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United States District Court,
N.D. Ohio, Eastern Division.

Charles E. AUSTIN, et al., Plaintiffs,
v.
Reginald WILKINSON, et al., Defendants.

No. 4:01–CV–71. | July 12, 2002.

Attorneys and Law Firms

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Opinion

ORDER

GWIN, J.

***1** On June 6, 2002, the defendants filed a motion seeking partial relief from judgment under Rule 60(b) of the Federal Rules of Civil Procedure [Doc. 293]. The plaintiffs oppose the motion. Because the Court holds that the defendants were not surprised by the Court's judgment, the Court had authority to order the injunctive relief at issue, and no other reason exists to upset the judgment, the Court denies the defendants' motion.

I.

The defendants have motioned for relief from portions of the Court's orders in this class action lawsuit brought by former and current inmates at the Ohio State Penitentiary ("OSP") against employees of the Ohio Department of Rehabilitation and Correction (the "Department"). In the interest of brevity, the Court only describes the procedural aspects of the case relevant to the current order. The Court directs the reader to its earlier orders for a complete factual description of the case.

On February 25, 2002, the Court, after a bench trial at which the Court heard from twenty witnesses and accepted over one thousand pages of exhibits, issued an opinion finding that the conditions at the OSP constituted an atypical and significant hardship in relation to the ordinary incidents of prison life. *See Austin v. Wilkinson,* 189 F.Supp.2d 719, 742 (N.D.Ohio 2002). Because of the conditions at the OSP, the Court held that the inmates had a protected liberty interest in not being assigned to the OSP and must receive adequate process before being sent to the facility or retained at the facility. *See Austin,* 189 F.Supp.2d at 742—47. On March 26, 2002, the Court ordered the Department to make certain changes to its Policy 111–07, the policy under which inmates were transferred to and retained at the OSP. *See Austin v. Wilkinson,* No. 4:01–CV–71, 2002 WL 519006, at *1 (N.D.Ohio Mar. 26, 2002). On May 15, 2002, the Court adopted a new Policy 111–07 as the procedure by which inmates were to be transferred to and retained at the OSP [Doc. 284].

The defendants now move for a relief from judgment of portions of the Court's February 25, 2002, March 26, 2002, and May 15, 2002, orders. Specifically, the defendants ask the Court to vacate under Rule 60(b)(6)[1] that part of its order that states unless an inmate's prior conduct during incarceration resulted in death or extreme bodily harm, the Department should only consider behavior in the last five years, including behavior prior to level 4 or 5 classification. The defendants say the requirement directly interferes with their ability to prevent violence inside Ohio's prisons because recent conduct is not necessarily the best predictor of future violence. In fact, the defendants say the restriction is so restrictive as to violate the separation of powers doctrine. In support of this argument the defendants point to several recent violent incidents involving inmates formerly housed at the OSP.

The defendants also ask the Court to vacate under Rule 60(b)(1) and Rule 60(b)(4)[2] the provisions of its orders prohibiting placement of an inmate in security level 5 unless he possessed a quantity of drugs constituting a third degree felony. The defendants first say that this ordered relief came as a surprise because the plaintiffs did not ask for it or ever seek such relief through administrative means. Second, the defendants say the Court did not have the authority to order this relief because the plaintiffs failed to exhaust their administrative remedies as required by 42 U.S.C. § 1997e(a).

***2** The plaintiffs say that the Court's current orders should remain. Specifically, the plaintiffs say the Court

struck a careful balance between the Department's safety concerns and the inmates' due process rights by setting a time limit upon which the Department can consider past activity. In addition, the plaintiffs say that recent incidents involving former OSP inmates are not evidence of the Department's inability to control the inmates they house.

With respect to the issue of the drug quantity, the plaintiffs say that one of the named class members did exhaust his remedies with respect to this issue. Furthermore, the plaintiffs say the defendants cannot be surprised by the issue because their own expert witnesses testified about the appropriateness of housing inmates at the OSP for drug offenses. In addition, the Court questioned the defendants' counsel about placement at the OSP for drug offenses.

The Court considers the defendants' motion below.

II.

A.

The defendants first say they should be relieved from judgment under Rule 60(b)(6) because the Court's order interferes with the Department's ability to prevent violence in their prisons. In support of their argument, the defendants cite *Turner v. Safley,* 482 U.S. 78, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1986) and *Lewis v. Casey,* 518 U.S. 343, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996).

In *Turner,* the Supreme Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. at 89. The Court established this standard because it felt that prison administrators should make the difficult judgments concerning institutional operations. *See id. Turner* described four factors for courts to consider when determining the reasonableness of the regulation at issue. Those factors are: 1) that there must be a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it; 2) whether an inmate has alternate means to exercise the right limited by the action; 3) what the impact accommodation of the of alleged constitutional right will have on prison staff, other inmates, and on the general allocation of prison resources; 4) whether there are an absence of effective alternatives without more than de minimis cost. *See* 482 U.S. at 89—90. A district court is not required to weigh evenly, or even consider explicitly, each *Turner* factor. *See Spies v. Voinovich,* 173 F.3d 398, 403—04 (6th Cir.1999); *see also Flagner v. Wilkinson,* 241 F.3d 475, 484 (6th Cir.2001).

In *Lewis,* the Supreme Court held that a district court's injunction imposing changes on the Arizona Department of Corrections was invalid because it failed to accord adequate deference to the judgment of prison authorities. *See* 518 U.S. at 361. The Court held that the district court's order ignored *Turner'* s charge that a regulation is valid if it is reasonably related to a legitimate penological interest. *See id.*

> ***3** The District Court here failed to accord adequate deference to the judgment of the prison authorities in at least three significant respects. First, the court concluded that ADOC's restrictions on lockdown prisoners' access to law libraries were unjustified. *Turner'* s principle of deference has special force with regard to that issue, since the inmates in lockdown include "the most dangerous and violent prisoners in the Arizona prison system," and other inmates presenting special disciplinary and security concerns. The District Court made much of the fact that lockdown prisoners routinely experience delays in receiving legal materials or legal assistance, some as long as 16 days, but so long as they are the product of prison regulations reasonably related to legitimate penological interests, such delays are not of constitutional significance, even where they result in actual injury (which, of course, the District Court did not find here).
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> Second, the injunction imposed by the District Court was inordinately—indeed, wildly—intrusive. There is no need to belabor this point. One need only read the order to appreciate that it is the no plus ultra of what our opinions have lamented as a court's "in the name of the Constitution, becom [ing] ... enmeshed in the minutiae of prison operations."
>
> Finally, the order was developed through a process that failed to give adequate consideration to the views of state prison authorities. We have said that "[t]he strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors ... also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." For an illustration of the proper procedure in a case such as this, we need look no further than *Bounds [v. Smith,* 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72(1977)] itself. There, after granting summary judgment for the inmates, the District Court refrained from " 'dictat[ing] precisely what course the State should follow." ' Rather, recognizing that "determining the 'appropriate relief to be ordered ... presents a difficult problem," ' the court " 'charge[d] the Department of Correction with the task of devising a Constitutionally sound program' to assure inmate

> access to the courts." The State responded with a proposal, which the District Court ultimately approved with minor changes, after considering objections raised by the inmates. We praised this procedure, observing that the court had "scrupulously respected the limits on [its] role," by "not ... thrust[ing] itself into prison administration" and instead permitting "[p]rison administrators [to] exercis[e] wide discretion within the bounds of constitutional requirements."

Id. at 361—63 (internal citations omitted).

The defendants say that the Court's order prohibiting the Department from considering an inmate's behavior beyond the last five years is invalid because it impedes the Department's pursuit of the legitimate penological interests of preventing violence in prisons, decreasing gang activity in prisons, and protecting the public at large. The defendants also say the five year limitation runs afoul of *Turner* because inmates have alternative means of exercising the right infringed if the five year limitation is eliminated, the five year limitation unfairly impacts third parties, and the plaintiffs did not suggest any alternative.

***4** The Court acknowledges that the defendants are charged with the difficult, and often thankless, task of overseeing Ohio's prison system. Nonetheless, their motion is not well taken. The defendants correctly state that the *Turner* standard applies to due process claims brought against prison regulations. *See, e.g., Washington v. Harper,* 494 U.S. 210, 223—24, 110 S.Ct. 1028, 108 L.Ed.2d 178 (1990) ("We made quite clear that the standard of review adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights."). The Supreme Court also makes clear that district courts must seek significant input from prison administration officials when crafting remedies for constitutional violations at prisons. *See Lewis,* 518 U.S. at 361—63. However, the defendants' motion for relief from judgment completely ignores the Court's findings that placement at the OSP constitutes an atypical and significant hardship and that the Department's former procedures for placing inmates at the OSP violated due process. *Austin,* 189 F.Supp.2d at 742, 749. In the context of these findings, the Court's order is appropriate.

The Court's finding that placement at the OSP constitutes an atypical and significant hardship entitles inmates to a liberty interest. *Id.* at 742. Because of this liberty interest, inmates must receive adequate notice of the Department's intent to place or retain them at the OSP, an adequate hearing on the matter, and an adequate explanation for their placement or retention at the OSP once the Department finalizes its decision. *See id.* at 743—45 (citing *Wolff v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)). The Court made these findings in the context of concern over why inmates were being sent to the OSP.

> As it currently exists, the Department's procedure for selecting and retaining inmates at the OSP has great potential for error. Evidence at trial demonstrated a wide disparity between the recommendations of the reclassification committee, the OSP's warden, Chief Ryznar, and the North Regional Director.
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> ....
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> The OSP aims to house only the most dangerous prisoners in Ohio's correctional system. Additional process advances the state's interest by consistently sending only those inmates who truly are "the worst of the worst" to the OSP. Parole Board Member Peter Davis best described the risk:
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> > The only thing that's clear is, as I've said here, for every inmate that was cited to me and the reasons why that person was sent there, for this particular act, this assaultive behavior, if you will, we knew for a fact of plenty other inmates that were at other institutions, even close security institutions, that were not transferred [to the OSP].
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> (Davis Test. at 126).[3]

Id. at 745, 746 (footnote in original).

The Court also found evidence that once some inmates were placed at the OSP, they were denied reclassification based on minimal evidence. *See id.* at 732—35 (discussing the Court's findings with respect to inmates Kevin Roe and Lahray Thompson).

> ***5** The treatment of Thompson and Roe reflects a troublesome trend where the defendants deny reclassification based upon gang activity without giving the inmates notice and an opportunity to respond. Equally troublesome, reclassification is denied based on exceedingly weak evidence and alleged activity years in the past. In Thompson's case, he has been held in near solitary confinement for more than three years based on nothing more than the way he writes the letter "b," the fact that in 1999 he was with a group involved in a dispute, and his association with Crip members more than fifteen years ago while growing up in southern California.

Id. at 735. In light of these specific findings, the Court's order is not invalid under *Turner.*

In reference to the first *Turner* factor, the defendants overstate matters by saying the Court's five year limitation dangerously impedes the Department's penological interests. The current edition of Policy 111–07 lists eighteen factors that must be considered when evaluating whether an inmate's level 5 security classification should be lowered.[4] These eighteen factors are the same factors contained in the former edition of Policy 111–07 that the Court explicitly found provided inadequate due process.

> The [old] policy provides a long list of information the reclassification committee will consider, but in the end the only standard governing the committee is "whether there has been a diminishing of the inmate's risk to the safety of persons or institutional security." (Defs.' Ex. C at 9—10). This lack of a defined standard is troubling because [old] Policy 111–07 also does not require the ultimate decision maker to explain why an inmate's reclassification is denied.
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> *Austin,* 189 F.Supp.2d at 753.

To ensure that the Department's policy satisfies the inmates' minimal due process rights, the Court ordered the Department to only consider an inmate's behavior in the last five years, including behavior prior to his level 4 or 5 classification. *See Austin,* 2002 WL 519006, at *5—6. There is no restriction on considering an inmate's behavior if his prior conduct during incarceration resulted in death or extreme bodily harm. *See id.* The Court's order is far from the "inordinately—indeed, wildly—intrusive" remedy decried by the Supreme Court in *Lewis.* 518 U.S. at 362. Much of the current edition of Policy 111–07 remains unchanged. The Court only modified Policy 111–07 as necessary to ensure that it fulfills the minimum due process requirements necessitated by the atypical and significant hardship imposed by placement at the OSP.

The Court also sought the defendants' input when crafting its remedy. In *Lewis,* the Supreme Court also took issue with the district court's injunctive order because it failed to give adequate consideration to the views of state prison authorities. *Id.* Specifically, the Supreme Court disliked the district court's decision to make a special master responsible for a remedial plan while limiting the remedies the special master could choose from. *Id.* at 363. The Supreme Court felt "[t]he State was entitled to far more than an opportunity for rebuttal." *Id.*

***6** In this case, the Court specifically asked both parties to submit proposed injunctive orders that would correct the federal due process rights violations by the least intrusive means. *Austin,* 189 F.Supp.2d at 754. The Department's proposed injunctive order was one and a half pages in length. The only relevant language to the current motion is in the first paragraph of the proposed injunctive order:

> Defendants are hereby required to comply with the procedural requirements set forth in *Wolff v. McDonnell,* 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974), regarding the placement and retention of members of the class in the Ohio State Penitentiary. Defendants are also required to comply with the requirements relating to Gang Affiliation (pp. [52—53]), Drug Distribution (pp. 51—52), and New Evidence (pp. 53) set forth in this Court's Opinion and Order entered on February 25, 2002.

(Defs.' Proposed Inj. Order at 1). The Court gleaned as much information as possible from the defendants' proposed injunctive order. However, the defendants' lack of specific proposals required the Court to rely on the trial evidence and its own judgment when issuing a practical solution to the Department's due process violations in its March 26, 2002, order.

Finally, the Court did not arbitrarily order the five year limitation. The old edition of Policy 111–07 specifically stated that "[b]ehavior in the last five years, including prior Level 4 or 5 classification" was a factor to consider for reclassification out of level 5 security. All the Court has done is place a reasonable time limit on what behavior the Department can consider when deciding whether to retain inmates at the OSP who were sent there for non-violent behavior.

In reference to the second *Turner* factor, the defendants incorrectly state that "[t]he right supposedly in need of protection by the Retention Limitations is a prisoner's right to have the decision as to his proper security level decided based upon accurate information." (Defs.' Mot. for Partial Relief from J. at 11). The "right" at issue in this case is the inmates' right to minimum due process. When the Supreme Court laid out the minimum due process rights to which prisoners are entitled, it took into account the appropriateness of restricting inmates constitutional rights because of their status. *Wolff,* 418 U.S. at 556—58. The Department's old edition of Policy 111–07 did not afford inmates the minimum due process they are entitled to under *Wolff. See Austin,* 189 F.Supp.2d at 750—53. The Court's order merely ensures that the minimum due process requirements are met.

Importantly, the Court's order does not prevent the Department form considering an inmate's attempt to participate or direct gang activity while at the OSP. When evidence shows that security threat group leaders, enforcers, or recruiters housed at the OSP have reached

out to fellow gang members, the Department may consider that behavior in making its reclassification decision within the framework of the hearing procedure outlined in Policy 111–07. Likewise, the actions of inmates at the OSP who remain actively involved in terrorist activities may be considered by the Department when making reclassification decisions. However, the Court's order does not allow the Department to keep an inmate at the OSP indefinitely once he has conformed to incarceration at the OSP by keeping free of major misconduct nor committing any violence for a period of years while at the OSP.

***7** For the reasons discussed above, the Court denies the defendants' motion for relief from judgment under Rule 60(b)(6).

B.

The defendants say they should be relieved from the judgment under Rule 60(b)(1) because they were surprised by the Court's order prohibiting the Department from placing an inmate into security level 5 for a drug related offense unless he possessed a quantity of drugs constituting a third degree felony. The defendants say that they were harmed by the surprise because they were not able to present the defense that the plaintiffs had not exhausted their administrative remedies under 42 U.S.C. § 1997e(a). In addition, the defendants say they are entitled to relief from judgment under Rule 60(b)(4) because the Court did not have authority to order this particular form of relief because, in fact, the plaintiffs had not exhausted their administrative remedies.

With respect to Rule 60(b)(1), the defendants say neither the plaintiffs' original complaint, the amended complaint, or their other pretrial briefs suggested the relief ordered by the Court. The defendants say they did not know a change to the drug limitations was contemplated before or during the trial.

The Court disagrees. The defendants are correct that the plaintiffs never specifically requested the change in the drug limitations before trial. However, the plaintiffs' complaint did charge that the defendants' current policy of classifying inmates to the OSP was arbitrary and capricious. In addition, the Court questioned the defendants' counsel about the wisdom of placing prisoners at the OSP for drug offenses. (Trial Tr. at 301—04). In fact, the defendants' own experts testified at trial about their opinions on whether drug offenses should be a basis for transfer to the OSP or supermax prisons in general. (Trial Tr. at 948—50, 1014—15). The Court holds that the defendants were not surprised within the meaning of Rule 60(b)(1) to be entitled to relief from judgment.

Next, the defendants say that the plaintiffs failed to exhaust their administrative remedies under § 1997(e) so that the Court did not have jurisdiction to order the relief it did.[5] The defendant correctly states that § 1997(e) means a district court should not prematurely decide a cause of action if all available remedies have not been exhausted. *See Brown v. Toombs,* 139 F.3d 1102, 1104 (6th Cir.1998). However, the exhaustion provision is not jurisdictional and a showing that the requirement is substantially met is sufficient to satisfy the exhaustion requirement. *See Wyatt v. Leonard,* 193 F.3d 876, 879—80 (6th Cir.1999).

The plaintiffs attached to their amended complaint Plaintiff Daryl Heard's letter appealing his placement at the OSP and North Regional Director Stephen J. Huffman's letter denying his appeal. (Am.Compl.Ex. III–H). Defendant Huffman's denial letter specifically states that Heard was sent to the OSP for smuggling marijuana into the Orient Correctional Facility. The Court holds that Plaintiff Heard's attempt to appeal his placement at the OSP, and the plaintiffs' inclusion of that paperwork with their complaint, satisfies § 1997e's requirement for the exhaustion of remedies.

***8** Even more compelling is the undisputed fact that the defendants waived the exhaustion of remedies issue with respect to Heard in their answer. "Defendants admit that Daryl Heard is incarcerated at OSP and that he has exhausted his administrative remedies regarding his challenge to his placement at OSP." (Defs.' Answer ¶ 9(h)). There is no dispute that the defendants' transferred Heard to the OSP for smuggling marijuana. Because the defendants admitted that Heard exhausted his administrative remedies, the Court had the authority to order the injunctive relief concerning the drug quantity sufficient fo placement into the OSP. The Court denies the defendants' motion for relief from judgment under Rule 60(b)(4).

III.

For the reasons discussed above, the Court denies the defendants' motion for relief from judgment.

IT IS SO ORDERED.

Footnotes

[1] In pertinent part, Rule 60(b)(6) says:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> ....
>
> (6) any other reason justifying relief from the operation of the judgment.

Fed.R.Civ.P. 60(b)(6).

[2] In pertinent part, Rule 60(b)(1) and Rule 60(b)(4) say:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise, or excusable neglect
>
> ....
>
> (4) the judgment is void

Fed.R.Civ.P. 60(b)(1), (4).

[3] Peter Davis was the executive director of the Ohio General Assembly's Correctional Institution Inspection Committee. Davis's comment is in the context of questions about his December 8, 1999, inspection report on the OSP, prepared for the Ohio General Assembly. (Pls.' Trial Ex. 11). That report, after commenting on the subjectivity of the supermax placement process, concluded:

> Serious questions remain as to how adequate, proper, fair and objective are the decisions to identify, justify and assign selected inmates to supermax. Still needed is a "clearer, more precise understanding of the working distinctions" among decisions to assign inmates to either high maximum, or to maximum [general population], or to maximum Administrative Control or to high close security.

(Pls.' Trial Ex. 11 at 10).

[4] The current edition of Policy 111–07 lists the relevant factors as follows:

> A. Reason for placement in Level 4 or 5 and relevant circumstances;
> B. Conduct Reports;
> C. Current Privilege Level;
> D. Time Served in current privilege level;
> E. Total time spent in level 5 and/or level 4;
> F. Time left to spend on current sentence;
> G. Time since last incident that resulted in inmate being designated level 5 or 4;
> H. Program Involvement;
> I. Behavior in the last five years, including prior Level 4 or 5 classification;
> J. Security level prior to placement;
> K. Adjustment/behavior after placement;
> L. Factors which indicate a risk of future violence;
> M. Interaction with others (staff and/or inmates);
> N. Recognition and acknowledgment of the factors contributing to the commission of the placement offense and nature;
> O. The findings and recommendations of the previous assessment committees;
> P. Previous review committees;
> Q. The findings and recommendations of all assessment committees subsequent to the placement in level 4 or level 5; and
> R. The findings and recommendations of all supervision and privilege review committees subsequent to placement in level 4 or level 5.

[5] Section 1997e(a) says in its entirety: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a).