RECEIVED APR 26 2007

FILED
APR 25 2007
RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

MARCIANO PLATA, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER, et al.,

Defendants.

NO. C01-1351 TEH

CLASS ACTION

ORDER GRANTING RECEIVER'S MOTION FOR ONE TIME LIMITED WAIVER OF CALIFORNIA GOVERNMENT CODE SECTION 19080.3

United States District Court
For the Northern District of California

The Court is in receipt of the Receiver's Motion for One Time Limited Waiver of California Government Code § 9080.3, filed April 6, 2007, and supporting declarations. The Receiver seeks this limited, one-time waiver in order to permit 22 Pharmacy Technicians to complete their previously authorized, limited-term appointments.

On April 11, 2007, the Court ordered the parties to respond to the Receiver's motion. Plaintiffs filed a timely Statement of Non-Opposition. Defendants filed a late "Response"[1] stating that they "agree that a waiver of state law is needed to allow 'the existing pharmacy appointments set to expire on June 30, 2008. . . to remain limited-term employees until the funding approved by the Legislature for their positions expires on June 30, 2008.'" Defs.'

[1] Defendants' response was filed five days late, and only after being contacted by the Court. The parties are informed, and warned, that, in the future, the Court will construe a failure to timely respond as a statement of non-opposition.

Response at 2. They further state that they "support the Receiver's effort to obtain this waiver." *Id.*[2]

DISCUSSION

As explained in the Receiver's motion, the California Department of Corrections and Rehabilitation ("CDCR") obtained funding in 2004 for 53.5 two-year "limited term" Pharmacy Technician positions to address serious staffing deficiencies in CDCR prison pharmacies around the state. Although CDCR stated that it would conduct a statewide study during the two-year period to further determine and justify its staffing requirements for pharmacy technicians it failed to undertake the promised study. Nonetheless, funds were approved for the 2006-07 budget to undertake such a study, and the Pharmacy Technician positions were approved for an additional two-years. Notwithstanding a number of obstacles to recruitment, *see* Mot. at 5, the Receiver has filled 31 of these positions. *See* Exhibit to Mynhier Dec. ("List of Limited-Term Pharmacy Technician Positions") (Filed April 10, 2007).

The Receiver has learned, however, that state law requirements would operate to prevent 22 of the 31 Pharmacy Technicians from completing their terms. Specifically, a restriction in Government Code § 19080.3 would require 22 Pharmacy Technicians to be terminated after expiration of the original two-year term, notwithstanding the fact that the Legislature has extended the funding for those positions for an additional two years. Accordingly, the Receiver seeks "a limited, one-time waiver of Government Code § 19080.3 for the purpose of permitting the 22 Pharmacy Technicians with appointments that are funded until June 30, 2008 to continue as limited-term employees until that date." *See* Mot. at 7.

---

[2] Defendants also note that they "do not take a position on the specific facts and/or arguments in the Receiver's Motion." Response at 2. They do not, however, identify any inacurracy in the motion or object to any specific statement of fact or argument.

United States District Court
For the Northern District of California

The Receiver's request is governed by this Court's February 14, 2006 Order which provides in pertinent part as follows:

> The Receiver shall make all reasonable efforts to exercise his powers, as described in this Order, in a manner consistent with California state laws, regulations, and contracts, including labor contracts. In the event, however, that the Receiver finds that a state law, regulation, contract, or other state action or inaction is clearly preventing the Receiver from developing or implementing a constitutionally adequate medical health care system, or otherwise clearly preventing the Receiver from carrying out his duties as set forth in this Order, and that other alternatives are inadequate, the Receiver shall request the Court to waive the state or contractual requirement that is causing the impediment.

February 14, 2006 Order at 5.

As the Receiver states, "[n]o one seriously disputes the fact that the CDCR pharmacy program is in a state of abject disrepair." *see* Mot. at 3, and that an adequate pharmacy program is essential to a minimally functioning medical delivery system. Nor is it disputed that the Receiver has undertaken an aggressive program to remedy the pharmacy system and that pharmacy technicians are central to this program, which requires "maximizing the utilization of Pharmacy Technicians so that pharmacists are freed to perform much needed clinical functions." *Id.* at 4. In short, Pharmacy Technicians "are essential in the routine processing and delivery of pharmaceuticals"and without them, "daily services provided by the pharmacist would be. . . severely impacted . . . and create a void in pharmacy services that cannot be immediately overcome." *See id.* at 4, and Ex. 2 (Decl. of Dr. Glenn Johnson).

As such, the Court is satisfied that the Pharmacy Technicians at issue fill an essential role in the Receiver's efforts to remedy the pharmacy system and thus the constitutional deficiencies in the delivery of medical care. At the same time, there are no adequate alternatives for obtaining the critical services provided by the 22 Pharmacy Technicians should they be prematurely terminated. Shifting their duties to others would undermine the effectiveness of pharmacy remedial efforts. Nor is making such employees permanent a viable option given that the entire pharmacy management system is undergoing a restructuring and adding permanent positions in certain geographic locations at this point in

United States District Court
For the Northern District of California

time would undermine the ability of the Receiver to effectively manage the pharmacy remedial process.

Given all of the above, the parties' agreement that a waiver is warranted in this case, and the entire record herein, the Court finds that the requested limited, one-time waiver of Government Code § 19080.3 is appropriate and that other alternatives are inadequate. Accordingly, the Court HEREBY WAIVES Government Code § 19080.3 for the limited, one-time purpose of permitting the 22 Pharmacy Technicians with appointments in positions that are funded by the Legislature until June 30, 2008 to continue as limited-term employees until that date.

IT IS SO ORDERED.

Dated: 4/24/07

THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

PLATA et al,

Plaintiff,

v.

SCHWARZENEGGER, et al,

Defendant.

_____/

Case Number: CV01-01351 TEH

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on April 25, 2007, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

Alton G. Burkhalter
Burkhalter Michaels Kessler & George LLP
2020 Main Street, Suite 600
Irvine, CA 92614

Caroline N. Mitchell
Jones Day
555 California Street
26th Floor
San Francisco, CA 94104

Charles J. Antonen
California Department of Justice
Office of the Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102

Donald Howard Specter
Prison Law Office
General Delivery
San Quentin, CA 94964

Jerrold C. Schaefer
Hanson Bridgett Marcus Vlahos & Rudy LLP
425 Market Street, 26th Floor
San Francisco, CA 94105-2173

John Hagar
Judge's Reading Room
450 Golden Gate Ave
18th Floor
Law Library
San Francisco, CA 94102

Martin H. Dodd
Futterman & Dupree LLP
160 Sansome Street, 17th Floor
San Francisco, CA 94104

Paul B. Mello
Hanson Bridgett Marcus Vlahos & Rudy LLP
425 Market Street, 26th Floor
San Francisco, CA 94105

Robert Sillen
California Prison Receivership
1731 Technology Drive, Suite 700
San Jose, CA 95110

Samantha D. Tama
California State Attorney General 's Office
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

Steven Fama
Prison Law Office
General Delivery
San Quentin, CA 94964

Warren E. George
Bingham McCutchen LLP
Three Embarcadero Center
San Francisco, CA 94111-4066

Dated: April 25, 2007

Richard W. Wieking, Clerk
By: R.B. Espinosa, Deputy Clerk