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**FILED**  
 U.S. DISTRICT COURT  
 EASTERN DISTRICT OF ARKANSAS

FEB 27 1995

AMES W. MCCORMACK, CLERK  
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IN THE UNITED STATES DISTRICT COURT  
 EASTERN DISTRICT OF ARKANSAS  
 PINE BLUFF DIVISION

ERNEST SMITH and JIMMY RUDD

PLAINTIFFS

v.

PB-C-93-731

LARRY NORRIS, Former Acting Director and Current Director of the Arkansas Department of Correction; WILLIS H. SARGENT, Former Warden of the Cummins Unit of the Arkansas Department of Correction; MAJOR A.J. HALL, Chief of Security; LIEUTENANT R.R. WOOD, Shift Supervisor; J. CLEVELAND, Guard; JOHN HOOD, Officer; JAMES BANKS, Classification and Assignment Officer; and DALE REED, Warden, Cummins Unit of the Arkansas Department of Correction

DEFENDANTS

ORDER

Before the Court is defendants' Motion for Stay of District Court's Judgment and Order Pending Review by the Eighth Circuit Court of Appeals. On February 23, 1995, the Court, in accordance with the terms of its Memorandum Opinion, entered an order of partial summary judgment on plaintiff Smith's claim for damages under 42 U.S.C.A. § 1983 (West 1994), and a Declaratory Judgment and Injunction in connection with plaintiff Rudd's challenge to the constitutionality of the prison conditions maintained at the open barracks of the Cummins Unit operated by the Arkansas Department of Correction. This injunction requires that:

[D]efendants shall, starting no later than February 28, 1995, station at least two Correction Officer I's (or higher ranking officers), inside open barracks 5, 6 and 8 on each of the twelve hour night shifts and shall make commensurate staffing assignments during the twelve-hour day shifts, depending upon the population of inmates actually located in such barracks at any time during said daylight shift. These requirements

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are in addition to the staffing and procedures presently employed, but defendants may use their own judgment in deciding whether to use the newly assigned officers stationed inside the barracks to perform the "Counts" and other duties heretofore assigned to other officers. Defendants shall document and record all entries and exits of any of its personnel into or out of the open barracks.

Although defendants' motion papers indicate that they are seeking "a stay of its judgments and injunction," which could be read to suggest that they are seeking a stay of the Court's entry of partial summary judgment on Mr. Smith's damage claim, the Court believes that defendants' motion, when viewed as a whole, is properly construed as being targeted at the declaratory and injunctive relief awarded in connection with Mr. Rudd's claims for relief.<sup>1</sup>

The Court plainly has the authority to stay its award of injunctive and declaratory relief, Fed. R. Civ. P. 62(c). In determining whether to award such a stay, the Court should consider the following factors:

- (1) whether the stay applicant[s] ha[ve] made a strong showing that [they are] likely to succeed on the merits;
- (2) whether the

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<sup>1</sup> Although the Court has granted Mr. Smith summary judgment of the issue of liability in his § 1983 claim, the issue of damages remains to be determined. Defendants' motion papers do not indicate whether they have sought to take an interlocutory appeal from the Court's denial of their qualified immunity claim raised in connection with Mr. Smith's cause of action under § 1983, and a copy of their notice of appeal has not been yet been provided to the Court. As this would be the only basis for the Court to consider staying its order of partial summary judgment in favor of Mr. Smith (given that this order of partial summary judgment is not yet a final, appealable order), the Court will not now consider staying this order. Defendants, of course, remain free to file a supplemental motion with the Court, with appropriate documentation and supporting argument, should they desire to do so.

stay applicant[s] will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987). Ultimately, however, the decision whether to grant such a stay is one committed to the Court's sound discretion. See Fed. R. Civ. P. 62(c); Sweeny v. Bond, 669 F.2d 542, 547 (8th Cir.), cert. denied, 459 U.S. 878 (1982).

The Court believes that the above-mention factors strongly counsel against granting defendants' stay application. First, the Court cannot conclude that defendants have made a strong showing that they will likely prevail on appeal with respect to the declaratory and injunctive relief awarded. Given the tenor of the Court's final Memorandum Opinion entered in this case, this conclusion should hardly be surprising to defendants. In support of their stay application, defendants argue that they "have continuously maintained that they do not have sufficient staff in place to put two correctional officers in the open barracks." The Court will not recount the substance of its prior opinion. The short answer to defendants' contention is that if they desire to keep prisoners housed in the open barracks, the Constitution requires them to implement the staffing changes outlined by the Court. Indeed, as the Court explained in its prior opinion, given that the Arkansas Legislature, at the request of then Governor Clinton, appropriated monies in 1991 and 1992 which were intended to be used to implement the very

staffing changes ordered by the Court, defendants claim (not raised until trial) that they declined to do so in light of more pressing security needs is, at best, disingenuous. The fact that defendants have continued to rely upon this factual claim in the present application -- a claim which this Court has already discounted -- suggests that they will seek to relitigate this factual issue before the Court of Appeals. Indeed, defendants themselves have indicated that they intend to seek "resolution of the facts by a higher Court." While defendants' are free to do so, the Court does not believe that such an argument will provide defendants with a substantial likelihood of success on the merits of their appeal. See generally Anderson v. Bessemer City, 470 U.S. 564, 573-74 (1985) (district court's findings of fact must be respected on appeal unless they are "clearly erroneous"); Stanislowski v. Upper River Servs., Inc., 6 F.3d 537, 540 (8th Cir. 1993) (same).

The Court also notes that defendants have argued that "even if the Separate defendants had every position filled at the Cummins Unit, which pursuant to the uncontroverted evidence, has never occurred, the Separate Defendants would not be able to place two correctional officers into the open barracks during the daytime hours." This statement totally misconstrues the terms of the Court's injunction. Under the terms of the Court's injunction, defendants will be required to place correctional officers inside the open barracks during the daytime hours only in the unusual situations when prisoners are housed in these

barracks at that time. Since the evidence presented to the Court indicates that, during the daytime, prisoners are normally outside the barracks, the Court believes that this requirement will come into play infrequently. Moreover, since the number of any such guards assigned to the open barracks during the daytime will be a function of the number of "inmates actually located in such barracks at any time during said daylight shift," the Court believes that this requirement will not severely burden the day-to-day operations of the Cummins Unit. In any event, given the present conditions that obtain in the open barracks, the Court believes that this requirement is necessary.

The Court also believes that the interests of all those concerned with this proceeding, namely the residents of the open barracks, and the general public, counsel against defendants' stay request. As the Court has already spelled out in great detail, the present conditions of the open barracks pose an unacceptable risk of danger to the inmates housed therein, and thereby serve to deny them their constitutional rights secured by the Eighth Amendment. Absent a truly compelling reason to the contrary, the Court believes that it is simply unacceptable to subject these persons to the continued deprivation of their constitutional rights. Moreover, the Court is satisfied that the public interest weighs in favor of denying defendants' stay request. The public has a compelling interest in insuring that persons in the custody of their state's penal institutions are housed under conditions that comply with the Constitution. This

interest stems not only from the noble end of insuring that the public's official representatives honor the Constitution, but also from the more pragmatic reason that the public fisc will be at risk should the State deliberately fail to do so. The Court believes that any potential injury to defendants is far outweighed by the unreasonable risk of serious harm to those persons in the open barracks, and to the public interest as well, that will continue to exist if defendants' stay application were to be granted.

Accordingly, IT IS THEREFORE ORDERED that defendants' Motion for Stay of District Court's Judgment and Order Pending Review by the Eighth Circuit Court of Appeals be, and it is hereby, DENIED.

Dated this 27th day of February, 1995.

  
Samuel Thomas Cueva  
UNITED STATES DISTRICT COURT

*Arkansas Democrat-Gazette*  
2/28/95

# Eisele won't hold his order for more guards at Cummins

BY PATRICIA MANSON  
Democrat-Gazette Federal Reporter

A federal judge Monday refused to temporarily block an order requiring the Arkansas Department of Correction to beef up security.

U.S. District Judge G. Thomas Eisele's move means that prison officials must place officers inside Barracks 5, 6 and 8 at the Cummins Unit whenever inmates are present. Those are the only open barracks at Cummins that do not already have officers stationed in them.

Although Eisele's order did not go into effect until today, prison officials began putting the additional guards in place early. Cummins is located near Varner about 28 miles southeast of Pine Bluff.

"We began doing that last night, so we're in compliance," Correction Department spokesman Alan Ables said Monday.

Eisele ordered the increased security in a decision issued last Thursday in a lawsuit brought by inmates Ernest Smith and Jimmy Rudd.

Smith filed suit after being critically wounded in a 1992 attack by another prisoner wielding a razor-sharp hobby knife. Rudd later joined the suit as a plaintiff.

In Thursday's decision, Eisele said the Correction Depart-



Judge G. Thomas Eisele

ment violated prisoners' constitutional rights by failing to protect them from violence at the hands of fellow inmates.

Eisele said prison officials failed to comply with staffing requirements imposed in a long-running lawsuit over prison conditions called the Finney case.

Eisele dismissed the 13-year-old Finney case in 1982 after finding that the Arkansas prison system had evolved from what another judge called "a dark and evil world" into a mod-

el institution.

In Thursday's opinion, Eisele said that even if Correction Department officials were obeying Finney, that case's requirements were no longer enough to protect prisoners from cruel and unusual punishment.

On Friday, Correction Department officials filed a notice that they planned to appeal Eisele's decision to the 8th U.S. Circuit Court of Appeals at St. Louis.

The officials also asked Eisele to stay his decision while that appeal is pending.

In a six-page order Monday, Eisele refused to grant the stay.

Pointing out that the Arkansas General Assembly in 1991 added 92 positions at the Cummins Unit, Eisele described the Correction Department's argument that it does not have sufficient staff to place officers in the open barracks as "disingenuous."

Eisele also said that Arkansans have a "compelling interest" in seeing that state prisons comply with the U.S. Constitution.

"This interest stems not only from the noble end of insuring that the public's official representatives honor the Constitution," Eisele wrote, but also from "the more pragmatic reason" of avoiding costly lawsuits.

3/1/95

## State will fight to finish on prison-guards order

BY PATRICIA MANSON  
Democrat-Gazette Federal Reporter

Arkansas officials are willing to go to the U.S. Supreme Court to fight a federal judge's order to beef up prison security, Attorney General Winston Bryant said Tuesday.

Bryant said officials will ask the high court to consider the case if the 8th U.S. Circuit Court of Appeals at St. Louis rejects the state's argument.

In the meantime, Bryant said, officials will ask the 8th Circuit to stay U.S. District Judge G. Thomas Eisele's order for increased security.

"We think the judge is incorrect," Bryant said. "We respect his position, but we think it is incorrect."

Bryant also said the state has always made a "good-faith" effort to comply with court orders concerning prison security, but has been hampered by high personnel turnover.

The turnover rate for officers at the Cummins Unit near Varner is 20 percent a year, according to the attorney general's office. That climbs to 37 percent for the lowest-grade officers, whose duties include guarding the open barracks.

Last week, Eisele directed the Arkansas Department of Correction to place officers inside Barracks 5, 6 and 8 at Cummins whenever inmates are present. Those are the only open barracks at Cummins that do not already have officers stationed in them.

Eisele said the Correction Department violated prisoners' constitutional rights by failing to protect them from violence at the hands of fellow inmates.

Eisele issued the order in a lawsuit filed by inmate Ernest Smith after he was critically wounded in a 1992 attack by another prisoner wielding a razor-sharp hobby knife. Inmate Jimmy Rudd later joined the suit as a plaintiff.

Eisele on Monday refused to stay his order.

The additional guards were in place Sunday, Correction Department spokesman Alan Ables said.