

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO**

CALIFORNIA CORRECTIONAL PEACE
OFFICERS ASSOCIATION

Plaintiffs/Respondents,

vs.

ARNOLD SCHWARZENEGGER, in his capacity
as Governor of the State of California;
CALIFORNIA DEPARTMENT OF PERSONNEL
ADMINISTRATION; CALIFORNIA
DEPARTMENT OF CORRECTIONS AND
REHABILITATION; CALIFORNIA
DEPARTMENT OF MENTAL HEALTH; and
CALIFORNIA DEPARTMENT OF JUVENILE
JUSTICE

Defendants/Appellants.

JOHN CHIANG, in his capacity as the Controller of
the State of California

Defendant

Court of Appeal Case No. A127292

(Superior Court Case No. RG-09-441544)

Appeal from the Superior Court, Alameda County
The Honorable Frank Roesch, Department 31, (510) 268-5105

**REPLY TO REAL PARTY IN INTEREST'S SUPPLEMENTAL
BRIEF**

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ARNOLD SCHWARZENEGGER, as Governor of the
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ADMINISTRATION; CALIFORNIA DEPARTMENT
OF CORRECTIONS AND REHABILITATION;
CALIFORNIA DEPARTMENT OF MENTAL
HEALTH; CALIFORNIA DEPARTMENT OF
JUVENILE JUSTICE

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I.

INTRODUCTION

In its supplemental brief to this Court following the California Supreme Court's decision in *Professional Engineers in California Government v. Schwarzenegger* (2010) 50 Cal.4th 989, 116 Cal.Rptr.3d 480, Real Party in Interest California Correctional Peace Officers' Association ("CCPOA") argues that the Court's decision in that case does not serve to validate the "self-directed" furloughs, which were used to furlough its members working in 24-hour, 7-day-a-week facilities.

In *Professional Engineers*, the California Supreme Court held that the Legislature's enactment of the Revised Budget Act of 2008, which included a provision for reduction of state employee compensation through "existing administration authority," constituted a legislative ratification of the Governor's furlough program. The central holding of *Professional Engineers* is that the California Legislature's enactment of the Revised Budget Act of 2008 on February 19, 2009 "operated to ratify the use of the two-day-a-month furlough program as a permissible means of achieving the reduction of state employee compensation mandated by the act." (*Professional Engineers*, 50 Cal.4th 989, 116 Cal.Rptr.3d at 486.) The Court found that the legislative history underlying the 2008 Budget Act "makes it abundantly clear the Legislature contemplated that the reduction in appropriations for employee compensation ... could be achieved through

the furlough plan *that was then in existence.*” (*Professional Engineers*, 50 Cal.4th 989, 116 Cal.Rptr.3d at 524. Emphasis added.)

The central premise of CCPOA’s supplemental brief, and indeed of its entire case, is that self-directed furloughs, *i.e.*, those situations in which state employees in State Bargaining Unit 6 (“BU 6”) were required to work on furlough days and to bank furlough time for later use, violates Labor Code section 223, which generally prohibits an employer from paying a wage less than that required by either contract or statute. Based on this premise, CCPOA argues that the holding in *Professional Engineers* is not dispositive of the issues in this case. In support of this contention, however, CCPOA raises arguments that have been addressed and rejected by the Supreme Court in its decision in *Professional Engineers*.

CCPOA admits at pages 16 and 17 of its supplemental brief to this Court that the furlough program as it existed at the time the Legislature ratified it through enactment of the Revised 2008 Budget Act included the use of self-directed furloughs. Without considering any of the arguments raised by CCPOA in its supplemental brief, this admission is fatal to its efforts to distinguish *Professional Engineers* from this case because, as noted above, the Court’s holding in *Professional Engineers* was that the Legislature’s enactment of the Revised 2008 Budget Act ratified the furlough program “that was then in existence.” (*Professional Engineers*, 50 Cal.4th 989, 116 Cal.Rptr.3d at 524.)

CCPOA devotes the majority of its supplemental brief to two arguments: (1) that any interpretation of the budget act to authorize reductions in employee compensation through self-directed furloughs violates the “single-subject” rule, which limits budget enactments to the subject of appropriations to support the annual budget (see Cal. Const. art. IV, § 9) and (2) “[i]f ... the Legislature approved the ‘self-directed’ program for Unit 6, such approval would constitute a delegation of legislative authority to CDCR [California Department of Corrections and Rehabilitation] officials to change state employee wage rates.” (See p. 20 of CCPOA’s Supplemental Brief.) CCPOA contends that the California Supreme Court “has flatly rejected such expansions of agency authority in a budget act” based on the “single-subject” rule. (*Id.* at p. 21.)

These arguments are incorrect. First, the California Supreme Court already considered and rejected a challenge to the furlough program on the basis of the single-subject rule. CCPOA has not offered any new analysis on this point. Thus, its argument should be rejected in the same fashion as it was rejected by the Supreme Court when raised by the union petitioners in *Professional Engineers*.

Second, the Supreme Court also held in *Professional Engineers* that the Legislature’s reliance on furloughs as a means of achieving personnel cost savings, as evidenced by its enactment of the Revised 2008 Budget Act, constituted an exercise of legislative fiat, not executive authority. As

the Supreme Court found, furloughs, and the corresponding reduction in state personnel compensation, was a matter well within the Legislature's authority, an authority it exercised by ratifying the Governor's furlough program. The Court further held that by enacting Section 3.90 of the Revised Budget Act of 2008, the Legislature did not purport to confer any new authority on the Governor or the DPA. (*Professional Engineers*, 50 Cal.4th 989, 116 Cal.Rptr.3d at 526- 527.)

Finally, as this Court held in *CCPOA v. State of California* (2010) 188 Cal.App.4th 646, the provisions of the California Labor Code on which CCPOA's claims in this case fundamentally rest are inapplicable to public employers. CCPOA raised the same sophistic argument in that case as it does here to escape the well-established rule that provisions of the California Labor Code are inapplicable to public employers unless the language of a particular code section makes it expressly applicable. In *CCPOA v. State of California*, CCPOA attempted to argue that Labor Code section 220 rendered Labor Code section 226.7 applicable to the State. This Court rejected that argument and that holding is applicable here to render Labor Code section 223 inapplicable to the State.

Accordingly, this Court should issue the requested writ of mandate directing the trial court to vacate its ruling in favor of CCPOA.

II.

LEGAL ANALYSIS

A. The Supreme Court's Holding In *Professional Engineers Is Applicable To The Third Furlough Day Implemented Pursuant To Executive Order S-13-09 Issued On July 1, 2009*

As a threshold matter, CCPOA argues that the Court's holding in *Professional Engineers* did not affirm implicitly the third furlough day directed by the Governor in Executive Order S-13-09 issued on July 1, 2009. CCPOA argues that the legislative history underlying AB4X 1, the Revised Budget Act of 2009, which mandated personnel cost savings to be achieved through "existing administration authority" in the same fashion as the 2008 Budget Act analyzed by the Court in *Professional Engineers*, demonstrates an intent to reject the Governor's use of a third furlough day. Specifically, CCPOA points to the Senate Floor Analyses of July 23, 2009, for ABX4 1, which states that the Legislature is rejecting the Governor's proposal of a five percent pay cut for state employees "thereby maintaining the two-day furlough for all employees." (See CCPOA Supplemental Brief at pp. 10-12.) Rejection of the Governor's five percent pay cut proposal is not a rejection of the Governor's furlough program. As recognized by the Governor and the Legislature, a pay cut must be implemented by the Legislature. Unlike a pay cut, the furlough program was designed as a reduction in hours with a corresponding reduction in pay based on the reduced number of hours worked. While the Supreme Court in

Professional Engineers did not agree with the Governor's position, there is no dispute that a straight pay cut for state employees is a different proposal and is not synonymous with the Governor's furlough program.

As CCPOA is forced to concede, however, the legislative history underlying ABX4 1 is less than clear because the Assembly Floor Analyses for the bill indicates that the revised budget "reflects \$850 million in savings achieved by the Governor's executive order two [sic] additional days." CCPOA argues that the use of the word "additional" must constitute scrivener's error and the reference should have been to the two original furlough days. (See CCPOA Supplemental Brief at p. 12.) The statement in the Assembly Floor Analyses cannot be so easily dismissed, however, as the "scrivener's error," assuming there even was one, could just as easily be the reference to *two* additional furlough days, rather than one as the Governor had directed pursuant to Executive Order S-13-09.

What is not ambiguous is the language of Section 3.90 of the Revised Budget Act of 2009, the parallel section to the one analyzed by the Court in *Professional Engineers* in connection with the 2008 Budget Act. That section mandates personnel cost savings in the total amount of \$1,477,917,000 from the General Fund and \$973,058,000 from other funds, or a total of \$2,450,975,000 in total personnel costs savings to be achieved through either the collective bargaining process or through "existing administration authority," the exact phrase the Court found to constitute a

legislative ratification of the Governor's then-existing furlough program. In the case of the Revised Budget Act of 2009, it was passed on July 28, 2009, nearly a month after the Governor had directed a third furlough day pursuant to Executive Order S-13-09. Accordingly, the same logic that led the Court to find the use of the phrase "existing administration authority" in the Revised Budget Act of 2008 to be a legislative ratification of the Governor's two-day furlough program should lead this Court to find that same phrase in the Revised Budget Act of 2009 constitutes a legislative ratification of the third furlough day.

B. Legislative Ratification Of Self-Directed Furloughs Did Not Violate The Single-Subject Rule.

CCPOA argues that if the Revised Budget Act of 2008 is interpreted as legislative ratification of the use of self-directed furloughs, the act would violate the single-subject rule. CCPOA bases this argument on the proposition that legislative approval of self-directed furloughs would constitute a legislative repudiation of the Labor Code provisions CCPOA contends prohibit self-directed furloughs, specifically Labor Code section 223. Apart from the fact that Labor Code section 223 is inapplicable to the State (see below) and, even if applicable to the State, is inapplicable to the analysis of self-directed furloughs, the California Supreme Court already has considered and rejected the applicability of the single-subject rule to the

Legislature's approval of the Governor's furlough plan as it existed in February 2009.

In ruling that the Legislature ratified the Governor's furlough program through enactment of the Revised 2008 Budget Act on February 19, 2009, the Court in *Professional Engineers* considered and rejected the unions' challenge to such a finding based on the single-subject rule. In rejecting this challenge, the Court held that Section 3.90 of the Revised Budget Act of 2008 "[did] not substantively amend or change any existing statutory provision or expand or restrict the substantive authority of any state agency, and cannot reasonably be described as a substantive policy change masquerading as a Budget Act provision." (50 Cal.4th 989, 116 Cal.Rptr.3d at 526, internal citations omitted.) The Court further ruled that Section 3.90 of the Revised Budget Act of 2008

does not alter the provisions of Government Code section 19826 or purport to grant the Governor or the DPA authority to impose unpaid furloughs *unilaterally*, but rather embodies *the Legislature's determination* that the two-day-a-month furlough plan is a permissible means by which the specific reductions set forth in section 3.90 may be implemented.

(*Ibid.* Emphasis both added and in original.) In finding that the furlough program ratified by the Legislature, a program that included self-directed furloughs, constituted an act of legislative determination that the furlough program was a permissible means of achieving personnel cost savings, the

Court noted that Government Code section 19826 “places no limitations on the Legislature’s authority to increase or reduce the pay of salaries of state employees, and section 3.90 simply represents an exercise of the Legislature’s reserved authority over state-employee compensation.” (*Id.* at 527.) These findings by the Court in *Professional Engineers* dispose of CCPOA’s arguments regarding self-directed furloughs violating the single-subject rule. As the Court concluded, “the budget provision here at issue concerns only the one subject of appropriations to support the annual budget.” (*Id.*)

C. **Legislative Ratification Of Self-Directed Furloughs Did Not Constitute a Delegation Of Legislative Authority To The Executive Branch.**

The above-quoted portions of the Supreme Court’s opinion in *Professional Engineers* also dispose of CCPOA’s argument that interpreting Section 3.90 of the Revised 2008 Budget as a legislative ratification of the Governor’s furlough plan would amount to an unconstitutional delegation of authority from the legislative to the executive branch. As the Court held in *Professional Engineers*, enactment of section 3.90 of the Revised Budget Act of 2008 constituted the *Legislature’s determination* that the Governor’s then-existing furlough program, which included self-directed furloughs, was a permissible means of achieving personnel cost savings. (50 Cal.4th 989, 116 Cal.Rptr.3d at 526.) The Court further found that by enacting section 3.90 of the Revised 2008

Budget Act, the Legislature did not purport to confer any authority on the Governor or DPA. (*Ibid.*) Accordingly, there is no basis for CCPOA's delegation of authority argument.

D. The California Labor Code Sections On Which CCPOA Relies Are Inapplicable To The State.

As this Court held in *California Correctional Peace Officers' Association, et al v. State of California, et al*, (2010) 188 Cal.App.4th 646, at 653, this Court confirmed the "established rule" that provisions of the California Labor Code are inapplicable to public employers unless made expressly applicable to them. Based on this rule, this Court ruled against CCPOA in its effort to apply the meal period statutes in the Labor Code to the State. In that case, CCPOA made the same arguments it makes here with respect to which article or chapter of the Labor Code a specific statute is found as impacting the application of the established rule of statutory construction. This Court rejected CCPOA's argument on the principle that "when the Legislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded." (*Ibid.*)

The foundation of CCPOA's challenge to self-directed furloughs is the applicability of Labor Code section 223 to the State. Based on this Court's holding in *CCPOA v. State of California, supra*, that foundation no longer exists and CCPOA's claims here have no legal merit.

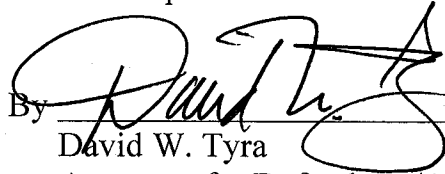
III.

CONCLUSION

Based upon the foregoing, State Petitioners respectfully submit that this Court should issue the requested writ of mandate and direct the trial court to vacate its decision in favor of CCPOA.

Dated: November 30, 2010

KRONICK, MOSKOVITZ, TIEDEMANN &
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By  _____

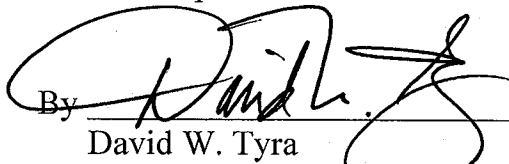
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CERTIFICATE OF WORD COUNT

I, David W. Tyra, Attorney for Defendants/Appellants Governor Arnold Schwarzenegger, Department of Personnel Administration, California Department of Corrections and Rehabilitation, California Department of Mental Health and California Department of Juvenile Justice, hereby declare under penalty of perjury that the number of words in Appellants Governor Arnold Schwarzenegger, Department of Personnel Administration, California Department of Corrections and Rehabilitation, California Department of Mental Health and California Department of Juvenile Justice's Reply to Real Party in Interest's Supplemental Brief equals 2,308 words, as per the word count feature in Microsoft Word.

Dated: November 30, 2010

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PROOF OF SERVICE

I, May Marlowe, declare:

I am a citizen of the United States and employed in Sacramento County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 400 Capitol Mall, 27th Floor, Sacramento, California 95814. On November 30, 2010, I served a copy of the within document(s):

Reply to Real Party in Interest's Supplemental Brief

- by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 30, 2010, at Sacramento, California.



May Marlowe