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**CALIFORNIA COMMISSION ON
PEACE OFFICER STANDARDS AND TRAINING ("POST")**

IN THE MATTER OF

TERENCE V. MCCULLOUGH

Appellant

v.

CALIFORNIA COMMISSION ON
PEACE OFFICER STANDARDS AND
TRAINING

Respondent.

CASE NO.:

**APPEAL BRIEF OF APPELLANT
TERENCE V. MCCULLOUGH**

DATE: JUNE 22, 2017

TIME: 10:00 A.M.

**PLACE: POST HEADQUARTERS
860 Stillwater Road, Suite 100
West Sacramento, CA 95605**

**TO THIS HONORABLE COMMISSION, ALL PARTIES AND THEIR ATTORNEYS
OF RECORD:**

Appellant, TERENCE V. MCCULLOUGH, hereby submits the following Appeal Brief
to the California Commission on Peace Officer Standards and Training (hereinafter, "POST"):

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TABLE OF CONTENTS

I. INTRODUCTION.....	3
II. TIMELINE OF PERTINENT EVENTS.....	4
III. BACKGROUND OF APPELLANT.....	5
IV. LEGAL AND ADMINISTRATIVE STANDARD FOR THIS APPEAL.....	6
V. POST’S IMPLEMENTATION OF AND/OR THE REGULATONS AND STATUTES THEMSELVES VIOLATE BOTH THE FEDERAL AND STATE EQUAL PROTECTION CLAUSE.....	13
VI. POST’S IMPLEMENTATION OF AND/OR THE REGULATONS AND STATUTES THEMSELVES VIOLATE BOTH THE FEDERAL AND STATE DUE PROCESS CLAUSE.....	19
VI. CONCLUSION.....	20

1 **I. INTRODUCTION**

2 This is an appeal by a sworn peace officer employed by the California Department of
3 State Hospitals, Office of Protective Services (Napa, CA), who seeks a POST Basic Certificate
4 pursuant to the exception enumerated in Penal Code §832. Detective McCullough regularly
5 participates in and has been granted certifications in POST continued training courses; in fact,
6 he has approximately 1,300 hours of POST certified training on his POST profile. Like many
7 dedicated law enforcement officers, Detective McCullough seeks to enhance his skill sets so
8 that if the time comes that he seeks an appointment and/or lateral transfer to another law
9 enforcement agency, his years' experience and continued training will be properly credited to
10 the position sought. However, rather, than assist Detective McCullough in this endeavor, POST
11 to date has taken the position that he should be, in essence, penalized for serving as a peace
12 officer in the "wrong" agency.

13 While POST's undergirding continuing education requirements for peace officers is
14 understandable and laudable (*e.g., inter alia*, to ensure that peace officers who leave the field
15 are equipped with the most current law in order to serve the public), such a concern is non-
16 existent whereas here, the request for a POST Basic Certificate pursuant to the exception
17 enumerated in Penal Code §832.4 comes from an actively employed member serving in the
18 state of California as a peace officer for an established state agency such as the California
19 Department of State Hospitals, Office of Protective Services.

20 Yet, here, when Detective McCullough made his request for a POST Basic Certificate
21 pursuant to the exception enumerated in Penal Code §832, he was denied on the ground that his
22 agency did not in fact, exercise the enumerated peace officer powers pursuant to Penal Code
23 §830.1. However, as shown herein (and as pointed out to POST), this is not the case.
24 Accordingly, Appellant Terence McCullough respectfully requests that the decision by the
25 Executive Director regarding his appeal be set aside and a new order and decision granting his
26 request in its entirety be granted.

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II. TIMELINE OF PERTINENT EVENTS

August 31, 2012	Appellant, Terence McCullough hired as a fully sworn officer for California Department of State Hospitals, Office of Protective Services Napa, CA where he is still currently employed (McCullough Decl., ¶ 2.) ¹
July 7, 2014	Appellant promoted to Detective (McCullough Decl., ¶ 2.)
May 19, 2016	Email to former POST Bureau Chief Kate Singer (McCullough Decl., Ex. A.)
May 19, 2016	Email from POST Bureau Chief Mario Rodriguez (McCullough Decl., Ex. B.)
May 20, 2016	Email from POST Bureau Chief Mario Rodriguez (McCullough Decl., Ex. C.)
May 20, 2016	Email to POST Bureau Chief Mario Rodriguez (McCullough Decl., Ex. D.)
May 21, 2016	Email to POST Bureau Chief Mario Rodriguez (<i>no response given to Penal Code §832.4 exception inquiry</i>) (McCullough Decl., Ex. E.)
May 26, 2016	Email from POST Bureau Chief Mario Rodriguez (McCullough Decl., Ex. F.)
In or around May 2016	Several telephone calls with POST Bureau Chief Mario Rodriguez
August 20, 2016	Formal request for POST Basic Certificate under the authority of the exception contained in Penal Code §832.4, sent Registered U.S. Mail to then Interim Executive Director Stephanie Scofield (McCullough Decl., Ex. G.)
September 2, 2016	Email from POST Interim Executive Director Stephanie Scofield (McCullough Decl., Ex. H.)
September 2, 2016	Email to POST Interim Executive Director Stephanie Scofield (McCullough Decl., Ex. I.)
October 4, 2016	POST Decision sent from Manuel Alvarez, Jr. (McCullough Decl., Ex. J.)
October 11, 2016	Email to POST Interim Executive Director Stephanie Scofield (McCullough Decl., Ex. K.)
---	California Department of State Hospitals Policy Manual, Policy 100 (McCullough Decl., Ex. L.)
---	Hospital Police Officer, Department of State Hospitals (McCullough Decl., Ex. M)
---	Police Officer, City of Martinez (McCullough Decl., Ex. N)
---	Deputy Sheriff, County of Napa (McCullough Decl., Ex. O)

¹ All references to "McCullough Decl." refer to the Declaration of Terence V. McCullough, submitted concurrently herewith.

III. BACKGROUND OF APPELLANT

Detective McCullough currently serves as a law enforcement officer for the California Department of State Hospitals, Office of Protective Services Napa, CA, where he has served as a peace officer for that agency since August 31, 2012. He began working with the agency as a fully sworn police officer and was promoted to Detective on or about July 7, 2014.

Detective McCullough has consistently sought to enhance his skill sets as a law enforcement officer and has taken the following courses and certifications to ensure that he is a well-qualified law enforcement professional²:

- 2017: POST ICI Criminal Investigation Core Course LAPD (80 hours);
- 2016: Implications of the "Use of Force" by Law Enforcement, California Narcotics Officers Association (8 hours);
- 2016: School Violence and the Active Shooter, Public Safety Training Institute (8 hours);
- 2016: POST Firearms Instructor Update, Sacramento Regional Public Safety Training Center (24 hours);
- 2015: Organized Criminal Street Gangs, Sacramento Regional Public Safety Training Center (16 hours);
- 2015: POST Field Training Officer, Napa Valley Criminal Justice Training Center (40 hours);
- 2015: POST LAPD Detective School, Los Angeles Police Department (40 hours);
- 2014: POST Firearms Instructor, Napa Valley Criminal Justice Training Center (40 hours);
- 2014: POST Interview & Interrogation, Sacramento Regional Public Safety Training Center (40 hours);

² Upon information and reasoned belief, POST verified the majority of Detective McCullough's POST training by reviewing his POST Profile. See McCullough Decl., ¶3 .

- 2014: POST Northern California HIDTA (High Intensity Drug Trafficking Area) Search Warrants for Patrol, Napa Valley Criminal Justice Training Center (16 hours);
- 2014: POST Gangs – Penal Code §186.22 for Patrol, POST Learning Portal (3 hours);
- 2013: POST Basic Course Requalification, South Bay Regional Training Consortium (136 hours);
- 2011: POST Health & Safety Code §11550 Drug Recognition, Santa Rosa Public Safety Training Center (16 hours); and,
- 2009: POST Regular Basic Course, Napa Valley Criminal Justice Training Center (878 hours).

On or about August 30, 2016, Detective McCullough sent a formal request for a POST Basic Certificate under the authority of the exception contained in Penal Code §832.4 to then Interim Executive Director Stephanie Scofield. McCullough Decl., Exhibit G. POST responded to Detective McCullough's request via letter dated October 4, 2016 from POST Executive Director Manuel Alvarez. McCullough Decl., Exhibit J. In same, Director Alvarez stated that:

Peace officers appointed under Penal Code 830.38 are not required by statute to have a POST Certificate as they do not exercise the powers under Penal Code 830.1. McCullough Decl., Exhibit J. POST then denied Detective McCullough's request based upon the above.

IV. LEGAL AND ADMINISTRATIVE STANDARD FOR THIS APPEAL

Post Administrative Manual ("PAM"), Section B, Regulation 1058 provides that "[a]t an appeal hearing, the burden of proof is on the appellant to demonstrate to the Commission that error was committed by POST staff in its decision. See also PAM Section D, D-16-1 Appeals Process. Here, the PAM as well as the California Penal Code expressly mandates that a law enforcement officer such as Detective McCullough is entitled to the relief requested.

1 POST's Administrative Manual, Section B, Regulation 1008 (b)(3) provides thusly:

2 An exemption of the requalification requirement may be granted by the Executive
3 Director or the Commission as follows:

4 ...

4 (B) The Commission may, in response to a written request or on its own motion,
5 upon a showing of good cause and based upon an individual's employment,
6 proficiency, training, and education, exempt an individual from completion of the
7 basic course requalification requirement. The individual shall: 1) have satisfied the
8 Regular Basic Course training requirement; 2) become reemployed as a peace
9 officer after a three-year-or-longer break in service; and 3) not be described or
10 included in subsection 1008(3)(A)(1.- 5.).

9 Here, a well-qualified peace officer such as Detective McCullough should be granted an
10 exemption under the aforementioned provision.

11 Moreover, POST's Administrative Manual, Section B, Regulation 1011, Section 4
12 therein states, in relevant part as follows:

13 ***

14
15 **(4) Certificate Award Requirements – All Levels**

16 Each certificate applicant, except the applicant for a Reserve Peace Officer Certificate,
17 shall satisfy the following requirements:

18 **(A) Employment Requirement**

19 At the time of application, an applicant shall be employed as a **full-time** peace
20 officer by a **POST-participating** department.

21 **Exception : When a POST Basic Certificate is required to continue to exercise**
22 **peace officer powers pursuant to Penal Code section 832.4, employment with a**
23 **participating department is not required at the time of application.**

24 **(B) Basic Course Training Requirement**

25 When applying for any level of certificate, an applicant shall have satisfied the basic
26 course training requirement, as specified in Regulation 1005, for the applicant's
27 current appointment.

28 **(C) Requalification Requirement**

1 1. Applicants for general or specialized category certificates must possess basic
2 training that has not expired as specified in Regulation 1008(b), Basic Course
3 Requalification Requirement.

4 2. Applicants for coroner's category certificates must possess Penal Code 832,
5 Arrest and Firearms training that has not expired, as specified in Regulation
6 1080, PC 832 Arrest and Firearms Course Requalification.

7 **(D) Application Requirements**

8 An applicant (or an applicant's employing department) shall submit a
9 completed Certificate Application, POST 2-116 (Rev 06-2014), herein incorporated
10 by reference, along with supporting documents as follows:

11 1. Documentation that supports the required education and experience (i.e.,
12 official transcripts, diplomas, certificates of course completion, and proof of
13 law enforcement experience).

14 2. When the units of credit are transferred from one educational institution to
15 another, supporting documentation from all educational institutions is required.

16 3. Supporting documents are not required if the education and/or experience
17 information needed to support the current certificate request is already
18 reflected on the applicant's POST Profile. Any education or experience that is
19 not reflected on the POST Profile must be supported as described in subsection
20 1010(a)(D)1. and/or 2.

21 (emphasis via italics, bold and double-underline added, all other bold emphasis in original text).

22 In short, the above-referenced employment requirement, *e.g.*, to be employed full time by a
23 POST participating agency for a POST Basic Certificate to be awarded, is waived if the peace
24 officer serves in the capacity as a law enforcement officer pursuant to Penal Code §832.4.

25 Penal Code §832.4 provides in relevant part, thusly:

26 (a) Any undersheriff or deputy sheriff of a county, any police officer of a city, and any
27 police officer of a district authorized by statute to maintain a police department, who is
28 first employed after January 1, 1974, and is responsible for the prevention and detection
of crime and the general enforcement of the criminal laws of this state, shall obtain the
basic certificate issued by the Commission on Peace Officer Standards and Training
within 18 months of his or her employment in order to continue to exercise the powers
of a peace officer after the expiration of the 18-month period.

1 ***(b) Every peace officer listed in subdivision (a) of Section 830.1, except a sheriff, or***
2 ***elected marshal, or a deputy sheriff described in subdivision (c) of Section 830.1, who***
3 ***is employed after January 1, 1988, shall obtain the basic certificate issued by the***
4 ***Commission on Peace Officer Standards and Training upon completion of probation,***
but in no case later than 24 months after his or her employment, in order to continue
to exercise the powers of a peace officer after the expiration of the 24-month period.

5 Deputy sheriffs described in subdivision (c) of Section 830.1 shall obtain the basic
6 certificate issued by the Commission on Peace Officer Standards and Training within 24
7 months after being reassigned from custodial duties to general law enforcement duties.

8 In those cases where the probationary period established by the employing agency is 24
9 months, the peace officers described in this subdivision may continue to exercise the
10 powers of a peace officer for an additional three-month period to allow for the
11 processing of the certification application.

12 (c) Each police chief, or any other person in charge of a local law enforcement agency,
13 appointed on or after January 1, 1999, as a condition of continued employment, shall
14 obtain the basic certificate issued by the Commission on Peace Officer Standards and
15 Training within two years of appointment.

16 (emphasis added). ***Accordingly, the statute specifically refers to peace officers who exercise***
17 ***powers afforded them pursuant to Penal Code §830.1.*** Penal Code §830.1 provides , in
18 relevant part thusly:

19 ***(a) Any sheriff, undersheriff, or deputy sheriff, employed in that capacity, of a county,***
20 ***any chief of police of a city or chief, director, or chief executive officer of a consolidated***
21 ***municipal public safety agency that performs police functions, any police officer,***
22 ***employed in that capacity and appointed by the chief of police or chief, director, or***
23 ***chief executive of a public safety agency, of a city, any chief of police, or police officer***
24 ***of a district, including police officers of the San Diego Unified Port District Harbor***
25 ***Police, authorized by statute to maintain a police department, any marshal or deputy***
26 ***marshal of a superior court or county, any port warden or port police officer of the***
27 ***Harbor Department of the City of Los Angeles, or any inspector or investigator***
28 ***employed in that capacity in the office of a district attorney, is a peace officer.*** The
authority of these peace officers extends to any place in the state, as follows:

(1) As to any public offense committed or which there is probable cause to believe
has been committed within the political subdivision that employs the peace officer
or in which the peace officer serves.

(2) Where the peace officer has the prior consent of the chief of police or chief,
director, or chief executive officer of a consolidated municipal public safety
agency, or person authorized by him or her to give consent, if the place is within a
city, or of the sheriff, or person authorized by him or her to give consent, if the
place is within a county.

1 (3) As to any public offense committed or which there is probable cause to believe
2 has been committed in the peace officer's presence, and with respect to which there
3 is immediate danger to person or property, or of the escape of the perpetrator of the
 offense.

4 Accordingly, all of the aforementioned penal code statutes and POST administrative
5 regulations, read in tandem, provide that the awarding of the POST Basic Certificate is deemed
6 an "exception" under Penal Code §832.4. Here, Detective McCullough concedes that the
7 agency for which he serves as a law enforcement officer, the California Department of State
8 Hospitals, Office of Protective Services, is *not* a POST participating agency. Nevertheless,
9 Detective McCullough is entitled to be granted the exception enumerated in Penal Code §832.4
10 because it is undisputed that the agency for whom Detective McCullough works, California
11 Department of State Hospitals, Office of Protective Services, clearly falls under the list of peace
12 officers who are enumerated in Penal Code §832.4. Unfortunately, despite the clear mandate
13 of the law, POST denied Detective McCullough's request.

14 On or about August 30, 2016, Detective McCullough sent a formal request for a POST
15 Basic Certificate under the authority of the exception contained in Penal Code §832.4 to then
16 Interim Executive Director Stephanie Scofield. McCullough Decl., Exhibit G. POST
17 responded to Detective McCullough's request via letter dated October 4, 2016 from POST
18 Executive Director Manuel Alvarez. McCullough Decl., Exhibit J. In same, Director Alvarez
19 stated that:

20 *Peace officers appointed under Penal Code 830.38 are not required by statute to*
21 *have a POST Certificate as they do not exercise the powers under Penal Code*
22 *830.1.*

23 McCullough Decl., Exhibit J. POST then denied Detective McCullough's request based upon
24 the above.

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1 POST's position as concerns whether the California Department of State Hospitals,
2 Office of Protective Services is incorrect. Penal Code §830.38 provides thusly:

3
4 (a) The officers of a state hospital under the jurisdiction of the State Department of
5 State Hospitals or the State Department of Developmental Services appointed pursuant
6 to Section 4313 or 4493 of the Welfare and Institutions Code, ***are peace officers whose***
7 ***authority extends to any place in the state*** for the purpose of performing their primary
8 duty or when making an arrest pursuant to Section 836 as to any public offense with
9 respect to which there is immediate danger to person or property, or of the escape of the
10 perpetrator of that offense, or pursuant to Section 8597 or 8598 of the
11 Government Code provided that the primary duty of the peace officers shall be the
12 enforcement of the law as set forth in Sections 4311, 4313, 4491, and 4493 of the
13 Welfare and Institutions Code. Those peace officers may carry firearms only if
14 authorized and under terms and conditions specified by their employing agency.

15 (b) By July 1, 2015, the California Health and Human Services Agency shall develop
16 training protocols and policies and procedures for peace officers specified in
17 subdivision (a). When appropriate, training protocols and policies and procedures shall
18 be uniformly implemented in both state hospitals and developmental centers.
19 Additional training protocols and policies and procedures shall be developed to address
20 the unique characteristics of the residents in each type of facility.

21 (c) In consultation with system stakeholders, the agency shall develop
22 recommendations to further improve the quality and stability of law enforcement and
23 investigative functions at both developmental centers and state hospitals in a
24 meaningful and sustainable manner. These recommendations shall be submitted to the
25 budget committees and relevant policy committees of both houses of the Legislature no
26 later than January 10, 2015.

27 Based on the foregoing, Penal Code §830.38 is the appropriate agency appointment code
28 for California Department of State Hospitals, Office of Protective Services. However, contrary
to POST's conclusion, the California Department of State Hospitals, does in fact exercise the
powers enumerated under Penal Code §830.1 (see, *supra*). See People v. Superior Court (Ortiz)
(2004) 115 Cal. App. 4th 995, 1003, *disapproved on other grounds*,
People v. Watson (2007) 42 Cal. 4th 822, fn. 8 ("Officers of state hospitals under the
jurisdiction of the Department of Mental Health are empowered to take such action, for they
"are peace officers whose authority extends to any place in the state for the purpose of
performing their primary duty" under Penal Code §830.38); City of L.A. v. Superior Court,

1 (1997) 57 Cal. App. 4th 1506, fn. 2 (“A public safety officer is defined as an officer specified in
2 sections ... 830.38... of the Penal Code.”); “[Penal Code §830.38] is one of several statutes
3 which define categories of persons who are "peace officers" in various circumstances” Gauthier
4 v. City of Red Bluff (1995) 34 Cal. App. 4th 1441, fn. 2.

5 Indeed, The California Department of State Hospitals Policy Manual, Policy 100 (see
6 McCullough Decl., Exhibit L), clearly provides in section 100.3.4 therein as follows:

7 The arrest authority within the State of California is as follows (***Penal Code***
8 ***830.1***):

9 (a): As to any public offense committed or which there is probable cause to believe
10 has been committed within the jurisdiction of the California Department of State
Hospitals.

11 (b): Where the peace officer has the consent of the Chief of Police.

12 (c): As to any public offense committed or which there is probable cause to believe
13 has been committed in the officer’s presence and there is immediate danger to a
14 person or property, or of the escape of the perpetrator of the offense.

15 (d): Arrest pursuant to a warrant.

16 (emphasis added); accord Government Code §1194 (“When not otherwise provided for, each
17 deputy possesses the powers and may perform the duties attached by law to the office of his
18 principal.”).

19 That Detective McCullough’s agency is in fact a law enforcement agency is not even in
20 doubt by POST, given that POST has included the Department of State Hospitals Hospital
21 Police Officer job classification (which is coincidentally, detective McCullough’s appointed
22 classification) on its “Law Enforcement Jobs” page. Based on the foregoing, as well as the
23 clear authority of POST’s Administrative Manual, Section B, Regulation 1011 (Section 4
24 therein), Penal Code §830.1, Penal Code §832.4 and Penal Code §830.38, Detective
25 McCullough’s request for a POST Basic Certificate under the authority of the exception
26 contained in Penal Code §832.4.

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1 **V. POST'S IMPLEMENTATION OF AND/OR THE REGULATIONS AND**
2 **STATUTES THEMSELVES VIOLATE BOTH THE FEDERAL AND STATE**
3 **EQUAL PROTECTION CLAUSE**

4 The Fourteenth Amendment provides thusly:

5 All persons born or naturalized in the United States, and subject to the jurisdiction
6 thereof, are citizens of the United States and of the State wherein they reside. No
7 State shall make or enforce any law which shall abridge the privileges or
8 immunities of citizens of the United States; nor shall any State deprive any person
9 of life, liberty, or property, without due process of law; nor deny to any person
10 within its jurisdiction the equal protection of the laws.

11 United States Constitution, Amended 14, §1. Further, Article 1, Section 7 of the California
12 Constitution provides, in relevant part, thusly:

- 13 (a) A person may not be deprived of life, liberty, or property without due process
14 of law or denied equal protection of the laws

15 The Fourteenth Amendment to the United States Constitution prohibits the denial of
16 equal protection of the laws. "The constitutional guaranty of equal protection of the laws has
17 been judicially defined to mean that no person or class of persons shall be denied the same
18 protection of the laws which is enjoyed by other persons or other classes in like circumstances
19 in their lives, liberty and property and in their pursuit of happiness." People v. Romo (1975) 14
20 Cal.3d 189, 196.

21 The California Supreme Court has long ago made clear that "the Fourteenth Amendment
22 protects the pursuit of one's profession from abridgment by arbitrary state action."
23 Endler v. Schutzbank (1968) 68 Cal. 2d 162, Thus, the concept of equal protection requires that
24 "persons similarly situated with respect to the legitimate purpose of [a particular] law receive
25 like treatment." Cooley v. Superior Court (2002) 29 Cal.4th 228, 253.

26 "The first prerequisite to a meritorious claim under the equal protection clause
27 is a showing that the state has adopted a classification that affects two or more similarly situated
28 groups in an unequal manner." In re Eric J. (1979) 25 Cal.3d 522, 530 (italics omitted).
Accordingly, "an equal protection claim cannot succeed, and does not require further analysis,
unless there is some showing that the two groups are sufficiently similar with respect to the

1 purpose of the law in question that some level of scrutiny is required in order to determine
2 whether the distinction is justified." People v. Nguyen (1997) 54 Cal.App.4th 705, 714.

3 Moreover, California's constitutional guarantee of equal protection as embodied by the
4 California Constitution, Article I, §7 is substantially equivalent to that contained in the federal
5 14th Amendment. Thus, any analysis of state and federal equal protection claims is
6 substantially the same. See Manduley v. Superior Court (2002) 27 Cal.4th 537, 571- 572.

7 "Under the strict standard applied in such cases, the state bears the burden of
8 establishing not only that it has a *compelling* interest which justifies the law but that the
9 distinctions drawn by the law are *necessary* to further its purpose." Sail'er Inn, Inc. v.
10 Kirby(1971) 5 Cal. 3d 1, 16-17. Where a government regulation such as the POST guidelines
11 "limits the fundamental right of one class of persons to pursue a lawful profession as strict
12 scrutiny analysis is appropriate. As explained by the California Supreme Court:

13 We have held that the state may not arbitrarily foreclose any person's right to
14 pursue an otherwise lawful occupation. The right to work and the concomitant
15 opportunity to achieve economic security and stability are essential to the pursuit
16 of life, liberty and happiness. As early as 1915, the United States Supreme Court
17 declared that "the right to work for a living in the common occupations of the
18 community is of the very essence of the personal freedom and opportunity that it
19 was the purpose of [the Fourteenth] Amendment to secure." The California
Legislature accords statutory recognition to the right to work by declaring the
opportunity to seek, obtain and hold employment without discrimination a civil
right. Limitations on this right may be sustained only after the most careful
scrutiny.

20 Sail'er Inn, Inc. v. Kirby (1971) 5 Cal. 3d 1, 17 ("Bartending and related jobs, though carefully
21 regulated, are lawful occupations and the strict standard of review is therefore justified on this
22 ground.") (citations to state and federal authority omitted).

23 Here, POST enacts and promulgates administrative regulations that treat one class of
24 peace officers differently from another, especially where they are similarly situated in terms of
25 experiential and educational background. Thus, POST's decisions based on such guidelines, as
26 well as the guidelines themselves, are subject to a higher level of scrutiny since its regulations
27 implicate a fundamental right. See United States v. D'Anjou (4th Cir. 1994)16 F.3d 604, 612.
28 The right to advance in one's career in the same manner as other similarly situated peace

1 officers who are officers under Penal Code §830.38. It is well established that the right of a
2 peace officer in this state to his employment, *and issues affecting the status of same*, is a
3 property interest that must be afforded protection as a matter of law. Mays v. City of Los
4 Angeles (2008) 43 Cal.4th 313, 321, fn. 6 ("a public entity must accord constitutional
5 procedural due process before depriving an officer of any significant property interest in his or
6 her employment"); see also, Cleveland Bd. of Educ. v. Loudermill (1985) 470 U.S. 532, 543
7 (the "significance of the private interest in retaining employment cannot be gainsaid"); but see
8 California Gillnetters Assn. v. Department of Fish & Game (1995) 39 Cal. App. 4th 1145, 1155
9 ("The courts have repeatedly cautioned that while a particular right such as the right to work
10 may have sufficient gravity to warrant heightened judicial scrutiny of *administrative*
11 *rulings* affecting that right, that status does not elevate the right to one that is "fundamental" for
12 purposes of strictly scrutinizing *legislative enactments* regulating the right.") (citations omitted)

13 Further, even if a strict scrutiny analysis does not apply here, POST's application of the
14 regulations would be subject to a rational basis analysis. Equal protection requires that the
15 distinction be "rationally related to a legitimate government interest." United States v. Ruiz-
16 Chairez, (9th Cir. 2007) 493 F.3d 1089, 1091, *quoting*, City of Cleburne v. Cleburne Living Ctr.
17 (1985) 473 U.S. 432, 440.

18 Under a rational-basis review, "[t]he burden falls on the party seeking to disprove the
19 rationality of the relationship between the classification and the purpose." United States v. Ruiz-
20 Chairez, (9th Cir. 2007) 493 F.3d 1089, 1091, *quoting*, City of Cleburne v. Cleburne Living Ctr.
21 (1985) 473 U.S. 432, 440.

22 Detective McCullough has met this burden. It is undisputed that POST is a government
23 agency. As explained by the Court of Appeals:

24 POST is a state-funded organization designed to insure professional standards in
25 law enforcement. Penal Code section 13500 et seq. describes POST's role in
26 setting standards and guidelines pertinent to the selection and training of peace
27 officers.
28

1 Diffey v. Riverside County Sheriff's Department (2000) 84 Cal.App.4th 1031, 1034,
2 *disapproved on other grounds in* Colmenares v. Braemar Country Club, Inc. (2003) 29 Cal.4th
3 1019, 1031; see also Penal Code §13510. Indeed, as stated on the POST website:

4 The Commission on Peace Officer Standards and Training (POST) was
5 established by the Legislature in 1959 to set minimum selection and training
6 standards for California law enforcement.

7 <https://www.post.ca.gov/about-us.aspx>.

8 Here, the POST regulations violate the fundamental tenets of equal protection because it
9 arbitrarily and capriciously denies a property right to peace officers such as Detective
10 McCullough the opportunity to obtain an exception to the statutory scheme, even though it
11 acknowledges that peace officers employed by the California Department of State Hospitals,
12 Office of Protective Services, are in fact, law enforcement officers and duly recognized as such
13 by the state of California. The ability to obtain POST certificates is critical for the livelihood
14 for peace officers, especially those who wish to lateral to other agencies. POST's position
15 denies, without any justifiable basis, this property right to entire classes of peace officers simply
16 because of *where* they work, here for the California Department of State Hospitals, Office of
17 Protective Services, even though these peace officers perform the same duties as other officers
18 and deputies throughout the state are permitted this right. Thus, the refusal to grant Detective
19 McCullough's appeal as fully requested was unconstitutional and must be overturned as a
20 matter of law.
21

22 As discussed above, POST's stated reasons for its decision to deny Detective
23 McCullough's requested relief was based on an erroneous interpretation and application of both
24 its own regulations and state statutes. Moreover, it cannot be stated that Detective
25 McCullough's peace officer duties is functionally different than a peace officer employed by,
26 for example, a local police department or county sheriff's department. Compare, e.g., the jibe
27 descriptions for:
28

//

- Hospital Police Officer, Department of State Hospitals (McCullough Decl., Exhibit M);
- Police Officer, City of Martinez (McCullough Decl., Exhibit N); and,
- Deputy Sheriff, County of Napa (McCullough Decl., Exhibit O)

People v. Superior Court (Ortiz) (2004) 115 Cal. App. 4th 995, 1003, *disapproved on other grounds*, People v. Watson (2007) 42 Cal. 4th 822, fn. 8, is instructive as the case demonstrates that even the court recognize that there is no meaningful distinction between sworn peace officers such as Detective McCullough employed by state mental hospitals and other law sworn law enforcement officers. In that case, the trial court granted a motion to dismiss of a criminal defendant who claimed that Penal Code § 2684 patients were not located under the custody of prison officials while they were being treated at the state hospital. The Court of Appeals reversed, and in doing so made clear that:

Although we do not disagree with the proposition that section 2684 inmates are under the custody of ASH [Atascadero State Hospital], they are *held* under custody by peace officers within the facility. Notwithstanding the fact that ASH is under the jurisdiction of the Department of Mental Health, inmates transferred there for treatment pursuant to section 2684 are confined just as if they were in prison; it is the duty of law enforcement officers employed by the hospital to prevent them from leaving the premises. Officers of state hospitals under the jurisdiction of the Department of Mental Health are empowered to take such action, for they “are peace officers whose authority extends to any place in the state for the purpose of performing their primary duty” [pursuant to] §830.38.

In reaching a contrary conclusion, the trial court relied on dicta in *In re Bennett* (1969) 71 Cal.2d 117, 120 [77 Cal. Rptr. 457, 454 P.2d 33], to the effect that inmates are under the custody of ASH while they are being treated there. Aside from the fact that cases are not authority for propositions not considered, we do not quarrel with the proposition that section 2684 inmates are located under the custody of ASH. Rather, we simply recognize that custody, as contemplated by section 4573.6, refers to the *individuals* within an institution who have the authority to prevent the inmates from leaving. At ASH, that authority lies with the hospital administrator (who also holds the power conferred on peace officers) and, by extension, the peace officers within the hospital’s employ.

People v. Superior Court (Ortiz) (2004) 115 Cal. App. 4th 995, 1002-1003 (citations omitted, bracketed terms inserted).

1 Accordingly, POST's stated reasons for denying Detective McCullough the relief he
2 requested cannot be said to constitute any legitimate government interest. See Ewing v.
3 California (2003) 538 U.S. 11, 29 (recognizing "the State's public-safety interest in
4 incapacitating and deterring recidivist felons"); Bankers Life & Cas. Co. v. Crenshaw, 486 U.S.
5 71, 82 (1988) (recognizing "the State's interest in conserving judicial resources"). Granting
6 rights and privileges to certain peace officers serving in this state, while denying those same
7 rights and privileges to other peace officers who perform *the same duties*, simply because they
8 do not happen to be employed by, for example, a city or county law enforcement agency
9 demonstrates a lack of any "rational connection" between the rule and the governmental
10 interest. Mauro v. Arpaio (9th Cir. 1999) 188 F.3d 1054, 1059–1060.

11 The constitutional infirmity here is manifest as POST's application of its regulations
12 virtually ensures that a peace officer, despite many years of dedicated service by he or she to
13 California citizens will not be able to advance that career solely because of the whether the law
14 enforcement agency for whom they work is not one that POST deems is a traditional agency.
15 Such an application and promulgation of such rules is simply not rational. While it is true that
16 "a classification does not fail rational-basis review because it is not made with mathematical
17 nicety or because in practice it results in some inequality" (see Aleman v. Glickman (9th Cir.
18 2000) 217 F.3d 1191, 1201, *quoting*, Heller v. Doe ex rel. Doe (1993) 509 U.S. 312, 321), this
19 is not a situation where POST is promulgating and applying rules where the risk of inequality is
20 minor or slight. To the contrary, POST's rules are consigning whole sectors of the law
21 enforcement community to second-class status. Accordingly, where as here, no conclude that
22 Navarro has not met his "conceivable basis which might support' the POST's decision exists,
23 the relief requested by Detective McCullough should be granted in its entirety. Los Coyotes
24 Band of Cahuilla & Cupeno Indians v. Jewell (9th Cir. 2013) 729 F.3d 1025, 1039.

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27 //

1 **VI. POST'S IMPLEMENTATION OF AND/OR THE REGULATIONS AND**
2 **STATUTES THEMSELVES VIOLATE BOTH THE FEDERAL AND STATE**
3 **DUE PROCESS CLAUSE**

4 "The touchstone of due process is fundamental fairness." Salas v. Cortez (1979) 24
5 Cal.3d 22, 27; see also Gagnon v. Scarpelli (1973) 411 U.S. 778, 790. Further, a property
6 interest is defined as 'a legitimate claim of entitlement to [a benefit]." Blank v. Kirwan (1985)
7 39 Cal.3d 311, 319. The right to engage in a profession may entitle a person to procedural due
8 process Endler v. Schutzbank (1968) 68 Cal.2d 162, 168-170. Moreover, legislative
9 classifications discriminating against a suspect class will be overturned absent a compelling
10 state interest. Sail'er Inn, Inc. v. Kirby (1971) 5 Cal.3d 1, 16-22.

11 As shown *supra*, the right to have the fair opportunity to obtain, maintain and advance in
12 one's profession --- here, as a law enforcement officer --- is a fundamental right that is a
13 constitutionally cognizable property interest given that law enforcement agencies use POST
14 guidelines for such hiring, retention and advancement policies.

15 Here, it is undisputed that POST Certificates are critical for a peace officer to advance in
16 the profession and law enforcement agencies often rely on same to hire, retain (including fitness
17 for duty) and promote their sworn officers according to POST guidelines. See Diffey v.
18 Riverside County Sheriff's Department (2000) 84 Cal.App.4th 1031, 1034, *disapproved on*
19 *other grounds*, Colmenares v. Braemar Country Club, Inc. (2003) 29 Cal.4th 1019, 1031
20 (County Of Riverside sheriff relies on POST recommendation that the color vision of deputy
21 sheriff candidates be undertaken using two kinds of color vision tests); Quinn v. City of L.A.
22 (2000), 84 Cal. App. 4th 472, 477 (probationary patrolman terminated by LAPD due to hearing
23 impairment; letter from agency stated "You were medically removed from the Department for
24 failing to meet the requirements established by the California Commission on Police Officer
25 Standards and Training (POST)...[T]he Department must rely upon the standards established
26 by POST regarding the selection and training of peace officers." Indeed as explained on
27 POST's website:

28 //

1 The Professional Certificate Program fosters education, training, and
2 professionalism in law enforcement; raises the level of competence of law
3 enforcement officers; and fosters cooperation between the Commission, its clients,
4 and individuals. The Commission, through the POST Certificates Unit, awards
5 professional certificates comprised of the Basic, Intermediate, Advanced,
6 Supervisory, Management, Executive, Reserve Officer, Public Safety Dispatcher,
7 and Records Supervisor certificates.

8 <https://www.post.ca.gov/certificates.aspx>.

9 POST is authorized to apply its regulations in a manner that does not disenfranchise
10 Detective McCullough. See Penal Code §13511.3 (“The commission may evaluate and approve
11 pertinent training previously completed by any jurisdiction's law enforcement officers as
12 meeting current training requirements prescribed by the commission pursuant to this chapter.
13 The evaluations performed by the commission shall conform to the standards established under
14 this chapter.”) That POST failed to exercise this clearly established authority to grant the relief
15 requested by Detective McCullough, which would have helped ensure his access to a property
16 right, *e.g.*, an exception or the requested Certificate, demonstrates that POST violated
17 fundamental due process.

18 **VII. CONCLUSION**

19 Based on the foregoing, Appellant TERENCE MCCULLOUGH respectfully requests
20 that POST set aside the decision of the Executive Director and grant Detective McCullough's
21 appeal as fully requested therein, or alternatively, under the provision of POST's Administrative
22 Manual, Section B, Regulation 1008 (b)(3) in its entirety.

23 Respectfully Submitted,

24 Dated: May 24, 2017

25 BY:

26 ESTELLE & KENNEDY, APLC

27 MICHAEL L. KENNEDY

28 DANIELLE K. LITTLE

Attorneys For Appellant

TERENCE MCCULLOUGH

1 **PROOF OF SERVICE**

2
3 STATE OF CALIFORNIA
COUNTY OF SAN BERNARDINO }

4
5 I am employed in the County of San Bernardino, State of California. I am over the age
6 of 18 years and not a party to the within action, my business address is 400 N. Mountain Ave.,
7 St. 101, Upland, CA 91786. On May 24, 2017, I served the foregoing document described as:
APPEAL BRIEF OF APPELLANT TERENCE MCCULLOUGH on the interested parties
in this action by delivering () the original (X) a true copy thereof to:

8 Scott Loggins, Assistant Executive Director
9 Standards and Development Division
Commission on POST
10 860 Stillwater Road, Suite 100
West Sacramento, CA 95605-1630
11 Email: scott.loggins@post.ca.gov
12 Desk line: (916) 227-2807

13 [] **VIA FACSIMILE TRANSMISSION:** I transmitted the above documents by
14 facsimile transmission to the FAX telephone number listed for each party above listed above
with a fax machine and obtained confirmation of complete transmittal thereof.

15 [] **VIA U.S. MAIL:** I am "readily familiar" with the firm's practice of collection and
16 processing correspondence for mailing. Under that practice it would be deposited with U.S.
17 postal service on that same day with postage thereon fully paid at Los Angeles, California in
the ordinary course of business. I am aware that on motion of the party served, service is
18 presumed invalid if postal cancellation date or postage meter date is more that one day after
date of deposit for mailing in affidavit.

19
20 [] **VIA PERSONAL DELIVERY:** I caused such envelope to be delivered by hand to
the addressee(s) listed herein.

21
22 [X] **VIA OVERNIGHT DELIVERY:** I served such envelope or package to be delivered
23 on the same day to an authorized courier or driver authorized by the express service carrier to
receive documents, in an envelope or package designated by the express service carrier.

24
25 Executed on May 24, 2017, at Upland, California.

26
27 BY:

ARLENE AGUILERA