IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ALEJANDRO MADRID, et al.,

Plaintiffs

v.

JAMES E. TILTON et al.,

Defendants,

NO. C90-3094-T.E.H..

SPECIAL MASTER'S DRAFT REPORT RE STATUS OF STATE OF CALIFORNIA CORRECTIVE ACTION PLANS FOR ADMINISTRATIVE INVESTIGATIONS AND DISCIPLINE; RECOMMENDATIONS

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I.

INTRODUCTION

A. The Special Master's Final Post Powers Report and Recommendations.

On June 24, 2004 the Special Master issued a Final Report Re Department of Corrections "Post Powers" Investigations and Employee Discipline" ("Final Report") concerning the California Department of Corrections' (since renamed the California Department of Corrections and Rehabilitation ["CDCR"])"Post Powers"[1] investigations. The report found that CDCR internal affairs investigations and administrative discipline were plagued by systemic problems that, in terms of actual practice, rendered investigations and discipline entirely ineffectual. In addition, the report found a pervasive code of silence in the CDCR (a problem so ingrained in California prisons that there was a code of silence about the code of silence itself), a pattern and practice of interference with administrative and criminal investigations at Pelican Bay State Prison ("PBSP") by representatives of the California Correctional Peace Officers Association ("CCPOA"), and the inappropriate termination of the Post Powers investigations by the former Director of Corrections, Edward Alameida and Thomas Moore, the former Deputy Director of the Office of Investigative Services.

At the conclusion of the Final Report, the Special Master informed the Court that the State of California's response to these problems was, at first, entirely inadequate.

> The CDC's initial response to the Court's scrutiny of the Post Powers investigation shut-down was poor. CDC officials focused their attention downward, suggesting the Office of Investigative Services ("OIS") agent was responsible instead of a lack of leadership within the Central Office. Promises were made of a review of OIS by a retired annuitant, while Moore and Alameida put great stock in ordering the three administrative investigations to be re-opened as criminal investigations. The Office of the Inspector General, which had done a

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[1] These administrative investigations had been opened to look into allegations that correctional officers had perjured themselves during the trial of Sergeant E.M. Powers ("Powers") and Correctional Officer J. R. Garcia ("Garcia"), who were charged in the United States District Court for the Northern District of California (case CR-00-0105-MJJ) with a conspiracy to violate civil rights (18 U.S.C. § 241) and a substantive count of violations of civil rights (18 U.S.C. § 242). Following a trial by jury, Powers and Garcia were each convicted of one count of conspiracy to violate civil rights and sentenced to prison.

> diligent and professional job auditing and analyzing the serious systemic shortfalls of both OIS and the Employment Law Unit ("ELU"), was essentially gutted by budget cuts. At first, there was no indication that the CDC had an interest in solving the investigation and discipline shortfalls described above.

Report at 106.

However, the State's response changed for the better in dramatic fashion following the election of Governor Arnold Schwarzenegger. As explained in the report:

> The State of California's response to the problems described in the draft report changed significantly for the better after Arnold Schwarzenegger was elected as Governor. Roderick Hickman has replaced Robert Presley as the Secretary of the Youth and Adult Correctional Agency ("YACA"). Thomas Moore, Robert Gaultney, and Edward Alameida either transferred to new positions or retired. Jeanne Woodford, the former Warden of San Quentin, has been appointed as Director of Corrections.
>
> Under Mr. Hickman's leadership, a Post Powers remedial team was established in YACA. Warden Joe McGrath from PBSP was placed on a special assignment to help develop this remedial plan. Martin Hoshino, formerly of Office of the Inspector General ("OIG"), was appointed as Assistant Director of OIS and has brought in a team of former OIG staff to make improvements to OIS operations. To date, significant progress has been made in terms of policies, procedures, consistency, and computer controls over case work. Kathleen Keeshen, Deputy Director of Legal Affairs, has begun a series of corrective actions in ELU and started work developing a plan for long term changes to the unit.
>
> Mr. Hickman has announced a "zero tolerance" policy concerning the code of silence . . . YACA and CDC officials, counsel for plaintiffs, and the Special Master have engaged in a series of meetings concerning possible remedial efforts. The Special Master characterizes the progress as positive. All in all, defendants' effort to formulate an adequate remedial plan is better organized and staffed today than at any time in the past nine years.
>
> In addition, Governor Schwarzenegger made the decision to re-institute a strong Office of the Inspector General. Matthew Cate has been nominated as the Inspector General and has actively participated in the Post Powers remedial process. Michael Gennaco, an experienced civil rights litigator who manages the Office of Independent Review that monitors the internal affairs investigations of the Los Angeles County Sheriff, has been appointed the Court's expert to assist the parties with the remedial process.

Report at 106-107.

Because of the expressed determination by the Schwarzenegger Administration to address the serious problems found in the Final Report, the Special Master recommended that he:

> [C]ontinue to work with defendants concerning the development and implementation of an adequate remedial plan to address the problems with investigations, adverse action discipline and the code of silence identified in the Special Master's Final Report re Department of Corrections "Post Powers" Investigations and Employee Discipline. The Special Master should report to the Court as necessary during this process, and submit recommendations for further Court orders if warranted.

Recommendation 3.A., Report at 122.

B. The Court's Post Powers Remedial Orders.

On July 29, 2004, the Court issued an interim Order adopting the Special Master's proposed interim monitoring plan. Specifically, the Court instructed the parties to consider the following:

> The Special Master's monitoring shall encompass investigations and discipline cases arising from violations of the use of force policies, including integrity issues such as the code of silence. This monitoring shall, of necessity, involve monitoring Defendants' and the BIR's handling of casework from prisons other than Pelican Bay State Prison . . .

Pursuant to the July 29, 2004 Order, the Special Master continued working with the parties concerning investigations, adverse action discipline, and the code of silence. At the same time, the Office of the Inspector General began to organize a new bureau, the Bureau of Independent Review ("BIR") whose mission was to function as a "real time" oversight agency that monitored CDCR use of force and code of silence investigations from inception through the completion of the State's discipline process.

On November 17, 2004 the Court issued its final order concerning monitoring, entitled "Order re Special Master's 'Post-Powers' Report re Investigations and Employee Discipline and (2) CCPOA's Motion to Intervene." At page 25, paragraph 3, the Court ordered as follows:

> The Special Master shall continue working with defendants concerning the development and implementation of an adequate remedial plan to address the problems with investigations, adverse action discipline and the code of silence identified in the Special Master's Final Report re Department of Corrections "Post Powers" Investigations and Employee Discipline, and shall keep the Court fully informed as to defendants' progress.

C. The Purpose and Timing of this Report.

Pursuant to the November 17, 2004 order, the Special Master, working closely with counsel, the CDCR, Court experts, and the Inspector General, has continued to monitor progress toward improving the CDCR's administrative investigation and discipline process. This report sets forth the Special Master's findings and recommendations concerning the current status of the Post Powers remedial program. It is submitted at this time for two reasons. First, the initial phase of the Post Powers remedial process is nearing completion and, as explained below, the BIR has begun to assume monitoring oversight over CDCR use of force and code of silence investigations and discipline. Second, a recent series of disturbing events signals an abrupt reversal of policy by the Governor's Office, a retreat from prison reform that may threaten the Court's ability to enforce the Post Powers remedial plan, including the elimination of the code of silence.

To summarize, the initial phase of the Post Powers' remedial plan, which took place during the first twenty-four months of the governorship of Arnold Schwarzenegger, marked one of the most productive periods of prison reform in California history. In addition to re-organizing the California corrections system, eliminating several agencies and modifying the missions and structure of others, Governor Schwarzenegger and his appointees, working with the Special Master and counsel, agreed to implement a number of critical remedial programs which started the process of improving CDCR investigation and employee discipline practices.

Once again however, California has taken three steps forward and then three steps back when attempting to reform its troubled prison system. Following the appointment of Susan Kennedy as the Governor's Chief of Staff on January 1, 2006, a series of disturbing developments have taken place which signal a return to the prior Davis Administration's practice of allowing the CCPOA to over-rule the most critical decisions of the CDCR Secretary. In a period of six weeks, two CDCR Secretaries committed to reform, Rod Hickman and Jeanne Woodford, left state service, stating as their reasons the CCPOA's influence with the Governor's Office. The top ranking leadership of the CDCR is confused, understaffed, dispirited, and most

important, uncertain who is really in charge: the Acting Secretary or the President of the CCPOA. At the same time, a quiet purge of the leadership of the Department of Personnel Administration ("DPA") was instituted by the Governor's Office, removing the State's experienced labor administrators. Ms. Kennedy also allowed the CCPOA to over-rule Acting Secretary Jeanne Woodford's appointment for CDCR Assistant Secretary of Labor relations, thereby reducing the bargaining credibility and authority of State negotiators on the eve of the 2006 negotiations concerning the CCPOA's (two *billion* dollars per year) new contract, which potentially impacts many aspects of the Post Powers remedial plan. The sum total of this turn-about by the Governor's Office raises serious questions of whether the Court's Post Powers remedial plan is in jeopardy.

II.

FINDINGS

A. The Post Powers Corrective Action Plan.

1. *Introduction.*

As explained in the Special Master's Final Report, the Order of July 29, 2004, and the Order of November 17, 2004, there are four major elements to the State of California Post Powers Remedial program: (1) eliminating the code of silence; (2) improving internal affairs investigations; (3) improving the CDCR's handling of employee adverse action discipline cases; and (4) establishing a "real time" process for monitoring use of force and code of silence related investigations by the Office of the Inspector General.

The State's efforts to address these challenges was instituted by Governor Schwarzenegger. It was led by Rod Hickman, CDCR Secretary, and Matthew Cate, Inspector General. The Court approved remedial programs which followed involved the re-structuring and improvement of the internal affairs and employment law units, the promulgation of new legislation, establishing new and effective department operating policies, establishing new data processing systems, and creating the Bureau of Independent Review. Throughout the reform process, CDCR officials (including but not limited to Rod Hickman, Joe McGrath, Mark Gant,

Martin Hoshino, Bruce Slavin, Kathleen Keeshen, and Debra Ashbrook) have worked closely with the Special Master and Court experts Dr. Patrick Maher and Michael Gennaco. Meetings were conducted on a regular basis that included counsel for the parties. A chart displaying the status of the remedial plan is attached as Exhibit 1. A descriptive summary is set forth below.

2. *Providing CDCR Officials With the Authority to Manage Investigations, Discipline, and the Code of Silence.*

I. Introduction.

While giving prison officials the authority to do their job would seem to be a given, in the State of California the power to manage has been delegated to a significant degree to the CCPOA. Thus, perhaps the most important energizing aspect of the reform process was Governor Schwarzenegger's decision not to accept money from the CCPOA.

ii. Managing the Labor Relations Process.

During the first two years of the Schwarzenegger administration, the Governor's Office did not allow the CCPOA to interfere with the management prerogatives of CDCR officials. Governor Schwarzenegger's approach to prison management was in striking contrast to the policy of the Davis Administration. During the Davis Administration, CCPOA officials exercised their close relationship with the Governor and his Chief of Staff, Susan Kennedy, to interfere with the management discretion necessary to run the largest prison system in the United States. For example, the Davis administration required the Director of Corrections to meet directly with CCPOA officials whenever the CCPOA wanted to talk, and regardless of the topic for discussion. The Special Master's Final Report describes examples of inappropriate contacts, including Chuck Alexander's telephone call to Director Edward Alameida concerning the status of an internal affairs investigation involving CCPOA members (Final Report at 58-59) and Lance Corcoran's telephone call to Director Alameida objecting about the fact that CDCR investigators were assisting the United States Attorney concerning a criminal prosecution against a CCPOA member (Final Report at 89-90; *see also* Exhibit 38 to the Final Report).

In contrast, in 2004 Governor Schwarzenegger, former Legal Secretary Peter Siggins,

and Secretary Hickman put into place a program for dealing with CCPOA complaints that was consistent with how other California agencies deal with the needs of employee unions: a process whereby legitimate union concerns are dealt with through the formal grievance process and through a "meet and confer" procedure. To this end, the CDCR's Office of Labor Relations was re-organized and strengthened. Bridget Hanson was appointed as Assistant Secretary of CDCR Labor Relations and Tim Virga appointed as Chief of Labor Relations.

iii. The Corrections Independent Review Panel.

In addition, Governor Schwarzenegger ordered an independent evaluation of California's prison system by a "Corrections Independent Review Panel." The Panel, chaired by former Governor George Deukmejian, issued a comprehensive report in June 2004 entitled *Reforming Corrections*. Notably, the first page of the report detailed a correctional system in need of drastic and fundamental reform, commenting that "[t]raditional management functions have been negotiated away in a labor agreement between the state and the correctional officers union." The Panel recommended that the Secretary of the CDCR be responsible for negotiating all management issues with the CCPOA (rather than deferring to negotiators from the Department of Personnel Administration ["DPA"] who do not understand prison operations), and that the Memorandum of Understanding ("MOU") between the State and CCPOA be modified to provide for the following:

1. Eliminating the practice of allowing CCPOA members to sit on management committees;
2. Not allowing the CCPOA to sit in at meetings that review inmate assaults;
3. Changing seniority rules;
4. Changing longevity pay issues;
5. Eliminating the 70-30 percent rule for assignments and overtime, and;
6. Revising the existing sick leave policy.

See, Reforming Corrections at pages 229 - 232, attached as Exhibit 2).

iv. Re-Negotiating the CCPOA Memorandum of Understanding in 2006.

The State of California/CCPOA MOU impacts upon all aspects of CDCR operations. Not only are the respective rights of investigators and subjects defined by the MOU, so is a Warden's ability to assign officers and prison managers to key posts, including special housing units and units with investigation responsibility. As described below, problems of interpretation in the existing MOU provisions which affected investigations have been addressed by the Special Master. However, the clarifications do not apply to changed language or new language which may be negotiated in the 2006 contract renewal process. Therefore, the need to make changes to the MOU, and the need to protect those MOU provisions which relate to investigations and discipline, was designated by the Administration as a necessary part of the Post Powers remedial plan.

To accomplish this objective, beginning in 2005, CDCR officials began to meet with DPA. Plans were developed for Ms. Hanson and Mr. Virga to negotiate all issues involving CDCR management during the 2006 bargaining sessions. This strategy was developed and approved by the Director of DPA, Mike Navarro, and by Deputy Director Bill Curtis. Assurances were provided to counsel and to the Court that in 2006 the Governor of California would finally put a stop to the "Capitol walk" (a process whereby, in past bargaining years, the President of the CCPOA has walked away from formal bargaining with DPA straight into the Capitol building to get whatever he wanted directly from the Governor). With the groundwork established for CDCR officials to use their authority and discretion to implement prison reform without "back door" interference by the CCPOA, the State of California began to correct the problems set forth in the Final Report.

3. *Correcting the Primary CDCR Cultural Problem That Allows Prisoner Abuse, Thwarts Investigations, and Renders Administrative Discipline Difficult To Administer - The Code of Silence.*

a. *The Leadership of Rod Hickman*: Without question, the most important step in the Post Powers remedial process was the decision by Secretary Hickman to take timely

and definite steps to end the code of silence. The process was initiated by Mr. Hickman's "Zero Tolerance" letter of February 17, 2004 (Exhibit 3), when Hickman displayed the courage to do what no leader of California's prisons has ever done - take steps to end the code of silence. As explained below, integrity and commitment to reform cost Mr. Hickman his job.

b. *The Code of Silence Corrective Action Plan*: The initial code of silence corrective action plan had two primary components:

I. Policy Statements and Standards: Rules prohibiting the code of silence were established, and documented in the letter of February 17, 2004 (distributed to all employees and posted on the CDCR website). A new Code of Conduct was published on March 30, 2005, and later incorporated into Article 22, and a revised Law Enforcement Code of Ethics was published on June 16, 2004 (the date that the new oath was provided to new cadets and direction given from the Director's Office to Hiring Authorities to publish the revised oath in IST bulletins for existing staff's review).

ii. Training: Thereafter, the CDCR began development of an eight hour interactive training program concerning the code of silence. Working with the Court experts, a program was established to provide code of silence training for all CDCR personnel. The program began in late 2004 and continued, until fully implemented, for a one year period.

4. *Professionalizing the Internal Affairs Investigation Process.*

a. *Introduction*: The problems within the CDCR's internal affairs operation were so severe that a wide range of corrective actions were needed to initiate the path to reform. Six major changes to operation and policy have now begun.

b. *Establishing Consistent and Professional Policies and Procedures*: Internal affairs policies were almost entirely re-written, including fundamental changes in the manner in which investigation conclusions are reported. One significant change in CDCR operations implemented in 2005 was for the prison's hiring authority (warden or health care manager) to be responsible for determining the "result" of an investigation (e.g. whether the charges against the employee should be "sustained" or "not sustained") rather than the

investigator making this finding. The change of policy is consistent with the preferred practices of progressive California law enforcement agencies.

c. *Establishing a Central Intake Unit*: After several months of struggling with the need for operational consistency and the sound initiation of investigations, the decision was made to form a "Central Intake" unit at CDCR headquarters. In essence, the initiation of all internal affairs cases in the CDCR must now be approved by a team of professional investigators and attorneys.[2] Requests for investigations which lack foundation are rejected, requests that can be dealt with through the local institution's discipline process are referred back to the prisons for action, and cases where the investigation request is too vague or uncertain are returned for clarification. Central Intake has had an initial significant impact on improving the quality and fairness of CDCR investigations.[3]

d. *Establishing and Enhancing the Case Management System*: A Case Management System was developed to track the status of investigations and discipline cases pending in the CDCR's thirty-three institutions, central office, and parole facilities. Over time, the CDCR's internal affairs unit has begun to move from a system with no controls into a system that is beginning to provide the ability for the "real time" monitoring of all agent activity. A summary of the tracking of each implementation stage is attached as Exhibit 4.

e. *Training*: Training has been provided to internal affairs agents. Concerning many important issues, e.g. sexual assault investigations and critical incident review, specific agent-oriented training materials have been prepared and distributed to staff. New and

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[2] Participating in decisions made by the Central Intake Unit are attorneys from the Bureau of Independent Review ("BIR") and the Employment Advocacy Prosecution Team ("EAPT"), both entities which are discussed later in this report. The participation of the BIR and EAPT in these decisions ensures the presence of independent voices and strengthens the work of the Central Intake Unit.

[3] Establishing a central intake unit serves to protect correctional officers and other employees from local retaliation. A warden or health care manager can no longer initiate an investigation without Central Office approval. This employee protection is an example of many such protections that were part of the reforms instituted by Secretary Hickman.

important forms have been prepared, and old forms revised (including the 989 form, and the 402 and 403 forms).[4]

f. *Securing Necessary Staff:*

At the time of the Special Master's Final Report, internal affairs was understaffed and under funded. To implement the reforms above, including Central Intake, additional investigators and support staff were required. To its credit, the Schwarzenegger Administration has fulfilled the first phases of a staged plan to staff internal affairs, and the recent shortage of investigators caused by the need to staff the unfunded intake unit has now been addressed. Additional resources will be required in the future, however, and the Special Master should continue to monitor the adequacy of investigator staffing.

g. *Leadership*: Martin Hoshino provided the leadership and integrity to get the internal affairs reforms off to a timely and effective start. Subsequently joined by Mark Gant, these two leaders oversaw the implementation of the reform of the CDCR's investigative process. Without the tireless work of Mr. Gant and Mr. Hoshino, the important changes described above would not have taken place. They have consistently demonstrated professionalism and integrity that is very opposite of the official misconduct by their predecessor, as described in the Special Master's Final Report.

5. *Improving the CDCR Employee Discipline Process.*

a. Introduction.

The Post Powers remedial process pertaining to discipline involved two separate programs: (1) improving CDCR legal support for investigators and hiring authorities and (2) developing a fair and consistent discipline matrix.

[4] This training, much of which focused on due process rights and consistency, serves to ensure the appropriate protections for staff who are under investigation.

b. Changing How the Office of Legal Affairs Provides Support for Investigations and Employee Discipline Litigation.

i. *Introduction*: If anything, problems with lack of organization, poor morale, and the ineffectual leadership of the Employment Law Unit (that section of the Office of Legal Affairs responsible for representing the CDCR during employee discipline litigation), were more severe than those faced by internal affairs. As found in the Final Report:

> The Special Master previously reported to the Court about the *Mayo* cases, which involved MTA's at PBSP who were not disciplined for very serious violations of CDC policy because the CDC's investigation and discipline process took more than one year. Because of the *Mayo* cases, in 2001 the Special Master requested that the OIG conduct an audit of the CDC's adverse action process. Similar to the OIG's findings in the OIS audit, the OIG audit report of March 2002 (which has previously been filed under seal with the Court), found numerous systemic problems with the processing of adverse action cases, including a lack of coordination between ELU and OIS, inadequate or non-existent policies concerning important issues such as when to file an appeal or how to settle a case, inadequate training for OIS agents and the Employee Relations Officers in the prisons, inadequate tracking of discipline related processes, confusion about the POBAR one year statute of limitations, and a lack of clarity concerning the roles and responsibilities of the CDC officials involved with employee discipline. The OIG found that these problems led to *forty percent* of all adverse actions being dismissed or otherwise compromised because the CDC was unable to complete the cases in a one year period of time.

Final Report at 82-83.

Structurally reorganizing the former ELU was necessary prior to initiating the Post Powers remedial plan pertaining to employee discipline. The remedial actions implemented for the unit, which has been re-named the Employment Advocacy & Prosecution Team ("EAPT"), include the following.

ii. *Management Reviews*: To its credit, the CDCR sought the advice of outside consultants, who performed a detailed evaluation of the management, organization, and attitudes of the employees of what is now EAPT. Numerous recommendations of the consultants have been, over time, successfully implemented.

iii. *Establishment of the Vertical Advocate Model of Litigation Control*: The manner in which the EAPT monitors investigation and discipline cases has improved. Instead of the past practice of EAPT lawyers first becoming involved with an

investigation only after the investigation was completed, discipline imposed, the matter taken to a *Skelly* hearing, and the case appealed by the employee to the State Personnel Board, EAPT lawyers are now assigned to investigations as soon as they are initiated. In essence, the vertical prosecution model is operable in EAPT, in that an EAPT lawyer works closely with internal affairs, the hiring authority (usually a warden), and the prison's Employment Relations Officer ("ERO") to ensure that the case is properly initiated, the investigation proceeds in a timely manner, the findings by the hiring authority are supported by the facts, and the discipline imposed (if the allegations of the investigation are sustained) is consistent with CDCR and State policy.

iv. *Securing Additional Staff:* At the time of the Special Master's Final Report, the old ELU was understaffed and under funded. To implement the reforms above, additional attorney and support staff were required. To its credit, the Schwarzenegger Administration has fulfilled its initial promise to appropriately staff the EAPT.

EAPT, however, has encountered difficulty hiring and retaining attorneys given the current low salaries, constant travel, litigation pressures, and the significant work load of the unit. The State's response to this problem, including the response of the DPA and State Personnel Board, has been untimely and inadequate. Simply stated, a host of State bureaucratic barriers have been raised to preclude the appropriate adjustment of the salaries of EAPT attorneys, increases that are necessary in order that EAPT related Post Powers' corrective actions continue. Therefore, the Special Master recommends that the Court issue an order enhancing the salaries of EAPT attorneys, as explained below.

v. *Development and Implementation of New Policies:* To establish a base for EAPT reforms, extensive work was necessary to establish professional and consistent policies and procedures, including policies relating to: (a) settlements, (b) the Skelly process, (c) and writs and appeals. These projects are now complete.

vi. *Implementing Information Technology to Control Case Processing*: Similar to the situation with internal affairs in 2004, the EAPT had to establish a

computerized tracking system to manage workload and monitor case deadlines. To the credit of the EAPT, this conversion was accomplished in a timely and effective manner.

vii. *Leadership:* Kathleen Keeshen and Deborah Ashbrook demonstrated the foresight, patience, and perseverance necessary to plan, manage, and implement the EAPT reforms set forth above. These efforts called for paying attention to operational details as well as acquiring a "big picture" vision, not to mention hours of work far above that normally expected from State employees. Without Ms. Keeshen and Ms. Ashbrook's devotion, the changes in operation described above would not have taken place.

b. *Establishing the CDCR Discipline Matrix.*

Secretary Hickman also led the effort to establish a CDCR discipline matrix, whereby administrative misconduct calls for a specific range of punishment. Yet again, this reform provides important protections for employees. Regardless of institution, regardless of rank, if the matrix is followed, the discipline imposed should be fair and consistent. The matrix addresses code of silence concerns; for example, mandating for the first time that CDCR officials impose an appropriate punishment for those employees who lie, cover-up, or threaten other employees in a concerted effort to impose a code of silence.

6. *Establishing Oversight For CDCR Investigations and Discipline: the Office of the Inspector General.*

a. *Introduction.*

The most important element of State of California reforms implemented in response to the Final Report was the re-establishment of the Office of the Inspector General, and the creation of the BIR. While an adequate internal affairs operation and a vertical advocate oriented EAPT are necessary components to bring CDCR investigations and discipline up to standard, the creation of the BIR will provide California taxpayers the appropriate State watchdog agency to monitor and report upon misconduct within the CDCR. A fully functioning BIR should, over time, lead to the end of Federal Court monitoring of the CDCR's investigation and employee discipline process.

b. *Creation of the BIR.*

In late 2004 the Special Master and counsel for the parties met with Peter Siggins, the Governor's Legal Secretary, to discuss the Post Powers remedial process. One of the issues that was discussed was how to develop a procedure whereby the State of California could adequately monitor CDCR investigations, and report to the Legislature and public about administrative misconduct, employee discipline, special incidents, and corruption. The concept of forming an agency to conduct "real time" monitoring of CDCR investigations and discipline was first developed during those meetings.

To his credit, Governor Schwarzenegger displayed the courage to reverse an earlier decision to eliminate the Office of the Inspector General. He not only re-established the Office, he instituted a plan to restore to the Office the scope of operations it had prior to a wave of budget cuts implemented during the final years of the Davis Administration. In addition, the Governor took an additional step; he added a new Bureau to the Inspector General's Office, the Bureau of Independent Review. Credit should also be given to two California Senators, Gloria Romero and Jackie Speier, who sponsored important Administration bills that re-instituted the Office of the Inspector General and established the BIR.

c. *The BIR Concept.*

The BIR provides the Legislature and public with real-time monitoring of critical CDCR administrative investigations. In other words, the BIR is involved in the initial CDCR decision to accept or reject a request for an internal affairs investigation during the Central Intake process, it subsequently tracks the progress of the investigative agent, the decisions of the hiring authority after he or she receives a completed investigation, and the work of the EAPT attorney during the employee discipline process. Modeled after the successful Office of Independent Review in Los Angeles County, the BIR provides expertise, experience, access to internal processes, and a new window of transparency into the world of prison misconduct that should prove to be far superior to a more traditional (and often politicized) "civilian review panel" model.

In addition, the BIR has the expertise and flexibility to respond to special incidents; for

example, prison disturbances, officer deaths or injuries, misconduct by clinical personnel, etc. Furthermore, working with the fiscal side of the Inspector General's Office, BIR staff can refer for investigation cases that they encounter which involve fiscal misconduct or corruption.

B. Documenting the Post Powers Remedial Plan.

The policies listed below provide insight concerning the detail and the scope of planning that was necessary to begin to implement the Post Powers remedial effort:[5]

1. *"Zero Tolerance" Code of Silence Letter*: The letter was signed by Secretary Hickman on February 17, 2004 and included as a paycheck stuffer in February 2004. It has been posted indefinitely on the CDCR webpage.

2. *Law Enforcement Code of Ethics*: On June 16, 2004 the oath was implemented for new cadets and direction given from the Director's Office to Hiring Authorities to publish the revised oath in IST bulletins for existing staff's review (with a revised oath published in local IST bulletins in July and August 2004). The staff Code of Conduct was established on March 30, 2005 (the date that Secretary Hickman distributed the Code of Conduct). The Code itself was posted statewide at local sites on or before April 29, 2005, and was redistributed to all CDCR ee's on September 28, 2005 with information regarding how and where to report misconduct (Code later incorporated into Article 22).

3. *Article 22 of CDCR "Department Operations Manual" ("DOM")*: On March 8, 2005 direction was given to the field to implement Article 22 following statewide training; initial draft submitted to Special Master on February 25, 2005, secondary draft submitted on December 5, 2005; order filed on December 22, 2005; direction provided to implement in field on January 3, 2006).

4. *Vertical Advocacy Policy*: On March 1, 2005 the model was implemented at headquarters, implemented statewide on March 8, 2005. Initial modifications to Article 22 were

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[5] This list is not exhaustive. Furthermore, it does not include policies, procedures, training plans, etc. from the BIR.

forwarded to Special Master on November 1, 2004; Special Master's report filed on November 6, 2004. Modifications were also proposed and approved after that date.

5. *Employee Disciplinary Matrix Policy*: On March 8, 2005 the Matrix was implemented statewide. Original proposal for a matrix provided to Special Master on September 24, 2004; order filed on October 19, 2004. Since that date, revisions to Matrix were included in the December 5, 2005 version of Article 22.

6. *CDCR Settlement Policy Re Administrative Disciplinary Cases*: On March 8, 2005 a new discipline settlement policy was implemented statewide, as part of Article 22. Revisions were subsequently implemented which are included in the December 5, 2005 version of Article 22.

7. *CDCR "Skelly Hearing" Policy/Procedure & Forms*: On March 8, 2005 a modified Skelly policy/procedure was implemented statewide, as part of Article 22. (Subsequent revisions were included in the December 5, 2005 version of Article 22).

8. *CDCR Writs and Appeals Policy to Address Adverse State Personnel Board ("SPB") Decisions*: On March 8, 2005 the writs and appeals policy was implemented statewide, as part of Article 22.

9. *New CDC Form 989 (the form utilized to open an internal affairs investigation)*: On July 18, 2005 the modified form 989 was distributed with direction to implement statewide. This form is included in modified Article 14 of the DOM.

10. *New CDC Forms 402 & 403 (the forms used to document the closure of an internal affairs investigation*): On March 8, 2005 the new 402 and 403 forms were distributed with Article 22 and implemented statewide. Subsequently, revised forms were included in the December 5, 2005, version of Article 22 and distributed with directions to implement on January 3, 2006.

11. *Investigative Report Template*: On May 2005 CDCR Hiring Authorities began to render investigative findings using the template. Likewise, a revised investigative report format was implemented at the OIA regional offices and at the local CDCR institutions.

12. *Central Intake Policy*: On January 2006 Central Intake was fully implemented statewide. To begin this process, various policy directives by memorandum were distributed between April 2005 and January 2006. The finalized Central Intake policy is included in Article 14.

13. *Formalized OIA Training Plan*: On November 8, 2005 the formal OIA training plan was submitted to the Special Master.

14. *Internal Affairs Related Training Materials*:

a. *Sexual Assault Guide*: On October 12, 2005 this Guide was implemented statewide.

b. *Critical Incident Manual:* On August 29, 2005 the manual was implemented statewide.

c. *Direction for Local Internal Affairs Investigators*: On April 8, 2005 memoranda and direction were distributed to Hiring Authorities concerning the statutory requirements of the Penal Code for staff conducting IA investigations.

The following policies are "in the works." Most are expected to be formally implemented in the near future.

15. *Incompatible activity regulations [15 California Code of Regulations (CCR), sec. 3413]* - Submitted to Special Master on October 11, 2005, currently pending in the Office of Administrative Law ("OAL").

16. *Travel and salary compensation for employee witnesses regulations [15 CCR, sec. 3413.1]* Submitted to Special Master on October 11, 2005, currently pending in the OAL.

17. *Reporting Serious Misconduct and Protecting Employees from Retaliation* - Submitted to Special Master on October 11, 2005, to be included with almost-finalized Article 14 of the DOM.

18. *Immunity During Internal Affairs Investigation Policy* - Submitted to Special Master on October 11, 2005, to be included with almost-finalized Article 14 of the DOM.

19. *Reciprocal discovery in State Personnel Board matters regulations [(Gov. Code sec. 19574.1; 2 CCR, sec. 57.1; 2 CCR, sec. 57.2)]*. Under existing law in California, the State employer faces a serious disadvantage when management appears before the State Personnel Board ("SPB"). The SPB does not allow the employer to conduct discovery prior to SPB hearings. For example, the State employer does not know what evidence or "experts" the employee will bring to hearing. The employee, on the other hand, has the right to request discovery from the employer. In a significant number of cases involving correctional officers who have been terminated or otherwise disciplined for abusing prisoners, the Special Master has found a pattern whereby the officer has appeared at his or her hearing with an alleged "expert" who then offers testimony that is difficult, if not impossible to rebut, given the fact that the CDCR did not know about the expert or the evidence to be submitted by the expert. To address this problem, the CDCR prepared a legislative concept statement that was forwarded through the CDCR Legislative Office and submitted to the Governor's Office. The proposed CDCR legislation, however, was rejected by the Governor's Office and never submitted for consideration by the California legislature.

20. *Case Management System -2004/2005* - Policy and procedure directives distributed as needed during Case Management System deployment, policies to be included with almost-finalized Article 14 of the DOM.

It is important to note the following: every remedial program cited above was implemented without CCPOA "assistance." While the union was afforded the appropriate "meet and confer" benefits called-for by the MOU, it did not participate in, nor was it allowed to disrupt the reform process. Because CDCR *management* addressed the Post Powers problems *as managers*, and because the CCPOA was not allowed to interfere with this group of reforms, they have begun to be implemented in an effective manner.

C. The Status of Post Powers Remedial Efforts.

1. *Investigations.*

The CDCR internal affairs operation is significantly stronger today than in 2004. As

noted above, improvements have been made in case initiation, processing, and documentation. In addition, new policies have been implemented, limited staffing enhancements have been provided, and investigators are now supported (and monitored) by the EAPT and BIR.

Additional investigators are needed, however, to ensure timely completion of all investigations (a limited number of cases continue to languish unnecessarily, and some of the timeliness improvements achieved for use of force investigation has been achieved by shifting investigators and slowing down the processing of other cases). Certain investigators have proven unable to meet the standards for casework defined by Articles 22 and 14 of the DOM, which will require re-training and in some cases, reassignment or progressive discipline. A number of high level internal affairs positions still need to be filled with competent personnel.[6] Additional remedial work is necessary to complete the essential computer based controls on pending investigations and discipline. Finally, internal affairs needs additional, well trained investigators skilled in, or adequately supported for, cases that involve overlapping issues such as the code of silence combined with medical malpractice.

2. *Employee Discipline.*

Similar to internal affairs, the CDCR's legal support for employee investigations and discipline is significantly more complete and sophisticated today than in 2004. Nevertheless, the EAPT suffers from continued unacceptable levels of turn over, caused in part by inadequate salaries for EAPT attorneys. More training is needed for new attorneys, and for the ERO's who serve on the front line of the employee discipline process inside the CDCR's thirty-three prisons. Similar to EAPT attorneys, ERO's turn over is so excessive that a team approach to employee discipline (hiring authority, ERO, and EAPT attorney) is often difficult, if not impossible, to accomplish in day-to-day practice.

As mentioned above, two of the more important changes in CDCR operations put in

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[6] As explained below, one of the CDCR officials who helped initiate the improvements in internal affairs, Assistant Secretary Mark Gant, retired following the resignation of Secretary Hickman.

place by the Post Powers remedial plan are (1) having the hiring authority instead of the investigator make the final determination concerning whether charges are sustained or not sustained; and (2) using the CDCR discipline matrix for imposing consistent and fair sentences for charges that are sustained. Again, however, unacceptably high level of turn over among prison wardens and health care managers have created what one CDCR official has termed an ongoing "training nightmare." Inexperienced hiring authorities who are unskilled in making sustained or not sustained findings, and who are also unfamiliar with using the discipline matrix, have generated case problems and/or delays which have increased the burdens on the EAPT and BIR.

Simply stated, the Post Powers remedial plan is encountering certain implementation problems because of fundamental problems within the CDCR, and it may be necessary to modify the remedial plan in the future. In addition, it may be necessary to staff internal affairs, the EAPT, and the BIR with more agents and attorneys than originally anticipated, assuming that the current levels of warden and health care manager turn over continues into the future.

3. *The Code of Silence.*

As explained above, the CDCR has completed its code of silence training program. Investigators and State attorneys close to the administrative investigation process have indicated some improvement in staff conduct when faced with code of silence issues as a result of the training and Secretary Hickman's "Zero Tolerance" letter.

The CCPOA leadership, however, continues to refuse to acknowledge the existence of the code of silence, and continues to attack efforts to eliminate the code. Typical of CCPOA attempts to ridicule, identify, and attack those who report force is the "rat trap" case out of Calipatria State Prison.

After observing a use of force incident at Calipatria, a prison Captain believed that staff misconduct had taken place. He reported his observations to the Warden, as required by policy. The CCPOA's top ranking union representative at the prison, however, objected to the Captain's report, and also objected to the investigation which followed. Thereafter, this CCPOA executive

hung a rat trap and note inside the CCPOA bulletin board at the entrance to the prison's administrative building (see Exhibit 5). Note use of the words "rat trap" on the pictured mouse trap.[7] The implications of the words "the CCPOA will attempt to catch them" should be obvious.[8]

Secretary Rod Hickman was immediately and repeatedly attacked by the CCPOA's leadership following his decision to address the Code of Silence in the CDCR. Indeed, any doubts about the importance of the Code of Silence for CCPOA President Mike Jimenez and Executive Vice President Chuck Alexander have been dispelled by their repeated denials that the Code exists, and their subsequent attempts to criticize and humiliate Secretary Hickman. For examples of CCPOA attacks, *see* the fake money ridiculing Secretary Hickman and insults posted on various blog sites affiliated with the CCPOA (for example, a "Hickman Has to Go" posting accusing the Secretary of being "either a liar or a rat" or the "official resume translated" posting, claiming that Governor Arnold Schwarzenegger "didn't know sh*t from Shinola about corrections" (Exhibits 6 - 8).[9] [10] The Court has previously commented on the troubling questions posed by the CCPOA's response to Post Powers corrective actions, including the union's juvenile attacks on plaintiffs' counsel (*see* Order Re (1) Special Master's "Post Powers" Investigation and Employee Discipline; and (2) CCPOA Motion to Intervene filed November 17,

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[7] The term "rat" is used by prison inmates to designate a prisoner who reports crimes or misconduct to prison staff. The term has been adopted by the CCPOA and its blogs to enforce the Code of Silence by labeling officers who report the misconduct of fellow officers as "rats." For example, *see* Final Report at page 121.

[8] When an internal affairs investigation was initiated to look into the matter, CCPOA President Mike Jimenez accused the CDCR of launching an attack on all local CCPOA presidents.

[9] The attacks on Secretary Hickman are part of a CCPOA program of "attack your enemies and reward your friends." To a large degree, this confrontational strategy is based on Ronald G. DeLord's rendering of Saul Alinsky's community organizing theory, which is taught to CCPOA representatives at the guard's union annual convention (*see* Exhibit 9).

[10] The CCPOA denies an official connection with these blogs; nevertheless, blog founders sell tee-shirts at CCPOA's annual conferences and on occasion, official CCPOA telephone messages direct union members to blog sites.

2004, at page 22).

A more recent example of the ridicule, threats, and humiliation delivered by the CCPOA to competent CDCR employees to enforce this code of silence is found at Exhibit 10, a flyer which the CCPOA leadership ordered printed and posted on all CCPOA Bulletin Boards: an unflattering picture of Governor Arnold Schwarzenegger, naked except for shorts, and standing to the right side of the Governor are cut-and pasted photographs of the faces of former Assistant Secretary of CDCR Labor Relations Brigid Hanson and the Chief of CDCR Labor Relations Tim Virga. CCPOA executives adopt the schemes of the convicts they guard. Identical to the biggest bully in the prison yard, CCPOA leaders deliberately select out specific individuals to embarrass and publically humiliate, as it is now attempting to do with Brigid Hanson and Tim Virga. The purpose of this very public attack is simple, to terrorize CDCR employees so they will not report, or attempt to correct, inappropriate behavior by CCPOA leaders.[11] By the use of flyers, bulletin board postings, and blog sites, the CCPOA leadership continues to encourage the code of silence.

To summarize, some progress has been made by the CDCR to train about the code of silence and investigate incidents where the code of silence is used to cover up abuses or thwart investigations. CCPOA leaders, nonetheless, continue to attempt to preserve the code of silence.

4. *The Bureau of Independent Review.*

a. *Establishing the BIR.*

Establishing the BIR as an operational agency involved numerous and difficult challenges, including developing duty statements for attorneys, investigators, and administrative support personnel, developing policies and procedures, recruiting, hiring, and appointing key personnel, establishing offices in the same three locations where internal affairs agents are located, Sacramento, Bakersfield, and Rancho Cucamonga, training lawyers and investigators,

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[11] Concerning this specific poster, the underlying issue which angers the leadership of the CCPOA is not allegation of an abuse of force by its members, but the fact that Ms. Hanson and Mr. Virga had taken steps to stop the misuse of vacation days and sick leave credits by CCPOA leaders.

establishing positive working relationships with prison wardens and health care managers, establishing positive working relationships with local, State, and Federal law enforcement agencies and District Attorneys and U.S. Attorneys, meeting and conferring and establishing relationships with the numerous public and private agencies and interest groups who are involved with CDCR operations, establishing relationships with the Legislature and Federal Court, and developing a systematic method of accurately reporting the details of internal affairs investigations and discipline to the Legislature and public in a manner that does not compromise the effectiveness of the investigation nor the due process rights of the employees under investigation.

These challenges have been met in a timely manner by the Office of the Inspector General. Credit is due Matthew L. Cate, David R. Shaw, Barbara Sheldon, Howard Moseley, Robert Barton, Stephen Miller, and Tim Rieger among many others. Examples of the quality of BIR public reporting is found at Exhibit 11, the May 2006 BIR Report for the period of July - December 2005. An example of the quality of Inspector General special reviews is found in the report entitled Special Review Into the Death of Correctional Officer Manuel A. Gonzalez, Jr. (issued March 16, 2005) (Exhibit 12).

b. *Monitoring the BIR.*

Initially, the Special Master tracked pending internal affairs and discipline cases directly through the CDCR, receiving formal presentations from internal affairs and EAPT. As BIR operations expanded, however, the Special Master modified the bi-monthly presentation process so that BIR became responsible for overall case tracking as well as the specific case presentations. Counsel has attended all of these meetings, and actively participated. State officials from control agencies such as the DPA were invited to certain meetings as necessary, as were the Court experts.

Now that the BIR is fully operational, the Special Master will monitor the status of the CDCR's Post Powers' reform through presentations by BIR. In other words, the Special Master will monitor the effectiveness of the BIR's monitoring. This change-over in monitoring began

January 2006.

In addition, the Special Master will begin monitoring BIR case management with the assistance of Court expert Michael Gennaco and the Office of Independent Review of Los Angeles County. Mr. Gennaco's monitoring can be best characterized as a form of peer review, complimented by public reporting. The decision to intensify case specific monitoring is a positive step, indicating that the BIR is fully operational and performing effectively. Despite decades of State neglect concerning correctional officer investigations and discipline, the Special Master has confidence with the Inspector General assuming primary responsibility for monitoring CDCR investigations and discipline.

The Special Master's intensified review of BIR operations should not be confused with BIR monitoring of the CDCR. BIR monitoring of CDCR investigations and discipline, as explained above, is the heart of the Post Powers remedial plan. Given the powerful outside influences that impact on investigations and discipline, and given the inherent challenges in operating an effective investigation and discipline process within an organization the size of the CDCR, it is anticipated that BIR monitoring will become an established structure of California State Government, and that it will continue indefinitely. The Special Master's enhanced review of the BIR, however, is temporary, anticipated to be limited to a two-year period commencing January 1, 2006 and ending in January 2008.

The Special Master's proposed Peer Monitoring Plan, prepared by Mr. Gennaco, has been reviewed and approved by the Inspector General. It is attached to this report as Exhibit 13. As set forth below, the Special Master recommends that the Court adopt this monitoring program.

c. *Future Challenges to an Effective BIR Operation.*

The initial effort to create the BIR has been remarkable. The BIR, however, is charting unknown waters as it begins to monitor on a real time basis the internal affairs investigations of the CDCR. Without question, the number of important cases and/or events that require BIR oversight are increasing. The term "real time" encompasses a wide range of oversight: from

periodic monitoring, to the critical juncture review, to monitoring important cases on a day to day basis. At present, the BIR does not have enough attorneys and investigators to monitor as intensely as necessary each pending investigation. Furthermore, there are indications that the salary offered to candidates for BIR positions is no longer competitive, given the quality and necessary background required for these critical State positions. Both issues call for continued monitoring by the Special Master.

5. *Summary.*

The State of California has attempted to initiate its Post Powers remedial plan concerning the elimination of the code of silence, adequate investigations, adequate and timely discipline, and the formation of the BIR in a timely manner. The initial progress has been appropriate; however, for each critical element of the remedial plan, more work is needed. No one involved with the Post Powers remedial plan takes the position that the job is done; indeed, the results thus far, while positive, are best described as tenuous. The loss of a leader of a unit, an increase in turn over among key personnel, the failure to obtain needed budget enhancements, and numerous other factors can quickly turn what so far has been a success into a long term failure. Simply stated, at this point in time, timely investigations, fair discipline, the elimination of the code of silence, and adequate investigation oversight are not well established practices in the CDCR, and they are certainly not immune from outside influences.

D. Memorandum of Understanding Issues.

The Special Master's Final Report also included a recommendation that he investigate the real life impact of certain provisions of the MOU on the Court's use of force remedial plans. The November 17, 2004 Order instructed the Special Master to investigate, hold hearings if necessary, prepare a report, consider comments from the parties and the CCPOA, and issue recommendations as to whether certain provisions of the MOU or the August 12, 2004 Addendum to the MOU violated, by their terms or practice, the Court's use of force remedial

plans.[12] In the same order, the Court granted intervenor-party status to the CCPOA for the following purpose: (1) taking part in the Special Master's investigation and, (2) in the event that the Special Master, as a result of this investigation, issues a draft or final report which recommends that the Court find that one or more provisions of the MOU violate, by their terms or practice, the Court's remedial orders and/or that the Court should consider overriding such provision(s) in order to cure the constitutional violations at issue in this case, the CCPOA may raise any objection(s) it has to either the draft or final report, and (3) in the event that any such objection(s) are not sustained by this Court, it may appeal such decision, to the extent such decision is otherwise appealable by law.

Working with the parties, including the CCPOA, and following numerous meetings and revisions a stipulation was prepared, modified, finalized and signed by the State and CCPOA which addresses the concerns expressed by the Special Master in the Final Report. Both the CCPOA and DPA participated in this process in a cooperative and professional manner. The Special Master filed his Report and Recommendations Re Investigation into Selected Provisions of CCPOA/CDCR Memorandum of Understanding on March 26, 2006, which included the executed stipulation.

E. The 2006 Retreat From Prison Reform.

1. *Introduction.*

For more than a quarter of a century, the State of California's efforts to comply with Federal Court orders have been inconsistent at best. Long term, permanent improvement in corrections has proven elusive; most short term enhancements were followed by sullen retreats to mediocrity. As a consequence, Federal oversight of CDCR operations has, of necessity,

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[12] The specific provisions of the Agreement Between the State of California and the California Correctional Peace Officers Association Covering Bargaining Unit Six, Corrections (July 1, 2001 through July 2, 2006) that were examined by the Special Master included Sections 2.07, 2.10, 5.02, 6.01, 9.05, 9.06, 9.09, 9.16, 10.10, 10.12, Appendix #9, Side Letter #12, Side Letter #14, and the following sections of the 2004 Addendum: Continuous appropriation, CDC/CYA Video Access, Transfer of Peace Officers Between Departments, Chapter President Release, Addendum Grievance Provision, Side agreement re post and bid for supervisors.

continued for decades, regardless of whether the underlying constitutional violation involved conditions of segregated confinement, abuses of force, medical care at specific prisons, medical care state-wide, mental health care at specific prisons, mental health care state-wide, parole practices, or care for disabled inmate/patients.

Unfortunately, there are now strong indications that the Post Powers remedial process will be no exception. While the beginning of substantial and significant reform was achieved, the Special Master has very serious concerns as to whether the Post Powers remedial order can continue to be effectively implemented in light of recent developments.

2. *The Appointments of Susan Kennedy and Fred Aguiar.*

Following the defeat of propositions submitted to California voters in late 2005, Governor Schwarzenegger appointed Susan Kennedy as his Chief of Staff on November 30, 2005. Kennedy, who was Chief of Staff for Governor Davis, assumed her new position on January 1, 2006. The Governor appointed Fred Aguiar as Cabinet Secretary on December 9, 2005.

3. *The Resignations of Secretary Rod Hickman and Acting Secretary Jeanne Woodford.*

Chief of Staff Susan Kennedy did not meet with CDCR Secretary Rod Hickman during January or February of 2006. She and Fred Aguiar did, apparently, commence meetings with the CCPOA, including CCPOA President Mike Jimenez and did not inform Mr. Hickman. From what has been stated publically, Secretary Hickman learned of the meetings and observed CCPOA lobbyists entering the Governor's Office. Understanding that a lack of support from the Governor's office would mean an end to prison reform, and realizing that a return to the Davis era practice of allowing the CCPOA to over-rule decisions of the CDCR Secretary would render his efforts to end the code of silence impossible, Mr. Hickman made the decision to resign as CDCR Secretary on February 28, 2006. His retirement from state service was effective May 31, 2006.

The Special Master has also learned that following Mr. Hickman's decision to retire, key

CDCR officials responsible for moving the Post Powers remedial plan forward have left State service. For example, Joe McGrath, Assistant Secretary over Adult Operations, the primary CDCR contact for all Post Powers reforms, retired effective May 31, 2006. Mark Gant, Assistant Secretary, Internal Affairs, separated from State service on April 7, 2006.

Secretary Hickman was replaced on an acting basis by the Undersecretary of the CDCR, Jeanne Woodford. Ms. Woodford had been the Director of Corrections prior to the CDCR re-organization, and had personal knowledge of the Post Powers remedial plan. She was also one of the driving forces behind the Governor's efforts to bring rehabilitation back into California's prisons. However, within six weeks, Ms. Woodford also stepped down from the Acting Secretary position to Undersecretary, and will retire from State service effective July 6, 2006.

The Special Master has obtained information indicating that Ms. Woodford's decision was motivated by the fact that her request to the Governor's Office that Tim Virga, the CDCR Chief of Labor Relations be appointed as Acting Assistant Secretary of Labor Relations was not approved by the Governor's Office because placing Mr. Virga into this crucial position was not to the liking of the leaders of the CCPOA. Apparently, Ms. Woodford's appointment recommendations were the subject of discussion between Susan Kennedy, Fred Aguiar and CCPOA leaders. Kennedy and Aguiar, without the Acting Secretary Woodford's knowledge, were conducting regular meetings with CCPOA officials. Given the rumors circling around CDCR headquarters and in the prisons, additional resignations may be pending, and several highly regarded candidates for promotion within the CDCR have decided to "keep their heads down," and reject promotion opportunities.

4. *The Purge of the State of California Labor Relations Negotiating Team.*

At the same time, the Special Master has learned that Susan Kennedy and Fred Aguiar have taken steps, on the eve of the July 1, 2006 contract negotiations between the State and the CCPOA, to remove the senior Department of Personnel Administration executives who manage contract negotiations with the CCPOA and other State labor unions. Sometime in either late April or early May 2006, Mike Navarro, the Director of DPA, and Bill Avery, the Deputy

Director of DPA were told to resign.[13] The timing of these retirements, in conjunction with the other developments discussed above, give rise to the question of whether the State is in a position to adequately negotiate a contract which protects the court's remedial plans.

5. *Summary.*

Former Secretary Rod Hickman's decision to call for a zero tolerance policy concerning the code of silence was the heart of the Post Powers remedial plan and rightfully so. Integrity and remedial plan efforts must begin at the top, and then percolate down. Beginning January 2006, however, it appears that the requisite leadership has been absent from the Governor's Office. Evidence before the Special Master indicates that the Governor's Office may have given the code of silence in California's prisons a new lease on life. Considering the turn-over of CDCR Secretaries, the DPA purge, the meetings that Susan Kennedy and Fred Aguiar have arranged with the CCPOA without telling the CDCR Secretary, and the continuation of concerted efforts by the CCPOA to embarrass and humiliate CDCR employees who have the courage to report misconduct, the Special Master is seriously concerned that the entire Post Powers remedial plan is now in jeopardy. For this reason, he recommends that the Court direct him to hold hearings, open to the public, that investigate whether developments since January 2006, are, in fact, threatening the effective implementation of the Court's Post Powers remedial orders, and if so, whether the Court's remedial orders should be modified in any way to ensure their effective implementation.

III.

RECOMMENDATIONS

Based on the findings above, the Special Master recommends as follows:

1. Continued Monitoring:

While significant remedial progress has been achieved, each element of the Post Powers remedial plan must continue forward with additional implementation steps to be successful.

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[13] Mr. Navarro and Mr. Avery will retire effective July 1, 2006.

Furthermore, as explained above, the January 2006 change of policy in the Governor's Office threatens the entire remedial process. Therefore, the Special Master recommends that the Court order him to monitor the Post Powers reforms as follows:

A. Continue periodic meetings with counsel, CDCR officials, and the Inspector General concerning CDCR investigations and discipline;

B. Monitor and report to the Court concerning the adequacy of staffing for the BIR, Internal Affairs, and the EAPT, including the adequacy of the salaries for both BIR and EAPT attorneys;

C. Issue a report and recommendations, no later than January 31, 2008 concerning future Court oversight of CDCR investigations and discipline (including the end of the proposed peer review monitoring of the BIR by Court Expert Michael Gennaco).

2. Monitoring the BIR's Monitoring.

Now that the BIR has assumed systemic oversight over internal affairs investigations and CDCR discipline related casework, the Special Master and the Inspector General have approved a plan developed by Court Expert Michael Gennaco which provides a policy and mechanism for the Special Master to monitor the adequacy of BIR monitoring. The plan, attached as Exhibit 13, provides an appropriate and comprehensive tool to determine whether the newly created BIR is providing adequate oversight over CDCR investigations which warrants the end of, or some reduction of, Court oversight. Therefore, the Special Master recommends that the Court adopt the BIR monitoring plan submitted by Court Expert Michael Gennaco (Exhibit 13).

3. Establishing an Appropriate Salary Enhancement for EAPT Attorneys.

The salaries of the lawyers who serve in the critical EAPT unit are woefully inadequate. The Special Master has listened for months to various reports about why the State's salary system cannot self-adjust so that these attorneys, essential to the Post Powers remedial plan, are adequately compensated so that turn over in the EAPT is not excessive. In many respects, what the Special Master discovered concerning EAPT salaries is identical to what he reported to the

Court in *Plata* while working as the Court's Correctional Expert. Simply stated, the DPA and SPB manner of evaluating attorney salaries does not comport with either: (a) the reality of the job market; and (b) the reality of the difficult EAPT assignment (including the requirement of constant travel to far flung institutions to conduct hearings).

It would have been helpful if defendants had provided the Special Master with relevant comparative salary data. It appears, however, that such information is simply not compiled by the State. Therefore, in order to determine an appropriate salary enhancement, the Special Master met and conferred with EAPT staff (including those who were leaving for other [and perceived easier] State attorney assignments), the Court experts, and representatives from the BIR. While the enhancement proposed by the Special Master may be too conservative, hopefully the State will conduct an appropriate survey that considers both the job and the competition and thereafter further increase the salaries of EAPT staff.

The Special Master recommends that the Court order defendants to establish and implement, effective August 1, 2006, a recruitment and retention differential for all EAPT attorneys, up to and including the Assistant Chief Counsel of the Employment Advocacy Team, of $900.00 per month.

4. Conducting an Investigation, Including Public Hearings, to Preserve the Post Powers Remedial Plan and Move Forward the CDCR's Effort to Eliminate the Code of Silence.

There exists a compelling need to achieve, in a timely manner, the objectives of the *Madrid* and Post Powers remedial plans. Indeed, given the years which have elapsed and the limited results, the need is more compelling today than ever before. The Schwarzenegger Administration's 2006 reversal of policy, however, may threaten the entire Post Powers remedial plan. For example, it is absolutely essential for the timely and effective implementation of Post Powers remedial plan that the Assistant Secretary of CDCR Labor Relations position is staffed by an individual who can effectively protect investigation and discipline related management rights set forth in the MOU. Susan Kennedy, however, appears to have given the CCPOA veto power over this critical appointment. If the CCPOA is allowed to select the next Assistant

Secretary of CDCR Labor Relations, all that has been achieved during the past two years may be lost. Likewise, given an environment in Sacramento and the prisons where CCPOA leaders continue to attempt to intimidate staff and enforce the code of silence, compliance with the Court's orders will not take place without competent and ethical prison executives who are willing to face up to CCPOA attacks. Two CDCR Secretaries with unquestioned ethics, however, have retired from State service – apparently because of the CCPOA's influence in the Governor's Office. At present, the CDCR is faced with a brain drain, and a refusal by correctional leaders from other states to consider an assignment in California. In similar fashion, the 2006 MOU negotiations have the potential to impact on numerous contract provisions that are tied directly to use of force and other remedial plan requirements. Given recent forced retirements in DPA and other setbacks, however, the State may be unable to carry forward with those negotiations in a manner which protects the Court ordered remedial plans.[14] Because of these disturbing developments, the Special Master recommends that the Court order the Special Master to investigate, hold public hearings as necessary, and report to the Court concerning whether the *Madrid* and Post Powers remedial plans have been compromised, and if so, whether the Court's remedial orders should be modified.

IV.

COMPLIANCE WITH THE ORDER OF REFERENCE

This draft report has been filed because of extraordinary public concern expressed about the problems which plague California's prisons. It will not be considered by Judge Henderson. Prior to the Special Master filing of the final report, plaintiffs and defendants will be provided the opportunity to offer objections and/or comments in a formal and informal manner, as explained below.

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[14] For example, seemingly minor modifications to the MOU (or MOU related "side agreements") such as extending the range of post and bid for supervisors (as negotiated in 2004) may allow the CCPOA to determine who among its members manages prison investigative units. Likewise, changes to Section 9.09 and related provisions may jeopardize the integrity of internal affairs investigations.

Pursuant to the Order of Reference filed January 23, 1995, the Special Master will conduct a hearing on the record concerning the parties' objections to the draft report at 9:00 a.m. on Wednesday July 12, 2006 in Courtroom 12, located on the 19th Floor of the United States District Court for the Northern District of California. The parties' comments and objections should be filed no later than Friday, July 7, 2006. Non-parties wishing to submit briefs in amicus curiae concerning the draft report must seek prior approval from the Special Master. Briefs or other documents submitted without such approval will not be considered by the Special Master. The deadline for submitting amicus requests is July 7, 2006.

Dated: June 20, 2006.

John Hagar
Special Master

PROOF OF SERVICE BY MAIL

I, Kristina Hector, declare:

I am a resident of the County of Alameda, California; that I am over the age of eighteen (18) years of age and not a party to the within titled cause of action. I am employed as an Assistant to the Special Master in *Madrid v. Tilton* in the County of San Francisco, California.

On June 21, 2006 I arranged for the service of a copy of the attached documents described as the SPECIAL MASTER'S DRAFT REPORT RE STATUS OF STATE OF CALIFORNIA CORRECTIVE ACTION PLANS RE ADMINISTRATIVE INVESTIGATIONS AND DISCIPLINE; RECOMMENDATIONS on the parties of record in said cause by sending a true and correct copy thereof by pdf and by United States Mail and addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on June 21, 2006 at San Francisco, California.

Kristina Hector