No. A127292

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

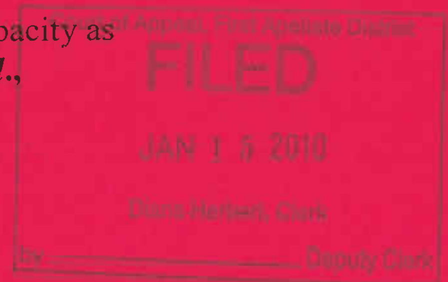
CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION,

Plaintiff/Respondent,

vs.

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

Defendants/Appellants.



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

OPPOSITION TO REQUEST FOR TEMPORARY STAY

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

No. A127292

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

CALIFORNIA CORRECTIONAL PEACE OFFICERS' ASSOCIATION,

Plaintiff/Respondent,

vs.

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

Defendants/Appellants.

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

OPPOSITION TO REQUEST FOR TEMPORARY STAY

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

Court of Appeal
State of California
First Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: A127292 Division 2

Case Name: *California Correctional Peace Officers' Association v. Schwarzenegger, et al.*

Please check the applicable box:

[x] There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d)(3).

[ ] Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with Entity or Person information if necessary.

Signature of Attorney/Party Submitting Form

Printed Name: Jonathan Yank

Address: CARROLL, BURDICK & McDONOUGH LLP
44 Montgomery Street, Suite 400, San Francisco, CA 94104

State Bar No: 215495

Party Represented: California Correctional Peace Officers' Association, Plaintiff/Respondent

IF SUBMITTED AS A STAND-ALONE DOCUMENT, SUBMIT A SEPARATE PROOF OF SERVICE ON ALL PARTIES WITH YOUR CERTIFICATE.

TABLE OF CONTENTS

Page

I INTRODUCTION 1

II DEFENDANTS MISREPRESENT THE NATURE OF THE WRIT OF MANDATE 2

III DEFENDANTS DO NOT SHOW IMMINENT IRREPARABLE HARM 3

IV DEFENDANTS ARE NOT ENTITLED TO A TEMPORARY STAY BECAUSE THEY APPEAL FROM NON-APPEALABLE ORDERS 8

V CONCLUSION 9

TABLE OF AUTHORITIES

Page(s)

State Cases

Korean Philadelphia Presbyterian Church v. California Presbytery
(2000) 77 Cal.App.4th 1069 4

Morehart v. County of Santa Barbara
(1994) 7 Cal.4th 725 8

Pazaderka v. Caballeros Dimas
(1st Dist. 1998) 62 Cal.App.4th 658 8

White v. Davis (2003)
30 Cal.4th 528 .... 2, 6

State Statutes

Government Code
section 19838 4

Rules

California Rules of Court
rule 8.112 1

I

INTRODUCTION

Plaintiff and Respondent California Correctional Peace Officers' Association ("CCPOA") ***opposes the request for temporary stay*** pending this Court's determination of the Petition for Writ of Supersedeas filed by Defendants ARNOLD SCHWARZENEGGER, in his capacity as Governor of the State of California, 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"). ***CCPOA intends also to oppose Defendants' petition for writ of supersedeas***, as soon as possible within the 15 days permitted by Rule of Court 8.112, subd. (b)(1), unless this Court orders otherwise. (See also Rule of Court 8.112, subd. (b)(3).)

Defendants are not entitled to a temporary stay because they make no showing of imminent, irreparable harm that will occur while this Court determines the merits of Defendants' petition for supersedeas relief. The harms Defendants invoke do not stem from the two interlocutory orders at issue here: the Order from the Alameda Superior Court granting CCPOA's Petition for a Writ of Mandate, and the Writ of Mandate itself. Compliance with the Writ by paying money to employees that they have

earned "for all hours worked during each preceding pay period" 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 that warrants the granting of preliminary injunctive relief"].)

Moreover, Defendants misrepresent to this Court numerous significant facts supporting their request for a temporary stay (and for supersedeas relief) — including the substance of the trial court's orders. This Court should deny Defendants' request for a temporary stay.

II

DEFENDANTS MISREPRESENT THE NATURE OF THE WRIT OF MANDATE

The Writ of Mandate issued by the Alameda Superior Court 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. 32, 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, 7 [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; Defs. App. 55 [Kernan declaration].)
- ***Does not*** order Defendants to cease their self-directed "furloughs" program. (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.)

All the Writ requires is that Defendants pay employees "prospectively . . . for all hours *worked* during each preceding pay period, without reduction." (Defs. App. 32, italics added.)

III

DEFENDANTS DO NOT SHOW IMMINENT IRREPARABLE HARM

Defendants have not shown any imminent irreparable harm entitling them to a temporary stay. "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.)

Recouping "overpayment" to state employees will not be "costly and burdensome" if the Writ of Mandate is overturned on appeal because the Writ only commands payment to employees who actually work furlough hours. [1] (Petition at p. 23.) 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. 32.) Requiring Defendants to comply with the law by paying employees for actual hours worked cannot result in irreparable harm, in part because the Government Code expressly provides the State with a mechanism to efficiently and expediciously recoup any overpayment. (See Government Code § 19838 [recoupment , *inter alia*, "through payroll deduction"].)

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.)

---

[1] Defendants want to be able to push back the date they pay employees for certain hours worked—and thereby gain savings—until, potentially, the end of fiscal year 2011-12. So the issue is about timing of payment, not about "improper" payment that may be subject to recoupment.

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 argument fails because it is 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 temporary 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 at each agency 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 Court's Order and Writ, whether read together or separately, ***do not so require***. The Writ only directs that employees be paid prospectively for actual hours worked, and it does not require that employees not work three days out of the month. (See Defs. App. 32.) 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].)

Compliance with the Order and Writ will *not* create "severe financial harm" because the trial court orders only apply to employees who work furlough hours. (Petition at p. 26-27.) 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. Payment of money 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 that warrants the granting of preliminary injunctive relief"].)

Defendants further argue 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 significant budgetary or financial harm because the Writ and Order will necessarily only apply to the 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 furloughs 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 temporary stay.

IV

DEFENDANTS ARE NOT ENTITLED TO A TEMPORARY STAY BECAUSE THEY APPEAL FROM NON-APPEALABLE ORDERS

Relatedly, a stay of any sort ought not to be founded on a notice of appeal that is premised upon two non-appealable orders. Defendants expressly conceded in their Notice of Appeal that no final judgment has been entered by the trial court. (Defs.' App. 16 ["final judgment has yet to be rendered or entered in this action"].) Yet, their petition mischaracterizes the trial court's order granting the writ of mandate as a "final ruling" and a "final order." (E.g., Petition at p. 5.)

CCPOA has already filed with this Court a motion to dismiss the appeal, because Defendants appeal from nonappealable orders that do not dispose of all issues between the parties. (See *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 740-741 [a "judgment" ordering issuance of peremptory writ of mandate and the writ of mandate itself not appealable because they did not resolve pending damages claims]; see also *Pazaderka v. Caballeros Dimas* (1st Dist. 1998) 62 Cal.App.4th 658, 666 [trial court "retained jurisdiction" when invalid appeal filed with court of appeal].)

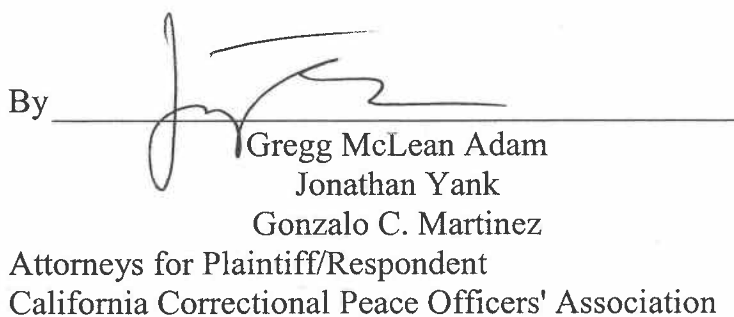
V

CONCLUSION

For all these reasons, this Court should deny Defendants' request for a temporary stay.

Dated: January 15, 2010

CARROLL, BURDICK & McDONOUGH LLP

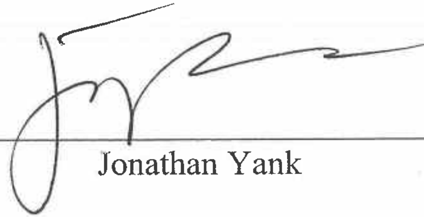


By ______________________
Gregg McLean Adam
Jonathan Yank
Gonzalo C. Martinez
Attorneys for Plaintiff/Respondent
California Correctional Peace Officers' Association

WORD COUNT CERTIFICATION

Pursuant to Rule 8.204(c) of the California Rules of Court, I certify that the attached brief contains 1658 words, as determined by the computer program used to prepare the brief.

Dated: January 15, 2010



Jonathan Yank

CBM-SF\SF468246

California Correctional Peace Officers' Association v. Arnold Schwarzenegger, et al.,
California Court of Appeal, First Appellate District, Division 2, No. A127292

PROOF OF SERVICE BY UNITED PARCEL SERVICE (UPS) – NEXT DAY

I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen years and not a party to the within cause; my business address is 44 Montgomery Street, Suite 400, San Francisco, CA 94104. On January 15, 2010, I served the enclosed:

OPPOSITION TO REQUEST FOR TEMPORARY STAY

on the parties in said cause (listed below) by enclosing a true copy thereof in a prepaid sealed package, addressed with appropriate United Parcel Service shipment label and, following ordinary business practices, said package was placed for collection (in the offices of Carroll, Burdick & McDonough LLP) in the appropriate place for items to be collected and delivered to a facility regularly maintained by United Parcel Service. I am readily familiar with the Firm's practice for collection and processing of items for overnight delivery with United Parcel Service and that said package was delivered to United Parcel Service in the ordinary course of business on the same day.

Ross C. Moody, Esq.
California Attorney General's Office
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Counsel for Defendant ; John Chiang in his capacity as the Controller of the State of California

(415) 703-1376
Fax (415) 703-1234

David W. Tyra, Esq.
Kristianne T. Seargeant, Esq.
Kronick, Moskovitz, Tiedemann & Girard
400 Capitol Mall, 27th Floor
Sacramento, CA 95814

Counsel for Defendants/Respondents Arnold Schwarzenegger, State of California; California Department of Personnel Administration; California Department of Corrections and Rehabilitation; California Department of Mental Health; California Department of Juvenile Justice (State Defendants)

(916) 321-4500
Fax (916) 321-4555

Linda A. Mayhew, Esq.
Will M. Yamada, Esq.
Department of Personnel Administration
1515 S Street, North Building, Suite 400
Sacramento, CA 95811-7258

Co-Counsel for State Defendants

(916) 324-0512
Fax (916) 323-4723

Clerk
Alameda County Superior Court
U.S. Post Office Building
201 13th Street, 2nd Floor
Oakland, CA 94612

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on January 15, 2010, at San Francisco, California.

Janine Oliker