1996 WL 476662
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United States District Court, N.D. Indiana, South Bend Division.

Charles Everett WINSTON, Jeffrey A. Farler, Jackie Owen Scott, Jr., Todd Allen Williams, Thomas Brian Johnson, Charles Williams, Stafford Okokon, Edward Lee Skelton, Anthony P. Kamerman, Donald Joseph Dockery, Lonnie Garner, Jr., Donald R. Anderson, Derrikes Lamont McRae, Ray G. Stewart, Ikeelee Jason Lottie, Sammy L. Jones, Clarence D. Hurmon, Sr., Daniel Stephen Hopkins, John Banks, Ronald G. Davis, Shawn C. Williams, Brent Lee Houck, Michael T. Orr, Clarence D. Hurmon, Sr., Michael Paul Barton, Scott Frederick, Ryan James Dials, Alex C. Liggins, Daniel Alan Terhorst, David Elmer Oblinger, Brian Scott Divens, Ronald Renee Avance, James Robert Hemingway, Phillip G. Helpin, Michael M. Chatman, and Marcus Cannady, Plaintiffs,
v.
Joseph SPEYBROECK, Sheriff of St. Joseph County, Joseph Nagy, in his official capacity, St. Joseph County Commissioners: Richard Jasinski, Joseph Zappia, Richard Larrison; St. Joseph County Council: James Rienebold, Hank Keultjes, Rafael Morton, Joe Baldoni, Larry Jasinski, Dennis Schafer, Gatha Vaughn, George Nome, Jim Reinholtz, Terry D. Wilson, Phillis Martin, Cynthia Dwyer, Foley, Dr., St. Joseph County Commissioner, Phil Canoy, and Bill Goss, Defendants.

No. 3:94CV0150AS. | Aug. 2, 1996.

Opinion

ORDER

ALLEN SHARP, Chief Judge.

***1** This court has before it the Report and Recommendation filed on August 2, 1996, by the Honorable Robin D. Pierce, United States Magistrate Judge. This court also has before it the objection filed on August 12, 1996. This court has also examined and is aware of the pro se filings made a part of this record. This court will deal with last things first. On page 11 of Magistrate Judge Pierce's August 2, 1996, Report and Recommendation there is an extensive footnote one where the conduct of counsel is described by the magistrate judge as "completely inappropriate." Counsel in this case appear determined to place the decisional burden to build a new jail in and for St. Joseph County, Indiana on a non-elected appointed to life United States district judge. Some of the efforts to do so are nothing less than attempts at legal slight-of-hand. Such an effort has been now again exposed by the careful and thoughtful efforts of the United States magistrate judge who has done so much to move this litigation to an appropriate conclusion. There is at least a second major effort in this regard. The differences between that which was noticed and that which was submitted to this court on July 31, 1996, involves more than semantics as footnote one of Magistrate Judge Pierce well indicates. The plaintiffs filed a series of civil rights cases in this court purporting to allege claims under 42 U.S.C. § 1983 and asking for class certification under Rule 23, Federal Rules of Civil Procedure. The defendant local officials agreed to settle those cases which is all well and good. This court is well aware that the perfect is often the enemy of the good. Such settlements generally do not involve a blanket admission of liability and as Magistrate Judge Pierce well indicates, these defendants here stopped short of such an admission. Carefully prepared notices went forth which is also well and good. Then counsel submitted to this court a proposed entry that goes well beyond that which is apparent in the settlement papers and notices. Magistrate Judge caught this effort to semantically re-cast this settlement and properly noted it in footnote one. Appropriate defendant local officials have agreed to construct a new jail and have apparently substantially complied with state law procedures in regard thereto. Most of these plaintiffs have given up any damage claims. These procedures are a long way from a statement that federal law *mandates* the construction of a new jail in St. Joseph County, Indiana. That bold statement is premature, in fact very premature, and these defendant local officials must bite the bullet of responsibility and desist in their efforts to cast it elsewhere. Counsel now ask that the settlement agreement be approved on the basis of the language submitted on July 31, 1996 by counsel. Such will not be done. This court is in complete accord with the report and recommendation of Magistrate Judge Pierce entered on August 2, 1996. This judge spent more than two decades supervising a consent decree regarding the operation of the jail in Lake County, Indiana at Crown Point, and has no intent or desire to repeat that performance here. As indicated by Magistrate Judge Pierce, the Congress of the United States has recently and very precisely attempted to put the brakes on certain species of judicial activism in the Prison Litigation Reform Act of 1996, (PUB.L. NO. 104–734, 110 STAT. 1321). The Congress of the United States has specifically discouraged such long-term decrees which impact on the operation of state and local government. This court finds no fault whatsoever with Magistrate Judge Pierce's

submitted Report and Recommendation and now fully and completely approves and confirms the same.

***2** Apparently unsuccessful in attempting to rewrite the settlement agreement as reflected in the notices given, counsel now appear to be attempting to rewrite the magistrate judge's Report and Recommendation. The Report and Recommendation is now APPROVED AND CONFIRMED *as written and submitted* by the able and experienced United States Magistrate Judge. This court under the record is certainly entitled to do this and is obliged to do no more. A separate decree will issue. IT IS SO ORDERED.

REPORT AND RECOMMENDATION

PIERCE, United States Magistrate Judge.

This class action, brought on behalf of all past, present, and future prisoners incarcerated in the St. Joseph County Jail (the "Jail") in South Bend, Indiana, challenges conditions of confinement, including alleged overcrowding, at the Jail. The parties have now reached a final settlement agreement. That agreement, along with a proposed consent decree, was filed with the court on June 21, 199 (Dkt. # 210). The court subsequently conducted a fairness hearing concerning the proposed settlement on July 12, 1996. The St. Joseph County Council approved the settlement agreement and consent decree on July 23, 1996. For the reasons which follow, it is recommended that the proposed consent decree as previously tendered to the court on June 21, 1996, be approved and entered.

Procedural History

This action was commenced by the receipt and subsequent filing of a complaint on February 15, 1994. On October 18, 1994, Chief Judge Sharp made a preliminary determination that the action filed by Charles Everett Winston should be maintained as a Class Action and consolidated all pending and subsequently filed litigation regarding the conditions at the Jail into the action filed by Charles Everett Winston. On January 18, 1995, the court determined that this action was properly maintained as a class action.

Plaintiffs' complaint, as amended, charged that the Jail is overcrowded, that some inmates are forced to sleep on floors, that the plumbing, ventilation, and heating are inadequate, that dangerous inmates are not classified and segregated from the general population, that pre-trial detainees are housed with convicted felons, and that the Jail lacks facilities for outdoor exercise or recreation. Plaintiffs sought an order to correct the overcrowding and related conditions, compensatory and punitive damages, and injunctive relief closing the Jail.

On May 7, 1996, following settlement negotiations, the parties reached agreement upon a partial interim consent decree which, among other things, provided for an inmate population cap at the present St. Joseph County Jail. Class members were subsequently provided with notice of the proposed partial interim consent decree (Dkt. # 190), and the court conducted a fairness hearing regarding that matter on May 31, 1996 (Dkt. # 200). On June 5, 1996, the undersigned issued a Report and Recommendation, recommending that the partial interim consent decree be approved and entered (Dkt. # 204).

***3** Following further negotiations, the parties reached a comprehensive settlement agreement, including a proposed consent decree, which was filed with the court on June 21, 1996 (Dkt. # 210). On that date, Judge Sharp issued an Order approving the notice of the proposed settlement (Dkt. # 209). The terms of the consent decree were conditioned upon the approval of a majority of the St. Joseph County Council after a public hearing. The court conducted a fairness hearing concerning the proposed settlement on July 12, 1996. On July 23, 1996, the St. Joseph County Council approved the consent decree and evidence of the approval was subsequently filed with this court.

Adequacy of Notice

On June 21, 1996, the parties filed a settlement agreement and proposed consent decree which was approved by the court on the same date. At the same time, counsel for the plaintiff class also filed an affidavit stating that individual notice to class members was not practicable and that notice of the proposed settlement by publication was the best form of notice under the circumstances. The court, pursuant to terms of the settlement agreement and proposed consent decree, entered an order certifying a class, setting a hearing on the proposed settlement and prescribing the notice to be given class members. The notice was to be published on two separate occasions, at least five days apart, in the South Bend Tribune. According to the notice, the consent decree provided:

> (A) That the Sheriff of St. Joseph County, the Board of County Commissioners of the County of St. Joseph and the St. Joseph County Council shall construct and finance a new St. Joseph County Jail facility with a minimum capacity of 600 inmates that fully complies with the Indiana Jail Standards and the federal laws mandating compliance in design prior to commencing

actual construction of the jail facility with construction to begin on or before December 1, 1996.

(B) The St. Joseph County Sheriff will maintain a program of classification and segregation of dangerous inmates at the current St. Joseph County Jail.

(C) The St. Joseph County Sheriff will ensure that all inmates confined to the Jail for a continuous period in excess of twelve hours will be provided with a bunk or mattress.

(D) The St. Joseph County Sheriff will meet with counsel for the Plaintiff class and all necessary persons to determine the most effective way of improving the heating, cooling, ventilation and plumbing systems, recreation and exercise opportunities in the current St. Joseph County Jail pending the completion of the new Jail. The Sheriff of St. Joseph County and the St. Joseph County Commissioners and St. Joseph County Council shall in good faith consider all recommendations of counsel for the Plaintiff Class.

(E) The population cap imposed upon the Jail by the Partial Interim Consent Decree shall remain in effect.

(F) The Plaintiff Class shall waive any and all claims for damages, either compensatory or punitive damages against the defendants.

***4** (G) Members of the Plaintiff Class who were or are inmates at the St. Joseph County Jail prior to the date of the execution of this Consent Decree by the parties may exclude themselves from the class by filing with the Committee of Counsel appropriate written indication that they request exclusion from the Class.

The notice further stated that the court would conduct a fairness hearing on July 12, 1996 at 2:00 p.m., and advised class members that they had a right at the fairness hearing to comment on or object to the settlement agreement and consent decree. Class members were also advised of the procedure for filing objections.

Based upon its review of the procedures the parties have adopted for notifying the class members, the court finds that the class members have been fully and accurately advised of the terms of the proposed consent decree, as well as the procedure for bringing comments supporting or objecting to the consent decree to the attention of the court. In addition, the comment period provided in the notice fully satisfied the requirements of Rule 23(e) of the Federal Rules of Civil Procedure. *See Van Horne v. Trickey,* 840 F.2d 604 (8th Cir.1988); *Diaz v. Romer,* 801 F.Supp. 405, 408 (D.Colo.1992).

Approval of Settlement

Before a court can approve a class action settlement, it must determine that the settlement is lawful, fair, reasonable and adequate. *Isby v. Bayh,* 75 F.3d 1191, 1199 (7th Cir.1996); *E.E.O.C. v. Hiram Walker & Sons, Inc.,* 768 F.2d 884, 889 (7th Cir.1985); *Gautreaux v. Pierce,* 690 F.2d 616, 631 (7th Cir.1982); *Armstrong v. Board of Sch. Directors, etc.,* 616 F.2d 305, 313 (7th Cir.1980). Among the factors that a court should consider in making this "fairness" determination are: the strength of the plaintiffs' case compared to the defendants' offer; the likely length, complexity and expense of further litigation; the amount of opposition to the settlement among affected parties; the opinion of competent counsel; and the stage of the proceedings and the amount of discovery already completed. *Isby,* 75 F.3d at 1199; *E.E.O.C.,* 768 F.2d at 889; *Armstrong,* 616 F.2d at 314. In considering a proposed class action settlement, a court may either approve or disapprove of the settlement; it may not rewrite the parties' agreement. *Armstrong,* 616 F.2d at 315; *Harris v. Pernsley,* 654 F.Supp. 1042, 1049 (E.D.Pa.1987). A court "may not deny approval of a consent decree unless it is unfair, unreasonable, or inadequate." *E.E.O.C.,* 768 F.2d at 889.

The court's initial inquiry is concerned with whether the settlement is lawful. As the Seventh Circuit has explained, a court "cannot approve a class action settlement 'which either initiates or authorizes the continuation of clearly illegal conduct.' " *Isby,* 75 F.3d at 1197 (quoting *Armstrong,* 616 F.2d at 315). At the same time, the Seventh Circuit has pointed out that in applying this principle " 'the court must not decide unsettled legal questions; any illegality or unconstitutionality must appear as a legal certainty on the face of the agreement before a settlement can be rejected on this basis.' " *Isby,* 75 F.3d at 1197 (quoting *Armstrong,* 616 F.2d at 320). Furthermore, "in determining whether to reject a settlement as initiating or authorizing a 'clearly illegal or unconstitutional practice, prior judicial decisions must have found that practice to be illegal or unconstitutional as a general rule.' " *Isby,* 75 F.3d at 1197 (quoting *Armstrong,* 616 F.2d at 321).

***5** In this case, nothing suggesting illegality or unconstitutionality is apparent on the face of the settlement agreement and proposed consent decree. The only other matter of which the court is aware relates to the enforceability of the proposed consent decree in light of the recently enacted Prison Litigation Reform Act (the "Act" or "PLRA"), Pub.L. No. 104–134, 110 Stat. 1321, §§ 801–810 (Apr. 26, 1996) (amending 18 U.S.C. § 1326). The PLRA limits prospective relief (all relief other than compensatory monetary damages) in prison or jail condition cases to that necessary to correct the violation of the federal right of a particular plaintiff or plaintiffs. Section 802 of the Act amended 18 U.S.C. § 626(a)(1)(B)

to prohibit a federal court from granting or approving prospective relief unless the court finds that:

1. The relief is narrowly drawn;

2. The relief extends no further than necessary to correct the violation of the federal right;

3. The relief is the least intrusive means necessary to correct the violation of the federal right; and

4. The relief will not adversely impact the public safety or the operation of the criminal justice system.

The relief specified in the proposed consent decree in this case passes muster under the PLRA. Uncontradicted evidence in the record, in the form of admissions by St. Joseph County Sheriff Joseph Speybroeck, establishes that the present Jail is overcrowded and that the physical structure of the Jail does not meet federal constitutional standards for a jail facility. Sheriff Speybroeck has also admitted that the only feasible means of providing the inmates at the Jail with a facility which meets minimum constitutional requirements is by construction of a new jail; the physical structure of the existing Jail cannot be modified to meet federal constitutional standards.

The terms of the consent decree, moreover, have been narrowly drawn to remove the court from the decisionmaking process of St. Joseph County. The consent decree was made contingent upon approval by a majority of the members of the St. Joseph County Council and County Commissioners. Control with respect to the costs associated with construction of the Jail will be retained by the St. Joseph County Council. And, no master will be appointed to oversee the construction of the Jail. The consent decree will not place this court in the position of an architect, accountant, or appropriating body for the Jail. Instead, the proposed decree limits the court's role in enforcing its terms. Ultimately, the court finds that the proposed relief in the form of the consent decree is narrowly drawn; that it extends no further than necessary to correct the violation of the federal rights asserted in plaintiffs' complaint; that it is the least intrusive means necessary to correct the violation of those rights; and that it will not adversely impact the public safety or the operation of the criminal justice system.

The court must next examine the strength of the plaintiffs' case compared with the defendants' settlement offer. *Isby,* 75 F.3d at 1199; *E.E.O.C.,* 768 F.2d at 889; *Armstrong,* 616 F.2d at 314. In this regard, the court firmly believes that plaintiffs' chances of success would be relatively low by comparison to what defendants have offered under the settlement agreement and proposed consent decree—the construction of a new Jail. To prevail on their claims for injunctive relief, plaintiffs would be required to demonstrate that their constitutional rights under the Fourteenth Amendment (in the case of pre-trial detainees) or the Eighth Amendment (in the case of convicted prisoners) were violated. To demonstrate a constitutional violation under either Amendment, plaintiffs would have to show that defendants acted with "deliberate indifference." *Steele v. Choi,* 82 F.3d 175, 178 (7th Cir.1996); *Antonelli v. Sheahan,* 81 F.3d 1422, 1427–28 (7th Cir.1996); *Zarnes v. Rhodes,* 64 F.3d 285, 290 (7th Cir.1995).

***6** In clarifying the term "deliberate indifference" in an Eighth Amendment context, the Supreme Court explained that a prison official cannot be found liable "unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan,* 511 U.S. 825, 114 S.Ct. 1970, 1979, 128 L.Ed.2d 811 (1994); *see Houston v. Sheahan,* 62 F.3d 902 (7th Cir.1995); *Miller v. Neathery,* 52 F.3d 634, 638–39 (7th Cir.1995); *Dorsey v. St. Joseph Co. Jail Officials,* 910 F.Supp. 1343, 1351 (N.D.Ind.1996). Because plaintiffs' claims for injunctive relief are aimed at the defendants in their official capacities, plaintiffs would also be required to establish "a direct causal link between a municipal [or county] policy or custom" and the claimed constitutional deprivation. *City of Canton, Ohio v. Harris,* 489 U.S. 378, 385, 109 S.Ct. 1197, 1202–03, 103 L.Ed.2d 412 (1989); *Starzenski v. City of Elkhart,* 1996 WL 344927, *5 (7th Cir. June 25, 1996).

Here, it is apparent that plaintiffs would have a difficult time proving that the defendants established the conditions of the Jail to inflict wanton pain, or that they are deliberately indifferent to whether the conditions at the Jail have such an effect. Moreover, even if plaintiffs were to prove deliberate indifference, as well as establish a causal link between a constitutional violation and an official policy or custom of the county, Judge Sharp's Memorandum of June 10, 1996, strongly implies that the court would not allow itself to become involved in ordering the construction of a new Jail if the parties did not agree to it on their own. Thus, the relief which defendants have offered as part of the settlement—the construction of a new Jail—extends well beyond any relief the court might order if plaintiffs were successful at trial.

The next factor—the likely length, complexity and expense of further litigation—militates strongly in favor of approval of the proposed consent decree. Indeed, continued litigation of conditions of confinement at the Jail would require the resolution of many difficult and complex issues, entail considerable additional expense, and involve an estimated seven weeks of trial time. The resolution of plaintiffs' injunctive claims at this point through the proposed consent decree will clearly result in

considerable savings in terms of time and expense. The consent decree represents an outcome at least comparable, if not far superior, to that which plaintiffs might achieve by proceeding to trial.

The next factor—the amount of opposition to the settlement among affected parties—strongly favors approval. Indeed, opposition to the proposed consent decree is essentially nonexistent. Only one former inmate of the Jail submitted a written objection to the settlement and only one class member appeared at the fairness hearing to voice an objection.

***7** The next factor is concerned with the opinion of competent of counsel. In the present case, all of the parties are represented by very capable and competent counsel. It is clear that counsel have represented their clients ably throughout the negotiation process which led to the present agreement. There is no indication that the proposed consent decree, or any aspect of it, is the product of collusion among or between counsel for the plaintiff class and the attorneys for defendants. The court has no reason to doubt the judgment of counsel in recommending the approval and adoption of the consent decree.

The last factor calls for consideration of the stage of the proceedings and the amount of discovery completed. Since the filing of this action, plaintiffs have undertaken extensive discovery, including 8 depositions, the submission of over 100 interrogatories to defendants, interviews with over 50 potential witnesses, inspection of defendants' books and records on several occasions, and review of approximately 6,000 documents produced by defendants. It is clear, as counsel for plaintiffs maintain, that they have completed sufficient investigation to provide them with sufficient insight into the facts underlying plaintiffs' claims, as well as the strengths and weaknesses of those claims.

Having reviewed the terms of the parties' settlement agreement and proposed consent decree, and having considered the matters presented at the fairness hearing, the court finds that the settlement agreement and consent decree are lawful, fair, reasonable, and adequate. Accordingly, it is RECOMMENDED that the settlement agreement and consent decree be approved, that the consent decree be entered by the court,[1] and that final judgment be entered thereon.

[1] On July 31, 1996, plaintiffs' counsel submitted a proposed form of order entitled "Judgment Order Approving Consent Decree." The form of order contained a discussion together with findings regarding the issues involved in the court's "fairness" determination, as well as a consent decree for the court's approval and signature. The court understands that the form of judgment order was tendered as a convenience to the court, much like proposed findings of fact and conclusions of law. The language of the proposed judgment order, however, differs in important respects from the settlement agreement and proposed consent decree which was filed with the court on June 21, 1996.

The proposed consent decree tendered on July 30, 1996, omits a number of provisions which were contained in the "Settlement Agreement and Consent Decree" tendered to the court on June 21, 1996. It also contains one provision which does not appear at all in the original settlement agreement and consent decree—a provision that states: "That federal law mandates the construction of a new jail facility for St. Joseph County, Indiana." (Proposed Judgment Order Approving Consent Decree, p. 10 ¶ 4.) This provision was apparently lifted verbatim from a proposed order granting plaintiffs' partial summary judgment which plaintiffs previously submitted on May 31, 1996 (Dkt. # 201). Following a hearing, the undersigned recommended the denial of that motion on June 6, 1996 (Dkt. # 205), and that recommendation was formally approved and adopted by Judge Sharp on July 22, 1996 (Dkt. # 218). This apparent attempt to have the court revise the settlement agreement and consent decree which the parties had previously agreed upon—which was made the subject of the notice to members of the class and voted upon by the County Council—is completely inappropriate.

NOTICE IS HEREBY GIVEN that within ten (10) days after being served with a copy of this recommended disposition a party may serve and file specific, written objections to the proposed findings and/or recommendations. Fed.R.Civ.P. 72(b). FAILURE TO FILE OBJECTIONS WITHIN THE SPECIFIED TIME WAIVES THE RIGHT TO APPEAL THE DISTRICT COURT'S ORDER. See *Thomas v. Arn,* 474 U.S. 140, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985); *Lerro v. The Quaker Oats Company,* 84 F.3d 239 (7th Cir.1996); *Lockert v. Faulkner,* 843 F.2d 1015 (7th Cir.1988); *Video Views, Inc. v. Studio 21 Ltd.,* 797 F.2d 538 (7th Cir.1986).

Dated this 2nd day of August, 1996.