

MASTER, SPECIAL/APPOINTMENT OF/ORDER

TRP

DURAN DURAN

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

DWIGHT DURAN, LONNIE DURAN,  
and SHARON TOWERS, and all  
others similarly situated,

Plaintiffs,

vs.

No. Civil 77-721-C

JERRY APODACA, Governor of the  
State of New Mexico, et al.,

Defendants.

Duran v. Apodaca



PC-NM-001-009

COPY

FILED  
AT ALBUQUERQUE

JUN 3 1983

JESSE CASAUS  
CLERK

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO

DWIGHT DURAN, et al.,

Plaintiffs,

v.

TONY ANAYA, et al.,

Defendants.

ENTERED ON DOCKET  
6-3-83

Civil Action No. 77-721-JB

ORDER OF REFERENCE

By joint motion the parties in this cause have requested the appointment of a special master to monitor compliance with earlier remedial orders that have been entered herein and have nominated VINCENT NATHAN to serve as master. The Court, having recently inherited this protracted and complicated litigation, agrees that the appointment of a special master is both necessary and desirable and that such an appointment is in full accordance with Rule 53 of the Federal Rules of Civil Procedure. In addition to the authority conferred by that rule, the Court relies upon its inherent power "to appoint persons unconnected with the court to aid...in the performance of specific judicial duties, as they may arise in the progress of a cause." Ex Parte Peterson, 253 U.S. at 312-13 (1920), Ruiz v. Estelle, 679 F.2d 1115, 1159 (5th Cir. 1982). Therefore, the Court being fully advised in the premises, and for good cause shown, it is hereby

ORDERED that VINCENT NATHAN shall serve as special master for the Court to monitor the state of the defendants' compliance with all remedial orders that have been entered or that may be entered in this cause.

A. The duties of the special master shall be to observe, monitor, find facts, report or testify as to his findings, and make recommendations to the Court concerning steps that should be taken to achieve compliance. The special master may and should assist the

defendants in every possible way, and to this end he may and should confer informally with them, their subordinates and all counsel on matters affecting compliance. In order to accomplish these objectives, the special master shall have only the following powers:

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1. The special master shall have unlimited access to any maximum, close or medium security facilities, buildings, or premises, under the jurisdiction or control of the New Mexico Department of Corrections (hereinafter "Department of Corrections") as necessary to achieve compliance with the orders in this cause, and no advance notice of any visit of inspection shall be required. In the event of an emergency as defined in the consent decree, the Special Master and members of his staff may be excluded from all or a portion of an institution if their presence would exacerbate or complicate the emergency or if their safety would be endangered by their presence.
  2. The special master shall have unlimited access to the records, files and papers maintained by the Department of Corrections to the extent that such access is related to the performance of the special masters' duties of monitoring compliance except as to matters covered by the attorney-client privilege and the work product doctrine. Such access shall include all departmental, institutional and inmate records, including but not limited to medical records. The special master may obtain copies of all such relevant records, files and papers; provided that the special master or his staff shall not be permitted to testify as to an inmate's medical or mental health record in unrelated litigation, and further, that any report by the special master shall not identify by name any specific inmate in regard to his medical or mental health condition. The defendants shall not be liable for release of any records to the special master pursuant to the terms of this Order.
  3. The special master may conduct confidential interviews with all staff members and employees of the Department of Corrections. In addition, he may engage in informal conferences with such staff members and employees, and such persons shall cooperate with the special master and respond to all inquiries and requests related to compliance with the Court's orders in this case. The special master may require compilation and communication of oral or written information relevant to such compliance. If such requests are deemed by defendants to be unreasonable or unduly burdensome, defendants may seek a protective order from the Court.
  4. The special master may conduct confidential interviews and meetings at the institution to which they are confined with any prisoners or group of prisoners under the jurisdiction of the Department of Corrections.
  5. The special master may attend any institutional meetings or proceedings at any institution under the jurisdiction of the Department of Corrections.
  6. The special master may require written reports from any staff member or employee of the Department of Corrections with respect to compliance

with this Court's orders.

7. The special master shall have the full power to order and conduct hearings with respect to the defendants' compliance with this Court's orders. To this end he shall have the power to require the attendance of witnesses, including both prisoners and employees of the Department of Corrections, and he shall exercise all other powers described in subsection (c) of Rule 53 of the Federal Rules of Civil Procedure.
8. The special master may select and employ necessary professional, administrative, clerical, and support staff. All such persons as well as the nature of their compensation, duties and authority shall be approved by the Court in advance of their employment after notice to the parties and opportunity for objection by them. In addition, with advance permission of the Court, the special master may hire independent specialists and experts to assist him in fulfilling the responsibilities assigned to him by this Order.

B. All actions of the special master and his staff shall be under the direct control and supervision of the Court. In particular, the special master and other persons operating on his behalf shall not intervene in the administrative management of the Department of Corrections or any of its institutions. In addition, the special master and his staff shall not be empowered to direct the defendants or any of their subordinates to take or to refrain from taking any specific action to achieve compliance, nor shall the special master be empowered to resolve inmate grievances. The sole power to direct compliance and to punish non-compliance remains with this Court.

C. The special master shall, as he deems necessary or as required by the Court, at least every six months, file reports with the Court in which he shall make findings concerning the defendants' compliance with the provisions of the Court's remedial orders in this cause and the need if any for supplemental remedial relief. If the special master's report is based upon a hearing held by him pursuant to Rule 53 of the Federal Rules of Civil Procedure, either upon his own motion or upon the request of a party, the master shall file his findings and recommendations with the Court, and copies shall be served on all parties. Any report based upon such a hearing may be challenged only in accordance with the following provisions:

1. If any party objects to any or all of the findings contained in the special master's report, that party shall file written objections within fifteen (15) days of the receipt of the report. The objecting party shall note each particular finding to which objection is raised, shall provide proposed alternative findings, and may request a hearing or oral argument before the Court.
2. Any request for a hearing before the Court must include a list of witnesses and documents to be presented to the Court. A copy of the objections, proposed findings, and any request for a hearing before the Court shall be served on all parties.
3. The special master's findings shall be accepted by the Court unless shown to be clearly erroneous. Any evidence not previously presented to the special master will be admitted at a hearing before the Court only upon a showing that the party offering it lacked a reasonable opportunity to present the evidence to the special master.

D. When a report submitted by the special master is not preceded by a formal hearing pursuant to Rule 53 of the Federal Rules of Civil Procedure, the special master shall submit his report to the parties and to the Court. All such reports shall first be submitted to the parties in draft form pursuant to Rule 53(e)(5) and the master shall provide the parties a reasonable time up to thirty (30) days within which to submit their suggestions. Reports of the special master that are not based on formal hearing may be challenged only in accordance with the following provisions:

1. Any party may file written objections to any or all the findings or recommendations of the special master within ten (10) days of receipt of the special master's report. The objecting party may request a de novo hearing before the special master. A copy of the objections and request for hearing shall be served on opposing counsel.
2. If no party files written objections within the requisite time period, the special master's findings to which no objection has been made shall be accepted by the Court unless they appear to be clearly erroneous.
3. If a de novo hearing is held before the special master, he shall prepare a report of his findings and recommendations based upon the evidence presented in the course of that hearing. That report shall be treated like any other report of the special master that is preceded by formal hearing pursuant to Rule 53 of the Federal Rules of Civil Procedure.
4. If any party files written objections to the special master's report but fails to request a de novo hearing before the special master, those

objections will be resolved by the Court. Unless a request for a de novo hearing before the special master has been made, however, the objecting party shall be precluded from requesting a hearing before the Court absent a showing of exceptional circumstances, except as the Court may otherwise order upon application of any party in the interest of justice.

E. In order to utilize the office of the special master in the most efficient manner, focusing the master's efforts on those areas where compliance reporting is most needed, and in order to narrow the field of the master's activities as various areas of the Court's orders are brought into substantial and sustained compliance, the following procedures shall be used:

1. The special master shall at such times as he determines appropriate, issue reports in accordance with the procedures set forth in this Order of Reference, which shall indicate for each of the substantive areas of the Order (e.g., Classification, Food Services, etc.) whether that area is or is not in substantial compliance with the Court Order and the basis and reasons for such finding in each area. If an area is not found to be in substantial compliance it will be assigned to "Level 1". If an area is found to be in substantial compliance it will be assigned to "Level 2".
2. In keeping with the concept of focusing the master's attention on those areas of the decree where the need for monitoring appears to be the greatest, the parties have agreed that the areas of Visitation, Attorney Visitation, and Correspondence (except for paragraph 9 in that section) may be placed initially in "Level 2" since it appears that the level of compliance is presently higher in those areas than in other areas of the decree.
3. The reports and findings of the special master, and the designation of an area as "Level 1" or "Level 2" may be challenged in accordance with the procedures contained in this Order of Reference.
4. (a) For those areas assigned to "Level 1" the master shall continue to monitor, investigate and issue periodic written reports as described in this Order of Reference.  
(b) For those areas assigned to "Level 2", the master may monitor and investigate allegations of non-compliance but he shall not be required to file the periodic written reports otherwise required by the Order of Reference. He may, however, at his discretion file a written report and in the event he finds or is presented with prima facie evidence of non-compliance he shall investigate and report the results of his investigation.
5. An area designated as "Level 2" shall remain so designated unless the master finds that there is a pattern or policy of non-compliance in that area. In determining whether non-compliance exists and whether the area should be redesignated in "Level 1", the master shall take into account,

among other factors, the seriousness and frequency of non-compliance, as well as defendants' remedial efforts and the time necessary to achieve compliance.

6. If an area of the Order has been retained in "Level 2" for a reasonable period of time and the master finds that there is continued substantial compliance in that area, and that the defendants have established and implemented an effective monitoring mechanism to ensure continued compliance in that area, the master shall so report to the parties and to the court. Unless the plaintiffs challenge the report of the master pursuant to the procedures set out in this Order of Reference, that area will then be removed from the scope of this Order of Reference. Once an area is removed from the Order of Reference, plaintiffs may seek from the Court, or the special master, if the Court so directs, re-inclusion of that area in the Order of Reference upon a showing of substantial evidence of non-compliance. As to those areas removed from the Order of Reference the master shall bring to the parties' attention evidence and allegations of non-compliance which are received by him.

F. In the event defendants seek to modify the Orders entered in this case, the parties will follow the provisions set forth in paragraph 6 of the Agreement between the parties dated July 14, 1980, (hereafter "Agreement"). If informal efforts between the parties do not resolve the matter the special master will attempt to mediate the dispute. If that effort does not succeed, the special master will hold hearings on the matter and make a report to the parties and to the Court containing his recommendations as to the proposed modification pursuant to the standards contained in paragraph 6 of the Agreement. If the matter is still unresolved, the defendants may submit the dispute to the Court for a de novo hearing pursuant to the standards and procedures set forth in paragraph 6 of the Agreement. At such hearing, the report and the recommendations of the master will be admitted into evidence, pursuant to Rule 706 of the Federal Rules of Evidence, and give appropriate consideration by the Court.

G. The special master shall not make statements to the press or media unless approved by the Court or in accordance with the Code of Judicial Conduct.

H. The special master shall be compensated at the rate of \$85 dollars per hour for services performed in accordance with this Order of Reference outside the State of New

Mexico and \$600 per day for services performed in the State of New Mexico. Within sixty (60) days following entry of this Order the special master shall submit to the Court a proposed budget covering the first year of the mastership after notice to all parties. An appropriate budget for the office of the special master and compensation for the members of the special master's staff shall be established by the Court upon application of the special master and after notice to all parties. All reasonable expenses incurred by the special master in the course of the performance of his duties, including but not limited to salaries of staff, long distance telephone calls, photocopying, printing, travel, data processing and postage shall be reimbursed; however, the special master shall not incur expenses in excess of \$185,000 without prior approval of the Court and notice to the parties.

I. Paragraphs Two and Four of the Agreement entered on July 14, 1980, as part of the consent decree are incorporated into this Order and made applicable to the use hereof. Specifically, such paragraphs apply to reports, findings, conclusions and all other activities of the Special Master, his employees or agents, on the same basis as applicable to the policy statement and partial consent decrees entered in accordance with the Agreement.

The costs of the mastership shall be borne by the defendants as costs in this action. The special master shall submit to the Court periodic statements of his time and expenses for review and approval by the Court.

IT IS FURTHER ORDERED that the defendants shall deposit the sum of \$100,000 with the Clerk of this Court as interim payment of costs and payments to the special master shall be made by order of the Court out of such funds. As payments are made by the Clerk, the defendants shall deposit additional sums with the Clerk to maintain the aforementioned balance of funds.

The special master may cause copies of this Order of Reference or portions thereof to be posted in any facility under the jurisdiction of the Department of Corrections.

SO ORDERED this 3rd day of June, 1983.

  
JUAN G. BURCIAGA  
UNITED STATES DISTRICT JUDGE

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and SHARON TOWERS, and all  
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