IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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DENNIS E. JONES 'EL, MICHA'EL JOHNSON, DE'ONDRE CONQUEST, LUIS NIEVES, SCOTT SEAL, ALEX FIGUEROA, ROBERT SALLIE, CHAD GAOETSCH, EDWARD PISCITELLO, QUINTIN L'MINGGIO, LORENZO BALLI, DONALD BROWN, CHRISTOPHER SCARVER, BENJAMIN BIESE, LASHAWN LOGAN, JASON PAGLIARINI, and all others similarly situated,

ORDER

Plaintiff,

00-C-0421-C

v.

GERALD BERGE and JON LITSCHER,

Defendants.

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A hearing on the parties' joint motion for approval of the settlement agreement in this case was held on March 8, 2002. Plaintiffs were represented by Ed Garvey, Howard Eisenberg, David Fathi, Micabil Diaz, Pamela McGillivray and Glen Stoddard. Defendants were represented by Stan Davis, Assistant Attorney General for the State of Wisconsin.

This suit was begun by plaintiffs Dennis E. Jones 'El and Micha'el Johnson, who sued

on behalf of all inmates, challenging the conditions at the state prison known as Supermax Correctional Institution. Plaintiffs contended that the totality of the conditions constituted cruel and unusual punishment under the Eighth Amendment. The allegedly unconstitutional conditions included constant illumination in cells; hourly bed checks throughout the night (waking inmates if the guards could not see the inmate's skin); no real windows in the cells; confinement of prisoners in their cells for 24 hours a day; limited use of the phone; visits by video conferencing rather than face-to-face; constant monitoring; insufficient time for recreation and inadequate recreational facilities. Plaintiffs challenged defendants' use of cell searches, strip searches and body cavity searches without cause as violations of the Fourth Amendment and systemic inadequacies in the provision of medical, dental and mental health care; improper use of stun guns and stun shields; and the housing of seriously mentally ill prisoners at the institution as violations of the Eighth Amendment.

Because plaintiffs were not lawyers and could not represent the class, I appointed counsel to represent plaintiffs and the class they represented. Plaintiffs sought a preliminary injunction directing defendants to remove seven seriously mentally ill inmates from the institution. After holding an evidentiary hearing, I granted the motion, ordering defendants not to retain five of the seriously mentally ill prisoners then being held at Supermax and not to return two others to the institution. In addition, I directed defendants to arrange for mental health professionals not employed by the Department of Corrections to perform

immediate evaluations of certain categories of inmates at Supermax, including those who had been placed on suicide watch and those who were prescribed psychotropic medications. In December 2001, counsel advised the court that the parties had reached a tentative agreement of the entire case. In an order entered January 30, 2002, I gave tentative approval to the proposed settlement and scheduled a fairness hearing to be held on March 8, 2002. Notice of the settlement and of the opportunity to object to it was sent to the class members in early February 2002. (Initially, copies of the proposed agreement were not included with the notice; this inadvertent error by counsel was corrected as soon as it was brought to their attention.) Counsel have met with the named plaintiffs, the lead plaintiffs and a number of the members of the class in the course of three visits to Supermax to discuss the proposed settlement.

In brief summary, under the settlement agreement, a court approved monitor will provide ongoing supervision of the terms of the agreement for two years, with the possibility of an additional two-year appointment. All inmates shall have at least the same rights and privileges that prisoners in other maximum security institutions in Wisconsin have in program or administrative segregation. No seriously mentally ill prisoners will be assigned to Supermax or allowed to remain there. No prisoners in protective custody status will be assigned to Supermax. There will be restrictions on the length of time inmates may remain in Level 1 status. Inmates on Level 1 status will have video programs and additional reading

material. Inmates will receive a minimum number of hours outside their cells that can be used for exercise; visits will not be counted against the time. The indoor recreation room will be heated when necessary to 68 degrees and will have fans and ventilation in the summer. Night lights will be have bulbs of no more than 5 watts. The agreement addresses inmate concerns about medical and dental care and allows privacy consistent with security needs. Allowable religious articles are itemized. (The Muslim prayer rug was listed in the proposed agreement as 24" x 20"; this is an error. The agreed upon size is 24" x 40".) The agreement sets limits on cell temperatures and permits inmates to have extra blankets and a long sleeved underwear top, guarantees inmates three showers a week, promises the installation of calendar clocks to be installed in each cell and provides that shutters in Alpha Unit will be open to the hallway. Phone privileges will be increased.

In general, the class members' objections to the proposed settlement are that it does not go far enough. Many members of the class would like to have an 18-24 month cap on the length of time any imate may be confined in a 23-24 hour a day lockdown status; additional educational programs; a ban on shackles during non-contact visits and while using the law library; permission to seal their outgoing non-legal mail; weekly telephone calls of 15 minutes; a ban on the use of video cameras for inmate observation, with the exception of inmates on suicide watch; lights out entirely in cells; clear glass in their cell windows; full due process hearings for level changes; daily visits by supervisors; and a prompt response to

medication needs by prison nurses. Other members are concerned about the treatment of inmates housed at Supermax for segregation purposes. They are unsure whether the provisions of the settlement apply to these inmates. At least one inmate asks for Spanish language television programs; a number object to being unable to watch television after 5:00 p.m. Several class members object to the settlement in and of itself, arguing that they should have a chance to show the world how bad the conditions are at Supermax. Some want damages for all class members and a number want a holding that defendants are liable to plaintiffs for legal wrongs.

As the objectors point out, there are a number of ways in which the proposed settlement agreement could have been more generous to the class members. If the only inquiry would be whether the settlement agreement achieved all of the relief sought by any inmate, I could not approve the agreement as proposed. However, the inquiry is not so limited. It is necessary to consider the fairness, reasonableness, lawfulness and adequacy of the proposed agreement. Isby v. Bayh, 75 F.3d 1191, 1196 (7th Cir. 1996) (citing EEOC v. Hiram Walker & Sons, Inc., 768 F.2d 884, 889 (7th Cir. 1985)). In evaluating the fairness of the agreement, a court considers the relative strength of the plaintiffs' case on the merits as compared to what the defendants have offered. In this instance, I find it unlikely that plaintiffs could have achieved any more through litigation than they have through negotiation. For example, the class members have expressed enormous frustration with the

way in which their levels are determined and their lack of opportunity for hearings before they are demoted to a lower level. From an administrative standpoint, one would think there would be a significant benefit in making clear to inmates the expectations they must fulfill in order to progress to a higher level and in giving them an opportunity to be heard before they are demoted, again to be sure that they understand the rules and consequences of the level program. However, there is no requirement under the laws or Constitution of the United States that inmates have a due process hearing before being promoted to a new level or demoted to a lower one. This is the reason the named plaintiffs were denied leave to proceed on this claim.

Other objections by the class members concern matters that were never raised in this action, including the treatment of mail and censorship of publications, or the award of damages to all class members. Plaintiffs' claim for relief was limited to injunctive and declaratory relief only. The class members remain free to file individual suits for money damages for injuries they believe they have suffered during their incarceration at Supermax. They can file either in federal court, if they can show that a federal law or constitutional provision has been violated, or in state court, if their claim is that the institution has not followed the requirements of state law.

Resolution of this case by trial would have been expensive and time-consuming for everyone concerned. In all probability, the trial itself would have lasted several weeks and

would have required months of additional discovery and other trial preparation, with no realistic chance that the outcome would be better than the negotiated settlement.

Although the record contains more than 100 objections from class members, many presented very thoughtfully, I am not persuaded that the objections warrant rejection of the agreement. In part, this is because many of the objections relate to matters for which there is no legal basis to obtain the desired change, as discussed above, and the corollary that a trial would not improve the outcome for plaintiffs. In larger part, it is because I am convinced that counsel have negotiated an agreement that will make real changes at Supermax (over and above changing the name) that will benefit all of the class members. With a monitor in place, it is possible that many of the irritants that the class members describe can be addressed, despite the fact that they are not covered explicitly in the agreement. Inmates will have more exercise and shower time; they will have a recreational area that is heated in cold months and cooled in the summer; they will have more access to the telephone; they will have more comfortable temperatures in their cells; they will have access to religious articles; they should have better medical and dental care; they will have additional reading materials, even at Level 1; and perhaps most important, there will be a time limit on stays at Level 1. Life in Supermax will continue to be difficult, tedious and unpleasant but the conditions will be ameliorated to some degree and the sensory deprivation lessened under this agreement.

The agreement satisfies the final criterion, lawfulness. Nothing contained within it "either initiates or authorizes the continuation of clearly illegal conduct." Isby, 75 F.3d at 1197 (quoting Armstrong v. Board of School Directors, 616 F.2d 305, 315 (7th Cir. 1980)).

In summary, I conclude that the settlement is a fair, reasonable, lawful and adequate resolution of this class action. I find that the relief granted under the agreement and this order is narrowly drawn, extends no further than necessary to correct the alleged violation of plaintiffs' federal rights and is the least intrusive means necessary to correct the alleged violation of plaintiffs' federal rights.

Counsel for both sides deserve praise for negotiating the settlement. Plaintiffs' counsel have achieved results at least as good and probably quite a bit better than they could have achieved through long and drawn out litigation. Defendants' counsel have saved the state and its taxpayers the costs of an expensive trial and achieved a result of which corrections officials approve. Everyone who contributed to this settlement can take pride in knowing they have taken an important first step toward the long term improvement of the Supermax Correctional Institution.

ORDER

IT IS ORDERED that the parties' joint motion for approval of the settlement agreement attached to this order is GRANTED. Defendant Gerald Berge is requested to

make copies of this order and the attached settlement agreement available in the law library.

Entered this 8th day of March, 2002.

BY THE COURT:

BARBARA B. CRABB
District Judge