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ALAMEDA COUNTY

DEC 17 2009
CLERK OF THE SUPERIOR COURT
By Vicki Daybell

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION, Petitioner/Plaintiff, vs. ARNOLD SCHWARZENEGGER, STATE OF CALIFORNIA, CALIFORNIA DEPARTMENT OF PERSONNEL ADMINISTRATION, et al., Respondents/Defendants.	RG09 441544 ORDER GRANTING PETITION FOR WRIT OF MANDATE

The Petition of California Correctional Peace Officers' Association ("CCPOA") came on regularly for hearing on November 16, 2009, in Department 31 of this Court, Judge Frank Roesch presiding. CCPOA appeared by counsel Jonathan Yank, Esq., of Carroll, Burdick & McDonough, LLP. Respondents Arnold Schwarzenegger, State of California, California Department of Personnel Administration, John Chiang, California Department of Corrections and

Rehabilitation, California Department of Mental Health, and California Department of Juvenile Justice ("Respondents") appeared by counsel David W. Tyra, Esq., of Kronick, Moskovitz, Tiedemann & Girard, and Will M. Yamada, Esq., Labor Relations Counsel for the Department of Personnel Administration, and Ross C. Moody, Esq., California Department of Justice.

The Court having considered the pleadings, evidence,[1] and arguments submitted in support of and in opposition to the Petition, and good cause appearing, it is hereby ORDERED that the Petition is GRANTED IN PART. The reasons follow:

Factual Background

On December 19, 2008, Governor Schwarzenegger issued Executive Order S-16-08, which directed the Department of Personnel Administration ("DPA") to adopt a plan to furlough state employees for two days per month and reduce their pay by a commensurate amount, effective February 1, 2009, through June 30, 2010. DPA issued a plan on January 9, 2009, which required state employees working in the state's correctional institutions to take their furlough days "when feasible," rather than all taking them on set days, due to the 24 hours-a-day/7-days-a-week nature of correctional operations. Correctional employees accrue two "furlough credits" per month, which they may schedule as time off, with their supervisor's approval. The "furlough credits" must be used on or before June 30,

[1] The Court has issued rulings, by separate orders, on the objections submitted by the parties. The parties' Requests for Judicial Notice, and Petitioner's Supplemental Request for Judicial Notice, are GRANTED as unopposed.

2012, or they will be forfeited. Furlough credits cannot be cashed out. DPA did not require that furlough credits be used within the month accrued. DPA later followed with a memo prohibiting use of overtime to cover for absences due to use of furlough credits.

On July 1, 2009, Governor Schwarzenegger issued Executive Order S-13-09, which directed DPA to implement a third furlough day each month. DPA implemented the third furlough day in the same "self-directed," "when feasible" manner as the first two furlough days.

The Instant Petition for Writ of Mandate

Petitioner represents state employees in Bargaining Unit 6, as well as correctional sergeants and lieutenants who supervise those Unit 6 members, all of whom are employed in California correctional facilities. Petitioners contend that correctional employees have been denied permission to take furlough credit days off, and that there is no feasible way for all correctional employees to take off all their accumulated furlough credit days before they expire. Petitioners further contend that even if employees eventually were able to take all their furlough credit days off, in the meantime they are having three days' pay deducted from their wages in every pay period without a proportionate reduction in their hours worked. Petitioner seeks a writ of mandate compelling Respondents to comply with their obligations pursuant to Government Code §19826 and Labor Code §§212, 1171 et seq. and 223 to pay all Unit 6 employees the full cash wages due,

or at least the state minimum wage, for all hours worked during each 28-day pay period.

DISCUSSION

A writ of mandate will lie to compel the performance of an act which the law specifically enjoins, as a duty resulting from an office, trust, or station. (Cal. Code Civ. Proc. §1085.) A writ of mandate will issue when there is a clear, present ministerial duty on the part of the respondents and a clear, present beneficial right in the petitioner to performance of that duty. (*Baldwin-Lima-Hamilton Corp. v. Sup. Ct.* (1962) 208 Cal.App.2d 803, 813-14.) The Court finds that there is a clear, present ministerial duty on the part of Respondents to comply with Government Code section 19826(b) and Labor Code sections 223 and 1171 *et seq.*

A. The Self-Directed Furlough Program, As Implemented, Constitutes A Salary Reduction in Violation of Government Code §19826(b).

Pursuant to the State Constitution, salary setting for state employees is a power held only by the Legislature. (See *Tirapelle v. Davis* (1993) 20 Cal.App.4th 1317, 1325.) Government Code section 19826(b) states, in pertinent part, that 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." The statute bars DPA from reducing state employees' salaries, reserving such decisions to the Legislature. (*Department of Personnel Administration v. Sup. Ct.* [Greene] (1992) 5 Cal.App.4th 155, 172-73.) Here, all

correctional employees have had their salaries reduced, but few have seen their hours reduced by a concomitant amount, either when viewed overall or within a pay period.

Respondents argue that self-directed furloughs are not salary reductions, but instead "diminution in total compensation" due to a reduction in hours worked. They argue that there is no change in the hourly rate of compensation and therefore no salary reduction. This argument fails because it mistakenly assumes that employees are able to actually reduce their hours. The evidence -- offered both by Petitioners and Respondents by way of their respective experts -- indicates that all employees have not been able to reduce their hours, and have particularly not been able to reduce their hours within the same 28-day pay period that their pay was reduced by three days' wages. While each expert projects different results as to the ability to take all furlough days by June 30, 2012, it is apparently undisputed that furlough days are not all being taken within the pay period in which they are accrued. (See Declaration of Richard Drogin at ¶8.)

It is also abundantly clear that while the accounting change[2] instituted following the July 1, 2009 Executive Order creates the ability to argue with statistics that the employees were, in fact, able to take off furlough credit days, there is no evidence whatever to demonstrate that the accounting change did anything more than just convert the name of the time off earned by the employees

[2] The change was to require that "furlough credit days" be utilized prior to any accrued vacation days or annual leave days. The change appears to be in name only and there is no mechanism that changes or directs when any employee will be permitted to utilize his/her accrued days off.

as vacation or annual leave from "vacation" to "furlough credit" day. The Respondents' statistician, Dr. Udinsky, does not address the question of the impact of the change of the name of days off that had been scheduled as "vacation" which converted to "furlough credit" in the months his statistical analysis deems as the most relevant and important.

Moreover, even if it were true that "furlough credit days" or "furlough credit hours" are being utilized at a greater rate after the accounting change, it is apparent that: (1) the employees are not all able to utilize their furlough days off within each pay period; and (2) each month the backlog of furlough credit days owed to the employees grows. This is the only conclusion that can be reached no matter which statistical expert has done the correct crunching of numbers. (See Declaration of Dr. Jerald Udinsky at 3:24-4:2 [finding that 77.5% of furlough credit hours were utilized in July and August 2009 [which is a suspect number without analysis of the vacations involved]] and Drogin Declaration at 4:1-8 [finding that furlough credits are not being used in the month they accrue and that by June 2012, when the furlough credits expire, the remaining unused hours will total approximately 418,000].)

It is a failing of the statistical analyses that they do not address the common sense evaluation that the current workforce, which already requires overtime pay to some employees to accommodate the vacations of others, can somehow absorb the furlough credit days created by the furlough program without overtime and without expanding the size of the workforce. On its face, each employee will

accumulate a total of forty-six furlough credit days during the February 2009 through June 2010 time frame. No evidence has been presented that can support the notion that each correctional employee will be able to take off over nine weeks of work plus however many weeks of vacation/annual leave they might otherwise accumulate before the furlough credits are revoked. Absent convincing evidence that such could be done without overtime and without expanding the workforce, the court must conclude that it simply cannot be done.

Further, Respondents offer no authority that would allow them to defer, for months or possibly years, compensation for hours worked under the guise of an "emergency."[3] No authority for such a proposition was offered in either Executive Order.

The Court must conclude, for those pay periods in which an employee works more hours than those for which he or she is compensated at the regular rate

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[3] The issue of the Governor's authority to issue the executive orders is not directly before the Court on this Petition. However, the Court notes that the authorities offered by the Governor were premised on a fiscal emergency and the absence of action by the Legislature to amend the budget in light of changed circumstances (in January 2009) or to pass a budget (in July 2009). (See Petitioner's Request for Judicial Notice dated October 15, 2009, items 4 and 11). The Court notes that the Governor cited Government Code sections from the California Emergency Services Act and concerning emergency rule enactments in the labor context, as well as Article IV, Section 10(f), giving the Governor the authority to hold a special session in a fiscal emergency. None of the cited authorities appear to contemplate the Governor to declaring an "emergency," and suspending regular Legislative authority, for more than a temporary period. (See Government Code §8629; see, e.g., Government Code §8627.5(b).) Even the Executive Orders themselves appear to recognize that the emergency necessitating them was the failure of the Legislature to pass the budgets, though the reach of the orders extended long after those budgets were subsequently passed and signed into law.

of pay, that constitutes a reduction in salary by Respondents contrary to the requirements of Government Code §19826(b).

B. The Self-Directed Furlough Program, As Implemented, Violates Mandatory Duties Under Labor Code Sections 223 and 1171 *et seq.*

Labor Code Section 223 states "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." It is unlawful for an employer subject to a wage rate set by statute or by contract to pay a lower wage. (See *Steinhebel v. Los Angeles Times Communications, Inc.* (2005) 126 Cal.App.4th 696, 707; *Armenta v. Osmose, Inc.* (2005) 135 Cal.App.4th 314, 323.) Here, the wage scales for employees represented by Petitioner were set by a memorandum of understanding with the State which, by operation of Government Code section 3517.8, remains in effect until negotiation of a new agreement, or until an impasse is reached and the state employer implements a last, best and final offer approved by the Legislature. Regardless of whether the wage scale currently in effect here is considered a contract or a wage implemented by operation of statute, Labor Code section 223 is applicable.

Labor Code 1171 et seq., and implementing regulations, set the minimum wage for labor in California. In determining whether the obligation to pay the minimum wage has been met, the employer may not divide the total compensation paid by the hours worked in the pay period to satisfy the minimum wage with an

hourly average. (*Fitz-Gerald v. SkyWest Airlines, Inc.* (2007) 155 Cal.App4th 411, 417; *Armenta*, supra, 135 Cal.App.4th at 323.) Instead, the employer must pay at least the minimum wage for all hours worked. (*Armenta*, supra.) Here, when correctional employees are required to work the same number of hours in the pay period, but are not paid for three days' worth of time worked, they are not paid the minimum wage for those hours worked.

Again, the Court must conclude that for any pay period in which an employee works more hours than those for which he or she is compensated at either the regularly-established rate of pay or the minimum wage, Respondents have violated the mandatory duties imposed upon them under Labor Code sections 223 and 1711 *et seq.*, respectively.

Respondents' argument that the State is not bound to comply with these Labor Code sections is incorrect. Labor Code Section 220 specifies those sections of the Labor Code that do not apply to state employees; neither section 223 or 1171 appear on that list. The Attorney General Opinions cited by Respondents on this point all antedate the 2000 amendments to Labor Code 220, which specifically deleted exemptions for state employees. (See Cal. Statutes 2000, c. 885 (A.B. 2410 §1.)

The Court does not find that accrual of "furlough credits" that cannot be cashed out violates Labor Code Section 221. The Executive Orders and the DPA implementation memos reduced the wages of employees with the promise of time off at some later undetermined date. That promise, in the form of a furlough

credit, does not constitute "payment" for any work day. Thus, the Court does not find that writ relief based upon a violation of Section 221 is warranted.

CONCLUSION

Based upon the foregoing, the Court GRANTS the Petition for Writ of Mandate. A writ of mandate shall issue commanding Respondents to rescind the portions of Executive Orders S-16-08 and S-13-09 that are in violation of State law that will and have resulted in salary reductions to those employees represented by Petitioner in this action.

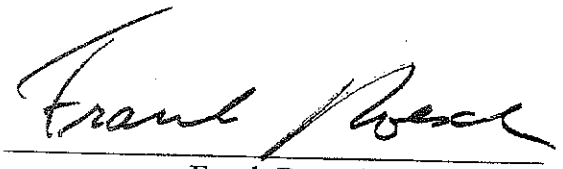
The writ will further command Respondents to pay all employees represented by Petitioner in this action for all hours worked for which furlough credits have not been utilized.

While Petitioner would be entitled to a judgment enjoining Respondents from failing or refusing to pay employees represented by Petitioner for all hours worked in a pay period at their designated wage scale, that remedy is duplicative of the mandamus relief and it will not be ordered.

Petitioner shall prepare a form of judgment for execution by the Court and a form of writ for approval as to form by the Court and execution by the Clerk of the Court.

IT IS SO ORDERED.

DATED: 12/17/09



Frank Roesch
Judge of the Superior Court

CLERK'S DECLARATION OF MAILING

I certify that I am not a party to this cause and that on the date stated below I caused a true copy of the foregoing ORDER GRANTING PETITION FOR WRIT OF MANDATE to be mailed first class, postage pre paid, in a sealed envelope to the persons hereto, addressed as follows:

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I declare under penalty of perjury that the same is true and correct.
Executed on December 17, 2009.

By: Vicki Daybell

Vicki Daybell, Deputy Clerk
Department 31