

Execs



DEPARTMENT OF
FINANCE
OFFICE OF THE DIRECTOR

ARNOLD SCHWARZENEGGER, GOVERNOR

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August 13, 2008

Honorable Dean Florez
Chair, Senate Committee on Governmental Organization
State Capitol, Room 5061
Sacramento, CA 95814

Dear Senator Florez:

This is in response to your letter of August 7, 2008 in which you ask several follow up questions relative to my letter of August 6, which answered the follow up questions you had after the hearing you conducted on August 5 related to Executive Order S-09-08.

First, I am happy to note that you agree with the Governor's position on two critical points:

- "I agree with your assertion that the Governor's Executive Order does not exempt any employee from *White v. Davis*. Such an Assertion is clearly outside the Governor's authority." This exact point—that *White v. Davis* is the law of the land—is at the heart of our lawsuit to compel the Controller to implement the order and thereby uphold the Constitution. So it is indeed gratifying that you see the issue just as we do on this critical point.
- "In order for any employee, such as officers in the California Highway Patrol, to be paid more than minimum wage **they necessarily must work overtime**" (emphasis in the original). While this statement is not entirely true, as I will explain below, the central point of it, that workers who do not work overtime must receive payment at the minimum wage in the absence of budget, is right on the money.

From your second statement quoted above, it is clear that you overlooked an important distinction that I made in my first letter. As I noted, *White v. Davis* says that the state must pay minimum wage to employees that "it reasonably anticipates will not work overtime." Our exemption process is designed to clarify for the Controller which employees can reasonably be expected to work overtime and which can not.

This concept (reasonable expectation) is the key to our answer to your question about our financial rationale in exempting 14 departments from the ban. You seem to believe that all of the employees in those departments must work overtime to be paid full salary rather than minimum wage. Were that the case, it would certainly represent an additional expense. Of course, we are certainly not requiring all such employees to work overtime. In fact, directors of those exempt departments are urged to keep overtime to a prudent minimum, consistent with public safety and adequate care. We are merely advising the Controller that there is a reasonable expectation that employees in those departments will work overtime. This does not mean that we expect them all to do so, only that we would not rule out the possibility that any of them might. As a result 59,000 employees of these departments who are subject to the FLSA are exempt from the overtime ban.

The Department of Corrections and Rehabilitation (CDCR) is the largest user of overtime in state government and its overtime is almost entirely financed by the General Fund. We believe that S-09-08 provides an opportunity to achieve substantial General Fund savings by reducing unnecessary overtime at CDCR. At the same time, we are very cognizant of the need for maximizing safety in our prisons. As

Honorable Dean Florez
August 13, 2008
Page 2

a result, the Secretary of CDCR has granted a large number of exemptions to the overtime ban. We will continue working with the Secretary to determine how best to inform the Controller as to which units, classifications, or other subdivisions or groups within CDCR are reasonably likely to work overtime and which are not.

In closing, I want to thank you for recognizing that the Constitution of the State of California does not authorize the expenditure of state funds without a legal appropriation, a fundamental principle designed to jealously guard the Legislature's prerogative to appropriate money.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael C. Genest", written in a cursive style.

MICHAEL C. GENEST
Director