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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, NORTHERN DIVISION

JUDITH REGAN, JANE DOE, JANE MOE, SUSAN SORENSEN and SANG YO WATTERS, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

COUNTY OF SALT LAKE; DARREL B. BRADY, individually and as Commander of Salt Lake County Jail; ROBERT SALTER, as Salt Lake County Commissioner; WILLIAM DUNN, as Salt Lake County Commissioner; JACQUELINE LLOYD, ANNICK COOMBS, and JANE FOES I, II, and III, individually and as officers or agents of Salt Lake County,

Defendants.

Case No. C-80-131J

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' SECOND MOTION TO TERMINATE CONSENT DECREE.

Honorable Bruce S. Jenkins

Plaintiffs oppose Defendant' second motion to terminate the consent decree and file this memorandum in support of that opposition. Plaintiffs incorporate by reference all arguments stated in their first memorandum in opposition.

FACTUAL BACKGROUND

On December 30, 2004 Judge Jenkins held a hearing to consider Defendants' first motion to terminate the consent decree. In support of the first motion, the Defendants submitted a copy of the New Policy (Salt Lake County Jails Policy Manual, Revised July 7, 2001). The New Policy was ambiguous and included an attached email message from Carol McAlister to SH Corrections Bureau DL dated February 19, 2004 (Exhibit B, Plaintiffs Motion for Appointment of an Expert), which appeared to contradict parts of the published policy. In light of these ambiguities and for other reasons, the Court ruled that Defendants' motion to terminate the consent decree was premature and denied the motion but allowed Defendants to correct the defects in their first motion and refile by January 12, 2005.

Defendants have come before the court again to request the consent decree be terminated. In support of Defendants' second motion to terminate, they have attached the Second New Policy (Salt Lake County Jails Policy Manual, Revised January 1, 2005 and July 7, 2001).

POINT I

THE DEFENDANTS' PROCEDURES REMAIN CONTRADICTORY, AMBIGUOUS, AND POTENTIALLY VIOLATIVE OF PRISONERS' RIGHTS, PARTICULARLY IN LIGHT OF THE DEFENDANTS' FAILED EARLIER PLEADINGS.

The Second New Policy (January 11, 2005) fails to address some of the ambiguities and policy changes which were needed to correct the problems with the New

Policy (July 7, 2001). In light of Defendants' continued failure to address these problems, terminating Plaintiffs' prospective relief would be inappropriate and premature. It is telling that Defendants did not address the problems with the New Policy until the problems and ambiguities were pointed out by Plaintiffs. Now, even after being told by Plaintiffs which areas of the New Policy were defective, the Defendants' Second New Policy fails to correct several sections that allow for continued violations of constitutional rights.

Only by having a qualified expert review all procedures and policies and report to the Court will it be possible to determine if the current procedures and the Second New Policy at the Jail comport with constitutional requirements.

POINT II

THIS COURT SHOULD NOT RULE ON TERMINATION OF THE CONSENT DECREE WITHOUT GIVING PLAINTIFFS THE OPPORTUNITY TO PRESENT FINDINGS THAT PROSPECTIVE RELIEF REMAINS NECESSARY TO CORRECT THE VIOLATION OF FEDERAL RIGHTS.

18 U.S.C. Section 3626(b)(3) of the Prison Litigation Reform Act provides that a consent decree granting prospective relief

> shall not terminate if the court makes written findings based on the record that prospective relief remains necessary to correct a current and ongoing violation of the Federal right, extends no further than necessary to correct the violation of the Federal right, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

As one Tenth Circuit court has noted, "the party opposing termination must be given the opportunity to submit additional evidence in an effort to show current and ongoing constitutional violations." Ginest v. Bd. of County Comm'rs, 295 F. Supp. 2d 1274, 1276 (D. Wyo. 2003). The party opposing termination must be allowed to present

additional evidence because, "the PLRA directs a district court to look to current conditions, and because the existing record at the time the motion for termination is filed will often be inadequate for purposes of this determination." Id.

In Ginest, the defendant government officials moved for immediate termination of a 1987 consent decree without allowing the plaintiff to present evidence of ongoing violations. See id. at 1275. The court rejected the government's motion, finding that the plaintiffs were "entitled to pursue discovery and that the Court must first hold an evidentiary hearing as to the existence of alleged ongoing and continuing constitutional violations by the defendants." Id. Citing numerous other courts, including the Sixth, Eighth, and Eleventh Circuits, the court reasoned that to refuse to hold a hearing and allow the party opposing the motion to present evidence prior to terminating a consent decree "would read all meaning out of [§ 3626(b)(3)]." Id. at 1276 (citing Loyd v. Ala. Dep't of Corrections, 176 F.3d 1336, 1342 (11th Cir.), cert. denied, 528 U.S. 1061 (1999)).

In this case, Plaintiffs have not been given the opportunity to present evidence of current and ongoing violations at the Jail. However, by the Defendants' admission, the County has settled two lawsuits alleging violations of prisoners' rights at the Jail since the consent decree was entered. These previous suits suggest that continued violations have occurred since the entry of the consent decree and warrant further investigation as to the existence and scope of ongoing constitutional violations at the Jail.

Because further investigation of current practices at the Jail is necessary, the court should appoint an expert pursuant to Federal Rulesof Evidence 706 so that Plaintiffs may have an opportunity to supplement the record with current information. See, e.g., Hadix

v. Johnson, 228 F.3d 662, 671 (6th Cir. 2000); Laaman v. Warden, N.H. State Prison, 238 F.3d 14, 18-19 (1st Cir. 2001); Gilmore v. California, 220 F.3d 987, 1008-09 (9th Cir. 2000). The appointment of an expert or provision for a similar discovery mechanism would assist the court in making the necessary "written findings based on the record" that relief "remains necessary to correct a current and ongoing violation of the Federal right" and meets the same requirements of narrowness and least-intrusiveness as required for the initial entry of relief. 18 U.S.C. § 3626(b)(3). An evaluation of current procedures and actual practices at the Salt Lake County Jail would provide the Court with current information upon which to base its determination.

The Jail's Second New Policy demonstrates the continued need for a court-appointed expert to examine conditions at the Jail. Although the Defendants have addressed some of the problems raised by Plaintiffs, some policies are still ambiguous and/or highly invasive and suggest a high likelihood of current and ongoing violations of a Federal right at the Jail. Even the policies Defendants revised and supposedly improved in the Second New Policy are not necessarily indicative that the Jail is not violating Federal rights in these areas. After all, any policy change is only as effective as its implementation.

Even with the changes embodied in the Second New Policy, search procedures at the Jail remain substantially similar in many respects to the pre-consent version of the same procedures ("1978 Policy")—procedures that were inadequate to prevent the abuses that led to entry of the consent decree. Worse, in some cases safeguards that were in place to limit unreasonable searches even before the consent decree was entered have actually been removed in the Second New Policy. Even without the safeguards imposed

by the PLRA itself, a comparison of these two manuals shows the need for further discovery before the court makes a determination whether there are ongoing violations of Federal rights at the Jail.

For instance, the 1978 Policy provides that, "Women will, of course, be searched by matrons instead of Escort Officers." 1978 Policy at 3625.00. That policy was in place for both frisk searches and strip searches. The 1978 Policy also provides that strip searches are to be conducted in the dressing room. Id. at 3620.02(1).

In contrast, the Second New Policy provides less privacy protection to prisoners. Instead of restricting frisk and strip searches to persons of the same gender, the Second New Policy provides that women may rub search male prisoners with few restrictions. Second New Policy at N02.02.01. More troubling is that, while the Second New Policy maintains that, "Reasonable efforts will be made to minimize the degree of sexual privacy intrusions which occur as a result of cross-gender searches and supervision," the policy provides exceptions that could allow for frequent participation of officers in searches of prisoners of the opposite gender. Id. at N01.03.01.

As an example, the Second New Policy still permits any "staff members working in the area" where the prisoner is searched to observe any strip search. Id. at F03.03.05(A)(2). The Defendants have lowered the protections afforded to prisoners under the 1978 Policy without providing any justification for why strip searches must be conducted in an area where prisoners may be observed by employees of the opposite sex who have nothing to do with the search. Nor have Defendants' provided any policy for minimizing the privacy intrusions created by such searches.

The policy on male searches of female prisoners is also unexplainably different

from the policy on female searches of male prisoners. For instance, section N02.02.02 says that, "The involvement of female staff in strip searches of male prisoners will be infrequent, casual, and/or indirect or at a distance when feasible." One problem with this statement is that there is no parallel statement in the policy on male searches of female prisoners. This discrepancy could lead to different standards unconstitutionally being applied to male and female prisoners.

Second, the use of the "and/or" and "or" connectors permits a plausible interpretation of the Second New Policy that allows frequent and non-casual involvement of female staff in strip searches of male prisoners, as long as such involvement was indirect or at a distance. Or, the policy could permit direct, frequent involvement at close distances, as long as such involvement was termed "casual." Finally, N02.02.02 adds a qualifier, "when feasible," to any of these conditions. Therefore, if the Defendants deem it to be not feasible to grant prisoners protection from such intrusion, the Second New Policy permits officers to have frequent, non-casual, close contact with disrobed prisoners of the opposite sex. The policy does not even define feasibility, further increasing the ambiguity associated with Section N02.02.02.

Another problematic area in the Second New Policy is the standard for visual body cavity searches, which remains unchanged from the standard in the New Policy. It still provides that such searches are permissible if any officer has a reasonable suspicion that "contraband is, or could be concealed in the body-cavity visually examined." F03.03.06. In contrast, the Code of Federal Regulations authorizes a digital body cavity search in federal prisons "only if the Warden or Acting Warden has reasonable belief that an inmate is concealing contraband in or on his person." 22 C.F.R. §552.12(c). By

including the phrase, "or could be" the Second New Policy could in theory authorize a body cavity search for any prisoner, including someone arrested for a traffic infraction as was the case with Plaintiff Regan. The Second New Policy also allows for such a search on reasonable suspicion, a lower standard than reasonable belief. By setting the standard for a body cavity search significantly below that applicable to a federal prison, the Defendants' increase the likelihood that Federal rights may be violated under the provisions of the Second New Policy.

Although there are other problems with the Second New Policy, these examples demonstrate the need for further findings before the court rules on Defendants' second motion to terminate the consent decree. Appointing an expert will give the Plaintiffs an adequate opportunity to determine the existence of ongoing violations at the Jail and to supplement the record with any issues noted by the expert in reviewing complaints and records at the Jail and in observing current implementation of jail policy.

CONCLUSION

This court should reserve ruling on the Defendants' motion until it appoints an expert pursuant to Federal Rule of Evidence 706 to observe complaints, records, and conditions at the Jail and report to the Court. The expert will provide the court with facts needed for written findings whether prospective relief remains necessary to correct current and ongoing violation of Federal rights, extends no further than necessary to correct the violation of the Federal rights, and that the prospective relief is narrowly drawn and the least intrusive means to correct the violation.

DATED this 11th day of February, 2005.

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Certificate of Service

I hereby certify that on the 11th day of February, 2005, a true and correct copy of the above and foregoing PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' SECOND MOTION TO TERMINATE CONSENT DECREE was mailed, first-class postage prepaid, to:

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