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12 **UNITED STATES DISTRICT COURT**

13 **NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**

14

15 MARCIANO PLATA, et al.,

16 Plaintiffs,

17 v.

18 GAVIN NEWSOM, et al.,

19 Defendants.

Case No. 4:01-cv-01351-JST

**AMICUS CURIAE CALIFORNIA
CORRECTIONAL PEACE OFFICERS'
ASSOCIATION'S SUBMISSION FOR
JULY 29, 2021 CASE MANAGEMENT
CONFERENCE**

The Hon. Jon S. Tigar

20

21 Since the last case management conference, the California Correctional Peace Officers'
22 Association ("CCPOA" or "the Union") has communicated with all of the parties regarding the
23 issue of a mandatory staff vaccination order. The Union is tracking infection rates and concerns
24 about the spread of the delta variant. Whether rising infection rates are a natural result of the
25 State's reopening on June 15, and will flatten out and decrease in due course, or will continue to
26 increase, remains to be seen. The Union notes that resident infection rates, after a temporary spike
27 following outbreaks in a handful of prisons, have returned to an extremely low level—suggesting
28 existing COVID-19 prevention methods continue to work.

1 The Union’s position remains that voluntary vaccination should be pursued with renewed
 2 vigor—especially since it appears that efforts to this date have not been vigorous. A mandatory
 3 vaccination order should be avoided, particularly because infection rates remain extremely low
 4 and less intrusive means of addressing the challenges of COVID-19 have not been exhausted.

5 With this in mind, CCPOA addresses four points as follows:

6
 7 **1. Voluntary vaccination efforts do not appear to have been pursued with
 necessary vigor.**

8 For months, CCPOA has argued that CDCR and CCHCS should pursue a variety of
 9 voluntary vaccination efforts to increase staff vaccination rates. The Union’s suggestions, which
 10 do not purport to cover all potential voluntary vaccination encouragement efforts, included
 11 COVID Mitigation Officers, Incentives, and One-on-One Medical Meetings for those not
 12 vaccinated. These three suggestions were seemingly adopted by CDCR and CCHCS.

13 In a letter to the Receiver dated June 14, 2021, which appears to be a direct response to
 14 CCPOA’s 19-page May 24, 2021 Preliminary Submission Regarding Mandatory Vaccinations,
 15 Plaintiffs contend that voluntary vaccination efforts promoted by the Union have been exhausted;
 16 however, recent information received by the Union establishes that these efforts are, in fact,
 17 contrary to the Plaintiffs’ assertions, only in their infancy. That is, in a series of exchanges
 18 between CCHCS and CCPOA during the week of July 19, the status of these three voluntary
 19 vaccination programs appears to be as follows:

20 **a. Mitigation Officers**

21 Though the basic terms of the COVID Mitigation Advocacy Program were memorialized
 22 in April 2021, to date, the program has held only four general “kick-off” meetings to introduce the
 23 program to staff throughout the state. (*See* email dated July 13, 2021 from Jay Leon Guerrero,
 24 Captain of the CCHCS Field Operations, Corrections Services, COVID Mitigation Advocate
 25 Program, enclosed herein as Exhibit A.) The focus of the meetings was to introduce its software
 26 and ask for feedback from staff to provide to CDCR headquarters. The program has yet to even
 27 begin carrying out its primary task of deploying coworkers amongst their peers to encourage
 28 vaccination. As the Union has explained, the concept of peer-to-peer encouragement is considered

1 by behavioral scientists to be more effective than top down efforts from management. As Captain
 2 Leon Guerrero notes, the Program appears to have been well received amongst staff, with over
 3 800, including 350 custody staff, volunteering to take part.

4
 5 **b. One-on-One Meetings Between Unvaccinated Employees and a
 Healthcare Professional**

6 Back in May, the Union suggested—at the recommendation of behavioral science and
 7 public health experts—that CCHCS and/or CDCR require that unvaccinated staff be required to
 8 undergo a one-on-one consultation with a healthcare professional, including with the opportunity
 9 to be vaccinated during the appointment. As the Case Management Statement filed by the parties
 10 on May 25, 2021 stated:

11 To this end, **CDCR and the Receiver’s office are developing a
 12 program for one-on-one medical consultations with staff who
 13 have not yet been vaccinated, based on evidence that such
 consultations have a significant influence on vaccine acceptance.**
 14 This program will be implemented in the near future and is
 supported by CCPOA. (See ECF No. 3591 [emphasis added].)

15 Despite CCHCS’s support for this program, CDCR’s “Employee Case Management for
 16 COVID-19 Vaccination” bulletin, which we understand was distributed last week, indicates that
 17 the process to make appointments for these one-on-one consultations will not even commence
 18 until August 2, 2021, suggesting no such meetings have yet occurred. (A copy of this bulletin is
 19 attached as Exhibit B.)

20 **c. Incentive programs**

21 CCPOA has long advocated for an incentive program to encourage staff to get vaccinated,
 22 like those employed by many other employers. (See CCPOA’s May 24, 2021 Preliminary
 23 Submission Regarding Mandatory Vaccinations, pp. 1:28 – 2:21, 4:8 – 12, 5:13 – 26, 6:11 – 12,
 24 7:19 – 19:22.) The Receiver appeared to embrace incentives to foster voluntary staff vaccinations.
 25 (See Joint CMC Statement filed on May 25, 2021, pp. 8:13 – 11:1.) We understand that CDCR
 26 sent email notifications to staff members about these cash prizes in May 2021, but the Union is not
 27 aware of: how many employees received an incentive; if any did, whether those awards were
 28 publicized; whether the incentive program still exists; and, if so, whether any further attempts to

1 publicize the existence of these incentives to employees have been undertaken. (See email dated
2 July 19, 2021 from CCHCS Captain Jay Leon Guerrero, Field Operations, Corrections Services,
3 COVID Mitigation Advocate Program enclosed herein as Exhibit C.) An incentive program
4 without publicity is like an arrow without a bow.

5 Furthermore, although providing monetary awards to employees is a mandatory subject of
6 bargaining, no outreach has been made to CCPOA about the program, how to publicize it, or how
7 to improve it.

8 ----oooo0000oooo----

9 Voluntary vaccination programs of the magnitude contemplated, intended to be put into
10 effect state-wide in numerous institutions, as well as across many disciplines within each
11 institution, need time to work properly and produce results. At bare minimum, they have to be
12 given the opportunity to begin before being declared a failure.

13 **2. CCPOA’s efforts to receive information relevant to vaccination and infections**
14 **from the parties has met with mixed results.**

15 On July 19, 2021, the Union wrote to the parties asking, in anticipation of a
16 recommendation about a mandatory vaccination order issuing, for certain pieces of (what CCPOA
17 considers) relevant information. The Receiver’s Office was very responsive regarding the
18 information about Mitigation Officers, One-on-One medical meetings, and incentives, as
19 described in Section 1 a – c hereof; however, CCPOA has yet to hear from the parties as to
20 whether they intend to share information with the Union, in its current status as friend of the court,
21 on an ongoing basis. We encourage the parties to do so; otherwise, if CCPOA does successfully
22 intervene in this case for the limited purpose of protecting its collective bargaining rights and
23 memorandum of understanding (“MOU”) with the State, which the Plaintiffs and Defendants have
24 stated some openness to, it will unnecessarily delay proceedings if CCPOA is required to seek the
25 same information that the parties are freely exchanging now through formal discovery or other
26 means.

27 ///

28 ///

1 **3. The Union has circulated a proposed stipulation and complaint in intervention**
2 **to the parties.**

3 As CCPOA has previously noted in its comments to the Court, it is likely that, should the
4 Court issue an order requiring mandatory vaccination of employees, it would seek to intervene for
5 the limited purpose of protecting the collective bargaining rights of its members and its MOU with
6 the State, both of which would be likely to be impaired by a vaccination order. To this end, with
7 the aim of minimizing any delay in proceedings that might occur as a result of intervention
8 proceedings but not being premature, the Union sent the Plaintiffs and the Defendants a draft
9 complaint in intervention and draft stipulation under which, were the Court to sign it, CCPOA
10 would be permitted to intervene for the limited purpose so described. This form of limited
11 intervention previously occurred in *Madrid v. Schwarzenegger*, albeit after a noticed motion,
12 which was partially granted.

13 Given that the scope of any vaccination order remains uncertain, the Union's draft
14 complaint in intervention cited sections of the MOU that are likely to be impaired by any
15 mandatory vaccination order. If and when the Receiver (as he has announced he will do), issues a
16 recommendation, CCPOA will revise its complaint to address the specific impairments we
17 anticipate such a mandatory vaccination order will have on the MOU.

18 **4. If the Court's primary concern, and primary authority, is inmate healthcare,**
19 **an inmate vaccination order is more narrowly tailored to addressing that**
20 **concern than is a staff one.**

21 No party has yet raised the issue of a mandatory vaccination order for residents (at least as
22 far as CCPOA is aware). Yet, any serious discussion of combatting COVID-19 and protecting the
23 healthcare of residents, as is the Court's primary authority and concern in this case, necessarily
24 requires discussion of this point.

25 CCPOA has largely observed this case, litigating only in the Three Judge Court
26 proceedings involving an inmate release order (which it advocated vigorously in favor of).
27 Accordingly, the Union's lawyers do not profess to be experts in Eighth Amendment
28 jurisprudence; nevertheless, it strikes us that it is a very expansive reading of that laudable
constitutional right that employees should be forced to be vaccinated, upon pain of losing their

1 employment, in order to protect the healthcare of residents who themselves have declined the
2 opportunity to be vaccinated.

3 Even if, hypothetically, all staff were vaccinated, they would still present a threat of
4 infection to residents. Medical authorities are increasingly reporting about vaccinated people
5 getting infected with COVID-19. Just this weekend, the Financial Times reported that 17% of
6 delta variant cases in the UK over four weeks were among the fully vaccinated, as were 52% of
7 the 6,000 people who tested positive in the week to July 21, 2021.

8 And the argument that staff are the only “vector” for the entry of COVID-19 into the
9 prisons is more tenuous given (what CCPOA understands to be) the resumption of transfers,
10 visitations, and intake at many prisons.

11 Regarding the question of the Court’s authority to order vaccinations, the Plaintiffs have,
12 in their communications with the Receiver, raised state and federal authority that they contend
13 makes clear that public employers have authority to impose a mandatory vaccination order on
14 staff. Perhaps. Yet, equally, if this authority is as robust as Plaintiffs assert, would it not give the
15 State the same right to order that inmates be vaccinated?

16 One might opine that, as a society, we should not countenance forced vaccination of the
17 incarcerated, since they have “no choice” in their incarceration. It is a powerful moralistic
18 argument. Yet to suggest staff should be subject to forced vaccination because they do have a
19 “choice” about where to work, does grave disservice to their obligations to their families and to
20 their public service in keeping our communities safe.

21 ----oooo0000oooo----

22 Mandatory vaccination presents tough questions. Conversely, we live in a society that
23 wants an easy label for everything. However, we should avoid trying to label, or pigeon-hole,
24 those employees who have so far declined to be vaccinated. As The Atlantic explained at length
25 this past weekend, “Unvaccinated Is Different From Anti-Vax.” (See
26 <https://www.theatlantic.com/health/archive/2021/07/unvaccinated-different-anti-vax/619523/>.) In
27 other words, the reasons employees may decline to be vaccinated, even where their government
28 (and their Union) encourages them to do so, are wide and varied, including concerns by minority

1 employees about historical misuses of vaccinations, which the undersigned has witnesses in
2 multiple unions. And CDCR employees, and their unions, are not alone in their reservations about
3 forced vaccination. The undersigned notes that when the City and County of San Francisco
4 recently announced its intent to require vaccination of all city employees, all of its employee
5 unions who opined on the subject (and there are many), having advocated in support of voluntary
6 vaccinations, invariably came out strongly against the mandatory vaccination order for a litany of
7 reasons.

8 **CONCLUSION**

9 Having lost 19 members to COVID-19, the Union recognizes the grave importance of
10 these issues. However, for the reasons summarized above, CCPOA continues to advocate for
11 voluntary vaccination efforts to be given a reasonable opportunity to succeed.

12 We go back to something we set forth in our May 24, 2021 filing with the Court:

13 CCPOA suggests that the Court direct the parties to use the next
14 several months, if infections remain low, to give current programs
15 and efforts more time, and to consider implementing new initiatives.
16 **It could also encourage the parties to use that time to provide a
17 plan on how a mandatory staff vaccination program would be
18 implemented, if and when an order becomes necessary.** This
19 would create the best opportunity to minimize many of the potential
20 challenges described above. [Emphasis added.]

21 Dated: July 27, 2021

MESSING ADAM & JASMINE LLP


22 By 
23 _____
24 Gregg McLean Adam
25 Attorneys for Amicus Curiae California
26 Correctional Peace Officers' Association
27
28

Exhibit A

From: Leon Guerrero, Joshua@CDCR <Joshua.LeonGuerrero@cdcr.ca.gov>
Sent: Tuesday, July 13, 2021 1:06 PM
To: Gregg Adam; Foss, Tammy@CDCR
Cc: Jamie Dupree
Subject: RE: Mitigation Officers - Update

Good afternoon,

The COVID Mitigation Advocate Program (COMit) is made up of teams at every institution, consisting of custody and non-custody staff. Each institution's team has a mix of staff from Custody, Medical, Mental Health, Office/Ancillary, Warehouse, Plant Operations, Education, etc. During the month of May, institutions provided rosters of staff who volunteered or were ask to assist. We created an MS Teams Page that gives members access to all current directives and the ability to communicate with the entire group. We added all the COMit teams as members.

We have a total of 800 members throughout the state. Team sizes range from 11 (California City Correctional Facility) to 67 (Kern Valley State Prison). There are approximately 350 Custody, 200 Non-Custody, 200 Medical/Mental Health, and 50 Admin/Exec staff involved.

On June 4 and June 10, we had a total of 4 COMit Kick-Off meetings to introduce the program to staff throughout the state. Approximately 500 COMit members participated in the Kick-off meetings. During the meetings, we presented the MS Teams page and demonstrated how to navigate the tabs and find all the current information. We asked for feedback on communication to and from headquarters. Since then, we have posted updates on the MS Teams Page and emailed all directives to each team and all its members. We have not had any subsequent trainings, but teams have reported having town hall meetings to share information and get feedback. I have had communication with the teams via the MS Teams COMit page, email, and phone. Team leaders and team members have called to clarify direction and I have either provided the clarification or elevated for additional information prior to reporting any updates to the field.

The COMit members are tasked to share information during the course of their daily duties and to share updates as we provide them. We ask that they share feedback, best practices and good news.

I hope I've answered your questions and am happy to discuss more with you. Please call or email me if you have any additional questions, comments, or concerns. Thank you.

Jay Leon Guerrero
Captain
Field Operations, Corrections Services
COVID Mitigation Advocate Program
(916) 905-2308 Desk
(916) 895-3977 Cell



CALIFORNIA CORRECTIONAL
HEALTH CARE SERVICES



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Exhibit B



EMPLOYEE CASE MANAGEMENT FOR COVID-19 VACCINATION

The California Division of Occupational Safety and Health (CalOSHA) adopted the Aerosol Transmissible Diseases (ATD) Standard in 2009, which was later codified in the California Code of Regulations, Title 8, Section 5199. The ATD Standard requires covered employers to protect its employees from airborne infectious diseases and pathogens transmitted by aerosols, including novel ones such as COVID-19.

Among other provisions of the ATD Standard, employers are required to:

1. Make vaccinations available to all employees with occupational exposure.
2. Ensure employees who decline a recommended vaccination sign and date a declination form.
3. Provide training to employees, inclusive of, among others: a) information on vaccines (efficacy, safety, etc.); and b) an opportunity for interactive questions and answers with a person knowledgeable in the employer's workplace and infection control procedures.

In order to comply with the requirements of the ATD Standard, the California Department of Corrections and Rehabilitation (CDCR) and California Correctional Health Care Services (CCHCS) established procedures to facilitate informed decision-making regarding the COVID-19 vaccination. CDCR and CCHCS recognize that vaccination is a personal choice. Thus, trained Employee Health Program (EHP) staff will schedule all partially-vaccinated and unvaccinated CDCR and CCHCS employees for a one-on-one appointment, wherein COVID-19 information can be shared and questions or concerns can be addressed. All EHP staff completed training on *COVID-19 Vaccine Communications*, developed by the University of California, San Francisco, and offered by the California Department of Public Health, which equipped them to communicate with various audiences, including skeptical individuals, in a safe, non-threatening, and open environment. While COVID-19 vaccination is not mandated, all employees are still required to complete an appointment for the declination process.

Beginning August 02, 2021, partially-vaccinated and unvaccinated CDCR and CCHCS employees will be contacted in order to verify their information and make an appointment either to: a) get their COVID-19 vaccination; or b) complete the declination process. With approximately half of the CDCR and CCHCS workforce unvaccinated and partially-vaccinated, this effort is expected to last until approximately September 13, 2021.

For information on what each appointment type entails, refer to the summary below:

VACCINATION APPOINTMENT	DECLINATION APPOINTMENT
1. Employee is provided COVID-19 vaccination information.	1. Employee is offered COVID-19 vaccination information.
2. Employee completes pre-vaccination assessment.	2. Employee is offered an opportunity to ask any questions, verify any information, etc.
3. Employee is administered vaccine and observed for 20 minutes.	3. Employee completes declination form.
4. Employee is issued a completed-vaccination card.	

Exhibit C

Janine R. Oliker

From: Leon Guerrero, Joshua@CDCR <Joshua.LeonGuerrero@cdcr.ca.gov>
Sent: Monday, July 19, 2021 8:28 AM
To: Gregg Adam; Foss, Tammy@CDCR
Cc: Jamie Dupree
Subject: RE: Mitigation Officers - thank you, and follow up questions

[EXTERNAL]

Good morning Gregg,

I do not have information on incentives given. A notification to all staff was distributed via email back in May, that anyone who received the vaccination would be entered into a raffle. There was a statement indicating staff who received vaccination from their own provider would be able to submit proof of vaccination, and any unvaccinated staff would be entered into the raffle if they received education via our Learning Management System. I asked Employee Health Program to provide contact information for these staff to submit verification of vaccination or completed training. As of this date, that information has not been provided.

I am unaware that one-on-one conversation is occurring unless by choice of the employee. The vaccination is not mandatory. I have been told that Employee Health Program has not directed to administer the vaccine to employees, nor has there been a vaccine information and declination form provided.

My role in the COVID Mitigation Advocate Program is to deliver all current directives relevant to COVID mitigation strategies, and to share any information provided to me that our line staff may not receive through their own chains of command. We have gotten a lot of feedback from institutions that also challenge the application of new direction based on current populations, programs, case factors, etc. When I get questions from the field, I bring that back to the HQ executives for review and consideration.

Please let me know if you have any other questions. Thanks.

-JAY

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From: Gregg Adam <Gregg@majlabor.com>
Sent: Monday, July 19, 2021 07:51
To: Leon Guerrero, Joshua@CDCR <Joshua.LeonGuerrero@cdcr.ca.gov>; Foss, Tammy@CDCR <Tammy.Foss@cdcr.ca.gov>
Cc: Jamie Dupree <JDupree@fddcm.com>
Subject: Mitigation Officers - thank you, and follow up questions

CAUTION: This email originated from outside of CDCR/CCHCS. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Josh (with apologies for the delay in responding, I've been traveling):

This is helpful. Thank you.

Can you also provide me with a breakdown of what incentives have been provided to state employees on a prison-by-prison basis? The Receiver previously published information about up to \$25,000 per institution.

I am also inquiring as to whether the Receiver set up one-on-one medical interviews with health case professionals for unvaccinated employees? CCPOA, relying on advice from behavioral health specialists, had recommended taking this step. And in one of the CMC statements in Plata I recall a reference to the Receiver, or perhaps CDCR, looking at such an approach. Has that happened?

Gregg



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