

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 PETITION FOR WRIT OF SUPERSEDEAS

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 PETITION FOR WRIT OF SUPERSEDEAS

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*

TABLE OF CONTENTS

	Page
I INTRODUCTION	1
II DEFENDANTS MISREPRESENT AND OMIT MATERIAL FACTS IN THEIR PETITION	2
III DEFENDANTS ARE NOT ENTITLED TO SUPERSEDEAS RELIEF	6
A. Supersedeas Issues Only To Protect Appellate Jurisdiction in a Valid Appeal.....	6
B. Defendants' Premature Appeal Requires Denial of Their Request for Supersedeas Relief Because There Is No Appellate Jurisdiction to Protect	8
IV DEFENDANTS FAIL TO DEMONSTRATE THEY WILL SUCCEED ON THE MERITS.....	10
A. Plaintiff's Underlying Case Challenged Defendants' Implementation of the Self-Directed Furloughs as to Unit 6.....	10
B. Defendants' Petition Does Not Demonstrate They Are Likely To Win on the Merits.....	13
C. The Trial Court's Judgment Will Likely Be Affirmed on Appeal and CCPOA Will Prevail on the Merits	16
V CCPOA MEMBERS WILL SUFFER IRREPARABLE HARM IF THE TRIAL COURT'S WRIT OF MANDATE IS STAYED, BUT DEFENDANTS WILL SUFFER NO COGNIZABLE HARM	20
A. CCPOA Members Currently Suffer and Will Continue to Suffer Irreparable Harm If A Stay Is Granted.....	20
B. Defendants Make No Showing of Cognizable Harm Arising From Prospectively Paying State Employees for Actual Hours Worked.....	24

TABLE OF CONTENTS
(continued)

	Page
1. Paying Employees for Actual Hours Worked Will Not Lead to “Recoupment” Problem.....	24
2. The Trial Court’s Orders Do Not Address Staffing or Require Defendants To Suspend Furloughs.....	25
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”	27
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.....	28
VII CONCLUSION.....	29

TABLE OF AUTHORITIES

	Page(s)
State Cases	
<i>Armenta v. Osmose, Inc.</i> (2005) 135 Cal.App.4th 314	18, 19
<i>Brown v. Trophy-Craft Co.</i> (1948) 85 Cal.App.2d 246	7, 9
<i>Deepwell Homeowners Protective Assoc. v. Palm Springs</i> (1965) 239 Cal.App.2d 63	10, 16
<i>Department of Personnel Administration v. Superior Court</i> ("Greene") (1992) 5 Cal.App.4th 155	14, 15, 17
<i>Food and Grocery Bureau of Southern Cal. v. Garfield</i> (1941) 18 Cal.2d 174	7
<i>Hayworth v. City of Oakland</i> (1982) 129 Cal.App.3d 723	9
<i>In re Christy L</i> (1986) 187 Cal.App.3d 753	7
<i>Korean Philadelphia Presbyterian Church v. California</i> <i>Presbytery</i> (2000) 77 Cal.App.4th 1069	24
<i>Mills v. County of Trinity</i> (1979) 98 Cal.App.3d 859	6
<i>Morehart v. County of Santa Barbara</i> (1994) 7 Cal.4th 725	28
<i>Nuckolls v. Bank of California</i> (1936) 7 Cal.2d 574	6, 7, 8, 10, 16, 20

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Pazderka v. Caballeros Dimas</i> (1st Dist. 1998) 62 Cal.App.4th 658.....	8
<i>Peninsula Properties Co. v. County of Santa Cruz</i> (1951) 106 Cal.App.2d 669	9
<i>Pomper v. Superior Ct.</i> (1923) 191 Cal. 494	9
<i>Social Services Union, SEIU Local 535 v. County of San Diego</i> (1984) 158 Cal.App.3d 1126	23
<i>Steinhebel v. LA Times Comm.</i> (2005) 126 Cal.App.4th 696	18
<i>Tirapelle v. Davis</i> (1993) 20 Cal.App.4th 1317	17
<i>West Coast Home Improvement Co. v. Contractors' State License Board</i> (1945) 68 Cal.App.2d 1	6, 7, 8
 State Statutes	
California Code of Regulations 8 CCR § 11000 et seq.	19
Code of Civil Procedure	
section 1110b	23
section 916	6
section 923	6
Government Code	
section 3512 et seq. (Ralph C. Dills Act)	17
section 3520.5	17

TABLE OF AUTHORITIES
(continued)

Page(s)

section 19826	12, 13, 14, 15, 16, 17, 18, 19
section 19838	25

Labor Code

section 212	12, 13, 19
section 223	12, 13, 15, 18, 19
section 1171 <i>et seq.</i>	3, 12, 13, 15, 19

Rules

California Rules of Court

rule 8.112	5, 8
------------------	------

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.¹

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

¹ 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

2010. (See Exhs. D-E. to Yank Decl.; Controller’s Exhs. 3-4.)

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.² (*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].)

² 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 exists 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.³ (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

³ 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.

[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.⁴ 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*.

⁴ 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).

