IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

THIRD JUDICIAL DISTRICT AT ANCHORAGE

MICHAEL CLEARY, et al.,

Plaintiff,

vs.

ROBERT SMITH, et al.,

Defendant.

Case No. 3AN-81-5274 Civ.

DECISION AND ORDER:
DEFENDANT'S MOTION FOR RELIEF FROM JUDGMENT

Defendant Department of Corrections [DOC] has moved this court for an order modifying the requirements of Section VIII of the Final Settlement Agreement and Order [FSA] relating to institutional overcrowding. The DOC contends that there have been two changes in circumstance justifying modification of the FSA: $8 million decrease in FY '93 operating budget, and an 6 month increase in prisoner population. Thus, pursuant to ARCP 60(b)(5), (6), and Section IX.A.4 of the FSA, the DOC requests this court to modify inmate capacity populations at certain correctional centers upward.[1]

In response, Plaintiffs contend that mere financial constraints are not sufficient to justify relief from judgment, and

[1] Specifically, the DOC requests the following temporary modifications:
(1) Increase the maximum capacity of the Lemmon Creek Correctional Center by six inmates;
(2) Increase the maximum capacity of the Fairbanks Correctional Center by four inmates; and
(3) Increase the maximum capacity of the Palmer Security Correctional Center by 10 inmates.
The DOC also seeks the following permanent modifications:
(1) Increase the maximum capacity of the Sixth Avenue Correctional Center by two inmates (Dorm 1);
(2) Increase the maximum capacity of the Fairbanks Correctional Center by two inmates (B Dorm); and
(3) Increase the maximum capacity of the Spring Creek Correctional Center by up to 80 inmates. In its reply brief, the DOC has modified this request to an increase of 50 inmates.

that the DOC's proposed modifications to the FSA are not tailored to address the changed circumstance upon which the DOC's relies to seek modification.

The parties' contentions raise the following issues:

1. Has the DOC made a sufficient showing of a significant change in circumstances to permit modification of the FSA?

2. Are the DOC proposed modifications tailored to resolve the problems created by the change in circumstances?

Extended hearings were held several months apart in this case in order to present testimony of two experts.

Terrell Hutto is a corrections consultant and corrections administrator who was retained by the defendants in this case. He holds a Bachelor of Arts in History and Sociology and a Masters in Corrections Administration. From 1964 to 1967, he was a correctional officer in Texas. From 1967 to 1971, he was a warden in Texas. In 1971, Hutto was hired as a "reform" Director of the Alaska Department of Corrections to oversee and bring the DOC in compliance with the court-ordered changes articulated in Hope v. Sauto.

In 1976, he left Alaska to become Deputy Director of the Virginia Department of Corrections. In 1977, he became Director, a position he held until 1982. According to Hutto, although all the local "jails" in Virginia were operated by local sheriffs, the state funded the operations. His department set the capacity limits and monitored compliance. The usual population in the "jail" facilities was 4000 to 5000 inmates. In the "state-wide" prisoner facilities, the population was 6500 inmates in 1977, and

in 1982 when he left the system, it was 9500.

In 1982, Hutto became a corrections consultant. His responsibilities include evaluating corrections facilities, designing new facilities, establishing population capacities, and developing management procedures. In 1983, Hutto formed the Corrections Corporation of America [CCA], which still employs him on a part-time basis. The purpose behind CCA is to design, build, and manage corrections facilities. CCA currently manages 20 such facilities in the United States.

Hutto is a member of the following Professional organizations. From 1985 to 1987, Hutto served as a president and a director of the American Correctional Association, which establishes accreditation standards for corrections institutions. He served as president and a director of the Southern States Correctional Association. He served as president and a director of the Association of State Correctional Administrators.

Hutto has evaluated over 100 prison facilities for the purpose of determining conditions of confinement. He has usually been retained by state departments of corrections. Of these 100 prison evaluations, 50 of them were evaluated to determine the impact of population pressures on inmates. Hutto estimates that he has testified on behalf of departments of corrections 28 to 30 times following these evaluations, and 2 to 3 times on behalf of inmates. He has testified as an expert witness on prison conditions in Alaska, Arkansas, Virginia, Indiana, and Oklahoma.

In 1982, Hutto visited Alaska as part of a team from the American Corrections Association. The purpose was to set

capacities of Alaska corrections facilities in accordance with ACA standards. Hutto's responsibility was to visit each facility, evaluate the prevailing conditions, and set the capacity of the facility. In 1983, Hutto conducted a followup visit to evaluate capacities of corrections institutions that had been set after his 1982 visit. In 1984, Hutto testified in this case about his 1983 evaluation.

Hutto gave the following definitions.

"Overcrowding" in a correctional facility is defined as "a condition that exists whenever the number of inmates exceeds the capacity of the facility's resources to provide facilities that meet applicable standards."

"Facility resources" include physical plant, program, staff availability, recreation space, day space, mental health, education, inmate job opportunities, cell size, and the number of special beds available at each facility.

Because staff ratio and programs are important, "over capacity," does not necessarily mean "overcrowding." Consequently, capacity numbers do not necessarily determine overcrowding. Likewise, the design of a facility alone can not determine whether the facility is overcrowded. Finally, population itself is an aspect of overcrowding, but is not by itself determinative of overcrowding. The key determination as to overcrowding is whether the resources necessary to administer a facility are available.

The negative effects of overcrowding include: (1) reduced safety of inmates (i.e. an increase in or an unacceptable number of assaults between inmates or between inmates and staff), (2) an

increase in inmate medical complaints, (3) an increase in complaints and grievances, (4) delays in responding to complaints and grievances, (5) increased idleness, (6) deterioration of the maintenance of the physical plant (e.g. sanitation problems), (7) fewer clothing exchanges, (8) reduced shower time, (9) reduced items in commissary, (10) reduced visitation time, (11) less time out of the cells, (12) less time per inmate per program and/or increased waiting time in entering available programs, (13) inadequate segregation, (14) inadequate medical services rendered in terms of time, scope, and communicable diseases, and (15) corrections staff has increased physical demands, increased overtime, greater job responsibilities, and increased levels of stress.

"Double bunking" or "double celling" is the practice of placing 2 inmates in one cell. Hutto is personally biased against double celling because it creates too many opportunities for mischief and requires better trained as well as an increased number of staff. However, he is more tolerant of double celling if there are also improvements in recruiting and training staff, improvements in inmate/staff ratios, and improvements in the number of inmate programs. The keys to successful double celling are the inmates occupy the cells only for sleeping, and that inmates spend most of their time outside the cells. According to Hutto, double celling is the prevailing practice in most corrections facilities.

According to Hutto, the facilities overseen by the Corrections Corporation of America do not exceed population caps except where required to do so by the government entity with which it has

contracted.[2]

In Hutto's opinion, the factors listed in Section VIII.B of the FSA were appropriate for the DOC to use to evaluate and determine the relative capacities at each facility. Hutto indicated that the FSA standard is consistent with the 1990 ACA standards. Since 1990, however, ACA standards have been modified to include more factors to estimate square footage per inmate per cell. In 1990, the ACA standards did not provide for double celling, but currently they provide for 35 square feet of "unencumbered space" in a double cell. However, FSA Section VIII.B.10(a)(2) and (3) of the FSA permit double celling of inmates in a way which is contrary to the ACA standards.[3]

When evaluating a facility for overcrowding, Hutto looks for the indicia of overcrowding listed above. He does not look at individual data such as the standards for maximum capacity set forth in the FSA.

In 1992, Hutto evaluated the impact on the Alaska inmates of DOC exceeding the population caps set in the early 1980s as set forth in the FSA. From November 9, 1992 through November 14, 1992, Hutto visited Cook Inlet Pretrial Facility, Fairbanks Correctional Center, Hiland Mountain Correctional Center, Lemon Creek

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[2] Hutto was not contacted by the Alaska DOC to conduct an audit for purposes of the FSA.

[3] Specifically, Section VIII.B.10(a)(1) provides:

> 10. That in determining maximum capacity, the following cell size and square footage criteria shall be used: (a) For existing facilities where an inmate is locked in his or her living unit for 10 hours or less per day: (1) no more than one inmate may be assigned to a cell or room which is 60 square feet or smaller; (2) no more than 2 inmates may be to a cell or room which is 61-100 square feet; and (3) no more than three inmates may be assigned to a cell or room that is 101-150 square feet; and (4) no more than one inmate for every 50 square feet may be assigned to a dormitory including dayroom space, but excluding bathroom space;

Correctional Center, Spring Creek Correctional Center, Mat-Su Pretrial, Meadowcreek Correction Center, Palmer Medium Correctional Center, Palmer Minimum Correctional Center, 6th Avenue, and Bethel. All tours were conducted independently of DOC personnel except the one in Bethel. He spent approximately 2 to 5 hours at each facility with the exception of Palmer Minimum Correctional Center which he visited only briefly.

Hutto observed the following differences since his 1983 visit. He noted improvements in physical plants, such as the new facility at Spring Creek and the addition to Lemon Creek, and renovations and refurbishment. He also noted a change in staffing patterns. Staff to inmate ratios were reduced from 1983. Hutto observed that the training programs had increased and that there were more programs available for the inmates.

Hutto conducts his tours according to the following pattern. First he learns the statistics of the facility. He visits the superintendent to get the management point of view re: problems, the superintendent's role in managing the facility, and his/her viewpoint on how things are working. Usually during this time Hutto asks the superintendent or the staff for such documentation as the inmate profile, grievance statistics, and disciplinary logs, programs schedules, and population numbers. Hutto explains his role and the purpose for his visit.

Following this introduction, Hutto typically tours the facility with either corrections officers or the superintendent. During these tours Hutto speaks with inmates and staff asking them open-ended questions. He observes specifically the physical

facilities, the activities, and the interaction between inmates and staff.

1. Cook Inlet Pretrial Facility [CIPT]

On November 9, 1992, Hutto spent approximately 2 and 1/2 hours at CIPT. The inmate population was 397 [maximum capacity is 397; emergency capacity is 403]. At CIPT, Hutto met with Superintendent Briggs in his office for 30 to 40 minutes and was provided with an inmate profile which contains statistics for the past year re: inmates and their classifications. Hutto reviewed the grievance log. Hutto found that the staff's response time to filed grievances was within department limits. Hutto did not review overtime staff records, post-admission medical exam records, attorney client conference records, or classifications. He was unaware that there was a waiting list for drug and alcohol treatment programs. However, he noted that there is generally no requirement that all inmates be admitted into all programs at the same time.

Superintendent Briggs was with him during the 2 to 2 and 1/2 hour tour. Hutto spoke with 6 inmates outside the hearing of corrections personnel. He did not volunteer the information either as to who he was or the purpose of his visit. He also spoke to 5 or 6 staff members.

Hutto thought CIPT was "well-maintained" in that it was clean and appeared to be "working quite well." CIPT is designed to apply the principles of "direct supervision" which means that corrections officers are inside each pod with the inmates themselves. Double celling is common at CIPT. Hutto opined that double celling where

direct supervision was applied presented fewer negative effects. Hutto noted that the mental health program at CIPT was good: he was impressed with the staff's knowledge, training, and approach to the inmates.

Hutto's only negative observation about CIPT was that it was currently holding more sentenced inmates that it should as a pre-sentence facility. As to whether overcrowding was a problem at CIPT, Hutto's opinion was that CIPT could handle 5 to 10 more inmates on an irregular or random basis [emergency cap is 403] as long as the situation was corrected very shortly.

2. 6th Avenue

[DOC requests a permanent increase in population capacity by 2 inmates.] On November 9, 1992, Hutto spent approximately 3 hours at 6th avenue. The population was 116 [maximum capacity is 104; emergency capacity is 108]. His visit was announced to Superintendent Zogg and he spent most his time with her. While there, Hutto spoke with 5 to 6 inmates for a few minutes each. He also spoke with 6 to 8 staff members and the medical staff. He did not ask about the inmates fire safety concerns nor review medical or overtime records. Hutto did not speak with any incarcerated female inmates. Similar to his visit to CIPT, Hutto reviewed facility records, activity schedules, and recreational activities, but he did not observe any specific programs.

Hutto's impression was that the facility was clean and well-maintained and that the number of programs had increased since 1983. Double celling is practiced at 6th Avenue. The population at 6th Avenue was 116 at the time, which is 12 inmates beyond

maximum capacity and 12 inmates beyond emergency capacity.

Compared to his 1983 visit, Hutto thought the staff had improved; that the staff-to-inmate communications were friendlier; and that staff was overall more "impressive." Hutto noted that a great deal of the administration's time is devoted to population cap compliance.

One negative observation by Hutto was that 6th Avenue is holding sentenced people. In his opinion, no long-term inmates should be incarcerated at 6th avenue. There are no programs available at 6th Avenue. He identified the problem as one of moving sentenced inmates to a proper facility. He also noted that cots were in the dorms.

Hutto's opinion is that the established cap level of 108 is preferable and that if it is exceeded, steps must be taken immediately to bring the facility into compliance with the cap.

3. Lemmon Creek Correctional Center [LCCC]

[DOC requests temporary changes to increase maximum capacity at LCCC by 6 inmates for 6 months.] On November 10, 1992, Hutto visited LCCC in Juneau. He initially discussed his plans with the superintendent, then toured the facility, followed by another discussion with the superintendent. He also received an inmate profile, the facilities' management plan, and a floor plan. Hutto did not review records of staff overtime, visitation, program waiting lists, or plant maintenance records.

On the day of Hutto's visit the inmate population was 182 [maximum cap is 164; emergency is 170]. He noted that building modules had been completed and thought that the changes were well-

planned and well-executed. He found the staff at LCCC was enthusiastic. While there, he discussed modifying old dormitories into more program space for the inmates which he believes would be a positive step.

Currently, inmates at LCCC are double celled, although they were not double-celled at the time Hutto visited the facility. They have 20 hours of out-of-cell time each day.

Hutto noted negative effects of overcrowding included the placement of 2 to 3 cots in the dorms. However, Hutto thought the safety level was unaffected and noted that there had been no corresponding increase in complaints or grievances. His opinion was that exceeding the maximum capacity of the facility would not cause any adverse effects now or in the immediate future as long as there was no corresponding negative impact on the inmates access to programs nor any decrease in the inmates quality of life. However, in his opinion, in the not too distant future, exceeding the population cap should be changed.

4. Fairbanks Correctional Center [FCC]

[DOc requests temporary increase in the maximum capacity by 4 inmates for 6 months and a permanent increase of 2 inmates.] On November 11, 1992, Hutto visited FCC. Inmate population was 216 [maximum capacity is 187; emergency is 198]. Hutto noted that the old dorm facilities had utilized double bunks, but now it had single bunks. Two dormitories still used cots which Hutto thought should be eliminated. Hutto considered that access to the gym had improved; hobby craft area had lots of activity, and he noted availability of substance abuse counselors.

The DOC's current plan at the facility is to employ double celling in single celling areas and convert the dormitories into program space. Hutto opined that, although this does not increase capacity, it does improve the overall function of the facility. In his opinion, no negative impact would result if the facility increased the number of double cells.

5. Spring Creek Correction Center [SCCC]

[DOC requests a permanent increase of 50 inmates.] Hutto visited SCCC on November 12, 1992. SCCC is a high security facility that was not in operation during Hutto's 1983 visit. The population on day of his visit is unknown [maximum is 416; emergency is 436]. Hutto and a second corrections expert jointly met with the superintendent of SCCC and were briefed prior to the tour.

Hutto noted that higher security inmates require "programming" to adjust to higher security. At SCCC, inmates have a great deal of out-of-cell time and free access to activities. During the tour, Hutto discussed the population mix of the facility with 3 or 4 inmates. Although it is a maximum security facility, it is currently being used to house both maximum security and long-term prisoners.

Hutto approved of the DOC plan is to increase the maximum capacity of the SCCC if it is by no more than 50 inmates and the facilities are also expanded. Currently, the lower floors of the facility are double-celled. Under the DOC plan, the upper tiers of the facility would be double-celled as well to provide space for an additional 50 inmates. Additionally, sprinklers would have to

be added to the upper tier.

In Hutto's opinion, the DOC plan would have very little impact at SCCC as long as the amount of activity available to the inmates was maintained, and the program space and the staff were increased proportionately to the increase in capacity. In his opinion, the key to making this facility work is the amount of activity that is made available to the inmates.

6. Mat-Su Pretrial Facility

On November 13, 1993, Hutto visited Mat-Su Pretrial. Mat-Su is a newer, modern facility employing the "semi-direct" theory of supervision of inmates. Hutto spent very little time at Mat-Su. He only spoke with 3 to 4 staff members and 3 to 6 inmates. He also reviewed the inmate profile for the facility.

The day Hutto visited the facility the population was 93 [maximum cap is 76; emergency is 79]. Hutto thought the facility was clean, well-run, and provided a great number of recreational activities for the inmates. He noted however, that there was a high number of sentenced inmates as opposed to pretrial inmates. In his opinion, it is not a good idea to mix sentenced inmates with pretrial inmates. He noted that if the sentenced inmates were moved out, the population caps could be maintained.

7. Palmer Medium Correctional Center [PCC/Med]

[DOC requested to increase maximum capacity by 10 inmates for 6 months.] Hutto visited Palmer Medium on November 13, 1993. The population on the day of his visit is unknown [maximum capacity is 165; emergency is 172]. Palmer Medium is a small, direct supervision, cottage-type facility built in 1980. Fifty additional

cots were added to Palmer Medium and the number of inmates has been increased. Hutto considered this increase to be a problem due to the facility's size and its small common areas and small living units. He noted that the staff at Palmer Medium also seemed concerned about the increase in inmate population.

The DOC's plan is to raise the capacity of the facility from 165 to 175 through April of 1993 and then to eliminate 30 to 40 inmates currently incarcerated there. Hutto thought that the DOC being 10 inmates over the maximum capacity was a tolerable situation for four to six months. However, in his opinion, the population should not be raised beyond 10 or for more than 4 to 6 months.

Hutto noted that of all the facilities he toured, Palmer Medium is the least amenable to modification due to its basic design. It involves the use of "houses" with 20 inmates in each. Each house contains one urinal and two commodes. The houses contain cells that are 7 feet by 9 feet and sufficient for single inmates. The day area is also sufficient, but only when the cell are single-celled.

8. Palmer Minimum Correctional Center [PCC/Min]

Hutto visited Palmer Minimum on November 13th also. Palmer Minimum is a new facility. The current population does not exceed the maximum capacity of facility. Palmer Minimum has small common areas and small living units and does not lend itself to exceeding the populations caps. DOC's proposed modification does not include any modification to Palmer Minimum.

9. Hiland Mountain Correction Center [HMCC]

On November 13, 1992, Hutto also visited HMCC. HMCC has not exceeded its emergency capacity [maximum capacity is 225; emergency is 233]. Hutto noted that an important change at HMCC is the sexual offender treatment program. He noted that the characteristics of the inmate population must be monitored, e.g., the facility holds both sex-offenders and non-sex-offenders. Hutto opined that the inmates had good access to programs and the facility had good overall morale.

10. Meadow Creek Correctional Center [MCCC]

Hutto's only comments re: MCCC were that it had never exceeded emergency capacity maximum is 62; emergency is 66]. The DOC's plan does not include any modification to MCCC.

11. Yukon-Kuskokwim Pretrial Facility [YKCC]

On Saturday, November 14, 1993, Hutto visited Kuskokwim pretrial facility in Bethel. Inmate population on the day he visited was 108 [maximum capacity is 88; emergency is 92]. Hutto considered it to be a clean facility with a good staff/inmate relationship. Because it was a Saturday there were few programs occurring during Hutto's visit. He also noted the amount of activity and the recreation area. Hutto mentioned that his only negative impression of Kuskokwim was that there was a significant number of sentenced prisoners who clearly did not belong there and needed to be sent to another facility to serve their felony sentences.

Summary

Hutto summarized his overall opinions. In Alaska prisons, the potential for violence is low and violent incidents are the

exception rather than the norm. This is borne out by his review of the medical reports and the shift reports of corrections staff. His principle negative concerns are the DOC exceeding population caps and the improper classification of inmates. For example, Palmer Medium should remove the 50 extra cots. Hutto thought that the DOC was unable to properly place inmates who were properly classified which results in sentenced and non-sentenced prisoners being housed in the same facilities. The negative result of this classification problem is that it creates a greater potential for violence and increases the frustration of the inmates. In his opinion, 95% capacity is the ideal number of inmates because it gives staff necessary flexibility to properly place inmates.

Hutto's recommended solution for the overcrowding problem is to re-open Wildwood and though double celling increase the population at Spring Creek. Hutto believes that there is a potential for increased violence if the overcrowding problem is not resolved.

Hutto also summarized what he considered to be the strengths of DOC: Its planning efforts have borne good results and the pressure of this case and the court's supervision has brought about significant improvements. The DOC has improved staffing levels and training within its organization and the staff at the facilities demonstrate more professionalism. The institution of the substance abuse treatment and sexual offender treatment programs has been a significant improvement. The facilities are well-designed, well maintained, and function well according to their purpose. His overall opinion was that the quality of life of the inmates is very

good and increasing population would not have a negative impact on their quality of life except where already noted.

In his opinion, the factors listed in FSA VIII.B are appropriate to evaluate and determine what population capacities should be established and adhered to for a facility. The 60 square foot per inmate space set forth in section B.10.a.1 is consistent with the 1990 American Correctional Association standard which provided for 50 square feet per occupant. It did not provide for double celling of inmates.

In the second edition, 1990 supplement, the standards changed and include more factors to establish square footage. Currently the standard permits double celling and provides for 35 feet of unencumbered space in a double cell. However, they still disapprove of double celling for closed, maximum security inmates. However, he does not consider Springfield to be "closed" nor the inmates to be maximum prisoners.

Eugene Miller is a penologist with 28 years of experience. He was retained by the plaintiffs in this case. He has made approximately 100 similar evaluations. A couple were for plaintiffs and one was for a federal court. He is scheduled to do a Justice Department study evaluation re: litigation.

He received staff training at Glynco, Georgia. He also worked with prisons while in the U.S. Navy and as a sheriff. He has done institutional evaluations and accreditation preparation. For the past eight years, he has spent about 20% of his time consulting and the rest of his time working for a private building company that builds prison facilities.

Miller has been an assistant professor of criminal justice at Virginia Commonwealth University, and adjunct professor at American University. He has consulted with the United States Department of Justice and the San Diego County jails.

Miller managed prison facilities in Bucks County for 2 and 1/2 years, District of Columbia for 5 and 1/2 years, and served as assistant director in Alaska and for the Massachusetts Correctional Center.

In addition to publishing several articles on penology, Miller authored a book on jail management and co-authored one on corrections in the community. He is a member of the American Correctional Association, the American Jail Association, and the National Sheriffs' Association.

Miller has toured and examined approximately 600 jails in the United States and 11 -12 jails in other countries. He was retained by the U.S. District Court in Northern District of Florida as court expert in a suit against Florida prisons. He has qualified as an expert witness in the federal courts of Florida, North Carolina, Michigan, Pennsylvania and the District of Columbia.

Miller's approach to inspection of each institution was to meet with the superintendent to learn the mission of that facility within the corrections system. He reviewed populations and discussed anticipated changes in the facility, if any. His usual pattern is to begin with inmate entrance point and go through the intake process. He goes into the housing unit and talks with the inmates about such things as visits, recreational areas, phone access, and frequency of clothing changes.

He talks with staff informally re: their working environment and response to inmate complaints. He also conducts formal interviews of medical staff, mental health co-ordinator, program director and classification personnel.

He inspects grievance and disciplinary logs for 6 months to 2 years in order to learn fairness of the process. He gets an inmate profile from each institution. He also looks at personnel overtime statistics, program schedules, schematics of the facility, fire marshall inspection reports re: population evacuation, and health department reports. He checks the special incident file.

Miller defines "overcrowding" as occurring when the facility cannot meet the basic inmate needs such as food; when medical and mental health facilities are inadequate; and where there is too little exercise and program space.

"Overcrowding" exists when there are waiting lists for programs, delays in meal service, decreased medical response to requests, delay in routine medical exams (especially for communicable diseases), clothing is issued in wrong sizes, basic supplies are lacking, and there is increased tension among inmates.

Miller considers classification to the be key to overcrowding. Inmates who have to be housed separately need to be identified because options are reduced if there is overcrowding. Classification also tells the staff how to do their job and how to allocate resources.

1. Cook Inlet Pretrial Facility.

Miller spent 8 hours at CIPT on January 25, 1993. The population count was 410 which included 42 federal prisoners

[maximum is 397; emergency cap is 403]. As evidence of overcrowding, he noted that instead of 2 weeks do get a psychical exam, inmates were waiting 4 weeks. There is double celling. Prisoners have been put in the attorney visitation rooms and in booking cells. Because the Booking area is busy, there is no privacy in the holding cells.

There is no place to medically isolate inmates. One [ill] inmate was held 6 and 1/2 weeks in a holding cell. A day room has been eliminated. The result has the effect of inmates being in solitary confinement. There is no provision for handicapped inmates.

In his opinion, CIPT should operate at below the FSA capacity in order to give a margin of safety.

2. Sixth Avenue Jail

[DOC requests to permanently increase population capacity by 2 inmates.] Miller spend 5 and 1/2 hours at 6th Avenue on January 26, 1993. The population count was 105 (80 males, 25 female) [104 is maximum, 108 is emergency]. He observed that the facility was clean and without tension. Everyone had a bunk. However, he did note that the mattresses were not sanitized between uses which he considers harder to do if a facility is overcrowded.

3. Lemon Creek Correction Facility

[DOC requested to temporarily increase inmate capacity by 6 inmates for 6 months.] Miller spent 8 hours at LCCC on January 27, 1993. The population count was 175 [maximum is 164, emergency is 170]. He observed that the cells are closed only a short time. DOC has increased the showers and inmates can buy individual ear

plugs for television. Complaints about the double celling from inmates were that they had lost space; short timers are destablizing to their environment; and they fear thefts. He considered these to be "aminated" complaints, but there were no facility-wide tensions. One mod unit of eight inmates was affected by the population figures. He noted that a genuine attempt was made to offset this result by planning before double bunking occurred. In his opinion, the solution was to separate short-timers from long-timers into separate quads. He has no opinion about whether converting a dorm to modular cells in a good or a bad change, but he does have a bias against dorm housing.

The female housing in Dorm I has 2 sleeping rooms (199 square feet), a shower and a toilet area. Maximum cap is 5 women in this space which is approximately 40 square feet per inmate. Women inmates have been bunked for as long as three days in holding cells when the facility is at full capacity. This results in approximately 25 square feet per female inmate.

Women prisoners may go to male programs as long as a staff person is present. However, there is no requirement that female staff supervise female inmates.

Inmates who are working or going to school have a special recreation room which was converted from a bunkroom by a local community group.

He noted that DOC has no policy about which inmates get doubled celled together. In his opinion, it is important to identify people who should not be doubled celled. His observation is that DOC needs a staff person to be in charge of celling in

order to avoid mentally ill, aggressively homosexual, and violent inmates being inappropriately double celled.

He also noted that the "cop out" system may or may not work, but he had no examples of the "cop out" system not working. In his opinion, having a designated person to deal with such requests is alright.

Miller testified that the national standard is that there should be 75 square feet of space per each inmate.[4] Nonetheless, in his opinion, an additional 5 - 6 beds at LCCC are acceptable because it is a small increase in the population and the impact is small. He opined that LCCC is operating at the maximum capacity that it should be operating.

4. Ketchikan Correctional Center

Miller spent 7 and 1/2 hours at KCC on January 28, 1993. The population count was 62 [maximum is 47; emergency is 53]. Miller found overcrowding at this facility. It is a poorly designed, two story building that is expensive to operate. One half the beds are in one housing unit. DOC has removed a trailer from the site so the cap should be reduced by 7 inmates. The segregation unit is two cells plus a day room. There were two male inmates to one cell, but there were three women in one cell which had two bunks and a mattress in 70.2 square feet. The male double bunked cells had approximately 74 - 75 square feet.

Male and female inmates can not be in the day room at the same

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[4] **Miller neither identified the source of his testimony on national standards nor the period in which they applied. If his testimony is accurate, the FSA was out of compliance with such a standard when it was executed by the parties. See: FSA VIII.B**

time so the recreation time is split between males and females. However, when men are housed in the day area, women cannot get to the day area at all. His solution is to use the "segregation area" for women only.

Miller found that access to the exercise equipment and program area was equal for men and women. He found a significant array of educational programs offered. Although he had no concern about the number of such programs, he noted that there is no hobby or handicraft areas available.

He also noted that inmates with mental problems are held in a quasi-office area where holding is also done.

As evidence of overcrowding, he noted that TB tests take 5 - 7 days instead of 72 hours and that pregnant women are checked by a general medical doctor instead of a specialist.

5. Fairbanks Correction Center [FCC]

[DOC requests to temporarily increase maximum capacity at FCC by 4 inmates for 6 months; and to permanently increase population capacity by 2 inmates.] Miller spent 7 and 1/2 hours at FCC on January 30, 1993. The count was 215 [maximum is 187; emergency is 198]. As evidence of overcrowding, Miller noted that in the women's area, there are 2 dorms with 2 - 6 people. This is triple bunking in approximately 560 feet which included bunks, television, chairs, and day room. There is no separate day area so females are out of cells only for exercise, and visits. There is no natural light in the area. In the second female inmate area, there were single rooms which housed overflow from the male inmate population.

The male inmate areas were overcrowded and are already double

celled. S-1 and S-2, where there are no exterior windows, has a total of 210 square feet in each. With 8 inmates instead of 4, each person has less than 30 square feet each. In the S-4 area, he found 8 people in 2 cells which totalled 238 square feet. Because inmates are in protective custody in this facility, there are no classes and no programs. Therefore, inmates are out of their cells only for exercise.

There had been only four hours of psychiatric time per month for the preceding six months. Although the inmates have appropriate gym access, Miller found the gym equipment to be inadequate because 45 -60 inmates were in the area at one time. The meal service took three shifts to finished, but he observed no rushing of inmates.

6. Spring Creek Correction Center

[DOC requests to permanently increase population capacity by 50 inmates.] Miller spent 12 hours at SCCC on February 2, 1993 and talked to 25% of the inmate population. The count was 438 [maximum is 416; emergency is 436]. None of his observations indicated overcrowding.

However, in his opinion, DOC's request to double cell up to 50 cells is a bad idea because it would cause infrastructure problems. Education programs are "maxed" now because of limited space and resources. Although hobby crafts are popular and well-managed, it is "maxed out" also. Likewise, the increase would force inmate idleness because the jobs held by inmates are "maxed out" now.

According to staff reports to him, the infrastructure is not

adequate to handle the increase unless there are one additional physician's assistant, a drug and alcohol person along with 2 new teachers and 2 new transport officers added to staff.

He received inmate complaints about the temperature of the food. He thought this resulted from the food being brought into the facility by handcarts and served cafeteria style.

SCCC houses 20 - 100 year sentenced inmates. If both staff and program space were increased, Miller's only concern about the increased population would be a decrease in inmate initiative to work at something and to be discipline-free in order to earn a single cell. However, he noted that if DOC did double 50 of the 128 cells, some single cells would still be available to motivate inmate behavior.

7. Hiland Mountain Correctional Center [HMCC]

Miller spend 6 and 1/2 hours at HMCC on February 4, 1993. The population count was 278 [maximum is 225; emergency is 233]. Miller observed the following indicia of overcrowding. This facility has the only sex offender program in the system, and it has a six month wait to get into it. There is a 3 - 4 month wait to get into a substance abuse program. There is some double bunking, but no one is locked in.

Close custody inmates should be housed elsewhere. His conclusion is based upon an incident of violence by a close custody inmate whom the staff said should be housed elsewhere. He concluded the facility does have good handicapped inmate access.

8. Mat-Su Pretrial [MSPT]

Miller spent 5 hours on January 30, 1993. The population

count was 78 [maximum is 76; emergency is 79]. Miller concluded that the FSA limits are on target because if they are exceeded, the only place to house inmates is on cots in the dayrooms. The only bathrooms are in the cells so an unoccupied cell would have to be left open at night. Incidents of fighting went from 1 per month to 2 -3 per week in December, 1992 and January, 1993 when the counts were as high as 106.

Finally, he noted that all support facilities are designed for the present caps.

9. Palmer Medium [PCC/Med]

[DOC requests that a temporary increase of 10 inmates be permitted for 6 months.] Miller spent 5 hours at Palmer Medium on February 5, 1993. The population count was 180 [maximum is 165; emergency is 172]. Although Miller observed nothing while he was there, staff reported to him that when SCCC closed, misdemeanors had to be housed in cots in the day room; fights increased; and overnight security was sometimes increased. He did observe that some housing is double celled. In his opinion, the population cap is alright now, but should not be raised.

10. Palmer Minimum [PCC/Min]

Miller spent 2 hours at Palmer Minimum on February 5, 1993. The count was 174 [maximum and emergency is 176]. He found an efficiently operating facility without any evidence of overcrowding.

Summary

Miller formed a high impression of the staff. He concluded that overcrowding is present in the Alaska prison system and noted

the following. Housing for female inmates is below standards throughout the system. Handicap access is poor in most facilities. Separation of inmates based upon classification is inconsistent and noted that DOC has a contract with ACA to revamp its classification system. The DOC has a policy of double celling to meet population demands. Restraining for psychological purposes is done by the superintendent instead of by a mental health specialist.

In Miller's opinion, these problems are not difficult to address if DOC resources do not have to be expended to jiggle population numbers. In his opinion, the 10 FSA factors for determining capacity are excellent. The resulting capacities are appropriate and in one case are exactly right. He notes that they are objective as to square footage and the staff-to-inmate ratio. However, they are subjective as to indoor/outdoor recreational activities and prohibition of double celling of high custody with other inmates.[5] Nonetheless, in his opinion, the capacity numbers for each facility would not likely vary if more than one person applied those factors and came up with a capacity number. He does not accept the FSA provision that permits misdemeanor inmates to waive and to remain with sentenced felons. The acceptable classification rule is that 95% capacity is needed to give officials adequate opportunity to classify and house inmates.

Affidavits were submitted by both parties. They state as follows.

I. DOC personnel

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[5] Miller defines subjective as a standard or factor upon which reasonable minds could differ and, therefore, judgement is required.

The crowding problem was precipitated by the reduction in the DOC FY 1993 operating budget of approximately $8 million ($4M in overall executive branch reductions + $3.5M in unfunded personnel costs + $.5M legislative unallocated reduction). In addition, a Joint House and Senate Finance Subcommittee further directed DOC to spend $1.7 of its FY '93 allocation to establish and maintain intermediate sanctions (in lieu of jail.) DOC absorbed this reduction primarily by downsizing Wildwood Correction Center from 204 to 55.

The permanent changes sought by DOC are as follows. It seeks to close two dormitories at Lemon Creek and three dormitories at Fairbanks Correctional Center in order to convert both to program space. To regain bed space, DOC will double bunk: (a) all 52 cells at LCCC for an increase of 6 beds; and (b) 30 of the 72 cells at FCC for a gain of 4 beds.[6]

DOC seeks to add 2 beds to Sixth Avenue and to FCC which would drop the square footage in each of these dorms to 45 square feet per inmate. It justifies this reduction on grounds that no prisoners will remain in these housing areas for longer than 15 days and often no longer than 72 hours.

In the month of July, 1992, 95% of the prisoners admitted to Sixth avenue remained there for less than 15 days. On July 1st and July 30th however, 37% had been there longer than 15 days.

The inmate population at FCC has changed since the FSA. Instead of being a prison for sentenced inmates, it now consists

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[6] **There is no representation or argument that this change decreases the square footage below that required by Section III.G of the FSA.**

of pretrial detainees, sentenced misdomeanants and paroles/probationers facing revocation.

DOC seeks to double bunk up to 10 of the 16 cells on the second floor in each of the general population mods at SCCC for a gain of 50 beds. The size of these cells is currently 88 square feet. The dayroom space would continue to be 75 square feet per inmate.

The Alaskan prison inmate population increased by 21 prisoners in the period of December, 1991 to July 1992. For the period July 1992 to December, 1992, the inmate population increased by 179 prisoners. Combined with the loss of beds due to closing Wildwood, the increase need for existing beds in that period was 325 prisoners.

II. Inmate affidavits

Affidavits from SCCC state that it is already overcrowded at present population cap levels. The affidavits cite the time it takes to get meal service, lack of recreation equipment, mod noise levels, insufficient number of available showers, overtaxed laundry facilities, inadequate number of telephones, overworked mod unit managers, too little space in gym, weightlifting room, law library, visiting room, main library, property issue room, and on gym bleachers. There are too few programs, hobby craft opportunities, medical facilities and opportunities for inmate employment. Inmates are currently over-classified.

The affidavits also state concern about triggers for violence in the future and the loss of inmate opportunity/motivation to behave in order to earn a single cell.

The affidavits of inmates at Fairbanks Correction Center state that it is already overcrowded and cite 2 extra women sleeping on cots on the floor, segregation cells holding non-segregated male prisoners, lack of chairs in the dayroom, only one telephone line per 44 inmates, lack of socks and underwear for each inmate, tripling of inmate grievances, and overclassification of prisoners.

Affidavits from inmates at LCCC state that it is overcrowded and cite inadequate shower and laundry facilities, and too few inmate jobs. The express concern that converting mod cells to dorms will impact an inmate's motivation to behave and opportunity to work in order to earn a single cell.

Affidavit from Ketchikan Correctional Center states that the facility is overcrowded and cites inadequacy of the law library, programs, recreational space and classification of inmates.

Affidavit from Palmer Minimum states that it is overcrowded and cites the lack of restroom and laundry facilities, canvas cots without mattresses, only 6 chairs in the dayroom, inadequate recreational space, and inadequate security for inmates.

Affidavits from Hiland Mountain state that it is overcrowded and cite lack of recreational and gym space, inadequate dining area and staff to keep it clean, too small rooms, too few urinals, inadequate medical treatment, a wing being without hot water for three weeks, 20 year old bedding, old and inadequate recreational equipment, unhealthy hobby shop area, inadequate sewage disposal facility, and discontinuing of programs such as Male Awareness for sex offenders.

Affidavits from Wildwood state there is overcrowding and cite lack of recreation space causing 24 hour lock-down, putting a sentenced prisoner in with pre-trial inmates, lack of access to educational programs, and lack of staff supervision which restricts access to recreation.

Affidavits from Mat-Su Pretrial state it is overcrowded and cite inmates sleeping on cots, "borrowing" bathroom facilities, and lack of rehabilitation programs.

Affidavit from Cook Inlet inmate states that lack of staff has decreased opportunity to open a barbershop to only once a week, and there are no drug and alcohol treatment programs.

From the testimony presented to the court in the two days of hearings as well as the filed affidavits, the court finds the following facts, pertinent to the issues before the court, have been established by a preponderance of the evidence.

1. The Legislature reduced the FY '93 operating fund allocation to DOC by approximately $8 million and by designating an additional $1.7 for development of intermediate sanctions, further reduced funds available to DOC to operate its existent facilities. The percentage of total budget represented by this reduction is not established by the evidence.

2. Expert Hutto expressed no opinion about reducing the space at 6th avenue to below the 50 square feet per inmate requirement of the FSA. He did state that the present cap of 108 is preferable. Expert Miller expressed no opinion about reducing the space at 6th Avenue to below the square footage requirement of FSA. However, his opinion that the present capacities are "excellent"

impliedly rejects decreasing the present square feet per inmate at 6th avenue.

3. Expert Hutto expressed the opinion that no negative impact would result if Fairbanks Correctional Center increased the number of double cells to raise the population caps by 2 inmates. Expert Miller, although he found that an inmate population which had 17 inmates more than permitted by the emergency cap, clearly established several indicia present of overcrowding, expressed no opinion about DOC's request to increase the permanent capacity number by 2 inmates.

4. Expert Hutto approved of DOC's plan to double cell and increase SCCC by 50 inmates provided that the amount of activity available to inmates remain the same; and the program space and staff were increased proportionately to the increase in capacity. Expert Miller disapproved of DOC's request to increase population by 50 inmates finding that the infrastructure could not absorb the additional inmates citing filled-to-capacity educational and hobby craft programs. Like Hutto, however, he testified that any population increase would have to accompanied by additional staff and program opportunities for inmates.

The affidavits of inmates were instructive, but not persuasive because they begin with the premise that the facility(s) in which they are or have been housed are already overcrowded under the existing FSA population caps. Although such testimony may be helpful in considering the plaintiff's motion for sanctions for violating existing population caps, it is not helpful in resolving the issue of whether modification of the FAS is appropriate to

permanently increase in the capacities of 6th Avenue, FCC and LCCC.

DISCUSSION

In the context of institutional reform litigation there is no authoritative Alaska precedent directly addressing the issues raised by the parties' contentions. However, both parties contend that the recent United States Supreme Court Decision in Rufo v. Inmates of Suffolk County Jail, 502 U.S. ___, 112 S.Ct. ___, 116 L.Ed.2d 867 (1992), which construes the federal counterpart of ARCP 60(b) under facts similar to those presented in this case is appropriate to resolve the DOC's motion.

The court agrees. First, ARCP 60(b) is identical to Federal Rule 60(b). See Norman v. Nichiro Gyogyo Kaisha, Ltd., 761 P.2d 713, 715-16 n.4 (Alaska 1988). Second, FSA Section IX.A.4 specifically provides for modification pursuant to ARCP 60(b)(5) or (6). Third, both Rufo and the present case involve ongoing institutional reform litigation requiring years to complete during which changes in circumstance are likely.[7] Fourth, Rufo and the present case involve conditions in correctional institutions.

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[7] Rufo began in 1971 when pre-trial detainees housed in the Suffolk County Jail sued Boston Municipal and Massachusetts state officials in federal court re: the conditions of confinement in the facility. Following trial, the federal court held that the facility was unconstitutionally overcrowded and that the conditions in the facility amounted to unconstitutional punishment in violation of the Due Process clause of the U.S. Constitution. As a remedy, the government defendants were enjoined from double celling inmates at the facility after November 30, 1973 and from incarcerating any inmates at the facility after June 30, 1976.

A plan to construct a new facility was submitted to the court in 1978, and formed the basis for a consent decree which resolved the case. Provisions of the consent decree required that inmates be provided single occupancy cells in the new facility, which was scheduled to be completed in 1983. In 1984 construction had not yet begun on the new facility. Based on inmate populations outpacing projections of inmate population, the government defendants sought modification of the consent decree to permit a larger facility and a later startup date.

In 1989, during construction of the new facility, the government defendants sought modification of the consent decree under FRCP 60(b)(5) and (6) to permit double celling of 197 of the 453 cells in the jail. The federal district court denied the modification. The federal court of appeals affirmed, and the government sought review in the Supreme Court which rejected the test used in the lower courts and remanded the case.

Lastly, in the context of this case, the Rufo consent decree and the negotiated FSA address similar subject matter which has been the subject of court oversight.[8] Thus, the court concludes that the standards set forth in Rufo are appropriate to resolve the DOC's motion to modify provisions of the FSA.

Section IX.B.4 of the FSA provides:

> 4. The parties acknowledge that a clear showing of material changes in circumstance or controlling law, material changes in the makeup of inmate population, or a record of good faith implementation and substantial compliance with the provisions of this agreement which ensures that the original and overall purpose of this agreement or a portion thereof will be met, may give rise to a request by either party that it be relieved from judgment, and that all or some provisions of this agreement be vacated and/or modified accordingly. Whether any material change that may occur was foreseen or unforeseen is an element that should be considered in any request for modification, but shall not be a determination in and of itself. The parties agree that an application to the court to modify or vacate shall be governed by the principles of Civil Rule 60(b)(5) and (6) and the following...

ARCP 60(b)(5) and (6) provide in relevant part:

> (b) **Mistakes -- Inadvertence -- Excusable Neglect -- Newly Discovered Evidence -- Fraud -- Etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . .
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> (6) any other reason justifying relief from the operation of the judgment.

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[8] Consent decrees are compromises reached by disputing parties that are approved and signed by a judge. Rufo v. Inmates of Suffolk County Jail, 734 F. Supp. 561, 563 (D.Mass.), aff'd, 915 F.2d 1557 (1st Cir 1990), vacated and remanded, 502 U.S. ___, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992); Ruiz v. Lynaugh, 811 F.2d 856, 858 (5th Cir. 1987); New York Ass'n for Retarded Children v. Carey, 706 F.2d 956, 958 (2d Cir. 1983). This combination of agreement and judicial intervention makes the consent decree a hybrid of a contract and a judicial order. Rufo, 116 L.Ed.2d at 876. See also, Note, The Modification of Consent Decrees in Institutional Reform Litigation, 99 Harv. L.Rev. 1020, 1020 n.2 (1986). Similarly, the Cleary FSA is a negotiated settlement between the parties that as been subject to court supervision.

In Rufo, the Supreme Court began its analysis with FRCP 60(b). Rule 60(b)(5) provides that a party may obtain relief from a court order when "it is no longer equitable that the judgment should have prospective application." Rufo, 116 L.Ed. at 886. Accordingly, the party seeking modification bears the burden of establishing that a significant change in circumstances warrants modification or revision of the agreement. Id.

A party seeking modification may meet its initial burden by showing either a significant change in factual conditions or in law. Id. Modification may be warranted: (1) when changed factual conditions make compliance substantially more onerous; (2) when the agreement proves unworkable because of unforeseen obstacles; or (3) when enforcement of the agreement without modification would be detrimental to the public interest. Rufo, 116 L.Ed.2d at 886-87 (citing Inmates of Suffolk County Jail v. Kearney, Civ. Action No. 71-162-G (Mass. Apr. 11, 1985); New York State Ass'n for Retarded Children, Inc. v. Carey, 706 F.2d 956, 968 (CA2), cert. denied, 464 U.S. 915, 78 L.Ed.2d 257, 104 S.Ct. 277 (1983); Philadelphia Welfare Rights Organization v. Shapp, 602 F.2d 1114, 1119-21 (CA3 1979), cert. denied, 444 U.S.1026, 62 L.Ed.2d 660, 100 S.Ct. 689 (1980); Duran v. Elrod, 760 F.2d 756, 759-61 (CA7 1985)).

Ordinarily modifications should not be granted where a party relies upon events that actually were anticipated at the time it entered into an agreement. Rufo, 116 L.Ed.2d at 887 (citing Twelve John Does v. District of Columbia, 274 U.S.App. DC 62, 65-66, 861 F.2d 295, 298-99 (1988); Ruiz v. Lynaugh, 811 F.2d 856, 862-63 (CA5 1987)). If it is clear that a party anticipated changing

conditions that would make performance of the agreement more onerous but nevertheless agreed with the agreement, that party would have a heavy burden to convince a court that it agreed to the agreement in good faith, made a reasonable effort to comply with the agreement, and should be relieved of the undertaking under Rule 60(b). Rufo, 116 L.Ed.2d at 887.

Once the moving party has met its burden of establishing either a change in fact or in law warranting modification of the agreement, the court must determine whether the proposed modification is suitably tailored to the changed circumstance. Rufo, 116 L.Ed.2d at 890. In evaluating a proposed modification, three matters are clear: (1) the proposed modification must not create or perpetuate a constitutional violation; (2) a proposed modification should not strive to rewrite the agreement so that it conforms to constitutional minimums;[9] and (3) a court should keep in mind the public interest in ruling on a request to modify based on a change in conditions making it substantially more onerous to abide by the decree. Rufo, 116 L.Ed.2d at 890-92.

1. Has the DOC made a sufficient showing of a significant change in circumstances under Rufo.

The DOC contends that it has made a sufficient showing of an unforeseen change in circumstances under ARCP 60(b): (1) a drastic budget cut of: a) the loss of $8 million in funding in the DOC's FY 93 operating budget, b) the legislative requirement that $1.77

[9] As noted in Rufo, "Once a court has determined that changed circumstances warrant a modification in a consent decree, the focus should be on whether the proposed modification is tailored to resolve the problems created by the change in circumstances. A court should do no more, for a consent decree is a final judgment that may be reopened only to the extent equity requires. The court should not turn aside to inquire whether some of the provisions of the decree upon separate as distinguished from joint action could have been opposed with success if the defendants had offered opposition." Rufo, 116 L.Ed.2d at 891.

million in DOC funds implement a program of intermediate sanctions; and (2) the unusual, unexpected increase in prisoner population has resulted in the DOC's inability to maintain its prison populations within emergency capacities under the FSA.

In response, the Plaintiffs contend the following. (1) The budgetary constraints were foreseen by the DOC or were foreseeable because: (a) DOC's budget is always dependent upon legislative appropriations, (b) the FSA was negotiated during a time of declining oil revenues, and (c) the contingent provisions of the FSA addressing budget contingencies militate against the DOC's assertions re: unforeseen budget cuts. (2) Under Rufo, financial constraints are never sufficient grounds to relieve government defendants of their obligations under an institutional consent decree or a final judgment. (3) The DOC agreed to a $4 million reduction in its annual budget and may not rely on the reduction as an unforeseen circumstance justifying modification of the FSA.

Under Rufo, modification to a consent decree should not be granted where a party relies upon events that were actually anticipated at the time the decree was entered into. Rufo, 116 L.Ed.2d at 887. Plaintiffs argue that the DOC anticipated the budget cut because "[t]he department has always known that its funding is dependent on legislative appropriation." Plaintiffs' Opposition at 5. The court disagrees. The fact that an administrative agency's budget is dependent upon legislative appropriation is determinative of the agency's reasonable expectations regarding the likely level of operational funding to

be appropriated. However, it is not determinative of whether the agency foresaw that a significant decrease in the level of operational funding would occur in a single year. Likewise, the argument that DOC foresaw declining operating budgets because the FSA was negotiated during a time of declining revenues lacks persuasion. Additionally, plaintiffs contend that because the FSA was written to anticipate shortfalls in legislative appropriation re: construction of long-term women's facilities, DOC should have anticipated the FY '93 budgetary shortfall. The contingency is provided in FSA Section III.L:

> L. New Facilities for Women
>
> 1. The Department shall establish an additional facility or devote all or part of an existing facility for long-term sentenced women to be in operation no later than July 1, 1994. The facility or unit shall be of such size as necessary to accommodate the population of long-term sentenced women projected to the year 2010, and to provide the programs and services required by this agreement. **In the event that the Department does not, by July 1, 1991, receive sufficient funding to construct the facility, plaintiffs shall be entitled to bring an action challenging the Department's policies and practices toward long-term sentenced women offenders. (emphasis added)**

This provision of the FSA anticipates that the DOC will either construct a facility for long-term sentenced women or convert an existing facility for exclusive use by long-term sentenced women. The contingency provides that if the DOC does not receive sufficient funding for either purpose, plaintiffs may bring an action challenging the Department's policies and practices toward long-term sentenced women offenders.

The court disagrees that the contingency being anticipated in this section of the FSA indicates that future budget constraints should have been anticipated by the DOC. The fact that the DOC may

have anticipated difficulty in securing sufficient capital appropriations to construct a new facility is not reasonably probative of whether the DOC anticipated future operating budgets which were seriously insufficient to maintain operation of existing facilities. Further, the omission of a contingency provision relating to legislative appropriation of operating funds strongly suggests that neither party anticipated significantly reduced operation appropriations.

Plaintiffs next argue that the consequences of the drastic budget cut were dictated by DOC because it chose to make its principal cost savings by downsizing Wildwood Correctional Center in Kenai from 255 inmates to 55 inmates. The court disagrees. The Department's reaction to the budgetary constraints is not an issue for purposes of this motion. Rather, the threshold issue is whether the budgetary constraints are a sufficient change in circumstance justifying modification of the FSA.

Lastly, plaintiffs contend that mere financial constraints are never sufficient to relieve government defendants of their obligations under institutional reform agreements.

In Rufo, the United States Supreme Court mentioned "financial constraints" in the following context:

> [A] court should surely keep the public interest in mind in ruling on a request to modify based on a change in conditions making it substantially more onerous to abide by the decree. To refuse modification of a decree is to bind all future officers of the State, regardless of their view of the necessity of relief from one or more provisions of a decree that might not have been entered had the matter not been litigated to its conclusion. The District Court seemed to be of the view that the problems of the fiscal officers of the State were only marginally relevant to the request for modification in this case. 734 F.Supp, at 566. Financial constraints may not be used to justify the creation or

> perpetuation of constitutional violations, but they are a legitimate concern of government defendants in institutional reform litigation and therefore are appropriately considered in tailoring a consent decree modification. (emphasis added)

Rufo, 116 L.Ed.2d at 891-92.

The Rufo court recognized that public appropriations may be considered by the court as long as the result does not rise to the level of a constitutional violation of the plaintiffs' rights. Plaintiffs do not oppose the requested modification of population caps at 6th Ave, FCC or LCCC on grounds that to so modify the FSA would violate a constitutional right. Consequently, the issue in this case is whether the decrease in the DOC's operating budget by $8 million presents a sufficient "change in circumstance" under ARCP 60(b) to permit modification of the FSA - an issue not decided by Rufo.

However, in Rufo, the United States Supreme Court articulated the three circumstances under which modification may be warranted: (1) when changed factual conditions make compliance substantially more onerous; (2) when the agreement proves unworkable because of unforeseen obstacles; or (3) when enforcement of the agreement without modification would be detrimental to the public interest.

The DOC argues that the loss of $8 million in funding and the increase in prisoner population were unforseen[10] and have made compliance with Section VIII.C of the FSA substantially more

[10] Rufo clearly indicates that unanticipated increases in inmate populations constitute a sufficient change in circumstance under FRCP 60(b). 116 L.Ed.2d at 887. Plaintiffs do not argue that the increase in inmate population was anticipated by DOC. They do contend that the changes sought by DOC to LCCC, FCC and 6th Avenue will not solve the overcrowding problem.

onerous.[11] In response, plaintiffs contend that allowing modification of consent decrees because the government has failed to allocate sufficient resources undermines the purpose of such decrees and provides the government with the key to avoiding its obligations under such decrees. The court finds that issue troublesome, but based upon Rufo must disagree. Rufo requires that the proposed modification must neither create nor perpetuate the violation the agreement was intended to remedy. 116 L.Ed.2d at 891-92.[12]

Lastly, plaintiffs contend that mere changes in legislative appropriation would automatically open the door to re-litigation of the merits of every consent decree and undermine the finality of such agreements. The court agrees. The plaintiffs' contention that the purpose behind institutional reform litigation can be "torpedoed" by the legislature's refusal to fund the reform is very valid. However, in the context of this case, the DOC is not seeking to make fundamental changes to the FSA. It does not seek to change the capacity criteria not alter any of the underlying premises of its agreement. Rather, it seeks upward adjustment of maximum capacity at three institutions. Finally, the Rufo

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[11] The provisions of the agreement for which the DOC seeks modification are located in Section VIII.C. of the FSA at 74, which provide for the following maximum capacities of correctional institutions:

Facility	Maximum Capacity	Special Beds	Emergency Capacity
Sixth Avenue	104 (106)	7	108
Fairbanks CC	183 (185)	21	194
Spring Creek CC	412 (462)	32	428

[12] Thus, contrary to plaintiff's assertion, under the Rufo standard, a legislature could not refuse to fund forced bussing if necessary to comply with decrees involving desegregation of schools because a constitutional violation would be at issue.

requirement that DOC establish unforeseen changed circumstances prevents mere non-funding being sufficient to permit changes in the FSA.

Thus, the court is left with the issue of whether the decrease in the DOC's budget by $8 million combined with a significant increase in inmate population present a sufficient "change in circumstance" under ARCP 60(b). On the record before it, he court finds that it does. As discussed above, the legislature's decrease in the DOC operating budget for FY '93 in the amount of $8 million was not foreseeable by the DOC. No evidence before the court suggests that an increase of 176 inmates in the six months from July, 1992 through December, 1992 was foreseen.[13]

Thus, the court concludes that the decrease in funding and the increase in inmate populations constitute a "changed factual condition" which makes compliance with the maximum capacity provisions of Section VIII.C substantially more onerous. Having made this threshold determination, the court must now consider whether the DOC's proposed modifications to the FSA are tailored to resolve the problems created by the change in circumstances.

2. Are the DOC's proposed modifications tailored to resolve the problems created by the change in circumstances?

The temporary changes sought in the housing arrangements at LCCC for 6 inmates, at FCC by four inmates, and at Palmer SCC by 10 inmates on their face were not tailored to resolve the problems created by the change in circumstance. Nothing before the court suggests that temporarily increasing the number of inmates in those

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[13] As set forth in Cooper's affidavit, the prior six month period had an increase of 21 prisoners.

three facilities for the period October 1992 until April 1993 would substantially reduce the operational costs of running the prisons such that it would either help to absorb an $8 million decrease in one year's appropriations budget or accommodate an inmate population increase of 179 prisoners in six months. Consequently, the temporary modifications sought by DOC are not tailored to resolve problem caused the change of circumstances.

The 2 person permanent increase in the maximum population capacity at Sixth Avenue violates not only the square foot capacity standards set forth in the FSA, it also violates the ACA 50 square foot per inmate standard testified to by Hutto. Further, the affidavit evidence before the court admits that although DOC argues that prisoners would not often be housed in the cells for longer than 72 hours, on both the first and last days of July, 1992, 37% of the Sixth Avenue facility had been there longer than 15 days. Consequently, the permanent modification proposed by DOC to Sixth Avenue is not permissible.

The 2 person permanent increase in the Fairbanks Correction Center does not violate any other provision of the FSA and is permissible. It is tailored to solve the problems created by an unforeseen budget cut and prisoner increase.

The 50 inmate change in the population cap of LCCC is permissible provided that staff-inmate ratios, activities and activity space remain unaltered by the population increase. It does not violate the square footage provision of FSA and both experts agree that if staff and program modifications are made by DOC, 50 additional inmates at LCCC is acceptable. It is a

modification that is tailored to address the problems created by an unforeseen $8 million reduction in operational funds and an unforeseen increase in prison population. The fact that it does not equal the bed reduction that occurred when DOC reduced Wildwood by 149 prison beds is not determinative of whether it is tailored to meet the changed conditions.

NOW, therefore, it is hereby ORDERED

(1) that the motion by DOC to temporarily increase the number of beds at Lemon Creek Correctional Center by six inmates, at Fairbanks Correctional Center by 4 inmates, at Palmer Security Correctional Center by 10 inmates, and to permanently increase the maximum capacity at Sixth Avenue by two inmates is **DENIED**; and

(2) that the request to permanently increase the maximum capacity of Fairbanks Correctional Center by two inmates and Lemmon Creek Correctional Center by 50 inmates is **GRANTED.**

DATED at Anchorage, Alaska, this 25th day of October, 1993.

Karen L. Hunt
Superior Court Judge

I certify that on 10-25-93
a copy of the above was mailed to each
of the following at their addresses of
record: Stark
Hicks Volland Williams
Secretary/Deputy Clerk