

FILED
ALAMEDA COUNTY

DEC 31 2009

CLERK OF THE SUPERIOR COURT

By Vicki Daybell *VD*

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

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

Petitioner/Plaintiff,

vs.

ARNOLD SCHWARZENEGGER,
et al.,

Respondents/Defendants.

RG09453982

ORDER GRANTING PETITION
FOR WRIT OF MANDATE

The hearings on the coordinated Petitions for Writ of Mandate of California Attorneys, Administrative Law Judges and Hearing Officers in State Employment ("CASE"), Union of American Physicians and Dentists ("UAPD"), and Service Employees International Union, Local 1000 and Yvonne Walker ("SEIU") came on regularly on November 16, 2009, in Department 31 of this Court, Judge Frank

Roesch presiding. CASE appeared by Patrick Whalen of The Law Office of Brooks Ellison. UAPD appeared by Adam Zapala of Davis, Cowell & Bowe, LLP. SEIU appeared by Felix J. De La Torre, Esq.

Respondents on the Petitions appeared as follows:

Respondent Arnold Schwarzenegger, David Gilb, and Kris Perry appeared by David W. Tyra, Esq., of Kronick, Moskowitz, Tiedemann & Gerard.

Respondents Alan Kerzin, Bonnie Garcia, Bridgett Luther, Caleb Cheung, David Maxwell-Jolly, Carrie Lopez, Dale Bonner, Destie Overpeck, Dorothy Rice, Douglas Bosco, Fred Armendariz, George Valverde, J.A. Farrow, Jon Duncan, John P. Donnelly, Julie Nauman, Karen Humphrey, Ken Lewis, Kirk Breed, L. Steven Spears, Lester Snow, Lloyd Throne, Lynn Daucher, Lynn Jacobs, Mark Horton, Mark Leary, Mary D. Nichols, Mary-Ann Warderman, Maziar Movassaghi, Mike Chrisman, Patrick Henning, Patrick Wright, Raynor T. Tsuneyoshi, Ron Diedrich, Ronald P. Schafer, Ruth Coleman, Steve Hardy, Steve Poizner, Terri Ciau, Tony Sauer, John A. Wagner, Kimberly Belshe, Will Kempton, and William Haraf appeared by Will M. Yamada, Esq., Labor Relations Counsel for the Department of Personnel Administration.

Respondents Anne Stausboll, Jack Ehnes, and John A. Wagner appeared by Harvey L. Leiderman, Esq., of Reed Smith.

Respondents Edmund G. Brown Jr., Debra Bowen, and John Chiang appeared by Ross C. Moody, Esq., California Department of Justice.

Respondent Glenn Pomeroy appeared by Aparna Sridhar, Esq. and Michael J. Strumwasser, Esq. of Strumwasser & Woocher LLP.

Respondent Joan Borucki represented by Ronald B. Turovsky, Esq. of Manatt, Phelps, & Phillips, LLP.

At the hearing, Petitioners on all three Petitions joined in each others' arguments, as did Respondents on all Petitions.

The Court having considered the pleadings, evidence,¹ and arguments submitted in support of and in opposition to the CASE Petition, and good cause appearing, it is hereby ORDERED that the Petition is GRANTED. The reasons follow:

FACTUAL BACKGROUND

A. The State's General Fund and Special Funds

State employees' salaries may be paid from any one or more of three funding sources: the General Fund, special state funds that are earmarked for particular programs or agencies, and federal funds received by the state as a passthrough. Many, but not all, special funds agencies deposit "idle" cash in the Pooled Money Investment Account ("PMIA"), which creates a pool of resources from which the State may borrow to meet current fiscal obligations. The State may also directly borrow from special funds held by an individual agency or

¹ Respondents' objections to the Declaration of Patrick Whalen are overruled as moot in light of the supplemental Declaration of Patrick Whalen, submitted on November 9, 2009. All requests for judicial notice are GRANTED as unopposed.

department. The Controller's Office turns to external borrowing only after determining that resources available from internal borrowing are insufficient to meet the cash needs of the General Fund. Certain special funds are, by statute, non-borrowable. Likewise, federal funds designated for use by particular agencies cannot be borrowed to pay General Fund obligations.

B. The Executive Orders

The Governor issued two Executive Orders that reduced the workdays and salaries of State employees. On December 19, 2008, Governor Schwarzenegger issued Executive Order S-16-08, which directed the Department of Personnel Administration ("DPA") to adopt a plan to furlough state employees "regardless of funding source" for two days per month, and to reduce their pay by a commensurate amount, effective February 1, 2009, through June 30, 2009. The order directed DPA to include a "limited exemption process." The only specific authority cited in the order was Government Code section 3516.5.

Two months later, on February 19, 2009, the Legislature passed a budget, which was signed into law by the Governor the next day.

On July 1, 2009, Governor Schwarzenegger issued Executive Order S-13-09, which directed DPA to implement an additional (third) furlough day each month, and extended the implementation of the prior two-day furlough an additional year, effective July 1, 2009, and through June 30, 2010. Again, the only specific authority cited in the order was Government Code section 3516.5.

Approximately a month later, on July 28, 2009, the Governor signed into law a budget for fiscal year 2009/10.

C. The Petitioners in this Matter

Petitioner CASE represents legal professionals in Bargaining Unit 2, who work in some 80 different state departments, boards and commissions. CASE argues that a majority of its members work in positions that are either entirely or almost entirely funded by monies from sources other than the State's General Fund. For instance, the Department of Insurance, which employs 71 CASE-represented employees, is funded entirely from non-General Fund monies. A furlough of these employees does not result in a direct General Fund savings. Similarly, the Department of Corporations, the Department of Managed Health Care, the Department of Real Estate and the Department of Motor Vehicles, to name but a few, are funded entirely by non-General Fund monies. Of the agencies whose heads are named in the CASE Petition, at least 6 exclusively specially-funded agencies, and at least 13 primarily specially-funded agencies, pay their employees with non-borrowable funds.

SUMMARY OF ARGUMENTS

Petitioners argue that, while the justification offered for the furloughs was to create savings for the General Fund, such savings cannot come from furloughs of these non-General Fund positions. CASE alleges that the furloughing of employees in agencies where there is no General Fund savings has no rational basis and is arbitrary, capricious and unlawful. In addition, Petitioners argue that

furloughs of special funds positions interfere with the purposes for which those special funds were created because they decrease services to the public and impede the operations of the special funds departments and agencies.²

Respondents argue that furloughs achieve General Fund savings as well as other benefits to the General Fund. Furlough of those employees in special fund departments or positions increased the amount of unallocated special fund monies, and that those unallocated special fund monies are borrowable resources that the State can use to meet its fiscal obligations. The greater the amount of internal borrowable resources, the less external borrowing the State must pursue to meet its obligations. Respondents argue that the Governor has the discretion to decide that furloughs are the best means to achieve the goal of ameliorating the State's fiscal crisis, and that the Court cannot substitute its judgment for the Governor's. Moreover, Respondents argue, this discretion permits the Governor to furlough employees even when it creates no savings or benefit to the General Fund if he

² The Court notes that CASE sought a writ of mandate in the Sacramento County Superior Court on the grounds that the Governor lacked authority to order furloughs or that statutory law expressly forbids ordering furloughs. In that case, which is now on appeal, the court determined that the Governor has the statutory authority to reduce the hours of state employees under Government Code section 19851 and 19849. While that decision is not a final decision and is not binding on this Court, the court there did not reach the questions of whether the July 1, 2009 Executive Order complied with the requirements of Section 19851(a), whether either Executive Order failed to comply with Section 19851(a) with respect to non-General Fund agencies, or whether furloughs of non-General Fund agencies violated Section 16310(a). Further, that decision was based upon the circumstances presented at the time, and was issued before the Legislature passed a revised budget in February of 2009, and before it passed its 2009/10 budget.

does so based upon the principles of labor parity and sharing the burden among all State employees.

In response to Respondents' borrowable funds argument, Petitioners contend that several agencies are funded by special funds as to which internal borrowing is expressly prohibited. As to these agencies, there are no General Fund savings and no benefits to the State's fisc, only reductions in service to the public. Further, in those instances where special funds are "borrowable funds," Government Code section 16310(a) permits special funds to be loaned to the General Fund only when such borrowing will not "interfere with the object for which a special fund was created."

DISCUSSION

A writ of mandate will lie to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station. (Cal. Code Civ. Proc. §1085.) A writ of mandate will issue when there is a clear, present, ministerial duty on the part of the respondents and a clear, present, beneficial right in the petitioner to performance of that duty. (*Baldwin-Lima-Hamilton Corp. v. Sup. Ct.* (1962) 208 Cal.App.2d 803, 813-14.)

Discretion is abused when a public officer acts beyond the bounds of reason or in derogation of applicable legal standards. (*See Calif. Correctional Supervisors Organization v. Dept. of Corrections* (2002) 96 Cal.App.4th 824, 827.) A court cannot compel a public officer to exercise discretion in a particular way, but where only one choice can be a reasonable exercise of discretion, a court may

compel a public officer to make that choice. (*Id.*; see also *Ng v. State Personnel Board* (1977) 68 Cal.App.3d 600, 605 [discretion is abused when the action exceeds the bounds of reason].)

A. The Governor Violated a Mandatory Duty to Take Into Account the Agencies' "Varying Needs" Before Reducing Working Hours

Issuance of the furlough Executive Orders by the Governor, and implementation by the Respondent state agencies, was an abuse of discretion because the Executive Orders violated the requirements of Government Code section 19851(a). Government Code section 19851(a) provides:

It is the policy of the state that the workweek of the state employee shall be 40 hours, and the workday of state employees eight hours, *except that workweeks and workdays of a different number of hours may be established in order to meet the varying needs of the different state agencies.* It is the policy of the state to avoid the necessity for overtime work whenever possible. This policy does not restrict the extension of regular working-hour schedules on an overtime basis in those activities and agencies where it is necessary to carry on the state business properly during a manpower shortage.

(Cal. Gov't Code §19851(a), emphasis supplied.) The furloughs mandated by the Governor's Executive Orders reduced all State employees' workweeks to four days, or 32 hours, for three weeks per month.³ The Executive Orders applied a workweek reduction across-the-board. Indeed, Respondents contend that section 19851 gives the Governor discretion to decide that the State's overall needs can

³ The Executive Orders permitted only a "limited exemption" from the furlough requirement. At the hearing on the Petition, Respondents conceded that the exemptions have been limited to agencies involved in public safety, such as the California Highway Patrol and, during fire season, State firefighters.

substitute for an individual determination of the needs of the agency. Such a decision by the Governor is contrary to Section 19851(a), which only permits a workweek reduction "in order to meet the varying needs of the different state agencies."

Moreover, when employee positions are funded *entirely* by non-borrowable special funds or federal funds -- as is the case for many of the agencies at issue here -- the General Fund savings justification for furloughs does not survive scrutiny. When the only justification underpinning the furlough of these employees that remains is "labor parity,"⁴ the Court cannot do otherwise than to conclude that Respondents have abused their discretion. This is particularly so when the result of the furloughs in these areas is, *inter alia*, to slow down processing of unemployment claims, impede state workers' ability to respond to losses of CalPERS's investments, and delay moving persons with disabilities from the state disability rolls to the federal rolls. All of these cost the State yet more money, without resulting in any savings.

Each State agency has differing needs relating to its function and to the sources of its funding. Respondents' refusal to consider those varying needs of the

⁴ The "labor parity" justification is one based only on the feelings of the General Fund agencies' employees. It is not based upon the principle that the quantum of pay cuts suffered by those employees ought to be spread out amongst all the State employees. Rather it is a decision that "labor parity" requires the quantum of pay cuts be increased so that all State employees suffer equally, without regard to savings to the General Fund and without lessening the pay cuts suffered by the General Fund agencies' employees. This is not rationally related to any governmental purpose.

different state agencies before ordering and implementing furloughs conflicts with the requirements of Section 19851.⁵ Failure to comply with the mandatory duty in Section 19851 was an abuse of the Respondents' discretion. Moreover, when furloughs are implemented to save money, yet their implementation in some agencies saves nothing and increases costs, such a policy is arbitrary, capricious and unlawful.

B. Furloughing Employees to Increase Potential Borrowing from Special Fund Agencies Interferes with those Agencies' Operations In Violation of Government Code §16310(a)

Respondents further abused their discretion by ordering and implementing furloughs in order to increase internal borrowing from special funds, without regard to whether such borrowing interfered with the objects for which the special funds were created. Government Code section 16310(a) permits special funds to be loaned to the General Fund only when such borrowing will not "interfere with the object for which a special fund was created." Similarly, the California case law provides that a writ will lie to reverse a budgetary decision where such a decision eliminates the ability to carry out a mandatory function required by law.

(See *Scott v. Common Council* (1996) 44 Cal.App.4th 684, 694.)

⁵ The Court rejects the notion that the exemption of public safety officers and forest fire fighters is evidence that the Governor evaluated the "varying needs of the different state agencies." It is persuasive only that the Governor considered the varying needs of those specific agencies, not others. It does not demonstrate that the Governor ever considered the varying needs of agencies such as the California Earthquake Authority or the Department of Health Care Services.

The operations of each agency have been reduced by three days per month. This basic fact alone is at least a prima facie showing of interference with the object of the special funds agencies, specifically the agencies' ability to carry out their respective missions.

In addition, Petitioner CASE offers evidence that:

- the case loads of CASE-represented employees have increased at thirteen of the named agencies, according to those agencies' own admissions;
- the backlog for matters handled by CASE-represented employees has increased at 17 of the named agencies, according to those agencies' own admissions;
- since the inception of the furloughs, the named agencies have incurred \$102 million in overtime hours and have executed at least 54 contracts for outside counsel.

Respondents contend that the outside contracts and overtime evidence do not show an interference with the purposes of the special fund. They argue that CASE-represented employees are exempt from overtime. This response is a *non sequitur*. The amount of overtime that is being worked, even if not worked by CASE-represented employees themselves, indicates that the agencies are making up the time lost due to furloughs by having employees work extra hours on the days that they are there. The reduced workweeks ordered by the Governor interfere with the ability of the agencies' employees to complete their work, and require increased overtime expenditures to make up for the loss.

Petitioner's evidence demonstrates furloughing employees of agencies funded by special funds for the purpose of freeing up additional borrowable funds has resulted in an interference with the objectives of those agencies. As such, the Executive Orders and their implementation violate Government Code section 16310(a) and are an abuse of discretion.

C. The Emergency Provisions Cited by the Governor Do Not Change the Result Here

The Governor has relied upon several provisions concerning emergency measures that the Governor may take in issuing both the Executive Orders and accompanying emergency proclamations, including provisions of the California Emergency Services Act. The authorities offered by the Governor in his Executive Orders do not appear to allow the Governor to implement furloughs if they would violate other provisions of the law. Nor does the California Emergency Services Act appear to contemplate the Governor declaring an "emergency," and suspending regular Legislative authority, for more than a temporary period. (See Government Code §8629; see also, e.g., Government Code §8627.5(b).) The Executive Orders themselves appear to recognize that the emergency necessitating them was the failure of the Legislature to pass the budgets, though the reach of the orders extended long after those budgets were subsequently passed and signed into law.

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CONCLUSION

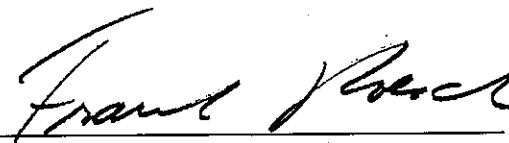
Based upon the foregoing, the Court GRANTS the Petition for Writ of Mandate. A writ of mandate shall issue commanding Respondents to set aside those portions of Executive Orders S-16-08 and S-13-09 affecting CASE-represented employees which were issued in violation of mandatory duties in Government Code §§16310(a) and 19851(a), and to cease and desist the furlough of CASE-represented employees.

The declaratory and injunctive relief sought in the operative Second Amended Petition and Complaint is entirely duplicative of the writ relief granted herein.

Petitioner shall prepare a form of judgment for execution by the Court and a form of writ for approval as to form by the Court and execution by the Clerk of the Court.

IT IS SO ORDERED.

DATED: December 31, 2009



Frank Roesch
Judge of the Superior Court

CLERK'S DECLARATION OF MAILING

I certify that I am not a party to this cause and that on the date stated below I caused a true copy of the foregoing ORDER GRANTING PETITION FOR WRIT OF MANDATE to be mailed first class, postage pre paid, in a sealed envelope to the persons hereto, addressed as follows:

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I declare under penalty of perjury that the same is true and correct.

Executed on **JAN - 4 2010**

By: *Vicki Daybell*
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