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8
9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE DISTRICT OF ARIZONA**

11 EDWARD HAROLD SCHAD, JR.,

12 Plaintiff,

13 v.

14 JANICE K. BREWER,
15 Governor Of the State of Arizona in Her
16 Official Capacity,

17 SCOTT SMITH,
18 Chief of Staff to Governor Brewer,
19 In His Official Capacity

20 BRIAN LIVINGSTON,
Chairman and Executive Director,
21 Arizona Board of Executive Clemency

22 JOHN "JACK" LASOTA,
23 Member, Arizona Board of Executive
Clemency, In his Official Capacity

24 ELLEN KIRSCHBAUM,
25 Member, Arizona Board of Executive
26 Clemency, In Her Official Capacity

Case No. 2:13-cv-019162-ROS

**RESPONSE IN OPPOSITION TO
PLAINTIFF'S MOTION FOR A
TEMPORARY RESTRAINING
ORDER AND/OR PRELIMINARY
INJUNCTION**

CAPITAL CASE

**EXECUTION SET FOR
OCTOBER 9, 2013**

DONNA HARRRIS, Member, Arizona Board of Executive Clemency, In Her Official Capacity, Defendants.	
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Defendants Governor Janice K. Brewer, Chief of Staff, Scott Smith, Chairman/Executive Director of the Arizona Board of Executive Clemency, Brian Livingston, Board Member, John “Jack” LaSota, Board Member Ellen Kirschbaum, and Board Member Donna Harris oppose Plaintiff Edward Schad’s Motion for a Temporary Restraining Order and/or Preliminary Injunction in which Schad complains that the Board has an alleged bias against him and as a result of that alleged bias would not vote to recommend clemency.

The Arizona Board of Executive Clemency (“Board”) is ready to conduct the clemency hearing for Mr. Schad on October 2, 2013. Board members Brian Livingston, Ellen Kirshbaum, John LaSota and former Board member Melvin Thomas will be present at the evidentiary hearing scheduled for September 30, 2013 at 2:00 p.m. The current Board members plus Melvin Thomas are available to testify and will dispute the allegations asserted by Schad.

MEMORANDUM OF POINTS AND AUTHORITIES

SUMMARY OF RELEVANT FACTS

On August 9, 1978, a badly decomposed body of an elderly male was found approximately nine miles south of Prescott, Arizona, adjacent to a roadway pull-off on U.S. Highway 89. After the corpse was discovered, the Yavapai County Sheriff’s Department and the County Medical Examiner observed a small rope tied around the victim’s neck. It was later established that the cause of death was strangulation. In 1985, an Arizona jury found respondent guilty of first-degree murder for the 1978 strangling of

1 74-year-old Lorimer Grove. The court sentenced respondent to death.

2 After 28 years of litigation, a warrant of execution was issued and Mr. Schad was
3 scheduled for a reprieve/commutation hearing on February 27, 2013. On the evening
4 prior to the scheduled reprieve/commutation hearing, Ms. Henry sent an e-mail to
5 Director Ryan of the Arizona Department of Corrections declining to participate in the
6 clemency process due to a decision in the 9th Circuit Court of Appeals.

7 Once again, Schad has exhausted his legal remedies and the Arizona Supreme
8 Court issued another warrant of execution which is scheduled for October 9, 2013.
9 Despite the fact that Mr. Schad previously declined to participate in his commutation
10 hearing, the Board has scheduled a clemency hearing for October 2, 2013. The Board is
11 prepared to hold the clemency hearing on October 2, 2013.

12 **LEGAL AUTHORITY AND ARGUMENT**

13 **1. Schad will not prevail on the merits because there is no evidence that the 14 Board is biased.**

15 Schad's unsubstantiated claims about current Board members do not meet the
16 standard for the issuance of a temporary restraining order or preliminary injunction. A
17 preliminary injunction is "an extraordinary and drastic remedy, one that should not be
18 granted unless the movant, by a clear showing, carries the burden of persuasion."
Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)

19 The Ninth Circuit has established two tests for determining whether to grant a
20 preliminary injunction. Under the traditional test, the court considers (1) the likelihood
21 that the moving party will prevail on the merits; (2) whether the moving party will suffer
22 irreparable injury if the court denies relief; (3) whether the balance of potential harm
23 favors the moving party; and (4) whether the public interest favors the moving party (in
24 certain cases). *Save Our Sonoran, Inc. v. Flowers*, 408 F.3d 1113, 1120 (9th Cir. 2005).
25 Under the second, alternative test, the court considers "either a combination of probable
26 success on the merits and the possibility of irreparable injury or that serious questions are

1 raised and the balance of hardships tips sharply in [plaintiff's] favor.” *Id.* at 1120
2 (emphasis in original).

3 Schad will not prevail on the merits of his complaint because he has not and
4 cannot make a clear showing that the current Board members are biased against him.
5 Jesse Hernandez is the only declarant that alleges that the Board members have engaged
6 in prohibited acts including open meeting law violations and skirting their responsibilities
7 to act independently. *See* Compl. at Ex I. Mr. Hernandez is a disgraced and disgruntled
8 former board member and his allegations are false and should be disregarded. *See* Ex. A.
9 Mr. Hernandez resigned his position as Executive Director and Chairman of the Board
10 after a state investigation substantiated nine allegations that he engaged in inappropriate
11 and unprofessional acts. *Id.* Mr. Hernandez seemingly has a prejudice against his former
12 employer and a motivation behind his misstatements. Jesse Hernandez’s bald
13 allegations, that the Board illegally discussed Schad’s case is insufficient to show “bias”
14 and “prejudice” let alone establish a basis for a temporary restraining order.

15 Mr. Hernandez’s veracity and credibility should be questioned. For example, Mr.
16 Hernandez’s swears under penalty of perjury that he overheard or participated in a
17 conversation with three Board members discussing how they would vote on Mr. Schad’s
18 case. *Id.* Mr. Hernandez’s ‘overhearing’ this alleged conversation constitutes a violation
19 of Arizona open meeting laws as he would be participating in that alleged meeting. As
20 Executive Director of the Board, he has had extensive training on Arizona’s opening
21 meetings laws. Further, if Mr. Hernandez truly had witnessed Board members engaging
22 in activities that violated Arizona law, as Executive Director and Chairman, he would
23 have an obligation to report it. Mr. Hernandez never reported any open meeting
24 violations.

25 Additionally, Mr. Hernandez was the only Board member to have been found by
26 the state’s investigation to have engaged in misconduct when he accepted basketball
tickets from an inmate’s step-brother during a time the Board was considering his

1 commutation. The Court cannot ignore these examples when weighing the credibility of
2 his statements. Mr. Hernandez's statements have less credibility when viewed with the
3 categorical denial of Melvin Thomas, Brian Livingston and Ellen Kirshbaum. *See* Exs.
4 B, C, and E.

5 **2. Board Members will conduct Schad's clemency hearing in a fair and**
6 **impartial manner.**

7 Defendant Board members and former Board member Melvin Thomas deny
8 having a discussion in violation of Arizona Law regarding how they would vote on
9 Schad's request for clemency. *See* Exs B, C, D, E, affidavits dated September 30, 2013
10 from current Board members Brian Livingston, Ellen Kirschbaum, John LaSota and
11 former Board member Melvin Thomas. There is a presumption of honesty and integrity
12 of those serving as adjudicators; to show disqualifying prejudgment, a claimant must
13 demonstrate that the decision maker's mind is irrevocably closed on the particular issue
14 being decided. *See, Havasu Heights v. Desert Valley Wood Products*, 167 Ariz. 383,
15 387, 807 P.2d 1119, 1123 (App. 1990). "Without a showing of actual bias or prejudice,
16 the members of [an administrative board] are presumed to be fair." *Lathrop v. Arizona*
17 *Bd. Of Chiropractic Examiners*, 182 Ariz. 172, 180, 894 P.2d 715, 723 (App. 1995). In
18 the absence of a showing that the decision maker is not "capable of judging a particular
19 controversy fairly on the basis of its own circumstances," the decision maker cannot be
20 disqualified. *Hortonville Joint School District No. 1. v. Hortonville Education*
21 *Association*, 426 U.S. 482, 493, 96 S. Ct. 2308, 2314 (1976). The current Board
22 members absent any credible evidence must be presumed by this Court to be fair and
23 unbiased.

24 Schad realizing that he cannot make a case based on Mr. Hernandez's statements,
25 attempts to confuse this court by filing numerous declarations from former Board
26 members complaining that the Governor was allegedly not happy with the way they had

1 voted in certain cases. *See* Compl. at Exs E, F and G. Schad then extrapolates from that
2 and argues the Governor and/or her staff has allegedly attempted to manipulate the
3 clemency process.¹ The Governor has the authority to appoint new members to the
4 Board and a public officer does not have a property or contract right to compel his or her
5 continuation in office. *Ahearn v. Bailey*, 104 Ariz. 250, 254 (1969). Past Board
6 members' beliefs and/or perceptions of why they were not re-appointed does not prove
7 that the current Board has the same perceptions or that they will act improperly in
8 performing their duties. Former Board members Belcher, Wilkins and Stenson's
9 declarations are noticeably void of any evidence demonstrating bias or prejudice by the
10 current Board members in the pending Schad clemency hearing. *Id.* Furthermore, the
11 current Board members in their affidavits explicitly state that they have not been told how
12 to vote, that job security is not a consideration in their vote and that they exercise
independence in voting. *See* Exs B, C, D and E.

13 The current Board is prepared to proceed with the scheduled
14 reprieve/commutation hearing and provide Schad with the appropriate due process.
15 Arizona's reprieve/commutation process satisfies due process in that it provides an
16 automatic hearing upon a receipt of a warrant of execution and provides the defendant
17 with an opportunity to present mitigating or extenuating evidence showing that clemency
18 is appropriate. *McGee v. Arizona State Board of Pardons and Parole*, 92 Ariz 317, 376
19 P.2d 779 (1962). Courts only address claims relating to clemency upon a showing that an
20 inmate has been denied minimal due process, which has been defined as an opportunity
21 to present reasons clemency should be granted and a decision maker who does not act in
22 a completely arbitrary and capricious manner. *Id.* at 289 (plurality opinion)(O'Connor,

23
24 ¹ Ms. Henry unsuccessfully argued that the current Board was biased in *State v. Lopez*, Arizona
25 Supreme Court Number CR-90-0247-AP. In *Lopez*, the Supreme Court of Arizona rejected all
26 bias claims. Attached as Ex F.

1 J., concurring in part and concurring in the judgment). Contrary to Schad assertion that
2 this is the last chance for him to prove his innocence, clemency proceedings are not “an
3 integral part of the. . . system for finally adjudicating the guilt or innocence of the
4 defendant”. *Ohio Adult Parole Authority v. Woodard*, 523 U.S. 272. 285 (1998).
5 Clemency proceedings are purely a matter of “grace”. *Id.*

6 7 **3. Schad Has Not Demonstrated Irreparable Harm**

8 Schad has not shown that he will suffer irreparable harm if the Court fails to grant
9 the temporary restraining order. Based on the affidavits of the current Board members,
10 any argument that a clemency hearing would be futile is not supported by the evidence.
11 There is no credible evidence on how the Board will vote or that the Board engaged in
12 any other improper activities. Likewise, Schad’s argument fails in that it is in the
13 public’s interest for the Board to hear evidence to determine whether Schad should be
14 recommended clemency.

15 Schad’s argument misconstrues the basic function of clemency. It is in the
16 public’s interest not to have these proceedings delayed based on challenges to the
17 composition of the Board based on the political appointment process. To its illogical
18 conclusion, Schad’s argument is that every appointed Board member must be biased
19 simply because they were appointed. Entering a TRO in this case will preclude the Board
20 from administering required statutory duties.

21 For all the reasons discussed above, Schad’s argument does not pass the second,
22 alternative test for preliminary injunctive relief. Schad has no reasonable chance of
23 success on the merits and there is no irreparable harm in having these Board members
24 hold the requested clemency hearing.
25
26

CONCLUSION

Schad's only pertinent argument for the granting of the temporary restraining order is predicated on the statements of Mr. Hernandez. As previously argued, Hernandez's allegations against the Board are baseless and therefore, Schad cannot meet the standard required for this Court to issue a temporary restraining order.

Dated this 30th day of September, 2013.

THOMAS C. HORNE
Attorney General

By: /s Kelly Gillian-Gibson
Kelly Gillilan-Gibson
Brian P. Luse
Attorneys for Defendants

Electronically filed this
30th day of September, 2013 with:

Clerk of the U.S. District Court
for the District of Arizona
401 W. Washington
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COPY of the foregoing served
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Exhibit A



Janice K. Brewer
Governor

Brian McNeil
Director

ARIZONA DEPARTMENT OF ADMINISTRATION

HUMAN RESOURCES DIVISION

100 NORTH FIFTEENTH AVENUE • SUITE 261
PHOENIX, ARIZONA 85007
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COMPLAINT INVESTIGATION Arizona Board of Executive Clemency August 6, 2013

BOARD INTRODUCTION:

In 1913 The Board of Pardons and Paroles was established and functioned as the state's discretionary releasing mechanism for inmates. In 1993, Legislation passed which eliminated Board releases for inmates whose offenses were committed after January 1, 1994. As part of this legislative change, the Board of Pardons and Paroles was renamed the Arizona Board of Executive Clemency (Board).

The mission of the Arizona Board of Executive Clemency is to ensure public safety by considering and granting parole to eligible inmates who meet the legal criteria for a grant of parole. The Board also recommends certain clemency actions to the Governor. Each month the Board conducts parole hearings for inmates who have committed offenses prior to January 1994. Parole hearings include consideration for home arrest, work furlough, rescission, modification, revocation, and absolute discharge. The Board also conducts clemency hearings, which include commutations, pardons and reprieves.

The Board consists of four Board Members and a Chairman. The Board Members serve five year terms and the Chairman serves a two year term; all are appointed by the Governor. The Board also has six full-time employment positions; five are filled, one was vacated by the complainant on May 31, 2013.

BACKGROUND OF COMPLAINT:

On May 16, 2013, [REDACTED] with the Board of Executive Clemency, submitted a formal complaint to the Governor's Office of Equal Opportunity. In her complaint she alleged sexual harassment, retaliation, and discrimination based on age, color, national origin, pregnancy, and race. The allegations were against the Board Director - Jesse Hernandez, and [REDACTED], Human Resources Officer in the Arizona Department of Administration (ADOA) Human Resources Division, and [REDACTED], Human Resources Program Administrator in the Governor's Office of Equal Opportunity, conducted an investigation into [REDACTED] allegations.

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Research Conducted:

1. Investigative Interviews
2. Review of personnel action documentation, emails, agendas and memorandums relevant to alleged events
3. Statutes related to hearings

Persons Contacted:

- [REDACTED]
- Jesse Hernandez, Chairman/Executive Director
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

Complainant's Employment History:

[REDACTED] was hired by the Arizona Board of Executive Clemency as an uncovered [REDACTED] on November 5, 2012. On January 31, 2013, [REDACTED] received a memorandum of concern for failing to respect the chain of command (Exhibit One). On April 17, 2013, [REDACTED] received a memorandum advising her she was being reassigned to a different position and would be evaluated in two weeks to determine if she would remain in the position (Exhibit Two). On May 31, 2013, [REDACTED] resigned her position with the agency.

ALLEGATIONS AND FINDINGS:

Allegation One

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

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[REDACTED]

Finding Allegation One

This allegation is inconclusive.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Allegation Two

[REDACTED]

[REDACTED]

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[REDACTED]
[REDACTED]

Finding Allegation Two

This allegation is inconclusive.

[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Allegation Three

[REDACTED] alleged that on April 8, 2013, [REDACTED] asked Mr. Hernandez if she could attend a hearing at the Lewis Prison with [REDACTED]. [REDACTED] had already asked [REDACTED] if she could attend the hearing with him and [REDACTED] stated it was fine. Mr. Hernandez advised [REDACTED] that it was fine for her to attend but he would talk to [REDACTED] and get back to [REDACTED]. Later, Mr. Hernandez told [REDACTED] that [REDACTED] did not want [REDACTED] to attend the hearing.

Finding Allegation Three

This allegation is substantiated.

[REDACTED] had requested to attend a hearing with the Board Members at the prison facility. Mr. Hernandez had stated this was fine. In response, [REDACTED] sent Mr. Hernandez an email about the hearing and indicated he was fine with [REDACTED] attending the hearing. Mr. Hernandez called [REDACTED] into his office and advised [REDACTED] that [REDACTED] was promiscuous and was trying to entice him. Mr. Hernandez stated that [REDACTED] is smart and attractive and has ways to get people to do things. [REDACTED] stated he has not seen [REDACTED] be anything other than professional and appropriate.

The following day Mr. Hernandez told [REDACTED] that [REDACTED] said he is uncomfortable with [REDACTED] because she comes into his office uninvited and talks to him. Mr. Hernandez stated to [REDACTED] that [REDACTED] is worried people will think he and [REDACTED] are dating. [REDACTED] denies making these comments to Mr. Hernandez or stating he did not want [REDACTED] to attend hearings.

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Allegation Four

Finding Allegation Four

This allegation is inconclusive.

Allegation Five

██████████ alleged that Mr. Hernandez and ██████████ are dating and that ██████████ was promoted to the ██████████ position due to the dating relationship. ██████████ indicated that ██████████ is not qualified for the ██████████ position and that ██████████ received a substantial pay increase with the promotion.

Finding Allegation Five

This allegation is substantiated.

Mr. Hernandez and ██████████ deny ever dating or being involved in a sexual relationship. Both admitted to frequently attending happy hour together and both confirmed that they occasionally attend each other's family gatherings. Mr. Hernandez stated that he and ██████████ also occasionally carpool to and from work. However, ██████████ stated they have only carpooled once when Mr. Hernandez's vehicle was in the shop. ██████████ denies any other carpool incidents.

All four employees, four Board Members, and three Victims' Services employees believe Mr. Hernandez and ██████████ are in a relationship. All have based their opinion on personal observation rather than hear say. The majority of interviewees stated that they frequently see Mr. Hernandez and ██████████ arrive at work and leave at the end of the day in the same vehicle. ██████████ stated that for a three month period between January and March of 2013, the Board was temporarily located in an ADC building while the Board office was being remodeled. During this period ██████████ stated that she personally saw Mr. Hernandez and ██████████ arrive and leave in the same vehicle 80 percent of the days they were in the temporary building. ██████████

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also stated that most every day Mr. Hernandez and [REDACTED] brought in the same leftovers in identical Tupperware or both have leftovers from the same restaurant.

Every employee questioned stated that Mr. Hernandez and [REDACTED] are very comfortable and familiar with each other and act like a couple. When they speak to each other they are in very close proximity to each other, and touch each other's arm, shoulder, hair, etc. Each interviewee stated that they are both very personally affected by the other's moods and seem to "get under the other's skin, in a way that only your significant other could do."

An ADC employee, [REDACTED], stated that she has personally seen numerous interactions between Mr. Hernandez and [REDACTED] because her office window faces the parking lot. [REDACTED] has witnessed Mr. Hernandez give [REDACTED] a kiss when she got out of the vehicle one morning when Mr. Hernandez and [REDACTED] arrived at work in the same vehicle. She has also seen Mr. Hernandez play with [REDACTED] hair through the car window and seen [REDACTED] give Mr. Hernandez play slaps.

[REDACTED], also from Victims' Services, stated that he has seen Mr. Hernandez play with [REDACTED] hair on several occasions.

In regard to [REDACTED] promotion, [REDACTED] was promoted from a [REDACTED] to a [REDACTED] (working title [REDACTED]) on August 4, 2012. With the promotion [REDACTED] received a \$21,340 pay increase. The Personnel Action Form, job offer letter, and Position Description Questionnaire (PDQ) related to [REDACTED] promotion are provided as Exhibit Three. Review of the PDQ reveals that at the time of the promotion [REDACTED] did not meet the entry qualifications for the position. Additionally, [REDACTED] is not performing the majority of the duties listed in the PDQ.

[REDACTED] from ADOA Shared Services had assisted Mr. Hernandez with the promotion and pay increase. [REDACTED] confirmed that she reviewed the PDQ with Mr. Hernandez prior to the promotion and that she questioned [REDACTED] qualifications. However, [REDACTED] stated that Mr. Hernandez indicated that [REDACTED] was performing all the duties in the PDQ and met the qualifications of the position.

Also, [REDACTED] was aware of the significant pay increase and ADOA Shared Services entered the transaction into the Human Resources Information System (HRIS). However, at the time of the promotion Boards and Commissions were not required to receive ADOA approval before awarding pay increases to uncovered employees. Copies of the memorandums from ADOA indicating Boards were not required to receive ADOA approval for salary increases at the time of the promotion are included as Exhibit Four.

On April 25, 2013, Mr. Hernandez spoke to [REDACTED], ADOA Shared Services [REDACTED], about reallocating [REDACTED] position to an official [REDACTED], as her current position is a [REDACTED], with the working title of [REDACTED]. Mr. Hernandez and [REDACTED] discussed increasing [REDACTED] pay by 2.5 percent if her position was reallocated to a [REDACTED] position. However, [REDACTED] advised Mr. Hernandez that most requests to hire or promote [REDACTED] in small agencies have not been approved as the belief of the Department of

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Administration is that small agencies do not need [REDACTED]. To date, Mr. Hernandez has not submitted the reallocation request for [REDACTED].

Allegation Six

[REDACTED] alleged that Mr. Hernandez calls employees into his office, tells them confidential information, and then asks them to gossip about each other. [REDACTED] stated that Mr. Hernandez attempts to manipulate staff and turn them against each other.

Finding Allegation Six

This allegation is substantiated.

Each employee and Board Member confirmed that they have been asked to gossip about each other, spy on each other, and each was told that other employees were talking badly about them behind their backs. They all indicated that they felt they were being manipulated and that Mr. Hernandez was attempting to turn them against each other.

Mr. Hernandez denies ever sharing confidential information about individual employees. Mr. Hernandez stated that staff freely tell him things, but he does not ask and does not share the information with other staff.

All four clerical staff confirmed that Mr. Hernandez has told them he was going to discharge Ms. Aguilar and that he has advised Ms. Aguilar to find another job. [REDACTED] has stated that Mr. Hernandez told her he was going to discharge Ms. Jackson and Ms. Kirkpatrick. All four stated that Mr. Hernandez has told them he was going to discharge Mr. Thomas and Mr. LaSota.

Both [REDACTED] and [REDACTED] stated that Mr. Hernandez informed them that the Governor gave him permission to fire any Board Member he chose and that he was planning on dismissing Mr. Thomas and Mr. LaSota.

[REDACTED] from Victims' Services stated that [REDACTED] told her that Mr. Hernandez wanted information about [REDACTED]. [REDACTED] stated that it was implied that if she reported to [REDACTED] everything [REDACTED] did that the Board would hire [REDACTED] and provide her a substantial pay increase.

Allegation Seven

[REDACTED] alleged that Mr. Hernandez and [REDACTED] picked on and harassed her, subjected her to a hostile work environment, disciplined her, forbid her from speaking to co-workers, and subjected her to other actions which she stated were discriminatory.

Finding Allegation Seven

This allegation is substantiated.

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According to the four clerical staff, when [REDACTED] was hired, Mr. Hernandez and [REDACTED] spent a lot of time in Mr. Hernandez' office, behind closed doors. Staff have indicated that it was clear that Mr. Hernandez really liked [REDACTED], but he only spoke to [REDACTED] when the [REDACTED], [REDACTED], was out of the office. The majority of the staff indicated that Mr. Hernandez and [REDACTED] appeared to be "flirting" with each other. Mr. Hernandez was observed touching [REDACTED] hair on several occasions by several different employees and Mr. Hernandez and [REDACTED] were reported to stand very close together when they spoke to each other.

The four staff stated that [REDACTED] seemed to resent [REDACTED] and appeared to be jealous of Mr. Hernandez' interest in [REDACTED]. [REDACTED] in turn avoided interacting with [REDACTED] and preferred to interact directly with Mr. Hernandez; which staff report exacerbated the problems between [REDACTED] and [REDACTED].

When [REDACTED] was hired she was assigned to work at the Phase I Commutations desk. [REDACTED] and the four clerical staff have indicated that [REDACTED] was performing satisfactorily at this desk. On January 22, 2013, [REDACTED] was reassigned to the Revocations Desk.

[REDACTED] was responsible for training [REDACTED] on the duties of the Revocations Desk. Three of the four staff interviewed stated that the Revocations Desk is the most difficult of all the clerical assignments and that due to the large number of Revocation hearings the desk should be managed by two staff. The staff stated that this desk was too complex for a new person to handle alone. The three staff who have worked the Revocations Desk all indicated that [REDACTED] was doing a fine job at the Revocations Desk and was not making any more errors than any of them made while in training at the Revocations Desk.

[REDACTED] stated that [REDACTED] was only on the Revocations Desk for at most three months and had not received adequate training on the desk. [REDACTED] had provided only three weeks of training, [REDACTED] had provided a small amount of training, and [REDACTED] had provided a small amount of training to [REDACTED]. All three trainers trained differently, which caused more confusion to [REDACTED].

[REDACTED] and Mr. Hernandez both reported that on April 9, 2013, [REDACTED] met with Mr. Hernandez and [REDACTED] and reported to them that [REDACTED] was making numerous severe mistakes at the Revocations Desk, which was resulting in hearings not being scheduled and inmates not being timely released from the prisons. [REDACTED] and Mr. Hernandez stated that they asked [REDACTED] to document all job functions which she trained [REDACTED] to perform and report to them any errors [REDACTED] discovered which were made by [REDACTED].

According to both [REDACTED] and Mr. Hernandez, on April 15, 2013, [REDACTED] called [REDACTED] and announced that she was resigning her position with the Board effective immediately. They stated that [REDACTED] provided explanation that she was resigning her position because working with [REDACTED] was intolerable. Both stated that [REDACTED] reported that [REDACTED] continuously gossiped and complained about [REDACTED] and Mr. Hernandez and that [REDACTED] planned to file a sexual harassment claim against Mr. Hernandez.

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According to Mr. Hernandez and [REDACTED], [REDACTED] stated she could not work with [REDACTED] due to [REDACTED] inappropriateness and the severity of the errors [REDACTED] was making on the Revocations Desk. Both stated that they advised [REDACTED] that if she did not resign that they would remove [REDACTED] from the Revocations Desk and not allow [REDACTED] to speak to [REDACTED].

Both Mr. Hernandez and [REDACTED] stated that in response to [REDACTED] desire to leave the agency because of the actions of [REDACTED], they notified all staff that they were not allowed to gossip or discuss personal issues with each other or any Board Members. Staff were also advised that they were not permitted to speak to the Board Members. In addition, offices were moved so that [REDACTED] was separated from the other staff and lunch and break schedules were staggered. All staff interviewed stated that they were told they were not allowed to speak to each other, Board Members, or ADC employees; this included personal and work related conversations and included before and after work and during breaks and lunches.

When [REDACTED] was interviewed by the investigators she stated that on April 9, 2013, she was called into a meeting with Mr. Hernandez and [REDACTED] where she was instructed to document every job duty she had trained [REDACTED], review all work completed by [REDACTED], and document anything [REDACTED] had not completed correctly. [REDACTED] was provided the same directive to report any training provided to [REDACTED] and document any errors made by [REDACTED].

[REDACTED] was puzzled by the request and indicated she had no issues with [REDACTED] work and had not brought any concerns about [REDACTED] to management's attention. [REDACTED] stated she was advised that any errors made by [REDACTED] were a direct reflection on her because she trained [REDACTED]. [REDACTED] stated that management's request felt like a "witch hunt" in which management was requesting for her to "find every single tiny thing she could find that they could use to get [REDACTED] in trouble".

[REDACTED] stated that on April 15, 2013, she called and notified [REDACTED] that she was resigning her position effective immediately. [REDACTED] told the investigators that the reason she resigned had nothing to do with [REDACTED]; rather, she resigned because she was being forced to help management find reasons to fire [REDACTED].

[REDACTED] confirmed that she stated she would rescind her resignation if management allowed her to discontinue training [REDACTED] and documenting [REDACTED] performance. [REDACTED] said she also stipulated that Mr. Hernandez needed to stop calling staff into his office and expecting them to report on their co-workers' actions and conversations. [REDACTED] also told Mr. Hernandez that he needed to stop calling staff into his office, closing the door, and flirting with them or at some point an employee would file a sexual harassment claim against him. [REDACTED] stated that her comment was not intended to warn him that [REDACTED] was setting him up, but rather to warn him that his own actions would cause a sexual harassment claim.

Subsequently, on April 17, 2013, [REDACTED] was reassigned to the Revocations Desk and [REDACTED] was removed from the Revocations Desk and reassigned to the Reception Desk. [REDACTED] was provided with a memorandum stating her work would be reviewed on May 1, 2013, to determine if

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the Receptionist desk would become her permanent assignment. The memorandum is attached at Exhibit Two.

All four clerical staff stated that in mid-April 2013 it became obvious that management was displeased with [REDACTED] and they were trying to "get rid of her". They stated that management nit-picked [REDACTED] every action and that they were all required to "spy" on [REDACTED] and let management know who [REDACTED] spoke with and when she arrived to work, took lunch and breaks, went to the restroom, and left for the day. Each stated that [REDACTED] was not treated fairly and it was clear management was out to get [REDACTED].

Allegation Eight

[REDACTED] stated that both Mr. Hernandez and [REDACTED] regularly make inappropriate and discriminatory comments.

Finding Allegation Eight

This allegation is substantiated.

Following are the allegations made by [REDACTED] that were confirmed by interviewees.

1. Two employees and a Board Member have confirmed that Mr. Hernandez told them [REDACTED] is promiscuous. [REDACTED] stated that Mr. Hernandez told her that when [REDACTED] went to lunch with an ADC employee, [REDACTED], "it was so much more than lunch". [REDACTED] stated that Mr. Hernandez "sounded jealous" when he made the statement. Mr. Hernandez denies making any statement about [REDACTED] being promiscuous.
2. [REDACTED] is [REDACTED] who recently graduated from college and was beginning to seek professional employment. [REDACTED] is also [REDACTED], [REDACTED], and not married. On April 26, 2013, when [REDACTED] informed [REDACTED] and Mr. Hernandez that she was [REDACTED], Mr. Hernandez told her that she was not permitted to tell any Board employee that she was [REDACTED], stated that no employer would hire her since she was [REDACTED], and told her that when she told her mother that she was [REDACTED], her mother would beat her with a bamboo stick.
3. [REDACTED] stated that she was telling Mr. Hernandez and [REDACTED] about her fiancée's cousin and his girlfriend. The girlfriend is from India and her family is considerably wealthy. [REDACTED] said to [REDACTED], "then why is she dating that white trash?" Both Mr. Hernandez and [REDACTED] also made references to [REDACTED] fiancée's family being hillbillies because they are from Arkansas.
4. [REDACTED] stated that Mr. Hernandez routinely calls her a "heathen" because she does not attend church. [REDACTED] indicated that Mr. Hernandez has called her a heathen in the presence of other staff; however, she did not recall which staff may have witnessed the comments. Neither [REDACTED] nor Mr. Hernandez were asked this question as the allegation was made after [REDACTED] and Mr. Hernandez were interviewed.

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5. [REDACTED] stated Mr. Hernandez said her mother was promiscuous because after [REDACTED] parents had been divorced, her mother "got back together" with her father when her father was dying. [REDACTED] [REDACTED] stated [REDACTED] witnessed the comment. [REDACTED] denied hearing this comment.
6. Two Board Members, [REDACTED] and [REDACTED], both stated that Mr. Hernandez told them [REDACTED] is too old to be effective on the Board and that his mind is not what it used to be.
7. [REDACTED] and [REDACTED] also stated that Mr. Hernandez told them [REDACTED] needs to stop "shucking and jiving with the brothers". Both Board Members stated that Mr. Hernandez was referring to [REDACTED] speaking to other [REDACTED] men and high level ADC Deputy Directors and Wardens.
8. Everyone interviewed discussed Mr. Hernandez' substantial ego and stated, "Mr. Hernandez' head is so big he can hardly get into the building". Most of the interviewees indicated Mr. Hernandez' ego is especially prevalent in his interactions with women. [REDACTED] referred to Mr. Hernandez as, "thinks he is the king and you are the maidservant and you better act that way". Several staff provided examples of Mr. Hernandez being disrespectful and yelling at women visitors and advocates during the hearings.

[REDACTED] stated that she has personally heard Mr. Hernandez make inappropriate comments about women and stated she told him his comments were inappropriate. [REDACTED] could not recall the specific comments.
9. Three staff confirmed that Mr. Hernandez had them hold hands and then led them in a prayer at the Board Christmas party. All confirmed that Mr. Hernandez did not provide them an option of not participating. Several staff were offended. None felt they had the option of declining participation.
10. [REDACTED] from Victims Services stated she has heard Mr. Hernandez refer to inmates as "fucking scumbags".

Allegation Nine

[REDACTED] alleged that Mr. Hernandez and [REDACTED] were not holding hearings in accordance with relevant statutes and policies and that Mr. Hernandez was treating Board Members and visitors inappropriately.

Finding Allegation Nine

This allegation is substantiated.

Each staff and Board Member and the ADC Victim's Services group were interviewed and mentioned concerns with the manner in which Mr. Hernandez conducts hearings.

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██████████, ██████████ and ██████████, as well as ██████████ from Victims Services stated that the Board was violating Arizona Revised Statute § 13- 4414 (Exhibit Five) by failing to provide victims with 15 days' notice when hearings were being held or cancelled or inmates released. The issue was brought to Mr. Hernandez' attention but he continues to schedule hearings with less than 15 days as required by statute. Additionally, when hearings were cancelled the Board has failed to notify the victims. When the victims have complained Mr. Hernandez has told the victims that Victims' Services was at fault for failing to notify them.

The practice for Board hearings is that a schedule is created 15 days in advance of the hearing and lists all the hearings that will be held each day. On average three to eight hearings are scheduled each day Monday through Thursday. All interested parties are notified of the date of the applicable hearing (i.e. inmates, families of inmates and victims, attorneys for the inmates or victims, and advocates for the inmates and victims). No specific times are scheduled for the hearings. Rather, any visitors, lawyers, etc. must report to the lobby at the start of the day, generally either at 8:00 a.m. or 9:00 a.m. The visitors wait in the lobby until the applicable hearing is held, then they are called into the Board room. Hearings can last anywhere from 30 minutes to three hours. Visitors can wait in the lobby anywhere from a few minutes to the entire day. The practice has always been and continues to be when Mr. Hernandez is not present, that hearings are held by prison unit and within the unit the hearings with visitors are heard first.

Three staff members, two Board Members, and two Victims' Services interviewees stated that Mr. Hernandez deliberately holds hearings in which family members are present late in the day. Family members are not informed what time their hearing is scheduled, so they wait in the lobby all day until they are called. They generally do not leave to eat lunch because the hearing might be held while they are gone.

For numerous years there have been vending machines in the lobby of the building so that families and visitors could have water and snacks in case there was a lengthy delay before their hearing. Mr. Hernandez has recently removed the vending machines and stated he did not want people eating in his lobby.

██████████ reported that she witnessed Mr. Hernandez hold hearings straight through all day without restroom or lunch breaks. ██████████ stated that ██████████ was vocal to Mr. Hernandez about being a ██████████ and needing to eat and take his ██████████ on regular intervals, yet Mr. Hernandez "gave ██████████ grief" and did not alter his hearing schedule to accommodate ██████████ or anyone else to eat or take breaks. ██████████ confirmed Mr. Hernandez' actions related to the hearings. ██████████ stated that his health began deteriorating so he eventually insisted on taking breaks, to which Mr. Hernandez is now supportive.

Additionally, all four clerical employees, all four Board Members, and all three Victims' Services employees stated that Mr. Hernandez is rude and condescending to the Board Members, inmates and visitors and often talks down to them, yells at them, or does not allow them to speak. This is problematic for the Board Members who are attempting to obtain relevant information in order to make determinations on inmate releases.

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In one recent instance related to the hearing of an inmate convicted of child molestation, Mr. Hernandez said on tape, "Would you like a child molester living in your neighborhood? No, okay then." During another hearing the family was requesting early release for the inmate because the inmate was dying. Mr. Hernandez stated he did not think the family was prepared. They did not know what he was referring to as no preparation was required. Mr. Hernandez stated he "would just let the inmate die" rather than consider the hearing request for release.

In another recent incident a female advocate was expressing her opinion when Mr. Hernandez stood up, yelled at her to shut up and sit down, and demanded that she not disrespect him.

Several employees and Board Members have stated that Marwin Williams, the brother of Amare Stoudemire of the New York Knicks, was scheduled for an early release hearing about nine months ago. All notices were sent to interested parties and the parents of a victim who was murdered in the robbery leading to Mr. William's imprisonment drove over 250 miles to attend the hearing. Mr. William's attorney requested a continuation because they were not ready to present their case. Mr. Hernandez provided the continuation.

Several employees and Board Members have stated that Mr. Hernandez provided his personal cell phone number to Mr. Stoudemire at the hearing and the two of them have since been in communication. Mr. Hernandez has spoken freely to staff about his relationship with Mr. Stoudemire and joked that Mr. Stoudemire has provided him tickets to basketball games and the two have met for lunch along with Mr. Hernandez' children. Mr. Hernandez also requested for a staff Member to take a photograph of Mr. Hernandez and Mr. Stoudemire. The photograph was posted on Mr. Stoudemire's website. The photograph is attached as Exhibit Six.

Mr. Williams' hearing was rescheduled for June 13, 2013. The victim's mother drove the 250 miles again to attend the hearing. The mother has [REDACTED] and has very limited financial resources. On the day of the hearing Mr. Williams' new attorney spoke to Mr. Hernandez privately in Mr. Hernandez' office and stated that the family had fired the previous attorney that morning and therefore would be requesting a fourth continuation because they were not prepared for the hearing.

When the hearing began, Mr. Hernandez sat as the chair of the hearing. Mr. Williams' attorney requested the continuation. Mr. Hernandez granted the continuation without allowing any Board Members or the victim's family to provide input. Board Members and employees have stated that it was inappropriate for Mr. Hernandez to meet with or have any communication with the inmate's family outside of the hearings. The Board Members and employees have also stated that it goes against the principles of the Board meetings for the chair to make a decision without having a discussion or allowing anyone to speak. A computer disk with the recording of the hearing is available with this report.

Additional Allegations:

The following allegations were not brought up by [REDACTED], but were brought forward by interviewees during the course of the investigation.

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Allegation Ten

Ms. Kirschbaum stated that Board Members are not permitted to review their recommendations before they are submitted to the Governor's Office. Rather, Ms. Aguilar edits their letters then stamps their names on them. The Board Members have requested to review the letters before they are sent and have requested to manually sign the letters. The Board Members have also requested to receive copies of the finalized recommendation letters. They have yet to see the letters before they are sent to the Governor or receive copies of the final letters.

Finding Allegation Ten

This allegation is substantiated.

All four Board Members have confirmed that they have requested to review the letters, sign them manually and receive copies of the final letters. However, they have yet to receive responses to their request.

Additionally, Mr. Thomas was vocal about requesting to see the recommendation letters. Ms. Kirschbaum stated that in response to Mr. Thomas' vocalization of his concerns, Mr. Hernandez told Ms. Kirschbaum that the Governor advised Mr. Hernandez that he can fire Mr. Thomas.

Allegation Eleven

It was also alleged that Mr. Hernandez watches females' rear ends as they walk by, including [REDACTED], [REDACTED], [REDACTED] and visitors to the building.

Findings Allegation Eleven

This allegation is substantiated.

Three of the employees interviewed stated that they have personally witnessed Mr. Hernandez stare at the buttocks of two employees, [REDACTED] and [REDACTED], and watch them walk by until they are out of sight. One of the employees also stated that on one occasion when Mr. Hernandez was watching a woman walk by outside the window, Mr. Hernandez, stated, "Sorry, I'm a guy, I have to look".


CONCLUSION:

Three of the twelve allegations were found to be inconclusive. There were no witnesses to the alleged events and no documentation was provided to substantiate the claim of sexual harassment.

The other nine allegations of inappropriate actions by Mr. Hernandez related to his interactions with staff and Board Members and his handling of hearings were substantiated.

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Prepared by:


Human Resources Officer, Shared Services Unit
Arizona Department of Administration

Janice K. Brewer
Governor



David Raber
Interim Director

ARIZONA DEPARTMENT OF ADMINISTRATION

OFFICE OF THE DIRECTOR

100 NORTH FIFTEENTH AVENUE • ROOM 401
PHOENIX, ARIZONA 85007
(602) 542-1600

MEMORANDUM

TO: All Cabinet Level Agency Directors, Boards and Commissions
FROM: David Raber, Interim Director *DM*
DATE: March 30, 2010
SUBJECT: Salary Increases of Uncovered Employees

Effective immediately, all requests for salary increases of uncovered employees must be approved by my office prior to any implementation.

The purpose of this policy is to ensure that the pay reductions pursuant to HB2003 are not offset by other personnel actions. This policy will remain in effect until June 30, 2012, unless modified or extended as necessary.

Thank you for your cooperation.

c: Kathy Peckardt, Human Resources Director



Janice K. Brewer
Governor

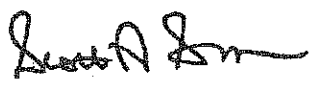
Scott A. Smith
Director

ARIZONA DEPARTMENT OF ADMINISTRATION

OFFICE OF THE DIRECTOR

100 NORTH FIFTEENTH AVENUE • SUITE 401
PHOENIX, ARIZONA 85007
(602) 542-1500

MEMORANDUM

TO: All Cabinet Level Agency Directors, Boards and Commissions
FROM: Scott A. Smith, Director 
DATE: June 21, 2012
SUBJECT: Salary Increases of Uncovered Employees

In March 2010, a new policy was implemented that required all salary increases for uncovered employees be approved by ADOA prior to processing. The directive was to remain in effect until June 30, 2012.

Given the continued concern of the budget situation and the sluggish economic conditions, the policy is being extended for all cabinet level agencies until January 2015.

I encourage all other agencies, boards and commissions to continue to scrutinize such actions and to ensure sufficient justification supports any uncovered salary increase.

As we move forward with the implementation of personnel reform, the Human Resources Division will provide future guidance on compensation.

If you should have any questions regarding this policy, please contact ADOA Human Resources at 602.542.5482. Thank you for your cooperation.

cc: Kathy Peckardt, Human Resources Director

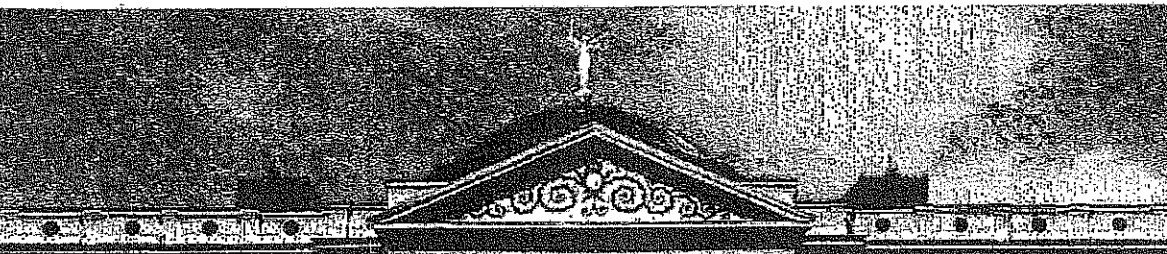
13-4414. Notice of post-conviction release; right to be heard; hearing; final decision

A. The victim has the right to be present and be heard at any proceeding in which post-conviction release from confinement is being considered pursuant to section 31-233, section 31-326 or section 31-411.

B. If the victim has made a request for post-conviction notice, the board of pardons and paroles shall, at least fifteen days before the hearing, give to the victim written notice of the hearing and of the victim's right to be present and be heard at the hearing.

C. If the victim has made a request for post-conviction notice, the board of pardons and paroles shall give to the victim notice of the decision reached by the board. The notice shall be mailed within fifteen days after the board reaches its decision.

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31-233. Order for removal; purposes; duration; continuous alcohol monitoring program; failure to return; classification

A. The director may authorize the temporary removal under custody from prison or any other institution for the detention of adults under the jurisdiction of the department of any inmate for the purpose of employing the inmate in any work directly connected with the administration, management or maintenance of the prison or institution in which the inmate is confined, for purposes of cooperating voluntarily in medical research that cannot be performed at the prison or institution, or for participating in community action activities directed toward delinquency prevention and community betterment programs. The removal shall not be for a period longer than one day.

B. Under specific rules established by the director for the selection of inmates, the director may also authorize furlough, temporary removal or temporary release of any inmate for compassionate leave, for the purpose of furnishing to the inmate medical treatment not available at the prison or institution, for purposes preparatory to a return to the community within ninety days of the inmate's release date or for disaster aid, including local mutual aid and state emergencies. When an inmate is temporarily removed or temporarily released for a purpose preparatory to return to the community or for compassionate leave, the director may require the inmate to reimburse the state, in whole or part, for expenses incurred by the state in connection with the inmate's temporary removal or release.

C. Under specific rules established by the director for the selection of inmates, the director also may authorize release under a continuous alcohol monitoring program for any inmate who is sentenced pursuant to section 28-1383, subsection D or E and who is placed on probation. The director may require an inmate who is released under a continuous alcohol monitoring program to reimburse the state, in whole or part, for expenses incurred by the state in connection with the inmate's release.

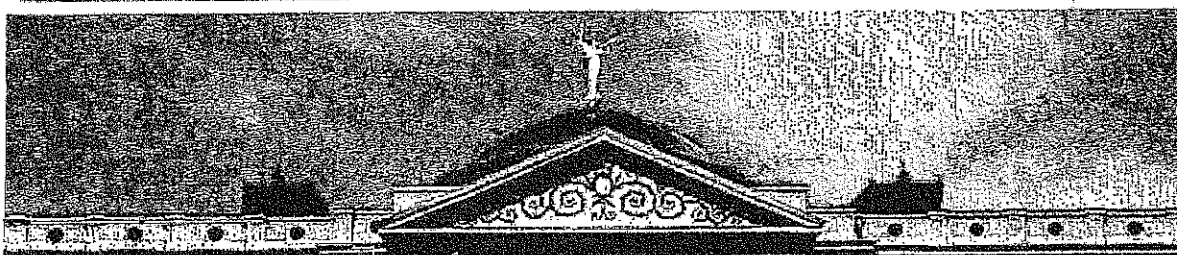
D. An inmate who is released under a continuous alcohol monitoring program shall meet the following program eligibility requirements:

1. Serve an initial minimum term of twenty per cent of the inmate's term of incarceration.
2. Maintain compliance during the period of monitoring with all of the following requirements:
 - (a) At a minimum, once a day testing for the use of alcoholic beverages or drugs by a scientific method that is chosen by the director.
 - (b) Participation in an alcohol or drug program, or both. These programs shall be accredited by the department of health services.
 - (c) Prohibition of association with any person who is determined to be detrimental to the inmate's successful participation in the program.
 - (d) All other provisions of the inmate's sentence.
3. Any additional eligibility criteria that the director may impose.

E. Except if community supervision is waived pursuant to section 13-603, subsection K, the department shall add the amount of time the director approves for the inmate's temporary release to the inmate's term of community supervision imposed by the court pursuant to section 13-603. While the person is on temporary release the person is not on inmate status and is under the jurisdiction of the department until the terms of community supervision are met.

F. Any inmate who knowingly fails to return from furlough, temporary removal or temporary release granted under this section is guilty of a class 5 felony.

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31-411. Parole or discharge; conditions of parole; release under supervision of state department of corrections; notice of hearing; exceptions; drug testing costs

A. Any prisoner who has been certified as eligible for parole or absolute discharge from imprisonment pursuant to section 31-412, subsection B or section 41-1604.09 shall be given an opportunity to apply for release on parole or for an absolute discharge from imprisonment. The board of executive clemency shall not entertain any other form of application or petition for the release on parole or absolute discharge from imprisonment of any prisoner.

B. A prisoner who is eligible for parole or absolute discharge from imprisonment shall be given an opportunity to be heard either before a hearing officer designated by the board or the board itself, at the discretion of the board.

C. If the hearing is heard by a hearing officer, the hearing officer shall make a recommendation on application for parole or absolute discharge from imprisonment to the board within thirty days after the hearing date. Within thirty days after the date of the hearing officer's recommendations, the board shall review these recommendations and either approve, with or without conditions, or reject the prisoner's application for parole or absolute discharge from imprisonment. A prisoner who is eligible for parole or absolute discharge from imprisonment shall not be denied parole or absolute discharge from imprisonment without an opportunity to be heard before the board unless another form of release has been granted.

D. If parole is granted, the prisoner shall remain on parole unless the board revokes the parole or grants an absolute discharge from parole or until the prisoner reaches the individual earned release credit date pursuant to section 41-1604.10. If the prisoner violates a condition of parole but has not committed an additional offense, the board may place the prisoner on electronic monitoring and order the defendant to participate in a community accountability pilot program pursuant to section 41-1609.05. If the prisoner is still on parole on reaching the individual earned release credit date pursuant to section 41-1604.10, the prisoner shall be terminated from parole but shall be subject to revocation under section 41-1604.10. When the prisoner reaches the individual earned release credit date the prisoner's parole shall be terminated and the prisoner shall no longer be under the authority of the board.

E. During the period of time that the prisoner remains on supervised parole under subsection D of this section, the board shall require as a condition of parole that the prisoner pay a monthly supervision fee of not less than sixty-five dollars unless, after determining the inability of the prisoner to pay the fee, the board requires payment of a lesser amount. The supervising parole officer shall monitor the collection of the fee. The board may also impose any conditions of parole it deems appropriate in order to ensure that the best interests of the prisoner and the citizens of this state are served. These conditions may include:

1. Participation in a rehabilitation program or counseling.
2. Performance of community restitution work.

F. Seventy per cent of the monies collected pursuant to subsection E of this section shall be deposited, pursuant to sections 35-146 and 35-147, in the victim compensation and assistance fund established by section 41-2407 and thirty per cent shall be deposited in the community corrections enhancement fund established by section 31-418.

G. When parole or absolute discharge from imprisonment is denied, the board, within ten days, shall prepare and deliver to the director of the state department of corrections a written statement specifying the individualized reasons for the denial of parole or absolute discharge from imprisonment unless another form of release has been granted. The prisoner may view the written statement prepared by the board. Every prisoner, having served not less than one year, may be temporarily released according to the rules of the department one hundred eighty days before the expiration of the sentence or the earned release credit date, whichever first occurs, if the director finds that the release is in the best interest of the state. The releasee

shall remain under the control of the state department of corrections until expiration of the term specified in the sentence. If the releasee violates any condition of release, the releasee may be returned to custody without further process.

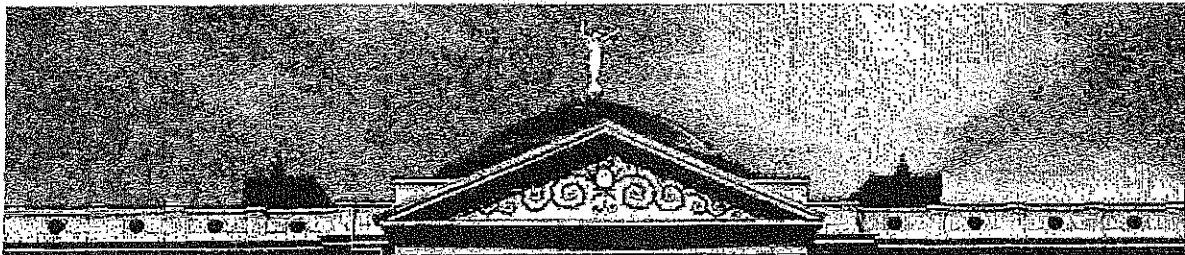
H. When a commutation, absolute discharge from imprisonment or parole is to be considered, the board, on request and before holding a hearing on the commutation, absolute discharge from imprisonment or parole, shall notify the attorney general, the presiding judge of the superior court, the county attorney in the county in which the prisoner requesting a commutation, absolute discharge from imprisonment or parole was sentenced, and the victim of the offense for which the prisoner is incarcerated. The notice to the victim shall be mailed to the last known address. The notice shall state the name of the prisoner requesting the commutation, absolute discharge from imprisonment or parole and shall set the month of hearing on the application. The notice to the victim shall also inform the victim of the victim's right to be present and to submit a written report to the board expressing the victim's opinion concerning the release of the prisoner. No hearing concerning commutations, absolute discharge from imprisonment or parole shall be held until fifteen days after the date of giving the notice. On mailing the notice, the board shall file a hard copy of the notice as evidence that notification was sent.

I. The provisions of this section requiring notice to the officials named in subsection H of this section shall not apply:

1. When there is imminent danger of the death of the person convicted or imprisoned.
2. When the term of imprisonment of the applicant is within two hundred ten days of expiration.

J. In addition to any other fees, the board may require as a condition of parole that the prisoner pay the reasonable costs associated with the prisoner's participation in a drug testing program. The prisoner's costs shall not exceed the department's cost for the program. The monies collected pursuant to this subsection by the department may only be used to offset the costs of the drug testing program.

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31-403. Commutation; restrictions on consideration

A. A person who is otherwise eligible for commutation and who is denied a commutation of sentence recommendation shall not petition or be considered by the board for commutation of that sentence for a period of five years following the date of the board's denial of the commutation recommendation if the offense for which the commutation recommendation was denied involved any of the following:

1. Death in violation of section 13-1104 or 13-1105.
2. Serious physical injury if the person was sentenced pursuant to section 13-704.
3. A dangerous crime against children as defined in section 13-705.
4. A felony offense in violation of title 13, chapter 14 or 35.1.

B. Notwithstanding subsection A, paragraph 2 of this section, if, in its sole discretion, the board determines that the person committed an offense that involved serious physical injury as defined in section 13-105 and that the person was not sentenced pursuant to section 13-704, the board may order that the person shall not petition or be considered by the board for commutation of that sentence for a period of five years following the date of the board's denial of the commutation recommendation.

C. Notwithstanding subsection A or B of this section, the board, at the time of denial, may lengthen the five year period of time prescribed in subsection A or B of this section to a period of up to ten years, except that if the offense for which commutation was denied involved a violation of an offense listed in subsection A, paragraph 1 of this section, the board may lengthen the period of time to a period of time that is greater than ten years and that is specified by the board by one of the following votes:

1. A majority affirmative vote if four or more members consider the action.
2. A unanimous affirmative vote if three members consider the action.
3. A unanimous affirmative vote if two members consider the action pursuant to section 31-401, subsection I and the chairman concurs after reviewing the information considered by the two members. If the chairman is one of the two members constituting a two member quorum under section 31-401, subsection I, and both the chairman and the other member vote to lengthen the five year period to a period of time greater than ten years, no further action shall be taken and the decision on whether to lengthen the five year period shall be considered by the board at a meeting at which at least three members are present and voting.

D. The board may waive the provisions of subsections A, B and C of this section if any of the following applies:

1. The person is in imminent danger of death due to a medical condition, as determined by the board.
2. The person is the subject of a warrant of execution.
3. The sentence for which commutation is sought is the subject of a special order issued by the court pursuant to section 13-603, subsection L.

E. This section applies only to offenses that are committed on or after January 1, 2006.

**ARIZONA BOARD OF EXECUTIVE CLEMENCY
BOARD POLICY**

Policy Title Commutation of Sentence	Effective Date 10/19/2011	Policy No 400.13.G
	Supersedes 400.13.F 08/10/2009	Page(s) 1 of 3

Authority

ARS § 13-603(L)
 ARS § 31-402
 ARS § 31-411 (H)(I)(1)
 ARS § 38-431.01
 ARS § 31-403

Policy

It is the policy of the Arizona Board of Executive Clemency, to conduct a hearing for all eligible applicants to determine whether to recommend to the Governor that a commutation of sentence be granted. If granted, the action changes the penalty imposed by a court on a convicted felon to one that is less severe, but does not restore the inmate's civil rights.

Procedures

- A. Individuals must complete and sign the application for commutation form adopted by the Board.
- B. All applications made to the Governor for a commutation of sentence are transmitted to the Chairperson of the Board of Executive Clemency for review. Only those applicants deemed eligible after review by the Department of Corrections, will be scheduled for a hearing.
- C. Only those applicants who have served two (2) years from their sentence-begin date and are not within one (1) year of their release eligibility date as determined by the Department of Corrections will be considered. However, in cases where an applicant has served only one (1) year of his or her sentence, but is not in imminent danger of death or in a persistent

vegetative state, the Board may consider and act on an application for commutation of sentence if all of the following apply:

- i. the applicant's sentence is three (3) years or less;
- ii. the applicant is not within six (6) months of their earliest eligibility release date

D. An order of the court pursuant to ARS § 13-603 (L) – i.e., that the court at the time of sentencing finds that the legally mandated sentence is clearly excessive – allows the defendant, notwithstanding the minimum service requirements of subsection C. of this policy, to petition the Board, within ninety days after commitment to the Department of Corrections, for commutation of that sentence, even if the sentence is a consecutive sentence that the defendant has not yet begun to serve (i.e., a future consecutive sentence). If on the initial petition commutation is not recommended or is denied by the Governor, after the two-year waiting period imposed in subsection I. and so long as there is no law to the contrary, the Board may again consider an application for commutation of any or all current sentences or future consecutive sentences for which there is a ARS § 13-603 (L) order, even though the defendant has not yet begun to serve the sentence(s).

E. When the applicant is in imminent danger of death or in a persistent vegetative state, and the medical status has been verified by the Department of Corrections, or the Board has received a warrant of execution issued by the Arizona Supreme Court, or in cases where the court has entered a special order pursuant to ARS § 13-603 (L), or the applicant has been recommended to the Governor for a commutation previously for the same sentence, the Board may waive the above eligibility criteria and schedule a Phase II hearing. In order for the Board to consider the application, however, the applicant must meet the statutory eligibility criteria.

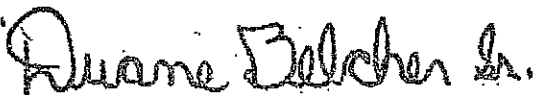
F. Except as provided in subsection E. and in subsection F.3 of this policy, commutation hearings will be held in two phases:

- i. On the date set by the Chairperson for the Phase I hearing, the Board will review the application, applicant's files, letters and all relevant information. The Phase I hearing is an in absentia hearing; however, family, friends, victims, other witnesses and legal counsel may submit written information concerning the matter or may provide oral testimony. At the conclusion of the hearing, the Board may take one of the following actions:
 - a. Find by a majority vote of the Board members that there is no basis for further consideration on the application.

- b. Find by a majority vote of the Board members that sufficient reasons exist to warrant further investigation, and pass the matter to a Phase II hearing.
 - ii. At the Phase II hearing, the Board will interview the applicant, review all relevant information and take testimony from family, friends, victims, other witnesses and/or legal counsel. At the conclusion of the hearing, a final decision is made to either recommend this action to the Governor or not to recommend this action to the Governor.
 - iii. If an Inmate is the subject of a warrant of execution issued by the Arizona Supreme Court the requirement for a Phase I hearing does not apply.
- G. When a majority of the Board votes to recommend a commutation of sentence to the Governor, a letter of recommendation is prepared that includes the reasons for the affirmative vote. Letters of dissent may also be prepared and forwarded.
- H. Letters of recommendation and if applicable, dissent letters, along with the case materials considered by the Board at the Phase II hearing, are transmitted to the Governor by the Chairman.
- I. Subsequent applications for commutation of sentence for an offense committed before January 1, 2006, are not considered until a period of two (2) years has elapsed from the final action taken by the Board on the matter.
- J. Subsequent applications for commutation of sentence for an offense committed on or after January 1, 2006, that are not governed by ARS § 31-403, are not considered until a period of two (2) years has elapsed from the final action taken by the Board on the matter.

Implementation

This policy was adopted by the Arizona Board of Executive Clemency in accordance with law.



Duane Belcher, Sr.

Chairman

10/19/2011

Date

ARIZONA CONSTITUTIONAL RIGHTS FOR CRIME VICTIMS
(After conviction and sentencing)

A victim of crime has a right:

1. To be treated with fairness, respect and dignity, and to be free from intimidation, harassment or abuse, throughout the criminal justice process.
2. To be informed, upon request, when the accused or convicted person is released from custody or has escaped.
3. To read presentence reports relating to the crime against the victim when they are available to the defendant.
4. To receive prompt restitution from the person or persons convicted of the criminal conduct that caused the victim's loss or injury.
5. To be heard at any proceeding when any post conviction release from confinement is being considered.
6. To a speedy trial or disposition and prompt and final conclusion of the case after the conviction and sentence.
7. To have all rules governing criminal procedure and the admissibility of evidence in all criminal proceedings protect victims' rights and to have these rules be subject to amendment or repeal by the legislature to ensure the protection of these rights.
8. To be informed of victims' constitutional rights.

In addition to those Constitutional rights listed above, victims of crime have the following rights under Arizona law.

1. The right to be notified, upon request, prior to any hearing of reconsideration of release on parole, work furlough, home arrest, or commutation.
2. The right to be present and to submit a written report to the Board expressing an opinion concerning the release of the prisoner.
3. The right to be notified, upon request, of the results of any Board release hearing.

IN ORDER TO IMPLEMENT YOUR RIGHTS, PLEASE FILL OUT THE FORM ON THE BACK OF THIS PAGE AND RETURN IT TO THE ADDRESS INDICATED.

Victims' addresses are considered confidential by the Board and are not released.

NOTE: No additional notices will be sent to you unless we receive a completed request form.

Amare Stoudemire (amarestoudemire): Government office working.

Page 1 of 2

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September 23, 2013
ADDENDUM TO
Complaint Investigation
Arizona Board of Executive Clemency, August 6, 2013

After listening to the June 13, 2013 hearing of Marwan Williams Phase I Commutation Hearing it was determined that the information supplied by those interviewed is inconsistent. This ADDENDUM is based on what is factually supportable in the record after further review of foundation for Findings in the report.

The following information was obtained from listening to the recording of the June 13 hearing:

- Page 13, paragraph three, is clarified that it was Mr. Stoudemire who requested the continuation on behalf of Marwan Williams during the hearing of June 13, 2013, not Mr. Williams' attorney.
- Page 13, paragraph five, is clarified that Kristin Sherman of the Maricopa County Attorney's Office stated the victim's family drove 150 miles to the hearing, not 250 miles as reported by two individuals during the investigation.
- Page 13, paragraph five, is clarified that it has not been substantiated that an attorney representing Mr. Williams spoke to Mr. Hernandez privately in Mr. Hernandez' office.

Related clarifying information from Board of Executive Clemency records not previously included:

- During the June 13, 2013 hearing, Jack LaSota, Board Member, asked if Tracey Westerhausen was Mr. Williams' current counsel. Mr. Stoudemire stated no, though she was previously, Mr. Williams was seeking a new attorney.
- During the June 13, 2013 hearing, Colleen Crase stated that Ms. Westerhausen was at the Board of Executive Clemency Office before the hearing that day and that Ms. Crase spoke to Ms. Westerhausen.
- During the June 13, 2013 hearing, Jesse Hernandez stated that he also saw Ms. Westerhausen.
- Visitor sign-in sheet with Ms. Westerhausen's name indicating she was present at the Board of Executive Clemency Office on June 13, 2013.

Exhibit B

AFFIDAVIT

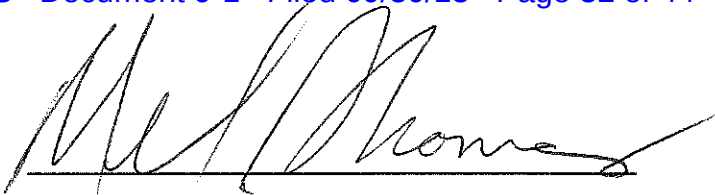
STATE OF ARIZONA)

) ss.

County of Maricopa)


MELVIN THOMAS, having first been duly sworn, depose and state as follows:

1. I served as a member of the Arizona Board of Executive Clemency from April 9, 2012 until I retired on August 5, 2013.
2. During the time I served as a Board member, I would vote based on the materials presented, the verbal testimony and the evidence offered at a hearing.
3. I was never pressured by anyone at the Governor's Office on how to vote in a particular matter. My decisions were never influenced by how they would be perceived by the Governor. I never believed that my job was in jeopardy based on how I voted. I voted based solely on my beliefs and not by any other influences.
4. I did not discuss Mr. Schad's case with Ellen Kirschbaum and Brian Livingston in a break room or anywhere else outside of a public meeting. I have never stated that I would vote 'no' regarding Mr. Schad's case or any other inmates' case outside of a properly noticed Board meeting. I have never engaged in conversations or actions that have violated Arizona's opening meetings laws.
5. Ms. Kirschbaum or Mr. Livingston never told me that they would vote no to recommend clemency for Mr. Schad.
6. Chairman Hernandez stated to the Board members that the Governor had been unhappy with one of our decisions. I did not ever hear from the Governor or her staff that she was unhappy with any of the Board's decisions.



A handwritten signature in black ink, appearing to read "Michael J. Thomas", written over a horizontal line.

SUBSCRIBED AND SWORN to before me this 30th day of September, 2013.



A handwritten signature in black ink, appearing to read "Moira S. Green", written over a horizontal line.

Notary Public

My Commission expires:

Nov 18, 2014



Exhibit C

AFFIDAVIT

STATE OF ARIZONA)

) ss.

County of Maricopa)

ELLEN KIRSCHBAUM, having first been duly sworn, depose and state as follows:

1. I serve on the Arizona Board of Executive Clemency. I was appointed to the Board December, 2010 and confirmed in April, 2011. My term expires January, 2015. I was interviewed by the Executive Clemency Selection Committee and believe I was selected to serve on the Board based on my qualifications and experience. During this interview and/or after selection, I was never contacted or engaged in conversation regarding the Governor's position on clemency or how I should vote as a member of the Board.
2. I have never met the Governor professionally or socially. I do not know her position on clemency.
3. I have no knowledge of any letter from the Governor's office informing a board member that the Governor was displeased with a Board member's vote.
4. I recognize my appointment is for a five year term and I am aware that the Governor may dismiss me for cause. I have never been told that my voting record may be considered cause for dismissal during my term.
5. My decisions are independent from ~~any~~ outside influence and are not based on what my perception of what would please the Governor.
6. I have voted "yes" in many clemency cases where I believed the sentence was excessive and/or the individual was deserving of mercy. I was one of the "yes" votes in the high profile case of Mr. Robert Flibotte and authored the letter that was signed by all the members of the Board recommending clemency to the Governor.
7. I have voted for clemency in various cases including the 'high profile' case of Betty Smithey. I also voted for clemency in the Erik Oman case. In that case the Board voted unanimously to grant clemency and the Governor granted the clemency. I authored both recommendations in those cases (Mr. Erik Oman and another gentleman).
8. I have not stated to fellow board members or heard other board members state their final decision on a particular case prior to a hearing outside a public meeting.

9. I have never been informed and/or reprimanded by Mr. Hernandez regarding his awareness that I or any other Board member had stated we would not vote for Mr. Schad's clemency.
10. I have not made a final decision regarding Mr. Schad's clemency hearing. Prior to Mr. Schad's March, 2013 hearing, I had reviewed the materials. Since that time, I do not recall the specifics of Mr. Schad's case and I would have to review the materials again as well as listen to the presenters to make a final decision.
11. I have not discussed the Mr. Schad. matter with other members of the Board in violation of any Arizona open meetings law in a break room or anywhere else. I never stated that I am 'always a no' vote. I never stated "I could not put my name on that. What would the Governor think." Brian Livingston or Melvin Thomas never told me that they would vote no to recommend clemency for Mr. Schad.
12. I have no predisposition on how I will vote regarding Mr. Schad's request for Clemency.

Elen Kirschbaum

SUBSCRIBED AND SWORN to before me this 30th day of September, 2013.

Maira S. Green

Notary Public

My Commission expires:

Nov. 18, 2014



Exhibit D

AFFIDAVIT

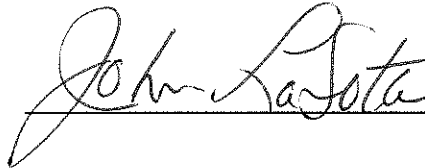
STATE OF ARIZONA)

) ss.

County of Maricopa)

JOHN LASOTA, having first been duly sworn, depose and state as follows:

1. I am a member of the Arizona Board of Executive Clemency and have been since 2010.
2. As a Board member I vote based on the materials presented, the verbal testimony and the evidence offered at a hearing.
3. I always vote independently.
4. I have never been pressured on how to vote in a particular case either by the Governor or Governor's staff. My decisions are never influenced by how they would be perceived by the Governor. My Board membership is not at risk by how I vote. I vote based on my experience and beliefs.
5. I have not discussed Mr. Schad's case or how I would vote with anyone else in violation of any Arizona Law.
6. I have no prejudice or predisposition regarding Mr. Shad's case.
7. I am not aware nor did I participate in any conversations concerning how Board members would vote regarding Mr. Schad.



SUBSCRIBED AND SWORN to before me this 30th day of September, 2013.



Notary Public

My Commission expires:

Nov 18, 2014



Exhibit E

AFFIDAVIT

STATE OF ARIZONA)

) ss.

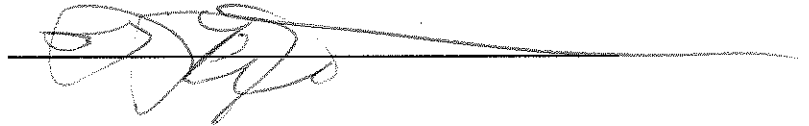
County of Maricopa)

BRIAN L. LIVINGSTON, having first been duly sworn, depose and state as follows:

1. I was appointed to the Arizona Board of Executive Clemency in April of the year 2012.
2. I agreed to become a member of the Board of Executive Clemency on April 3, 2012. Soon thereafter I received a letter from Governor Brewer noting my date of acceptance. Upon completion and submission of my loyalty oath and other forms, I was named to the Board officially on April 19, 2013. This was at or near the same time former Board Chairman Jesse Hernandez and member Melvin Thomas were appointed to the Board. I assumed the Chairmanship of the Board on August 16, 2013 and was appointed Chairman of the Board on August 19, 2013. I currently serve in this position.
3. I knew at the time of my hiring on the Board, as a Board member, that I would be replacing a current board member whose term had expired. I was never told that I was replacing a board member because of how the Board member voted. I was told that I was chosen to be a member of the Board because I was known in governmental and other public circles as having an independent voice and opinion. Since becoming a member of the Board I was told by two board members, Mrs. Kirschbaum and Mr. Thomas, that past board members felt they were not being reappointed to a board position because of how they had voted in the past. However, I never saw or read any document, letter or email that substantiated these opinions and comments.
4. During the time I served as a Board member I would cast my vote based on the written material I was presented, the verbal testimony and evidence offered at a hearing, and only after due contemplation and examination of all the facts was completed.
5. I have never been asked to cast a vote in a particular manner. Nor have I felt pressured by any internal or external person or source to vote in a particular manner. If any such action would have occurred I would have reported it immediately to the Board Chairman. If it would occur to me or any Board member now I would report it to a law enforcement entity for further review and investigation.
6. If I felt a conflict of interest was possible or could be perceived by the public I have made it a practice to recuse myself from a particular hearing. I have taken such action on several occasions to insure a fair hearing would be conducted. I recuse myself if I knew personally the investigating officer and had social contact with them regularly or if I knew the inmate from a

past law enforcement contact or briefing. When I did recuse myself I would leave the hearing room and wait until summoned for the next hearing. I would offer no information to the Board before or after the hearing was conducted just in case the matter was continued or re-calendared for reconsideration.

7. I have no recollection of Mr. Hernandez telling the Board that the Governor or a member of her staff was unhappy with a vote cast by me or the Board. If such a statement was made I took no notice of it nor would I have if it had been recognized. Any vote I have cast is based on the facts and evidence presented as well as personal contemplation and reflection.
8. I was once criticized by Mr. Hernandez for being too probative in my questions to individuals at hearings. I explained to Mr. Hernandez that my questions are made to seek clarity of the information or testimony provided. I ask such detailed questions so I have a true understanding of what transpired during and after a specific event. Such questioning assists me in my final determination process. After my initial conversation on this topic the matter was not brought up again by Mr. Hernandez.
9. Conversations with Board members about a specific matter or upcoming hearing were not conducted in my presence. I did not discuss Mr. Schad's case with Ellen Kirschbaum or Melvin Thomas in a break room. Ellen Kirschbaum or Melvin Thomas never told me that they would vote no to recommend clemency for Mr. Schad.
10. I will independently decide Mr. Schad's request for clemency when it is before the Board.



SUBSCRIBED AND SWORN to before me this 30th day of September, 2013.



My Commission expires:

Nov 18, 2014

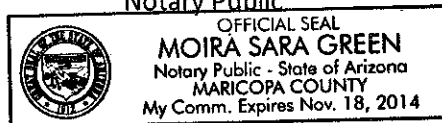


Exhibit F

SUPREME COURT OF ARIZONA

STATE OF ARIZONA,)	Arizona Supreme Court
)	No. CR-90-0247-AP
Appellee,)	
)	Maricopa County
v.)	Superior Court
)	Nos. CR-163419;
SAMUEL VILLEGAS LOPEZ,)	LC2012-000264-001
)	
Appellant.)	ORDER GRANTING STAY
)	AND RESETTING DATE
)	OF EXECUTION
		FILED 5/15/2012

Samuel Villegas Lopez raised several claims in a superior court special action relating to his application to the Board of Executive Clemency for commutation and reprieve. The superior court found two of those claims colorable and set an evidentiary hearing for July 16, 2012. One of these claims is that three newly appointed members of the Board of Executive Clemency have not received all training specified by A.R.S. § 31-401(C). The State does not contest that these members have not yet completed that training.

The superior court's minute entry clearly implies that, were it within that court's power, it would have stayed Lopez's execution. See Ariz. R. Crim. P. 32.4 (providing that "no stay of execution shall be granted upon the filing of a successive petition except upon separate application for a stay to the Supreme Court"). That minute entry reaches us on the very eve of Lopez's scheduled execution. Without a stay, the case would be rendered moot. Without addressing the merits of the § 31-401(C) issue, we conclude that the interests of justice are best served by staying the pending execution and forthwith issuing under separate cover a new warrant of execution for June 27,

2012. The period between now and the new execution date will allow training of new Board members and a clemency hearing to be subsequently held by the Board, if the Board should elect such a course of action. That procedure would moot Lopez's claim under § 31-401(C).

Unlike the superior court, we do not find colorable Lopez's claim that appointment of the new Board members violates § 31-401(B), which requires that members "shall have demonstrated an interest in the state's correctional program." Like the superior court, we do not find colorable other claims raised by Lopez in the special action.

We therefore grant the application for stay of execution of the sentence of death and will reschedule the execution for June 27, 2012.

DATED this _____ day of May, 2012.

For the Court:

Rebecca White Berch
Chief Justice

TO:

Kent E Cattani
Susanne Bartlett Blomo
David R Cole
Joe Sciarrotta
Julie S Hall
Denise I Young
Kelley Henry
Samuel Villegas Lopez, ADOC 043833, Arizona State Prison,
Florence - Eyman Complex-Browning Unit (SMU II)
Joseph C Kreamer
Douglas L Rayes
Diane Alessi
Charles Ryan
Lance Hetmer
Dawn Northup
Jesse Hernandez

Dale A Baich
Amy Sara Armstrong