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NATIONAL CORRECTIONAL INDUSTRIES ASSOCIATION, INC.
1202 North Charles St. * Baltimore, MD 21201 * (410) 230-3972 * Fax (410) 230-3981

SUMMARY FINDINGS OF THE 2010-2011 PIECP COMPLIANCE SITE AND DESK ASSESSMENTS

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Prepared By:
Barbara J. Auerbach
PIECP Technical Coordinator
National Correctional Industries Association, Inc.

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BACKGROUND

BJA's Prison Industry Enhancement Certification Program (PIECP) was established by Congress in 1979 in an effort to address prison management concerns about prisoner idleness, to train the growing prison population in marketable job skills, and to benefit taxpayers through inmate wage deductions for room and board, victims' compensation, family support, and taxes. BJA's goal is to encourage partnerships between state and county prison industries and private sector companies that employ inmate workers in manufacturing operations that resemble the real world as closely as possible.

The sale of inmate-made goods in interstate commerce is prohibited except for projects certified by BJA as meeting the conditions of the PIECP statute [18 USC 1761(c)]. The prohibition applies only to originally manufactured *goods* produced by inmates that cross state lines, entering into interstate commerce. Service operations, such as refurbishing goods that have already entered into interstate commerce, are not prohibited. Goods produced in conjunction with private sector partners which do not cross state lines are subject only to *state* law which varies from state to state. Agricultural goods are exempt from regulation as are goods produced for a non-profit organization.

Over the 32 years of its existence, the program has attracted primarily small and medium-sized private sector companies. Participation has been steady for several years at approximately 200 separate operations or Cost Accounting Centers (CACs) and 4,500 to 5,000 inmate workers nation-wide, though there has been a noticeable decline during the current economic recession (there were 190 CACs as of June 30, 2011).

BJA has Certified 44 jurisdictions as of 6/30/11. Interest in participating in the PIECP continues: Michigan has submitted its certification application, New Hampshire is in the process of applying for certification, and Kentucky and Pennsylvania have introduced legislation that would facilitate participation in the program.

As the program arm of the U.S. Department of Justice, BJA has no criminal enforcement power over violations of the PIECP statute. That power rests with the Criminal Division of the USDOJ. However, as the agency identified by Congress to administer the PIECP program, BJA does have the authority to rescind a jurisdiction's PIECP Certification if the jurisdiction is found to be out of compliance with PIECP mandatory requirements and if the jurisdiction is unwilling to work with BJA to come into compliance.

Since 1995, BJA has provided grant funding to the National Correctional Industries Association (NCIA) to perform assessments to provide BJA with sufficient information to make compliance decisions. NCIA's goal is to identify any non-compliant conditions and to assist the Certificate Holder to return to compliance within a reasonable period of time (usually 60 to 90 days). If compliance requirements cannot be met, BJA can rescind the PIECP Certificate.

Mandatory requirements include meeting legal and administrative eligibility criteria; the payment of a wage comparable to the wages of similarly situated civilian workers in the locality; the avoidance of displacement of civilian workers in the locality; the provision of benefits comparable to those made available to other workers on the basis of their employment (workers' compensation and FICA in some cases¹); voluntary inmate participation; wage deductions limited to 80% of gross salary and only for taxes, room and board, victims' compensation/restitution, and family support; prior notification to organized labor and local business organizations of proposed operations; and compliance with the National Environmental Protection Act (NEPA).

Grant funds have been significantly reduced in recent years, necessitating a cutback in the performance of on-site assessments. However, NCIA was funded to perform sixteen assessments in 2011, thirteen of which were site assessments. When an assessment is performed, a PIECP Certificate Holder is asked to provide two actual payrolls along with wage determination letters from its State Department of Economic Security (DES). Information on wages paid to civilian workers used to set comparable wages for PIE workers is now available on the Internet through websites administered by State Departments of Labor and the Federal Bureau of Labor Statistics. Assessors use this information to determine whether inmate workers were paid the comparable wage, including overtime at time-and-a-half, and did not displace civilian workers in the locality where the work takes place. They review payrolls to determine if PIECP inmate workers were moved from training wages to full comparable wages once DES approved training times have expired. Deductions and benefits are also tracked by payroll and other financial documents; a review of voluntary participation forms and changes in NEPA are included in the on site assessment as well. Inmates are interviewed and each operation is toured by the assessor. Certificate Holders have taken the process seriously and submitted the required documentation with minor exceptions.

SCOPE OF THE ASSESSMENT PROCESS

As of June 30, 2011 there were thirty (30) jurisdictions with active PIECP operations.² Of those, thirteen jurisdictions had site assessments and three had desk assessments (Hawaii, Louisiana, and Maine), with a total of 59 CACs assessed. The assessments were performed by experienced prison industry managers with PIECP programs of their own, and by NCIA staff.

¹ The IRS has ruled that only PIECP inmate workers who work in an Employer Model CAC, where the workers are directly supervised and paid by the private sector company, are eligible for FICA. In Customer Model CACs, where the inmate workers are supervised and paid by the prison industry operation, inmate workers are not eligible to participate in FICA.

² They included: Arizona, Arkansas, California, Colorado, Florida, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Minnesota, Hennepin County (MN), Mississippi, Montana, Nebraska, Nevada, Strafford County (NH), North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas Board of Criminal Justice, Utah, and Utah County (UT). There were 14 *inactive* Certificate Holders as of 6/30/11 including: Alaska, Belknap County (NH), Connecticut, Denver County Sheriff's Department, New Mexico, North Carolina, Ohio, Vermont, Virginia, Washington, Washington State Jail Industries Board, West Virginia, Wisconsin, and Wyoming.

	SITE	DATE	# CAC(S) ASSESSED	ASSESSOR
1.	Arizona	6/23/11	1	Barbara Auerbach
2.	California	5/8-10/11	5	Robert Carter
3.	Georgia	5/15-17/11	2	Sahra Nadiir
4.	Hawaii (Desk)	9/30/11	1	Wil Heslop
5.	Iowa	5/3-6/11	7	Tom Vohs
6.	Louisiana (Desk)	8/9/11	1	Wil Heslop
7.	Maine (Desk)	8/15/11	1	Wil Heslop
8.	North Dakota	6/16-18/11	3	Kevin Simondet
9.	Strafford County, NH	6/6-7/11	5	Barbara Auerbach
10.	Nevada	6/27-29/11	7	Barbara Auerbach
11.	Oklahoma	4/21/11	1	Tom Vohs
12.	South Carolina	3/24-27/11	10	Wil Heslop
13.	Tennessee	5/17-18/11	4	Becky Deeb
14.	Texas	6/22-23/11	3	Carol Tortarelli
15.	Utah County, UT	5/26/11	1	Gay Zalman
16.	Utah	5/23-25/11	6	Gay Zalman

THE ASSESSMENT PROCESS

- ❑ In 2011, NCIA reviewed all active CACs and assessed the top 16 jurisdictions based upon the potential risk for non-compliance due to not being assessed for two or more cycles or for being a new project that had never been assessed.
- ❑ Assessment materials were upgraded to reflect changes resulting from the previous assessment round as well as policy decisions made by BJA in the interim.
- ❑ NCIA hosted a Webinar training session for all Certificate Holders in February 2011, focused on all substantive and process requirements for the upcoming assessments. A separate Webinar training session was held for the assessors in early March 2011. In the same month, a NCIA's annual National Training Conference was held in Baltimore where PIECP managers could review their individual practices against PIECP requirements.
- ❑ Prior to the assessment, the Certificate Holders provided NCIA with the requested information on wages, displacement as it relates to annual wage determination, benefits, deductions, voluntary participation, and changes NEPA conditions for all CACs to be assessed. Determinations of eligibility and non-displacement of civilian workers, as well as the notification of local private business and organized labor, take place at the time of CAC designation and therefore had already been reviewed.
- ❑ As much as possible, NCIA personnel and the assessor utilized email to transfer information among the parties to the assessment. All of NCIA's 2011 assessment materials were created in Microsoft Word and Microsoft Excel so that all parties could easily manipulate the information necessary to complete the assessment. Assessment materials also were available on NCIA's website: <http://www.nationalcia.org/>.

For each Certificate Holder:

- Program performance was compared against statutory and administrative requirements for participation in the PIECP.
- Payroll review for two separate months (January 2010 and January 2011) was performed to verify that comparable wages were actually being paid to PIECP inmate workers, including a comparison of training times authorized by the Department of Economic Security (DES) against actual time spent in training.
- Supporting documentation to and from the State DES for comparable wage and non-displacement determinations was reviewed and verified.
- Deductions for taxes (state, federal, and FICA), room and board, victims' compensation/restitution, and family support were examined and verified.
- The existence of Workers' Compensation insurance was verified by reviewing actual Workers' Compensation insurance policies or their equivalent and comparing coverage for PIECP inmate workers against their private sector counterparts (similarly situated civilian

workers for Employer Model CACs and correctional industries employees for Customer Model CACs).

- The voluntary status of inmate workers was confirmed through verification of relevant documents and inmate interviews.
- Changes in NEPA since the time of designation were reviewed and the operation was toured by the assessor; inmate interviews also included questions on this topic.

What follows is an issue-by-issue description of the findings of the assessments. A summary discussion of substantive findings completes this report. All assessment instruments were developed in cooperation with and approved by BJA. They are publicly available at <http://www.nationalcia.org/pieforms.html>.

COMPLIANCE ASSESSMENT FINDINGS AND BJA DETERMINATIONS

1. Eligibility

BJA's 1999 Guideline states that all non-Federal departments of correction and juvenile justice agencies authorized by law to administer correctional industry programs are eligible for PIECP certification. Once certification is awarded, the Certificate Holder determines which specific operations will be included under the PIECP. All production operations, where a non-agricultural commodity/product is produced for sale to the for-profit sector on the open market and the product moves in interstate commerce, must be designated under the PIECP. Additional enterprises may be included at the Certificate Holder's discretion. Once included, all PIECP mandatory requirements must be met for all Cost Accounting Centers.

Findings:

All CACs assessed in 2011 had been through NCIA's certification and designation processes and therefore had already met this criterion.

2. Inmate Worker Wages

The PIECP statute requires that inmate workers be paid "at a rate which is not less than that paid for work of a similar nature in the locality in which the work is performed." BJA's administrative Guideline for PIECP sets out procedures for determining the appropriate wage under various conditions. The Guideline expressly states that wage determinations must be made by State Department of Economic Security (DES) agencies. Certificate Holders must re-determine wages annually on or before the date the previous wage update was made. In November 2006, BJA further specified that because of an "across-the-board change in how wage data is reported by employment agencies...wages for PIECP inmate workers may not fall below the tenth percentile (unless their employment agency provides express written agreement of a wage less than the tenth percentile for a limited training period)."

Findings:

Wages remain a source of some difficulty for PIECP Certificate Holders, but there was significantly less confusion over the 10th percentile requirement in this assessment round and fewer cases of back wages due. Almost all Certificate Holders were clear about the requirement and had received appropriate DES information identifying the 10th percentile wage. NCIA had requested two separate payrolls for each CAC it assessed (January 2010 and January 2011), thus providing the assessors with a picture of wage practices over time. All of the sites assessed submitted this information to NCIA.

Three of the sixteen jurisdictions assessed had wage issues of some kind, fewer than has been the case in past assessment rounds. In one case the Certificate holder did not make the required update for 2010 and was not paying the 10th percentile wage identified by the state DES. In a second case, the 10th percentile wage was not being paid in some, but not all, of the jurisdiction's CACs. In both of those cases the issue has been resolved, with the payment of back wages agreed to and soon to be paid. One Certificate Holder has not submitted the required information in order for NCIA to determine and confirm whether back wages may be due; the assessor has not received wage verification letters from the state DES and therefore cannot make a wage determination. The matter has been referred to BJA.

a. The Training Wage Exception to the 10th Percentile Wage Floor

As noted above, because wage data for all states had become available electronically, BJA determined in 2006 that wages must be set at or above the 10th percentile³, as defined by the State Department of Economic Security Agency. BJA takes the position that this is a “generous interpretation of *comparable*, yet still fair to competitor manufacturers because of the “lack of education, training, and experience typical of the inmate labor force.”⁴ The one exception to the 10th percentile requirement is that inmate workers may be paid a training wage that falls below the 10th percentile if “their employment agency provides express written agreement of a wage less than the tenth percentile for a limited training period.”

Because the wage cannot legally fall below the Federal or State minimum wage (whichever is higher), training wages must by definition fall somewhere between the Federal or State minimum wage and the 10th percentile. Of the sixteen states and counties assessed, only four use a training wage. In all four cases the training wage starts at the minimum wage and progresses to the 10th percentile over a period of time: Georgia raises pay from the FMW by 20% every 1,664 hours (208 days) until the 10th percentile is reached; Iowa uses a training wage of 90 days in two of the CACs assessed; Tennessee uses a training wage that falls between the FMW and the 10th percentile, for an indefinite term; and Utah County uses a 90-day training period.⁵

³ meaning that 90% of all workers performing similar work earn more than this amount, and 10% earn less

⁴ Letter to all Certificate Holders from Julius C. Dupree, Jr., PIECP Program Manager (November 17, 2006).

⁵ Authority to set training wages rests with the State DES agency and therefore the length of time allowed varies from state to state. BJA now requires that it be comparable to times used in comparable industries.

The assessors found no jurisdictions where PIECP inmate workers had worked longer at the training wage than the training period determined by the State DES. However, there was one jurisdiction in which workers were paid the minimum wage without movement towards the 10th percentile, even though the DES had identified a 10th percentile wage that was higher than the FMW.

b. Annual Wage Updates Not Implemented in a Timely Fashion

Two jurisdictions did not implement wage updates on or before the anniversary date of the previous update and back wages are pending.

c. 10th Percentile Not Implemented as Wage Plan Floor

Two jurisdictions had not understood that the 10th percentile is the lowest possible wage to be paid to inmates unless the State DES provides an exemption for a limited training period (one was under the FMW). Back wages were assessed and their payment is pending.

d. Overtime Is Being Administered Correctly

Overtime in every case where it was used was paid at time-and-a-half.

e. Other Observations

All jurisdictions continue to use SOC codes to describe the work being performed. As was the case in the previous assessment round, a few states had not included SOC codes for all inmate workers on payroll documents, necessitating an additional request from the assessors to provide that information, without which it is impossible to determine whether a given inmate worker is receiving the appropriate wage. In two jurisdictions, a small number of inmate workers were found to be categorized under the wrong SOC code. Those jurisdictions have agreed to change the SOC codes for the workers in question going forward.

Ten of the sixteen jurisdictions assessed use the 10th percentile as the floor of their wage scale. Two use a wage floor that is higher than the 10th percentile; two use the FMW because the 10th percentile is lower than the FMW. One uses a wage determined by court order which equates with the state minimum wage. The same certificate holder previously mentioned (incomplete assessment that was referred to BJA) uses the FMW and is under review as to the reasons why.

3. Displacement

The PIECP statute requires that a PIECP project not "result in the displacement of employed workers, or be applied in skills, crafts, or trades where there is a surplus of available gainful labor in the locality, or impair existing contracts for services." The 1999 Guideline repeats this same language, stating that the State Department of Economic Security should verify that the proposed PIECP project will not displace employed workers. In addition, the private sector company involved is required to provide a written statement that it will not displace its own workers in favor of PIECP inmates. A definition of displacement is provided in the Guideline

that includes all the prohibited activities noted above, as well as the “inappropriate transfer of private sector job functions to PIECP inmates.”

Findings:

This element was reviewed and verified for all Certificate Holders at NCIA headquarters as part of NCIA’s designation process. Displacement documents for all CACs were compiled and reviewed and all CACs were found to be in full compliance at the time of designation. As a secondary check, annual wage re-verifications also must take displacement into consideration.

Again this assessment round, the State DES in a few jurisdictions expressed strong discomfort in making non-displacement determinations, particularly in the current economic downturn. One jurisdiction’s DES refused to make the determination for existing CACs. Because BJA’s Guideline states that special scrutiny will apply only for the first year after designation, and because no complaints were filed, no non-compliance finding was made. NCIA has asked BJA to address this issue as part of its Guideline/Regulation revision process.

4. Benefits

Federal law requires that PIECP workers "have not solely by their status as offenders been deprived of the right to participate in benefits made available by the Federal and State government to other individuals on the basis of their employment, such as Workmen's Compensation." BJA's 1999 Guideline states that workers' compensation, and under certain circumstances (that is, for employer model projects where the inmate works directly for the private sector company), Social Security (FICA), must be provided to PIECP inmate workers.

Findings:

a. Workers' Compensation: All but one (the same certificate holder previously mentioned) of the jurisdictions assessed were providing Workers’ Compensation coverage or its equivalent. Again, that one jurisdiction is under review by BJA.

b. FICA: All employer model projects were found to be covering their PIECP workers under FICA, as is required by the PIECP Guideline. One Certificate Holder provides FICA to its inmate workers in customer model projects. The matter was referred to BJA and the Certificate Holder was provided with the guidance BJA received from the Social Security Administration and the IRS in 1999 (stating that inmates who work for the state are not eligible for Workers’ Compensation). The Certificate Holder will make its own decision under advice of counsel.

5. Deductions

Federal law provides that "wages may be subject to deductions which shall not, in the aggregate, exceed 80 per centum of gross wages, and shall be limited as follows: (a) taxes; (b) reasonable charges for room and board as determined by regulations which shall be issued by the chief State correctional officer; (c) allocations for support of family pursuant to State statute, court order, or agreement by the offender; (d) contributions to any fund established by law to compensate the

victims of crime of not more than 20 per centum but not less than 5 per centum of gross wages." BJA's 1999 administrative Guideline makes it clear that participating CACs are not required to take deductions from PIECP inmate wages. However, some deductions may be required under other Federal statutes, such as the Internal Revenue Code.

Findings:

Fourteen of the sixteen jurisdictions assessed had no difficulty meeting this requirement. In two cases, deductions were being take for purposes other than the four purposes enumerated above, but in both cases the deductions in question were clearly a mis-labeled form of room and board, and as such were incorporated into the room and board deduction.

In three cases Certificate Holders were asked to revise their voluntary participation forms to reflect the fact that no more than 80% of the inmate worker's gross earnings may be deducted.

6. Voluntary Participation

Federal law requires that inmates "have participated in such employment voluntarily and have agreed in advance to the specific deductions made from gross wages pursuant to this section, and all other financial arrangements as a result of participation in such employment."

Findings:

All Certificate Holders were found to have signed voluntary forms on file for all CACs. As noted above, in three cases Certificate Holders were advised to revise their voluntary participation forms to include clear assurances that no more than 80% of gross wages could be deducted from the PIECP inmate worker's pay (with the exception of legal fines). In two jurisdictions assessors became concerned that the 20% of gross held by the inmate workers might not be accounted for in the case of "lifers." As it turned out, in both cases lifers were able to direct the disposition of these funds.

7. Consultation with Organized Labor

Federal law requires that representatives of local union central bodies or similar labor union organizations have been consulted prior to the initiation of any project qualifying for any exemption created by this section. The 1999 Guideline expands the consultation requirement slightly by asking the Certificate Holder to contact all relevant unions, not just a single union which may or may not be the most directly involved in the production of items similar to those produced in a PIECP CAC. In addition, if there is no local labor union, the State organization must be informed in its stead.

Findings:

This mandatory criterion is among those reviewed by NCIA as part of its designation process. Certificate Holders either sent letters to the relevant unions or had written records of advisory board meetings where organized labor was represented.

8. Consultation with Local Private Industry

BJA's 1999 administrative Guideline states that applicants must consult with representatives of local businesses that may be economically impacted by CAC production prior to beginning operations and lays out minimum criteria for that consultation.

Findings:

This mandatory criterion is among those reviewed by NCIA as part of its designation process. All jurisdictions either sent letters to the local chamber of commerce or included representatives of local private industry on a correctional industries advisory board. Some jurisdictions did both. In a small number of cases, the department of corrections publishes its intentions to initiate a new PIECP CAC in a local newspaper.

9. National Environmental Policy Act (NEPA)

BJA's 1999 Guideline requires that all PIECP CACs must comply with NEPA and other related Federal environmental review requirements. Certificate Holders submit a request for BJA approval at the time they designate each CAC and BJA approves or disapproves the request at that time.

Findings:

Only one of the jurisdictions assessed had any changes in NEPA conditions since the time of the last assessment or since receiving its certification. In that particular case, a new NEPA clearance was required due to the need to separate the CAC into two parts, reflecting its location in two different buildings.

SUMMARY DISCUSSION

PIECP ELEMENT	NON-COMPLIANCE	CURRENT STATUS
WAGES	2	Pending
DISPLACEMENT	none	
BENEFITS	1	Pending
DEDUCTIONS	2	Resolved
VOLUNTARY PARTICIPATION	none	
NEPA (Changes)	1	Resolved

Sixteen jurisdictions were assessed on six separate PIECP required elements as part of the site assessments: Wages, Displacement, Benefits, Deductions, Voluntary Participation, and changes in NEPA (Eligibility, Consultation with Labor and with Business, and compliance with NEPA

are assessed at the time of Certification and Designation). Therefore there is potential for a maximum of 96 separate instances of non-compliance. In fact, the non-compliance instances found by the assessors totaled 7. Three are still pending.

Of the seven instances, two involved a violation of the PIECP 10th percentile requirement, one involved a lack of documentation from the state DES, one involved the lack of a disagreement workers' compensation policy, two involved deductions that were inappropriately labeled, and one involved the need for a new NEPA designation.

WAGES AS THE KEY ASSESSMENT ISSUE

Most PIECP workers continue to earn wages at or slightly above the 10th percentile, in part because much of the work is entry level and in part because workers are untrained and inexperienced. It appears that labor intensive work is the kind of work that companies are willing to bring to the prison or jail setting, with few exceptions. PIECP managers also look for labor intensive work, in the belief that the companies most likely to consider inmate labor are not those with highly skilled labor needs.

BJA's Guideline identifies the State DES agencies as the authorized decision-makers as to wage ranges for PIECP inmate workers. BJA does not exercise independent judgment as to wage determinations made by the State DES agencies since only the State DES agencies have the knowledge to determine local labor conditions and practices, and thus "comparable" wages. Wage findings that lie outside the ranges identified as comparable by a State DES agency are considered to be out of compliance with BJA's PIECP regulations.

Despite the issues relating to 10th percentile, wage procedures are good across the board. The need to base wage payments and plans on the 10th percentile as a floor is well understood by all of the Certificate Holders. All but one of the jurisdictions assessed now implement their annual wage updates on or before the anniversary date of the last update. All make a good faith effort to accurately identify the appropriate SOC code for the work being performed; the small number of workers identified as working in the wrong SOC codes have been reassigned to the correct SOC codes. There continues to be a need to clarify the parameters of comparable training wages and time periods in a few jurisdictions, even though BJA has issued clarification on this issue.

OTHER ASSESSMENT ISSUES

Changes in policy resulting from this assessment cycle include the need to ensure that voluntary participation forms clearly state the limits of authorized deductions (80%) and the voluntary nature of participation. Back wage policies have also been clarified but need continuing emphasis. Strategies for determining the 10th percentile have evolved in several jurisdictions, in some cases meaning that the PIECP manager makes a determination using information found on the state DES website and asks the DES to affirm that finding.

CONCLUSION

As noted in previous reports, challenges to the PIECP Guideline continue to occur. The complex nature of PIECP requirements, coupled with high turnover among PIECP managers, creates the ongoing potential for non-compliance of PIECP CACs. Clearly, there is a need for regular review of operations so that BJA can continue to evolve its policies to meet the changing needs of its Certificate Holders. PIECP assessments are the logical vehicle to achieve that end. BJA has made funding available to NCIA to site assess an additional set of jurisdictions during the 2012 Fiscal Year.