



PC-NM-001-026

FILED

UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

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

SEP 23 1991

R. P. Tommich
CLERK

DWIGHT DURAN, et al.,

Plaintiffs,

v.

Civil No. 77-0721-JB

BRUCE KING, et al.,

Defendants.

ENTERED ON DOCKET

9-30-91

ORDER

Introduction

On June 10, 1991, the parties filed a proposed Settlement Agreement in this cause. The agreement is the result of negotiations that commenced following the Court's directions set forth originally in its order of August 8, 1990, and iterated in its order of October 3, 1990. The parties were directed in those to attempt to reach agreement on (1) all issues that were then the subject of Plaintiffs' pending contempt motion, (2) all modifications of the Consent Decree in this case Defendants intended to seek, and (3) a timetable for the termination of external monitoring and reporting by the Special Master and the orderly vacation of the remedial orders in this cause following a finding of compliance with the terms of those orders.

By order of June 18, 1991, the Court provisionally approved the Settlement Agreement, finding that it appeared to be fair and reasonable and to operate in the best interests of the Plaintiff Class. Because the agreement constitutes a compromise of a class action, however, the provisions of Rule 23(e) of the Federal Rules of Civil Procedure require that members of the class be given appropriate notice of the terms of the settlement.

Provision of Adequate Notice

To meet the requirements of Rule 23(e), the Court directed counsel to prepare a joint form of notice. That notice, as well as an Amended Joint Statement Regarding Rule 23 Process, was presented by counsel and approved by the Court on July 2, 1991. The form of notice set forth a brief but accurate description of the salient provisions of the Settlement Agreement and identified inmates at each affected institution to serve as members of Plaintiffs' Attorneys' Committees from whom class members could obtain additional information about the terms of the agreement. The notice also identified one attorney for the class and a former named Plaintiff to whom inquiries could be directed. The notice provided that written objections could be filed with the Clerk of the Court on or before August 21, 1991, and informed members of the class that a formal hearing on the terms of the agreement would be held on August 30, 1991.

The Amended Joint Statement provided for the posting of the approved notice in the law library, general library, dining facilities, recreational facilities, and other bulletin boards in areas of each affected institution. Moreover, both the notice and the entire text of the Settlement Agreement, including attachments, were required to be provided to each inmate in any segregated housing unit. Copies of the entire Settlement Agreement were required to be made available to general population inmates in the general library and the law library of each institution.

By the terms of the Amended Joint Statement, inmates serving as members of the Plaintiffs' Attorneys' Committees were permitted access to all housing units to meet with class members, explain the provisions of the Settlement Agreement, and accept inquiries about the document. At each institution, a location was to be set aside for meetings among committee

members and other members of the class. The Amended Joint Statement further provided for written communication and telephone contact between committee members and Plaintiffs' counsel and their paralegal.

The Amended Joint Statement scheduled two meetings among Plaintiffs' counsel and the Plaintiffs' Attorneys' Committee members representing each institution. One of these meetings was attended by Mr. Alvin Bronstein, the Director of the National Prison Project, who served as lead counsel during the negotiations leading to the Settlement Agreement, and both meetings were attended by local counsel.

Plaintiffs' counsel were required by the Amended Joint Statement to provide the Court with a summary of objections, by category, no later than August 28. The statement concluded with a provision permitting one inmate from each affected institution to attend the August 30 meeting.

Evidence presented at that hearing disclosed that the comprehensive notice provisions required by the Amended Joint Statement were fulfilled in all but immaterial respects. Apparently, for a brief period of time, incoming inmates at the Reception and Diagnostic Center at Western New Mexico Correctional Facility received copies of the Amended Joint Statement rather than the notice itself. This discrepancy was discovered by a member of the Plaintiffs' Attorneys' Committee at that institution and was remedied immediately by institutional officials. The committee member at Central New Mexico Correctional Facility was denied access to inmates transferred to the acute mental health care unit at that institution on July 29, 1991. Prior to the transfer of these inmates, however, they were assisted by a committee member at the Penitentiary of New Mexico - North Facility. Finally, a number of written objections

submitted by inmates at the New Mexico Women's Correctional Facility inadvertently were addressed directly to the Court, rather than to the Clerk, and did not reach Plaintiffs' counsel until shortly before August 28. Counsel had an opportunity to review these objections, however, and they are addressed in Plaintiffs' Memorandum in Support of Proposed Settlement Agreement, filed on that date.

In summary, the Court finds that exceptionally careful and effective efforts were made by Plaintiffs' counsel, members of the Plaintiffs' Attorneys' Committees, and institutional officials to apprise all members of the class of the terms of the Settlement Agreement. These efforts succeeded in providing all members of the class with an opportunity to read and understand the agreement and to object to any provision to which they took exception.

Objections to the Settlement Agreement

Plaintiffs' counsel filed a detailed memorandum in support of the Settlement Agreement. The memorandum sets forth the background of this litigation leading to the agreement, summarizes all of its significant provisions, and describes the steps that were taken to ensure adequate notice to all class members. Although the description of the history of the litigation may fairly be described as reflecting only the perspective of Plaintiffs' counsel, it nonetheless is helpful in explaining the willingness of Plaintiffs' counsel to accept compromise in certain areas that drew objections from class members.

The final section of the memorandum identifies numerous objections that were made by class members from each institution. These included individual objections as well as those set forth on single petitions signed by many inmates.

One recurring objection to the Settlement Agreement is that the earlier decision of this Court denying Defendants' motion to vacate most of the provisions of the Consent Decree precludes modification of that decree. *Duran v. Carruthers*, 678 F. Supp. 839 (D.N.M.), aff'd, 885 F.2d 1485 (10th Cir. 1989), cert. denied, ___ U.S. ___, 110 S. Ct. 865 (1990). As Plaintiffs' counsel point out, this objection reflects a misunderstanding of the import of the earlier decision. Indeed, the Court made it clear in denying Defendants' motion that, at an appropriate time, it would consider any modifications Defendants chose to seek. 678 F. Supp. at 853.

According to the memorandum, the "vast majority" of objections took exception to the fact that members of the Plaintiff Class were not at the bargaining table during negotiations leading to the Settlement Agreement. Although Plaintiffs' counsel strongly urged that class members be present, Defendants would not agree to inmates' participation in this form. As the Court has noted, the negotiations leading to agreement commenced shortly after August 8, 1990, and extended until early June 1991. The Court concludes that it would not have been practicable to include inmate representatives in the numerous meetings that were held during his period and finds that the rights of the class were fully protected by the complete notice class members received commencing July 8, 1991.

Other objections were addressed to the provisions of the Settlement Agreement permitting limited use of day rooms to house inmates. In exchange for this concession, Plaintiffs obtained a non-modifiable agreement that existing institutions, all but one of which are modern, air-conditioned, state of the art facilities, will not be double-celled. The provision of double-occupancy cells in new construction is carefully limited. In view of the change of law

established in *Rhodes v. Chapman*, 452 U.S. 337 (1981), and its progeny, the likelihood that Defendants would have prevailed on any motion to modify the single-ceiling provision in the existing Consent Decree is high, and the compromise struck in the Settlement Agreement on this issue is one that favors the interests of the class.

Some inmates objected to the ultimate termination of the role of the Special Master and the phased vacation of the remedial orders that comprise the Consent Decree. The agreement requires a finding of substantial performance in advances of termination of monitoring by the Special Master and provides for a period of reporting and self-monitoring by Defendants before vacation of the Consent Decree at any institution. The population control provisions of the Settlement Agreement are permanent in nature.

Although it is understandable that class members would prefer external monitoring in perpetuity, the Court's role in this litigation is limited. When the Consent Decree has achieved its intended effect through Defendants' sustained compliance with that decree, the role of the Court as external monitor must come to an end. Thus, in these respects the Settlement Agreement simply reflects the proper limits of judicial intervention into the operation of New Mexico's correctional facilities.

Other objections took issue with the definition of "substantial compliance" set forth in the Settlement Agreement. This definition, which appears in the Agreement of the Parties, reads as follows:

For purposes of this Agreement, "substantial compliance" means that defendants generally are in compliance with the terms of the Court's remedial order as it affects a particular area. Incidents of non-compliance do not necessarily prevent a finding of substantial compliance. The determination of substantial compliance shall take into account the extent to which exceptions to compliance are

sporadic or isolated in nature, are unintentional, are the temporary result of actions by the members of the plaintiff class and are promptly and properly addressed by corrective action and, where appropriate, disciplinary action against staff members responsible for the exception to compliance. In no event shall a determination of substantial compliance be made if exceptions to compliance are the result of willful or intentional actions by defendants.

Compliance of Modified Decree, pp. 49-50. This definition provides reasonable guidelines to the parties as well as to the Special Master, who is responsible for making findings and recommendations that substantial compliance has or has not been achieved. The Court finds that this definition is an appropriate one that provides a fair measure of Defendants' entitlement to relief from continued external monitoring by the Special Master.

Inmates objected to a number of specific modifications of substantive provisions of the Consent Decree in the areas of correspondence, classification, administrative segregation, and inmate discipline. The Court has reviewed these objections and the challenged provisions with care and finds that, with one exception, they are without merit.

No legitimate interest of inmates is disserved by the modification that permits incoming legal mail to be opened and inspected for contraband in the presence of the addressee. Indeed, as counsel point out in the memorandum, this provision potentially protects inmates from charges that they received contraband correspondence from unintended correspondents posing as attorneys.

The Court also agrees with Plaintiffs' counsel that the amended provisions relating to classification to which objections were made are not significant modifications of the Consent Decree. The reduction of the composition of classification committees from three members to two and the limitation of input by mental health professionals to classification decisions

regarding inmates receiving mental health treatment are entirely reasonable. Likewise, potential transfers of class members to minimum security facilities, which are not the subject of the Consent Decree, can hardly be disadvantageous to members of the *Duran* class housed in higher security facilities requiring a greater degree of restriction and surveillance.

The carefully crafted changes in the policies and procedures controlling administrative segregation protect inmates' interests while streamlining inefficient and unworkable procedures contained in the Consent Decree. Moreover, Defendants' commitment to a transition unit designed to reintegrate inmates in this status into the general population, a new provision to which no inmate objected, is a gain of singular importance to the class. In summary, the Court finds that the amendments in this area strike a fair balance between the need of Defendants to separate, sometimes for lengthy periods of time, certain inmates from the general population for legitimate reasons of safety and security and the interest of the class in fair procedures that will prevent abuse of administrative authority in this area.

Numerous objections were made to changes in the inmate discipline policies and procedures. Most of these changes are designed to improve the workability of the system and to exercise greater control over misconduct that endangers the security of institutions, inmates, and staff. The Court finds these objections to be without merit, although undoubtedly the revised regulations will discourage certain forms of conduct on the part of some members of the class. The same is generally true of increased penalties reflected in the Settlement Agreement.

Upon its initial review of the proposed agreement, however, the Court was concerned by the extension of disciplinary segregation from 30 days, as prescribed in the Consent Decree, to as many as 120 days under the terms of the Settlement Agreement. This concern was

confirmed during the course of inspections of all institutions conducted by the Court on August 8, 9, and 12. Several wardens stated that the 120-day provision was unnecessary and unlikely to be used, particularly at medium custody institutions that have the option to transfer a seriously delinquent inmate to the Penitentiary of New Mexico. Even at that institution, the option of long-term administrative segregation is available as a response to intractable behavior.

The Court was pleased, however, to learn at the August 30 hearing that the parties have agreed to further refinement of the Settlement Agreement that will limit sentences to disciplinary segregation to no more than 60 days and any sentence in excess of 30 days must be specifically approved by the warden of the institution. This amendment is tied to certain proposed changes in provisions relating to activity time to be offered to inmates in administrative segregation. As a result, these proposed modifications of the Settlement Agreement will be submitted to the Court in the near future and will be the subject of another notice to the class. Because counsel have assured the Court that the maximum sentence to disciplinary segregation will be reduced in accordance with their representations in open court, the Court finds that class members' objections on this subject are moot and should not prevent final approval of the Settlement Agreement.

The August 30 Hearing

At the August 30 hearing, counsel for the Defendants and counsel for the Plaintiffs strongly urged the Court to approve the Settlement Agreement. Dwight Duran, former named Plaintiff in this case, testified that the agreement is a fair and balanced resolution of the competing interests of the parties. Testimony also was heard from Lawrence Hurd, Reilly

Johnson, Donald Duncan, Jeff Johnson, Evelyn Sandoval, Phillip Cristo, Thaylan Courtwright, and Patricio Esquivel, who served as members of the Plaintiffs' Attorneys' Committees at the institutions. Most of these inmates testified that they recommended approval of the Settlement Agreement, although they acknowledged that, from their perspective as inmates, the agreement was a "mixed bag." Ms Sandoval declined to express an opinion on the question, and Mr. Esquivel, who is confined in administrative segregation at the Penitentiary of New Mexico - North Facility, argued against confirmation.

The Court called Vincent M. Nathan, the Special Master in this case since 1983, to testify. Mr. Nathan urged the Court to approve the Settlement Agreement, emphasizing the permanent gains achieved by the class with respect to avoidance of double-celling. He opined that permanent achievement of the objectives of the Consent Decree, as modified, would be threatened -- indeed, made near impossible -- by overcrowding occasioned by double-celling.

As has been noted, the Court toured the facilities on August 8, 9, and 12. During these tours, the Court saw firsthand the substantial improvements in conditions that have been effected as a result of this litigation. The Court was impressed by the evident sincerity and commitment of central office and institutional staff to maintain decent and humane facilities in compliance with constitutional standards.

Approval of the Settlement Agreement

In reaching its decision on the fairness, reasonableness, and adequacy of the Settlement Agreement, see Wright, Miller & Kane, *Federal Practice and Procedure: Civil 2d* § 1797.1 (1986), the Court has been assigned, by an unusually effective notice process that produced

numerous general and specific objections to the agreement, a thorough and cogent analysis of those objections by Plaintiffs' counsel, the hard work and sincere testimony of inmate representatives, the advice of a Special Master with more than nine years of experience in monitoring the detailed provisions of the Consent Decree, the advice of counsel representing Defendants and Plaintiffs, and the Court's firsthand observations of the institutions to which the Settlement Agreement and the modified decree will apply. That this process has been a meaningful one is attested to by the effect of inmates' objections to the unnecessary lengthening of sentences to disciplinary segregation and by the compelling balance on the part of representatives of the inmate class who expressed their views in testimony.

For all of these reasons, the Court finds that the Settlement Agreement is a fair, reasonable, and adequate one, which operates in the best interests of all who are affected by it. Accordingly, it will be approved.

Adequacy of Representation of the Class

Having determined to approve the Settlement Agreement, the Court turns to the last matter before it. A number of inmates raised, in one form or another, a challenge to the adequacy of representation afforded the class. In general, these objections took exception to counsel's decision to abandon pending contempt motions in favor of a negotiated settlement and stressed the absence of inmate representatives from the bargaining table. For reasons that are inexplicable to the Court, a number of objecting inmates relied upon expressions of support for the agreement by Dwight Duran, a former named Plaintiff in this action, as evidence of inadequacy of representation.

Over the course of more than nine years, the Court has observed the resolute efforts of Plaintiffs' counsel and the dedication of Mr. Duran on behalf of the interests of class members throughout New Mexico. Those efforts produced substantial improvement in conditions over those in existence in 1980, when the tragic riot at the Penitentiary of New Mexico occurred. These improvements occurred largely during the administration of former Secretary Michael Francke between 1982 and 1986. Litigation ensued shortly after Secretary Francke was replaced in 1987, and a new administration devoted its efforts to attempting to upset the Consent Decree rather than to comply with it. During the course of that lengthy litigation, there was little the Court, the Special Master, or Plaintiffs' counsel could do to bring about compliance with the Consent Decree until the legitimacy of that order was established through lengthy proceedings at the trial court and at the appellate stage. In due course, that vindication was achieved, to no small extent, through the efforts of Plaintiffs' counsel.

During the nearly four years that were lost in this process, necessary modifications could have been negotiated or, failing agreement, could have been presented to the Court for resolution. Valuable time could have been devoted to achieving compliance with the decree, as modified, and the likelihood is that by today the Court's involvement in this litigation could have been ended. The delay occasioned by Defendants' resistance, however, cannot be laid at the feet of Plaintiffs' counsel, whose efforts always have been to protect to the maximum extent possible the constitutional rights of their clients as reflected in the Consent Decree.

Although the vindication of the Court's power to enforce the Consent Decree ultimately occurred and a change of administration in 1991 resulted in renewed commitment to compliance on the part of State officials, modification of that decree has long been inevitable. This is true

both because certain of its provisions have proved over the years to be unworkable and because changes in the substantive law relating to institutional reform have narrowed the scope of recognized rights of inmates and cast doubt on the continuing effect of remedial decrees in institutional reform litigation. Plaintiffs' counsel cannot be faulted for recognizing these factors and for their commitment to engage in good faith negotiations to protect their clients from wholesale modification of a decree that, in the main, has been demonstrated to be workable and fair. Counsel's conscientious efforts to this end are to be applauded and surely provide no basis for criticism of the quality of representation the *Duran* class has enjoyed since the inception of this litigation. This is particularly true in view of the end result of those efforts: a modified decree that protects the legitimate interests of the Plaintiff Class and ensures that inmates in New Mexico, unlike those in most other jurisdictions, will never suffer the disastrous effects of gross overcrowding.

Accordingly, the Court finds that objections to the adequacy of representation of the class are spurious. In particular, the efforts of counsel that resulted in the submission of the Settlement Agreement reflect the highest standards of professional conduct and of effective representation of the diverse interests of New Mexico's several thousand inmates.

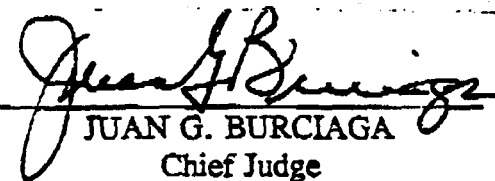
Wherefore, for the reasons set forth above,

IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. All objections to the aforementioned Settlement Agreement are overruled;
2. All objections to the adequacy of representation of the class are overruled; and

3. The Settlement Agreement and the modified remedial decrees resulting from that agreement are finally approved in all respects. The effective date of the Settlement Agreement shall be the date of this order.

DATED at Albuquerque this 19th day of September, 1991.


JUAN G. BURCIAGA
Chief Judge