Attachment 7

MICHAEL W. DYER
SANDRA G. LAWRENCE*
JAMES W. PENROSE*
FRANCIS C. FLAHERTY
THOMAS J. DONALDSON
JESSICA C. PRUNTY

* ALSO ADMITTED IN CALIFORNIA

DYER ♦ LAWRENCE
PENROSE ♦ FLAHERTY
DONALDSON & PRUNTY
Attorneys & Counselors At Law

PAUL D. COTSONIS
TODD E. REESE*
SUE S. MATUSKA*
J. DANIEL YU
CASEY A. GILLHAM

OF COUNSEL
HON. MICHAEL E. FONDI*

November 30, 2011

By Messenger

Hon. Brian Sandoval
Hon. Ross Miller
Hon. Catherine Cortez Masto
Board of State Prison Commissioners
P.O. Box 7011
Carson City, Nevada 89702

Re: **Board Meeting of December 5, 2011**
Temporary Administrative Regulation No. 350

Dear Governor Sandoval, Secretary Miller and General Masto:

I write on behalf of our client, the Nevada Corrections Association ("NCA"), in connection with Temporary Administrative Regulation No. 350 ("AR 350" or "the Regulation" herein). As its name suggests, AR 350 has been adopted by Nevada Department of Corrections Director Greg Cox as a "temporary" regulation. It purportedly became effective (for custody staff) as of August 1 of this year – *i.e.*, more than 4 months ago. AR 350 is one of approximately two dozen regulations of the Director that are scheduled for discussion and possible approval by the Board at its meeting on December 5, 2011.

AR 350 is overbroad. NCA has two concerns about AR 350. The first involves the specific provision of the Regulation relating to the display of tattoos by Correctional Officers and other employees of NDOC. The former version of the Regulation – which apparently has been in effect for at least the past 8 years – provided: "Tattoos that are racially or sexually explicit shall be kept covered at all times." (See copy attached as Exhibit 1.) AR 350 amends this provision to prohibit the display of *any* tattoo, regardless of its nature and regardless of any message it conveys. In pertinent part, the Regulation provides:

> *Tattoos or branding will not be exposed or visible while on-duty. Such markings must be covered by clothing. All other markings that cannot be covered by clothing will be covered using make-up, neutral toned bandages or patches.* Hand and finger tattoos shall be covered with approved gloves. Employees are prohibited from getting tattoos or any other type of visible markings on their head, neck, hands, or face after employed [sic]. (Emphasis added.)

(See Exhibit 2.)

Thus, under AR 350, a Correctional Officer or other employee is effectively prohibited from displaying a tattoo of the word "Mom," or a depiction of the American flag or – in at least one case familiar to me – a tattoo honoring a son killed in the service of his country.

To our understanding, the asserted justification for AR 350 runs something like this: (1) many inmates are tattooed; (2) tattoos are commonly used by inmates to signify affiliation with a criminal gang; and (3) a Correctional Officer's display of a tattoo – *any* tattoo – somehow creates a security risk by signifying the officer's affiliation with a gang or the officer's empathy with the lifestyle or the associations of inmates. Additionally, or alternatively, the Director has stated that this revision of the tattoo policy is necessary "to portray the Department of Corrections in the most favorable image of law enforcement."

The "security risk" rationale is nonsensical on its face, since it is apparent that many tattoos, including the three examples mentioned above, cannot possibly be interpreted to connote membership in a gang or identification with a criminal lifestyle. Additionally, because tattoos have been held to be a form of "pure speech," AR 350 appears to violate the First and Fourteenth Amendments by prohibiting more speech than is necessary to accomplish the asserted security objectives of the Director and NDOC. See *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1064 (9th Cir. 2010) (tattoos held to be protected "speech" akin to painting or writing; city's ban on tattoo parlors could not be upheld as a reasonable time, place or manner restriction because, *inter alia*, it was not "narrowly tailored to serve a significant governmental interest").

The "professional image" rationale is undercut by the practices of correctional agencies in other states that have adopted tattoo policies. Ironically, in the process of adopting AR 350, the Director apparently considered policies from Arizona, Washington and Colorado that are all *substantially less restrictive* than AR 350. Thus, the Arizona Department of Corrections prohibits the display of tattoos "that are obscene or that advocate sexual, racial [or] religious discrimination, or [are] sexually explicit, such as nude pictures, symbols, language, etc." (See Exhibit 3.) Similarly, the Washington Department of Corrections bars the display of tattoos "that depict violence, gang affiliation, or could be construed as sexual in nature." (See Exhibit 4.) Finally, while the Colorado Department of Corrections requires that tattoos be covered "if possible" for uniformed officers whose job duties "include public interaction," Colorado's policy otherwise precludes the display of tattoos suggesting or expressing "any idea that is contrary to the mission of the Department, to include tattoos that are vulgar or suggestive in nature." (See Exhibit 5.)

In short, AR 350's prohibition against the display of *any* tattoo is overbroad, unnecessarily abridges the rights of Correctional Officers and other employees, and defies common sense. These employees are not inmates or school children; they are free adult citizens of the United States and should be treated accordingly.

The Director's practice of adopting "temporary" regulations without the approval of the Board. AR 350 is also objectionable because the Director has purported to adopt and enforce

it without the approval of the Board. In this respect, astonishingly, AR 350 is apparently only one example of a pervasive practice. For example, a quick review of the "300 series" of the Director's regulations, relating to personnel, indicates that 25 of them (as of today) have been adopted as "temporary" regulations. But all of these regulations are currently "effective," all of them are currently being enforced against employees, *and some of them have been in effect for a year or more without ever having been presented to or approved by the Board.* A list of the regulations is attached. (See Exhibit 6.)[1]

The Director's authority to adopt regulations is not conferred by natural law or divine right, but by statute. NRS 209.131(6) provides that the Director "shall . . . [e]stablish regulations *with the approval of the Board* and enforce all laws governing the administration of the Department and the custody, care and training of offenders." (Emphasis added.) The plain meaning of this statute is that the Board's approval of a regulation is a *prerequisite* to the effectiveness of the regulation, not something sought, as an afterthought, by the Director months or years after the regulation has been adopted and implemented. Any other reading of the statute would render the requirement of "approval" utterly meaningless. Moreover, such a reading would be inconsistent with the Board's constitutional role, which is to "have such supervision of all matters connected with the State Prison as may be provided by law." Nev. Const., Art. 5 § 21. *The Director's apparent assertion of unilateral regulatory authority, independently of the Board's approval or even its knowledge, is flagrantly unlawful and should be halted forthwith by the Board.*

It is no answer to suggest – as the Director may suggest – that the process of obtaining the Board's approval of proposed regulations is cumbersome or time-consuming. A review of the information available on the Secretary's website indicates that the Board has met at least four times in each of the past 2 years, and met six times in 2008. The very fact that the Director has seen fit to adopt and implement dozens of "temporary" regulations during this period without any apparent effort to obtain the approval of the Board is not evidence that the Board has been "unavailable," but simply that the Director apparently regards the Board as superfluous. In any case, if the existing constitutional and statutory scheme governing the Director's regulatory authority is unworkable, as the Director apparently believes, *the answer is to change the law, not disregard it.*

Conclusion. NCA's objection to AR 350, then, is that the Director has purported to "adopt" the Regulation and make it "effective" without so much as a by-your-leave from the Board. Unless and until the Board's approval of the Regulation is given, AR 350 has no legal effect.

But whatever has happened or failed to happen procedurally, the fact remains that AR 350 in its present form is overbroad and unnecessarily restrictive. The Board should require the Director to revise the Regulation so that it corresponds more closely with the legitimate security objectives

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[1] Remarkably, while some of these regulations have been "agendized" for approval by the Board at its meeting on December 5, several others – including at least one regulation that has been in effect for more than a year – have not. These include Temporary AR 301, 304, 314, 320 and 330, among others.

of the Director and NDOC. NCA suggests that AR 350 be changed to provide, in pertinent part:

> Tattoos or branding *that are obscene or sexually suggestive, that promote racial discrimination, depict violence or are indicative of any gang affiliation* will not be exposed or visible while on-duty. Such markings must be covered by clothing. All **[~~other~~]** *such* markings that cannot be covered by clothing will be covered using make-up, neutral toned bandages or patches. Hand and finger tattoos shall be covered with approved gloves. Employees are prohibited from getting tattoos or any other type of visible markings on their head, neck, hands, or face after *their date of hire*. (Changes from the language of AR 350 are denoted by strike-throughs and italics.)

Thank you very much for your time and your consideration of this matter.

Very truly yours,

James W. Penrose

JWP:ss
Attachments
cc: Gene Columbus, President, NCA
Thomas J. Donaldson, Esq.
Janet E. Traut, Esq.

EXHIBIT 1
(FORMER TATTOO REGULATION)

6. Sideburns shall be of an even width and will not be flared.

7. The bottom of the sideburn shall be trimmed with a clean shaved horizontal line.

8. The wearing of jewelry in a prison setting is neither appropriate nor safe:

Wristwatches may be worn. Watches worn on chains or pinned to the uniform are not permitted.

Medical alert identification bracelets are permitted. No other jewelry other than the watch may be worn on the wrists.

Rings shall be limited to one ring per hand.

Neck chains and necklaces, if worn, will not be visible.

Stud/post earrings which do not extend below the earlobe may be worn. Nose rings or any other body piercing that are visible are not permitted.

F. Staff should refrain from wearing precious or semi-precious stones. The Department accepts no responsibility for loss of, or damage to, such personal items.

9. Mustaches shall not extend over the top, or in any way obscure the upper lip.

10. Mustaches shall not extend more than ½ of an inch beyond or below the corners of the mouth.

11. Mustaches shall be kept short and neatly trimmed to prevent an "overly" bushy appearance.

12. Beards and/or goatees are allowed. They will be kept neatly trimmed to no longer than 2 inches in length. However, should safety equipment be part of the position, employee must be able to properly utilize.

13. Staff shall notify supervisor of intent to grow or remove facial hair and must obtain a new ID card within one week.

14. Tattoos that are racially or sexually explicit shall be kept covered at all times.

15. T-shirts visible under the uniform (i.e., T-shirt) shall be white, black, or forest green in color (depending on the type of uniform worn) and have a round neck (with the exception of CERT, who will wear black). Their condition shall:

Be clean, unsoiled and free of holes.

Not be frayed, worn, stained or overly faded.

EXHIBIT 2

(REVISED TATTOO REGULATION)

I. Hair shall not be styled in any fashion, which hinders wearing the uniform hat in its original and historical prescribed manner.

J. Ponytails are not authorized.

2. **Facial Hair**:

A. Sideburns shall not extend below the middle of the exterior opening of the ear.

B. Sideburns shall be of an even width and will not be flared.

C. Sideburn shall be trimmed with a clean shaved horizontal line.

D. Mustaches shall not extend over the top lip, nor in any way obscure the upper lip.

E. Mustaches shall not extend beyond or below the corners of the mouth.

F. Mustaches shall be kept short and neatly trimmed to prevent an "overly" bushy appearance.

G. Beards and/or goatees are allowed. They will be kept neatly trimmed to no longer than 1 inch in length. However, should safety equipment be part of the position, employee must be able to properly utilize said equipment. Officers not wearing a beard or goatee must be clean shaven when reporting for duty.

H. Staff shall notify supervisor of intent to substantially change their facial appearance, to include the growing or removal of facial hair. New I.D. cards are mandatory, within one week, after substantial changes have been made. Employees are responsible for the purchase of new I.D. cards.

3. **Make-up:** Cosmetics shall be soft, subdued and restrained, matching the natural color of skin and lightly applied.

4. **Tattoos**:

Tattoos or branding will not be exposed or visible while on-duty. Such markings must be covered by clothing. All other markings that cannot be covered by clothing will be covered using make-up, neutral toned bandages or patches. Hand and finger tattoos shall be covered with approved gloves. Employees are prohibited from getting tattoos or any other type of visible markings on their head, neck, hands, or face after employed.

5. **Fingernails**:

A. Fingernails shall be kept clean and neatly trimmed.

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EXHIBIT 3
(ARIZONA TATTOO POLICY)

1.9 Employees who engage in physical fitness activities during their meal break may wear athletic shoes when leaving the office and returning after an exercise period.

1.10 Earrings

1.10.1 Female uniformed personnel shall be authorized to wear earrings.

1.10.1.1 Earrings shall be limited to stud earrings or small clip-on earrings.

1.10.1.2 Only one earring may be worn on each earlobe.

1.10.2 Female non-uniformed staff shall be authorized to wear earrings to include hoop style, not to exceed 2 millimeters or 3/4 of an inch. Earrings shall be limited to no more than two per ear.

1.10.3 Male personnel are prohibited from wearing earrings while on duty.

1.11 All personnel are strictly prohibited from wearing any object inserted into an exposed body part that has been pierced. Examples include the tongue, nose, lips, eyebrow(s), and etc. Objects include, but are not limited to jewelry, rings, posts, straw or toothpick material. Earrings may be worn as specifically authorized.

1.11.1 While on duty or on location at a Department facility, contractors or volunteers with inmate contact are prohibited from wearing any object inserted into an exposed body part.

1.12 Tattoos - Personnel are prohibited from exposing tattoos anywhere on the body that are obscene or that advocate sexual, racial, religious discrimination, or sexually explicit, such as nude pictures, symbols, language, etc. while on duty.

1.13 Badge/Employee Identification Card - Employees may shroud their badge or employee identification card as a demonstration of respect for deceased Department employees or law enforcement officers killed in the line of duty as outlined in Department Order #521, Employee Assistance and Support Program.

503.03 **UNIFORM SPECIFICATIONS - UNIFORMED CORRECTIONAL SERIES** - Uniformed personnel shall follow all style and specific requirements for uniforms as outlined in Attachment C. Grooming standards shall be in compliance with section 503.01 of this Department Order and as otherwise authorized in this section.

1.1 General Uniform Appearance

1.1.1 Only regulation uniform items shall be worn.

1.1.2 Uniforms shall be clean, in good condition, and devoid of stains or patched areas.

1.1.3 Uniforms shall fit properly, without undue bagginess or tightness in the trousers or shirt.

1.1.4 All buttons shall be secured, with no unsightly bulging of buttonholes.

1.1.5 Shoes, boots and accouterments shall be kept shined.

1.1.6 Pant length shall be approximately one inch above the floor when standing in shoes and from one to two inches above the floor when standing in boots.

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EXHIBIT 4
(WASHINGTON TATTOO POLICY)

STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS	APPLICABILITY PRISON		
	REVISION DATE 12/26/08	PAGE NUMBER 2 of 8	NUMBER DOC 870.400
POLICY	TITLE EMPLOYEE PERSONAL APPEARANCE/UNIFORM STANDARDS		

REFERENCES:

DOC 100.100 is hereby incorporated into this policy; Collective Bargaining Agreements; Employee Handbook

POLICY:

I. The Department will ensure the attire and personal appearance of all employees is professional and appropriate for their classification and job duties.

II. All Department employees are expected to be well groomed and dressed in a professional manner appropriate to their work assignment and safety standards.

III. No Department employee, contract employee, volunteer, or visitor may wear clothing similar to state issued offender clothing, unless specifically authorized by the facility Correctional Captain or higher authority.

IV. Employees will keep in mind that individual actions reflect on the entire Department as they represent the Department in the public view.

DIRECTIVE:

I. General Requirements

A. Both uniformed and non-uniformed Department employees will adhere to the following requirements:

1. Staff are expected to maintain good personal hygiene, and will not report for duty in an unclean condition.

2. Staff appearance will reflect a professional image appropriate for their position.

3. Hair, beards, sideburns, and mustaches will be neat and clean. Facial hair will not interfere with wearing a protective mask to comply with OSHA/WISHA standards.

4. Light, mild use of cologne or perfume is authorized.

5. Tattoos that depict violence, gang affiliation, or could be construed as sexual in nature must be covered while representing the Department.

B. Non-uniformed employees will adhere to the following requirements:

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EXHIBIT 5
(COLORADO TATTOO POLICY)

7. Visible tattoos shall not depict any symbol which suggests or expresses any idea that is contrary to the mission of the Department, to include tattoos that are vulgar or suggestive in nature. If possible, when in uniform and assigned job duties that include public interaction, visible tattoos shall be covered.

8. Appropriate undergarments will be worn.

E. NON-UNIFORM DRESS CODE

1. DOC employees, contract workers, and volunteers who are authorized by the administrative head to wear civilian attire in place of a uniform will be expected to display a professional business appearance in both dress and grooming standards, at all times.

   a. Clothing: Non-uniform DOC employees, contract workers, and volunteers shall wear business professional clothing that is clean, properly fitting, and in good repair. Clothing containing logos that are small and in good taste or with DOC/facility/center/office logos are permitted.

      1) Males:

         a) Dress slacks or khaki-style pants.

         b) Dress shirts (long or short sleeved) and a tie. If a tie creates a substantiated safety hazard, then a tie may not be required. Volunteers are not required to wear a tie.

         c) Sweaters may be worn; however, a tie is still required.

      2) Females:

         a) Dresses and skirts must be no shorter than one inch above the kneecap, when standing. Slits shall not be more than three inches above the kneecap when standing.

         b) Dress slacks or khaki-style pants.

         c) Dress gauchos or capris. (See Attachment "D" for examples.)

         d) Sleeveless dresses/blouses, provided that the arm opening is not loose fitting and that the blouse/dress material extends the entire width of the shoulder (tank tops are unacceptable).

      3) Non-uniformed DOC employees, contract workers, and volunteers are not permitted to wear:

         a) Casual attire such as skorts, pedal pushers (trousers that end at the knee), and shorts.

         b) Clothing designed or intended to be tightly worn, to accent the body, e.g., tight fitting shirt or blouse, spandex tights, tight body framing leggings, and tank tops.

         c) Clothing that exposes cleavage, back, stomach, midriff, and thighs.

         d) Clothing containing controversial messages, photographs, or pictures.

      4) Leisure clothing, to include: sweatshirts, T-shirts, sweatpants, jogging suits, denim jeans, and tennis shoes may only be worn for special activities, with authorization (see IV.F.3., below).

   b. Hair/Facial Hair:

      1) Hair should be clean, combed, and styled in a professional manner.

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EXHIBIT 6

(LIST OF "300 SERIES" REGULATIONS)

300 Series - Personnel

AR Number	Title	Effective Date	Last Review Date
300	Recruitment and Hiring - - - (Temporary)	09/07/2011	
301	Shift Bidding - - - (Temporary)	12/08/2010	
302	Meet and Confer Procedures	08/13/2010	
304	Equal Employment Opportunity (EEO) Discrimination Charges - - - (Temporary)	09/07/2011	
305	Sexual Harassment Prevention	08/13/2010	
306	Employee Formal Grievance Procedure	08/13/2010	
307	Furlough Policy - - - (Temporary)	02/24/2011	
308	Department Staff and Applicant Records - - - (Temporary)	12/08/2010	
310	Work Performance Standards	08/13/2010	
311	Performance Evaluations for Classified Employees	08/13/2010	
313	Dismissal of Probationary and Trial Period Employees	08/13/2010	
314	Employee Physical Examinations & Health Requirements - - - (Temporary)	04/24/2011	
316	Employee Transfers - - - (Temporary)	10/26/2011	
317	Employee Awards and Commendations - - - (Temporary)	10/26/2011	
318	Employee Performance Cards	08/13/2010	
319	Workplace Safety	08/13/2010	
320	Salary Administration - - - (Temporary)	11/18/2010	
321	Workplace Violence - - - (Temporary)	08/08/2011	
322	Types of Leave and Leave Procedure - - - (Temporary)	09/27/2011	
326	Posting of Shifts/Overtime	08/13/2010	
329	Employee Work-Related Illness or Injury	08/13/2010	
330	Employee Resignation and Reinstatement Procedure - - - (Temporary)	10/26/2011	
332	Employee Reporting Responsibilities - - - (Temporary)	10/27/2010	

337	Staff Requirements for Home Address and Personal Telephone Number - - - (Temporary)	*05/25/2011*	
338	Former Employees - Access to Department Property	*08/13/2010*	
339	Code of Ethics, Employee Conduct, Prohibitions and Penalties - - - (Temporary)	*11/24/2011*	
340	Employee Complaint Reporting and Investigation	*08/13/2010*	
341	Employee Misconduct and Performance Adjudication	*08/13/2010*	
342	Employee Representation Witness Compensation	*08/14/2009*	*09/27/2010*
343	Imposing Corrective/Disciplinary Action	*02/12/2010*	*02/28/2011*
345	Unauthorized Relationships - - - (Temporary)	*02/24/2011*	
346	Nepotism	*05/20/2010*	
347	Political Activities By Employees - - - (Temporary)	*08/08/2011*	
348	Alcohol and Drug Testing Requirements - Commercial Driver's License	*08/13/2010*	
349	Employee/Applicant Alcohol and Drug Testing - - - (Temporary)	*12/08/2010*	
350	Department Grooming and Dress Standards - - - (Temporary)	*5/2/2011 - 8/1/2011*	
352	Staff Identification Cards - - - (Temporary)	*04/28/2011*	
355	Employee Secondary Employment - - - (Temporary)	*10/22/2011*	
357	Service of Actions Against Department Accepting Service - - - (Temporary)	*10/26/2011*	
358	Basic Peace Officer Certification	*08/13/2010*	
359	Employee Development Program Coordination and Supervision - - - (Temporary)	*09/14/2011*	
360	Correctional Employee/Officer Basic Training Program - - - (Temporary)	*08/08/2011*	
362	Weapons Training and Qualification - - - (Temporary)	*04/28/2011*	
363	Honor Guard	*08/13/2010*	