Attachment 6

May 16, 2012

Nevada Board of Prison Commissioners
Carson City, Nevada

Dear Gov. Sandoval, Attorney General Cortez Masto, and Secretary Miller:

The American Civil Liberties Union of Nevada appreciates the opportunity to comment on proposed administrative regulations (AR) of the Nevada Department of Corrections.

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We have had the opportunity to give at least an initial review to dozens of proposed regulations, on the agenda for the May 17 meeting, which are of potential interest and concern to us.

We would like to make the following suggested amendments to proposed regulations that we reviewed:

AR 339: Subsection 1.A.(12), subsection 7.E., and subsection 7.F.(1) currently prohibit discrimination on the basis of race, color, religion, sex, sexual orientation, age, disability, or national origin. Last year, the Nevada Legislature prohibited discrimination, in housing, employment, and public accommodations, on the basis of gender identity or expression, and the Nevada Department of Corrections also should do so.

AR 339: Subsection 16.A. currently classifies as "sexual misconduct": "any sexual contact including but not limited to, oral sexual contact or sexual intercourse, masturbation, homosexual acts or physical contact with the clothed or unclothed genitals or pubic area to arouse, appeal to or gratify sexual desires involving any individual other than an inmate on State time...." The term "homosexual acts" here is vague at best, and at worst a kind of indirect slur on the gay, lesbian, and bisexual communities as "homosexual acts" are apparently are too unspeakable and/or too mysterious to be specifically named. In context, it seems that "homosexual acts" is probably meant to refer to anal sex, but even then it is a troubling usage: not all gay and lesbian individuals engage in anal sex, and statistically, the majority of anal sex acts in the United States are engaged in by heterosexual individuals. In short, if the regulation means "anal sex," it should say "anal sex"; if something other than anal sex was meant, it is baffling as to what other sexual act historically has been primarily or only associated with gay, lesbian, and/or bisexual persons.

AR407: Subsections 407.03.2.D. and 3.E. under "Degrees of Restraint" are, of course, the execution of the new state law requiring minimally necessary

restraints on pregnant inmates. These subsections made particular practices, with no discretion left to officers except to further restrain an inmate (Subsection 407.03.4), and thus the Department of Corrections needs to remain vigilant that these particular practices actually are the minimally necessary restraints in all cases. This also is applicable to AR 430.03.9.B. and AR 430.03.9.C. Even more significant, Section 407.03.4 provides an unacceptable level of discretion to transporting officers, in the use of additional restraints. "In case of doubt, the officer should further restrain the inmate." This provision flies in the face of the mandates established by NRS 209.376 and NRS 209.371, prohibiting inhumane treatment.

AR 446: The ACLU of Nevada understands the need to assess "Security Threat Groups and Disruptive Groups" and appreciates that inmates have an opportunity to contest their classification by staff as members of such groups. However, at 446.03.6, the proposed regulation states that an inmate at a Due Process Hearing can "present evidence if he believes the suspected affiliation is incorrect" but "may not call any witnesses." This procedure is a logical conundrum as it requires an inmate to prove a negative using only his own testimony and documents; by the same token, I am not a Ku Klux Klan member, but I could not produce any document that says I am not. This would seem to leave the fate of the inmate only to perceptions of his or her credibility.

AR 610: The ACLU of Nevada previously has indicated to Mr. Cox its position on employment of inmates who are HIV+ or have AIDS, in a letter to him dated April 19. That letter (included here as Appendix), in turn, was a final version of an earlier draft presented to him in person at a meeting with him prior to April 19. However, we note in proposed AR 610.03.2. that the Nevada Department of Corrections still plans to prohibit such prisoners from "any assignment in the canteen, culinary, food services, infirmary, or allied health services area." As we noted in our letter, such bans are in place only in Alabama, South Carolina, and Nevada, and Alabama's currently is being legally challenged. More importantly, such bans are based on limited knowledge of HIV/AIDS from 20 or more years ago, and allowing prisoners to have broader job opportunities in prison increases the likelihood that they will be contributing members of the society when they are no longer in prison.

AR 613: We note that section 613.01.1 refers to "medical, dental and mental health needs" of inmates as "serious," but it is unclear whether this is a mere acknowledgment that inmates have "serious" needs (although surely not all do), or whether the policy is only about those needs that are characterized as "serious" (which does not seem to be the case, in context).

AR 722: Section 722.10 is simply confusing. Subsection 1. states, "Legal correspondence cannot be monitored," while Subsection 2 outlines an entire policy and procedure for "censor[ing]" "Incoming or Outgoing legal or privileged mail." (AR 750.05 also describes in detail the policy and procedure for monitor-

ing inmate mail.) It is unclear how legal mail can be censored if it is not being monitored in the first place.

AR 750. Section AR750.06.1.C. reads, "Correspondence that would be detrimental to the security, good order, or discipline of the institution" can be censored. Censorship of mail is an extreme step, as is clear in context from the various mail regulations, yet "good order" and "discipline" are vague and would seem to give prison officials wide discretion in censoring inmate mail.

AR 814: Attachment 2 to AR 814 is extremely troubling to the ACLU of Nevada. That inmates are required to complete a 30-question form about their religious beliefs, their religions, and their diets is a significant burden in any case. But the specifics of this form, in the context of a state prison, is very problematic. First, it is widely known that a substantial percentage of prison populations are individuals who struggle with functional illiteracy, mentally illness, or even mentally disabilities, and that another substantial percentage of inmates are poorly educated. These factors alone would limit many inmates' abilities to completely and even relatively accurately answer a lengthy and detailed questionnaire. However, the set of questions in Attachment 2 is particularly onerous in that it would seem to require a level of expertise of, and commitment to, a particular religious faith that, arguably, relatively few persons could navigate given social scientific findings about how little knowledge most Americans have about their own religion. This questionnaire (when viewed also in light of Attachment 6, "Religious/ Dietary Accommodation Challenge Form") assumes a substantial problem with insincere inmates requesting a kosher or other religious diet and places a substantial and unreasonable burden on even those inmates who are knowledgeable, let alone those who are not, about their own religions. Therefore, it arguably constitutes an infringement on the rights of Nevada prison inmates to practice their religions.

Thank you for your consideration of our positions on these various proposed Administrative Regulations of the Nevada Department of Corrections. We also reserve the right, naturally, to provide additional comments.

Very truly yours,

Dane S. Claussen
Executive Director

APPENDIX

April 19, 2012

James "Greg" Cox, Director
Department of Corrections
3955 West Russell Road
Las Vegas, NV 89118

Dear Greg:

Thank you again for meeting with me on March 27, 2012. As promised, this letter addresses the Department of Corrections' categorical ban of inmates with HIV from participating in work assignments in the "canteen, culinary, food serviees, infirmary, or allied health services areas." *See* NV DOC, AR610.03. We appreciate the significant changes that NV DOC has made to its policies regarding employment opportunities for prisoners with HIV, and that inmates with HIV are now eligible for other work assignments on a case-by-case basis. However, for the reasons discussed below, we urge you to take the next step and assess the eligibility of inmates, including those living with HIV disease, to work on all assignments on a case-by-case basis.

Preliminarily, we note that permitting inmates with HIV to work in food service positions would pose no risk of HIV transmission. The medical community, including the Centers for Disease Control and Prevention ("CDC"), has long concluded that there is no evidence that HIV can be transmitted through food service positions. The CDC, for example, is unequivocal in its position: "There is no known risk of HIV transmission to co-workers, clients, or consumers from contact in industries such as food-service establishments. Food-service workers known to be infected with HIV need not be restricted from work unless they have other infections or illnesses (such as diarrhea or hepatitis A) for which any food-service worker, regardless of HIV infection status, should be restricted." *See* "HIV and its Transmission," CDC Fact Sheet (July 1999).

The EEOC likewise states that there is no medical basis for categorically excluding people with HIV from jobs in the food service industry. *See*, EEOC "How To Comply with the Americans with Disabilities Act: A Guide for Restaurants and Other Food Service Employers" (2004) *available at* http://www.cdc.gov/niosh/topics/bbp/occupations.html. An inmate with HIV can work in food service without any need for accommodation—he must simply follow the health and safety guidelines all other persons should follow. Similarly, because there is no risk of HIV transmission through casual contact, there is no

medical reason to bar inmates with HIV from working in the infirmary or allied health services positions.[1]

In light of this medical understanding of HIV, prison restrictions on working in jobs like food service are becoming rarer and rarer. Michigan, one of the few states that had barred prisoners from working in food service jobs, eliminated its restriction several years ago. *See* Michigan Department of Corrections, Policy Directive, Control of Communicable Bloodborne Diseases, §MM *available at* http://www.michigan.gov/documents/corrections/03_04_120_328496_7.pdf. And the department of corrections in California, which was sued and defended a prior policy of banning inmates with HIV from food service jobs, no longer imposes that restriction. Currently, to our knowledge, only the two prison systems (Alabama and South Carolina) that segregate inmates with HIV have policies categorically excluding prisoners with HIV from jobs like food service. (Alabama's policy of segregating inmates with HIV, and the corresponding exclusion from many work opportunities, is currently facing legal challenge.)

We urge the DOC to reconsider its policy, not only because of the current medical understanding of HIV, but also because we believe considering eligibility of inmates to work in all positions on a case-by-case basis would benefit the DOC itself and society as a whole. Maintaining the restriction stigmatizes inmates with HIV, for no medical reason, and perpetuates outdated discrimination. This stigma can deter people with HIV from seeking treatment and medical services, and deter other inmates from accessing HIV testing and HIV prevention and education measures, decreasing the effectiveness of prisons' attempts to combat HIV. *See, e.g.*, United Nations Office on Drugs and Crime, HIV/AIDS Prevention, Care, Treatment, and Support in Prison Settings: A Framework for an Effective National Response (2006). Finally, discrimination outside the prison walls makes finding employment difficult for inmates with HIV. Jobs like food service allow prisoners to gain marketable work skills and experience. The more likely these prisoners are to find employment upon re-entry, the more likely it is that their re-entry will be successful. Prisoners who can successfully reintegrate into society benefit themselves, their families, their communities, and greater society.

We understand that almost twenty years ago, the 9th Circuit sanctioned the California department of corrections' policy of excluding inmates with HIV from food service. *Gates v. Rowland*, 39 F.3d 1439 (1994). However, the advancement of scientific understanding of HIV in nearly two decades that have elapsed since *Gates* show its reasoning is fatally flawed. In 1994, the court spoke of "the perception problems in the methods of transmission of a mysterious virus about which much is, as yet, unknown." *Id.* at 1447. The court further explained that

[1] The only restrictions the CDC recognizes might be appropriate for health services positions are in so-called "exposure prone" practices, which involve the insertion of a sharp instrument like a needle or scalpel, with a finger for manipulation, into a poorly lit body cavity. We find it difficult to imagine that DOC would permit inmates to engage in these types of practices (e.g., surgery or dentistry). Routine jobs in infirmary or health services would not be exposure prone or present any risk of HIV transmission.

"saliva, tears, and possibly sweat" are among the bodily fluids that can transmit HIV. *Gates* at 1447. This is simply untrue. Center for Disease Control, HIV Transmission, *available at* http://www.cdc.gov/hiv/resources/qa/transmission.htm ("Which bodily fluids transmit HIV? Blood, semen, vaginal fluid, breast milk, other bodily fluids containing blood…fluid surrounding the brain and the spinal cord, fluid surrounding bone joints, fluid surrounding an unborn baby."). Put simply, HIV is no longer "mysterious." The advances in the last two decades have added much to our knowledge of HIV, including the truth that persons with HIV working food service or health services jobs involving casual contact pose no risk to anyone's safety.

To the extent that the Department is concerned about the potential responses of other prisoners, education about the means by which HIV is and isn't transmitted, rather than discrimination against prisoners with HIV, is a more appropriate response. Moreover, the Department already has many mechanisms in place to ensure both that prisoners do not commit violence against other prisoners based on irrational prejudices or otherwise, as well as to ensure safety and health standards in its food preparations or in health services positions. As a result, the exclusion sweeps much more broadly than is necessary to ensure the security of the prison.

In light of the current understanding of the medical community and the courts regarding HIV, we urge the Nevada Department of Corrections to bring its policy in line with modern knowledge and practice by allowing prisoners with HIV to be evaluated on a case-by-case basis for all work assignments within the prison or on work release. This decision, which will benefit these prisoners by expanding their range of meaningful work opportunities and relieving some of the stigma they face both inside and outside of prison, will require no accommodation by nor create any undue burden on the Department.

We appreciate the many difficulties and responsibilities of your office, and understand the primary importance placed upon prison security. However, we firmly believe that there is a practical solution that satisfies the DOC's legitimate security concerns while respecting the rights of inmates with HIV. To that end, we look forward to working with your office to discuss this issue further, and to determine how we can help educate the general population about the medical community's consensus that there is no risk of transmission of HIV in jobs such as food service or health services.

Very Truly Yours,

Dane S. Claussen
Executive Director