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February 5, 2009

State Board;

As we anticipated, the Superior Court ruled against us regarding the furlough program. Attached, you will find the tentative ruling issued yesterday that was affirmed in Court today. It is now CRITICAL that the members begin requesting use of their two furlough days each month beginning NOW.

Consistent with yesterday's memorandum, we need "harmed" members in order to go forward with further litigation. As such, have members do any requests in writing, and process any denials through your respective Field Representative. Also, any facilities or work locations that produce "plans" as to how these "furlough" days will be used, assigned, facilitated etc. should be sent to CCPOA HQ to my attention. These will then be forwarded to the legal staff working this case.

Non-posted positions, such as parole and counselors, should request overtime to accommodate case load (assuming it is not reduced commensurate with any reduced hours of work) and forward any denials to CCPOA. Assuming overtime is denied, you should then request (in writing) which job expectations are to be left unaccomplished. This again, assumes case loads are not reduced but hours of work are. Any such documentation should be forwarded to me at CCPOA.

Chuck

CALIFORNIA CORRECTIONAL PEACE OFFICERS ASSOCIATION v. GOVERNOR
ARNOLD SCHWARZENEGGER, et al., Case No. 2009-80000137:

The following shall constitute the Court's tentative rulings on the demurrer and petition for writ of mandate and complaint for declaratory relief in the above-captioned matter, set for hearing in Department 19 on Thursday, February 5, 2009. The tentative ruling shall become the final ruling of the Court unless a party wishing to be heard so advises the clerk of this Department no later than 4:00 p.m. on the court day preceding the hearing, and further advises the clerk that such party has notified the other side of its intention to appear.

In the event that a hearing is requested, oral argument shall be limited to no more than 20 minutes per side.

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Introduction and Background:

On December 19, 2008, in a response to the current State budget crisis, Governor Arnold Schwarzenegger issued Executive Order S-16-08. As relevant to this action, the Executive Order directed the Department of Personnel Administration, effective February 1, 2009 through June 30, 2010, to adopt a plan to implement a furlough of represented state employees and supervisors for two days per month, and to adopt a plan to implement an equivalent furlough or salary reduction for all state managers, including exempt state employees.

Several organizations representing state employees affected by the Executive Order have filed petitions for writ of mandate and complaints for declaratory relief challenging the provisions of the Order imposing the furloughs, and seeking to overturn them. On January 29, 2009, the Court heard oral argument in three such cases (Case No. 2008-80000126, filed by petitioners Professional Engineers in California Government ("PECG") and California Association of Professional Scientists ("CAPS"); Case No. 2009-80000134, filed by petitioner California Attorneys, Administrative Law Judges and Hearing Officers in State Employment ("CASE"); and Case No. 2009-80000135, filed by petitioner Service Employees International Union, Local 1000 ("SEIU")). At the conclusion of the hearing, the Court issued an order overruling respondents' demurrers, denying the petitions for writ of mandate; and finding that judgment should be entered in favor of respondents on the complaints for declaratory relief.

On January 12, 2009, the present action was filed challenging the Governor's Executive Order, entitled *California Correctional Peace Officers Association v. Governor Arnold Schwarzenegger, et al.*, Case No. 2008-80000137. The Court issued an order finding this case to be related to the three cases captioned above and further ordered this case assigned to this Department. Respondents filed a demurrer to the petition and complaint. The case is now before the Court for hearing on the demurrer and the merits of the petition and complaint.¹

¹ Three more actions have been filed challenging the Governor's Executive Order: *CDF Firefighters v. Governor Arnold Schwarzenegger, et al.*, Case No. 2009-00032732; *California Association of Psychiatric Technicians v. Governor Arnold Schwarzenegger, et al.*, Case No. 2009-80000148; and *Yvonne Walker and Service Employees International Union, Local 1000 v. Governor Arnold Schwarzenegger, et al.*, Case No. 2009-80000150. Those cases have not yet been set for hearing on the merits.

Ruling on Preliminary Evidentiary Issues:

Petitioners have made a request for judicial notice, filed January 27, 2009, and a supplemental request for judicial notice, filed January 30, 2009. Respondents² have made two requests for judicial notice, filed January 27, 2009 and January 30, 2009. No objections to the requests have been filed. The Court has reviewed the requests and the documents attached thereto and finds that all such documents are proper subjects for judicial notice. All requests for judicial notice are therefore granted.

Respondents' evidentiary objections to the Declaration of Charles L. Alexander, Jr. are overruled. The declaration adequately demonstrates that Mr. Alexander has personal knowledge of the matters stated therein by virtue of his being a correctional officer since 1988 and an officer of petitioner CCPOA since 2005. His explanation of the relevant policies of CDCR institutions regarding use of vacation time and holiday leave, being based on his personal knowledge of these matters, constitutes more than mere opinion testimony, and, to the extent that he expresses an opinion as to how such policies will impact the taking of accrued furlough days, such opinion is based upon facts within the declarant's personal knowledge and therefore is presented with an adequate foundation. The declarant's statement of the facts within his knowledge and his opinions based thereon are relevant to the issues before the Court, most particularly whether the furlough amounts to a reduction in salary ranges that is forbidden by Government Code section 19826(b).

Petitioner's evidentiary objections to the Declaration of Joseph Moss are overruled. The declaration adequately demonstrates that Mr. Moss has personal knowledge of the matters stated therein by virtue of his being a Correctional Administrator since 1994 who is familiar with institutional policies regarding, among other things, vacation and holiday leave. His testimony regarding the possible means by which CCPOA members may be able to use accrued furlough days is more than mere speculation in that it is based on facts regarding CDCR operations and thus is based upon an adequate foundation, specifically, his personal knowledge and experience as a Correctional Administrator.

Ruling on Respondents' Demurrer to the Petitions:

Respondents' demurrer is overruled on the following basis:

The petition and complaint in this matter differs from the petitions and complaints that were before the Court in the PECG/CAPS/SEIU/CASE matters. Here, CCPOA does not allege that the Governor generally lacked the authority to make the challenged order, as the other employee unions did.³ Instead, CCPOA's petition and complaint focuses solely on the theory that the provisions of the Governor's Executive Order imposing a furlough on its members violate Government Code section 19826(b). The factual basis for this theory, as set forth in the petition and complaint, is that the policies of the institutions where CCPOA's members work with regard to use of vacation and holiday time off are such that CCPOA's members will not, as a matter of

² In using the terms "respondents" or "defendants" in this ruling, the Court is referring to Governor Arnold Schwarzenegger and the Department of Personnel Administration. Although State Controller John Chiang also has been named as a respondent in these actions, the Controller has filed a Response to the Petition and Complaint stating that he takes no position with respect to the merits of the matter. In this ruling, the Court also has treated the terms "the Governor", "the Department of Personnel Administration" (or "the department" or "DP A") and "the State" as being essentially interchangeable.

³ See footnote 13, below.

fact, be able to use their furlough days at the time they accrue, and will not be able to take them at all before they expire, thus rendering the furlough a true salary range reduction in a manner the furlough was not for the other employee unions.⁴ These facts must be taken as true for the purposes of demurrer, and the pleading must be construed liberally in favor of the petitioner/plaintiff. (See, *Gerawan Farming, Inc. v. Lyons* (20-00)24 Cal. 4th 468,515-516.)

Moreover, the petition and complaint in this matter must be read in conjunction with facts of which the Court has taken judicial notice, specifically, that CCPOA and the State do not have an existing MOU, having officially bargained to impasse as of September 18, 2007, after which the State implemented the terms of its "last, best and final offer" pursuant to Government Code section 3517.8(b). Such facts were not before the Court in the prior furlough cases.

Having reviewed the facts alleged in the petition and complaint in light of the facts judicially noticed, the Court finds that the facts alleged in the petition and complaint are sufficient to state a cause of action for violation of Government Code section 19826(b), which, as interpreted in *Department of Personnel Administration v. Superior Court (Greene)* 5 Cal. App. 4th 155, prohibits the Governor from imposing a unilateral reduction of established salary ranges of represented employees when the state employer and the employee organization are at impasse in negotiations for a new MOU.

Respondents' contention that Section 19826(b) is superseded by the terms of the implemented "last, best and final offer", in particular by Section 4.02 of the Implemented Terms, is not persuasive. Respondents' contention is based on the theory that Section 4.02 is in conflict with Section 19826(b), and thus would supersede that statute under Government Code section 3517.8(b).⁵ The Court finds no conflict between Section 19826(b) and Section 4.02 of the Implemented Terms that would result in the statute being superseded here. Section 19826(b) prohibits the State from unilaterally establishing or adjusting the salary ranges of represented state employees. Section 4.02 of the Implemented Terms states that "[e]mployee services will continue unless eliminated or modified by management because of economic, program(s) or business-related reasons." The two provisions address different subjects, the establishment or adjustment of salary ranges, on the one hand, and the adjustment of services for economic or other reasons, on the other. Section 4.02 of the Implemented Terms does not, on its face, permit the Governor to alter established salary ranges. The existence of Section 4.02 therefore does not

⁴ To be precise, the specific facts regarding institutional policies are not set forth in the petition and complaint, which merely alleges that the "self-directed" furlough plan that CCPDA's employees will utilize amounts to a 10% pay reduction. Instead, the specific facts regarding institutional policies are set forth in the Declaration of Charles L. Alexander, Jr. In light of the urgency of this matter, and the fact that petitioner could amend the petition and complaint to state the facts set forth in the Alexander Declaration with specificity should the Court find that the petition and complaint technically failed to state sufficient facts to constitute a cause of action, the Court has elected to treat this matter as though the petition and complaint in fact incorporated the matters stated in the Alexander Declaration.

⁵ This statute provides, in relevant part: "If the Governor and the recognized employee organization reach an impasse in negotiations for a new memorandum of understanding, the state employer may implement any or all of its last, best and final offer. Any proposal in the state employer's last, best, and final offer that, if implemented, would conflict with existing statutes or require the expenditure of funds shall be presented to the Legislature for approval and, if approved, shall be controlling without further legislative action, notwithstanding Sections 3517.5, 3517.6, and 3517.7."

prevent petitioner from stating a cause of action for violation of Section 19826(b) based on the facts alleged in the petition and complaint.⁶

The Court further finds, as it did in the prior cases, that the issue of the Governor's authority to make the challenged order is not an issue within the exclusive initial jurisdiction of the Public Employment Relations Board, because it involves issues of statutory interpretation and separation of powers between the Governor and the Legislature, which are matters properly within the jurisdiction of the courts, and not issues of unfair practices under the Ralph C. Dills Act, which are matters properly within the jurisdiction of the Board. (See, e.g., *California School Employees Association v. Azusa Unified School District* (1984) 152 Cal. App. 3rd 580, 592-593; *California Teachers' Association v. Livingston School District* (1990) 219 Cal. App. 3rd 1503, 1519.)

Moreover, as before, even if this Court were to conclude that the Board did have jurisdiction over this matter, it would conclude that the normal policy reasons requiring parties to exhaust available administrative remedies do not apply in this case for many of the reasons stated by the Third District Court of Appeal in a case arising out of an earlier state budget crisis: namely, that many of the essential facts are undisputed, so there is no need for administrative development of the record; judicial intervention will not interfere with the expertise of the agency or create problems of judicial economy, given that the underlying issues are within the expertise of the courts and undoubtedly would be resolved ultimately by the courts even if initial jurisdiction were found in the Board; and, given that this case raises questions of first impression which most likely are bound for ultimate determination in the appellate courts, there is little concern of conflicting decisions between the Board and the courts. (See, *Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal. App. 4th 155, 168-169.)

Finally, as the Court found in the prior cases, even if this Court were to conclude that the Board did have jurisdiction over this matter, it would conclude that exhaustion of administrative remedies by resort to the Board should be excused on the ground that requiring exhaustion under the particular circumstances of this case would cause both the State and its employees to suffer irreparable injury, again, for many of the reasons stated in the 1992 *Greene* case: specifically, that the extremely grave nature of the fiscal crisis faced by the state, and the urgent need for resolution of these issues in as expeditious a manner as possible, create a great potential for irreparable harm in the nature of layoffs of state employees, with a concomitant reduction in the nature of state services, all of which are amply demonstrated by the declarations and documents that have been filed by respondents in this matter. Even if, as the Court of Appeal stated in the *Greene* case, there is a possibility that the Board could order the same relief that petitioners seek here, it is extremely unlikely that the entire process of Board adjudication followed by judicial review as provided by law would be completed in a sufficiently timely manner to address the immediate crisis. (See, *Department of Personnel Administration v. Superior Court (Greene)* (1992) 5 Cal. App. 4th 155, 170-171.)

Respondents' demurrer is therefore overruled.

⁶Because the Court finds no conflict between the statute and Section 4.02 of the Implemented Tenus, it is not necessary to address the issue of whether Section 4.02 required Legislative approval to become effective, which is necessary under Section 3517.8 where there is a conflict with existing statutes.

Ruling on the Petition and Complaint:

As noted above, the petition and complaint in this matter are based on the theory that the provisions of the Governor's Executive Order imposing furloughs on CCPOA members amount to a 10% reduction in established salary ranges that violates Government Code section 19826(b).

The facts regarding the implementation of the furlough are essentially undisputed, as is the fact that the State faces an extremely urgent fiscal crisis.⁷ As noted above, the furlough, as applied to CCPOA's members, differs from that applied to the represented employees whose unions were before the Court in the prior cases. In this case, state offices will not close on two Fridays each month. Instead, the Governor, through the Department of Personnel Administration, has developed a "self-directed" furlough for state operations that cannot close, such as state prisons. There are two types of "self-directed" furlough:

"Employees take two furlough days each month but on days chosen by the employees and approved by the supervisor. For example, revenue-generating positions may be considered for this type of furlough.

"Employees accrue two furlough days per month to be taken when feasible. Furlough days that cannot be used within the same month must be taken within two years following the end of the furlough program. Furlough days will not be cashed out. Posted positions in 2417 facilities such as prisons and hospitals automatically qualify for this self-directed furlough and do not require prior approval from DPA."

In either case, "[s]alaries will be adjusted to reflect the unpaid furlough days, but benefits will remain the same".⁸

The Governor's Executive Order thus reduces the normal work hours of state employees represented by CCPOA for a temporary period due to the state's current fiscal crisis. The emergency measure will result in an accompanying deduction from pay for the hours not worked, but the order does not change established salary ranges. The Governor's authority for this action is found in statutes in the Government Code and in the provisions of the Implemented Terms of the State's last, best and final offer to CCPOA.

As the Court found in the prior cases, the Governor has the statutory authority to reduce the hours of state employees pursuant to Government Code section 19851 and 19849.

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 the state employee 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."

Section 19849(a) provides that the Department of Personnel Administration " ... shall adopt rules governing hours of work and overtime compensation and the keeping of records

⁷ There is a factual dispute regarding whether CCPOA's members will be able to use accrued furlough days within the period of their validity. That issue is discussed below.

⁸ The quoted language and the summary of the "self-directed" furlough are found in the Memorandum dated January 9, 2009 ITom David A. Gilb, Director of the Department of Personnel Administration, to Agency Secretaries, et al., regarding "State Employee Furlough per Governor's Executive Order S-16-08", attached to the Amended Declaration of Jonathan Yank as Exhibit 2.

related thereto, including time and attendance records. Each appointing power shall administer and enforce such rules."

The Court finds that these two statutes, taken together, provide the Governor with authority to reduce the workweek of state employees to meet the needs of state agencies. Under the circumstances of the current fiscal crisis, the reduction in the workweek of state employees under the furlough order is indisputably related to the needs of the various state agencies (including the CDCR, which employs CCPOA's members). From the evidence respondents have submitted to the Court, it is clear that the State government as a whole runs the imminent risk of running out of money and that its various executive branch agencies, including the CDCR, would be unable to carry out their missions if immediate action is not taken to reduce expenditures.

These statutes continue to govern the employment-relationship between the State and CCPOA's members notwithstanding the fact that no MOU is currently in effect and the parties are operating under Implemented Terms of the State's last, best and final offer imposed after the parties reached impasse. As the Court of Appeal held in the *Greene* case, once an MOD has ceased to be effective at impasse, the many Government Code sections regulating wages, hours and other terms and conditions of employment which the parties' expired MOD may have superseded take effect (See, *Department of Personnel Administration v. Superior Court (Greene)* 5 Cal App. 4th 155, 187.) This continues to be true under Government Code section 3517.8(b) except to the extent that there is anything in the Implemented Terms that conflicts with existing statutes and is approved by the Legislature. Here, petitioner has not identified, and the Court has not found, anything in the Implemented Terms that conflicts with the State's authority to reduce the hours of state employees under Government Code sections 19851 and 19849.

In fact, at least one provision of the Implemented Terms is consistent with the State's power to reduce employee hours. As noted above, Section 4.02 of the Implemented Terms, which appears under the heading "State's Rights", provides that: "Employee services will continue unless eliminated or modified by management because of economic, program(s) or business-related reasons.,⁹ This language in itself authorizes the furlough: a reduction in hours in the face of a fiscal emergency is a modification of employee services because of economic reasons.¹⁰

The Court accordingly finds that both statutory law and the provisions of the Implemented Terms authorized the Governor to reduce the work hours of CCPOA members through a furlough in the current fiscal emergency.

The Court further finds that Government Code section 19826(b) does not preclude the Governor from taking such action.

⁹ See, respondents' Request for Judicial Notice filed January 27, 2009, Exhibit 2.

¹⁰ In responding to the State's argument in support of its demurrer that Section 4.02 of the Implemented Terms supersedes Government Code section 19826(b), petitioner argued that the State would have been required to seek Legislative approval of Section 4.02 pursuant to Government Code section 3517.8(b) in order for that term to become effective and thus supersede the statute. As the Court pointed out above, Section 3517-8(b) requires Legislative approval of any proposal in the State's last, best, and final offer that, if implemented; would conflict with existing statutes. As the Court found specifically with regard to a potential conflict between Section 4.02 and Section 19826(b), petitioner has not identified, and the Court has not found, any other conflict between Section 4.02 of the Implemented Terms and existing statutes such that Section 4.02 would have required Legislative approval to become effective. Thus, to the extent that petitioner argues that Section 4.02 is not effective absent proof of such Legislative approval, that argument is rejected.

Section 19826(b) states that the Department of Personnel Administration shall not establish, adjust or recommend a salary range for any employees in an appropriate unit where an employee organization has been chosen as the exclusive representative pursuant to Government Code section 3520.5, which is the case here.

As the Court found in the prior cases, however, the challenged furlough does not involve the establishment, adjustment or recommendation of a salary range for represented state employees. This case involves a temporary reduction in the hours worked by CCPOA's members, which will result in a reduction of pay to reflect the hours not worked: The order does not change established salary ranges at all: CCPOA's members will continue to receive their normal pay according to established ranges in weeks that do not include a furlough day. In essence, CCPOA's members are subject to a temporary deduction from their total pay under the established ranges, and not to being paid under a new or adjusted salary range. The present case is therefore distinguishable from *Department of Personnel Administration v. Superior Court, supra*, which involved an across-the-board salary cut of 5% with no furlough or reduction in work hours. The *Greene* case also did not discuss any provisions of the Implemented Terms imposed at impasse that might have authorized the respondents' actions in that case.

Petitioners contend that the particular facts of this case, involving the realities of operation of the institutions in which CCPOA members work and the details of the "self-directed" furlough, are such that the furlough, in this case, amounts to a 10% pay cut, and thus a reduction in established salary ranges, with no actual reduction in hours. In essence, petitioner argues that its members will not be able to use their accrued furlough days before they expire. As a matter of proof, rather than a matter of pleading, the Court finds that petitioner has not established this contention on the basis of probative, persuasive evidence. The only such evidence petitioner has offered is the Declaration of Charles L. Alexander, Jr. Although Mr. Alexander's declaration does suggest that the staffing needs and policies of CDCR institutions make it probable that at least some CCPOA members will not be able to use all of their furlough days in the actual month in which they accrue, the declaration does not establish that it is, or will be, impossible for them to use their furlough days within the two-year period of their validity.¹¹ Moreover, the declaration of Joseph Moss, a Correctional Administrator employed by CDCR, which has been submitted by respondents, suggests that there are a number of ways in which CCPOA members could use their furlough days within the allotted time, for example, by permitting staff to use accrued furlough days in lieu of other accumulated leave balances, or by implementing a furlough leave program modeled after the existing Holiday Leave program.¹² The Court therefore finds that the furlough, as applied to CCPOA members, has not been shown to amount to a 10% reduction in salary ranges without a reduction in hours worked, and is not precluded by Government Code section 19826(b).

¹¹ Mr. Alexander's declaration states his conclusion that " ... such so-called 'furloughs' could not occur for all correctional officers in a given institution even within a year's time of when they would accrue, if ever." (See, Declaration of Charles L. Alexander, par. 10, p. 4:26-28.) Because the furlough days remain usable for two years, not one, this conclusion is not probative or persuasive.

¹² See, Declaration of Joseph Moss, par. 3, p. 2:14-27. The Court notes for the record that Mr. Moss' declaration refers to a "42 month" furlough leave usage period under the January 9, 2009 DPA memorandum. Since the DPA memorandum refers to a two year period of validity, the reference to 42 months in the declaration appears to be a typographical error for "24 months", and the Court has treated it as such in reviewing the declaration.

Although the CCPOA petition and complaint does not explicitly raise the issues of whether there is a legitimate fiscal emergency and whether the Governor's Executive Order is a reasonable exercise of his authority under the circumstances¹³, the Court finds, in conformity with its rulings in the prior cases, that the evidence submitted by respondents amply documents the existence of a legitimate fiscal emergency, and that the state employee furloughs imposed by the Governor's Executive Order are both necessary and reasonable under the circumstances.

As the Court also found in the prior cases, the existence of the current emergency also authorized the Governor to make his order without first meeting and conferring with state employee organizations pursuant to Government Code section 3516.5.

The Court accordingly rules that the petition for writ of mandate is denied and judgment shall be entered for the defendants (respondents) on the complaint for declaratory relief.

A final issue remains with regard to the State Controller. In the PECG/CAPS/SEIU/CASE matters this Court previously ruled upon, the Controller, although named as a respondent/defendant, formally took the position that he was in alignment with the petitioners and that his office " ... ha[d] no intention of implementing the reduction in pay as contemplated in the Governor's Order, unless determined otherwise by a court of law.,¹⁴ In its final ruling in those matters, the Court directed that its judgment should include an order directing the Controller to take all necessary and appropriate steps to implement the provisions of the Governor's Executive Order imposing furloughs on state employees, including the reduction in such employees' pay, under the holding of *Tirapelle v. Davis* (1993) 20 Cal. App. 4th 1317. In this case, the Controller has not filed a formal statement indicating that he will not implement the reduction in pay unless ordered to do so, merely stating, as described above, that he takes no

position with respect to the merits of this matter. ¹⁵ In the interests of consistency, and to avoid any misunderstanding regarding the obligation of the State Controller, the Court's judgment in this matter shall also include an order directing the Controller to take all necessary and appropriate steps to implement the provisions of the Governor's Executive Order imposing furloughs on state employees who are CCPOA members, including the reduction in such employees' pay.

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In the event that this tentative ruling becomes the final ruling of the Court, counsel for respondents is directed to prepare the order and judgment in accordance with the ruling under the procedure set forth in Rule of Court 3.1312.

¹³ As petitioner states in its Reply Brief filed on February 2,2009: "This case is *not* about the Governor's authority to issue an emergency executive order directing true furloughs, or whether the State of California is in a fiscal emergency, or even the magnitude of that emergency. [...] The Governor indisputably has a broad array of powers at his disposal for addressing the fiscal emergency." (See, Petitioner's Reply Brief, p. 1 :22-28 (emphasis in original).)

¹⁴ See, Controller's Opposition to Respondents' Demurrer in the PECG/CAPS/SEIU/CASE matters, p. 2:15-17.

¹⁵ See, footnote 2, above.