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United States District Court, E.D. Pennsylvania.

IMPRISONED CITIZENS UNION, et al,
v.
Milton SHAPP, et al.

No. CIV.A. 70–3054. | June 26, 1997.

Opinion

ORDER AND MEMORANDUM

DUBOIS, J.

***1** AND NOW, to wit, this 25th day of June, upon consideration of the Motion to Invoke Standing to File a Motion of Jerome Silo to Intervene Under Rule 24, as Amended in 1966 ("Motion to Intervene") (Document No. 711, filed May 27, 1997),[1] Class Counsel's Response to Jerome Silo's Motion to Intervene (Document No. 717, filed June 3, 1997), and Defendants' Response to Jerome Silo's Motion to Intervene (Document No. 728, filed June 16, 1997), and movant's later submissions related to the Motion to Intervene, Submission Related to Intervention (Document No. 712, filed May 27, 1997), Motion of Jerome Silo to Invoke MLB v. SLJ (Document No. 715, filed June 3, 1997), Motion to Invoke Standing to File a Motion to Intervene Under Rule 24, as Amended in 1966 (Document No. 721, filed June 10, 1997), Motion of Enforcement of the Court's Order Dated May 27, 1997, and/or to Compel a Response, in Particularity, to Jerome Silo's "Objection(s) to the Binding Effect" of the Consent Decree (Document No. 723, filed June 13, 1997), Motion to Invoke Adkins v. DuPont, ... Pursuant to Invoking Jerome Silo's IFP Status as an ICU Class Member [and] To Appoint an Expert in the Field of Mental Health and to Appoint an Expert in the Field of Imprisonment (Document No. 724, filed June 13, 1997), Motion to Request "As of Right" Assistance of Counsel Under Lassiter v. DSS (Document No. 725, filed June 16, 1997), Motion to Reply to Defendants' Response to Jerome Silo's Motion to Intervene by Requesting Court to Please Appoint Expert in Constitutional Law to File a Brief to "Inform the Conscience of the Court" (received by the Court June 20, 1997),[2] and Motion to Respectfully Request the Twenty–Eight (28) Page Document from Jerome Silo (Which Had Improperly Been Submitted as a Request for the court to take Judicial Notice of Adjudicatory Facts and to Assess the Tenor of Said Adjudicatory Facts), ... Which the Court Denied By His Order Dated June 9, 1997, ... Should Please be Considered by the Court, in the Alternative, as if it Were a "Memorandum of Law" in Support of the Original Motion to Which the Court had Ordered a Response from Counsel (received by the Court June 18, 1997),[3] IT IS ORDERED that each of the following Motions is DENIED:

1. Motion to Invoke Standing to File a Motion of Jerome Silo to Intervene Under Rule 24, as Amended in 1966 (Document No. 711);

2. Motion of Jerome Silo to Invoke MLB v. SLJ (Document No. 715);

3. Motion to Invoke Standing to File a Motion to Intervene Under Rule 24, as Amended in 1966 (Document No. 721);

4. Motion of Enforcement of the Court's Order Dated May 27, 1997, and/or to Compel a Response, in Particularity, to Jerome Silo's "Objection(s) to the Binding Effect" of the Consent Decree (Document No. 723);

5. Motion to Invoke Adkins v. DuPont ... Pursuant to Invoking Jerome Silo's IFP Status as an ICU Class Member [and] To Appoint an Expert in the Field of Mental Health and to Appoint an Expert in the Field of Imprisonment (Document No. 724);

***2** 6. Motion to Request "As of Right" Assistance of Counsel Under Lassiter v. DSS (Document No. 725);

7. Motion to Reply to Defendants' Response to Jerome Silo's Motion to Intervene by Requesting Court to Please Appoint Expert in Constitutional Law to File a Brief to "Inform the Conscience of the Court" (received by the Court June 20, 1997); and,

8. Motion to Respectfully Request the Twenty–Eight (28) Page Document from Jerome Silo (Which Had Improperly Been Submitted as a Request for the court to take Judicial Notice of Adjudicatory Facts and to Assess the Tenor of Said Adjudicatory Facts), ... Which the Court Denied By His Order Dated June 9, 1997, ... Should Please be Considered by the Court, in the Alternative, as if it Were a "Memorandum of Law" in Support of the Original Motion to Which the Court had Ordered a Response from Counsel (received by the Court June 18, 1997).

The denial of Jerome Silo's Motions is based on the following:

1. *Federal Rule of Civil Procedure 24:* Federal Rule of

Civil Procedure 24 ("Rule 24") provides for two types of intervention, "Intervention of Right" (Rule 24(a)) and "Permissive Intervention" (Rule 24(b)). Movant does not state under which subsection of Rule 24 he moves to intervene. Because courts are instructed to read *pro se* complaints liberally, *Haines v. Kerner,* 404 U.S. 519, 520–21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), the Court will consider movant to have made his motion pursuant to both subsections "a" and "b" of Rule 24.

2. *Intervention of Right:* Whether movant is entitled to intervene of right depends on his satisfying the Court in three respects: "first, that [he] ha[s] sufficient interest in the matter, and that [his] interest would be affected by the disposition; second, that [his] interest was not adequately represented by the existing parties; and third, that [his] application is timely." *Commonwealth of Pennsylvania v. Rizzo,* 530 F.2d 501, 504 (3d Cir.1976). Because the Court concludes that movant's interests have been more than adequately represented by the existing parties the Court need not consider the other two factors.

3. *Class Counsel is More Than Adequate:* Movant's lengthy filings may be distilled to a single argument: he contends that class counsel has failed to represent his interests by failing to challenge 1) certain provisions of the Consent Decree and 2) a number of this Court's prior rulings with respect to the Consent Decree. That argument has no merit because: 1) class counsel has been far more than adequate and 2) movant's arguments with respect to the Consent Decree and this Court's prior rulings have no merit.[4] Thus, class counsel was not inadequate in deciding not to present those arguments to this Court.

As a general rule, " 'what measure of representation is adequate is a question of fact that depends on each peculiar set of circumstances.' " *In re Asbestos Litigation,* 90 F.3d 963, 977 (5th Cir.1996) (quoting *Guerine v. J & W Investment, Inc.,* 544 F.2d 863, 864 (5th Cir.1977) (citation omitted)), *petition for cert. filed,* 65 U.S.L.W. 3631 (U.S. Mar. 3, 1997) (No. 96–1394). Here, the facts clearly illustrate class counsel's adequacy.

***3** As this Court noted in *Austin v. Pennsylvania Department of Corrections,* 876 F.Supp. 1437 (E.D.Pa.1995), a prisoner class action challenging conditions of confinement in Pennsylvania prisons, "plaintiffs' counsel[, Steffan Presser, is a] highly experienced litigator[ ] in prisoner civil rights actions." *Austin,* 876 F.Supp. at 1472. Moreover,

> Stefan Presser, is the Legal Director of the American Civil Liberties Foundation of Pennsylvania. He has litigated the following cases involving prisoners rights and/or institutional reform: *Medina v. O'Neill* 589 F.Supp. 1028 (S.D.Tex.1984) (forcing the closing of the nations's first for-profit prison)[, *rv'd in part, vacated in part,* 589 838 F.2d 800 (5th Cir.1988)], *Quinlin v. Estella,* Civil Action No. H–78–2117 (S.D.Tex.1978) (securing equal protection for women incarcerated within the Texas Department of Corrections with regard to educational and vocational opportunities), *Peterkin v. Jeffes,* 855 F.2d 1021 (3d Cir.1988 (improving conditions of confinement for Pennsylvania death sentenced inmates), and *Arbogast v. Owens,* Civil Action No. 1–CV–1592 (M.D.Pa.1989) (requiring the Pennsylvania Department of Corrections to unshackle two thousand prisoners in the aftermath of the Camp Hill riot). *Austin,* 876 F.Supp. at 1473.

The *Austin* litigation must now be added to that already lengthy list. *See Austin,* 876 F.Supp. at 1473 (approving a "Settlement Agreement [that] provide[d] substantial benefits to the plaintiff class"). The Court is more than satisfied that Mr. Presser has the experience and skills necessary to litigate and properly monitor a case such as this one and that he has, in fact, applied that experience and those skills to the instant case.

The Court has previously stated that "[a]s the class members' advocate, class counsel is duty-bound to aggressively pursue any allegations of institution or system wide violations of the Consent Decree *that he believes are meritorious.* Class counsel has done so in the past, and the Court has been provided with no reason to believe he will not continue to do so." *Imprisoned Citizens Union v. Shapp,* No.Civ.A. 70–3054, 1996 WL 735489, *6 (E.D.Pa. Dec.9, 1996) (emphasis added). Moreover, class counsel has represented to this Court, on many occasions, that he or members of his staff review the *Imprisoned Citizens Union*-related inmate correspondence mailed directly to his office or forwarded to him by the Court. Where class counsel deems it appropriate, he takes action in response to such correspondence.

Class counsel's careful monitoring of defendants compliance with the Consent Decree is evidenced by his recent filing of a Motion to Compel Discovery Regarding Defendants' Consent Decree and Compliance (Document No. 696, filed April 11, 1997).[5] Moreover, in response[6] to a *pro se* Motion for Contempt, submitted to the Court by a

number of class members, but not filed at their request, class counsel has informed the Court that, in summary:

***4** 1. Once an inmate affected by an alleged breach of the Consent Decree by the Department of Corrections ("Department") addressed in the proposed Motion has exhausted his administrative remedies, class counsel will initiate discovery and, if appropriate, adopt any of the following claims of contempt of the Consent Decree, as amended, made by *pro se* movants that are deemed to be meritorious by class counsel:

a. Department's violation of Section § I(A), which provides for mandatory review of disciplinary sentences;

b. Department's failure to conduct a daily sick call as indirectly provided for in Appendix A, Health Care Provisions;

c. Department's failure to distribute basic issue in the Restricted Housing Unit;

d. Department's failure to comply with privacy requirements regarding strip searches, as set forth in Appendix E;

e. Department's prohibition and confiscation of civilian clothing;

f. Department's failure to respond to grievances in a timely fashion;

2. Class counsel will adopt two of the claims made by *pro se* movants once those claims are exhausted, as follows:

a. Department's interference with the right of an inmate preparing defenses to misconducts to have the assistance and advice of any resident of the general population, as set forth in § II(F);

b. Department's handcuffing of inmate advisors housed in restricted housing units, in violation of § II(H);

3. Class counsel has concluded that other claims made by *pro se* movants are not subjects of the Consent Decree, and he therefore 1) will not investigate those claims further and 2) notes that *pro se* movants may file suit with respect to such claims in the Middle District of Pennsylvania, as follows:

a. Department's interference with outgoing mail sent by inmate organizations;

b. Department's change in policy regarding placement of inmates in institutions most removed from the sentencing community;

c. Department's change in visitation policy;

d. Department's interference with telephone calls;

4. Class Counsel declines to adopt *pro se* movants claim that some of the hearing examiners who conduct misconduct hearings are biased against inmates on the ground that class counsel has unsuccessfully raised such a claim in a motion for contempt in the past. *See Imprisoned Citizens Union v. Shapp,* CA No. 70–354, slip op. at 26–31 (E.D.Pa. Nov. 25, 1987) (Lord, J.).

In sum, class counsel has a long history of competent and vigorous advocacy on the behalf of inmates in this Commonwealth and elsewhere, and movant presents the Court with no evidence that class counsel is not acting with such competence and vigor here. As class counsel has more than adequately represented movant's interests in this litigation, movant is not entitled to intervene of right.

4. *Permissive Intervention:* As has been recognized by the Third Circuit, the question of whether a movant may be allowed to intervene permissively is a "highly discretionary decision." *Brody By and Through Sugzdinis v. Spang,* 957 F.2d 1108, 1115 (3d Cir.1992). The Court will not exercise its discretion to allow permissive intervention in this case because movant's interests are more than adequately represented by class counsel.

Footnotes

1 Muhammad K. El–Amin and Carlton Estes, two inmates at State Correctional Institution at Pittsburgh, were granted permission to be treated as additional movants with respect to the Motion to Intervene (Document No. 711) by separate Order dated June 25, 1997.

2 The original of this document shall be filed.

3 The original of this document shall be filed.

4 For example, movant alleges the illegality and/or unconstitutionality of: 1) the exhaustion requirement of the Consent Decree; 2)

the requirement that an allegation raised in a motion for contempt of the Consent Decree address an institution or system wide violation of the Consent Decree; 3) the use of administrative directives to change Department of Corrections policies that affect inmates; and, 4) the Court's ruling that other lawsuits may be filed by inmates who are members of the plaintiff class if they believe that their individual constitutional rights have been violated. None of these arguments has merit, and, assuming *arguendo* class counsel had notice of them, he was therefore correct in choosing not to raise them before this Court.

First, the Court notes that the basis for the exhaustion and system/institution wide violation requirements of the Consent Decree are set forth in this Court's Memorandum dated December 9, 1996. *See Imprisoned Citizens Union v. Shapp,* No. Civ. A. 70–3054, 1996 WL 735489, *5–7 (E.D.Pa. Dec.9, 1996). Movant's arguments do not provide meritorious bases for challenging those requirements.

Second, with respect to movant's concern with the alleged "illegality" of various administrative directives promulgated by the Department of Corrections, the Consent Decree provides as follows: "Defendant Commissioner of Correction[s] reserves the right to amend, suspend, alter or modify any of the Administrative Directives and the additions and amendments thereto as provided in this Decree, and plaintiffs reserve their right to contest in this Court any such amendment, suspension, alteration or modification of the provisions of this Consent Decree." Consent Decree, § XIX. Class counsel carefully monitors all administrative directives and "it is his position ... that newly enacted administrative directives which do not explicitly run counter to rights enumerated in the Consent Decree can not be the subject of contempt citation." Class Counsel's Response to Pro Se Motion for Contempt Filed By Class Members Smith, Yount, Boone, Romberger, Kopac and Teater, at 2 (Document No. 720, filed June 9, 1997). The Court agrees with class counsel's position and notes that throughout his "Response to Pro Se Motion for Contempt" he explicitly states which challenges to current administrative directives he believes run afoul of the Consent Decree and which do not.

Finally, there is no merit in movant's challenge to the Court's prior ruling that individuals who are not entitled to relief under the Consent Decree but believe that their individual constitutional rights have been violated may file a lawsuit in a Court with jurisdiction and where venue is properly laid. Movant fails to recognize that the subject matter of the Consent Decree is limited in such a manner that inmates within the plaintiff class may file lawsuits claiming violations of their constitutional rights as *individuals*. Such suits are permissible because the Consent Decree only addresses institution and system wide violations of its terms—not individual violations, nor unrelated violations of an inmate's individual constitutional rights. *See Imprisoned Citizens Union,* 1996 WL 735489, at *5–6 (concluding that Section XXIII of the Consent Decree does not create an individual cause of action under the Decree and requires that motions for contempt of the Decree be based upon system and/or institution wide violations of the Decree). Thus, lawsuits based upon the violation of individual inmate's constitutional rights are *not* preempted by the Consent Decree. *See Moore v. Lehman,* 940 F.Supp. 704, 708 (M.D.Pa.1996).

5 The Court was recently notified that defense counsel has provided class counsel with some of the documents and other information covered by the Motion to Compel and that discussions are continuing with respect to production of additional documents and information. At the joint request of counsel the Court ordered that the Motion to Compel be held in abeyance. *Imprisoned Citizens Union v. Shapp,* Civ.A.No. 70–3054 (E.D.Pa. June 24, 1997) (order holding Motion to Compel Discovery Regarding Defendants' Consent Decree and Compliance in abeyance). The current procedural status of the Motion supports the Court's conclusion that class counsel has more than adequately represented movant's interests.

6 That response is entitled Class Counsel's Response to Pro Se Motion for Contempt Filed By Class Members Smith, Yount, Boone, Romberger, Kopac and Teater ("Response to Pro Se Motion for Contempt") (Document No. 720, filed June 9, 1997). The title of the response is in error because the Motion for Contempt was not filed.