

February 9, 2023

Sent via electronic mail

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Re: Discriminatory denial of medical and religious accommodations for peace officers

Dear Mr. Macomber and CDCR Executive Staff,

On behalf of the American Civil Liberties Union of Northern California (“ACLU NorCal”)¹ and the Sikh Coalition,² we write with grave concerns regarding the California Department of Corrections and Rehabilitation (“CDCR”)’s recent efforts to deny and/or improperly rescind medical and religious accommodations for bearded peace officers. We understand that these efforts were in part outlined in various CDCR memoranda, starting with one issued on September 22, 2022,³ under which the accepted grooming options explicitly exclude a full beard.⁴ In particular, we are concerned that the categorical application of this policy is discriminatorily and disparately impacting peace officer employees, many of whom are racial

¹ ACLU NorCal, founded in 1934, is an affiliate of the national ACLU, is a non-partisan, non-profit that works to defend and preserve the individual rights and liberties guaranteed to every person in this country by the Constitution and laws of the United States. The ACLU and its affiliates stand up for these rights even when the cause is unpopular, and sometimes when few others will. The ACLU acknowledges that, as a result of historic and systemic racism and other forms of oppression, rights and liberties are not equitably applied to or enjoyed by all people of this country. Inequitable enforcement of our laws and policies, as well as the laws and policies themselves, can reinforce systems of oppression, exclusion, and disenfranchisement for many groups of people, including people of color, immigrants, currently and formerly incarcerated people, LGBTQ people, women, people with disabilities, youth/elders, religious minorities, and low-income, poor, and homeless people.

² The Sikh Coalition is a community-based organization that defends civil rights and civil liberties in the United States, educates the broader community about Sikhs and diversity, and fosters civic engagement amongst Sikh-Americans. The Sikh Coalition owes its existence in large part to the effort to combat discrimination and uniformed hate against Sikh-Americans after September 11, 2001. Since its inception, the Sikh Coalition has worked with schools, government agencies and the private sector to achieve mutually acceptable solutions to the accommodation of Sikh articles of faith.

³ See Memorandum from CDCR on Compliance with California Code of Regulations, Title 8, Section 5144 and Section 5199 – All Staff Directives (Sept. 22, 2022) (hereinafter, “Policy”).

⁴ *Id* at 6.

and religious minorities, who suffer from serious medical conditions such as Pseudofolliculitis Barbae⁵ and/or men whose faiths require them to maintain facial hair, including but not limited to Sikhs, Muslims, and members of the Jewish faith. Categorically denying such individuals reasonable medical or religious accommodations to maintain their beards, or rescinding such accommodations, risks violating federal and state law, and serves to severely limit access to employment for a multitude of minority communities by one of California's largest public employers. The fact that this new discriminatory Policy was put into effect on February 1, the first day of Black History Month, makes it all the more egregious.

Undoubtedly, the newly implemented Policy risks direct conflict with the Department's explicit goal of increasing diversity in the workplace.⁶ Here, implementing the Policy without reasonable accommodations will substantially decrease the number of men from Black, Sikh, and other minority religious communities eligible for service with CDCR, ultimately resulting in disproportionate discipline against, including terminations of, these marginalized communities. We respectfully urge the CDCR Executive Staff to revise the Policy of excluding beards from the acceptable grooming options in order to grant reasonable medical and religious accommodations to personnel with serious medical conditions such as PFB and/or religious reasons for maintaining facial hair.

RACIAL DISCRIMINATION IN CDCR POLICY AND PRACTICE OF RESCINDING OR DENYING ACCOMODATIONS FOR OFFICERS WITH PFB

Implementing the Policy and denying medical accommodations to officers with PFB will have the pernicious effect of drastically decreasing the number of Black men eligible for service. PFB "is found in 50% to 75% of [B]lacks and 3% to 5% of whites who shave," meaning Black men are 10-25 times more likely to develop the condition than white men.⁷ Other studies have found that 45-83% of Black men develop PFB upon shaving.⁸ Persistent shaving can lead to permanent scarring in people with the condition.⁹ The literature is clear that "[t]he most definitive treatment for PFB is the cessation of shaving."¹⁰

CDCR employs approximately 41,000 employees, of which approximately 2,000 are Black men.¹¹ Per the California Department of Human Resources' Demographic Reports for state employees, Black men make up 4.8% of CDCR's workforce.¹² Approximately 900 to 1,600 of

⁵ James G.H. Dinulos, MD, *Bacterial Infections*, Habif's Clinical Dermatology (2021).

⁶ CDCR, *CCHCS Staff Lead Movement to Advance Race and Gender Equity*, California Department of Corrections and Rehabilitation, (Aug. 2, 2019)

⁷ James G.H. Dinulos, MD, "Bacterial Infections", Habif's Clinical Dermatology (2021).

⁸ AJ McMichael, "Hair and scalp disorders in ethnic populations." *Dermatol Clin.* 21, 629-644 (2003).

⁹ A Kelly, SC Taylor, HW Lim, A Serrano. *Pseudofolliculitis barbae*. In: Kelly A, Taylor SC, Lim HW, Serrano A, eds. Taylor and Kelly's dermatology for skin of color. 2nd ed. New York: McGraw-Hill; 2016. p. 264-9.

¹⁰ Divya Sharma, Yoseph Dalia, and Tejesh S. Patel. *Ethnic Equity Implications in the Management of Pseudofolliculitis Barbae*. *The Journal of the American Board of Family Medicine* January 2022, 35 (1) 173-174.

¹¹ *Departmental Demographic Reports*, Cal. Dep't of Human Res., <https://www.calhr.ca.gov/Pages/workforce-analysis.aspx> (last visited Feb. 9, 2023).

¹² *Id.*

these Black men likely have or would develop PFB if required to shave their facial hair regularly. In comparison, only approximately 300-500 white men are likely to be affected by CDCR's new policy, even though white men make up approximately 25% of CDCR's workforce.¹³

This disparate impact is emblematic of long-standing cultural insensitivities related to Black hair. The history of such discrimination as it relates to Black Americans is well-documented. In passing the CROWN ACT ("Create a Respectful and Open Workplace for Natural Hair"), the California Legislature declared the following:¹⁴

(a) The history of our nation is riddled with laws and societal norms that equated "blackness," and the associated physical traits, for example, dark skin, kinky and curly hair to a badge of inferiority, sometimes subject to separate and unequal treatment.

(b) This idea also permeated societal understanding of professionalism. Professionalism was, and still is, closely linked to European features and mannerisms, which entails that those who do not naturally fall into Eurocentric norms must alter their appearances, sometimes drastically and permanently, in order to be deemed professional.

(c) Despite the great strides American society and laws have made to reverse the racist ideology that Black traits are inferior, hair remains a rampant source of racial discrimination with serious economic and health consequences, especially for Black individuals.

(d) Workplace dress code and grooming policies that prohibit natural hair, including afros, braids, twists, and locks, have a disparate impact on Black individuals as these policies are more likely to deter Black applicants and burden or punish Black employees than any other group.

Unfortunately, discrimination against the natural state of Black hair is not limited to employment cases but is much more pervasive. For example, in 2015, ACLU NorCal filed a complaint against Transportation Services Administration ("TSA") for its discriminatory and intrusive searches of Black people's hair.¹⁵ The indignity and impact of these sorts of policies that lack cultural awareness cannot be understated, particularly in this instance where individuals are being threatened with economic deprivation for something that they cannot control. As noted above, the disproportionate impact on Black men undermines the diversity goals of CDCR and is out of step with other more notable government entities, including the branches of the United States

¹³ *Id.*

¹⁴ Discrimination: hairstyles, SB 188 (Cal. 2019), available at: https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200SB188.

¹⁵ *Civil Rights Complaint on Behalf of Malaika Singleton Against the TSA*, ACLU of Northern California (Jan. 12, 2015), <https://www.aclunc.org/our-work/legal-docket/civil-rights-complaint-behalf-malaika-singleton-against-tsa>.

Military.¹⁶ Before the Navy recently amended its grooming policy, one Black officer shared: “The razor bump issue is actually as much of a rock in my shoe as Confederate flags on base . . . The current climate sends a bad message to Black males that the service isn’t meant for you.”¹⁷

RELIGIOUS DISCRIMINATION IN CDCR POLICY AND PRACTICE OF RESCINDING OR DENYING ACCOMMODATIONS

Sikhism is the fifth largest world religion, with over 25 million followers globally and an estimated half a million Sikhs living within the United States. The first Sikh *gurdwara* (house of worship) in the U.S. was founded in Stockton, CA in 1912. It is believed that there are now congregations across the state supporting approximately 100 *gurdwaras*.

By way of background, Sikhism was founded in Punjab, India in 1469 by Guru Nanak, who rejected the caste system and declared all human beings equal. The Sikh religion is monotheistic, believing in one God that is all all-pervading. For Sikhs, this God of love is obtained through grace and sought by service to humankind. Observant Sikhs are required to wear a religious uniform consisting of certain articles of faith, including Kesh (uncut hair, including facial hair). The articles of faith distinguish a Sikh and have deep spiritual significance. Maintaining hair and beards unshorn, for example, is considered living in harmony with the will of God.

Like members of other religious communities and in accordance with religious protections under both California and federal Constitutions and laws, Sikhs may practice their faith on a spectrum consistent with their individualized sincerely held religious beliefs. Thus, followers may interpret, express, and identify with their traditions in various ways. For example, there are many Sikhs who do not wear all of the articles of faith. This does not make these individuals any less Sikh or their practice any less significant, nor does it disqualify believers from calling themselves Sikhs. Notwithstanding, denying a Sikh the right to practice their faith by denying them the right to maintain their articles of faith in a manner consistent with their religious practice is often perceived as one of the most hurtful and humiliating physical injuries that can be inflicted upon a Sikh.

We understand that a number of Sikh male peace officers work for CDCR in institutions across the state, and many had standing or pending religious accommodations to maintain religiously mandated beards at the time CDCR issued its memoranda. It is also our understanding that the Policy requires CDCR to engage with individuals who have standing or pending religious accommodations in an “interactive process,” but that process has not been implemented in the manner that the Policy stated. Rather, various CRDC facilities handled religious accommodation requests in different ways, some choosing to ignore these requests, others verbally indicating to

¹⁶ The Navy was the last Branch to institute a policy change in 2022. Thomas Novelly, *Navy Won't Kick Out Bearded Sailors Who Can't Shave Due to Skin Conditions Under New Policy*, Military.com, Mar. 9, 2022, available at: <https://www.military.com/daily-news/2022/03/09/navy-wont-kick-out-bearded-sailors-who-cant-shave-due-skin-conditions-under-new-policy.html>

¹⁷ Geoff Ziezulewicz, *How the Navy's beard policy discriminates against Black sailors*, NavyTimes, Apr. 5, 2022, available at: <https://www.navytimes.com/news/your-navy/2022/04/05/how-the-navys-beard-policy-discriminates-against-black-sailors/>.

Sikh employees that their accommodations remained intact. In all cases, it is clear that the CDCR's haphazard and inconsistent implementation and roll out of the Policy was woefully mismanaged in a manner that ultimately led to the violation of its religiously and medically accommodated employees' rights.

FAIR EMPLOYMENT CONCERNS

CDCR is bound by fair employment practices under both California and Federal law. The California Fair Employment and Housing Act ("FEHA") prohibits an employer from discriminating against an employee based on race, religious creed, physical disability, and medical condition, among other identity markers.¹⁸ An employer must provide an employee with reasonable accommodation unless doing so will endanger the employee's health or safety or the health or safety of others, or the employee cannot perform their essential duties even with the accommodation.¹⁹ Similarly, under Title VII, it is unlawful for an employer that receives federal funds, such as CDCR, to discriminate on the basis of race, color, religion, sex, or national origin.²⁰ Like FEHA, Title VII requires an employer to provide reasonable accommodations and make exceptions to policies such as dress and grooming requirements unless doing so would pose an undue hardship to the business. The Americans with Disabilities Act ("ADA") also requires employers to offer reasonable medical accommodations to people with disabilities.²¹

In any case, the Policy refers to specific regulations that require that facial hair not come in contact with the seal for certain personal protective equipment ("PPE") that CDCR has chosen to provide to its employees. However, the Policy fails to recognize that, as an employer, CDCR is required to individually assess specific requests for alternative PPE. Part of its "interactive process" should have been to engage with individuals who were requesting accommodations to determine what workable solutions may be available rather than flatly, and without discussion, turning these employees away from their work shifts and putting them in the untenable position of having to come to work without their medical or religiously mandated beards intact.

Accommodating individuals affected by PFB or those who maintain facial hair for religious reasons does not pose a health or safety concern and does not interfere with peace officers' ability to perform their duties. Not only have impacted individuals previously passed fit tests but, additionally, there are alternative mask styles and mask techniques that can be used effectively with a beard. The Occupational Safety and Health Administration ("OSHA") itself has issued an interpretation letter to support using loose-fitting powered air-purifying respirators (PAPRs) as an alternative to N95 respirators "for workers who maintain facial hair for religious or medical reasons."²² More recently, employers have also found other cost-effective workable solutions

¹⁸ Cal. Gov't Code § 12940(a).

¹⁹ *Id.*

²⁰ 42 U.S.C. § 2000e.

²¹ 42 U.S.C. § 12112(d).

²² Standard Interpretation Letter from Kimberly A. Stille, Acting Director of Directorate of Enforcement Programs, on Respiratory protection against COVID-19 for employees with religiously mandated facial hair, Occupational Safety and Health Admin. (Dec. 16, 2021), available at: <https://www.osha.gov/laws-regs/standardinterpretations/2021-12-16>.

such as Beard Bands that prevent facial hair from coming in contact with PPE seals.²³

Despite the myriad ways in which CDCR could have created and implemented the Policy in a culturally competent manner, as applied in its current form, it will have a disparate impact on Black officers due to the documented prevalence of PFB in Black men. As stated earlier, PFB is found in 50% to 75% of Black people who shave.²⁴ This disparate impact could give rise to successful FEHA, Title VII, and ADA claims. Similarly, applying the Policy to officers such as practicing Sikhs and others whose faith prohibits them from shaving could give rise to successful FEHA and Title VII claims.

RECONSIDERATION OF GRANTING ACCOMODATIONS FOR CDCR OFFICERS WITH PFB

We respectfully urge the CDCR Executive Staff to revise the policy of excluding beards from the acceptable grooming options and to grant reasonable medical accommodations to personnel with PFB and religious accommodations to personnel who must maintain facial hair for religious reasons. Given the pervasiveness of PFB in Black men, the impact of imposing the Policy in its current state will drastically reduce the number of Black men who are able to participate in CDCR employment. Similarly, denying religious accommodations for Sikh, Muslim, Jewish, and other officers who maintain faith-based beards, unlawfully curtails religious freedom and will undoubtedly restrict the number of these religiously observant bearded individuals who are able to serve as CDCR officers.

We are available to discuss this further at your request.

Sincerely,



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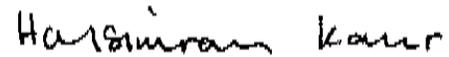
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²³ D.D.S. Bhatia et al., *Under-mask beard covers achieve an adequate seal with tight-fitting disposable respirators using quantitative fit testing*, 128 J. of Hospital Infection 8 (2022), available at: <https://www.sciencedirect.com/science/article/pii/S0195670122001694>; see also Clinical Excellence Comm'n, *Beard Cover Technique - Fit testing with a balaclava and elastic band*, YouTube (Oct. 25, 2021), <https://www.youtube.com/watch?v=w7FUo0bfknE>; New South Wales Government, Clinical Excellence Comm'n, *Respiratory Protection Program* (2022), available at: <https://www.ccc.health.nsw.gov.au/keep-patients-safe/COVID-19/respiratory-protection-program>.

²⁴ James G.H. Dinulos, MD, *Bacterial Infections*, *Habib's Clinical Dermatology* (2021).



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