

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Plaintiffs and Respondents

v.

**ARNOLD SCHWARZENEGGER, as
Governor of the State of California, etc. et al.,**
Defendants and Appellants

**JOHN CHIANG, as State Controller, etc.
et al.,**

Defendants and Respondents.

S182581

Court of Appeal,
First Appellate
District, Case No.
A125292

San Francisco
County Superior
Court
No. CPF-09-509205

RESPONDENT'S BRIEF ON THE MERITS

After a Decision from the Court of Appeal, First Appellate District,
Affirming a Decision of the Superior Court, San Francisco County, the
Honorable Peter J. Busch

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TABLE OF CONTENTS

STATEMENT OF THE CASE..... 1

STATEMENT OF FACTS 2

ARGUMENT..... 5

 I. APPELLANTS’ BRIEF RAISES ISSUES THAT ARE BEYOND THE SCOPE OF
 REVIEW 5

 II. THE GOVERNOR HAS NO CONSTITUTIONAL AUTHORITY TO FURLOUGH
 STATE EMPLOYEES..... 7

 III. THE GOVERNOR LACKS STATUTORY AUTHORITY TO FURLOUGH
 EMPLOYEES 10

 IV. THE MOU BETWEEN THE PARTIES EXPRESSLY FORBIDS UNILATERAL
 IMPLEMENTATION OF FURLOUGHS..... 15

 A. Section 10.3 Expressly Prohibits Unilateral Implementation of Furloughs..... 16

 B. Section 4.4 Does Not Authorize Furloughs 17

 C. Section 3.1 Does Not Authorize Furloughs 19

 V. THE UNILATERAL IMPLEMENTATION OF FURLOUGHS WAS NOT
 AUTHORIZED..... 20

 VI. INSURANCE CODE SECTION 11873 PROHIBITS FURLOUGHS 22

CONCLUSION..... 28

CERTIFICATE OF COMPLIANCE..... 29

TABLE OF AUTHORITIES

Cases

<i>Carmel Valley Fire Protection Dist. v. State</i> (2001) 25 Cal.4th 287	7
<i>Deluca v. Fish & Game Commission</i> (1951) 103 Cal.App.2d 273	13
<i>Department of Personnel Administration v. Superior Court (Greene)</i> (1992) 5 Cal.App.4th 155	11, 22
<i>In re Attorney Discipline System</i> (1998) 19 Cal.4 th 582	7
<i>In re Rosenkrantz</i> (2002) 29 Cal.4th 616	22
<i>Kray Cabling Co. v. County of Contra Costa</i> (1995) 39 Cal.App.4th 1588	26
<i>Krug v. Maschmeier</i> (2009) 172 Cal.App.4th 796	23
<i>Lowe v. California Resources Agency</i> (1991) 1 Cal.App.4th 1140	11
<i>McCarther v. Pacific Telesis Group</i> (2010) 48 Cal.4 th 104	9
<i>Methodist Hospital of Sacramento v. Saylor</i> (1971) 5 Cal.3d 685	10, 11
<i>Millholen v. Riley</i> (1930) 211 Cal. 29	7
<i>Notrica v. State Compensation Insurance Fund</i> (1999) 70 Cal.App.4th 911	25
<i>People v. Estrada</i> (1995) 11 Cal.4 th 568	6
<i>Sonoma County Organization v. County of Sonoma</i> (1991) 1 Cal.App.4th 267	21
<i>State Compensation Insurance Fund v. McConnell, etc.</i> (1956) 46 Cal.2d 330	26
<i>Superior Court v. County of Mendocino</i> (1996) 13 Cal.4th 45	10
<i>Tirapelle v. Davis</i> (1993) 20 Cal.App.4th 1317	11
<i>Tricor California, Inc. v. State Compensation Insurance Fund</i> (1994) 30 Cal.App.4th 230	25
<i>Vandegrift v. Riley</i> (1934) 200 Cal. 340, 342	9
<i>Walt Rankin & Associates, Inc. v. City of Murrieta</i> (2000) 84 Cal.App.4th 605	14

<i>Younger v. Superior Court</i> (1978) 21 Cal.3d 102	25
<i>Zumbrun Law Firm v. California Legislature</i> (2008) 165 Cal.App.4 th 1603	7

Statutes

Code of Civil Procedure section 1110b	2
Code of Civil Procedure section 916	2, 4
Government Code section 1001	8
Government Code section 12010	8
Government Code section 12011	8
Government Code section 13070	8
Government Code section 19826	11, 12
Government Code section 19851	13, 14
Government Code section 19996.22	12
Government Code section 19997	12
Government Code section 3516.5	20, 21
Government Code section 3517.6	17
Government Code section 3517.8	16
Government Code section 3524	15
Insurance Code section 11771.5	24
Insurance Code section 11775	24
Insurance Code section 11778	24
Insurance Code section 11781	24
Insurance Code section 11800.1	24
Insurance Code section 11800.2	24
Insurance Code section 11873	passim
Labor Code § 57.5	24

Other Authorities

Opn. 69-98 (1969) 52 Ops. Cal. Atty. Gen. 160	25
---	----

Rules

California Rules of Court, rule 8.512..... 2
California Rules of Court, rule 8.516..... 5, 6

Constitutional Provisions

California Constitution, Article III, section 3 7, 24
California Constitution, Article IV, section 10 9
California Constitution, Article XIV, section 4 26

STATEMENT OF THE CASE

On February 10, 2009, Petitioners California Attorneys, Administrative Law Judges and Hearing Officers in State Employment (“CASE”), Glen Grossman, Mark Henderson, and Geoffrey Sims filed a verified petition for writ of mandate and complaint for declaratory and injunctive relief in the San Francisco County Superior Court. (AA 1.)¹ The petition named as respondents Governor Arnold Schwarzenegger, Director of the Department of Personnel Administration (“DPA”) David Gilb, State Controller John Chiang, and State Compensation Insurance Fund (hereafter “State Fund”) President Jan Frank. (*Ibid.*) The petition alleged that Insurance Code section 11873² prohibited the Governor from furloughing State Fund employees. (AA 6, 9.)

Governor Schwarzenegger and Director Gilb opposed the petition. (AA 55.) Controller Chiang took no position. (AA 198.) Jan Frank filed a response which took no position on the merits. (AA 200-202.) At the conclusion of the hearing on March 20, 2009, the trial court requested supplemental briefing. (3/20/09 RT 48-51.)³ After briefing was completed, a subsequent hearing was held on April 15, 2009. (4/15/09 RT 3.) At the conclusion of the hearing, the trial court ruled from the bench in favor of

¹ Citations to the Appellant’s Appendix (“AA”) will be designated as AA followed by the page number.

² Subdivision (c) of that section provides:

Notwithstanding any provision of the Government Code or any other provision of law, *the positions funded by the State Compensation Insurance Fund are exempt from any hiring freezes and staff cutbacks otherwise required by law.*

(Emphasis added.)

³ The Reporter’s Transcripts (“RT”) are designated by the date, followed by RT and the page number.

Petitioners. (4/15/09 RT 47.) An order granting the writ of mandate was filed on June 4, 2009; judgment for petitioner was entered the same day. (AA 329, 331.)

Governor Schwarzenegger and Director Gilb filed a notice of appeal on June 10, 2009. (AA 335.)

Despite prevailing below, Petitioner CASE and its members were still subject to the furloughs, due to the general rule that a ruling on a writ of mandate is stayed pending appeal. (Code of Civil Procedure section 916, subd. (a).) Accordingly, Petitioners filed a motion for relief from automatic stay under Code of Civil Procedure section 1110b. (AA 350.) Over the objection of Governor Schwarzenegger and Director Gilb (see AA 381), that motion was granted on July 9, 2009 (AA 389), and the CASE members employed at State Fund are no longer being furloughed.

The Court of Appeal, First Appellate District, issued a published opinion affirming the trial court.⁴ After the time within which to file a petition for review had passed, appellant Governor Schwarzenegger sent a letter to this Court on May 11, 2010, asking this Court to grant review of the case on its own motion pursuant to California Rules of Court, rule 8.512. On May 20, 2010, this Court granted review on a single issue: Does the Governor have the authority to furlough the state employees at issue in this case by executive order?

The order granting review set an expedited briefing schedule, and respondent CASE hereby files its brief on the merits.

STATEMENT OF FACTS

On December 19, 2008, Governor Arnold Schwarzenegger issued Executive Order S-16-08, which made a number of proclamations relating to a perceived fiscal cash crisis

⁴ Prior to this Court's grant of review, that decision was published as *California Attorneys, Administrative Law Judges and Hearing Officers in State Employment v. Schwarzenegger* (2010) 182 Cal.App.4th 1424.

and a budget deficit of \$15 billion. The order proclaimed that there was a General Fund deficit that was projected to grow to \$42 billion over the next 18 months. (AA 40.) The order further proclaimed that “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” Finally, the order directed the Department of Personnel Administration (“DPA”) to implement a furlough of two days per month “regardless of funding source” but directed DPA to allow limited exemptions. (AA 41.)

On January 30, 2009, Sacramento County Superior Court Judge Patrick Marlette issued a minute order in the first furlough case (CASE I) in which he denied the petitions filed by CASE and other unions challenging the legality of the furloughs. (AA 114.)⁵ Only a few days later, on February 4, 2009, Judge Marlette issued a second minute order. (AA 240.) The second order was a response to a letter from the State Controller requesting clarification as to whether the January 30 ruling was applicable to “employees of independently elected Constitutional Officers.” (AA 240.) The minute order explained that those officers had sent letters to the State Controller questioning “the Governor’s authority to order furloughs of their employees.” (AA 240.)⁶

In answering the Controller’s letter, Judge Marlette explained that CASE I had been brought by four employee organizations, “raising issues regarding the Governor’s authority to order furlough of their members, as employees of *executive branch agencies.*” (AA 240, emphasis added.) Judge Marlette further explained that the elected Constitutional Officers were not parties to CASE I, and thus the case:

did not raise any issues regarding the Governor’s authority to order furloughs for the employees of those officers or officials. The Court’s ruling therefore did not address, or make any ruling regarding, the Governor’s authority to order furloughs for the employees of those officers and officials.

(AA 240.)

⁵ CASE’s appeal in that case is currently pending in this Court in case number S183411.

⁶ Reports of those letters appear at AA 264-273.

Subsequent to that clarification, the Governor and DPA filed their own writ of mandate in Sacramento County Superior Court seeking to direct the Controller to apply the furlough order to all employees of the civil executive officers. (3/20/09 RT 9-12.)² In the instant action, it was undisputed that the majority of the civil executive officers' employees are members of employee organizations, including CASE. (AA 256.) In fact, approximately one-third of CASE members are employed by those civil executive officers. (3/20/09 RT 11.) The Governor and DPA prevailed in their writ of mandate, and that case is currently on appeal in the California Court of Appeal, Third Appellate District, in case no. C061648. However, because the ruling is automatically stayed by statute (see Code Civ. Pro. section 916, subd. (a)), the employees of the civil executive officers are not being furloughed.

Until Friday, February 6, 2009, it was unclear whether State Fund would be impacted by furloughs. On Friday, January 30, 2009, State Fund President Jan Frank sent a memo to all State Fund employees entitled "Furloughs" in which she indicated that discussions with DPA were still ongoing regarding an exemption for State Fund. (AA 43.) On Friday, February 6, 2009, State Fund President Jan Frank sent an email to all State Fund employees announcing her disappointment that after lengthy negotiations with DPA, State Fund's request for an exemption from the furloughs was denied. Moreover, Ms. Frank stated that DPA had instructed State Fund to move forward with two days of furloughs per month. (AA 45.)

This action was instituted several days later. (AA 1.)

² The trial court was supplied with a copy of Judge Marlette's decision in the subsequent case (3/20/09 RT 12), but determined it was not helpful to the resolution of the instant case. (3/20/09 RT 28.)

ARGUMENT

I. APPELLANTS' BRIEF RAISES ISSUES THAT ARE BEYOND THE SCOPE OF REVIEW

This Court's May 20, 2010 order specified the narrow issue on which review was granted: Does the Governor have the authority to furlough the state employees at issue in this case by executive order? California Rules of Court, rule 8.516(a) specifies that "the parties must limit their briefs and arguments to those issues and any issues fairly included in them." In this case, appellants raised two issues in the Court of Appeal. The first was a procedural argument based on the doctrine of exclusive concurrent jurisdiction. (See AOB 11-36.)⁸ The second argument concerned Insurance Code section 11873. (AOB 37-43.) Appellants' brief in this Court abandons the procedural argument. And while the last five pages address section 11873, the entire 52 pages prior to that raise issues never before raised in this case at the trial court or on appeal.

The majority of appellants' brief in this Court addresses the issue of whether the Governor has the power to furlough employees *generally*, rather than simply those at issue "*in this case*" as ordered by this Court. Appellants make no argument whatsoever that their arguments are fairly included within the issue on which this Court granted review.

It is worth noting that on June 9, 2010, this Court granted review on its own motion on three cases involving state employee furloughs that were pending in the Court of Appeal, Third Appellate District.⁹ Arguably, the issue of the Governor's authority to furlough employees generally is relevant to those three cases, as those cases at least involve a wide number of employees employed at various agencies and represented by different organizations. This case, however, concerns only the 500 attorneys employed at State Fund, a unique entity governed by specific provisions of the California Constitutional and the Insurance Code.

⁸ AOB refers to Appellants' Opening Brief in the Court of Appeal.

⁹ Those three cases were C061009, C061011, and C061020, which have been consolidated in this Court as case number S183411.

In the June 9, 2010 order, this Court directed that it would consider the briefs already filed in the Court of Appeal as though they had been filed in this Court, thus obviating the need (and opportunity) to file additional merits briefing in those cases.¹⁰

By electing to brief the issue of whether the Governor has the power to furlough generally, appellants are essentially trying to supplement the briefing they previously filed in the Court of Appeal, Third Appellate District. Such a tactic should not be allowed. Appellants, having failed to timely file a petition for review in this case, should be confined to the narrow issue on which this Court granted review, and this Court should not tolerate the unseemly tactic of using a grant of review in this case to brief issues related to other pending cases.

This case is similar to *People v. Estrada* (1995) 11 Cal.4th 568, 581, where this Court noted that a party raised an issue for the first time in his opening brief in this Court. The Court declined to address the issue, and the result should be the same here. Even a cursory review of the prior pleadings in this case reveals that appellants have never advanced – in any court – the arguments made in their opening brief in this Court. Accordingly, the issue is not properly before the court. (*Ibid.*)

Appellants may argue that Rule 8.516(b)(2) allows this Court to decide issues not fairly included in the issue for which review was granted, so long as the parties have had the opportunity to brief those issues. While respondent CASE will respond to the arguments, the parties in the other cases are not a party to this case and thus will not have an opportunity to address the issues. Accordingly, this Court should decline appellants' invitation to address issues beyond the scope of review.

¹⁰ This Court did direct the parties to submit supplemental briefing on two discrete issues not directly raised in the briefing in the Court of Appeal.

II. THE GOVERNOR HAS NO CONSTITUTIONAL AUTHORITY TO FURLOUGH STATE EMPLOYEES¹¹

Appellants concede that the Governor's legislative power is extremely limited by the Constitution (OBM 22-24), but argues that his "expansive" executive power gives him the power to manage the state's fiscal affairs and workforce in times of crisis. (OBM 24.) Appellants cite no authority for this proposition. They do cite cases which establish the authority of the judiciary to respond to certain crises (see OBM 26-27, citing *In re Attorney Discipline System* (1998) 19 Cal.4th 582 and *Millholen v. Riley* (1930) 211 Cal. 29), as well as the power of the Legislature to act in response to disasters (see OBM 27, citing *Zumbrun Law Firm v. California Legislature* (2008) 165 Cal.App.4th 1603).

Noticeably absent from the recitation of authority for the constitutional powers of *other* branches is any authority that establishes the power of the executive branch. To the extent the foregoing cases are cited simply for the general proposition that the respective branches have certain inherent powers, they are silent as to whether the Governor has the precise power he claims to have in this case.

The doctrine of separation of powers derives from the California Constitution. Article III, section 3 states:

The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.

The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch. (*Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 297.) To the extent appellants are claiming that the Governor has "expansive" executive power in the area of fiscal affairs, it is important to note that "[e]xecutive power over appropriations is limited and is set out in the state Constitution." (*Id.* at p. 299.) Appellants cite no constitutional authority for the power the Governor claims to have.

¹¹ Although the Governor's arguments should be ignored by this Court for the reasons set forth in Argument I, *supra*, respondent CASE will address those arguments on their merits as well.

The only authorities cited in appellants' brief which illustrate *executive* power are statutes. (OBM 28-29.) Appellants argue that these statutes are evidence that "[t]he Legislature has confirmed the Governor's powers." (OBM 28.) Quite the contrary, the statutes cited prove that the Governor's power in this area are quite limited.

Government Code section 1001 (cited at OBM 28) simply designates a long list of "civil executive officers" but says nothing about whether executive power includes the power to furlough employees. Government Code section 12010 (cited at OBM 28), states, in its entirety, that "The Governor shall supervise the official conduct of all executive and ministerial officers." Again, however, there is nothing in the duty to "supervise" executive officers that suggests any power whatsoever to unilaterally manage the State's fiscal crisis by furloughing employees.

In fact, the very next section of the Government Code (which is omitted from appellants' brief) reads as follows:

The Governor shall see that all offices are filled and their duties performed. If default occurs, he shall apply such remedy *as the law allows*. *If the remedy is imperfect, he shall so advise the Legislature at its next session.*

(Gov. Code sec. 12011, emphasis added.) This section appears in Article 2 of Chapter 1 of Part 2 of Division 3. Division 3 concerns the Executive Department, and Article 2 in particular concerns the powers and duties of the Governor. Section 12011 makes clear that in enacting statutes describing the Governor's powers, the Legislature took pains to ensure that when acting to cure defaults, the Governor was required to stay within the law. Moreover, they left no doubt that even if the Governor was unsatisfied with an imperfect - but legal - remedy, he was required to report to the Legislature. In other words, the Governor is not authorized to act on his own, outside the parameters of the law, to do what he thinks is necessary. Rather, he is duty bound at all times to let the Legislature enact laws that will address a perceived crisis.

Appellants also cite Government Code section 13070, which specifies that the Department of Finance has general supervisory power of the financial and business policies of the State. (See OBM 29.) However, in interpreting the predecessor statute to

section 13070, this Court concluded that the department had the power to authorize the expenditure of funds from an emergency fund established by the Legislature when the amounts appropriated by the Legislature for certain agencies were insufficient to protect the public welfare. (*Vandegrift v. Riley* (1934) 200 Cal. 340, 342-343.) What is significant about that case is the fact that the discretion exercised by the Department of Finance was limited to appropriations already authorized by the Legislature. Nothing in that case or in the history of section 13070 suggests the Governor may take on additional powers not authorized by the Legislature. Rather, as the statutes confirm, his authority is limited to that authorized by law, and if it is imperfect, he must so advise the Legislature.

Curiously absent from appellants' brief is any discussion of the passage of Proposition 58. That proposition was passed early in the tenure of Governor Schwarzenegger, and it amended section 10 of Article IV of the California Constitution. Specifically, subdivision (f) now empowers the Governor to declare a fiscal emergency, call a special session of the Legislature, and submit legislation to deal with the fiscal crisis. It took a constitutional amendment to give the Governor the power to declare a fiscal emergency, and that same amendment precisely identified his powers under such an emergency. Notwithstanding that expressly limited grant of power, appellants argue that the Governor had a more expansive power all along. Rather than having to involve the Legislature at all to deal with a fiscal crisis, appellants contend that the Governor may act unilaterally to deal with the State's finances. Such an argument would render Proposition 58 completely unnecessary, and any interpretation of the law which renders provisions surplusage is to be avoided. (*McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104, 110.)

What emerges from the enactment of Proposition 58 is the following: either 1) the Governor never had the power to take any special action during a fiscal crisis, and Proposition 58 specifically gave him limited power as specified, or 2) whatever constitutional power the Governor may previously have had has now been expressly limited by amending the Constitution. Either way, there is simply no authority to use a fiscal emergency as justification to take actions that are beyond the bounds of law.

Legislative determinations relating to expenditures are binding upon the executive branch: “The executive branch, in expending public funds, may not disregard legislatively prescribed directives and limits pertaining to the use of such funds.” (*Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53.) Thus, it is necessary to explore existing statutory law to determine whether furloughs are authorized by law. In the absence of express statutory authorization, it must be concluded that the Governor lacks the authority to manage the State’s finances via furloughing state employees.

III. THE GOVERNOR LACKS STATUTORY AUTHORITY TO FURLOUGH EMPLOYEES

Appellants argue that the Governor has statutory authority to furlough employees. (OBM 32.) They also argue that existing statutes confirm the Governor’s claimed constitutional authority. (OBM 28.) However, a review of the relevant statutes reveals that the Governor lacks the authority he claims.

Preliminarily, it is important to understand that in California, the Legislature is the seat of virtually all legislative power.

Unlike the federal Constitution, which is a grant of power to Congress, the California Constitution is a limitation or restriction on the powers of the Legislature. [Citations.] Two important consequences flow from this fact. First, the entire law-making authority of the state, except the people’s right of initiative and referendum, is vested in the Legislature, and that body may exercise any and all legislative powers which are not expressly or by necessary implication denied to it by the Constitution. [Citations.] In other words, ‘we do not look to the Constitution to determine whether the Legislature is authorized to do an act, but only to see if it is prohibited.’ [Citation.] [¶] Secondly, all intendments favor the exercise of the Legislature’s plenary authority: ‘If there is any doubt as to the Legislature’s power to act in any given case, the doubt should be resolved in favor of the Legislature’s action. Such restrictions and limitations [imposed by the Constitution] are to be construed strictly, and are not to be extended to include matters not covered by the language used.

(*Methodist Hospital of Sacramento v. Saylor* (1971) 5 Cal.3d 685, 691.)

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

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

(b) Notwithstanding any other provision of law, the department 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 Section 3520.5.

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

Because “the entire law-making authority of the state, except the people’s right of initiative and referendum, is vested in the Legislature” (*Methodist Hospital of Sacramento v. Saylor, supra*, 5 Cal.3d at p. 691), it necessarily follows that the salary-setting authority remains in the Legislature unless and until it is delegated elsewhere. Moreover, all doubts about the scope of Legislative authority must be resolved in favor of the Legislature. (*Ibid.*) As illustrated by the statutes and cases set forth above, both the Legislature and the judiciary have already determined that the executive branch does not have the power to reduce employee salaries.

Appellants' acknowledge section 19826 but argue that the salary reduction that accompanied the furloughs was not an adjustment to the salary range prohibited by that statute. (OBM 50-52.) Specifically, they argue that "salary range" refers to an employee's hourly rate and not the total compensation. (OBM 51-52.) Their argument appears to be that total compensation may be reduced as a result of the furloughs but as long as the hourly rate remains the same, no violation of section 19826 can be shown. The problem with this argument is that it completely ignores the fact that the legal professionals in CASE are not paid an hourly rate; rather, they are salaried professionals who are largely exempt from overtime and other conditions applicable to hourly workers. Moreover, as detailed more fully in Argument IV, *infra*, they are entitled to "full compensation" regardless of the number of hours they work. Appellants' arguments are inapposite to CASE, and read as if they were cut and pasted from a brief in another, unrelated case.

Moreover, the Government Code specifically grants to state departments the power and authority to lay off employees "because of lack of work or funds, or whenever it is advisable in the interests of economy, to reduce the staff of any state agency. . . ." (Gov. Code § 19997.) There is a detailed and specific statutory scheme for the manner in which layoffs are to be implemented. (See Gov. Code § 19997 et seq.) There is no such statutory authorization for furloughs.¹² In fact, the Government Code expressly prohibits departments from unilaterally reducing the work time of employees against their will. (Gov. Code § 19996.22, subd. (a).)¹³ The Legislature has given very precise direction to

¹² 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.

¹³ Section 19996.22, subdivision (a) provides:

(a) Any employee who is being coerced, or who has been required, by the appointing power, a supervisor, or another employee, to involuntarily reduce his or her worktime contrary to the intent of this article, or who has been unreasonably denied the right to participate in this program, may file a grievance with the department.

the executive branch as to how to deal with employees in the event there is a lack of funds: use layoffs. It would be remarkable to conclude that the Legislature had to give express authority for layoffs, while the Governor all along had the expansive implied power to act unilaterally to furlough employees.

In an effort to cobble together at least some statutory authority for the power to furlough, appellants argue that Government Code section 19851 “provides the Governor with the statutory authority to furlough state employees.” (OBM 32.)

Government Code section 19851 provides as follows:

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

(b) If the provisions of this section are in conflict with the provisions of a memorandum of understanding reached pursuant to Section 3517.5, the memorandum of understanding shall be controlling without further legislative action, except that if the provisions of a memorandum of understanding require the expenditure of funds, the provisions shall not become effective unless approved by the Legislature in the annual Budget Act.

Appellants argue that it is necessary to ascertain the intent of the Legislature, and cite various canons of statutory construction. (OBM 33.) However, in this case, “[t]he law is plain and unambiguous. No resort to any canons of construction is required.” (*Deluca v. Fish & Game Commission* (1951) 103 Cal.App.2d 273, 274.) Appellants’ also argue that section 19851 merely sets forth a “policy” and does not establish a mandatory duty. (OBM 33-34.) However, it is settled that “the usual rule with California codes is

that ‘shall’ is mandatory and ‘may’ is permissive unless the context requires otherwise.” (*Walt Rankin & Associates, Inc. v. City of Murrieta* (2000) 84 Cal.App.4th 605, 614.) Section 19851 specifies that “that the workweek of the state employee *shall* be 40 hours, and the workday of state employees eight hours.” (Emphasis added.)

Moreover, Government Code section 19851, subdivision (a) specifically provides an exception to the otherwise mandatory 40-hour workweek: “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.” No amount of statutory construction will change the fact that the statute provides for an exception to the general rule provided certain conditions are met. Failure to meet those conditions means the Governor cannot claim to fall within the exception.

Appellants argue that the Governor met his burden under this statute:

Under the fiscal and cash crisis of 2008-2009, the Governor determined that the varying needs of the different state agencies – and in fact the entire State – were best met by a statewide and immediate reduction of state employee work hours.

(OBM 35.) Appellants also acknowledge that the Governor made a “uniform decision” regarding furloughs to preserve cash for the state. (*Ibid.*) These arguments are extraordinary admissions which prove the Governor abused his authority. By arguing that the furlough decision was “uniform” and that the decision was to address the needs of “the entire State,” appellants have admitted that the Governor failed to adhere to the precise and narrow exception spelled out in section 19851, subdivision (a). There simply is no room in the statute to allow the Governor’s view of what is best for the entire state to supplant the requirement that the varying needs of the different state agencies be served by a deviation from the prescribed 40-hour workweek. Such an argument would render the Legislature’s precise statutory exception nugatory, and must be rejected.

Section 19851 plainly requires consideration of “the varying needs of the different state agencies.” Nothing in the statute contemplates consideration of the needs of the State as a whole, nor does anything authorize the consideration of the State’s overall

fiscal condition as a substitute for the needs of the agencies. The Governor's Executive Orders thus ignored the requirements of the statute.

Appellants' arguments regarding the legislative history of section 19851 are unhelpful. (See OBM 36-40.) For the most part, the discussion of the various statutory antecedents to section 19851 (AOB 38-42) is irrelevant because those provisions predate the enactment of the Ralph C. Dills act in 1977. (Gov. Code sec. 3524.)

In its present incarnation, subdivision (b) of section 19851 is expressly subject to supersession by a memorandum of understanding ("MOU"). Similarly, Government Code section 19816.10 provides that DPA has no power to alter days, hours, or conditions of work in a manner contrary to any existing MOU. As will be discussed in Argument IV, the applicable MOU expressly precludes unilateral implementation of furloughs. For present purposes it is sufficient to recognize that the Legislature has expressly made the Governor's power to alter days and hours subservient to an MOU. The fact that they have legislated in this manner suggests that the Governor has neither the implied constitutional power nor the express statutory power to furlough employees in the name of managing the State's finances. Moreover, whatever power section 19851 may confer, it is expressly limited by the terms of an MOU. For that additional reason, the Governor lacked authority to implement furloughs.

IV. THE MOU BETWEEN THE PARTIES EXPRESSLY FORBIDS UNILATERAL IMPLEMENTATION OF FURLOUGHS

Appellants argue that the MOU between CASE and the State expressly authorizes furloughs. (OBM 40.) They are incorrect. Although they fail to address the most pertinent section of the MOU, appellants argue that other provisions of the MOU somehow give the Governor the power to furlough CASE members, including those at State Fund. (OBM 40.) Specifically, appellants rely on section 4.4 (OBM 42) and section 3.1 (OBM 44.) Neither section supports appellants' argument.

A. Section 10.3 Expressly Prohibits Unilateral Implementation of Furloughs

Appellants have requested judicial notice of the MOU presently in effect. (Req. for Judicial Notice (hereafter “RJN”), Exhibit 7.) The current MOU between the State and the legal professionals in State Bargaining Unit 2 expired on July 1, 2007, but by law remains in effect pending the ratification of a successor MOU, or until impasse is reached. (Gov. Code § 3517.8.) Article 10 of the MOU deals with layoffs, and section 10.3 in particular provides:

The State may propose to reduce the number of hours an employee works as an alternative to layoff. Prior to the implementation of this alternative to a layoff, the State will notify and meet and confer with the Union to seek concurrence of the usage of this alternative.

(RJN Exh. 7, p. 59.) This section emulates the Government Code, which expressly allows for layoffs but does not allow furloughs. More importantly, this section merely allows the state to “propose” a reduction in hours as an alternative to layoffs, but does not empower the state to unilaterally impose that reduction.

It may well be the case that employee unions would decide to accept a reduction in hours as an alternative to layoffs for some of their members, but nothing in the MOU compels them to do so. In fact, section 10.3 specifically requires the state to “seek concurrence” from CASE before implementing the alternative. It is apparent from the plain text of the MOU that the State lacks the power to unilaterally impose a reduction in hours.

The MOU recognizes the state’s express statutory power to lay off employees pursuant to the Government Code in section 10.1.B. (RJN Exh. 7, p. 58.) And it expressly contemplates furloughs in section 10.3, but states quite clearly that, unlike layoffs, the State must seek agreement from CASE before implementing furloughs. This section conclusively rebuts appellants’ argument that the MOU provides authority to furlough employees unilaterally.

Perhaps recognizing that section 10.3 is fatal to their argument, appellants mention the section only briefly and use an incomplete and misleading quote. At page 44 of their Opening Brief on the Merits, appellants cite section 10.3 for the proposition that the MOU “expressly provides the state with authority to reduce hours as an alternative to layoff.” They then quote the first sentence of section 10.3 but fail to include the second sentence. By not even including the caveat “in pertinent part” the appellants have tried to suggest that section 10.3 contains the first sentence and nothing more. But the second sentence is critical because it establishes that the Union’s concurrence in the proposal is required. Appellants do not address this express limitation anywhere in their brief.

B. Section 4.4 Does Not Authorize Furloughs

Section 4.4 is the portion of the MOU that deals with supersession. By way of background, pursuant to the Dills Act, numerous Government Code section are subject to supersession by an MOU. Specifically, Government Code section 3517.6, subdivision (a)(1) contains a long list of statutes that are subject to supersession, and, as applicable to this case, reads as follows:

In any case where the provisions of [section 19851] are in conflict with a memorandum of understanding, the memorandum of understanding shall be controlling without further legislative action.

Section 4.4 thus begins with the following clause:

The following Government Code sections and all DPA regulations related thereto are hereby incorporated into this MOU. *However, if any other provision of this MOU is in conflict with any of the Government Code sections listed below or the DPA regulations related thereto, such MOU provision shall be controlling.*

(RJN, Exh. 7, p. 13.) The several pages following that introductory clause list a variety of Government Code sections, including section 19851. (*Id.* at p. 16.) Thus, while that section is incorporated, it is only incorporated to the extent it is not in conflict with other

provisions. And, as will be demonstrated, other provisions of the CASE MOU conflict with, and thus supersede section 19851.

For example, section 6.3.A of the MOU provides as follows:

Employees are expected to work all hours necessary to accomplish their assignments and fulfill their responsibilities. Employees will normally average forty (40) hours of work per week including paid leave; however, work weeks of a longer duration may occasionally be necessary.

(RJN, Exh. 7 at p. 30.) This section of the MOU establishes that the work week will be, on average, 40 hours, except that longer work weeks may be occasionally required. This provision is in direct conflict with section 19851, which establishes a work week of 40 hours (without the modifier “on average”) and does not provide for longer work weeks of any kind. To the extent the “average” language suggests that CASE members will occasionally enjoy work weeks of less than 40 hours, it must be remembered that under section 6.2.C of the MOU, the rate of pay is “*full compensation* for all the time that is required” to perform the work. (RJN, Exh. 7, p. 29, emphasis added.) Because the attorneys, administrative law judges and hearing officers in CASE are salaried, their pay cannot be reduced simply because their hours may fluctuate from week to week. Rather, they are entitled to “full compensation,” which is the salary range established by the MOU. The salaries for all CASE members are set forth in a detailed table designated as Attachment A to the MOU. (RJN, Exh. 7, pp. 99-102.)

Thus, the MOU expressly provides for hours of work, and also expressly provides for full compensation regardless of fluctuations in hours. Assuming *arguendo* section 19851 gives the Governor some power to reduce hours, it is expressly in conflict with the provisions of the MOU, and thus is superseded. Appellants do not address these provisions of the MOU at all, and offer no argument as to how the caveat regarding conflicting provisions set forth in section 4.4 of the MOU can be interpreted in any other way than to conclude that section 19851 has no application in this case.

C. Section 3.1 Does Not Authorize Furloughs

Appellants next argue that section 3.1 of the MOU independently authorizes the Governor to unilaterally impose furloughs. (OBM 44.) That provision provides as follows:

3.1 State Rights

A. All State rights and functions, except those which are expressly abridged by this MOU, shall remain vested with the State.

B. To the extent consistent with law and this MOU, the rights of the State include, but are not limited to, the exclusive right to determine the mission of its constituent departments, commissions, and boards; set standards of service; train, direct, schedule, assign, promote, and transfer its employees; initiate disciplinary action; relieve its employees from duty because of lack of work, lack of funds, or for other legitimate reasons; maintain the efficiency of State operations; determine the methods, means and personnel by which State operations are to be conducted; take all necessary actions to carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. The State has the right to make reasonable rules and regulations pertaining to employees consistent with this MOU provided that any such rule shall be uniformly applied to all affected employees who are similarly situated.

C. This MOU is not intended to, nor may it be construed to, contravene the spirit or intent of the merit principle in State employment, nor to limit the entitlements of State civil service employees provided by Article VII of the State Constitution or by-laws and rules enacted thereto.

(RJN, Exh. 7, p. 11.) The sum total of appellants' argument about section 3.1 is that the State has the right to "maintain efficiency in State operations" and "to take all necessary action to carry out its mission in emergencies" and therefore reserves to the state the power to furlough employees. (OBM 45.)

The argument fails to account for subparagraph A, which expressly limits the operation of the "State rights" clause to matters that are not abridged by the MOU. Since the power to furlough (if it exists at all) is expressly abridged by section 10.3 of the MOU, nothing in section 3.1 can confer that expressly abridged power back to the State.

The argument also fails to account for the introductory clause of subparagraph B, which contains limiting language on the entirety of the section: it is only effective “[t]o the extent consistent with law and this MOU.” These two provisions make clear that the “State Rights” clause must be construed so as to be consistent with other terms in the MOU.

Contrary to appellants’ assertion, the MOU expressly prohibits the unilateral implementation of furloughs in section 10.3. Moreover, the other provisions relied upon by appellants do not establish any power to furlough whatsoever. Accordingly, the MOU does not provide the Governor with the power he claims.

V. THE UNILATERAL IMPLEMENTATION OF FURLOUGHS WAS NOT AUTHORIZED

Appellants argue that Government Code section 3516.5 “authorized the Governor to take immediate and unilateral action.” (OBM 46.) That section provides:

Except in cases of emergency as provided in this section, the employer shall give reasonable written 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.

Government Code section 3516.5 does not define “emergency.” However, that term is defined later in the same chapter of the Government Code. Section 3523, subdivision (d) refers to “an act of God, natural disaster, or other emergency or calamity affecting the

state, and which is beyond the control of the employer or recognized employee organization” This strongly suggests that an “emergency” in the context of employer-employee relations is limited to the common-sense definition of natural disasters and other events beyond human control, and thus it is doubtful whether the section has any application to this case. Neither a budget impasse nor a cash crisis is a natural disaster. Moreover, neither is beyond the control of the State. Indeed, given that budget deficits and budget impasses are becoming annual events at the State Capitol, it is doubtful whether the state’s fiscal situation is even an emergency at all; it appears to be the normal state of affairs.

More specifically, section 3516.5 does not empower the Governor to “furlough” state employees or otherwise reduce their wages. Quite the contrary, the statute only allows the Governor to perform actions which are otherwise legal, and provides for a relaxed notice requirement when justified by emergency circumstances. Section 3516.5 is not a grant of power in any meaningful respect, other than providing an exception to the notice requirement when the situation is so fluid as to preclude the ordinary process of meeting and conferring on issues. However, as set forth in the appellants’ Statement of Material Facts, the fiscal crisis began in the summer of July, 2008 (OBM 5) but the furloughs were not implemented until February 1, 2009 (OBM 10), nearly seven months later. Even assuming the fiscal situation presented an emergency of the sort contemplated by section 3516.5, it certainly was not one which was so time-sensitive as to excuse the normal process of meeting and conferring in good faith prior to implementation of a unilateral change in working conditions.

Appellants also argue that the Governor “must have powers and authority to take action to address and mitigate the emergency” but provide no authority for the proposition that such powers exist. Respondents rely on *Sonoma County Organization v. County of Sonoma* (1991) 1 Cal.App.4th 267 (OBM 49) but that reliance is misplaced. That case was interpreting the Meyers-Milias-Brown Act (MMBA), and not the Ralph C. Dills Act which governs state employees. California courts have already determined that “the Legislature structured the Dills Act differently than the Meyers-Milias-Brown Act”

and that the difference in structure has significant implications to the interpretation of the Dills Act. (*Department of Personnel Administration v. Superior Court (Greene)*, *supra*, 5 Cal.App.4th at pp. 175-176.) In particular, it is settled that “[t]he structure of the Dills Act demonstrates the Legislature's delegation to DPA of its authority over state employees' wages, hours and working conditions *was not entire*.” (*Id.* at p. 177, emphasis added.)

Thus, unlike the delegation to local agencies in the MMBA, the Legislature did not delegate all of its power to DPA; it reserved some. As has been observed, the Legislature could have simply repealed various provisions of the Government Code after enacting the Dills Act. (*Ibid.*) But it did not. Rather, “the Legislature insured that in the absence of an agreement, those aspects of state employment would continue to be determined by the Legislature.” (*Ibid.*) Because the Legislature retained ultimate authority over certain issues relating to state employees, respondent’s analogy to the MMBA governing local public employees is inapposite.

Appellants’ arguments that the Governor is entitled to deference (see, e.g. OBM 49, 50) overlook the fact that no deference is required when one branch usurps the power of another branch. As explained above, the Legislature has expressly reserved to itself the power to set salaries for state employees. Article III, section 3 of the California Constitution establishes the doctrine of separation of powers. This Court has observed that this doctrine “limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch.” (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 662.) The Governor’s actions did exactly that, and thus, the doctrine of separation of powers not only does not aid appellants, it demonstrates the illegality of the Governor’s actions.

VI. INSURANCE CODE SECTION 11873 PROHIBITS FURLOUGHS

All the parties below agreed that the issue was whether Insurance Code section 11873, subdivision (c), which prohibits “staff cutbacks,” prohibits the furloughs ordered

by the Governor. (4/15/09 RT 37) The trial court found the issue relatively simple and straightforward:

The term “staff cutback” has to be read in its commonsense meaning, and to the extent that it is informed by the policy concerns expressed in the legislative history as anything to the contrary, it is that a furlough program designed to reduce the availability of staff is a staff cutback for purposes of the statute.

(4/15/09 RT 49.)

Appellants disagree, arguing that section 11873 does not prohibit the Governor from directing furloughs. Instead, they argue that section 11873 only prohibits layoffs or other reductions in the *number of staff*. (OBM 53, emphasis in original.) Section 11873 provides, in pertinent part:

(c) Notwithstanding any provision of the Government Code or any other provision of law, the positions funded by the State Compensation Insurance Fund are exempt from any hiring freezes and staff cutbacks otherwise required by law.

Appellants’ arguments must be rejected, because the plain language of the statutory framework makes clear that furloughs are prohibited staff cutbacks.

It is a settled principle of statutory construction that a court’s “task is to discern the Legislature’s intent.” (*Krug v. Maschmeier* (2009) 172 Cal.App.4th 796, 802.) In conducting that inquiry,

[t]he statutory language itself is the most reliable indicator, so we start with the statute’s words, assigning them their usual and ordinary meanings, and construing them in context. If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute’s plain meaning governs.

(*Ibid.*) The term “staff cutbacks” is not ambiguous. It plainly refers to a limitation on the ability of State Fund’s ability to continue its current staffing level. It is, quite simply, a reduction in the staff available to State Fund. That reduction could come about because employees are laid off, or it could occur via an order directing the staff to work fewer

hours per month. In either case, the staff resources available to State Fund would be “cut back” and it would necessarily be hampered in its ability to do business.

To the extent appellants argue that “staff cutbacks” refers only to layoffs, i.e. a reduction in the actual number of staff, rather than a reduction in staff hours, the legislative framework does not support that interpretation. The California Constitution grants the Legislature “plenary power, unlimited by any provision of this Constitution, to create, and enforce a complete system of workers' compensation, by appropriate legislation. . . .” (Cal. Const. Art. XIV § 4.) The Legislature has placed all power and responsibility in the hands of the State Fund Board. (Labor Code § 57.5.) Because the Legislature has specifically created State Fund and delegated its plenary powers over State Fund to the board of directors, State Fund is unlike the various executive departments under the authority and control of the Governor.¹⁴

The Legislature has further directed that the State Fund Board of Directors are vested with “full power, authority and jurisdiction” over the fund, and may exercise any power over the fund “as fully and completely as the governing body of a private insurance carrier.” (Ins. Code § 11781.) State Fund is required to “be fairly competitive with other insurers. . . .”

State Fund is specifically empowered to transact insurance (Ins. Code § 11778) and State Fund is entirely funded by premiums paid by those employers who purchase workers compensation through the State Fund. State Fund is entirely self-supporting, and neither contributes to, nor takes from, the assets of the State of California. (Ins. Code § 11775.) Although State Fund may deposit money with the State Treasurer, such moneys “are not state moneys.” (Ins. Code § 11800.1.) Rather, the State Controller is required to keep a special ledger account for State Fund. (Ins. Code § 11800.2.) Moreover, pursuant to Insurance Code section 11771, “The State shall not be liable beyond the assets of the State Compensation Insurance Fund for any obligations in connection therewith.”

¹⁴ In fact, Pursuant to Insurance Code section 11771.5, State Fund is required to include the following disclaimer in any advertisement: “The State Compensation Insurance Fund is not a branch of the State of California.”

The Attorney General has opined that “unlike other state agencies, the Fund is an entirely self-supporting agency.” (Opn. 69-98 (1969) 52 Ops. Cal. Atty. Gen. 160.) The California courts recognize that State Fund “operates on a self-sufficient basis.” (*Tricolor California, Inc. v. State Compensation Insurance Fund* (1994) 30 Cal.App.4th 230, 241.) As one court observed, “although State Fund is a ‘public entity,’ State Fund is to be treated as a private enterprise.” (*Notrica v. State Compensation Insurance Fund* (1999) 70 Cal.App.4th 911, 941.)

The framework enacted by the Legislature is thus intended to treat State Fund as a special entity, unlike other branches of state government. State Fund is statutorily required to compete with other insurers in the private market. (Ins. Code § 11775.) State Fund cannot meet its obligation to be competitive if its workforce is subject to furlough by the Governor or officials outside of State Fund. Thus, in order to give State Fund the necessary ability to manage its workforce so as to best compete with other private insurers, the Legislature has determined in section 11873 that State Fund shall be exempt from staff cutbacks. It would be absurd to interpret that section as permitting the Governor to furlough State Fund employees for two days per month (or 10, 20, or 30 days per month) so long as the employees are not actually laid off. The damage done to State Fund’s ability to operate competitively in the private market would be the same.

The trial court recognized the absurdity in this argument below when it queried whether the Governor could use furloughs to direct that State Fund employees can only work from 9:00 a.m. to 9:05 a.m. every day. (4/15/09 RT 41.) Appellants below answered that the Governor could indeed impose such a furlough, because it would not impact the size of the workforce. (*Ibid.*) To argue that such a furlough is not a staff cutback is simply untenable.

When construing statutes, courts must avoid interpretations leading to absurd results the Legislature would not have intended. (*Younger v. Superior Court* (1978) 21 Cal.3d 102, 113.) The Legislature could not have intended for State Fund to be exempt from layoffs, but not a cutback in staff hours, as that would interfere with the Legislature’s carefully crafted framework which gives State Fund enough independence

to compete in the private market. By way of analogy, courts have already determined that the Insurance Commissioner, an independently elected statewide officer, has no power to adopt an insurance rating system that could hamper State Fund's ability to compete with other insurers. (*State Compensation Insurance Fund v. McConnell, etc.* (1956) 46 Cal.2d 330, 346.) Appellants' interpretation would destroy the very independence State Fund has with respect to its labor force the Legislature has prescribed. For this reason alone, appellants' argument should be rejected.

Appellants argue that section 11873, subdivision (c) must be read in conjunction with subdivision (b).¹⁵ (OBM 54.) Subdivision (b) subjects State Fund to various provisions of the Government Code. Respondents agree with appellants that as a general matter,

The words of a statute must be construed in context, and the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole.

(*Kray Cabling Co. v. County of Contra Costa* (1995) 39 Cal.App.4th 1588, 1592.)

However, that doctrine is of no avail to appellants. Subdivision (b) of Insurance Code

¹⁵ Subdivision (b) provides:

(b) The fund shall be subject to the provisions of Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1 of, Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of, Chapter 6.5 (commencing with Section 8543) of Division 1 of Title 2 of, Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3 of Title 2 of, the Government Code, and Division 5 (commencing with Section 18000) of Title 2 of the Government Code, with the exception of all of the following provisions of that division:

(1) Article 1 (commencing with Section 19820) and Article 2 (commencing with Section 19823) of Chapter 2 of Part 2.6 of Division 5.

(2) Sections 19849.2, 19849.3, 19849.4, and 19849.5.

(3) Chapter 4.5 (commencing with Section 19993.1) of Part 2.6 of Division 5.

section 11873 states that as a general matter, State Fund is subject to various provisions. But subdivision (c) begins with the phrase “Notwithstanding any provision of the Government Code or any other provision of law. . . .” Thus, while subdivision (b) makes State Fund generally subject to other provisions of law, and even some provisions of law regarding employment relations, subdivision (c) specifically exempts State Fund from staff cutbacks. Accordingly, harmonizing the statutory framework does not advance appellants’ argument.

Nothing in section 11873, subdivision (c) limits “staff cutbacks” to merely the number of staff, as advanced by appellants. Nor does any such limitation appear in any of the other provisions of law enumerated in subdivision (b). Appellants have identified nothing that would suggest that the term is so limited. The interpretation advanced by appellants would create an absurd result wherein the Governor could accomplish an end run around the statute. Appellants argue that section 11873 prohibits layoffs, but not furloughs. But their argument would allow the Governor to furlough State Fund employees for every day of the year, so long as they were not laid off. Such an interpretation should be rejected.

“Staff cutbacks” includes a cutback in the number of days staff is permitted to work. The trial court’s common sense interpretation was correct, and the judgment below should be affirmed.

CONCLUSION

For the foregoing reasons, the trial court ruling should be affirmed.

DATE

Patrick J. Whalen
Attorney for Plaintiffs/Respondents

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that the foregoing brief contains 9,152 words, as determined by the “word count” feature of commercial software.

Patrick J. Whalen

Date

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sacramento, California. I am over the age of eighteen (18) years and not a party to the above-entitled action. My business address is 1725 Capitol Avenue, Sacramento, CA 95811.

On June 29, 2010 I served the following documents:

1. Respondent's Brief on the Merits

I served the aforementioned document(s) by enclosing them in an envelope and (check one):

XX depositing the sealed envelopes with the United States Postal Service with the postage fully prepaid.

_____ placing the sealed envelope for collection and mailing following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

The envelopes were addressed and mailed as follows

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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 June 29, 2010.

Delaney Ellison