

Fitzpatrick PERRY, Guy H. Levia, Frank Ginese, James Lyons and Joseph Sacco, on behalf of themselves and all others similarly situated

v.

Michael V. FAIR, John R. Sharry, Paul X. Tivnan, Francis J. Hollway, John M. Flynn and Deborah Prothrow-Stith, Individually and in their Official Capacities

CIV. A. No. 89-40031-XX

**United States District Court
for the District of Massachusetts**

Decided December 28, 1989.

MEMORANDUM OF DECISION

ZOBEL, *District Judge.*

The plaintiffs, a class of inmates at the Worcester County Jail and House of Correction, brought this action claiming that conditions at the Worcester jail were unconstitutional and violated statutory and regulatory standards. Most of the plaintiffs' grievances have been addressed by a consent decree signed by all but defendant Prothrow-Stith, Commissioner of the Massachusetts Department of Public Health ("Commissioner"),¹ who moves to be dismissed as a defendant from this case.² She claims that, because Mass. Gen. Laws ch. 111, § 21 (1986) and the associated regulations in 105 Mass. Code. Regs. 451 (1988) do not create in plaintiffs a

¹ The Commissioner is named as a defendant in both her individual and official capacities. Insofar as Ms. Prothrow-Stith is sued in her official capacity, my ruling here applies equally to Mr. David Mulligan who has been appointed Commissioner since this action was begun.

² Plaintiffs correctly point out that the defendant's motion is more properly a motion for judgment on the pleadings rather than a motion to dismiss.

constitutionally protected liberty right, they have failed to state a cause of action under 42 U.S.C. § 1983 (1982). I agree.

The Commissioner is statutorily charged with the responsibility of making rules and regulations governing the health and safety of prisoners.³ Mass. Gen. Laws ch. 111, § 21 (1986). The plaintiffs claim that this responsibility in conjunction with the regulations in 105 Mass. Code. Regs. 451 creates a liberty interest protected by the Fourteenth Amendment. A protected liberty interest "may arise from two sources—the Due Process Clause itself and the laws of the States." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (quoting *Hewitt v. Helms*, 459 U.S. 460, 466 (1983)). A state creates a protected liberty interest by placing substantive limitations on official discretion. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. at 462 (citing *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983)); *Hewitt v. Helms*, 459 U.S. at 472; *Maldonado Santiago v. Velazquez Garcia*, 821 F.2d 822, 827 (1st Cir. 1987); see *Lanier v. Fair*, 876

³ Section 21 of chapter 111 provides:

The department shall make rules and regulations for police station houses, lockups, houses of detention, jails, houses of correction, prisons and reformatories, regarding the care and use of drinking cups and of dishes used for food, the care and use of bedding, appropriate clothing for detainees, the ventilation of the buildings, the minimum plumbing facilities for human habitation, and the general health and safety of the detainee.... [A] copy of such rules as are applicable to jails, houses of correction, prisons or reformatories shall be sent by the department to the proper authorities. Said officials shall enforce said rules.

The commissioner shall, following a public hearing, cause any facility failing to comply with the rules and regulations promulgated under the authority of this section to close until said facility is found to be in compliance and receives written notification from the department to that effect.

F.2d 243, 246 (1st Cir. 1989) ("a prisoner must show that particularized standards or criteria guide the State's decisionmakers.") (citing *Brennan v. Cunningham*, 813 F.2d 1, 6 (1987)); *Parenti v. Ponte*, 727 F.2d 21, 23 (1st Cir. 1984); *Four Certain Unnamed Inmates v. Hall*, 550 F.2d 1291, 1292 (1st Cir. 1977). Procedural guidelines alone will not create a liberty interest. *Hewitt v. Helms*, 459 U.S. at 469-70; *Lanier v. Fair*, 876 F.2d at 247; *Parenti v. Ponte*, 727 F.2d at 24. In order for state regulations to create a protected liberty interest, they must contain "'explicitly mandatory language', i.e., specific directives to the decisionmaker that if the regulations' substantive predicates are present, a particular outcome must follow." *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. at 463; see *Board of Pardons v. Allen*, 482 U.S. 369, 377 (1987); *Hewitt v. Helms*, 459 U.S. at 471-72; *Domegan v. Fair*, 859 F.2d 1059, 1064 (1st Cir. 1988); *Maldonado Santiago v. Velazquez Garcia*, 821 F.2d at 827; *Fiallo v. de Batista*, 666 F.2d 729, 731 (1st Cir. 1981). Imperative language alone is not enough to create a liberty interest; there must be relevant mandatory language requiring the decisionmaker to apply certain substantive predicates. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. at 464 n.4.

At issue here is the last sentence of section 21, which provides that "[t]he commissioner shall, following a public hearing, cause any facility failing to comply with the rules and regulations ... to close until said facility is found to be in compliance." Although this sentence is phrased in the imperative, it is not truly mandatory because the regulations to which it refers leave the Commissioner broad discretion. The procedural regulations, for example, provide that certain actions be taken "[i]f the Commissioner agrees" that conditions warrant such action. 105 Mass. Code Regs.

451.409. Another procedural regulation provides that the Commissioner act a certain way if "the Commissioner believes that conditions observed are so dangerous that a public health emergency may exist." 105 Mass. Code Regs. 451.410. Neither of these regulations impose substantive limitations on the Commissioner's discretion. Moreover, many of the substantive regulations are permissive in that they do not set minimum conditions prison officials must meet. *E.g.*, 105 Mass. Code Regs. 451.330-346. Since these regulations on their face are not mandatory, the Commissioner clearly has discretion to decide whether they have been violated and whether to close the prison based on those violations. In short, although section 21 mandates that the Commissioner close the prison if it does not comply with the rules and regulations, the rules and regulations themselves give the Commissioner latitude in deciding whether there has been compliance.⁴ The statute, therefore, is not mandatory in the sense envisioned by *Hewitt v. Helms* and does not create in plaintiffs a liberty interest protected by the Fourteenth Amendment.

The defendant's motion is granted

⁴ It should be stressed that primary responsibility for enforcement of the regulations rests with the prison authorities, not with the Commissioner. MASS. GEN. LAWS ch. 111, § 21. A liberty right claim based on the Commissioner's failure to enforce the regulations, therefore, is tenuous even apart from the discretionary framework of the regulations.