COURT OF APPEAL, THIRD APPELLATE DISTRICT
Nos. C061011, C061009, C061020
S183411

IN THE SUPREME COURT OF CALIFORNIA

JUN 30 2010

En Banc

PROFESSIONAL ENGINEERS IN CALIFORNIA GOVERNMENT, et al.
Plaintiffs and Appellants,

v.

ARNOLD SCHWARZENEGGER, as Governor, etc., et al.
Defendants and Respondents;
JOHN CHIANG, as State Controller, etc., Defendant and Appellant.

CALIFORNIA ATTORNEYS, etc., Plaintiff and Appellant,

v.

ARNOLD SCHWARZENEGGER, as Governor, etc., et al.
Defendants and Respondents;
JOHN CHIANG, as State Controller, etc., Defendant and Appellant.

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 1000,
Plaintiff and Appellant,

v.

ARNOLD SCHWARZENEGGER, as Governor, etc., et al.
Defendants and Respondents;
JOHN CHIANG, as State Controller, etc., Defendant and Appellant.

APPELLANT SEIU'S SUPPLEMENTAL REPLY LETTER BRIEF

On Appeal of an Order and Judgment
by the Sacramento Superior Court
No. 34-2009-80000135-CU-WM-GDS
The Honorable Patrick Marlette

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT

This Court directed the parties to submit simultaneous reply letter briefs in response to the June 23, 2010 supplemental letter briefs on two issues - concerning specific provisions of the Reduced Worktime Act and the 2008 Budget Amendments. SEIU Local 1000 submits this reply to the Governor's June 23, 2010 letter briefs.

The Governor's shifting explanations and thin support for his positions ultimately disclose the weaknesses in his case. His arguments about the correct statutory interpretation for the Reduced Worktime Act and the interpretation of the Budget Act can best be described as counter-intuitive. His last-minute effort to raise the issue of the alleged failure to exhaust administrative remedies must fail - as it was waived due to untimeliness.

Specifically concerning the Budget Act, the Governor's interpretation of "existing administrative authority" is contrived solely to justify his actions. Moreover, his version of the meaning of "administration authority" leads inexorably to yet other unconstitutional violations of the single subject rule and the separation of powers. Applicable law rejects interpretations which take words out of context and then use them to negate other provisions. Ultimately, the Governor's brief, as well as his prior arguments fail to find legal support for his unilateral act of imposing 18-month-long furloughs on state workers by executive fiat.

The Reduced Worktime Act - and Section 19996.22 - Verify the Invalidity of the Furloughs

In response to the Supreme Court's request for additional briefing on the import of Government Code section 19996.22 of the Reduced Worktime Act as it relates to the validity of his unilateral action, the Governor has switched his position on this Act. Earlier in the briefing on this case, he argued that not only did it not interfere with his ability to impose furloughs, it further supported his authority. Now he concedes that it does not even implicate his unilateral furloughs.

In Respondents' Combined Brief in Response to (1) Opening Brief of Appellants Professional Engineers in California Government and California Association of Professional Scientists and (2) Opening Brief of Appellant John Chiang, page 26, the Governor stated his position in response to the Controller's initial argument that sections 19996.21 and

19996.22 prohibit the unilateral furloughs imposed by the Governor. His precise words were as follows:

> These code sections permit the State to offer workweeks of less than 40 hours to accommodate employee special needs and requests. If anything, these code sections **further demonstrate the Governor's inherent authority** as state employer **to establish varying schedules** for state employees. (Emphasis added.)

In contrast, however, the Governor currently observes the following in his Supplemental Letter Brief, pages 5-6:

> ... the Governor's authority to furlough state employees to address a fiscal emergency is derived from various statutes recognizing the Governor's inherent executive authority over the State's finances and resources. [citations omitted.] The express legislative intent underlying the Reduced Worktime Act **does not implicate**, much less infringe upon, this inherent authority.

This shifting position on the interpretation and breadth of authority of the RWA is a classic example of a pretextual argument - one that shifts as needed to fit the current setting. As a result, it is difficult to place much weight on the conclusions currently drawn by the Governor about the RWA.

In addition, the Governor provides a lengthy recitation about the reasons and virtues of the RWA, and references, as well, the prohibition against involuntary furloughs. His conclusion, however, about the breadth (actually the lack thereof) of the remedy provided by Section 19996.22, is illogical in light of the purpose of the Act setting forth a voluntary scheme of reduced worktime, while prohibiting an involuntary one. The Governor seems to believe that in order for the prohibition against involuntary furloughs to go into effect, the State would have to **intend** to undercut one of the values promoted by the Act.

Indeed, the Governor states in his Supplemental Letter Brief, page 5, "section 19996.22 subdivision (a), provides employees a mechanism to grieve coerced or involuntary reductions in work hours *"contrary to the intent"* of the Reduced Worktime Act. This is essentially imposing on the employee the burden of proving the intent in the mind of the supervisor who forced a reduction on the employee - as opposed to simply prohibiting the action of the forced reduction. Consequently, the Governor contends that the remedy offered to workers in section 19996.2 is in effect only when the State's **motive** behind the forced reduced is contrary to the spirit of the RWA. Consequently, in any other forced reduction in work hours, for more damaging or nefarious reasons, the employee's remedy is cut off. Section 19996.22 is meaningless to them because the action of the forced reduction is only invalid when the motive behind the act is to violate the spirit of the act.

Were this interpretation true, the protection offered by the RWA, would be quite meaningless. Section 19996.22(a) states as follows:

> 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.

The proper meaning of the words "contrary to the intent" relate to the intent of the Act allowing only voluntary reductions pursuant to the system it created, simultaneously barring involuntary reductions. The primary rules of construction compel this conclusion. First, remedial statutes are to be liberally construed to achieve their purpose and further to actually inhibit the conduct at which they are directed. (Modern view of this rule is to grant relief unless expressly forbidden by statute); *Lande v. Jurisich* (1943) 59 Cal.App.2d 613; *Kaslavage v. West Kern County Water Dist.* (1978) 84 Cal.App.3d 529 (modern view of this rule is to grant relief unless expressly forbidden by statute.) Moreover, statutory requirements intended for the protection of individuals are viewed as mandatory duties or the government actions in violation thereof must be declared invalid.

(*People v. McGee* (1977) 19 Cal.3d 948.)

Finally, in a last ditch effort to wrest any protection from this Act, the Governor claims employees have lost their rights under the RWA because they failed to exhaust administrative remedies. (Governor's Supplemental Letter Brief, p. 7.) The Governor is incorrect. Instead, he has lost the opportunity to raise this defense because his effort at this point to invoke it is untimely. The assertion of the failure to exhaust administrative remedies is a defense that must be raised timely or it is deemed waived. (*Keiffer v. Bechtel Corp.* (1998) 65 Cal.App.4th 893, 897, 900.) In this case, however, the Governor has never previously raised this defense.

Ultimately, the Governor's proposed interpretation of this law cannot be allowed to stand. Not only has he changed his interpretations of this provision, as it becomes convenient, the result he proposes burdens the very employees intended to be protected by the proscriptions and remedies offered. Finally, his attempted invocation of the defense of administrative exhaustion is untimely. By contrast, Appellants have all asserted the correct interpretation of the protections offered by this Act, and its proscriptions as well. As a result, the Supreme Court should find that section 19996.22, and the entire RWA, as clarifying the invalidity of the Governor's unilateral furlough of state workers.

The 2008 Revised Budget Act Does Not Justify Furloughs

The Governor misreads the Budget Act language he signed into law. Not only does he take certain language out of context, but then he interprets that language in a manner that leaves other language of the Budget to be rendered meaningless. A further indication of his troubled position, if his interpretation is permitted to stand, his furloughs would constitute an unconstitutional act - both violating the single subject rule, and the separation of powers. For the reasons set forth herein and previously by all Appellants, the Governor's reliance on this Budget Act as justification for his unilateral furloughs is misplaced.

Because of the Governor's tendency to read words in isolation, it is critical to see Section 36, section 3.90 in context. In this manner, it is clear to see that the Governor's argument is contrived to fit the current situation. As set forth below, the phrasing of "existing administration authority" is

used twice in the same sentence.

(Chapter 2, Statutes of 2009-10 Third Extraordinary Session.) SEC. 36. Section 3.90 is added to the Budget Act of 2008, to read: Sec. 3.90.

> (a) 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 amounts of $385,762,000 from General Fund items and $285,196,000 from items relating to other funds.
> .....
> (c) **Nothing in this section shall change or supersede the provisions of the Ralph C. Dills Act** . . .(Emphasis added.)

To understand the phrase "existing administration authority," one must first acknowledge that the authority referred to must be "existing" at the time of the Budget Act. Obviously, the Legislature cannot be presumed to be referring to that of which they have no knowledge at the time of adoption. Secondly, the Legislature uses the same phrase concerning "nonrepresented employees." This indicates that the Legislature understood that administration authority over pay issues for nonrepresented employees was different than for represented employees (rank and file covered by collective bargaining agreements).

Clearly, the language about the collective bargaining process is well understood enough to know that a unilaterally imposed furlough such as enacted by the Governor, was not achieved through collective bargaining. Consequently, the only language the Governor can possibly rely on to

justify his unilateral act, is the fleeting reference to "existing administration authority."

If the Governor believed his authority to impose furlough was so clear, it is curious why furloughs were not referred to specifically by name. Especially given the timing of the Budget Revision along with the legal action pending in trial court, and more especially since the Governor is so strident that furloughs were contemplated and approved by the Legislature at the time. It actually damages the Governor's case that the Legislature never once acknowledged by name the right he now argues so strongly was his all along. The lack of this reference to furlough authority by name, suggests that no one, including the Legislature, believed this unilateral authority existed at the time. In this case, there was no prior implementation of administrative furloughs, and no long-standing practice on which to rely. (*Alpha Therapeutic Corp. v. Franchise Tax Bd.* (2000) 84 Cal.App.4th 1; *Van Wagner Communications, Inc. v. City of Los Angeles* (2000) 84 Cal.App.4th 499 (an administrative interpretation of enabling legislation may be considered particularly if the interpretation is supported by a consistent application or long-standing implementation).)

Consequently, the Governor's effort to enforce furloughs was a case of first impression with the Legislators, as it is with the Court. In such a case, the Governor's case for Budget Act ratification of his unilateral furlough is counter-intuitive at best. Had he believed he won over the Legislators with his executive power, the word furlough surely would have appeared in the amendment that actually coincided with his action. Instead, because of its strong references to collective bargaining and the protections offered by the Dills Act, the ready conclusion is the Legislature actually meant something different than unilateral furloughs. It is much more likely and reasonable that they meant for collective bargaining to occur *post haste* - as required by the Dills Act. This interpretation harmonizes all the language of section 3.90 of section 36. (*Mocek v. Alfa Leisure, Inc.* (2003) 114 Cal.App.4th 402, 408.)

Furthermore, the Governor's claimed interpretation does not harmonize this language. Indeed, it is unraveled by the subsequent reference in subsection (c) to the Dills Act. The fact that the Legislature and Governor acknowledged both the collective bargaining process and that nothing the Dills Act was changed or superceded, severely undercuts any

conclusion that Legislative ratification of unilateral furloughs was achieved by this Budget Act provision. It is obvious, reading this section in its entirety, and giving meaning to all its parts, the type of cuts that were contemplated were those achieved through collective bargaining or consistent with the Dills Act. Since the Dills Act is the State's collective bargaining law for state workers, it is hard to imagine that the Legislature contemplated that the traditional collective bargaining process would be so severely circumvented and damaged at the hands of the Governor based on the fleeting reference to "existing administration authority" it provided in the Budget Act. Instead, such an oblique reference to existing administration authority surely meant some more common action such as layoff, personal leave program or other explicit provision of existing law. (SEIU MOUs, - JA 000389, 000470-471 and same provisions in all SEIU contracts.)

Moreover, the Governor's argument is further hampered by the fact that, as previously argued in detail in all the prior briefs, no constitutional, statutory or administrative authority authorized the unilateral furloughs. Indeed, without any basis in law for his actions, the Governor's claimed authority cannot exist without a constitutional violation of either the single subject requirement or the separation of powers.

In the single subject requirement, the Constitution (art. IV, section 9) requires that statutes (including enactments such as the Budget Bill) "may not constitutionally be used to grant authority to a state agency that the agency does not otherwise posses or to substantively amend and change existing statute law." (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 394.) As set forth in arguments of other Appellants (Supreme Court Letter Briefs of State Controller, p. 6 and CASE, p. 8), this constitutional requirement would be violated if the Governor is permitted to add to his substantive authority by the mere enactment of a Budget amendment. Likewise, the Governor is not able to simply and easily repeal any existing rights by implication. (*Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 573.)

Indeed, the Governor then seems to bootstrap the trial court's mistaken ratification of his unilateral furlough as "administration authority" as well (Governor's Supplemental Letter Brief, p. 13). Of course, courts may not offer administration authority any more than the Governor may

unilaterally enact legislation. The separation of powers doctrine prohibits such actions. This separation of powers is set forth clearly in Article III, section 3 of the state constitution, which states: "The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of others except as permitted by this Constitution."

Ultimately, the Governor's arguments are circular on this point. If he had pre-existing authority to enact a unilateral furlough, then the Budget Act language would have been specific to that right. Likewise had such a right existed, it would have been unnecessary to repeat it in the Budget Act, as the power the Governor claims from it was completely superfluous. And finally, if he had "existing administration authority," it would have been unnecessary for him to draft and propose legislation on that point. Indeed, the fact that the Governor submitted two pieces of proposed legislation to the Legislature that would expressly grant administrative authority to furlough employees strongly suggests that even he did not believe he had that authority. In the Governor's Letter of June 23, 2010, responding to this Court's question about material in the appellate record, the Governor admitted that his administration submitted this precise legislation to the Legislature on November 6, 2008. (State Respondents' Letter re June 15, 2010 Letter, p. 2.) Then again on December 1, 2008, the administration submitted the identical proposed legislation for a second time. (*Id.* at p. 4, fn. 3.)

The Governor's claimed comparison to federal executive power is likewise misplaced.[1] The state Constitution operates as a restriction on the

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[1] Also noteworthy is that the federal executive power from *Youngstown Sheet & Tube Co. v. Sawyer* (1952) 343 U.S. 579 from which the Governor seeks to emulate his state executive authority was ultimately struck down by the Supreme Court. Indeed, the Supreme Court specifically limited the power of the United States President to seize private property absent either express authority under Article Two of the United States Constitution or statutory authority imparted on him by Congress. In this respect, it can only be viewed as support **against** the type of executive authority sought by the Governor in this case. As a result, reliance on a concurring opinion on the ultimate question of executive power is not particularly meaningful. (Governor's Supplemental Letter Brief, p. 15).

powers of the branches of state government. (*Laborer's Internat. Union of North America v. El Dorado Landscape Co.* (1989) 208 Cal.App.3d 993, 1000, *Sheehan v. Scott* (1905) 145 Cal. 684, 686, overruled in part on another point by *Zailanga v. Nelson* (1971) 4 Cal.3d 716.) To the extent the Constitution restricts certain acts, the branches of government do not have authority to proceed. (*Id.; Collins v. Riley* (1944) 24 Cal.2d 912, 916 (Courts should look to the constitution to determine whether an act is prohibited, not authorized).) In this case, two constitutional provisions impacted the Governor's ability to impose a unilateral furlough. First, the separation of powers doctrine indicates that the Governor may not take legislative acts in place of the Legislature, next article IV, § 10(f)(1) limits his actions in a fiscal emergency to declaring said emergency, assembling the Legislature and submitting legislation to address the fiscal emergency. The authority to sign an annual budget - adopted by a two-thirds vote of the Legislature - is not *carte blanc* to act unilaterally.

Additional power to act, as the Controller stated in its Supplemental Letter Brief, page 5, is extremely limited. Citing *Tirapelle v. Davis* (1993) 20 Cal.App. 4th 1317, 1324, the Controller noted that there are indeed "limited means by which employee compensation can be reduced .... reducing the size of the work force, reducing the compensation payable on a per-employee basis, or some combination thereof." The Governor, with his tendency to want to "blow up the boxes"[2] would rather ignore these limitations and attempt to contrive justifications at a later date. Ultimately, as argued by Appellants in the Opening Briefs on appeal, all argued that setting salaries of state employees was a legislative act. Consequently, it is not "existing administration authority" to alter them unilaterally or for an extended duration of eighteen months without any other meaningful action to bargaining them or enact them through law.

The Budget Act section in question is neither express nor implied support for the Governor's unilateral furloughs. For these reasons set forth herein, and for the many pages of argument which precedes this brief, the language demanded collective bargaining or action consistent with the Dills

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[2]Governor Schwarzenegger's State of the State Address, January 6, 2004 "Every governor proposes moving boxes around to reorganize government. I don't want to move boxes around; I want to blow them up."

Act. Nothing more can be gleaned from it despite the Governor's efforts to spin straw into gold.[3]

Courts Can Provide an Order for a Remedy for Violations

SEIU Local 1000 previously incorporated the arguments of other Appellants and Plaintiffs, and does so again herein. There is nothing in the Governor's lengthy recitation of the proposed prohibition against Courts appropriating money for damages that counters Appellants' prior arguments. (Governor's Supplemental Letter Brief, pp. 16-20.) Appellants are not asking for the Court to appropriate funds. Instead, the Court may remand and order additional briefing as indicated by the Controller, or rule on the issue of the legality of the furloughs and order words to the effect that to the extent damages can be paid through appropriations, they shall be paid. (*Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 538-540 citing *Serrano v. Priest* (1982) 131 Cal.App.3d 188.)

Regarding the documents found at pages 311-324 of the PECG joint appendix - formally introduced in the Legislature

The Governor clarifies that he and his administration submitted two pieces of proposed legislation to the Legislature that would expressly grant administrative authority to furlough employees. In the Governor's Letter of June 23, 2010, responding to this Court's question about material in the appellate record, the Governor admitted that his administration submitted this precise legislation to the Legislature on November 6, 2008. (State Respondents' Letter re June 15, 2010 Letter, p. 2.) Then again on December 1, 2008, the administration submitted the identical proposed legislation for a second time. (*Id.* at p. 4, fn. 3.)

These submissions coincide with his letter to "Valued State Workers" in November 2008 announcing the need for spending reductions

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[3] *See, Rumpelstiltskin*, a fairy tale by the Brothers Grimm, in which a miller lied to the king about his daughter's ability to spin straw into gold. This story highlights the temptation to falsely convey the ability to turn nothing into something valuable merely to impress or for self-gratification.

and his proposed solution to furlough all state employees - **through collective bargaining** - to reduce the salaries of represented state employees by about 5 percent to balance the General Fund.

However, sometime between December 1 and December 19, 2008, when the Governor issued Executive Order S-16-08, directing that state employees be furloughed two days per month effective February 1, 2009, through June 30, 2010, the Governor abandoned his understanding of collective bargaining and proceeded by executive fiat.

This record shows that Governor, in November and December, understood the limitations of his executive authority - to bargain for reductions and assemble the Legislature pursuant to article IV, § 10(f)(1). His submission of furlough legislation in November and again in December, 2008, shows he understood the specific role of the Governor to proclaim an emergency, assemble the politicians and propose legislation. Clearly, the Governor tired of being hampered by political inefficiency, chose the course of unilateral executive fiat. However, political expediency does make a basis for legal authority.

Dated: June 29, 2010

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PROOF OF SERVICE

CASE NAME: *SEIU LOCAL 1000 v. ARNOLD SCHWARZENEGGER, et al.*
COURT NAME: Sacramento County Superior Court / Third District Court of Appeal/California Supreme Court
CASE NUMBER: 34-2009-80000135 / C061020 / S183411

I am a citizen of the United States and a resident of the County of Yolo. I am over the age of eighteen (18) years and not a party to the above-entitled action. My business address is 1808 14th Street, Sacramento, California 95811.

I am familiar with SEIU Local 1000's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a United States mailbox after the close of each day's business.

On June 29, 2010, I served the following:

APPELLANT SEIU's SUPPLEMENTAL REPLY LETTER BRIEF

[X] (BY U.S. MAIL) by placing a true copy thereof enclosed in a sealed envelope addressed to the person(s) at the address as follows:

[ ] depositing the sealed envelope with the United States Postal Service, with the postage fully prepaid.

[X] placing the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the businesses' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, located in Sacramento, California, in a sealed envelope with postage fully prepaid.

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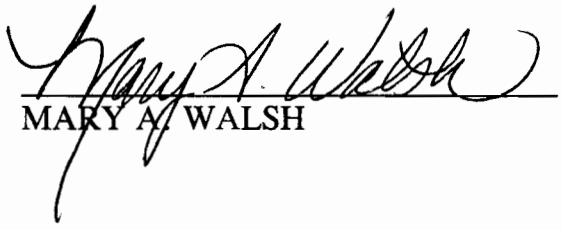
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on June 29, 2010, at Sacramento, California.



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