CALIFORNIA CORRECTIONAL SUPERVISORS ORGANIZATION

To: CCSO Members
From: CCSO President Richard Tatum
Date: March 4, 2011

Subject: Draft, Unsigned and Undated Memo directed by DPA Director Ron Yank that will be signed by Undersecretary Scott Kernan, challenging, the Stipulation to Judgment and Permanent Injunction, CCSO & Rote v CDCR

CCSO was given advance notice that a memo, with the subject: Access to Representation During The Adverse Action Process and signed by Undersecretary, Operations Scott Kernan would be released Friday, March 4th or thereafter. The memorandum is due to DPA Director Ron Yank's interpretation of the CCSO Stipulated Judgment and Permanent or as our members call it the 5-day injunction. The legal opinion by the CCSO Attorney Michael Lackie, on this memorandum is as follows:

"I am responding to your request for our position on Scott Kernan's memo (presently in draft form, unsigned and undated) challenging your Stipulation to Judgment and Permanent Injunction, *CCSO & Rote v CDCR, et al.*, San Bernardino Superior Court Case No. RCV059013 (often referred to as the "5 Day Permanent Injunction"). I am taking the liberty of putting my opinion in email form to expedite its delivery to you and interested CCSO members.

Kernan's memo is a carefully drafted and artfully worded piece likely coming out of DPA Director Ron Yank's office for some purpose involving his negotiations with CCPOA. Otherwise, there is no legal or practical reason for this memo -- and no reasoning is offered. There is no new court decision compelling the law and purpose of the injunction be reevaluated.

I suggest you take no action at this time and not initiate a protest. Kernan's memo carries no legal weight and is essentially a waste of paper. It does not say that CDCR intends to violate the injunction or POBOR. It essentially says OIA can ignore the injunction without directly saying so. There is no requirement that the department treat each bargaining unit equally. Kernan forgets that CDCR's violation of a member's right of representation caused CCSO to go to court to remedy the threatened discipline; the injunction was the result, something CDCR agreed to on behalf of everyone. For nearly 10 years CDCR has complied with the injunction.

POBOR, as statewide public policy, trumps all contrary law and agency attempts to limit its effect, such as through written waivers or a provision in DOM. *County of Riverside v. Superior Court (Madrigal)* (2002) 118 Cal.Rptr.2d 169. Thus, DOM sections seemingly contrary to POBOR are unenforceable. CDCR cannot negotiate away or issue orders limiting its application to correctional peace officers. We ignore what CDCR thinks about POBOR until an attempt is made to punish a member in violation of POBOR, at which time we go to court for an order ending the adverse action.

Your injunction is no different. Nearly 10 years ago CDCR agreed to the judgment and injunction. The department has for the most part complied fully with the injunction and to my knowledge has never before challenged it. Kernan's memo is the first time we have seen anything challenging the injunction on an official basis.

The first paragraph is essentially correct, that the injunction does not require CDCR provide 5 working-days notice to every correctional supervisor they want to interrogate. This is true even though the OIA Handbook and numerous other documents require agents to give correctional supervisors -- not just CCSO members -- 5 days notice. However, failure to provide 5 working days notice makes the tolling provision unavailable to CDCR. The end result would be the injunction's first commandment: CDCR is prohibited from proceeding

with an interrogation of a correctional supervisor when the chosen representative is not available and the interrogation cannot proceed until that rep is available. Period. Thus, Kernan correctly states the injunction does not command CDCR to give 5 days advance notice to everyone, only that they will look foolish if the chosen rep must reschedule the interrogation or is unavailable for an extended period of time.

CDCR cannot get around the prohibition against forcing a correctional supervisor to participate in an interview without his chosen rep. Nothing Kernan (or anybody else at HQ) puts in writing changes anything about the injunction. If he wants to be a tough guy, CDCR can begin paying attorneys fees and court costs and even court-ordered sanctions for not complying with the injunction. I can assure you the first time a supervisor member of CCSO is threatened with insubordination for refusing to appear at OIA when his representative is not available, we will be more than happy to let a superior court judge know about it and put a stop to that misconduct.

The rest of Kernan's memo is junk.DOM does not dictate how CDCR conducts interrogations, issues notices, and initiates disciplinary proceedings: POBOR and your injunction are the law, not what CDCR thinks your members' rights are or should be. For example, the advisal form for subject and witness interviews is about 12 years out of date with the law. Since your members' rights are determined by statutes and court decisions -- the law, what CDCR may think your rights should be is not relevant and not enforceable. Attorneys usually say nothing when they hear ridiculous interpretations of POBOR and injunctions arising from POBOR violations because POBOR and injunctions carry the day -- not something CDCR puts in writing, even if it looks and sounds important.

"Generally a minimum of 24 hours notice" is not the law. Kernan does not cite to anything when throwing this out. 24 hours notice is what CCPOA stupidly agreed to accept for its rank-and-file members many years ago (and likely not enforceable by CDCR anyway), or it may be what Yanks or Kernan would prefer the law to be. We ignore such notions.

Similarly, Kernan's direction that CDCR "<u>may</u> provide additional time for a member to secure representation" will be a direct violation of the injunction if enforced. The injunction is not about letting a member have more time to find an available representative; the injunction bars CDCR from doing anything until the chosen representative becomes available. CDCR is granted tolling of the one-year statute if it provides 5 working days notice -- and only if it does so. Otherwise, the interrogation is over before it begins should the representative not be available. CDCR cannot demand a member chose another representative who might be more available. I am very familiar with the case of *Upland POA vs. Kac* where a police department may in some circumstances require a peace officer employee to find another rep when the chosen one is unable to appear for a mutually-agreed upon date and time for the interrogation. The Upland case does not support Kernan's day dream of ordering employees to find any old rep hanging around without anything to do. More importantly, your injunction bars the interrogation in its entirety if CDCR tries to get rid of the more popular and busy attorneys. Even if 5 days notice is given, the department gets an extension of the one-year time constraint in POBOR but not the ability to bully members around about unavailable representatives.

So, Kernan's memo carries no weight. Your members should give it the regard it is due -- not much -- and then carry on as usual and continue to insist the department comply with the injunction and POBOR. Kernan has no authority to ignore or attempt to rewrite by fiat the injunction. The memo does not give legal authority or refer to a court order or provide any legal reason for its existence. While we would love to make a preemptive strike whenever your injunction is threatened, Kernan's memo does not order anyone to violate the injunction or ignore POBOR rights. It only removes the mandate of 5 working days advance notice. That directive, by itself, is OK (although incredibly stupid). Until OIA violates a member's rights in a specific case, Kernan's memo is nothing to us or anyone else protected by POBOR and the injunction.

As a general rule, orders should be followed and complained about afterwards unless plainly illegal. But not POBOR rights violations. Members may lawfully refuse orders contrary to POBOR (but consult with a knowledgeable attorney first) or contrary to an injunction (no need to see an attorney first -- always comply with an injunction or judicial order).

Just beware that members in OIA who try to screw with the injunction based on Kernan's memo will be putting themselves and their supervisors in jeopardy of costing CDCR a lot of money and being named in a contempt of court proceeding or other method of seeking court intervention. This is not the same as a false arrest or other misconduct for which the agency is always liable. Knowingly violating POBOR and/or the injunction could become a personal financial nightmare. The injunction is no joke; Kernan's memo is.

I hope this helps to understand why we ignore writings like Kernan's memo. The law is the law. The injunction could not more clearly describe the department's duties. Nobody in CDCR HQ or DPA can rewrite the injunction or attempt to ignore it by issuing a memo. Members under investigation should rely on the legal advice of their attorneys/reps and not try to tackle this issue by themselves. Chose a rep. Then let the rep take care of business. Under no circumstances can a member be insubordinate for refusing to appear for an interrogation without his/her chosen representative. My firm has repeatedly taken agencies to court for a judicial spanking and loss of money when they try to get around the right of representation. Kernan's memo is not even close to the settled law regarding representatives. We have no idea why anyone would issue that memo given the injunction. But, Kernan can write what he wants. We're just surprised and sorry he does not know what he is doing. I suppose we are in the business of re-educating those who trample on the rights of correctional supervisors.

Let me know when a member thinks the injunction is being violated and we or another CCSO attorney will take care of it. Also, members should read and reread the injunction to understand how it works and why CDCR is powerless to change it."