

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

JAMES BENJAMIN, et al.,

Plaintiffs,

- against -

WILLIAM J. FRASER, et al.,

Defendants.

75 Civ. 3073 (HB)

Opinion and Order

Hon. HAROLD BAER, JR., District Judge:

On January 9, 2001, I granted in part, and denied in part, the motion of the City of New York and the Department of Correction, et al. (collectively, the "defendants") to terminate the consent decrees and all supplemental orders concerning environmental health and related issues at fourteen jails.¹ See Benjamin v. Fraser, 2001 U.S. Dist. LEXIS 84 (S.D.N.Y. 2001) [hereinafter, "January opinion"]. The consent decrees at issue were entered in this action and six related cases in 1978 ("Consent Decrees").² My opinion of January 9, 2001 followed hearings

¹ The fourteen jails that were under review in the May proceeding were the Anna M. Kross Center (AMKC), the Adolescent Reception and Detention Center (ARDC), the George Motchan Detention Center (GMDC), the James A. Thomas Center (JATC), the Rose M. Singer Center (RMSC), the George R. Verno Center (GRVC), the North Infirmary Command (NIC), and the West Facility (West) on Rikers Island; the Vernon C. Bain Center (VCBC), a "maritime facility" anchored off the Bronx; the Manhattan Detention Center, (MDC), the Queens Detention Center (QHD), the Brooklyn Detention Center (BKHD), and the Bronx Detention Center (BXHD).

² The six related cases are: Forts v. Malcolm, 76 Civ. 101 (New York City Correctional Institute for Women), Ambrose v. Malcolm, 76 Civ. 190 (Bronx House of Detention for Men), Maldonado v. Ciuros, 76 Civ. 2854 (Adolescent Reception and Detention Center), Detainees of the Brooklyn House of Detention for Men v. Malcolm, 79 Civ. 4913, Detainees of the Queens House of Detention for Men v. Malcolm, 79 Civ. 4914, Rosenthal v. Malcolm, 74 Civ. 4854 (Adult Mental Health Center on Rikers Island).

the facility-wide ventilation failings at RMSC, I held, "[o]n these facts, I find that RMSC's lack of ventilation is constitutionally deficient." January opinion, at *37. The reference to "intake areas at RMSC" in the very next sentence of the January opinion was not intended to qualify my determination or limit the scope of my holding to RMSC's intake areas. See id. at *38. Nor, as defendants posit, did I rely exclusively upon Dr. Powitz's testimony there was "no or non-detectable exhaust ventilation in 21 of the 43 locations surveyed in the intake area of RMSC, including non-detectable ventilation in the two medical treatment rooms and the examination room." Id. at *37.

B. Ventilation in Jail Intake Areas at BKHD, QHD, VCBC and West Facility

Plaintiffs argue that the Court overlooked their claims concerning ventilation in the intake areas at BKHD, QHD, VCBC and West Facility, and that the Court mistook plaintiffs to have taken the position that these facilities passed constitutional muster. Id. at *24-25. Again, plaintiffs are correct. Because plaintiffs did, in fact, contest the ventilation in the intake areas of all four facilities in their post-hearing brief, (See Pl. Br. At 21; 23-30) a claim to which the defendants have not objected, plaintiffs did not waive the argument. Let me revisit, or visit, the record on the intake area issue.

1. governing law

The governing law is fully set forth in the January opinion, and will be articulated here only in an abbreviated form. See January opinion, at *7-21. Under the Prison Litigation Reform Act ("PLRA"), this Court will award such prospective relief as is "necessary to correct a current

because [i]nadequate ventilation . . . undermines efforts to maintain minimum levels of sanitation within the Department's facilities, providing an environment where mildew, mold, rust, and bacteria can flourish." *Id.* at *21.

2. analysis

The notes of Department of Correction's Director of Environmental Health, Patricia Feeney ("Ms. Feeney") taken by her in connection with her walk-through of BKHD in December, 1999 indicate ventilation problems in four of six "holding pens" in the intake area. (Pl. Exh. 363 at E06617.) Pen 10 entirely lacked a supply register, the register in Pen 10 was covered, and the registers in Pens 6 and 3 were "clogged with paint." (*Id.*) Additionally, the exhaust register in Pen 10 was dusty. (*Id.*)³ At the May 5, 2000 hearing, Robert W. Powitz, Ph.D., an expert in the field of environmental health ("Dr. Powitz"), testified that "[w]e found ventilation problems at . . . Brooklyn." (Tr. 654.) This record is sufficient to sustain a finding that ventilation in the intake areas of BKHD does not satisfy the Constitution.

At QHD, Dr. Powitz noted that there was no ventilation or problematic ventilation in four of the five pens. (Pl. Exh. 000140-01.) During the same visit to QHD, Ms. Feeney observed that of five pens, three pens lacked supply registers and the exhaust register in a fourth pen was partially blocked. (Pl. Exh. at E06608.) In her subsequent evaluation, dated April 20, 2000, Ms. Feeney stated that the "[v]entilation units in the facility were operable," but conceded that "[i]n several areas, the ventilation registers were partially clogged with dust. This impedes air flow

³ Ms. Feeney also noted significant ventilation problems in non intake-areas of BHHH. (Pl. Exh. 365 at E06617-27.)

Feeney's report of her visit on March 29, 2000 to West Facility makes no mention of ventilation, and states that "[t]he overall environmental condition of the facility was excellent." (Def. Exh. F-4 at 1.) Dr. Powitz's notes do not refute this assessment. His only comment on ventilation in the intake areas of West Facility is: "Hospital - No Ventilation." (Pl. Exh. 366 at 06736.) This record does not sustain a finding that ventilation in the intake areas of West Facility falls below constitutional minimums.

Therefore, the record is sufficient to sustain a finding that "intake area" ventilation does not satisfy the Constitution's requirements at BKHD and QHD, but does not support such a finding at VCBC and West Facility.

C. Sanitation at NIC

In the January opinion, I wrote: "I find that sanitary and lighting conditions at medical areas in . . . NIC had been improved by the time of the May Hearings and thus there is no 'current and ongoing violation' of detainees' rights to adequate sanitation in these facilities." January opinion, at *100. I made that decision despite the overwhelming evidence of constitutional violations at the time of Dr. Powitz's and Ms. Feeney's visit on March 20, 2000, a mere two months prior to the May Hearings, because I credited the April 25, 2000 letter of Elizabeth Loconsolo, the Department's General Counsel ("Ms. Loconsolo"), and the testimony of Ms. Feeney that conditions at NIC had been substantially improved. *Id.* at *100.⁵ After careful

⁵ Plaintiffs' half-hearted and unsuccessful attempt to make an issue of the fact that Ms. Loconsolo's letter was unsworn is curious, not least because the letter was plaintiffs' exhibit, not defendants'.

inspections and the clinic is clean, the treatment rooms were clean . . . the equipment was clean" (Tr. 968), her testimony was highly general and did not encompass areas of NIC other than the clinic and treatment rooms. Also, Ms. Loconsolo's lengthy and highly-detailed letter rebutted many of Dr. Powitz' claims, but left unanswered, or unsatisfactorily answered, many other clear failings.

For example, entirely unanswered is the evidence that the "treatment counter" was "filthy" (January opinion, at *102); the "medication counter was excessively dirty," (*id.*); and under pads (or "chucks") are used as shelf liner in working areas" even though to do so is "a breach of good infection control practice" (*id.* at *103-104).⁶ Further, since they limited their statements to the medical areas of NIC, Ms. Loconsolo and Ms. Feeney made no representations about sanitation in the infirmary living areas at NIC - areas which, as part of NIC, figure into the constitutional analysis of the facility.

In Dorm 1, the shower wall finish was in poor condition and there was pooling water on the floor with scaling dirt, along with a trip hazard on the floor. Many beds in Dorms 1 and 2 were less than 6 feet apart. (Pl. Ex. 107 at P000258-59.) In Dorm 2, the wheel chair ramp to the shower is made of wood and presents a risk of injury. (Tr. 714-715; see also Pl. Ex. 182 (photo of ramp).) In addition, Dr. Powitz found the floor and sill in the 2B shower were uncleanable. (Tr. 714; see also Pl. Ex. 181 (photo).)

Id. at *104-105.

Moreover, many of Ms. Feeney's and Ms. Loconsolo's statements about previously

⁶ Ms. Loconsolo did state that in many hospitals chucks are used to "prevent gross contamination of tables, stands, etc.," but does not fully rebut Dr. Powitz's testimony that chucks were relied upon excessively, some of the surfaces underneath the pads were stained, or that unless replaced chucks "become a porous surface on what should be a smooth, washable surface. A chucks under pad cannot be disinfected." (Tr. 617-618).

"some of the areas outside of cardboard boxes containing sealed sterile items were dirty" (*id.* at 4); "there may be cabinets where culture kits are stored with non-sterile supplies" (*id.*); "cabinets in the medication room did appear to be dusty" (*id.* at 5); "there was dirt build-up in isolated spots on the walls and some furnishings" (*id.*); and "there may have been some dust on the base of some IV poles and scattered areas of rust on parts of exam tables" (*id.* at 5-6). Additionally, Ms. Loconsolo implicitly acknowledged other problems to be remedied in the future -- i.e., problems not corrected by the time of the May hearing --: "six new blood pressure cuffs" have been ordered (*id.* at 4) and "new exam tables are on order, as are new medication cassettes" (*id.* at 6) (Dr. Powitz testified that medication cassettes were "grossly spoiled" (January opinion, at *103)).

Finally, as Ms. Loconsolo and Ms. Feeney may be considered interested witnesses, I am constrained to look at their testimony carefully. Further, their institutional connections, coupled with the protracted history of incomplete or outright non-compliance with the Consent Decrees, must go into the mix. On the record before me, I conclude that at the time of the May Hearings the sanitation at the medical areas -- i.e., the clinic areas and infirmary housing areas -- of NIC was inadequate, and thus constituted a "current and ongoing" violation. This Court does not issue separate findings with respect to clinics and infirmary housing areas (an issue raised by the plaintiffs) because such a distinction in the present analysis is neither logical nor practical. NIC's medical areas, not its individual subparts, are the objects of the constitutional analysis. Lastly, because I conclude to ground my holding upon the conditions at NIC at the time of the May Hearings, and have not acted on plaintiffs' suggestion that this Court consider the possibility of near-future violations, I need not resolve the parties' disagreement and interesting arguments

II. Defendants Cross-Motion For Reconsideration

Defendants request that the Court clarify its January Opinion with respect to (1) ventilation at the Queens House of Detention; (2) the facilities whose temperature OCC is directed to monitor; (3) the modular units; and (4) the RMSC Clinic.

A. Timeliness of Defendants' Cross-Motion

Local Rule 6.3 states that "a notice of motion for reconsideration or reargument shall be served within ten (10) days after the docketing of the court's determination of the original motion." Although Rule 6.3 does not by name include cross-motions, it does expressly include "all motions," and a cross-motion is a motion. See Tisdell v. Barber, 968 F.Supp. 957, 963 (S.D.N.Y. 1997) ("[w]e do not believe that a cross-motion, which is logically a separate motion brought by the non-moving party, can be considered to have been made at the time the original motion was made") (emphasis supplied). Defendants offer no case authority for their view that cross-motions are not "motions" within the scope of Rule 6.3, nor can they. Thus, the defendants' January 24, 2000 deadline to file a cross-motion for reconsideration came and went without filing and their motion is untimely. However, this Court thinks it appropriate that it exercise its discretion and consider the cross-motion to the extent that it requests clarifications and corrections of clerical errors in the January opinion.

B. Ventilation at Queens Detention Complex ("QHD")

The inclusion of QHD among the facilities that required remedy to improve ventilation was inadvertent; however, in section "I.B.2" of this opinion the Court found that the ventilation

Plaintiffs disagree, and submit, leaving that comment aside, Ms. Feeney's notes as well as those of Dr. Powitz "are replete with findings of [RMSC's] grossly unsanitary state." This Court's holding that RMSC's sanitation is unconstitutional is clear, fully supported by the record, and requires no clarification or correction. Moreover, there is no reason to assume that the statement, "Clinics don't meet veterinary [sic] standards" — which appears in Ms. Feeney's notes, in her hand, without quotations marks or any other indication of attribution — does not reflect that dogs and cats deserve better conditions.

CONCLUSION

For the aforementioned reasons, plaintiffs' motion is granted in part and denied in part, and the defendants' motion is granted in part, and denied in part. Defendants' motion for reconsideration of this Court's January opinion with respect to modular units is reserved.

SO ORDERED
New York, NY
March 20, 2001



U.S.D.J.