3/12/01

The Honorable Robert J. Bryan

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JAMES HORTON, JAMES BARNHART, JEROME PAYTON, J.B., through his next friend, LORRAINE WEST, and K.M., through his mother DEBBIE MOORE, on behalf of themselves and all others similarly situated, Plaintiffs, vs. BOB WILLIAMS, in his official capacity as Superintendent of Green Hill School; JEAN SOLIZ, in her official capacity as Secretary of the Department of Social and Health Services; and SID SIDOROWICZ, in his official capacity as Assistant Secretary of the Juvenile Rehabilitation Administration; and the Chehalis School District, Defendants.	CLASS ACTION NO. C94-5428 RJB AMENDED MEMORANDUM OPPOSING MOTION FOR PRELIMINARY INJUNCTION

This memorandum is filed by defendants Williams, Soliz, and Sidorowicz (state defendants) in opposition to plaintiffs' motion for preliminary injunction to prevent them from authorizing the use of pepper spray on residents at Green Hill School.

I. FACTS

Green Hill is the state institution which houses the oldest and most violent juvenile offenders in Washington. Att. 1 at 2. In such an institution, it is inevitable that some residents will

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engage in threatening and violent behavior. Att. 2 at 2-5. In October 1990 Green Hill instituted a policy allowing the use of pepper spray against threatening residents. Att. 1 at 2-4. Many law enforcement agencies and correctional facilities use it. Att. 1 at 4. Pepper spray temporarily incapacitates the person sprayed. The point of using the spray is to take control of a defiant and threatening resident without the need to physically subdue the resident which creates a serious risk of injury to both the resident and staff. Att. 1 at 4. The numbers of assaults and injuries at Green Hill in fact is down since the introduction of pepper spray. Att. 1 at 4. Spraying has occurred 103 times or about twice per month, and about six percent of the residents have been sprayed. Att 1 at 4.

Oleoresin capsicum (pepper spray) is a naturally occurring substance found in the oily resin of cayenne and other varieties of pepper. Att. 3 at 2-3. Pepper spray temporarily incapacitates a person by inducing an almost immediate burning sensation of the skin, and a burning, tearing, and swelling of the eyes. Att. 3 at 3. These sensations quickly diminish, and generally disappear completely within 15 to 45 minutes once a person receives fresh air, and showers to flush the eyes and skin with soap and water. Att. 3 at 3. Oleoresin capsicum, moreover, is biodegradable and, unlike chemical irritants, does not linger in ventilated affected areas or in clothing. Att. 3 at 4-5. Studies have discovered no known long-term health risks or deaths caused by exposure to pepper spray. Att. 3.

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At Green Hill, residents generally are showered within 10 to 15 minutes of being sprayed (Att. 1 at 18), and receive prompt medical attention. Att. 4 at 2-3. Residents have experienced no medical problems caused by being sprayed. Att. 4.

After this lawsuit was filed, Green Hill modified its pepper spray policy to address plaintiffs' concerns. Most importantly, the new policy more exactly defines the situations in which pepper spray may be used.

> [1] The resident fails to follow a staff directive, and use of other physical restraint methods to gain compliance, without the use of pepper spray, likely would result in bodily injury to resident, staff, and others.
>
> [2] The resident is engaging in disruptive behavior in his room which creates a serious disturbance and threatens institutional security by inciting serious misbehavior by other residents.

Att. 1 at 5-7. The new policy also more exactly prescribes warnings given prior to use (Att. 1 at 7); does away with spraying "pre-authorized" by the superintendent (Att. 1 at 7-8); enhances the training of staff authorized to use pepper spray (Att. 1 at 9-10); and requires administrative reviews of all pepper spray incidents (Att. 1 at 9). Green Hill also now uses only the 5% spray concentration, as opposed to the 10% that plaintiffs believe is more potent. Att. 1 at 7.

Since the new policy was implemented on October 1, 1994, pepper spray has been used at Green Hill in two incidents involving a total of three residents. Att. 1 at 18-24.

By no means does Green Hill rely on the use of pepper spray to control the behavior of residents. Instead, there is a "point"

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system to reward good behavior by granting special privileges. Att. 1 at 13-14. Room confinement for limited periods is used as a consequence for misbehaving. Att. 1 at 14. Residents who engage in serious misbehavior are placed in an "intensive management unit" (IMU) to provide them more intensive supervision and programming designed to correct their behavior. Att. 1 at 14, Att. 2. In addition, behavior is managed through extensive mental health services, counseling, and group therapy. Att. 1 at 11-13, Att. 2.

While plaintiffs believe the use of pepper spray is emotionally damaging and harms the rehabilitative environment, Green Hill's experienced psychologist and psychiatrist believe the use of pepper spray is a much better alternative to using physical force on a resident, and actually results in a better treatment environment by removing the risk of injury and discouraging assaultive behavior. Att 2.

Staff views Green Hill as a dangerous place to work, and believes pepper spray in an essential tool in avoiding physical confrontations that too often result in injury. They believe pepper spray is safe, effective, and does not harm the treatment environment. Att. 5.

II. ARGUMENT

To obtain a preliminary injunction, a party must show either (1) likelihood of success on the merits and the possibility of irreparable injury, or (2) the existence of serious questions going to the merits, tipping the balance of hardships in favor of

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the moving party. Diamondiney v. Borg, 918 F.2d 793, 795 (9th Cir. 1990). A preliminary injunction is an extraordinary remedy, and the burden is on the moving party to make a clear showing that money damages or other remedies are not adequate under the circumstances. Earth Island Institute v. Mosbacher, 785 F.Supp. 826, 831 (N.D.Cal. 1992).

A. Use of pepper spray under the new policy is a legitimate tool for maintaining institutional security.

There are no state or federal decisions on the constitutionality of using pepper spray on a threatening suspect or inmate.[1] However, in Youngberg v. Romero, 457 U.S. 307 (1982), involving the use of restraints against a person civilly-committed to a mental institution, the court set out the following test:

> In determining whether a substantive right protected by the due process clause has been violated, it is necessary to balance 'the liberty interest of the individual' and the 'demands of an organized society'... In seeking this balance in other cases, the Court has weighed an individual's interest in liberty against the state's asserted reasons for restraining the individual.

Id. at 320. In applying this test, the court ruled that it will uphold:

[1] To the state's knowledge, there is only one decision (unreported) in which pepper spray is discussed. Roy v. City of Lewiston, 1994 WL 129774 (D.Me.) In that case, plaintiff who was shot by a policeman argued the city was negligent in failing to use pepper mace to avoid the need to use deadly force. Plaintiff contended that in 1991, when the shooting occurred, the city should have known about a 1989 FBI study which found pepper spray to be safe and effective in incapacitating threatening suspects. In finding for the city, the court held that not knowing about pepper spray did not constitute "deliberate indifference".

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> those restrictions on liberty that were reasonably related to legitimate government objectives, and not tantamount to punishment.

Id. The Youngberg test applies to challenges to conditions of confinement of juvenile offenders who, as in Washington, have not been convicted of a crime. Gary H. v. Hegstrom, 831 F.2d 1430, 1432 (9th Cir. 1987). In this case, therefore, use of pepper spray at Green Hill under the terms of the new policy must be upheld if it is (1) reasonably related to legitimate government objectives, and (2) not tantamount to punishment.

1. The new policy is related to legitimate government objectives.

Maintaining the security of an institution is a legitimate government objective. Bell v. Wolfish, 441 U.S. 520 (1979). In pursuing this objective, prison officials may use tear gas. Spain v. Procunier, 600 F.2d 189 (9th Cir. 1979). There, the court noted:

> We think the record further indicates, however, that use of the substance in small amounts may be a necessary prison technique if a prisoner refuses after adequate warning to move from a cell or upon other provocation presenting a reasonable possibility that slight force will be required.

Id. at 195. The court further held:

> where there are safeguards to insure that tear gas is not used in dangerous quantities, we think use can be justified in situations which are reasonably likely to result in injury to persons or a substantial amount of valuable property.

Id. at 196.[2] In a later case, Michenfelder v. Sumner, 860 F.2d

[2] The court in Procunier was concerned that "small" amounts be used because tear gas can be "extremely dangerous". 600 F.2d at 1956. There is no evidence, on the other hand, that pepper spray is

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328 (9th Cir. 1988), the court upheld the use of a taser gun in potentially dangerous prison situations because:

> The taser was used to enforce compliance with a search that had a reasonable security purpose, not as punishment. The legitimate intended result of shooting is incapacitation of a dangerous person...

Id. at 335. Use of the taser gun, the court held, was not enjoinable because, while it may produce nausea and headaches, the prisoner failed to meet his burden of showing that there were adverse long-term health effects. Id. at 336. The appropriateness of its use, the court concluded, depends on the facts and circumstances of the particular case. Id.

Although Procunier and Michenfelder were decided under the Eighth Amendment, they are relevant. That is because in judging conditions of confinement at a juvenile institution, a court must apply "the due process clause which implicitly incorporates the (Eighth Amendment) cruel and unusual clause standards as a constitutional minimum." Gary H. v. Hegstrom, 831 F.2d at 1432. The differences between adult and juvenile institutions "should be accounted for in the liability stage, not the remedy stage." Id.

Indeed, when it comes to the need to prevent injury and maintain institutional security, there cannot be a lesser standard of safety in a juvenile institution than in an adult institution. Those who work and reside in a juvenile institution are entitled to the same level of safety.

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dangerous.

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Under the cases discussed above, Green Hill's new pepper spray policy is constitutionally-permissible because it is reasonably related to a legitimate government objective.[3] This conclusion is supported by the following:

1. Pepper spray is effective in incapacitating a resident to allow staff to safely take control of him.

2. Use of pepper spray is appropriate only in two situations. First, it may be used when necessary to take control of a resident, and failure to use pepper spray likely would result in injury. Second, it may be used when a resident's conduct in his room causes a serious disturbance outside the room. These two circumstances both are directly related to preventing injury and maintaining security.

3. Staff receives training on de-escalation skills, and how to properly use pepper spray.

4. Prior to using spray, staff is required to attempt to resolve the situation verbally, and to give advance warnings, in a process that generally continues for 30 minutes.

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[3] Plaintiffs misleadingly cite to the dispositions of staff members in an attempt to discredit how pepper spray was used under the former policy. For example, while cursing could lead to spraying of a resident, there also had to be a security threat. Beaver Dep., p. 116, l. 13-17. While on-the-job experience taught staff de-escalation skills, there also was formal training on this subject. Beaver Dep., p 133, l. 10-11. In singling out an incident in which they felt an allegedly disturbed resident should not have been sprayed, plaintiffs fail to mention he had a claw hammer. Beaver Dep., pp. 106-108. Plaintiffs quote staff as saying incident reports on spraying often are not filed, when in fact this failure very rarely occurs. Beaver Dep. p. 36, l. 5.

In fact deposed staff agreed that pepper spray was needed only a small percentage of the time when a disturbance occurs (Beaver Dep. p. 135-36, Eberle Dep., p 97-98, Rondo Dep., p. 101); that the purpose of pepper spray is to prevent injury (Beaver Dep. p. 134, l. 14-17, Eberle Dep., p. 96-97, Rondo Dep., p. 100, l. 19-20); that staff's goal is having to use peppery spray as little as possible (Beaver Dep., p. 133, 2. 13-19, Eberle Dep., p. 97, l. 12, Rondo Dep., p. 102, l. 14-17); and that pepper spray is an important tool in preventing injury to staff and residents (Beaver Dep., p. 136, l. 4, Eberle Dep., p. 98, l. 14-25, Rondo Dep., p. 101, l. 13.)

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5. Although pepper spray, in incapacitating an individual, causes discomfort for 30 to 45 minutes, it does not have any long-term effects.

6. Sprayed residents receive prompt medical attention to alleviate the symptoms.

7. Green Hill does not rely on pepper spray to control the behavior of residents. Instead, there is an incentive program for good behavior, room confinement, counseling, and sundry special programs.

Plaintiffs seek to prohibit altogether the use of pepper spray at Green Hill. Except to recommend that staff become better at verbal de-escalation, they offer no alternative method of safely controlling a threatening resident. Their leading behavioral expert, Mr. DeMuro, also criticizes both "room confinement" as a punishment for misbehavior, and "intensive management units" to treat residents with serious behavior problems. He claims there are better methods of controlling threatening residents, but fails to say what they are. The weakness of plaintiffs' position is exposed by their inability to offer specific alternative methods for controlling threatening residents.

2. Pepper spray is not used as punishment.

The second part of the Youngberg test is that the restraint not be used as punishment. As stated in Michenfelder, 860 F.2d at 336.

> A legitimate prison policy of carrying tasers to enforce discipline and security would not warrant their use when unnecessary, or 'for the role purpose of punishment or infliction of pain.'

In that case, the court held that use of a taser gun to

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discipline and security would not warrant their use when unnecessary, or 'for the role purpose of punishment or infliction of pain.'

In that case, the court held that use of a taser gun to enforce a requirement that inmates submit to a security search was permissible, because the use had a legitimate security objective, and was not used merely to inflict pain or punishment. By contrast, a stun gun may not be used as punishment for an inmate failing to sweep out his cell. Hickey v. Reeder, 12 F.3d 754 (8th Cir. 1993).

Plaintiffs repeatedly allege pepper spray is used at Green Hill simply to punish non-compliance with a staff directive. Certainly, every spray incident begins with a resident failing to follow a staff directive. There must be more, however: there must a threat to security, which is defined in the pepper spray policy. Under the reasoning in Procunier and Michenfelder, the policy is constitutional because spraying has a security objective (i.e., preventing injury), and therefore is not punishment. [4]

Plaintiffs contend that using pepper spray is improper because there are no mental health services provided. The point of pepper spray is to prevent injury and maintain security. When an incident is occurring, the policy is to diffuse the situation as quickly as possible through verbal negotiation. An array of services to address mental health issues is available at Green

[4] By contrast, under Green Hill procedures, when a resident simply fails to follow a staff directive, and security is not threatened, staff may "punish" the resident by taking away privileges or imposing temporary room confinement.

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institution may take steps to prevent injury and maintain security, regardless of their effects on the treatment environment. Green Hill, however, is convinced that use of pepper spray actually improves the treatment environment by reducing the risk of injury, and by discouraging threatening behavior.

B. Cases cited by plaintiffs do not support their argument.

Plaintiffs cite a host of cases in support of their request for a complete ban on the use of pepper spray at Green Hill. Pl. Brief at 18-19. These cases do not support their argument.

In several of the cases, harsh disciplinary practices were held unconstitutional. Stewart v. Rhodes, 473 F.Supp. 1185, 1193 (S.D.Ohio 1979) ("acting out" is not grounds for putting a prisoner in a "four-point" restraint in which he is chained on his back to a metal bed frame by means of handcuffs and leg irons); Hickey v. Reeder, 12 F.3d 754 (8th Cir. 1993) (prisoner who failed to sweep out his cell may not be shot with a stun gun); Nelson v. Heyne, 355 F.Supp. 451, 454 (N.D.Ind. 1972)(a juvenile offender may not receive "beating by use of a thick board" for violating institutional rules); Morales v. Turman, 364 F.Supp. 166, 173 (E.D.Tex. 1973)(struck down "widespread practices of beating, slapping, kicking, and otherwise physically abusing juvenile inmates, in the absence of any exigent circumstances"); Milonas v. Williams, 691 F.2d 931, 942 (10 Cir. 1982) ("hair dances", whereby juveniles were restrained by the hair, may not be used where "physical violence" or "physical control" is not at issue). These cases involved situations in which force was applied without a

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showing of any legitimate security objective. By contrast, under Green Hill's policy, pepper spray may be used only in two specific circumstances when necessary to prevent injury and maintain institutional security.

The other cases cited by plaintiffs involved the use of tear gas. Soto v. Cady, 566 F.Supp. 773, 779 (E.D.Wisc. 1983)(tear gas may be used "to subdue an inmate who poses an immediate threat of injury" which means at least "making physically threatening gestures"); Greear v. Loving, 538 F.2d 578, 579 (4th Cir. 1978)(summary judgment against plaintiff improper when he alleges tear gas was used to punish him for destroying property); McCargo v. Mister, 462 F.Supp. 813, 819 (D.Md. 1978)(because tear gas is potentially dangerous, and affects persons who are not targets, it may be used only in situations posing the utmost degree of danger and loss of control); Morris v. Travisono, 528 F.2d 856, 858 (1st Cir. 1976) (tear gas may not be used to punish non-threatening behavior). These cases hold that there must be security reasons for using tear gas. The courts are especially cautious about approving the use of tear gas because it is a potentially dangerous substance. Spain v. Procunier, 600 F.2d at 194.

What plaintiffs request is a complete ban on the use of pepper spray. Cases cited by plaintiffs underscore the fact there is simply no precedence for banning a substance, such as pepper spray, which is non-dangerous and can control a threatening person.

C. The Court must show deference to the Green Hill policy.

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In Ruiz v. Estelle, 679 F.2d 1115, 1126 (5th Cir. 1982), the court noted the limited role of the judiciary in challenges to prison conditions:

> The duty to protect inmates' constitutional rights does not confer the power to manage prisons, for which courts are ill-equipped, or the capacity to second-guess prison administrators. Federal courts should not, in the name of the constitution, become enmeshed in the minutiae of prison operations. Our task is limited to enforcing constitutional standards and does not embrace superintending prison administration.

The court stated further:

> As a matter of respect for the state's role and for the allocation of functions in our federal system, as well as comity towards the state, the relief ordered by the federal court must be consistent with the policy of minimum intrusion into the affairs of state prison administration...

Id. The Ninth Circuit expressly adopts the Ruiz view of the limited role of the federal judiciary. Toussaint v. McCarthy, 801 F.2d 1080, 1088 (9th Cir. 1986). This deference extends with special force to security matters. A prison's "internal security is peculiarly a matter normally left to the discretion of prison administrators." Rhodes v. Chapman, 452 U.S. 337, 349 (1981). Prison administrators "should be accorded wide-ranging deference in the adoption and execution of policies and practice that in their judgment are needed to preserve internal order and to maintain institutional security." Bell v. Wolfish, 441 U.S. at 547.

This deference applies to juvenile institutions as well as adult prisons. As stated in a juvenile institution case, Gary H. v. Hegstad, 831 F.2d at 1433:

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> The court should defer to the policy choices made by prison officials and order a remedy consistent with the basic approach taken by prison officials, unless that approach itself is inconsistent with the Eighth Amendment.

Quoting Hoptowit v. Ray, 682 F.2d 1237, 1247 (9th Cir.1982).

Youngberg v. Romero, 407 U.S. at 324, held:

> Decisions made by the appropriate professionals are entitled to a presumption of correctness. Such a presumption is necessary to enable institutions of this type -- often, unfortunately overcrowded and understaffed -- to continue to function.

Based on these cases, Green Hill's pepper spray policy is entitled to deference by the court, and to a presumption of correctness. Deference is due because it was formulated by professionals at Green Hill, who are best equipped to judge security needs of the institution. For reasons discussed in Section II(A) of this memorandum, the pepper spray policy should be upheld, and the security decisions of Green Hill officials should not be second-guessed. Plaintiffs have not overcome the presumption of correctness that attaches to the policy. Granting the injunction would be an impermissible intrusion into the internal security affairs of a state correctional institution.

D. The current pepper spray policy does not warrant the court granting a preliminary injunction.

Plaintiffs' expert, Dr. Milan, offers conclusory opinions that many of the prior sprays were of residents who presented no immediate danger. Green Hill disputes this conclusion, although admits two sprays were improper because the residents were handcuffed at the time. While the number of inappropriate past

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sprays is in dispute, the fact is that since the time this lawsuit was filed, Green Hill adopted a new pepper spray policy that addresses all plaintiffs' concerns. Infra. at 2-3.

Regardless of what allegedly happened in the past, a plaintiff must demonstrate a "credible threat" of specific injury. Kolender v. Lawson, 461 U.S. 352, 355 (1983). There must be an individualized showing of a "very significant possibility" that future harm will incur. Nelson v. King Cy., 895 F.2d 1248, 1950 (9th Cir. 1990). Past exposure to harm is largely irrelevant when ruling on injunctive relief predicated on the threat of future harm, if unaccompanied by any continuing, present adverse effects. O'Shea v. Littleton, 414 U.S. 488, 495-96 (1974). In denying a claim for injunctive relief, the court in Rodriquez v. Kincheloe, 763 F.Supp. 463, 468 (E.D.Wash. 1991) held:

> Mr. Rodriguez has presented no evidence of continuing, present adverse effects from the alleged unconstitutional conduct. Thus, he must show a threat of future harm. 'The burden (of) showing a likelihood of recurrence (is) firmly on the plaintiff.'

On October 1, 1994, Green Hill implemented a new pepper spray policy. Since that time, pepper spray has been used three times, and clearly was justified in each circumstance. There is absolutely no reason to believe that the policy will not be followed in the future. Green Hill's willingness to adopt a new policy addressing all of plaintiffs' concerns, and its record of adhering to that policy, demonstrate plaintiffs cannot meet their burden of showing a very significant probability of future harm.

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For the sake of argument, if Green Hill in the future uses spray in violation of the policy, plaintiffs may have a claim for damages under 42 U.S.C. § 1983. They also may have a claim for injunctive relief if they can show a very significant probability of additional violations in the future. However, under the current situation, there are no grounds for injunctive relief because Green Hill has adopted a constitutional policy for using pepper spray, is abiding by it, and intends to keep abiding by it.

III. CONCLUSION

Based on the foregoing, the state defendants respectively request that plaintiffs' motion for preliminary injunction be denied.

DATED this 31 day of November, 1994.

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