Honorable Leif B. Erickson
Federal Magistrate Judge
Missoula Division
P O Box 7219
Missoula, MT 59807-7219

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

IN THE MATTER OF LITIGATION RELATING TO CONDITIONS OF CONFINEMENT AT MONTANA STATE PRISON,

CAUSE NO. CV 93-46-H-LBE

ORDER

THIS DOCUMENT RELATES TO:

TERRY LANGFORD, JAMES BALL, JAMES PETERSCHICK, JEFF DELAPHIANO, TRUEMAN CONRAD, ANTHEL BROWN, DAN MASON, and RUDY MEISSNER, on behalf of themselves and all others presently incarcerated or who will in the future be incarcerated at the Montana State Penitentiary,

Plaintiffs,

vs.

MARC RACICOT, in his official capacity as Governor of the State of Montana; RICK DAY, in his official capacity as Director, Department of Corrections and Human Services; JAMES "MICKEY" GAMBLE, in his official capacity as the Administrator of the Corrections Division of the Montana Department of Corrections and Human Services; MIKE MAHONEY, in his official capacity as Deputy Warden, Montana State Prison; and THE DEPARTMENT OF CORRECTIONS AND HUMAN SERVICES,

Defendants.

CAUSE NO. CV 92-13-H-LBE

IT IS HEREBY ORDERED on this 29th day of November, 1994, that the proposed Settlement Agreement of the parties for this action is approved and entered pursuant to Rule 23(e) of the Federal Rules of Civil Procedure. A Rationale will issue following entry of this Order.

DONE and DATED this 29th day of November, 1994

Leif B. Erickson
United States Magistrate Judge

cc: American Civil Liberties Union Foundations
Cannon & Sheehy
Ogle & Worm
Attys. Dept. of Corrections & Human Serv.
Keller, Reynolds, Drake, Johnson & Gillespie

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HELENA DIVISION**

IN THE MATTER OF LITIGATION RELATING TO CONDITIONS OF CONFINEMENT AT MONTANA STATE PRISON,

CAUSE NO. CV 93-46-H-LBE

RATIONALE IN SUPPORT OF ORDER APPROVING SETTLEMENT AGREEMENT

THIS DOCUMENT RELATES TO:

TERRY LANGFORD, JAMES BALL, JAMES PETERSCHICK, JEFF DELAPHIANO, TRUEMAN CONRAD, ANTHEL BROWN, DAN MASON, and RUDY MEISSNER, on behalf of themselves and all others presently incarcerated or who will in the future be incarcerated at the Montana State Penitentiary,

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MARC RACICOT, in his official capacity as Governor of the State of Montana; RICK DAY, in his official capacity as Director, Department of Corrections and Human Services; JAMES "MICKEY" GAMBLE, in his official capacity as the Administrator of the Corrections Division of the Montana Department of Corrections and Human Services; MIKE MAHONEY, in his official capacity as Deputy Warden, Montana State Prison; and THE DEPARTMENT OF CORRECTIONS AND HUMAN SERVICES,

Defendants.

CAUSE NO. CV 92-13-H-LBE

On the 29th day of November, 1994, this Court entered its Order approving the Settlement Agreement (Agreement) proposed by the parties in the above-entitled action. Rule 23(e) of the Federal Rules of Civil Procedure provides that a "class action shall not be dismissed or compromised without the approval of the Court." In accord with that rule, and cases arising thereunder, this Court first made a preliminary evaluation of the fairness of the Agreement. It appearing that the proposed Agreement was the product of serious, informed and noncollusive negotiations with no obvious deficiencies and no preferential treatment for class representatives or segments of the class, and that it fell within the range of possible approval, the Court directed notice be given to the class members of a formal fairness hearing and invited the members to present objections in writing to be considered by the Court. The members of the class consisted of all male prisoners at the Montana State Prison at Deer Lodge, Montana. Notice was given by posting copies of the proposed Agreement at such locales within the prison confines that they were readily accessible to all inmates. Of the 1,270 or so inmates at the prison, objections were received from approximately 500. A large number of these objections did not address specific terms of the Agreement but were in the nature of a general objection to the Agreement as a whole. Because no specific grounds for objection were set forth the court did not afford these general objections as much weight in addressing the fairness of the Agreement as was given to the more specific objections interposed which are discussed further on.

Following receipt of the objections a fairness hearing was

held on the 28th day of November, 1994. Present were all counsel for the respective parties, together with three inmates who had been active in assisting many of the inmates present their objections to the Court. Based on the comments addressed to the Court by all participating counsel as well as by the three inmate representatives, the Court finds and concludes as follows:

1. Discovery commenced in January, 1994, and continued through August, 1994. It consisted of production of a huge number of documents by the Defendants as well as on site visits to the prison by Plaintiffs' counsel where documents were viewed and prisoners, as well as staff, were interviewed. According to Plaintiffs' counsel, Mark Lopez, the only discovery not yet accomplished as of the date of the Agreement would be the taking of formal depositions, updating written discovery, and having experts go through the prison one last time so that their information would be up to date just prior to trial. Counsel for the Defendants, Keith Keller, concurs that discovery was thorough and the only discovery not done was for trial preparation as opposed to familiarization with the issues. From this, the Court concludes that discovery was sufficiently complete to allow counsel for the parties to make a knowing and informed decision as to the factual basis for the Agreement.

2. The Agreement itself was the product of up to a dozen meetings between counsel for the parties, which took place over a period of three months. The Court is satisfied from having facilitated various preliminary meetings between counsel for the parties and the guidance of the Court's law clerk, Mary Ann Sutton,

on various procedural matters, as well as by the assurances of counsel for the parties, that the Agreement is not the result of any collusion or fraud between the parties, but rather the result of hard and intensive debate on the merits between the counsel for the respective parties.

3. Counsel for the respective parties are experienced in litigation involving conditions of confinement at issue in the present matter. Mark Lopez, a lawyer with the National Prison Project of the American Civil Liberties Union, representing Plaintiffs, has actively participated in up to a dozen class action prisoner suits over a period of seven years. Plaintiffs' counsel Ed Sheehy and Scott Wurster have been active in the present litigation from its outset in 1991. Counsel for several individual class members, Jeff Renz, presently the Director of the Montana Defender Project, has litigated a number of Section 1983 actions on behalf of prisoners challenging their conditions of confinement, both in his position as Director and prior thereto while in private practice.

Defendants' counsel Keith Keller has not only been a participant in the present litigation from the outset, but previously was defense counsel for the State in a similar type of action challenging conditions of confinement at the Montana state mental hospital, which included a three-week trial on the merits. Defendants' counsel, Dave Ohler, has been counsel for the Montana State Department of Corrections and Human Services for a number of years and in that capacity has represented the State in response to

a large number of individual Section 1983 actions brought by inmates at Montana State Prison.

4. The Agreement speaks for itself and the Court will not comment further on specific parts of the Agreement except insofar as necessary to respond to the objections that have been filed with this Court or made known to the Court at the time of the hearing.[1]

The Court has received objections from two primary sources: the United States Department of Justice and the inmate members of the class. The Court will first address the objections received from the Department of Justice.

Objections from the Department of Justice

The Civil Rights Division of the Department of Justice conducted investigations and on site inspections into the conditions of confinement at Montana State Prison following the 1991 riot. Attorneys for the Department have participated in meetings with state officials, attended conferences with counsel in this litigation, and provided input to counsel for both parties during the course of their negotiations. The Court solicited input from the Department regarding the terms of the Agreement and written comments were received.

The Department's concerns regarding the status and treatment of protective custody inmates is best addressed by noting that this issue is specifically excluded from the terms of the Agreement and

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[1] For an excellent discussion of the background of the litigation, summary of the issues addressed in the Settlement Agreement, and caselaw relied on, at least by Plaintiffs' counsel, in reaching the Agreement see the Plaintiffs' Memorandum in Support of Motion to Approve and Enter Settlement Agreement.

is set for trial, counsel having informed the Court that the protective custody issue could not be resolved through negotiation and so was reserved for separate litigation. The remaining objections are discussed below.

a. The Agreement provides at Page 6 that the Defendants shall have one year from the Court's approval of the Agreement to come into substantial compliance with its terms. Substantial compliance is to be assessed by not more than two impartial experts with the parties in agreement that the impartial expert for judging substantial compliance with medical, dental, and mental health provisions will be Ronald Shansky, M.D., and that an as yet unidentified expert will be selected who will address general penal conditions. The Department of Justice objects on the grounds that two additional experts are necessary to properly evaluate conditions at the prison. One of the additional experts would address psychiatric care and the remaining expert would address health and safety. In response to these objections, the Court notes that the Settlement Agreement requires compliance with "State building, Public Health and Fire Codes." Agreement, p. 17. This Court has received few, if any, complaints relative to the physical plant of late[2] (Although one of the objections voiced herein is as to ventilation which will be discussed in more detail infra) and is satisfied that, at least to this point, evaluation by an outside expert is not warranted absent an apparent identifiable deficiency

[2] This is not to say there have not been previous complaints, particularly with regard to Rothe dorm.

in the physical plant affecting the health and well-being of the inmates. Class counsel has not raised significant concerns in this area and is satisfied that adherence to state codes is all that could be achieved if the issue were litigated.

As to the issue of an expert to evaluate psychiatric care, the Court notes that Dr. Shansky is the Director of the Medical Division of the Illinois Department of Corrections who supervises prison psychiatric programs throughout the State of Illinois and has been deemed competent by both parties to do a proper evaluation.

Certainly nothing within the Agreement would preclude Dr. Shansky from conferring with other experts in the field of psychiatric care if he felt the need to do so in addressing any concerns he may have as to the appropriateness of mental health care provided by Defendants.

The Department of Justice also objects to measuring the performance of the Defendants on the basis of "substantial compliance." While absolute compliance may be a preferred standard, there is little doubt that a court, in reviewing compliance, would apply a substantial compliance standard. This is particularly so in light of the inherent discretion necessarily available to officials operating a prison to assure the safety and well being of both inmates and staff. At the same time, substantial compliance does not afford to the prison officials the right to ignore the terms of the Agreement nor to fail to make a good faith effort to fully comply with its terms.

b. The Department of Justice objects to the lack of power by the Court to impose sanctions in the form of contempt or fines against Defendants who may be found to be in violation of the Agreement. However, the Court retains authority to enter an order of specific performance in the event of a violation of the Agreement and, if that order were not complied with, then the usual authority of the Court to impose sanctions, including contempt and fines, remains available.

c. The Department of Justice disputes the provision that Defendants be excused from performing under the Agreement in the event of an emergency. However, the Court would likely excuse limited noncompliance in such an event so long as noncompliance were appropriate in light of the emergency and that the Defendants return to substantial compliance once the emergency was abated.

d. The Department of Justice objects to the lack of specifics as to officer training. However, the Agreement provides that officer training shall be in compliance with National Institute of Corrections standards and that a consultant will determine compliance. Class counsel has satisfied the Court that the NIC training standards themselves provide sufficient specificity to guide and determine Defendants' compliance on this point without the necessity of specificity in the Agreement itself.

Inmate Complaints

a. The overwhelming substantive objection from the inmates was as to the preclusive effect of the document. Specifically, they were concerned that the document may bar future damage claims

as well as claims for individual injunctive relief. As regards these concerns, the Agreement provides as follows: "Except as otherwise provided in this Agreement, the Plaintiffs shall not seek additional relief as to any claims for injunctive and declaratory relief on all issues specifically agreed to by the parties in this Agreement, ..." Agreement p. 2. This language would clearly not preempt individual claims for damages. Further, as understood by counsel for Plaintiffs and for Defendants, the language would preclude injunctive and declaratory relief only as to those claims seeking general or systemic relief contrary to what is provided in the Settlement Agreement but would otherwise not preclude a claim for injunctive relief brought by an individual inmate for wrongful acts particularly affecting that inmate.

b. The second primary concern of the objecting inmates is as to the enforceability of the Agreement. The concern is that the Agreement puts the case in abeyance for a year or longer and prohibits the Plaintiffs from conducting formal discovery, pursuing the litigation, and coming to the Court for relief. However, as has previously been discussed, the Agreement provides for two experts to come to the prison, which will be at the end of six months from the date of the Order approving the Agreement, in order to determine whether Defendants are making satisfactory progress toward substantial compliance. In the event it is their opinion the Defendants are not making satisfactory progress toward substantial compliance, the Plaintiffs may seek appropriate relief from the Court. Thus, a method for evaluating and a means for

enforcing compliance is contained within the document.

c. The Court has received objections from inmates held in maximum security as to "maximum security-general population" classification a/k/a Level 5. Inmates who have spent 60 days on Level 4 with clean conduct are eligible for consideration for Level 5 with the final determination at the discretion of the maximum security unit management team. Inmates in Level 5 will be allowed at least 26 hours out of cell per week including one meal per day outside the cell and one and a half hours recreation time every other day, amounting to privileges which class counsel state could not be achieved through litigation. Some inmates object that this may result in a mix of inmates outside of their cells who are incompatible with each. Others object that the discretion reposed in the maximum security management team in determining ultimately who will qualify for Level 5 will result in arbitrary decision making. As has been previously noted, the Court must recognize the obligation of the prison officials to operate the prison in a manner which takes into account the safety and well being of both inmates and staff. The concern by inmates as to an improper mix of incompatible inmates points out the necessity for such discretion. Absent some discretion, prison officials would not be able to consider and take appropriate steps to assure a proper mix of inmates out of their cells at any given time. Accordingly, it is appropriate to leave with those officials a certain amount of discretion subject only to the standard of whether that discretion has been abused. This latter standard will assure that an inmate

otherwise qualified for Level 5 is not arbitrarily excluded from being afforded that classification.

d. Inmate Doriel Sor-Lokken has set forth a lengthy list of objections which will be discussed as follows:

1. His objection that the Agreement would preclude individual claims is not well taken as previously discussed. Thus his complaints seeking compensation for property taken during the 1991 prison riot, for alleged discrimination as a consequence of performing pro se legal work for himself and for other inmates, for not being permitted to attend a pre-release center due to his handicap, for being required to perform heavy labor he is physically not suited for, for being denied access to certain classes of mail or tardy mail delivery and for lack of adequate ventilation in light of particular medical needs are all complaints for individual injury which are not precluded by the agreement.

2. His objection concerning the failure of the prison to comply with the Americans with Disabilities Act is addressed in Section 9 of the Agreement which provides that Defendants shall ensure that inmates with disabilities are not excluded from participation in or denied the benefits of housing, services, facilities, and programs because of their disabilities. Further, Defendants are to develop and implement plans to integrate disabled inmates into the main stream of the institution. As noted, any claim arising out of failure to comply which affects inmate Sor-Lokken individually

is not precluded.

3. He complains that men and women prisoners are not treated equally in living conditions and classification, that men and women are not treated the same with regards to filing of criminal charges, proceedings, plea bargaining, trial and sentencing and that there are different levels of pay within the prison system. These, however, are not issues that were pled in the litigation nor addressed in the Agreement. Accordingly, the Agreement would not preclude inmate Sor-Lokken from pursuing such claims.

e. Inmate Patrick Tye and a number of others complained of overcrowding. The Courts have generally recognized that "double bunking" is not a constitutional violation per se, provided that inmates are provided with "out of cell" time. Section 4 of the Agreement provides that general population inmates shall have the opportunity to spend at least eight hours out of cell time on a daily basis.

f. Inmate Tye and others complain that one year is too long to give to the Defendants to come into substantial compliance with the Agreement. As counsel have noted, were this Agreement not approved and the matter set for trial, and considering the possibility for appeal of all or any portion of the result of such trial, it would likely be much longer than one year before the programs which the Defendants have agreed to implement would be placed in effect by the Court. In addition, there is evidence that a number of the changes mandated by the Agreement have already been

implemented.

g. Objections were received as to the prioritizing of treatment programs for those closest to parole. The Agreement provides that the Defendants are to give priority for access to treatment programs to inmates who are closest to parole eligibility and to inmates who have parole conditioned on their completion of specific treatment programs. Several inmates have complained that although they are not close to parole they have been allowed to enter treatment programs and they are concerned with having those treatment programs taken away from them and given to those who are closer to parole status. While the Court appreciates the concerns expressed by these inmates, the Ninth Circuit has held that there is no right to programs in the first instance and this is a matter of making the most effective use of the programs that do exist. In a weighing of interests, the Court concludes that insofar as the liberty interests of inmates close to parole may be affected by participation in various programs it is important that those inmates be afforded priority for those programs.

h. A number of inmates object to the provision regarding over-the-counter medications, requesting that over-the-counter medications be provided free of charge to the inmates. The Agreement provides that Defendants shall revise the present over-the-counter medication policy and implement a revised policy so that over-the-counter medication that is authorized by a licensed health care provider shall be provided by the Defendants for the period of time recommended by the health care provider. It is the

stated expectation of the parties that the over-the-counter medications shall be provided for common ailments where medically appropriate. In any other instance, over-the-counter medications shall be available for purchase to the inmate population through the canteen. Insofar as over-the-counter medications are provided to inmates for common ailments where medically appropriate, free of charge to such inmates, the objection to that proviso is not well taken. This provision meets the concerns of the inmates that they be provided free medications where medically appropriate while still meeting the concerns of the Defendants that they not be required to provide free medications without a showing of some medical need.

i. Concern was expressed over the distribution of medications by the guards as opposed to distribution by medical staff personnel. Apparently there have been occasions when the medications were mixed up with the result the wrong medications were provided to inmates. This is of particular concern with regard to psychiatric care inmates who may not be able to distinguish which medications they should be receiving. This problem has apparently been alleviated to a large extent by the practice of the medications being prepared in a dispensary, sealed in a cup, and the inmate's initials being placed thereon. This has prevented the medications from being dropped and mixed up although human error may still allow for misdelivery of medications. The Agreement provides that with respect to distribution of medication the Defendants shall comport with state law and the Administrative

Rules of Montana-Board of Nursing guidelines. In the event medications continue to be delivered to the wrong inmates the Defendants would be out of compliance with this provision and would be subject to orders of enforcement.

j. Finally, objections have been received requesting that sick call be conducted seven days a week as opposed to the practice of five days a week. The Agreement requires Defendants to conduct a daily sick call except for weekends and holidays and further requires that Defendants shall ensure that all inmates are seen at sick call by a nurse and/or a physician assistant within 48 hours of their submission of a request for health care services. As noted by Mr. Lopez, while seven days a week may have been ideal, it could not be mandated. Sick call should not be confused with emergency medical services to address acute health care problems where death may be the likely outcome. In that regard, the policy of the Montana Corrections Division relative to therapeutic care states that the level of health care service provided by the Division will be consistent with the standards for such services in the community. Thus, while not specifically addressed within the Agreement, emergency medical services are considered and provided for by the existing prison policy.

The Court was advised at the hearing that during the interim between the receipt of objections and the time of the hearing, counsel for the Plaintiffs visited with inmates at the prison and discussed a number of the objections. The Court is further advised that once the attorneys had an opportunity to talk with the inmates about their objections the concerns of those inmates, particularly

as to the scope of the preclusive effect of the Agreement were alleviated. Jeff Renz, counsel for several individual class members, testified that he also visited at the prison during the comment period and no inmates requested that he present objections to the Agreement.

Inmate Ricky Worden, a law clerk on the Low Side, stated that most of the concerns that were voiced to him by the inmate population were with regard to the preclusive effect of the settlement on individual law suits. Inmate Worden felt that insofar as the Agreement would not preclude proceeding with such suits, those concerns have been addressed. Inmate Worden also expressed concern about the matter of compliance by the Defendants with the provisions in the Agreement similar to the concerns expressed by the Department of Justice which have been addressed supra. Provided the Defendants did comply with the Agreement, inmate Worden expressed satisfaction with the Agreement.

Inmate Steve Hardy is also a law clerk who addressed the Court relative to the Agreement. He, likewise, expressed the concern of the two or three hundred inmates he had discussed the Agreement with as to their right to continue with their individual claims. He also expressed concern, based on his long tenure at the institution, that should the prison officials and staff be granted too much discretion, then they would be free to make arbitrary decisions affecting individual inmates. He appreciated, however, that the courts have recognized the right of prison staff and officials to exercise discretion and stated his personal feelings

that the Agreement overall was a good settlement.

The third inmate testifying was Terry Langford, a death penalty inmate from maximum security and a named class representative. He expressed concern about defining what may be considered general dental care to be addressed within 60 days and what may be considered urgent or emergency dental care requiring a more prompt response. In replying to this concern Mr. Keller noted the intent was to use terms that would have medical meaning, i.e., urgent and routine, which would be understood within the profession and which would assure that the prison would not delay care that required immediate treatment. Inmate Langford expressed further concern about the delivery of medications by the guards as has been previously discussed relative to the medications still getting mixed up even though the medications are placed in a sealed container with the names written thereon. As the Court has noted, should this be a recurring problem, the Defendants would not be in compliance and would be subject to appropriate order of the Court. Finally, Inmate Langford expressed concern over the implementation of Level 5. His primary concerns were that the inmates who qualified for Level 5 be treated fairly, and in avoiding the creation of problems between inmates in Maximum Security. These concerns have been previously addressed. In spite of these expressed concerns, inmate Langford advised the Court he would be in favor of the Court adopting the Agreement.

CONCLUSION

The Settlement Agreement reached is the result of arms length

noncollusive bargaining between knowledgeable and experienced counsel on each side having as its base extensive discovery and an understanding of the applicable law. In a number of instances the relief agreed to by the Defendants goes beyond that which would likely be mandated were the matter to proceed to trial and in no instance does it appear that any portion of the Agreement would fall below constitutional standards. The Agreement is, in the opinion of this Court, a fair, adequate, and reasonable resolution of the matters at issue in the law suit, exclusive, of course, of the issue of protective custody which has been specifically excepted.

DONE and DATED this 23rd day of December, 1994

Leif B. Erickson
United States Magistrate Judge

cc: American Civil Liberties Union Foundations
Cannon & Sheehy
Ogle & Worm
Attys. Dept. of Corrections & Human Serv.
Keller, Reynolds, Drake, Johnson & Gillespie
Sherry Scheel Matteucci, U.S. Attorney
Tim Payne, Dept. of Justice
Jeff Renz, Montana Defender Project
Ricky Worden
Steve Hardy
Terry Langford