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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.

**SUPPLEMENTAL DECLARATION OF
LINDA BUZZINI IN SUPPORT OF
RECEIVER'S MOTION FOR WAIVER
OF STATE LAW RE CLINICAL
COMPETENCY DETERMINATIONS**

14 ARNOLD SCHWARZENEGGER, et al.,

15 *Defendants.*

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1 I, Linda Buzzini, declare as follows:

2 1. I am an attorney licensed to practice before all the courts of the State of California and
3 before this Court and employed as a staff attorney for Receiver Robert Sillen, specializing
4 in employment and labor relations matters. I make this declaration in support of the
5 Receiver's Motion for waiver of State law re clinical competency determinations. The
6 facts set forth herein are based on my own personal knowledge and, if called as a witness,
7 I could competently testify thereto.

8 2. As set forth in my original declaration filed herein, in the months prior to the filing of the
9 Receiver's motion, I and other members of the Receiver's staff met frequently with
10 representatives of the State Personnel Board ("SPB") in an effort to arrive at a peer
11 review procedure that would be acceptable to SPB and which accomplished the
12 Receiver's goals. Following the completion of the original briefing on the Receiver's
13 motion, the Receiver's Chief of Staff, John Hagar, and I continued to meet with SPB
14 representatives with the hope that an accommodation could be reached that was
15 satisfactory both to SPB and the Receiver. To that end, on August 24, 2007, Mr. Hagar
16 and I met with SPB Executive Officer Suzanne Ambrose to discuss alternatives which
17 would give meaning to the peer review process, and bring an end to the need for separate,
18 duplicative and time-consuming hearings before ending the employment of unqualified
19 physicians. To aid those discussions, I prepared a flow chart of an alternative process and
20 provided it to Ms. Ambrose. We also discussed having SPB adopt physician privileges as
21 a condition of employment pursuant to Government Code § 19585, as suggested by SPB
22 Chief Counsel, Elise Rose, as early as August 2006. Ms. Ambrose said she would
23 discuss these issues with the five-member SPB at its upcoming meeting on September 4,
24 2007.

25 3. Both before and after September 4, 2007, Ms. Ambrose and I had discussions about the
26 alternative process set forth in the flow chart I provided to her on August 24, 2007. The
27 flow chart reflected certain proposed changes to the original procedures submitted by the
28 Receiver to the Court. In particular, whereas the Receiver's original procedures called for

1 Administrative Law Judges (“ALJs”) employed by the Office of Administrative Hearings
2 to preside over the consolidated privileging and employment hearings, the Receiver now
3 offered to permit SPB ALJs to conduct the hearings if they received special training in
4 privileging matters.

5 4. Subsequent to September 4, 2007, I suggested to Ms. Ambrose that I attempt to prepare a
6 Stipulation Re: Motion for Waiver of State Law Re Physician Competency
7 Determinations in an effort to arrive at an agreement with SPB concerning a new process.
8 I spent a considerable amount of time drafting a detailed process with the goal of being as
9 responsive to the Board’s concerns as possible, while still giving meaning to peer review
10 and eliminating the current practice of duplicative hearings.

11 5. I sent a draft stipulation and proposed process to SPB on October 23, 2007. I believe this
12 material was discussed during closed session by the five-member SPB at its meeting on
13 November 5, 2007.

14 6. On November 16, 2007, I received a letter from SPB Chief Counsel, Elise Rose, a true
15 and correct copy of which is attached hereto as Exhibit 1. Ms. Rose informed me that
16 “the Board recognizes that you have made some concessions” and said that “the Board
17 agrees with the Receiver that there are potential benefits to consolidating the appeals of
18 loss of clinical privileges and discipline, given that they are based on the same set of
19 facts.” However, Ms. Rose then proceeded to reiterate SPB’s earlier objections to
20 altering the status quo. She said the Board took exception to the proposed process
21 because physicians provided by the California Medical Association Institute for Medical
22 Quality, rather than its own ALJs, will be charged with making finding of fact and
23 conclusions regarding the standard of care with respect to the privileging issue. Ms. Rose
24 informed me that the Board continued to insist that it must be able to review and take
25 action with regard to who is privileged to treat patients in the prisons. And, Ms. Rose
26 ended by stating that it was up to the Receiver to decide whether this represents an
27 impasse, meriting submission of the issue to the Court.

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EXHIBIT 1



CALIFORNIA STATE PERSONNEL BOARD

801 Capitol Mall • Sacramento, California 95814 • www.spb.ca.gov

ARNOLD SCHWARZENEGGER, Governor



November 16, 2007

Ms. Linda Buzzini
General Counsel
For Office of the Receiver
California Prison Health Care Receivership Corporation
501 J Street, Suite 605
Sacramento, CA 95814

Re: Proposed Stipulation Re: Motion For Waiver of State Law Re Physician
Clinical Competency Determinations

Dear Ms. Buzzini,

Having reviewed your October 23, 2007 draft of a "Stipulation Re: Motion For Waiver of State Law Re Physician Clinical Competency Determinations" and having shared your proposal with the State Personnel Board at its recent meeting, I have been asked to inform you that the Board recognizes that you have made some concessions, but continues to have serious concerns with both the process set forth in the proposed stipulation and your statement of the issue for the Court.

Probably most significant is the failure of the process to recognize that, under existing law, the revocation of clinical privileges and reassignment based on misconduct or poor performance constitutes "other disciplinary action" and would, on that basis, be appealable to the Board and subject to Board review.

Current law, as well as the stipulation itself, supports such an interpretation. The proposed "Referral and Intake" process set forth in the attachments to the Stipulation identifies disruptive conduct, unethical conduct, and failure to report substandard care as grounds for a loss of clinical privileges and ultimately reassignment. The Board has long held that reassignment based on performance issues constitutes "other disciplinary action" as that term is used in the statute that defines types of discipline that may be taken against state employees. (In the Matter of the Appeal by Carol DeHart (1994) SPB Dec. No. 94-22.) Thus, a loss of privileges based on those grounds and resulting in

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reassignment would be, standing alone, disciplinary action subject to Board review. The facts and law and evidence submitted at hearing in a case involving loss of privileges and reassignment would likely be so inextricably intertwined with any other disciplinary action (e.g. pay reduction, suspension, demotion, or dismissal) taken by the Receiver that, given the constitutional requirement that the Board review both disciplinary actions, the issuance of two separate decisions simply makes no sense.

The Board's specific concerns focus primarily on that point in the process when the physician suffers both a loss of clinical privileges and disciplinary action by virtue of a final decision of the Governing Board. The process provides the physician with the right to an appeal hearing regarding both the loss of privileges and other imposed disciplinary action. The SPB Administrative Law Judge (ALJ) is to sit with a panel of medical experts, denominated the "judicial review committee" (JRC) in hearing evidence on the misconduct underlying both the privileging action and the other imposed discipline. The Board agrees with the Receiver that there are potential benefits to consolidating the appeals of loss of clinical privileges and discipline, given that they are based on the same set of facts (See Proposed Stipulation, p. 2 line 27 through p. 3, line 9), and especially given the Board's role to review the privileging action and reassignment as "other discipline."

Yet, instead, the Receiver proposes a process that unconstitutionally eliminates the Board's review with respect to one of the consolidated disciplinary actions. The proposed process circumscribes the SPB ALJ's authority to such a point that the consolidation becomes almost meaningless. The JRC is charged with making final determinations as to factual findings and conclusions regarding the standard of care with respect to the privileging issue. Unless invited to do so by the JRC, the SPB ALJ, while presiding over the hearing, may not participate in deliberations, vote, comment, "or otherwise advise any person or entity regarding the privileging aspects of the case." (See Appealing Final Proposed Actions to Judicial Review Committee and State Personnel Board.) Nor would the ALJ's own findings or conclusions based on the evidence have any impact whatsoever on the result in the privileging case. Rather, the hearing will yield two separate decisions, one on the privileging action (drafted by the JRC unless the JRC asks the ALJ to draft it) and another on the other disciplinary case, drafted by the ALJ.

In rendering a proposed decision for Board review on the formal discipline, the ALJ would be required to either adopt the findings of the JRC, or decline to adopt them and render its own findings that would explain any deviation from the medical findings of the committee. Yet this requirement expressly conflicts with

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the directive that the ALJ not "...advise any....entity regarding the privileging aspects of the case." The ALJ's proposed decision would go to the Board for review, and presumably be subject to review by the superior court. The proposal is lacking detail on whether the JRC's "final and binding" decision on disciplinary loss of privileges would also be appealable to the courts.

This quasi-bifurcation of the hearing/decision process in the privileging and disciplinary cases is unconstitutional, unworkable and unwise for a number of other reasons. Most obviously, the proposed process defeats the purpose of a consolidated hearing by creating the risk of inconsistent decisions. The Receiver has already made it clear that if the JRC upholds revocation of the physician's clinical privileges, and the SPB ALJ revokes the dismissal and orders the physician reinstated to his former position, the Receiver does not intend to abide by the Board's decision to reinstate the physician to his or her prior position. Rather, the Receiver intends to reinstate the physician, if at all, to a non-clinical position, thereby imposing a second round of discipline, appealable to the Board. Thus, the fact that an SPB ALJ, trained in hearing medical cases and having the benefit of a panel of experts, reviews the discipline and finds that the physician's conduct did not fall below the standard of care becomes a meaningless review. The Board would have no authority to make the physician whole, a situation that results in a total emasculation of its constitutional review function. This, of course, is wholly inconsistent with the decision of the California Supreme Court in *State Personnel Board v. Department of Personnel Administration* (2005) 37 Cal.4th 512.

Finally, the Receiver has not articulated any legitimate rationale for separating the decision in the privileges action from the decision in the disciplinary action in these performance-based cases. The disciplinary action and the privileging action actually constitute two disciplinary measures arising out of the same set of operative facts. The SPB ALJ should, with the assistance of a medical panel and appropriate training in medical cases, rule on both the privileging and disciplinary actions, and the Board should review that decision under its constitutional mandate to review discipline.¹ Alternatively, the JRC and the SPB ALJ could issue two separate decisions, so long as both are reviewable by the Board and subject to Board action.

In conclusion, the Board can agree to a process that involves a hearing presided over by both a medical panel (JRC) and an SPB ALJ, and can agree that the

¹ The Receiver always has the option of pursuing revocation of a license or clinical privileges before the medical board and/or appeal what he considers an adverse decision by the SPB in superior court.

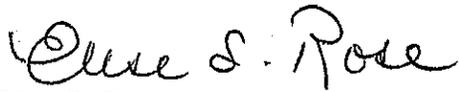
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SPB ALJ will give great weight to the decision of the JRC in crafting a proposed decision for the Board. What the Board cannot agree to is a process that eliminates its ability to conduct a meaningful review as mandated by the state constitution and supreme court precedent.

I am not sure where this leaves us in terms of a stipulation, so it will be up to you to determine if we have reached an impasse or whether there is still room to negotiate a stipulation leaving the broader issue to the court. I would identify the issue as *"Whether the hearing process for appeals of loss of clinical privileges (a form of disciplinary action, albeit subject to peer review) and the hearing process for any other adverse action that may be imposed as a result of substandard conduct by a physician should be consolidated in such a way as to yield one decision reviewable by the State Personnel Board."*

Please feel free to contact me at (916) 653-1403 or Suzanne Ambrose at (916) 653-1028 as to discuss how we might proceed from here.

Sincerely,



Elise S. Rose
Chief Counsel
State Personnel Board

cc: Members of the State Personnel Board
Suzanne Ambrose, Executive Officer

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):

SUPPLEMENTAL DECLARATION OF LINDA BUZZINI IN SUPPORT OF RECEIVER'S MOTION FOR WAIVER OF STATE LAW RE CLINICAL COMPETENCY DETERMINATIONS

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(s) to be served by hand to the address(es) designated below.

BY MAIL: I caused such envelope(s) to be deposited in the mail at my business address, addressed to the addressee(s) designated. 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.

BY OVERNIGHT COURIER SERVICE: I caused such envelope(s) to be delivered via overnight courier service to the addressee(s) designated.

BY FACSIMILE: I caused said document(s) to be transmitted to the telephone number(s) of the addressee(s) designated.

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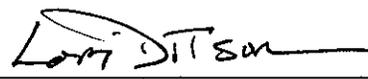
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25 Dated: January 7, 2008



Lori Dotson