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 GOETSCH, EDWARD PISCITELLO, QUINTIN L'MINGGIO, LORENZO BALLI, DONALD BROWN, CHRISTOPHER SCARVER, BENJAMIN BIESE, LASHAWN LOGAN, JASON PAGLIARINI, and ANDREW COLLETTE, and all others similarly situated,

Plaintiffs,

v.

GERALD BERGE and MATTHEW FRANK,[1]

Defendants.

ORDER

00-C-421-C

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A hearing was held on November 24, 2003, before United States District Judge Barbara B. Crabb on plaintiffs' "Motion to Enforce the Settlement Agreement and to

[1]Pursuant to Fed. R. Civ. P. 25(d)(1), Secretary Matthew Frank has been substituted for his predecessor in office, Secretary Jon Litscher.

Replace the Monitor." Ed Garvey, Pamela McGillivray and Dara Biederman appeared for plaintiffs; James McCambridge appeared for defendants. Also present were Stephen Hurley and Kenneth Streit, monitors, and Kevin Potter, counsel for the Wisconsin Department of Corrections.

Art. 13.12 of the settlement agreement required defendants to "investigate and implement as practical a means of cooling the cells during summer heat waves." Despite this agreement, defendants admit that they have taken no steps to cool the cells. Defendants say that they have found no way to cool the cells to temperatures between 80 degrees and 84 during the hot months other than air conditioning, although they have investigated the use of fans and other cooling methods. During the past summer, defendants responded to excessively high cell temperatures by allowing inmates to take a shower every day and to wear shorts instead of long pants and by distributing portions of ice chips. Although these measures may alleviate the *effects* of high temperatures to some extent, they do not constitute "a means of cooling the cells." Defendants have concerns that the taxpayers will object to providing air conditioning for prisoners and that inmates in other institutions will be angry that they are not provided air conditioning.

Defendants agreed to take steps to implement a means of cooling the cells. They entered into the agreement voluntarily and presumably, knowingly. Therefore, they must take the steps they agreed to take. If, as they say, air conditioning is the only viable way to

cool the cells to the required temperatures, then they must proceed to install air conditioning at the Secure Program Facility.

It is no defense for defendants to argue that the taxpayers may object to providing air conditioning to state prisoners. Defendants constructed a facility in which inmates are subjected to temperatures that can pose a serious risk to their well-being, particularly if they are taking medications or have health conditions that prevent their bodies from adjusting to high heat. If air conditioning is the only means of avoiding that risk, that is a function of defendants' decision to build the facility as they did. Leaving inmates vulnerable to serious health consequences or death is not a reasonable alternative.

The installation of the air conditioning shall be done immediately, so as to be operative before the first heat of 2004. Having put off any action on this problem for almost two years, defendants have no justification for delaying any longer in carrying out their obligation under the settlement agreement.

With respect to the building of the outdoor recreation facility, defendants have finally begun a concerted effort to comply with the decree. Defendants' counsel agreed to provide plaintiffs' counsel a report of the progress of the project twice each month. Plaintiffs' counsel may review the construction plans at the Department of Administration.

The question of the equality of rights and privileges remains a matter of dispute. Monitor Streit is in the process of preparing a comprehensive report of the situation. He will

turn over a final version of his report to plaintiffs' counsel no later than December 15, 2003. If, after plaintiffs have had an opportunity to review the report and meet with the monitors and with defendants, they want further judicial intervention on that issue, they are to advise the court.

The rights and privileges issue relates to the far more difficult question of the level system and the inmates who do not move within that system. It appears that there are inmates who fail to move through the system, for whatever reason. Merely moving them upwards one level after a certain number of days does not mean that they experience success at the higher level so as to be retained there or moved further up the levels. The department is convening a study committee to consider alternative responses to inmates who cannot be reached through any of the discipline or incentive systems now in use. Counsel for the parties and the monitor are to meet before December 15, 2003, to discuss the committee and its assignment.

Defendants have promulgated a new regulation regarding the use of nutra loaf. From my review of the regulation, I am satisfied that it serves the purpose of encouraging compliance with only those rules related to the use of food and that it does not condone the use of the loaf for punitive purposes. It includes limits on the length of time that the prison can serve nutra loaf to any inmate. As promulgated, the rule allows inmates to decide whether they wish to have a regular tray or the loaf. If they avoid behaviors such as throwing

bodily fluids or other liquids at staff using food containers, misusing eating utensils, smearing food or endangering the guards serving meal trays, the guards will not give them nutra loaf. If they engage in the prohibited behaviors, they will be given nutra loaf.

Although plaintiffs' counsel has expressed frustration with the monitors, I am not willing to decide whether the current monitors should continue to act in that capacity. The parties negotiated the appointment of the monitor and have agreed to his enlistment of another monitor to share the workload. It is up to the parties to negotiate any changes in the appointment. Only if they are unable to come to any decision, will it become a matter for the court to decide.

ORDER

IT IS ORDERED that

1. Defendants are to take steps immediately to air condition the cells at the Secure Program Facility;

2. Defendants' counsel is to provide plaintiffs' counsel and the monitors a report on the progress of the construction of the outdoor recreation facility at least two times each month and are to continue to make the construction plans available to plaintiffs' counsel at the Department of Administration;

3. Monitor Streit is to provide a final version of his report on comparable rights and privileges to plaintiffs' counsel no later than December 15, 2003.

4. Plaintiffs' objection to the use of nutraloaf in compliance with the regulation promulgated by the Department of Corrections is DENIED.

5. Plaintiffs' motion to replace the monitor is DENIED.

Entered this 26th day of November, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge