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IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

MICHAEL CLEARY, et al.
Plaintiffs,
vs.
ROBERT SMITH, et al.,
Defendants.

Case No. 3AN-81-5274 Civil

D E C I S I O N A N D O R D E R

(PLAINTIFFS' MOTION FOR SANCTIONS)

Plaintiffs have moved this court for an order holding the defendants in contempt for failure to comply with population cap provisions in the Final Settlement Agreement (FSA) agreed upon by both parties and ordered by the court on September 21, 1990.[1] The plaintiffs seek an order fining the state $1000.00 per day for each day the statewide inmate population exceeds its emergency capacity limit and $500.00 per day per institution for each day an individual facility exceeds its emergency capacity limit.

In response to the motion for sanctions, Department of

[1] The population cap provisions, agreed upon after consultation with national experts in prison management, establish criteria for determining safe facility capacity levels and set maximum and emergency population caps at each of the incarceration facilities managed by the Department of Corrections within the state of Alaska.

Corrections (DOC) filed a population management plan, asserted that it had made good faith efforts to comply with the FSA population cap, and assured the court that its management plan would have population levels within the caps by early 1994.[2] In April 1994, the court gave DOC the opportunity to demonstrate that it was in compliance with the FSA population caps.

In response to the court order, DOC filed exhibits A through AL. Those exhibits establish the following.

(1) In September 1993, DOC issued its short-term population management plan entitled "Department Population Management Plan." This provided for Pt. Hope[3] and for a statewide program of intermediate sanctions in lieu of incarceration. No information has been provided to the court to show that either the

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[2] On October 25, 1993, the court granted the state's motion to modify judgement to increase population caps by enlarging the Fairbanks Correctional Center by 2 beds and the Spring Creek Correctional Center by 50 beds. As a part of its argument for the expanded population capacity, DOC asserted that the additional beds would permit it to comply with the statewide population caps.

[3] In 1993, the legislature appropriated 1.7 millions dollars in capital funds and 1.5 million dollars in operating funds to DOC to restore and preserve 3 of the Point MacKenzie agricultural development properties on which the state had foreclosed loans. It is known at the Pt. Hope project. (See exhibit Z) Over a three year phase-in period, DOC expects Point Hope to ease overcrowding in 3 camps as follows. Camp 1 will house 40 low custody, long term felony inmates and 64 rotating misdemeanant and provide a program of agriculture, husbandry, industry, and special needs (e.g. substance abuse, life skills, etc.). Camp 2 will house 64 low custody, long term Native Alaska inmates in a non-conventional correctional methodology with heavy reliance upon existing regional native organizations for program input, involvement and accountability. (e.g. advisory board of Native elders.) Camp 3 will house 10-20 low custody females offenders in a women's program (e.g. pre-release planning, single mothers, life skills, etc.) (See exhibit Y) In its opposition to the plaintiffs' motion for sanctions, DOC argued that by early 1994, with adequate funding, 100 beds could be available at Pt. Hope.

Pt. Hope project or intermediate sanction project are in effect or what impact, if any, they have had on increasing prison capacity or managing inmate population levels.

(2) Effective December 1993, at the direction of the legislature, DOC liberalized its pre-release furlough policy.[4] (See exhibit T) It purchased additional Community Residential Center (CRC) and residential substance abuse beds. However, in March 1994, DOC advised the legislature that the furlough program was inadequate to relieve overcrowding because of the lack of sufficient "low risk" offenders to fill community program beds.[5] (See exhibit N) (Earlier in its November 1993 FY95 Budget Overview Memorandum, DOC had warned the legislature that even with 130 new community beds filled on average to at least 90% capacity, the

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[4] In 1990, the Legislature created the Alaska Sentencing Commission which in its 1992 Annual report to the Governor and the Alaska Legislature recommended that all classes of offenders should be considered for early furlough to halfway houses near the end of their prison term. Annual Report, p.10, no. 21.

Likewise, the Legislature itself included the following language in the DOC FY94 operating budget:

> It is the intent of the legislature that the department should utilize its authority...to establish a furlough program to facilitate an inmate's reintegration to society during at least the final six months of incarceration through a gradual lessening in supervision and restrictions...It is [also] the intent of the legislature that the department ...accord the highest priority to the development of intermediate sanctions in order to successfully deal with prison overcrowding and budgetary constraints.

[5] According to DOC, over 54% of Alaska's inmates are serving time for a violent offense including almost 20% for sex offenses. An additional 17% of the prison population are probation and parole violators "most of whom were convicted of violent crimes." (See Prewitt letter to Barnes, March 10, 1994 exhibit N) Further, the space created by early furloughed felony-prisoners is being taken by the increasing misdemeanant population. id.

prison population would remain over its emergency capacity.[6] (See exhibit AF))

(3) Also in December 1993, DOC formed the Criminal Justice Working Group (CJWG) comprised of representatives from agencies involved in every facet of the criminal justice system. The first meetings were facilitated by Allen Beck, nationally recognized consultant in population forecasting. Three subgroups were formed to look separately at pre-sentence proposals, post sentence proposals, and information needs to quantify specific proposals for the Governor and Legislature. (See exhibit AK)

On January 11, 1994 the CJWG found that 13 of the 15 DOC prisons were at or above maximum capacity; the CRC and treatment program placements exceeded 95%; and bringing prison population down to maximum capacity required a reduction in prison population of 261 offenders. Id.

The CJWG further found that the additional 50 beds approved by the court at Spring Creek Correctional Center could be utilized for $522,000 per year. Comparing the cost of $29.00 per bed to increase capacity at Spring Creek with the $160,000 per bed cost for a new high security/high custody facility, the CJWG recommended that the state fund the new beds. Id.

The CJWG further recommended that DOC secure 40

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[6] The prison capacity in Alaska includes almost 100 beds at Wildwood and Spring Creek which can not be filled due to lack of funding. (See exhibit AF)

additional substance abuse program beds at a cost of $49.00 per day per bed. The CJWG estimated that 69 substance abuse treatment slots could be provided at Cordova Center, Tundra Center, and Northstar Center for $300,000 per year. Id.

Finally, the CJWG recommended that Wildwood Correctional Center be re-activated from present level of 145 inmates to maximum capacity of 204. It found the cost of full activation would be an increase of $41.00 per year per additional bed. Id.

(4) On June 1, 1993, DOC reactivated its Classification Review Committee to review the security/custody configuration of the inmate population in order to increase by 10-15% the number of prisoners eligible for the pre-release furlough program in any given period of time. The expertise of Dr. Robert Levinson was enlisted to meet this objective. (See exhibit R) No information has been provided to the court as to the impact, if any, of reclassification on prison population.

(5) In February 1994, DOC compiled a "Population Data Analysis" by averaging annual population increases to show that in the last decade, prison population in Alaska has increased at the average rate of 8.2% per year.[7] (See exhibit AJ)

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[7] cf. In March, 1985, the court found that the facilities were "already filled beyond their operating capacities" and concluded "that any overcrowding beyond the total regular residential housing capacity of such institutions presumptively presents constitutionally impermissible housing conditions." Moreover, the court found that "the rapid growth in inmate population could give rise to such an unconstitutional situation in the immediate or very near future." The court went on to find that it:

"is necessary to adopt presumptive population 'caps' or

(6) Finally in March 1994, DOC requested a budget amendment of $3.44 million. The requested funds would have added 50 beds at Spring Creek Correction Center, permitted Wildwood Correctional center to be used at full capacity, added approximately 150 misdemeanant/CRC beds, augmented existing CRC programs with substance abuse treatment components, added residential substance abuse treatment beds, and funded a pilot project to assess the usefulness of the Level of Supervision Inventory risk/needs assessment instrument. (See exhibit AL)

The above efforts failed to increase prison capacity or to manage inmate population even to within emergency levels by early 1994. On March 23, 1994, DOC advised members of the legislature that its statewide institutional count was 231 inmates over its maximum capacity. (See exhibit L) In addition, approximately 1,200 sentenced offenders statewide were waiting to come into the system to serve their sentence. Id. The undisputed fact is that since January 1993, state prisons have consistently

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> ceilings for Alaska's correctional institutions and its state-wide system which may not be exceeded without the permission of the court. That is, the Court is adopting population caps beyond which housing conditions will be deemed to be presumptively unconstitutional, unless otherwise demonstrated to the court."

See Findings of Facts and Conclusions of Law dated March 1, 1985 issued by Judge Serdahely, p.40-42 (adopting a statewide cap for the prison system). See also September 21, 1990, FSA sec. VIII in which, after negotiation and an increase in the number of facilities, the parties agreed and the court ordered both criteria to determine individual facility population and the resultant increased statewide population cap.

exceeded the agreed-upon, court ordered maximum and emergency population caps.[8]

The dangers created by consistent prison overcrowding to facility staff, to inmates, and to the public are well documented.[9] The demand that staff work overtime escalates, stress climbs, tempers flare, and eventually employees suffer injury and loss of life. Inadequate prisoner supervision results in escapes, staff/inmate injuries, suicides, errors concerning classification and community placement, accelerated deterioration of facilities and equipment, and inmate idleness. Inmates become a danger to other inmates. The ultimate danger is violent inmate riots.

These dangers are becoming reality in Alaska prisons. According to DOC, by November 1993, escapes were at 9 compared to 7 for the entire year of 1992 - a year in which inmate population also consistently exceeded population caps. (See exhibit AF) DOC further reported that inmates at Spring Creek have begun producing weapons for self-protection in case staff are unable to adequately

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[8] See attached exhibit 1 (population reports, DOC, January, 1993 - April, 1994). The compliance monitor has found DOC in noncompliance with FSA population requirements each year since 1990.

[9] See testimony of experts Terrell Hutto for DOC and Eugene Miller for plaintiffs presented in the multiple hearings held on the defendant's motion for relief from judgement. Based upon their separate inspections of Alaska's prisons in November, 1992, both experts agreed that Alaska's prisons are safe if maintained at FSA agreed upon, court ordered population caps, but neither expert approved housing inmates in excess of those caps except for short periods of time if necessary to bring population levels within the caps. (See also Decision and Order: Defendant's Motion for Relief from Judgment, pg. 6-27, October 25, 1993.)

protect them. Id.

The state has two obligations when such overcrowding occurs. (1) FSA section VIII.E.6 requires DOC to present to the court a plan to reduce inmate populations to acceptable levels whenever any facility exceeds its emergency capacity for ten consecutive days or for 30 days in a ninety day period.[10] (2) FSA section VIII.E.7 requires DOC to immediately present a plan to the court whenever the statewide inmate population exceeds DOC's emergency capacity for more than 30 consecutive days or more than 45 days in a 90-day period. This plan must provide both for reduction of inmate population to below maximum capacity in each facility within 30 days and for maintenance of the inmate population at or below maximum capacity.[11]

The extensive record before the court establishes that the state has not complied with the Section VIII.E provisions that it agreed upon in September 1990 and which the court ordered. DOC

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[10] Section VIII.E.6: Whenever the inmate population in a facility has exceeded emergency capacity for 10 consecutive days and is not reduced to below maximum capacity within 20 days thereafter, or whenever the inmate population in a facility has exceeded emergency capacity for 30 days in any 90 day period, the Department must immediately report to the court and present a plan which provides for the reduction of inmate population to below maximum capacity within 20 days.

[11] Section VIII.E.7: Whenever the total inmate population of the Department's facilities exceeds emergency capacity for 30 consecutive days or for a total of 45 days in any 90 day period, the Department must immediately report to the court and present for approval a plan which provides for the reduction of the inmate population to below maximum capacity in each of the Department's facilities within 30 days, and a plan which will maintain the population level at or below maximum capacity.

has proposed renovations, re-openings and additions to existing facilities in order to increase inmate housing space; the legislature has repeatedly refused to fund those proposals. DOC seeks to avoid court action by offering that lack of funding as excuse for the state's non-compliance.

DOC has failed to provide a workable population management plan.[12] DOC's September 1993 "Population Management Plan" is the same plan it presented in November 1991 (when plaintiffs opposed DOC's attempt to transfer inmates to Oklahoma), in February 1992 (When DOC promised the reforms outlined by compliance monitor), in October 1992 (when DOC produced its "interim population plan"), and again in May 1993 (when DOC responded to the compliance monitor's finding of noncompliance).

Further, many of the measures proposed in DOC's "Population Management Plan" either have not been executed or are insufficient to reduce inmate population to the population caps. (1) DOC has been "revising" its classification system for years. (2) DOC admits that the new, relaxed pre-release policy has not substantially reduced inmate population. (3) The intermediate sanction plan is contingent on nonexistent and unfunded community

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12 The court found DOC's inmate population projections "unreliable" as early as 1985 and required that DOC make a population growth study taking into account the impact of presumptive sentencing upon future prison population increases. (See Memorandum Decision, March 15, 1985 at 4). The only prison population growth projections provided by DOC are an assumed yearly average increase based upon the past average growth from 1984 to 1994. (See Exhibit AJ)

programs. (4) Project Hope, if fully funded, has a three year phase-in and given DOC's population projections, can be reasonably expected only to maintain current overcrowding levels without reducing them. (5) Wildwood has not been funded so it can be operated at its full capacity. (6) Spring Creek Correction Center has neither been renovated to increase its population by 50 beds nor has the accompanying staff and program requirements been funded.

The remedy for the state's non-compliance is set out in Section IX.B.3 of the FSA:

> A finding of contempt may also lie for the Department's failure to comply, without justification, with a provision of this agreement generally applicable to all inmates or a group of inmates (i.e., three or more inmates). In the event of a court challenge, the burden is on the Department to establish adequate reasons for the justification.

The state contends that the following elements are also required for a finding of civil contempt and that they are not present in this case:

> (1) the existence of a valid order directing the alleged contemnor to do or refrain from doing something and the court's jurisdiction to enter that order; (2) the contemnor's notice of the order within sufficient time to comply with it; (3) the contemnor's ability to comply with the order; and (4) the contemnor's wilful failure to comply.

L.A.M. v. State, 547 P.2d 827, 831 (Alaska 1976).

In State, Dep't of Revenue v. Oliver, 636 P.2d 1156 (Alaska 1981), the court stated:

> Wilfulness is a prerequisite, but only in the sense that the act ordered must be within the power of the defendant to perform. We have held that inability to comply is an affirmative defense to a contempt charge, with the burden of proof on the defendant.

Id. (footnote omitted); See also FSA section IX.B.3 (placing burden on state to establish justification for noncompliance).

The formation of a plan which will manage population levels, reasonably project prison population increases, and accommodate that projected future prison population increase is within the power of the state to perform. Further, although DOC has demonstrated the unwillingness of the legislature to fund DOC projects, no showing has been made that the state lacks the power to maintain safe inmate population caps in Alaska's prisons.

The plan which DOC filed in response to the plaintiff's contempt motion assured the court that the state would have population levels within acceptable limits by early 1994. The state has failed to fulfilled its assurances: it has not demonstrated compliance with the FSA and the resultant consent decree; and it has not demonstrated a lack of power to comply. Despite the plaintiffs' motion for sanctions, and the opportunity to demonstrate compliance, the state has continued to fail to meet its obligations. Taking its record as a whole, the state's non-compliance is unjustified and wilful.

Monetary sanctions are appropriate against correctional departments for failure to abide by remedial court orders. In

Stone v. San Francisco, 978 F.2d 850 (9th Cir. 1992), the district court held that the city had not taken "all reasonable steps" to comply with court ordered population limits. It ordered the city to immediately comply with the consent decree and imposed sanctions if the city failed to comply within 14 days. The Ninth Circuit affirmed the district court's finding that the city was in contempt. The Ninth Circuit determined that (1) good faith efforts to comply are irrelevant to the issue of contempt; (2) given the city's history of noncompliance with population caps and the city's failure to comply despite the pendency of the contempt motion, the district court's finding that the city had failed to take reasonable steps was not an abuse of discretion; (3) the evidence supported the district court's finding that population increases were foreseeable; and (4) financial constraints do not allow states to deprive persons of constitutional rights.

In Benjamin v. Sielaff, 752 F. Supp 140 (S.D.N.Y. 1990), the district court held that the corrections department failed to comply with a court order entered a year earlier which had replaced an order entered nine years earlier governing the housing of inmates in non-housing areas. The court determined that (1) the population increases were foreseeable; (2) the department's good faith efforts to comply were not a defense to a contempt motion; and (3) the department did not seek temporary modification of the order when it appeared noncompliance was inevitable. The district court held that sanctions were an appropriate remedy and ordered

the department to pay a specific amount to each inmate incarcerated in a non-housing area for more than 24 hours in the future.

In Parmigiano v. Diprete, 700 F. Supp. 1180 (D.R.I. 1988), the district court held the state corrections department in civil contempt of court orders, including a court approved consent decree, governing the overcrowding of pretrial detainees at a state facility. Although the consent decree specified fines if the various deadlines were not met, the department repeatedly missed deadlines and sought extensions which resulted in a series of court orders. Ten years after the original consent decree, the facility was still seriously overcrowded and the plaintiffs moved the court for an order to show cause why the department should not be held in contempt. In response, the department argued that it had made good faith efforts to comply, that the current conditions of incarceration were not unconstitutional, and that compliance was impossible. The district court rejected these arguments finding that (1) the relevant inquiry was not whether the department made "good faith" efforts to comply with the consent decree but rather whether the department was in "substantial compliance" with its obligations; (2) the department could not collaterally attack the court's earlier determination that populations above the maximum level was unconstitutional; and (3) the department had failed to establish that compliance was impossible (i.e. that there were "no steps [defendants] could take within their lawful authority to maintain uncrowded conditions at the Consent Decree Institutions.")

As relief, the district court imposed the sanctions set forth in the consent decree finding that (1) plaintiffs had established by clear and convincing evidence numerous and continuing violations; (2) measures short of sanctions had proved ineffective; (3) the court had put the department on notice ten months earlier that it intended to impose sanctions if the department failed to comply with the consent decree. The court then gave the department an opportunity to "purge" itself of contempt by filing a specific and detailed plan within one month and by coming into compliance within four months. If the department failed to purge itself of contempt, the court would impose fines totaling $10,000 per day.

See also Newman v. Alabama, 683 F.2d 1312 (11th Cir. 1982); Powell v. Ward, 643 F.2d 924 (2d Cir.), cert. denied, 454 U.S. 832 (1981); Mobile County Jail Inmates v. Purvio, 551 S.Supp. 92 (S.D. Ala. 1982), aff'd, 70 F.2d 580 (11th Cir. 1983).

The court emphasizes that the purpose in ordering such sanctions is not to have the state escalate its current population control policy of early release of prisoners into the community; the state has other choices. Rather, the purpose of this order to enforce the state's obligation to develop and execute a plan which will meet its responsibility to provide adequate facility space to house its current and future prison population. The safety of the inmates, the staff, and the public is at stake.

NOW THEREFORE, IT IS ORDERED that the State of Alaska

shall pay a sanction of $1000.00 per day for each day that the statewide prison population exceeds the statewide emergency capacity agreed upon in the Final Settlement Agreement and ordered by the court on September 21, 1990; and

IT IS FURTHER ORDERED that the State of Alaska shall pay a sanction of $500.00 per day for each facility which exceeds its emergency capacity agreed upon in the Final Settlement Agreement and ordered by the court on September 21, 1990; and

IT IS FURTHER ORDERED that the DOC shall file and serve monthly population reports on or before the 10th day of each month and that plaintiffs shall file and serve a proposed order every month showing sanction calculations as long as the state remains in non-compliance.

DATED at Anchorage, Alaska this 9th day of September, 1994.

Karen L. Hunt
Superior Court Judge

I certify that on 9-9-94
a copy of the above was mailed to each of the following at their addresses of record: Volland / Stark

KLH
Secretary/Deputy Clerk

cc: Williams, Oberly, Daughenbaugh