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Superior Court of Massachusetts, Suffolk County.

Robert COHEN et al., Plaintiffs,

v.

Paul DiPAOLO, individually and in his official
capacity as Superintendent of MCI-Concord, and
Another², Defendants.

Civ. A. No. 93-7314-B. | July 13, 1995.

Opinion

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

PATRICK J. KING, Justice.

INTRODUCTION

*1 This is a class action for equitable and declaratory relief brought by inmates of the Massachusetts Correctional Institution at Concord (MCI-Concord). The plaintiffs contend that extreme overcrowding, in combination with inadequate toilets, showers, hand wash facilities, water, heat and clothes constitute violations of rights secured by articles 1, 10, 12, and 26 of the Massachusetts Declaration of Rights; the Eighth and Fourteenth Amendments to the United States Constitution; G.L. c. 111, § 21; G.L. c. 124, § 1(c), (g) and (q); G.L. c. 125, § 14; G.L. c. 127, § 32; G.L. c. 12, §§ 11H and 11I; G.L. c. 249, § 5; 42 U.S.C. § 1983; 103 CMR § 403.11; and 105 CMR § 451.000 et seq. On May 18, 1995, the court took a view of the facility. A hearing was held on plaintiffs' motions for class certification and for a preliminary injunction on June 2, 1995.³

BACKGROUND

The parties do not dispute that the capacity of MCI-Concord is 514 inmates. At the time of the court's visit, the population at the facility was 1,446. Although the daily population varies, there is no question that the facility has been approaching 300% of capacity during the

pendency of this action. The defendants admit that MCI-Concord is the most overcrowded of the Massachusetts correctional institutions.

MCI-Concord functions as the reception and classification center for the Department of Correction (DOC).⁴ Newly committed inmates, parole violators and returnees from lower security pass through MCI-Concord for classification purposes. The classification process, which takes between eight to ten weeks on average, involves, among other things, a medical screening and an assessment to determine the security rating for the inmate. There are approximately 800 bed changes each week at the facility and the average length of an inmate's stay at MCI-Concord is about sixteen weeks. The inmates remain at the facility for an additional six to eight weeks after completion of the classification process because of the difficulty in locating beds for them in the overcrowded correctional system.

MCI-Concord also houses about 100 pretrial detainees. These prisoners are held pursuant to G.L. c. 276, § 52A, and are individuals who have been previously incarcerated in a state correctional institution and have been removed to MCI-Concord by the Commissioner of Correction to await trial. The pretrial detainees are held in C-building. They are double-bunked in two tiers of cells. Each cell has a toilet and there are two showers in the building which are shared by the roughly 100 pretrial detainees. At times these individuals also have the use of shower facilities at the gym which is located in a separate building.

C-building also contains the segregation unit. This unit contained 36 men on the day of the court's visit to the institution. As recently as May 28, 1995, inmates have had to sleep on the floor in the segregation unit.⁵

As recently as March of 1995, a number of inmates were housed in the day room of the "new line" unit of C-building. There are no toilets in the day room. During the 11 p.m. to 7 a.m. shift the door from the day room to the toilet is kept locked and a guard had to open the door to allow access to a toilet. On one reported occasion, an inmate could not locate a guard to open the door to the bathroom and was forced to urinate in a trash can. Another inmate had to urinate in a cup in the middle of the night because he had no access to a toilet. Inmates slept on mattresses on the floor in the day room as recently as March of 1995.

*2 E-building contains four wings, each with between 52 and 54 double-bunked cells. The cells are cramped with only about 50 square feet of floor space. The doors to the cells are solid metal except for a small window. There are two tiers per wing. Each cell contains a toilet and each tier

has two showers. Thus, there are roughly two showers per 53 men in the E-building cells. As of the date of the court's visit, the day rooms of E-building were crammed with bunkbeds and prisoners. The day rooms were extremely overcrowded. There are no toilets or showers in the day rooms. A cell on the adjoining tier is left open to provide these inmates access to the toilet inside, and the showers on the adjoining tier are also made available during the day, but the defendants concede that the doors to the day rooms are secured at night. Once the inmates in the day rooms are locked in, they can only use the toilet if granted permission to do so by a guard.

L-building, which was designed to be a maintenance building, contains six extremely crowded dormitory style rooms, each of which consists of numerous bunk beds placed closely together in rows. Most have gang-style wash basins in the room, and a very poor ratio of men to shower and toilet facilities. For example, L-6 contains 50 men and only one toilet and one shower; L-1 contains 70 men, three showers, three toilets and three urinals; L-2 contains 40 men, two showers, one toilet with a door and one without. The DOC maintains that, three times each day, the men in L-6 are provided access to four showers and a number of urinals located in the now defunct auto shop adjacent to that particular dormitory. Men have slept on mattresses on the floor in L-6 probably as recently as March of 1995.

J-building is more modern than the other housing units. Each cell in J-building was designed for a single inmate and all are double-bunked. There are seven units. J-1 and J-4 have 30 cells. J-2, J-3, J-5 and J-6 have 45 cells each. J-7 is a dormitory and houses 48 inmates. There are two toilets and six showers in J-7.

On June 2, 1995 the court allowed plaintiffs' motion to expand the record to include the results of the most recent Department of Public Health inspection of MCI-Concord. That report is the result of an inspection conducted on December 23 and 27, 1994. It is 35 pages long and it describes hundreds of violations of the Department of Public Health regulations, many if not most of which have been cited on previous inspection reports.⁶ The cover letter of the report from the Director of the Department of Public Health to the Superintendent of MCI-Concord concludes that:

"[t]he facility continues to be overcrowded resulting in stretching the ability of the facility to adequately accommodate the inmates who are housed there.... We are also concerned about what appears to be a lack of compliance to the requirement of daily showers and access to out-of-cell exercise at least one hour per day for five days within a week. This appears to be a problem within the Isolation Unit."

*3 The report cites general violations of the following

sections:

451.320 "Each cell or sleeping area in an existing facility should contain at least sixty (60) square feet of floor space for each occupant, calculated on the basis of total habitable room area, which does not include areas where floor-to-ceiling height is less than eight feet."

451.321 Each cell in a new facility or a part of a facility constructed after the effective date of these regulations should contain: "[f]or segregation and special management areas where inmates are usually locked in for greater than ten hours per day, at least eighty (80) square feet of floor space for a single inmate.... For inmates usually locked in for less than ten hours per day at least seventy (70) square feet of floor space for a single inmate. Provided, however, two inmates may occupy a room or cell designed for double occupancy which has a floor space of 120 square feet.... Floor space shall be calculated on the basis of total habitable room area which does not include areas where floor-to-ceiling height is less than eight feet."

The report cites numerous other violations in reference to particular housing units including section 451.119 requiring that "each facility shall have at least one shower or bathtub with hot and cold running water for the first twelve inmates and then one for each additional fifteen inmates...." Section 451.114 provides that "each facility, where toilet and handwash facilities are not required for each individual ... and where the inmate has continuous access without assistance, shall have at least one working toilet and one working handwashing sink for every eight male inmates.... Urinals may constitute up to [[[one third]]] of the number of men's toilets required...."

CLASS CERTIFICATION

The plaintiffs have moved pursuant to Mass. R. Civ. P. 23 for certification of this suit as a class action. The proposed class consists of "all individuals who are now, or may be at any time in the future, confined at MCI-Concord."

Under Mass. R. Civ. P. 23(a) a class action may be maintained if four preconditions are met. The class must (1) be "numerous", (2) there must be common questions of law or fact, (3) the claims or defenses of the representative parties must be "typical" and (4) those parties must "fairly and adequately" protect the interests of that class. *Carpenter v. Suffolk Franklin Sav. Bank*, 370 Mass. 314, 318 (1976); Mass. R. Civ. P. 23(a). Even if these four requirements are met, a court must find that questions of law or fact common to the case

“predominate” over questions affecting individual members, and that a class action is “superior” to other available methods for the efficient adjudication of the controversy. *Carpenter, supra* at 318; Mass. R. Civ. P. 23(a)(b); J.W. Smith & H.B. Zobel, Rules Practice § 23.3, at 90; §23.8 at 100; § 23.9, at 100 (1975). Plaintiffs bear the burden of demonstrating that the class meets the six requirements for class certification under Mass. R. Civ. P. 23(a) and (b). *Fletcher v. Cape Code Gas Co.*, 394 Mass. 595, 601 (1985). A court must carefully apply the criteria of Rule 23 because once a Massachusetts class action is certified, it must resolve all the issues, for all class members. *Id.* at 602.

*4 Because MCI-Concord is a classification facility, the bulk of the inmate population turns over approximately every sixteen weeks. That is, prisoners at MCI-Concord typically spend about sixteen weeks at the facility before being sent to another prison. Since the proposed class consists of many future and unidentifiable members who could be subjected to the treatment alleged, the plaintiffs easily satisfy the numerosity requirement.

There are two distinct categories of prisoner at MCI-Concord: (1) pretrial detainees who are in custody pursuant to the provisions of G.L. c. 276, § 52A; and (2) the rest of the prison population who are in custody serving time on their sentences. Although these two groups are physically segregated, common issues of fact clearly affect the entire population at MCI-Concord. The facility is at close to 300% of capacity and it is fair to say that every available space is overcrowded. The court finds that the claims of the proposed class representatives are typical of the entire class. Moreover, the common factual issues predominate in this case over questions affecting individual members. The overcrowded conditions exist throughout the institution, stretching the ability of the prison to provide adequate toilets, showers and washing facilities. Thus, the proposed class meets the numerosity, commonality, typicality and predominance requirements.

Under the United States and the state constitutions, however, different legal standards apply to pretrial detainees and inmates who are convicted of crimes. Convicted prisoners may be punished as long as punishment is not “cruel and unusual” under the Eighth Amendment to the United States Constitution, but pretrial detainees may not be punished at all. See *Richardson v. Sheriff of Middlesex County*, 407 Mass. 455, 461 (1990), citing, *Bell v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). Because the factual issues are essentially the same for the two groups in this case, but the legal issues are different, the court concludes that two separate classes should be certified instead of the one proposed by the plaintiffs. The classes are to be as follows: CLASS ONE: all present and future pretrial detainees in the custody of MCI-Concord pursuant to G.L. c. 276, § 52A; and CLASS TWO: all present and future prisoners confined at MCI-Concord

who are not pretrial detainees.

In addition, the court finds that the classes are adequately represented by competent legal counsel. Finally, in light of the relatively rapid turnover in the population at MCI-Concord, and the difficulty in identifying future class members, the court concludes that a class action is the superior method for the efficient adjudication of this controversy.

MOTION FOR PRELIMINARY INJUNCTION

“In evaluating a request for preliminary relief the court must first evaluate, in combination, the moving party’s claim of injury and its chance of success on the merits. If the failure to issue the injunction would subject the moving party to a substantial risk of irreparable harm, the court must then balance this risk against any similar risk of irreparable harm which granting the injunction would create for the opposing party. The raw amount of conceivable irreparable harm which each party may suffer does not matter; rather, the court must evaluate the risk of such harm in light of the party’s chance of success on the merits.” *Packaging Industries Group, Inc. v. Cheney*, 380 Mass. 609, 617 (1980). See *Planned Parenthood League of Mass. v. Operation Rescue*, 406 Mass. 701, 710 (1990).

*5 It is undeniable that the extremely overcrowded conditions at MCI-Concord have resulted in inadequate access to toilets, showers and wash facilities for many hundreds of inmates. Since inmates at MCI-Concord are moved so frequently from one housing block to another for intake and classification purposes, the problem is pervasive and affects the entire institution.

Class I - The Pretrial Detainees:

The conditions in C-building where the pretrial detainees are held are no exception. About 100 men are double-bunked in the unit and share only two showers. The cells are quite small with only about 50 square feet of floor space. The amount of time out of these cells each day is quite limited. Confinement for extended periods of time under these conditions in C-building probably constitutes punishment in violation of the pretrial detainees Due Process rights. For the present the court will enter a preliminary injunction requiring that the pretrial detainees be allowed outside of their cells for at least three hours per day with adequate access to shower facilities. Also, beginning on September 15, 1995, the court will require that all pretrial detainees be housed one person to a cell.

Class II - The Rest of the Inmate Population:

In the court's view, the plaintiffs in Class II have a strong likelihood of establishing at trial that the conditions of their confinement violate at least the protection against cruel and unusual punishment guaranteed by article 26 of the Massachusetts Declaration of Rights.⁷

Article 26 bars punishments which are found to be cruel or unusual in light of contemporary standards of decency which mark the progress of society. *Good v. Commissioner of Correction*, 417 Mass. 329, 335 (1994); *Libby v. Commissioner of Correction*, 385 Mass. 421, 435 (1982). Although violations of state Department of Public Health regulations are not *per se* violations of article 26, the court may look to state statutes and regulations "as an objective standard for assessing whether sanitary conditions at MCI-Concord fall below minimum standards of decency." *Good*, 417 Mass. at 335 n.5, citing, *Michaud v. Sheriff of Essex County*, 390 Mass. 523, 529-531 (1983).

While the court does not rely on it exclusively, the Department of Public Health report submitted in this case is replete with evidence that the conditions at the facility fall below minimum standards of decency. The report describes numerous violations including general violations of the regulations governing the amount of space per prisoner. 105 CMR § 451.320; 105 CMR § 451.321. The affidavits submitted by the plaintiffs and the court's visit to the facility corroborate that the housing at MCI-Concord falls grossly short of the minimum space requirements set forth in the regulations. Cells are double-bunked throughout the prison. The dormitory style housing used in several buildings falls woefully short of the space requirements set forth in the Department of Public Health regulations. The inmates are stacked in the dormitories like cords of wood with virtually no space or privacy. The Department of Public Health report also cites numerous violations of the sections governing the availability of toilets, showers and wash facilities. See, 105 CMR § 451.114 (requiring at least one toilet and sink for each eight inmates); 105 CMR § 451.119 (requiring one shower or bathtub for the first twelve inmates and one more for each additional fifteen inmates); 105 CMR § 451.112 (providing that each inmate "shall have access to a toilet and handwashing facility at all times.") Plaintiffs affidavits describe these violations and the conditions were also apparent during the court's visit. Conditions such as those in the E-building day rooms, where each night guards lock the inmates into very crowded dormitory style rooms that contain no toilet whatsoever simply cannot be tolerated under today's standards of decency. The conditions in several of the dormitory units in L-building are similarly unacceptable with inmate to toilet ratios as bad as fifty to one.

*6 There is no dispute that inmates have been required to sleep on the floor because of the extreme overcrowding

and lack of beds. While this problem has abated for the most part in recent months, it is likely to reoccur unless injunctive relief is granted.⁸ The Supreme Judicial Court has decided that a failure to provide inmates with beds "constitute[s] punishment without regard to the number of days for which a prisoner is so confined." *Richardson v. Sheriff of Middlesex County*, 407 Mass. 455, 462 (1990). Although *Richardson* examined the bed issue in the context of pretrial detainees only, and did not decide whether failure to provide beds constitutes cruel and unusual punishment, using the mandatory provisions of the DPH regulations as a guide for contemporary standards of decency, it appears that failure to provide beds could be considered cruel or unusual punishment. See 105 CMR §§ 451.103, 451.104 (each inmate shall receive a clean mattress and "a bed and bedspring or platform raised above the floor and in good condition.")

In addition to the obvious mental and physical suffering such conditions impose on the inmates, it is axiomatic that these conditions are likely to result in violence towards inmates and corrections staff, and serious health problems. The court has no doubt that if these violations are allowed to persist, the risk of irreparable harm to present and future inmates would substantially outweigh any hardships the prison administrators might face in ameliorating the problems.

Because MCI-Concord is being used as a classification facility, the administration of this prison has little control over the numbers of prisoners coming into the institution.⁹ The inmate population depends largely on the numbers of newly committed inmates and returnees from lower security that arrive each day. Other prisoners, such as parole violators, can be brought in at any time -- sometimes in the middle of the night -- and need to be housed. The court was favorably impressed by the professionalism of the staff of MCI-Concord. They appear to have done their best under exceptionally difficult circumstances largely beyond their control. Although there has been a significant decrease in the crime rate in recent years, mandatory sentencing and restrictive Parole Board policies have caused an explosion in the growth of the prison population without any significant increase in the Department of Correction's resources to cope with the population growth. Unfortunately, there is no easy solution to the problem. The problem will not go away by pretending that it does not exist. The court has a duty to fashion a remedy that will address the violations of the plaintiffs' constitutional rights as expeditiously as possible. The problems created by extreme overcrowding at MCI-Concord can be significantly ameliorated over a several month period by moving the inmates to other facilities as soon as the classification process is completed. Without judicial intervention, MCI-Concord will remain unacceptably overcrowded and probably become even more overcrowded no matter how conscientious the defendants may be in their daily

administration of the prison. The court is mindful of the administrative difficulties which the injunction set forth below may have on other Massachusetts correctional facilities. Nonetheless, the record before the court requires the entry of a preliminary injunction reducing the overcrowding at MCI-Concord to a level which will remedy the constitutional violations found by the court.

ORDER

*7 A. The plaintiffs' motion to certify a class action is allowed as follows. The court certifies two classes:

CLASS I: All present and future pretrial detainees in the custody of MCI-Concord pursuant to G.L. c. 276, § 52A

CLASS II: All present and future prisoners confined at MCI-Concord who are not pretrial detainees.

B. Plaintiffs' motion for preliminary injunction is allowed as follows. The defendants, their agents and employees, are hereby preliminarily enjoined from:

1. failing to furnish all inmates and pretrial detainees at MCI-Concord with a bed.
2. allowing double occupancy of cells by pretrial detainees after September 15, 1995.

3. failing to permit all double bunked pretrial detainees to be outside their cells at least three hours per day and to have a shower each day commencing no later than August 15, 1995.

4. housing inmates after September 15, 1995 in any cell or dormitory room where there is not ready, twenty-four hour per day access to a toilet.

5. maintaining a population at MCI-Concord exceeding:

(a) 1328 inmates by September 15, 1995;

(b) 1228 inmates by October 15, 1995;

(c) 1128 inmates by November 15, 1995; and

(d) 1028 inmates by December 15, 1995 and thereafter.¹⁰

C. By the last day of each month, beginning with September 1995, the defendants shall file a report with the court and class counsel describing the housing of the population of MCI-Concord in sufficient detail so that compliance with the court's order can be monitored.

D. A status conference to discuss completion of discovery and the setting of a trial date will be held in courtroom 306 on September 21, 1995 at 3:30 p.m.

Footnotes

- ¹ Jose Solivan, William T. Johnson, Caesar Lopes, Brahe Stowell, David Hathaway, and Dwayne Hopkins, on behalf of themselves and on behalf of the two classes defined in the body of this memorandum.
- ² Larry DuBois, individually and in his official capacity as Massachusetts Commissioner of Correction.
- ³ The case was originally filed December 29, 1993 and the court scheduled a hearing for January 13, 1994 on the request for a preliminary injunction. Before the hearing, the parties requested that the case be removed from the calendar. The plaintiffs then filed a renewed motion to certify the class and for a preliminary injunction in late February of 1995.
- ⁴ About eighty inmates serving sentences are assigned to permanent work details at the facility.
- ⁵ According to the affidavit of Victor Ortiz, "the hole is about 5 feet by 8 feet. On May 27th and May 28th, I slept on the floor on a mattress which fits under the lip of the other bed, where another guy is sleeping.... I have none of my property in the hole. I can't shower or brush my teeth. I have no towel, so I can't wash.... There is no window in there. You can't see the daylight."
- ⁶ Although the plaintiffs claim that the drinking water makes them sick, the court found no evidence to corroborate this claim. The Department of Public Health reports are quite detailed and make no mention of any problem with the water. If the plaintiffs wish to pursue this claim arrangements should be made to have the drinking water tested if this has not already been done.
- ⁷ Plaintiffs also allege violations of the Eighth Amendment to the United States Constitution. To show that conditions of confinement constitute a violation under the Eighth Amendment, plaintiffs are required to show "deliberate indifference" on the part of prison officials. See e.g. *Wilson v. Seiter*, 111 S.Ct. 2321 (1991). However, article 26 provides protections that are at least as broad as the Eighth Amendment. See *Good v. Commissioner of Correction*, 417 Mass. 329, 335 (1994), and cases cited. There is no requirement under article 26 that the plaintiffs establish "deliberate indifference" to prove that the conditions of their confinement violate the state constitution. Because the court finds that the plaintiffs are likely to succeed on the merits on the claimed violations of article 26, there is no need to assess possible Eighth Amendment violations.

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- 8 Two of the plaintiffs' affidavits allege that inmates slept on the floor of cells in the segregation unit as recently as May 28, 1995.
- 9 MCI-Concord processes about 5,600 inmates per year.
- 10 Even at this population level, the facility will still be at two hundred percent of capacity.