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9 JAN FRANK

10 SUPERIOR COURT OF THE STATE OF CALIFORNIA
11 FOR THE COUNTY OF SAN FRANCISCO
12

13 CALIFORNIA ATTORNEYS,
14 ADMINISTRATIVE LAW JUDGES AND
HEARING OFFICERS IN STATE
15 EMPLOYMENT, GLEN GROSSMAN,
MARK HENDERSON, GEOFFREY
16 SIMS, and DOES 1-500,

17 Petitioners/Plaintiffs,

18 vs.

19 ARNOLD SCHWARZENEGGER as,
Governor of the State of California;
20 DAVID GILB as Director of the
Department of Personnel Administration;
21 JOHN CHIANG, Controller of the State of
California; JAN FRANK, as President of
22 STATE COMPENSATION INSURANCE
FUND, and DOES 1-50,
23

24 Defendants/Respondents.

Case No. CPF-09-509205

**RESPONDENT AND DEFENDANT JAN
FRANK'S MEMORANDUM OF POINTS
AND AUTHORITIES IN RESPONSE TO
THE COURT'S MARCH 20, 2009,
REQUEST**

Date: April 15, 2009
Time: 9:30 a.m.
Department: 301

[Declaration of Ronald B. Turovsky concurrently
filed]

25
26 **I. INTRODUCTION.**

27 Respondent and Defendant Jan Frank (hereinafter "Frank"), named in this litigation in her
28 capacity as President of the State Compensation Insurance Fund (the "State Fund"), submits this

1 Memorandum of Points and Authorities in response to the Court’s request at the hearing on
2 March 20, 2009. The Court asked the parties to brief the question of whether the doctrine of
3 concurrent exclusive jurisdiction applies to the action filed by Petitioners and Plaintiffs California
4 Attorneys, Administrative Law Judges and Hearing Officers in State Employment (“CASE”),
5 Glen Grossman, Mark Henderson, and Geoffrey Sims (collectively “Petitioners”). The Court also
6 stated at the conclusion of the hearing that, if Frank “decides to either be taking issues or pressing
7 issues in some forum, I would like to know that . . . because I think potentially, at least, that
8 would be significant.” Declaration of Ronald B. Turovsky (“Turovsky Decl.”), Exhibit 1. In this
9 Memorandum, Frank addresses the issue of exclusive concurrent jurisdiction, and also provides
10 information on the latter subject as well.

11 On the subject of exclusive concurrent jurisdiction, Frank believes that the issues raised in
12 this action should be resolved on the merits and resolved as quickly as possible. Frank thus
13 requests that this Court take into consideration which court is best positioned to resolve the matter
14 on the merits and which court can do so most expeditiously. Further, with respect to the Court’s
15 request that Frank inform the Court if Frank wishes to promote any positions, Frank believes that,
16 to the extent the Court considers the merits of the litigation, there are various provisions of the
17 California Constitution and the California Insurance Code that show that a decision whether to
18 impose a furlough is to be left to the State Fund’s Board of Directors. The provisions of the
19 Constitution and of the Insurance Code are summarized below.

20 **II. STATEMENT OF POSITION.**

21 **A. Exclusive Concurrent Jurisdiction.**

22 The parties have submitted extensive briefing on whether the doctrine of exclusive
23 concurrent jurisdiction applies. Frank therefore will not provide an exhaustive legal argument in
24 order to avoid duplication.

25 Rather, Frank notes that the underlying issues raised in this case are critical to Frank. The
26 issues raised in this matter have not been addressed on the merits in any forum. Frank believes
27 that it is imperative that they be resolved on the merits – for the benefit of all parties. Frank also
28 believes that the issues should be resolved on the merits as quickly as possible. With this in

1 mind, Frank requests that this Court take into consideration which court is best positioned to
2 resolve the matter on the merits and which court can do so most expeditiously.

3 **B. The Court Should Consider the Language of the California Constitution and**
4 **Various California Insurance Code Sections.**

5 The Court, at the hearing on March 20, noted that, if Frank “decides to either be taking
6 issues or pressing issues in some forum, I would like to know that . . . because I think potentially,
7 at least, that would be significant.” Turovsky Decl., Exhibit 1. To the extent the Court concludes
8 that it does have the ability to rule on the matter on the merits, Frank believes there is language in
9 the California Constitution and numerous sections of the California Insurance Code that should be
10 considered, which make clear that the State Fund is unlike the various executive departments
11 under the authority and control of the Governor, that all decisions are left to the State Fund’s
12 Board of Directors, that the State Fund’s moneys are entirely separate from those of the State of
13 California, and that a decision whether to impose a furlough is to be made by the State Fund’s
14 Board of Directors. Certain of the sections were cited by Petitioners in their brief. Certain
15 additional sections also are important to consider.

16 To begin with, the California Constitution has vested “plenary power” to the Legislature
17 over the workers’ compensation system, including “the establishment and *management* of a State
18 compensation insurance fund.” Cal. Const. Art. 14 §4 (emphasis added). The Constitution
19 further states that all the “functions” of the “State compensation insurance fund” are “vested” in
20 the State Fund. *Id.* Pursuant to that Constitutional mandate, the Legislature has enacted a variety
21 of statutory provisions that further delegate decisions to the State Fund’s Board of Directors and
22 that make clear that the State Fund’s moneys are entirely separate from the State.

23 For example, the Legislature in 2003 enacted workers’ compensation reform, which
24 among other things added Insurance Code §11873(c). As noted by Petitioners, §11873(c)
25 provides that:

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

Section 11873(c) was enacted in order to allow the State Fund executives to exercise their best

1 business judgment over staffing needs in light of the negative impact the State’s hiring freeze had
2 had on State Fund’s operations. The Legislative History states:

3 The state hiring freeze had a substantial impact on SCIF during a period of intense growth
4 in SCIF’s policyholder base due to many other insurance companies dropping out of the
5 California workers’ compensation market. Despite large increases in premium volume,
6 numbers of policyholders, necessity for claims adjustment services, increased demand for
7 health and safety services and other insurance company operations, SCIF was unable to
8 increase the size of its workforce. This in itself may have had negative impact on the cost
9 of claims, in that delays in underwriting and claims adjusting responsibilities may have
10 caused higher policy costs to employers, may have caused penalties to occur, and may
11 have led to more and unnecessary litigation – to the extent that employers operated
12 without any insurance due to their inability to obtain a policy from SCIF, this may have
13 led to civil liability and/or substantial penalty assessments for illegal uninsurance.

9 The impact of allowing SCIF to expand and contract its workforce without regard for
10 hiring requirements applicable to other state departments will allow SCIF’s executive
11 leadership to exercise its best business judgment on SCIF’s staffing needs. This should
12 have a positive impact on controlling policy costs and providing better service to
13 policyholders.

12 See Turovsky Decl., Exhibit 2 at 22-23.¹ This Legislative History shows that it was the intent of
13 the Legislature to include furloughs within the exemption. The Legislature recognized the State
14 Fund’s need to be able to make its own decisions concerning the level of its staffing needs. A
15 furlough reduces the hours employees may work and thus impacts staffing. As such, furloughs
16 have the same potential impact on policy costs and providing services to policyholders. The State
17 Fund Board and executive leadership should be allowed to exercise their best business judgment
18 on furloughs as well, as contemplated by the Legislature.

19 Similarly, numerous Insurance Code sections demonstrate that all powers to administer
20 the State Fund’s activities reside in the State Fund’s Board. As noted by Petitioners, Insurance
21 Code §11781 provides that the State Fund’s Board is “vested with full power, authority and
22 jurisdiction over the State Compensation Insurance Fund” and that the Board “may perform all
23 acts necessary or convenient in the exercise of any power, authority or jurisdiction over the fund,
24 either in the administration thereof or in connection with the insurance business to be carried on
25 by it under the provisions of this chapter, as fully and completely as the governing body of a

26 ¹ Attached as Exhibit 2 to the Turovsky Decl. are excerpts from the Legislative History of AB 227, which enacted
27 Insurance Code §11873(c). Included are the introductory pages, the declaration from the individual at Legislative
28 Intent Service who prepared the Legislative History, and the pertinent pages from the history. Pursuant to Evidence
Code §452(a) and (c), Frank requests that the Court take judicial notice of the attached pages of the Legislative
History.

1 private insurance carrier.” As noted by Petitioners, §11771.5 requires that advertisements make
2 clear that the State Fund “is not a branch of the State of California.” In addition, §11770
3 provides that the State Fund is “to be administered by its board of directors.”

4 Likewise, numerous sections of the Insurance Code make clear that the finances of the
5 State Fund are entirely separate from State moneys and that a furlough would not in any way
6 effectuate a savings to the State. Petitioners cite, for example, Insurance Code §11771, which
7 provides that the “State shall not be liable beyond the assets of the State Compensation Insurance
8 Fund for any obligations in connection therewith.” As Petitioners note, §11775 provides that the
9 fund shall be “self-supporting” and shall “be fairly competitive with other insurers.” As
10 Petitioners note, §11800.1 provides that “the moneys deposited with the State Treasurer are not
11 state moneys. . . .” As noted by Petitioners, pursuant to §11800.2, the State Controller is required
12 to keep a “special ledger account” for the State Fund. Section 11774 states that the “assets of the
13 fund shall be applicable to the payment of losses sustained on account of insurance and *to the*
14 *payment of the salaries* and other expenses charged against it.” Cal. Ins. Code §11774 (emphasis
15 added). Again, this section shows that salaries of State Fund employees are paid out of the assets
16 of the State Fund, which are in turn derived from premiums and investments made using those
17 premiums, not out of State revenues. When the exemption for the State Fund from hiring freezes
18 and staff cutbacks contained in §11873(c) was enacted, the Legislative History noted that the
19 exemption “would not result in a direct fiscal impact to the state, since SCIF is an off-budget
20 department.” Turovsky Decl., Exhibit 2 at 30.

21 These provisions make clear that the State Fund’s Board is vested with full power and
22 authority over the State Fund, and that the State Fund’s Board is to operate as fully and
23 completely as the governing body of a private insurance carrier. Moreover, the sections show that
24 the funds of the State Fund, including those used to pay salaries, are not moneys of the State. To
25 the extent the furlough would create any savings, the savings would be experienced by the State
26 Fund, not by the State of California.

27 **III. CONCLUSION.**

28 Frank requests that the Court take into consideration which court is best positioned to

1 resolve the matter on the merits and which court may do so most expeditiously. To the extent the
2 Court exercises jurisdiction, Frank requests that the Court consider the above Constitutional
3 language and Insurance Code sections when deciding whether Respondents may impose a
4 furlough order on State Fund employees.

5 Dated: April 9, 2009

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By: _____
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