



**Executive Office**

P.O. Box 942701

Sacramento, CA 94229-2701

TTY for Speech and Hearing Impaired: (916) 795-3240

Phone: (916) 795-3825; Fax: (916) 795-3410

August 3, 2010

John Chiang, State Controller  
Office of the State Controller  
300 Capitol Mall, Room 1850  
Sacramento, CA 95814

Re: Furlough Order (Executive Order S-12-10)

Dear Controller Chiang:

On July 28, 2010, the Governor issued Executive Order S-12-10, unilaterally declaring an "emergency" and ordering the Department of Personnel Administration to implement a three-day-per-month unpaid furlough of State employees, effective August 1, 2010. The Order exempted a few state agencies from its mandate and the employees represented by certain bargaining units. It did not exempt CalPERS or any of its employees.

As you know, the illegality of the Governor's two previous furlough orders is presently being reviewed by the California Supreme Court. In multiple actions statewide, trial and appellate courts have entered and sustained judgments specifically finding that the Governor's 2008 and 2009 furlough orders were unlawful as they applied to over 60 special fund agencies, including CalPERS, whose employees' salaries were not paid out of the State's General Fund. Those judgments found that mandatory furloughs of the employees of special fund agencies, including CalPERS, could not be imposed on them against their will, regardless of whether any of their funds were "borrowable" by the State.

In each of those cases, your office filed briefs in support of the Court's rulings.

CalPERS is a special fund agency, which pays all of its expenses from sources other than the State's General Fund. CalPERS funds are designated as "non-governmental funds" by the Department of Finance in its Manual of State Funds. This and the "non-borrowable" status of CalPERS' retirement funds have been confirmed by Veronica Chung-Ng, that Department's Program Budget Manager. Under oath, she identified CalPERS as a special fund agency whose funds were not derived from the General Fund and were not borrowable (except for one small health fund, designated "Fund 0950"). See her Declaration and accompanying Exhibit A attached to this letter.

John Chiang  
August 3, 2010  
Page 2

Applying furloughs to CalPERS' staff results in neither savings to the General Fund nor available liquidity to mitigate cash shortages. The furlough of CalPERS employees under these circumstances is arbitrary and capricious, and without any valid legal basis.

In the only cases to squarely challenge the application of the Governor's December, 2008 and July, 2009 furlough orders to employees of special fund agencies like CalPERS, Judge Frank Roesch of the Alameda County Superior Court ruled on December 31, 2009 that the Governor's two Executive Orders of December, 2008 and July, 2009 were "arbitrary, capricious and unlawful" as applied to the employees of CalPERS and other special fund agencies, in violation of Government Code sections 19851(a) and 16310(a). Further, the Court ruled that "the [emergency] authorities offered by the Governor in his Executive Orders do not appear to allow the Governor to implement furloughs if they would violate other provisions of the law." Those rulings have been entered as judgments, binding on the Governor, the Department of Personnel Administration, CalPERS and your office. (The judgments are now stayed on appeal, pending appellate review.)

We also note that the only case in which your office has been stayed from paying CalPERS' employees their full salaries during the past 18 months did not address the legality of imposing furloughs on special fund agencies at all. In his decision last year upholding the furlough orders, Judge Peter Marlette of the Sacramento County Superior Court was careful to carve out the special fund issue later decided by Judge Roesch, expressly "mak[ing] no findings on it." See Minute Order, January 29, 2009 at p. 5 footnote. The Alameda County judgments then, are the exclusive and authoritative word on the subject.

Over the past two years, the State Controller's Office has objected to implementing the unlawful furlough orders but has been prevented by a court injunction from exercising its independent judgment and paying our employees the full amount due them. Today, however, your office is under no such injunction, and you are free to exercise your independent judgment on the matter. I urge you to act consistently with the position you've taken in the courts.

CalPERS members have a vested right in the security and integrity of the source of funding for the payment of their retirement benefits. (*Board of Administration v. Wilson* (1997) 52 Cal.App.4<sup>th</sup> 1109, 1135, 1136.) This requires a properly administered and invested retirement system. This new furlough will continue to interfere with our ability to carry out our Constitutional duties of prudently administering the retirement system and delivering the promised benefits to our members and their beneficiaries.

John Chiang  
August 3, 2010  
Page 3

On behalf of CalPERS, I request that your office continue to transfer funds from our accounts sufficient to fully compensate our employees, notwithstanding the Governor's illegal furlough order.

I look forward to hearing from you.

Sincerely,

A handwritten signature in cursive script that reads "Anne Stausboll".

ANNE STAUSBOLL  
Chief Executive Officer

Attachment

cc: CalPERS Board of Administration  
Bill Leonard, Secretary, State & Consumer Services Agency  
Ana J. Matosantos, Director, Department of Finance  
Debbie Endsley, Department of Personnel Administration

John Chiang  
August 3, 2010  
Page 4

bcc. Jack Ehnes