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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

DORU GABRIEL TRIFU,
Petitioner,

v.
CRAIG APKER, Administrator,
Respondent.

Case No. 1:15-cv-01114 LJO MJS (HC)
FINDINGS AND RECOMMENDATION
REGARDING PETITION FOR WRIT OF
HABEAS CORPUS

Petitioner is a federal prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. Petitioner challenges the implementation and collection of restitution and felony assessments under the Inmate Financial Responsibility Program (“IFRP”) by private prison employees.

First, Plaintiff asserts that the employees of Taft Correctional Institution (“TCI”) violated his due process rights based on their lack of authority to set or collect restitution payments through the IFRP program. Second, he asserts that the action of taking his restitution was an abuse of process in light of the language of federal regulations including 28 C.F.R. § 545.10 which limits the authority of the Bureau of Prisons to collect restitution. (Pet. at 3, ECF No. 1.)

1 Petitioner filed his petition on July 20, 2015. Respondent filed an answer to the
2 Petition on October 5, 2015. (Answer, ECF No. 12.) Petitioner filed a traverse to the
3 answer on October 28, 2015. (Traverse, ECF No. 13.)

4 **I. Factual Background**

5 On December 2, 2013, Petitioner was sentenced by the United States District
6 Court, Southern District of Texas, to 96 months in federal custody for Wire Fraud. (Decl.
7 of Dale Patrick (“Patrick Decl.”), Ex. A, ECF No. 12-1); United States v. Trifu, Case No.
8 6:12CR00081-S-001.) In addition to his federal prison sentence, Petitioner was assigned
9 a felony assessment of \$3,300.00 and \$562,239.78 in restitution. (ECF No. 12-1 at 11.)

10 The schedule of payments stated:

11 [C]riminal monetary penalties is due as follows: Lump sum payment of
12 \$3,300.00 due immediately, balance due in accordance with F below.

13 F – Special Instructions regarding payment of criminal monetary penalties:
14 The restitution shall be paid during the term of supervised release at a rate
15 of \$300.00 per month, beginning 30 days after placement on supervised
16 release.

17 Unless the court has expressly ordered otherwise, if this judgment
18 imposes imprisonment, payment of criminal monetary penalties is due
19 during imprisonment. All criminal monetary penalties, except those
20 payments made through the Federal Bureau of Prisons’ Inmate Financial
21 Responsibility Program, are made to the clerk of the court.

22 (Id., at 17.)

23 Petitioner arrived in custody at TCI on February 7, 2014. (Patrick Decl., Ex. B.)
24 August 21, 2014, Petitioner signed an Inmate Financial Responsibility Program Inmate
25 Financial Plan contract (“IFRP Contract”) to voluntarily participate in the IFRP. (Patrick
26 Decl., Ex. C.) His payment schedule was set at \$50 a month. (Patrick Decl., Exh. G.) On
27 July 23, 2015, Petitioner signed another IFRP Contract reducing his payment schedule
28 to \$25 a month. (Id.)

The IFRP Contracts signed by Petitioner contained the following advisement:

A staff member has provided me with information regarding the potential consequences of refusal on my part to participate in the inmate financial responsibility program. I agree to submit payments toward satisfaction of the financial obligation(s) indicated on the form in accordance with the payment plan outlined below. I agree to have funds

1 automatically withdrawn from my account. I agree to follow this payment
2 plan until the financial obligation(s) is satisfied.

3 (Patrick Decl., Ex. C.)

4 Despite entering into the above IFRP Contracts, on August 25, 2014, Petitioner
5 requested that the prison stop deducting money from his account. (Patrick Decl., Ex. D).
6 TCI responded on August 27, 2014, stating that Petitioner's financial obligation was
7 determined based on the IFRP policy, Management and Training Corporation ("MTC")¹
8 policy 4B2, and Program Statement 5380.08. (Id., Ex. E.)

9 Petitioner next sent a Request for Administrative Remedy, stating that "MTC's
10 employees cannot lawfully use the IRFP to collect payments from me because privately-
11 run prison [MTC] may not schedule or set its own payment plan." (Patrick Decl., Ex. F.)
12 In support of his position, Petitioner cited Ward v. Chavez, 678 F.3d 1042 (9th Cir.
13 2012). (Id.)

14 On September 5, 2014, TCI responded, stating:

15 In Ward v. Chavez, 678 F.3d 1042 (9th Cir. 2012), the Ninth Circuit
16 held that where the sentencing court has failed to consider whether the
17 defendant has the financial resources to pay restitution immediately,
18 ordering immediate payment impermissibly delegates to the BOP the
19 court's obligation to set a payment schedule. However, it appears you
20 have misread your J&C and the Ninth Circuit decision in Ward v. Chavez.
21 Ward v. Chavez dealt specifically with restitution orders and only
22 restitution orders. Special assessments (felony assessments), Fines and
23 court costs, and State or local court obligations are not included in the
24 Ward v. Chavez ruling. Any court imposed obligation in one or more of the
25 aforementioned areas will be handled by staff in accordance with the
26 provisions set forth in Program Statement 5308.08, and TCI Policy 4-B-2.

27 Therefore, staff will continue to monitor your progress in meeting
28 your court imposed financial obligation with regards to your \$3,300.00
felony assessment. However, staff will not collect any part of your
\$562,239.78 restitution as the sentencing court specifically set the
schedule for payment of the restitution to begin 30 days after placement
on supervised release in the amount of \$300.00 per month.

The Ninth Circuit has held that the Bureau of Prison's operation of
the IFRP does not constitute an unlawful delegation of authority and that
an inmate's participation in the IFRP is voluntary even though he may be
denied certain privileges if he refuses to join the program. See United
States v. Lemoine, 546 F.3d 1042, 1046 (9th Cir. 2008).

¹ MTC is the private corporation that manages TCI.

1 (Patrick Decl., Ex. G.)

2 On March 3, 2015 Petitioner sent a request that his repayment of the \$3,300.00
3 Felony Assessment be reviewed. (Patrick Decl., Ex. H.) On March 11, 2015, Warden
4 Craig Apker responded:

5 Records indicate the matter regarding your \$3,300 felony assessment was
6 appropriately addressed on the response to Administrative Remedy
7 201481-F1 dated September 5, 2014. However, you appear to be
8 requesting a review of your \$50.00 per month IFRP payment currently
9 being made towards your felony assessment. . .Records indicate your
10 next program review is currently scheduled for August 2015. [A]t that time
11 staff will review your IFRP status as required by policy.

12 (Patrick Decl., Ex. I.)

13 Petitioner next filed the instant petition for writ of habeas corpus under 28 U.S.C.
14 § 2241.

15 **II. Standard of Review**

16 Writ of habeas corpus relief extends to a person in custody under the authority of
17 the United States. See 28 U.S.C. § 2241. Writ of habeas corpus relief is available if a
18 federal prisoner can show he is "in custody in violation of the Constitution or laws or
19 treaties of the United States." 28 U.S.C. § 2241(c)(3). Petitioner's claims are proper
20 under 28 U.S.C. § 2241 and not 28 U.S.C. § 2255 because they concern the manner,
21 location, or conditions of the execution of Petitioner's sentence and not the fact of
22 Petitioner's conviction or sentence. Tucker v. Carlson, 925 F.2d 330, 331 (9th Cir.1990)
(stating that a challenge to the execution of a sentence is "maintainable only in a petition
for habeas corpus filed pursuant to 28 U.S.C. § 2241"); Montano-Figueroa v. Crabtree,
162 F.3d 548, 549 (9th Cir. 1998).

23 Further, Petitioner is challenging the execution of his sentence at Taft
24 Correctional Institution in Taft, California, which is within the Fresno Division of the
25 Eastern District of California; therefore, the Court has jurisdiction over this petition. See
26 Brown v. United States, 610 F.2d 672, 677 (9th Cir. 1990).

1 **III. Review of the Petition**

2 **A. Exhaustion of Administrative Remedies**

3 "As a prudential matter, courts require that habeas petitioners exhaust all
4 available judicial and administrative remedies before seeking relief under § 2241." Ward
5 v. Chavez, 678 F.3d 1042, 1045-1046 (9th Cir. 2012). The exhaustion requirement in §
6 2241 cases is not required by statute nor is a "jurisdictional" prerequisite. It is a
7 prudential limit on jurisdiction and can be waived "if pursuing those [administrative]
8 remedies would be futile." Id.; Castro-Cortez v. INS, 239 F.3d 1037, 1047 (9th Cir.
9 2001), abrogated on other grounds, Fernandez-Vargas v. Gonzales, 548 U.S. 30 (2006);
10 Fraley v. U.S. Bureau of Prisons, 1 F.3d 924, 925 (9th Cir. 1993).

11 Here, Petitioner filed administrative appeals regarding his challenges to the use of
12 the IFRP to allow a private prison to collect payments. It appears, however, that any
13 administrative appeal would have been futile since the outcome, denial, was
14 predetermined based on a BOP policy memorandum regarding the application of the
15 IFRP program in federal prisons. (Patrick Decl., Ex. J, BOP Program Statement
16 P5380.08.) However, the policy does not address the authority of the BOP under the
17 regulations to delegate the authority to TCI to implement the IFRP. In addition, the
18 decision by the warden of TCI to reject Petitioner's administrative appeal did not address
19 Petitioner's arguments regarding whether private prison employees had authority to
20 implement the IFRP.

21 Prior attempts to challenge aspects of the IFRP have been found futile by the
22 Ninth Circuit where the actions complained of were based on reliance on BOP
23 memorandum. Ward, 678 F.3d at 1045-1046 (citing, as examples, Fraley, 1 F.3d at 925;
24 Sours v. Chavez, No. 2:08-cv-01903-SRB, Dkt. No. 22, 2009 U.S. Dist. LEXIS 76743 at
25 *2 (D. Ariz. June 17, 2009)). In light of the futility of pursuing administrative remedies,
26 and the fact that Respondent has not asserted a defense based on Petitioner's lack of
27 exhaustion, the exhaustion requirement is waived, and the Court shall review the merits
28 of the petition.

1 **B. Authority of Private Prison Staff to Implement IFRP Orders**

2 Petitioner asserts that staff at TCI lacked authority to collect restitution payments
3 as they were not employees of the BOP as required by applicable Federal Regulations.
4 Petitioner relies on relevant Federal Regulations (28 C.F.R. §§ 500.1, 545.10-11) and an
5 unpublished Ninth Circuit case in which a staff member at the same private correctional
6 facility was found to lack authority to administer prison discipline as he was not an
7 employee of the BOP. See Arredondo-Virula v. Adler, 510 Fed. Appx. 581, 582 (9th Cir.
8 2013). In Arredondo, the Ninth Circuit held:

9 Logan was not an employee of the Bureau of Prisons (the B.O.P.)
10 or Federal Prison Industries, Inc. as required by the applicable regulation
11 in place at the time. 28 C.F.R § 541.10(b)(1) (2010). The regulation
12 provided: "only institution staff may take disciplinary action." Staff was
13 defined as "any employee of the Bureau of Prisons or Federal Prison
14 Industries, Inc." 28 C.F.R. § 500.1(b). We note that 28 C.F.R §
15 541.10(b)(1) is no longer in force.

16 [Respondent] concedes that Logan was not an employee of the
17 B.O.P. or Federal Prison Industries, Inc. At oral argument, his counsel
18 suggested that Logan was "an officer". He was not an officer of the B.O.P.

19 A significant difference exists between employees and independent
20 contractors. Minneeci v. Pollard, 132 S. Ct. 617, 623, 181 L. Ed. 2d 606
21 (2012) (federal inmates have no federal Bivens cause of action for
22 damages against privately-run prison workers because these workers are
23 not federal employees), see also Allied Chem. & Akali Workers of Amer.,
24 Local Union No. 1 v. Pittsburgh Plate Glass Co. et al., 404 U.S. 157, 167,
25 92 S. Ct. 383, 30 L. Ed. 2d 341 (1971). Under the plain meaning of the
26 law, [the DHO] was not authorized to discipline [Petitioner].

27 Arredondo-Virula, 510 Fed. Appx. at 582.

28 In this case, Petitioner challenges the authority of staff of the same private
correctional institution to collect restitution and felony assessment penalties under a
similar federal regulation that likewise defines staff as BOP employees.

1 **1. Regulatory Framework for Payments Under the IFRP**

2 The Inmate Financial Responsibility Program applies to nearly all post-trial
3 inmates in federal facilities. 28 C.F.R. § 545.10. The purpose of the program is to
4 encourage inmates to meet their "legitimate financial obligations." See 28 C.F.R. §
5 545.10; United States v. Lemoine, 546 F.3d 1042, 1046 (9th Cir. 2008). The regulations

1 describe the implementation of the program:

2 As part of the initial classification process, *staff* will assist the inmate in
3 developing a financial plan for meeting those obligations, and at
4 subsequent program reviews, *staff* shall consider the inmate's efforts to
5 fulfill those obligations as indicative of that individual's acceptance and
demonstrated level of responsibility. The provisions of this rule apply to all
inmates in federal facilities, except: Study and observation cases, pretrial
detainees, and inmates in holdover status pending designation.

6 28 C.F.R. § 545.10 (emphasis added).

7 28 C.F.R. § 545.11 describes the procedures for implementing the IFRP. It states
8 that "When an inmate has a financial obligation, unit *staff* shall help that inmate develop
9 a financial plan and shall monitor the inmate's progress in meeting that obligation." Id.;
10 Lemoine, 546 F.3d at 1047 (emphasis added).

11 The IFRP is a voluntary program and inmates may choose not to participate but
12 the failure to participate in or to comply with a financial plan carries the following possible
13 consequences:

14 (d) Effects of non-participation. Refusal by an inmate to participate in the
15 financial responsibility program or to comply with the provisions of his
financial plan ordinarily shall result in the following:

16 (1) Where applicable, the Parole Commission will be notified of the
17 inmate's failure to participate;

18 (2) The inmate will not receive any furlough (other than possibly an
emergency or medical furlough);

19 (3) The inmate will not receive performance pay above the
20 maintenance pay level, or bonus pay, or vacation pay;

21 (4) The inmate will not be assigned to any work detail outside the
secure perimeter of the facility;

22 (5) The inmate will not be placed in UNICOR. Any inmate assigned
23 to UNICOR who fails to make adequate progress on his/her
24 financial plan will be removed from UNICOR, and once removed,
may not be placed on a UNICOR waiting list for six months. Any
exceptions to this require approval of the Warden;

25 (6) The inmate shall be subject to a monthly commissary spending
26 limitation more stringent than the monthly commissary spending
27 limitation set for all inmates. This more stringent commissary
28 spending limitation for IFRP refusees shall be at least \$ 25 per
month, excluding purchases of stamps, telephone credits, and, if
the inmate is a common fare participant, Kosher/Halal certified
shelf-stable entrees to the extent that such purchases are allowable

1 under pertinent Bureau regulations;

2 (7) The inmate will be quartered in the lowest housing status
(dormitory, double bunking, etc.);

3 (8) The inmate will not be placed in a community-based program;

4 (9) The inmate will not receive a release gratuity unless approved
5 by the Warden;

6 (10) [Reserved]

7 (11) The inmate will not receive an incentive for participation in
8 residential drug treatment programs.

8 28 C.F.R. § 545.10(d); Lemoine, 546 F.3d at 1047.

9 **2. Authority of Private Prison Staff to Implement the IFRP**

10 TCI is a federal facility operated by the private corporation, Management and
11 Training Corporation. See Edison v. United States, 2013 U.S. Dist. LEXIS 128503, 2013
12 WL 4828579, at *1 (E.D. Cal. Sept. 9, 2013) ["Taft Correctional Institution is a
13 government-owned, contractor-operated facility for federal inmates."] ² Petitioner
14 contends that the regulations, as stated, only allow BOP staff to administer the IFRP
15 program. Accordingly, Petitioner asserts that TCI staff - i.e., employees of Management
16 and Training Corporation - lacked the authority to administer the IFRP. (See generally
17 Pet. and Traverse, ECF Nos. 1, 13.)

18 Respondent does not dispute, and therefore concedes, that Taft is a private
19 prison and that the staff who implemented Petitioner's IFRP assessment were not BOP
20 employees. However, Respondent contends that the implementation of the IFRP
21 program was authorized. Respondent relies on United States v. Lemoine, in which the
22 Ninth Circuit upheld the constitutionality of the IFRP. 546 F.3d at 1050. The Court in
23 Lemonie stated that, "where the district court has properly set a restitution repayment
24 schedule as required under the [Mandatory Victims Restitution Act], the BOP has the

25
26 ² Likewise, the BOP identifies TCI as "A contracted correctional institution, operated by a private
27 corporation." <https://www.bop.gov/locations/ci/taf/>. Court may take judicial notice of facts that are subject to
28 ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid.
201(b); United States v. Bernal-Obeso, 989 F.2d 331, 333 (9th Cir. 1993). Further, Respondent has not
challenged Petitioner's assertion that TCI is a privately-run correctional institution.

1 authority to encourage voluntary payments in excess of those required under the court's
2 judgment by conditioning the receipt of certain privileges during the term of imprisonment
3 on the inmate's participation in the IFRP. Id. While Lemonie indicates that the IFRP is
4 constitutional, it does not address Petitioner's contentions that employees of TCI lacked
5 authority to implement the program.

6 Next, Respondent relies on a BOP memorandum issued on August 15, 2015,
7 providing guidance on how to implement the IFRP, and a MTC memo dated on July 17,
8 2008 describing guidelines and procedures for TCI staff to implement the IFRP program.
9 (Patrick Decl., Ex. J, K.) The BOP memorandum contains no language discussing or
10 expanding the definition of "staff." (Patrick Decl., Ex. J.) However the MTC memo defines
11 "Unit Team/Staff" as: "The Classification Team for the purpose of this policy indicates
12 membership consisting of a Counselor, Case Manager, and Unit Manager." (Patrick
13 Decl., Ex. K.)

14 **3. Legal Standard for Review and Application of Federal** 15 **Regulations**

16 To resolve the present claims of Petitioner, the Court must interpret the meaning
17 of the regulations and determine whether the regulations limit who may administer the
18 IFRP. The standards for review and application of federal regulations are well
19 established under federal law.

20 With respect to interpretation of federal regulations, the agency's interpretation is
21 provided deference. "It is well established that an agency's interpretation need not be the
22 only possible reading of a regulation--or even the best one--to prevail." Decker v.
23 Northwest Env'tl. Def. Ctr., 133 S. Ct. 1326, 1337 (2013). Under Auer v. Robbins and
24 Seminole Rock, a court will defer to an agency's interpretation of its regulations, "even in
25 a legal brief, unless the interpretation is plainly erroneous or inconsistent with the
26 regulations or there is any other reason to suspect that the interpretation does not reflect
27 the agency's fair and considered judgment on the matter in question." Talk Am., Inc. v.
28 Mich. Bell Tel. Co., 131 S. Ct. 2254, 2260-2261 (2011) (citation omitted); Chase Bank

1 USA, N. A. v. McCoy, 131 S. Ct. 871, 881 (2011); Auer v. Robbins, 519 U.S. 452, 461
2 (1997); Bowles v. Seminole Rock & Sand Co., 325 U.S. 410, 411 (1945); Indep. Training
3 & Apprenticeship Program v. Cal. Dep't of Indus. Rels., 730 F.3d 1024, 2013 U.S. App.
4 LEXIS 19255 (9th Cir. 2013). "This is generally called Seminole Rock or Auer
5 deference." Decker, 133 S. Ct. at 1339 (Scalia, J., dissenting.) Justice Scalia
6 summarized Auer deference as follows:

7 In practice, Auer deference is Chevron deference applied to
8 regulations rather than statutes. See Chevron U.S. A. Inc. v. Natural
9 Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L.
10 Ed. 2d 694 (1984). The agency's interpretation will be accepted if, though
11 not the fairest reading of the regulation, it is a plausible reading--within the
12 scope of the ambiguity that the regulation contains.

13 Id. at 1339-1340.

14 With respect to the inquiry whether the interpretation does not reflect the agency's
15 fair and considered judgment on the matter in question, "[i]ndicia of inadequate
16 consideration include conflicts between the agency's current and previous
17 interpretations; signs that the agency's interpretation amounts to no more than a
18 convenient litigating position; or an appearance that the agency's interpretation is no
19 more than a post hoc rationalization advanced by an agency seeking to defend past
20 agency action against attack." Price v. Stevedoring Servs. of Am., Inc., 697 F.3d 820,
21 830 n.4 (9th Cir. 2012) (en banc) (citing Bowen v. Georgetown Univ. Hosp., 488 U.S.
22 204, 213 (1988) and Auer, 519 U.S. at 462).

23 Where a court declines to give an interpretation Auer deference, it accords the
24 agency's "interpretation a measure of deference proportional to the 'thoroughness
25 evident in its consideration, the validity of its reasoning, its consistency with earlier and
26 later pronouncements, and all those factors which give it power to persuade."
27 Christopher v. SmithKline Beecham Corp., 132 S. Ct. 2156, 2169 (2012) (quoting United
28 States v. Mead Corp., 533 U.S. 218, 228 (2001)); Indep. Training & Apprenticeship
Program, 2013 U.S. App. LEXIS 19255 at *27. This amount of consideration will "vary
with circumstances" and may be "near indifference," such as has been given in some

1 cases when considering an "interpretation advanced for the first time in a litigation brief."
2 Mead, 533 U.S. at 228 (citing Bowen, 488 U.S. at 212-13).

3 With respect to the application of federal regulations generally, the government is
4 bound by the regulations it imposes on itself. United States v. 1996 Freightliner FLD
5 Tractor, 634 F.3d 1113, 1116 (9th Cir. 2011); (citing United States ex rel. Accardi v.
6 Shaughnessy, 347 U.S. 260, 265 (1954)). "Where the rights of individuals are affected, it
7 is incumbent upon agencies to follow their own procedures. This is so even where the
8 internal procedures are possibly more rigorous than otherwise would be required."
9 Morton v. Ruiz, 415 U.S. 199, 235 (1974); Alcaraz v. INS, 384 F.3d 1150, 1162 (9th Cir.
10 2004).

11 Having chosen to promulgate a regulation, the agency must follow that regulation.
12 Nat'l Ass'n of Home Builders v. Norton, 340 F.3d 835, 852 (9th Cir. 2003). The Ninth
13 Circuit explained the rationale for the Accardi principle:

14 An agency's failure to follow its own regulations "tends to cause
15 unjust discrimination and deny adequate notice" and consequently may
16 result in a violation of an individual's constitutional right to due process.
17 NLRB v. Welcome-American Fertilizer Co., 443 F.2d 19, 20 (9th Cir.
18 1971); see also United States v. Newell, 578 F.2d 827, 834 (9th Cir.
19 1978). Where a prescribed procedure is intended to protect the interests
20 of a party before the agency, "even though generous beyond the
requirements that bind such agency, that procedure must be scrupulously
observed." Vitarelli, 359 U.S. at 547 (Frankfurter, J., concurring); see also
Note, Violations by Agencies of Their Own Regulations, 87 Harv. L. Rev.
629, 630 (1974) (observing that agency violations of regulations
promulgated to provide parties with procedural safeguards generally have
been invalidated by courts).

21 Sameena Inc. v. United States Air Force, 147 F.3d 1148, 1153 (9th Cir. 1998).

22 5. Analysis

23 a. Interpretation of the Regulations

24 Petitioner argues that the regulations only allow BOP employees to implement the
25 IFRP. See 28 C.F.R. §§ 500.1(b), 545.10-11. The Court agrees. Sections 541.10 and
26 541.11 allow staff to develop inmates' financial plans for meeting financial obligations.
27 As defined by section 500.1, "staff" is any employee of the Bureau of Prisons or Federal
28 Prison Industries, Inc." The plain language of the regulations state that only BOP staff

1 may develop financial plans under the IFRP. The regulations clearly define the term
2 "staff," as employees of the BOP. Respondent has presented no argument as to why
3 employees of TCI would have authority in light of the clear language of the regulations
4 limiting the scope of the term 'staff.'

5 Neither the express nor implied language of the regulations allows non-BOP staff
6 to administer the IFRP. Respondent has presented no argument that TCI employees
7 somehow are defined as BOP staff or that the definition is otherwise ambiguous.
8 Respondent's election not to claim the regulatory language is ambiguous renders it
9 inappropriate to invoke Auer deference to its interpretation. See Tibble v. Edison Int'l,
10 711 F.3d 1061, 1072 n.8 (9th Cir. 2013) (ambiguity in the regulation needs to be shown
11 to invoke Auer deference.) (citing Gonzales v. Oregon, 546 U.S. 243, 255 (2006)).
12 Respondent presents no argument as to why staff should be defined in a different
13 manner than as expressly described in the regulations, or how the phrase "staff will
14 assist the inmate in developing a financial plan" is ambiguous and open to interpretation.

15 Because the Court finds that the text of the regulation is not ambiguous and
16 Respondent presents no argument otherwise, the Court "does not grant deference to
17 [Respondent's] views apart from their inherent ability to persuade." Schwab v. Comm'r,
18 715 F.3d 1169, 1176 (9th Cir. 2013); Christopher, 132 S. Ct. at 2169. As Auer deference
19 does not apply to Respondent's interpretation of the regulations, the Court "must employ
20 traditional tools of interpretation" in reviewing the language of the governing statute and
21 regulations to determine their meaning. Christopher, 132 S. Ct. at 2170. Congress
22 provided broad authority to the BOP to manage correctional institutions. See 18 U.S.C. §
23 4042(a). It is possible that the statutory grant of authority by Congress would allow the
24 BOP to delegate the authority to administer the collection of restitution and assessments
25 to private contractors. See Chevron, U.S.A., Inc., 467 U.S. at 844. However, the statute
26 is silent regarding any delegation, and is of little assistance in interpreting the language
27 of the regulations promulgated by the BOP, which are more detailed and onerous than
28 the statute. See Alcaraz v. INS, 384 F.3d at 1162.

1 The regulations clearly define the definition of staff: "Staff means any employee of
2 the Bureau of Prisons or Federal Prison Industries, Inc." 28 C.F.R. § 500.1(b). Under
3 rules of statutory construction, "we must follow that definition, even if it varies from that
4 term's ordinary meaning." Stenberg v. Carhart, 530 U.S. 914, 942 (2000). The regulation
5 states what the term staff means, and "[a]s a rule, 'a definition which declares what a
6 term "means" . . . excludes any meaning that is not stated." Id. (citing Colautti v. Franklin,
7 439 U.S. 379, 392-393, n. 10 (1979).

8 The regulations further explain that Bureau staff will review an inmate's financial
9 obligations, develop a financial plan for the inmate, and monitor the inmate's progress in
10 meeting the financial obligations. See 28 C.F.R. §§ 545.10; 541.11. Nothing in the
11 regulations address the application of the IFRP to inmates in private correctional
12 institutions or delegating the authority of implementing IFRP plans to private prison
13 employees. The policies set forth in the BOP memorandum and MTC guidance
14 memorandum fail to address the issue whether TCI employees, rather than Bureau
15 employees, have authority to implement the IFRP. As Respondent has not addressed
16 basic issues such as interpretation of the language of the regulation, Respondent's
17 interpretation, while considered, is of little weight. Christopher 132 S. Ct. at 2169; Mead,
18 533 U.S. at 228.

19 The Court finds that the regulations require Bureau staff implement the IFRP. See
20 28 C.F.R. §§ 500.1, 545.10, 545.11. The referenced sections of the regulations, when
21 read together, are unambiguous. Adopting a contrary interpretation would "permit the
22 agency, under the guise of interpreting a regulation, to create de facto a new regulation."
23 Chase Bank USA, N.A. v. McCoy, 131 S. Ct. 871, 882 (2011); Christensen, 529 U.S. at
24 588. Such an alternative interpretation would be "plainly erroneous or inconsistent" with
25 the regulation and not entitled to Auer deference. Id. As Respondent's conduct was not
26 authorized, Petitioner is entitled to habeas corpus relief.

27 While not raised by Respondent, the Court does not foresee major administrative
28 hurdles in requiring Bureau staff to implement and administer the IFRP as required by

1 federal regulations. While the regulations require Bureau staff to assist inmates in
2 developing financial plans and monitoring inmates' progress, nothing in the regulations
3 preclude Bureau staff from implementing the program remotely. The findings of this
4 Court should have little impact on the BOP's efforts to collect restitution and criminal
5 assessments from inmates held at private correctional institutions.

6 **IV. Petitioner's Motion for Injunctive Relief**

7 On November 13, 2015, Petitioner filed a motion for injunctive relief based on the
8 claims in the petition. (Mot., ECF No. 14.) Respondent filed an opposition to the motion
9 on December 7, 2015, and Petitioner filed a reply on December 21, 2016. (ECF Nos. 15-
10 16.) Having found Petitioner's claims meritorious, the Court grants Petitioner's request
11 for injunctive relief.

12 **V. Recommended Relief**

13 It is well established that federal district courts have broad discretion in
14 conditioning a judgment granting habeas relief. Hilton v. Braunskill, 481 U.S. 770, 775
15 (1987). Pursuant to 28 U.S.C. § 2243, federal courts are authorized to dispose of
16 habeas corpus matters "as law and justice require." "In modern practice, courts employ a
17 conditional order of release in appropriate circumstances, which orders the
18 [Government] to release the petitioner unless the [Government] takes some remedial
19 action, such as to retry (or resentence) the petitioner." Harvest v. Castro, 531 F.3d 737,
20 741-742 (9th Cir. 2008) (citing Wilkinson v. Dotson, 544 U.S. 74, 89 (2005) (Kennedy, J.,
21 dissenting); Herrera v. Collins, 506 U.S. 390, 403 (1993); Hilton v. Braunskill, 481 U.S. at
22 775 ("[T]his Court has repeatedly stated that federal courts may delay the release of a
23 successful habeas petitioner in order to provide the State an opportunity to correct the
24 constitutional violation found by the court."); In re Bonner, 151 U.S. 242, 259-60 (1894)).

25 Accordingly the Court recommends that Petitioner's IFRP Inmate Financial Plan
26 contract be rescinded and Respondent shall provide Petitioner a new IFRP Inmate
27 Financial Plan contract prepared by Bureau staff within sixty (60) days of the adoption of
28 the instant Findings and Recommendation by the District Court Judge.

1 **VI. Conclusion and Recommendation**

2 Accordingly, IT IS HEREBY RECOMMENDED that the Court finds that Petitioner
3 is entitled to relief and that Petitioner's IFRP Inmate Financial Plan contract be rescinded
4 and Respondent shall provide Petitioner a new IFRP Inmate Financial Plan contract
5 prepared by Bureau staff within sixty (60) days.

6 This Findings and Recommendation is submitted to the assigned District Judge,
7 pursuant to the provisions of Title 28 U.S.C. § 636(b)(1) and Local Rule 304. Within
8 fourteen (14) days after being served with the Findings and Recommendation, any party
9 may file written objections with the Court and serve a copy on all parties. Such a
10 document should be captioned "Objections to Magistrate Judge's Findings and
11 Recommendation." Any reply to the objections shall be served and filed within fourteen
12 (14) days after service of the objections.

13 The parties are advised that failure to file objections within the specified time may
14 waive the right to appeal the District Court's order. Wilkerson v. Wheeler, 772 F.3d 834,
15 839 (9th Cir. 2014).

16
17 IT IS SO ORDERED.

18 Dated: March 21, 2017

19 /s/ Michael J. Seng
20 UNITED STATES MAGISTRATE JUDGE
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