UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

LINDA NUNN, et al,

Plaintiffs,

Case No. 96-CV-71416-DT

v.

Hon. John Corbett O'Meara

MICHIGAN DEPARTMENT OF CORRECTIONS, et al,

Magistrate Marc L. Goldman

Defendants.

SETTLEMENT AGREEMENT REGARDING INJUNCTIVE AND DECLARATORY RELIEF

I. DEFINITIONS

- A. "Prisoner" means any women prisoner under the jurisdiction of the Michigan Department of Corrections housed in a facility. Women prisoners housed in a center are also covered by the provisions of this agreement using the term "prisoner," except for Sections IX(A and C), X(A)(3)(b), and except as provided by Section XI(I).
- B. "Facility" means any prison, institution or camp housing women prisoners. "Center" means any community corrections center or technical rule violation center housing women prisoners. The term "Housing Unit" includes segregation units at facilities.
- C. "Staff" means correctional officers, maintenance workers, kitchen workers, teachers, counselors, supervisors, administrators, and any other person who has contact with prisoners as a regular and routine part of their employment, by MDOC or as a full time contractual worker assigned to a facility or a center.
- D. "Sexual Misconduct" means staff engaging in, attempting to engage in or aiding and abetting: (1) a sexual act with any prisoner; (2) the touching of a prisoner, either directly or through clothing, of the genitalia, anus, groin, breasts, inner thighs or buttocks with the intent to abuse, humiliate, harass, degrade, arouse, or gratify the sexual desire of any person; (3) prohibited physical contact including fondling or kissing. (4) indecent exposure or other indecent sexual behavior by a staff person in the presence of a prisoner.

- E. "Sexual Harassment" means sexual advances, requests for sexual favors, and other verbal or non-verbal communication of a sexual nature. Sexual harassment also includes verbal conduct of a gender-related nature intended to humiliate, harass degrade or arouse.
- F. "Retaliation" means harmful action, or threat of such action taken by staff against a prisoner because of that prisoner's resistance to, complaint regarding, or cooperation in an investigation of sexual misconduct, sexual harassment, or other conduct prohibited by this agreement.

II. POLICIES AND PROCEDURES PROHIBITING SEXUAL MISCONDUCT

Within 120 days of execution of this agreement, the MDOC shall develop and maintain one policy which implements prohibitions against sexual misconduct, sexual harassment, and retaliation, and identifies the reporting and complaint mechanisms, the investigation procedures and discipline for sexual misconduct, sexual harassment, and retaliation, included in this agreement. The policy shall also identify the counseling and education concerning sexual misconduct, sexual harassment and retaliation, to be provided to prisoners pursuant to this agreement. The policy may refer to other policies as a means of setting forth this information.

III. SCREENING OF JOB APPLICANTS AND CURRENT STAFF

- A. Prior to staff being assigned to a position involving contact with prisoners, MDOC will ensure that the following has occurred: drug abuse screening; investigate information in employment applications; perform LEIN checks on criminal history and personal protective orders for domestic violence; review National Crime Information Center records; investigate whether applicants have ever worked in a correctional setting and, if so, whether they were the subject of allegations of sexual misconduct, sexual harassment, or retaliation and, if so, whether any such allegations were sustained.
- B. MDOC shall perform LEIN checks on criminal history and personal protective orders for domestic violence for all staff every five (5) years.
- C. The MDOC shall develop written procedures for employment and placement of staff in contact positions with prisoners consistent with MDOC's policies regarding prevention of sexual misconduct against women prisoners, based upon the results of the screening performed pursuant to this section.

IV. STAFF TRAINING

A. Basic Training on Working with Prisoners

- 1. Training on issues relating to the supervision of prisoners shall be provided to all staff. The frequency and level of training provided to part time and full time contractual staff shall be in accordance with MDOC training policies and practices.
- 2. The existing curriculum and training materials for facility staff shall be reviewed for adequacy and effectiveness by an independent consultant agreed to by the parties.
- 3. The consultant shall have the opportunity to observe the training which occurs during the compliance period, and if necessary, make recommendations for changes or additions to the training materials, methodology or implementation of training. The compliance expert shall review the consultant's recommendations in accordance with Section XIII(B)(6).
- 4. Any recommended training, or portion thereof, which has not been rejected by the compliance expert and which has been designated by the consultant as critical will be provided to current staff not more than ninety (90) days after the recommendation is made, and to any transferring staff immediately upon their assignment to a facility. All other recommendations which have not been rejected pursuant to section IV(A) will be incorporated into the next annual inservice training program.

B. Investigator Training

- The existing curriculum and training materials for facility staff responsible for investigating allegations of sexual misconduct, sexual harassment, or retaliation shall be reviewed for adequacy and effectiveness by an independent consultant agreed to by the parties.
- 2. The consultant shall have the opportunity to observe the training which occurs during the compliance period and, if necessary, make recommendations for changes or additions to the training materials, methodology or implementation of training. The compliance expert shall review the consultant's recommendations in accordance with Section XIII(B)(6).
- 3. Within one hundred and twenty (120) days from the date the recommendations are made, MDOC will train all current facility staff assigned to investigate allegations of sexual misconduct, sexual harassment or retaliation in accordance with the consultant's recommendations, or portion thereof, which have

- not been rejected pursuant to section IV(B). Thereafter, staff who have not completed the recommended training will not be assigned to investigate such allegations.
- 4. Specialized training will be provided by an outside consultant with expertise in sexual assault intervention and crisis counseling for all facility Medical and Mental Health Staff who may receive a prisoner's complaint of sexual misconduct.

V. PRISONER EDUCATION

- A. The existing training materials for prisoner education, the brochure on sexual misconduct, and the sexual misconduct/harassment posters shall be reviewed for adequacy and effectiveness by an independent consultant agreed to by the parties.
- B. The consultant shall have the opportunity to observe the prisoner education training, and if necessary, make recommendations for changes or additions to the materials, training method or implementation. The consultant may obtain evaluations of existing prisoner education training from a reasonable sampling of prisoners and staff involved in the training. The compliance expert shall review the consultant's recommendations in accordance with Section XIII(B)(6).
- C. Any recommendation, or portion thereof, which has not been rejected by the compliance expert will be implemented within ninety (90) days after the recommendation is made. Thereafter, the recommendations which were not rejected by the compliance expert pursuant to section V (B) and (C) will be provided to all incoming prisoners as part of their orientation.
- E. All written material shall be available in Spanish as well as English. Reasonable measures shall be taken to ensure that other non-English speaking prisoners receive the same information.

VI. CONSULTANTS

- A. The consultant(s) identified in this agreement must be selected and contracted with before this agreement is executed.
- B. The parties shall have the right to meet jointly with the consultant(s).
- C. The consultant(s) shall submit recommendations regarding training and education materials, and postings, to the parties for review and comment.
- D. The costs of consultant(s) shall be borne by the MDOC.

VII. PREVENTION OF PROHIBITED CONDUCT

A. Minimization of One on One Situations

MDOC will maintain a written procedure that restricts male staff from being alone in one-on-one situations with prisoners at facilities and centers in areas not clearly visible to prisoners or other staff, with the following exceptions: emergencies, medical care, counseling, questioning during investigations, and reporting of confidential information.

B. Minimizations of Access to Secluded Areas

MDOC will maintain reasonable measures to eliminate prisoner access to secluded areas that are not necessary to the operation of the facility or center.

C. Sexual Misconduct Files

MDOC will use a tracking system to store allegations and information concerning, sexual misconduct, sexual harassment, and retaliation, whether substantiated or not. The tracking system will be searchable by, at a minimum, prisoner and staff name, type of prohibited behavior, date, facility, location and shift when the alleged incident occurred. Investigators and management will have access to this tracking system. The tracking system will be queried prior to accepting rehires. MDOC will conduct a quarterly search of this tracking system, and any staff shown in this review to have been the subject of more than two allegations of prohibited behavior within the past five years shall be subject to appropriate action, including, but not limited to a meeting with supervisors, a referral to an employee assistance program, retraining, or reassignment.

VIII. PAT DOWN SEARCHES

Absent emergency circumstances or a reasonable suspicion that the prisoner is in possession of contraband, pat down searches of prisoners will only be conducted by female corrections officers during an evaluation period of at least twelve months. Should the MDOC decide to resume the routine search of inmates by male officers, it will give plaintiffs' counsel thirty (30) days written notice.

IX. STAFFING ISSUES

A. Consistent with the MDOC's announced intention to limit the assignment of staff in facility housing units to female officers, the MDOC will make a good faith effort to accomplish this objective during

- the monitoring period. If such efforts are still ongoing at the end of the monitoring period, monitoring will be extended as to this issue only for not more than two additional six month periods.
- B. Any male entering a housing unit area in a facility or center shall announce his presence upon entering that area.
- C. All male staff must log in when they enter a housing unit or other area which keeps a log and any failure to log in shall be immediately reported to supervision.
- D. Except when a female officer is not available and immediate transport is deemed necessary at least one female officer will be assigned to transport a prisoner. On medical runs where it is probable the prisoner will be seen fully or partially nude, no male officer will remain in the examination room absent an emergency or a request from the examining physician.
- E. MDOC shall maintain locations at facilities and centers where prisoners may dress, shower and use the toilet without being observed by male staff.
- X. FACILITATION OF PRISONER AND STAFF REPORTING OF ALLEGATIONS OF SEXUAL MISCONDUCT, SEXUAL HARASSMENT AND RETALIATION
 - A. Prisoner Reporting. To encourage and facilitate the reporting of sexual misconduct, sexual harassment, retaliation and other conduct prohibited by this agreement, the MDOC agrees to provide the following:
 - 1. Secure box. At facilities and centers Prisoners shall have access to a secure locked box to make written reports of sexual misconduct, sexual harassment, or retaliation. The sole individuals who will have access to this box are the facility Inspector, the Warden, or the supervisor of the center. The contents of the box shall be reviewed on a daily basis by one of the above individuals and receipt acknowledged to the prisoner within four (4) days.
 - 2. Confidentiality. MDOC will take all reasonable steps to ensure that staff and prisoners preserve the confidentiality of staff and prisoners who report sexual misconduct, sexual harassment, retaliation and other conduct prohibited by this agreement. These steps include, but not limited to, warnings not to discuss investigations and disciplinary action against individuals who intentionally compromise the confidentiality of an

investigation. This does not preclude a prisoner from discussing the matter a) with counsel, b) for purposes of seeking treatment, or c) to ensure her own safety.

3. Retaliation

- Retaliation against a prisoner or staff for reporting staff misconduct is prohibited and subject to disciplinary action including termination;
- b. At each facility, a Review Committee shall be maintained consisting of the Grievance Coordinator, and at least one person in the position of ADW, Inspector or Deputy. Within five (5) days of receipt of an allegation of retaliation from a prisoner who has reported sexual misconduct or sexual harassment, the review committee shall begin review of the allegations including major and minor misconduct tickets issued against the prisoner. Factors which may be considered by the committee shall include, but are not limited to: 1) the connection between the staff who issued the ticket and the staff accused of sexual misconduct or sexual harassment; 2) any evidence or witness statements submitted by the prisoner alleging retaliation; 3) critical incident reports, grievances, kites and any other documents related to the prisoner's report of sexual misconduct or sexual harassment; 4) the prisoner's prior allegations of retaliation, 5) the amount of time between the reporting and the misconduct ticket; and 6) the prisoner's prior misconduct history.

Within ten (10) days, unless a one time extension of not more than two weeks is granted by the warden, the Review Committee shall report its findings to the warden with an explanation of the factual basis for its finding. The warden or designee shall promptly notify the prisoner of the review results. Findings or recommendations of the Review Committee are advisory only, and shall not have any bearing upon the hearings process for prisoner misconduct or grievances established by statute, administrative rule and policy directive unless the hearings officer, hearings administrator or grievance coordinator chooses to consider the information gathered. If the warden determin**es** that there is evidence of retaliation, the warden shall take appropriate action which may include withdrawing a ticket pursuant to P.D. 03.03.105(K)(3), bringing it to the attention of the hearing officer or requesting a rehearing if the ticket has already been heard.

- c. Within 90 days after execution of this agreement, prisoners who received major misconduct tickets from staff convicted of criminal sexual conduct or against whom allegations of sexual misconduct or sexual harassment have been sustained, may present these tickets to MDOC for review if there is a written record that the prisoner asserted retaliation during the time the ticket was reviewed. If there is evidence that the major misconduct ticket was issued in retaliation for reporting staff sexual misconduct or sexual harassment, MDOC will request a rehearing on that major misconduct ticket. This provision applies only to major misconduct tickets that have been issued since March 1, 1991.
- d. Prisoners will not be involuntarily placed in protective custody simply because they reported conduct prohibited by this agreement.
- e. Prisoners will not be issued a misconduct for filing a complaint of sexual misconduct, sexual harassment, or retaliation which is not sustained, unless it is shown by a preponderance of evidence that the complaint was intentionally false.

XI. INVESTIGATION OF ALLEGATIONS

- A. Consistent with the investigative training set forth in Section IV.B. of this agreement, MDOC will conduct timely, complete, thorough, documented and uniform investigations of all allegations, however received (verbal report, kite, grievance, or letter) of sexual misconduct, sexual harassment, retaliation or conduct prohibited by policies established pursuant to this Agreement. MDOC investigators will continue to be trained consistent with Section IV(B) in conducting such investigations.
- B. MDOC will continue to refer allegations of sexual misconduct which, if true, constitute criminal acts to the Michigan State Police (MSP) for investigation. Regardless of whether the referral to the MSP results in a criminal prosecution, MDOC will continue its administrative investigation into the allegations, using a "preponderance of evidence" standard, and will take appropriate disciplinary action.
- C. MDOC investigators will conduct face-to-face interviews of all suspects, victims and eye witnesses to sexual misconduct and retaliation.
- D. Staff are required to cooperate in all investigations. MDOC will discipline, up to and including termination, staff who are accused of, witnessed, or have personal knowledge of sexual misconduct, sexual harassment, or retaliation and who refuse to cooperate.

- E. If a staff accused of sexual misconduct, sexual harassment or retaliation resigns, transfers, or is fired, the investigation will be completed in accordance with procedures developed pursuant to this agreement.
- F. MDOC will review the named Plaintiffs' allegations of sexual misconduct and sexual harassment which were not sustained if the Plaintiffs present new evidence supporting the allegations. The MDOC will review the Plaintiff's allegations of retaliation based on major misconduct tickets resulting in a guilty finding which were issued within one (1) year of the Plaintiff making a formal complaint of sexual misconduct or sexual harassment. In any review under this paragraph, the MDOC will apply the investigative standards to be implemented pursuant to this agreement. The allegations which Plaintiffs wish to have reviewed must be identified prior to execution of this agreement. If any reviewed allegations are sustained, MDOC will take appropriate action.
- G. MDOC will continue to remove staff accused of sexual misconduct from physical contact with prisoners until the investigation is concluded.
- H. MDOC will ensure that all investigations of staff accused of sexual misconduct, sexual harassment, retaliation or other conduct prohibited by this agreement, will include a search for prior allegations, investigations, or discipline against the accused staff.
- I. A prisoner who has reported sexual misconduct by staff shall be provided the opportunity to speak with a counselor trained in sexual assault and crisis intervention prior to being interviewed by a facility investigator or Internal Affairs. This prisoner shall have the right to have this counselor present during the investigation interview. This provision is not mandatory at centers if trained counselors are not available in that location.

XII. RESPONSE TO SUSTAINED MISCONDUCT

A. Staff Discipline

1. Staff who resign in lieu of discipline as a result of an investigation for sexual misconduct, sexual harassment, retaliation or other conduct prohibited by policies established pursuant to this agreement, or during an investigation which ultimately results in a sustained finding, will not be eligible for rehire by the MDOC.

- 2. Where allegations of such conduct are sustained, or the investigation reveals violations of work rules or other policies and procedures, appropriate disciplinary action shall be taken pursuant to MDOC policy and work rules.
- B. Prisoner Psychological Services
- 1. MDOC will offer psychological services consistent with and identified in P.D. 04.06.180 to any prisoner subjected to or alleged to have been subject to sexual misconduct with staff. MDOC will offer psychological services consistent with and identified in P.D. 04.06.180 to any prisoner found by MDOC to have been subjected to, or to any prisoner who makes a credible allegation in a kite, grievance, or letter to management that she was subjected to sexual harassment.

XIII. COMPLIANCE/TERMINATION

A. Conditional Dismissal Under Rule 41(a).

Upon execution of this Settlement Agreement, the parties will jointly move the Court for entry of an Order conditionally dismissing this action, pursuant to Fed. R. Civ. P. 41(a) (2), conditional upon the MDOC achieving substantial compliance with its terms, and will attach this Settlement Agreement to such motion. The motion will request that the case be placed on the Court's inactive docket, though the Court shall retain jurisdiction over the case until a final dismissal.

B. Compliance Expert and Monitoring.

A compliance expert agreed to by the parties will have reasonable access to prisoners and staff, MDOC documents, information relating to implementation of this Settlement Agreement, and to allegations of sexual misconduct and other prohibited conduct addressed by this Settlement Agreement for the purpose of monitoring the MDOC's implementation of the Settlement Agreement. The Plaintiffs' attorneys will have reasonable access to information, including MDOC documents, relating to implementation of this Settlement Agreement, and to allegations of sexual misconduct and other prohibited conduct addressed by this Settlement Agreement for the purpose of monitoring the MDOC's implementation. The MDOC will fund the compliance expert's activities. The compliance expert's shall:

Review allegations of sexual misconduct, sexual harassment,

- Review allegations of sexual misconduct, sexual harassment, retaliation and conduct prohibited under the agreement whether received directly from a prisoner or through reports, or grievances made to prison staff, investigators or administrators;
- 2. Determine whether alleged victims of sexual misconduct have been provided counseling, medical treatment, and mental health care in accordance with this agreement;
- 3. Determine whether prisoners have been treated in accordance with Department policy and the terms of this agreement during and subsequent to investigations;
- 4. Monitor or review investigations and procedures to be certain they comply with the requirements of this agreement;
- Recommend the initiation or reopening of investigations or reviews of allegations arising during the monitoring period;
- 6. Review the recommendations of the consultants and reject recommendations that are unreasonable or contrary to the purposes of this agreement;
- 7. Prepare a report midway through the monitoring period based on the information collected informing the parties of his or her opinion of the MDOC's compliance with each of the terms of this Settlement Agreement, including identifying any deficiencies in compliance, and any recommendations for achieving substantial compliance;
- 8. Prepare a final report within 30 days of the end of the initial compliance period informing the parties of his or her opinion of the MDOC's compliance with each of the terms of this Settlement Agreement, including identifying any deficiencies in compliance;
- The compliance expert's reports explaining his assessment of the MDOC's compliance with each provision of this agreement shall be provided to all parties. The expert must promptly notify the parties of any finding of non-compliance;

10. The parties shall have thirty (30) days to comment on each report. The parties shall meet within two (2) weeks of the submission of comments in an attempt to resolve disputes.

The compliance expert will conduct an initial on-site compliance monitoring tour of the facilities, and centers approximately 120 days after execution of this Settlement Agreement. The compliance expert will conduct a final on-site compliance monitoring tour of the facilities and centers 12 months after execution of this Settlement Agreement. Not more than three Plaintiffs' attorneys, three attorneys for the MDOC, and the MDOC Director or his designee may accompany the compliance expert on these tours. The compliance expert may conduct private meetings with staff and prisoners. Plaintiffs' attorneys may hold a group meeting with the named plaintiffs after the initial and final compliance monitoring tours. Neither the parties nor the compliance expert shall add provisions or expand the scope of this Settlement Agreement in any manner.

If the compliance expert determines that the MDOC has substantially complied with the terms of the Settlement Agreement, the parties will file a stipulation to dismiss. If the compliance expert determines that the MDOC has substantially complied, but good faith efforts are still ongoing under section IX(A), the parties will file a stipulation dismissing all but that remaining portion of the agreement. If the compliance expert declares that the MDOC has not substantially complied, the Court shall hold *de novo* hearings to make findings and issue orders regarding the allegations of non-compliance. Neither Plaintiffs nor the MDOC shall file a motion or suit for specific performance of the Settlement Agreement.

C. Substantial Compliance. "Substantial Compliance" with the terms of the Settlement Agreement will fully satisfy the Settlement Agreement. Isolated and unintentional incidents will not constitute noncompliance.

XIV. COSTS

All parties shall bear their own costs and fees.

XV. INTEGRATION AND LIMITATION

This document is a final and complete expression of the agreement between the parties as to all claims for declaratory, equitable or injunctive relief. Nothing in this agreement shall be construed to require any party to act in violation of law or court order.

Dated: July 31, 2000

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