



JOHN CHIANG  
California State Controller

February 3, 2009

The Honorable Patrick Marlette  
Superior Court of California  
County of Sacramento  
Gordon D. Schaber Courthouse  
Department 19  
720 Ninth Street  
Sacramento, CA 95814

Re: *Professional Engineers in California Government, et al. v. Governor Arnold Schwarzenegger, et al.*, Case No. 2008-80000126

*California Attorneys, Administrative Law Judges and Hearing Officers in State Employment v. Governor Arnold Schwarzenegger, et al.*, Case No. 2009-80000134

*Service Employees International Union, Local 1000 v. Governor Arnold Schwarzenegger, et al.*, Case No. 2009-80000135

Dear Judge Marlette:

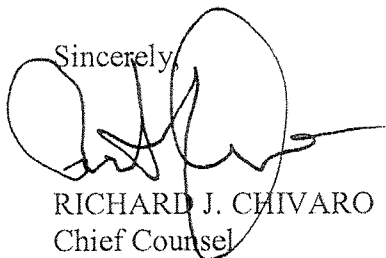
This office has received the enclosed letters from the independently elected Constitutional Officers and other elected state-wide officials including the Lieutenant Governor, Office of the Attorney General, Secretary of State, State Treasurer, Superintendent of Public Instruction, and Insurance Commissioner regarding the applicability of the recent ruling in the above-referenced cases to employees of those offices.

Prior to the ruling, the Governor and his staff contacted the constitutional officers and informed them that their offices were not affected by the executive order inasmuch as those officers were not under the direct authority of the Governor. Based on this contact, none of the constitutional officers sought to challenge the executive order. The specific terms of the executive order state that it only applies to state employees under the Governor's direct authority. However, since your decision was issued, the Governor's office has construed the ruling in its broadest possible sense to apply to all state employees and, basing its decision on this reading, has now notified the independent constitutional officers and state-wide officials that their employees are impacted by the ruling.

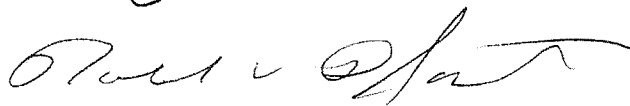
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The issue of whether independently elected constitutional and state-wide officers are subject to a Governor's executive order and/or whether the Governor's executive order applies to constitutional and state-wide officers, their agencies and staff was not an issue before the court and, therefore, was never pled, briefed, litigated or argued by any of the parties. Therefore, the State Controller's Office respectfully requests clarification of the breadth of the court's ruling. Specifically, we ask that the court clarify whether the ruling was intended to confer broad authority in the Governor to cover issues that were not properly before the court. Given the fact that the Governor intends to implement his order on February 6, 2009, your prompt response would be appreciated.

Sincerely,



RICHARD J. CHIVARO  
Chief Counsel



RONALD V. PLACET  
Senior Staff Counsel

RJC/RVP/ac

Enclosures

Letter from Lieutenant Governor John Garamendi  
Letter from Secretary of State Debra Bowen  
Letter from California State Treasurer Bill Lockyer  
Letter from Superintendent of Public Instruction Jack O'Connell  
Letter from Insurance Commissioner Steve Poizner  
Letter from Chief Deputy Attorney General James M. Humes

cc: David W. Tyra, Kronick, Moskovitz, Tiedemann & Girard

Will M. Yamada, Personnel Relations Counsel,  
Department of Personnel Administration

J. Felix De La Torre and Brook Pierman, SEIU Local 1000

Patrick Whalen, California Attorneys, Administrative Law Judges and  
Hearing Officers in State Employment

Gerald James, Professional Engineers in California Government and  
California Association of Professional Scientists

Gregg McLean Adam, Carroll, Burdick & McDonough



*Secretary of State*  
**DEBRA BOWEN**  
*State of California*

February 2, 2009

The Honorable John Chiang  
California State Controller  
P.O. Box 942850  
Sacramento, CA 94250-5872

Dear Mr. Chiang:

I write regarding Governor Schwarzenegger's direction to you following the January 29, 2009, Superior Court ruling concerning the Governor's ability to furlough certain state employees. I do not believe this ruling can legally be applied to state employees working at the Secretary of State's office, nor do I believe it is in California's best interests. I respectfully ask that you not apply the ruling to the employees under my control and direction.

I am committed to doing my part to address California's unprecedented budget situation. However, implementation of the Governor's Executive Order as written will interfere with my ability to provide services, such as filing corporate documents and accepting Uniform Commercial Code filings, that are critical to business and commercial activity in the state.

Moreover, reducing the number of employee hours spent now will result in overtime hours being spent later, thus costing taxpayers money rather than saving it. I support the Governor's overall goal of reducing state spending, which is why I reduced my 2008-09 General Fund budget by 10%. For 2009-10, I am committed to achieving savings equal to or greater than the amount of money the Governor seeks to achieve by furloughing people who work for the Secretary of State's office.

As you are aware, California's Constitutional officers were not a party to the Superior Court litigation because they were repeatedly told that the Governor believed he lacked authority over their employees.

Executive Order S-09-08, issued on July 31, 2008, recognized that Governor Schwarzenegger did not have the authority to impose the requirements on the state's Constitutional officers because they are not under his direct executive authority:

"IT IS FURTHER 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, constitutional officers, the legislative branch



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(including the Legislative Counsel Bureau), and judicial branch, assist in the implementation of this Order and implement similar mitigation measures that will help to preserve the State's cash supply during this budget impasse."

Similarly, Executive Order S-16-08, issued on December 19, 2008, explicitly omitted agencies not under the Governor's direct executive authority:

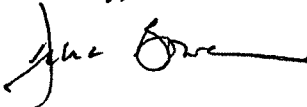
"IT IS REQUESTED that other entities of State government not under my direct executive authority, including the California Public Utilities Commission, the University of California, the California State University, California Community Colleges, the legislative branch (including the Legislative Counsel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

As recently as January 9, 2009, the Governor's own staff conceded in a telephone conference, that the Governor had no authority to apply Executive Order S-16-08 to the agencies of other Constitutional officers. They requested that the Constitutional officers implement the order voluntarily.

While the Superior Court's ruling upholds Executive Order S-16-08, it does not address the employees of California's other Constitutional officers because that issue was never raised during the litigation. I did not join the lawsuit filed against the Governor because I am not under his direct executive authority and his staff assured me and the other Constitutional officers that we were not subject to his order. Having thus ensured that I would have had no standing to challenge the order in court, the Governor cannot now use the decision of the Superior Court to require my staff to take unpaid furlough days.

If you have any questions about my position in this matter, or if you need further information, please contact me at (916) 653-7244.

Sincerely,



Debra Bowen  
Secretary of State

DB:elg:pg



LIEUTENANT GOVERNOR JOHN GARAMENDI

February 2, 2008

The Honorable John Chiang  
State Controller  
P.O. Box 942850  
Sacramento, CA 94250-5872

Dear Controller Chiang:

I am writing to clarify my position with regard to employee furloughs affecting state constitutional offices, and to request that you not implement a furlough applying to employees under my direction. I respectfully maintain that the Governor does not have the power to mandate a furlough.

I understand these are extraordinary times. We are facing unprecedented economic challenges and there is no question that all state offices must share in making hard choices to cut costs and preserve cash. I have agreed to substantial cuts in my operating budget, including two consecutive 10% reductions this fiscal year, which more than offset savings from a furlough.

It is my responsibility to structure cost savings that preserve the integrity of my office.

Nothing in Judge Marlette's ruling could be construed to modify historical precedent which requires Constitutional officers to manage their budget and operations in a manner which will allow for the most effective discharge of their duties. This includes decisions relating to effective staffing requirements.

I appreciate your cooperation in this request, and will await the Court's direction.

Sincerely,

A large, stylized handwritten signature of John Garamendi in black ink.

JOHN GARAMENDI  
Lieutenant Governor



STATE OF CALIFORNIA  
OFFICE OF THE ATTORNEY GENERAL  
JAMES M. HUMES  
CHIEF DEPUTY ATTORNEY GENERAL

February 2, 2009

Honorable John Chiang  
California State Controller  
300 Capitol Mall, Suite 1850  
Sacramento, CA 95814

RE: *Professional Engineers in California Government v. Schwarzenegger*  
Sacramento Superior Court Case No. 34-2008-80000126-CU-WM-GDS

*California Attorneys, Administrative Law Judges, etc. v. Schwarzenegger*  
Sacramento Superior Court Case No. 34-2009-800000134-CU-WM-GDS

*Service Employees International Union, Local 1000 v. Schwarzenegger*  
Sacramento Superior Court Case No. 34-2009-80000135-CU-WM-GDS

Dear Mr. Chiang:

I understand that the Governor's Office has changed its position regarding the applicability of the Governor's furlough order on other constitutional officers. Before Judge Marlette's January 29, 2009 minute order, the Governor's Office encouraged, but did not require, other constitutional officers to comply with the furlough order. Accordingly, this office did not intervene in these cases. But emboldened by the minute order, the Governor's Office now informs us that it wants to apply the furlough order to other constitutional officers after all. Because we believe that the Governor's interpretation of the minute order is incorrect, and because we believe that the furlough order cannot be forced on other constitutional officers under these circumstances, we ask the Controller's Office to refrain from implementing the furloughs called for in Executive Order S-16-08 on our employees.

It appears that the Governor's Office is attempting to use the *absence* of any ruling addressing whether the Governor has authority to furlough employees of constitutional officers like the Attorney General as a ground to assert that authority. This tactic is improper for several reasons.

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To begin with, the question of whether the Governor has authority to furlough employees of the other constitutional officers was not before the court. As you know, the writ actions were each brought by unions asking the court for an order holding that the Governor's executive order requiring the furloughs is illegal. Thus, unions were trying to prove that you had a ministerial duty not to follow the Executive Order for the reasons set forth in their writ petitions. (*Sacramento County Fire Protection Dist. v. Sacramento County Assessment Appeals Bd. II* (1999) 75 Cal.App.4th 327, 331 [describing the requirements for a writ as "a clear, present (and usually ministerial) duty on the part of the respondent; [and] (2) a clear, present and beneficial right in the petitioner in the performance of that duty." (citation omitted)].) The court rejected the unions' position and intends to render a judgment denying the writ petitions. But that judgment, whenever it is signed, cannot be interpreted to address issues that were not before the court, much less to grant affirmative relief in favor of the Governor on those issues as if he had prosecuted his own petition for writ of mandate against you.

Nor can the Governor's authority to unilaterally impose a furlough on employees of the other constitutional officers be lightly implied from his more general authority. While a full briefing regarding the Governor's authority to issue executive orders is beyond the limited scope of this letter, our Supreme Court has noted, "[u]nlike the federal Constitution, the California Constitution . . . embodies a structure of divided executive power." (*Marine Forests Soc. v. California Coastal Com'n* (2005) 36 Cal.4th 1, 31; see also Cal. Const., art. V, § 11 [providing for the election of the Lieutenant Governor, Attorney General, Controller, Secretary of State, and Treasurer]; Zasloff, *Taking Politics Seriously: A Theory of California's Separation of Powers* (2004) 51 UCLA L. Rev. 1079, 1113 ["the California Constitution explicitly and repeatedly creates a multiple executive. The Lieutenant Governor, Attorney General, Secretary of State, Treasurer, and Controller all are directly elected and do not answer to the Governor."] The Attorney General has a constitutional duty to ensure that the laws are uniformly and adequately enforced in California (Cal. Const., art. V, § 13) and statutory control over the Department of Justice. (Gov't Code, § 15000.) Dozens of statutes impose various duties on the Attorney General and DOJ. Thus, there can be no question that the Attorney General, like the other constitutional officers, wields executive authority as surely as the Governor does. For this reason, we do not believe that an executive order, which has been defined as "a formal written directive of the Governor which by interpretation, or the specification of detail, directs and guides *subordinate officers* in the enforcement of a particular law" (63 Ops.Cal.Atty.Gen. 583, 584 (1980), emphasis added), applies to the Attorney General. Accordingly, the Governor lacks the authority to compel the Attorney General to comply with the executive order mandating furloughs.

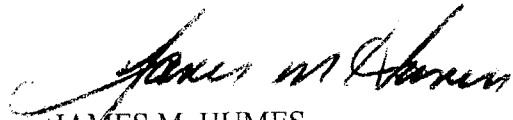
The Attorney General would have intervened in these writ actions had he believed that the Governor intended to apply mandatory furloughs to DOJ employees. He did not do so only because the Governor's Office previously took the position, both in private conversations and

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publicly, that the constitutional officers were not required to participate in the furlough program. (See Goldmacher, *Statewide Dems Say No to Furloughs For Own Staff*, Sacramento Bee (January 12, 2009) [article notes that Governor's Office "has said the furloughs can't be mandated on other constitutional offices" and quotes Governor's spokesman stating that with respect to constitutional officers, furloughs are "their decision"] <available at <http://www.sacbee.com/static/weblogs/capitolalertlatest/018524.html>>.) For the Governor presently to take the position, based on Judge Marlette's order, that he is entitled to require furloughs for the constitutional officers' employees, is tantamount to a bait-and-switch.

We urge the Controller not to implement the furlough order against DOJ employees.

Sincerely,



JAMES M. HUMES  
Chief Deputy Attorney General



**BILL LOCKYER**  
TREASURER  
STATE OF CALIFORNIA

January 30, 2009

John Chiang  
State Controller  
P.O. Box 942850  
Sacramento, CA 94250-5872

RE: State Employee Furlough per Governor's Executive Order S-16-08

Dear Mr. Chiang:

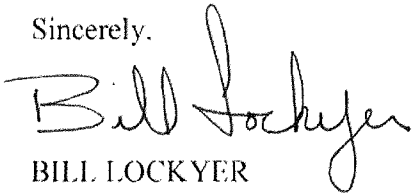
In light of the ruling issued by Judge Marlette yesterday, I am requesting that the State Controller's Office not implement the furlough order in connection with employees under my control and direction. It is my position that the Governor does not have the authority to unilaterally impose a furlough on the employees of the other constitutional officers without their consent and that there is nothing in Judge Marlette's ruling that deals with these issues, which were neither argued nor pled in his court. His order cannot be interpreted to authorize furloughs in the departments under the control and management of constitutional officers other than the Governor.

Government Code section 12302 provides the Treasurer with the exclusive authority, subject to the Civil Service Act, to appoint and fix the salaries of the employees necessary to carry out the duties of the office. In addition, as the office of a separately elected constitutional official, this office has been granted inherent powers and responsibilities and the authority to act independently within certain constraints. For instance, the Treasurer must act within the constraints of budget appropriations and legislative enactments. However, the Treasurer retains the authority to determine how best to carry out his duties without interference from other executive branch elected officials.

I would note that both in private conversations and in statements to the press, representatives of the Governor's Office have previously acknowledged and assured our offices that constitutional officers are not required to comply with Executive Order S-16-08. I do not see anything in Judge Marlette's ruling that would suggest that generally accepted principle to be overturned.

As this matter progresses, we would certainly comply with an appellate court order upholding the Governor's Executive Order and applying it to the constitutional offices; any legislative action taken to impose furloughs on state employees; or agreements reached with state employee bargaining units that are subsequently ratified by the Legislature. However, at this time and as noted above, I am asking that the Controller's Office not implement the Executive Order with respect to employees under my control and direction.

Sincerely,

A handwritten signature in black ink that reads "Bill Lockyer". The signature is written in a cursive style with a large, prominent "B" and "L".

BILL LOCKYER  
California State Treasurer



CALIFORNIA  
DEPARTMENT OF  
EDUCATION

**JACK O'CONNELL**

STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

February 2, 2008

The Honorable John Chiang  
State Controller  
P.O. Box 942850  
Sacramento, CA 94250-5872

Dear Controller Chiang:

I write in response to the Sacramento Superior Court's ruling upholding Governor Arnold Schwarzenegger's employee furlough plan, specifically, the Governor's recent directive to apply his plan to departments not under his auspices. I request that you not apply the furlough to employees under my control and direction, based on my belief that the Governor lacks the authority to unilaterally impose a furlough on state employees who work for an elected constitutional officer other than the Governor. The court proceedings did not address this issue, and the court's order cannot be read to allow or require that my employees be subjected to a furlough at the Governor's directive.

There is good reason why the court's order cannot be given such sweeping application. Until the court's ruling, representatives of the Governor's Office and the Department of Personnel Administration explicitly advised the various constitutional offices that they were not required to comply with Executive Order S-16-08. Instead, the Governor's representatives sought our commitment to achieving the Executive Order's primary objective of a ten percent reduction in General Fund expenditures. This approach is consistent with the position of elected constitutional officers as separately elected leaders charged with the duty to fulfill the obligations of their offices. The State Superintendent of Public Instruction (SSPI) must act within budgetary limitations and legislative enactments, but as an elected official, the SSPI retains inherent powers to determine the manner in which the duties of the office are carried out.

Under my direction, the California Department of Education will do its part to address the state's dire financial situation and achieve General Fund savings. My Department has frozen hiring and contracting, and substantially limited travel and other expenditures. All expenditures are being closely monitored and trimmed. However, reductions will be made by me in a thoughtful manner that preserves, where ever possible, our capacity to carry out vital programs. As an example, it makes no sense to drastically cut federally funded programs that provide meals to needy children, when the goal is a reduction in General Fund spending. In addition, the needs of students at

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California's State Special Schools, which operate on a 24-hour basis, must be given careful consideration.

I remain hopeful that these difficult circumstances can be resolved without the imposition of unilateral furloughs for any state employee, and will follow the progress of further judicial proceedings, collective bargaining efforts, and legislative action. But at this time, for the reasons described above, I ask that the Controller's Office not implement Executive Order S-16-08 for the Department under my control and direction.

Sincerely,

A handwritten signature in black ink that reads "Jack O'Connell". The signature is written in a cursive style with a large initial "J".

JACK O'CONNELL

JO:gp



STEVE POIZNER  
Insurance Commissioner

February 2, 2009

Honorable John Chiang  
State Controller  
300 Capitol Mall  
Sacramento, CA 95814

Dear Controller Chiang:

The Governor's office has informed me that they intend to apply Judge Marlette's court ruling to the Department of Insurance as well as to the offices of the other independently-elected statewide officers. There is legal uncertainty as to the Governor's authority in this matter.

The court's ruling did not specifically address the question of whether the Governor's executive authority to order furloughs extends to other statewide offices. Therefore, I ask you to withhold implementation the ordered furloughs at the Department of Insurance until this matter is resolved.

Thank you for your immediate attention to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Steve Poizner", written over a large, faint circular stamp.

STEVE POIZNER  
Insurance Commissioner