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9 SUPERIOR COURT OF CALIFORNIA
10 COUNTY OF SAN FRANCISCO

11 CALIFORNIA ATTORNEYS,
12 ADMINISTRATIVE LAW JUDGES AND
13 HEARING OFFICERS IN STATE
EMPLOYMENT,

14 Petitioner/Plaintiff,

15 vs.

16 DEPARTMENT OF PERSONNEL
17 ADMINISTRATION,

18 Defendant/Respondent.
19
20
21

CPF-09-509A27
Case No.

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
VERIFIED PETITION FOR WRIT OF
PROHIBITION AND COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF

Date:
Time:
Dept.:

22
23 **I. Statement of Facts**

24 The California Department of Personnel Administration ("DPA") serves as the
25 Governor's designated representative for purposes of collective bargaining, and for purposes of
26 meeting and conferring with the state bargaining units' exclusive representatives. (See Gov.
27 Code § 19815.2; Gov. Code § 3517.) Petitioner/Plaintiff California Attorneys, Administrative
28 Law Judges and Hearing Officers in State Employment ("CASE") is the exclusive collective

COPY

1 bargaining representative of approximately 3400 legal professionals in State Bargaining Unit 2
2 pursuant to Government Code section 3520.5.

3 There currently exists a valid, binding, and enforceable Memorandum of Understanding
4 (“MOU”) between the parties. The original term of the MOU was from July 1, 2005 through
5 June 30, 2007. (See Exhibit A to Declaration of Peter Flores, Jr.) However, pursuant to
6 Government Code section 3517.8, the terms of the expired MOU remain in effect unless the
7 parties have reached impasse in negotiating a successor agreement. The parties have not reached
8 impasse and are still bargaining over a successor agreement. (See Declaration of Peter Flores,
9 Jr., ¶ 2.)

10 Article 8 of the MOU is entitled “Holidays.” Section 8.1.A provides as follows:

11 All full-time and part time employees shall be entitled to such observed holidays
12 with pay as provided herein, in addition to any official State holidays declared by
13 the Governor.

14 Section 8.1.B further provides:

15 Observed holidays shall include January 1, the third Monday in January, February
16 12, the third Monday in February, March 31, the last Monday in May, July 4, the
17 first Monday in September, the second Monday in October, November 11,
18 Thanksgiving Day, the day after Thanksgiving and December 25. The holidays
are observed on the actual day they occur. . . .

19 As relevant to this proceeding, section 8.1.B specifically identifies both February 12 (Lincoln’s
20 Day) and the second Monday in October (Columbus Day) as holidays. (See Declaration of Peter
21 Flores, Jr., ¶ 4.)

22 The State Compensation Insurance Fund employs approximately 500 CASE members.

23 On July 24, 2009, the Human Resources division of the State Compensation Insurance Fund sent
24 a memo to all employees which began as follows:

25
26 The Department of Personnel Administration has given instruction to all
27 departments regarding recent changes in the Government Code enacted through
28 legislation. Specifically, Senate Bill (SB) X3 8 amended Government Code
(G.C.) section 19853, which governs the State holidays our employees are entitled
to, eliminating two State holidays, February 12th (Lincoln’s Day) and the second

1 Monday in October (Columbus Day). These changes in the holiday provisions
2 were passed by the Legislature as part of the state budget legislation and will take
3 effect immediately. All employees are subject to these holiday provisions.

4 (See Exhibit A to Declaration of Patrick Whalen, Attachment A.) Similar memos were sent to
5 CASE employees at the Department of Justice and the Board of Equalization. (See Exhibit A to
6 Declaration of Patrick Whalen, Attachments B and C.) Approximately one thousand (1000)
7 members are employed by the Department of Justice. Approximately sixty-four (64) members
8 are employed by the Board of Equalization. (Declaration of Peter Flores, Jr., ¶ 5.)

9 CASE has members in 82 different Departments, Boards, and Commissions. (Declaration
10 of Peter Flores, Jr., ¶ 5.) CASE depends on its members for information about the policies in
11 their particular departments. (Declaration of Peter Flores, Jr., ¶ 5.) CASE has learned that other
12 departments employing CASE members have been given similar instructions by DPA to
13 eliminate the Columbus Day and Lincoln's Day holidays. (Declaration of Peter Flores, Jr., ¶ 6.)

14 On February 19, 2009, the Legislature passed SB X3 8, which was signed into law by the
15 Governor the next day. Prior to this legislation, Government Code section 19853, subdivision
16 (a) read in pertinent part:

17 all employees shall be entitled to the following holidays: January 1, the third
18 Monday in January, February 12, the third Monday in February, March 31, the
19 last Monday in May, July 4, the first Monday in September, the second Monday
20 in October, November 11, the day after Thanksgiving, December 25, the day
21 chosen by an employee pursuant to Section 19854, and every day appointed by
22 the Governor of this state for a public fast, thanksgiving, or holiday.

23 SB X3 8 modified section 19853 in several ways.

24 First, it added a new subdivision (f) which stated that the entire section was inoperative
25 on the effective date of the legislation,¹ and was repealed effective January 1, 2010 in the
26 absence of a later-enacted statute deleting or extending the dates of on which it becomes
27 inoperative or is repealed.

28 _____
¹ The effective date of the legislation was February 20, 2009, the date the law was approved by the Governor.

1 Second, it enacted a new version of section 19853, to be operative on the effective date of
2 the legislation, which contained the following recitation in subdivision (a):

3
4 (a) All state employees shall be entitled to the following holidays: January 1, the
5 third Monday in January, the third Monday in February, March 31, the last
6 Monday in May, July 4, the first Monday in September, November 11,
7 Thanksgiving Day, the day after Thanksgiving, December 25, the day chosen by
8 an employee pursuant to Section 19854, and every day appointed by the Governor
9 of this state for a public fast, thanksgiving, or holiday.

10 Missing from this new version of the statute were both February 12 (Lincoln's Day) and the
11 second Monday in October (Columbus Day).

12 Third, SB X3 8 added a new subdivision (g), which provides as follows:

13 (g) If subdivision (a), (c), or (d) is in conflict with the provisions of a
14 memorandum of understanding executed or amended pursuant to Section 3517.5
15 on or after February 1, 2009, or the date that the act adding this section takes
16 effect, whichever is later, the memorandum of understanding shall be controlling
17 without further legislative action, except that if those provisions of the
18 memorandum of understanding require the expenditure of funds, the provisions
19 shall not become effective unless approved by the Legislature in the annual
20 Budget Act.

21 This passage reflects an intent on the part of the Legislature to allow section 19853 to operate in
22 conjunction with new MOUs executed after the date of enactment.

23 **II. Both the State and Federal Constitutions Prohibit the Impairment of Contracts**

24 The rights of CASE members under the MOU are protected by the State and Federal
25 contract clauses because "public employment gives rise to certain obligations which are
26 protected by the contract clause of the Constitution." (*California Ass'n of Professional Scientists*
27 *v. Schwarzenegger* (2006) 137 Cal.App.4th 371, 376.)

28 Article I, § 10 of the United States Constitution provides that "[n]o State shall . . . pass
any law . . . impairing the Obligation of Contracts." It has been settled law for more than a
century that "[t]he prohibition of the Constitution against the passage of laws impairing the
obligation of contracts applies to the contracts of the State, and to those of its agents acting under

1 its authority, as well as to contracts between individuals.” (*Wolff v. City of New Orleans* (1880)
2 103 U.S. 358, 367.)

3 Article I, § 9 of the California Constitution provides that a “law impairing the obligation
4 of contracts may not be passed.” The Ninth Circuit has observed that

5 The California Supreme Court uses the federal Contract Clause analysis for
6 determining whether a statute violates the parallel provision of the California
7 Constitution. *See Calfarm Ins. Co. v. Deukmejian*, 48 Cal.3d 805, 258 Cal.Rptr.
8 161, 771 P.2d 1247, 1262-63 (1989) (holding that a statute that passed the federal
test did not violate either the federal or state Constitutions).

9 *Campanelli v. Allstate Life Ins. Co.* (9th Cir. 2003) 322 F.3d 1086, 1097.) Accordingly, this
10 Court may employ the federal contracts clause analysis in determining whether there has been a
11 violation of both the state and federal constitutional provisions. (See also *20th Century Ins. Co.*
12 *v. Superior Court* (2001) 90 Cal.App.4th 1247, 1269, fn. 24.)

13 14 A. The Legislature Did Not Intend to Eliminate State Employee Holidays

15 It is important to construe statutes in a way that will give full effect to the statute and
16 avoid a construction that violates the constitutional proscription against impairment of contracts.
17 (*Morro Hills Community Services Dist. v. Board of Supervisors* (1978) 78 Cal.App.3d 765, 773-
18 774.) To this end, it is important to understand that at the time SB X3 8 was enacted, the largest
19 state employee organization (SEIU 1000) had just agreed to a successor MOU which gave up
20 Lincoln’s Day and Columbus Day in exchange for two “floating holidays” to be used at the
21 option of the employee. (Declaration of Peter Flores, Jr., ¶ 7.) It was generally believed that the
22 SEIU agreement would serve as a template for other bargaining units. (*Ibid.*) Thus, at the time
23 SB X3 was enacted, it was believed that there would be an exchange of holidays, not a complete
24 elimination. As it turned out, the SEIU agreement was never ratified. (*Ibid.*) Subdivision (g) of
25 the new section 19853 is consistent with this view, because it contemplates the statute operating
26 in conjunction with successor MOUs executed after the date of enactment.

27 Moreover, SB X3 8 did not purport to change Government Code section 6700. That
28 section specifies that the holidays in this state include February 12 (subd. (d)) and the second

1 Monday in October (subd. (k)). The fact that section 6700 remains in effect is evidence that the
2 Legislature did not intend a wholesale elimination of holidays. Rather, the amendments to
3 section 19853 are properly construed as an effort to change a section of the Government Code so
4 as to allow employees to get the benefit of their bargain, i.e. two floating holidays to be used
5 anytime instead of two holidays on rigidly defined dates.

6 Accordingly, the legislative changes enacted as part of SB X3 should be viewed as an
7 effort to facilitate the implementation of an MOU provision, which, unfortunately, never became
8 operative. It should not be construed as an attempt by the Legislature to unilaterally violate the
9 contractual rights of state employees in violation of the State and Federal Constitutions. Viewed
10 in this light, the statutory changes cannot be interpreted so as to confer on DPA the authority to
11 instruct State departments to violate the provisions of section 8.1.B of the CASE MOU with
12 respect to holidays.

13
14 B. Heightened Scrutiny Applies to Contracts to which the State is a Party

15 If, despite the foregoing, SB X3 is nevertheless construed as an impairment of the CASE
16 MOU, this Court must then determine whether that impairment is constitutional. The contract
17 clause does not absolutely bar the legislature from subsequently modifying the state's own
18 contractual obligations. For both private and state contracts, an impairment may be constitutional
19 if it is reasonable and necessary to serve an important public purpose. But, according to the
20 United States Supreme Court, when the state is a party to the affected contract, it is inappropriate
21 to defer to the legislature's judgment of reasonableness and necessity, because the state's self-
22 interest is at stake. (*United States Trust Co. of New York v. New Jersey* (1977) 431 U.S. 1, 25-
23 26; compare *Keystone Bituminous Coal Ass'n v. Benedictus* (1987) 480 U.S. 470, 505-506
24 (refusing to "second-guess" Pennsylvania's determination of necessity because state was not a
25 party to the contracts)).

26 It has been observed that if a state could reduce its obligations whenever it wanted to do
27 so for what it regarded as an important public purpose, there would be no contract clause
28 protection at all. (*United States Trust Co. of New York v. New Jersey, supra*, 431 U.S. at p. 26.)

1 In *Energy Reserves Group Inc. v. Kansas Power and Light Co.* (1983) 459 U.S. 400, 413, fn. 14,
2 the Court noted that “[i]n almost every case, the Court has held a governmental unit to its
3 contractual obligations when it enters financial or other markets.” Similarly, California courts
4 recognize that under the federal test, strict scrutiny applies to the question of whether a public
5 contract impairment is constitutional. (*Board of Administration v. Wilson* (1997) 52 Cal.App.4th
6 1109, 1156.)

7 C. The State Has Substantially Impaired Its Contract With CASE Members

8 The threshold inquiry in contracts clause cases is whether the change in state law has
9 “operated as a substantial impairment of a contractual relationship.” (*Allied Structural Steel Co.*
10 *v. Spannaus* (1978) 438 U.S. 234, 244.). The Supreme Court has observed that

11 “[t]his inquiry has three components: whether there is a contractual relationship,
12 whether a change in law impairs that contractual relationship, and whether the
13 impairment is substantial. Normally, the first two are unproblematic, and we need
address only the third.

14 (*General Motors Corp. v. Romein* (1992) 503 U.S. 181, 186.) In this case, there is no credible
15 dispute that there is a contractual relationship. (See Declaration of Peter Flores, Jr. ¶ 3 and
16 Exhibit A.) Although the term of the MOU was from July 1, 2005 through June 30, 2007, all of
17 the terms and provisions continue in effect pursuant to Government Code section 3517.8.
18 Neither is there any dispute that the change in law impairs the contractual relationship. The
19 amendments to Government Code section 19853 eliminate two holidays which are expressly
20 provided for in the MOU. This case turns on whether the elimination of those two holidays was
21 substantial.

22 Both state and federal courts recognize that “[t]otal destruction of contractual
23 expectations is not necessary for a finding of substantial impairment.” *Energy Reserves Group*
24 *Inc. v. Kansas Power and Light Co.*, *supra*, 459 U.S. at p. 411; *Hellinger v. Farmers Group, Inc.*
25 (2001) 91 Cal.App.4th 1049, 1064.) In this case, however, the legislative change does result in
26 total elimination of bargained-for holidays. The vested contractual rights of CASE members to
27 enjoy those two holidays, with pay, have been completely impaired. The change is not subject to
28 any condition, and is intended to last forever, without limitation. While it is true that the MOU

1 covers a variety of terms and conditions of employment, it is also true that an entire article of the
2 MOU is devoted to holidays, which demonstrates that the topic is of considerable importance to
3 the parties. Moreover, section 4.3 of the MOU makes clear that it reflects the entire agreement
4 between the parties, and that the parties cannot pick and choose which provisions to enforce.

5 The issue of holidays was so critical to the parties that the MOU expressly references
6 Government Code section 19853 in section 4.4, entitled "Supersession." Specifically, the MOU
7 provides that various Government Code sections (including section 19853) are incorporated into
8 the MOU, with the following exception: "However, if any other provision of this MOU is in
9 conflict with any of the Government Code sections listed below or the DPA regulations related
10 thereto, such MOU provision shall be controlling." This reflects the intent of the parties that, as
11 to holidays, the provisions of the MOU shall control over the Government Code.

12 Any argument that merely eliminating two state holidays is not "substantial impairment"
13 overlooks the fact that the MOU is the end result of negotiations where the parties trade benefits
14 in one area of employee benefits in exchange for concessions in another area. Allowing the State
15 to unilaterally eliminate two holidays would open the door for the State to pass another law
16 eliminating two more holidays, and so on, until all benefits under the MOU were incrementally
17 removed. The elimination of the two holidays is substantial because it effects a unilateral
18 reduction in benefits with no corresponding or offsetting concession by the state. It completely
19 bypasses the collective bargaining process, and thus is antithetical to the very foundation of the
20 MOU. Given that contracts to which the state itself is a party are subject to strict scrutiny, and
21 because the State has the ability to negotiate changes in holidays at the bargaining table, the
22 State's unilateral action should be viewed as a substantial impairment of the existing contract.

23 D. There is No Legitimate Public Purpose Justifying the Impairment

24 Courts will sometimes overlook minor impairment of contracts if the legislation has "a
25 significant and legitimate public purpose" such as "the remedying of a broad and general social
26 or economic problem" and if the adjustment of contractual rights is based on reasonable
27 conditions appropriate to the public purpose. (*20th Century Ins. Co. v. Superior Court, supra*,
28 90 Cal.App.4th at p. 1269). In this case, the legislation amending Government Code section

1 19853 contained no statement of legislative intent or other indicia of the public purpose. Indeed,
2 no broad public purpose is achieved at all, because the provision in question merely targets state
3 employees, a relatively small subset of California's population. It cannot be said that the issue of
4 state employee holidays presents broad social or economic concerns.

5 Moreover, the adjustment in contractual rights between the parties was not reasonable or
6 balanced. It was completely one-sided. There are no conditions or limits on the holiday
7 elimination; it is absolute. Accordingly, the State cannot justify its action based on the "public
8 purpose" exception, and the impairment is therefore unconstitutional.

9
10 **CONCLUSION**

11 Based on the foregoing points and authorities, Petitioner CASE respectfully requests this
12 court issue a determination that Government Code section 19853, as amended by SB X3 8, is not
13 intended to impair the contractual rights of CASE members, and that therefore, DPA has no
14 authority to instruct State departments to violate the CASE MOU with respect to holidays.

15 Alternatively, Petitioner CASE requests a determination that the amendments to section
16 19853 operate as an unconstitutional impairment of contract in violation of the State and Federal
17 Constitutions, and that therefore, DPA has no authority to instruct State departments to violate
18 the CASE MOU with respect to holidays.

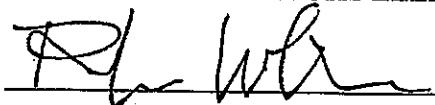
19 In either event, Petitioner CASE respectfully submits a writ of prohibition should issue
20 prohibiting Respondent/Defendant DPA from denying to Petitioner/Plaintiff and its members the
21 holidays specified in section 8.1.B of the MOU. Moreover, Petitioner CASE respectfully
22 submits this Court should issue a declaration that any action by Respondent/Defendant which
23 seeks to deny CASE members the holidays to which they are entitled under the MOU, or which
24 seeks to encourage State Departments to deny such holidays, is an illegal and unilateral breach of
25 the MOU.

26 Finally, Petitioner CASE respectfully submits this Court should issue a preliminary and
27 permanent injunction prohibiting Respondent/Defendant from taking any action to violate, or to
28

1 encourage others to violate, the provisions of the MOU relating to the holidays to which CASE
2 members are entitled.

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6 Dated: 9/17/09

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