

**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA**

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE STATE OF OKLAHOMA; THE HONORABLE BRAD HENRY, Governor of the State of Oklahoma, in his official capacity only; THE OKLAHOMA OFFICE OF JUVENILE AFFAIRS; ROBERT E. CHRISTIAN, Executive Director of the Oklahoma Office of Juvenile Affairs, in his official capacity only; THE OKLAHOMA BOARD OF JUVENILE AFFAIRS; LONELLIA L. SIMMONS, Chairperson of the Oklahoma Board of Juvenile Affairs, in her official capacity only; and JIMMY MARTIN, Superintendent of the L.E. Rader Center, in his official capacity only,

Defendants.

Case No. 06-CV-673-GKF-FHM

ORDER

The United States' Motion to Compel Entry Upon Land [Dkt. 68] and the State of Oklahoma's Motion for A Protective Order [Dkt. 86] are before the undersigned United States Magistrate Judge for decision. On June 20, 2007, a hearing was held to address the issues raised by these motions.

The motions relate to the United States' request to "inspect" the L.E. Rader Center. The inspections are to be conducted by the United States' experts and are to include *ex parte* interviews with Rader Center staff and residents. The State of Oklahoma does not object to the "inspection" but seeks the court's protection regarding aspects of the inspection. Prior to the hearing counsel were able to resolve many of the issues relating

to the inspection. Given the somewhat unusual nature of this case, such communication and cooperation between counsel is essential and commended by the Court.

At the hearing counsel for the parties represented that the following issues remained unresolved: 1) whether the USA would be permitted to conduct one or two inspections of the Rader Center; 2) whether the USA would be required to record interviews of staff and residents conducted during the inspection; and 3) whether the USA would be required to pay the Rader Center's cost of providing escorts for the various groups participating in the inspection.¹

Pursuant to Fed.R.Civ.P. 26(c)(2) the court may make any order which justice requires to protect a party or person from undue burden or expense, including that discovery may be had only on specified terms and conditions. The undersigned makes the following order to govern the United States' inspection of the Rader Center.

Number of Inspections of the Rader Center

The United States represented that it has engaged seven different experts to participate in the inspection of the Rader Center. However, only five experts are available to participate during the week of July 16, 2007. The other two experts are available during the week of August 2, 2007. There is no week when all seven experts are available. The United States represented that the experts operate independently and will address different areas of the Rader Center operation. The State of Oklahoma objects to accommodating

¹ There are also unresolved issues concerning the scheduling logistics of the inspections and interviews of youth represented by private counsel. Counsel indicated that those issues would likely be resolved between the parties without court intervention.

more than one inspection, citing the cost of the additional inspection and disruption to the operation of the institution.

Although it presents a close case, based on the information presented the Court will permit the United States to conduct two inspections. In reaching this conclusion the Court accepts the representations by Plaintiff's counsel that they used their best efforts to avoid the need for multiple inspections and that they will continue to use their best efforts to reduce the burden and expense of the inspections on the Rader Center. The Court has also considered the importance of the inspections to the United States' case.

The United States will be permitted to conduct inspections of the Rader Center during the week of July 16, 2007, and during the week of August 2, 2007, under the terms set out herein or otherwise negotiated by the parties. As represented by the United States at the hearing, the August 2 visit will involve only two experts and will be conducted as expeditiously as possible and with as little overlap of the earlier visit as possible.

Recording of Interviews

The parties have agreed that the United States' experts will conduct interviews of Rader Center residents and staff in order to enable them to form their opinions. The State of Oklahoma has requested that all interviews conducted during the inspection be recorded. The State reasons that the substantive content of interviews will become discoverable in the event that the interviews form the basis of an opinion offered by an expert. The United States objects to recording the interviews and argues that there is no legal basis for requiring it to create work product. The United States points out that the State of Oklahoma can obtain the same information by interviewing the witnesses itself and that the experts' notes and recollection of the interviews at deposition will provide a sufficient record.

The inspection is being conducted under the authority of Fed.R.Civ.P. 34 which does not specifically address whether *ex parte* interviews are permitted under the rule or if permitted whether they should be recorded. These issues are within the court's discretion. The United States' inspection and *ex parte* interviews with staff and residents are being permitted because, as a practical matter, the inspection is a reasonable use of the parties' time and resources to obtain information relevant to the case in a manner consistent with the needs of the case, the importance of the issues at stake in the litigation and the importance of the proposed discovery in resolving the issues. Fed.R.Civ.P.26(b)(2)(C)(iii). In the same vein, in view of the fact that the interviews are being accommodated by the State of Oklahoma and in view of the likelihood that some of those interviews will become discoverable to the extent they form the basis of expert opinions, the Court sees recording the interviews as a reasonable use of the parties' resources to ensure that the substance of the interviews is accurately preserved.² Furthermore, the recording of interviews will not result in any invasion of attorney thought processes or work product because the only way a recorded interview will become discoverable is if the interview is relied on by an expert to form the basis of an opinion offered in this case. There is, therefore, no reasonable basis for the United States to object to recording the Rader Center interviews. There is no potential for prejudice to the United States' case in preserving an accurate record of the interviews to aid in the search for the truth in this case.

² The Court views the expert interviews with Rader Center staff and residents to be conceptually similar to other examinations or testing performed on the subject of a lawsuit by experts. In such situations the court has the discretion to require the testing to be recorded, or to have an opponent's expert or attorney present. Requiring the United States to record the Rader Center interviews is minimally intrusive and burdensome yet serves the truth-finding role of this litigation.

The United States is hereby directed to electronically record all interviews of Rader Center staff and residents conducted during the inspections authorized by this Order.

Reimbursement for Cost of Escorts During Inspections

The United States' July discovery visit will involve approximately twelve people who will divide up into five groups to conduct interviews and inspect the facility. The August visit will involve two such groups. The Court is persuaded that since the Rader Center is a maximum security facility, it will be necessary for each group to be escorted throughout the time spent at the facility. The State has represented that it intends to use police or personnel not otherwise scheduled to serve as escorts at a cost of \$10 to \$12 per hour.

The Court finds that the cost of the escorts is a necessary expense, but an undue burden for the State of Oklahoma to bear to accommodate the discovery needs of the United States. Given the number of groups visiting the facility and the duration of the visits it is appropriate to shift the cost of providing escorts at the rate of \$10 to \$12 per hour to the groups visiting the Rader Center on behalf of the United States as permitted by this Order.

CONCLUSION

The United States' Motion to Compel Entry Upon Land [Dkt. 68] and the State of Oklahoma's Motion for A Protective Order [Dkt. 86] are GRANTED in PART and DENIED in PART, as specified herein.

SO ORDERED this 22nd day of June, 2007.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE