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SUPREME COURT COPY

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SUPREME COURT
FILED

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Frederick K. Ohlrich Clerk

Deputy

June 23, 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:

By order filed on June 9, 2010, this Court directed the parties to submit simultaneous supplemental letter briefs on two questions. By letter dated June 15, 2010, this Court asked for additional information regarding documents contained in the appellate record. This letter brief constitutes the response of California Attorneys, Administrative Law Judges and Hearing Officers in State Employment ("CASE") to both the June 9, 2010 order and the June 15, 2010 letter. Please forward this to the honorable justices of the California Supreme Court.

## I. GOVERNMENT CODE SECTION 19996.22 IS FURTHER EVIDENCE THAT THE GOVERNOR'S EXECUTIVE ORDER WAS ILLEGAL

The first question posed by this Court in its June 9, 2010 letter was as follows:

> (1) What effect, if any, does Government Code section 19996.22 - which provides in part that "[a]ny employee . . . who has been required, by the appointing power, . . . to involuntarily reduce his or her worktime contrary to the intent of this article . . . may file a grievance with the department" - have on the validity of the Governor's executive order instituting a mandatory furlough on state employees?

As will be demonstrated, the Government Code section identified by this Court is yet additional evidence that the Governor's Executive Order directing furloughs was in excess of his authority.

Government Code section 19996.22 is part of Article 1.6, which is known as the "Reduced Worktime Act." (Gov. Code sec. 19996.29.) That article begins with a series of legislative findings and declarations. Specifically, section 19996.19, subdivision (a) finds as follows:

> (1) Many individuals in our society possess great productive potential which goes unused because they cannot meet the requirements of a standard workweek.
>
> * * *
>
> (6) *Voluntary* reduced worktime benefits both employers and employees, by increasing flexibility and decreasing absenteeism, offering management more flexibility in meeting work requirements, and filling shortages in various occupations.
>
> (7) Society is benefited by offering a needed alternative for those individuals who require or *prefer shorter hours*, despite the reduced income, thus increasing jobs available to reduce unemployment while retaining the skills of individuals who have training and experience.
>
> (8) Employment opportunities are maximized by providing for *voluntary* reduced worktime options to a standard workweek.

(Emphasis added.) These findings make clear that the entire article is aimed at making "voluntary" reduced worktime available to individuals who have obligations that prevent them from working a standard workweek, or to those who shorter hours."

Section 19996.19, subdivision (b) goes on to express the intent of the Legislature, including:

> (3) To increase the numbers and kinds of public and private sector *voluntary* reduced worktime options.
> (4) To support the creation of a healthy balance between work and family needs, including the need for *additional income*.
> (5) To encourage *voluntary* reduced worktime opportunities within the private as well as public sector.
> (6) To develop policies and procedures which support the growth of *voluntary* reduced worktime positions.
> (7) To promote job stability.

(Emphasis added.) Once again, these provisions make clear that the intent is to create "voluntary" options. Moreover, the Legislature recognized the need for "additional income" and the importance of job stability.

The Reduced Worktime Act goes on to define "reduced worktime" as a variety of options for "employees desiring other than a standard worktime." (Gov. Code sec. 19996.20.) This definition necessarily limits the application of the act to situations involving employees who desire reduced worktime, and does not include situations where employees do not desire to have their worktime and income reduced.

The Act also appears limited so as not to reduce the personnel available to state agencies. Section 19996.21, subdivision (a) states 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." Thus, the intent is that, to the extent reduced worktime is utilized by employees desiring such an option, the Legislature has made clear that the department shall not suffer a reduction in personnel or "full-time equivalency positions."

With the foregoing findings and declarations of intent in mind, it is clear that section 19996.22, subdivision (a) specifically prohibits forcing an employee to involuntarily reduce their worktime. By specifically authorizing the filing of a grievance, the subdivision leaves no doubt that forcing an employee to reduce their worktime involuntarily is a prohibited act.

In addition, the furloughs deprived state agencies of manpower for 17 months, by effectively reducing all positions to part-time positions for two weeks per month. This is contrary to the express intent of the Act that the number of full-time positions not be reduced. Furthermore, despite the fact that the Act recognized the need of employees for additional income, the furloughs had the opposite effect: income for furloughed employees was reduced significantly. And, despite the fact that the Act expressly recognized the importance of job stability, the furloughs created instability in the workforce because the closing of offices for several days per month made it difficult to accomplish assigned tasks in a timely manner.

Moreover, subdivision (c) of the same section provides: "Nothing in this article shall impair the employment or employment rights or benefits of any employee." This provision is significant because it makes clear that the Reduced Worktime Act may not be construed to abridge any employment rights of "any employee." Section 19996.25 echoes this prohibition because it specifies that if the Reduced Worktime Act conflicts with a memorandum of understanding ("MOU"), the MOU is controlling.

Because the Reduced Worktime Act prohibits the involuntary reduction in worktime of employees, the Governor's Executive Order is manifestly illegal. The Attorney General has opined that "the Governor may not invade the province of the Legislature." (75 Ops.Cal.Atty.Gen 263 (1992), citing California Constitution article III, section 3.)[1] In that same opinion, the Attorney General opined that "the Governor is not empowered, by executive order or otherwise, to amend the effect of, or to qualify the operation of existing legislation." (*Ibid.*) Thus, Executive Orders cannot contravene legislative enactments.

However, the Governor's Executive Order in this case did exactly that. The Executive Order in this case directed that furloughs be implemented two days per month on all employees without regard to whether the employees desired the furloughs. This action created a situation where thousands of employees were "required, by the appointing power . . . to involuntarily reduce his or her worktime contrary to the intent of this article. . . ." (Gov. Code sec. 19996.22.) The reduction in worktime was involuntary because the furloughs applied across-the-board, and did not apply only to employees who lacked adequate or affordable child care (Gov. Code sec. 19996.19, subd. (a)(3)), had special health needs (Gov. Code sec. 19996.19, subd. (a)(5)), or who fell into any of the other specified categories.

The furloughs were "contrary to the intent of this article" because the Article specifically provides that "Nothing in this article shall impair the employment or employment rights or benefits of any employee." (Gov. Code sec. 19996.22, subd. (c).) By reducing employees' worktime involuntarily (and thereby reducing their income), the furloughs impaired the rights of CASE members to enjoy the terms and conditions of employment specified in their MOU. For example, section 6.3.A of the MOU provides as follows:

> Employees are expected to work all hours necessary to accomplish their assignments and fulfill their responsibilities. Employees will normally average forty (40) hours of work per week including paid leave; however, work weeks of a longer duration may occasionally be necessary.

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[1] The published Opinions of the Attorney General, although not binding on courts, are nevertheless "entitled to great weight." (*City of Irvine v. Southern California Association of Governments* (2009) 175 Cal.App.4th 506, 521.)

(CASE JA 416.)[2]

Thus, this section of the MOU establishes that the work week will be, on average, 40 hours, except that longer work weeks may be occasionally required. This provision is in direct conflict the Governor's furlough order, which resulted in workweeks of *less than* 40 hours two weeks of every month. Moreover, under section 6.2.C of the MOU, the rate of pay is "*full compensation* for all the time that is required" to perform the work. (CASE JA 415, emphasis added.) Because the attorneys, administrative law judges and hearing officers in CASE are salaried, their pay cannot be reduced simply because their hours may fluctuate from week to week. Rather, they are entitled to "full compensation," which is the salary range established by the MOU. Those salaries are specified in Attachment A to the MOU, which is a detailed salary schedule for the various positions held by CASE members. (CASE JA 485-488.) The State is therefore contractually obligated to pay those salaries.

The furloughs ordered by the Governor violate all of these provisions regarding workweeks and compensation. Accordingly, the furloughs "impaired the employment rights" of CASE members, contrary to the express provisions of the Reduced Worktime Act. For that reason, Government Code section 19996.22 and the entire Reduced Worktime Act make clear that Governor has no authority to involuntarily reduce the worktime of employees.

## II. THE REVISED 2008 BUDGET ACT HAS NO EFFECT ON THE VALIDITY OF THE GOVERNOR'S EXECUTIVE ORDER OR THE REMEDY AVAILABLE TO CASE

The second question posed by this Court in its June 9, 2010 letter was as follows:

> (2) What effect, if any, does the provision of the revised 2008 Budget Act which reduced the appropriation for employee compensation for the 2008-09 fiscal year in an amount comparable to the savings sought to be achieved by the Governor's furlough order (Stats. 2009, 3d Ex. Sess. 2009 2010, ch. 2, § 36 (SBX3 2, § 36), passed by the Legislature and approved by the Governor on Feb. 20, 2009) have on (a) the validity of the Governor's executive order, and/or (b) the remedy, if any, to which the petitioning labor organizations may be entitled in these actions?

[2] "CASE JA" refers to the CASE Joint Appendix being filed and served concurrently with this brief. Citations to the record will be in the format "CASE JA ##." Citations to the Joint Appendices in the companion cases will be "PECG JA ##" or "SEIU JA ##."

A. Section 36 Did Not Authorize the Governor to Implement Furloughs Via Executive Order

The full text of section 36 of the revised 2008 Budget Act reads as follows:

> 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. It is the intent of the Legislature that General Fund savings of $1,024,326,000 and other fund savings of $688,375,000 in the 2009–10 fiscal year shall be achieved in the same manner described above. The Director of Finance shall allocate the necessary reduction to each item of appropriation to accomplish the employee compensation reductions required by this section.
> (b) The Department of Personnel Administration shall transmit proposed memoranda of understanding to the Legislature promptly and shall include with each such transmission estimated savings pursuant to this section of each agreement.
> (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).

This appropriation is expressly limited by the terms of several of its provisions. First, the appropriation specifies that reduction in employee compensation is to be "achieved through the collective bargaining process for represented employees or through existing administration authority . . . ." Thus, this enactment did not purport to enlarge the Governor's authority at all. Rather, the reduction in compensation could only be achieved (if at all) through either the collective bargaining process or pre-existing authority.

The collective bargaining process (see Gov. Code sec 3512 et seq.) requires the Governor, through his designated representative (Gov Code sec. 3513, subd. (j)), to meet and confer in good faith regarding wages, hours, and other conditions of

employment. (Gov. Code sec. 3517.) It is important to note that section 3517 imposes a mandatory duty ("shall") that may not be bypassed at the whim of the Governor. (*People v. Standish* (2006) 38 Cal.4th 858, 869 [When interpreting statutes, the presumption is that the word "shall" is ordinarily deemed mandatory and "may" permissive].) The duty to meet and confer specifically includes the obligation to meet "for a reasonable period of time" and to allow "adequate time for the resolution of impasses." Of course, by unilaterally imposing furloughs, the Governor bypassed all of those requirements. The Governor may only unilaterally impose terms after impasse is reached. (Gov. Code sec. 3517.8, subd, (b).) In this case, the process of meeting and conferring was not even begun, let alone allowed to continue to impasse.

Section 36 expressly contemplated that the collective bargaining process would be utilized, because in subdivision (b) it provided for the transmission of MOUs addressing the furlough savings. MOUs are the result of the collective bargaining process. (Gov. Code sec. 3517.5.) No such MOU was reached or even attempted in the instant case. Accordingly, the Governor did not impose furloughs via the collective bargaining process.

"Existing authority" is not defined in section 36. However, in determining the meaning of this term, it is useful to note that in addition to expressly contemplating the collective bargaining process, section 36 also was self-limiting in that subdivision (c) provided "Nothing in this section shall change or supersede the provisions of the Ralph C. Dills Act." This express limitation, combined with the provisions relating to collective bargaining, suggest that the "existing authority" refers to the possibility that the Governor may already have reached agreements with various bargaining units regarding furloughs through the collective bargaining process.

In fact, CASE has such an agreement. Section 10.3 of the CASE MOU provides:

> 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.

(CASE JA 445.) This section merely allows the state to "propose" a reduction in hours as an alternative to layoffs, but does not empower the state to unilaterally impose that reduction. In fact, section 10.3 specifically requires the state to "seek concurrence" from CASE before implementing the alternative. Thus, had the Governor been at all interested in adhering to the existing MOU (which was itself reached through the very collective bargaining process sanctioned in section 36), then he could have sought the concurrence of CASE and perhaps reached an agreement. He certainly had the "existing authority" to pursue such an agreement, and would not have needed to negotiate an entirely new MOU to effectuate furloughs if an agreement could have been reached. But again, the Governor did not act within

that existing authority, and instead imposed the furloughs unilaterally, completely bypassing the collective bargaining process and such other authority as he may have had to negotiate furloughs.

It is apparent from the limitations contained within the text of section 36 that it was not intended to convey any additional power to the Governor to furlough state employees. Nor could it have done so without violating the single-subject rule in California's Constitution. The single-subject rule in article IV, section 9, provides, in pertinent part: "A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void."

Applying the single-subject rule, this Court has previously held:

> the budget bill may deal only with the one subject of appropriations to support the annual budget, and thus may not constitutionally be used to grant authority to a state agency that the agency does not otherwise possess or to substantively amend and change existing statute law.

(*Association for Retarded Citizens v. Department of Developmental Services* (1985) 38 Cal.3d 384, 394, quoting 64 Ops.Cal.Atty.Gen. 910, 917 (1981).) In *Planned Parenthood Affiliates v. Swoap* (1985) 173 Cal.App.3d 1187, 1199 the court recognized that the purpose of the annual budget bill is "'itemizing recommended expenditures' for the ensuing fiscal year." (Cal. Const., art. IV, § 12, subd. (c).)

In *Planned Parenthood*, this Court found an appropriation provision constitutionally invalid under the single-subject rule in the 1985-1986 Budget Act when the provision restricted funding for abortions otherwise authorized by the Family Planning Act (Welf. & Inst. Code, § 14500 et seq.). The Court first noted that "the annual budget bill is particularly susceptible to abuse of that rule." (*Planned Parenthood Affiliates v. Swoap, supra*, 173 Cal. App.3d at p 1198.)

The court observed that a budget bill which seeks to clarify or correct uncertainties in existing law is precisely the sort of amendatory change prohibited by the Constitution. (*Id.* at pp. 120-1201, citing *Franchise Tax Bd. v. Cory* (1978) 80 Cal.App.3d 772, 777.) Any revision of existing law accomplished in a budget bill is unconstitutional, because the purpose of the budget bill is merely to appropriate funds, not change or clarify existing law. (*Ibid.*)

Accordingly, there can be no argument that section 36 in any way gave the Governor authority to implement furloughs, as any such reading of the budget bill would render it unconstitutional. Therefore, in answer to this Court's question as to what effect section 36 had on the validity of the Governor's executive order, the answer is, quite simply, none whatsoever. Either the Governor had the authority to furlough independent of the budget bill, or he did not, but in no case did section 36 confer upon him power that he did not already possess.

B. Section 36 Has No Effect on the Remedy to Which CASE Is Entitled

This case was initiated as a writ of mandate. (CASE JA 1.) Under existing law, 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.)

Moreover, numerous courts have recognized that ensuring payment of unpaid or wrongfully withheld salary to public employees is a legitimate function of the writ of mandate, particularly where recovery of money is ancillary to 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.)

Because these are settled principles of existing law, the single-subject rule discussed in the preceding section above prohibits reading section 36 as an effort to limit the remedies available in writ proceedings. Accordingly, should CASE prevail on the merits, nothing in 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 adjudged 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.) Every year, the Legislature passes a number of bills authorizing the payment of various legal judgments and settlements. (See, e.g. SB 911 (Kehoe) signed by the Governor on June 15, 2010; AB 92 (De Leon) signed by the Governor on October 11, 2009; AB 2597 (Leno) signed by the Governor on June 23, 2008; AB 1273 (Leno) signed by the Governor on October 11, 2007.)

Section 36 was of course silent as to any appropriation to pay a claim resulting from this or any other furlough lawsuit, as it would have been premature to appropriate money at the time the Revised Budget Act was enacted. The fact that section 36 made an adjustment to a previous appropriation does not prohibit the

Legislature from approving more funds for any purpose in a subsequent appropriation.

## III. THE LEGISLATURE WAS AWARE OF THE GOVERNOR'S PROPOSED STATUTORY CHANGES

By letter dated June 15, 2010, this Court asked for additional information relating to documentation appearing at CASE JA 311-324. By way of background, the material in question is proposed legislation in Legislative Counsel form which, in part, would have enacted Government Code section 19826.4 to allow the Department of Personnel Administration to implement a furlough and salary reduction for a limited time.

This Court asked whether the language was included in any bills that "formally were introduced in the Legislature." A review of the Table of Sections Affected by the California Legislature for the 2007-2008 session[3] reveals that they were not formally introduced as bills. As reflected in the Declaration of Ted Toppin (see PECG JA 47), this language was proposed by the Governor during the fourth extraordinary session in 2008, but ultimately was not enacted by the Legislature. In December, 2008, the Governor called a special session of the Legislature pursuant to Proposition 58. (PECG JA 48.) During that session, according to the Assembly Budget Committee, the Governor proposed legislation "identical to those proposed in November for the 2007-08 4th Extraordinary Session." (PECG JA 76.) The Legislature did not enact the furlough legislation during the Proposition 58 special session. (PECG 48.)

This Court also asked whether the documents were included in any material submitted to the Governor. The answer is yes. The Assembly Budget Committee prepared a report entitled "Summary of Governor's Proposed December 2008-09 Budget Adjustments." (PECG JA 75.) That report identified proposed savings in employee compensation of $802 million. (PECG JA 76.) Specifically, the report explained that the Governor's proposal called for state employees to take one furlough day each month from February 1, 2009 through June 30, 2010. (PECG JA 88.) Thus, while it appears that the language in question was never formally introduced, it was nevertheless submitted to the Legislature by the Governor and was before them during multiple special sessions.

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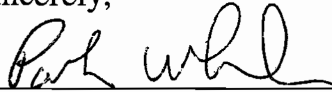
[3] The Table of Sections Affected is published by the Legislature and lists every section of the California codes referenced in any legislation introduced, regardless of whether the legislation was ultimately enacted.

## IV. CONCLUSION

The Reduced Worktime Act illustrates that the Governor's Executive Order was in violation of existing law. Section 36 of the revised 2008 Budget Act has no effect whatsoever on either the validity of the Governor's Executive Order or the remedy to which CASE is entitled. Finally, the Legislature was aware of the proposed statutory changes the Governor proposed to specifically empower him to implement furloughs, but elected not to enact those changes.

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

Sincerely,



6-23-10

Patrick Whalen
Attorney for Appellant CASE

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 23, 2010 I served the following documents:

1. **Appellant/Petitioner CASE's Supplemental 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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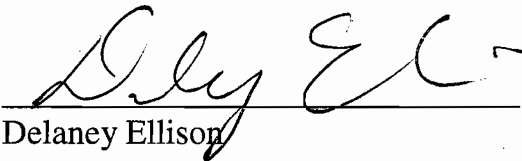
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this Declaration was executed on June 23, 2010



Delaney Ellison