

2006 WL 5429533 (Mass.Super.) (Trial Order)
Superior Court of Massachusetts.
Suffolk County

Robert FOXWORTH, and others¹, Plaintiffs,
v.
Michael MALONEY, Commissioner of the Department of Correction, and others², Defendants.

No. 03-00895.
April 14, 2006.

Memorandum of Decision and Order on Defendants' Motion to Dismiss, or in the Alternative for Summary Judgment, and Plaintiffs' Cross-Motion for Summary Judgment

Margot Botsford, Justice the Superior Court.

SUFFOLK, ss.

NOTICE SENT: 04/19/2006 (ah)

R.F.-C.H.-T.G. J.E.D.-M.C.D. NO 03-00895

M.A.-D.W.C.T. J.R.P.-M.C.L.S.

The plaintiffs are either current inmates in Massachusetts Correctional Institution-Cedar Junction ("MCI-Cedar Junction") or former inmates who have completed their sentences and have been released from custody. In February of 2003, the plaintiffs commenced this suit against the defendants, all officials or employees of the Department of Correction ("the department") at the time the suit was commenced, challenging certain policies applied by the defendants to inmates placed in "10-Block," a special management unit at MCI-Cedar Junction; the plaintiffs seek injunctive relief and damages. The defendants have moved to dismiss the plaintiffs' complaint or in the alternative for summary judgment, and the plaintiffs have filed a cross-motion for summary judgment.³ The defendants' motion to dismiss any claim by the plaintiffs to bring this case as a class action is not opposed and is allowed, and on the narrow issue of whether the defendants restricted the plaintiffs' television and canteen privileges in violation of the department's own regulations, the plaintiffs' cross-motion for summary judgment is allowed. No further action will be taken on the pending motions until a further hearing is held.

Background

MCI-Cedar Junction operates a special management unit (SMU) that it calls "10-Block." Under the department's regulations applicable to SMUs, 103 Code Mass. Regs. § 423.00 *et seq.*, an inmate may be placed in an SMU, among other reasons, when awaiting a hearing on a charge of violating the institution's rules and procedures, and when the department is investigating a report of serious disciplinary offenses. See 103 Code Mass. Regs. § 423.08. While an inmate is in an SMU, he is isolated from the general prison population, and is generally restricted to his cell for 23 hours a day, with one hour

available for recreation.

Each of the plaintiffs in this case was placed in 10-Block on awaiting action status because of his alleged participation in a serious disciplinary offense. In particular, the plaintiff Robert Foxworth was placed in 10-Block on January 17, 2003, pending an investigation of a charge of distributing heroin within the institution. After a disciplinary hearing that appears to have been held in March of 2003, Foxworth was found guilty of the charged offense and was sentenced to eighteen months in the MCI-Cedar Junction departmental disciplinary unit (DDU). He was transferred from the SMU to the DDU in June 2003, and was given credit on his disciplinary sentence for the time spent in the SMU.

Plaintiff Hood served time on 10-Block on two occasions between 2002 and 2004. He was placed in 10-Block on September 6, 2002, pending an investigation into a fight allegedly involving several inmates, including Hood. A disciplinary report against him was issued October 31, 2002, and was ultimately heard on January 23, 2003. On appeal, the disciplinary report was dismissed, and Hood was returned to general population. In July of 2003 Hood was placed in 10-Block again in connection with another disciplinary offense. He was transferred from there to the DDU on January 12, 2004.

Plaintiff Gaskins was transferred to 10-Block on September 3, 2002, pending an investigation of an altercation that took place in the prison, involving Gaskins and two other inmates. After the conclusion of the investigation, the disciplinary report against Gaskins was dismissed. However, he was in 10-Block from September 3, 2002, to March 28, 2003, when he was transferred to general population.

On October 30, 2002, plaintiff Adessa received two disciplinary reports and was placed on 10-Block. He remained on and off 10-Block following additional disciplinary reports until June 2, 2003, when he was transferred to MCI Souza-Baranowski (SBCC). Plaintiff Thore was placed on 10-Block for over three months pending his transfer to SBCC. Finally, plaintiff Wigfall was transferred to 10-Block on December 5, 2002, on awaiting action status after receiving a disciplinary report for disruptive and violent behavior. A disciplinary hearing was held on or about January 31, 2003. On February 11, 2003, Wigfall was returned to general population, but was transferred again to 10-Block on November 30, 2003. After a ten-day period in later December 2003 when he was temporarily transferred to general population, Wigfall was transferred back to 10-Block on December 29, 2003. The record does not indicate where he is assigned at the present time.

The department's SMU regulations, 103 Code Mass. Regs. § 423.00, contain specific provisions for inmates who are assigned to an SMU on administrative segregation status - a term that applies to all the plaintiffs in this case. With respect to "personal items," the regulations state:

"(a) *Personal Items*: Inmates should, as far as reasonably practicable, be provided clothing that is comparable to that permitted in population. Property will be restricted to what is permitted in 103 CMR 403.11, Approved Inmate Personal Property -- Transient with the exception of a cigarette lighter that is prohibited. In addition, each inmate will be permitted a television or radio. The superintendent is authorized to further limit the amount of property and to issue jumpsuits in lieu of such clothing for security purposes, if there is imminent danger that an inmate or inmates will destroy an item, or induce injury to self or others."

103 Code Mass. Regs. § 423.09(a)(emphasis supplied). On the subject of canteen, the regulations provide:

"(k) *Canteen*: Inmates may order items from the canteen. Items from the canteen may be withheld if determined by the institution's director of security to be a threat to the security of the special management unit."

Id., § 423.09(k). Finally, with respect to telephone access, these regulations state:

“(i) *Telephone Access*: Inmates shall be allowed telephone privileges in accordance with institutional procedure. Superintendents may set limits on the permitted number of telephone calls.”

Id., § 423.09(i).

Despite the existence of these SMU regulations, MCI-Cedar Junction has issued a “MCI-Cedar Junction Ten Block Inmate Booklet”(referred to hereafter as the “inmate handbook”) that outlines rules and procedures for the 10-Block inmates. The inmate handbook provides that inmates in 10-Block “are permitted to possess a radio” (Inmate handbook, p. 6 [Exhibit Q to Defendants’ Motion to Dismiss]), but there is no authorization for a television. With respect to canteen privileges, the booklet states:

“*CANTEEN*

A. Inmates may only order stamps, cosmetics and legal supplies.

B. Any misuse of canteen articles purchased i.e., creating a health hazard, assaulting with, excessive property, etc. may result in the loss of this privilege.

....”

(Inmate handbook, p. 9 [Exhibit Q to Defendants’ Motion to Dismiss].)

Discussion

1. Class Action

The defendants move to dismiss any claims by the plaintiffs to bring this case as a class action. The plaintiffs, however, do not assert any such claims. No one disputes that this case is not a class action or a putative class action.

2. Mootness

It appears to be the case that none of the plaintiffs currently remains on 10-Block, and indeed one or more of the plaintiffs may have been released from the department’s custody completely. In the circumstances, there is an argument that at least the plaintiffs’ claims for injunctive or declaratory relief are moot. See *Pidge v. Superintendent, Mass. Correctional Inst. Cedar Junction*, 32 Mass. App. Ct. 14, 19-20 (1992). Nevertheless, there are two exceptions to the application of the mootness doctrine which are applicable here. See *Blake v. Massachusetts Parole Bd.*, 369 Mass. 701, 707-708 (1976). First, this is a case which promises “a good likelihood that the same disputes would recur between the same parties.” *Id.*(citations omitted).

Plaintiffs Foxwood, Hood, Gaskins, and Wigfall are currently serving time in MCI-Cedar Junction and a review of their institutional records that are included in the summary judgment materials suggests that there is certainly a possibility they may be returned to 10-Block in the future and suffer from the same loss of privileges.

Additionally, the plaintiffs' claims fit within a second exception, namely, they are "capable of repetition, yet evading review." See *In the Matter of Strutz*, 410 Mass. 58, 60 (1991) (citing *Commonwealth v. Yameen*, 401, Mass. 331 (1987)); *Wolf v. Commissioner of Pub. Welfare*, 367 Mass. 293, 298 (1975). Inmates who are placed on 10-Block spend varying amounts of time there. Particularly for those who, like the plaintiffs in this case, go to 10-Block on administrative segregation or awaiting action status, the duration of the stay may well not be long enough to litigate a claim at the trial court level, much less on appeal. See *Lockhart v. Attorney General*, 390 Mass. 780, 783 (1984) ("we have on occasion answered questions in moot cases where ... appellate review could not be obtained before the recurring question would again be moot"). It is therefore appropriate for the court to review the plaintiffs' claims that can be characterized as seeking injunctive or declaratory relief.

3. Plaintiffs' Television, Canteen and Telephone Access Claims

The department is subject to the provisions of the Administrative Procedure Act that govern the adoption of agency regulations. G. L. c. 30A, § 1A. *Dougan v. Commissioner of Correction*, 34 Mass. App. Ct. 147, 148 (1993). Once the commissioner promulgates a set of regulations, the regulations "carry 'the force of law' " and the department is obligated to follow them. *Id.* Accord, *Royce v. Commissioner of Correction*, 390 Mass. 425, 427 (1983). Such regulations "may not be arbitrarily disregarded by individual members of the rule-making body to the prejudice of a party's essential rights." *DaLomba's Case*, 352 Mass. 598, 603 (1967). See generally *Kenney v. Commissioner of Correction*, 393 Mass. 28, 33 (1984).

The SMU regulations of the department permit inmates who are segregated and awaiting disciplinary action a television or a radio and to make general purchases at the canteen, including food purchases. The 10-Block inmate handbook permits neither of these privileges. However, the inmate handbook was not promulgated in accordance with the provisions of G. L. c. 30A, §§ 2-6, and is not a regulation within the meaning of G. L. c. 30A, § 1(5). It does not have the same binding legal effect as the SMU regulations, and the department is not free to ignore the provisions of its own formal regulation in favor of the handbook. See *Dougan v. Commissioner of Correction*, *supra*, 34 Mass. App. Ct. at 148-149. Because the provisions in the SMU regulations that generally authorize inmates to have a television or radio and to purchase food from the canteen remain in effect, inmates who are placed in 10-Block are entitled to the benefit of these provisions, regardless of contrary provisions in the inmate handbook.⁴

The defendants disagree. They argue first the plaintiffs have failed to state an actionable claim with respect the defendants' failure or refusal to follow the SMU regulations in their administration of 10-Block because these regulations expressly state that they are "not intended to confer any procedural or substantive rights not otherwise granted by state or federal law." 103 Code Mass. Regs. § 423.02. The argument fails. The issue here is not whether the plaintiffs can recover damages or obtain injunctive relief against a party whose conduct is claimed to violate a statute or regulation allegedly intended for the benefit of the plaintiffs or a class of persons which includes the plaintiffs. See, e.g., *Loffredo v. Center for Addictive Behaviors*, 426 Mass. 541, 545 (1998); *Ludlow Education Ass'n v. Ludlow*, 31 Mass. App. Ct. 110, 118-120 (1991). Rather, the question is whether the plaintiffs, as inmates who have been housed in an SMU operated by the department, may obtain declaratory or injunctive relief to require that the department and the individual defendants - all of whom were or are employed by the department - to follow the department's duly promulgated regulations. As the *Kenney*, *Royce*, and *DaLomba* cases demonstrate, the defendants cannot insulate themselves or the department from judicial review when there is a claim that the department and its employees are failing or refusing to follow the department's own regulations. See *Kenney v. Commissioner of Correction*, *supra*, 393 Mass. at 33; *Royce v. Commissioner of Correction*, *supra*, 390 Mass. at 427; *DaLomba's Case*, *supra*, 352 Mass. at 603.

The defendants also contend that in any event, they have complied with the provisions of the SMU regulations governing television access and canteen privileges, because those regulations contain provisos that permit the superintendent of a particular institution to (1) limit access to items of personal property - including televisions - if there is an “imminent danger that an inmate or inmates will destroy an item, or induce injury to self or others,” 103 Code Mass. Regs. § 423.09(a); and (2) withhold item(s) from what may be purchased from the canteen if the director of security for that institution determines that the item(s) would be “a threat to the security of the [SMU],” *id.* at § 423.09(k).⁵

The language in § 423.09(a) and (k) on which the defendants rely does not support the defendants. With respect to items of personal property, the regulatory language by its terms indicates that the superintendent must affirmatively justify any determination to restrict an inmate’s -- or a group of inmates’ -- access to a particular item of property that inmates are generally authorized to have, by defining the “imminent danger” on which the restriction is based. Insofar as televisions are concerned, the inmate handbook contains no showing that inmates’ access to televisions on 10-Block creates any danger, imminent or otherwise, that one or more inmates will destroy the televisions or injure themselves or others with a television. Similarly, under § 423.09(k), for a limitation on canteen privileges to a few specified items that do not include any food items, the director of security for MCI-Cedar Junction must present an actual determination that permitting inmates on 10-Block to purchase any food items would be a threat to the security of 10-Block. There is no such determination set out in the inmate handbook.

3. Other Matters

This memorandum of decision resolves in the plaintiffs’ favor the question of whether they are entitled to a declaratory judgment on the claim that the defendants are bound to comply with the terms of the SMU regulations, and with 103 Code Mass. Regs. § 423.09(a) and (k) in particular, despite conflicting provisions in the MCI-Cedar Junction inmate handbook. This resolution makes it unnecessary to consider the plaintiffs’ claims that the defendants have violated their constitutional rights by denying them access to televisions or the ability to purchase food from the canteen while they are on 10-Block. See, e.g., *Royce v. Commissioner of Correction*, *supra*, 390 Mass. at 426.

There are, however, a variety of issues that are, or may be, raised by the plaintiffs’ complaint that are not resolved here, because I am not clear about what specific claims the plaintiffs are raising. I also have not addressed the regulatory issue presented by Massachusetts Correctional Legal Services in its memorandum, viz., whether 10-Block is in fact equivalent to a DSU, and the department therefore should be required to apply its DSU regulations to 10-Block.⁶ In light of the passage of time, the changed status of the various plaintiffs since the commencement of the suit and the filing of these cross-summary judgment motions, and my lack of clarity as to what actually remains in issue in this case, I believe a status hearing is in order.

Order

For the foregoing reasons, it is ordered that the plaintiffs’ cross-motion for summary judgment be allowed in part. It is further ordered that a status hearing be held in this case to clarify the status of each plaintiff and to identify the remaining live issues in the case as well as the manner in which they will be addressed.

<<signature>>

Margo Botsford

Justice of the Superior Court

Dated: April 14, 2006

Footnotes

- ¹ Craig Hood, Tony Gaskins, Michael Adessa, Dornell Wigfall and Charles Thore
 - ² Peter Allen, Superintendent of MCI-Cedar Junction, and John Luongo, Deputy Superintendent of MCI-Cedar Junction, Mellisa Coache
 - ³ Massachusetts Correctional Legal Services has filed a memorandum as *amicus curiae* supporting the plaintiffs' cross-motion for summary judgment and opposing the defendants' motion.
 - ⁴ Telephone access presents a different story. The pertinent SMU regulation provides that inmates are to "be allowed telephone privileges in accordance with institutional procedure" This provision thus authorizes MCI-Cedar Junction to establish its own rules and procedures for the inmates' use of the telephone without creating any issue of inconsistency. The plaintiffs accordingly cannot succeed on any claim that the telephone access provision in the inmate handbook violates or contradicts a provision in the SMU regulations. I do not discuss the issue of telephone access further.
 - ⁵ See page 4 above, where these provisions are quoted in full.
 - ⁶ I note that the defendants have not addressed this issue either.
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