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I.

INTRODUCTION

The questions before this Court are: 1) Do Government Code sections 19851 and 19849 authorize the Governor to reduce the hours of work and the salary of state employees?, and 2) If the answer to question number one is “Yes”, do the labor contracts between the State and PECG and the State and CAPS preclude him from doing so for employees in Bargaining Unit 9 and Bargaining Unit 10?

Although Respondents’ Brief repeatedly uses the phrases “executive power” and “inherent executive authority” the Governor and DPA’s actual argument is that Sections 19851 and 19849 and the state’s labor contracts with PECG and CAPS, authorize the Governor to “furlough” state engineers and state scientists two days per month by cutting employees’ hours and cutting employees’ salaries. The statutes do not allow these actions. That is obviously why in November and December of 2008 the Governor sought, but did not receive, authorization from the Legislature to cut the hours and the pay of state employees. The Legislature retains ultimate authority over salaries (Gov. Code § 19826) and other specified terms and conditions of employment, including hours of work (Gov. Code § 19851, 19852.).

While PECG and CAPS argue that Sections 19851 and 19849 do not provide the Governor with statutory authority to reduce hours and pay, if those statutes do authorize the Governor and DPA to cut hours and salaries as they claim, the collective bargaining agreements with PECG and CAPS expressly conflict with those statutes by mandating a 40-hour workweek and by listing the salaries to be paid to state engineers and state scientists. In this circumstance, the MOUs provide that “such MOU provision shall be controlling” over the statutes (J.A. I, Tab N, p.192.) and preclude the Governor’s exercise of any furlough power he might otherwise possess for state engineers and state scientists.

In opposition, the Governor has no answer for the clear language in the labor agreement between PECG, representing the rank-and-file state engineers, and the State that “Unless otherwise specified herein, the regular work week of full-time Unit 9 employees shall be forty (40) hours.” As the MOU calls unequivocally for a 40-hour workweek and contains no exceptions, Unit 9 employees may not have their hours of work reduced and the furlough program may not apply to Unit 9 employees.

The CAPS MOU, covering rank-and-file state scientists, also expressly calls for a 40 hour workweek and contains a “no lockout” provision which precludes the Governor from withholding employment

through the partial closing of state offices, preventing state scientists from working their full schedules. State scientists have a right under the MOU to a 40 hour workweek and cannot be locked out.

The Governor claims that Appellants' arguments fail to address that there was a serious fiscal emergency and the furlough is a step to respond to that fiscal emergency. The Governor is making a public policy argument, not a legal argument. While the Governor was within his authority to propose that the Legislature adopt statutory provisions to allow the Governor to implement the furlough program as a response to the fiscal emergency, once the Legislature rejected his proposal and declined to give him that authority, he could not then ignore the law and the parties' labor contracts and take an action he had no authority to take. The Governor and DPA lack legal authority to reduce hours and salaries and the furloughs must be reversed.

II.

ARGUMENT

A. **THE GOVERNOR LACKS STATUTORY AUTHORITY TO ALTER THE HOURS OR PAY OF STATE ENGINEERS OR STATE SCIENTISTS**

The Governor claims that under the California Constitution, Article V, § 1 that he "has the authority to issue orders to ensure the fiscal

viability of the State and to safeguard the continual operations of all state departments.” (Respondents’ Brief, page 16.) Article V, section 1 of the Constitution states: “The supreme executive power of this State is vested in the Governor. The Governor shall see that the law is faithfully executed.” This Constitutional provision does not give the Governor authority to set aside laws or take action which is within the purview of the Legislature. The Legislature expressly retains control over terms and conditions of employment including hours of work (Government Code §§ 19851 and 19852) and ultimate authority over salaries (Government Code § 19826). The furlough Executive Order adopted by the Governor is in direct conflict with these statutes.

1. Neither Section 19851 nor Section 19849 Allow The Governor to Unilaterally Alter the Hours of Work of State Engineers or State Scientists

The Legislature has established the workweek of state employees. Government Code section 19851 provides 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.”

The need for legislative approval to alter hours of work is confirmed by the Governor's introduction of legislation to implement a furlough during the 2008 Special Sessions. Governor Schwarzenegger specifically introduced proposed legislation to furlough state employees. (J.A. I, Tab F, p. 56-69.) The Governor's legislative proposal would set aside the bargaining law and any other provision of law to add the statutory authority at proposed Section 19826.4 to furlough state employees by allowing "the placement state employees on temporary, nonduty status to reduce payroll costs." (J.A.I, Tab F, p. 57.) Without this authorization, the Governor has no authority to unilaterally reduce employees' full-time work schedules below the 40 hour workweek established by the Legislature. The proposed legislation would also have given the Governor the power to "reduce employees' salaries, as defined in paragraph (1) of subdivision (c) of Section 19827.2, to accomplish the purposes of the furlough." (J.A. I, Tab F, p. 55.) The furlough statutory language was not adopted by the Legislature.

PECG and CAPS' Opening Brief cited an opinion of the Attorney General which addressed the 40-hour minimum work week language now in Section 19851. The AG's opinion stated that an appointing power "has authority to fix within reasonable bounds the daily working hours of

department employees, provided the required 40-hour minimum work week is observed.” (39 Ops.Cal.Atty.Gen 261, 262 - 263.) The Governor’s attempt to distinguish the AG’s Opinion based upon the nature of the request for the opinion must fail. It is true that the opinion was issued in response to an inquiry about overtime, but this does not in any way detract from the opinion interpreting the exact language of former Section 18020 which is now found in Section 19851. In interpreting this same language, the AG’s Opinion very clearly concluded that working hours can be adjusted - provided the required 40-hour minimum work week is observed.

As noted in PECG and CAPS Opening Brief, Government Code section 19852 provides the Governor limited discretion in determining whether the 40 hour work week should be worked in four or five days. That section provides that when the Governor determines it is in the best interests of the state, “the Governor may require that the 40-hour workweek established as the state policy in Section 19851 shall be worked in four days in any state agency or part thereof.” As argued by the State Controller, Section 19852 would not be necessary if Section 19851 gave the Governor the kind of authority that he claims. The Governor and DPA responded by stating that the Controller’s proffered interpretation would render the language in Section 19851 allowing “workweeks and workdays of a

different number of hours may be established in order to meet the varying needs of the different state agencies” meaningless. Section 19852 makes it clear that the minimum workweek established by Section 19851 is 40 hours, which can be worked in four days in some circumstances.

For decades, the minimum workweek of 40 hours has been in statute. The Governor or a state department can restructure when the work is done, as long as the 40-hour minimum workweek is adhered to.

PECG and CAPS and the State Controller each cited the Reduced Worktime Act (Government Code section 19996.19 et seq.) as an example where the Legislature has allowed for a deviation from the legislatively created 40 hour minimum workweek. The Governor states in his Opposition Brief at page 26, “If anything, these code sections serve to further demonstrate the Governor’s inherent authority as the state employer to establish varying schedules for state employees.” Far from a demonstration of any “inherent authority”, the Legislature had to specifically authorize reduced worktime by passing a statute to establish the program. Under the program, involuntary reductions are prohibited. (Gov. Code § 19996.22) Similarly when a “personal leave program” consisting of a salary reduction in exchange for leave credits was implemented in 1992, it was done so at the bargaining table and required legislation for employees

excluded from collective bargaining. (Gov. Code § 19996.3.) There is clearly no “Governor’s inherent authority” over hours of work, rather the Legislature has and retains authority over hours of work.

The Governor and DPA make little effort to argue Section 19849 (a) provides any authority to cut hours. Under Section 19849 (a), DPA can establish rules governing “hours of work and overtime compensation and the keeping of records related thereto...” This statute allows the DPA to adopt rules to assist with keeping track of overtime. In their Opening Brief, PECG and CAPS noted that each of the rules adopted by DPA under Section 19849 discuss the “minimum work week of 40 hours.” The Governor and DPA responded by arguing the “reference to the 40 hours in the regulation does not reflect the 40-hour minimum workweek but rather reflects that overtime must be paid after employees work 40 hours in a workweek.” (Respondents’ Brief, page 22.) While PECG and CAPS agree this statute merely allows DPA to adopt rules to assist with the tracking of overtime, the regulations adopted by DPA without exception lists the minimum workweek of 40 hours.

2. **Government Code Section 19826 Precludes the Adjustment of Salaries of Represented Employees As Only the Legislature Can Adjust Salaries in the Absence of a Collective Bargaining Agreement**

Government Code section 19826 expressly and unambiguously

precludes the reduction of represented employee wages by the Governor or the DPA. (*Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal.App.4th 155.) The Governor here argues that Section 19826 is “superseded” by the existing MOUs between the parties. As there is nothing in the parties’ MOUs which allows for the reduction of salaries, the Governor lacks the authority under the MOUs to reduce the salaries owed under the MOUs. In the absence of the Legislature taking an action to reduce the salaries of Unit 9 employees or Unit 10 employees, the salaries of those employees may not be lawfully reduced.

It is not in dispute that setting compensation for state employees is a legislative function. (*Lowe v. Resources Agency* (1991) 1 Cal.App.4th 1140.) Salaries for represented employees are set through collective bargaining. If the parties are not operating under a bargaining agreement which covers salaries, the Legislature necessarily retains the salary setting role for itself. Since the Legislature has chosen not to delegate this salary setting function to the DPA with respect to represented employees under the Dills Act, there is no setting where DPA or the Governor have the authority to reduce salaries of represented employees without legislative approval. Whether the represented employees salaries are protected by the parties’ MOU or by the statutory provision precluding the alteration of the salary,

the salaries may not be reduced. In the absence of conflicting provisions in an MOU, the statutory bar in Section 19826 (b) on DPA adjusting salaries remains in place. (*Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1325; Gov. Code § 19826 subd. (b).)

The Governor and DPA argue that the reduction in total compensation is not a reduction in the “salary range.” (Respondents’ Brief, page 43.) They argue that because there is a DPA regulation which allows the conversion of monthly salary ranges from monthly to hourly rates, that salary ranges are really about hourly rates, so the reduction in salaries as part of the furlough program are outside Section 19826 (b). This regulation does not provide authority to reduce salaries. If the Governor lacks authority to reduce salary ranges, what gives him authority to reduce pay within those ranges? The Governor and DPA’s position ignores the fact that the salary ranges listed in the parties’ MOUs are monthly salaries and that Unit 9 and Unit 10 employees are paid on a monthly basis. (J.A. I, Tab N, p. 205-214 (Unit 9 MOU monthly salaries) and J.A. II, Tab O, p. 331-340 (Unit 10 MOU monthly salaries).)

As argued in PECG and CAPS’ Opening Brief, a 10% pay cut will drop some employees below the salary range, so clearly the salary range has been reduced. Similarly, because no employees can come within 10% of

the top of the salary range, the salary range has been moved. The salary rates negotiated in the parties' MOUs are negotiated so that those salaries will be received. Under the MOUs, those bargained for salaries must be paid.

B. THE PARTIES' MOUs ESTABLISH THE 40-HOUR WORKWEEK AND THE SALARIES OF STATE ENGINEERS AND STATE SCIENTISTS

The Governor contends that "Appellants cannot direct the Court to a single provision of the MOUs expressly forbidding the furloughing of employees subject to those MOUs." (Respondents' Brief, page 31.) This has the argument backward - it is up to the Governor to identify the authority to furlough employees. Nevertheless, a furlough is a cut in hours and a cut in salary. Each action is precluded by the parties' MOUs. The 40-hour workweek and the salaries of state engineers and state scientists are mandated by the parties' MOUs.

The MOU between the State and PECG and the MOU between the State and CAPS are binding contracts which establish the 40-hour workweek and establish the salaries and wages to be paid.

The Governor and DPA argue that because Sections 19851 and 19849 are expressly incorporated into the parties' MOUs, that they must not

conflict with the MOUs. (Respondents' Brief, page 29.) This is simply wrong. The Opposition Brief cites only a portion of the parties' agreed to supersession language in the PECG Unit 9 MOU, omitting the part listed below in italics:

The following Government Code Sections and all DPA regulations and/or rules 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 regulations related thereto, such MOU provision shall be controlling. The Government Code Sections listed below are cited in Section 3517.6 of the Dills Act.*

(J.A. I, Tab N, p. 192.)

The Opposition Brief similarly cites only a portion of the parties' supersession language from the CAPS Unit 10 MOU. The full supersession clause in the CAPS Unit 10 MOU reads as follows:

The following enumerated Government Code Sections and Education Code Sections and all existing rules, regulations, standards, practices and policies which implement the enumerated Government Code Sections and Education Code Sections are hereby incorporated into this Agreement. *However, if any other provision of this Agreement alters or is in conflict with any of the Government Code Sections or Education Code Sections enumerated below, the Agreement shall be controlling and supersede said Government Code Sections or Education Code Sections or parts thereof and any rule, regulation, standard, practice, or policy implementing such provisions. The Government Code Sections listed below are cited in Section 3517.6 of the Dills Act.*

(J.A. II, Tab O, p. 301.)

It is clear that if a provision of an MOU is in conflict with 19851 or 19849, the conflicting MOU provision controls. (Gov. Code § 3517.6.)

1. The MOUs Govern the Hours of Work of Unit 9 and Unit 10 Employees

The PECG Unit 9 MOU provides unequivocally, “Unless otherwise specified herein, the regular work week of full-time Unit 9 employees shall be forty (40) hours.” (J.A. I, Tab N, p. 172.) There is no exception to this mandatory statement of the 40-hour work week elsewhere in the PECG Unit 9 MOU. On that basis, the work week of Unit 9 employees shall be 40 hours. As the MOU controls, the Governor may not unilaterally reduce the hours of Unit 9 employees. Any supersedable statute, interpreted to the contrary, would be superseded by the PECG Unit 9 MOU. (Gov. Code § 3517.6.)

The Governor and DPA argue that the Unit 9 MOU contains “language nearly identical to that found in Government Code section 19851” allowing the State to establish varying work shifts. (Respondents’ Brief, page 31.)

The MOU is in fact very different from the statute. To the extent the Governor argues that the statute simply lists the “policy” of the state is a 40

hour workweek, as opposed to a mandate of a 40 hour workweek, the MOU leaves no uncertainty by stating at 8.4 subdivision (a): “the regular work week of full-time Unit 9 employees shall be forty (40) hours.” While the statute says “workweeks and workdays of a different number of hours may be established in order to meet the varying needs of the different state agencies”, the Unit 9 MOU does not contain this language. Instead, it provides at 8.4 subdivision (b):

Varying work shifts (swing shift, night shift, or any work shift other than a traditional day shift) may be established by the employer in order to meet the needs of the state agencies.

(J.A. I, Tab N, p. 172.)

Allowing varying *work shifts* is very different than allowing *work weeks* of a different number of hours. The plain language of the MOU implies a work shift to be the starting and stopping time for a workday, not the duration of a day, much less the duration of a work week.

Quite simply, the Unit 9 MOU mandates a 40-hour workweek. To the extent this mandate conflicts with Government Code section 19851, the MOU’s 40 hour workweek controls.

The CAPS Unit-10 MOU also contains the 40-hour work week. The CAPS MOU incorporates Section 19851 into the MOU by stating:

“12. Workweek
19851 Sets 40-hour work week and 8- hour day.

(J.A II, Tab O, p. 305.)

Clearly, the agreement is for a 40-hour work week. The only exception to the 40-hour work week in the CAPS Unit 10 MOU is found in the provision which allows *upon request of a Unit 10 employee*, a consideration of reduced worktime shall not be unreasonably denied by the employer. (J.A II, Tab O, p. 281.) This provision is consistent with the Reduced Worktime Act found at Government Code section 19996.19 et seq. As the 40-hour work week listed in the MOU controls, the Governor may not unilaterally reduce the hours of Unit 10 employees.

The Governor did not respond to CAPS’ argument in the opening brief that the Unit 10 MOU contains a “No Lockout” provision which precludes the Governor’s “partial closing” of state offices preventing state scientists from working their full 40-hour workweeks is contrary to the Unit 10 MOU.

2. The MOUs Govern the Salaries of Unit 9 and Unit 10 Employees

The PECG Unit 9 MOU calls for Unit 9 employees to be paid no less than salaries received by their counterparts subject to a salary parity survey.

(J.A. I, Tab N, p. 123.) The Unit 9 MOU also contains an appendix listing

classifications and the salary schedule for those classifications. (J.A. I, Tab N, p.205.) So to comply with the Unit 9 contractual provisions regarding salaries, the salaries bargained for must be actually received. There is no provision in the Unit 9 MOU which allows salaries to be reduced by the furlough program or for any other reason.

Similarly, the CAPS Unit 10 MOU contains a provision on salaries. The CAPS MOU calls for a salary increase to take effect on July 1, 2006, a second increase to take effect on July 1, 2007, and various labor market adjustments to take effect January 1, 2007 (J.A. II, Ex. O, p. 230, 240-242.) The Unit 10 MOU also contains an appendix listing classifications and the salary schedule for those classifications. (J.A. II, Ex. O, p.331.) So to comply with the Unit 10 contractual provisions regarding salaries, the salaries bargained for must be actually received. There is no provision in the Unit 10 MOU which allows salaries to be reduced by the furlough program or for any other reason.

3. The State's Rights Clauses of the MOUs Do Not Provide the Authority to Furlough Unit 9 or Unit 10 Employees

The PECG Unit 9 MOU does not have a State Rights clause which provides any authority to the Governor or DPA as the employer. The PECG

Unit 9 MOU State Rights clause provides in its entirety: "All the functions, rights, powers and authority not specifically abridged by this MOU are retained by the employer." (J.A I, Tab N, p. 187.) Retaining rights you might possess is far different from gaining new rights. As discussed above, while PECG contends the Governor and DPA have no authority in statute to cut hours or cut pay of state employees, if they do have such power, it is specifically abridged by the hours of work provision which mandates a 40-hour workweek and salary provisions of the Unit 9 MOU.

The CAPS Unit 10 State Right's clause is applicable only to rights which are not abridged or limited by the Agreement. (J.A II, Tab O, p. 300.) As discussed above, the 40-hour workweek and the salaries to be paid are covered by the MOU. There is therefore no retained state right, in an emergency or otherwise, to cut hours or cut pay of Unit 10 employees.

III.

CONCLUSION

For all the foregoing reasons, Plaintiffs and Appellants PECG and CAPS respectfully request that the Court vacate the trial court's judgment and enter its own judgment reversing the lower court and ordering the trial court to grant the Petition for Writ of Mandate and Complaint for Declaratory Relief.

Date: November 24, 2009

Respectfully submitted,



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CERTIFICATE OF WORD COUNT

I, Gerald James, am counsel for Appellants in the above referenced appeal. I certify that the foregoing brief consists of 3681 words. I am relying on the computer program, Corel Word Perfect X4, used to prepare this brief for this word count.

Date: November 24, 2009

A handwritten signature in black ink, appearing to read "Gerald James", written over a horizontal line.

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PROOF OF SERVICE BY MAIL

Court of Appeal Case No. CO61011

Case: Professional Engineers in California Government et al., Plaintiffs and Appellants,
v. John Chiang, as State Controller, etc., Defendant and Appellant; Arnold
Schwarzenegger, as Governor, etc., et al., Defendants and Respondents.

I the undersigned, declare that:

I am a resident of the State of California and over the age of 18 years and not a party to the within entitled cause. The address of my business is 455 Capitol Mall, Suite 501, Sacramento, California 95814. On November 24, 2009, I mailed a copy of the within document **PECG and CAPS APPELLANTS' REPLY BRIEF** to the parties listed below by placing a true copy of said documents, enclosed in a postage paid sealed envelope, for collection and mailing following our ordinary business practices.

I am readily familiar with this business's practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service, in a sealed envelope(s) with postage fully prepaid.

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

Executed on November 24, 2009, at Sacramento, California.


Breanna Cabrera