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A SURVEY OF CALIFORNIA FURLOUGH LAWSUITS

by Jason J. Jarvis

The current economic crisis is forcing states to adopt creative means of balancing their budgets. California is again at the vanguard.¹ The state has raised taxes, issued IOUs, and made deep budget cuts in numerous aspects of state government.² Those efforts, however, have not been enough to bring the budget into balance. As a result, Governor Arnold Schwarzenegger acted on his own authority to furlough state workers in an effort to save money.³ The Governor's furlough decisions have resulted in the filing of numerous lawsuits, which are being resolved in conflicting ways by the California trial courts.

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Summary of Lawsuits

On December 19, 2008, Governor Schwarzenegger issued Executive Order S-16-08, directing California's Department of Personnel Administration ("DPA") to furlough certain employees and managers for two days per month.⁴ Six months later, the Governor issued a second furlough Executive Order that increased the number of furlough days from two to three.⁵ Union employees affected by the furloughs filed several lawsuits in different courts seeking to either stop the furloughs or pay money already lost due to their imposition. State Controller John Chiang, as well as other state executive officers who are separately elected by the voters, refused in many instances to act in accordance with the furlough orders on the basis that, as separately elected officers, they were not bound by Governor Schwarzenegger's decision.⁶ These actions also resulted in widespread litigation.⁷

Union-plaintiffs composed of the Professional Engineers in California Government, California Association of Professional Scientists ("PECG, CAPS"), Service Employees International Union Local 1000 ("SEIU"), and California Attorneys, Administrative Law Judges, and Hearing Officers in State Employment

("CASE") filed the first group of anti-furlough cases in Sacramento Superior Court, challenging generally the authority of the Governor to order furloughs.⁸ The trial court rejected that broad argument, however, and held that the Governor was authorized to reduce state-employee hours and pay to reduce state-employee hours because of the fiscal emergency.⁹ The court considered California's economic situation to be "an extremely urgent fiscal crisis" in which certain agencies would not be able to function without budget cuts such as the furloughs.¹⁰

The California Correctional Peace Officers Association ("CCPOA") filed a separate action against the Governor, (which was not consolidated with the first three but was heard and ruled upon by the same judge) arguing that his Executive Order violated Government Code section 10826(b) because state employees cannot use accrued vacation and holiday time, meaning that the Executive Order constitutes a "true salary range reduction."¹¹ The trial court concluded that the exigency of the budget crisis authorized Governor Schwarzenegger to order furloughs because temporary reductions in hours did not constitute a salary adjustment per se.¹²

Having failed to secure relief in the first set of cases, the same unions filed subsequent actions in other counties, relying on more nuanced arguments. CASE, for example, filed suit in San Francisco Superior Court, alleging that the furlough orders could not apply to non-executive agency employees who were specially funded, such as those of the State Compensation Insurance Fund.¹³ The trial court agreed, finding that Insurance Code § 11873(a) protects Insurance Fund workers from any provisions of the Government Code that apply to agencies “generally or collectively” unless specifically named. The San Francisco Superior Court denied the Governor’s argument that jurisdiction over the CASE allegations should continue to reside exclusively in the Sacramento Court because those consolidated actions had only concerned executive-branch employees. Thus, in spite of “any other provision of law,” Insurance Fund employees “are exempt from any hiring freezes and staff cutbacks otherwise required by law.”¹⁴

Three additional actions were filed against the Governor by CASE, SEIU, and UAPD in Alameda County Superior Court.¹⁵ They argued that Government Code section 19851 mandated that the Governor consider the varying needs of various agencies before reducing working hours.¹⁶ By failing to do more than require an across-the-board hour reduction, Governor Schwarzenegger had not “considered” varying needs at all.¹⁷ Further, each of the plaintiff-employees was employed by a “specially funded” agency. Thus, they claimed to be affected by the furloughs in violation of Government Code § 16310(a),¹⁸ which forbids any transfer “that will interfere with the object for which a special fund was created.” The court issued nearly identical rulings in these cases,¹⁹ holding that plaintiffs had made a prima facie showing based on the fact of the furloughs alone, such that there had been a “transfer” of monies, which interfered with the respective special funds’ missions.²⁰ In response, the Governor argued that there was no interference because the agencies’ employees can work overtime, even if the additional work is done by non-specially funded workers.²¹ The court rejected that argument and it also rejected the notion that the existence of an “emergency” situation permits the Governor to avoid his other obligations under the law.

In a related but not coordinated or consolidated case, CCPOA also brought an action in Alameda County where it maintained that the DPA cannot “reduce salaries” under either of two theories: first, that Labor Code Section 223 prohibits paying less than that agreed upon, and, second, that the minimum wage statute in California forbids the division of total compensation by hours worked to

achieve compliance with that provision.²² The trial court agreed.²³

Although several cases other than the consolidated Sacramento and coordinated Alameda County actions have been filed,²⁴ only one has resulted in a substantive decision: *California Public Employees’ Retirement System Board of Administration v. Schwarzenegger (CalPERS)*.²⁵ CalPERS is the organization that represents state pension workers.²⁶ It claimed a specific need for workers to handle the influx of investment issues related to the poor economy, as well as claiming—similar to CASE, SEIU, and UADP—that as a specially-funded entity the Governor could not furlough its employees. Unlike the Alameda County actions, however, the trial court there rejected the “special funding” argument and upheld Governor Schwarzenegger’s power to require furloughs.²⁷

Addressing Conflicting Decisions

The present set of divergent decisions coming from different state trial judges has left the Governor’s power to furlough state workers in doubt. Governor Schwarzenegger has appealed the Alameda County actions to the California Court of Appeal’s 1st Appellate District.²⁸ The Court of Appeal granted a stay of the order directing the furloughs to stop two days after the appeal was filed, but the case is not yet briefed on the merits.²⁹ Resolution of this issue by the intermediate appellate courts and ultimately the Supreme Court is urgently needed as the state continues to risk running out of money. Indeed, the Governor recently sought consolidation and review in the California Supreme Court of a series of actions related to the furloughs.³⁰ The Supreme Court has not yet ruled on this request.

CCPOA has also recently filed another action, this time in the United States District Court for the Northern District of California.³¹ In its federal action, CCPOA claims violations of the Fair Labor Standards Act (FLSA), arguing that “by requiring [CCPOA] employees to work their furlough days without paying them within the pay period in which they work, and by failing to count their hours worked during uncompensated furlough days towards overtime, [the Governor] continuously violate[s] the FLSA’s wage and hour, overtime, and record keeping requirements.”³² CCPOA brought three causes of action in its complaint: (i) a failure to pay for work performed in a given pay period; (ii) a failure to calculate hours worked during furlough periods as overtime; and (iii) a failure to keep adequate payroll records. Governor Schwarzenegger and other defendants have not yet responded to the

complaint. Adding a federal component to this litigation will only further delay resolution of this vital question regarding the ability of the state to function during these challenging economic times and will certainly lead to additional appellate proceedings.

Conclusion

Although Governor Schwarzenegger has been vocal in his frustration with court rulings that fail to agree with his perspective, thus far he has won as many disputes as he has lost. The result is that many, but not all, state workers targeted for furloughs have been taking them, resulting in some savings for the state.³³ However, it is uncertain how long the furloughs will continue or how they will ultimately fare in the courts.

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Endnotes

1 J. Steinhauer, "Plan to Close California's Budget Deficit," NYTimes Jan. 8, 2010, located at: <http://www.nytimes.com/2010/01/09/us/09calif.html>.

2 R. Knutson, "Big Banks Don't Want California IOUs," Wall Street Journal July 7, 2009, located at: <http://online.wsj.com/article/SB124692354575702881.html>; E. Halper and S. Goldmacher, "Governor Warns of Deep Fiscal Crisis As He Unveils California Budget Plan," LA Times Jan. 9, 2010, located at: <http://articles.latimes.com/2010/jan/09/local/la-me-state-budget9-2010jan09>.

3 For most intents and purposes, a furlough is an unpaid vacation.

4 Prof. Eng. in California Gov't v. Schwarzenegger, Case No. 08-80000126, Amended Minute Order at 1.

5 Executive Order S-13-09, located at: <http://gov.ca.gov/executive-order/12634/>.

6 See, e.g., M. Yi, "Governor Orders Layoffs, Heavy Pay Cuts," S.F. Gate Aug. 1, 2008, located at: <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/07/31/MNEP122S2P.DTL>.

7 After a dispute arose between the State Controller and Governor Schwarzenegger, the Governor sued the Controller in Sacramento Superior Court to force him to execute the furloughs. See Schwarzenegger v. Chiang, Case No. 34-2009-80000158. Other executives, including the Lieutenant Governor, intervened. The Controller argued that applying the furlough orders to other executives' offices' employees would violate the California Constitution's system of "divided executive power" and that the exigency no longer existed. The court rejected Controller Chiang's arguments, finding that other executives enjoyed no special privilege against the Governor's power to manage agency budgets and that the exigency persisted despite the passing of a new budget because the new budget had included furloughs in its accounting.

8 The first case filed was 2008-80000126 (*PECG*). Also consolidated in the court's ruling on the petition for writ of mandate and declaratory relief were 2009-80000134 and 2009-80000135; as used in this article, the short titles for those cases are *CASE I* and *SEIU I*, respectively. The California Correctional Peace Officers Association ("CCPOA") also filed in Sacramento, but its action was not consolidated with the other three although it was considered related and assigned to the same judge.

9 "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.*" CAL. GOV'T CODE § 19849(a) (emphasis added). Section 19851(a) states in part that "[The Department of Personnel Administration] shall adopt rules governing hours of work and overtime compensation and the keeping of records. . . . Each appointing power shall administer and enforce such rules."

10 Amended Minute Order at 6.

11 *Id.* at 2.

12 See *id.* The court also noted that, unlike other plaintiffs, CCPOA did not have a current Memorandum of Understanding ("MOU") with the state, which governed the parties' employment relationship. See *id.* at 6-7.

13 California Attorneys, Administrative Law Judges and Hearing Officers in State Employment v. Schwarzenegger, (*CASE II*) Case No. 09-509205, Order Granting Writ at 2.

14 CAL. INS. CODE § 11873(c). Although the decision appears to be correct substantively, there are a few troubling aspects of the court's decision in *CASE II* not dismiss or transfer the action to the Sacramento court. First, the Sacramento Superior Court's consolidation order does not distinguish between executive and non-executive employees represented by CASE. Second, the chief basis on which the Sacramento Superior Court based its decision was Government Code sections 19851 and 19849, which do not distinguish between executive and non-executive employees. Finally, the *CASE II* order addresses the exclusive concurrent jurisdiction issue but not any issue or claim preclusion effects of the Sacramento consolidated cases decision (released one day after *CASE II* was filed). Even if preclusive effects should not have applied, one would think analysis of the question was in order. In any event, CASE was successful not only in keeping the case from the unfriendly Sacramento forum, but also in carving out a group of represented employees from the Governor's Executive Orders.

15 CCPOA v. Schwarzenegger (*CCPOA II*), Case No. 09-441544; CASE v. Schwarzenegger (*CASE III*), Case No. 09-453982; Service Employees International Local 1000 (SEIU II) v. Schwarzenegger, Case No. 09-456750; Union of American Physicians and Dentists (UAPD II) v. Schwarzenegger, Case No. 09-456684. The petitions for writ of mandate were "coordinated" but the cases were not consolidated.

16 See SEIU v. Schwarzenegger, Slip Op. at 7; UAPD v. Schwarzenegger, Slip Op. at 7-8; CASE v. Schwarzenegger, Slip Op. at 8. The failure to consider the varying needs of agencies was not saved, according to the court, by Governor Schwarzenegger's exemption from the furloughs of public safety and firefighter officers because it does not prove that the needs of other agencies,

such as the California Earthquake Authority, were considered. See *CASE III* at n.5.

17 The court also noted that where money saved through the furloughs is not sourced from special or federal funds, the delay in payout achieved by the furloughs does not actually save the General Fund money, and, thus, the Governor abuses his discretion in ordering the furloughs. The court's reasoning on this point relies on contentions by the plaintiffs that the furloughs will result in slower unemployment claims and delay in moving disabled workers from state to federal rolls. Although the court asserted that certain agencies will save nothing but instead suffer increased costs, it undertook no analysis of the cost versus benefit of the alleged financial "harms" to the General Fund as opposed to benefits from the furloughs. The court concluded, however, that because the General Fund will not save money, it "cannot do otherwise than to conclude that [the Governor has abused his discretion]."

18 Section 16310(a) permits the General Fund to borrow monies from other funds when it is exhausted. Although there is no specified time limit, the monies borrowed "shall" be returned as soon as available.

19 As noted *supra*, the cases were coordinated but not consolidated.

20 See, e.g., *CASE III*, Slip Op. at 11.

21 See *id.* The court did not analyze what is meant by "interfere"; is *de minimis* interference enough, or must severe interference occur before the special funds are protected from borrowing?

22 See *CCPOA II*, Slip Op. 8-9 (citing CAL. LABOR CODE § 1171 et seq.).

23 In concluding a violation of Labor Code § 223, the court quotes the statute and also cites *Steinhebel v. Los Angeles Times Communications*, 126 Cal.App.4th 696, 707 (Cal. App. 2 Dist. 2005). The court ignored an arguably critical aspect of the statute, however, which the court in *Steinhebel* recognized, to wit: "it is unlawful for an employer to pay less than any contract or statute requires *while purporting to pay the required wage.*" *Id.* (emphasis added). In other words, the point of Labor Code § 223 is to prohibit dishonest pay practices, not prohibit forever any form of salary reduction. As to its conclusion under § 1171 et seq., because certain employees may need to *work anyway in spite of the furlough*, not paying for those three days, concluded the court, would violate § 1171 et seq.

24 CASE, SEIU, and CAPS also filed actions in San Francisco Superior Court; other unions have filed in San Francisco, Sacramento, and Los Angeles.

25 Case No. 09-509754, filed August 19, 2009.

26 See <http://www.calpers.ca.gov/index.jsp?bc=/about/home.xml>.

27 See Minute Order dated December 18, 2009, located at <http://webaccess.sftc.org/Scripts/Magic94/mgrqispi94.dll?APPNAME=IJS&PRGNAME=ROA22&ARGUMENTS=-ACPF09509754>.

28 *CCPOA v. Schwarzenegger*, Case No. A127292.

29 Governor Schwarzenegger filed a petition for writ of supersedeas and requested a temporary stay of the writ of mandate issued by the Alameda Superior Court.

30 K. Yamamura, "Schwarzenegger Seeks to Consolidate Furlough Cases," *Sacramento Bee* Mar. 2, 2010, located at: <http://www.sacbee.com/static/weblogs/capitolalertlatest/2010/03/schwarzenegger-153.html>.

31 *Newton v. Schwarzenegger*, Case No. 2009cv05887, filed December 16, 2009. The case is so styled because the three named plaintiffs are individual corrections officers, albeit under the CCPOA umbrella, and the attorneys who filed the complaint are employed in CCPOA's Legal Department. A copy of the Complaint is located at: <http://www.courthousenews.com/2009/12/17/ArnoldFurlough.pdf>.

32 Complaint at 2 ¶ 3.

33 K. Yamamura, "Governor Blames Budget Woes on Judges 'Going Absolutely Crazy,'" *Sacramento Bee* Jan. 24, 2010, located at: <http://www.sacbee.com/capitolandcalifornia/story/2272576.html>. His complaints, however, tend to address challenges to his authority in contexts other than just the furlough orders.