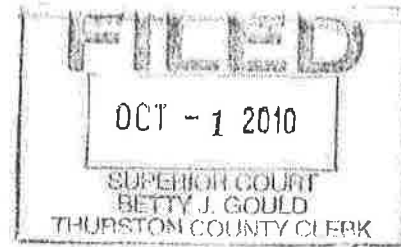


☐ EXPEDITE
☐ No Hearing is Set
☒ Hearing is Set
 Date: August 6, 2010
 Time: 9:00 am
 JUDGE WM. THOMAS MCPHEE



STATE OF WASHINGTON
THURSTON COUNTY SUPERIOR COURT

JANE DOE 1, et al.,

NO. 07-2-01513-0

Plaintiffs,

~~[PROPOSED]~~ SETTLEMENT
AGREEMENT AND ORDER

v.

HAROLD CLARKE, et al.,

Defendants.

I. INTRODUCTION

A. Purpose Of The Settlement Agreement And Order

The purpose of this Settlement Agreement and Order is to resolve all of Class Plaintiffs' claims for injunctive relief in this action, as stated in their Third Amended Complaint for Injunctive Relief and Damages. This Settlement Agreement and Order shall not be construed as an admission by any party regarding liability or the violation of any law by Class Defendants. The parties agree that this Settlement Agreement and Order is in the best interest of the Class.

B. Conditions Of Settlement Agreement And Order

1. The parties in *Doe v. Clarke*, Cause No. 07-2-01513-0 enter into this Settlement Agreement and Order ("Agreement") with the goal of ultimately resolving the claims brought by Plaintiffs Jane Doe 1, Jane Doe 3 and Jane Doe 4, on behalf of

1 themselves and on behalf of the Plaintiff class certified by the Court in this action ("Class
2 Plaintiffs").

3 2. Within fifteen (15) calendar days following the Court's preliminary approval
4 of this Agreement, Class Defendant shall provide notice to the Class by posting the notice
5 form attached hereto as Appendix 1 in conspicuous locations within the Women's Facilities,
6 by mailing the notice to the last known address of female offenders on Community Status,
7 and by providing copies of this Agreement as described in the notice.

8 3. On October 1, 2010, the Court will conduct a hearing on the subject of final
9 approval of the Agreement.

10 4. Nothing herein is intended to address or affect damages claims made in this
11 matter, or to revoke, amend, or otherwise affect the validity or terms of the Judgment for
12 damages entered in this matter on June 12, 2009.

13 5. In the event that application of any of the provisions in this Agreement
14 violates governing law, governing law shall apply. The party deviating from the Agreement
15 on the basis of this section shall provide written notice to counsel for the opposing party
16 within seven (7) calendar days of the deviation. In the event any portion of the judgment is
17 deemed to be invalid due to a conflict with governing law, the remaining provisions of this
18 Agreement shall not be affected, and shall remain valid and enforceable.

19 6. In the event that one of the parties determines one or more provisions of this
20 Agreement conflict with governing law, the parties shall engage in dispute resolution as set
21 forth in Section III.C to determine what modifications to this Agreement are necessary, if
22 any, to effectuate the intent of the parties.

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25 //
26

II. TERMS OF AGREEMENT

A. Definitions

The definitions provided in Appendix 2, as well as the definitions of Staff Sexual Misconduct and Staff Misconduct of a Sexual Nature provided in Appendix 3, shall apply throughout this Agreement.

B. Defendant's Obligations

The Department will substantially comply with the provisions of this Agreement. The Department is in substantial compliance if any deviations from the terms do not affect the protections of the Class Plaintiffs set forth in the Agreement and the deviations are neither systemic nor serious. Non-compliance with mere technicalities will not constitute failure to maintain substantial compliance. To the extent that this Agreement refers to obligations of persons who are not directly employed by the Department, but are providing compensated or volunteer services pursuant to a contract and/or interagency agreement with the Department, the Department will, within one year of entry of this Agreement, modify or clarify contract and/or interagency agreement requirements to substantially reflect the requirements of this Agreement.

Whenever the Agreement requires actions to be taken in less than six (6) calendar days, in the event of a natural disaster, riot, bomb or terrorist threat or action, or other unforeseen emergency arises, the compliance with the required timing will be extended by the length of the disruption caused by the unforeseen emergency.

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1 The terms of this Agreement apply only to, and are enforceable only by members of
2 the Class through Class Counsel. This Agreement is not enforceable by any third parties.

3 *1. Policy Compliance*

4 (a) DOC 490.800

5 The Department will comply with DOC Policy 490.800 as revised effective January
6 15, 2010, and as set forth in Appendix 3. Sections V.C.1, V.C.3, V.C.4, and IX.D do not
7 apply to this Agreement.

8 (b) DOC 490.850

9 The Department will comply with DOC Policy 490.850 as revised effective January
10 15, 2010, and as set forth in Appendix 4. Sections I.D, II.A, III, IV, V.D, V.E.2.b, VII.B.,
11 VII.D.1, VIII.C, X, XI, and XII do not apply to this Agreement.

12 (c) DOC 420.310

13 The Department will comply with DOC policy 420.310 Sections II.D, III.C.1, and
14 III.D as revised effective August 17, 2009, and as set forth in Appendix 5.

15 (d) DOC 420.325

16 The Department will comply with DOC policy 420.325 Section II.C as revised
17 effective March 11, 2009, and as set forth in Appendix 6.

18 (e) DOC 400.360

19 The Department will comply with DOC policy 400.360 Section III as revised effective
20 August 14, 2009, and as set forth in Appendix 7.

21 (f) Policy Updates

22 Within ninety (90) calendar days of the adoption date of this Agreement, the
23 Department will verbally and in writing update the staff, contract workers, and volunteers at
24 the Women's facilities as to the major requirements of the policies referenced in this
25 Agreement and adopted since January 14, 2010.

1 2. *Other Obligations.*

2 (a) The Department has represented to Class Plaintiffs that it has made a number
3 of changes since Class Plaintiffs filed this lawsuit. The changes made are listed in
4 Appendices 8 - 13. The parties agree that the changes shall remain in place while this
5 Agreement is in effect.

6 (b) The Department's investigations regarding Staff Misconduct of a Sexual
7 Nature, Staff Sexual Misconduct, and policies cited herein will be sufficiently timely and of
8 sufficient quality to promote safety, security and the Department's zero tolerance policy
9 regarding sexual misconduct.

10 (c) When an allegation of Staff Misconduct of a Sexual Nature or Staff Sexual
11 Misconduct is substantiated, the Department will initiate discipline sufficient to promote
12 safety, security and the Department's zero tolerance policy regarding sexual misconduct.
13 When a violation of policies cited herein, other than engaging in Staff Sexual Misconduct
14 and Staff Misconduct of a Sexual Nature, is substantiated, the Department will initiate
15 corrective action or discipline sufficient to promote safety, security and the Department's
16 zero tolerance policy regarding sexual misconduct.

17 (d) Within 30 calendar days of executing this Agreement the Department shall
18 issue the letter Attached as Appendix 14 to all staff as defined herein.

19 (e) The Department will not rehire Steven Fewkes, Gregory Fontenette, Leonard
20 Merkle, Kenneth Lane, and Marvin Taylor, unless required by law or court order.

21 **III. AGREEMENT ADMINISTRATION**

22 **A. Term Of Agreement**

23 This Court has continuing jurisdiction to enforce the terms of the Agreement for
24 three (3) years from the date of its entry by this Court. At the conclusion of the three years
25 this Agreement shall be vacated, the Court's jurisdiction shall terminate, and this case shall
26 be dismissed.

1 **B. Review**

2 1. *Every Four Month Reporting Requirements*

3 Every four months during the term of this Agreement, the Department will provide
 4 to Class Counsel a report documenting the Department's achievements and deficiencies in
 5 complying with this Agreement. Unless otherwise agreed by the parties, the reports will be
 6 due on the last Friday of each February, June, and October, while the Agreement is in
 7 effect. Where the reports contain information that is deemed Restricted Confidential
 8 pursuant to the Protective Order entered by the Court, either party may designate the report
 9 or portions thereof as Restricted Confidential. These reports shall also include information
 10 as to any determinations, made during that reporting period, that an allegation where a
 11 female offender is the alleged victim, that would have otherwise been deemed to be Staff
 12 Sexual Misconduct or Staff Misconduct of a Sexual Nature did not fit the definition of
 13 those terms as set forth in the Prison Rape Elimination Act Definitions attached to DOC
 14 Policies 490.800 and 490.850 because it was: (1) done for a legitimate penological
 15 purpose; (2) not done for the purpose of gratifying the sexual desire(s) of any person; (3)
 16 not done to get an offender to engage in Staff Sexual Misconduct; or (4) was not
 17 misconduct that has sexual undertones. The information shall include a summary of the
 18 allegations, the location of the alleged incident, and the name of the alleged victim.

19 2. *Monthly Reporting Requirements*

20 During the term of the Agreement, Class Defendant shall provide Class Counsel
 21 with the following documents every month:

- 22 (a) A listing of all Staff Sexual Misconduct and Staff Misconduct of a Sexual
 23 Nature investigations opened that month where a female offender was the
 24 alleged victim, to include, at a minimum, the case number, the investigator
 25 assignment, the location of the alleged incident, a summary of allegations, the
 26 date the allegation was made, the name of the alleged victim, and the date and

1 location to which the accused staff member, contract worker, or volunteer was
2 re-assigned;

3 (b) All SIU Systemic Issues Report Corrective Action Plans (DOC 02-352)
4 created that month pursuant to DOC Policy 490.850 VII.C.4 as part of the
5 investigations into allegations of Staff Sexual Misconduct and Staff
6 Misconduct of a Sexual Nature where a female offender is the alleged
7 victim;

8 (c) All Serious Infractions and Findings and Sanction Sheets pertaining to
9 instances during that month where a female offender was disciplined for
10 making a false report of Staff Sexual Misconduct or Staff Misconduct of a
11 Sexual Nature;

12 (d) A report identifying any investigations into allegations of Staff Sexual
13 Misconduct or Staff Misconduct of a Sexual Nature where a female offender
14 was the alleged victim that are open over ninety (90) calendar days,
15 accompanied by an explanation as to why the case remains open;

16 (e) All investigation files pertaining to allegations of Staff Sexual Misconduct
17 and/or Staff Misconduct of a Sexual Nature where a female offender was the
18 alleged victim closed within that month; and

19 (f) The final pre-disciplinary and disciplinary letters regarding substantiated
20 allegations of Staff Sexual Misconduct and Staff Misconduct of a Sexual
21 Nature where a female offender was the alleged victim, where the
22 disciplinary process was completed within that month subject to a ten (10)
23 day delay giving the Department the option to notify the employee.

24 (g) Records provided under paragraphs e and f above, will be designated
25 Restricted Confidential pursuant to the Amended Stipulated Protective
26 Order entered in this matter on April 25, 2008, subject to all provisions of

1 that Order except that all but one copy of the records held by Class Counsel
2 shall be destroyed at the termination of this Injunction. The copy
3 maintained by Class Counsel upon the termination of the Injunction shall be
4 used only for purposes of validating the propriety of Class Counsel's
5 prosecution of this action.

6 3. *Other Reporting Requirements*

7 In addition to the documents provided above, Defendants shall provide to Class
8 Counsel:

- 9 (a) Written notice of the Department's intent to rehire or assign to a women's
10 facility, or to a position that supervises female offenders, a staff member
11 who resigned while allegations of Staff Sexual Misconduct or Staff
12 Misconduct of a Sexual Nature were pending against him or her. Notice
13 will be provided at least fifteen (15) calendar days in advance of the staff
14 member's start date and shall include the basis for the Department's
15 decision to rehire or assign, the alleged victim's name, the staff member's
16 name, and a description of the staff member's assignment.
- 17 (b) Written notice of the reemployment to a women's facility or to a position
18 supervising female offenders, of a staff member who was terminated for
19 engaging in Staff Sexual Misconduct and/or Staff Misconduct of a Sexual
20 Nature where a female offender was the alleged victim. Written notice will
21 be provided within fifteen (15) calendar days of such reemployment. The
22 notice shall include an explanation as to why the rehiring was required by
23 law or court order, the alleged victim's name, the staff member's name, and
24 a description of the staff member's assignment.
25
26

1 (c) Written notice if the Department returns an individual reassigned and/or
 2 removed pursuant to DOC 490.850, Section V.E to a job assignment where
 3 the individual is in a position to provide direct supervision to the alleged
 4 victim where the alleged victim is a female offender, at least forty-eight (48)
 5 hours prior to returning the individual.

6 (d) Copies of the sexual misconduct data review report compiled by the
 7 Department pursuant to DOC Policy 490.800, Section II.4 and DOC Policy
 8 490.850, Section XIII.A, within thirty (30) calendar days of its completion.

9 (e) Written notice at least fifteen (15) calendar days prior to assigning Darrell
 10 Chamberlin or Johnny Davis to a post where they will have contact with
 11 female offenders.

12 (f) Notice when the Department and/or its officials are party to a legal action or
 13 a Human Rights Commission/Equal Employment Opportunity Commission
 14 (HRC/EEOC) complaint challenging Bona Fide Occupational Qualifications
 15 (BFOQ) designated positions at the Women's Prisons. In instances of Union
 16 grievances challenging BFOQ designated positions the Department will
 17 provide the notice at the time the arbitration is scheduled.

18 4. *Annual Audits*

19 (a) At least thirty (30) days prior to the due date for the February compliance
 20 reports set out in Section III.B.1, the Department will conduct a walk
 21 through at each of the Women's Prisons. At least thirty (30) calendar days
 22 prior to each walk through, Class Counsel will be provided notice as to the
 23 time and date of the walk through and will be given the opportunity to
 24 attend the walk through with an identified expert. As part of its February
 25 compliance report, the Department shall identify any physical plant changes
 26 the Department identified during the walk through as necessary to protect

1 female offenders from Staff Sexual Misconduct or Staff Misconduct of a
2 Sexual Nature, or where the facility was not in compliance with this
3 Agreement.

4 5. *Class Counsel's Access To Information*

5 (a) Access to Documents and Information

6 i. While this Agreement is in effect, Class Defendant shall allow Class
7 Counsel access to documents and provide information reasonably
8 necessary to verify the Department's compliance with this Agreement.

9 ii. If Class Counsel seek access to Department documents or seeks
10 information, they will submit a written request to the PREA
11 Administrator setting forth the documents and/or information sought,
12 along with a brief explanation for the reason for the request. Except as
13 set forth in subsections 3 and 4, the Department shall provide the
14 documents and information requested with its next regular four (4)
15 month compliance report.

16 iii. In the event that the requested documents or information are needed
17 prior to the next regular four (4) month compliance report, Class
18 Counsel shall state in their initial request when the documents or
19 information are needed and the basis for this timeframe. The
20 Department shall provide the requested documents or information within
21 the requested timeframe or respond within fifteen (15) calendar days of
22 receiving Class Counsel's request by stating how much additional time
23 is needed and explaining why the additional time is needed.

24 iv. If the Department disputes a request for documents and/or information
25 by Class Counsel, the Department shall notify Class Counsel of the
26 dispute within fifteen (15) calendar days of receiving Class Counsel's

1 request. The parties shall confer in good faith to attempt to resolve the
2 dispute. If such discussions are unsuccessful, or do not occur within a
3 reasonable time, Class Counsel may file a motion with the Court seeking
4 an order authorizing limited formal discovery of the documents or
5 information sought.

6 (b) Newly Opened Facilities

7 If the Department houses female offenders in a facility or building other
8 than one currently used for female offenders, the Department will conduct a walk
9 through of the building or facility prior to occupancy. At least thirty (30) calendar
10 days prior to such a walk through, Class Counsel will be provided notice as to the
11 time and date of the walk through and will be given the opportunity to attend the
12 walk through with an identified expert. As part of the next regularly scheduled
13 compliance report, the Department shall identify any physical plant changes the
14 Department identified during the walk through as necessary to protect female
15 offenders from Staff Sexual Misconduct or Staff Misconduct of a Sexual Nature, or
16 where the facility was not in compliance with this Agreement.

17 6. *Review Costs*

18 Class Defendant shall pay Class Counsel five thousand (\$5,000) dollars per
19 month during the term of this agreement for fees and expenses that Class Counsel
20 will incur for the purpose of reviewing Class Defendant's compliance with the
21 terms of this Agreement.

22 C. **Resolution Of Disputes**

23 1. *Informal Resolution*

24 Disputes may be raised as to whether the Department is in substantial compliance
25 with the provisions of this Agreement, or whether the Department sufficiently reported as
26 to their compliance with this Agreement, or responded to a request by Class Counsel for

1 documents and/or information. In the event of a dispute, the parties agree to confer
2 informally prior to engaging in any formal dispute resolution.

3 2. *Agreement To Utilize ADR*

4 In the event a dispute cannot be resolved through informal direct conferral, the
5 parties may, but are not required to engage in Alternative Dispute Resolution (ADR),
6 including but not limited to mediation or arbitration.

7 3. *Court Review*

8 A party may seek Court review of any dispute subject to informal resolution, no
9 sooner than thirty (30) calendar days after informal conferral between the parties is initiated
10 in writing. Notwithstanding the foregoing, if at any time while this Agreement is in effect,
11 there is reasonable cause to believe that the Plaintiff Class is at immediate and substantial
12 risk of irreparable harm as a result of substantial non-compliance, Class Counsel may
13 petition the Court to enforce this Agreement without first engaging in an informal
14 resolution or ADR.

15 **D. Attorney Fees And Costs**

16 The parties will bear their own costs and attorney fees for this action except as
17 provided herein, and except that following the entry of this Agreement, Class Counsel may
18 seek an award of reasonable attorneys' fees and expenses incurred in a Court enforcement
19 action pursuant to RCW 7.21.030(3) for the enforcement action, or parts thereof, in which
20 the class substantially prevails; provided the conditions precedent to seeking enforcement
21 in Court under part C, above, are complied with. Class Defendants may oppose such an
22 award. In any court enforcement action, both parties will adhere to the requirements of
23 Washington Superior Court Civil Rule 11, and shall be subject to sanctions under the Civil
24 Rules for any violation of the requirements of CR 11, including reasonable costs and
25 attorneys fees.

26 **E. Dismissal Of Department Officials**

1 With the entry of this Agreement, Alice Payne, Eldon Vail, Douglas Cole, Harold
 2 Clarke and Ruben Ceden0 are dismissed with prejudice.

3 **F. Notice To Parties**

4 Any notice to be given to a party under this Agreement shall be sent to the following
 5 address unless a different address is provided to all parties by counsel:

6 1. *For the Plaintiff Class:*

7 Beth Colgan, Melissa Lee, & Gavin
 8 Thornton
 9 Columbia Legal Services
 10 Institutions Project
 11 101 Yesler Way, Suite 300
 12 Seattle, WA 98104
 13 beth.colgan@columbialegal.org
 14 melissa.lee@columbialegal.org
 15 gavin.thornton@columbialegal.org

Hank Balson & Nancy Chupp
 Public Interest Law Group PLLC
 705 Second Ave., Suite 1000
 Seattle, WA 98104
 hbalson@pilg.org
 nchupp@pilg.org

12 2. *For Class Defendant:*

13 Kimberly Frinell
 14 Dan Judge
 15 Assistant Attorneys General
 16 Office of the Attorney General
 17 Corrections Division
 18 PO Box 40116
 19 Olympia, WA 98504-0116
 20 Kimberlyf1@atg.wa.gov
 21 DanJ@atg.wa.gov

Tom Wendel
 Assistant Attorney General
 Office of the Attorney General
 Torts Division
 7141 Cleanwater Drive SW
 Olympia, WA 98504-0126
 tomw@atg.wa.gov

19 **G. Protective Order**

20 All parties remain bound by the terms of the Amended Stipulated Protective Order
 21 entered in this matter on April 25, 2008.

22 //

24 //

IV. ORDER

The Court has reviewed this Settlement Agreement and Order, including attachments thereto, and the pleadings and other documents on file herein. Being fully advised and based on the Agreement described above, the Settlement Agreement and Order is Approved and Adopted as an Order of this Court.

DATED this 15th day of October, 2010.

THOMAS MCPHEE

JUDGE WM. THOMAS MCPHEE
Thurston County Superior Court

Presented by:

COLUMBIA LEGAL SERVICES

PUBLIC INTEREST LAW GROUP, PLLC

By _____
Beth A. Colgan, WSBA #30520
Melissa Lee, WSBA #38808
Gavin Thornton, WSBA #32996
Attorneys for Plaintiffs

By _____
Hank Balson, WSBA #29250
Attorneys for Plaintiffs

ROBERT M. McKENNA
Attorney General

By _____
Kimberly D. Frinell, WSBA #31451
Tom Wendel, WSBA #15445
Daniel J. Judge, WSBA #17392
Assistant Attorneys General
Attorneys for Defendants

1 **IV. ORDER**

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3 thereto, and the pleadings and other documents on file herein. Being fully advised and based
4 on the Agreement described above, the Settlement Agreement and Order is Approved and
5 Adopted as an Order of this Court.

6
7 DATED this _____ day of _____, 2010.

8
9
10 JUDGE WM. THOMAS MCPHEE
11 Thurston County Superior Court

12 Presented by:


13 **COLUMBIA LEGAL SERVICES**

14 **PUBLIC INTEREST LAW GROUP, PLLC**

15 By _____
16 Beth A. Colgan, WSBA #30520
17 Melissa Lee, WSBA #38808
18 Gavin Thornton, WSBA #32996
19 Attorneys for Plaintiffs

20 By _____
21 Hank Balson, WSBA #29250
22 Attorneys for Plaintiffs

23 **ROBERT M. McKENNA**
24 **Attorney General**

25 By 
26 Kimberly D. Frinell, WSBA #31451
Tom Wendel, WSBA #15445
Daniel J. Judge, WSBA #17392
Assistant Attorneys General
Attorneys for Defendants

IV. ORDER

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DATED this _____ day of _____, 2010.


JUDGE WM. THOMAS MCPHEE
Thurston County Superior Court

Presented by:

COLUMBIA LEGAL SERVICES

PUBLIC INTEREST LAW GROUP, PLLC

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Attorney General

By

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Tom Wendel, WSBA #15445
Daniel J. Judge, WSBA #17392
Assistant Attorneys General
Attorneys for Defendants

[PROPOSED] SETTLEMENT
AGREEMENT AND ORDER
NO. 07-2-01513-0

14

ATTORNEY GENERAL OF WASHINGTON
Corrections Division
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