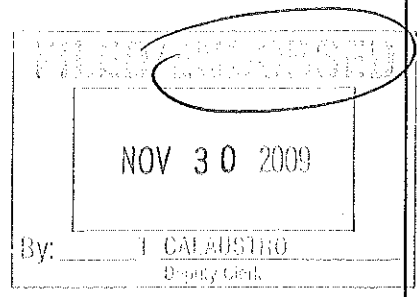


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6
7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF SACRAMENTO
9

10 CALIFORNIA ASSOCIATION OF)	Case No.: 34-2009-80000148-CU-WM-GDS
11 PSYCHIATRIC TECHNICIAN)	
12)	PETITIONER/PLAINTIFF'S POINTS AND
13 vs.)	AUTHORITIES IN SUPPORT OF FIRST
14)	AMENDED PETITION FOR WRIT OF
15)	MANDATE AND COMPLAINT FOR
16)	DECLARATORY RELIEF
17)	
18)	
19 Respondents)	
)	Date: January 15, 2010
)	Time: 1:30 a.m.
)	Dept: 29
)	

20
21 **STATEMENT OF FACTS**

22 Petitioner/Plaintiff California Association of Psychiatric Technicians (CAPT) is the
23 exclusive representative for state employees in Bargaining Unit 18. These employees are
24 employed in state developmental centers, state mental hospitals and state prisons. They provide
25 mental health services to clients in those facilities 24 hours a day 7 days a week 365 days a year.

26 On December 19, 2008, Governor Arnold Schwarzenegger issued Executive Order S-16-
27 08 that ordered the Department of Personnel Administration (DPA) to adopt a plan to furlough
28 state employees for two days per month effective February 1, 2009 through June 30, 2010.
29 Subsequently, DPA issued a directive that provided for state employees to select and take two
30 furlough days per month (self directed) or, if not feasible, to "accrue" two furlough days per
month to be taken later "when feasible" or within two years of the end of the furlough program.

1 (Exhibit 1 attached to First Amended Petition). The DPA directive provides that “[F]urlough
2 hours have no cash value and may not be cashed out. Employees get no money for furlough
3 hours leftover when they separate.” The result of the furlough plan is that employees’ salaries
4 are adjusted to reflect two unpaid days per month, resulting in an approximate 10% salary
5 decrease for all affected employees.

6 On July 1, 2009, the Governor issued Executive Order S-13-09. This order effective July
7 1, 2009 through June 30, 2010 required DPA to adopt a plan to furlough state employees three
8 days per month instead of two days per month. DPA adopted a plan implementing Executive
9 Order S-13-09. It requires state employees to take three furlough days per month (self directed),
10 or if not feasible, to “accrue” three furlough days per month to be taken within two years of the
11 expiration of the furlough plan. Again, the plan provides that furlough days have no cash value.
12 Implementation of the furlough plan results in a loss of salary of about 15% per month for
13 affected employees.

14 Bargaining Unit 18 members who are employed as psychiatric technicians and
15 psychiatric technician assistants provide care to clients suffering from developmental disabilities
16 and mental health issues in state developmental centers, state mental health hospitals and state
17 prisons. These employees work three shifts throughout a 24 hour day—the day, swing and noc
18 shifts. In the state developmental centers, state hospitals and state prisons numerous psychiatric
19 technicians and psychiatric technician assistants are not being permitted to take furlough days by
20 their state employer—either scheduled or self directed days. Instead, they are being required to
21 work a 40 hour work week, getting paid for 32 hours in those weeks that are designated furlough
22 weeks by the State, and “accrue” the untaken furlough days.

23 However, pursuant to the DPA memo, the “accrued” furlough days have no cash value.
24 Employees, who are required to work a full 40 hour week, but only receive compensation for 32
25 hours, are not getting compensation for the 8 hours that “accrue” as a furlough day because
26 furlough days have no cash value. Thus, for 24 hours per month these employees are required to
27 work but receive no compensation for those hours. As will be discussed, the failure to
28 compensate these employees for all hours worked in a particular month violates Labor Code
29 section 212 because section 212 requires that employees be compensated for hours worked in
30 cash or by some means payable in cash on demand.

1 Additionally, assuming that the state has a fiscal emergency Bargaining Unit 18 members are
2 willing to comply with the Executive Orders and the DPA memo that requires the first three
3 Fridays of every month to be furlough days. These employees want the Executive Orders and
4 DPA memo enforced so that they also get furloughed on the first three Fridays of every month.

5 Finally, CAPT seeks a declaration on behalf of Bargaining Unit 18 members under Code
6 of Civil Procedure section 1060 regarding its and Respondents'/Defendants' rights under Labor
7 Code section 212 with regard to the failure of Respondents/Defendants to pay Bargaining Unit
8 18 members in cash for all hours worked in a work week and/or month.

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11 **ARGUMENT**

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13 **A WRIT OF MANDATE UNDER CODE OF CIVIL PROCEDURE SECTION 1085**
14 **IS THE APPROPRIATE REMEDY TO COMPEL COMPLIANCE WITH**
15 **LABOR CODE SECTION 212**

16 CAPT is the exclusive representative of Bargaining Unit 18. As such, it may bring this
17 action in its own name to enforce the employment rights of Bargaining Unit 18 members.
18 *California School Employees Association v. Willits Unified School District* (1966) 243
19 Cal.App.2d 776, 780-781, *Professional Firefighters, Inc. v. City of Los Angeles* (1963) 60
20 Cal.2nd 276, 285.

21 A traditional writ of mandate will lie to compel a public official to perform an official act
22 required by law. *People v. Karriker* (2007) 149 Cal.App.4th 763, 775. Mandamus has long been
23 recognized as the appropriate means by which to challenge a government official's refusal to
24 implement a duty enacted by legislative measure. *Morris v. Harper* (2001) 94 Cal.App.4th 52,
25 59.

26 Here, CAPT contends section 212 requires Respondents/Defendants to pay Bargaining
27 Unit 18 members in cash or by some means payable by cash on demand, and that requiring them
28 to "accrue" furlough days that have no cash value and are not payable in cash on demand
29 violates section 212. CAPT seeks a writ on behalf of these members to compel compliance with
30 section 212.

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3 **LABOR CODE SECTION 212 REQUIRES THAT EMPLOYEES BE**
4 **COMPENSATED IN CASH FOR WAGES EARNED OR BY SOME**
5 **MEANS PAYABLE BY CASH ON DEMAND**

6 Labor Code section 212 provides in relevant part that:

7 (a) No person, or agent or officer thereof, shall issue in payment of wages due
8 due, or to become due, or as an advance on wages to be earned:

9 (1) Any order, check, draft, note, memorandum, or other acknowledgment
10 indebtedness, unless it is negotiable and payable in cash, on demand, without
11 discount, at some established place if business in the state, . . .

12 (2) Any scrip, coupon, cards or other thing redeemable, in merchandise or
13 purporting to be payable or redeemable otherwise than in money.

14 Pursuant to Labor Code section 220, section 212 is applicable to the payment of wages of
15 employees employed by the State of California.

16 In *People v. Hampton* (1965) 236 Cal.App.2d 795, 802 the court explained the purpose of
17 section 212 as follows: "In analyzing the predecessor statute to the present section 212, the court
18 in *In re Ballestra* 173 Cal. 657 stated: 'In considering this statute we may presume, in support of
19 the legislative enactment, that some employers in this state had adopted and followed the custom
20 of paying the daily, weekly, or monthly wages of their employees, when due, by giving orders
21 for the amount thereof payable only in goods, or orders of an indefinite nature not payable in
22 demand, but at some future time. The purpose of the statute evidently is to prevent the evils
23 which the legislature believed had arisen from such practices.'" Section 212 requires that an
24 employer pay an employee his/her wages in cash or by some means that is payable in cash upon
25 demand.

26 The state requires Bargaining Unit 18 members to work on days that are designated as
27 furlough days (the first three Fridays of each month). Thus, in the first three weeks of every
28 month, an employee will work 40 hours per week but is only compensated for 32 hours per
29 week. Under the Executive Orders and the DPA memo, when this occurs, the employee is
30 supposed to be able to designate an alternative day as a furlough day, or if that is not possible the
 employee will "accrue" a furlough day and must use the day within two years of the end of the
 program, or by June 30, 2012. Otherwise, the employee will not be compensated for the day.

1 In actuality, Bargaining Unit 18 members are not able to designate or take alternative
2 furlough days each month because of the staffing levels required for state developmental centers,
3 state mental hospitals and state prisons. Routinely, Bargaining Unit 18 members request to take
4 a furlough day during the month, but those requests are denied because of staffing requirements.
5 These employees "accrue" furlough days, but receive no assurance they will ever be
6 compensated for the days because the "accrued" days have no cash value.

7 For example, an employee may "accrue" up to 36 furlough days from July 1, 2009
8 through June 30, 2010.¹ This results from the employee working the three designated furlough
9 days per month and receiving no compensation for those days. If on July 1, 2010 at the end of
10 the furlough program, that employee leaves state service for any reason, he/she will not be
11 compensated for the "accrued" furlough days because the days have no cash value. Only if the
12 employee remains employed by the state, and is able to use the furlough days by June 30, 2012,
13 will the employee be compensated for the furlough days. Further, even if an employee demands
14 payment of his/her wages, during the period of the furlough program, or after its completion on
15 June 30, 2010, the state will not pay the wages owed according to the DPA memo.

16 In sum, the state has a duty to comply with section 212 and pay employees their wages in
17 cash or by some means that is payable in cash on demand either bi-monthly or monthly as may
18 be the case for each employee. Under the furlough program implemented by the two Executive
19 Orders and the DPA memo the state is violating section 212 because it is not paying those
20 employees who are forced to work on the three designated furlough days each month their wages
21 in cash or by some means payable in cash on demand, as "accrued" furlough days have no cash
22 value and an employee cannot demand and receive payment of the wages owed. Therefore, a
23 writ of mandate should issue ordering the Respondents/Defendants to comply with section 212
24 and pay all Bargaining Unit 18 members who work on any designated furlough day each month
25 all their wages for the hours worked in each month and for all hours worked on any furlough day
26 since February 2009.

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¹ From February 1, 2009 through June 30, 2009 employees were required to take two furlough days per month.
Thus, some employees may "accrue" between 36 and 46 furlough days during the duration of the program.

1 Respondents/Defendants have failed, and are continuing to fail to perform their duty by requiring
2 Bargaining Unit 18 members to work on the designated furlough days and instead “accrue” three
3 furlough days per month that have no cash value and are not payable in cash on demand.

4 CAPT and Bargaining Unit 18 employees disagree that furloughs achieve any savings for
5 the state. However, given that the furloughs have been implemented and approved by Court
6 order, Bargaining Unit 18 members want to be furloughed on the designated furlough days, and
7 not required to work on those days for no wages, or “accrued” days that have no cash value. If a
8 writ does not issue requiring Respondents/Defendants to comply with section 212, CAPT
9 requests that a writ of mandate issue ordering Respondents/Defendants to furlough Bargaining
10 Unit 18 members on the days designated as furlough days each month by
11 Respondents/Defendants.

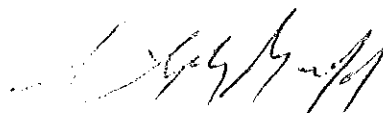
12 CONCLUSION

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14 Labor Code section 212 sets forth a straightforward proposition—employees must be
15 paid their wages when due in cash or by some means payable by cash on demand. The furlough
16 program imposed on Bargaining Unit 18 members violates section 212. Bargaining Unit 18
17 members are required to work on the days designated as furlough days by
18 Respondents/Defendants but receive no compensation for those days worked. Instead, they
19 “accrue” furlough days that have no cash value and are not payable in cash on demand. In fact,
20 unless a Bargaining Unit 18 member uses the days by June 12, 2012, he/she will never be
21 compensated for the furlough days that were actually worked.

22 Section 212 applies to the State of California. Respondents/Defendants as the employer
23 of Bargaining Unit 18 members have the duty to comply with section 212. The failure to do so
24 must be compelled by the issuance of a writ of mandate ordering compliance with section 212.
25 In the alternative, the Executive Orders and DPA memo provide that the first three Fridays of
26 every month shall be furlough days. Therefore, Respondents/Defendants have a duty to comply
27 with the Executive Orders and DPA memo and furlough Bargaining Unit 18 members on the
28 days designated as furlough days. Therefore, a writ of mandate should issue ordering
29 Respondents/Defendants to comply with the Executive Orders and the DPA memo and furlough
30 Bargaining Unit 18 members on the days designated as furlough days each month.

1 Finally, there is a controversy that is ripe for adjudication concerning the
2 interpretation/application of section 212. CAPT requests that the Court adjudicate the rights of
3 Bargaining Unit 18 members and those of Respondents/Defendants under section 212 as it
4 pertains to the payment of wages in cash or by some means payable by cash on demand.

5 Dated: November 24, 2009
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9 STEVEN B. BASSOFF
10 Attorney for
11 Petitioner/Plaintiff
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1 **PROOF OF SERVICE BY MAIL**

2 **I, THE UNDERSIGNED, SAY:**

3 I am, and was at all times herein mentioned, a citizen of the United States and employed in the
4 County of Sacramento, State of California, over the age of eighteen (18) years, and not a party to the
5 within action; that my business address is 1220 S Street, Suite 100, Sacramento, CA 95811.

6 On November 30, 2009, I enclosed a true copy of the attached Notice of Hearing and Points and
7 Authorities in Support of First Amended Petition for Writ of Mandate in a separate envelope for each of
8 the person(s) named below, addressed as set forth immediately below the respective name(s), as
9 follows:

10 **NAME(S) /ADDRESS(ES)**


11 David W. Tyra
12 Kronick, Moskovitz, Tiedemann & Girard
13 400 Capitol Mall, 27th Floor
14 Sacramento, CA 95814

15 Michelle M. Mitchell
16 Deputy Attorney General
17 1300 I Street, Suite 125
18 P.O. Box 944255
19 Sacramento, CA 94244-2550

20 Each said envelope was sealed and placed in the US Mail for collection and mailing on the
21 aforesaid date.

22 **I DECLARE UNDER PENALTY OF PERJURY** that the foregoing is true and correct.

23 Executed at Sacramento, California, on November 30, 2009.

24 
25 _____
26 Steven B. Bassoff