

Duran v. Apodaca



PC-NM-001-024

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

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Robert M. Marshall
CLERK-ALBUQUERQUE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

DWIGHT DURAN, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil No. 77-0721-JB
	)	
BRUCE KING, et al.,	)	
	)	
Defendants.	)	
_____	)	

SETTLEMENT AGREEMENT

Whereas on August 8, 1990 and October 3, 1990, the Court ordered the parties to enter into negotiations in an effort to resolve plaintiffs' pending contempt motions and any other pending motions by either party, to address any proposals that defendants might have for modification of existing orders, and to address the ultimate termination of auditing and reporting by the Special Master and of the Court's active supervision of its remedial orders in this cause, the parties hereby enter into this Settlement Agreement on this 10th day of June 1991.

I. DEFINITIONS

A. "Existing Facility" shall mean any facility which is in existence on the Effective Date of this Settlement Agreement.

B. "Newly Constructed Facility" shall mean any facility which is completed after the effective date of this Settlement Agreement and shall include additions to an Existing Facility.

C. "Effective Date of this Settlement Agreement" shall mean the date upon which the Court enters an order approving this Settlement Agreement.

D. "Decree" shall mean the the Order of the Court entered on July 14, 1980, the Agreement of the parties approved by that Order, the policy statements attached thereto and the partial consent decrees and agreements referenced therein, as modified by order of the Court prior to the Effective Date of this Settlement Agreement.

E. "Modified Decree" shall mean the Decree, as modified by this Settlement Agreement and by Exhibits B and C attached to this Settlement Agreement.

II. RESTRICTIONS ON OVERCROWDING

A. i. Areas, including dayrooms, not designed for housing prisoners may be utilized for the housing of prisoners only as provided in this Settlement Agreement.

ii. The parties agree that housing prisoners in dayrooms that were not originally designed as housing areas does not constitute an appropriate long-term solution to overcrowding. However, from time to time, defendants may need to place prisoners in dayrooms on a temporary basis to accommodate increasing population levels while other alternatives are developed. In those circumstances, defendants may house prisoners in dayroom areas in Existing Facilities, except that no prisoner may be assigned to dayrooms in the S-Unit and the B and C Buildings at Western New Mexico Correctional Facility (WNMCF). Any use of dayrooms in Existing Facilities shall be subject to the provisions of Section IIB.1-6.

B. Defendants may house no more than 300 prisoners in dayrooms in Existing Facilities, including the Reception and Diagnostic Center and the New Mexico Women's Correctional Facility (NMWCF), if the following conditions are met:

1. When a need arises for prisoners to be housed in any dayroom, if vacancies exist at any minimum or medium security facility, defendants shall make conscientious efforts through the application of existing classification procedures to identify medium security prisoners eligible for reclassification and reassignment

to minimum security facilities or reassignment to other medium security facilities where non-dayroom beds are available. In order to accomplish this objective, defendants shall notify caseworkers in all medium security facilities of the need to evaluate likely candidates for reclassification and reassignment as promptly as possible, consistent with the normal and efficient operation of the classification process.

2. Only dayrooms in general population medium security housing units are utilized to house prisoners; provided, however, that dayrooms in the Reception and Diagnostic Center may be used to house prisoners whose preliminary classification review by someone trained in classification procedures indicates that those prisoners can be housed appropriately in a dayroom setting. The review referred to immediately above shall consist, at a minimum, of (a) the assignment of the prisoner to a cell for a period of at least three days prior to the prisoner's assignment to a dayroom, (b) an opportunity for the prisoner to meet privately with the classification person to discuss any concerns the prisoner may have concerning the prisoner's possible assignment to a dayroom, and (c) a documented preliminary determination that the prisoner can be housed appropriately in a dayroom.

3. No more than five prisoners per dayroom are assigned to dayrooms; provided, however, that no more than eight prisoners per dayroom are assigned to dayrooms at NMWCF.

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of 4*

4. One cell in any pod in which prisoners are placed in the dayroom is vacated so that the hygiene facilities in that cell are available for use by prisoners assigned to the dayroom. This provision shall not apply if the prisoners in the dayroom have direct access without assistance from a staff member to suitable hygiene facilities at all times.

5. No individual prisoner is housed in a dayroom for more than 120 consecutive days.

6. No general population prisoner classified as maximum or close custody is assigned to a dayroom.

C. Defendants may house prisoners in dayrooms in any Newly Constructed Facility provided the following conditions are met:

1. The defendants may not seek to house more than 120% of design capacity at a particular facility or a total of more than 500 prisoners for the entire system (including Existing Facilities) in dayrooms, whichever number is smaller.

2. The resulting dayroom housing must provide a minimum of sixty square feet of combined living and sleeping space for each prisoner housed in the dayroom, as well as a reasonable amount of activity space for the other prisoners assigned to that housing unit.

3. Except for Section IIB.3, the conditions in Section II.B are applicable to the use of any dayroom in a Newly Constructed Facility.

D. It is the parties' intention that any use of dayrooms extend for no longer than is reasonably necessary. Whenever defendants house prisoners in dayrooms pursuant to this Settlement Agreement, defendants shall prepare a written plan to periodically eliminate the use of dayrooms and shall share that plan with plaintiffs' counsel.

E. Plaintiffs agree not to move the Court to modify the provisions of this Settlement Agreement pertaining to dayroom use for five years from the Effective Date of this Settlement Agreement, and also agree that they will not, at any time, request the Court to entirely prohibit dayroom use for housing prisoners. Defendants agree not to move the Court to modify the provisions of this Settlement Agreement pertaining to dayroom use for five years from the Effective Date of this Settlement Agreement.

F. i. Except as provided in Paragraph G of this Section II, defendants agree that they will not assign more than one prisoner to a cell in Existing Facilities. Defendants may assign two prisoners to a cell in Newly Constructed Facilities if that cell contains at least sixty square feet per prisoner, and such cells must allow prisoners direct access to hygiene facilities without assistance from a staff member.

ii. Except as provided in Paragraph F.iii, defendants shall not move any court to modify paragraph F.i. Defendants shall assert no change of law or change of conditions, anticipated or unanticipated, or any other grounds as a basis for modification and declare their intention to bind themselves in perpetuity to this promise. Paragraph F.i shall be enforceable in any federal or state court of competent jurisdiction. In addition, Paragraph F.i shall be specifically enforceable under New Mexico law in the courts of the State of New Mexico as a binding contractual agreement.

iii. Prior to the time when the Modified Decree is vacated, if delays in achieving the goal of vacating the Modified Decree in a timely manner are caused primarily by the bad faith action of plaintiffs' counsel, defendants may move the court to modify the provisions of Paragraph F.i.

iv. Defendants also agree that any multiple occupancy rooms or dormitories used for the housing of prisoners shall provide each occupant at least sixty square feet of combined living and sleeping space.

G. Pursuant to the provisions of this Paragraph G, rooms located in the S-Unit at WNMCF may be used for double occupancy housing. Because these rooms do not contain toilets or lavatories, however, doors to these rooms must remain unlocked by security staff at all times unless (1) a bona fide emergency exists requiring that one or more doors be locked or (2) an occupant requests that his door be locked. In the latter event, special care shall be taken to unlock the door promptly whenever the occupant of a locked room requests that the door to his room be unlocked. 120 sq. ft.

H. The definition of substantial compliance in the Modified Decree, as set forth in Exhibit C attached hereto, shall apply to defendants' compliance with Section II of this Settlement Agreement, except as otherwise provided in this Paragraph H. One or more provisions of Section II of this Settlement Agreement may be suspended, but only as follows:

1. Any provision establishing population limits may be suspended, even in the absence of an emergency, if

the suspension is temporarily necessary because of actions by members of the plaintiff class or if suspensions are sporadic or isolated in nature. In no event shall this paragraph authorize suspension of any provision establishing population limits for more than 72 consecutive hours. Any such suspension, including the reason therefor, shall be reported to counsel for plaintiffs as promptly as is reasonably possible following the commencement of the suspension.

2. i. In the event of an emergency that makes compliance with any of the terms of this Settlement Agreement impossible, extraordinarily difficult or infeasible, it may be necessary to suspend temporarily, even beyond 72 consecutive hours, any provision that establishes population limits of this Settlement Agreement. In such event, the defendants shall formally declare a state of emergency, and, as soon as practical, but no later than five days after such declaration, notify counsel for plaintiffs of the reasons that justified the suspension of any provision that establishes population limits of this Settlement Agreement. The defendants shall also notify counsel for plaintiffs of the expected duration of the suspension and the plan of the defendants to restore full operation of the Settlement Agreement.

ii. For purposes of this Settlement Agreement, an emergency is defined as a circumstance caused by a riot, fire, or similar event not caused intentionally by the defendants, their agents, or employees, that makes compliance with the provisions that establish population limits of this Settlement Agreement temporarily impossible, extraordinarily difficult or infeasible. Construction delays or labor disputes not caused intentionally or reasonably anticipated by the defendants may constitute an emergency, but legislative, executive, or administrative policy decisions not to appropriate funds or allocate resources to the housing of prisoners shall not justify the declaration of an emergency. In addition, legislative or judicial decisions regarding sentencing shall not justify the declaration of an emergency.

iii. In the event that the defendants seek to continue suspension of any provision that establishes population limits of this Settlement Agreement for a period of time greater than sixty days without the agreement of plaintiffs, the defendants may seek the Court's permission to suspend any provision that establishes population limits of this Settlement Agreement. In any such motion, the defendants bear the burden of persuasion.

3. If the plaintiffs believe that any suspension of any provision that establishes population limits of this Settlement Agreement or the duration of the suspension is unjustified, unreasonable, or taken in bad faith, they may request appropriate relief from the Court. In such event, the plaintiffs bear the burden of persuasion.

4. In no case shall defendants be required to release any prisoner before the prisoner's sentence is completed in accordance with applicable law, except upon order of the Court. Defendants shall not be required by the Court to release any prisoner incarcerated for a violent offense before the prisoner's sentence is completed in accordance with applicable law.

III. MODIFICATION AND TERMINATION PROVISIONS

A. Certain modifications of the Decree and the Order of Reference, upon which the parties have agreed, attached hereto as Exhibits A, B and C, shall be submitted to the Court immediately for approval pursuant to F.R.Civ.P. 23. The definition of substantial compliance set forth in the modification to the Order of Reference, attached hereto as Exhibit A, shall apply to all provisions of this Section III relating to findings of substantial compliance, the termination of auditing by the Special Master, and the vacation of extant orders.

B. All pending motions by either party shall be dismissed. The plaintiffs' pending contempt motions shall be dismissed. Any future contempt motions must be based on conditions claimed to exist at the time the contempt motion is filed.

C. The Modified Decree shall be vacated, with the exception of the provisions in Sections I, II and IV of this Settlement Agreement, after defendants have demonstrated substantial compliance for each Existing Facility and each systemwide issue specified in this Settlement Agreement for a reasonable period of time in the manner set forth in this Section III with regard to that facility or issue. With the exception of Sections I, II and IV of this Settlement Agreement, the Modified Decree may be vacated with respect to an Existing Facility or systemwide issue when defendants demonstrate substantial compliance for a reasonable period of time in the manner set forth in this Section III with regard to that facility or issue.

D. i. The Special Master shall recommend a schedule for auditing all Existing Facilities. The schedule may provide for abbreviated auditing at Central New Mexico Correctional Facility, Southern New Mexico Correctional Facility, and WNMCF. These abbreviated

audits shall be completed by October 1, 1991. In the event that the Special Master makes a recommended finding that any of these facilities has achieved substantial compliance with the Modified Decree, the Special Master shall recommend a period of self-monitoring and self-reporting for that facility. In no event shall such period be shorter than six months or longer than one year. If during such period of self-monitoring and self-reporting the facility remains in substantial compliance, at the end of the period of self-monitoring and self-reporting, the Modified Decree shall be vacated with respect to that facility, except that such facility shall remain subject to the provisions of Sections I, II and IV of this Settlement Agreement.

ii. The Special Master shall also complete a full audit of NMWCF by December 31, 1991 and shall conduct periodic audits of the Penitentiary of New Mexico (PNM) (including PNM-Main, PNM-North, and PNM-South) commencing January 1, 1992. In the event that the Special Master makes a recommendation that any of these facilities has achieved substantial compliance with the Decree -- and in the case of NMWCF, the order in Klatt v. King, Cause No. Civ. 80-871 (JB) -- the Special Master shall recommend a period of self-monitoring and self-reporting for the

facility. The period of self-monitoring and self-reporting shall not exceed one year for NMWCF and two years for PNM-Main, PNM-North, or PNM-South. If during the period of self-monitoring and self-reporting, the facility remains in substantial compliance, at the end of the period, the Modified Decree -- and in the case of NMWCF, the order in Klatt -- shall be vacated with respect to that facility, except that the facility shall remain subject to the provisions of Sections I, II and IV of this Settlement Agreement.

iii. Notwithstanding the above schedule with reference to PNM, if the defendants obtain American Correctional Association accreditation for PNM prior to the time that the Special Master makes a recommendation that PNM has achieved substantial compliance, the Special Master shall schedule an audit of PNM as expeditiously as possible to determine whether the defendants have achieved substantial compliance.

E. i. Several areas to be monitored by the Special Master are deemed to be systemwide issues. These include disciplinary and classification appeals and issues relating to access to courts, medical care, and mental health care.

ii. As quickly as possible following the Effective Date of this Settlement Agreement, the Special Master shall finalize the pending report on medical care throughout the New Mexico Corrections Department prepared by Lambert King, M.D., on February 20, 1991. Within ninety days following the Effective Date of this Settlement Agreement, defendants shall provide to the Special Master and plaintiffs' counsel a written plan for providing access to the courts by prisoners in administrative segregation on total lockdown status. Within six months following the Effective Date of this Settlement Agreement, the Special Master shall audit access to courts by prisoners in administrative segregation on total lockdown status. As quickly as possible after January 1, 1992, the Special Master shall audit defendants' compliance with orders governing disciplinary and classification appeals. According to a schedule to be developed in consultation with counsel for all parties, the Special Master shall audit defendants' compliance with the mental health provisions of the Modified Decree. This audit shall be limited to the following issues: the appropriate assessment, evaluation, and treatment of prisoners requiring acute mental health care; the provision of intermediate level mental health

care to all prisoners requiring such care; the evaluation and treatment of prisoners suspected of having an organic impairment or a developmental disability; the provision of sex offender treatment to prisoners whose eligibility for parole is adversely affected by the unavailability of such treatment or the removal of such requirement from parole eligibility; the implementation of Vitek procedures when those procedures are required; the defendants' policies and practices with respect to minimum custody placement of prisoners with mental disorders; the implementation of appropriate quality assurance mechanisms; and defendants' planning for the provision of mental health services to prisoners as the population within the New Mexico Department of Corrections increases. In auditing these issues, the Special Master shall not apply any standards other than those required by the Modified Decree (that is, those currently required by the Decree, as modified by Exhibit C attached hereto).

iii. When the Special Master finds substantial compliance as to one or more of the systemwide issues addressed in this Paragraph E, he shall recommend a period of self-monitoring and self-reporting by defendants with respect to the systemwide issue or issues found to be in substantial compliance. This period shall not be shorter

than six months or longer than two years. If defendants remain in substantial compliance during the period of self-monitoring and self-reporting, the provisions of the Modified Decree governing the relevant systemwide issue shall be vacated.

F. The Special Master shall develop a recommended scope and format for self-reporting. All resulting reports shall be filed with the parties and the Court, unless the Court approves filing under seal, in which case the reports shall be filed with the Court and provided to counsel for plaintiffs. The Special Master shall also establish a schedule for re-auditing if any audits contemplated in this Section III do not result in a finding of substantial compliance.

G. Any finding or recommendation of the Special Master made pursuant to this Settlement Agreement may be challenged in the manner specified in Section C of the Order of Reference dated June 3, 1983.

IV. MISCELLANEOUS PROVISIONS

A. Nothing in this Settlement Agreement shall be construed to extend the application of the Modified Decree to any prisoner other than a prisoner assigned to a medium, close, or maximum security facility.

B. This Settlement Agreement shall not be admissible in evidence in any proceeding or trial other than for the sole and limited purpose of enforcement of the Modified Decree. Specifically, it is understood and agreed that Rules 407 and 408 of the Federal Rules of Evidence are applicable to this Settlement Agreement.

C. This Settlement Agreement shall be submitted to the Court for its review and approval pursuant to Rule 23 of the Federal Rules of Civil Procedure.

D. If this Settlement Agreement is approved in its entirety by the Court, then:

1. This Settlement Agreement and the Modified Decree constitute the entire agreement of the plaintiffs and defendants;

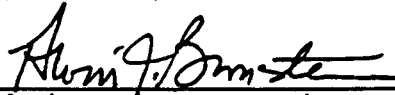
2. In the event of any inconsistency or ambiguity among this Settlement Agreement and the Modified Decree, the provisions of this Settlement Agreement shall control;

3. Only the provisions of Sections I, II and IV of this Settlement Agreement shall apply to Newly Constructed Facilities; provided, however, that Section III shall apply to the extent necessary to enable the Special Master to address systemwide issues; and

4. After the Modified Decree has been vacated in its entirety, except for the provisions of Sections I, II and IV of this Settlement Agreement, as provided in Section III of this Settlement Agreement, then Sections I, II and IV of this Settlement Agreement shall constitute the entire agreement of the plaintiffs and defendants.

E. If this Settlement Agreement is not approved in its entirety by the Court, then this Settlement Agreement shall be null and void.

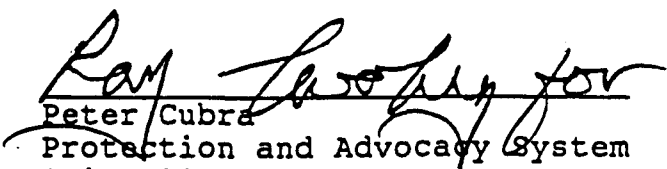
F. This Settlement Agreement is a document which all parties have negotiated and drafted. Since all parties participated equally in drafting its terms, the general rule of construction interpreting a document against the drafter shall not be applied in future interpretation of this Settlement Agreement.



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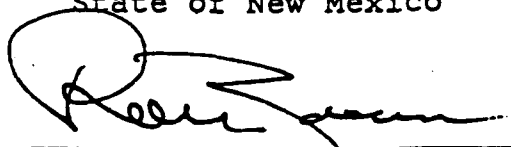

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EXHIBIT A

ORDER OF REFERENCE.

Revise Paragraph E-1 of the Order of Reference of June 3, 1983 to read as follows, and renumber succeeding paragraphs accordingly:

1. The Special Master shall, at such times as determined appropriate, issue reports in accordance with the procedures set forth in this Order of Reference, which shall indicate for each of the substantive areas of the Order (e.g., Classification, Food Services, etc.) whether that area is or is not in substantial compliance with the Court Order and the basis and reasons for such finding in each area. If an area is not found to be in substantial compliance it shall be assigned to "Level 1". If an area is found to be in substantial compliance it will be assigned to "Level 2".

2. For purposes of this Order, "substantial compliance" means that defendants generally are in compliance with the terms of the Court's remedial order as it affects a particular area. Incidents of non-compliance do not necessarily prevent a finding of substantial compliance. The determination of substantial compliance shall take into account the extent to which exceptions to compliance are sporadic or isolated in nature, are unintentional, are the temporary result of actions by the members of the plaintiff class and are promptly and properly addressed by corrective action and, where appropriate, disciplinary action against staff members responsible for the exception to compliance. In no event shall a determination of substantial compliance be made

if exceptions to compliance are the result of wilful or intentional actions by defendants.

EXHIBIT B

THE COURT'S REMEDIAL ORDERS

CORRESPONDENCE.

Revise Section 9 of the Policy Statement regarding Correspondence Regulations (pages 2-3) to read:

9. PRIVILEGED CORRESPONDENCE:

Outgoing letters to attorneys, recognized agencies that provide legal assistance, the courts, elected and appointed governmental officials, the news media, grand juries, law enforcement agents or agencies, the Secretary of Corrections, Corrections Commissioners, and the Parole Board are considered privileged correspondence and shall not be opened for inspections.

Letters in this category should be sealed by the inmate and dropped in the special box provided for such letters.

Incoming letters from privileged communicants may be opened, but not read, in the presence of the inmate in an appropriate, secure area of the institution by the warden or the warden's designee to determine if the letters are counterfeit or contain contraband. A written notice shall be prepared and the correspondent shall be notified by the warden or the warden's designee that the mail was opened and the reason for the opening. The notification to the correspondent shall be signed by the warden or the warden's designee.

LIVING CONDITIONS.

Except as modified by the Settlement Agreement to which this Exhibit B is attached, the Policy Statement on Living Conditions remains unchanged.

CLASSIFICATION.

Revise Paragraphs 1-15 of the Policy Statement on Classification as follows:

A. Pages 1-2: Revise Sections 1-4 to read:

1. The New Mexico Corrections Department has the overall responsibility to receive and classify all inmates committed to its custody. Following initial classification, further classification and monitoring of an inmate's progress shall be conducted as appropriate. Monitoring of the departmental classification system shall be ongoing and shall be conducted by the Office of the Director of Classification. As part of this monitoring, defendants shall collect and maintain information on the classification profile of the population of the Department, including information relating to the special needs of inmates.

2. A written classification manual shall be maintained, in English and Spanish, that contains the policies which govern classification and the procedures for implementing those policies. The manual shall be reviewed and revised as needed, but at least annually. Copies of the manual, in English and Spanish, shall be made available to inmates in the law library at each institution, and shall be available to all staff. A summary of the

classification process shall be included in materials provided to the inmate during the initial classification process.

3. Custody classification shall be guided by rational and objective standards derived from specific or general behavioral criteria. All classification decisions shall be made through the classification process.

4. No inmate shall be classified under a more restrictive designation than is required by security and custody considerations. If an inmate is housed for more than thirty days in an institution more secure than indicated by the classification system the inmate shall be afforded, to the maximum extent possible, conditions of confinement similar to those that would exist at the indicated institution. The defendants shall maintain a record of the reasons for any override of an inmate's custody designation which leads to an increase in custody or security level.

B. Pages 2-3: Delete Section 5 in its entirety, and renumber succeeding sections accordingly. (Note: Hereafter, references to sections of classification shall refer to revised section numbers.)

C. Page 3: Revise Section 8 (formerly Section 9) to read:

8. Consistent with the time demands of the intake and classification process, inmates at the reception and diagnostic center shall be provided correspondence, visitation, recreation, legal access and religious services comparable to those available to inmates in general population.

D. Page 3: Revise Section 9 (formerly Section 10) to read:

9. All classification decisions involving an increase in custody or security designation, or removal from a programming assignment, shall be made by a committee consisting of at least one member of the program staff and one member of the security staff. The committee shall solicit information from the mental health staff when making any decision involving an inmate who is under treatment of that staff. Notwithstanding this section, the Warden at each institution shall have full authority with respect to all institutional classification decisions relating to an inmate's security and custody designation and placement; provided that the Warden's decisions shall be in conformity with the provisions of the classification manual; that the Warden shall record in writing the reasons for the decisions; and that the Warden shall have no authority over classification decisions involving assignment to mental health, medical or educational programs, except school release. The Warden's exercise of that authority shall be subject to appeal to the departmental classification department.

E. Page 4: Revise Section 10 (formerly Section 11) to read:

10. An inmate shall be allowed to attend any classification hearing at which the inmate's classification is discussed, except during deliberations or when in the opinion of the classification committee the presence of the inmate would jeopardize the physical safety of staff or inmates or the inmate's disruptive behavior during the hearing prevents the hearing from proceeding in an orderly fashion. When the inmate is excluded, the reasons for this

action will be stated on the record. A summary of information introduced in the inmate's absence, excluding any reference that would identify confidential sources, will be provided to the inmate. During the hearing, the inmate shall be given an opportunity to respond and shall be provided with reasons for any classification decision affecting the inmate. Inmates shall be carefully screened upon their commitment to the Department and shall be regularly evaluated thereafter. Inmates may be permitted to participate in assessing their needs and in selecting programs to meet those needs. If the classification decision is based, in whole or in part, on consideration of confidential information, the inmate shall be given a summary of that information sufficient to permit the inmate to challenge the truthfulness of the information and its relevance to the classification decision unless the summary would inherently identify the confidential source or pose a threat to the security of the institution.

If the classification committee relies on confidential information in making its decision, it shall record at least four of the following items so that the reliability of the confidential information may be reviewed on appeal as necessary:

- a. The identity of the staff member receiving the confidential information;
- b. Specific details of any conduct attributed to the inmate;
- c. The informant's basis for knowledge of the confidential information;

d. Whether the informant previously has provided information which proved accurate and useful;

e. The content of any statements attributed to the inmate being classified;

f. The penitentiary location where the information was received from the confidential informant;

g. The date the information was received;

h. What efforts were made to corroborate the information.

F. Page 4: Revise Section 11 (formerly Section 12) to read:

11. The classification (custody and program) of each inmate who is serving a sentence of less than five years shall be reviewed at least every ninety (90) days. The classification of inmates serving sentences of five years or longer shall be reviewed at least annually. Reviews shall be based on behavioral observations and analysis over a reasonable period of time. Inmates shall also be allowed to initiate reviews of their progress, status and programming if they can demonstrate significant changes.

G. Page 4: Delete Section 12 (formerly Section 13) in its entirety, and renumber succeeding sections accordingly.

H. Page 5: Revise Section 12 (formerly Section 14) to read:

12. Interviews with inmates in the classification and reclassification process shall be conducted in places that afford privacy from other inmates and from staff not involved in the classification process.

I. Page 5: Revise Section 13 (formerly Section 15) to read:

13. The defendants shall file with the court within sixty days of the date of this order the custody scoring form they intend to use as part of the departmental classification process. The custody scoring form initially filed by defendants, and any revisions to that form, shall be submitted to counsel for the plaintiff class no less than ten days before filing, to permit counsel to evaluate the form. Plaintiffs' counsel may challenge the form on the ground that it does not meet the requirements of paragraph 3 of this Section of the Order.

J. Page 5: Add Section 14, as follows:

14. The defendants shall maintain a process for appeal to the departmental office of all final classification decisions made at any institution, including the Reception and Diagnostic Center, which shall provide for meaningful review of any decision from which an inmate appeals. Final decision on such appeals shall be rendered within ninety days of the date of appeal.

K. Page 5: Add Section 15, as follows:

15. During initial orientation of inmates at the start of their confinement, they shall be provided with a copy of the consent decree and any modifications thereto approved by the Court, as well as summaries of policies on grievances, work and school release, classification, furloughs and good time. The defendants shall obtain a signed, dated receipt from each inmate reflecting the inmate's receipt of these materials. Additionally, the library of each institution shall contain copies of all of the

substantive orders in this case and copies of all of the Special Master's reports that have been filed with the Court.

ADMINISTRATIVE SEGREGATION

[Change all references in the consent decree to "maximum security" to read "administrative segregation."]

Revise the Policy Statement regarding Administrative Segregation as follows:

A. Page 1: Revise Section 2 to read:

2. The words "threat to the security of the institution" or their equivalent, as used in any order in Duran v. Apodaca, means any behavior which causes or is reasonably likely to cause acts of violence, escape, injury or death, substantial destruction of property or a state of emergency as defined in Paragraph 5 of the Agreement of the parties. When action is taken based upon a finding of a threat to the security of the institution, the specific reason(s) comprising the threat shall be documented.

B. Pages 1-3: Revise Section 3 to read:

3. An inmate may be placed involuntarily in administrative segregation through the classification process pursuant to the criteria stated in one or both of the following two subsections; provided, however, that this provision shall not be used as a basis for placement in administrative segregation of an inmate who departmental mental health professionals have recommended be housed other than in administrative segregation:

(a) According to information reviewed during the classification process, the inmate represents a threat to the security of the institution.

(b) The inmate is in danger of bodily harm or other violent acts from himself, herself or other inmates if the inmate remains in the general population, if the danger cannot otherwise be eliminated by transfers within the state.

4. The ranking shift officer may immediately place an inmate in involuntary administrative segregation based upon recent overt acts or reliable information which reasonably leads the officer in good faith to believe that an inmate presents a threat to the security of the institution or that the inmate's safety is jeopardized. The ranking shift officer who places an inmate in involuntary administrative segregation under this section shall document the reasons for the action and shall give a copy of the document to the inmate within one working day, weekends and holidays excluded. After the initial placement in administrative segregation, the action of the ranking shift officer shall be reviewed for continuation within five working days, weekends and holidays excluded, by the institutional classification committee, subject to approval of the Warden, to determine whether the inmate should remain in administrative segregation.

C. Pages 3-5: Redesignate Sections 4-7 as Sections 5-8 and revise them to read:

5. The defendants may place an inmate in administrative segregation if the inmate states his or her belief that housing in the general population places the inmate in jeopardy of serious bodily harm and requests placement in administrative segregation. The department may immediately place an inmate in voluntary administrative segregation pending a hearing in accordance with the classification process, and may accept or reject the request after the hearing. Pending such a hearing, an inmate housed in voluntary administrative segregation may be denied all congregate activity. An inmate who requests assignment to administrative segregation shall be required to sign a written request slip stating the inmate's desire for assignment to administrative segregation.

Any inmate housed in voluntary administrative segregation shall be reclassified from that status within 5 working days of a request for reclassification. However, an inmate who requests reclassification from voluntary administrative segregation may be reclassified into involuntary administrative segregation status if any of the conditions of Section 3 above is met.

6. Except as provided in Section 4 above, a statement detailing the alleged specific facts and specific reasons for classifying an inmate into administrative segregation shall be given to the inmate at least 24 hours prior to the classification hearing, including, in the case of an inmate already housed in administrative segregation, the basis for continued placement. If the basis for placing the inmate into administrative segregation involves information from a confidential informant, the disclosure

of which would place such informant in jeopardy of serious bodily harm or threaten the security of the institution, the inmate shall be given a summary of the facts upon which administrative segregation classification is being requested sufficient to allow the inmate to challenge the truthfulness of the facts and/or the need for administrative segregation status unless the summary would inherently identify the confidential informant or pose a threat to the security of the institution.

If the administrative segregation classification committee relies on confidential information in making its decision, it shall record at least four of the following items so that the reliability of the confidential information may be reviewed on appeal as necessary:

- a. The identity of the staff member receiving the confidential information;
- b. Specific details of any conduct attributed to the inmate;
- c. The informant's basis for knowledge of the confidential information;
- d. Whether the informant previously has provided information which proved accurate and useful;
- e. The content of any statements attributed to the inmate being classified;
- f. The penitentiary location where the information was received from the confidential informant;
- g. The date the information was received;
- h. What efforts were made to corroborate the information.

7. Except as provided in Section 4 above, prior to placing an inmate in administrative segregation, a finding must be made under the classification process that the requirements of Section 3 above have been met. Prior to initial classification of an inmate as administrative segregation, the classification process shall include an assessment of whether other alternatives are available and such alternatives and the reasons for rejecting each of them shall be documented. If an inmate is placed in administrative segregation housing, the inmate shall be housed in a single occupancy cell that provides safety and comfort and shall be allowed to participate in institutional programs as set forth in this section; however, if there is an emergency caused by riot, fire or other disaster making living units unusable, two people may be housed in said cells for a period of short duration while arrangements are made for alternate housing.

8. The classification process shall include a review of the status of each inmate with reasonable frequency, but at least every 30 days. More frequent reviews may be scheduled based on the request of the inmate. At each review, the classification process shall include determinations of the circumstances justifying continued placement in administrative segregation and whether there is a substantial basis to indicate that placement in administrative segregation is warranted under the criteria set forth in this order. If not, the inmate shall be reclassified out of administrative segregation status. The inmate shall be given written notice of the basis for continued placement in

administrative segregation. The inmate shall be given an opportunity to present his or her case regarding such reclassification. Nothing in this paragraph shall prevent making additional findings pursuant to the standards and procedures set forth above, to the effect that an inmate should continue to be classified in administrative segregation status.

D. Pages 5-6: Delete existing Section 8 in its entirety.

E. Pages 6-8: Revise Sections 9-11 to read:

9. The defendants shall develop, within 30 days of the date of this order, criteria for the classification of inmates within administrative segregation. The defendants shall develop and maintain at least two classes of inmates within administrative segregation.

Class A administrative segregation inmates shall have an opportunity for group recreation, group work, group meals and contact visiting. They shall not have group visiting. Class A inmates shall receive educational instruction in their cells.

Class B administrative segregation inmates shall be considered for group recreation, but shall have no other group privileges. Group recreation for class B inmates may be confined to recreation with selected inmates from class B. Class B inmates shall be considered for contact visits on a case-by-case basis. If a class B inmate is denied contact visiting, the reasons for the denial shall be documented.

All inmates assigned to administrative segregation, including pre-trial detainees and death-sentenced inmates, shall be evaluated

for a period not to exceed thirty days to determine the class to which the inmate is to be assigned.

At the conclusion of the thirty day evaluation process, the defendants shall prepare for each inmate an Individualized Treatment Plan (ITP). The ITP shall provide for programming designed specifically for the inmate. The total hours of daily programmed activity for each inmate may be more or less than five hours depending on the needs and interests of the inmate; provided, however, that unless specific circumstances of an inmate require less activity, the ITP shall provide the inmate with access to one or more of programs, jobs, activities or privileges so that the inmate shall be provided the opportunity for at least five hours of activity, five days per week, exclusive of recreation. Each inmate's ITP will be evaluated at least every thirty days.

The ITP shall include a schedule of personal and program objectives that shall lead to advancement within the classes of administrative segregation and, ultimately, to reintegration into the general population if the inmate successfully completes those objectives. However, if the classification process includes documentation of reasons justifying a good faith belief that reintegration into the general population may expose the inmate to bodily harm or other violent acts or may present a threat to the security of the institution, then reclassification and reintegration are not required.

For inmates who have been housed in administrative segregation for more than one year, the Central Classification Board shall

review the placement to ensure it is appropriate. Such reviews shall be held semi-annually. Moreover, for all such inmates, programming personnel shall review the inmate's programming to ensure that the inmate is provided the maximum degree of programming consistent with administrative segregation.

10. Every inmate in administrative segregation status shall receive an opportunity seven days a week for a minimum of one hour of exercise outside the inmate's cell. Exercise shall be outdoors whenever weather permits.

11. Inmates who have been classified as administrative segregation shall be provided with the following:

- (a) Clothing and linen issue and exchange similar to that provided to the general population;
- (b) Meals provided to the general population;
- (c) Correspondence privileges similar to those provided to the general population;
- (d) Showers and shaving five days a week;
- (e) Hair grooming and barbering;
- (f) A minimum of two hours visitation per week.

F. Pages 8-10: Revise Sections 14-20 to read:

14. Inmates in administrative segregation status may retain their personal property, as permitted in general population as long as appropriate fire, safety, health or sanitation rules are not violated, unless the removal of specific designated items of personal property is essential to protect the safety of the inmate

or others. If any of an inmate's personal property is removed from the inmate's cell to comply with fire, safety, health or sanitation rules, defendants shall document the basis for the removal of those papers. Defendants shall keep an inventory of all such removed property and the property shall be maintained in a secure manner that preserves the confidentiality of the papers, or the inmate shall be given the option of sending those papers to a person designated by the inmate, until the problem of compliance with rules has been remedied.

15. Inmates in administrative segregation status shall be housed in single occupancy cells or rooms; however, if an emergency makes living units unusable, two people may be housed in said cells or rooms for a period of short duration while arrangements are made for alternate housing. All inmates in administrative segregation status may have basic items needed for personal hygiene, as well as items such as eyeglasses, dentures and writing material.

16. A case manager shall visit at least weekly all areas in which administrative segregation inmates are housed and shall be available, no less frequently than once per week, to help each inmate who desires assistance or information. A qualified medical professional shall conduct sick call daily in each administrative segregation living area and shall examine every inmate who so requests to determine what medical care, if any, is required. A log of all sick call visits shall be maintained.

17. A qualified clinical psychologist or psychiatrist shall assess the status of each person classified as administrative

segregation within 30 days after placement and at least once every 90 days thereafter to ensure that no inmate is housed in administrative segregation for whom mental health considerations indicate such housing is inappropriate. Said assessment shall include a personal interview with the inmate.

18. Visitation by religious personnel to inmates classified as administrative segregation shall be governed by the terms of the visitation consent order in Duran v. Apodaca. Inmates in the administrative segregation living areas shall be provided with access to appropriate religious services.

19. Correctional officers assigned to administrative segregation living areas shall be selected to meet the needs of inmates so classified. Each supervisor shall supervise and evaluate the on-the-job performance of employees assigned to administrative segregation living areas.

20. The Warden shall designate an official to be responsible for the administration and operation of administrative segregation living areas who shall monitor and evaluate the entire program in the areas as often as necessary to insure compliance with all applicable policy statements. The following personnel shall visit administrative segregation living areas:

- | | |
|---|--------------|
| 1) Warden or Acting Warden | Weekly visit |
| 2) Director of Security or
Acting Director of Security | Weekly visit |
| 3) Chief Psychologist or designee | Weekly visit |
| 4) Medical Personnel | Daily visit |
| 5) Caseworker | Weekly visit |

6) Chaplain

Weekly visit

7) Shift Captain

Once per shift

VII. INMATE DISCIPLINE.

Revise Sections 2-17 of the Policy Statement on Inmate Discipline as follows:

A. Page 1: Revise Subsection 2(b) to read:

(b) Ensure the general welfare and safety of all persons living, working, visiting or volunteering services within the institution.

B. Page 2: Revise Subsection 3(f) to read:

(f) The words "threat to the security of the institution" or their equivalent, as used in any order in Duran v. Apodaca, means any behavior which causes or is reasonably likely to cause acts of violence, escape, injury or death, substantial destruction of property or a state of emergency as defined in paragraph 5 of the Agreement of the parties. When action is taken based upon a finding of a threat to the security of the institution, the specific reason(s) comprising the threat shall be documented.

C. Page 3: Revise Subsection 5(a) to read:

(a) Any act, although not listed in this policy, that would be either a felony or a misdemeanor under the criminal code of New Mexico, or the laws of the United States of America, shall constitute a major violation if a felony or a minor violation if a misdemeanor.

D. Pages 3-4: Revise Subsection 5(b) to read:

(b) In those cases where an inmate allegedly commits an act covered by statutory law, the case may be referred for evaluation for possible criminal prosecution to the local District Attorney.

E. Page 4: Amend Subsection 5(e) to read as follows:
At the discretion of the Hearing Officer, the inmate may receive a continuance of the disciplinary hearing when criminal prosecution is pending unless such a continuance would prevent the defendants from being able to prosecute the disciplinary matter within a reasonable time; provided, however, that the inmate shall receive a continuance if the inmate provides some evidence that denying a continuance would be prejudicial to the inmate's criminal case.

F. Pages 6-30: Revise Sections 6-17 to read as follows, and redesignate Sections 14-17 as 13-16 (there being no Section 13 in the original):

6. OFFENSES AND SANCTIONS: Major and minor offenses and sanctions are listed in Exhibit I to this Policy Statement. The offenses and sanctions shall be reviewed at least annually. If the defendants wish to revise Exhibit I, they shall submit the proposed revisions to counsel for the plaintiffs, and shall seek their agreement. If that agreement is obtained, the changes shall be submitted jointly to the Court for approval and implementation. If plaintiffs' counsel do not agree on the proposed changes, the defendants may seek modification by the Court, and shall have the burden of justifying the proposed modification. Any revisions shall be made available to all inmates and employees as they are

adopted and shall apply prospectively after adoption and notice to inmates and employees.^{1/}

7. MINOR REPORT DISPOSITION. Disciplinary authority for minor report disposition is delegated to the Disciplinary Officer or the Disciplinary Officer's designee. When the Disciplinary Officer or the Disciplinary Officer's designee receives a report of inmate misconduct, the Disciplinary Officer has the authority to impose minor sanctions, but only in accordance with the procedures set forth in paragraph 10 of this Policy Statement on Inmate Discipline. Within 15 days after the decision, the inmate may appeal the decision to the warden. The warden may approve, reduce, refer for further investigation or dismiss.^{2/} The bases for such an appeal are as follows:

- (1) the disciplinary policies were not followed;
- (2) the decision of the Disciplinary Officer was not based on evidence;
- (3) the punishment was excessive; or
- (4) new evidence or witnesses exist.

8. MISCONDUCT REPORTS. Informal resolution of minor incidents is encouraged. However, when any employee witnesses any act which would constitute a major or minor offense, or has reasonable belief that a serious violation has occurred, the employee has a responsibility to prepare a misconduct report.

^{1/} Material formerly contained in Sections 6 and 7 of this Policy Statement has been modified and incorporated in Exhibit I to this Policy Statement.

^{2/} The sanctions for minor reports have been moved to Exhibit I.

The initial misconduct report shall contain the date and time of the violation, the date and time the report was written and the date and time the report was submitted to the shift supervisor for review. The report shall include the specific rules violated; a formal statement of the charge; any unusual inmate behavior; any staff witnesses; disposition of any physical evidence; any immediate action taken, including the use of force; and the reporting officer's signature.

Following the initial investigation by the reporting employee, the misconduct report must be submitted for supervisory review and a copy given to the inmate within two working days, weekends and holidays excluded, from the date of the incident, or the date when the reporting employee obtains sufficient facts to justify issuing a misconduct report. Where additional investigation time is required by the reporting employee, written approval can be obtained from the warden or the warden's designee. The written approval must be obtained in advance of the filing of the report and attached to the report. The warden, or in the warden's absence the acting warden, may grant extensions for good cause shown, e.g., where there is a showing of extenuating circumstances such as a perpetrator is not identified; co-conspirators are unidentified; there is a criminal investigation controlled by other agencies; or in which the inmate requests a delay in order to protect the inmate's right to remain silent; or there is a work stoppage or group disturbance preventing the review. In all cases, however, the report shall be provided to the

inmate within two working days, weekends and holidays excluded, from the date the report is issued. A dismissal shall be entered in cases where these time requirements, including appropriate extensions, are not met unless the unexcused delay was unavoidable.

However, in the event of a continuing emergency, such as a riot, which prevents notice and hearing as required, said notice and hearing shall be provided as soon as is practical.

Whenever an incident and/or inmate poses an immediate threat to employees, inmates or the security of the institution, the shift supervisor and/or other appropriate supervisor must be notified immediately by the reporting employee so that prompt, appropriate steps may be taken to control the situation.

An inmate may not be placed in disciplinary segregation prior to a hearing. However, if the inmate poses a threat to the security of the institution, the inmate may be placed in prehearing detention pending a disciplinary hearing as if he or she were classified administrative segregation. When such circumstances are found to exist, the officer placing the inmate(s) in prehearing detention shall document the reasons and submit them with the officer's report to the shift supervisor. The shift supervisor shall immediately review the report and the circumstances surrounding the incident and determine whether such confinement is necessary. The shift supervisor who approves placing an inmate in prehearing detention under this section shall document the reasons for the action and shall give a copy of the document to the inmate within one working day, weekends and holidays excluded, after the

date of lock-down. The action of the shift supervisor shall be reviewed for continuation within three working days, weekends and holidays excluded, by the Chief of Security or in the Chief's absence the acting Chief of Security to determine whether the inmate should remain in prehearing detention prior to a disciplinary hearing. The review shall include an interview with the inmate to make certain the inmate has received notice of the charges against him or her and to provide the inmate an opportunity to present his or her views regarding whether the inmate should remain in prehearing detention until a disciplinary hearing is held. Based on this review, the Chief of Security or acting Chief of Security shall order the inmate either to be released from prehearing detention or to remain in prehearing detention until a disciplinary hearing is held. While an inmate is held in prehearing detention or disciplinary segregation, the inmate shall be subject to provisions of the policy statement on administrative segregation.

All disciplinary proceedings shall be expedited for any inmate housed in prehearing detention, so that the disciplinary hearing on any such inmate shall be held within 10 working days of the incident for which the inmate was placed in prehearing detention, unless the Hearing Officer grants a continuance at the request of the inmate or on the basis of exceptional circumstances that delay the investigation. If the Hearing Officer grants a continuance, the Hearing Officer shall document in the record the reasons for the continuance.

9. SUPERVISORY REVIEW: The shift supervisor shall conduct an independent review of all misconduct reports within two working days, weekends and holidays excluded, after receiving the report from the reporting employee so that the inmate receives the report as required by Paragraph 8.

Upon receiving the report, the shift supervisor shall record the date and time the review was begun and completed.

During the review, the shift supervisor shall inform the inmate that he or she has the right to remain silent. The shift supervisor may consult with any persons during the review, except the Hearing Officer.

The shift supervisor shall deliver the report to the Disciplinary Officer's office within two working days, weekends and holidays excluded, after the report is delivered to the inmate.

The shift supervisor may delegate the review to a lieutenant or sergeant, but no portion of the review may be conducted by the reporting employee.

10. DISCIPLINARY OFFICER: Within 5 working days, weekends and holidays excluded, after receiving the misconduct report from the reviewing supervisor, the Disciplinary Officer shall investigate the report, question or review statements from all known witnesses, collect evidence, documents and statements, and prepare a report of the findings and recommendation for submission to the highest ranking institutional official present at the institution.

All misconduct reports and actions shall be carefully reviewed by the Disciplinary Officer and if the report meets the criteria of a major report, the inmate shall be instructed to appear before the Hearing Officer, within 10 days, weekends and holidays excluded, after the Disciplinary Officer completes the investigation. The inmate shall receive a copy of the report and the action, and the grounds for finding the report to be a major report.

In the case of a minor report, the Disciplinary Officer shall conduct a hearing within 10 working days, weekends and holidays excluded, after the Disciplinary Officer completes the investigation. The inmate may request that witnesses be examined or statements taken, and may present the inmate's own statements and any relevant evidence. A written decision with findings shall be provided to the inmate within five working days after the hearing, weekends and holidays excluded. When an inmate is found not to have committed the alleged offense, the disciplinary report shall be removed from all files on the inmate. All such removed disciplinary reports shall be maintained in a separate file for at least one year but such reports shall not be made available to or utilized by departmental staff or the Parole Board, except at the request of the inmate.

All disciplinary reports, regardless of disposition, may be kept and used for statistical or research purposes provided that all inmate identification is removed. A dismissal shall be entered in a case where the time requirements, including appropriate

extensions, are not met unless the unexcused delay was unavoidable. Upon a finding of guilt, the misconduct report shall be forwarded to the Central Records Office.

11. MAJOR REPORT DISPOSITION: Disciplinary authority for the disposition of major misconduct reports is delegated to an Institutional Hearing Officer whose assignment to that function shall be priority over any other functions. The Hearing Officer shall be trained adequately and shall have had experience as a Disciplinary Officer at an institution affected by this order. A Hearing Officer may not preside at the hearing if that person had any role in the case or if he or she reported or investigated the case or if he or she was a witness to any alleged actions leading to the charge.

The Hearing Officer shall conduct hearings, make findings and impose appropriate sanctions for inmates found guilty of major misconduct. The Hearing Officer may also refer the report back to the Disciplinary Officer for further investigation, or may reduce the report to a minor misconduct report and impose appropriate sanctions. However, only the Hearing Officer can, as a result of a major misconduct report, order that an inmate be placed in disciplinary segregation, recommend to the Chief of Classification that an inmate's program assignment be modified, that the inmate be transferred from one institution to another, or recommend to the Chief of Classification that an inmate's good time be withheld or forfeited in accordance with Exhibit I.

12. HEARING OFFICER PROCEDURES: The Hearing Officer shall conduct the proceedings according to the following guidelines:

(a) The Hearing Officer shall convene hearings at times designated by the Hearing Officer but at least weekly, and shall prepare a record or written summary of the proceedings.

(b) A record or written summary of the entire proceedings shall be maintained by the institution and shall clearly document that the inmate was advised of his or her rights, including the appeal procedure. A tape recording shall be made of the hearing. Excluded shall be any reference to confidential sources that include identifying facts. The Hearing Officer's findings shall document the specific evidence relied upon, and the reasons for the action taken should be specifically described, unless doing so would jeopardize institutional security.

(c) An inmate shall be given advance written notice of the charge(s) against the inmate by the shift supervisor or Disciplinary Officer not less than 72 hours before the appearance before the Hearing Officer. Inmates shall receive a hearing at the first available date, but not more than 10 working days, weekends and holidays excluded, after the Disciplinary Officer completes the investigation. A continuance may be granted by the

Hearing Officer to either the inmate or the institution in order to prepare their case or where additional evidence is necessary. An inmate may waive in writing his or her right to 72 hour notice of the disciplinary hearing.

(d) The inmate may request the assistance of another inmate or staff member to assist in the preparation and/or presentation of the case. The inmate shall make such a request in writing no more than 24 hours after receipt of notice of the hearing on the charges against the inmate, and shall designate a first, second and third choice of individuals to provide assistance. If the inmate is in segregation or on lock-down status, the staff shall assist the inmate in requesting assistance from the individuals the inmate designates. Inmates are not entitled to be represented by legal counsel at hearings before the Hearing Officer. If the inmate being charged cannot read and write English adequately to comprehend and defend the charge, assistance shall be provided by a person capable of communicating with the inmate and the Hearing Officer. Employee representation may not include the Hearing Officer. The employee or inmate representative shall be given at least 24 hours in which to consult with the inmate and to investigate the charges before proceeding with the hearing.

(e) The inmate charged shall be present throughout the hearing except during deliberations or when in the opinion of the Hearing Officer the presence of the inmate would jeopardize the physical safety of staff or inmates or the inmate's disruptive behavior during the hearing prevents the hearing from proceeding in an orderly fashion. When the inmate is excluded, the reasons for this action shall be stated on the record. A summary of the evidence introduced in the absence of the inmate, excluding any reference to confidential sources, shall be provided to the inmate.

(f) An inmate shall be permitted to make his or her own statement, to request that the Hearing Officer call witnesses, and to present documents in his or her behalf, provided that the calling of witnesses and/or the disclosure of documentary evidence does not jeopardize the physical safety of staff and inmates. The Hearing Officer shall call those witnesses requested by the inmate unless calling the witness would interfere with the necessary operations of the institution or would produce only duplicative evidence. The Hearing Officer may accept written statements from those witnesses not called and may exclude witnesses whose testimony is irrelevant or cumulative. The Hearing Officer shall state for the record the reasons for excluding witnesses. Inmate witnesses may be questioned by the Hearing Officer

and, if the Hearing Officer permits, by the inmate or the inmate's representative. If the Hearing Officer does not permit the inmate to question inmate witnesses, the Hearing Officer shall state in writing the reasons for that decision. Employee witnesses shall not be interrogated or cross-examined by the inmate. The inmate may submit to the Hearing Officer written questions to be asked of employee witnesses. The Hearing Officer shall ask those questions if the Hearing Officer determines that doing so may produce relevant evidence, unless the Hearing Officer concludes that the questions are unduly confrontational, cumulative or argumentative. If the Hearing Officer declines to ask employee witnesses questions submitted by the inmate, the Hearing Officer shall state on the record the reason for declining.

(g) Where information obtained from a confidential, reliable informant is used, the Hearing Officer shall evaluate the reliability of the informant and state on the record the grounds for finding the informant reliable. The reliability of the informant shall be based on: the informant having provided reliable information in the past, the information being offered is based on first hand observations, or there is corroboration either from another source or through other evidence supporting the reliability of the informant's information. No inmate shall be found to have committed

the offense solely on the testimony of a confidential informant. A summary of confidential information obtained by the Hearing Officer, excluding identifying information, shall be given orally to the inmate unless the summary would inherently identify the confidential source or pose a threat to the security of the institution.

(h) The Hearing Officer shall prepare a written report of the evidence, including documents, statements, and physical evidence which were used as a basis for filing the misconduct report and all the evidence on which the Hearing Officer based the decision and reasons for the action taken. A copy of this report shall be given to the inmate within five working days, weekends and holidays excluded after the Hearing Officer's decision. The report shall contain notice of the inmate's right to an appeal and a form for filing an appeal. The decision shall be based only on substantial evidence presented at the hearing.

(i) A hearing may be conducted in the absence of the inmate charged when the inmate refuses to appear. In such a case, the refusal shall be obtained in the presence of two staff members, who shall sign the appropriate form attesting to the refusal to the Hearing Officer.

(j) When an inmate escapes from custody, the Hearing Officer may conduct a hearing in the inmate's absence.

13. HEARING OFFICER DISPOSITION: The Hearing Officer may recommend that the Warden take any or a combination of the following actions:

(a) Dismiss any charge.

(b) Impose any sanctions that are authorized for the offense of which the inmate has been convicted.

(c) Direct that an inmate be placed or be retained in disciplinary segregation for a specified period up to the allowable maximum period.

(d) Recommend that an inmate be reviewed during the term in disciplinary segregation for classification into administrative segregation status or transfer to another institution.

(e) Recommend to the Director of Classification that a specified amount of Good Time be forfeited consistent with Exhibit I.

(f) Suspend visiting privileges with the visitor involved in the incident when the violation involves these privileges, not to exceed 30 days.

(g) Suspend the allowable punishment.

14. WARDEN'S REVIEW OF DISCIPLINARY ACTIONS:

(a) Recommendations by the Hearing Officer shall be forwarded to the warden for review. Decisions shall be based on substantial evidence presented at the hearing. The Hearing Officer shall inform the inmate at the conclusion of the hearing in writing, no more than five working days, weekends and holidays excluded, after the initial hearing, that the Hearing Officer's decision is subject to review and possible revision by the warden including approval, reduction or modification of the decision. The Warden may not increase the penalty imposed by the Hearing Officer.

(b) If the warden reasonably determines that the decision was not based on substantial evidence presented at the hearing or was based on incomplete information or that there is newly discovered evidence which was not available to the Hearing Officer at the time of the hearing, the warden may reverse the decision and order a new hearing or enter a dismissal. In ordering a new hearing, the warden may limit the new hearing to the purpose of permitting the presentation of new evidence. The decision of the warden shall be provided in writing to the inmate within five working days, weekends and holidays excluded, after the warden receives the report of the initial hearing.

(c) When an inmate is found not guilty, the disciplinary report shall not be placed in the inmate's file. All dismissed disciplinary reports may be maintained in a separate file, but such reports shall not be made available to or utilized by departmental staff or the Parole Board, except at the request of the inmate or

for the purpose of evaluating compliance with this order. All disciplinary reports, regardless of disposition, may be kept and used for statistical or research purposes provided that all identification is removed from statistical reports.

15. APPEALS FROM DISCIPLINARY ACTIONS: Any inmate may appeal the Hearing Officer's decision as approved by the Warden to the Department's Disciplinary Appeals Officer for final adjudication of the matter. The Department's Disciplinary Appeals Officer shall have experience and training in the disciplinary process. The decisions of the Disciplinary Appeals Officer shall be subject to final review by the Secretary of Corrections or Deputy Secretary, who shall give substantial weight to the conclusions of the Disciplinary Appeals Officer.

(a) The inmate shall have 20 working days after the date the inmate receives the written report of the decision of the Hearing Officer, as approved or modified by the warden, to file a notice of appeal on a form provided by the Corrections Department. These forms shall be available to all inmates, including those housed in disciplinary or administrative segregation. The notice of appeal shall state the basis for the appeal and the names of any witnesses required to substantiate the appeal. The inmate shall attach to the appeal form any relevant documents that are not already part of the record of the hearing. The department shall ensure that such documents are reasonably accessible to the inmate, and shall ensure that any inmate who requests assistance in completing appeal forms is provided such assistance. If a notice

of appeal is not filed as required by this section, the decision of the Hearing Officer, as approved or modified by the warden, shall be final.

(b) An inmate shall file the completed appeal form and any attachments with the Disciplinary Officer, either by personal delivery or by placing the materials in an envelope addressed to the Disciplinary Officer and placing that envelope in the mailbox designated for legal mail. Inmates in segregated housing may file appeal forms by submitting them to a caseworker or Shift Captain assigned to that housing unit, who shall deliver the form to the Disciplinary Officer. An appeal shall be deemed to be filed at the time it is placed in a mailbox or delivered personally to the Disciplinary Officer, or, in the case of administrative segregation inmates, delivered to the caseworker or Shift Captain.

(c) Upon receipt of the appeal form, the Disciplinary Officer shall compile all documents relating to the disciplinary proceeding from which appeal is taken and, if the appeal requires review of the evidence, the tape of the hearing, and forward those materials and the inmate's appeal form to the Disciplinary Appeals Officer within 5 working days of receipt of the appeal form.

(d) Upon receipt of the appeal materials forwarded by the Disciplinary Officer, the Disciplinary Appeals Officer shall determine whether the appeal should be considered on-the-record or de novo. The appeal shall be considered de novo if it appears from the appeal materials that the inmate was not given the opportunity to present then existing or newly discovered relevant evidence at

the hearing. Appeals based on frivolous contentions shall be dismissed.

(e) The burden of proof is on the inmate to prove the contentions stated in the notice of appeal.

(f) In deciding an appeal on-the-record, the Disciplinary Appeals Officer shall consider the following factors:

1) Compliance with disciplinary policies.

2) Whether the decision of the Hearing Officer was based on substantial evidence presented at the hearing.

3) Whether the disciplinary sanction was proportionate to the offense.

(g) If the Disciplinary Appeals Officer concludes that the appeal should be heard de novo, the Disciplinary Appeals Officer shall notify the inmate, the inmate's witnesses, and any other persons whose attendance is required of the date of the hearing at least seven days in advance of the hearing. The de novo hearing shall be conducted by the Disciplinary Appeals Officer in accordance with the same procedure by which the initial hearing was conducted by the Hearing Officer.

(h) The Disciplinary Appeals Officer shall not reinvestigate the case, but may request additional information or documents be submitted by witnesses for the institution or by the witnesses for the inmate within reasonable time limits after the appeal hearing.

(i) The Disciplinary Appeals Officer shall prepare a narrative summary of the case, findings of fact, and conclusions, and shall submit them to the Secretary for review and approval. The Disciplinary Appeals Officer may affirm the decision, reverse the decision and order a new hearing, or enter a dismissal. In ordering a new hearing, the Disciplinary Appeals Officer may limit the new hearing to the purpose of permitting the presentation of new evidence.

(j) The Secretary shall have final authority in reviewing the Disciplinary Appeals Officer's summary, findings and conclusions. The Secretary may affirm the decision, reverse the decision and order a new hearing or enter a dismissal. In ordering a new hearing, the Secretary may limit the new hearing to the purpose of permitting the presentation of new evidence. After the Secretary has rendered a final decision on the appeal, the Disciplinary Appeals Officer shall notify the appellant in writing of the Secretary's decision within five (5) regular working days after the decision and shall forward the inmate a copy of the written summary, the findings of fact and conclusions. That disposition is final.

EXHIBIT I

OFFENSES AND SANCTIONS

Facts establishing that a prisoner committed an offense while acting under duress may be raised by the prisoner and shall be considered where appropriate as a defense to, or in mitigation of any sanctions for, any offense set forth in this Exhibit I.

1. CATEGORY A OFFENSES AND SANCTIONS

- (a) Riot or inciting a riot: Confinement in disciplinary segregation for up to 60 days; loss of good time not to exceed all good time.
- (b) Taking of hostages: Confinement in disciplinary segregation for up to 120 days; loss of good time not to exceed all good time.
- (c) Arson: Confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed all good time.
- (d) Assault or battery with a weapon on another person, unless in justifiable self-defense: Confinement in disciplinary segregation for up to 120 days; loss of good time not to exceed all good time.
- (e) Assault or battery without a weapon on an employee or visitor, unless in justifiable self-defense: Confinement in disciplinary segregation for up to 120 days; loss of good time not to exceed all good time.
- (f) Assault or battery without a weapon on an inmate, unless in justifiable self-defense: Confinement in disciplinary segregation not to exceed 30 days; loss of good time not to exceed 180 days.
- (g) Sexual assault: Confinement in disciplinary segregation for up to 120 days; loss of good time not to exceed all good time.
- (h) Unjustified killing of any person: Confinement in disciplinary segregation for up to 120 days; loss of good time not to exceed all good time.
- (i) Escape: Confinement in disciplinary segregation for up to 120 days; loss of good time not to exceed all good time.

- (j) Forging or altering official facility paper or documents: Confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed 180 days.
- (k) Threatening others who refuse to participate in a work stoppage or work strike or participating in a work stoppage or work strike: Confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed 180 days.
- (l) Giving or offering any official or staff member a bribe: Confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed all good time.
- (m) Possession, introduction, or manufacture of a firearm, explosive or ammunition: Confinement in disciplinary segregation for up to 120 days; loss of good time not to exceed all good time.
- (n) Possession, introduction, or manufacture of any contraband instrument which is capable of causing death or serious physical injury: Confinement in disciplinary segregation for up to 60 days; loss of good time not to exceed 180 days.^{3/}
- (o) Engaging in or coercing others to engage in group activity that threatens the security of the institution: Confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed all good time.
- (p) Possession, manufacture, introduction or use of any narcotics, drug paraphernalia, drugs or intoxicants, including alcohol, not prescribed for the individual by the medical staff, or refusal to submit to an authorized drug test: Confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed 180 days.
- (q) Extortion, blackmail, or demanding or receiving money or anything of value in return for protection from the individual or others to avoid bodily harm, or under threat of informing: Restitution; confinement in disciplinary segregation not to exceed 25 days; loss of good time not to exceed 90 days.

- (r) Giving a tattoo, possession of tattoo paraphernalia or exhibiting evidence of having recently received a tattoo: Confinement in disciplinary segregation not to exceed 25 days; loss of good time not to exceed 90 days.
- (s) Participating in, contributing to, or impeding control of a disturbance in any area either physically or verbally: Confinement in disciplinary segregation up to 30 days; loss of good time not to exceed 180 days.
- (t) Any act not listed above that would be a felony under the Criminal Code of the State of New Mexico or the laws of the United States of America: Any appropriate sanction approved for the above-listed major (Category A) offenses.
- (u) Entering another inmate's cell or housing unit except where permitted by institutional policy: Confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed 180 days.

2. CATEGORY B OFFENSES AND SANCTIONS

The offenses in Category B shall be considered to be major, only if one or more of the following factors is found to be present by the Disciplinary Officer or Hearing Officer:

- (a) A life threatening incident is involved.
- (b) A threat to the security of the institution.
- (c) The specific behavior is repeated or has previously been the subject of disciplinary action.
- (d) Substantial property damage or loss has occurred.
- (e) Any injury received was not of a minor nature and required medical attention.
- (f) The offense was committed by more than one person, excluding offenses in which more than one person is required to commit the offense.

If evaluated as a Major Report, the sanctions in the succeeding subparagraphs shall be applied. If evaluated as a Minor Report, the minor offense sanctions listed in Section 3 of this Exhibit shall be applied.

These principles apply to the following offenses:

- (a) Consensual engagement in sexual acts with others: Confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 30 days.
- (b) Willfully refusing to obey a lawful order of any staff member: Confinement in disciplinary segregation for up to 25 days; loss of good time not to exceed 90 days.
- (c) Stealing: Restitution; confinement in disciplinary segregation for up to 25 days; loss of good time not to exceed 180 days.
- (d) Possession of money without authorization: Confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 90 days.
- (e) Failure to report to an institutional assignment, refusing to accept a work or educational (other than Inmate Literacy Program) or program assignment, or failing to perform work as assigned by a supervisor: Confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (f) Failure to follow published institutional rules promulgated by the individual correctional institution or the Corrections Department resulting in damage or personal injury: Confinement in disciplinary segregation for up to 25 days; loss of good time not to exceed 90 days.
- (g) Use of abusive words or gestures to any person that is intended to provoke a fight, cause the violation of other institutional regulations or constitutes racial, ethnic or sexual harassment: Confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 45 days.
- (h) Willful interference with count: Confinement in disciplinary segregation for up to 20 days; loss of good time not to exceed 60 days.
- (i) Willful destruction or sabotage or altering of state property or property of another person: Confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed 180 days and/or restitution.

- (j) Possession of contraband items (i.e., anything not allowed to be received through the mail, not sold at the canteen or issued by the State or not otherwise permitted to be retained): Confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (k) Conduct with a visitor in violation of posted visiting regulations: Confinement in disciplinary segregation for up to 15 days; loss of visiting privileges for up to 30 days; loss of good time not to exceed 30 days.
- (l) Violating a condition of furlough, school or work release: Confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 90 days.
- (m) Knowingly making a false statement to a staff member which causes violation of other institutional regulations, or which causes substantial harm to another or which interferes with institutional operations: Confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (n) Gambling: Confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 90 days.
- (o) Violation of correspondence regulations: Confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (p) Possession of property on another inmate's property list; demanding, receiving or giving or bartering of property belonging to others: Restitution; confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 90 days.
- (q) Loaning of property listed on the inmate's property list or loaning of any property for profit or increased return: Confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (r) Physical fighting with another inmate, unless in justifiable self-defense: Confinement in disciplinary segregation for up to 30 days; loss of good time not to exceed 180 days.

- (s) Giving or offering any staff member or official anything of value: Confinement in disciplinary segregation for up to 10 days; loss of good time not to exceed 30 days.
- (t) Self-mutilation not caused by psychiatric or psychological problems: Confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.
- (u) Attempt to commit a major misconduct offense as defined in this Policy Statement (this must include an overt act in furtherance of said attempt): Confinement in disciplinary segregation for up to 25 days; loss of good time not to exceed 90 days.
- (v) Willful failure, without a statutory or regulatory exemption, to participate in the Inmate Literacy Program: Forfeiture of all good time and monetary compensation earned during the 90-day period following the inmate's eligibility for the Program.^{4/}
- (w) Any act not listed above that would be a misdemeanor under the Criminal Code of the State of New Mexico or the laws of the United States of America: Any appropriate sanction approved for the above-listed major (Category B) offenses.
- (x) Presence in unauthorized or restricted areas: Confinement in segregation up to 30 days; loss of good time not to exceed 180 days.
- (y) Leaving the inmate's place of assignment without permission of the staff member in charge: Confinement in segregation up to 30 days; loss of good time not to exceed 180 days.
- (z) Possession of tokens beyond amounts specified by institutional policy: Confinement in segregation up to 10 days; loss of good time not to exceed 30 days.
- (aa) Placing anything in or tampering with cell, pod or unit doors in a manner which obstructs the opening or closing of doors: Confinement in segregation up

^{4/}

Added by order of the Court entered on January 10, 1990.

to 15 days; loss of good time not to exceed 60 days.

- (bb) Alteration of a cell or housing unit to include altering electrical or plumbing fixtures; blocking vents; exchanging cell furnishings; placing furniture from activity areas into cells; writing, hanging or displaying anything on walls, on ceilings, over or on doors, over or on windows, or on cell fixtures except as provided in institutional rules and regulations. Confinement in segregation up to 15 days; loss of good time not to exceed 60 days.
- (cc) Use of institutional staff telephones except under the direct supervision of the shift supervisor or the respective case manager: Confinement in segregation up to 10 days; loss of good time not to exceed 30 days.
- (dd) Smoking in areas other than those authorized by institutional rules and regulations: Confinement in segregation up to 5 days; loss of good time not to exceed 10 days.
- (ee) Coercing others by threat or force to engage in any activity: Confinement in disciplinary segregation for up to 15 days; loss of good time not to exceed 60 days.

3. MINOR REPORTS AND SANCTIONS: Minor reports are reports of violations in which none of the criteria listed in Major Offenses and Sanctions (category B) are present or which were reduced from major reports.

The following prohibited acts are minor reports:

- (a) Improper or unauthorized use of equipment or machinery.
- (b) Failure to perform work properly as instructed by a staff member.
- (c) Possession of gambling paraphernalia.

The sanctions for a minor report can only consist of: dismissal of the charges; reprimand and warning; extra duty not to exceed one hour per day for no more than 30 days; confiscation; restitution; apology; restriction from social activities, e.g., movies and similar social entertainment not to exceed 30 days.

EXHIBIT C

I. 1980 AGREEMENT.

Add new paragraph 8, and renumber later paragraphs.

8. For purposes of this Agreement, "substantial compliance" means that defendants generally are in compliance with the terms of the Court's remedial order as it affects a particular area. Incidents of non-compliance do not necessarily prevent a finding of substantial compliance. The determination of substantial compliance shall take into account the extent to which exceptions to compliance are sporadic or isolated in nature, are unintentional, are the temporary result of actions by the members of the plaintiff class and are promptly and properly addressed by corrective action and, where appropriate, disciplinary action against staff members responsible for the exception to compliance. In no event shall a determination of substantial compliance be made if exceptions to compliance are the result of wilful or intentional actions by defendants.