

**RECEIVER'S WAIVER REQUESTS  
FACT SHEET**

**APRIL 2007**

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Robert Sillen, the federal-court appointed Receiver of the state's prison medical system filed a series of requests in April 2007 before U.S. District Court Judge Thelton E. Henderson to waive specific portions of state law to enable the process of lifting patient care up to constitutional standards to move forward.

The Receiver's decision to file the four motions – on April 6, 13, 17 and 25 -- came after one year on the job, careful study and early efforts to implement improvements in prison medical care. They address physician discipline, management personnel, pharmacy staffing and the Receiver's ability to enter into contracts on behalf of the California prison medical care system. In each case, Sillen asked Judge Henderson to take the narrowest, least intrusive action possible to allow the remedial efforts to happen in a timely manner. Here is information describing the narrow waiver requests and the court's actions.

**Judge Henderson:**

- **Granted the waiver regarding pharmacy staffing on April 25.**
- **Granted the waiver regarding contracting on June 4.**
- **Deferred ruling on the management personnel waiver on July 3, and approved the Receiver's agreement with the State Personnel Board September 11, making the waiver unnecessary.**
- **Is still considering the physician discipline waiver.**

For more detail, read the Receiver's motions for waivers of state law, and the Judge's corresponding orders, listed in date order on the California Prison Health Care Receivership web site at [http://www.cprinc.org/materials\\_plata.htm](http://www.cprinc.org/materials_plata.htm). The waivers also are summarized in the Receiver's Fifth Quarterly Report to the Court, which is posted on the web site under Court Materials.

**1. PENDING: Physician Discipline: Creating a Real-World Clinical Environment**

This waiver – Receiver's motion filed on April 25 – would allow the Receiver to establish a clinically based, peer reviewed system of physician discipline in the California Department of Corrections and Rehabilitation (CDCR) that would mirror practices in the health care industry.

“The basic problem with CDCR peer review, as it presently exists, is that it has no teeth,” the motion states. “In terms of the continued employment of physicians who have

engaged in the most serious of malpractice or deliberate misconduct, peer review results are entirely meaningless.”

Under the Receiver’s proposal, which was arrived at in consultation with the Union of American Physicians and Dentists (UAPD), the possession of privileges to practice medicine in a California state prison would become a condition of employment. In future, when the CDCR physicians’ peer review body, the Professional Practices Executive Committee (PPEC), revokes the privileges of incompetent doctors, they would lose their jobs. Today, the removal of privileges does not trigger termination, but begins a long and unwieldy bureaucratic process that can drag on for years and result in physicians remaining employed despite having lost privileges for incompetence. That final determination is made not by clinicians, but by members of the State Personnel Board (SPB).

“The ability to discipline physicians appropriately in order to protect the health and welfare of patients is essential to establishing a constitutionally adequate medical care system,” Sillen said. “This common sense notion has been maddeningly out of reach for the physician leaders in the system who are working hard to improve medical care and doctor performance.”

Under the proposed new system, CDCR physicians would be required to maintain privileges in order to practice medicine in California’s prisons, and the termination of both privileges and employment would be accompanied by due process. The clinical evaluation of physicians’ performance would be done by PPEC, which would make recommendations to CDCR’s Governing Body. That group, chaired by the Receiver’s Chief Medical Officer, would make a decision regarding both privileges and termination of employment. The physicians in question could appeal the action in a hearing presided over by a State Administrative Law Judge accompanied by a jury-like judicial review panel made up of independent primary care physicians. Either party could appeal the jury’s decision to the SPB, which would retain an appellate role that considers the employment – not clinical -- aspects of the physicians’ cases.

The Receiver requested that Judge Henderson issue an order establishing staff privileges as a condition of employment for physicians in CDCR; instruct the Receiver to begin implementing the new proposed peer review program; and waive state laws to allow the necessary changes to the current physician review and discipline process, including modification of the SPB’s role.

## **2. GRANTED: Contracting Practices: Streamlining the Receiver’s ability to enter into contracts to improve California’s prison medical system**

This waiver – Receiver’s motion filed on April 17 – streamlines the Receiver’s ability to enter into contracts on behalf of the state prison medical care system by waiving any requirement that the Receiver comply with state laws, rules, regulations and procedures governing the notice, bidding, award and protests of contracts necessary to implement a range of remedial projects. Instead, the Receiver requested that Judge Henderson approve a proposed substitute method of contracting, which would be transparent, fair and fiscally responsible. **Judge Henderson granted this waiver request on June 4.**

The pace of the state's complex, cumbersome contracting process is an impediment to fixing the state's prison medical system, where an average of one inmate per week dies due to inadequate care.

"The State's contracting process can actually take as long as two years from inception to the award of a contract and the State's seeming inability to speed the contracting process has contributed to the crisis in the prisons," the motion states.

This waiver would affect various contracts for 13 specific projects in areas including medical records, information technology, telemedicine, building of 5,000 new prison medical beds statewide, construction of the San Quentin Central Health Services building, recruitment and hiring of medical staff, emergency response, fiscal management and controls, the prison pharmacy turnaround project and others.

"No one questions the fact that, unless certain State contracting barriers are removed, the Receiver's carefully coordinated remedial plans will move forward, if at all, only at a glacial pace," the motion states.

For instance, the state's prison IT network is already at maximum capacity handling email alone and cannot also accommodate clinical or business systems, neither of which is currently in place. The Receiver must move forward at a faster pace than normal state contracting would allow in order to install appropriate systems for the handling and management of medical information. If the waiver is granted, Sillen plans to competitively bid the contract to manage a new IT unit within CDCR's *Plata* Support Division, using the proposed Receiver-contracting process.

The Receiver also must be able to enter into contracts with an overall program manager and planner in order to move forward the project to build 5,000 new prison medical beds statewide.

Similarly, the Receiver intends to engage consulting, recruitment and human resources firms to assist with filling the prisons' vast clinical and leadership vacancies. The first step to attracting sufficient numbers of qualified medical staff was taken last year, with the court-ordered salary increases. However, CDCR is not equipped to take on the enormous hiring task at hand. That work is essential to complete the job of adequately staffing the prison medical care system.

The Receiver's waiver request is limited to those state contracting rules that would apply to the 13 projects described in the motion. Sillen proposed an alternative process for contracting that would still achieve the State's goals of transparency, fairness and fiscal responsibility. The new program is spelled out in Judge Henderson's order granting the waiver request.

### **3. Judge Approved Agreement Between Receiver and SPB -- Management Personnel: Creating New Health Care Executive Leadership**

This waiver – Receiver's motion filed on April 13 -- would have allowed the Receiver to change 250 prison health care management positions into what the State calls Career Executive Assignments. The new positions would range from Directors of Nursing and

Chief Medical Officers at the institution level up to headquarters positions in the California Department of Corrections and Rehabilitation (CDCR) Sacramento office. The Court has previously found that there are very few competent managers and supervisors in the prison medical care system.

The State Personnel Board (SPB) opposed the waiver, and **Judge Henderson issued a July 3 order deferring a ruling on the Receiver's motion** and directing the Receiver and the SPB to meet on the proposal and submit a report to the Court within 45 days, indicating whether they are able to agree on a method for achieving the Receiver's goals to hire executives and managers in a manner consistent with the California constitution.

The Receiver's team and the SPB hammered out a deal to create prison health care executive positions that made the waiver unnecessary. **Judge Henderson approved the agreement on September 11.** Thanks to a lot of creativity and cooperation, the SPB and the Receivership have developed a new approach that will allow the Receiver to hire limited-term executives with full state benefits to help manage and lead the implementation of the Plan of Action. After two years of service, these executives can, at the Receiver's discretion, become permanent state employees. Lack of qualified managers has been a major factor in the devolution of prison medical care and a crippling problem in carrying out any remedial efforts.

#### **4. GRANTED: Pharmacy Staffing: Stabilizing Pharmacy Services**

This waiver – Receiver's motion filed on April 6 -- closed a technical loophole in state law that required 53.5 limited-term pharmacy technician positions in California prisons to be eliminated. **Judge Henderson granted this waiver request on April 25.**

The Legislature created the limited-term pharmacy technician positions as two-year temporary placements in January 2005, and although it had authorized their renewal through June 2008, California law still required the termination of the current group of two-year pharmacy technicians. The waiver allows this workforce – currently 31 pharmacy technicians -- to continue on the job for the next two years as authorized by the Legislature, preventing dangerous disruption to pharmacy operations and patient care.

Previous audits of the pharmacy system have found that the program lacks qualified staff in sufficient numbers. The Receiver has taken several steps to improve pharmacy operations, including raising pharmaceutical staff salaries and engaging Maxor National Pharmacy Services Corporation to take over management of the prison pharmacy system and lead a turnaround.

Judge Henderson waived the portion of state law that affects the existing limited-term pharmacy technicians, allowing them to remain employees until the funding approved by the Legislature for their positions expires on June 30 2008.

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