IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

NO. 5:06-CT-3135-FL

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| JOSEPH JOHN URBANIAK, JR., both individually and on behalf of all other similarly situated persons,<br><br>Plaintiff,<br><br>v.<br><br>SERGEANT DONNIE STANLEY, et al.,<br><br>Defendants. | ) | ORDER |

NO. 5:07-CT-3145-FL

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| EDWARD ALLEN, et al., both individually and on behalf of all other similarly situated persons,<br><br>Plaintiffs,<br><br>v.<br><br>ALVIN W. KELLER, et al.,<br><br>Defendants. | ) | ORDER |

This matter is before the court on the parties' joint motion for final approval of settlement agreement (DE # 42). A fairness hearing was held to review the proposed settlement agreement on July 27, 2010. At hearing, the court raised several issues regarding the proposed consent decree and directed the parties to file a supplement. On August 23, 2010, the parties filed a joint supplement regarding the proposed settlement. (DE # 129.) On August 27, 2010, the court resumed the fairness

hearing to determine final approval of the amended policy. Having reviewed the record, heard arguments from the parties, and considered objections to the proposed consent decree from class members, these issues raised are ripe for adjudication. For the reasons that follow, the court approves the proposed consent decree, which is entered contemporaneously.

## BACKGROUND

On December 12, 2006, plaintiff Joseph John Urbaniak, Jr. ("plaintiff"), filed this action *pro se* pursuant to 42 U.S.C. § 1983. He alleged that his rights pursuant to the First Amendment to the United States Constitution and the Due Process Clause to the Fourteenth Amendment of the United States Constitution were violated because he was denied several book and magazine publications. On April 14, 2007, North Carolina Prisoner Legal Services ("NCPLS") informed the court that it would provide representation to plaintiff. NCPLS then filed an amended complaint on behalf of plaintiff. In his amended complaint, plaintiff alleges that defendants violated his rights pursuant to the First Amendment when they arbitrarily and capriciously denied him access to publications without reference to legitimate penological interests. Plaintiff also alleges that defendants violated his rights under the Due Process Clause when they failed to provide him the opportunity to appeal rejected publications to the Publications Review Committee.

On May 30, 2008, the court consolidated Urbaniak v. Stanley, No. 5:06-CT-3135-FL, and Allen v. Beck, No. 5:07-CT-3145-H,[1] and designated the former as the lead case. On that date, the court also certified Urbaniak as a class action. The class members consist of all present and future inmates of the North Carolina Department of Correction ("DOC") who seek to receive publications

[1] In Allen v. Beck, consolidated plaintiffs allege consolidated defendants' handling of incoming publications violates the First Amendment and the Due Process Clause. NCPLS also represents consolidated plaintiffs.

through the mail. NCPLS continues to represent plaintiff and consolidated plaintiffs as class counsel.

After extensive but informal discovery, the parties reached a proposed consent decree and filed a stipulated settlement agreement. The agreement is closely tied to enforcement of defendants' revised publication policy, Division of Prisons, Department of Corrections, State of North Carolina, Publications Received/Possessed by Inmates, D.0100 (Mar. 22, 2010) ("policy").[2] The policy governs the treatment of publications that inmates receive in the mail and provides that DOC must explain reasons for disallowing publications and give time limits for appeals. The consent decree provides the following: (1) DOC must uniformly follow its written policy; (2) DOC must notify NCPLS of any significant change in its policy and the reason for the change at least forty-five (45) days in advance of the effective date of the change, unless an emergency requires a shorter notice;[3] (3) disapproval of a publication does not prevent an inmate from challenging the disapproval in an independent action; (4) DOC staff involved in reviewing inmate publications must be trained with a video at least once per year to allow consistency among prisons; (5) DOC must provide NCPLS information regarding pending appeals and rejected publications on a quarterly basis; and (6) DOC must make certain revisions.

On March 29, 2010, the court preliminarily approved the settlement agreement. Thereafter, the parties provided the class with notice of the settlement. The class members were given until

[2]The original draft of the policy submitted to the court was issued on March 22, 2010. A proposed amended policy was submitted on August 23, 2010.

[3]NCPLS may then within fifteen (15) days of the notice submit to the DOC its comments and suggestions, which the DOC must consider in good faith. If the DOC makes a change in the policy which NCPLS believes to be unconstitutional, NCPLS may ask the Court to disallow or modify DOC's proposal.

July 13, 2010, to submit objections. The court received sixty-nine (69) written objections to the settlement agreement, most of which challenged enforcement or certain provisions of the policy.[4]

The objections most commonly reference the following policy provisions and themes:[5]

> (1) Section .0109(f)(M), which restricts receipt of publications that are larger than 8 ½ x 11 inches and/or more than two inches thick ("size limit"), because it excludes many religious, legal and previously permissible publications;[6]
>
> (2) Section .0101(g), which provides in part that a "CD/DVD must be removed and destroyed prior to delivery to the inmate" ("CD/DVD limit"), as it does not give inmates the option to send the CD or DVD to someone else at their expense;[7]
>
> (3) Section .0101(a), which provides that an inmate in medium or close custody may receive a reasonable number of publications ("amount restriction"), because the provision is vague and fails to provide an inmate with notice of whether ordered publications will be allowed;[8]
>
> (4) Section .0101(a), which requires that publications originate from a publisher ("origination restriction"), on the

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[4]The court also received *pro se* motions during this period and untimely objections after the objection period expired. The court considers neither.

[5]In addition to the objections listed above, several inmates submitted objections that are too vague, fail to raise a question as to the fairness or adequacy of the settlement, or merely are general complaints regarding DOC conduct. Additionally, several class members submitted objections which are unrelated to the publications policy. As these objections are not pertinent to the proposed consent decree in this action, the court need not address them. Similarly, the court does not consider any specific challenge to the rejection of a specific publication, as these issues are preserved for review under the policy.

[6] The court received objections regarding this provision from the following inmates: Joseph M. Osorio (DE # 60), Leonard Camarata (DE # 61); Antwan Hargrove (DE # 66), Matthew A. Myers (DE ## 78, 119), Bobby R. Johnson (DE # 92), Angel Guevara (DE # 106), V.R. Berrier (DE # 112), and Robert W. Stanley (DE # 115).

[7] The following inmates filed objections regarding this policy: Matthew A. Myers (DE # 78), Marshall Brown (DE # 93), and Angel Guevara (DE # 106).

[8] The following inmates submitted objections to this proposed policy: Jamal Haith (DE # 58), Joseph M. Osorio (DE # 60), Leonard Camarata (DE # 61), Nijel Lee-Bey (DE # 97), and Robert W. Stanley (DE # 115).

grounds that it restricts publications provided by charitable organizations;[9]

(5) General objections that the policy is enforced in an inconsistent manner, which implicates section .0110;[10]

(6) Section .0109(f)(K), which bans sexually explicit material "which by its nature or content poses a threat to the security, good order, or discipline of the institution, or facilitates a criminal activity," on the ground that the restriction is too vague and lacks a legitimate penological purpose;[11]

(7) Section .0101(f), which forbids an entire publication if any portion of the publication is rejected, on the ground that is unfair;[12] and

(8) Sections .0109(a), (e), which respectively provide that "[n]o publication or material will be withheld solely on the basis of its appeal to a particular ethnic, racial or religious group" and that foreign language publications cannot *per se* demand disapproval, on the grounds that materials targeted toward African-American audiences or Spanish speakers often are rejected.[13]

At hearing, the court inquired into and the parties addressed these objections. Specifically, defendant Robert C. Lewis ("Lewis") candidly shared with the court that he personally had reviewed

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[9] The following inmates have submitted objections to this policy: Stanley Corbett, Jr. (DE # 53), Joshua McRavion (DE # 56), Christopher Ellerbe (DE # 98), and Carlos Sanchez (DE # 104).

[10] The following class members submitted objections to this policy: Charles Alonzo Tunstall (DE # 51), Stanley Corbett, Jr. (DE # 53), Darius Rutledge (DE # 57), Maurice A. Williamson (DE # 76), and Jimmy Ramos (DE # 82).

[11] The following inmates have submitted objections to this proposed policy: Joseph M. Osorio (DE # 60), Leonard Camarta (DE # 61), Christopher Adams (DE #70), Nijel Lee-Bey (DE # 97), Ian Aulden Campbell (DE # 100), and Dwight Parker (DE # 116).

[12] The following inmates submitted objections to this proposed policy: Raymond J. Jones (DE # 55), John Lowery (DE # 59), Jimmy Ramos (DE # 82), and Javier Rivera (DE # 89).

[13] The following inmates submitted objections implicating complaints of race or national origin discrimination: Laquail Wallace (DE # 65), Edward D. Huckabee (DE # 68), Maurice A. Williamson (DE # 76), Nijel Lee-Bey (DE # 97), Carlos Sanchez (DE # 104), and Jarkesh Johnson (DE # 110).

each of the objections raised in this action and diligently researched each objection. Defendant Lewis informed the court that § .0109(f)(M), the size limit, was of particular concern. He stated that he determined that this policy should be amended and that he already had initiated the process of amending the policy to provide an exception for religious and legal materials. Defendant Lewis further informed the court that the amendment to § .0109(f)(M) was memorialized in a DOC memorandum. As to the CD/DVD limit, defendant Lewis responded that, in the past, DOC officials would disapprove an entire publication if it came with a CD or DVD. He expressed concern over the administrative burden of handling CDs or DVDs in another manner but agreed to research and provide additional consideration to this provision.

In response to the amount restriction, defendant Lewis explained that flexibility in the number of publications an inmate is permitted to possess is essential and that it would be difficult to implement a more specific policy regarding this issue because the size and storage capacity at each DOC facility varies. Defendants also reasoned that a limitation on publications was necessary for security because some inmates used their publications as weapons or to block access from DOC officials. Plaintiffs' counsel expressed concern for inmates who experience custody changes and suggested that the policy be altered to allow inmates, who have experienced changes in custody status, be permitted to store their personal property, rather than have it destroyed. Defendants agreed to consider this policy change.

As to the origination restriction and ban on sexually explicit material, defendants responded that the former provision was implemented to further security at DOC by preventing contraband and the latter was implemented for disciplinary concerns. Defendants explained the censorship provision

was necessary because removing prohibited excerpts of publications would impose an administrative burden.

Regarding the enforcement objection, defendants conceded that the DOC's policies and procedures governing inmate publications were not consistently enforced in the past. Particularly, defendants stated that there was inconsistency with regard to which publications were banned. Both parties agree that the amended policies and procedures remedy these issues. Further, the parties pointed out that the policy is designed to enhance uniform enforcement. Similarly, regarding the objections charging race and foreign language discrimination, the parties noted that the policy prohibits such discrimination.

In light of the parties' continued diligence and thoughtful reflection upon the policies and procedures presented to the court at the July 27, 2010 hearing, the court deemed it appropriate to allow the parties additional time to file a supplement addressing the circumstances surrounding their negotiations and the amended policy. On August 23, 2010, the parties filed a joint supplement with an amended policy attached, Division of Prisons, Department of Corrections, State of North Carolina, Publications Received/Possessed by Inmates, D.0100 (Aug. 18, 2010)[14] ("amended policy"). The amended policy revises the size limit provision and allows inmates to receive softbound publications and hardbound religious and legal publications that are larger than 8½ x 11 inches and more than two inches thick; it also allows inmates to retain these religious and legal materials in most cases should their status change.[15] The amended policy includes a new provision which directs that an inmate's publications be stored when an inmate experiences a change in

[14]The policy does not contain an issue date, but August 18, 2010, is the date of the draft submitted.

[15]The forms that enforce these provisions have been amended to direct that the facility head, rather than a staff member, must provide the reason for rejecting these materials.

custody status .0101(h). Additionally, the amended policy permits inmates to send removed CDs or DVDs to an alternate address at their own expense. The court reconvened the fairness hearing on August 27, 2010. At hearing, the parties asked the court to approve the consent decree in light of the amended policy.

## DISCUSSION

### A. Compliance with PLRA

The court must determine whether the proposed consent decree complies with the Prison Litigation Reform Act ("PLRA"). In 1996, Congress enacted the PLRA and made substantial changes to civil rights litigation brought by prisoners pursuant to 42 U.S.C. § 1983 and other federal laws. The PLRA is intended to "provid[e] reasonable limits on the remedies available in lawsuits concerning prison conditions." Plyler v. Moore, 100 F.3d 365, 369 (4th Cir. 1996) (citation and quotation omitted). The PLRA provides:

> Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal rights, and is the least intrusive means necessary to correct the violation of the Federal right.

18 U.S.C. § 3626(a)(1)(A). Further, "the court shall not order any prospective relief that requires or permits a government official to exceed his or her authority under State or local law or otherwise violates State or local law" unless the following conditions are met: "(1) a federal law requires such relief to be ordered in violation of state or local law; (2) the relief is necessary to correct the violation of a federal right; and (3) no other relief will correct the violation of the federal right." 18 U.S.C. § 3626(a)(1)(B). In addition to limiting the type of relief a federal court may grant, the PLRA also curtails the longevity of such relief to two years after the court approves or grants the

relief, or one year after the court has entered an order denying termination of relief. 18 U.S.C. § 3626(b)(1).

The court has not received any objection to the proposed consent decree on the grounds that it violates the PLRA. Additionally, the court has reviewed the proposed consent decree and finds it is narrowly crafted to protect the Due Process and First Amendment rights of inmates. As it is not an intrusive remedy or overly broad, it complies with the terms of the PLRA.

B. Fairness and Adequacy Determination

Federal Rule of Civil Procedure 23(e)(2) provides that a court may only approve the binding settlement of a certified class action after determining that the proposed consent decree is fair, reasonable, and adequate. When reviewing a proposed settlement, the court separates the fairness inquiry from the adequacy determination. In re Jiffy Lube Secs. Litig., 927 F.2d 155, 158–59 (4th Cir. 1991).

While compromise and settlement are favored by the law, "[t]he primary concern addressed by Rule 23(e) is the protection of class members whose rights may not have been given adequate consideration during settlement negotiations." Id. at 158. Ultimately, approval of a class action settlement is committed to "the sound discretion of the district courts to appraise the reasonableness of particular class-action settlements on a case-by-case basis, in light of the relevant circumstances." Evans v. Jeff D., 475 U.S. 717, 742 (1986). However, "there is a strong initial presumption that the compromise is fair and reasonable." S.C. Nat'l Bank v. Stone, 139 F.R.D. 335, 339 (D.S.C. 1991) (quotations omitted). The manner of review is largely committed to the court's discretion: "it is entirely in order for the trial court to limit its proceedings to whatever is necessary to aid it in

reaching an informed, just and reasoned decision." Flinn v. FMC Corp., 528 F.2d 1169, 1173 (4th Cir.1975), cert. denied, 424 U.S. 967 (1976).

1. Fairness Inquiry

In assessing the fairness of a proposed consent decree, the court must consider the following four factors: " '(1) the posture of the case at the time the settlement was proposed, (2) the extent of discovery that had been conducted, (3) the circumstances surrounding the negotiations, and (4) the experience of counsel in the area of class action litigation.' " In re Jiffy Lube, 927 F.2d at 158-59.

Here, at the time the proposed consent decree was reached, the parties were actively litigating this case. Although the parties had only exchanged limited discovery before settlement negotiations began, they have since exchanged informal discovery throughout settlement negotiations. (Joint Supplement 3–4, Aug. 23, 2010.) Moreover, the circumstances surrounding negotiations indicate the process has been undertaken in good faith. Negotiations commenced in November 2007 and have been ongoing; during this process, several revisions to the policy have been considered. (Id. at 4–6.) The court also finds that counsel in this case is adequately skilled in handling prisoner civil rights cases. Accordingly, the above factors weigh in favor of finding the proposed settlement is fair.

2. Adequacy Determination

In determining whether the proposed consent decree is adequate, relevant factors to consider include: "(1) the relative strength of the plaintiffs' case on the merits; (2) the existence of any difficulties of proof or strong defenses the plaintiffs likely are to encounter if the case goes to trial, (3) the anticipated duration and expenses of additional litigation, (4) the solvency of the defendants and the likelihood of recovery on a litigated judgment, and (5) the degree of opposition to the

settlement." In re Jiffy Lube, 927 F.2d at 159. While opposition does not mandate rejection of settlement, it is important to consider whether objections raise serious reasons as to the unfairness of the settlement. Charles Alan Wright, Arthur R. Miller, & Mary Kay Kane, 7B Federal Practice & Procedure § 1797.1 (3d ed.).

Here, the merits, proof, and expense factors all weigh in favor of approving the settlement. At hearing on July 27, 2010, defendants conceded that the original DOC policy was not applied consistently and that the policy allowed for little accountability. The parties, however, agree that the new policy remedies these problems. As a result of these changes, plaintiffs' due process claim is weakened. Additionally, plaintiffs would face a significant obstacle were the case to continue given the deference given to prison administrators. See Bell v. Wolfish, 441 U.S. 520, 547 (1979); Taylor v. Freeman, 34 F.3d 266, 268 (4th Cir. 1994) ("[A]bsent the most extraordinary circumstances, federal courts are not to immerse themselves in the management of state prisons . . . ."). Such deference is present even if constitutional rights are implicated: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Turner v. Safley, 482 U.S. 78, 89 (1987).[16] In addition to these obstacles, resolution of the action would be burdensome and time consuming for both the parties and the court. Finally, the proposed consent decree imposes a limited burden on plaintiffs in that it does not prevent them from pursuing individual claims for violations of the policy.

[16]To determine whether a regulation relied upon by a defendant is constitutionally permissible, the court must consider the following factors: (1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) "the absence of ready alternatives." Turner, 482 U.S. at 89-90. An inmate bears the burden of proving that a prison regulation is unconstitutional. Hause v. Vaught, 993 F.2d 1079,1082 (4th Cir. 1993).

Despite these factors favoring approval of the settlement, the court would be remiss not to address the objections. At the July hearing, the court asked the parties to respond to class members' complaints that the size requirement eliminates many reference, legal and religious books and that the CD/DVD provision was inconsistent with other provisions related to the handling of rejected materials. The court also allowed the parties to file a supplement addressing these concerns. The amended policy submitted takes into account many of the concerns of the objectors. The size limit no longer applies to religious and legal hardbound texts or any softbound publications, though these hardbound texts may still be excluded if they pose a security threat or storage issue. The amended policy also allows inmates to send CD/DVDs to an alternate address at their own expense. These amended provisions reflect rational and reasonable positions which would likely reduce plaintiffs' ability to prevail on the merits were the case to continue.

That many objections were not taken into account by the amended policy does not make the amended policy inadequate. Regarding the origination restriction, there is a rational connection between the proposed policy regarding publications coming from the publisher only and the legitimate governmental interest of maintaining prison security. See United States v. Stotts, 925 F.2d 83, 86 (4th Cir. 1991) (noting prison official have a legitimate interest in maintaining security, discipline, and order). Likewise, the ban on sexually explicit material is justified by defendants' interest in maintaining discipline, and many of the objections which implicate whether material falls within a certain exception are best handled on a case-by-case basis. The censorship provision is also reasonable as forcing defendants to remove excerpts of publications would impose an extensive burden on the DOC.

Moreover, many of the themes raised in the objections implicate challenges which are preserved as the proposed consent decree allows inmates the opportunity to pursue their individual claims regarding the handling of their publications. Thus, claims implicating inconsistent enforcement or discrimination, both of which are contrary to the policy, can still be raised in an independent challenge. (See Stipulated Consent Decree ¶ 3.)

In sum, the amendments to certain provisions remedy any concerns the court had as to the adequacy of the settlement. Moreover, the other objections are neither pertinent to the adequacy inquiry nor mandate disapproval of the proposed consent decree agreement. Having reviewed the class members' objections and the amended policy, the court finds that the proposed consent decree is adequate and should be approved.

C. Opting Out

Inmate class members Roger Stevenson (DE # 24), Michael Eugene Hunt (DE # 79), and Ian Aulden Campbell (DE # 100) seek to opt out of the class. The instant class action was certified pursuant to Rule 23(b)(2). Accordingly, no class member has the right to opt out of the class action. See Olvera-Morales v. Intern. Labor Mgmt. Corp., 246 F.R.D. 250, 259 (M.D.N.C. Nov. 7, 2007) (unpublished). Thus, the class members' requests to opt out is denied.

## CONCLUSION

After careful consideration of the record, matters taken up at the hearings conducted on July 27, 2010 and August 27, 2010, the court finds that the proposed consent decree, contemporaneously entered, is fair and adequate and is approved. Additionally, the court DENIES the requests to opt out of the class filed by class members Roger Stevenson (DE # 24), Michael Eugene Hunt (DE # 79), and Ian Aulden Campbell (DE # 100). For the reasons and on the terms set forth above, the

parties' joint motion for approval of the stipulated consent decree (DE # 42) as supplemented (DE #129, Ex. 1) is ALLOWED. The clerk is directed to close the case.

SO ORDERED, this the 27th day of August, 2010.

LOUISE W. FLANAGAN
Chief United States District Judge