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9 UNITED STATES DISTRICT COURT  
10 NORTHERN DISTRICT OF CALIFORNIA

11  
12 MARCIANO PLATA, et al.,

13 *Plaintiffs,*

14 v.

15 ARNOLD SCHWARZENEGGER, et al.,

16 *Defendants.*  
17  
18

Case No. C01-1351 TEH

**RECEIVER'S REPORT RE PHYSICIAN  
CLINICAL COMPETENCY  
DETERMINATION POLICIES AND  
PROCEDURES**

19 I.

20 INTRODUCTION

21 On May 23, 2008, this Court granted in part and denied in part the Receiver's Motion for  
22 Waiver of State Law Regarding Physician Clinical Competency. Docket # 1205. The Court  
23 ordered the Receiver or his designees to meet and confer with the parties and amici curiae (*i.e.*,  
24 UAPD and SPB) to revise the proposed policies based on the Court's rulings and to submit  
25 revised policies governing physician clinical competency determinations on or before June 20,  
26 2008, together with an updated proposed order. This Report is intended to comply with the  
27 Court's order. The proposed revised policies and procedures are attached as Exhibit 1 to the  
28



1 ordered SPB, as part of the meet and confer process, to take the lead in developing an  
2 implementation plan with respect to the new policies and procedures.

3 **III.**

4 **THE RECEIVER'S EFFORTS TO COMPLY WITH THE MAY 23 ORDER**

5 **A. The Receiver Has Met And Conferred Regarding Revised Policies And**  
6 **Procedures**

7 The May 23 Order required the Receiver to "meet and confer with the parties and both  
8 amici [*i.e.*, SPB and UAPD] . . . to revise the proposed policies based on the Court's rulings."  
9 *Id.*, p. 16. The Receiver has done so.

10 Linda Buzzini, in-house counsel for the Receiver, prepared draft proposed policies and  
11 procedures, together with a graphic flow chart to describe the peer review process, and forwarded  
12 them to the SPB and UAPD on June 2, 2008 and to the parties on June 3, 2008. She also  
13 forwarded suggestions for the implementation plan to assist SPB. On June 4, 2008, Ms. Buzzini  
14 and the Receiver's outside counsel, Martin Dodd, met and conferred at great length, and in great  
15 detail, with SPB Executive Officer Suzanne Ambrose, SPB Chief ALJ Paul Ramsey and SPB  
16 Chief Counsel Elise Rose. The discussions centered on the draft documents provided to SPB on  
17 June 2, 2008. SPB did not provide any proposed revisions or an implementation plan for the  
18 Receiver's consideration and discussion at the June 4, 2008 meeting. Buzzini Decl., ¶¶ 3-4.

19 On June 5, 2008, Ms. Buzzini met and conferred with the UAPD leadership, its Executive  
20 Officer and its attorney regarding the proposed policies and the corresponding flow chart. *Id.*, ¶ 5.

21 As a result of the meetings with *amici* on June 4 and 5, 2008, Ms. Buzzini prepared a  
22 further draft of the policies and procedures, and a corresponding flow chart, which she provided  
23 to SPB and UAPD on June 6, 2008. On June 11, 2008, UAPD notified Ms. Buzzini that the  
24 revised policies and procedures were acceptable. *Id.*, ¶ 6.

25 On June 11, 2008, Ms. Buzzini contacted SPB Chief Counsel Elise Rose to inquire as to  
26 when the Receiver could expect to receive a proposed policy and implementation plan from the  
27 Board. Ms. Rose replied "perhaps tomorrow." SPB did not forward any proposed policies on  
28 June 12, 2008. Ms. Buzzini then provided the draft policies to which UAPD had agreed and the

1 corresponding flow chart to the *Plata* parties and solicited their suggestions, comments,  
2 objections and statements of non-opposition. Neither plaintiffs nor defendants have objected or  
3 commented on the proposed policies and procedures. *Id.*, ¶¶ 7-8.

4 On June 13, 2008, SPB Chief Counsel Elise Rose forwarded the Board's proposed  
5 policies and procedures, which consisted of changes to two parts of the policies the Receiver had  
6 developed. *See* Exh. 3 to Buzzini Decl. For reasons described below, the Receiver concluded  
7 that SPB's proposals were inconsistent with the Court's order. However, SPB's proposed  
8 policies stimulated the Receiver to clarify the provisions pertaining to SPB review of JRC  
9 decisions and the procedure to be followed after SPB had completed its review. These further  
10 modifications were forwarded to the parties and amici on June 19, 2008. UAPD agreed to them;  
11 the parties filed statements of non-opposition. Docket ## 1257, 1260. The Receiver got no  
12 response from the SPB. Buzzini Decl., ¶¶ 9-10.

13 Exhibit 1 to Ms. Buzzini's declaration reflects the final version of the Receiver's  
14 proposed policies to which UAPD has agreed, to which the parties have expressed no objection,  
15 but as to which SPB has *not* agreed. *Id.* The Receiver requests that Exhibit 1 be adopted as the  
16 order of the Court.

17 **B. The Proposed Policies And Procedures Submitted Herewith Have Addressed**  
18 **The Modifications Required By The May 23 Order.**

19 In its May 23 Order, this Court adopted the bulk of the policies and procedures initially  
20 proposed by the Receiver in his motion. May 23 Order, pp. 1, 9. Based on the Receiver's  
21 expressed willingness to compromise during the lengthy proceedings in connection with this  
22 matter, the Court issued a number of rulings that required modifications to the policies. Below,  
23 the Receiver sets out the specific provisions of the Court's Order requiring modifications to the  
24 original policies and identifies the specific policies set forth in Exhibit 1 which have been drafted  
25 to address those provisions.

26 1. The substantial evidence standard of review will apply to SPB review of the decisions  
27 of the JRC. May 23 Order, pp. 9, 12-14.

28 The Receiver has addressed this issue at page 28 of Exhibit 1 to Ms. Buzzini's

1 declaration under the subtopic “State Personnel Board Scope and Standard of Review.”

2 2. Staff privileges, as defined by California Business & Professions Code § 804(a)(4),  
3 shall be made a condition of employment for physicians providing clinical care in the  
4 CDCR, May 23 Order, p. 14.

5 The Receiver has addressed this issue directly at page 4 of Exhibit 1 to Ms. Buzzini’s  
6 declaration under the subtopic “Condition of Employment” and indirectly at pages 4 and 26,  
7 respectively, under the subtopics “Scope of JRC and SPB Review” and “Role of Judicial Review  
8 Committee.”

9 3. ALJs presiding over privileging hearings may adjudicate affirmative defenses that the  
10 referral to a privileging hearing was motivated by retaliation for whistle blowing,  
11 unlawful bias or discrimination or a conflict of interest. May 23 Order, p. 8.

12 The Receiver has addressed this issue at pages 25-26 of Exhibit 1 to Ms. Buzzini’s  
13 declaration under the subtopic “Role of Administrative Law Judge.”

14 4. SPB ALJs may preside over privileging hearings if they receive special training in  
15 privileging matters. May 23 Order, p. 8.

16 The Receiver has addressed this issue at page 25 of Exhibit 1 to Ms. Buzzini’s  
17 declaration under the subtopic “Administrative Law Judge.”

18 5. If the Governing Body includes voting members who are not medically trained, the  
19 “great weight” standard for considering peer review findings may be inappropriate.  
20 May 23 Order, p. 16.

21 The Receiver has addressed this issue at page 21 of Exhibit 1 to Ms. Buzzini’s  
22 declaration under the subtopic “Weight Given to PPEC.”

23 6. The new policies and procedures should be drafted in such a fashion that re-drafting  
24 will be unnecessary once the prison medical health care system has been returned to  
25 state control. May 23 Order, p. 16.

26 The Receiver has addressed this issue by using the phrase “Receiver ([and][or] his  
27 designee[s])” in those instances where reference to the Receiver is found, so that the appropriate  
28 State official can be deemed a “designee” when responsibility for the system is returned to the

1 State. See Exhibit 1, page 3 (“Discovery and Testimony”); page 21 (“Composition of Governing  
2 Body”).<sup>1</sup>

3 IV.

4 STATUS OF THE IMPLEMENTATION PLAN AND THE RECEIVER’S  
5 PROPOSAL FOR PEER REVIEW DETERMINATIONS IN THE INTERIM

6 The Court ordered SPB to take the lead in preparing an implementation plan that includes  
7 deadlines for completing training of SPB ALJs who will be conducting evidentiary hearings;  
8 entering into a contract with CMAIMQ to provide a pool of physicians to sit on peer review  
9 panels; and hiring any additional SPB staff necessary to implement the proposed policies. May  
10 23 Order, pp. 16-17. Late in the day on Thursday, June 19, the SPB provided its first draft of an  
11 implementation plan. Exh. 5 to Buzzini Decl. The Receiver understands that the draft was not  
12 provided to UAPD or the parties. Buzzini Decl., ¶ 11.

13 The proposed implementation plan will require additional study, analysis and refinement.  
14 In the interim, until the Receiver is satisfied that SPB’s implementation plan is finalized,  
15 functional and responsive to the Court’s orders, the Receiver will administer the peer review  
16 process (e.g., scheduling hearings before a panel of independent physicians) pursuant to the  
17 procedures set forth in Exhibit 1, but with one exception: the unitary privileging and employment  
18 hearings will be conducted by ALJs employed by the Office of Administrative Hearings in place  
19 of SPB ALJs. In all other respects, including the conduct of hearings, the form of decisions  
20 submitted to the SPB and the standard of review, the new policies and procedures will be  
21 followed. UAPD has indicated its agreement with this interim process. Id. and Exh. 6 thereto.

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24 <sup>1</sup> The Court also affirmed that clinical privileges may not be revoked, as opposed to temporarily suspended, until  
25 after a physician has had a pre-deprivation opportunity to respond. May 23 Order, p. 14. The Receiver is fully in  
26 accord and the policies and procedures, as drafted, presume that revocation of privileges can only occur after a pre-  
27 deprivation hearing. Two other components of the May 23 Order require no particular discussion at this juncture.  
28 The Court stayed all pending privileging proceedings while the new privileging procedure is being refined and  
implemented. Id., p. 15. With respect to any pending case in which the statute of limitations for adverse action under  
California Government Code § 19635 may run as a result of the stay, the stay will take effect only if the physician  
waives the benefit of Government Code § 19635. Id. Finally, the Court rejected plaintiffs’ request that peer review  
proceedings be monitored by the Office of Inspector General. Id., p. 16.

## V.

**SPB'S PROPOSED POLICIES ARE INCONSISTENT WITH THE MAY 23 ORDER**

On June 13, 2008, counsel for the SPB forwarded proposed revisions to two parts of the policies: "Plata Professional Clinical Practices Peer Review and Disciplinary Hearing Policies And Procedures Overview" and "Appealing Final Proposed Actions To Judicial Review Committee and State Personnel Board." Exh. 3 to Buzzini Decl. In an accompanying e-mail, SPB's counsel provided her explanation of SPB's proposed revisions and concluded by stating, "If the Receiver does not agree with the above, then I guess we will again have to ask the court to clarify." Exh. 4 to Buzzini Decl.

From the beginning, as the Court noted, the Receiver has made it clear that the role of the JRC is to make "medical determinations *and* privileging decisions." May 23 Order, p. 7 (emphasis added). As this Court stressed, "peer review is just that: review by one's peers." Id., p. 13.

SPB's proposed revisions are inconsistent with Court's Order because they would confer on SPB decision making authority over who will treat patients in the prisons, and in the process undermine peer review. For example, the SPB's proposals would limit JRC decisions only to "findings of fact and conclusions as to whether the physician met the medical standard of care." Id. And the SPB struck the following language from the Receiver's version of the policies: "Privileging, and consequently, employment decisions adversely affecting employment status, grade level, benefits and/or wages which are appealed for an evidentiary hearing shall be decided by the Judicial Review Committee (JRC)." Exh. 3 to Buzzini Decl., p. 5. In short, under SPB's version of the policies, the ultimate conclusion, *i.e.*, the remedy of whether privileges would be revoked and employment lost, would effectively remain with the SPB.

Elsewhere, SPB proposed to include a provision that it would "review matters adversely impacting *privileging*, employment status, grade levels, benefits and/or wages." Id., p. 29 (emphasis added). If the Board concluded that a privileging decision was not supported by substantial evidence, then the Board could "make its own findings based on the evidentiary record . . . ." Id., p. 5. The upshot of these policy proposals, when considered together, is that

1 the Board is seeking to reserve for itself ultimate decision making over medical findings and  
2 privileging and, therefore, who treats patients.

3 Under the procedures originally proposed by the Receiver, the JRC decides issues  
4 pertaining to privileging and employment and the ALJs “would make evidentiary and procedural  
5 rulings.” May 23 Order, p. 7. Based on representations made by the Receiver during subsequent  
6 proceedings, the Court ordered that the ALJs’ role would also be the adjudication of affirmative  
7 defenses, “including contentions ‘that the referral to hearing by the peer review body was  
8 motivated by retaliation for whistle blowing, unlawful bias or discrimination or a conflict of  
9 interest.’” *Id.*, p. 8. Though the ALJs’ role was thus expanded, it was not at the expense of the  
10 adjudicatory role of the JRC.

11 SPB’s proposed policies, however, would broaden its role and the role of its ALJs beyond  
12 the scope authorized by this Court’s Order. Under the SPB version of the policies “[t]he ALJ’s  
13 proposed decision shall decide *all* issues presented in the appeal, including, but not limited to,  
14 any affirmative defenses.” Exh. 3 to Buzzini Decl., p. 27. It goes without saying that neither the  
15 Receiver nor this Court anywhere suggested that the ALJs could decide all issues in a privileging  
16 case. The Board also proposes that it “shall review proposed decisions from SPB administrative  
17 law judges and shall rule upon factual and legal issues that are not dependent upon medical  
18 expertise *as well as* affirmative defenses . . . .” *Id.*, p. 5 (emphasis added). This latter policy  
19 could be construed to include credibility determinations and other fact finding not strictly  
20 “medical” in nature, but which are necessary to the JRC determination as to whether privileges  
21 should be revoked, and employment lost, in order to protect patients.

22 The inconsistencies between the SPB’s proposed policies and this Court’s Order are  
23 subtle, but that does not mean they are insignificant. A close review of the SPB’s proposed  
24 policies reveals that they threaten to eviscerate peer review and undermine the Receiver’s  
25 proposed process, a process which this Court stated struck “an appropriate balance between  
26 ensuring that the system effectively gives meaning to the findings of the peer review panel and  
27 ensuring that state employees’ rights are adequately protected.” May 23 Order, p. 13.

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**VI.**

**CONCLUSION**

The Receiver requests that the Court adopt the policies in Exhibit 1 to Ms. Buzzini's declaration as the Order of the Court and enter the proposed order submitted herewith.

Dated: June 20, 2008

FUTTERMAN & DUPREE LLP

By:                   /s/ Martin H. Dodd                    
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Attorneys for Receiver J. Clark Kelso

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies as follows:

I am an employee of the law firm of Futterman & Dupree LLP, 160 Sansome Street, 17<sup>th</sup> Floor, San Francisco, CA 94104. I am over the age of 18 and not a party to the within action.

I am readily familiar with the business practice of Futterman & Dupree, LLP for the collection and processing of correspondence.

On June 20, 2008, I served a copy of the following document(s):

**RECEIVER'S REPORT RE PHYSICIAN CLINICAL COMPETENCY DETERMINATION POLICIES AND PROCEDURES**

by placing true copies thereof enclosed in sealed envelopes, for collection and service pursuant to the ordinary business practice of this office in the manner and/or manners described below to each of the parties herein and addressed as follows:

       BY HAND DELIVERY: I caused such envelope to be served by hand to the address designated below.

  X   BY MAIL: I caused such envelope(s) to be deposited in the mail at my business address, addressed to the addressee(s) designated below. I am readily familiar with Futterman & Dupree's practice for collection and processing of correspondence and pleadings for mailing. It is deposited with the United States Postal Service on that same day in the ordinary course of business.

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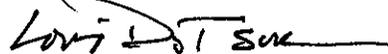
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21  
22 I declare that I am employed in the offices of a member of the State Bar of this Court at  
23 whose direction the service was made. I declare under penalty of perjury, under the laws of the  
24 united State of America, that the above is true and correct.

24 Executed on June 20, 2008 at San Francisco, California.

25 

26 Lori Dotson  
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