IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

LAWRENCE CARTY, ET. AL.,	**94-78)**	
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	)	
Plaintiffs	)	**Case No. 94-78**
	)	
vs.	)	
	)	
	)	
ALBERT BRYAN, ET. AL.,	)	
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	)	
Defendants.	)	
	)	
_____	)	

BOC'S RESPONSE TO COURT'S
SEPTEMBER 15, 2019 ORDER & COMPLIANCE PLAN

COME NOW, Defendants (or "Government"), by and through their undersigned counsel, and hereby file their response to the Court's Order of September 13, 2019 ("September 13 Order"), which requires, among other things, that Defendants "file a plan proposing specific, demonstrable, and tangible tasks necessary to be undertaken to obtain substantial compliance with the provisions of the 1994 and 2013 Settlement Agreements . . ."[1]

Introduction

The Alexander A. Farrelly Criminal Justice Complex ("CJC"), the subject of these Settlement Agreements, was never intended to house detainees or inmates long-term. It was designed solely as an intake facility, where recently-arrested detainees would spend a week at most, while being processed, before being transferred elsewhere to await trial. Over time,

[1] The proposing of long-term goals, as requested by the Court, should not be construed as an admission by Defendants that they are noncompliant as to all provisions of the Settlement Agreements nor should it be construed as a waiver of Defendants' rights under the Settlement Agreements, including their right to seek either modification or termination of those Settlement Agreements.

however, CJC became the functional equivalent of a jail, though it was never designed or intended for that purpose.

Physical plant limitations at CJC limits the structural changes and activities that can be performed at the jails. CJC was not designed to achieve efficiencies in the use of correctional staff. On the contrary, the design of the facility is particularly inefficient, requiring a larger ratio of correctional officers to inmates than would be necessary in a modern jail or prison. Space is extremely limited. Those space limitations were compounded when Hurricane Irma destroyed the Alva A. Swann Annex ("Annex") in September 2017. Detainees that previously could have been housed at the Annex must now be accommodated at CJC, pending disposition of their criminal charges. Although the Government presently is in negotiations with FEMA to rebuild the Annex, FEMA has not yet made a definitive decision on whether the Annex will be rebuilt or merely repaired. Ideally, the Government would prefer to build a modern facility at the site of the Annex, with FEMA's support, that would allow the Bureau to rely much less, it at all, on CJC. Whether such a project will eventually be realized, will depend largely on FEMA's decision, over which the Government exercises no control.

Many of the mid and long-term goals proposed by the court-appointed security and mental health experts recognize these physical plant limitations at CJC and appear designed to prod the Government to construct new correctional and mental health facilities. *See, e.g.,* David M. Bogard, Security Expert's Report to the Court and the Parties: A Plan of Near-Term, Mid-term and Long-term Objectives to Achieve Substantial Compliance with Settlement Agreement Provisions at 4 (Aug. 16, 2019) [ECF No.1143-1] ("With respect to a new direct supervision jail . . . ."); *see also* Kathryn A. Burns, Proposed Near, Mid and Long-Term Mental Health Tasks at

17-18 (Aug. 19, 2019) [ECF No.1144-1] (suggesting that safe cells and mental health office space be included in "plans developed for new jail construction").

While this Court plays an essential role in ensuring that conditions of confinement at CJC meet minimum constitutional standards, that role is inherently limited. The central problem facing CJC is one that the Court is ill-equipped to solve: too little money to both overcome physical plant limitations and pay for the needs of inmates and detainees. "[C]ourts are poorly suited to solving problems that require tremendous increases in spending and significant improvements in administration." Erwin Chemerinsky, *The Essential But Inherently Limited Role of Courts in Prison Reform*, 13 BERK. J. CRIM. L. 307, 315 (2008). When the problem is lack of money, the courts are limited in what they can do. *Id*. at 315. Deciding whether and when to build a new correctional facility is a task that has been committed to the executive and legislative branches. *See Bistrian v. Levi*, 912 F.3d 79, 94 (3d Cir. 2018) (citing *Turner v. Safley*, 482 U.S. 78, 84-85 (1987)).

Moreover, the drafters of the Prison Litigation Reform Act intended to limit the power of federal courts to require construction of modern facilities or to micromanage the day to day operations of prisons. As this Court stated:

> The PLRA sponsors described "overzealous Federal courts . . . micromanaging our Nation's prisons," 141 Cong. Rec. S14418 (daily ed. Sept. 27, 1995) (remarks of Sen. Hatch), and criticized "judicial orders entered under Federal law [which] have effectively turned control of the prison system away from elected officials accountable to the taxpayer, and over to the courts." *Id*. at S14419 (remarks of Sen. Abraham).
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> By requiring that relief be the least intrusive means of remedying a violation of a federal right, the PRLA "stops judges from imposing remedies intended to effect an overall modernization of local prison systems or provide an overall improvement in prison conditions."

United States v. Territory of the Virgin Islands, 884 F. Supp.2d 399, 407 (D.V.I. 2012) (emphasis added) (quoting H.R. Rep. No. 104-378 at 166); *see also Sandlin v. Conner*, 515 U.S. 472, 482 (1995) (observing that "federal courts ought to afford appropriate deference and flexibility to state officials trying to manage a volatile [prison] environment" and thus should "limit the involvement of federal courts in the day-to-day management of prisons.").

While the Court may not order the construction or modernization of a correctional facility, it may enter orders to ensure that conditions at CJC do not constitute cruel and unusual punishment. *See United States v. Territory*, 884 F. Supp.2d at 420 ("[T]he Supreme Court has made clear that 'the Eighth Amendment does not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual punishment.'") (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). Defendants' duty at CJC is to ensure that the conditions of confinement do not present an "excessive risk" of "serious harm" to inmate health and safety. *Farmer*, 511 U.S. at 837-38. And to recover for any harm suffered, plaintiffs must demonstrate that CJC officials had an objectively culpable state of mind. *Id*; *accord United States v. Territory*, 884 F. Supp.2d at 420 ("[T]he Court must make determinations regarding the objective likelihood of injury at Golden Grove and the current subjective state of mind of prison officials at Golden Grove.").

In assessing what constitutes "excessive risk" of "serious harm," the Court should take into consideration several facts. First, jail administrators should be permitted to develop a reasonable and fair strategy, consistent with community standards and practice, regarding the provision of medical and mental health care to detainees and inmates. It is within the discretion of jail officials, consistent with the Eighth Amendment and community standards, to determine what care is appropriate and necessary. *See, e.g.*, Kenneth Favier, HUMANE HEALTH CARE FOR PRISONERS: ETHICAL AND LEGAL CHALLENGES at 135-37 (2013). Thus, if there is no long-term,

forensic mental health facility in the Virgin Islands and only a handful of licensed psychiatrists, as is the case now, jail officials are severely limited in the level of care they can provide.

Second, the Court should evaluate whether the incidents highlighted by Plaintiffs are security lapses, present even in the best run jails, or whether they represent systemic failures which rise to the level of a constitutional violation. Defendants submit that they have put policies in place that promote the safety and security of detainees and inmates and that are designed to prevent the security lapses Plaintiffs have described. Defendants also have conducted training on these policies. More importantly, the critical inquiry is whether these lapses present an excessive risk of serious harm to those housed at CJC.

Third, for the first time in many years, the Bureau now has at its helm a seasoned, veteran, correctional professional. She should be given a reasonable opportunity to take corrective action at CJC to achieve substantial compliance with the Settlement Agreements. Her tenure should not be hamstrung – before it has begun in earnest – by coercive orders that respond to the shortcomings or failures of past jail administrators. The new Director has recently made significant personnel changes to address these shortcomings and to impose accountability on Bureau administrators in critical positions. Some of these personnel changes were made since the last quarterly status hearing. (The Bureau is in the process of filling the positions of Chief Investigator and Fire, Life, Safety Coordinator, among others, which recently became vacant).

Mid-Term and Long-Term Goals

With these principles in mind, and without waiving their right to seek modification or termination of the Settlement Agreements based on changes in law or circumstances,[2] Defendants make the following long-term proposals as required by the Court:

1. Defendants adopt those near term, mid-term, and long-term goals proposed by the court-appointed experts to which they have not either specifically or generally objected and which Defendants have already indicated can be achieved. Defendants incorporate herein Defendants' Objections to the Court Experts' Proposed Near-term, Mid-term, and Long-term Tasks (filed Sep. 6. 2019) [ECF No. 1159].

2. Defendants respectfully propose that the experts' quarterly or semi-annual reports include a clear, measurable, compliance rating for each provision of the Settlement Agreement, as required by ¶ VIII.F.1. Without measurable benchmarks to assess their progress, Defendants will continue to have difficulty apportioning scarce resources to best respond to shortcomings in compliance. After roughly twenty-five years of monitoring, Defendants have not been given a clear assessment as to where they stand in achieving full compliance. To use a football analogy, it is unclear whether they are on the opponent's one-yard line preparing to score or on their own one-yard line, needing to drive the length of the field.

[2] "The provisions of a consent decree that order prospective relief remain subject to modification or alteration for changes in law or circumstances. Such right as a litigant may have to prospective relief is thus neither final nor 'vested' in the constitutional sense." *Benjamin v. Jacobson*, 172 F.3d 144, 164 (2d Cir. 1999) (en banc).

3. Defendants also propose that the court-appointed experts state those provisions of the Settlement Agreements with which they are presently in either substantial or sustained compliance.

4. Within one year, Defendants propose to contract with an additional psychiatrist to provide support to Dr. Lu at CJC.

5. Within one year, Defendants propose to increase the number of correctional officers at CJC, by at least 5, by taking the following actions:

   a. Advertising correctional officer openings in newspapers in neighboring islands;

   b. Changing the advertised position for correctional officer on the Division of Personnel website to "open," so that the position can be advertised year-round, as is the case with the V.I. Police Department; and

   c. Propose amending existing V.I. law to allow retired correctional officers to perform part-time duties at CJC, without incurring a penalty from the GERS, as is the case with the V.I.P.D. Defendants have already engaged in discussions with several members of the Legislature on this topic.

6. Within six (6) months, have in place a computer system to access and monitor electronic medical records of all inmates and detainees.

7. Within six (6) months, implement a video visitation system, the use of which should significantly reduce the introduction of contraband, either through the mail or through contact visits.

8. Within six (6) months, hire the jail mental health professional / social worker.

9. Within three (3) months, conduct refresher training on the involuntary psychotropic medication policy.

10. Within six (6) develop, implement and train on the tool and key control policy.

11. Within one year, re-evaluate and conduct refresher training on the inmate/detainee grievance policy and procedure and implement audit tools to ensure that inmate grievances are being heard and addressed in a timely manner.

12. Long term - Implement regular, unannounced cell shakedowns and searches per Administrative Directive;

13. Within six (6) months, conduct refresher training of all correctional officers on report writing, with particular emphasis on incident report writing.

14. Within two (2) years, require that all log entries be electronic and/or automated (to the greatest extent possible) and stored in a centralized computerized database; phase out the use of logbooks and move to a fully computerized system.

15. Within one (1) year, ensure that all locks and keys at CJC are properly classified, numbered, and maintained and that key control is enforced and implemented;

16. Within nine (9) months, ensure that all CCTV systems remain operational and that a system for storage of archival CCTV footage is in place and readily accessible to jail administrators;

17. Within nine (9) months, ensure that all fire detection and fire suppression systems are fully functional, regularly tested, and inspected by local fire authorities.

18. Within six (6) months, conduct quarterly fire and evacuation drills of all shifts and all clusters.

19. Within eighteen (18) months complete all policies and procedures as required by the Settlement Agreements and train on and implement same.

Respectfully submitted,

DENISE GEORGE, ESQ.
ATTORNEY GENERAL

Date: September 30, 2019 BY: /s/ Carol Thomas-Jacobs

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2019, I electronically filed a true copy of the foregoing RESPONSE with the Clerk of the Court using the CM/ECF system, which gives notification of such filing (NEF) to the following:

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/s/ Carol Thomas-Jacobs_____