

APPOINTMENT SPECIAL MASTER

AMERICAN CIVIL LIBERTIES UNION FOUNDATION

BRIEF BANK

NATIONAL PRISON PROJECT

May 29, 1996

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Clerk
U.S. District Court
230 North First Avenue
Phoenix, AZ 85025

Re: Casey v. Lewis
C.A. No. 90-0054
C.A. No. 91-1808

Dear Clerk:

Enclosed for filing are the original and one copy of Plaintiffs' Opposition to Defendants' Motion to Modify Referral Orders Regarding Special Masters and accompanying memorandum, along with a certificate of service on opposing counsel.

Thank you for your attention to this matter.

Sincerely,



Stuart H. Adams, Jr.
Attorney for Plaintiffs

Enc:

cc: Daniel Struck
Alice Bendheim
Leslie Cohen
Janet Bliss

Casey v. Lewis



PC-AZ-004-007

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

FLETCHER CASEY, et al.,
Plaintiffs,

v.

SAMUEL A. LEWIS, et al.,
Defendants.

CIV. 90-0054 PHX CAM
(Lead)

CIV. 91-1808 PHX CAM
(Consolidated)

CHARLES L. ARNOLD, guardian
ad litem on behalf of H.B.,

Plaintiff,

v.

SAMUEL LEWIS, et al.,
Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION
TO MODIFY REFERRAL ORDERS REGARDING SPECIAL MASTERS

Plaintiffs, by and through counsel, oppose Defendants' Motion To Modify Referral Orders Regarding Special Masters, dated May 10, 1996. The grounds for plaintiffs' opposition are set forth in the accompanying memorandum.



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Date: May 29, 1996

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ad litem on behalf of H.B.,)
)
 Plaintiff,)
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 v.)
)
 SAMUEL LEWIS, et al.,)
)
 Defendants.)

MEMORANDUM IN SUPPORT OF PLAINTIFFS'
OPPOSITION TO DEFENDANTS' MOTION TO
MODIFY REFERRAL ORDERS REGARDING SPECIAL MASTERS

I. INTRODUCTION

On December 12, 1995 and December 15, 1995, this Court appointed Janet A. Bliss, Esq., as Special Master for medical care and Dr. Cassandra F. Newkirk as Special Master for mental health care respectively in this class action case pursuant to Fed. R. Civ. P. 53.¹ The Special Masters were appointed to monitor and report to the Court on defendants' compliance with the medical and mental health care remedial orders in this case. The Order of Reference [hereinafter "Referral Order"] justified the appointment of Ms. Bliss as follows:

There are several reasons that this court considers a limited appointment is necessary. First, this litigation has a lengthy history and the issues regarding the medical and dental care systems are complex. See U.S. v. Suquamish Indian Tribe, 901 F.2d 722 (9th Cir. 1990). Second, due to the long history of noncompliance by this defendant in this case² and in other similar cases³ this court cannot be assured that the constitutional violations will be eliminated. See National Org. for Reform of Marijuana Laws v. Mullen, 838 F.2d 536 (9th Cir. 1987); Walker v. HUD, 734 F. Supp. 1231 (N.D. Tx. 1989); Feliciano v. Barcelo, 672 F. Supp. 591 (D. Puerto Rico

¹ Ms. Bliss was appointed for a limited duration of twelve months. Referral Order dated December 12, 1995; Dr. Newkirk was appointed for a limited duration of eighteen months upon the consent of the parties. Referral Order dated December 15, 1995.

² "The defendant blatantly refused for six months to comply with the access to the courts injunction." Referral Order at 13-14 n.13.

³ See Hook v. Arizona, CIV 73-97 and Gluth v. Kangas, CIV 84-1626. Referral Order at 13-14, n.14.

1986); Hoptowit v. Ray, 682 F.2d 1237 (9th Cir. 1982).

Referral Order dated December 15, 1995 at 13-14.

The Referral Order justified the appointment of an expert/Special Master for mental health as follows:

The parties . . . have been unable to resolve their differences and have submitted different suggestions for injunctive relief and supplemented those suggestions. It is clear at this time that the parties will be unable to formulate the injunctive relief without the assistance of an expert/Special Master. This Court has given the parties at least two years to formulate their own injunctive relief. However, despite the many warnings of the Court that it would appoint an expert/Special Master if they could not formulate injunctive relief, the parties have failed to come forward with such stipulated relief.

Referral Order dated, January 23, 1995 at p.4-5.⁴

The referral orders provide that the full costs associated with the Special Masters are to be borne by the defendants; the referral orders also authorize the Special Masters to have ex-parte communications with prisoners and Arizona Department of Corrections Staff.⁵

⁴ Dr. Newkirk is the third of three Special Masters for mental health care in this case. See Referral Order dated December 15, 1996 and Referral Order dated August 2, 1995.

⁵ Referral Order dated January 23, 1995 at p.11-13 (order appointing special master for mental health); Referral Order, dated December 15, 1995 at pp.4-6 (order appointing special master for mental health); Referral Order dated December 12, 1995 at pp. 16-19 (order appointing special master for medical care).

The Prison Litigation Reform Act of 1995 [hereinafter, PLRA]⁶ was signed into law and took effect on April 26, 1996. Defendants now move for a modification of those provisions of the referral orders regarding the payment of the Special Masters and the scope of their duties regarding ex-parte communications. They argue that a modification is required because the PLRA is inconsistent with the current powers of the Special Masters to engage in ex-parte communications. Motion at 4.

For the reasons presented below, defendants' motion for modification should be denied.

II. A MODIFICATION OF THE REFERRAL ORDERS IS NOT REQUIRED BECAUSE OF THE ENACTMENT OF PLRA

In Rufo v. Inmates of Suffolk County Jail, 502 U.S. 367 (1992), the Supreme Court set forth the requirements that a party seeking modification of a consent decree must meet, as follows:

Rule 60(b)(5) provides that a party may obtain relief from a court order when "it is no longer equitable that the judgment should have prospective application," not when it is no longer convenient to live with the terms of a consent decree. Accordingly, a party seeking modification of a consent decree bears the burden of establishing that a significant change in circumstances warrants revision of the decree. If the moving party meets this standard, the court should consider whether the proposed modification is suitably tailored to the changed circumstances.

A party seeking modification of a consent decree may meet its initial burden by showing

⁶ The PLRA, enacted as part of the 1996 budget bill as Public Law No. 104-134, amends the Criminal Justice Act, 18 U.S.C. § 3626. Section 802 deals specifically with remedies for prison conditions. Throughout this brief, plaintiffs have cited to the relevant PLRA section as § 802, rather than 18 U.S.C. § 3626.

either a significant change in factual conditions or in law.

Rufo, 502 U.S. at 383 (footnote omitted). The defendants rely on the second prong of the Rufo standard; that is, they claim they have met their initial burden by showing a significant change in law. Id. Motion at 4. However, defendants have failed to meet this initial burden because the PLRA is not a significant change in law within the meaning of Rufo.

In order to obtain modification based on an alleged change in law, the party seeking modification must first establish either that the remedial orders impose an obligation that has been made impermissible under federal law, in which case the remedial orders must be modified; or that a change in law has made legal what the decree was designed to prevent, in which case modification may be warranted. Rufo, 502 U.S. at 388. The defendants rely on the former prong. Motion at 4. Defendants' reliance is inapposite: the PLRA does not render defendants' obligations under the Special Master referral orders in this case impermissible. Indeed, as set forth below, Section 802 of the PLRA does not apply to the referral orders.

A. The PLRA Does Not Apply to Special Masters Appointed Prior to the April 26, 1996 Effective Date

1. Introduction

Although § 802(b)(1) provides that this section applies to prospective relief granted before its date of enactment, the section is silent as to whether the provisions affecting the appointment of special masters are to be applied retroactively.

Accordingly, the Court is required to determine under general principles of statutory construction whether the section should apply to existing appointments of special masters. Under those principles, retroactive application must be denied.

2. The Appointment of a Special Master Does Not Constitute Relief

Congress sought to apply retroactively only the provisions of PLRA that relate to 'prospective relief.' According to § 802(b)(1), the PLRA "shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of the enactment of this title." § 802(b)(1). 'Prospective relief' is defined in PLRA § 802(g)(7) as "all relief other than compensatory monetary damages." This definition, in conjunction with the structure of the PLRA, simply does not encompass the appointment of a special master. The appointment of a special master is not relief at all, let alone prospective relief. Consequently, § 802(b)(1) does not require retroactive application of the special master provisions.

As a matter of statutory interpretation, the appointment of a special master does not constitute relief under PLRA.⁷ The PLRA is organized into sections that address "Requirements of Relief," "Prospective Relief," Preliminary Injunctive Relief," and "Termination of Relief," among others. The section that addresses

⁷ Construing PLRA to hold that the appointment of a special master is not a form of prospective relief is consistent with determinations that appointment of a special master does not constitute the granting of an injunction. See National Org. for Reform of Marijuana Laws v. Mullen, 828 F.2d. 536, 540-41 (9th Cir. 1987); Thompson v. Enomoto, 815 F.2d 1323, 1327 (9th Cir. 1987).

special masters is labelled separately, and is not subsumed into any of the other sections. § 802(f). Moreover, § 802(f) deliberately distinguishes the term 'special master' from the term 'relief,' using the two concepts as follows:

In no event shall the appointment of a special master extend beyond the termination of the relief... [and a special master] shall be relieved of the appointment upon the termination of the relief.

§ 802(5); § 802(6)(D).

The term of a special master thus is considered separate and apart from the term of the relief.

3. The Language of PLRA § 802(f) on Special Masters Is Prospective, Not Retroactive

Throughout the section of PLRA regarding special masters, the language is clearly prospective. For example, § 802(f)(1)(A) provides that "the court may appoint a special master ..."; § 802(f)(2)(A) provides that "the court shall request" a list of five special master candidates from the parties, from which each party "shall have the opportunity to remove" candidates according to § 802(2)(B), and "the court shall select the master from the persons remaining on the list." § 802(2)(C).

The PLRA does not address, and clearly does not mandate, the termination or modification of special masters appointed prior to the passage of the act. Indeed, §802(f)(B) states, "[t]he court shall appoint a special master under this subsection..." which reflects the prospective application of the special master provisions. PLRA § 802(f)(B)(emphasis added). Similarly, §802(f)(4) specifies "the compensation to be allowed to a special

master under this section." § 802(f)(B) (emphasis added).⁸ This distinction is repeated again in §802(f)(5), "[a] special master appointed under this subsection" has limited powers. §802(f)(5) (emphasis added). The PLRA definition of the term special master, designed to encompass all special masters under Rule 53 regardless of the title, does not conflict with this analysis:

any person appointed by a Federal court pursuant to Rule 53 of the Federal Rules of Civil Procedure or pursuant to any inherent power of the court to exercise the powers of a master, regardless of the title or description given by the court.

§ 802(g)(8).

Ms. Bliss and Ms. Newkirk were not appointed pursuant to PLRA § 802(f); their appointment took effect in mid-December 1995, long before the PLRA was signed, and was formalized under the Order of Reference on April 24, 1996. Moreover, they were not selected in the manner prescribed by § 802(f) and their duties and responsibilities are not circumscribed in line with the PLRA. Inasmuch as the Special Master was not appointed under this

⁸ Section 802(f)(4) provides in full as follows:

The compensation to be allowed to a special master under this section shall be based on an hourly rate not greater than the hourly rate established under section 3006A for payment of court-appointed counsel, plus costs reasonably incurred by the special master. Such compensation and costs shall be paid with funds appropriated to the Judiciary.

§ 802(a)(f)(4).

Since Ms. Bliss and Ms. Newkirk were appointed prior to the effective date of the PLRA, this provision does not affect the mandate of the Order of Reference that requires the defendants to pay their compensation and costs.

subsection, her compensation and costs need not be paid by the Court. Instead, the defendants must pay pursuant to the Order of Reference which clearly requires them to deposit funds for this purpose.⁹ Consequently, the Orders of Reference, requiring the defendants to pay the compensation and costs associated with the Special Masters, are still in effect and the current obligations of the parties are unchanged by the passage of PLRA. Accordingly, whether the PLRA provisions regarding special masters must be applied retroactively must be determined.

4. Congress Did Not Intend to Apply Retroactively the Special Master Provisions of PLRA

The Supreme Court recently reiterated the longstanding principle that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." Landgraf v. USI Film Products, 114 S.Ct. 1483, 1497 (1994); see also Armbruster v. Unisys Corp., 32 F.3d 768, 771 n.3 (3d Cir. 1994); Bishop v. Okidata, 864 F.Supp. 416, 420 (D.N.J. 1994). The Court in Landgraf formulated the "clear statement rule" to guide lower courts in determining whether to apply federal statutes retroactively:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains

⁹ See Referral Order dated December 12, 1995 (appointing Ms. Newkirk; Referral Order dated January 23, 1995 (appointing Dr. Rundle) at 12-13; Referral Order dated December 15, 1995 (appointing Ms. Bliss) at 17-19.

no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.

Landgraf, 114 S.Ct. at 1505.

Because there is no expression of congressional intent that the special master provisions of the PLRA, as distinct from the provisions of the PLRA concerning prospective relief, be applied retroactively, the rules in Landgraf apply. The Referral Orders were designed to ensure the enforcement of the remedial orders. The Special Masters' duties pursuant to the Referral Orders require that they evaluate the defendants' compliance with the terms of the remedial orders; the extent of substantive relief awarded to the plaintiffs is to be informed by the Special Master's findings. Thus if the PLRA provisions on special masters are applied retroactively, the plaintiffs' substantive rights would be impaired by the disruption in enforcement of the comprehensive relief ordered regarding medical and mental health care in this case. The Court should follow the clear statement rule set forth in Landgraf and presume that the special master provisions apply prospectively.

III. RETROACTIVE APPLICATION OF THE SPECIAL MASTER PROVISIONS OF PLRA WOULD RAISE CONSTITUTIONAL PROBLEMS

According to fundamental principles of statutory construction,¹⁰ the Court should avoid interpreting PLRA so as to raise serious constitutional questions.¹¹ Retroactive application of the PLRA provisions on special masters would also raise serious questions as to the potential conflict with the Rules Enabling Act. The Rules Enabling Act provides a careful procedure involving the Supreme Court and Congress for all changes in the Federal Rules of Civil Procedure, including Rule 53, and specifically provides that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." Accordingly, PLRA and the Rules Enabling Act are best harmonized by a determination that the special master provisions of PLRA are not in effect until they have been adopted pursuant to the process set forth in 28 U.S.C. §§ 2072-2074. Cf. Griffith Co. v. National Labor Relations Bd., 545 F.2d 1194, 1197 n.3 (9th Cir. 1976) (federal statutes are superseded by conflicting federal rules

¹⁰ St. Martin Lutheran Evangelical Church v. South Dakota, 451 U.S. 772, 780 (1981).

¹¹ Plaintiffs submit that the provisions on special masters, if applied retroactively, are unconstitutional on grounds including separation of powers, the Equal Protection Clause and the Due Process Clause. If the Court finds Congressional intent to invalidate existing masterships under PLRA and believes that it must decide the constitutional issues, plaintiffs request an opportunity for separate briefing on these issues.

pursuant to § 2072), cert. denied, 434 U.S. 854.¹² Particularly because PLRA fails to show a clear intent to effect an implied repeal of the Rules Enabling Act, § 802(f) regarding special masters should not be given effect until the Supreme Court promulgates it pursuant to the Rules Enabling Act.

Beyond the Rules Enabling Act, retroactive application of PLRA would tread on the Court's inherent power under Article III to appoint special masters and "provide [itself] with appropriate instruments required for the performance of [its] duties," such as "persons unconnected with the court to aid judges in the performance of specific judicial duties." Ex parte Peterson, 253 U.S. 300, 312 (1920); Eash v. Riggins Trucking Inc., 757 F.2d 557, 563 (3d Cir. 1985). By shifting the costs of special masters to the judiciary, § 802(f)(4) would also jeopardize the independence of the courts by giving them a financial stake in the outcome of cases. Such an arrangement would disrupt the separation of powers established in the Constitution, which "commands that the independence of the Judiciary be jealously guarded, and provides clear institutional protections for that independence." Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 458 U.S. 50, 51 (1982) (Brennan, J., with three Justices joining and two Justices concurring).

¹² A recent commentator noted the historical importance and centrality of the Rules Enabling Act, reflecting the courts' inherent powers over procedure. See Mullenix, Judicial Power and the Rules Enabling Act, 46 Mercer Law Rev. 733, 747-48 (1995).

Retroactive application of § 802(f) would disrupt the exercise of the Court's ongoing exercise of its Article III powers in this complex enforcement process. The Special Masters appointed pursuant to the Referral Orders prior to the PLRA should therefore be permitted to carry out their responsibilities under the Orders which are tied to the Orders that have become final entered on March 19, 1993.¹³

IV. THE COURT MAY APPOINT EXPERTS PURSUANT TO FED. R. EVID. 706

In the event that the Court determines that § 802(f) applies retroactively, the Court should preserve the essential functions of the existing Special Masters by reappointing them as experts pursuant to Fed. R. Evid. 706. The Court's power to appoint experts is unquestioned. Scott v. Spanjer Bros., Inc., 298 F.2d 928 (2d Cir. 1962); Danville Tobacco Ass'n v. Bryant-Buckner Assocs., Inc., 333 F.2d 202 (4th Cir. 1964); United States v. Michigan, 680 F. Supp. 928, 987-89 (W.D. Mich. 1987) (court-appointed expert to monitor and report to Court on implementation of a post-judgment plan to treat seriously mentally ill inmates). Furthermore, that power is untouched by PLRA, since PLRA purports to affect only appointments pursuant to Fed. R. Civ. P. 53 or the inherent power of the Court.

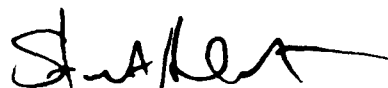
Rule 706 provides the legal basis for assigning the costs of the experts to defendants. Rule 706(b) provides that experts "shall be paid by the parties in such proportion and at such time

¹³ Indeed, any other interpretation of PLRA would raise serious separation of powers issues under Plaut v. Spendthrift Farm, Inc., 115 S. Ct. 1447 (1995).

as the court directs..." United States Marshals Service v. Means, 741 F.2d 1053, 1057-59 (8th Cir. 1984) (en banc). Further, experts appointed pursuant to Rule 706 would be authorized to carry out their fundamental role, i.e., to monitor and report to the Court on the defendants' compliance with the medical and mental health care remedial orders. They would be subject to deposition by the parties, and to providing testimony in court, and subject to cross examination by the parties. Moreover, the current fee rates for the Rule 706 experts in this case would not be limited by PLRA. Accordingly, PLRA does not preclude this Court from appointing Ms. Bliss and Ms. Newkirk under Rule 706 so that they retain their ability to perform their essential duties to monitor defendants' compliance with the remedial orders in this case and defendants are required to compensate them.

V. CONCLUSION

For the reasons discussed above, defendants' motion to modify the Special Master referral orders should be denied. In the event, however, that the Court determines that PLRA can be applied retroactively, plaintiffs request this Court appoint Ms. Bliss and Dr. Newkirk as experts pursuant to Fed. R. Evid. 706.

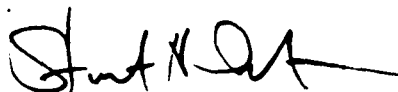


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Date: May 29, 1996

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 1996, a true and correct copy of the foregoing Plaintiffs' Opposition to Defendants' Motion to Modify Referral Orders Regarding Special Masters and accompanying memorandum was sent via first class mail, postage prepaid, to defendants' attorney Daniel Struck at Jones, Skelton & Hochuli, Phoenix Plaza, 2901 North Central, Suite 800, Phoenix, Arizona 85012.

A handwritten signature in black ink, appearing to read "Stuart H. Adams, Jr.", written over a horizontal line.

Stuart H. Adams, Jr.