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13 ARNOLD SCHWARZENEGGER and DAVID GILB

**Exempted from Fees
(Gov. Code § 6103)**

14
15 SUPERIOR COURT OF CALIFORNIA
16 CITY AND COUNTY OF SAN FRANCISCO

17 CALIFORNIA ATTORNEYS,
18 ADMINISTRATIVE LAW JUDGES AND
HEARING OFFICERS IN STATE
19 EMPLOYMENT, GLEN GROSSMAN,
MARK HENDERSON, GEOFFREY SIMS,
20 and DOES 1-500,

21 Petitioners/Plaintiffs,

22 v.

23 ARNOLD SCHWARZENEGGER as,
Governor of the State of California; DAVID
24 GILB as Director of the Department of
Personnel Administration; JOHN CHIANG,
25 Controller of the State of California; JAN
FRANK, as President of STATE
26 COMPENSATION INSURANCE FUND, and
DOES 1-50,

27 Defendants/Respondents.
28

CASE NO. CPF-09-509205

**REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF RESPONDENTS GOVERNOR
ARNOLD SCHWARZENEGGER AND DAVID
GILB'S OPPOSITION ON THE MERITS OF
PETITIONERS' PETITION FOR WRIT OF
MANDATE**

**Date: March 20, 2009
Time: 9:30 a.m.
Dept.: 301**

Action Filed: February 10, 2009

1 Respondents ARNOLD SCHWARZENEGGER, as Governor of the State of
2 California and DAVID GILB, as Director of the Department of Personnel Administration submit
3 the following documents in support of their opposition on the merits in this action and, pursuant
4 to Evidence Code sections 451 and 452(c), request that this Court take judicial notice of the same.
5 The matters submitted are part of the documented legislative history of Government Code section
6 19851, or its predecessor code section, and are, therefore relevant to the subject matter of this
7 action and proper matters for the taking of judicial notice:

8 Exhibit 1: Legislative history of section 19851

9 Exhibit 2: Verified Petition for Writ of Mandate and Complaint for
10 Declaratory and Injunctive Relief (*California Attorneys, et al. v.*
11 *Arnold Schwarzenegger, et al.*, Sacramento County Superior Court,
12 Case No. 34-2009-80000134).

13 Dated: March 9, 2009

14 KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
A Law Corporation

15
16 By: 

17 David W. Tyra
18 Attorneys for Defendants/Respondents
19 ARNOLD SCHWARZENEGGER as Governor of the
20 State of California; DAVID GILB as Director of the
21 Department of Personnel Administration
22
23
24
25
26
27
28

EXHIBIT 1

RALPH H. HALE
LEGISLATIVE COUNSEL
CHARLES W. JENNINGS
CHIEF CLERK
ANDREW C. BERNARD
J. B. STANLEY
FISCAL AND REVENUE
GEO. W. JONES
TREASURY - GENERAL
L. J. ANDERSON
OFFICE

STATE OF CALIFORNIA

Office of Legislative Counsel

1000 STATE CAPITAL, SACRAMENTO 14
200 STATE BUILDING, LOS ANGELES 12

JUNE 27, 1955

LEONARD G. ADAMS
TERRY L. BROWN
HARVEY E. BOWMAN
EDWARD C. CHAMBERLAIN
VICTORIA COOPER
GERRARD GIBSON
RICHARD E. GORDON
DONALD L. GRANT
J. HARRIS
WILLIAM G. HARRIS
GORDON H. HARRIS
JOSEPH W. HARRIS
GORDON H. HARRIS
RAY H. HARRIS
OFFICE

REPORT ON ASSEMBLY BILL NO. 1463. FLEXURY.

SUMMARY: Amends Secs. 18020 and 18021, adds Sec. 18021.5, Gov. C., re hours of employment and overtime in state service.

Recasts existing sections and deletes provisions establishing four work week groups and requiring overtime compensation for first three groups. Provides it is state policy that work week shall be 40 hours, but work weeks with different number of hours may be established to meet needs of state agencies. Provides it is policy to avoid necessity for overtime work whenever possible, but policy does not restrict extension of regular working hours on overtime basis in activities or agencies where necessary to carry on state business properly during manpower shortage.

Provides that State Personnel Board shall establish work week groups and assign classes or positions thereto. Groups may be of different lengths or of same length but with different provisions re overtime.

Requires board to establish extent to which and method by which ordered overtime or overtime in periods of critical emergency is compensated, and may provide for cash compensation equal to or less than regular rate. Rate may vary within class depending on conditions of work, or board may provide for compensating time off. Provisions so made shall be based on prac-

Report on Assembly Bill No. 1464 - p. 2

tices of private industry and other public
employment, needs of state service, and internal
relationships.

FORM: Approved.

TITLE: Approved.

CONSTITUTIONALITY: Approved.

Ralph M. Kleps
Legislative Counsel

Lawrence G. Allyn
By
Lawrence G. Allyn
Deputy

LOA/la

STATE OF CALIFORNIA

Inter-Departmental Communication

To: Honorable Goodwin J. Knight
Governor of California
State Capitol
Sacramento, California

Date: June 21, 1955

File No.

Subject: Assembly Bill
No. 1464

From: Office of The Attorney General
Department of Justice

Paul M. Joseph
Deputy Attorney General

This bill amends Sections 18020 and 18021 of the Government Code and adds Section 18021.5 to that code, all dealing with days and hours of work of State employees. The amended sections are recast. Section 18020 now provides that the State Personnel Board shall classify civil service and exempt positions with a monthly or annual salary into four designated work week groups. This bill does away with the four classifications and gives broader work week classification authority to the Board with respect to those positions or classes for which the Board establishes a monthly or annual salary (i.e., principally civil service positions) to be exercised by Board rules. At present, Work Week Class 4, in which are placed various positions designated as unlimited as to hours or otherwise not requiring a set number of hours, requires "unusual conditions or hours of work" and some question has been raised as to the authority of the State Personnel Board to place higher paid managerial and journeymen employees in this work week group on the basis of higher salary alone, without any other "unusual" conditions. To obviate this, and probably other objections, these amendments are made by this bill.

The bill also sets forth a statement of State policy 1) that State workers shall be employed forty hours a week, except that to meet the varying needs of the different State agencies workweeks of a different number of hours may be established, 2) to avoid the payment of overtime, 3) except during a manpower shortage.

The new section 18021.5 incorporates parts of the existing section 18021 in changed form and gives the State Personnel Board authority to determine the extent to which, and the method

Honorable Goodwin J. Knight
(Assembly Bill No. 1464)

-2-

June 21, 1955

by which, 1) ordered overtime and 2) overtime in times of critical emergency are to be compensated; that the Board may provide 1) cash compensation equal to or less (nothing is said about greater) than the regular rate of pay, which rate may vary within the same class or 2) for compensating time off. The provisions made by the Board under this new Section 18021.5 "shall be based on the practices of private industry and other public employment, the needs of State service, and internal relationships".

Title satisfactory.

No legal objections.

Paul M. Jank

PMJ:DMc

EXHIBIT 2

ORIGINAL

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And Hearing Officers in State Employment

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

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

Petitioner/Plaintiff,
vs.

ARNOLD SCHWARZENEGGER as, Governor
of the State of California; DAVID GILB as
Director of the Department of Personnel
Administration; JOHN CHIANG, Controller of
the State of California; and DOES 1 through 10,

Defendants/Respondents.

Case No.

**VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

Date:
Time:
Dept.:

Introduction

On December 19, 2008, Governor Arnold Schwarzenegger issued an executive order (see Exhibit A) which, as pertinent to this action, purported to order that represented state employees be furloughed two days per month effective February 1, 2009, through June 30, 2010. The

FILED
Superior Court Of California,
Sacramento
Dennis Jones, Executive
Officer
01/05/2009
avlaisavich
By _____, Deputy
Case Number:
34-2008-80000134-CU-WM-GDS

1 furloughs would result in an approximate 10 percent pay cut for all state employees. This
2 petition seeks injunctive and declaratory relief as follows:

- 3
- 4 1) a declaration that the Governor has no authority to unilaterally implement furloughs
for state employees;
- 5 2) an injunction prohibiting the Governor or any state officer from implementing the
6 furloughs;
- 7 3) a declaration that an attempt to furlough state employees who are exempt from the Fair
Labor Standards Act results in the loss of the exemption to the employer.
- 8

9 **I. Parties**

10 1. Petitioner/Plaintiff CALIFORNIA ATTORNEYS, ADMINISTRATIVE LAW JUDGES
11 AND HEARING OFFICERS IN STATE EMPLOYMENT (CASE), is, and at all times herein
12 mentioned was, a nonprofit corporation organized and existing under the laws of the state of
13 California, with its principal place of business in the County of Sacramento, State of California.
14 CASE is the exclusive collective bargaining representative of legal professionals in State
15 Bargaining Unit 2 pursuant to Government Code section 3520.5. CASE represents
16 approximately 3400 legal professionals in more than 80 different state departments, boards, and
17 commissions. Approximately 3240 members are attorneys, administrative law judges, and
18 hearing officers who are exempt from the Fair Labor Standards Act (FLSA). All CASE members
19 would be directly impacted if the executive order were to be implemented.

20 2. Respondent/Defendant ARNOLD SCHWARZENEGGER is the elected Governor of the
21 State of California. Pursuant to Government Code section 3513, subdivision (j), and section
22 3517, the Governor is the employer of state employees in Bargaining Unit 2, for purposes of
23 bargaining or meeting and conferring in good faith under the Ralph C. Dills Act. Governor
24 Schwarzenegger is named in his official capacity only.

25 3. Respondent/Defendant DAVID GILB is the Director of the California Department of
26 Personnel Administration (DPA) and is responsible for managing the nonmerit aspects of the
27 State's personnel system. DPA serves as the Governor's designated representative for purposes
28 of collective bargaining, and for purposes of meeting and conferring with the exclusive

1 representatives. (See Gov. Code § 19815.2; Gov. Code § 3517.) David Gilb is named in his
2 official capacity only.

3 4. Respondent/Defendant JOHN CHIANG is a constitutional officer and is the elected State
4 Controller of the State of California. (Cal. Const. Art. V, § 11.) Pursuant to Government Code
5 section 12410, the State Controller shall superintend the fiscal concerns of the state. The
6 Controller shall audit all claims against the state, and may audit the disbursement of any state
7 money, for correctness, legality, and for sufficient provisions of law for payment. In addition,
8 the Controller shall draw warrants on the Treasurer for the payment of money directed by law to
9 be paid out of the State Treasury; but a warrant shall not be drawn unless authorized by law.
10 (Gov. Code § 12440.) John Chiang is named in his official capacity only.

11 12 **II. Venue**

13 5. Respondents/Defendants engaged in all of the acts alleged herein within the County of
14 Sacramento. Accordingly, venue is proper in this county.

15 6. The California Attorney General has an office within the City of Sacramento, making
16 Sacramento County an appropriate venue. (Code of Civ. Proc. § 401.)

17 18 **III. The Executive Order**

19 7. The Governor's Executive Order (a true and correct copy of which is attached as Exhibit
20 A), made a number of proclamations relating to a perceived fiscal cash crisis, and the
21 Legislature's failure to "effectively" address the crisis.¹

22 8. Other than the general "power and authority vested in me by the Constitution and statutes
23 of the State of California," the only specific authority cited in the order was Government Code
24 section 3516.5.² Section 3516.5 does not define "emergency" nor does it empower the Governor
25 to "furlough" state employees or otherwise reduce their wages.

26
27 ¹ The Executive Order failed to mention that the Legislature passed a comprehensive budget package on December
28 18, 2008 and submitted it to him for signature; although he has not yet vetoed the legislation; presumably, the
Governor has determined that the legislation is not "effective."

² That section provides:

1 9. The order specifically directed DPA to adopt and implement a furlough of represented
2 state employees. (Exhibit A, p. 2.) A furlough of two days per month would result in a pay
3 reduction of approximately 10 percent.

4
5 **IV. The Authority to Reduce Salaries via Furloughs**

6 10. The setting of state employee salaries is a legislative function. (*Tirapelle v. Davis* (1993)
7 20 Cal.App.4th 1317, 1325, fn. 10; *Lowe v. California Resources Agency* (1991) 1 Cal.App.4th
8 1140, 1151.) The Legislature has partially delegated its authority in this regard to DPA.
9 Government Code section 19826 provides, in pertinent part:

10
11 (a) The department shall establish and adjust salary ranges for each class of
12 position in the state civil service subject to any merit limits contained in
13 Article VII of the California Constitution. The salary range shall be based on
14 the principle that like salaries shall be paid for comparable duties and
15 responsibilities. In establishing or changing these ranges, consideration shall
16 be given to the prevailing rates for comparable service in other public
17 employment and in private business. The department shall make no
18 adjustments that require expenditures in excess of existing appropriations that
19 may be used for salary increase purposes. The department may make a change
20 in salary range retroactive to the date of application of this change.

21
22 (b) Notwithstanding any other provision of law, the department shall not
23 establish, adjust, or recommend a salary range for any employees in an
24 appropriate unit where an employee organization has been chosen as the
25 exclusive representative pursuant to Section 3520.5.

26
27 Except in cases of emergency as provided in this section, the employer shall give reasonable written
28 notice to each recognized employee organization affected by any law, rule, resolution, or regulation
directly relating to matters within the scope of representation proposed to be adopted by the employer,
and shall give such recognized employee organizations the opportunity to meet and confer with the
administrative officials or their delegated representatives as may be properly designated by law.

In cases of emergency when the employer determines that a law, rule, resolution, or regulation must be
adopted immediately without prior notice or meeting with a recognized employee organization, the
administrative officials or their delegated representatives as may be properly designated by law shall
provide such notice and opportunity to meet and confer in good faith at the earliest practical time
following the adoption of such law, rule, resolution, or regulation.

1 11. In subdivision (b), the Legislature specifically withheld from DPA the power to reduce
2 salaries for represented employees. The statute expressly “preclud[es] DPA from unilaterally
3 adjusting represented employees’ wages.” (*Department of Personnel Administration v. Superior*
4 *Court (Greene)* (1992) 5 Cal.App.4th 155, 178.) Accordingly, “the question of represented
5 employees’ wages . . . must ultimately be resolved by the Legislature itself.” (*Ibid.*)

6 12. Pursuant to Article III, section 3 of the California Constitution, “[t]he powers of state
7 government are legislative, executive, and judicial. Persons charged with the exercise of one
8 power may not exercise either of the others except as permitted by this Constitution.” Pursuant
9 to Article IV, section 1 of the California Constitution, “[t]he supreme executive power of this
10 State is vested in the Governor. The Governor shall see that the law is faithfully executed.” The
11 Governor, while wielding supreme executive power, may not exercise the Legislative function of
12 salary setting.

13 13. The Government Code specifically grants to state departments the power and authority to
14 lay off employees “because of lack of work or funds, or whenever it is advisable in the interests
15 of economy, to reduce the staff of any state agency. . . .” (Gov. Code § 19997.) There is a
16 detailed and specific statutory scheme for the manner in which layoffs are to be implemented.
17 (See Gov. Code § 19997 et seq.) There is no such statutory authorization for furloughs.³ In fact,
18 the Government Code expressly prohibits departments from unilaterally reducing the work time
19 of employees against their will. (Gov. Code § 19996.22, subd. (a).)

20 14. The Government Code specifies that “[t]enure of civil service employment is subject to
21 good behavior, efficiency, the necessity of the performance of the work, and the appropriation of
22 sufficient funds.” (Gov. Code § 18500, subd. (c)(6).) The Legislature has already passed, and
23 the Governor has already signed, a budget appropriations bill for Fiscal Year 2008-2009.
24 Accordingly, the funds have already been appropriated, and there is no basis to alter the tenure of
25 the legal professionals in Unit 2.

26
27
28 ³ The single reference to employee furloughs in the Government Code appears in Government Code section 68108,
and is applicable only to employees of the judicial branch of government.

1 15. Similarly, Government Code section 19816.10 provides that DPA has no power to alter
2 days, hours, or conditions of work in a manner contrary to any existing Memorandum of
3 Understanding (MOU). The current MOU between the State and the legal professionals in State
4 Bargaining Unit 2 expired on July 1, 2007, but by law remains in effect pending the ratification
5 of a successor MOU, or until impasse is reached. (Gov. Code § 3517.8.) The parties are
6 currently in the process of negotiating an MOU, and thus impasse has not been reached.
7 Therefore, the prior MOU remains in effect, including all provisions regarding days and hours of
8 work.⁴

9 16. Government Code section 3516.5 does not empower the Governor to usurp the powers of
10 the other coequal branches of government. Quite the contrary, the statute only allows to perform
11 actions which are otherwise legal, and provides for a relaxed notice requirement when justified
12 by emergency circumstances. Notwithstanding the plain language of section 3516.5, the
13 Governor has relied upon that section as the authority for his order directing furloughs.
14 Interpreting section 3516.5 as broadly as the Governor apparently has would allow the Governor
15 to ignore the rulings of this Court of the California Supreme Court merely by declaring an
16 emergency.

17 17. For years, various California governors have sought to obtain the power to unilaterally
18 furlough state employees. In 1992, then-Governor Wilson was the proponent of an initiative
19 measure – the Government Accountability and Taxpayer Protection Act (GATPA) – which
20 appeared as Proposition 165 on the 1992 ballot and which would have, inter-alia, allowed him to
21 unilaterally impose furloughs on state employees. (*League of Women Voters v. Eu* (1992) 7
22 Cal.App.4th 649, 653-654.) According to the Secretary of State's Statement of Vote, Proposition
23 165 failed to garner a majority of votes in the election, and thus never went into effect.⁵

24 18. The Legislature has not enacted any legislation ratifying the Governor's Executive Order,
25 nor has it undertaken any action to otherwise delegate the salary-setting function to any other
26

27 ⁴ As but one example, section 6.3.A. of the MOU provides that all exempt legal professionals in Unit 2 shall work an
28 average of 40 hours per week. The contemplated furlough would obviously be contrary to that provision, and since
the MOU supercedes the Government Code in this instance, the furlough is therefore illegal.

⁵ See page viii at http://www.sos.ca.gov/elections/sov/1992_general/statement_of_vote_general_1992.pdf

1 state officer or department. By contrast, in the State of Maryland, the Governor recently called
2 for furloughs of state employees similar to the furloughs ordered by Governor Schwarzenegger.
3 (See Exh. B, pp. 2-3.) The difference is that in Maryland, the state legislature had previously
4 enacted legislation giving the governor the authority to order furloughs. (Exh. B at p. 2.) No
5 such analogous authority exists for governors in California. Therefore, the authority to reduce
6 salaries and/or furlough state employees resides solely in the Legislature.

7 8 **V. The Duty of the Controller**

9 19. It is clear that "the Controller has the power, indeed the duty, to ensure that the decisions
10 of an agency that affect expenditures are within the fundamental jurisdiction of the agency."
11 (*Tirapelle v. Davis, supra*, 20 Cal.App.4th at p. 1335.) Moreover, the Controller's "power of
12 audit does include the duty to ensure that the expenditure in question is authorized by law."
13 (*Ibid.*) The Legislature has specifically provided that "a warrant shall not be drawn unless
14 authorized by law" (Gov. Code § 12440.)

15 20. Any attempt by an administrative agency (such as DPA) to exercise control over matters
16 which the Legislature has not seen fit to delegate to it (such as salary reductions) is not
17 authorized by law and in such case the agency's actions can have no force or effect. The
18 Controller therefore has a duty to refrain from issuing pay warrants that are illegally reduced by
19 virtue of DPA's implementation of the furlough.

20 21 **VI. The Fair Labor Standards Act**

22 21. The Fair Labor Standards Act (FLSA) appears in sections 201 through 219 of title 29 of
23 the United States Code. As relevant to this action, the FLSA requires overtime to be paid to
24 employees who work more than 8 hours in a day or 40 hours in a workweek.⁶ (29 U.S.C. § 207,
25

26
27 ⁶ As between state and federal law, California employers are required to satisfy whichever laws are more protective
28 to the employee. (See 29 U.S.C. § 218(a); 29 CFR § 778.5; *Aguilar v. Association for Retarded Citizens* (1991) 234
Cal.App.3d 21, 34-35; *Pacific Merchant Shipping Association v. Aubry* (9th Cir. 1990) 918 F.2d 1409, 1426-1427.)
Accordingly, California's overtime law for hours worked in excess of 8 hours per day applies, even though the
FLSA does not speak to daily overtime. (See Labor Code § 510.)

1 subd. (a).) However, the FLSA also contains exemptions for certain professional employees. (29
2 U.S.C. § 213.)

3 22. Pursuant to regulations promulgated by the Secretary of Labor, to be exempt from the
4 FLSA, employees must meet both the "salary test" and the "duties test." (29 C.F.R. § 541.300.)
5 The salary basis test "is expressly applicable to public-sector employees." (*Auer v. Robbins*
6 (1997) 519 U.S. 452, 457.) Pursuant to section 6.2.B of the Memorandum of Understanding
7 (MOU) between the State and the legal professionals in State Bargaining Unit 2, the exemption
8 applicable to the approximately 600 administrative law judges and hearing officers in Unit 2 is
9 specifically conditioned upon satisfying both the "salary basis" and the "duties" test.

10 23. Employers may not reduce the pay of exempt employees and still enjoy the exemption,
11 because "an employee is not paid on a salary basis if deductions from the employee's
12 predetermined compensation are made for absences occasioned by the employer or by the
13 operating requirements of the business." (29 C.F.R. § 541.602.)

14 24. Section 6.3 of the MOU between the State and the legal professionals in State Bargaining
15 Unit 2 provides that legal professionals who are exempt from the FLSA "are expected to work all
16 hours necessary to accomplish their assignments and fulfill their responsibilities." Section 6.2 of
17 the same MOU provides that "the regular rate of pay is *full* compensation for all time that is
18 required" to complete the duties. (Emphasis added.)

19 25. The furlough contemplated by the Executive Order will not result in fewer hours worked
20 by the state's legal professionals, but will result in a reduction in salary. CASE members will
21 still be obligated to work as many hours as are necessary to fulfill both their contractual
22 obligations to their employer and their ethical obligations to their clients. The approximately
23 2600 attorneys in CASE will necessarily have to work more than 8 hours on days other than their
24 furlough days. They will therefore be entitled to an as yet undetermined amount of overtime
25 pay.

26 ///

27 ///

28 ///

1 **FIRST CAUSE OF ACTION**

2 **(Petition for Writ of Mandate)**

3
4 26. Petitioner/Plaintiff CASE hereby incorporates by reference all of the foregoing
5 paragraphs as if fully set forth herein.

6 27. The Executive Order issued on December 19, 2008, violates the Constitution of the State
7 of California and the doctrine of separation of powers to the extent it purports to exercise the
8 powers specifically reserved by the Legislature.

9 28. Petitioner/Plaintiff CASE and their members have an immediate and direct interest
10 affected by this proceeding in that employees have a right not to be illegally furloughed and
11 further have a right not to have their pay reduced as proposed by the Executive Order.

12 29. Respondents/Defendants Governor Schwarzenegger, Director David Gilb, and Controller
13 John Chiang each have a clear, present, and ministerial duty to conform to the laws of the State
14 of California and to avoid violations of the law.

15 30. Respondent/Defendant Controller Chiang has a duty to audit claims and to conclude that
16 since the Governor and DPA's proposed furlough conflicts with Government Code section
17 19826 subdivision (b), the Governor and the DPA have no authority to implement the furlough.
18 Since the furlough has no force or effect, the Controller has a duty to ensure that salaries not be
19 reduced as a result of the furlough.

20 31. As a matter of law, the Governor lacks the authority to unilaterally impose a furlough and
21 reduce the salaries of the legal professionals in Unit 2. The Executive Order is in direct conflict
22 with existing statutes and is therefore unlawful, and Petitioner/Plaintiff has a reasonable
23 likelihood of success on the merits.

24 32. Petitioner/Plaintiff has no plain, speedy, and adequate remedy in the ordinary course of
25 law, other than the relief sought in this petition, in that there is no other legal remedy to prevent
26 or enjoin the implementation of the illegal furlough and its reduction of salary and hours.

27 33. Petitioner/Plaintiff CASE and its members will suffer irreparable harm and injury if the
28 furlough is implemented, including the denial of the protection of the laws regarding their

1 salaries, and the actual economic loss of salary, which in turn will proximately cause some
2 members to be at risk of losing their homes, cars, and ability to purchase the basic necessities of
3 life.

4 34. Petitioner/Plaintiff has no administrative remedy which will result in preventing or
5 enjoining the illegal furlough and its reduction of salary and hours.

6
7 **SECOND CAUSE OF ACTION**
8 **(Complaint for Declaratory and Injunctive Relief)**
9

10 35. Petitioner/Plaintiff CASE hereby incorporates by reference all of the foregoing
11 paragraphs as if fully set forth herein.

12 36. The Governor and DPA presently intend to implement the furlough on February 1, 2009,
13 which would affect the February pay period. It is unclear precisely how the legal professionals
14 in CASE will be furloughed, but the forced absence from work for two days per month will
15 affect their ability to effectively manage their cases.

16 37. The Controller will be asked via a pay letter to implement a reduction in pay
17 corresponding to the equivalent of two days of salary per month.

18 38. Judicial relief is urgently needed to prevent the Governor and the DPA from violating the
19 law by imposing the illegal furlough program beginning in February 2009.

20 39. As a result of the Executive Order, an actual controversy has arisen and now exists
21 between Petitioner/Plaintiff and Respondents/Defendants regarding the furlough of state
22 employed legal professionals and the reduction of their salaries.

23 40. Petitioner/Plaintiff CASE desires a declaration of its rights and the rights of its affected
24 members with respect to the Governor and DPA's intent to furlough state employed legal
25 professionals and reduce their salaries through an unlawful executive order.

26 41. Such a declaration is necessary and appropriate at this time in order to avoid
27 implementation of these illegal provisions which would adversely affect the rights of
28 Petitioner/Plaintiff CASE and its members. Respondents/Defendants actions will result in

1 irreparable injury and harm to state employed legal professionals including the denial of the
2 protection of the laws regarding their salaries. The loss of such rights cannot be compensated
3 fully by damages or other forms of legal relief.

4 42. As a matter of law, the Governor lacks the authority to unilaterally impose a furlough and
5 reduce the salaries of the legal professionals in Unit 2. The Executive Order is in direct conflict
6 with existing statutes and is therefore unlawful, and Petitioner/Plaintiff has a reasonable
7 likelihood of success on the merits.

8 43. Therefore, Petitioner/Plaintiff CASE seeks temporary, preliminary and permanent
9 injunctive relief directing Respondents/Defendants to cease and desist taking action to furlough
10 state employed legal professionals, and prohibiting them from reducing their pay under an
11 unlawful Executive Order which conflicts with statute.

12 **THIRD CAUSE OF ACTION**
13 **(Complaint for Declaratory Relief)**
14

15 44. Petitioner/Plaintiff CASE hereby incorporates by reference all of the foregoing
16 paragraphs as if fully set forth herein.

17 45. The Governor and DPA presently intend to implement the furlough on February 1, 2009.
18 The furlough will effect a reduction in the salary for all legal professionals in State Bargaining
19 Unit 2 who are currently exempt from the FLSA. The salary reduction will be "occasioned by
20 the employer" inasmuch as the Governor is the employer of all CASE members.

21 46. The reduction in salary will result in loss of exempt status for all of the state's legal
22 professionals whose exemption is conditioned upon meeting the "salary basis" test.

23 47. Petitioner/Plaintiff CASE desires a declaration of its rights and the rights of its members
24 to overtime pay if and when the furlough is implemented.

25 48. Such a declaration is necessary and appropriate at this time in order to avoid the loss of
26 overtime compensation to which CASE members will be entitled. Respondents'/Defendants'
27 actions will result in irreparable injury and harm to state employed legal professionals including
28

1 the denial of the protection of the laws regarding overtime compensation. The loss of such rights
2 cannot be compensated fully by damages or other forms of legal relief.

3 49. Therefore, Petitioner/Plaintiff CASE seeks a declaration that if a furlough is
4 implemented, its members will be entitled to overtime compensation under the FLSA.
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1 **CONCLUSION**

2
3 WHEREFORE, Petitioner/Plaintiff CASE respectfully prays that:

4 1. The Court issue a peremptory writ in the first instance ordering
5 Respondents/Defendants Governor Schwarzenegger and Director Gilb to comply with their
6 mandatory duties under Article III, section 3 and Article V, section 1 of the California
7 Constitution and Government Code sections 19826, and to set aside the portions of the
8 Governor's Executive Order S-16-08 calling for a furlough and salary reduction for state
9 employed legal professionals because the Executive Order is unlawful.

10 2. The Court issue a peremptory writ in the first instance commanding
11 Respondent/Defendant Controller Chiang to ensure that salaries not be reduced as a result of the
12 illegal furlough.

13 3. The Court issue a declaration that the portions of the Governor's Executive
14 Order S-16-08 calling for a furlough and salary reduction for state employed legal professionals
15 are unlawful and illegal in that the Governor and DPA have violated and continue to violate the
16 provisions of Article III, section 3 and Article V, section 1 of the California Constitution and
17 Government Code section 19826 by calling for and implementing a furlough and salary
18 reduction for state employed legal professionals.

19 4. The Court issue a preliminary and permanent injunction directing the
20 Governor, DPA and the Controller to cease and desist taking action to furlough state employed
21 legal professionals by reducing their hours and reducing their pay under an unlawful Executive
22 Order.

23 5. The Court issue a declaration that implementation of a furlough on state employed
24 legal professionals will result in the loss of the FLSA exemption the State employer currently
25 enjoys, and will entitle state employed legal professionals to overtime under state and federal
26 law.

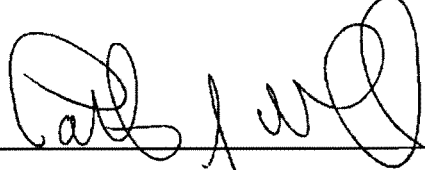
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1 6. Petitioner/Plaintiff be awarded attorneys fees and costs of suit incurred in this action.

2
3 THE LAW OFFICE OF BROOKS ELLISON

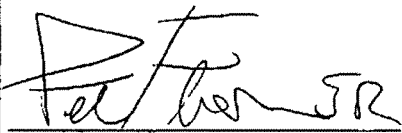
4 Dated: 1/5/09

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6 
PATRICK J. WHALEN

7 Attorneys for Plaintiff
8 CALIFORNIA ATTORNEYS,
9 ADMINISTRATIVE LAW JUDGES AND
10 HEARING OFFICERS IN STATE
11 EMPLOYMENT
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VERIFICATION

I, Peter Flores, Jr., am the President of CASE, the Petitioner/Plaintiff in this proceeding. I have read the foregoing petition and know its contents. The facts stated therein are true and are within my personal knowledge. 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 January 5, 2009 at Sacramento, California.



PETER FLORES, JR

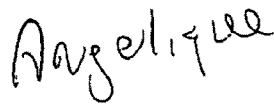
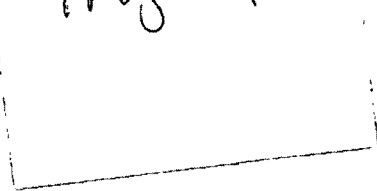



Exhibit A

Exhibit A



Office of the Governor

ARNOLD SCHWARZENEGGER
THE PEOPLE'S GOVERNOR

EXECUTIVE ORDER S-16-08

12/19/2008

WHEREAS, due to developments in the worldwide and national financial markets, and continuing weak performance in the California economy, there is an approximately \$15 billion General Fund deficit for the 2008-09 fiscal year, which without effective action, is estimated to grow to a \$42 billion General Fund budget shortfall over the next 18 months; and

WHEREAS the cash reserve in the State Treasury is below the amount established by the State Controller to ensure that the cash balance does not reach zero on any day in the month; and

WHEREAS without effective action to address the fiscal and cash crisis, the cash reserve in the State Treasury is estimated to be a negative \$5 billion in March 2009; and

WHEREAS on November 6, 2008, due to concerns regarding dramatically declining revenues, I issued a Special Session Proclamation and convened the Legislature of the State of California to meet in extraordinary session to address the fiscal crisis that California faces; and

WHEREAS the Legislature failed during that Special Session to enact any bills to address the State's significant economic problems; and

WHEREAS on December 1, 2008, due to the worsening fiscal crisis, I declared that a fiscal emergency exists and convened the Legislature to meet in extraordinary session to address the fiscal crisis that California faces; and

WHEREAS on December 1, 2008, due to the fiscal emergency and the nationwide economic recession, I also issued a Special Session Proclamation and convened the Legislature of the State of California to meet in extraordinary session to address the economic crisis; and

WHEREAS on December 17, 2008, the California Pooled Money Investment Board took the unprecedented action to halt lending money for an estimated 2,000 infrastructure projects as a result of the cash crisis, including the substantial risk that California will have insufficient cash to meet its obligations starting in February 2009; and

WHEREAS in the December 1, 2008 fiscal emergency extraordinary session, the Legislature failed to effectively address the unprecedented statewide fiscal crisis; and

WHEREAS immediate and comprehensive action is needed to address the fiscal and cash crisis facing the State of California; and

WHEREAS failure to substantially reduce the deficit carried forward from the current fiscal year into the next fiscal year will likely prevent the State from being able to finance the cashflow shortages of billions of dollars, thus making it likely that the State will miss payroll and other essential services payments at the beginning of 2009; and

WHEREAS immediate and comprehensive action to reduce current spending must be taken to ensure, to the maximum extent possible, that the essential services of the State are not jeopardized and the public health and safety is preserved; and

WHEREAS State agencies and departments under my direct executive authority have already taken steps to reduce their expenses to achieve budget and cash savings for the current fiscal year; and

WHEREAS a furlough will reduce current spending and immediately improve the State's ability to meet its obligations to pay for essential services of the State so as not to jeopardize its residents' health and safety in the current and next fiscal year.

NOW, THEREFORE, I, ARNOLD SCHWARZENEGGER, Governor of the State of California, by virtue of the power and authority vested in me by the Constitution and statutes of the State of California, do hereby determine that an emergency pursuant to Government Code section 3516.5 exists and issue this Order to become effective immediately:

IT IS ORDERED that effective February 1, 2009 through June 30, 2010, the Department of Personnel Administration shall adopt a plan to implement a furlough of represented state employees and supervisors for two days per month, regardless of funding source. This plan shall include a limited exemption process.

IT IS FURTHER ORDERED that effective February 1, 2009 through June 30, 2010, the Department of Personnel Administration shall adopt a plan to implement an equivalent furlough or salary reduction for all state managers, including exempt state employees, regardless of funding source.

IT IS FURTHER ORDERED that effective January 1, 2009 through June 30, 2010, the Department of Personnel Administration shall work with all State agencies and departments to initiate layoffs and other position reduction and program efficiency measures to achieve a reduction in General Fund payroll of up to ten percent. A limited exemption process shall be included.

IT IS FURTHER ORDERED effective January 1, 2009, the Department of Personnel Administration shall place the least senior twenty percent of state employees funded in any amount by General Fund resources on the State Restriction of Appointment (SROA) list.

IT IS FURTHER ORDERED that effective January 1, 2009 through June 30, 2010, all State agencies and departments under my direct executive authority, regardless of funding source, are prohibited from entering into any new personal services or consulting contracts to perform work as a result of the furloughs, layoffs or other position reduction measures implemented as a result of this Order.

IT IS REQUESTED that other entities of State government not under my direct executive authority, including the California Public Utilities Commission, the University of California, the California State University, California Community Colleges, the legislative branch (including the Legislative Counsel Bureau), and judicial branch, implement similar or other mitigation measures to achieve budget and cash savings for the current and next fiscal year.

This Order is not intended to create, and does not create, any rights or benefits, whether substantive or procedural, or enforceable at law or in equity, against the State of California or its agencies, departments, entities, officers, employees, or any other person.

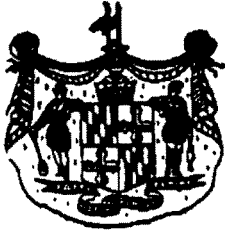
I FURTHER ORDER that, as soon as hereafter possible; this Order shall be filed in the Office of the Secretary of State and that widespread publicity and notice be given to this Order.



IN WITNESS WHEREOF I have hereunto set my hand and caused the Great Seal of the State of California to be affixed this 19th day of December, 2008.

ARNOLD SCHWARZENEGGER
Governor of California

ATTEST:
DEBRA BOWEN
Secretary of State



The State of Maryland

Executive Department

EXECUTIVE ORDER

01.01.2008.20

State Employees' Furlough and Temporary Salary Reduction Plan

- WHEREAS, During fiscal year 2009, the State of Maryland, like other states in our nation, has experienced significant revenue shortfalls which have necessitated significant reductions in the fiscal year 2009 budget;
- WHEREAS, The State's fiscal crisis has been exacerbated by a national economic downturn that has become a recession, declines in sales tax revenue, and a forecast of a reduction in income tax collections associated with capital gains, all of which have contributed to a projected deficit for the fiscal year 2009 budget;
- WHEREAS, The budget for the State of Maryland for fiscal year 2009, as adopted during the 2008 Session of the General Assembly, was reduced by \$75,179,560 on June 25, 2008, \$347,786,298 on October 15, 2008, and \$1,696,212 on November 5, 2008, pursuant to action by the Governor, with the approval of the Board of Public Works, under the State Finance and Procurement Article ("SFP") §7-213;
- WHEREAS, The O'Malley-Brown Administration has reduced spending growth by more than \$2.2 billion since taking office and has eliminated 1,500 State positions, while avoiding significant layoffs;
- WHEREAS, The Board of Revenue Estimates in its report of December 16, 2008, is expected to announce hundreds of millions in further reductions in state revenues for fiscal years 2009 and 2010;
- WHEREAS, Despite the above specified reductions in the fiscal year 2009 of nearly \$425 million, in order to balance the fiscal year 2009 budget, it is again necessary to reduce appropriations;
- WHEREAS, It is impossible to achieve reductions in spending of this magnitude without some action affecting employees;

WHEREAS, Substantial savings may be achieved without undue interruption of state services if state employees are required to participate in a carefully managed furlough and salary reduction plan;

WHEREAS, A carefully managed furlough plan for state employees is preferable to layoffs during these difficult economic times;

WHEREAS, Any cost containment plan ought to be progressive and place more of the financial burden on higher paid employees;

WHEREAS, To mitigate the impact of any salary reduction it is in the interests of state employees that the required two days salary equivalent reduction be spread over the remainder of FY 2009;

WHEREAS, In order to maximize operational savings outside of 24/7 health and public safety operations, state government operations should be significantly curtailed on the day after Christmas, Friday December 26, 2008 and the day after New Year's Day, Friday, January 2, 2009, but state employees should not also be asked to take those two days as unpaid furlough days;

WHEREAS, The Second Budget Reconciliation Act for Fiscal Year 1992, Chapter 62 of the Laws of Maryland 1992, authorized the Governor to institute a furlough plan for state employees by executive order in any fiscal year in which appropriations are reduced pursuant to SFP §7-213; and

WHEREAS, It is in the interest of the State to allow employees flexibility in the implementation of the furlough and salary reduction plan.

NOW, THEREFORE, I, MARTIN O'MALLEY, GOVERNOR OF THE STATE OF MARYLAND, BY VIRTUE OF THE AUTHORITY VESTED IN ME BY THE CONSTITUTION AND LAWS OF MARYLAND, HEREBY PROCLAIM THE FOLLOWING .
EXECUTIVE ORDER, EFFECTIVE IMMEDIATELY:

A. Except as provided in paragraph L, this Executive Order applies to all employees of the State of Maryland, including, but not limited to, employees of agencies with independent salary setting authority or independent personnel systems, employees of the Maryland Automobile Insurance Fund, the Maryland Food Center Authority, the Maryland Port Administration, the Maryland Stadium Authority, the Injured Workers Insurance Fund, and all contractual employees.

B. (1) All employees subject to this Executive Order shall be required to forego the equivalent of two days of pay, and employees making more than \$40,000 will also be required to take sixteen or twenty-four furlough hours on or after January 14, 2009 and before June 30, 2009.

(2) Employees earning salaries of less than \$40,000 will not be required to take furlough hours, although they will be included in the two days of pay equivalent salary reduction.

(3) Employees earning \$40,000 or more will also be included in the two days of pay equivalent salary reduction and those earning salaries of \$40,000-\$59,999 will be required to take 16 furlough hours, while those employees earning \$60,000 and over will be required to take 24 furlough hours.

(4) Salary or salaries means gross annual salary or salaries as of January 14, 2009, not including overtime, acting capacity, or shift differentials.

C. An employee may take furlough time in increments of four hours.

D. An employee may not receive pay for time during which the employee is furloughed.

E. An employee may take no more than eight furlough hours during any single work week.

F. An employee may not work during furlough time except that in the event of an emergency the appointing authority may revoke furlough time and the employee shall be paid for that time. An employee whose furlough time is revoked due to an emergency shall be required to take the furlough time on another day.

G. Unless authorized in writing by the employee's supervisor during a work week in which furlough time is scheduled, an employee may not work in excess of the employee's normal work week reduced by furlough time taken during such work week.

H. For all purposes other than salary or wages an employee on furlough time shall be deemed to be on paid leave.

I. The Secretary of Budget and Management, the heads of every other personnel system, and the appointing authorities shall

take all action as necessary or desirable to implement this furlough plan. The Secretary, the heads of every other personnel system, and the appointing authorities are authorized to designate certain time as furlough time for groups of employees, to allow employees to designate their own furlough time with approval of their supervisors, which approval may be withheld only in the event of an emergency, or otherwise to manage this program with the least possible disruption to the provision of state services.

J. In addition to furloughs the Secretary of Budget and Management shall implement a temporary salary reduction for state employees pursuant to the Secretary's authority under Title 8 of the State Personnel and Pensions Article.

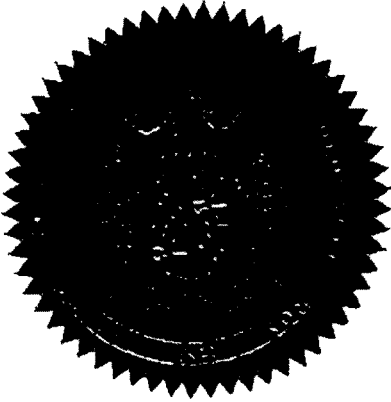
K. Routine state government operations shall be significantly curtailed for the day after Christmas, Friday December 26, 2008, and the day after New Year's Day, Friday, January 2, 2009, thus allowing the State to achieve additional savings due to reduced operating expenses over the long holiday weekends. The Secretary of Budget and Management shall authorize Administrative Leave for non-contractual state employees on those two days.

L. This Executive Order does not apply to:

- (1) The Legislative Branch;
- (2) The Judicial Branch;
- (3) Officers whose compensation is subject to Article III, § 35 of the Maryland Constitution;
- (4) Direct care employees in health, juvenile services, and correctional facilities; police officers employed by the State at the rank of first sergeant or below, except those in administrative or clerical positions; and other employees designated by the Secretary of Budget and Management who work on a shift schedule providing services as part of a 24-hour operation;
- (5) Employees who secure and maintain state facilities on a 24-hour per day basis; or
- (6) Employees of the University System of Maryland, St. Mary's College of Maryland, Morgan State University and Baltimore City Community College; however each university or

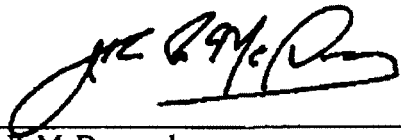
college's appropriation shall be reduced to reflect the amount of savings which would be achieved by implementing a furlough plan at each university in accordance with its rules and regulations and subject to approval of its governing board.

GIVEN Under My Hand and the Great Seal of the State of Maryland, in the City of Annapolis, this 16th day of December, 2008.




Martin O'Malley
Governor

ATTEST:


John P. McDonough
Secretary of State