarding the hours of work, it contains specific provisions about the pay that CASE members are to receive. Attachment A to the MOU is a detailed salary schedule for the various positions held by CASE members. (CASE JA 485-488.) The State is therefore contractually obligated to pay those salaries.

The MOU specifies that the 3,240 attorneys, administrative law judges and hearing officers shall not receive overtime pay, but rather are salaried employees. (CASE JA 415.) However, those same legal professionals are required to "work all hours necessary to accomplish their assignments and fulfill their responsibilities." (CASE JA 416.) Imposing a furlough of two days per month does not relieve CASE members from "working all hours necessary." These legal professionals still have the same case loads, the same ethical obligations to their clients, and the same contractual obligation to their employer to fulfill their responsibilities. Accordingly, the furlough amounts to a reduction in pay with no effective reduction in hours. Even if state offices where CASE members work are closed two days per month, CASE members are simply required to work extra hours on other days during the month to make up the time and complete their work. Therefore, even assuming the Governor has authority to reduce hours, such authority is not effective for CASE members, and

cannot be used as a basis to unilaterally reduce pay. As this Court has already determined, Government Code section 19826, subdivision (b) expressly "preclud[es] DPA from unilaterally adjusting represented employees' wages." (*Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal.App.4th 155, 178.) The furlough imposed by the Governor purports to be a reduction in hours, but as to CASE legal professionals, who are ethically and contractually obligated to work all hours necessary, the furlough is simply a unilateral pay reduction. Nothing in sections 19849 or 19851 authorize any reductions in pay.

III. THE MOU DOES NOT AUTHORIZE FURLOUGHS

The trial court also based its determination on selected provisions of the CASE MOU. First, the trial court cited to the "State Rights" provision. (CASE JA 515.) Second, the trial court referred to a section regarding layoff alternatives. (*Ibid*.)

A. The "State Rights" Clause Does Not Authorize Furloughs

The trial court's reasoning was based on the premise that section 3.1.B of the MOU independently authorizes the Governor to unilaterally impose furloughs. (CASE JA 515.) That provision provides as follows:

> To the extent consistent with law and this MOU, the rights of the State include, but are not limited to, the exclusive right to determine the mission of its constituent departments, commissions, and boards; set standards of service; train, direct, schedule, assign, promote, and transfer its employees; initiate disciplinary action; relieve its employees from duty because of lack of work, lack of funds, or for other legitimate reasons; maintain the efficiency of State operations; determine the methods, means and personnel by which State operations are to be conducted; take all necessary actions to

> carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. The State has the right to make reasonable rules and regulations pertaining to employees consistent with this MOU provided that any such rule shall be uniformly applied to all affected employees who are similarly situated.

(CASE JA 397.)

The trial court relied on the language permitting the state to "relieve its employees from duty because of lack of work, lack of funds, or for other legitimate reasons . . . [and to] take all necessary actions to carry out its mission in emergencies." (CASE JA 515.) However, the first clause of that very paragraph contains limiting language on the entirety of the section: it is only effective "[t]o the extent consistent with law and this MOU." Moreover, the immediately preceding section, 3.1.A, provides that "All State rights and functions, except *those which are expressly abridged by this MOU*, shall remain vested with the State." (CASE JA 397, emphasis added.) These two provisions make clear that the "State Rights" must be construed so as to be consistent with other terms in the MOU.

The interpretation adopted by the trial court results in absurd consequences. It must be remembered that the Governor declared a fiscal emergency. (CASE JA 325.) That emergency was based on the Governor's determination that there had been a failure to enact a budget. (See, e.g. CASE JA 17.) But the Governor was himself to blame for failing to sign the comprehensive budget package enacted by the Legislature. (CASE JA 3, fn. 1.) It must also be remembered that the Governor is the employer of state employees in Bargaining Unit 2, for purposes of bargaining or meeting and conferring in good faith under the Ralph C. Dills

Act, pursuant to Government Code section 3513, subdivision (j) and section 3517.

The trial court's interpretation thus allows the Governor, as an employer, to create and declare his own fiscal emergency, and then use that "emergency" to justify furloughs or any other action that would violate the express terms of the MOU. Such a broad interpretation of the "emergencies" clause in the MOU would render the entirety of the MOU meaningless, and thus such an interpretation is incorrect.

Nor does the State's power to "relieve its employees from duty because of lack of work, lack of funds, or for other legitimate reasons" justify furloughs. The State does have the power to "relieve" employees via layoffs. The layoff procedure is spelled out in great detail in Government Code section 19997, et seq. It is also specifically referenced and authorized by Article 10 of the MOU. (CASE JA 443-445.) Neither the Government Code nor the MOU reference furloughs in any fashion. The only plausible reading of the "relieve" clause is that it allows the Governor to initiate layoffs "because of lack of work, lack of funds, or for other legitimate reasons." This interpretation is entirely consistent with other provisions of the MOU.

It would be absurd to conclude that CASE and the State bargained and agreed on extensively detailed provisions relating to hours of work, salary, layoff provisions, and numerous other conditions of employment throughout a 113-page MOU (see CASE JA 386-499), but would agree to permit the State employer to do whatever it wanted to contravene any and all of those detailed provisions. The trial court's reading of the State Rights clause is not reasonable, and cannot form the basis of the Governor's

authority to unilaterally impose furloughs. Accordingly, the trial court's reasoning was incorrect.

B. The "Alternative to Layoff" Clause Does Not Authorize Furloughs

The trial court referred to section "Article 10.3" of the CASE MOU (see CASE JA 515) which provides:

> The State may propose to reduce the number of hours an employee works as an alternative to layoff. Prior to the implementation of this alternative to a layoff, the State will notify and meet and confer with the Union to seek concurrence of the usage of this alternative.

(CASE JA 445.) This section emulates the Government Code, which expressly allows for layoffs but does not allow furloughs. More importantly, this section merely allows the state to "propose" a reduction in hours as an alternative to layoffs, but does not empower the state to unilaterally impose that reduction. It may well be the case that employee unions would decide to accept a reduction in hours as an alternative to layoffs for some of their members, but nothing in the MOU compels them to do so. In fact, section 10.3 specifically requires the state to "seek concurrence" from CASE before implementing the alternative. It is apparent from the plain text of the MOU that the State lacks the power to unilaterally impose a reduction in hours.   Moreover, as discussed above, a reduction in hours is singularly ineffective for CASE members due to the preexisting ethical obligations to their clients and their contractual obligations to their employer.

Section 10.3 provides no authority whatsoever for the Governor's unilateral implementation of furloughs. Rather, it clearly contemplates a negotiation between the parties and that the union must agree to such a

proposal before it can be implemented. Nothing in this section authorizes the unilateral imposition of furloughs. The trial court was thus incorrect in relying on this section as a basis for the Governor's authority to implement furloughs.

IV. GOVERNMENT CODE SECTION 3516.5 DOES NOT PROVIDE AUTHORITY TO UNILATERALLY IMPOSE FURLOUGHS

The trial court did not base its ruling Government Code section 3516.5. However, in the Executive Order itself, the Governor declared that an emergency existed pursuant to that section. (CASE JA 18.) Other than the general "power and authority vested in me by the Constitution and statutes of the State of California" this statute was the only specific authority cited in the Executive Order. That section provides:

> Except in cases of emergency as provided in this section, the employer shall give reasonable written notice to each recognized employee organization affected by any law, rule, resolution, or regulation directly relating to matters within the scope of representation proposed to be adopted by the employer, and shall give such recognized employee organizations the opportunity to meet and confer with the administrative officials or their delegated representatives as may be properly designated by law.
>
> In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be adopted immediately without prior notice or meeting with a recognized employee organization, the administrative officials or their delegated representatives as may be properly designated by law shall provide such notice and opportunity to meet and confer in good faith at the earliest practical time following the adoption of such law, rule, resolution, or regulation.

Government Code section 3516.5 does not define "emergency." However, that term is defined later in the same chapter of the Government Code. Section 3523, subdivision (d) refers to "an act of God, natural disaster, or other emergency or calamity affecting the state, and which is beyond the control of the employer or recognized employee organization . . . ." This strongly suggests that an "emergency" in the context of employer-employee relations is limited to the common-sense definition of natural disasters and other events beyond human control. It is not intended to encompass a "fiscal emergency" created merely by the Governor's failure to sign a budget duly enacted by the Legislature.

More specifically, section 3516.5 does not empower the Governor to "furlough" state employees or otherwise reduce their wages. Quite the contrary, the statute only allows the Governor to perform actions which are otherwise legal, and provides for a relaxed notice requirement when justified by emergency circumstances. Section 3516.5 is not a grant of power in any meaningful respect, other than providing an exception to the notice requirement when the situation is so fluid as to preclude the ordinary process of meeting and conferring on issues.

Moreover, given the timing of events in this case, section 3516.5 provides no authority whatsoever. The possibility of furloughs was raised by the Governor as early as November 6, 2008. (CASE JA 306.) The Governor even proposed legislation to implement furloughs on November 6, 2008. (CASE JA 312.) The Executive Order was issued on December 19, 2008, but the furloughs were not even implemented until nearly seven weeks later, on February 6, 2009. It is apparent the kind of emergency contemplated by section 3516.5 did not exist because there was ample time for the Governor think about, discuss, debate, order, and implement the

furloughs. For all of the foregoing reasons, section 3516.5 provides no authority to the Governor to unilaterally implement furloughs.

V. THERE EXISTS NO OTHER AUTHORITY FOR THE GOVERNOR TO UNILATERALLY IMPOSE FURLOUGHS

The alternative grounds identified by the trial court as a basis for the Governor's authority to unilaterally implement furloughs have previously been shown to be erroneous, *supra*. The only authority cited by the Governor has also been shown to be inapplicable. The only question remaining is whether there is some other as yet unidentified source of power to justify the Governor's imposition of furloughs. There is not.

A. The Governor Has Acknowledged He Lacks the Power to Furlough State Employees

The inquiry into whether the Governor has the power to unilaterally impose furloughs should begin with the executive branch's own view as to the scope of its authority. For years, various California governors have sought to obtain the power to unilaterally furlough state employees. In 1992, then-Governor Wilson was the proponent of an initiative measure – the Government Accountability and Taxpayer Protection Act (GATPA) – which appeared as Proposition 165 on the 1992 ballot and which would have, inter alia, allowed him to unilaterally impose furloughs on state employees. (*League of Women Voters v. Eu* (1992) 7 Cal.App.4th 649, 653-654.) According to the Secretary of State's Statement of Vote, Proposition 165 failed to garner a majority of votes in the election, and thus never went into effect. (CASE JA 121 and fn. 4.) The fact that Governor Wilson proposed a ballot initiative to give him the power to furlough state

employees represents an acknowledgment that the authority of the Governor does not permit him to unilaterally furlough state employees.

Perhaps aware of his predecessor's determination as to the scope of the power of the Governor, Governor Schwarzenegger, in his letter to state employees on November 6, 2008, twice acknowledged that he needed legislative approval to impose his furlough plan. First, he outlined his various proposals and stated, "If approved by the Legislature, these spending reductions will impact our state workers." (CASE JA 306.) Later in the same letter, after explaining his then-one-day per month furlough plan, he stated, "All the actions we're proposing must first be approved by the Legislature." (CASE JA 307.)

After memorializing in writing his admission that he needed legislative authority to impose furloughs, Governor Schwarzenegger submitted to the Legislature, during the special session, proposed legislation that would specifically authorize DPA to implement furloughs. (CASE JA 312.) Thus, by word and by deed, Governor Schwarzenegger has repeatedly admitted that he lacks authority to implement furloughs without legislative authority. The trial court failed to even address the fact that the Governor repeatedly acknowledged he lacked the very authority he claimed in the Executive Order. However, his earlier admissions are relevant to the inquiry of whether the Governor has the power he now claims. (Evidence Code sections 210, 1220.)

B. Existing Law Demonstrates that the Governor Lacks Authority to Impose Furloughs

Preliminarily, it is important to understand that in California, the Legislature is the seat of virtually all legislative power.

> Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. [Citations.] Two important consequences flow from this fact. First, the entire law-making authority of the state, except the people's right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution. [Citations.] In other words, 'we do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited.' [Citation.] [¶] Secondly, all intendments favor the exercise of the Legislature's plenary authority: 'If there is any doubt as to the Legislature's power to act in any given case, the doubt should be resolved in favor of the Legislature's action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.

(*Methodist Hospital of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.)

The setting of state employee salaries is a legislative function. (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1325, fn. 10; *Lowe v. California Resources Agency* (1991) 1 Cal.App.4th 1140, 1151.) The Legislature has partially delegated its authority in this regard to DPA. Government Code section 19826 provides, in pertinent part:

> (a) The department shall establish and adjust salary ranges for each class of position in the state civil service subject to any merit limits contained in Article VII of the California

> Constitution. The salary range shall be based on the principle that like salaries shall be paid for comparable duties and responsibilities. In establishing or changing these ranges, consideration shall be given to the prevailing rates for comparable service in other public employment and in private business. The department shall make no adjustments that require expenditures in excess of existing appropriations that may be used for salary increase purposes. The department may make a change in salary range retroactive to the date of application of this change.
>
> (b) 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.

In subdivision (b), the Legislature specifically withheld from DPA the power to reduce salaries for represented employees. As this Court has already determined, the statute expressly "preclud[es] DPA from unilaterally adjusting represented employees' wages." (*Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal.App.4th 155, 178.) Accordingly, "the question of represented employees' wages . . . must ultimately be resolved by the Legislature itself." (*Ibid*.)

The Government Code specifically grants to state departments the power and authority to lay off employees "because of lack of work or funds, or whenever it is advisable in the interests of economy, to reduce the staff of any state agency. . . ." (Gov. Code § 19997.) There is a detailed and specific statutory scheme for the manner in which layoffs are to be implemented. (See Gov. Code §19997 et seq.) There is no such statutory authorization for furloughs.[5] In fact, the Government Code expressly

[5] The single reference to employee furloughs in the Government

prohibits departments from unilaterally reducing the work time of employees against their will. (Gov. Code § 19996.22, subd. (a).) The Government Code specifies that "[t]enure of civil service employment is subject to good behavior, efficiency, the necessity of the performance of the work, and the appropriation of sufficient funds." (Gov. Code § 18500, subd. (c)(6).) The Legislature has already passed, and the Governor has already signed, a budget appropriations bill for Fiscal Year 2008-2009.[6] Accordingly, the funds have already been appropriated, and there is no basis to alter the tenure of the legal professionals in Unit 2.

Similarly, Government Code section 19816.10 provides that DPA has no power to alter days, hours, or conditions of work in a manner contrary to any existing Memorandum of Understanding (MOU). The current MOU between the State and the legal professionals in State Bargaining Unit 2 expired on July 1, 2007, but by law remains in effect pending the ratification of a successor MOU, or until impasse is reached. (Gov. Code § 3517.8.) The parties are currently in the process of negotiating an MOU, and thus impasse has not been reached. Therefore, the prior MOU remains in effect, including all provisions regarding days and hours of work. Thus, the existing constitutional and statutory framework establishes that the Legislature, and not the Governor, can set the salaries of state employees.

Code appears in Government Code section 68108, and is applicable only to employees of the judicial branch of government.

[6] The fact that budget negotiations for Fiscal Year 09-10 are ongoing as of this writing does not change the fact that the previous budget impasse which the Governor relied upon in justifying his Executive Order has since been remedied.

The trial court attempted to distinguish the *Greene* case, but its reasoning was entirely unpersuasive. First the trial court found that the furloughs do not change the salary range of employees, but rather simply reduce the hours worked which results in a loss in pay. (CASE JA 516.) But this distinction is foreclosed by the language in *Greene*, which specifically found that section 19826 expressly "preclud[es] DPA from unilaterally adjusting represented employees' wages." (*Department of Personnel Administration v. Superior Court (Greene)*, *supra*, 5 Cal.App.4th 155, 178.) Using a reduction in hours to lower pay necessarily results in an adjustment of wages. Second, the trial court observed that in *Greene*, the parties had reached impasse, whereas in the instant case, an MOU is still in effect. (CASE JA 516.) Adopting the trial court's logic leads to the conclusion that employees are better protected without an MOU than with one, which is absurd and contrary to the entire Dills Act.

The trial court's efforts to distinguish the *Greene* case are unavailing. The Legislature has not enacted any legislation ratifying the Governor's Executive Order, nor has it undertaken any action to otherwise delegate the salary-setting function to any other state officer or department. It is well established in California that unless expressly permitted by the Constitution, "the Governor may not exercise legislative powers." (*Harbor v. Deukmejian* (1987) 43 Cal.3d 1078, 1084.)[7] The Governor's decision to implement the furloughs and reduce the wages of CASE members is an exercise of legislative power that has not been delegated, and is therefore necessarily illegal.

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[7] The Constitution does permit the Governor to exercise the legislative powers of veto and "line-item veto" in the context of appropriations. (See Cal. Const. Art. IV, §10.)

CONCLUSION

For the foregoing reasons, Appellant submits the Governor lacked authority to unilaterally implement furloughs, and the trial court was incorrect in finding such authority in the language of either the Government Code or the MOU. Therefore, the judgment should be reversed and the trial court should be directed to issue a writ of mandate prohibiting the implementation of the furloughs.

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DATE

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Attorney for Appellant

TABLE OF CONTENTS

STATEMENT OF THE CASE..1

STATEMENT OF APPEALABILITY 2

STATEMENT OF FACTS 2

STANDARD OF REVIEW 5

ARGUMENT

I. INTRODUCTION …………………………….……………………….……..6

II. SECTIONS 19851 AND 19849 DO NOT GRANT THE GOVERNOR THE POWER TO UNILATERALLY IMPOSE FURLOUGHS ……………….……7

A. The Statutes Do Not Authorize Furloughs …..…………………………......8

B. The Statutes are Supereseded by the MOU…..…………………………......9

C. The "Reduction of Hours" is Not a Basis to Reduce the Pay of CASE Legal Professionals ………………………...……………………12

III. THE MOU DOES NOT AUTHORIZE FURLOUGHS………………………13

A. The "State Rights" Clause Does not Authorize Furloughs …………………………………….………………………....13

B. The "Alternative to Layoff" Clause Does not Authorize Furloughs …………………………………….………………………....16

IV. GOVERNMENT CODE SECTION 3516.5 DOES NOT PROVIDE AUTHORITY TO UNILATERALLY IMPOSE FURLOUGHS ………………..17

V. THERE EXISTS NO OTHER AUTHORITY FOR THE GOVERNOR TO UNILATERALLY IMPOSE FURLOUGHS ……………….……………..19

A. The Governor Has Acknowledged He Lacks the Power to Furlough State Employees…………………………………………………19

B. Existing Law Demonstrates that the Governor Lacks Authority to Impose Furloughs ……………….……………………......21

CONCLUSION..25

TABLE OF AUTHORITIES

State Cases

California State Employees Association v. State of California
(1988) 199 Cal.App.3d 840 2
Department of Personnel Administration v. Superior Court (Greene)
(1992) 5 Cal.App.4th 758 .... 13, 22, 24
Gilbert v. City of Sunnyvale
(2005) 130 Cal.App.4th 1264 5
Harbour v. Deukmejian
(1987) 410 Cal.3d 1078 24
Kavanaugh v. West Sonoma County Union High School Dist.
(2003) 29 Cal.4th 911 5
Krug v. Maschmeier
(2009) 172 Cal.App.4th 796 8
League of Women Voters v. Eu
(1992) 7 Cal.App.4th 649 19
Lowe v. California Resources Agency
(1991) 1 Cal.App.4th 1140 21
Methodist Hospital of Sacrametno v. Saylor
(1971) 5 Cal.3d 685 21
Professional Engineers in California Government v. Kempton
(2007) 40 Cal.4th 1016 2
Tirapelle v. Davis
(1993) 20 Cal.App.4th 1317 21

Statutes

Code of Civil Procedure section 904.1. 2
Evid. Code section 210 20
Evid. Code section 1220 20
Gov. Code section 3516 12
Gov. Code section 3516.5 .... 17, 18, 19
Gov. Code section 3517.6. .... 10, 12
Gov. Code section 3517.8 23
Gov. Code section 3520.5. 1
Gov. Code section 18500 23

Gov. Code section 19816.10 23
Gov. Code section 19826 .... 13, 21, 24
Gov. Code section 19849 .... 7, 8, 9, 10, 11
Gov. Code section 19851 .... 7, 8, 9, 10, 11
Gov. Code section 19996.22 23
Gov. Code section 19997 .... 15, 22
Gov. Code section 68108 23

Constitutional Provisions

Article IV section 10 of the California Constitution 24