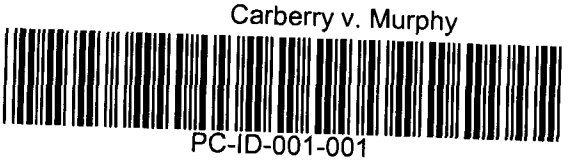
Consent Decree Motions



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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

CARBERRY, et al., Plaintiffs,	)	
v.	)	Civil No. 87-1249
MURPHY, et al., Defendants.	)	Judge Ryan

MOTION TO APPROVE AND ENTER CONSENT DECREE

Plaintiffs, through counsel, move this Court, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, to approve and enter the proposed consent decree of the parties for this action. In support thereof, plaintiffs submit the attached memorandum of law and further state as follows:

1. Counsel is the attorney of record for the plaintiffs in these consolidated cases.

2. The parties to the action have negotiated a Settlement Agreement that resolves the issues pending in this cause. Such Settlement Agreement is attached hereto.

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Plaintiffs,	)	
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v.	)	Civil No. 87-1249
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MURPHY, et al.,	)	Judge Ryan
	)	
Defendants.	)	
	)	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF APPROVAL AND ENTRY OF CONSENT DECREE

I. Introduction

This consolidated Section 1983 civil rights action challenges the "no beard" rule of the Idaho Department of Corrections as violative of plaintiffs' right to the free exercise of religion guaranteed by the First and Fourteenth Amendments of the United States Constitution. Plaintiffs seek class-wide declaratory and injunctive relief enjoining the enforcement of the department's policy ("policy"). Before the cases were consolidated, plaintiffs in Wilson v. McNeese sought a preliminary injunction enjoining the enforcement of the policy.

After an evidentiary hearing, Magistrate Williams issued a report and recommendation concluding that plaintiffs' motion be denied. Magistrate Williams' recommendation was subsequently adopted by Judge Ryan. (The Carberry action was pending at the time and no further action was taken). Thereafter, plaintiffs' counsel moved to consolidate the two cases and sought to obtain permanent declaratory and injunctive relief against the enforcement of the policy. The plaintiffs' motion to consolidate was granted after the pleadings were amended to conform to each other. [1]

After the cases were consolidated, plaintiffs moved for class certification. This motion is currently pending. Simultaneously, plaintiffs approached defense counsel about the possibility of settlement. After protracted negotiations, the parties were able to reach an agreement. At a status conference held before Magistrate Williams on March 4, 1988, the parties represented to the Court that a settlement had been reached, and the Court instructed the plaintiffs to file a copy of the proposed settlement with the Court for its review.

While the parties were finalizing the Consent Decree, some named plaintiffs expressed their dissatisfaction with some of the provisions of the Decree and indicated for the first time their intention to oppose it. This development necessitated further negotiations between the parties. After additional negotiations, the parties agreed to certain modifications to the

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[1] Specifically, the damage claims alleged in Wilson were severed, and the injunctive claims alleged in Carberry not related to the beard issue were dismissed voluntarily.

original proposal, but were unable to agree on a settlement that cured all the objections of the three plaintiffs who are opposed to the settlement. Nevertheless, the proposed settlement has the approval of at least two of the five remaining named plaintiffs. More importantly, under the standards for the approval of class actions, the terms of the Consent Decree represent a fair, adequate and reasonable settlement of the merits of this action.

II. Discussion

Pursuant to Rule 23(e), of the Federal Rules of Civil Procedure, a class action cannot be compromised without the approval of the district court. The purpose of this rule is to protect class members from an unjust or unfair settlement. Officers for Justice v. Civil Service Commission of the City and County of San Francisco, 688 F.2d 615, 624 (9th Cir. 1982), cert. denied, 459 U.S. 1217 (1983); Collins v. Thompson, 679 F.2d 168, 172 (9th Cir. 1982). Plaintiffs submit that the proposed Consent Decree provides the plaintiff class with substantial benefits, and represents a fair compromise in this action.

The fundamental principle governing the evaluation of a proposed class action settlement is whether the settlement is "fundamentally fair and reasonable." Officers for Justice, 688 F.2d at 625. This determination involves a balancing of several factors, including, the strength of plaintiffs' case; the risk, expense, complexity, and likely duration of further litigation; the risk of maintaining class action status throughout the trial; the amount offered in settlement; the extent of discovery

completed; and the stage of the proceedings; the experience and views of counsel; the presence of a governmental participant; and the reaction of the class members to the proposed settlement. Id. Finally, all these factors must be considered in light of the recognition that voluntary conciliation and settlement are the referred means of dispute resolution. Id.

Although the relative degree of importance to be attached to any of the factors listed above will depend upon the facts and circumstances presented by each case, id., it is universally accepted that the most important of the factors involves a determination of the benefits proffered to the class measured against the likely rewards the class would receive following a trial. See, Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424-25 (1968); Malehman v. Davis, 706 F.2d 426 (2nd Cir. 1983); In Re Corrugated Antitrust Litigation, 643 F.2d 195 (5th Cir. 1981); Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir. 1975); see generally, 3B J. Moore, Federal Practice, ¶ 23.80[4] (2d Ed. 1987). In this respect, the court must be careful not to turn the settlement or fairness hearing into a trial or rehearsal for a trial on the merits. Officers for Justice, 688 F.2d at 625. However, in order to "compare the terms of the compromise with the likely rewards of litigation," the judge must "apprise himself of all the facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated." Weinberger v. Kendrick, 698 F.2d 61, 73

(2d Cir. 1982) (citing and quoting, Protective Committee, etc., 390 U.S. at 424-25).

Undertaking the evaluation on the basis of the facts before the court, it is evident that the consent decree provides the relief sought by the plaintiff class. Plaintiffs sought declaratory and injunctive relief establishing their right to wear beards on religious grounds. The consent decree accomplishes this objective by providing the right to wear a beard, subject only to certain narrowly tailored restrictions. These restrictions are responsive to the security needs of the defendants and represent a reasonable and fair accommodation of the competing interests of the parties. Additionally, while the restrictions operate as an absolute prohibition against certain high risk inmates wearing beards, the overwhelming majority of inmates benefit from the policy set forth in the Decree.

Finally, and perhaps most significantly, plaintiffs' success in achieving their objective cannot be divorced from the fact that the weight of the case authority is not supportive. This Court recognized as much when it ruled against plaintiffs on their application for a preliminary injunction. Moreover, post-Safley v. Turner, 107 S.Ct. 2254 (1987) decisions of this Circuit have been extremely restrictive. See, Standing Deer v. Carlson, 831 F.2d 1525 (9th Cir. 1987) (upholding prison regulations prohibiting the wearing of religious head bands); Allen v. Toombs, 827 F.2d 563 (9th Cir. 1987) (upholding regulations prohibiting inmate spiritual leaders from conducting religious

ceremonies). Additionally, the lone favorable prisoner beard decision decided by a Court of Appeals has been reversed and remanded for reconsideration in eight of Safley and O'Lone v. Estate of Shabazz, 107 S.Ct. 2400 (1987). See, Fromor v. Scully, 817 F.2d 227 (2nd Cir. 1987), rev. and rem. 108 S.Ct. 254 (1987). Under these circumstances, the critical balancing of plaintiffs' gain under the proposed settlement against the likely result of trial, strongly militates in favor of approving the settlement.

Several other factors ordinarily require consideration in evaluating the fairness and adequacy of a proposed class compromise. For example, to ensure that the settlement was negotiated in good faith and free from fraud and collusion, the experience and views of competent counsel and the presence of a governmental participant, are important considerations. Officers for Justice, 688 F.2d at 625. The competence and experience of counsel in this case, can be reasonably inferred from their day-to-day involvement with prisoner civil rights litigation by virtue of their employment with the National Prison Project and the Idaho Department of Corrections, respectively. The participation of the deputy attorney general, who is presumed to act in the best interests of the state, serves as an additional safeguard against any potential collusion and fraud among the parties. Likewise, plaintiffs' counsel, associated with an organization dedicated to the protection of constitutional rights of prisoners, can be assumed to act in the best interests of

their clients.

Furthermore, the Court should take into account the prospects for protracted and complex litigation; and plaintiffs' attendant costs, should the Consent Decree not be approved. Officers for Justice, 688 F.2d at 625. The extent of discovery completed and the stage of the proceedings are similar factors in this respect. Finally, the risk to the class of proceeding to trial is an important consideration. Id. Wilson v. McNeese has been pending for 3 years. The staffing and dollar cost of conducting discovery to date, as well as the conduct of the preliminary injunction hearing, has been substantial. Further litigation, including conduct of depositions and the possibility of a full-blown trial, will only result in an unnecessary and debilitating staffing and financial drain on the already limited resources of both parties. The non-managerial and non-financial costs of further protracting this litigation would be even more destructive to the overwhelming number of inmates who stand to immediately benefit from the entry of the Decree. The conduct of a trial on the merits and a likely appeal would, even under the most favorable scenario, delay these benefits for a most inconsiderable amount of time. Under the worst scenario, these inmates would never achieve the benefits secured in the proposed settlement. The risk to the class of not prevailing under these circumstances, as well as the cost to the parties, clearly weights in favor of settlement.

The Court should consider the reaction of the class members

to the proposed settlement. Officers for Justice, 688 F.2d at 625. This determination cannot be made without notice to the class and an opportunity for the members of the class to submit comments and objections to the court. Mendoza v. U.S., 623 F.2d 1338 (9th Cir. 1980); Marshall v. Holiday Magic, Inc., 550 F.2d 1173 (9th Cir. 1977); Mardujano v.Basic Vegetable Products, Inc., 541 F.2d 832 (9th Cir. 1976). Although this process has not yet begun in this case, some objections can be anticipated. This is because the proposed settlement disqualifies certain inmates from growing beards. Some of the named plaintiffs fall into this category. Understandably, they have already made their objections heard. However, the actual number of inmates subject to disqualification is small in comparison to the state-wide inmate population who will benefit from the settlement. The overwhelming majority of inmates will be permitted to grow beards if the Consent Decree is approved.

Moreover such opposition to the settlement, is not sufficient reason for withholding approval if the proposed Decree is otherwise fair and reasonable. Parker v. Anderson, 667 F.2d 1204 (5th Cir. 1982) (settlement approved over objections of nine of eleven named plaintiffs); Handschu v. Special Services Division, 605 F.Supp. 1384 (S.D.N.Y, 1985) (unanimous approval of all named plaintiffs not required); Alliance to End Repression v. City of Chicago, 91 F.R.D. 182 (N.D. Ill. 1981) (settlement approved despite criticism of named plaintiffs); Reed v. General Motors Corp., 560 F.Supp. 60 (D. Tex. 1981) (consent decree

approved over objections of 23 of 27 named plaintiffs).

Although the presence or lack of opposition to the proposed settlement is one of the factors to be considered, Officers for Justice, 688 F.2d at 625, "overall fairness is the touchstone." Mendoza, 623 F.2d at 1344. A settlement represents a compromise, and in reaching it, it is unavoidable that some class members will be happier with a given result than others. Mendoza, 623 F.2d at 1344. The court's duty to the "unhappy class" members is to be informed of their objections and to determine whether the expressed dissatisfaction with the proposed settlement agreement deprives it of the fundamental fairness which it must possess to merit approval. Mandujano, 541 F.2d at 835. The notice and hearing requirements imposed by Rule 23(e) are addressed to this undertaking. This is all the dissenting class plaintiffs are entitled to. Their opposition does not require disapproval of the proposed Consent Decree.

III. Conclusion

The proposed Consent Decree of the parties provides significant affirmative relief to the members of the class, and compares favorably with any order the Court might have entered following a trial in this action. Plaintiffs therefore contend that the proposed consent decree represents a fair, adequate and reasonable compromise, and should be approved by the Court.

Respectfully submitted,

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Dated: May 12, 1988
Washington, D.C.

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ATTORNEYS FOR PLAINTIFFS

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

MIKE WILSON, et al., Plaintiffs, v. TIMOTHY McNEESE, et al., Defendants.	Case No. 85-1387
JOHN YOCHANAN CARBERRY, et al., Plaintiffs, v. AL MURPHY, et al., Defendants.	Case No. 87-1249 CONSENT DECREE

SETTLEMENT AGREEMENT

The parties to the above entitled action, by and through their attorneys of record, do hereby stipulate and agree in settlement of the above case as follows:

1. The Idaho Department of Corrections ("DOC") will institute and promulgate a new policy which will allow the growing of facial hair for religious reasons subject to the following conditions and restrictions:

a. The inmate must declare the religion to which he belongs and that the religion requires the growing of facial hair as a basic tenet of its practice. The determination of whether the religion requires the growing of a beard as a basic tenet will be made by the Director of Corrections using available community resources. The decision will be made within ten days. The Director's decision will be final and binding on the inmate. Initially, the Director and the DOC recognizes that Sikhs, Muslims and Orthodox Jews are required by the tenets of their respective faiths to refrain from shaving their beards.

b. The inmate must report that he is going to begin growing a beard to the deputy warden of security of the institution where he is housed.

(1) The inmate cannot begin growing the facial hair until approved by the deputy warden.

(2) Within one month, the deputy warden shall place the inmate in a secured cell until the beard is grown to the desired length, however, in no case longer than 2-1/2 inches as measured from the skin out. At the discretion of the deputy warden, any inmate who is classified as minimum custody or lower who is being

held in a minimum custody facility may be allowed to remain in the compound and not be placed in a secured cell.

(3) When the inmate has grown the beard to the desired length, he shall notify the deputy warden who will arrange for the inmate to have a new identification photograph taken, all costs of which will be paid by the inmate. Said cost shall be the same as the cost of a replacement identification card. If the inmate is indigent, all costs of the new identification photo will be paid by the inmate commissary fund.

(4) If the inmate is placed in secure housing prior to eligibility being determined, eligibility will be determined within 72 hours of placement.

(5) When the inmate is released after growing his facial hair, he shall be reinstated to the same custody, employment, and/or program as prior to his placement in secure housing within 10 days, unless he shall have become otherwise ineligible for reinstatement.

c. Once a beard is grown the inmate's appearance must be kept the same as the photograph on his I.D. card. Any significant change or alteration in the appearance of the beard will result in a disciplinary offense report for disobedience to orders. The inmate will be required to

shave and will thereafter be permanently ineligible to grow facial hair under this policy.

(1) Once the inmate has declared the religion which requires the growing of his facial hair, any subsequent change in religion will result in shaving of the beard and permanent ineligibility for the growing of facial hair under this policy, unless the new religion also requires a beard to be worn.

(2) If the inmate is ordered to shave by the Department medical staff for a medically prescribed reason, he may reapply for eligibility under this policy.

d. If the inmate chooses to shave his facial hair once grown, he must give notice to the deputy warden prior to shaving.

(1) Failure to give notice prior to the shaving of the facial hair will result in a disciplinary offense report.

(2) Once the facial hair is removed, the inmate shall be permanently ineligible for the growing of facial hair under this policy.

2. This policy and procedure section applies to all inmates in the custody of the Idaho Department of Corrections with the following exceptions:

a. Any inmate who has any record of escape or attempted escape, except as noted below:

(1) If the escape or attempted escape was not a criminal conviction or an institutional disciplinary offense finding of guilt, and, if the escape or attempted escape was not within the immediately preceding five (5) years, the inmate may apply to the Director for permission to grow facial hair under this policy. The burden of proving the circumstances of the escape or attempted escape is on the inmate. The Director's decision will be final and binding on the inmate.

(2) If the escape or attempted escape was from a furlough, work release, or non-secure facility, the inmate will be eligible. The burden of proving the nature of the escape or attempted escape is on the inmate.

b. Any inmate who has an institutional record of the following behavior:

(1) Rape or forcible sexual act.

(2) Killing another person.

(3) Taking of a hostage.

c. Any inmate who has a institutional record of possession of a staff uniform within the immediately preceding five (5) years.

d. Any inmate who within the past 24 months has an institutional record of behavior prohibited by the following Department of Corrections offense codes under Policy and

Procedure §318-C, and who classifies close custody or above;

(1) 02-H running from or resisting apprehension within a facility;

(2) 04-H participating in activity that directly results in the intentional death of another person;

(3) 04-C battery of another person (excluding mutual combat);

(4) 04-D participating in activity that directly results in the intentional injury of another person;

(5) 04-F kidnapping another person;

(6) 07-A unauthorized use of state property and supplies in an amount over $150;

(7) 07-B breaking into another person's room or locker;

(8) 07-D taking of property of the value of $150 or over;

(9) 16-B participating in any activity that aids or abets an escape;

e. For inmates being held in protective custody, the classification score sheet will be used to determine eligibility under this subsection.

f. Any inmate who has facial hair pursuant to this policy who shall be adjudicated guilty by criminal conviction or disciplinary offense for any of the behavior prohibited in paragraphs 2(a-d) shall be required to shave. The inmate may reapply for eligibility to the Director 24

months after the finding of guilt on the disciplinary offense. The Director's decision on eligibility will be final and binding on the inmate.

3. The provisions of the Consent Decree shall take effect immediately upon entry by the Court. The Consent Decree has a permanent, perpetual and binding effect upon the Defendants, their officers, successors in office, employees, agents and assigns and the directives contained herein and the relief granted herein shall be fully enforceable as between the parties hereto and all persons who may hereafter be subject to the jurisdiction of the Idaho Department of Corrections.

4. In order to avoid the expense and inconvenience of further litigation regarding matters contained in this Consent Decree, the parties agree to informally report any problems with its implementation to the parties or their counsel prior to seeking court relief. If no resolution is reached by the parties informally, they may submit the question to the presiding judge.

5. The parties agree that each party shall bear its own costs and attorney's fees in the settlement of this cause, except that plaintiff may petition the court for expenses and fees in the event that the defendants are found not to be in compliance with the terms of this decree.

6. The Court shall retain jurisdiction over this action to implement and enforce the provisions, of this Consent Decree for one year after the Defendants notify the Plaintiffs that it has been fully implemented.

FOR THE PLAINTIFFS:

NATIONAL PRISON PROJECT
OF THE ACLU FOUNDATION, INC.

Date: April 20, 1988

By _____
Mark J. Lopez
(Pro Hac Vice)

Date: _____

By _____
Stephen W. Beane
(Designated Local Counsel)

FOR THE DEFENDANTS

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

Date: 3 May 1988

By _____
Robert R. Gates

Date: 3 May 1988

By _____
Tim Wilson

ORDER

Good cause appearing to approve this Consent Decree:

IT IS THEREFORE SO ORDERED.

_____
United States District Judge

Date: