

**Chuck Alexander**, *Executive Vice President*

755 Riverpoint Dr., Ste. 200 • West Sacramento, CA 95605-1634 • (916) 372-6060

January 22, 2010

State Board;

CCPOA has filed our documents in rebut to the State's latest appeal maneuver of last week. The Court of Appeal ordered us to file on or before close of business yesterday January 21, 2010. Our attorneys of record on this matter, Carroll, Burdick & McDonough, have filed an excellent rebut to the State's WRIT OF SUPERSEDEAS.

Our "Opposition To Petition For Writ Of Supersedeas" is attached for you and will be posted on our web page later today.

Chuck

No. A127292

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOR THE FIRST APPELLATE DISTRICT  
DIVISION 2

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CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION,

Plaintiff/Respondent,

vs.

ARNOLD SCHWARZENEGGER, in his capacity as  
Governor of the State of California, *et al.*,

Defendants/Appellants.

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On Appeal from  
Alameda Superior Court, Case No. RG-09-441544  
Honorable Frank Roesch  
Department 31 (510) 268-5105

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**OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS**

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Gregg McLean Adam, No. 203436  
Jonathan Yank, No. 215495  
Gonzalo C. Martinez, No. 231724  
**CARROLL, BURDICK &  
McDONOUGH LLP**  
44 Montgomery Street, Suite 400  
San Francisco, CA 94104  
Telephone: 415.989.5900  
Facsimile: 415.989.0932  
Email: gadam@cbmlaw.com

Daniel M. Lindsay, No. 142895  
**CALIFORNIA CORRECTIONAL  
PEACE OFFICERS' ASSOCIATION**  
755 Riverpoint Drive, Suite 200  
West Sacramento, CA 95605-1634  
Telephone: 916.372.6060  
Facsimile: 916.340.9372  
Email: dan.lindsay@ccpoa.org

*Attorneys for Plaintiff/Respondent  
California Correctional Peace Officers' Association*

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# I

## INTRODUCTION

Although Defendants appeal from two non-appealable orders issued by the Alameda Superior Court—an order granting a petition for writ of mandate (“Order”), and the writ of mandate itself (“Writ of Mandate”)—their Petition for Writ of Supersedeas (“Petition”) asserts their entitlement to a stay prohibiting the State Controller from complying with the Writ of Mandate. Contrary to Defendants’ exaggerations, the Writ of Mandate does not direct termination of the furloughs program; it merely requires that Defendants pay state employees in Bargaining Unit 6 “prospectively . . . for all hours worked.” (Defendants’ Appendix to Petition for Writ of Supersedeas and Request for Temporary Stay (“Defs. App.”) 13.)

A writ of supersedeas issues only when necessary to protect an appellate court’s jurisdiction, yet their Petition fails to demonstrate they are entitled to such relief. Defendants’ invalid notice of appeal could not invoke this Court’s appellate jurisdiction, nor did it trigger any “automatic” statutory stay to be protected, because Defendants purport to appeal from non-appealable orders. Plaintiff California Correctional Peace Officers’ Association (“CCPOA”) filed a Motion to Dismiss the defective appeal on January 14 (currently pending before this Court).

Moreover, Defendants do not qualify for “discretionary”

supersedeas relief because they cannot show (1) that they will succeed on the merits or (2) cognizable irreparable harm. In sharp contrast, CCPOA members *have suffered and will continue to suffer* irreparable harm (as evidenced in the accompanying declarations; see Appendix to Opposition to Petition for Writ of Supersedeas (“CCPOA App.”)), including loss of income, bankruptcies, and foreclosures, if the Writ of Mandate is stayed. Given Defendants’ meager case for supersedeas relief, Unit 6 members are entitled to the protections of the Writ of Mandate (which was issued by the trial court only after full consideration of all arguments raised by the parties) pending any appellate review.

Resolution of CCPOA’s Motion to Dismiss will directly affect Defendants’ request for supersedeas relief and may ultimately render it improper and unnecessary. But even though Defendants’ appeal is procedurally improper, in the interest of expediting appellate review CCPOA would not oppose this Court’s conversion of Defendants’ pleadings into a procedurally-proper appellate petition for writ of mandate *provided* that there is no further stay of the trial court’s Writ of Mandate directing Defendants to pay Unit 6 members for hours they actually work.

## II

### **DEFENDANTS MISREPRESENT AND OMIT MATERIAL FACTS IN THEIR PETITION**

For the sake of judicial economy, CCPOA refers this Court to its

statement of facts in support of its Motion to Dismiss. However, CCPOA disputes several material factual misrepresentations in Defendants' Petition.

First, despite Defendants' repeated representations to the contrary, the Alameda Superior Court has not issued any "final order." (E.g., Petition at p. 2, ¶ 1.) Defendants expressly conceded this in their Notice of Appeal. (Defs. App. 16 ["final judgment has yet to be rendered or entered"].) Defendants appeal from the order granting CCPOA's writ of mandate, and the writ itself, which are non-appealable orders for the reasons explained in the Motion to Dismiss. There is no automatic stay when an appeal is made prematurely. (Petition at p. 3, ¶¶ 2-3; *id.* at 5-6, ¶¶ 8-11.)

Defendants also misrepresent to this Court the nature of the Writ of Mandate issued by the Alameda Superior Court. That Writ merely commands Defendants to:

Perform all acts necessary to immediately and ***prospectively*** pay all employees in State Bargaining Unit 6, as well as correctional sergeants and lieutenants, their full salaries in cash or cash equivalent at the end of each pay period ***for all hours worked during each preceding pay period***, without reduction, and at rates delineated for such classifications in the current State of California Civil Service Pay Scales, as set and required by, *inter alia*, Government Code sections 19824 and 19826(b) and Labor Code sections 223 and 1171 *et seq.*

(Defs. App. 13, emphasis added.)

Contrary to Defendants' assertions, the Writ:

- **Does not** “hold[] that the State of California may no longer utilize self-directed furloughs” for CCPOA-represented state employees. (Petition at pp. 1; *id.* at p. 7, ¶¶ 14-15 [averring that “CDCR and DMH are not permitted to continue using self-directed furloughs”].)
- **Does not** order any institution to “close completely on ‘furlough Fridays.’” (Petition at p. 6, ¶ 12; Defs. App. 55 [Kernan declaration].)
- **Does not** order Defendants to cease their self-directed “furloughs” program, nor would the Controller’s compliance with the Writ have this effect. (Petition at p. 5, ¶ 9; *id.* at p. 7, ¶¶ 14-15; Defs. App. 55, ¶ 6-7; *id.* at p. 63, ¶ 5.)
- **Does not** order that state employees must take three furlough days off per month. (Petition at p. 25; Defs. App. 55, ¶ 6-7; *id.* at p. 63, ¶ 5.)
- **Does not** direct Defendants to take any actions on staffing levels or budgeting. (Petition at p. 7, ¶¶ 13-15.)

All the Writ requires is that Defendants pay employees “prospectively . . . for all hours *worked* during each preceding pay period, without reduction.” (Defs. App. 13, italics added.)

Defendants further misrepresent the record when they assert that

“CCPOA has yet to explain why it has not complied with the trial court’s direction to prepare a form of judgment in this action.” (E.g., Petition at pp. 21, 13.) In fact, Defendants’ Petition and Appendix omit two letter briefs the parties submitted to the trial court on the matter.<sup>1</sup>

As explained in the Motion to Dismiss, and as Defendants well know, CCPOA advised the trial court that it was not submitting a form of judgment because entry of final judgment would be premature given that the court’s Order did not determine the actual backpay or liquidated damages owed to any CCPOA member. (Exhibit D to J. Yank Declaration In Support of Motion to Dismiss (“Yank Decl.”); Yank Decl. ¶ 7; Controller’s Exhibit 3.) Defendants objected and submitted their own letter brief arguing that the court’s earlier order determined all issues raised by the litigation. (Ex. E to Yank Decl.; Yank Decl. ¶ 8; Controller’s Exhibit 4.) Yet, notwithstanding Defendants’ objections, the trial court did not enter final judgment and instead issued the Writ of Mandate. (Yank Decl. ¶ 9; Defs. App. 12-14.) Thus, the trial court did not consider its orders as disposing of all the issues between the parties. (See Petition at pp. 19, 21.)

Misrepresenting and withholding facts is reason alone to deny supersedeas relief. (See Rule of Court 8.112, subd. (a)(4) [supersedeas

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<sup>1</sup> The letter briefs were submitted to the trial court on December 29-30, 2009, far in advance of Defendants’ petition to this Court on January 13,

petition must present “a fair summary of the material facts and the issues that are likely to be raised on appeal” and include “any other document “necessary for proper consideration of the petition”].)

### III

#### **DEFENDANTS ARE NOT ENTITLED TO SUPERSEDEAS RELIEF**

##### **A. Supersedeas Issues Only To Protect Appellate Jurisdiction in a Valid Appeal**

The “sole function” of a writ of supersedeas is to “preserv[e] appellate jurisdiction pending review of the appeal and a ruling on the merits.” (*Mills v. County of Trinity* (1979) 98 Cal.App.3d 859, 861; Code of Civil Procedure §§ 916, 923 [supersedeas issues “in aid of [appellate courts’] jurisdiction”].) “If a stay can be granted only at the risk of destroying rights which would belong to the respondent if the judgment is affirmed, it cannot be said to be necessary or proper to the complete exercise of appellate jurisdiction.” (*Nuckolls v. Bank of California* (1936) 7 Cal.2d 574, 578.)

Although it is true that one of the general purposes behind supersedeas relief “is to preserve to an appellant the fruits of a meritorious appeal” (*West Coast Home Improvement Co. v. Contractors’ State License Board* (1945) 68 Cal.App.2d 1, 5), our Supreme Court has directed that an

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appellate court “cannot presume error” and “[a]ffirmances must be contemplated as well as reversals.” (*Nuckolls, supra*, 7 Cal.2d at p. 578.) This means that “until the contrary is shown, the presumption is in favor of the lower court’s decision.” (*Ibid.*; see also *West Coast, supra*, 68 Cal.App.2d at p. 5 [recognizing general rule but denying writ for failure to show trial court error].)

Defendants assert they are entitled to supersedeas relief as a matter of right because their purported appeal “automatically” stayed the trial court’s Writ of Mandate. (Petition at p. 5; Defs. App. 16-17 [notice of appeal].) But as explained in CCPOA’s Motion to Dismiss, there is no final order in this case and Defendants’ appeal is premature. (See CCPOA’s Motion to Dismiss.) Because supersedeas can only issue when there is a valid appeal pending (see *In re Christy L* (1986) 187 Cal.App.3d 753, 759), a premature appeal cannot serve as the basis for supersedeas relief. (E.g., *Brown v. Trophy-Craft Co.* (1948) 85 Cal.App.2d 246.)

Nor are Defendants entitled to discretionary supersedeas relief. “[W]here there is no automatic stay and the appellant is not entitled to a writ of supersedeas as a matter of right,” a court may issue supersedeas only if necessary to protect its jurisdiction. (*Food and Grocery Bureau of Southern Cal. v. Garfield* (1941) 18 Cal.2d 174, 177.) This requires “a consideration of the respective rights of the litigants” such as irreparable injury. (*Ibid.*) Petitioner must also show that it will succeed on the

“substantial questions . . . presented [on] appeal” by showing trial court error, and that “some special reason exists” why the trial court’s orders should be stayed pending appeal.<sup>2</sup> (*West Coast, supra*, 68 Cal.App.2d at p. 6; *Nuckolls, supra*, 7 Cal.2d at p. 577; see also Rule of Court 8.112, subd.

(a).)

**B. Defendants’ Premature Appeal Requires Denial of Their Request for Supersedeas Relief Because There Is No Appellate Jurisdiction to Protect**

CCPOA’s Motion to Dismiss Defendants’ appeal is currently pending before this Court, and for the sake of judicial economy it refers the Court to its arguments therein and makes the following additional points.

The Alameda Superior Court has not issued any “final order.” Thus, whether Defendants’ notice of appeal is “timely” is irrelevant (see Petition pp. 18-20) because a premature appeal is “never perfected.” (*Pazderka v. Caballeros Dimas* (1st Dist. 1998) 62 Cal.App.4th 658, 666 [Division 2 holding that if an appealed “order is nonappealable, the appeal was *never perfected*,” italics added].)

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<sup>2</sup> Defendants did not ask the trial court for a stay, and their petition can be rejected on this ground alone: “Inasmuch as the legislature has provided a method by which the trial court . . . may grant the stay, appellate courts . . . should not . . . exercise their power until the petitioner has first presented the matter to the trial court.” (*Nuckolls, supra*, 7 Cal.2d at p. 577.) The trial court had authority to stay its writ of mandate because Defendants’ defective notice of appeal did not deprive the court of subject matter jurisdiction. (See *Pazderka v. Caballeros Dimas* (1st Dist. 1998) 62 Cal.App.4th 658, 666.)

Supersedeas relief cannot be granted where petitioner's appeal is invalid. For example, in *Brown v. Trophy-Craft Co.* (1948) 85 Cal.App.2d 246, the trial court assessed liability against defendant but had not yet determined the damages due to plaintiff—as in the case at bar. Defendant appealed from that order and also sought a writ of supersedeas to stay an accounting pending determination of the appeal. The court of appeal denied supersedeas relief because it determined that petitioner had prematurely appealed from a non-appealable order:

a decree . . . fixing the liability and rights of the parties . . . is not appealable merely because it has settled the basic issue involved in the case. It is not final if it has expressly left for future determination the rights of the parties with relation to [damages] . . . raised by the complaint. Under such circumstance the whole case is still before the court for final determination.

(*Id.* at p. 248, citing *Pomper v. Superior Ct.* (1923) 191 Cal. 494, 496.)

Accordingly, “[s]ince an appeal lies only from a final judgment . . . the petitioner is not . . . entitled to a writ of supersedeas.” (*Ibid.*) The court dismissed the appeal because the need for “further judicial action destroyed the finality of the decree” necessary for appellate review. (*Id.* at p. 247.)

(See also *Peninsula Properties Co. v. County of Santa Cruz* (1951) 106 Cal.App.2d 669, 686 [also denying supersedeas relief and granting motion to dismiss premature appeal].)

*Hayworth v. City of Oakland* (1982) 129 Cal.App.3d 723, 727,

does not help Defendants. *Hayworth* merely articulates the general rule that a well-taken appeal from proceedings on a writ of mandate stays further action in the trial court. (See *ibid.*) It does not, however, address a stay where an appeal is premature or invalid.

#### IV

#### DEFENDANTS FAIL TO DEMONSTRATE THEY WILL SUCCEED ON THE MERITS

Where petitioner has not shown that it will succeed on the merits, supersedeas relief is improper. “Affirmances must be contemplated as well as reversals,” and thus a “respondent, in whose favor the presumption exits as to the correctness of the trial court’s decision, should [not] be required to” suffer further damage where petitioner fails to demonstrate why the trial court’s orders will be overturned on appeal. (*Nuckolls, supra*, 7 Cal.2d at p. 578.) That is, the trial court’s ruling is presumed correct and Defendant has the burden of demonstrating error. (*Deepwell Homeowners Protective Assoc. v. Palm Springs* (1965) 239 Cal.App.2d 63, 67-68 [denying supersedeas because petitioner failed to show it would prevail given “presumption in favor of trial court’s action”].)

#### A. Plaintiff’s Underlying Case Challenged Defendants’ Implementation of the Self-Directed Furloughs as to Unit 6.

CCPOA’s case challenged Defendants’ policies implementing two Executive Orders—S-16-08 (issued 12/19/08) and S-13-09 (issued

7/1/09) (together “Executive Orders”)— which imposed two, then three, “furlough” days per month on CCPOA members.<sup>3</sup> (See CCPOA App. Ex. 1 [CCPOA’s 2nd Am. Ver. Pet.]; Petition at p. 3-5, ¶¶ 3-7.)

In Defendants’ “furloughs” scheme:

- employees received three “furlough” day credits per month;
- employees theoretically attempted to “self-direct” up to three furlough days per month (i.e., take days off);
- every employee’s pay was reduced by three days pay per month, or approximately 13.5%;
- employees who could take a furlough day had a day off without pay;
- employees who could not use three furlough days in a month worked their normal schedule, endured the pay cut, and carried over unused “furlough credit” balances;
- furlough credits have no cash value, cannot be cashed-out, and will expire if unused by June 30, 2012.

(*Ibid.*; see also Defs. App. 2-3.)

This scheme violated two sets of laws. CCPOA’s petition

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<sup>3</sup> Defendants concede CCPOA’s petition did not challenge the Governor’s authority to issue to the Executive Orders and only challenged implementation of the furloughs as to Unit 6. (See Petition at p. 5, ¶ 7)

alleged that as implemented, the furlough scheme violated Government Code § 19826 because it usurped the Legislature's sole authority to adjust state employees' salaries. Through the "furloughs" scheme Defendants reduced salaries by approximately 13.5% without a commensurate and contemporaneous reduction in hours. (*Ibid.*)

Because many employees could not use furlough days in the month they were accrued, and their monthly salaries were reduced as though they could, employees' only compensation for time worked on "furlough" days was a non-negotiable furlough credit. Put another way, defendants unilaterally stopped paying employees for three days per month, whether the employees worked those days or not. CCPOA's petition alleged this violated California's Labor Code §§ 212, 223, and 1171, *et seq.* (*Ibid.*)

CCPOA asked the Court to issue a writ of mandate compelling Defendants to pay employees their full wages each month, without reduction and in negotiable form, for all time worked during the preceding pay period, in accordance with Defendants' ministerial duties under the Government Code and the Labor Code. (*Ibid.*) CCPOA's action did not affect employees who *could* take their three furloughs off.

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[CCPOA challenged "the manner in which the furloughs . . . were being applied to employees in State Bargaining Unit 6".]

Presented with evidence *from both sides* of millions of hours of accrued furlough credits (signifying hours worked but not compensated), the trial court granted CCPOA's petition for writ of mandate on December 17, 2009. (Ex. C; Yank Decl. ¶ 5.) The trial court found merit in CCPOA's claims that Defendants violated mandatory ministerial duties arising under Government Code § 19826, Labor Code § 223, and Labor Code § 1171, but the court found Labor Code § 212 inapplicable. (*Ibid.*)

**B. Defendants' Petition Does Not Demonstrate They Are Likely To Win on the Merits**

Defendants fail to meet their burden of demonstrating how the trial court erred, i.e., they fail to rebut the presumption that the trial court's rulings were correct. Defendants make two principal arguments they claim will succeed on appeal.<sup>4</sup> Neither has merit.

First, Defendants assert that the trial court's ruling was an unwarranted intrusion into the Governor's discretion to set working hours and schedules of state employees, but do not explain why this was legal error. (See Petition at p. 28.) The Writ of Mandate does not intrude on the State's ability to set and schedule its employee working hours—it simply obligates payment to employees *who do work*.

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<sup>4</sup> Defendants' Petition asserted that their appeal would be based on five grounds (see Petition at p. 6, ¶ 11), but their brief only appears to advance two (see *id.* at pp. 28-30).

No error exists because (1) the Governor has no discretion to violate mandatory duties provided by the Government Code and Labor Code, and (2) the Writ of Mandate only required Defendants to obey the same statute as in *Department of Personnel Administration v. Superior Court ("Greene")* (1992) 5 Cal.App.4th 155. There the state employer and various unions bargained to impasse on pay cuts, whereafter the State attempted to unilaterally reduce salaries by 5% without seeking prior legislative approval. (*Id.* at pp. 162-164.) The court of appeal affirmed a writ of mandate prohibiting the salary reduction absent legislative approval under Government Code § 19826(b). (*Ibid.*) *Greene* is on all fours with this case. Here, though disguised as a generic furlough scheme, the trial court found that Defendants had implemented a de facto pay cut, without legislative approval in violation of Government Code § 19826(b). (Defs. App. 4-8.)

Second, Defendants argue that CCPOA did not meet its "burden of proof" because it did not show the absence of an adequate remedy at law and a violation of a ministerial duty. (See Petition at pp. 28-29.)

Defendants are incorrect. Defendants maintain that individual CCPOA members had a remedy at law because they could have brought a "claim for unpaid wages." (*Id.* at p. 29.) But Defendants ignore the substance of CCPOA's petition for writ of mandate before the trial court. CCPOA sought relief that is not available at law—a writ of mandate, a declaration

of what the law is and what the parties' rights were under it, and more importantly, prospective relief to ensure Unit 6 members were paid for hours worked going forward. (Ex. 1 [CCPOA petition]; see also Petition at pp. 4-5, ¶ 7.) These are all traditional equitable remedies unavailable at law.

Defendants are also simply incorrect that CCPOA showed no mandatory ministerial duty. (Petition at pp. 29-30.) The trial court found that a mandatory duty arose from Government Code § 19826(b) (which reserves to the Legislature alone the power to set salaries of union-represented state employees), and Labor Code § 223 (which requires payment for all hours worked at the statutorily or contractually required rate of pay), and Labor Code § 1171 (which requires payment of California Minimum Wage for all hours worked). (Defs. App. 4-9) Defendants do not explain why these statutes do not give rise to mandatory duties.

Defendants cite as an illustrative example of the trial court's error that it improperly found a ministerial duty to pay Unit 6 employees their "contractual" salaries under Labor Code § 223 (incorrectly identified as Labor Code § 233 in the Petition) because the court purportedly "ignore[d] undisputed evidence that the state has not had a Memorandum of Understanding with CCPOA since . . . the State implemented portions of its last, best, and final offer." (Petition at p. 30.)

This argument fails for a number of reasons. *Greene* established

that the Executive Branch (Defendants here) cannot reduce union-represented state employees' salaries absent prior Legislative approval—even when there is no MOU in place. (*Greene, supra*, 5 Cal.App.4th at p. 162-164 [granting relief under Government Code § 19826(b) even though no MOU in place].) CCPOA established in the trial court that the monthly wage scales now in effect were the same ones established under its prior MOU and remained enforceable because only the Legislature can change them and it had not done so. Defendants advance no argument to the contrary in their Petition.<sup>5</sup>

In sum, Defendants' meager showing does not carry their burden of demonstrating that the trial court erred, let alone that they will succeed on the merits. In this situation, the trial court's orders are presumed correct, and CCPOA members are entitled to the benefit of the Writ of Mandate. (*Nuckolls, supra*, 7 Cal.2d at p. 578; *Deepwell, supra*, 239 Cal.App.2d at pp. 67-68.)

**C. The Trial Court's Judgment Will Likely Be Affirmed on Appeal and CCPOA Will Prevail on the Merits**

The trial court's Order and Writ of Mandate, and CCPOA's arguments, will likely be affirmed on appeal. The analysis starts with

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<sup>5</sup> Defendants also quibble with a statement in the court's interlocutory order that the LBFO needs to be approved by the Legislature, but do not show why this should result in reversal. (Petition at p. 30.)

Government Code § 19826. That statute provides, in pertinent part, as follows:

Notwithstanding any other provision of law, the department [DPA] 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.<sup>6</sup>

(Government Code § 19826(b).) The California Supreme Court and the courts of appeal have consistently construed § 19826(b) as precluding the executive branch's unilateral alteration of union-represented state employees' salaries because the Legislature retained its authority to adjust their salaries. (See, e.g., *Greene, supra*, 5 Cal.App.4th at p. 174 ["The plain language of section 19826 supports the ... conclusion that DPA may not unilaterally decrease salaries for represented employees."]; see also *Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1325 n.10.)

Defendants conceded before the trial court that "[a] salary range adjustment occurs [when] an employee's total work hours remain unchanged and their corresponding pay ... decreases." (Trial Court Opposition Brief, 10:11-13.) The trial court found that under the furloughs

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<sup>6</sup> Government Code § 3520.5 is a portion of the Ralph C. Dills Act ("Dills Act"), Government Code § 3512 et seq., which is the statutory scheme governing the collective bargaining relationship between the State of California and State employee unions. CCPOA is the exclusive bargaining representative of employees in State Bargaining Unit 6, pursuant to section 3520.5 of the Dills Act.

plan CCPOA-represented employees were not paid for three “furlough” days each month even if they were required to work on the days in question. Defendants’ own evidence established that millions of hours of work were uncompensated. Accordingly, the trial court ruled that Defendants violated Government Code § 19826(b) because the furloughs program resulted in an unlawful salary reduction in that employees worked a full pay period but were paid less than their full salary. (Defs. App. 4-8.)

The trial court’s ruling on CCPOA’s Labor Code section 223 claims will also likely survive appellate review. That statute requires full payment of wages without reduction.

Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statute or by contract.

(Labor Code § 223.) This statute proscribes deductions where an employer appears to pay wages according to an applicable contract or statute but, in fact, pays less. (*Steinhebel v. LA Times Comm.* (2005) 126 Cal.App.4th 696, 707; see also *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323 [section “223 articulate[s] the principal that all hours must be paid at the statutory or agreed rate”].) Because Defendants cannot lawfully pay less than the designated wage scales for CCPOA-represented employees (see Government Code § 19826(b) above), Defendants’ payment of less than full salaries when working hours were not also reduced also violated

Labor Code § 223. The trial court agreed. (Defs. App. 8-9.)

Finally, the trial court's ruling on CCPOA's minimum wage claims will also likely be affirmed. (See Defs. App. 8-9; Labor Code § 1171 et seq. and 8 CCR § 11000 et seq.) The court relied on *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, where the Court of Appeal interpreted California's minimum wage laws as requiring that "employees be compensated at the minimum wage for each hour worked." (*Id.* at p. 323 [rejecting averaging method under federal law].)

*Armenta* found that California's labor laws "articulate the principal [sic] that all hours must be paid at the statutory or agreed rate and no part of this rate may be used as a credit against a minimum wage obligation." (*Id.*) That is, every hour worked by an employee must be compensated at least at the statutory minimum wage, and an employer may not "average" hours over a pay period to avoid paying that minimum wage. (See *id.*) The trial court ruled that because Unit 6 employees received no pay whatsoever for up to three days per month, Defendants violated California's minimum wage laws.

The trial court correctly found that the evidence before it established a violation of Government Code § 19826(b), and Labor Code §§ 212 and 223. The trial court's Writ ordered Defendants to comply with these statutory mandates going forward. Its factual findings are entitled to great deference on appeal, and will not be disturbed absent clear error. Its

legal findings are based on sound statutory construction and application of existing case law and will also likely be affirmed on appeal.

V

**CCPOA MEMBERS WILL SUFFER IRREPARABLE HARM IF THE TRIAL COURT'S WRIT OF MANDATE IS STAYED, BUT DEFENDANTS WILL SUFFER NO COGNIZABLE HARM**

**A. CCPOA Members Currently Suffer and Will Continue to Suffer Irreparable Harm If A Stay Is Granted**

Supersedeas relief is inappropriate because individual CCPOA members suffer and will continue to suffer real, irreparable harm if the Writ of Mandate is stayed. (*Nuckolls, supra*, 7 Cal.2d at p. 578.)

CCPOA showed at the trial court level that Unit 6 members suffered irreparable injury each and every pay period they were compelled to work unpaid up to 3 days per month (nearly 14% of salary). In late August 2009, CCPOA submitted numerous declarations to the trial court detailing the onerous effect of the "furloughs" scheme on Unit 6 members. (See, e.g., CCPOA App. Ex. 2: Adams Decl. ¶¶12-13, 16 [furloughs caused decrease in income; unable to afford hospice care for chronically ill wife; loss of car]; Parks Decl. ¶¶ 10-11 [furloughs caused decrease in income leading to potential foreclosure and bankruptcy]; Patterson Decl. ¶¶ 12-15 [potential foreclosure]; Rosen Decl. ¶¶ 16-17 [potential personal bankruptcy; unable to pay mortgage or credit cards]; Franzen Decl. ¶¶ 13, 16 [potential personal bankruptcy].)

Since then the harm to Unit 6 employees has only increased as the furloughs program continued. Unit 6 employees fully performing their necessary public safety obligations have been forced to file for bankruptcy, have lost their homes to foreclosure, and have had their credit ruined because the state has determined that it need not pay them in a timely manner for their full labor:

- Correctional Officer [REDACTED], who also submitted a declaration in August 2009, has been unable to pay his mortgage even though he “cut back on all non-essential spending.” As a result, his lender foreclosed on his home. Officer [REDACTED] and his wife were forced to file for bankruptcy on November 2009. (CCPOA App. Ex. 9, Parks Decl. ¶¶ 4-6; see also CCPOA App. Ex. 8, Franzen Decl. ¶¶ 4-6 [also in foreclosure and forced to file bankruptcy]; CCPOA App. Ex. 7, Castillon Decl. ¶¶ 3-5 [also in foreclosure and forced to file bankruptcy in November 2009].)
- Correctional Officer [REDACTED], who also submitted a declaration in August 2009, has a wife who suffers from two chronic and terminal illnesses. Because of the furloughs, he cannot afford to “fill all the prescriptions recommended for her, and we sometimes have to make

the choice between necessary medicines for her and food for the family.” He is unable to afford hospice care for his wife. (CCPOA App. Ex. 4, Adams Decl. ¶¶ 4-5, 7.)

- Correctional Officer [REDACTED] has been unable to pay his mortgage as a result of the furloughs pay cuts. His lender foreclosed on his home in September 2009, and the following month “my family was forced to move out of the home where my wife and I raised all three of our children.” (CCPOA App. Ex. 5, [REDACTED] Decl. ¶¶ 4-5; see also CCPOA App. Ex. 11, [REDACTED] Decl. ¶¶ 3-6 [also in mortgage default]; CCPOA App. Ex. 6, [REDACTED] Decl. ¶¶ 3-4 [foreclosure in November 2009, and expected bankruptcy].)
- Transportation Officer [REDACTED] is unable to afford his mortgage payments and is financially unable to care for his elderly mother. (CCPOA App. Ex. 10, [REDACTED] Decl. ¶¶ 4, 6.)

These are only a small, but representative sample of the real-life effect on Unit 6 members. Defendants are simply not entitled to supersedeas relief because any further stay would only compound the irreparable injury to Unit 6 members and would deprive them of the benefit of the Writ of Mandate.

This Court should not grant Defendants a stay even if it accepts appellate review. Code of Civil Procedure § 1110b provides that when an appeal is taken from proceedings on a writ of mandate, the court of appeal may “direct that the appeal shall not operate as a stay of execution” if petitioner shows that it will suffer “irreparable damage . . . if the execution is stayed.” (Code of Civ. Proc. § 1110b.)

In *Social Services Union, SEIU Local 535 v. County of San Diego* (1984) 158 Cal.App.3d 1126, the court of appeal affirmed the trial court’s refusal to stay a writ of mandate requiring the county to pay employees for two holidays. The court, relying on Code of Civil Procedure § 1110b, rejected the county’s argument that its appeal should have stayed the writ of mandate “because of [the] irreparable damage to the employees who would have completely lost the benefits of the writ had it been stayed.” (*Id.* at p. 1131.)

This case presents a more compelling reason to deny a stay. In *Social Services Union*, the court found that employees suffered irreparable harm because they lost two paid holidays (*id.* at p. 1129), but here Unit 6 members lose up to *three days of pay for hours worked every month* and, as detailed above, suffer lasting irreparable harm. If this Court affirms the trial court’s rulings, Unit 6 employees will be unable to retrieve their repossessed homes and cars, to remedy their poor credit damaged by bankruptcy, or to undo the real suffering caused by Defendants’ failure to

pay them as required by law.

**B. Defendants Make No Showing of Cognizable Harm Arising From Prospectively Paying State Employees for Actual Hours Worked**

Defendants have not shown any imminent irreparable harm entitling them to supersedeas relief. “An injunction cannot issue in a vacuum based on the proponents’ fears about something that *may happen in the future*. It must be supported by actual evidence that there is a *realistic prospect*” harm will take place. (*Korean Philadelphia Presbyterian Church v. California Presbytery* (2000) 77 Cal.App.4th 1069, 1084, italics added.)

**1. Paying Employees for Actual Hours Worked Will Not Lead to “Recoupment” Problem**

Recouping “overpayment” to state employees will not be “costly and burdensome” even if the Writ of Mandate is overturned on appeal because the Writ only commands payment to employees who actually work furlough hours.<sup>7</sup> (Petition at p. 23.) That is, compliance with the Writ will not result in “overpayment” because the Writ merely directs that employees be paid “for all hours *worked* during each preceding pay period.” (Defs. App. 13.) Requiring Defendants to comply with the law by paying employees for actual hours worked cannot result in irreparable harm, in part

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<sup>7</sup> Defendants do not dispute that they ultimately must pay employees for all hours worked, so even if they prevail on appeal they will not be entitled to recoupment from employees for any wages paid.

because the Government Code expressly provides the State with a mechanism to efficiently and expeditiously recoup any overpayment. (See Government Code § 19838 [recoupment, *inter alia*, “through payroll deduction”].)

**2. The Trial Court’s Orders Do Not Address Staffing or Require Defendants To Suspend Furloughs**

The Order and Writ will have no effect on operation of correctional institutions because they do not prohibit furloughs and have no effect whatsoever on the level of staffing. (Petition at pp. 24-28.) Defendants alone control staffing levels. The Writ simply commands payment when staff works. Defendants’ principal argument is that the Writ negatively impacts public safety, but that emotive argument fails on its face because it is entirely premised on an incorrect assessment of what the trial court’s Order and Writ command.

For example, the Declarations of Scott Kernan (CDCR’s Undersecretary of Operations), Stanley A. Bajorin (DMH’s Chief Deputy Director), and David Lewis (CDCR Fiscal Services Deputy Director) detail the purported disastrous consequences for public safety if there is no stay. According to Defendants, the Department of Corrections and Rehabilitation and Department of Mental Health will suffer irreparable harm if there is no stay because both agencies:

- run 24-hour institutions that cannot close on “furlough

Fridays” (Defs. App. 55, 62);

- will be unable to provide enough staff for vital programs (Defs. App. 55-61, 63-64);
- staffing ratios will be inadequate and corrections staff and inmates will be put “at risk” if they cannot use self-directed furloughs (Defs. App. 57-58, 62-64).

Two faulty assumptions underlie all of these “harms”: (1) that the trial court “issued a decision finding that self-directed furloughs . . . are unlawful” (Defs. App. 55, ¶ 6; *id.* at 63, ¶ 5) and (2) that the trial court ordered correctional staff to “take the mandated three furlough days off” each month. (Defs. App. 57, ¶¶ 12-13; *id.* at 63, ¶ 5; see also *id.* at p. 55, ¶ 7 [presuming that the orders “mandated three furlough days per month” which result in “an average of 85 daily posts . . . [that] must be held vacant every day”].)

But the Alameda Superior Court’s Order and Writ, whether read together or separately, *do not so require*. The Writ only directs that employees be paid for actual hours worked; it does not mandate that all employees must use their three furlough days each month. (See Defs. App. 13.) In fact, Defendants agree that “the writ does not invalidate furloughs, but only invalidates Self-Directed furloughs where employees cannot use their furlough days within the month pay period. Furlough days taken off within the month pay period remain valid under the writ.” (Defs. App. 49

[DPA letter to Controller].)

**3. The Trial Court's Orders Are Directed at the Limited Number of Employees Who Work Their Furlough Days and Will Not Cause Defendants "Severe Financial Harm"**

Defendants claim they will suffer financial harm because of budgetary constraints if they cannot use self-directed "furloughs." (Defs. App. 66, 63-64.) This rationale also fails. Compliance with the Order and Writ will *not* create "severe financial harm" (Petition at pp. 26-27) because the trial court orders only apply to employees who are unable to "self-direct" furlough days, requiring payment for such days when employees must work. Payment of state employee salaries is not irreparable harm. (*White v. Davis* (2003) 30 Cal.4th 528, 556-557 [payment of state employee salaries "does not in itself constitute . . . irreparable harm" warranting injunctive relief].)

Defendants themselves assert that only a limited number of Unit 6 employees do not take all their furlough days off. (Defs. App. 55, ¶ 5 [*"a large number of CDCR employees . . . use all three furlough days per month. However, due to the nature of the work, it is impossible for some CDCR employees to use all three furlough days per month"*], italics added; *id.* at 62, ¶ 4 [*"it is sometimes impossible for DMH staff to use all three furlough days per month"*], italics added.) But if the *majority* of employees are taking furlough days off, there can be little (if any) budgetary or

financial harm because the Writ and Order will necessarily only impact payments to the admittedly limited number of employees who work furlough days.

What is more, Defendants admit that they could receive legislative authorization to cover the Controller's intended payment of wages for all hours worked. (See Defs. App. 64, ¶ 10.) They never even claim that the Legislature would be likely to deny such a request. This is a further reason the Court should reject their claims of imminent irreparable harm warranting a stay.

## VI

### **CCPOA SUPPORTS CONVERTING DEFENDANTS' PREMATURE APPEAL INTO A PETITION FOR WRIT OF MANDATE SO LONG AS THERE IS NO STAY OF THE TRIAL COURT'S WRIT OF MANDATE**

Defendants should have sought appellate review not by filing a premature appeal from two non-appealable orders, but rather a petition for writ of mandate with this Court. Our Supreme Court has held that a "petition for a writ, not an appeal is the authorized means for obtaining review of judgments and orders that lack the finality required by Code of Civil Procedure 904.1 [the one final judgment rule]." (*Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 743-744 [deeming premature appeal as a writ of mandate].)

This Court may and should convert Defendants' defective appeal and petition for supersedeas into a petition for writ of mandate to

expedite appellate review. (See *ibid.*) CCPOA would not oppose this provided that the Alameda Superior Court's Writ of Mandate is not stayed pending this Court's review. As detailed above, Unit 6 members are suffering and will continue to suffer irreparable harm if the trial court's Writ is stayed, and given Defendants' meager showing there is no reason why Unit 6 members are not entitled to the benefit of the trial court's Writ during appellate review.

## VII

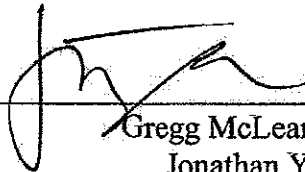
### CONCLUSION

For all these reasons, this Court should vacate the temporary stay and deny Defendants' request for a writ of supersedeas. Alternatively, this Court should vacate the temporary stay, deny supersedeas relief, and deem Defendants' defective appeal as a writ of mandate.

Dated: January 21, 2010

CARROLL, BURDICK & McDONOUGH LLP

By



Gregg McLean Adam

Jonathan Yank

Gonzalo C. Martinez

Attorneys for Plaintiff/Respondent

California Correctional Peace Officers' Association