No. C061011

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

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.

On Appeal of an Order and Judgment
by the Sacramento County Superior Court,
Case No. 34-2008-80000126-CU-WM-GDS,
The Honorable Patrick Marlette

APPELLANT STATE CONTROLLER'S OPENING BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about separation of powers. The issue is which branch of government – the legislative or the executive – may reduce state employees' salaries by requiring them to take two unpaid furlough days a month. The Governor insisted that he may unilaterally implement such a plan, thereby reducing state employees' pay by 10 percent per month, and the Superior Court agreed with him. On July 1, 2009, the Governor announced that he would impose a third furlough day on state employees, increasing the pay cut for state workers to 15 percent. As of this writing, no court has yet ruled on the legality of the third furlough day.

Nothing in the statutes on which the Governor or the Superior Court relied grants the Governor the right to furlough state employees, thereby cutting their salaries. Determining state employees' workweeks and setting their salaries are legislative functions, and prior to February 20, 2009, the Legislature had not delegated any authority to the executive branch to cut state employees' salaries or to shorten their workweeks. To the contrary, state law has long set the 40-hour workweek as state policy. (Gov. Code, § 19851.)

As described more fully below, the 2008-09 Budget Act revision passed on February 20, 2009 allows the Department of Personnel Administration to reduce compensation for certain employees, but for employees represented by unions like petitioners here, it expressly directs that the reductions be accomplished through collective bargaining. For represented employees, the question of whether the reductions are to be achieved through furloughs, salary adjustments, or layoffs is to be resolved at the bargaining table, not by executive order. Thus, the Legislature has

not authorized either of the Governor's furlough orders, and without such authorization, the Controller cannot legally implement them.

The Controller is acutely aware of the extent of the fiscal crisis that has prompted the Governor's actions. Indeed, as the constitutional officer entrusted with overseeing the State's fiscal affairs, his knowledge of the crisis and its implications is probably unparalleled in state government. But the exigencies of the crisis cannot be used to overcome the rule of law and the dictates of the Constitution. Without legislative authorization, the Controller cannot lawfully implement the Governor's orders.

STATEMENT OF FACTS AND OF THE CASE

In a November 6, 2008 letter to state employees, Governor Arnold Schwarzenegger announced that he would propose a combination of revenue increases and spending reductions to deal with the State's worsening fiscal situation. (CASE JA 306-307.)[1] The letter stated that, "*if approved by the Legislature*, these spending reductions will impact our state workers." (*Id.* at 306, emphasis added.) One of the Governor's proposed reductions was to furlough state workers one day a month with a corresponding pay cut of approximately 5 percent. In his letter, the Governor acknowledged that "[a]ll of the actions we're proposing must first be approved by the Legislature." (*Id.* at 307.)

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[1] The Controller cites to the three separate joint appendices filed in three related appeals: (1) the joint appendix filed in this appeal ("PECG JA"), (2) the joint appendix filed in appellate case no. C061009 ("CASE JA"), and (3) the joint appendix filed in appellate case no. C061020 ("SEIU JA").

On the same day, the Governor called the Legislature into special session and submitted proposed legislation to address the State's fiscal crisis. (CASE JA 309.) The Governor's legislation included a proposal to add section 19826.4 to the Government Code to require the Department of Finance and the Department of Personnel Administration ("DPA") to "implement a program for the furlough of state employees." (*Id.* at 312.) The Legislature did not pass the Governor's proposed legislation.

On December 1, 2008, less than one month after calling the first special session to deal with the fiscal crisis, the Governor called another special session, this time invoking Proposition 58, which added subparagraph (f) to article IV, section 10 of the Constitution to establish procedures for dealing with future state fiscal crises. (Controller's Request for Judicial Notice ["Controller's RJN"], Exh. A at 20; *see also* CASE JA 326.) Once again, the Governor submitted legislation that included his plan to furlough state employees one day a month. (CASE JA 326, 343.) Once again, the Legislature declined to pass it.

Article IV, section 10(f) allows the Legislature 45 days to pass legislation in a fiscal crisis special session; if it does not do so, the Legislature is prohibited from acting on any other bill or adjourning in joint recess until it passes legislation to deal with the fiscal crisis. Despite the 45-day provision, on December 19, 2008, the Governor issued an executive order directing DPA to "implement a furlough of represented state employees and supervisors for two days per month" effective February 1, 2009 through June 30, 2010. (CASE JA 347.) The Governor's order exempted employees who work for "other entities of State government not

under my direct executive authority," including the state's universities and community colleges, as well as the legislative and judicial branches. (*Id.*)

On January 9, 2009, DPA Director David Gilb sent a memorandum to all state departments announcing that general government operations would be closed on the first and third Friday of each month, beginning on February 6, 2009. (*Id.* at 350.) For operations that cannot close, the memorandum said that agency heads may request approval from DPA to use a "self-directed" furlough program for specific positions, under which employees would either choose two furlough days per month with approval of their supervisors or accrue two furlough days to be taken when feasible. (*Id.*)

The Governor's order prompted a number of lawsuits, three of which comprise the related actions at issue here. On December 22, 2008, Professional Engineers in California Government ("PECG") and the California Association of Professional Scientists ("CAPS") filed a petition for writ of mandate in the Sacramento Superior Court (No. 34-2008-80000126) against the Governor, DPA, and the State Controller to stop implementation of the Governor's executive order. On January 5, 2009, California Attorneys, Administrative Law Judges and Hearing Officers in State Employment ("CASE") filed a similar petition for writ of mandate in Sacramento Superior Court (No. 34-2009-80000134), and Service Employees International Union Local 1000 ("SEIU") did the same on January 7, 2009 (No. 34-2009-80000135).

The parties in all three cases stipulated to a briefing and hearing schedule that would allow the cases to be heard simultaneously before Judge Patrick Marlette prior to the February 1, 2009 date that the Governor had set for his order to go into effect. (PECG JA 653.) The

Governor and DPA opposed the petitions and filed a demurrer arguing that the petitions should first have been brought before the Public Employee Relations Board. (*Id.* at 97; *see generally id.* at 99-110.) The Controller filed a brief in support of petitioners in all three cases and in opposition to the Governor's demurrer. (*Id.* at 611-619.)

On January 29, 2009, the trial court heard argument and issued its order denying the petitions. (*Id.* at 650-659.) As part of that ruling, the trial court effectively realigned the Controller with petitioners, and despite the fact that no party had requested such relief, the court ordered the Controller to comply with the Governor's executive order. (*Id.* at 654, fn. 1, 659.)

SEIU filed a petition for writ of supersedeas on February 2, 2009, which this Court denied on February 27, 2009. (*SEIU v. Schwarzenegger, et al.*, No. C061020.)

On February 3, 2009, the Controller sent a letter to the trial court requesting clarification as to whether the court's order applied to employees in offices supervised by independently elected constitutional officers and other elected state-wide officials. (PECG JA at 679-692.) The trial court issued an order "express[ing] no view regarding" the issue of whether the court's ruling applied to "independently elected constitutional officers" and other elected statewide officials. (*Id.* at 693-695.) The Controller subsequently informed the Governor's office that he would not implement furloughs for the employees of the State's constitutional officers without a court order directing him to do so, because the constitutional officers' agencies are not subordinate agencies of the Governor. In response, the Governor filed a petition for writ of mandate against the Controller, and on March 12, 2009, Judge Marlette ruled that the Controller

must implement the Governor's furlough order with respect to employees who work for state constitutional officers. (Controller's RJN, Exh. B.) The trial court's order has been stayed by respondents' appeal, which is currently pending before this Court as appellate case number C061648.[2]

On February 20, 2009, the Governor signed Senate Bill 2, Third Extraordinary Session ("SBX3 2"), which revised the 2008-09 Budget Act. (Controller's RJN, Exh. C.) That bill included direction to DPA to make specified reductions in state employee compensation "achieved through the collective bargaining process for represented employees or through existing administration authority and a proportionate reduction for nonrepresented employees . . . ." (*Id.* at 31.) In SBX3 2, the Legislature stated its intent to make similar reductions in employee compensation for the 2009-10 fiscal year. Those reductions were included in SBX3 1, which the Legislature passed the same day. (Controller's RJN, Exh. D at 633.) Following passage of SBX3 2, DPA and SEIU 1000

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[2] CASE filed a separate action against the Governor, the Controller and others in San Francisco Superior Court challenging the Governor's furlough order as it applied to the State Compensation Insurance Fund ("SCIF"). (San Francisco Sup. Ct. No. CPF-09-509205.) The trial court in that action held that the Fund is not an executive branch agency and that Fund employees are exempt from the Governor's order pursuant to Insurance Code section 11873(c). That case is now pending in the First District Court of Appeal as No. A125292. CASE and SEIU have since filed two other lawsuits in San Francisco Superior Court involving furloughs at SCIF. (S.F. Sup. Ct. Nos. CPF-09-509629 and CPF-09-509580.) In addition, on August 19, 2009, the California Public Employees' Retirement System filed a lawsuit in San Francisco County Superior Court challenging the Governor's furlough order as it applies to CalPERS employees. (*CalPERS v. Schwarzenegger*, S.F. Sup. Ct. No. CPF-09-509754.)

negotiated a tentative agreement that provided for one furlough day per month for members of SEIU bargaining units. That agreement requires legislative approval and is currently pending in the Assembly as AB 964.[3]

On May 19, 2009, the voters disapproved several constitutional amendments that were part of the budget package passed in February,[4] and the State's fiscal crisis worsened. On July 1, 2009, the Governor issued Executive Order No. S-13-09, which institutes a third furlough day each month for state employees. (Controller's RJN, Exh. E.) On July 24, 2009, the Legislature passed AB4X 1, which reduced certain appropriations in the February, 2009 Budget Act. The Governor signed the bill on July 28, 2009. Although AB4X 1 amended the section of the February 2009-10 Budget Act that directed DPA to achieve reductions in employee compensation, it did so only by increasing the amount of the specified reductions. It did not change the language requiring that the reductions be "achieved through the collective bargaining process for represented employees or through existing administration authority and a proportionate reduction for nonrepresented employees . . . ."[5]

Because this Court denied SEIU's petition for writ of supersedeas to stay the trial court's ruling in these cases, the Controller is

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[3] The bill can be viewed at the Legislative Counsel's website at <http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0951_1000/ab_964_bill_2009023_amended_asmv98.pdf> [as of August 31, 2009].

[4] The election results for the May 19, 2009 special election and the measures that appeared on that ballot are available through the Secretary of State's web site at <http://www.sos.ca.gov/elections/elections_j.htm>.

[5] Controller's Supplemental Request for Judicial Notice ("Controller's Supp. RJN"), Exh. A at 425.

currently implementing the Governor's orders imposing three furlough days a month, with the exception of those employees who work in agencies headed by constitutional officers.

Because the issues are virtually identical in all three cases, this brief will serve as the Controller's opening brief in all three cases.

STATEMENT OF APPEALABILITY

The judgment appealed from is final. (Civ. Proc. Code, § 904.1(a)(1).) Petitioners in each of the three cases filed timely notices of appeal, as did the Controller.

STANDARD OF REVIEW

The trial court's ruling was confined almost entirely to issues of law and undisputed facts, and therefore this Court's review of that ruling should be *de novo*. (*Hofman Ranch v. Yuba County Local Agency Formation Com.* (2009) 172 Cal.App.4th 805, 810; *Riverside Sheriffs' Assn. v. County of Riverside* (2009) 173 Cal.App.4th 1410, 1418.)

As discussed in section III(B)(1) below, however, to the extent that the trial court based its ruling on an interpretation of the existing MOUs between the State and petitioners, it should have afforded the parties an opportunity to develop an evidentiary record, either in the court below, or before the State Public Employee Relations Board, as to the meaning of the MOU provisions upon which the trial court relied.

ARGUMENT

I.

THE CONTROLLER CAN ONLY ISSUE PAYROLL WARRANTS AUTHORIZED BY LAW

Although he was named as a respondent in these actions, the Controller agrees with petitioners that the Governor has overstepped his authority. As the constitutional officer charged with superintending the fiscal concerns of the State and in particular, the officer responsible for the State payroll,[6] the Controller must strictly adhere to the constitutional and statutory provisions that govern the performance of his duties. Article XVI, section 7 of the Constitution provides that "[m]oney may be drawn from the Treasury only through an appropriation made by law and upon a Controller's duly drawn warrant." Government Code section 12440 provides:

> The Controller shall draw warrants on the Treasurer for the payment of money directed by law to be paid out of the State Treasury; but a warrant shall not be drawn unless authorized by law, and unless, except for refunds authorized by Section 13144, unexhausted specific appropriations provided by law are available to meet it.

Setting public employee salaries is a quintessentially legislative act. (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 189; *Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1322, fn. 8.) The power to increase or decrease state employee salaries, therefore, is the prerogative of the Legislature. The Legislature, of course, can delegate this

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[6] Gov. Code, §§ 12410, 12470 et seq.

authority to an administrative agency, and in *Tirapelle*, *supra*, this Court held that the Legislature had properly delegated some of its salary-setting authority to DPA. When that Department reduced salaries for unrepresented supervisory and managerial employees by five percent, then-Controller Gray Davis had refused to implement the order on the ground that it violated state prevailing wage laws. (20 Cal.App.4th at 1326-1327, 1332.) This Court held that the Controller was required to implement the salary reduction because the Legislature had delegated the authority to DPA:

> [W]e conclude that the Controller's duty to audit claims against the Treasury includes the duty to ensure that expenditures are authorized by law, but does not include the power to review and approve or reject decisions of a department vested by the Legislature with authority over expenditures.
>
> (*Id.* at 1335.)

Thus, if the Governor acts within the jurisdiction delegated to him by the Constitution or the Legislature, the Controller must and will defer to him. But the Controller has a "duty to ensure that expenditures are authorized by law," and if the Governor's Executive Order is *not* authorized by law, the Controller cannot comply with it. (*Id.*) As demonstrated below, nothing in the Constitution or statute allowed the Governor to reduce state employees' salaries by ordering them to take unpaid furlough days each month.

II.

THE GOVERNOR HAD NO LEGAL AUTHORITY TO REDUCE STATE EMPLOYEE HOURS AND WAGES UNILATERALLY

A. The Constitutional Authority to Deal With a Fiscal Crisis Rests With the Legislature

1. The passage of Proposition 58

Only five years ago, the voters added procedures to the California Constitution designed to deal with the very kind of fiscal crisis the State confronted this year. Those procedures did not include giving the Governor the authority to reduce state worker salaries without legislative approval. Instead, the amendments approved by the voters make clear that the authority and responsibility to deal with a fiscal crisis lie with the Legislature.

Proposition 58 appeared on the March 2, 2004 ballot. The measure was an Assembly Constitutional Amendment strongly supported by Governor Schwarzenegger, who signed both ballot arguments urging voters to adopt it.[7] Among other things, Proposition 58 amended article IV, section 10 of the Constitution to read as follows:

> If, following the enactment of the budget bill for the 2004-05 fiscal year or any subsequent fiscal year, the Governor determines that, for that fiscal year, General Fund revenues will decline substantially below the estimate of General Fund revenues upon which the budget bill for that fiscal year, as enacted, was based, or General Fund expenditures will increase substantially above that estimate of General Fund revenues, or both, the Governor may issue

[7] Controller's RJN, Exh. A at 14-15.

> a proclamation declaring a fiscal emergency and shall thereupon cause the Legislature to assemble in special session for this purpose. The proclamation shall identify the nature of the fiscal emergency and shall be submitted by the Governor to the Legislature, accompanied by proposed legislation to address the fiscal emergency.
>
> (*Id.* at § 10(f)(1).)

Thus, Proposition 58 carefully delineated the Governor's authority to deal with a mid-year fiscal crisis: He may declare a fiscal emergency, call the Legislature into special session, and submit proposed legislation directly to the Legislature, with no need to find a member of the Legislature to carry his bill.

What happens if the Legislature fails to act? Proposition 58 prescribed the remedy for that as well:

> If the Legislature fails to pass and send to the Governor a bill or bills to address the fiscal emergency by the 45th day following the issuance of the proclamation, the Legislature may not act on any other bill, nor may the Legislature adjourn for a joint recess, until that bill or those bills have been passed and sent to the Governor.
>
> (*Id.* at § 10(f)(2).)

These procedures were invoked and put into use this year. As noted above, on December 1, 2008, Governor Schwarzenegger declared a fiscal emergency and called the Legislature into special session to deal with it. On February 20, 2009, the Legislature sent a number of bills to the

Governor[8] and passed legislative constitutional amendments to put before the voters at a May 19, 2009 special election. The Governor signed the bills, temporarily easing the fiscal crisis, but the voters did not approve the constitutional amendments that were part of the package.[9] That failure, combined with lower state revenues due to the worsening recession, caused the Legislature to remain in special session until July 24, 2009, when it passed ABX4 1.[10]

Nothing in the Constitution gives the Governor emergency powers to lower state employees' wages unilaterally by reducing their workweek. Instead, Proposition 58 reinforced the fundamental principle that it is the Legislature's responsibility to set the State's fiscal course and, if cuts are necessary, to decide where and how they are to be made. Unless the Legislature has expressly delegated that responsibility to him, the Governor lacks the authority to make those decisions.

2. The outcome of the February, 2009 Special Session and May special election

That the Legislature has *not* given the Governor the authority to reduce salaries is clear from recent actions it has taken to deal with the current fiscal crisis. In September of 2008, the Legislature enacted

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[8] As discussed more fully below, the package included authority for DPA to reduce employee compensation administratively for certain employees who are not members of a recognized bargaining unit and required that DPA engage in collective bargaining as to the others.

[9] Cal. Secretary of State, Election Returns at <http:// www.vote.sos.ca.gov/ returns/props/59.htm> [as of July 16, 2009].

[10] *See* Assembly Daily Journal, July 23, 2009, at <http://www.assembly. ca.gov/clerk/legisdocs/adj072309xxxx.pdf> [as of August 31, 2009].

Government Code section 13312, which would have given the Governor's Director of Finance authority to reduce appropriations for state operations if it became clear part-way into a fiscal year that a deficit would occur. In its original form, section 13312 stated, however, that it would only become operative if the voters passed constitutional amendments to article IV, section 12 and added a new section to article XVI of the California Constitution.[11]

As originally enacted, section 13312 would have given the Director of Finance new authority to reduce expenditures but prohibited him from reducing appropriations for a variety of purposes, including compensation for employees of the State's constitutional officers or cost of living adjustments for other state employees negotiated as part of a collective bargaining agreement.[12] Thus, even as it was originally enacted, section 13312 demonstrated that the Legislature did not construe then-existing law as giving the executive branch the authority to reduce appropriations for state operations – and therefore state spending for those operations – in order to deal with a fiscal crisis. If existing law had given such authority to the executive branch, then there would have been no need for section 13312.

The February, 2009 bills enacted as part of the special session made the Legislature's understanding even more clear. One of those bills, SBX3 8, amended section 13312 to add a new category to the list of

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[11] West's Ann. Cal. Codes, Historical & Statutory Notes, Gov. Code, § 13312.

[12] Controller's RJN, Exh. F at 38-39, § 33.

appropriations that the Director of Finance could not reduce in response to a fiscal crisis: "Any collective bargaining agreement with a recognized state employee organization." (Gov. Code, § 13312(b)(1)(I).) The bill also provided that section 13312 "shall only become operative if either Senate Constitutional Amendment 1 or Assembly Constitutional Amendment I in the 2009-10 Third Extraordinary Session is submitted to, and approved by, the voters at a statewide election." (*Id.* at § 13312(g).)

Thus, if section 13312 had become operative, it would have given the Director of Finance authority that he currently does not have: to reduce appropriations for the operations of executive agencies not under the control of the constitutional officers to the extent that they are not subject to collective bargaining agreements.

Section 13312 did *not* become operative, however, because the voters defeated the constitutional amendments to which it was tied at the May 19, 2009 special election. In doing so, the voters were aware that if they approved those amendments, section 13312 would go into effect. They were also aware of how section 13312 would change existing law. The Legislative Analyst's Analysis of Proposition 1A in the May 19, 2009 ballot pamphlet explained the change by first describing existing law as follows:

> **Authority to Reduce Spending**
>
> Once the annual budget has been approved by the Legislature and the Governor, the Governor has only limited authority to reduce spending during the year without legislative approval.
>
> (Controller's RJN, Exh. G at 2.)

The Analysis then described the change that would be made if Proposition 1A were to pass:

> **Governor's Authority to Reduce Spending**
>
> If Proposition 1A passes, the Governor would be given new authority to reduce certain types of spending during a fiscal year without additional legislative approval. (This authority is included in a part of a new law that will only go into effect if Proposition 1A passes.) Specifically, the Governor could reduce:
>
> - Many types of spending for general state operations (such as equipment purchases) or capital outlay by up to 7 percent.
>
> - Cost-of-living adjustments (COLAs)—provided to account for inflation—for any programs specified in the annual budget. This would not apply to any increases for most state employees' salaries.

(*Id.* at 5.)

Two things are apparent from this history. First, the Legislature did not believe that the Governor or Director of Finance had the authority to reduce state employees' salaries, but it was willing to give them certain limited authority to do that if the voters approved constitutional amendments to reform the state budget process. Second, the limited authority the Legislature was willing to give to the executive branch did not include the authority to alter collective bargaining agreements or to reduce appropriations for state constitutional officers. No matter what the voters did, the Legislature wanted to retain that authority, along with the other exceptions included in section 13312.

As it was, the voters declined even to give that much power to the Governor, because they defeated Proposition 1A. Thus, if there were any doubt before May 19, 2009 about the Governor's power to reduce employee salaries, that doubt has been erased by the vote on Proposition 1A. Despite this defect – or perhaps because of it – when the Legislature convened in its fourth special session, it did not include any authority for the Governor to reduce appropriations for the operations of executive agencies or to alter collective bargaining agreements as part of AB4X 1.

B. The Governor Had No Authority to Reduce the Forty-Hour Workweek Set by State Law

In the court below, respondents argued that they have authority to reduce state employee hours pursuant to Government Code section 19816, relating to the DPA, and section 3516.5, a provision of the Ralph C. Dills Act, which governs state employer/employee relations. The trial court rightly ignored these provisions, but concluded that Government Code sections 19851 and 19849 confer statutory authority on the Governor to order furloughs for state employees. (PECG JA 660-672.) None of these statutes authorizes the Governor to impose work furloughs on state employees. We begin with the provisions upon which the trial court relied.

1. Government Code section 19851

Both sides in this dispute relied on section 19851, but for different purposes. The first part of that section provides: "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." (Gov. Code, § 19851(a).)

Petitioners focused on the general state policy "that the workweek of the state employee shall be 40 hours, and the workday of state employees eight hours . . . ." Respondents, and the trial court, focused on the exception: ". . . 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."

Respondents' interpretation of the exception is inconsistent with both the statutory language and its legislative history. Allowing "workweeks and workdays of a different number of hours . . . to meet the varying needs of the different state agencies" is not the same as an across-the-board cut in hours. The Legislature did not say that workweeks and workdays could be shortened in every agency in the event of a fiscal emergency. It did not even say specifically that the workweek could be shortened at all. Even assuming that the Legislature contemplated a shorter workweek, it intended that the change could only be instituted to "meet the varying needs of the different state agencies." The Governor's order is the antithesis of that requirement. Rather than order the shortened workweek as the exception to the normal 40-hour workweek rule, the Governor's order does the opposite. With only a few exceptions, every state employee under the control of the executive branch has now been told to work a 32-hour week three out of every four weeks, with a corresponding reduction in pay. Such a sweeping one-size-fits-all approach is not consistent with the language of the statute, and it makes a mockery of the state policy codifying a 40-hour workweek.

The statute's legislative history reinforces the limited nature of the statutory exception to the 40-hour rule. The language first appeared in 1955 in Assembly Bill 1464, which amended two sections of the Government Code and added a third, all having to do with payment of overtime compensation to state employees.[13] Although the amendment to then-section 18020 reads exactly as section 19851(a) reads today, it is important to look first at what the new language replaced. Prior to the 1955 amendment, section 18020 read as follows:

> The State Personnel Board shall establish the work week for each position or class in the state service for which a monthly or annual salary range is fixed, whether or not the position or class is subject to state civil service, by allocating, and reallocating as the needs of the service require, each class or position to one of the following groups:
>
> (1) Classes and positions with a work week of 40 hours;
> (2) Classes and positions with a work week of 44 hours;
> (3) Classes and positions with a work week of 48 hours;
> (4) Classes and positions with conditions or hours of work requiring the establishment by the Personnel Board of special provisions governing hours of work or methods of compensation for overtime.
>
> (Controller's RJN, Exh. H at 2.)

Thus, whereas prior law divided the state workforce into three groups with workweeks of 40, 44, and 48 hours respectively, and a fourth

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[13] Controller's RJN, Exh. H at 2-3.

group of all others, the 1955 amendment established the 40-hour workweek as the norm, but allowed the executive branch to set workweeks of other lengths based on the specific needs of the particular agency involved. The other workweek lengths at issue, however, were *longer,* not shorter, than 40 hours.

The change in the law makes clear what problem the Legislature was trying to solve. Contrary to the trial court's reading of the statute, the Legislature was not trying to give the executive branch the authority to *reduce* state employee time; it was trying to delineate the circumstances under which the executive could *increase* that time and to make sure that if it did, it compensated employees for overtime.

The Legislature confirmed this intent when it amended then-section 18020 again in 1974 to provide: "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." (Controller's RJN, Exh. I at 8, emphasis added.) The Bill Analysis prepared by the Assembly Committee on Employment and Public Employees described the subject of AB 3436 as "Overtime in State Service in excess of normal workday" and summarized the amendment to section 18020 as follows:

> AB 3436 provides that overtime be paid when a state employee works in excess of his normal workday or in excess of his normal workweek.
>
> (*Id.* at 49.)

The Analysis also included this Comment:

> Proponents argue that employees who are required to work overtime on a daily basis but who work only a "normal" work week as a result of compensating time-off suffer from disruption of car pools and of family life with no premium compensation. To provide overtime on a daily basis would discourage the use of overtime consonant with state policy and compensate a state employee for the disruption to this schedule.
>
> (*Id.*)

The Legislature's intent is clear: to avoid uncompensated overtime and address work practices that impinge on state employees' personal lives. Far from intending to enlarge the authority of the Governor or the SPB over employee workweeks, the Legislature was trying to rein in what it perceived as abusive practices on the part of state employers.

If there were any doubt about the limits of the authority given to the Governor and DPA under section 19851, one need only look at sections 19852 and 19996.21 of the Government Code. Section 19852 reads as follows:

> When the Governor determines that the best interests of the state would be served thereby, 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.
>
> (Gov. Code, § 19852.)[14]

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[14] Section 19852 was first added in 1971 as then-section 18020.1. It was renumbered as section 19852 in 1981. (West's Ann. Cal. Codes, Historical & Statutory Notes, Gov. Code, § 19852.)

Section 19852 clearly would not be necessary if section 19851 gave the Governor the kind of authority that he claims. Instead, it provides an excellent example of the familiar maxim *expressio unius est exclusio alterius,* which the California Supreme Court has translated as "[t]he expression of some things in a statute necessarily means the exclusion of other things not expressed." (*Gikas v. Zolin* (1993) 6 Cal.4th 841, 852. *Accord Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1391, fn. 13.) By expressly granting the Governor the power to order that the 40-hour workweek be accomplished in four days instead of five, the Legislature made clear that it had *not* granted the Governor the power to order that the 40-hour workweek be reduced to 32 hours, with a corresponding cut in pay.

Government Code section 19996.21 is even more explicit:

> (a) It is the policy of the state that to the extent feasible, reduced worktime be made available to employees who are unable, or who do not desire, to work standard working hours on a full-time basis. Further, it is the intent of the Legislature that nothing in this act shall be used to reduce the number of full-time equivalency positions authorized to any department.
>
> (b) If the department determines that a reduction in the personnel of departments or agencies of state government equivalent to 1 percent or more or full-time equivalent jobs is contemplated in a single fiscal year, the director may conduct or may direct each affected department or agency to conduct a survey of either all permanent full-time employees or those permanent full-time employees most likely to be affected by the personnel reduction. The purpose of the survey shall be to determine

> the extent of the desire of employees to participate in voluntary reduced worktime.
>
> The survey shall contain information clearly informing employees of potential worktime options, the effect reduced worktime would have on benefits, and the right to return to full-time work as specified in Section 19996.24.

To underscore its intent that reduced worktime be *voluntary*, the Legislature added Government Code section 19996.22, which reads:

> (a) Any employee who is being coerced, or who has been required, by the appointing power, a supervisor, or another employee, to involuntarily reduce his or her worktime contrary to the intent of this article, or who has been unreasonably denied the right to participate in this program, may file a grievance with the department.
>
> (b) Any employee of the California State University system who is being coerced, or who has been required by the appointing power, a supervisor, or another employee, to involuntarily reduce his or her worktime contrary to the intent of this article, or who has been unreasonably denied the right to participate in this program, may file a grievance pursuant to the procedures established by the Trustees of the California State University.
>
> (c) Nothing in this article shall impair the employment or employment rights or benefits of any employee.
>
> (d) This article shall not apply to employees who are full-time state peace officers unless approved by the peace officers' appointing power.

In this case, contrary to the Legislature's intent, virtually every state employee is being coerced "to involuntarily reduce his or her worktime," in clear violation of the law.

2. Government Code section 19849

The trial court also relied on Government Code section 19849, which reads in its entirety 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.

Section 19849 merely sets up a process by which DPA is to perform its regulatory function. It does not vest the Department with any authority separate and apart from its enabling statutes. Unless some other statute confers authority on DPA to impose a furlough on state employees, it cannot adopt rules to that effect pursuant to section 19849. (Gov. Code, §§ 11342.1, 11342.2; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 321[15] ["[I]t is well established that the rulemaking power of an

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[15] Superseded by statute on other grounds as noted in *Milhous v. Franchise Tax Bd.* (2005) 131 Cal.App.4th 1260, 1267.

administrative agency does not permit the agency to exceed the scope of authority conferred on the agency by the Legislature."].)

Most importantly, no agency may adopt a rule that conflicts with a statute passed by the Legislature. (*Agricultural Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 419 ["'Administrative regulations that violate acts of the Legislature are void . . .'"], citation omitted.) As demonstrated above, the Legislature has mandated a 40-hour workweek for state employees. Neither the Governor nor the DPA has the authority to change the workweek policy without legislative authorization.

Finally, and most obvious, the Department did not "adopt rules governing hours of work" within the meaning of the statute. The Legislature's mandate that the Department "shall adopt rules" means that it shall do so pursuant to the notice and comment provisions of the Administrative Procedure Act ("APA"), Government Code section 11340 et seq., which apply unless the Legislature expressly provides to the contrary.[16] (*See, e.g.*, Gov. Code, § 11361 [setting forth exceptions to the requirements of the APA].) Clearly, these procedures were not followed.

3. Government Code sections 19816 and 3516.5

The Governor and DPA argued that Government Code sections 19816 and 3516.5 authorize DPA to implement the Governor's

[16] Under the APA, a rule has two principal identifying characteristics: First, the agency must intend its rule to apply generally to a certain class of cases rather than to a specific case. Second, the rule must be intended to implement, interpret or make specific the law administered by the agency. (Gov. Code, § 11342.600.) If a rule meets both of these characteristics, it must be adopted in accordance with specified procedures, including public notice, public comment and review by the Office of Administrative Law for consistency with the law, clarity, and necessity. (*See id.* at §§ 11340 et seq.)

furlough order. (PECG JA 439-444.) Section 19816, however, merely provides that DPA succeeds to the same authority exercised by the State Personnel Board "with respect to the administration of salaries, hours, and other personnel-related matters . . . ." If the State Personnel Board did not have authority to furlough state employees, then DPA cannot claim it pursuant to section 19816. Because DPA offers nothing to demonstrate that the State Personnel Board ever had authority to impose involuntary furloughs on state employees, section 19816 is of no use to respondents.

Section 3516.5 is similarly inapposite. That section merely provides a process that the State may use to adopt an emergency law or regulation without first meeting and conferring with recognized employee organizations. As is clear from the text, which is set out in full below, section 3516.5 does not confer independent authority on anyone in the executive branch to reduce employee salaries:

> 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.

Nothing in section 3516.5 gives the Governor or DPA authority to *adopt* a law, rule, resolution or regulation. Indeed, taken to its logical extreme, respondents' argument would allow them to bypass the Legislature altogether, if section 3516.5 truly conferred authority on them to reduce public employee salaries in the event "that a law . . . must be adopted immediately" without meeting and conferring with employee organizations. The provision does not do that, of course. It merely says that when the appropriate entity enacts a law or regulation on an emergency basis, the meet and confer process may occur "at the earliest practical time following the adoption of such law, rule, resolution, or regulation."[17]

Because section 3516.5 confers no authority on the Governor or the DPA to order involuntary furloughs for state employees, the trial court rightly ignored it.

III.

EVEN IF THE GOVERNOR CAN REDUCE WORKWEEKS AND SALARIES FOR NON-REPRESENTED EMPLOYEES UNDER HIS DIRECT CONTROL, HE CANNOT DO SO FOR EMPLOYEES WHO BELONG TO A RECOGNIZED BARGAINING UNIT

Even if this Court were to conclude that the Government Code sections discussed above allow the Governor to order a reduced workweek for employees who are under his direct control, the Legislature

[17] *See* Cal. Const., art. IV, § 8(d) (urgency statutes); Gov. Code, § 11346.1 (emergency regulations).

has expressly prohibited DPA from making unilateral adjustments to the salary ranges of represented employees. As explained in Part II(A)(2) above, the history of Government Code section 13312, which the voters decided should not go into effect, makes this clear. Even without section 13312, however, the Legislature has demonstrated its unwillingness to allow the Governor to reduce salaries for represented employees. It has done so three times: first in Government Code section 19826, again in revisions to the 2008-09 Budget Act passed last February, and most recently in AB4X 1 passed in July, 2009. In light of these clear pronouncements, the Governor's furlough orders cannot be made applicable to represented employees, whether or not they are under the Governor's direct control.

A. The Governor's Orders Are Barred by Statute With Respect to Represented Employees

Government Code section 19826 reads 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.
>
> . . .

Section 19826, subdivision (b) expressly precludes DPA from adjusting or even recommending a salary range for represented employees. Instead, as this Court has held, the Legislature has committed that function to the collective bargaining process and reserved to itself the authority to approve collective bargaining agreements. (*Department of Personnel Admin. v. Superior Court (Greene)* (1992) 5 Cal.App.4th 155, 185.)

The *Greene* case arose out of a fiscal crisis in the early 1990s similar to the one the State faces today. (*Id.* at 163.) As part of the state Budget Act, the Legislature ordered a $351 million reduction in employee compensation and ordered the Director of Finance to allocate the reduction to the various items of appropriation for different state agencies, with the exception of the Legislature and the Legislative Counsel. (*Id.*) At the same time, DPA was negotiating with various state employee unions for new collective bargaining agreements. When those negotiations reached impasse, DPA unilaterally imposed its last, best offer, thereby reducing represented employees' salaries by 5 percent. (*Id.* at 164.)

This Court held that Government Code section 19826 prohibited DPA from imposing the salary cuts on represented employees, noting that the plain language of subdivision (b) "unambiguously precludes DPA from adjusting represented employees' salaries." (*Id.* at 174.) The Court rejected DPA's argument that the Dills Act allows it to impose its last, best offer at impasse when the bargaining agreement has expired.

Comparing the language of the Dills Act to other public employee relations statutes, the Court concluded that the Legislature intended section 19826 to take effect in the absence of a collective bargaining agreement that expressly supersedes it as permitted by Government Code section 3517.6 of the Dills Act:

> It is significant also that the Legislature included section 19826 within the numerous Government Code sections specified in section 3517.6, which may be superseded by a MOU. By doing so, the Legislature has indicated that section 19826 takes effect in the absence of an agreement, precluding DPA from unilaterally adjusting represented employees' wages. As a consequence the question of represented employees' wages at impasse must ultimately be resolved by the Legislature itself.
>
> (*Id.* at 177-178.)

The Court went on to say that the legislative histories of the Dills Act and of section 19826 "demonstrate that, particularly regarding wages, the Legislature intended to retain ultimate authority." (*Id.* at 178.) The Court noted that an early version of the bill that enacted the Dills Act "permitted the state and unions to reach 'binding agreements,' but this language was transferred to and amended in section 3517.5 to require submission of memoranda of understanding to the Legislature for approval." (*Id.* at 181, fn. 17.) "This legislative history," the Court went on, "as well as the structure of the Dills Act, supports the conclusion that, in the absence of agreement between DPA and the state unions regarding wages, the Legislature intended section 19826, subdivision (b), which expressly precludes DPA from establishing or adjusting the salaries of represented employees, would apply." (*Id.* at 181-182.) Observing that "it

is not at all absurd that the Legislature would reserve its authority to act in the event of a stubborn wage dispute," the Court concluded that "the Legislature intended to retain final determination of state salaries." (*Id.* at 182.)[18]

Respondents and the trial court reasoned that the Governor's orders do not violate section 19826 because they do not reduce salary *ranges*. As the trial court put it, the "emergency measure will result in an accompanying deduction from pay for the hours not worked, but the order does not change established salary ranges." (PECG JA 665.)

That distinction ignores the real world impact of the furlough order. Based on the 40-hour workweek that the Legislature has declared to be state policy in Government Code section 19851(a), the order has reduced the salaries of state employees affected by the furlough program by 15 percent. If that 40-hour workweek is reduced to 32 hours for three weeks out of four, it is sophistry to suggest that salary ranges have not been adjusted downward.

Indeed, the Governor has recognized as much. In a November 6, 2008 letter addressed to "Valued State Workers," the Governor proposed a one day per month furlough for state employees and described it as follows:

> Furloughs: All state employees will be furloughed one day each month for the next year and half, a total of 19 days. *This will result in a pay cut of about 5 percent.* The pay cut will not

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[18] Although the parties are not at impasse and the MOUs remain in effect, the MOUs do not supersede section 19826 because they are not in conflict with it. (*See* Part III(B), *infra*.)

> affect retirement and other benefits for which you are eligible.[19]

The Governor also recognized that he could not impose the pay cut alone: "All the actions we're proposing must first be approved by the Legislature." (CASE JA 306.)[20] The Governor clearly had it right the first time, a position confirmed by the Legislature when it passed a new budget on February 20, 2009.

Section 3.90(a) of the Legislature's revision of the 2008-09 Budget Act provides:

> Notwithstanding any other provision of this act, each item of appropriation in this act . . . shall be reduced, as appropriate, to reflect a reduction in employee compensation achieved through the collective bargaining process for represented employees or through existing administration authority and a proportionate reduction for nonrepresented employees (utilizing existing authority of the administration to adjust compensation for nonrepresented employees) in the total amount of $385,762,000 from General Fund items and $285,196,000 from items relating to other funds.
>
> (Controller's RJN, Exh. C at 31.)

Section 3.90(b) of the 2008-09 Budget Act Revision goes on to provide: "The Department of Personnel Administration shall transmit

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[19] CASE JA 306, emphasis added.

[20] Governor Schwarzenegger is not the only Governor to recognize that he must get legislative approval to furlough state employees. In 1992, Governor Wilson sponsored Proposition 165, which would have amended the Constitution to allow the Governor to reduce state employees' work time by up to 5 percent, except for represented employees. (Controller's RJN, Exh. J.) The measure failed.

proposed memoranda of understanding to the Legislature promptly and shall include with each such transmission estimated savings pursuant to this section of each agreement." (*Id.*) And section 3.90(c) of the 2008-09 Budget Act revision clearly states: "Nothing in this section shall change or supersede the provisions of the Ralph C. Dills Act (Chapter 10.3 (commencing with section 3512) of Division 4 of Title 1 of the Government Code)." (*Id.*)[21]

Thus, the Legislature approached the furlough issue in the same way as it did when it enacted section 19826, requiring the executive branch to use the collective bargaining process for represented employees and to use "existing administration authority [*i.e.*, section 19826(a)] and a proportionate reduction for nonrepresented employees . . . ." It did *not* give the administration authority to impose furloughs on represented employees unilaterally. Just as in *Greene,* the Governor's attempt to do so violates section 19826(b), as well as the Legislature's express direction.

B. Section 19826 and the Budget Act Are Not Superseded by Provisions of the MOUs

The trial court held that "the specific terms of certain of the petitioners' MOUs expressly permit the State either to reduce hours in case of lack of funds or to take all necessary action to carry out its mission in emergencies." (PECG JA 667.) In support of its holding, the trial court cited two provisions of the CASE MOU regarding the State's right to lay off workers, and provisions of the CAPS and SEIU MOUs regarding the

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[21] The same language appears in the 2009-10 Budget Act, which the Legislature passed on February 20, 2009, and which it revised on July 24, 2009. Controller's Supp. RJN, Exh. A at 425.

State's right "to take all necessary action to carry out its mission in emergencies." (*Id.*) Neither of these provisions allows the Governor to order furloughs across the board nor do they control in light of the Legislature's most recent direction in the 2008-09 Budget Act revision.

1. **The layoff provisions of the MOUs**

The trial court relied on Article 10 of the CASE MOU, which allows the State to lay off employees "[w]henever it is necessary because of a lack of work or funds, or whenever it is advisable in the interest of economy to reduce the number of permanent and/or probationary employees (hereinafter known as 'employees') in any State agency . . . ." (CASE JA 443.) In particular, the trial court relied on section 10.3, which is entitled "Alternative to Layoff" and which reads:

> 10.3 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.
>
> (*Id.* at 445.)[22]

The trial court failed to cite the immediately preceding provision, section 10.2, which reads:

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[22] The SEIU MOU contains the same language and the CAPS MOU contains similar language, but the PECG MOU does not. (*Compare* SEIU JA 471; SEIU JA 654; SEIU JA 886; SEIU JA 1051; SEIU JA 1200; SEIU JA 1352; SEIU JA 1526; SEIU JA 1737; SEIU JA 1872; PECG JA 313 *with* PECG JA 182-184.) Any ruling based on the language in section 10.3, therefore, cannot be made applicable to PECG.

10.2 Reducing the Adverse Effects of Layoff

> Whenever the State determines it is necessary to lay off employees, the State and the Union shall meet in good faith to explore alternatives to laying off employees such as, but not limited to, *voluntary* reduced work time, retraining, early retirement, and unpaid leaves of absence.

(*Id.*, emphasis added.)

The language of section 10.2 is different from that in section 10.3. Section 10.2 uses the term "employees," plural, while section 10.3 refers to "an employee," singular. The distinction is important. When the State determines that it is necessary to lay off a group of employees, section 10.2 controls, and it requires the State to meet and confer with the union to explore *voluntary* reduced work time.

By contrast, section 10.3 allows the State to "propose to reduce the number of hours *an employee* works as an alternative to layoff." (*Id.*, emphasis added.) It goes on to require the State to meet and confer with the union "[p]rior to the implementation of this alternative to a layoff . . . to seek concurrence of the usage of this alternative." (*Id.*) The language of section 10.3 is unclear as to whether the State may implement its proposal without union concurrence, but it is very clear about the situation to which it applies: when the State proposes to reduce hours for "an employee." Section 10.3 does *not* apply when the State proposes to reduce hours for virtually every employee in its workforce.

These distinctions are apparent on the face of the MOU itself; at worst, the meaning of these two provisions is ambiguous. In that case, the trial court should not have resolved the issue without asking the parties to brief it and to provide any appropriate extrinsic evidence. (*See, e.g.*,

Los Angeles City Employees Union, Local 347 v. City of El Monte (1985) 177 Cal.App.3d 615, 622-623 [intended meaning of phrase in collective bargaining agreement may be implied by resort to custom and usage]; *Mario Saikhon, Inc. v. United Farm Workers of Am.* (1980) 104 Cal.App.3d 1, 494-495 [trial court properly admitted extrinsic evidence to resolve latent ambiguity in collective bargaining agreement].)

2. The emergency provisions of the MOUs

The trial court also relied on language in the SEIU, CAPS, and CASE MOUs to the effect that "the rights of the State shall include, but not be limited to, the right . . . to take all necessary action to carry out its mission in emergencies." (PECG JA 667.)[23] The court wrote:

> The Court finds that the current fiscal emergency, which is amply documented in the evidence respondents have submitted, authorizes the Governor to reduce the work hours of state employees under these cited terms of the various MOUs. The nature of the fiscal emergency is such that the state employee furloughs imposed by the Governor's Executive Order are both necessary and reasonable under the circumstances.
>
> (*Id.* at 667-668.)

Whether the furloughs are necessary or reasonable is not the point. The issue is whether they are permissible under the terms of the collective bargaining agreements. Although none of the MOUs defines the

[23] As with the layoff language, this language does not appear in the PECG MOU. (PECG JA 187.)

term "emergencies," it defies belief that the unions would have agreed to the meaning that the trial court poured into the word. To do so would have given the State *carte blanche* to walk away from the MOU whenever the State found itself in a fiscal crisis, as it has been for most of the past two decades.[24] It would also have ignored the express procedures imposed in 2004 by Proposition 58 to deal with those fiscal crises.[25]

Instead, the reference to "emergencies" must be read to mean the type of emergency contemplated in Government Code section 8558, which defines the circumstances under which the Governor may proclaim a state of emergency pursuant to Government Code section 8625. Other than a state of war, those circumstances are as follows:

> (b) "State of emergency" means the duly proclaimed existence of conditions of disaster or of extreme peril to the safety of persons and property within the state caused by such conditions as air pollution, fire, flood, storm, epidemic, riot, drought, sudden and severe energy shortage, plant or animal infestation or disease, the Governor's warning of an earthquake or volcanic prediction, or an earthquake, or other conditions, other than

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[24] *See, e.g.*, the Legislative Analyst's Summary of its report on the 1989-90 State budget, which begins this way: "In beginning its work on the state budget for 1989-90, the Legislature faces the most adverse set of fiscal circumstances, it has faced since the recession of 1981-82." The summaries for 1991-92, 2002-03, and 2007-08 are similarly dire. (*See* Legislative Analyst's Office, State Budget, Perspectives and Issues at http://www.lao.ca.gov/laoapp/PubDetails.aspx?id=1560 [as of July 16, 2009].)

[25] The SEIU and CASE MOUs were effective starting in 2005, after Proposition 58 was passed. (CASE JA 385, 484; SEIU JA 348, 543, 783, 927, 1093, 1235, 1414, 1620, 1780.) The CAPS MOU was effective in 2006. (PECG JA 329.)

> conditions resulting from a labor controversy or conditions causing a "state of war emergency," which, by reason of their magnitude, are or are likely to be beyond the control of the services, personnel, equipment, and facilities of any single county, city and county, or city and require the combined forces of a mutual aid region or regions to combat, or with respect to regulated energy utilities, a sudden and severe energy shortage requires extraordinary measures beyond the authority vested in the California Public Utilities Commission.
>
> (Gov. Code, § 8558(b).)

These are not the attributes of a fiscal crisis. They aptly capture, however, the traditional definition of an emergency as limited to such things as war, natural disaster, epidemic or riot. Moreover, the statutory definition specifically excludes "conditions resulting from a labor controversy," indicating the Legislature's intent not to allow the Governor's emergency powers to interfere with collective bargaining. (*Id.*)

Absent any contract language to the contrary, the parties' use of the term "emergencies" should be given its normal meaning. It should not be stretched beyond all recognition to give the Governor authority to gut the agreement when the State goes into an economic downturn. Such an approach would contradict the very purpose of a collective bargaining agreement.

CONCLUSION

The Governor has no inherent authority to reduce three out of every four workweeks for almost every state employee by 20%. Absent some appropriate delegation of such authority by the Legislature, the Governor's orders cannot stand.

Dated: August 31, 2009

Respectfully submitted,

OFFICE OF THE STATE CONTROLLER

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(00083909-17)

BRIEF FORMAT CERTIFICATION PURSUANT TO RULE 8.204 OF THE CALIFORNIA RULES OF COURT

Pursuant to Rule 8.204 of the California Rules of Court, I certify that this brief is proportionately spaced, has a typeface of 13 points or more and contains 9,926 words as counted by the Microsoft Word 2003 word processing program used to generate the brief.

Dated: August 31, 2009

Margaret R. Prinzing

PROOF OF SERVICE

I, the undersigned, declare under penalty of perjury that:

I am a citizen of the United States, over the age of 18, and not a party to the within cause or action. My business address is 201 Dolores Avenue, San Leandro, CA 94577.

On August 31, 2009, I served a true copy of the following document(s):

Appellant State Controller's Opening Brief

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Maria E. Mora

Maria E. Mora

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, THIRD **APPELLATE DISTRICT, DIVISION**	Court of Appeal Case Number: C061011
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address):* Robin B. Johansen, SB# 79084 Margaret R. Prinzing, SB# 209482 Remcho, Johansen & Purcell, LLP 201 Dolores Avenue, San Leandro, CA 94577 TELEPHONE NO.: (510) 346-6200 FAX NO. *(Optional):* (510) 346-6201 E-MAIL ADDRESS *(Optional):* rjohansen@rjp.com; mprinzing@rjp.com ATTORNEY FOR *(Name):* Appellant State Controller John Chiang	Superior Court Case Number: 34-2008-80000126CU-WM-GDS *FOR COURT USE ONLY*
APPELLANT/PETITIONER: Professional Engineers in California Government RESPONDENT/REAL PARTY IN INTEREST: Arnold Schwarzenegger	

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1. This form is being submitted on behalf of the following party (*name*): Appellant State Controller John Chiang

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	**Nature of interest *(Explain):***
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: August 31, 2009

Margaret R. Prinzing
(TYPE OR PRINT NAME)

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Cal. Rules of Court, rules 8.208, 8.488
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