

2004 WL 2623924  
United States District Court,  
N.D. California.

Alejandro MADRID, et. al., on behalf of themselves and all others similarly situated, Plaintiffs,  
v.  
Jeanne WOODFORD, et. al., Director, California Department of Corrections, et. al., Defendants.

No. C90-3094 TEH. | Nov. 17, 2004.

#### Attorneys and Law Firms

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#### Opinion

### ***ORDER RE (1) SPECIAL MASTER'S REPORT RE "POST POWERS" INVESTIGATIONS AND EMPLOYEE DISCIPLINE, AND (2) CCPOA'S MOTION TO INTERVENE***

HENDERSON, J.

#### **I. BACKGROUND**

##### ***A. The Special Master's "Post Powers" Report and Recommendations***

\*1 On July 24, 2003, the Special Master reported to this Court that he had discovered a potentially disturbing pattern of events. The events related to the apparent failure of the California Department of Corrections ("CDC") to adequately investigate whether three Pelican Bay State Prison ("PBSP") officers had perjured themselves when they testified in the defense of two fellow guards, Sergeant E.M. Powers, and Correctional Officer J.R. Garcia, who were facing criminal charges for misconduct at PBSP. The Special Master was particularly concerned because it appeared that the CDC had not followed its own "Post Powers Plan," which it had specifically created to govern internal investigations and discipline of employees who had engaged in misconduct relating to the Powers/Garcia trial. *See* Report, Ex. 2 ("Follow-up Investigative Plan and Disciplinary Review Process" or "Post Powers Plan").

Accordingly, on July 28, 2003, the Court directed the Special Master to fully investigate the matter, including whether there had been any deliberate attempts to mislead the Court with respect to the investigations, and to prepare a full record and report of what had transpired. The Special Master thereafter undertook an extensive inquiry over several months that included review of numerous documents and five days of hearings during which 20 witnesses were called to testify by either the Special Master or the parties. He initially reported his findings and recommendations in draft form in January 2004. After considering the parties' objections and comments in follow-up hearings, he submitted his final "Report Re 'Post Powers' Investigations and Employee Discipline" ("Report") on June 24, 2004.

This Report, which is quite detailed and thorough, concludes that the perjury investigations of the three officers—William Jones, C.P. Matlock, and Owen Tuttle—were riddled with failures and mishandled from the start. The Report finds, for example, that the three perjury investigations (referred to as the "Post Powers investigations") were delayed for months, grossly understaffed, and not completed within the limitations period governing administrative discipline. Neither the

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investigative agent nor the CDC Employment Law Unit (“ELU”) attorney assigned to the Post Powers cases were even informed of the Post Powers Plan by Thomas Moore (“Moore”), then Deputy Director of the Office of Investigative Services (“OIS”), or any other superior. These, and other significant failings, the Report finds, are indicative of serious systemic problems in the OIS and the ELU. As the Special Master also observes, the Office of Inspector General previously identified many of these same problems almost three years earlier in an audit of OIS, but the CDC never effectively addressed them.<sup>1</sup> Overall, the Special Master concludes that the CDC “has lost control of its investigative and discipline processes.” Report at 103. Notably, the Special Master’s findings of pervasive systemic deficiencies were recently corroborated by the comprehensive June 2004 Report of the Corrections Independent Review Panel, chaired by former Governor George Deukmejian.

\*2 Even more disturbing, the Report finds that the then Director of the CDC, Edward Alameida (“Alameida”), prematurely shut down the Post Powers investigations in an unusual and hastily called meeting on March 27, 2003, just days after the Post Powers investigator, Bob Ballard, had informed the California Correctional Peace Officers Association (“CCPOA”) that CDC was planning to refer one of the three perjury cases to the San Francisco District Attorney’s office for criminal charges (and despite the fact that the other two investigations had barely begun). The Report also finds other instances in which the CDC had deferred to the CCPOA in matters involving the investigation and discipline of guards accused of abuses of force, and discussed some of the ways in which the Memorandum of Understanding (“MOU”) between the CCPOA and the CDC may unduly interfere with the ability of the CDC to effectively investigate and discipline officers charged with such abuses.

Finally, the Report finds that after Alameida prematurely shut down the three Post Powers investigations at the March 27, 2003 meeting, it was decided at that same meeting that the decision to close the investigations would be communicated to the Special Master with a “Fact Finder” letter. The Report finds that four days later, on April 1, 2003, Moore sent a letter to the Special Master that was designed to deceive the Court by papering over the aborted investigations. In particular, the Report finds that Moore submitted a letter to the Special Master stating that the investigations were closed because they lacked sufficient merit to warrant further investigation. The letter attached, as support, a Fact Finder memorandum that emphasized only the weaknesses of each case.

In short, the Special Master’s Report, in vivid and damning detail, documents that the CDC’s system for investigating and disciplining officers is broken to the core. Not only is the system dysfunctional from a managerial standpoint, but it is also subject to interference and obstruction from the CCPOA.

The Special Master follows his findings with two categories of recommendations to the Court. The first category consists of recommendations aimed at addressing his findings with respect to the specific conduct of Alameida and Moore. The second category concerns recommendations that are aimed at remedying the systemic, institutional deficiencies in the CDC’s methods for investigating and disciplining employee officers. With respect to the first category, the Special Master recommends that the Court consider (1) issuing an Order to Show Cause (“OSC”) re criminal contempt for Alameida and Moore based on their actions (or inactions) taken in connection with the three Post Powers perjury investigations, and (2) referring perjury charges against Moore to the United States Attorney’s Office based on the Special Master’s conclusion that Moore gave false testimony under oath at a July 30, 2003 hearing regarding the Special Master’s Post Powers investigation. *See* Special Master’s Report at 119–21 (Recommendations 1 and 2).

\*3 With respect to the second category, the Special Master begins with the observation that the CDC has begun showing a genuine commitment to reforming the deficiencies identified in the Report under the leadership of the new Secretary of the Youth and Adult Correctional Agency (“YACA”), Roderick Hickman, and the new Director of the CDC, Jeanne Woodford. The Report notes that, under this leadership, Joe McGrath, the former Warden at PBSP, was specially assigned to assist in developing a remedial plan, and Martin Hoshino, formerly of the Office of Inspector General, was appointed to replace Thomas Moore and begin reforms in the OIS. Kathleen Keeshen, the CDC’s Deputy Director of Legal Affairs, had also initiated reforms in the ELU. Finally, Governor Arnold Schwarzenegger had recently nominated Matthew Cate to the newly revived Inspector General position and Cate was actively involved in the remedial process.

All in all, the Special Master reports that defendants are making a “strong effort to address the serious and persistent problems with inadequate investigations and correctional officer discipline.” Report at 109. Accordingly, he concludes that civil contempt proceedings do not appear necessary to secure compliance with the Court’s remedial orders. He cautions, however, that “[p]owerful outside forces oppose the implementation of fair and effective investigations and discipline in the [CDC], and development and implementation of an effective remedy is far from complete.” Report at 109–10. The Special Master thus recommends that the Court direct him to continue working with defendants to develop and implement an adequate remedial plan to address the systemic problems with investigations, adverse action discipline and the code of silence identified in his Report. *See* Special Master’s Report at 121–22 (Recommendation 3(A)).

The Special Master also recommends that the Court take several other actions to address the findings of systemic deficiencies. First, he recommends that defendants be directed to modify their use of force remedial plans so as to exclude CCPOA participation from Executive Review Committee evaluations of the use of force at PBSP. Second, he recommends that the Court direct the Special Master to investigate and report on whether provisions of the CCPOA's MOU with the CDC violate, by their terms or practice, the Court's use of force remedial plans. Third, he recommends that the Court direct the Special Master to work with the parties to develop and implement a plan for monitoring the Post-Powers remedial efforts. Finally, he recommends that defendants be directed to post copies of the Special Master's Report in the prisoner law libraries at PBSP. Report at 121–24 (Recommendations 3(B)-(E)).

***B. Proceedings Subsequent to Issuance of the Special Master's Report***

No party filed objections to the Special Master's recommendations relating to systemic reform. Alameida and Moore, however, both filed objections to the Special Master's recommendations that the Court consider issuing an OSC re criminal contempt. Moore also objected to the Special Master's recommendation that the Court refer perjury charges to the United States Attorney's Office. On October 25, 2004, the Court heard extensive and helpful argument on these objections.

\*4 On June 14, 2004, the CCPOA filed a motion to intervene in this case on the ground that the Special Master's recommendation regarding review of the MOU's impact on the remedial process could directly affect its contractual interests. This motion remains pending. On July 29, 2004, this Court issued an order directing the Special Master to identify the specific provisions of the MOU, or any amended MOU, that he seeks to investigate should the Court adopt his proposed recommendation 3(B). This was done on August 31, 2004. The Court also directed plaintiffs to clarify what specific discovery they believe is necessary to permit the Court to address the issues raised by the CCPOA's motion to intervene. In response, plaintiffs filed their discovery plan on August 12, 2004, and the CCPOA filed its opposition thereto on August 19, 2004.

On July 29, 2004, this Court also adopted two recommendations relating to systemic reform that had not been objected to: (1) a portion of the Special Master's Recommendation 3(D)—which concerned an interim monitoring plan—and (2) Recommendation 3(E)—which concerned the posting of the Special Master's Final Report.

The Court now addresses (1) the Special Master's recommendations regarding the conduct of Alameida and Moore, (2) the remaining recommendations for systemic reform that the Court has not yet addressed, and (3) the CCPOA's motion to intervene.

**II. THE SPECIAL MASTER'S RECOMMENDATIONS RE CRIMINAL CONTEMPT AND PERJURY**

***A. Objections to Recommendations re Criminal Contempt***

In his Report, the Special Master recommends that the Court “consider issuing an Order to Show Cause re Criminal Contempt for Edward Alameida and Thomas Moore because of willful violations of the Court approved Use of Force Discipline Remedial Policy, Use of Force Disciplinary Procedure, and the Use of Force Investigation Policy and Procedure.” Report at 119. In particular, the Report identifies four actions or omissions by Edward Alameida (“Alameida”) and Thomas Moore (“Moore”) that he concludes potentially constitute criminal contempt of this Court's orders:

- (a) The failure to adequately investigate the perjury allegations against Correctional Officers Jones, Matlock, and Tuttle;
- (b) The failure to prepare a report of the Post Powers investigations on CDC forms 989 A and B;
- (c) The failure to set forth findings concerning each of the allegations against Officers Jones, Matlock, and Tuttle in a manner that notes whether the inquiry supports or refutes the allegations, and the failure to arrive at one of the findings specified by the governing Use of Force Investigation Policy and Procedure; and
- (d) The act of organizing and condoning a cover-up concerning Alameida's decision to shut down the Post Powers investigations on March 27, 2003 through the submission of a false and misleading letter to the Special Master, and thereby to the Court.

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The Special Master concludes that these actions or omissions violate specific remedial procedures that govern employee misconduct investigations and employee discipline at PBSP, which are set forth either in the September 20, 2000 PBSP Use of Force Investigation Policy and Procedure or the September 30, 2002 PBSP Use of Force Disciplinary Policy and Procedure. The Special Master further concludes that since these remedial policies and procedures were adopted by the Court in its Orders of April 24, 1998 or December 2, 2002, that Alameida and Moore's actions and omissions potentially constitute contempt of court.

\*5 As plaintiffs emphasize, the Special Master did not recommend that the Court find Alameida and Moore in criminal contempt in this proceeding. Rather, the Special Master only recommended that the Court consider ordering Alameida and Moore to *show cause* in future proceedings as to why they should not be held in criminal contempt. Moore and Alameida argue, however, that the Court should not further pursue this matter because it is clear at this juncture that any prosecuting authority would not ultimately be able to establish all of the elements of criminal contempt beyond a reasonable doubt.

The Court's power to impose criminal contempt sanctions derives from 18 U.S.C. § 401 which provides in part that "[A] court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority ... as [d]isobedience or resistance to its lawful order..." Unlike civil contempt proceedings, which are remedial in purpose and intended to coerce compliance with court orders, the purpose of criminal contempt is to "vindicate the authority of the court." *United States v. Powers*, 629 F.2d 619, 627 (9th Cir.1980). Hence, any punishment imposed is "unconditional and fixed." *Id.*

As courts have long recognized, the Court's powers of contempt are particularly potent. Indeed, it is the only instance in American jurisprudence in which the court can function as prosecutor, judge, and jury. Courts have thus created several prudential principles to ensure that this unique and potent power is invoked only sparingly and in appropriate circumstances. *Project B.A.S.I.C. v. Kemp*, 947 F.2d 11, 16 (1st Cir.1991). In particular, a court or jury<sup>2</sup> may only find criminal contempt if the evidence establishes, beyond a reasonable doubt, that (1) there is a clear and definite order of the Court that imposes obligations upon the alleged contemnor, (2) actual knowledge of the order by the alleged contemnor, and (3) willful disobedience of the order by the alleged contemnor. *Id.* at 17–18 (order must be directed at alleged contemnor); *United States v. Powers*, 629 F.2d 619, 626 n. 6, 627 (9th Cir.1980); *United States v. Rylander*, 714 F.2d 996, 1003 (9th Cir.1983); *see also Spallone v. United States*, 493 U.S. 265, 276–77, 110 S.Ct. 625, 107 L.Ed.2d 644 (1990).

Here, Alameida and Moore primarily argue that the Court should reject the Special Master's recommendation re criminal contempt because: (1) the policies and court orders relied upon by the Special Master do not specifically direct Moore or Alameida to take or not take the actions that form the basis of the alleged contemptuous behavior; (2) that even if the policies and orders did so, there is no evidence that Alameida and Moore were actually aware of such court-ordered obligations; and (3) even if they did have such knowledge, there is no evidence that any non-compliance by Alameida or Moore was willful and purposeful.

With respect to the last argument, Alameida and Moore both conceded at the hearing that their conduct relating to the Post Powers investigations was negligent; Alameida offered that perhaps his conduct rose to the level of malfeasance. Both he and Moore, however, reject the Special Master's credibility determinations, and take issue with the primary factual findings that underlay the contempt recommendations. Alameida, for example, argues that the evidence does not support the conclusion that he called the unusual March 27, 2003 meeting and then shut down the Post-Powers investigations because the CCPOA did not want the investigations to proceed. Alameida and Moore also both argue that there is no evidence that they intended to submit a misleading letter to the Special Master, and Moore argues that the evidence does not show that he caused the delays and inadequacies in the investigations. Accordingly, they contend that no reasonable trier of fact could find, beyond a reasonable doubt, that they engaged in any conduct rising to the level of criminal contempt.

\*6 The Court has carefully reviewed the documents and transcripts upon which the Special Master's findings are based, as well as Alameida and Moore's written and oral arguments, including Alameida's supplemental submission, filed June 15, 2004. Having done so, the Court concludes that Alameida and Moore's analysis of the facts and appraisal of witness credibility is not convincing and represents a decidedly self-serving view of the evidence. The Court is amply satisfied that a neutral appraisal of the full record demonstrates that the Special Master's credibility determinations and factual findings are fair, persuasive, and well-supported by the record, regardless of whether they are reviewed for clear error or *de novo*. Indeed, the Court is well satisfied, based on its careful and independent review, that, at all times relevant hereto, Alameida had neither the will nor intent to effectively investigate and potentially discipline the three Pelican Bay officers accused of the most serious of charges—suspected perjury in federal court to cover up excessive force by fellow officers—but instead chose to shut down the investigations in order to appease the CCPOA.<sup>3</sup> The Court is also amply convinced that Moore treated the Post Powers plan as a sham which he never seriously attempted to follow. The Court has no doubt that both Alameida and

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Moore engaged in gross abuses of the public trust.

As noted above, however, the doctrine of criminal contempt imposes strict legal requirements by which courts must abide. Upon careful review, this Court reluctantly concludes that although misconduct plainly occurred, the requirements for finding Alameida and Moore in criminal contempt can not be fully met in this case. The Post Powers Plan that defendants developed specifically to govern investigations and discipline in any Post-Powers related matters was never adopted as a court order directed at Alameida or Moore. The provisions of the more general PBSP investigation and discipline policies that were violated in this case—and which serve as the basis for the Special Master’s recommendations regarding contempt—were not directed at either Alameida or Moore, and the Court orders adopting these provisions did not require Alameida or Moore to implement them or otherwise take any action with respect to those provisions. So while it is clear that provisions of these policies were violated, there is no Court order that specifically directed *Alameida* and *Moore* to comply with these provisions. As such, it is unlikely that a trier of fact could find, beyond a reasonable doubt, that Alameida and Moore violated a clear and definite order of the Court which imposed obligations upon them. *Powers*, 629 F.2d at 619; *Project B.A.S.I.C.*, 947 F.2d at 17. Accordingly, the Court concludes that an OSC re criminal contempt should not issue in this instance.

This decision should not, however, be construed in any way as a vindication of Alameida and Moore’s conduct; rather, as expressed above, the Court’s view is to the contrary. Instead, this result is simply necessitated by the fact that the Court’s orders were not sufficient in this instance to hold Alameida and Moore fully accountable for their actions.<sup>4</sup> The Court intends, however, to take such steps as may be necessary to ensure that, in the future, the highest-ranking officials of the CDC are on notice and fully accountable with respect to this Court’s orders.<sup>5</sup>

\*7 Further, the Court is not limited to powers of criminal contempt with respect to managing the litigation process before it. While Congress’ sanctioning scheme of statutes and rules “reaches only certain individuals or conduct, the [court’s] inherent power [to sanction] extends to the full range of litigation abuses,” which would include, of course, any intentional effort to defraud or mislead the Court. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); *see also Pope v. Fed. Express Corp.*, 974 F.2d 982, 984 (8th Cir.1992). As in the case of criminal contempt, the “very potency,” of inherent powers dictates that they be “exercised with restraint and discretion.” *Chambers*, 510 U.S. at 44. As such, sanctions under the court’s inherent power are reserved for those cases in which the offender’s conduct “constituted, or was tantamount to, bad faith.” *Primus Auto. Fin. Serv., Inc. v. Batarse*, 115 F.3d 644, 648 (9th Cir.1997). The concept of bad faith encompasses “a broad range of willful improper conduct,” including conduct which is reckless “when combined with an additional factor such as ... an improper purpose.” *Fink v. Gomez*, 239 F.3d 989, 991–92, 994 (9th Cir.2001); *Gomez v. Vernon*, 255 F.3d 1118, 1134 (9th Cir.2001).

Here, Moore personally signed and submitted a letter to the Special Master, dated April 1, 2003, in which he represented that everyone in attendance at the March 27, 2003 meeting unanimously agreed that the perjury investigations of Officers Jones, Matlock, and Tuttle lacked sufficient merit to warrant further investigation, and recommended that the Special Master close the matter in the interests of justice. Report, Ex. 18. It is clear to this Court, however, that there was no such unanimous consensus. Further, Moore attached, as support for his letter, a Fact Finder memorandum that had been prepared to justify closure of the investigations and which, as Moore has admitted, emphasized only “the negatives.” *See Moore Tr. Vol. 1 at 175; Ballard Tr. Vol. 2 at 359.*<sup>6</sup> At the hearing, Moore’s counsel conceded that Moore’s April 1, 2003 letter and attachment could “appear” misleading but suggested that Moore should not be faulted because he was not represented or assisted by counsel at the time. Such excuses ring hollow. The Director of the OIS should not need a lawyer to advise him that the submission of misleading documents to the Special Master for the Court constitutes a fraud upon the Court that is highly improper. The Special Master also found that Alameida participated in this deception by directing his agents to shut down the investigations with a Fact Finder letter.

Accordingly, the record justifies the issuance of an OSC as to why Moore and Alameida should not be sanctioned, pursuant to this Court’s inherent powers, for intentionally submitting (or recklessly submitting for an improper purpose) a misleading document to the Court—to wit, the letter of April 1, 2003, supported by the Fact Finder memorandum which presented only the negatives. The Court concludes, however, that since this OSC would involve the exercise of its inherent powers, rather than its contempt powers, that it would be appropriate to take into account equitable considerations before proceeding. Having done so, the Court concludes, for the reasons set forth a pages 5–6 of Alameida’s Supplemental Submission, that, in this instance, substantial equitable factors, including the dramatic deterioration of Alameida’s health and his resignation, weigh against ordering Alameida to show cause regarding this matter. Moore, however, has raised no such considerations, and he remains fully employed at the CDC. Nor are any similar equitable factors apparent from the record. Accordingly, the Court shall issue an OSC as to Moore pursuant to this Court’s inherent powers.

**B. Objection to Recommendation re Perjury by Moore**

\*8 The Special Master also recommends that the Court consider referring perjury charges against Moore to the United States Attorney's Office based on false testimony given under oath at the July 30, 2003 hearing before the Special Master relating to the Post Powers investigation. See Report at 121 (identifying five specific statements). Plaintiffs do not oppose Moore's objection to this recommendation. They explain that "[a]fter carefully reviewing the transcripts and Moore's objections, plaintiffs believe that while Moore's testimony was misleading and not credible, the specific instances cited by the Special Master do not meet the strict requirements necessary to prove perjury." Pls.' Opp. at 7. The Court concurs with this assessment. Accordingly, it will sustain this objection to the Report.

**III. THE SPECIAL MASTER'S RECOMMENDATIONS RE SYSTEMIC REFORM**

As noted above, the Special Master has made several recommendations designed to remedy the systemic deficiencies in the CDC's investigation and discipline of correctional staff. While the Court has already adopted certain of these recommendations, it now adopts the remaining recommendations for the reasons set forth below.

**Recommendation 3(A)**

The Special Master first recommends that the Court direct him to 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." Report at 122.

This recommendation flows from the Special Master's findings, discussed above, that the CDC is currently incapable of effectively investigating violations of this Court's remedial policies or imposing discipline when needed. As this Court explained in its decision after trial, the ability to effectively investigate and discipline officers charged with abusing force (or interfering with abuse of force investigations) is essential to correcting the underlying constitutional violations found in this case, and thus to the final resolution of this long-standing litigation. Effective investigation and discipline is the final cornerstone of defendants' use of force remedial plans since without effective investigation and discipline, all of the remedial policies, no matter how well conceived, would eventually turn into little more than a "dead letter":

A system that adequately monitors and regulates the use of force consists of five components: (a) written policies that clearly identify for line staff when and how much force is appropriate under different circumstances; (b) training of correctional officers regarding the proper use of force; (c) supervision of the use of force to ensure that it is consonant with departmental and institutional policies and procedures; (d) investigation of possible misuses of force; and (e) officer discipline for the misuse of force (citations omitted).

\*9 Each of these interrelated components builds upon and reinforces the others. Thus, adequate written policies provide the necessary framework for properly training staff and evaluating subsequent conduct. Yet, written policies alone serve little purpose unless staff are trained as to their content. Adequate supervision and investigation are necessary to ensure that, in practice, staff are properly implementing written policies and principles learned through training. Finally, a meaningful disciplinary system is essential, for if there are no sanctions imposed for misconduct, the prison's "policies and procedures ... become a dead letter." (citation omitted).

*Madrid v. Gomez*, 889 F.Supp. 1069, 1181 (N.D.Cal.1995).

The fact that the Director of the CDC does not object to the recommendation that the Special Master work with defendants to develop and implement a plan for systemic reform reflects not only the merit of the Report's findings on this issue, but also an acknowledgment of the important role that effective investigation and discipline plays in remedying the constitutional violations at issue in this case. The Court further believes that it reflects a genuine desire to tackle these issues. Indeed, considerable additional progress has been made since the Report issued in June 2004. For example, under the firm and steady leadership of Secretary Hickman, the CDC has embarked on several important initiatives. It has developed a comprehensive, first-ever "Employee Disciplinary Matrix," which was recently adopted as an order of the Court. When fully implemented, it will ensure that discipline of CDC employees is undertaken in a timely, fair, and consistent manner, regardless of the employee's location or position. Secretary Hickman has also launched new programs to counter the long-standing and pervasive code of silence, and have developed a new "Vertical Advocacy Program" that is designed to cure some of the deficiencies in the way investigations and disciplinary matters are handled. A new Bureau of Internal Review ("BIR") within

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the Office of Inspector General has also been legislatively established and will soon be operational. It will provide critically needed, systematic “real-time” monitoring of the investigative and discipline process in cases where there are charges of significant misuse of force.

The only deviation from this steady and impressive line of progress was the State’s agreement in July 2004 to amend its MOU with the CCPOA as part of the effort to balance the State budget. This Court previously expressed its concerns that certain of these amendments could pose further obstacles to the Court’s remedial efforts. Defendants have informed the Court, however, that YACA has appointed a Deputy Secretary of Labor Relations to manage all labor negotiations including negotiating the renewal of the MOU in 2006. In addition, the Deputy Secretary will establish centralized controls on “local agreements,” arbitrations, and grievance processing.

**\*10** Given all of the above, the Court is satisfied that defendants have demonstrated a sincere commitment to remedying the very serious problems identified in the Report. As such, the Court concurs in the Special Master’s conclusion that civil contempt proceedings are unnecessary at this time to secure compliance with the Court’s orders. Accordingly, the Court adopts Recommendation 3(A) and will direct the Special Master to continue working with defendants to develop and implement appropriate remedial plans.

### ***Recommendation 3(b)***

Second, the Special Master recommends that the Court direct defendants to modify their use of force remedial plans to exclude CCPOA participation from Executive Review Committee (“ERC”) evaluations of the use of force at PBSP. Report at 122.

As the Report explains, CCPOA representatives are currently permitted to observe Executive Review Committee meetings at PBSP. These meetings are intended to provide PBSP “executives” (i.e. the Warden, Associate Wardens and other prison officials) with an opportunity to review reported use of force cases and candidly discuss potential discipline and related issues. The CCPOA representatives who observe the weekly ERC meetings may later represent the same officers whose cases are discussed in these meetings. Report at 32. Given the Report’s findings, the Special Master concludes that there is no “justifiable reason to allow the CCPOA to continue to observe a process whereby discipline decisions are discussed and often implemented.” *Id.* at 33. The Special Master further notes that attendance at this meeting is not necessary to protect the due process interests of correctional officers because contractual and statutory procedures are already in place to protect these interests.

The Court concurs in this recommendation. An Executive Review Committee should be just that: an opportunity for PBSP executives to discuss pending investigative and disciplinary matters in “executive session.” It is not appropriate for the CCPOA, which has distinct and potentially adverse interests to the ERC members, to attend these meetings—the effectiveness of which are critical to the successful implementation of the remedial orders in this case. The Special Master also informs the Court that he has been assured by CDC officials that the attendance or non-attendance of CCPOA representatives at ERC meetings is not an issue that is covered by the MOU. And as previously noted, no party has objected to this recommendation. Accordingly, the Court shall adopt this recommendation.

### ***Recommendation 3(c)***

Third, the Special Master recommends that the Court direct him to “investigate, hold hearings if necessary, prepare a report, consider comments from the parties and CCPOA, and issue recommendations concerning CCPOA/CDC MOU provisions that violate, by their terms or practice, the Court’s use of force remedial plans.” Report at 122.

During the course of his Post Powers investigation the Special Master discovered that provisions in the MOU between the CDC and the CCPOA may, in practice, be relied upon to hinder or obstruct fair investigations into allegations of abuse of force by correctional staff and deter the initiation of complaints. To illustrate, the Special Master provides examples of how three provisions of the MOU have operated to hamper the investigative process. *See* Report at 113–17. In his filing of August 31, 2004, the Special Master identifies the specific provisions in the MOU, and the August 12, 2004 amendments to the MOU, that he concludes warrant investigation. The Court fully concurs that further investigation is appropriate in order to assess to what extent, if any, these MOU provisions may impede or prevent the full and effective implementation of the Court’s remedial plans.

#### IV. THE CCPOA'S MOTION TO INTERVENE

\*11 The CCPOA moves to intervene in this action as a matter of right pursuant to Fed.R.Civ.P. 24(a). The CCPOA does not, however, seek intervention for all purposes or to revisit matters previously litigated. Rather, as its Reply brief clarifies, it asserts that its motion is prompted by the Special Master's recommendation that the Court direct him to investigate whether provisions of the CCPOA's MOU violate the Court's use of force remedial plans—which in turn could potentially lead to litigation over whether any such provision should be modified or overridden. *See e.g.* CCPOA's Reply at 5 and n. 2. As such, the CCPOA argues, it should be allowed to intervene for the limited purpose of "responding to any effort to modify or change the terms and conditions of employment of employees it represents, as contained in the MOU." CCPOA Reply at 8.

In order to establish intervention as a matter of right, the applicant must show that (1) it has a significant protectable interest relating to the action, (2) disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest, (3) the application is timely, and (4) the existing parties may not adequately represent the applicant's interest. *United States v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir.2002). Plaintiffs do not dispute that the CCPOA can satisfy the second and fourth of these factors. They contend, however, that the CCPOA's motion should be denied because (1) it is untimely, and (2) the CCPOA fails to specify a significant protectable interest relating to the action. They also argue that the CCPOA seeks to intervene to thwart the remedies sought by the parties and the Court, and thus their motion should be denied on this ground as well. The Court addresses these issues in turn.<sup>7</sup>

Although "timeliness" is the third factor, it is "the threshold requirement for intervention." *United States v. Oregon*, 913 F.2d 576, 588 (9th Cir.1990). A determination of timeliness turns on three factors: (1) the stage of the proceeding at which the applicant seeks to intervene, (2) any prejudice to the other parties, and (3) the reason for and length of delay. *League of United Latin Am. Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir.1997). As such, timeliness does not depend just on the age of the lawsuit, but rather on all the relevant circumstances.

As plaintiffs point out, the amended class action complaint in this action was filed almost exactly 13 years ago, on November 21, 1991, and the Court issued its opinion after trial in January 1995, almost ten years ago. Since then there have been extensive remedial proceedings. The CCPOA does not deny that it has followed and been fully aware of all of these events. Indeed, the CCPOA has been informally involved in the remedial process with respect to various issues over the years. The extremely late stage of the proceedings, combined with the CCPOA's knowledge of this action, thus clearly militate against allowing any broad-based intervention or even intervention for purposes of participating in the remedial phase generally. Indeed, intervention for such purposes would plainly be untimely. *See e.g., Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir.1978).

\*12 Where, however, a specific issue arises for the first time late in the proceedings, limited intervention for the sole purpose of addressing that issue is not necessarily barred on grounds of untimeliness. As the Court observed in *Alisal Water Corp.*, an applicant's interest in a "specific phase of a proceeding may support intervention at that particular stage of the lawsuit." *United States v. Alisal Awater Corp.*, 370 F.3d 915, 921–22 (9th Cir.2004). This is the case here. Pursuant to Section III above, the Court has adopted the Report's Recommendation 3(C), which directs the Special Master to investigate provisions of the CCPOA's MOU, and make recommendations with respect to any such provisions that are found to violate, by their terms or practice, the Court's use of force remedial plans. If the Special Master finds that any of the investigated MOU provisions violate the remedial orders in this case, and are impeding the Court's ability to cure the constitutional violations at issue, this could, in turn lead, for the first time, to litigation directly challenging provisions of the CCPOA's MOU. Thus, the possibility of MOU modification is a new and discrete issue in this case. Nor did the CCPOA have reason to know that modifications to its MOU might be directly litigated in this action until the Special Master's draft report in January 2004.<sup>8</sup> Finally, the Court concludes that a narrowly circumscribed intervention limited to this newly injected issue would not result in the type of prejudice that justifies denial of intervention—such as the revisiting of issues previously decided.<sup>9</sup> Accordingly, the Court concludes that a motion to intervene based on the Special Master's Recommendation 3(C) should be not denied on grounds that it is untimely.

With respect to the first factor—the existence of a significant protectable interest relating to the action—it is well established that the CCPOA has a protectable interest in its collectively bargained agreement with the CDC. *See, e.g., United States v. City of Los Angeles*, 288 F.3d 391, 399–400 (9th Cir.2002); *Southwest Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 820 (9th Cir.2001) (contractual interests are protectable interests for purposes of Rule 24); *Richardson v. Alaska Airlines, Inc.*, 750 F.2d 763 (9th Cir.1984); Cal. Gov't Code § 3512 *et seq.* The CCPOA's significant protectable interest in its contract with the CDC is also "related to" this action in light of this Court's decision to adopt the Special Master's Recommendation 3(C), as set forth above.

Plaintiffs argue, however, that intervention should be denied even if it is timely and the CCPOA has a protectable interest, because the CCPOA will misuse its status as a party to thwart the remedial process in this case. Among other things, they point to CCPOA statements that signal their continued support of the code of silence, and the CCPOA's decision to shun a PBSP officer who broke the code of silence while giving a "hero's welcome" to a PBSP officer accused of unjustifiably shooting and severely wounding an PBSP inmate and was fired for using racial slurs. *See* Pls.' Opp. at 6. Plaintiffs also emphasize that the CCPOA mocked Secretary Hickman's recent reform efforts by distributing a mock paper currency at the California State Capital featuring Mr. Hickman's image, the slogan "Not Worth A Buck!", and the mock signatures of plaintiffs' counsel and a state legislator critical of the CCPOA. *See* Fama Dec ¶ 5, and Exh. A. The plaintiffs also seek leave to take discovery designed to assist the Court in addressing whether the CCPOA's intervention would inhibit the remedial process, and what limitations, if any, should be imposed on any such intervention.

**\*13** The Court concludes that the discovery sought by plaintiffs is over broad and not necessary for disposition of this motion.<sup>10</sup> The Report's findings, however, do raise very troubling questions regarding the CCPOA's approach to the Post-Powers remedial process in this case. Nor are juvenile attacks on plaintiffs' counsel consistent with the level of professional advocacy expected by this Court. Nonetheless, the Court concludes that the extremely limited scope of the intervention that will be permitted should address plaintiffs' concerns that the CCPOA could or would use its intervenor status to interfere with or otherwise thwart the remedial process. The Court will, of course, be monitoring this issue closely to ensure that the CCPOA heeds its representation that it intends to "constructively work with the Court." *See* CCPOA's Oct. 29, 2004 Reply at 5.<sup>11</sup>

In sum, the Court concludes that the CCPOA has satisfied the requirements for intervention under Rule 24(a) with respect to one issue only: whether or not the Court should override any provision(s) of the CCPOA's MOU with the CDC. Accordingly, the Court will permit the CCPOA to intervene for this very limited purpose as set forth in paragraph 6 below.

## ***V. CONCLUSION***

In light of all of the above, and good cause appearing, it is HEREBY ORDERED that:

1. The Court grants in part, and denies in part, Alameida and Moore's Motions to Reject or Modify the Special Master's Final report. In particular, the Court grants Alameida and Moore's motions to reject the Report's recommendations to issue an order to show cause as to why Alameida and Moore should not be held in criminal contempt for the reasons set forth above. The Court further grants Moore's motion to reject the Report's recommendation to refer perjury charges to the United States Attorney for the reasons set forth above.

2. Moore shall SHOW CAUSE, no later than Monday, December 6, 2004, as to why he should not be sanctioned under the Court's inherent powers for misleading the Court by submitting the April 1, 2003 letter and attachment to the Special Master in an effort to cover-up the fact that Alameida had prematurely shut down the three Post-Powers perjury investigations.<sup>12</sup> Plaintiffs may file a response thereto no later than Wednesday, December 22, 2004. Moore may file any reply to Plaintiffs' response no later than Wednesday, January 12, 2004. The matter shall be scheduled for hearing on Monday, January 31, 2005 at 10:00 a.m.

3. 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.

4. Defendants shall, within 10 days of the date of this Order, modify their use of force remedial plans to fully exclude CCPOA participation—direct or indirect—from Executive Review Committee evaluations of the use of force at PBSP.

**\*14** 5. The Special Master shall investigate, hold hearings if necessary, prepare a report, consider comments from the parties and CCPOA, and issue recommendations as to whether any of the following provisions of the CCPOA/CDC MOU or August 12, 2004 addendum to the MOU, set forth in the Special Master's August 31, 2004 submission, violate, by their terms or practice, the Court's use of force remedial plans:

*MOU*

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2.07(E), § 2.10, § 5.02, § 6.01, §§ 9.05–06, § 9.09, § 9.16, § 10.10, § 10.12, Appendix # 9, Sideletters 12, 14

*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

6. The CCPOA's Motion to Intervene is granted in limited part and otherwise denied as follows:<sup>13</sup> The CCPOA is hereby granted intervenor-party status for the following limited purposes only: (1) taking part in the Special Master's investigation described in numbered paragraph 5 above of this Order, (2) in the event that the Special Master, as a result of this investigation, issues a draft or final report, pursuant to paragraph 5 above of this Order, which recommends that the Court find that one or more provisions of the CCPOA's 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. Other than as expressly set forth in this paragraph, the CCPOA may not participate as a party in any aspect of this case or proceeding.

In its opinion after trial, the Court directed the parties to work together "jointly and in good faith" to remedy the constitutional deficiencies. *Madrid*, 889 F.Supp. at 1283. For the most part, the plaintiffs and defendants have done this in an admirable fashion, particularly in recent years. As the Court moves toward concluding the final remedial stages of this case, the Court directs the CCPOA to do the same in its new status as a intervenor-party for the limited purposes set forth above.

7. The CCPOA shall SHOW CAUSE, no later than Monday, December 6, 2004 as to why it should not be sanctioned under the Court's inherent powers for attempting to mislead the Court with respect to whether a PBSP officer had contracted MRSA. Plaintiffs and defendants may file any responses thereto no later than Wednesday, December 22, 2004. The CCPOA may file a reply no later Wednesday January 12, 2005. The matter shall be scheduled for hearing on Monday, January 31, 2005 at 10:00 a.m.

IT IS SO ORDERED.

**Parallel Citations**

60 Fed.R.Serv.3d 56

**Footnotes**

<sup>1</sup> The Inspector General's "Special Review of the Office of Investigative Services," dated October 29, 2001, found that OIS suffers major systemic problems including, *inter alia*, (1) an inaccurate and unreliable management information system, (2) ineffective oversight of regional offices, (3) inadequate staff training programs, (4) inadequate control over access to the case tracking system, (5) inadequate documentation in case files, (6) inconsistencies among regional offices, and (7) deficiencies in handling and storing evidence. See Special Master's Report, Ex. 29 (filed July 2, 2004).

<sup>2</sup> Persons prosecuted for "serious" criminal contempt are entitled to a trial by jury. *United States v. Powers*, 629 F.2d 619, 625 (9th Cir.1980).

<sup>3</sup> In his Supplemental Submission, Alameida points to three incidents in which he opposed the position of the CCPOA in order to buttress his argument that he had a "history of adversity" with the CCPOA, See Suppl. Submission at 2, and therefore his decision to shut down the Post-Powers investigations should not be construed as an effort to satisfy the CCPOA. The Court notes, however,

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that two of the three incidents did not involve disciplinary matters (and the third never required him to carry through with his position since the then Secretary of the Youth and Adult Correctional Agency acceded to the position of the CCPOA). Nor does citation to three isolated incidents convincingly demonstrate that Almeida had a consistent “history of adversity” with CCPOA.

4 While Almeida left the employ of the CDC in December 2003, and officially resigned effective January 15, 2004, Moore remains employed by the CDC, albeit not in his former position. While the requirements peculiar to criminal contempt may not be satisfied here, the Court anticipates that the CDC will, if it has not already done so, initiate its own internal investigation into Moore’s conduct relating to this matter.

5 In this regard, the Court notes that it had already taken significant steps in this direction in its October 19, 2009 Order Re Special Master’s Recommendations Re Defendants’ Employee Disciplinary Matrix. *See* Order at 2 ¶¶ 3, 5.

6 At the July 30, 2003 hearing, Moore testified as follows:

Moore: “You’ve [referring to the Special Master] got the downside in the [Fact Finder] investigative report that was submitted to you.”

Special Master: “I got the downside, I agree. I got the negatives?”

Moore: “Yes, sir.”

Special Master: “Okay.”

Moore: “Given that, I have to acknowledge that we flawed and erred in that particular scenario.”

7 The CDC filed a statement of non-opposition to the CCPOA’s Motion to Intervene.

8 Indeed, as the Special Master notes, all recommendations to the Court to date have been carefully tailored to ensure that they do not conflict with the CCPOA MOU. Report at 27.

9 Plaintiffs also raise the concern that the CCPOA, if allowed to intervene, would chill discussions relating to individual inmate health care matters, and the investigation and discipline of correctional staff, that the parties currently undertake on a regular basis as part of the ongoing remedial process. *See* Pls.’ Opp. at 11. The very limited intervention contemplated by the Court, however, would not permit the CCPOA to be a party to the general, ongoing remedial process in this case. As such, it would not be permitted to participate in these ongoing discussions.

10 The Court does not, by this Order, however, intend to preclude such discovery as may be a reasonable and appropriate part of the Special Master’s investigation pursuant to Recommendation 3(C).

11 Proceeding in a “constructive” manner of course requires candor with the Court. Unfortunately, it appears that such candor was already lacking in the manner in which the CCPOA handled one issue related to the instant motion to intervene. Specifically, the CCPOA submitted, as an exhibit, a May 18, 2004 letter from the CCPOA to John Hagar which asserted, *inter alia*, that one officer at PBSP “had already contracted” a particular type of bacterial infection that is resistant to treatment, referred to as MRSA (Methicillin Resistant Staphylococcus Aureus). *See* Sybesma Decl. in Support of Mot. to Intervene, Exh. C. The Special Master then requested that the CCPOA provide documentation by August 6, 2004 to support this serious claim. *See* Special Master’s Response to CCPOA’s Allegations Re MRSA at 8 and Exh. 19, filed July 22, 2004. Instead of acknowledging that no such documentation existed, and that no PBSP officer had in fact contracted MRSA, the CCPOA asserted that it would respond by August 6, 2004 in a manner appropriate to guarantee the privacy rights of the affected officer(s). *See* Reply of CCPOA to Special Master’s Response at 3, filed July 29, 2004. The CCPOA then ignored its own representation to the Court and failed to respond by August 6, 2004, as promised. When the Special Master pointed this out several weeks later on September 29, 2004, the CCPOA responded by filing documents that show that the officer in question was concerned that he had MRSA, was tested for MRSA, but did *not in fact* have MRSA. Moreover, this medical determination was made in late 2003, long before the filing of the instant motion to intervene. *See* Adam Decl., ¶ 3 and Exhs. A and B, filed Oct. 29, 2004. Finally, it appears that the CCPOA would never have responded, had the Special Master not raised the issue in his September 29, 2004 filing.

As this Court has made clear, it need not and does not countenance evasive and misleading representations to the Court. As in the case of Moore, discussed above, the Court will issue an OSC as to why the CCPOA should not be sanctioned, pursuant to the Court’s inherent powers, for attempting to mislead the Court that an PBSP officer had contracted MRSA when the documentation failed to support such a claim.

12 The Court notes that Moore disputes knowing that certain statements in the Fact Finder memorandum are false. The Court does not intend to address this specific issue in the OSC. If Moore knew that the Fact Finder letter focused solely on the negatives of each case, then it raises the issue of whether he intended to mislead the Court, regardless of whether he also knew that some of the negative statements in the Fact Finder letter were false.

The Court also notes that, to the extent that Moore seeks to further supplement the evidentiary record in responding to the OSC, he may address the exact scope of the desired supplement, and why it is necessary and appropriate, in his response to the OSC.

13 As discussed above, the CCPOA’s reply brief essentially limits its requested intervention to the issue of addressing the Special Master’s Recommendation 3(C); however, language in the CCPOA’s moving papers could be construed as seeking intervention that is broader in scope. Accordingly, the Court grants the motion in part, and denies it in part, consistent with the limited

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intervention actually granted.