

1
2
3
4
5 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
7
8

9
10 MARCIANO PLATA, et al.,
11 Plaintiffs,

12 v.

13 ARNOLD SCHWARZENEGGER,
14 et al.,
15 Defendants.

NO. C01-1351 TEH
CLASS ACTION

ORDER RE RECEIVER’S MOTION
FOR WAIVER OF STATE LAW RE
RECEIVER CAREER EXECUTIVE
ASSIGNMENTS

16
17
18 This matter comes before the Court on the Receiver’s Motion for Waiver of State Law
19 Re Receiver Career Executive Assignments. By this motion, the Receiver requests that the
20 Court (1) “[o]rder the Receiver to commence the design [of] and establish a program to hire
21 and retain 250 Receiver Career Executive Assignment (“RCEA”) appointees,” and (2) waive,
22 for the purpose of establishing such program, certain provisions of the California
23 Government Code that would otherwise govern the hiring of the RCEA appointees and
24 preclude the Receiver’s proposed program. *See* Receiver’s Amended Motion For Waiver of
25 State Law Re Receiver Career Executive Assignments (“Amended Mot.”) at 22.

26 Defendants have filed a Statement of Non-Opposition. Plaintiffs do not oppose the
27 Receiver’s proposed program in principal but contend that more details about the program
28 should be required at this juncture. They urge the Court to deny the motion and direct the
Receiver to re-submit it accompanied by additional information. The State Personnel Board

1 (“SPB”), which is not a party, but was invited to submit a response in the capacity of amicus
2 curiae, has raised concerns regarding the constitutionality of the Receiver’s proposal. For the
3 reasons explained below, the Court defers ruling on the Receiver’s motion and directs the
4 Receiver and the SPB to meet and confer consistent with this Order.

5
6 BACKGROUND

7 The genesis for this motion is the severe void in qualified health care executive level
8 managers within the California Department of Corrections and Rehabilitation (“CDCR”).
9 Indeed, when this Court held evidentiary hearings in 2005, it became clear that the CDCR
10 was content to operate without any functioning leadership in medical services – a startling 80
11 percent of higher level management positions in the CDCR Health Care Services division
12 were vacant. *See* October 3, 2005 Findings of Fact and Conclusions of Law (“Findings of
13 Fact”) at 7. As this Court analogized, “[t]his is akin to having a professional baseball team
14 with only a relief pitcher and no infielders.” *Id.* Further, after hearing essentially uncontested
15 evidence of serious systemic failings in virtually every area of health care management, the
16 Court readily found that “[t]he leaders of the CDCR medical system lack the capability. . . .
17 necessary to deliver adequate health care, much less fix the abysmal system that now exists.”
18 *Id.*

19 Moreover, this lack of leadership capability extends beyond the central and regional
20 levels and into the individual prisons. Then Acting Director of Health Care Services for the
21 CDCR, Dr. Renee Kanan, conceded that “the CDCR lacks an adequate system to manage and
22 supervise medical care, both in the central office and at nearly all of its prisons.” *Id.* at 5.
23 This combination of factors – “the absence of regional management, coupled with
24 incompetent prison staff”– led court expert Dr. Joseph Goldenson to describe the situation as
25 the “blind leading the blind.” *Id.* at 7-8.

26 Not surprisingly, the lack of adequate medical leadership has profound consequences
27 for the delivery of medical care:
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A further result of this non-supervision is that doctors responsible for patient death and morbidity receive little if any discipline from supervising physicians. . . . Beyond the obvious problem of condoning malpractice and allowing incompetent doctors to remain on staff, the leadership vacuum and lack of discipline also fosters a culture of non-accountability and non-professionalism whereby ‘the acceptance of degrading and humiliating conditions [becomes] routine and permissible.’ . . . No organization can function for long when such a culture festers within it, and it has become increasingly clear to the Court that this is a major factor in the current crisis.

Findings of Fact at 15 (citations omitted).

When the Receiver began his remedial efforts in 2006, the CDCR had taken no steps to improve the situation. Instead the Receiver found a “pervasive lack of effective medical management throughout the CDCR system.” Am. Mot. at 2. Specifically, he found that personnel expected to assume leadership positions within medical health care lacked “qualifications, training, and in some instances, competence. . . [which] has created a culture of incompetence and non-performance.” *Id.* at 5 (quoting Receiver’s First Bi-Monthly Report). These problems have been reinforced by an agency that has consistently viewed health care as a dispensable item rather than a core competency. Findings of Fact at 6; *see also* Am. Mot. at 11-14 (detailing inadequate minimum requirements for leadership positions within medical health care services).

Indeed, after initially assessing the “utter disarray in the management, supervision, and delivery of [medical health] care,” the Receiver concluded it was necessary to began assuming direct management of medical health care related administrative programs. Am. Mot. at 3; Receiver’s Third Bi-Monthly Report at 7-9; Fourth Bi-Monthly Report at 49-52. The Receiver further concluded that curing the constitutional deficiencies in this case will require medical health care executives who are “qualified and willing to accept the challenge” of changing a “deeply entrenched culture of non-accountability and substandard care.” Am. Mot. at 6. He further determined, however, that there are “no, or virtually no current State employees with the skills, commitment and experience needed to take on the daunting task of managing the workings of the prison health care system.” Receiver’s Reply

1 at 3; Hagar May 25, 2007 Dec. in Support of Receiver’s Am. Mot. (“Hagar Dec.”) ¶ 6. As
2 such, limiting the Receiver to this pool of employees “to effectuate massive restructuring and
3 to change attitudes in order to comply with the Court’s directives, [would render] his
4 remedial mission. . . a mission impossible.” Am. Mot. at 8.

5 In his motion, the Receiver seeks permission to hire up to 250 “career executive
6 appointees” to remedy the gross inadequacies in the current management and supervision of
7 the medical health care delivery system. He proposes a new medical health care
8 management structure, which would be instituted at each prison (consisting of four to five
9 health care executives/ administrators), along with supporting regional and central office
10 administrative positions. *See* Am. Mot. at 9 and Ex. 1. He proposes that the new appointees
11 be state civil service employees so that they can be integrated into the state system upon
12 dissolution of the Receivership. *See e.g.* Receiver’s Reply at 6. He further proposes,
13 however, that the applicant pool be open to any person (rather than limited to current civil
14 service employees or persons eligible for civil service employment) and that all such
15 appointees serve “at-will” (i.e. such employees could be terminated at any time for any
16 reason that is not unlawful). *See* Amended Mot. at 17. He further states that he “intends to
17 work with the State Personnel Board and the Department of Personnel Administration
18 (“DPA”) to develop job descriptions and duties, qualifications, classifications and salary
19 ranges and intends to utilize a competitive . . . process to fill the positions.” Receiver’s
20 Reply at 4. Hagar Dec. at ¶¶ 7, 19.

21 As noted above, the Receiver seeks approval to (1) commence this program, and (2) a
22 waiver of five sections of the California Government Code. He asserts that waiver of these
23 sections is both necessary and sufficient to permit the proposed program to proceed under
24 California law.

25

26 LEGAL STANDARD

27 The Court’s Order Appointing Receiver, provides that the “Receiver shall make all
28 reasonable efforts to exercise his powers, as described in this Order, in a manner consistent

1 with California state laws, regulations, and contracts, including labor contracts.” See Feb.
2 14, 2006 Order at Section II (D). The Order further provides, however, that the Receiver
3 may request a waiver of state law in the event such waiver becomes necessary and other
4 alternatives are inadequate:

5
6 In the event, however, that the Receiver finds that a state law, regulation,
7 contract, or other state action or inaction is clearly preventing the Receiver
8 from developing or implementing a constitutionally adequate medical health
9 care system, or otherwise clearly preventing the Receiver from carrying out his
10 duties as set forth in this Order, and that other alternatives are inadequate, the
11 Receiver shall request the Court to waive the state or contractual requirement
12 that is causing the impediment.

13 *Id.*

14 DISCUSSION

15 A. Receiver Career Executive Appointments

16 As explained above, the Receiver seeks to hire medical health care executives/
17 administrators who would be classified as civil service state employees but (1) could be
18 selected from inside or outside the civil service, and (2) would serve “at will.” The Court
19 wholeheartedly agrees with the Receiver that, given the findings discussed above, remedying
20 the unconstitutional medical conditions within the CDCR will necessarily require an infusion
21 of new medical care executives/administrators who are well qualified and committed to
22 revamping the current dysfunctional system and establishing a culture of competence and
23 professionalism.

24 The Court is equally convinced that the Receiver can only succeed in this goal if he is
25 able to hire medical health care executives/administrators through an open, competitive
26 process that includes applicants from either inside or outside the civil service system. As the
27 Court’s findings above underscore, such flexibility will be critical to any effort to bring the
28 medical system into constitutional compliance. Indeed, there is no dispute on this issue from
any party or amicus. See e.g. SPB Response at 1 (“The [SPB] understands and supports the
Receiver’s need to recruit highly skilled and competent personnel to ensure success in

1 restructuring the healthcare system with . . . (CDCR)"). Nor is there any dispute that state
2 laws and inaction are clearly preventing the Receiver from taking such action and that no
3 lesser alternative exists that would enable him to fill the ranks of desperately needed health
4 care executives/administrators with well qualified individuals in a timely and effective
5 manner.

6 The Receiver's proposal, however, to combine hiring outside the civil service system
7 with permanent at-will status raises concerns. The Receiver contends that his proposal can
8 be accomplished by making one minor change to an existing state civil service classification:
9 the Career Executive Assignment ("CEA"). The CEA is a high-level, policy-influencing
10 position within the state civil service. It was created in 1963 "to give scope to younger civil
11 service employees possessing extraordinary ability and initiative, and to enhance the ability
12 of the policy forming heads of state agencies to perform efficiently the tasks for which the
13 public holds them accountable." *Professional Engineers in California Government v. State*
14 *Personnel Board*, 90 Cal.App.4th 678, 685 (2001) (citation omitted). While it appears that
15 the positions proposed by the Receiver would be "policy influencing" positions, eligibility
16 for appointment to a CEA is limited to state employees who have permanent civil service
17 status, with the exception of certain political exempt employees and legislative employees.
18 Calif. Gov't Code §§ 18546-47, 18990, 18992-93, 19889.3; 2 Cal. Code Reg. §§ 548.70,
19 548.145; *Professional Engineers*, 90 Cal. App.4th at 686, 692. As the Receiver points out,
20 CEAs can be terminated from their CEA position on 20 days notice; they are entitled,
21 however, to return to the civil service and their attendant civil service protections. 2 Cal.
22 Code Reg. § 548.145.

23 In short, the primary feature of the CEA program is that it is designed for existing
24 permanent civil service employees. Cal. Gov't Code § 18546 ("Career executive' means an
25 employee appointed from ... a list of persons with permanent status in the civil service who
26 are available for career executive assignments . . ."). The fact that a small category of non-
27 civil service, state employees (legislative employees and certain political exempt employees)
28 are also eligible for such positions does not undermine this fact. Thus the Receiver's

1 proposal to create a new “Receiver Career Executive Assignment” position (or “RCEA”) –
2 by waiving state law requirements so as to permit an open applicant pool for CEA positions –
3 involves more than a minor change to the CEA program.

4 Of more importance, however, is the fact that the Receiver’s proposal to combine the
5 “at will” aspect of the CEA position with an open applicant pool implicates State
6 constitutional limits on positions that are exempt from the civil service. The two primary
7 features of civil service employment are (1) selection through the civil service system and (2)
8 procedural protections governing terminations or adverse employment actions. The
9 California Constitution provides that state employment shall consist of the state civil service
10 except for certain positions which are exempt from the civil service system. Cal.
11 Constitution, Art. 7, §§ 1(a)-(b); *Professional Engineers*, 90 Cal. App. 4th at 683-85. Such
12 “exempt” positions, however, are delineated in the Constitution, and are limited to specific
13 categories.¹ The hallmark of exempt positions is that they can be filled without regard to
14 civil service requirements (i.e. through an open applicant pool) and that the exempt employee
15 serves “at will.” As such, the proposed RCEA positions are not materially distinguishable

16
17
18
19
20
21

22
23 ¹ See Calif. Const., Art. 7, § 4 (“Exemptions”). The exempt categories include
24 persons employed by the State Legislature, judicial appointees and employees, state officers
25 directly appointed by the Governor (along with one deputy for each appointee), members of
26 boards and commissions, members of the militia while engaged in military service, and
27 officers and employees of the University of California. See also *Professional Engineers*, 90
28 Cal.App. 4th at 678, 684-85 (“Broadly speaking, these are elected or confidential
employees, such as judicial, gubernatorial and legislative employees, elected officials, a
specified number of deputies of elected officers, and board and commission members or
deputies; university officials and employees are also exempted.”).

1 from exempt positions.² The Receiver has not, however, sought a waiver of the
2 Constitutional limits on exempt positions.

3
4 B. The Need for Further Discussions Between the Receiver and the SPB

5 For the reasons discussed above, the Court finds that state law or inaction is clearly
6 preventing the Receiver from carrying out his duties to the extent that it precludes him from
7 remedying the severe void in qualified leadership of the medical health care system through
8 the hiring of qualified individuals from outside the civil service system. At the same time,
9 the proposal to hire such employees on an “at will” basis creates significant constitutional
10 concerns and the Court is not willing to waive provisions of the State Constitution at this
11 juncture.

12 The Court appreciates the Receiver’s concern, however, that the full panoply of civil
13 service protections – which normally are triggered after a six month probation period – may
14 unduly interfere with the remedial process. The Receiver is charged with the enormous task
15 of restructuring the system of managing and supervising an extremely complex medical
16 delivery system involving close to 175,000 inmates spread over 33 prisons across the State.
17 In order for such a massive restructuring to proceed efficiently the Receiver will need some
18 additional flexibility so that he can make adjustments as needed. *See* Hagar Dec. at ¶ 6. The
19 Court is not satisfied that the SPB’s suggested alternatives in their opposition to the motion
20 adequately address this need.

21 Both the Receiver and the SPB have acknowledged their desire to work together to
22 address the problems faced by the Receivership. The Court is confident that if the parties
23 approach the issue with a fresh perspective and think creatively, they will be able to arrive at

24 _____

25
26 ² The Receiver argues that the proposed RCEA positions are distinguishable from
27 exempt positions because no competitive process is required for exempt positions and the
28 Receiver intends to utilize a competitive process to fill the proposed RCEA positions. The
fact, however, that a competitive process is not *required* for exempt positions does not
detract from the overriding fact that the proposed RCEA positions would be exempt from the
core features of civil service employment.

1 a new, joint proposal that is consistent with this Order and satisfies the legitimate concerns
2 raised by the Receiver and the SPB. Accordingly, the Court defers ruling on the Receiver’s
3 motion and will instead direct the Receiver and the SPB to meet and confer as soon as
4 practical and to submit a joint report to the Court within 45 days³ as to whether they are able
5 to agree upon a mechanism for hiring medical health care executives/administrators in the
6 CDCR which satisfactorily addresses the needs of the Receiver in a manner consistent with
7 the California Constitution.

8
9 C. Number of Positions

10 The Receiver’s proposal seeks permission to hire up to 250 medical health care
11 executives/administrators. The Receiver, however, has not adequately documented the need
12 for 250 positions, which he acknowledges is just an estimate at this point and may change
13 with time and experience. *See* Hagar Dec. ¶ 8. The Receiver also emphasizes that he plans
14 to move slowly and in phases in order to ensure that the new management structure is
15 effectively implemented, starting with a pilot program at three prisons and regional level
16 nursing and physician positions:

17 The Receiver does not intend simply to hire [250] people in RCEA positions
18 and throw them at the problem. Instead, the Receiver will work closely with
19 the SPB and DPA to develop appropriate job descriptions and qualifications,
20 civil service classifications and salary ranges for the positions and then develop
21 a competitive examination process to produce a pool of qualified candidates.
22 And, then as the Receiver has emphasized repeatedly, he will test and refine the
23 RCEAS on a pilot basis in limited settings before applying them systemwide.
24 Thus, RCEA positions will first be tested in three prisons this Summer and in
25 senior nursing and physician positions at the regional level. In this fashion, the
26 job descriptions, qualifications, functions and lines of authority can be
27 developed and refined before the full complement of positions are filled
28 throughout the system.

24 Receiver’s Reply at 10 (citations omitted); *see also* Hagar Dec. ¶¶ 7, 18-19.

26 _____

28 ³ This schedule is intended to permit any potential agreement to be considered by the full SPB at its scheduled August 7-8, 2007 meetings.

1 The Court agrees with the Receiver that this “step at a time” approach is the
2 responsible manner in which to proceed. Consistent with this approach, however, the Court
3 concludes that it is also appropriate to approve the hiring program on a phased basis as well.
4 Accordingly, any new proposal shall seek immediate approval to proceed with sufficient
5 positions to fully staff the pilot program at the three prisons as well as the regional nursing
6 and physician positions, along with leave to seek future approval of additional positions as
7 the Receiver obtains more information regarding the specific needs of the remedial process.

8
9 D. Specific Job Qualifications Requirements and Descriptions of Duties

10 Plaintiffs argue that the Receiver should be directed to re-submit his motion with
11 specific “job qualification requirements, a description of their duties, and an overall
12 statewide medical manager organizational structure for the proposed RCEA positions.”
13 Plaintiffs’ Response at 8. The Receiver responds that it would be premature to require him to
14 “craft all 250 RCEA positions before it is clear what precise functions and responsibilities
15 will be most effective for RCEAS generally, and within each prison and region specifically.”
16 Reply at 10-11. The Receiver has also emphasized that he intends to work with the DPA and
17 SPB regarding the development of appropriate job descriptions, qualifications, and salary
18 ranges. Given this, the Court agrees with the Receiver that requiring further details at this
19 point in time is not efficient and may hamper the remedial process. Further, given the
20 unprecedented nature and scope of the project at issue it will be necessary to permit the
21 Receiver some flexibility in this area. The Court will, however, accept the Receiver’s
22 suggestion that he file two special status reports regarding this project, within 90 and 180
23 days from approval, which shall provide as much detail regarding the matters requested by
24 Plaintiffs as is available at the time.

1 CONCLUSION

2 Accordingly, and in light of the above, it is HEREBY ORDERED that:

3 1. The Receiver and the SPB shall meet and confer as soon as practical and, within 45
4 days of the date of this Order, submit a joint report to the Court as to whether the Receiver
5 and SPB are able to agree upon a mechanism for hiring medical health care executives/
6 administrators for the CDCR that is consistent with this Order, and if so, they shall include
7 the agreement for review.

8 2. The parties shall file any response to the joint report no later than 7 calendar days
9 from the date the Receiver and SPB electronically file their joint report. The matter shall
10 then be deemed submitted on the papers and the Court will endeavor to issue further
11 instructions or rule as quickly as practical.

12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IT IS SO ORDERED.

Dated: July 3, 2007



THELTON E. HENDERSON
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California