

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DAVID DONHAUSER,

Plaintiff,

01-CV-1535

-against-

DNH/GHL

GLENN S. GOORD, Commissioner, NY DOCS; MARTHA
E. YOURTH, CSW Guidance Specialist; DOMINIC
MARTINELLI, Sex Offender Program Counselor; SUE
CARTER, S.C.C., Oneida Corr. Facility,

Defendants.

SETTLEMENT AGREEMENT

I. Introduction

A. Plaintiffs in this class action comprise “current or former New York State prisoners who have lost or been denied good time credits or have been threatened with the loss or denial of good time credits because of a refusal to admit guilt to criminal sexual conduct as part of the Sexual Offender Counseling Program.” The action was filed by David Donhauser on October 10, 2001, seeking declaratory and injunctive relief for alleged violations of his rights under the Fifth Amendment to the United States Constitution.¹ In the Second Amended Complaint, plaintiff alleged that various Department of Correctional Services (DOCS) officials violated his Fifth Amendment right against self-incrimination by denying him parole and threatening to deny him good time based on his refusal to participate in DOCS’ Sex Offender Counseling Program (SOCP), a therapeutic

¹ Procedurally the posture of the case has changed since the original complaint was filed, plaintiff’s First and Fourth Amendment claims and claims for compensatory damages were dismissed; in addition, the class was certified following opposition from defendants on February 15, 2005.

program for sex offenders that requires participants to discuss their history of sexually offending behavior.² Plaintiff alleged that if he refused to divulge such information in connection with the SOCP, he would automatically lose his good time credits. Plaintiff alleged that this constituted a violation of his Fifth Amendment right against self-incrimination.

B. The defendants deny any and all allegations, including but not limited to the allegations in the Second Amended Complaint asserting violations of the plaintiff's Fifth Amendment right against self incrimination based upon the requirement that inmates discuss their history of sexually offending behavior in SOCP, and note that the purpose of the program is to prepare offenders for release to society by equipping them with the knowledge that they will need to avoid committing future sex offenses, and by enhancing the likelihood that the inmate will be able to lead a prosocial, law abiding life upon release from custody.

C. Defendants in this case are all sued in their personal and official capacities.

D. For purposes of this Settlement Agreement (hereinafter also referred to as Agreement and Settlement Agreement), the term "Parties" shall include the plaintiff class and the Defendants in their official capacities.

² In October 2001, DOCS instituted a standardized six month long SOCP, which is the subject of this lawsuit. In November 2007, following enactment of New York Correction Law § 622, DOCS began implementation of a Sex Offender Counseling and Treatment Program (SOCTP) consistent with current best practices in the field of sex offender treatment. The new SOCTP provides different levels of treatment based on an offender's risk level as determined utilizing actuarial risk assessment instruments and any special needs of the individual offender. The new SOCTP includes six month long modular programs for low risk offenders, residential therapeutic community programs staffed by psychologists and licensed social workers for moderate to high risk offenders, and a number of specialty programs for offenders with special needs.

E. This Settlement Agreement is submitted and entered into as a settlement of all claims, including but not limited to the claims for declaratory and injunctive relief set forth in plaintiff's Second Amended Complaint.

F. On February 15, 2005, the Court granted plaintiff's motion for class certification over the opposition of the defendants.

G. The class representatives seek, on behalf of themselves and the Plaintiff Class, injunctive and declaratory relief against the defendants to remedy alleged violations of their Fifth Amendment right against self-incrimination.

H. The plaintiffs and defendants mutually desire to settle all claims asserted in the Complaint.

I. The plaintiffs and defendants agree that in the absence of a settlement, members of the Plaintiff Class are likely to assert substantially similar claims with respect to the practice of requiring disclosure of past sexual offending behavior in connection with DOCS' new Sex Offender Counseling and Treatment Program (SOCTP).

J. Counsel for the Parties negotiated this Agreement for approximately two months. The resulting Agreement, subject to approval by the Court upon notice to members of the Plaintiff Class, will settle all the declaratory and injunctive claims in this action.

K. The Notice of Proposed settlement was posted in all facility law libraries, general libraries, inmate housing areas, and all Sex Offender Counseling and Treatment Program housing and programming areas, and provided to the Inmate Liaison Committee and the Inmate Grievance Resolution Committee at each Correctional Facility beginning on or before May 30, 2008.

Thereafter, the Notice was supplemented by adding the proposed Private Settlement Agreement dated March 13, 2008, and remained posted until at least August 29, 2008.

L. The Court received objections and comments from fifty (50) inmates, which have been reviewed by Counsel for the Parties and addressed with the Court. As a result, certain modifications have been made to the terms of this Settlement Agreement.

M. The terms of this Settlement Agreement shall remain in effect for a period for two (2) years from the date that the Agreement is signed by the parties and shall be binding on the parties, their successors, agents, employees and all persons acting in concert with them.

II. IT IS AGREED BY AND BETWEEN THE PARTIES AND THEIR RESPECTIVE COUNSEL AS FOLLOWS:

1. Limits of Confidentiality, Partial Waiver of Confidentiality and Acknowledgment

A. During the life of this Agreement, the Department of Correctional Services shall upon admission of any inmate into any DOCS SOCTP provide to each participant a “Limits of Confidentiality, Partial Waiver of Confidentiality and Acknowledgment” form to be signed by the inmate after the inmate has had an opportunity to review the form with treatment staff. The form shall set forth the program policy with respect to confidentiality and reporting requirements, and shall include the following provisions:

I understand that the primary purpose of the program is to reduce the likelihood of reoffending by assisting me to control my chain of behaviors that lead to sexual offending. I also understand that I am not required to admit the commission of a particular crime, whether it resulted in the present commitment or not.

Rather, for successful program participation, I may discuss my behavior in general terms without providing the full names of victims, without disclosing the exact dates, times, and places of various sexual offending behavior, and without admitting to any specific crime or the violation of any specific section of the Penal Law. Nonetheless, I must openly and honestly discuss the behavior that resulted in my incarceration and

referral to the program, demonstrate acceptance of responsibility for the conduct that resulted in my criminal conviction and demonstrate an understanding of my sexual offending behavior and cycle of abuse.

I have been advised that no written or oral statement made by me in conjunction with treatment services rendered in connection with the Sex Offender Counseling and Treatment Program may be used against me in a subsequent criminal proceeding.

I have further been advised that I may not reveal in any subsequent criminal proceeding any information disclosed by another inmate in a group therapy session or otherwise disclosed in conjunction with treatment services rendered as part of the Sex Offender Counseling and Treatment Program.

B. Counsel for the plaintiffs has been provided with the proposed “Limits of Confidentiality, Partial Waiver of Confidentiality and Acknowledgment” dated March 11, 2008, and hereby acknowledges that the proposed form is satisfactory. The parties agree that the contents and layout of the form may be subject to change, however, the immunity provision set forth in section II.1.A. of this Agreement shall not be changed during the term of this agreement absent a change in the law or a court order prohibiting Defendants from continuing to grant such immunity, or upon agreement by counsel for the parties.

2. Compliance Monitoring

A. In the event that plaintiffs’ counsel finds that NYSDOCS is not in substantial compliance with this Agreement, plaintiffs’ counsel shall bring the facts supporting that belief to the attention of defendants’ counsel and give NYSDOCS an opportunity to investigate and correct the alleged problem prior to counsel seeking court intervention concerning such alleged substantial non-compliance.

B. Plaintiffs’ counsel may communicate in writing, directly with NYSDOCS counsel’s office in regard to complaints received by plaintiffs’ counsel from class members concerning their

participation in SOCTP. Also, plaintiffs' counsel will provide a copy of any such communication to defendants' counsel. NYSDOCS shall provide a written, substantive response to any such complaint letter within 30 days of receipt of the complaint.

3. Notice

NYSDOCS has provided notice of the material terms of this Settlement Agreement by posting notices, with the content to be mutually agreed upon, describing the material terms of this Settlement Agreement, as well as contact information for class counsel and the Court as set forth in Paragraph I-K, above.

4. Meeting of Counsel

For a period of two (2) years from the time this Agreement is signed by the parties, if plaintiffs' counsel believes that the NYSDOCS is not in "substantial compliance," with the terms of this Agreement, plaintiffs' counsel may request a meeting with counsel for defendants and NYSDOCS counsel at a mutually agreeable time and place to discuss and attempt to resolve the dispute(s). For the purpose of this Agreement "substantial compliance" means NYSDOCS' failures or omissions to meet the terms of this Agreement were not minimal or isolated but were substantially and sufficiently frequent and widespread so as to be systemic. Any such request for a meeting made by plaintiffs' counsel shall be in writing. The parties will use their best efforts to schedule and attend such meeting(s) within thirty (30) days of NYSDOCS' receipt of plaintiffs' counsel's written request for a meeting pursuant to this Paragraph. Nothing said by either party or counsel for either party during those meetings may be used by the opposing party in any subsequent litigation in this or any other lawsuit or for any purpose other than implementing the terms of this Agreement.

4. Dismissal of Action

Upon the signing of this Agreement, all plaintiffs and defendants will jointly move the Court for entry of an Order dismissing this action pursuant to Federal Rules of Civil Procedure 23(e) and 41(a)(1) and will attach a copy of this Settlement Agreement to such motion.

5. Term of Agreement

The terms of this Settlement Agreement shall remain in effect for a period of two (2) years from the date that the Agreement is signed by the parties and shall be binding on the parties, their successors, agents, employees and all persons acting in concert with them. Consistent with the provisions of 18 USCA 3626 (b)(2), after the two (2) year term, the terms and conditions of this Agreement shall automatically cease to bind the parties, as well as their successors, agents, employees, assigns and those acting in concert with them; and all claims on behalf of the plaintiffs are discontinued and dismissed with prejudice.

6. Private Settlement Agreement

This Settlement Agreement is a “private settlement agreement” as that term is used in the Prison Litigation Reform Act (PLRA), 18 USCA 3626(c). If any provision of this Settlement Agreement is declared invalid, illegal or unenforceable in any respect, the remaining provisions shall remain in full force and effect, unaffected and unimpaired.

7. Resolution of All Claims

This Settlement Agreement shall resolve all claims or potential claims for injunctive relief identified in the Complaint and that could arise from the allegations contained in the Complaint. This Agreement is not intended to restrict any defenses that may be available to defendants in any future claims, or the legal requirements, procedures, or standards to be employed in determining any such future claims.

8. Precedential Value

Nothing in this Agreement shall be construed as an admission or acknowledgment of liability whatsoever by any of the defendants or the New York State Department of Correctional Services regarding any of the allegations made by the plaintiff in his complaint. This Settlement Agreement may not be used for any purpose other than enforcement of the provisions of this Agreement and shall not in any way be construed as precedent for any other present or future litigation.

9. Attorneys' Fees

Defendants will pay to plaintiffs' counsel \$28,920.00 (twenty eight thousand nine hundred twenty dollars) in attorneys' fees, associated with legal work on the file since counsel's involvement in 2004 including settlement negotiations, which shall be payable out of the fund established pursuant to Section 17 of the NYS Public Officer's Law (no costs have been requested or will be reimbursed). Payment of this amount is subject to the approval of all appropriate New York State officials in accordance with the provisions for indemnification under New York Public Officers Law, Section 17, subdivision 3(a). Should such approval be denied, the Stipulation of Dismissal and this Settlement Agreement shall become null and void. In the event payment of this sum is not made within one hundred and twenty (120) days after the receipt by defendants' counsel from plaintiffs' counsel of a copy of the Stipulation of Dismissal with annexed Settlement Agreement, fully executed and "So Ordered" as entered by the Court, interest shall accrue on the outstanding principal balance at the rate set forth in 28 U.S.C. sec 1961, beginning on the one hundred twenty-first day after said receipt by defendants' counsel of the fully executed "So Ordered" Stipulation of Dismissal and continuing until payment is made. Plaintiffs agree to waive any rights or claims to attorneys'

fees, court costs, or disbursements incurred during the two (2) year period this Settlement Agreement is in effect.

Dated: Middletown, New York
October 3, 2008

ROBERT N. ISSEKS, ESQ.
Attorney for Plaintiffs
Law Office of Robert N. Isseks
6 North Street
Middletown, New York 10940

By: *s/ Robert N. Isseks*
Robert N. Isseks, Esq.
Attorney for Plaintiff Class
Bar Roll No. 507486
Telephone: (845) 344-4322
Fax: (845) 341-1760
Email: Isseks@frontiernet.net

Dated: Albany, New York
October 3, 2008

ANDREW M. CUOMO
Attorney General of the State of New York
Attorney for Defendants Glenn S. Goord, Martha E.
Yourth, Dominic Martinelli and Sue Carter
The Capitol
Albany, New York 12224-0341

By: s/ Douglas J. Goglia
Douglas J. Goglia, Esq.
Assistant Attorney General, of Counsel
Bar Roll No. 302406
Telephone: (518) 474-7184
Fax: (518) 473-1572 (Not for service of papers.)
Email: douglas.goglia@oag.state.ny.us

The Court approves this Private Settlement Agreement as to form only.
Section 1 II-9 is so ordered by the Court.

Dated: Utica, New York
October 3, 2008.

ENTER:

HON. DAVID N. HURD
UNITED STATES DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DAVID DONHAUSER,

Plaintiff,

-against-

GLENN S. GOORD, Commissioner, NY DOCS;
MARTHA E. YOURTH, CSW Guidance Specialist;
DOMINIC MARTINELLI, Sex Offender Program
COUNSELOR; SUE CARTER, S.S.C., Onieda Corr.
Facility,

Defendants.

ORDER

Civ. No. 01-CV-1535
(DNH) (GHL)

ORDER

On February 1, 2008, a teleconference was held, at which the attorneys for the respective parties – Robert N. Isseks, Esq., for the Plaintiffs and the Office of the New York State Attorney General for the Defendants – advised the Court that an agreement-in-principle had been reached with respect to the settlement of the above-captioned class-action lawsuit. (Docket Entry 177). A proposed Private Settlement Agreement was submitted for the Court’s approval on March 13, 2008. (Docket Entry 184), and a further teleconference was held on March 18, 2008, during which the Court and Counsel addressed the issue of notifying potential class-members of proposed settlement. (Docket Entry 185). The parties thereafter submitted a Notice of Class-Action Settlement for the Court’s consideration, and by Order dated May 13, 2008, the Court approved of the Notice and directed that it be posted in all correctional facility law libraries, general libraries, inmate housing areas, and all Sex Offender Counseling and Treatment Program areas. (Docket Entries 192 and 194). Thereafter, an objection to the proposed settlement was submitted to the Court by plaintiff David Donhauser, and numerous other objections were

submitted under seal by other potential members of Class. (Docket Entries 190, 195-222, 224-227). The objections filed under seal were forwarded to the attorneys for the respective parties, each of whom submitted letters in response to both Mr. Donhauser's objections, and those submitted by other potential class members. (Docket Entries 190, 191, 231, 232). A teleconference was held on September 23, 2008, and the attorneys for the parties were directed to submit a revised Private Settlement Agreement. (Docket Entry 234). The Court has read and considered the revised Private Settlement Agreement dated October 3, 2008 , all of the objections that have been submitted to the Court, and the responses to those objections submitted by Counsel. Based upon the foregoing, the Court concludes that the Private Settlement Agreement is fair, reasonable and adequate. Accordingly, the Private Settlement Agreement dated October 3, 2008 is approved, and this class action is hereby dismissed with prejudice.

IT IS SO ORDERED.

Dated: Utica, New York
October __, 2008

ENTER:

HON. DAVID N. HURD
U.S. District Court Judge

DECLARATION OF SERVICE BY CM/ECF

DOUGLAS J. GOGLIA, does hereby declare under penalty of perjury, that the foregoing is being filed with the Clerk of the District Court using the CM/ECF system, which is sending notification of such filing to:

Robert N. Isseks, Esq.
6 North Street
Middletown, NY 10940

I certify under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct. Executed on October 3, 2008.

s/ Douglas J. Goglia

DOUGLAS J. GOGLIA
Assistant Attorney General
Bar Roll No. 302406