UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

RALPH VALVANO, et al.,

Plaintiffs,

- against -

BENJAMIN MALCOLM, et al.,

Defendants.

70-C-1390

DETAINEES OF THE BROOKLYN HOUSE OF DETENTION, et al.,

Plaintiffs,

- against -

BENJAMIN MALCOLM, et al.,

Defendants.

73-C-261

July 31, 1974

Appearances:

WILLIAM E. HELLERSTEIN, ESQ.
JOEL BERGER, ESQ.
STEVEN A. HERMAN, ESQ.
MICHAEL B. MUSHLIN, ESQ.
PIERCE GERETY, JR., ESQ.
The Legal Aid Society
Prisoners' Rights Project
Attorneys for Plaintiffs

70-C-1330

Appearances (continued):

HON. ADRIAN P. BURKE
Corporation Counsel, City of New York
Attorney for Defendants

By: DONALD J. TOBIAS, ESQ.
JEFFREY FRIEDMAN, ESQ.
MARIAN PROBST, ESQ.
Assistant Corporation Counsel
of Counsel

J U D D, J.

MEMORANDUM OF DECISION AND ORDER

Two major issues were tried before the court in this prisoner civil rights action. The first related to overcrowding, particularly the confinement of two men in a single cell, and the second related to alleged excessive confinement because of inadequate time out of the cells (lock-out), the requirement that detainees eat meals in the cells, and inadequate recreation and dayroom facilities.

Facts

The Valvano action, relating to Queens House of Detention (QHD), and the Detainees action, relating to the Brooklyn House of Detention (BHD), involve similar issues and were consolidated for trial. The court heard eleven witnesses on behalf of the plaintiffs and four for the

defendants, as well as receiving a number of exhibits. A considerable mass of material accumulated in earlier phases of the actions has also been considered.

Structure and Facilities

The Brooklyn and Queens Houses of Detention are multi-storied institutions. Although both are relatively recently constructed, they embody concepts of penology different from those now commonly held, and are basically maximum security institutions, although only a fraction of the detainees require maximum security.

The housing floors of BHD and QHD are each divided into four quadrants, with two tiers of fifteen cells, one above the other in each quadrant. These cells have solid walls but steel bar fronts and gates, opening onto corridors about 90 feet long and 5 feet wide. There is one shower for each tier.

Each section of two tiers shares a single dayroom, with an area of approximately 425 square feet at BHD and 550 square feet at QHD. Each quadrant is sealed off from the other sections on the same floor so that detainees cannot move from one part of the floor to another.

All cells are approximately 40 square feet in area, furnished with two bunk beds, one table, one immovable seat, one unenclosed toilet and one mirror. There is one shower for each tier. There are no closets. Lockers which previously existed at QHD were destroyed or damaged by the inmates during the 1970 riots and have not been replaced, allegedly for security reasons. Inmates at the Federal House of Detention (FHD) at West Street are provided with lockers.

In BHD detainees under mental observation are housed in a dormitory in the former 10th floor gymnasium. In QHD there are two dormitories capable of housing 80 men each; one is used for sentenced prisoners who do household and kitchen chores and the other is vacant. In BHD 95 sentenced inmates who work in the institution are housed in cells.

Each institution has a gymnasium and theatre auditorium and an enclosed roof recreation area. The largest of these rooms is approximately 3,400 square feet. There are classroom areas and libraries in both institutions.

Overcrowding

The rated capacity of BHD is 814 and of QHD 520. This is based on single occupancy of cells with all cells filled.

The average rate of occupancy for the years 1969 to 1973 was 170 percent of capacity at BHD and 153 percent of capacity at QHD. Occupancy has dropped during the pendency of this action. At the time of the hearings in late January, there were 998 inmates or 23 percent above capacity at BHD and 670 inmates or 29 percent above capacity at QHD. Actual overcrowding was substantially greater because 90 cells in BHD are usually unused and one dormitory and 40 cells are not in service at QHD. Consequently, the normal practice in both institutions is to house two men in a cell.

Confining two men in a space of 40 square feet creates personal problems. They may not be "horrors" as plaintiffs assert, but even one of the wardens has characterized the practice as "sort of dehumanizing." Two men cannot move about at the same time in the portion of the cell which is not utilized for bunks, table, seat, and toilet. Since the meals are fed to inmates in the cells and there is only one chair, only one man can use the table and the other must sit on the bed to eat; the choice of who eats on the bed is made in varying ways, depending on seniority, rotation, strength, or other factors. Disagreements concerning the choice of activities, embarrassment and discomfort in the use

of the toilet in the presence of a cell-mate, and disagreements concerning personal belongings are common. Fights and charges of theft are frequent, although fights between inmates who do not share cells are also common. Loss of privacy is one of the major results of double celling.

Most inmates stated a preference for living alone in a cell, although some inmates actually prefer having a cell-mate. Some had been in state institutions where inmates were housed one in a cell, and spoke particularly of the lack of privacy at the city institutions. Experts testified that long confinement together increased homosexual impulses.

Complaints by the newly formed inmate councils have not focused on double-celling, but this may have been because correction of the condition is not within the power of the individual wardens.

The dayrooms were constructed to accommodate the needs of the institutions under conditions of single cell occupancy. With 60 men in a quadrant, two to a cell, instead of just 30, the dayrooms are unduly crowded. Warden West of BHD admitted that there were not enough chairs for everyone to sit. He would prefer to limit cells to a single person, given the ability.

On week days, many inmates are not in the dayrooms because they may be making court appearances or may be participating in some of the other activities which are available, but on Saturdays and Sundays most of the activities are suspended.

The undesirability of double-celling was confirmed by Dean Robert B. McKay of New York University Law School, who was serving as Chairman of the Board of Correction of the City of New York. He had previously been Chairman of the New York State Special Commission on Attica. He stated that in his experience all correctional professionals considered it "inadvisable" to confine two persons in a single cell and that

> The city did it not because it is desirable, but they considered the necessity of the circumstances. I think there is uniform conclusion that it is an undesirable fact.

The Manual of Correctional Standards issued in 1966 by the American Correctional Association, states (p. 49):

> All cells should be designed for the use of one prisoner. The minimum clear size of an interior cell should be approximately 50 square feet, with an elevation of not less than 8 feet.
>
> In the case of squad rooms or dormitories, the

Standards recommend that they have a capacity of not less than four nor more than fifty inmates and that

> the ceiling height should be at least ten feet and at least 75 square feet of floor space should be available for each prisoner.
>
> . . . and a minimum of one shower head for each fifteen inmates or fraction thereof.

The Committee which drafted the Standards, as a revision of the 1959 Manual, included the Director of the United States Bureau of Prisons, the Chairman of the New York State Board of Parole, Russell G. Oswald, and the Commissioner of Corrections of the City of New York, Anna M. Kross. The Manual does not have the force of law, and its 600-odd pages of recommendations are not in full effect in any state.

The United Nations' Congress on the Prevention of Crime and the Treatment of Offenders adopted in 1965 a set of Standard Minimum Rules for the Treatment of Prisoners. These rules also recommend that each prisoner have an individual cell, and at least one hour of suitable outdoor exercise daily, weather permitting.

No defense witness stated that double-celling was desirable.

The defendants' brief attacks the credibility of

the inmate witnesses and the qualifications of the experts. It is true that all the inmate witnesses had prior convictions before their current arrest, and that some had not complained earlier about double-celling. It is also true that Dean McKay never supervised a correctional institution, but this does not alter the fact that in his statewide studies and in his New York City experience he had found no defenders of double-celling. Mr. Goff, whose testimony confirmed that of Dean McKay, was acting superintendent of two New Jersey reformatories, Director of Classification and Education in the New Jersey Bureau of Correction, and General Secretary of the Correctional Association of New York, among other posts, before becoming Director of the Prisoners' Rights Project of the United States Commission on Civil Rights.

The court has also given weight to the testimony of Dr. Augustus Kinzel concerning the psychiatric effects of confinement without accepting his specific computations concerning the "buffer zones" required by violent and non-violent prisoners.

The overcrowding of dayrooms at BHD and QHD is related to the practice of double-celling. The Manual of Correctional Standards of the American Correctional Association recommends (p. 49):

> The housing unit should be so designed as to provide approximately 75 square feet per inmate, including the cells and day-room areas.

The comparable areas are 43 square feet per inmate at BHD and 23 square feet at QHD, with 30 inmates double-celled on a tier. Obviously, these figures would be improved if cells were occupied by only one man. The shower facilities at BHD and QHD would meet the A.C.A. standards if there were only one man in a cell, although they fall short now.

The Federal House of Detention on West Street has many cells which are occupied by two men, but the average period of confinement there is much less than at BHD or QHD. Only 30 percent of the inmates at FHD have been there for more than two months, while almost 40 percent of those at BHD have been there more than four months and 75 men have been there more than one year. Defendants pointed out that the United States Bureau of Prisons had examined BHD and qualified it to receive federal prisoners in case of over-crowding at the Federal House of Detention.

A new federal facility with greater capacity is expected to be available before the end of 1974. There was no testimony concerning the possible use of West Street to house New York City prisoners after the building is evacuated

by the United States Bureau of Prisons.

Excessive Confinement

Time out of cells is divided into three periods in each institution, spaced in the morning, early afternoon, and evening. At BHD, the lockout time is approximately eight and one-half hours, with a few minutes leeway at the end of each period before all inmates return to their cells. At QHD, the lockout time is approximately nine and three-quarters hours. The time is related to the necessities of institutional administration, arranging for court appearances, distributing and gathering food trays, performing tier sanitation, and making head counts. The length of time necessary for such chores depends on the number of men per tier, and the limited number of correction officers.

The inmates at both institutions are fed in their cells, a practice which is not followed at FHD. Wardens of both institutions recognize that there are advantages in feeding inmates in the dayrooms, but consider that this practice is not feasible under present conditions. The dayrooms at BHD and QHD would not accommodate all the inmates of a double-celled section at a time, and feeding would have to be in shifts.

At FHD, inmates are permitted unrestricted movement throughout both housing floors and from floor to floor, from 6:00 a.m. to 10:30 p.m. There is a lower proportion of violent crimes charged against the federal inmates than is true in city institutions. However, sentenced state prisoners in upstate institutions have much greater freedom of movement than the detainees at BHD and QHD.

During the lockout times, the cells in BHD are open, while those in QHD are locked. There are arguments in support of both practices. Locking the cells minimizes thefts, avoids the risk of fights occurring in cells outside the view of correction officers, and improves the security situation. Leaving the cells open increases the space available for inmates, provides greater flexibility of movement during lockout periods, and promotes privacy.

Activities

Both institutions have a variety of facilities available for inmates. One witness, for instance, said that he participates five nights a week in a program of John Jay College; another takes part in an arts and crafts program scheduled by the Brooklyn Museum of Arts. Another sings in the choir, studies English and participates in a dramatic

program. There is an inmate newspaper at BHD supported by the administration, without undue censorship. At QHD, there is group counselling by the Ethical Culture Society; outside agencies specializing in drug addiction have access to the institution for inmate counselling, and there is an extensive volunteer clergy program in addition to the regular chaplains employed by the institution. Weekly movies are shown in the auditorium and periodic live plays and concerts are presented by outside community groups.

Other activities include a high school equivalency program, where inmates may attend classes twice a week, instruction in English as a second language, and instruction in legal research. There are a few detainee work programs where they can earn nominal sums in housekeeping tasks.

Other positive aspects of BHD and QHD include closeness to the inmates' homes, a relatively large percentage of black and Puerto Rican correction officers, a policy of not censoring mail, and liberal access to the press.

Some of the programs at both institutions have waiting lists, but this is not true of all. Half of the counseling positions at BHD are vacant.

The gymnasiums at both institutions are small, and

available generally only once or twice a week for each inmate. The elevators in both institutions were designed for a period before there was such a variety of activities. Program scheduling difficulties have arisen because of the necessity to reduce elevator tie-ups as well as lack of staff.

Classification

Admittedly, the classification system at both institutions is inadequate. There are limits on the extent of classification that is possible in a detention facility, but again inadequate staff and budget prevent even attaining what is possible. The Wardens recognize that many detainees are not dangerous and do not need maximum security. Plaintiffs' experts testified that only about 20 percent of inmates require maximum security, and this estimate was basically confirmed by Warden Rubin of CHD.

Discussion

Judicial concern with conditions inside correctional institutions is a relatively new development in this generation. It requires balancing the need for security against the rights of inmates to a humane living environment. E.g. Inmates of Milwaukee County Jail v. Petersen, 353 F. Supp. 1157

(E.D. Wisc. 1973). Security includes not only preventing escape so as to assure production in court, but preventing harm to inmates from others in custody. It is frequently stated that pretrial detainees should be held under the least restrictive conditions compatible with security. E.g. Rhem v. Malcolm, 371 F. Supp. 594 (S.D.N.Y. 1974); Brenneman v. Madigan, 343 F. Supp. 128 (N.D. Calif. 1972); Hamilton v. Love, 328 F. Supp. 1182 (E.D. Ark. 1971).

The problem is compounded by the fact that budget-makers give a low priority to correctional institutions in both state and federal areas and by the fact that federal courts may function only to protect inmates from deprivation of constitutional rights, not to declare optimum policies for state administration or funding. Breeden v. Jackson, 457 F.2d 578 (4th Cir. 1972); Collins v. Schoonfield, 344 F. Supp. 257 (D. Md. 1972).

1. As to the problem of double-celling, there is square authority that there should not be more than one man in a cell. The District Court of Massachusetts enjoined the officials of Suffolk County from housing more than one inmate awaiting trial in a cell, subject to a grace period to comply with the ruling. Inmates of the Suffolk County Jail v.

Eisenstadt, 360 F. Supp. 676 (D. Mass. 1973), aff'd, 494 F. Supp. 1196 (1st Cir. 1974). Although the A.C.A. Standards do not have the force of law, they have a persuasive effect within the amorphous boundaries of federal rights.

Defendants cite cases which permit two inmates in a cell and hold that the forbidden limits are reached only when there are three or more in a cell. Johnson v. Lark, 365 F. Supp. 289 (E.D. Mo. 1973); Jones v. Wittenberg, 330 F. Supp. 707 (N.D. Ohio 1971), aff'd sub. nom. Jones v. Metzger, 456 F.2d 854 (6th Cir. 1972). Given the length of confinement at BHD and QHD, see Wallace v. Kern, 72-C-898 (E.D.N.Y. March 7, 1974), rev'd, F.2d (2d Cir. July 8, 1974), the court cannot accept double-celling as permissible. It may not be practicable to terminate the practice at once, and there may be a few cases where inmates prefer to have cellmates, but the practice should be eliminated as soon as possible.

Overcrowding is not measured by the percent of capacity as computed by comparing census with total beds, but by the number of individual cells that are over-occupied, whatever may be the reason for keeping other cells and dormitory areas out of use. Lack of funds is not an excuse for

denying constitutional rights. Jones v. Wittenberg, supra; Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968 - per Blackmun, J.).

Limiting cells to single occupancy will create problems. It may be necessary to recruit detainees to do the work now done by sentenced prisoners, and this may have to be limited to volunteers. The city may have to spend money to utilize space that is now vacant. It may be necessary to move some inmates to places farther from their homes. Those problems can be held to a minimum with good planning; they do not justify continued adoption of the line of least resistance, which would mean continued double occupancy of cells.

2. As to excessive confinement, the problem arises in part from overcrowding. The inmates presently are out of their cells for periods ranging from eight to ten hours per day. Additional lockout time can quite likely be provided when double-celling is eliminated. The precise number of hours may be left to the judgment of the wardens and administration. Comparison with state prison conditions has some significance, but is not decisive.

Feeding in the dayrooms would be preferable to feeding in cells. The dayrooms may be adequate to serve as

dining facilities when the cells are occupied by only one man. Likewise, the necessity for one inmate to eat on his bed will be eliminated when there is only one inmate to seat at the table. The discomfort or indignity of eating in a cell is not a constitutional violation within the general principles laid down in Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971), cert. denied, 404 U.S. 1049, 92 S.Ct. 719, 405 U.S. 978, 92 S.Ct. 1190 (1972). Nor can it be described as cruel and unusual punishment. Rhem v. Malcolm, 371 F. Supp. 594, 624 (S.D.N.Y. 1974).

Denial of outdoor exercise is a serious violation. New York State Association v. Rockefeller, 357 F. Supp. 752, 769 (E.D.N.Y. 1973). There is no indication that adequate outdoor exercise can be provided at either institution, considering the lack of yard space and the small area of the roof tops. No practicable form of injunctive relief in this connection has been proposed.

A variety of problems at BHD and QHD are interconnected with the effects of undue delays in trial of defendants, budgetary restraints respecting staff and equipment, and lack of prescience in the planning and construction of the institutions, and cannot all be corrected in one action.

Trial delays are being reduced, according to the evidence recently provided to this court in Wallace v. Kern, 72-C-898, although less rapidly than might be desired.

It is ORDERED (1) that, counting from September 1, 1974, no person shall be confined in a cell with another person for a period longer than thirty days unless on the voluntary written consent of both persons; (2) that beginning six months after the date of this Memorandum and Order, no person shall be confined in a cell with another person without similar consent, except in the case of an emergency certified by the Commissioner of Correction and the Chairman of the Board of Correction, and then for periods not longer than ten days; (3) that the complaints be dismissed in so far as they seek other relief; and (4) that the operation of this Order be stayed for seven days to permit defendants to determine whether to appeal and apply to the Court of Appeals for a stay pending appeal.

/s/ ORRIN G. JUDD
U. S. D. J.