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

IN THE SUPREME COURT OF CALIFORNIA

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 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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I. INTRODUCTION

The dispute now being considered by the Supreme Court - the validity of unilateral state employee furloughs - commenced almost two years ago when Governor Schwarzenegger sent a letter to "Valued State Workers" in November 2008 announcing the need for spending reductions. The solution the Governor proposed was 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, no sooner than the ink was dry on this letter, the Governor ignored his own words, and on December 19, 2008, 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. (*See,* Executive Order S-16-08 dated December 19, 2008.)

The Governor called the Legislature into Special Session pursuant state constitution, article IV, § 10(f), and on February 19, 2009, the Legislature approved the 2009-10 Budget Act, including amendments to the 2008 Budget Act. The Governor signed the new budget on February 20, 2009. That Budget Act authorized reductions in compensation to occur **through collective bargaining** consistent with the Dills Act. (*See,* Chapter 2, Statutes of 2009-10 Third Extraordinary Session. ("SB3X1").)

Once again, no sooner than the ink was dry on the Governor's signature, on March 1, 2009, state employees received their paychecks **unilaterally** reduced by about 10%. Soon thereafter, on July 1, 2009, the Governor issued Executive Order S-13-09, directing that state employees be furloughed for a third day per month and further reducing the salaries of state employees by about a total of 15 percent.

In the trial court case, the Sacramento Superior Court consolidated the Union petitions, and Judge Marlette found that Government Code section 19851(a), gave the Governor the authority to reduce the regular 40-hour workweek. ("The Governor has the statutory authority to reduce the hours of state employees pursuant to Government Code sections 19851 and 19849.") (JA, Vol. X, Tab WW, JA 001915-001927.) However, the Governor's actions had no basis in law. Likewise, the trial court's ruling was legally unsound.

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The Supreme Court transferred this case from the appellate courts after briefing was completed and in an order dated June 9, 2010 and letter dated June 15, 2010 has now asked for briefing on three additional issues. Those are summarized here:

1. What effect does Government Code section 19996.22 prohibition on involuntary reductions in worktime have on the validity of the furloughs?

2. What effect does the revision of the 2008 Budget Act reducing the appropriations for employee compensation have on (1) the validity of the furloughs, and (2) the remedy available to petitioning unions?

3. Were the documents found at pages 311-324 of the PECG joint appendix formally introduced in the Legislature, and with what bill number or numbers?

Set forth below is the argument and information in response to these three additional questions.

II. ARGUMENT

1. What effect does Government Code section 19996.22 have on the validity of the furloughs.

This section supports the Appellants' case that the unilateral and involuntary furloughs imposed by the Governor - reducing hours and pay - have no basis in law. The language and existence of the remedy provided in section 19996.22 for involuntary reductions compels the conclusion that such an unilateral and involuntary action is inappropriate and illegal. For this reason, SEIU cited these provisions in its opening brief on appeal. (SEIU's Appellants Opening Brief page 37.)

The Legislature took great effort to adopt an Act applicable to state workers creating a system of reduced work hours at a reduced pay - the Reduced Worktime Act. (Sections 19996.19-19996.29) Citing numerous valid purposes and reasons, the State crafted a voluntary system of reduced work time in exchange for reduced pay, but which prohibited involuntary reductions. (Section 19996.22) Section 19996.19 contains the many

supporting reasons for enacting the law. Importantly, however, in section 19996.19(c), the State included significant language reserving certain management rights. By specifically reserving these management rights, the State showed two aspects of statutory construction: first, that it knew how to specifically reserve important rights; and second, that it was paying attention to the types of rights it would need to reserve.

Keeping these two features in mind, section 19996.19(c) refers to two additional provisions which lists a series of management rights not altered by the act. (Sections 19996.20 and 19996.21[1]) These sections contained the essential state's rights that would not be altered by adoption of the Act. These include that voluntary reduced worktime should only be an option when it is determined to be feasible, when it can operate to allow job-sharing, and when it can be used to offset a reduction in personnel (e.g., lay-offs). However, nowhere in this list is the reservation of a management right to **unilaterally** reduce work hours and pay.

Consequently, it is appropriate to conclude that when the State was constructing the reservation of needed rights contained within a proactive law the addresses voluntary reductions in work hours with accompanying reductions in pay, if it believed it **had** a right to unilaterally impose such reductions, it would have specifically retained such a right. However,

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[1] The language of these provisions follows:

19996.20. "Reduced worktime," as used in this article, means employment of less than 40 hours of work per week, and includes arrangements involving job sharing, four-, five-, or six-hour workdays, jobs which provide eight hours of employment or less for one, two, three, four or five days per week, and such other arrangements *which the department finds* consistent with maximum employment opportunity to employees desiring other than a standard worktime.

19996.21. (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.

review of all the provisions of the Act discloses no such retention.

Next, the State adopted in section 19996.22 a very specific prohibition against involuntary reductions in worktime, as well as a broad ban on the impairment of employee work rights and benefits. Since the Legislature's efforts cannot be presumed to be idle or trifling, it would make very little sense to, on the one hand, protect employees against involuntary reductions in hours or pay, while secretly believing that the State had silently retained that very right elsewhere in the law. (*Pacific Gas & Electric Co. v. Shasta Dam Area Public Utility Dist.* (1955) 135 Cal.App.2d 463.) Indeed, such a result would be absurd. (*In re Luke W.* (2001) 88 Cal.App.4th 650.) However, by virtue of the fact that the State never references this countervailing management right at the time when it would have been critical to do so, one must conclude that the alleged right to impose involuntary reductions simply did not exist. Likewise, if such a right did not exist at the time of the adoption of the Act, the State has referenced no law enacted since then that accomplished this same goal.

Moreover, such a tortured interpretation would violate the MOUs between the State and SEIU. The SEIU MOU also defines "flexible work hours" and "reduced work time." The reference to reduced worktime is clearly and specifically tied to Gov. Code sections 19996.20 through 19996.29. However, Article 19.8 makes clear that both these options must be **initiated by the employee**, and not unilaterally: "*Upon request by the Union or an employee,* the State shall not unreasonably deny a request for flexible work hours, an alternate workweek schedule or reduced workweek schedule." (SEIU JA 483.) (MOU, 19.8(B).)

Ultimately, this language expressly states that reduced hours cannot be forced on employees, and refers to the specific statutory and administrative regulations prohibiting involuntary reductions in hours. (*See, e.g.*, section 19996.22 and Cal. Code. Regs., tit. 2 section 599.832.) However, in defiance to these clear statutory guidelines, this is exactly what the Governor's unilateral furlough does.

While the language of section 19996.22 additionally states that a worker "may file a grievance" with the department, it is unlikely that administrative exhaustion would have been mandatory in this case. Obviously, the trial court had already decided the matter before the

implementation of the pay reductions, in a ruling that was quickly appealed. Looking to California Code of Regulations tit. 2, sections 599.830-599.837 and specifically section 599.832, for an explanation of the grievance process one is redirected to the contractual MOU process (for represented workers) or to 599.855 et seq. for those state workers excluded from collective bargaining. By the terms of section 19996.22, this grievance process was not mandatory (i.e., "[a]ny employee ... may file a grievance...."). Consequently, when the employee organizations representing state workers filed a legal action disputing the validity of the same illegal reductions that may have been subject to a permissive grievance, exhaustion would have been excused.

Substantial legal authority supports this conclusion. First, exhaustion is mandated when it is required by statute or rule. (*Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280; *Palmer v. Regents of Univ. Of Cal.* (2003) 107 Cal.App 4th 899.) In this case, a grievance was a permissible but not the exclusive remedy. In addition, exhaustion is not required when the remedies that would be offered would be inadequate or nonexistent. (*Rosenfield v. Malcolm* (1967) 65 Cal.2d 559, 566.) Surely, in this case, once the trial court ruled on the validity of the Governor's unilateral act, the affected state workers would not remotely believe that a grievance to the State which implemented the furloughs would have led to a different result. Moreover, since a grievance is defined as a dispute about the terms of the Contract (Article 6.2), once the Superior Court ruled on the legality of the furloughs, employees would be unlikely to believe that the matter fell squarely on contractual interpretation versus legal authority. (SEIU JA 000372.) Likewise, an arbitrator would naturally believe his/her authority was restricted by a pre-existing legal ruling on appeal. Finally, on the issues of futility of pursuing the grievance remedy, clearly once the trial court ruled, it would be a fruitless effort for individual state workers to avail themselves further at an administrative level. (*See e.g., In re Locks* (2000) 79 CalApp 4th 890, 893.)

For all these reasons, the clear conclusion from reviewing section 19996.22, and the other provisions of the Act, is that while voluntary reductions in worktime would be permissible, involuntarily imposed reductions have no basis in law. The existence of a specific prohibition against involuntary reductions with no countervailing retention of a management right to exercise involuntary furloughs supports this result.

2. What effect does the revision of the 2008 Budget Act reducing the appropriations for employee compensation have on (1) the validity of the furloughs, and (2) the remedy available

The Budget Act at issue confirms the Union's position that furloughs were invalid unless achieved through collective bargaining and consistent with the Dills Act. The Governor's authority to act must be within the boundaries of existing law. As set forth in detail in the prior briefs on record, the separation of powers doctrine inhibits the Governor from acting in place of or defying the Legislature. Unless the Governor could imbue his actions with other legal authority, he could not unilateral impose the furloughs on employees. Indeed, as argued extensively in prior briefs, no legal authority authorized his actions.

The Constitution contains only one relevant delegation of authority to the Governor to act in the event of a "fiscal emergency." It is found in article IV, § 10(f)(1), and provides that if the Governor determines that there will be a substantial imbalance in General Fund revenues and expenditures,

> (1) He may issue 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.
> (2) 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.

Clearly, this Section grants authority to the Governor for the limited purpose of declaring a fiscal emergency, assembling the Legislature and

submitting legislation to address the fiscal emergency. Thus, this language conveys that the specific role of the Governor is to proclaim an emergency, assemble the politicians and propose legislation. This section does not in any way authorize the Governor to unilaterally enact a new law or amend an existing law. These types of action are clearly still within the specific realm of the Legislature.

Likewise, in subsection 10(f)(2), the Constitution prohibits the Legislature from taking action on other bills or even calling a recess unless and until it addresses the fiscal emergency proclaimed by the Governor.

Consequently, when, in the third Extraordinary Session of the Legislature, legislation was finally adopted and chaptered into law effectuating salary savings, the Governor was bound by the language he signed into law. (Chapter 2, Statutes of 2009-10 Third Extraordinary Session.) ("SB3X1") However, in this legislation, the Legislature demanded that such savings be achieved consistent with existing law **and** through collective bargaining. (Section 36, SB3X1.)

In the budget amendments at issue, the Legislature included the language highlighting that the Legislature knew how to implement a salary reduction in a manner consistent with the requirements of the Dills Act and its collective bargaining obligations. That language is:

> 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, with the exception of those items for the California State University, the University of California, Hastings College of the Law, the Legislature (including the Legislative Counsel Bureau), and the judicial branch, **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 (**Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1 of the Government Code). (Emphasis added.)

Not only did the Legislature specifically require the reduction to occur through collective bargaining, it also included language highlighting the need to observe the requirements of the Dills - neither changing nor superceding a single requirement therein. Further, by including an unallocated aggregate amount for the budget reduction in employee compensation, along with a bargaining obligation, the Legislature indicated that it did not approve or intend to approve the unilateral actions of the Governor.

Instead, for the Governor to actually have authority to unilaterally implement furloughs, full Legislative ratification of such authority would have had to occur prior to implementation of the furloughs. Indeed, in order for the Governor's claim of Proposition 58 authority to withstand constitutional scrutiny, the Legislature would have had to specifically revoke the Dills Act bargaining obligations existing for the contrary purpose. However, having failed to achieve Legislative authorization for his intended actions, the Governor would have had to resort back to his ordinary authority to carry out the laws of the state.

Interestingly, the Legislative action in amending the 2008 Budget clearly indicated that it did not intend to take away either side's bargaining authority in such a situation. Instead, it upheld the collective bargaining authority as being paramount. As a result, it was not the collective bargaining laws that were at all intended to be circumvented. For the Legislature, it was a question of the amount of the reduction to be achieved through collective bargaining. Unfortunately, the Governor utterly vitiated

the applicable collective bargaining laws and process. While the Trial Court had the opportunity to correct this error, it failed to do so.

As for the remedy, Code of Civil Procedure section 1095 expressly allows the recovery of damages as part of the judgment in writ proceedings. Moreover, 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.)

Since courts have long recognized that ensuring payment of unpaid or wrongfully withheld salary to public employees is a legitimate function of the writ of mandate, no barrier exists to such an award. More convincingly, such an award is justified for the recovery of money which is ancillary to a determination of a claim that the public entity employer is acting in violation of law - amounting to the violation of a ministerial duty. (*E.g.*, *Holt v. Kelly* (1978) 20 Cal.3d 560, 565, fn. 5; *Tevis v. City & County of San Francisco* (1954) 43 Cal.2d 190, 198; *California School Employees Assn. v. Torrance Unified School Dist.* (2010) 182 Cal.App.4th 1040, 1044; *A.B.C. Federation of Teachers v. A.B.C. Unified Sch. Dist.* (1977) 75 Cal.App.3d 332, 340-342; *Reed v. Board of Education* (1934) 139 Cal.App. 661, 663.)

Nothing in the Budget Act, section 36 would prohibit any court of competent jurisdiction from awarding damages pursuant to Code of Civil Procedure section 1095 in amounts deemed just and proper. It is true that a judgment awarding damages would itself require an appropriation, but this is no different than any other situation in which the State is held liable for monetary damages in a civil proceeding.

Government Code section 965.7, subdivision (b) makes clear that the Legislature retains the discretion to determine whether or not to "[m]ake an appropriation for the payment of a claim, compromise, settlement, or judgment or to provide an offset for a claim, compromise, settlement, or judgment." In light of this statutory provision, it is settled that "[a] judgment against the state, even when authorized by law, may be paid only out of appropriated funds." (*Veterans of Foreign Wars v. State of California* (1974) 36 Cal.App.3d 688, 697.) As this Court is able to rule on the validity of the Governor's actions in violation of the collective bargaining process, it is equally able to order payment from existing funds

or funds which are "reasonably available from appropriations entered 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, 538-540 citing *Serrano v. Priest* (1982) 131 Cal.App.3d 188.)

3. Were the documents found at pages 311-324 of the PECG joint appendix formally introduced in the Legislature, and with what bill number or numbers?

SEIU Local 1000 is diligently researching this question. At this point in the proceeding, it appears that other Plaintiffs and Appellants have greater knowledge about the origin, disposition and public disclosure of these documents. SEIU has no independent knowledge, but incorporates by reference the information provided by other Plaintiffs and Appellants.

Dated: June 23, 2010

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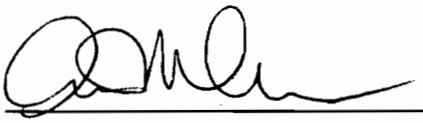
INTERNATIONAL UNION, LOCAL
1000,

By: 

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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 23, 2010, I served the following:

APPELLANT SEIU's SUPPLEMENTAL 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 23, 2010, at Sacramento, California.

MARY A. WALSH