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

MARCIANO PLATA, et al.,

Plaintiffs,

v.

ARNOLD SCHWARZENEGGER,
et al.,

Defendants.

NO. C01-1351 TEH

ORDER APPROVING, WITH
MODIFICATIONS, PROPOSED
POLICIES REGARDING
PHYSICIAN CLINICAL
COMPETENCY

This matter comes before the Court on the Receiver’s request to approve the policies submitted on June 20, 2008, regarding physician clinical competency. The Court now APPROVES these policies subject to the modifications discussed below.

BACKGROUND

On May 23, 2008, the Court granted in part and denied in part the Receiver’s motion for waiver of state law regarding physician clinical competency. The Court ordered the Receiver to meet and confer with the parties and both amici, the State Personnel Board (“SPB”) and the Union of American Physicians and Dentists (“UAPD”), to revise the proposed peer review policies based on the Court’s rulings. The Court also ordered the SPB to “take the lead in preparing an implementation plan that includes deadlines, for example, for completing training of the SPB ALJs [administrative law judges] who will be conducting the evidentiary hearings; entering into a contract with CMAIMQ [California Medical Association Institute for Medical Quality] to provide a pool of physicians for use on the peer review panels; and hiring any additional SPB staff necessary to implement the proposed policies.” May 23, 2008 Order at 16-17.

1 The Receiver timely submitted a revised set of policies on June 20, 2008. The SPB
2 filed timely objections on June 25, 2008. Defendants filed a statement of non-opposition on
3 June 20, 2008, and the Court construes Plaintiffs’ and the UAPD’s failure to file any
4 objections as statements of non-opposition. On June 27, 2008, the Receiver filed an
5 application for leave to file a response to the SPB’s objections, and the Court now grants
6 such leave and has considered the reply brief attached to the Receiver’s application.

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8 **DISCUSSION**

9 As a general matter, the majority of the SPB’s objections are based on a flawed
10 interpretation of this Court’s May 23, 2008 order. The medical issues to be decided by the
11 peer review panel – i.e., the Judicial Review Committee (“JRC”) – are not limited to whether
12 the physician under review has met the appropriate standard of care. Contrary to the SPB’s
13 interpretation, medical issues falling under the expertise of the peer review panel also include
14 whether privileges should be revoked or suspended in cases where the standard of care was
15 not met, or whether lesser corrective measures such as additional supervision or professional
16 development would be more appropriate. Indeed, if the system allowed peer review only on
17 the limited issue of whether a physician has met the applicable standard of care, and
18 individuals with no medical expertise were allowed to determine whether a physician should
19 retain his or her privileges, then the system would not be one of meaningful peer review.
20 Where the peer review panel’s decision adversely impacts employment status by, for
21 example, resulting in the permanent revocation of privileges, the SPB retains jurisdiction to
22 review that decision. However, because the privileging decision requires medical expertise,
23 such review must be under the substantial evidence standard adopted by the Court in its
24 May 23, 2008 order. This clarification resolves many of the SPB’s objections.

25 The Court now addresses SPB’s specific objections to particular portions of the
26 revised policies in turn below. Page references are to the proposed policies attached as
27 Exhibit 1 to the Declaration of Linda Buzzini filed on June 20, 2008.

28

1 Purpose (page 2, paragraph 3). In accord with the above discussion and this Court’s
2 May 23, 2008 order, the policies should clarify that the JRC shall render a decision
3 concerning privileges but shall not have authority over affirmative defenses or other issues
4 unrelated to the standard of care. Thus, this paragraph shall be revised to read:

5 The outcome of the evidentiary hearing shall be determined by a
6 three-member judicial review committee (JRC) composed of
7 independent and impartial physicians who shall, by majority vote,
8 make findings of fact based on the preponderance of evidence;
9 make credibility determinations; and render a decision
10 concerning privileges, as well as employment to the extent that
11 the findings of fact relating to the standard of care and privileging
12 conclusions impact employment. The State Personnel Board
13 (Board) shall review the JRC’s employment decision based on
14 the substantial evidence standard if the matter adversely impacts
15 employment status, grade level, benefits, and/or wages. The
16 Board shall simultaneously consider the administrative law
17 judge’s (ALJ’s) decision regarding procedural issues and
18 affirmative defenses, as well as the ALJ’s recommendations as to
19 whether substantial evidence supports the JRC’s decision.

20 Conditions of Employment (page 4). The SPB’s interpretation of this language is
21 incorrect. As stated in the revised policies, and in accord with the Court’s May 23, 2008
22 order, privileges are a condition of employment. Thus, if the SPB sustains the revocation of
23 privileges to practice medicine at CDCR, that determination shall – not may – warrant
24 discipline such as suspension or termination.

25 Scope of JRC and SPB Review (page 4). In accord with the above discussion and this
26 Court’s May 23, 2008 order, the first paragraph of this section shall be revised to read: “The
27 Judicial Review Committee (JRC) shall decide privileging decisions that are appealed for an
28 evidentiary hearing. The JRC shall also decide employment decisions adversely impacting
employment status, grade level, benefits, and/or wages where those decisions are based on
privileging conclusions and findings of fact relating to the standard of care.”

Notice of Final Proposed Action (pages 22-23). To clarify what “pertains to
employment,” the following shall be added after the end of paragraph 3 of this section: “An
action does not pertain to employment if it concerns only privileges (e.g., corrective
measures including, but not limited to, non-permanent privilege restrictions, duty changes,
training, and monitoring) and does not adversely impact employment status, grade level,

1 benefits, and/or wages.” The Court does not find it necessary to reference California
2 Government Code section 19572 because the adverse actions contemplated in these policies
3 will necessarily fall under at least one of the legal causes for discipline under that code
4 section. For example, if the peer review panel finds that a physician’s practices have fallen
5 below the appropriate standard of care, then that physician would undoubtedly be subject to
6 discipline under section 19572(b) based on “[i]ncompetency.”

7 Filing Copy of Final Proposed Action, Skelly Officer, Skelly Hearing, and Final
8 Proposed Action Takes Effect (page 23). The word “continued” shall be removed from the
9 paragraph under “Filing Copy of Final Proposed Action.” The following shall be added as a
10 separate section following “Final Proposed Action Takes Effect,” under the heading
11 “Definition of Employment Action”: “An action does not pertain to or impact employment if
12 it concerns only privileges (e.g., corrective measures including, but not limited to, non-
13 permanent privilege restrictions, duty changes, training, and monitoring) and does not
14 adversely impact employment status, grade level, benefits, and/or wages.”

15 Time and Place for Hearing Before Judicial Review Committee (page 24). The Court
16 finds no merit to the SPB’s objection that the title of this provision omits reference to the
17 SPB as an adjudicatory body. This provision concerns only the hearing before the JRC, and
18 it is abundantly clear from these policies that the SPB has an adjudicatory role in other parts
19 of the proceedings. This provision shall, however, be modified as follows to specify when
20 the 30-day period for scheduling a hearing shall commence: “The State Personnel Board
21 shall schedule (or cause to be scheduled) a hearing before an ALJ and the Judicial Review
22 Committee and, within 30 days of the SPB’s receipt of the notice of appeal, shall give notice
23 to the parties. . . .”

24 Confidentiality (page 25). The SPB’s objections to this provision are nonsensical, and
25 it appears that the SPB inadvertently repeated its objections to other provisions. The
26 confidentiality provision, for example, does not contain the terms “employment” or
27 “continued employment,” and it therefore makes no sense to object to this provision on
28 grounds that these terms are ambiguous.

1 Role of Administrative Law Judge (pages 25-26). In accord with the above discussion
2 and this Court's May 23, 2008 order, the fourth paragraph of this provision shall be revised
3 to read: "The ALJ may participate in the JRC deliberations when requested to do so by the
4 judicial review committee. However, clinical competency and privileging determinations, as
5 well as employment decisions based on such determinations, shall be made exclusively by
6 the judicial review committee." The fifth paragraph shall be revised to read: ". . . pertaining
7 to privileges and employment decisions based on privileging conclusions and findings of fact
8 relating to the standard of care" The SPB's objection regarding language describing the
9 ALJ's decision has no merit because the ALJ is clearly authorized to submit written
10 recommendations to the SPB as to whether substantial evidence supports the JRC's decision.
11 The JRC's and ALJ's decisions will be submitted simultaneously to the SPB, and there is no
12 need to have a single written decision that incorporates both the JRC's and ALJ's findings
13 and conclusions.

14 Role of Judicial Review Committee (page 26). In accord with the above discussion
15 and the Court's May 23, 2008 order, the following shall be added to the end of the first
16 paragraph of this provision: ". . . based on privileging conclusions and findings of fact
17 relating to the standard of care." In addition, the second paragraph shall be revised to read:
18 ". . . which pertains to privileging and, therefore, employment determinations based on
19 privileging conclusions and findings of fact relating to the standard of care" Finally, the
20 fourth paragraph shall be revised to read: ". . . the privileging and employment actions based
21 on privileging conclusions and findings of fact relating to the standard of care. . . ."

22 Time and Content of Decisions (page 27). While the Court understands the need for
23 an expedient final decision on privileging and employment issues, the Court agrees that 15
24 days after receipt of the JRC's findings may be insufficient to allow the ALJ to prepare a
25 meaningful recommendation to the SPB. The Court also does not see any substantial harm to
26 allowing an additional 15 days for the ALJ to prepare his or her decision. Accordingly, the
27 first paragraph of this provision shall be revised to read as follows: ". . . the written judicial
28 review committee decision shall be available to the ALJ, who, within 30 days thereafter,

1 shall complete preparation of his/her written proposed decision. . . . Within 60 days after
2 submission of the case, the JRC’s decision, the ALJ’s proposed decision, and the ALJ’s
3 written recommendations to the five-member Board regarding substantial evidence shall be
4 delivered to the Board. . . .” To promote expediency, the Court encourages the JRC, ALJ,
5 and SPB to act as quickly as possible within the time limits prescribed in these policies, and
6 the prescribed time limits shall not be extended under any circumstances.

7 State Personnel Board Scope and Standard of Review (pages 28-29). The above
8 discussion and modifications resolve the SPB’s objections regarding the scope of the SPB’s
9 review. Regarding the SPB’s objections to the time frames imposed by this section, the
10 Court finds that three business days for service is adequate. The SPB also proposes a 45-day
11 time frame from the time of submission of the ALJ’s proposed decision until the Board acts
12 on that decision, but the time frame in this provision is already 45 days: “The Board shall
13 complete its review and render a final decision within 45 days of receiving JRC decisions.”
14 The JRC decision and ALJ decision are submitted to the Board simultaneously.

15 Licensing Actions (page 29). While it appears that only the California Medical Board
16 can take actions against a physician’s license, this provision shall be amended to make
17 explicit that the provision applies only to such actions: “In those cases where privileges have
18 been automatically suspended or revoked due to an action against the physician’s license by
19 the California Medical Board”

20


21 **CONCLUSION**

22 The Receiver shall modify the policies regarding physician clinical competency to
23 reflect the changes ordered above. With those modifications, the Receiver’s proposed
24 policies, attached as Exhibit 1 to the Declaration of Linda Buzzini filed on June 20, 2008, are
25 hereby APPROVED and shall take effect immediately. The following state laws are waived
26 to the extent necessary to implement the policies: California Government Code sections
27 19574.2, 19574.5, 19575-76, 19578, 19581-83, 19585, 19587, 19590, and 19592.2; and
28 California Code of Regulations, title 2, section 51.4.

1 IT IS FURTHER ORDERED that the Receiver, the parties, and amici SPB and UAPD
2 shall continue to meet and confer regarding an implementation plan that is responsive to this
3 Court's May 23, 2008 order. While the SPB contends that its ALJs will be ready to conduct
4 hearings under the above policies by August 15, 2008, the Court agrees with the Receiver
5 that it would be premature to approve an implementation plan on which the Receiver has
6 been unable to comment on the SPB's proposals, and on which the parties and the UAPD
7 have had no opportunity to provide input. Until the implementation plan is finalized, the
8 policies approved by this order shall be modified to allow ALJs employed by the Office of
9 Administrative Hearings, rather than SPB-employed ALJs, to preside over the evidentiary
10 hearings. Once an implementation plan is finalized, the Receiver shall file a report with the
11 Court with the implementation plan attached. This shall occur no later than **August 1, 2008**.
12 If an extension of time is needed, the Receiver shall submit an application – ideally a
13 stipulation – requesting an extension and explaining the reasons for delay.

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15 **IT IS SO ORDERED.**

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17 Dated: 07/09/08



THELTON E. HENDERSON, JUDGE
UNITED STATES DISTRICT COURT

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