

LAW OFFICES OF
RICE, VOLLAND AND GLEASON
A PROFESSIONAL CORPORATION

WILSON A. RICE
PHILIP R. VOLLAND
SHARON L. GLEASON
R. SCOTT TAYLOR

December 28, 1993

211 H STREET
ANCHORAGE, ALASKA 99501
(907) 276-5231
FAX (907) 278-6328

Ed Koren
National Prison Project
1875 Connecticut Avenue N.W., #410
Washington, D.C. 20009

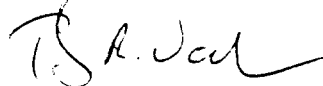
Re: Cleary

Dear Ed:

I realized I had forgotten to send you Judge Hunt's decision and a copy of our motion for reconsideration. Much to our surprise, Judge Hunt recently granted reconsideration and has set a schedule for the state to file additional briefing. (Under Alaska Rules, a court cannot grant the relief requested on reconsideration without allowing the opposing party an opportunity to brief the issue as there is no opposition allowed to a motion to reconsider.) I will keep you posted.

Sincerely,

RICE, VOLLAND AND GLEASON, P.C.



Philip R. Volland

PRV/sf
Enclosure

court also overlooked evidence that the alleged changed circumstances were foreseen and should have been anticipated by the Department. Finally, the court failed to consider the implications of granting permanent relief in response to merely transitory changes in conditions.

A. FACTUAL CONDITIONS HAVE NOT SIGNIFICANTLY CHANGED

Based on affidavits of Danith Watts, then Director for the Division of Administrative Services, the court found that the Department's operating budget for FY '93 was reduced by "approximately \$8 million (\$4M in overall executive branch reductions + \$3.5M in unfunded personnel costs + \$.5M legislative unallocated reduction)." Decision and Order at p. 28. "Reduction" is a relative term, however, and Ms. Watts' affidavits provide no reference point. Summaries of Appropriations prepared by the Legislative Finance Division indicate that the Department of Corrections' operating budget received \$102.7 million in total authorized funds in FY '92 and a \$10.8 million supplemental, for a combined total of \$113.5 million. The total authorized operating budget for the Department in FY '93 was \$111.2 million. After the Motion for Relief from Judgment was filed, the Department received an FY '93 supplemental of \$5.5 million¹, for a total FY '93 operating budget of \$116.7 million. See Exhibit 1. Thus, the Department's FY '93 operating budget actually increased more than

¹ The FY '93 supplemental specifically included funds to re-open Wildwood Correctional Center.

\$3 million over FY '92.²

The finding of a significant increase in inmate population is equally illusory. Affidavits of Allan Cooper, Deputy Director of the Division of Institutions, alleged an unexpected increase of 176 inmates in the six months ending December 1992, compared to an increase of only 21 inmates the prior six months. Decision and Order at p. 42. Of the 176 inmates, 40 were in community residential centers, not constrained by the population capacities specified in Section VIII of the FSA. Cooper Aff'd of January 8, 1993 at p. 4. Furthermore, the remaining increase appears to have been no more than a fleeting or seasonal fluctuation. Comparison of the Department's "Instate Inmate Counts" indicates that the average daily count for all institutions has actually declined over the last six months (from an average 2659 in April, 1993, to 2649 in October, 1993). See Exhibits 2 & 3.

By the time of the court's Decision and Order of October 25, 1993, the Department was not laboring under a significant budget reduction or an unusual increase in inmate population. Upon reconsideration, the court must conclude that the Department has not met its threshold burden of establishing a sufficient change in circumstances to justify modification of the FSA.

B. CHANGES IN FUNDING AND INMATE POPULATION WERE ANTICIPATED

In finding that the Department did not foresee an FY '93 budget cut, the court overlooked the fact that \$7.5 million of the

² Exhibit 1 also indicates that the Department's FY '94 operating budget has already been funded at the FY '93 level (\$116.2M), prior to any supplemental appropriation.

alleged \$8 million reduction was attributed to negotiations within the executive branch. See Aff'd of Danith Watts. Corrections is a department within the executive branch. The Department cannot claim that a legislative appropriation is unanticipated when the legislature largely approves the budget request submitted by the governor. The alleged "reduction" appears to have been the difference between the Department's original requests and its resulting budget from OMB. The court's finding that the agency has "reasonable expectations regarding the likely level of operational funding to be appropriated" is not implicated here, where the alleged reduction comes not from the legislature, but from the executive branch itself. Granting relief here truly would hand the Department the key to avoiding its obligations under the FSA.

In finding that a six-month increase in the inmate population was not foreseen, the court overlooked the fact that a growing inmate population and overcrowding have been a focus of this litigation for a decade. As early as 1985, this court found the Department's "prison population projections for the near future, and plans to accommodate population increases" as "unreliable."³ The statewide prison population increased an average of 5% per year between 1985 and 1991. See Exhibit 4. The Department's own consultant has advised that its no-growth population forecast was inappropriate and inconsistent with historical trends. See Exhibit 5. Even the Department has

³ See Memorandum Decision and Findings of Fact and Conclusions of Law, dated March 15, 1985.

concluded that its population forecast was unreliable. Id. Given historical trends and its unreliable forecasting methods, the Department cannot legitimately claim that a 5.6% increase in incarcerated inmates over a six-month period is an unforeseen and unanticipated significant change in circumstances.

C. TRANSITORY CHANGES DO NOT WARRANT PERMANENT MODIFICATION

The changed circumstances alleged by the Department are transitory in nature. Inmate populations are constantly in flux and budgets are approved twice yearly. In granting the Department's motion, the court failed to consider the impropriety of making permanent modifications in the FSA to address temporary changes in circumstances. As appears to have happened here, the Department can meet its operational needs with a supplemental appropriation, inmate population increases can even out over time, but the modifications of bargained-for rights and conditions decreed in the FSA are forever. If the FSA is to have any lasting finality and integrity, it must not be permanently modified in response to transparent, foreseen, or temporary changes in conditions. For these reasons, Plaintiffs respectfully request this court to reconsider its Decision and Order of October 25, 1993, and deny the Department's motion for relief from judgment.

DATED at Anchorage, Alaska this 4th day of November, 1993.

RICE, VOLLAND AND GLEASON, P.C.
Attorneys for Plaintiffs

By Philip R. Volland
Philip R. Volland