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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

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11 MARCIANO PLATA, et al.,

Case No. C01-1351 TEH

12 *Plaintiffs,*

13 v.

14 ARNOLD SCHWARZENEGGER, et al.,

**RECEIVER'S REPORT AND
SUPPLEMENTAL MEMORANDUM IN
SUPPORT OF MOTION FOR WAIVER
OF STATE LAW RE PHYSICIAN
CLINICAL COMPETENCY
DETERMINATIONS**

15 *Defendants.*

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1 Receiver Robert Sillen (the "Receiver") submits this Report and Supplemental
2 Memorandum with respect to his pending motion for a waiver of State law as it pertains to
3 physician clinical competency determinations.

4 **I. INTRODUCTION**

5 The Receiver's motion effectively poses the following question: Who should determine
6 if physicians are qualified to practice medicine in the State prisons the State Personnel Board
7 ("SPB") or physicians through the process of peer review? It has long been accepted in the
8 private sector that physicians themselves, through peer review, determine who is qualified to
9 continue to practice in clinical settings. To that end, State law includes well-articulated
10 procedural protections to ensure that peer review decisions are made carefully, fairly and
11 confidentially to protect both the public and the affected physician. Cal. Bus. & Prof. Code
12 § 809.1 *et seq.*; Cal. Evid. Code § 1157.

13 This Court found that "repeated gross departures from even minimal standards of care"
14 resulted in the shocking number of deaths in the prisons and that peer review of CDCR
15 physicians – the primary mechanism by which physician incompetence is investigated and
16 remedied – was "either bogus or [] not done at all." Findings of Fact and Conclusions of Law
17 ("FFCL"), filed herein October 5, 2005, pp. 10-13, 16. This Court has also said that "a primary
18 component of a minimally acceptable correctional health care system is the implementation of
19 procedures to review the quality of medical care being provided." *Madrid v. Gomez*, 889 F.Supp.
20 1146, 1258 (N.D. Cal. 1995); *see also id.* at 1208-1210. The Receiver concurs and believes that
21 meaningful peer review is essential to bringing the quality of care in the prisons up to
22 Constitutional standards. But if a peer review system is to be meaningful and effective, it must
23 have appropriate consequences.

24 Since at least August 2006, the Receiver has been working with various stakeholders to
25 craft policies and procedures that will meet the legitimate needs and interests of physicians, the
26 Union of American Physicians and Dentists ("UAPD"), SPB and, most of all, the inmate-patients
27 who bear the brunt of unconstitutional care. The Receiver's proposed policies and procedures,
28 including certain modifications thereto discussed below, represent an appropriate compromise

1 among these various interests, while remaining faithful to the Receiver's core principle – a
2 principle as to which he believes there can be no compromise: **doctors who are determined**
3 **through a rigorous peer review process to be unqualified to practice medicine in the**
4 **prisons will not be permitted to practice medicine in the prisons.** The Receiver is firmly of
5 the view that constitutionally-adequate care demands nothing less than strict adherence to this
6 principle.

7 Unfortunately, SPB disagrees. In opposition to this motion, the SPB has asserted that *it* is
8 the body that not only should, but must, decide whether physicians may treat patients in the
9 prisons. SPB contends that its position is enshrined in the California constitution and that this
10 Court may not implement the Receiver's proposed changes without waiving provisions of the
11 State constitution. Thus, while giving lip service to the importance of peer review, SPB has
12 staked out positions intended to ensure the status quo, a status quo in which peer review is
13 functionally meaningless and effectively without consequences.

14 The Receiver believes that this matter is now ripe for decision, that SPB's arguments
15 should be rejected and that this motion should be granted.

16 **II. SUMMARY OF PRIOR PROCEEDINGS IN CONNECTION WITH THIS**
17 **MOTION**

18 Given the amount of time that has passed since this issue was originally before the Court,
19 the Receiver summarizes below the procedural history of this motion.

20 The Receiver filed this motion on April 25, 2007, requesting both a waiver of certain
21 statutes applicable to State personnel procedure and adoption of the proposed policies and
22 procedures attached as Exhibit 3 to the motion. The Court issued an order on May 1, 2007,
23 soliciting responses to the motion from the parties and amici curiae SPB and UAPD by May 22,
24 2007.

25 On May 22, 2007, plaintiffs and defendants each filed a statement of non-opposition to
26 the motion, UAPD filed a statement in support of the Receiver's motion, and SPB filed a
27 response in opposition to the Receiver's motion. Docket ## 679, 680-1, 682, 683. On June 5,
28 2007, the Court requested replies to SBP's response by June 15, 2007. Docket # 702.

1 On June 15, 2007, the Receiver and plaintiffs filed replies to SPB's opposition. Docket ##
2 709-712, 715. On June 21, 2007, SPB requested leave to file a response to the Receiver's reply,
3 which the Court granted on June 27, 2007. Docket ## 725, 728. In the meantime, UAPD filed a
4 response to the Receiver's and plaintiffs' replies. Docket # 726. On July 6, 2007, the SPB filed
5 its supplemental opposition to the Receiver's motion. Docket # 763. The motion has been
6 pending since that time. In the intervening months, the Receiver continued to discuss with SPB
7 possible approaches to achieve his goals. Supplemental Declaration of Linda Buzzini ("Supp.
8 Buzzini Decl."), filed herewith, ¶¶ 2-6.

9 III. SUMMARY OF ISSUES IN DISPUTE

10 In his moving papers, the Receiver identified two distinct, but related problems which his
11 proposed procedures are designed to address: (1) peer review of physicians in the prisons has no
12 "teeth" because under current law and procedure a physician who loses his/her privileges remains
13 employed unless and until terminated through existing civil service procedures; and (2) the peer
14 review and employment action processes are independent of one another, resulting in time-
15 consuming, duplicative procedures and potentially inconsistent determinations. Together, these
16 two problems threaten the Receiver's efforts to provide constitutionally-adequate care because
17 his ability to rid the prisons of unqualified physicians is substantially impaired.

18 Prior to bringing the motion, the Receiver spent the better part of a year working with
19 SPB and UAPD to develop policies and procedures that would adequately address these two
20 concerns, while protecting the procedural due process rights of State-employed physicians.
21 Originally, as discussed in Section IV below, SPB made helpful suggestions that would have
22 gone far toward accomplishing the Receiver's primary goals. Unfortunately, SPB declined to
23 follow through on those suggestions, opting instead for the status quo. UAPD, on the other hand,
24 worked hard to assist the Receiver in developing procedures that protected physicians' rights to
25 due process before loss of employment, but permitted the Receiver to terminate physicians who
26 were determined by peer review to be unqualified.

27 In brief, the Receiver has proposed that the Professional Practice Executive Committee
28 ("PPEC") will be empowered to investigate whether particular physicians have fallen below the

1 standard of care and, if so, to recommend that the physician be referred for hearing to determine
2 if she/he will retain the privilege to practice in the prisons. Meanwhile, the CDCR may
3 recommend that the physician be terminated if privileges are revoked. A single evidentiary
4 hearing on the privileging and employment questions will be presided over by an Administrative
5 Law Judge (“ALJ”) employed by the Office of Administrative Hearings (“OAH”) and who is
6 specially-trained in privileging cases. The ALJ will make evidentiary and procedural rulings.
7 The privileging determination will be made by a Judicial Review Committee (“JRC”) comprised
8 of three doctors chosen from a list provided by the California Medical Association Institute for
9 Medical Quality (“CMAIMQ”). Consistent with State law governing peer review, members of
10 the JRC will be subject to voir dire and challenge by the physician. The JRC will decide whether
11 the physician will continue to enjoy privileges to practice medicine in the prisons and, if not, the
12 termination would be sustained. Either party may appeal to the SPB, which may review the
13 determination as to whether the physician should be terminated from State service, but it will not
14 review whether the physician is privileged to treat patients in the prisons.

15 SPB reacted with hostility to the Receiver’s proposal and expressed one primary, and two
16 related, but subsidiary concerns. First and foremost, SPB contended that Art. VII, Section 3(a) of
17 the California constitution mandates that SPB be the final arbiter of whether physicians are
18 privileged to treat patients in the prisons and, therefore, the Receiver’s proposal requires a waiver
19 of that provision of the State constitution.¹ Second, SPB argued that the Receiver’s proposed
20 procedures did not protect the rights to due process in employment guaranteed to State-employed
21 physicians. Third, SPB argued that its own generalist ALJs were better qualified to preside over
22 loss of privilege cases than even ALJs employed elsewhere in State service who had been
23 specially-trained to handle such cases. Together, these three contentions reflected SPB’s belief
24 that its routine method of review and its existing procedures were necessary – indeed, required by
25 the State constitution – in cases involving physicians found unqualified to practice medicine in
26 the prisons.

27 ¹ Section 3(a) provides: “The [State Personnel] Board shall enforce the civil service statutes, and by a majority of its
28 members shall prescribe probationary periods and classifications, adopt other rules authorized by statute, and review disciplinary actions.”

1 The Receiver disagreed vigorously with each of SPB's contentions. The Receiver argued
 2 that no waiver of the State constitution is necessary; the proposed procedures provide full
 3 constitutional due process – a position with which UAPD expressly agreed; and there is no
 4 reason in law or logic why SPB-employed ALJs should preside over the hearings, if other,
 5 specially-trained, State-employed ALJs are available. All that said, the Receiver expressed a
 6 willingness to accommodate certain of SPB concerns. The Receiver's willingness to
 7 compromise is limited, however, by his fundamental contention that if the peer review process is
 8 not the determinant of a physician's qualification to practice medicine in the prisons then, not
 9 only will peer review itself be a meaningless exercise, there is a substantial risk that unqualified
 10 physicians will continue to endanger inmate lives.

11 **IV. THE RECEIVER SUGGESTS TWO ALTERNATIVE APPROACHES TO**
 12 **RESOLVING THE ISSUES ON THIS MOTION**

13 With the foregoing as backdrop, the Receiver submits that there are two avenues
 14 potentially available to this Court to help the Receiver achieve his goal: (1) granting his motion
 15 in its entirety, together with an explicit acknowledgement by this Court that the State constitution
 16 is not implicated by the Receiver's proposal; or (2) granting the motion in part by waiving the
 17 statutes at issue and adopting the Receiver's proposed procedures, but deferring decision on
 18 whether a waiver of the State constitution is required unless and until a case is presented in
 19 which a physician has lost the privilege to practice in the prisons through the peer review
 20 process, but SPB disagrees and orders that the physician be reinstated to treat patients in CDCR
 21 prisons. The Receiver has submitted herewith two Proposed Orders reflecting these alternatives.

22 **A. The Court Should Grant The Receiver's Motion In Full.**

23 **1. The Court can reach the result requested by the Receiver without**
 24 **waiver of any provision of the State constitution.**

25 The bottom line for the Receiver is that a physician's loss of privileges to treat patients in
 26 the prisons should be decided via the peer review process, *not* by SPB, and that loss of privileges
 27 should preclude the physician from further practice in the prisons. The Court can reach this
 28

1 result without having to accept the SPB's invitation – or challenge – to waive Art. VII, § 3(a) of
2 the State constitution.

3 The underlying premise of SPB's argument is that a loss of privileges amounts to
4 discipline that triggers SPB's duty to "review" disciplinary actions. This argument is a construct
5 that is not mandated by California constitutional law. There is no question that what constitutes
6 employee discipline under State law is not governed by Article VII of the State constitution, but
7 rather is exclusively a legislative function. *See* Cal. Gov't Code § 19570 (defining "adverse
8 action"). Moreover, the ballot argument for the 1934 amendment to the State constitution that
9 established the current civil service system stated, in part: "Having by constitutional mandate
10 prohibited employment on any basis except merit and efficiency . . . the Legislature is given a
11 free hand in setting up laws relating to personnel administration for the best interests of the State,
12 including the setting up of causes of dismissal such as inefficiency, misconduct and lack of
13 funds." *Pacific Legal Foundation v. Brown*, 29 Cal.3d 168, 183 (1981) (emphasis in original
14 removed).

15 The Legislature has, in fact, set forth a list of "causes of discipline" in California Gov't
16 Code § 19572. It is undisputed that "loss of physician privileges" is not among the 24
17 enumerated causes for discipline listed in Section 19572.² Indeed, in August 2006, long before
18 the Receiver brought this motion, the SPB's general counsel suggested that the Receiver's goals
19 could be achieved by treating continued privileges to practice as an employment qualification,
20 the loss of which would result in loss of employment as a "non-punitive" termination under Cal.
21 Gov't Code § 19585.³ *See* Exh. 4 to Receiver's Motion. In effect, under SPB's original
22
23

24 ²Of course, if the Legislature had specifically identified loss of privileges as either "discipline" or as a "cause for
25 discipline," this Court could waive that provision of State law without constitutional implications as suggested by
26 SPB.

27 ³ Section 19585 provides in part: "(b) An appointing power may terminate, demote, or transfer an employee who
28 fails to meet the requirement for continuing employment that is prescribed by the board . . . in the specification for
the classification to which the employee is appointed. . . . In prescribing requirements for continuing employment,
the board may specify standards to ensure that the requirements are consistently applied. The board may also specify
when separation from a position for failure to meet requirements for continuing employment also constitutes
separation from former positions that the employee held in other classifications that have the same or greater
requirements for continuing employment."

1 suggestion, privileges would be treated like other preconditions to continued employment, such
2 as the doctor's license to practice medicine. SPB's general counsel wrote:

3 You can take appropriate action against a substandard physician through non-
4 disciplinary process with some changes to existing specifications and/or statutes.
5 Government Code section 19585 provides for the non-punitive termination,
6 demotion or transfer of an employee "...who fails to meet a requirement for
7 continuing employment that is prescribed by the board . . . in the specification for
8 the classification to which the employee is appointed." Clearly, the state can
9 invoke this statute once a physician's license is pulled. To utilize the non-
10 punitive termination process for physicians in the process of license revocation,
11 however, the specification and minimum qualifications for physician classes
12 would need to be amended to include, for example, a requirement that the
13 physician has not had any staff privileges finally revoked pursuant to a peer
14 review process. . . . After the peer review process, CDCR could serve notice of a
15 non-punitive termination and the physician could appeal to SPB only on the
16 grounds that the physician does in fact meet the qualifications in the specification.

11 Exh. 4 to Receiver's Motion, p. 2.

12 Because discipline and cause for discipline are defined by statute, and because continued
13 privileges to practice can potentially be treated as a qualification of continued employment under
14 Gov't Code § 19585, it follows that there is no State *constitutional* impediment to the Receiver's
15 proposal. The only issue is whether and to what extent State statutes or regulations may need to
16 be waived to accomplish the Receiver's goals.

17 Had SPB followed through on its proposal that qualifications for CDCR-employed
18 physicians be amended to include continued privileges to practice in the prisons, the Receiver's
19 motion might have been avoided. Unfortunately, SPB backed away from its proposal apparently
20 based on a view that a loss of privileges determined by one's peers constitutes "disciplinary
21 action" under State law. *See* Exh. 1 to Supp. Buzzini Decl.

22 SPB concedes, however, that a determination by, for example, the Department of Motor
23 Vehicles that an employee's driver's license should be revoked for work-related driving
24 infractions can form the basis for a non-punitive termination if the employee must have a valid
25 license to work. Similarly, as indicated above, SPB acknowledges that a doctor whose license
26 has been revoked by the California Medical Board on grounds of incompetence would
27 nevertheless be subject to a non-punitive termination. *See* Exh. 4 to Receiver's Motion, p. 2;
28 Docket # 763, p. 7. The Receiver submits that a determination by the Receiver's proposed JRC –

1 an independent body, the members which will be selected from names supplied by the CMAIMQ
2 – that a physician is not qualified to practice and should lose privileges is not dramatically
3 different from the license revocation situations just described. In each instance, a body other
4 than the employer has made the critical decision regarding the necessary precondition to
5 continued employment, even though the underlying conduct, standing alone, might be considered
6 “cause for discipline.”

7 **2. The Receiver’s proposal will incorporate both peer review and**
8 **meaningful SPB review.**

9 It is important to emphasize here that the Receiver is not proposing that loss of privileges
10 be treated as subject only to the non-punitive termination rules. Instead, the Receiver
11 understands that in most instances questions of clinical performance will be at the core of the
12 privileging decision. Thus, just as the peer review process in the private sector requires “fair
13 procedures” that carry the indicia of procedural due process (Cal. Bus. & Prof. Code § 809.1 *et*
14 *seq.*), the Receiver proposes to ensure that CDCR doctors faced with loss of privileges are
15 accorded appropriate due process. As such, the Receiver believes that the peer review process is,
16 and ought to be treated as, a kind of hybrid between the pure “qualification” case, as to which a
17 non-punitive termination process would apply, and an employee discipline case that would be
18 subject to typical SPB review.

19 Under the Receiver’s approach the peer review body determines that a physician should
20 be referred for hearing regarding potential loss of privileges. The preliminary peer review
21 decision will then be the subject of a full evidentiary hearing before the JRC, a body independent
22 of the employer, utilizing the panoply of procedural protections set forth in the Receiver’s
23 proposed procedures. If the JRC concludes that privileges to practice in the prison should be
24 revoked, the JRC privileging determination will be not subject to review by SPB and the
25 physician will no longer be permitted to treat patients in the prisons. The Receiver has no
26 objection if SPB wishes to return the physician to the prisons in some other capacity or to permit
27 the physician to practice in some other part of CDCR or another State agency. But the physician
28 will not treat patients in the prisons.

1 But that need not be the end of the story, nor the limit of the SPB's review under the
 2 Receiver's approach. The ALJ who presides over the hearing, in addition to making procedural
 3 and evidentiary rulings, will be available to adjudicate affirmative defenses raised by the
 4 physician that may not be strictly addressed by the peer review process. For example, if the
 5 physician contends that the referral to hearing by the peer review body was motivated by
 6 retaliation for whistle blowing, unlawful bias or discrimination or a conflict of interest, there is
 7 no reason why that issue should not be decided by the ALJ, subject to typical SPB review, since
 8 those are the types of employment-related defenses commonly raised and decided in civil service
 9 proceedings. If, having heard all the evidence, the ALJ concludes that the employee has proven
 10 by a preponderance of the evidence that the privileging referral came about because of an
 11 unlawful motivation, then the privileging decision by the JRC could be nullified.⁴

12 Thus, the "bifurcated" decision making process built into the Receiver's proposal will not
 13 be unwieldy or illogical; both SPB and the JRC will address those matters within their particular
 14 areas of expertise. In the fraction of cases that raises broader issues of unlawful motivation, SPB
 15 will retain the power to order reinstatement.

16 **3. There is no constitutional requirement that SPB-employed ALJs**
 17 **preside over the evidentiary hearings and the Receiver's proposed**
 18 **procedures afford adequate due process to affected physicians.**

19 The remaining issues that SPB originally raised in its opposition can be dispensed with
 20 quickly.

21 SPB originally contended that, as a matter of constitutional law, only its ALJs could
 22 preside over the evidentiary hearings to determine a physician's entitlement to practice in the
 23 prisons. Why SPB took this position remains a bit of a mystery because there is no constitutional
 24 requirement that only ALJs employed by SPB preside over such hearings. Rather, Section 3(a)
 25 of Article VII of the California constitution provides only that SPB is to "review" employment
 26 discipline and, significantly, the drafters of that provision noted that the five-member SPB may
 27 not delegate its "review" function to others, such as Board staff. *See* Docket # 712, p. 6. It

28 ⁴ This approach is not unlike the burden shifting in employment discrimination cases or a trial judge's ability post-trial to overturn a jury verdict if warranted by the evidence.

1 follows that conducting administrative hearings does not constitute a “review” function within
2 the meaning of Article VII because ALJs routinely preside over administrative hearings as
3 provided by *statute*. *See, e.g.*, Cal. Gov’t Code § 19582(a); Cal. Gov’t Code § 18671; 2 Cal.
4 Code Regs. § 52. There is no constitutional impediment, therefore, to having ALJs employed
5 elsewhere in State service preside over such hearings. The Receiver understands, however, that
6 use of SPB-employed ALJs remains something of a point of principle for SPB. The Receiver is
7 willing to accept a modification of his proposed procedures to permit SPB-employed ALJs to
8 preside over privileging hearings in the manner otherwise provided in those procedures, as long
9 as the SPB ALJs receive special training in privileging matters.

10 With respect to SPB’s more generalized due process arguments, the Receiver does not
11 believe that SPB can or will seriously continue to contend that, insofar as physicians’ right to
12 procedural due process is concerned, his proposed procedures do not pass constitutional muster.
13 Significantly, UAPD is comfortable with – and indeed helped to craft – the procedural
14 protections in the Receiver’s proposal. *See* Docket # 679, p.2; Receiver’s Motion, pp. 14-15.
15 Doctors will be entitled to the full panoply of procedural rights required under State law with
16 respect to employment decisions, as well as procedural due process with respect to the
17 privileging decision. The Receiver’s procedures do not eliminate any procedural rights; instead,
18 his procedures eliminate the potential for duplication, delay and potential inconsistency in
19 determinations inherent in the current process. In recent communications with the Receiver, SPB
20 has not pressed its earlier due process arguments and presumably its concerns have been laid to
21 rest. *See* Exh. 1 to Supp. Buzzini Decl.

22 **4. The Receiver has adequately established that existing State law is**
23 **impeding meaningful peer review.**

24 At one point, SPB suggested that the Receiver had not adequately established that State
25 law was interfering with his ability to institute a meaningful peer review system and, therefore,
26 the waiver of State law requested by the Receiver was not appropriate. While in its more recent
27 pleadings and communications SPB has not continued to make this argument, the Receiver
28 addresses it here briefly out of an abundance of caution.

1 This Court has recognized that meaningful peer review is necessary to a constitutional
2 medical care system (*Madrid*, 889 F.Supp. at 1258) and that the current system of peer review in
3 California prisons is woefully inadequate. FFCL, p. 16. The current system of “peer review” – in
4 which peer review lacks any consequences and peer review determinations are entirely
5 independent of decisions about whether a doctor may remain employed – exists *because of State*
6 statutes and procedures governing the civil service system. *See generally* Receiver’s Motion.
7 Indeed, the letter from SPB’s general counsel in August 2006 concedes as much. Exh. 4 to
8 Receiver’s Motion. The Receiver submits, therefore, that the operation of State law is one of the
9 key impediments to the meaningful peer review system the Receiver seeks to implement.

10 SPB had the opportunity early on to work within existing State law to bring about
11 changes to the qualifications for CDCR doctors so as to eliminate the barriers in the State civil
12 service system that effectively preclude a functioning peer review and privileging system; SPB
13 chose in the end not to do so. In light of that history, SPB should not now be heard to argue that
14 existing State law works just fine, is no impediment to the Receiver and needs no change.

15 **B. The Court Can Approve The Receiver’s Proposed Clinical Practice**
16 **Competency Policies And Procedures And Defer Decision On The**
17 **Constitutional Issue Posed By SPB Until Presented With A Proper Case.**

18 SPB continues to assert that privileging decisions should be subject to the review it
19 typically affords in discipline cases and that a waiver of Art. VII, § 3(a) of the State constitution
20 is necessary to implement the peer review process proposed by the Receiver. The Receiver
21 disagrees for all the reasons previously expressed in the proceedings on this matter and urges the
22 Court not only to grant his motion, but to do so with an a clear statement that no waiver of the
23 constitution is required. *See* Proposed Order submitted herewith. That said, the Receiver also
24 believes that it is not essential that this Court rule on the constitutional question at this point. If
25 the Court concludes that the Receiver’s clinical competency procedures may implicate Article
26 VII of the State constitution, then the Receiver suggests as an alternative that the Court grant the
27 Receiver’s motion, but expressly defer to another day the question of whether a waiver of the
28 constitutional provision is required. *See* Alternate Proposed Order submitted herewith.

CERTIFICATE OF SERVICE

The undersigned hereby certifies as follows:

I am an employee of the law firm of Futterman & Dupree LLP, 160 Sansome Street, 17th 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 January 7, 2008 I served a copy of the following document(s):

RECEIVER'S REPORT AND SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR WAIVER OF STATE LAW RE PHYSICIAN CLINICAL COMPETENCY DETERMINATIONS

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