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June 30, 2010

Frederick K. Ohlrich
Supreme Court of California
Office of the Clerk, First Floor
350 McAllister Street
San Francisco, CA 94102

Re: Case No. S183411

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.

Dear Mr. Ohlrich:

This letter constitutes the reply letter brief ordered by this Court on June 9, 2010 in its order directing supplemental briefing. This letter responds to the arguments raised in the letter brief filed on June 23, 2010 by respondents Governor Arnold Schwarzenegger and the Department of Personnel Administration (collectively, "State Respondents.")

I. Government Code Section 19996.22 Demonstrates the Illegality of the Furloughs

In their answer to this Court's question about the import of Government Code section 19996.22, State Respondents argue that the section is inapplicable to the

question of the validity of the Governor's Executive Orders mandating furloughs. (State Respondents' Supp. Letter Brief, p. 5.) They argue that the section only prohibits coerced or involuntary reductions in work hours that are "contrary to the intent" of the Reduced Worktime Act. (*Ibid.*) This argument defies logic. As explained in the June 23, 2010 letter filed by CASE, the Reduced Worktime Act is intended to create a *voluntary* system for reduced work hours for those who "prefer shorter hours." (Gov. Code sec. 19996.19, subds. (a)(6) and (a)(7). In fact, the intent of the Act was expressed by the Legislature in Government Code section 19996.19, subdivision (b), which expressed its desire for *voluntary* reduced work time options at least three separate times. (See Gov. Code sec 19996.19, subds. (b)(3), (b)(5), and (b)(6).) State Respondents fails to explain how the unilateral implementation of furloughs on all state employees was anything other than an involuntary reduction of work hours. Accordingly, their assertion that section 19996.22 is inapplicable must be rejected. To the contrary, the section demonstrates the illegality of the Governor's Executive Orders.

II. There Is No Constitutional Authority Empowering the Governor to Order Furloughs

State Respondents argue that the Governor's power to furlough state employees "is derived from his constitutional role as the chief executive officer of the State of California." (State Respondents' Supp. Letter Brief, p. 6.) In addition, they argue that the authority to furlough is also derived from various statutes, including Government Code sections 1001, 12010, and 19851, subdivision (b).

State Respondents have identified no constitutional provision whatsoever which even remotely suggests that the Governor has the power to furlough state employees. Neither have they cited any cases, treatises, or law review articles which suggest the power to furlough employees lies with the executive branch. Their argument is quite simply, *ipse dixit*. When advancing such an extraordinary claim of executive power, the burden of producing at least some legal authority for that power should lie with the party advancing the claim. State Respondents' failure to cite anything other than the generic statement of executive power in Article V, section 1 of the California Constitution is indicative that no such authority exists.

State Respondents' citation to various statutes fares no better. Quite the contrary, the statutes cited prove that the Governor's power in this area is quite limited. Government Code section 1001 simply designates a long list of "civil executive officers" but says nothing about whether executive power includes the power to furlough employees.

Government Code section 12010 states, in its entirety, that "The Governor shall supervise the official conduct of all executive and ministerial officers." Again, however, there is nothing in the duty to "supervise" executive officers that suggests any power whatsoever to unilaterally manage the State's fiscal crisis by furloughing employees. In fact, Government Code section 12011 reads as follows:

> The Governor shall see that all offices are filled and their duties performed. If default occurs, he shall apply such remedy *as the law allows. If the remedy is imperfect, he shall so advise the Legislature at its next session.*

(Emphasis added.) This section appears in Article 2 of Chapter 1of Part 2 of Division 3. Division 3 concerns the Executive Department, and Article 2 in particular concerns the powers and duties of the Governor. Section 12011 makes clear that in enacting statutes describing the Governor's powers, the Legislature took pains to ensure that when acting to cure defaults, the Governor was required to stay within the law ("as the law allows"). Moreover, they left no doubt that even if the Governor was unsatisfied with an imperfect - but legal - remedy, he was required to report to the Legislature. In other words, the Governor is not authorized to act on his own, outside the parameters of the law, to do what he thinks is necessary. Rather, he is duty bound at all times to let the Legislature enact laws that will address a perceived crisis.

Government Code section 19851, also cited by State Respondents, confers no authority for the Executive Orders either. That section permits deviation from the normal 40-hour work week "in order to meet the varying needs of the different state agencies." State Respondents have never identified the varying needs of the different state departments that were purportedly met by the implementation of furloughs. And, it is difficult to imagine how a department's particular needs could be met by reducing the resources available to it. State Respondents have based much of their argument on the State's fiscal and cash crisis. It is reasonable to conclude that those State departments which actually generate revenue, including the Franchise Tax Board and the Board of Equalization, would need *more personnel resources*, not less, so that they could increase or at least maintain the State's incoming revenue streams. Accordingly, State Respondents have failed to demonstrate that their actions fell within the limited exception prescribed in section 19851.

III. This Court Has Subject Matter Jurisdiction

State Respondents argue in the alternative that if section 19996.22 applies to this case, it operates to deprive the courts of subject matter jurisdiction over the various pending furlough lawsuits. (State Respondents' Supp. Letter Brief, pp. 7-8.) Their argument is based on the fact that section 19996.22 allows a permissive grievance, and the failure to pursue the grievance process demonstrates that administrative remedies have not been exhausted. This argument is untenable for several reasons.

First, the doctrine of exhaustion of administrative remedies does not apply at all. Section 19996.22 provides that employees "may file a grievance" but nowhere does it state that a grievance is the exclusive remedy available. Because the

grievance is a permissive option, the failure to employ that avenue of redress is of no consequence. In *Sierra Club v. San Joaquin Local Agency Formation Commission* (1999) 21 Cal.4th 489, this Court analyzed a similar statutory provision which provided that a person "may" file a petition for reconsideration. This Court determined that such language was indeed permissive, and not mandatory, and thus the failure to avail oneself of the optional administrative procedure was not a bar to proceeding in the courts. (*Id.* at pp. 499-500.)

Second, any failure to exhaust administrative remedies is excused in this case under the futility exception. "The failure to exhaust an administrative remedy is excused if it is clear that exhaustion would be futile." (*City and County of San Francisco v. International Union of Operating Engineers, Local 39* (2007) 151 Cal.App.4th 938, 847.) In this case, any grievance would have been filed with DPA ("the department"). However, it was DPA that had been directed by the Executive Orders to implement the furlough plan, so there is no question that any grievance would have been denied. Accordingly, exhaustion, even if required, would have been futile.

Third, State Respondents are estopped from asserting that the courts, including this Court, lack subject matter jurisdiction over the furlough litigation. On March 2, 2010, State Respondents filed an application in this Court seeking to transfer these and several other furlough cases to this Court. On April 22, 2010, this Court denied that application in case number S180643. The doctrine of judicial estoppel applies to prohibit State Respondents from arguing this Court lacks subject matter jurisdiction because they have taken inconsistent positions in judicial proceedings. (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 183.)

Fourth, it is well-established that the defense of failure to exhaust administrative remedies is itself waived if not asserted timely in the trial court. (*Cummings v. Stanley* (2009) 177 Cal.App.4th 493, 506.) Accordingly, it is far too late for State Respondents to try to assert that defense for the first time in this Court.

IV. There Is No "Existing Administrative Authority"

In their answer to this Court's question about the effect of the revised 2008 Budget Act, State Respondents completely ignore the language in SB X3 2, §36 referring to the collective bargaining process. Instead, they argue that the furloughs were achieved through "existing administrative authority." (State Respondents' Supp. Letter Brief, pp. 10, 13.) They claim that the existing administrative authority was based on the Sacramento County Superior Court's ruling on January 30, 2009. (*Ibid.*) This argument is flawed in several respects.

First, the argument falls under its own weight, because it is entirely tautological. This Court is reviewing the correctness of the Sacramento County Superior Court's decision of January 30, 2009 *in this very case*. Yet it is that ruling that State Respondents argue confers the very authority that is being challenged here. In other words, in an effort to show that the trial court's ruling in this case was

correct, State Respondents point to the trial court ruling. Courts have recognized that "[i]t needs no citation of authority for us to reject an argument that chases itself in circles." (*Poland v. Department of Motor Vehicles* (1995) 34 Cal.App.4th 1128, 1135.)

Second, the assertion that the trial court decision conferred authority on the Governor is flatly inconsistent with State Respondents' assertion *in the very same letter* that the Governor's authority to furlough employees is derived from the California Constitution. (See State Respondents' Supp. Letter Brief, p. 6.) If the latter assertion is true, then the Governor would not need a decision of a lone superior court judge to establish his authority.

Third, for all of the reasons discussed in the letter filed by CASE on June 23, 2010, the single-subject rule prohibits the Legislature from changing the law or conferring authority that did not previously exist. (*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 394.)

Fourth, the assertion that there was "existing administrative authority" is completely at odds with the fact that the Governor twice submitted proposed legislation to the Legislature that would expressly confer upon the administration the authority to furlough employees. In a letter filed by State Respondents in this Court on June 23, 2010 responding to this Court's question about material in the appellate record, State Respondents acknowledged that the administration submitted such legislation to the Legislature on November 6, 2008. (State Respondents' Letter re June 15, 2010 Letter, p. 2.) The same proposed legislation was submitted again on December 1, 2008. (*Id.* at p. 4, fn. 3.)

If the Governor already had "existing administrative authority" to furlough employees, there would be no need to seek legislation conferring that same authority. Sensing the incongruity between their actions and their arguments, State Respondents assert:

> It would be incorrect to assume that the proposed legislation [authorizing furloughs] constituted an implicit admission that the Governor lacked the inherent executive authority to order furloughs of state employees.

(*Id.* at p. 5.) Instead, they argue that the proposed legislation was simply "an effort by the Governor to engage the Legislature. . . ." But under State Respondents' view, involving the Legislature was completely unnecessary. This Court presumes that the Legislature does not engage in idle acts. (*California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 634.) Similarly, this Court should presume that the Governor's solemn act of submitting legislation to respond to a fiscal emergency was not merely an idle act. Rather, it was done because the administration recognized that it needed legislative authority to implement the furloughs. The Governor's admission that he lacked the power to furlough without statutory authority should be given deference by this Court.

Fifth, State Respondents ironically reference the passage of Proposition 58 in 2004 in the course of enumerating the Governor's limited constitutional powers in fiscal matters, but fail to recognize that it is fatal to their claim that there was "existing administrative authority." (State Respondents' Supp. Letter Brief, pp. 11-12.) That proposition was passed early in the tenure of Governor Schwarzenegger, and it amended section 10 of Article IV of the California Constitution. Specifically, subdivision (f) now empowers the Governor to declare a fiscal emergency, call a special session of the Legislature, and submit legislation to deal with the fiscal crisis. It took a constitutional amendment to give the Governor the power to declare a fiscal emergency, and that same amendment precisely identified his powers under such an emergency. Notwithstanding that expressly limited grant of power, State Respondents argue that the Governor had a more expansive power all along. Rather than having to involve the Legislature at all to deal with a fiscal crisis, they contend that the Governor may act unilaterally to deal with the State's finances by furloughing state employees. Such an argument would render Proposition 58 completely unnecessary, and any interpretation of the law which renders provisions surplusage is to be avoided. (*McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104, 110.)

What emerges from the enactment of Proposition 58 is the following: either 1) the Governor never had the power to take any special action during a fiscal crisis, and Proposition 58 specifically gave him limited power as specified, or 2) whatever constitutional power the Governor may previously have had has now been expressly limited by amending the Constitution. Either way, there is simply no authority to use a fiscal emergency as justification to take actions that are beyond the bounds of law. Pursuant to Article V, section 1 of the California Constitution, the Governor is charged with faithfully executing the law, not acting in excess of it.

For all of the foregoing reasons, State Respondents' argument that there was some "existing administrative authority" to furlough employees must be rejected. In the absence of any such authority, it is patent that the only import of the revised 2008 Budget Act was to recognize existing law. Specifically, the Governor was required to utilize the collective bargaining process to secure an agreement before he could impose furloughs.

V. The Issue of a Remedy Is Premature, but Trial Courts Are Empowered To Issue Monetary Awards in Mandamus Proceedings

State Respondents argue that any monetary order that might be granted in this case would be a violation of the doctrine of separation of powers. (State Respondents' Supp. Letter Brief, pp. 17-18.) They are simply incorrect.

Preliminarily, the type of remedy that might be available will likely be determined, if at all, upon remand following this Court's reversal of the trial court. Accordingly, opining about such a remedy borders on issuing an advisory opinion.

However to the extent this Court may wish to provide guidance to the trial court upon remand, it is important to note that monetary judgments against the State are awarded with some frequency in numerous cases in courts around the state, and those awards are not universally illegal. Code of Civil Procedure section 1095 expressly allows the recovery of damages as part of the judgment in writ proceedings. Courts have recognized that unlawfully withheld salary is a proper basis for damages in the context of mandamus. (*Poschman v. Dumke* (1973) 31 Cal.App.3d 932, 943-944.)

While it is true that courts cannot directly order the Legislature to appropriate funds, orders awarding monetary judgments are not directed at the Legislature, and are not an order to appropriate funds. Rather, they are directed to the State as a defendant. In the event the State fails to pay a judgment, courts do have power to order payment if funds are "reasonably available from appropriations enacted in the Budget Act in effect at the time of the court's order, as well as from similar appropriations in subsequent budget acts." (*Carmel Valley Fire Protection Dist. v. State of California* (1987) 190 Cal.App.3d 521, 540.)

Any argument that a court order directing payment of a monetary judgment from lawfully appropriated funds is somehow a violation of the doctrine of separation of powers would have to be raised after all of the following occur:

1) this Court reverses the trial court;
2) this Court remands the matter for a determination of remedies;
3) the trial court awards monetary damages;
4) the State refuses to pay the judgment;
5) a court subsequently directs payment from one or more already appropriated funds.

Since the above events have yet to unfold, and may not all occur, it is premature to assess the constitutionality of a hypothetical trial court order. Accordingly, State Respondents' arguments about a monetary award violating the separation of powers doctrine should be rejected.

VI. Conclusion

For the foregoing reasons, the judgment of the trial court should be reversed.

Sincerely,

Patrick Whalen
Attorney for Appellant CASE

6-29-10
Date

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sacramento, California. I am over the age of eighteen (18) years and not a party to the above-entitled action. My business address is 1725 Capitol Avenue, Sacramento, CA 95811.

On June 29, 2010 I served the following documents:

1. **Appellant/Petitioner CASE's Supplemental Reply Letter Brief**

I served the aforementioned document(s) by enclosing them in an envelope and (check one):

_XX_ depositing the sealed envelopes with the United States Postal Service with the postage fully prepaid.
_____ placing the sealed envelope for collection and mailing following our ordinary business practices. I am readily familiar with this business' 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 in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed as follows

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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

Delaney Ellison